Fall 2017 / September-November

Volume XII Official Publication of the Capitol City Trial Lawyers Association Issue 3

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Kudos for CCTLA's unsung hero

Bob Bale
CCTLA President

This quarter's President's Message sheds light on an individual who labors out-of-sight to the benefit of every CCTLA member.

The term "indispensable" an adjective, originated in the 1530s. As was true with a lot of words in that time period, the term was religious in nature, and meant, "not subject to dispensation." It derived originally from medieval Latin, indispensabilis (from "not, or opposite of") combined with dispensabilis, for "disburse, administer, distribute.."

As a noun, the term followed a different path. By 1794, at least in France, it referred to the name of a type of pocket bag worn by women, i.e., an "indispensable thing." By the 1820s, it was one of many jocular euphemisms for "trousers."

According to Merriam-Webster, its modern definition is, "absolutely necessary." Synonyms include essential, necessary, and all-important, of the utmost importance, of the essence, vital, must-have, crucial, key, needed, required, requisite and imperative. Another synonym for "indispensable," at least for CCTLA, is Debbie Keller.

If you have ever attended a CCTLA seminar, the Spring Fling, our holiday party or the like, you have met Debbie. She not only gets there early to set up, but personally mans every sign-in table, keeps track of money paid and attendance, greets the speakers, and tears everything down when the event is over. In any given year, Debbie Keller keeps literally dozens of programs, seminars, meetings, benefits, celebrations and events of every ilk on track. This means she confirms the topics, speakers, dates, times and locations; negotiates rates and books the facility (when necessary); coordinates the sponsors; prepares and distributes all of the marketing materials; collects the attendance fees; and keeps everyone (board and members) in the loop, without fail. She sends and responds to hundreds (if not thousands) of emails, follows up on hundreds of requests for information, and deals with CAOC on a wide range of topics.

Debbie is a key laboring oar behind the Spring Fling, working tirelessly with Margaret Doyle, Justice Scotland, Jill Telfer and their standing committee to pull off CCTLA's principal annual fundraiser, which raises roughly $70,000 a year for Sacramento Food Bank and Family Services.

But that's just the tip of the iceberg of what Debbie Keller brings to this organi-

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By: Michael Jansen
CCTLA Member

Please remember that some of these cases are summarized before the official reports are published and may be reconsidered or de-certified for publication. Be sure to check to find official citations before using them as authority.

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PO Box 22403 • Sacramento, CA 95822-0403 • Website: www.cctla.com
916 / 917-9744 • Debbie@cctla.com

Editor, *The Litigator*:
Jill Telfer: jtelfer@telferlaw.com

Jacobo G. Garcia, et al., v. American Golf Corporation, et al.
2017 DJDAR 4207 (May 3, 2017)

FACTS: The Brookside Golf Course is owned by the City of Pasadena and managed and operated by American Golf Corporation. The Brookside Golf Course is next to the Rose Bowl, which is encircled by the Rose Bowl Loop, a walking, jogging, skating and bicycling recreational area. The loop is between the golf course and an asphalt roadway. A chain link fence approximately seven-feet, six-inches tall separates the golf course from the walkway and a 12-inch wide, white painted line separates the walkway from the asphalt roadway.

Jacobo, a young child, was hit in the head by an errant golf ball from the golf course as his mother pushed him in a stroller on the walkway. Jacobo suffered serious brain injuries and sued the city and American Golf Corporation.

The city filed a motion for summary judgment, arguing that the walkway was not a dangerous condition, the city did not have actual or constructive notice, and the city was entitled to immunity under Government Code §831.4 (trail immunity) and other immunity statutes.

The trial court granted the city's motion for summary judgment, concluding that the city was entitled to trail immunity. Jacobo appealed.

HOLDING: Reversed. Jacobo has a chance for justice.

The trail immunity of Government Code §831.4 does not immunize a dangerous condition of a commercially operated, revenue-generating public golf course that causes injury to pedestrians on an adjacent trail. This court pointed to the fact the dangerous condition was created on the golf course, not the trail. Moreover, since the golf course was commercially operated, it could afford insurance and should not be provided immunity.

REASONING: This court distinguished Amberger-Warren, (2006) 143 Cal App 4th 1074, where a motion for summary judgment was granted. This case stated that Amberger-Warren identified the issue as whether a trail and an adjacent public property meet a relatedness test which has two parts: proximity; and liability that will likely cause the trail to close. Thus, Amberger-Warren embraced a nuanced, policy-based relatedness test for determining whether an injury is caused by a condition of a trail when an adjacent public property may have contributed to the injury.

Another case, Prokop v. City of Los Angeles, (2007) 150 Cal App 4th 1332, is a bicycle path immunity case wherein a bicyclist was impaled on a gateway in the fence around the bike path and tried to avoid bicycle path immunity by saying the gateway was not part of the bike path. The bicyclist lost, the appellate court concluding that the gate was part of the bike way because the bike way could not be used without the gate.

The last case cited by the court herein is Leyva v. Crockett and Company, Inc., (2017) 7 Cal App 5th 1105. In Leyva, the private owner of a golf course granted the City of San Diego easements for an unpaved recreational hiking and equestrian trail running parallel to the golf course. A person using the trail was hit by a golf ball and sued. In Leyva, Plaintiff lost. [Note: Leyva was not reported herein due to the fact I did not think it broke any new ground but reiterated the same old tired, "Plaintiff loses."]

How could this court get around this triad of bad cases to rule in favor of Plaintiff? First, this court decided that Government Code §831.4 was not clear and unambiguous because it did not determine if an adjacent public property that increases the risk of injury could be considered dangerous or should be shielded with immunity. This court cites

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Snares for the Unaware:

Pitfalls for Even Prudent Practitioners

By Walter Schmelter, CCTLA Board Member

I thought being a lawyer would be about righting wrongs. By this article I am still trying do right, but writing about wrongs: traps for the unwary. On the balance scale of the law, no matter how hard you try, there are a million ways to die. Doubtless, you have observed ambiguous, misleading, conflicting, unusual statutes, case law or secondary authority, hopefully soon enough to avoid stepping into the problem. Relying on a single presumably correct practice guide may be the hardest trap to avoid. Use careful good judgment researching legal issues. As Shakespeare put it: "Modest doubt is called the beacon of the wise."

Like every profession since flint-knapping, the practice of law grows increasingly specialized. The average practitioner best never venture without special guidance and study into antitrust law, patent law, medical malpractice law and Anti-SLAPP litigation, to name a few. That pitfalls too many to catalogue exist underscores the advantage of continuing education and professional educational guilds such as CCTLA.

Below, I note some legal oddities, in rough procedural order, to red-flag some issues in your mind and prompt your own diligent research when you spot these spiders. As Shakespeare put it: "Let every eye negotiate for itself and trust no agent."

My first example illustrates the need to know the law *immediately.*

PRE-LAWSUIT

20-Day Retraction Trap

Avoid a shocking trap for the uninformed. Civil Code §48a requires a written request for retraction within 20 days of knowledge of the publication of defamation by a newspaper (libel) or by a radio broadcast (slander)—or the plaintiff will be limited to special damages. A related mistake is believing items published on a public forum, website or listserve are private communications for purposes of laws of slander and libel and privacy protections.

SHAKESPEARE

'Modest doubt is called the beacon of the wise'

Extortion

Extortion includes trying to settle a civil case by threatening even implicitly to report a wrong to criminal authorities (or to a prosecuting agency, or to the public at large), or to disclose a secret affecting the recipient, or impute disgrace to them. "Demand Letters As Extortion," by Zachariah D. Baker, *Cal Lawyer* Aug. 2014.

Even your polite collection letter to a defendant on a consumer debt may result in you and your client being liable for up to $1,000 per violation of the federal and state fair debt collection practices laws. Consult a treatise, or give defense counsel a treat.

Government Claims Traps

The government claims statutes create many traps, including being limited to the legal theories or facts set forth in the tort claim, so you need to make the allegations very broad to include all types of negligence.

Claims against governmental entities require compliance with specified claims mechanisms as a condition to filing a lawsuit. A dollar amount must not be stated for state governmental claims of $10,000 or

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Snares for the unaware

Continued from page 3

less per Gov. Code §910(f), (but best to file an amended claim idea to state dollar loss if claim exceeds that amount.)

Some government authorities (esp. transit authorities) provide to injured bus passengers forms that amount to a governmental tort claim form. Passengers think they are just providing basic info. The "claims" are summarily denied. Always ask immediately of client and government agency if any previous claims were submitted or denied, and get copies of all letters to client from the agency immediately.

Federal tort claims, e.g. against the USPS, have different rules than state claims, such as the requirement to state a "sum certain" rather than just "This claim exceeds $25,000" and is not suitable for filing as limited civil case, which language will normally suffice for state, county, or local government claim. Differing circuit court opinions create confusing law about what may constitute a "denial" of a federal tort claim, which then triggers the deadline within which to file suit.

In federal court, if you get tired of waiting for your government claim to be denied and file suit too early, the case gets dismissed. If by then, statute of limitations has now run, too bad.

Probate Claims Traps

If defendant dies, probate laws require a timely claim be made against a decedent's estate, and timely filing and serving a proper verified response to notices given, with suit filed within just 90 days if your claim is rejected. Prob. Code §9000 et seq. Claims filed more than a year from date of death will or may be barred by Code Civ. Proc. §366.2, a statute intended to prevent delay in closing decedent's estates, and held to supersede older less specific probate procedural statutes that seem to otherwise apply. *Sometimes* there is an antidote for the poison. This rule re: 366.2 inverted has been held to *extend* to within one year of decedent's death a probate law trust statute that ostensibly bars claims not made within 90–day–from–date–of–rejection time. Allen v. Stoddard, 212 Cal.App.4th 807 (2013). Still, if defendant dies, act quickly or your case may die quickly.

On a lawsuit for sale of goods for personal, household, or family use, failure to send a proper pre-suit notice is fatal to a cause of action under the plaintiff's- attorney-fees-friendly *Consumer Legal Remedies Act*, Civ. Code, §1782.

Statutes of Limitations

The general rule that statutes of limitations are tolled for a minor do not apply to government tort claims.

Be aware that sometimes contracts set a statute of limitations and/or prerequisite procedures before filing suit. Actually read the contract and all related writings and attachments.

Minors often get an extended statute of limitations, but that does not apply to a minor's uninsured /underinsured motorist claim; suit must be filed within two years of injury. Remember to comply with specific statutes to notify the insurer of the claim against the third party.

Obvious traps include one-year statutes for med mal, legal mal, harassment at work, defamation, and the six months for government tort claims. Med mal and legal mal have escapes based on the fiduciary relationship in that if the attorney or doctor knows he screwed up, he or she has a duty to divulge that to the patient or client. Arguably, the failure to do that is a fraudulent concealment.

For harassment, the SOL runs from the last act of harassment, so usually prior acts get before a jury. For defamation, the last publication of the defamatory remark is the beginning of the SOL. For tort claims, a late-claim procedure exists which is fairly easy to meet unless there was knowledge and procrastination.

Pleadings, Contract Cases and Attorney Fees

Failure to object to jurisdiction, or to move for a change of venue before making a "general appearance" waives those objections. Tread carefully here.

If you fail to name the driver of a vehicle in an auto case when the attorney's file has the driver's information, and you only name the owner instead, a Doe amendment after the SOL runs does not work. The attorney and client have to be truly ignorant of the Doe defendant's name.

For MSJ/MSA, your theory of liability is limited by the pleadings, so if your case is subject to such a motion, make sure you promptly amend the complaint to include all available theories.

RE: MSJ/MSA, deponent cannot contradict statements made in deposition via declaration in opposition, so make sure any problems with testimony are fixed at the deposition or minimally make sure the deposition is reviewed and changes are made within the statutory time period.

Not noticing an arbitration clause in a written contract is a mistake often made, but easily avoided. Your suit may be met with a motion to compel arbitration.

Pleading for Civ. Code §1717 attorney fees against a defendant not a party to the contract can result in that party winning §1717 attorney fees against plaintiff, even though defendant is not a party to the contract. If you put a nonsignatory at risk for attorney fees, it is your client who takes the risk of paying them. *California Attorney Fees Awards* by R. Pearl is an excellent treatise on attorney fees generally.

A common related mistake is naming a nonsignatory spouse in a breach of contract case where only one spouse signed, with a general prayer for attorney fees against "defendants." Nonsignatory spouses are generally not liable for their spouse's debts, though their share of community property (if any) is exposed. "Enforcement of Debt Against the Community Property of Debtor Spouses," by Matthew C. Mickelson, *Los Angeles Lawyer*, July/Aug. 2013

Plead for prejudgment interest is warranted. Reference before trial specialized case law re: how to claim pre-judgment interest on your CCP 998 offer your judgment exceeded. One treatise is flat wrong on this issue.

DISCOVERY

A mandatory requirement to discovery motions to compel is to Meet and Confer and so aver in writing. CCP § 2033.290(b). Remember to file with your discovery motions to compel further responses the mandatory Separate Statement of Interrogatories/RFA/Depo Questions and Responses In Dispute.

Especially in the eReservation courts, there might not be any available hearing dates before trial for discovery motions or MSJ's, etc. In some counties, it can take several months to get a hearing date on a Motion to Compel Discovery, meaning if you get stonewalled, you'll be close to trial by the time your Motion to Compel is heard the first time. Start discovery as soon as you can.

Failing to have a court reporter present and request a Statement of Decision can negate your chance to overturn on appeal an important ruling.

If you do not elect in your Case Management Statement and make your own required deposit for a jury, you may waive right to trial by jury. Do not rely upon your

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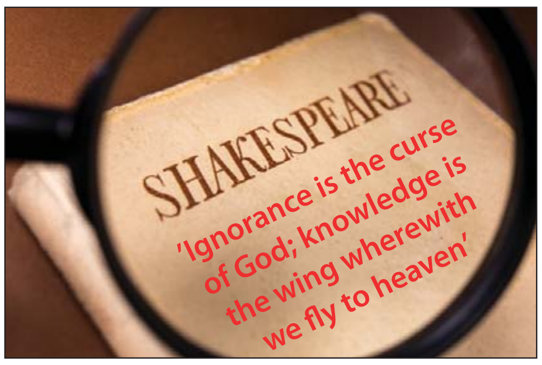
opponent having elected a jury and posted his or her deposit for jury fees; opponent can withdraw his election.

Deposition Traps

When taking a deposition, never stipulate that "all objections to questions be reserved until time of trial" or you could lose helpful testimony because the form of your question to the deponent was compound, speculative, etc. Require objections to the form of questioning be raised at the deposition, so you can consider and if appropriate modify your question *on the spot*.

Correct a deposition transcript via deponent's sworn declaration sent within 30 days if served via personal delivery, 30 + five days for first class mail. Beware receipt via overnight delivery—you get only 30 + two court days—so pay attention to the manner of service of the reporter's notice the depo transcript is ready. Sometimes critical words are transcribed wrong, or deponent misunderstood or mis-heard an important question—prompting need for correction. Sworn corrections must be served via return receipt certified or registered mail, cc on all parties/counsel via first-class mail. Code Civ. Proc. §2025.520(c).

Possible (but only discretionary) relief for untimely service lies with Code Civ.



Proc. §473 subd. (b). Do not wait until your client faces a motion for summary judgment to make corrections, or the court might consider them to be "sham corrections."

Hearings

Check local rules for Motion and Response filing requirements. Sometimes local rules squarely conflict with Cal. Rules of Court. Some Departments in eCourts require papers copies as a courtesy, and some departments in LA, downtown and Santa Monica, require the paper copy be lodged within so many days of filing, so long distance folks need to pay for and send a courier. Note that attorney efiling is evidence attorney indicates consent to accept e-service. CRC Rule 2.251(b)(1)(B), eff. 1/1/2017.

Having no court reporter sometimes means waiving meaningful right to appeal.

On important motions, timely request on the record a Statement of Decision.

Subpoena your own witnesses, especially experts, lest their unexpected and otherwise excusable delay from sickness or flat tire leaves you without cause for a continuance.

Never record a proceeding, even for personal educational purposes, without prior consent of the court and notice to all. Some judges prefer attorneys ask permission even to use a laptop.

Settlement

Settling with less than all alleged co-obligors but failing to follow exactly the good-faith settlement procedures specified in Code Civ. Proc. §877.6(a) can render your settlement ineffective and impair your trial against the remaining defendants.

Escaping from these traps for the unwary is beyond the scope of any article, but consider seeking relief under Code Civ. Proc. §473 subd. (b); consider dismissing the case without prejudice and re-filing (if there is time); and seek ideas from experienced colleagues.

"I say there is no darkness but ignorance. Ignorance is the curse of God; knowledge is the wing wherewith we fly to heaven." Shakespeare

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CCTLA's unsung hero

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zation. Debbie Keller is the engine that makes us go. I'm just the most recent in a long line of CCTLA presidents who has learned that first-hand. In point of fact, the rest of us ARE dispensable; as president, I am obsolete by design come December 31. Ms. Keller is not.

If organizational skill was people, Debbie would be China. There are a thousand details that keep CCTLA up and running, and Debbie is involved in every single one of them, one way or another. She holds in her hands all the disparate threads of institutional knowledge about how this organization works. She does this year after year with aplomb, grace and humility, without ever pushing any kind of personal agenda.

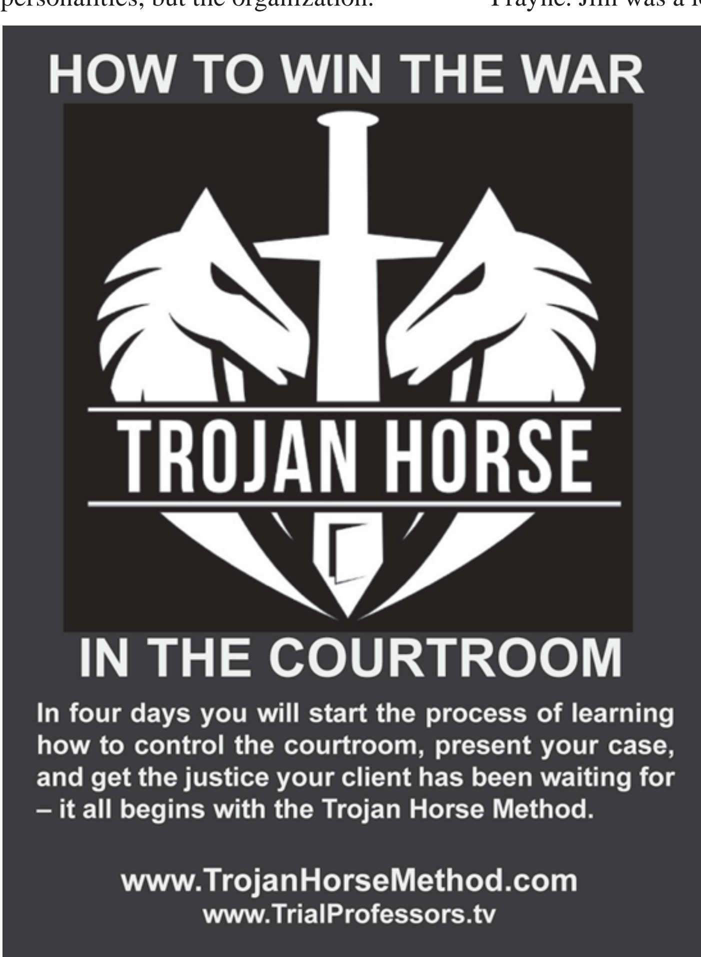
Despite having to deal with hundreds of egos all the size of, well, Northern California as part of her job, I have never heard a board member, a CCTLA member, a vendor, or any human being say a single unkind word about Debbie. That is because for Debbie, it is not about the personalities, but the organization.

DEBBIE KELLER AND BOB BALE

For Debbie, there is only one side, and that is what is right for CCTLA; her quiet behind-the-scenes diplomacy has helped the board navigate stormy waters to the right decision on more than one occasion. Of course, she comes from good stock; her parents were Jim and Bobbie Frayne. Jim was a lobbyist, and a tremendous advocate for and supporter of trial lawyers, and Bobbie worked for CAOC for many years.

Every year at the CCTLA Holiday Party, the outgoing president thanks Debbie Keller for her selfless hard work, but those messages, although heartfelt, are necessarily short. Even this article is woefully inadequate to detail how truly indispensable Ms. Keller has been to this organization. Most incredible of all, Debbie has been devoting her indefatigable energy to CCTLA for nearly 37 years now, has been our executive director since 2003, and accomplishes all this in addition to working a fulltime day job. She is also a fulltime (and extremely proud) Mom to her daughter, Taylor, who recently graduated from Christian Brothers and is headed to college.

If I had my way, when you Google the word, "indispensable," a photo of Debbie Keller would pop up. Until I can hack out a way to make that happen, we'll all just have to be grateful that Debbie's actions for CCTLA speak louder than any words, or definition.



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641 Fulton Avenue, Suite 200
Sacramento, CA 95825 • (916) 333-5933
www.smithzitanolaw.com

dsmith@smithzitanolaw.com • ezitano@smithzitanolaw.com

Despite Strong Legislation, Wage Theft is Still Thriving in California

By: John Stralen, CCTLA Board Member

California continues to pass legislation on an annual basis increasing employees' rights to recover for wage and hour violations, a.k.a. "wage theft." We can better serve our clients and those who seek our advice by understanding how prevalent wage theft is, how to identify it and knowing what can be done about it.

It is important to understand just how wide spread of a problem wage theft has become. Although a recent survey of state employment laws concluded that California's employment legislation provides the strongest employee protections in the country, wage theft continues to be a growing problem in California. Newly released figures from the Economic Policy Institute show that low-wage workers in California lose nearly $2 billion a year to minimum wage violations committed by their employers. On average, these violation cost the wage-theft victim—who is already at lowest end of the wage scale—about $64 a week or $3,400 annually. This equates to 22 percent of earnings.

According to one study conducted by the UCLA Labor Center, in Los Angeles County there are 744,220 low-wage workers who make up almost one fifth of the workforce. Of these, 30 percent, or nearly a quarter of a million workers, are illegally being paid less than minimum wage.

Wage theft continues because sometimes employees do not know they are being victimized. In other cases, the statistics tell the story. Of those low-wage earners surveyed in LA County, only 15 percent actually filed a complaint against their employer. The LA County study also showed that half of those who did complain were retaliated against in some fashion by their employers.

Moreover, half of the wage theft victims who understood they had a claim reported they did not file a complaint, either for fear of retaliation or a feeling that their complaints would not bring about change. Because low-wage workers are compensated well below the poverty line, they have difficulty saving money. Every bit of their earnings goes towards rent, food, diapers, baby formula and other basic human needs. Employers get away with wage theft by exploiting this lack of stability and the employee's fear of losing his or her job.

Wage theft also negatively effects the overall economy. On a small scale, the local business communities where the majority of low-wage workers live depend on their earnings to keep businesses afloat. When employers withhold workers' wages, there is less money circulating in the local economy. As a result, the local economy fails to grow, and living conditions remain undesirable. Additionally, on a broader scale ethical employers are harmed.

Some employers pay their workers fair wages and give appropriate breaks and pay all required benefits. Yet, due to the existence of wage theft by their competitors, the competitor gains an economic advantage over the ethical employers.

The good news is that in order to combat this problem, as mentioned earlier, California has enacted strong employee protection laws for the purpose of holding offenders accountable through lawsuits. Remedies include unpaid wages, liquidated damages in the case of minimum wage violations, interest, and penalties. Additionally, statutory provisions in the Labor Code also allow employees who successfully bring wage and hour cases to recover their reasonable attorney fees. In some cases, the fee award can be several times the employee's wage recovery. Public policy supports such an award because otherwise employees who do not have significant unpaid wage claims would not otherwise be able to hire an attorney.

In identifying wage theft, it is significant to know that there is no typical offender. Companies engaging in wage theft range from small employers to large corporations with thousands of employees throughout all industries. Because wage theft is prevalent, we likely come in contact with clients or others who are victims on a regular basis, yet they may not know they are a victim or may not know what can be done about it.

A foreseeable scenario in one of our practices might occur during the process of handling an injury cases. We often receive copies of our injury client's employment files and wage information and might spot an issue concerning potential wage theft.

One example of this occurred when I was in the process of handling an

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Wage theft

Contnued from page 7

injury case. We had difficulty getting our client's employment payroll records from her former employer. When we did receive the pay records, it turned out her former employer had misclassified her as an exempt, commissioned outside sales employee, and in the process, failed to pay her a substantial amount of overtime. Her wage-theft case that she did not know about until we received her employment records settled for more than her injury case.

. . . I was in the process of handling an injury case. We had difficulty getting our client's employment payroll records from her former employer. When we did receive the pay records, it turned out her former employer had misclassified her as an exempt, commissioned outside sales employee, and in the process, failed to pay her a substantial amount of overtime. Her wage-theft case that she did not know about until we received her employment records settled for more than her injury case.

Another issue might arise in handling an injury case when the client makes a workers compensation claim, and the claim is denied because the employer classified the client is an independent contractor. Misclassification of the employee as either exempt or as an independent contractor often occurs because the employer is avoiding responsibility for paying overtime wages.

Other common wage-and-hour violations include failing to pay for all time worked, such as requiring the employee to arrive at a certain time, but not allowing them to "clock in" until later. Resident apartment managers, or others living on the jobsite, are often either underpaid wages or overcharged for the lodging.

Failing to provide pay stubs in compliance with Labor Code § 226 allows an employee to recover statutory penalties. An obvious example of this violation occurs when an employee works "under the table" and is paid wages in cash with no withholdings. However, because pay stubs must be provided, and they must also be accurate, generally a violation of Labor Code § 226 can be alleged in conjunction with any other violation resulting in non-payment or under-payment of wages.

Failing to reimburse the employee for expenses is another common violation. This can occur, for example, when the employer requires the employee to have a cell phone, computer or to drive to job locations, etc., for business purposes but does not provide reimbursement to the employee.

The potential violations and scenarios where they occur are endless. Hopefully, by providing awareness about wage theft and some examples of how to spot it will help you better serve your clients and others and assist them with identifying when they have been victimized and what can be done about it.

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DON'T FIX WHAT ISN'T BROKEN:

California Legislature Considers Allowing Evidence from Mediation to Bring Attorney Malpractice Claim

By: Peter Tiemann, CCTLA Board Member

Mediation has become an essential tool in the representation of injury victims. An essential part of mediation involves the plaintiff's attorney advocating and bolstering the plaintiff's case, while contesting and assaulting the defendant's case. The process can only work effectively if counsel is allowed to advocate strategically and without fear of being taken out of context or being required to later explain his or her statements made during the mediation.

Currently, statements made "for the purpose of, in the course of, or pursuant to mediation" are confidential and not admissible or discoverable. California Evidence Code § 1119(a). Proposed legislation seeks to change all of that by creating an exception to the mediation privilege for clients claiming legal malpractice.

Imagine, after hours of participating in mediation, your client consents to a settlement. Both parties agree, and both parties go home happy. However, things change when the client goes home and tells his family all the statements you made on his behalf, how you advocated and shot down every defense argument and how the mediator told your client that his injuries were significant. Then, a family member tells your client, "That isn't enough. You were misled. Even your lawyer told the mediator your case was a slam-dunk and refuted every defense argument."

Now, the client is angry and has buyer's remorse about settling. The client thinks he was tricked into agreeing to settle at the mediation. The client calls a legal malpractice attorney and tells the attorney his version of events regarding statements, representations and alleged mistakes you made during mediation. The legal malpractice attorney agrees to represent the client and brings a claim against you, the attorney who mediated the case. The heart of the complaint are the statements you made during the mediation—the same statements that were effective in compelling the defense to settle the case. Now you're forced to defend a meritless malpractice claim against your own former client.

If the proposed legislation is passed, the above scenario will become a frequent reality.

MEDIATION PRIVILEGE – CURRENT STATE OF THE LAW

The heart of California mediation is confidentiality. Generally, all statements made in connection with mediation may be precluded from introduction as evidence at a court proceeding. The mediation privilege is codified at Cal. Evid. Code Setion 1119; 1121; 1123.

> **The heart of California mediation is confidentiality**

The California Supreme Court has declared that there is no exception to mediation confidentiality, even where the evidence is needed to substantiate or defend a claim for legal malpractice. Cassel v. Superior Court (2011) 51 Cal.4th 113,128. The Supreme Court confirmed this holding and simultaneously rejected the argument that public policy required such an exception to protect a client's right to sue his or her attorney. *Id*, at 132.

PROPOSED CHANGE TO MEDIATION PRIVILEGE

The proposed change to the mediation privilege provides, in essence, that a communication or a writing that is made or prepared for the purpose of, or in the course of, a mediation is not protected from disclosure if: (1) the evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement while representing the client; and (2) the evidence is connected with:

(a) a complaint against the lawyer;
(b) a cause of action for damages against the lawyer based on alleged malpractice; or (c) a dispute

Continued on page 10

Mediation confidentiality on the line

Continued from page 9

between a lawyer and client regarding fees, costs, or both.

This exception would apply in State Bar disciplinary proceedings as well as in malpractice suits.

CONSEQUENCES OF THE PROPOSAL

First, the proposed change will lead to a greater number of frivolous malpractice filings. Any client such as the hypothetical plaintiff above who later second guesses what occurred at the mediation will believe that they have a claim for legal malpractice. Consequently, the client will introduce his or her own version of events regarding the attorney's alleged statements, promises, coercions, etc. during mediation.

Another downfall to this broad exception to the privilege rule is that it will chill and hinder the mediation process. Attorneys often use negotiating tactics during the mediation that cannot otherwise be used in the adversarial court system. However, creating this opening for a legal malpractice claim will undermine an attorney's effectiveness and restrict what the attorney will say or do during the mediation.

Even the opening demand figure could be used against the attorney who settled for something much lower than the opening demand. Imagine having to defend a settlement during a malpractice action against the initial demand amount—the potential negative impact on effective negotiation strategy could be very significant. Creating an exception to the privilege rule will harm the overall integrity of the mediation, may lead to fewer mediations, and significantly increase the court's caseloads and the costs of litigation.

The proposed exception to mediation privilege is simply unnecessary. Attorneys with mediating experience understand how to manage indecisive clients well in advance of mediation. The attorney cautions the client that they don't have to settle, that they can take their time to make a decision, that trial is an option, etc. The pros and cons of settlement are carefully presented to the client, and the final decision is ***always*** left up to the client.

All of these precautions will become fruitless, however, when a client is later convinced, without any reasonable basis, that they were misled into settling.

The mediation privilege is essential to the success and integrity of a mediation. It is long and well settled law that has well-served the attorneys, mediators, the clients, and the courts in facilitating settlements and reducing case loads. The fact that the lawyer, parties and mediators involved know that everything said or done in mediation will remain confidential allows the parties to confide with the mediator freely and without fear of additional litigation. More simply, it allows for frank discussion and strategic negotiation. There is no reason to change it now and many harmful reasons not to change it. I urge you to contact CAOC Political Director Lea-Ann Tratten at ltratten@caoc.org and your local trial lawyers' association, urging them to oppose this change.

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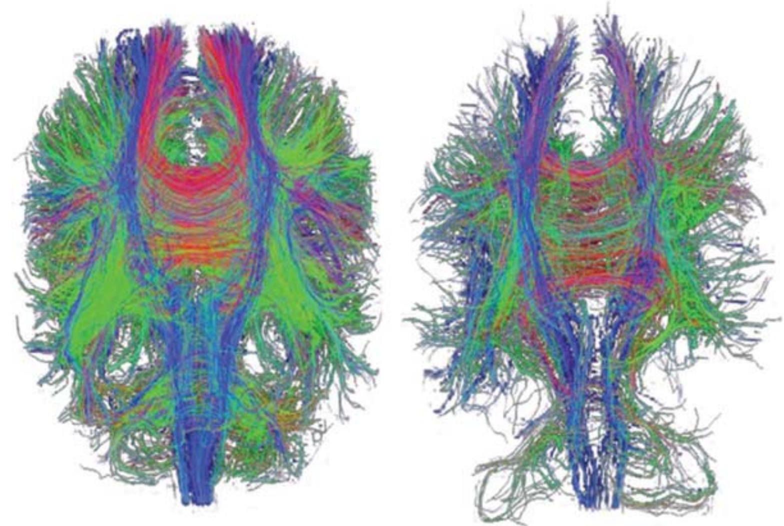

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By: Amar Shergill, CCTLA Board Member

This is the story of an improbable connection between Woodland's Dead Cat Alley and a roadway off of Hollywood Boulevard in Hollywood, CA. It's also the story of a man who refused to accept a jaywalking ticket, not knowing that this decision would resonate decades later. I have had the opportunity to take some big cases to trial and some smaller ones. I have also helped write and lobby for legislative action that has reverberated around the world. Yet, somehow, this story sticks with me when I think of the beauty of the law.

Some of you may know a little roadway in Woodland, CA, named Dead Cat Alley. Sitting between Court Street and Main Street, you may have driven by it and not thought much of it. Unfortunately, on Febr. 15, 2005, a client, let's call her Lilly, was hit by a car as she walked across Fourth Street where it intersected with Dead Cat Alley.

At trial, opposing counsel submitted that Lilly was at fault because she had crossed the road even though there were two perfectly good intersections on Fourth Street (at Court and at Main) where she could have crossed with the benefit of a sidewalk and traffic lights. They referred the court to California Vehicle Code Section 21955, which states, "'Between adjacent intersections controlled by traffic control signal devices or by police officers, pedestrians shall not cross the roadway at any place except in a crosswalk."

Defendant's counsel explained to the court that Lilly was negligent per se; she was jaywalking. They further said that since she shouldn't have been crossing along Dead Cat Alley, the collision and her injuries were all her fault. The court was inclined to rule against Lilly, finding that this alley was not an intersection and that she was negligent. However, the court also, in its wisdom, asked Lilly's counsel, myself and my able colleague, Tim O'Connor, to provide even a single example where such an alley was determined to be an intersection.

As one might expect, the issue of "whether a small alley between two controlled intersections can also form part of an intersection" has not been the subject of much appellate attention. Which leads us to Hubert Eugene Blazina. In 1975, Mr. Blazina crossed Cahuenga Boulevard at a non-descript alley just south of Hollywood Boulevard. Unfortunately for him, there was a law enforcement officer nearby who chose to cite him for jaywalking in violation of the aforementioned CVC Section 21955.

Mr. Blazina fought the ticket without the help of an attorney (in pro per)…and lost. He was convicted of jaywalking despite his references to the definitions provided in the vehicle code. The basics of his traffic court argument are provided below:

1. A "roadway" is designed and used for vehicular travel.
2. A "highway" is publicly maintained and open to the public for vehicular travel.
3. An "alley" is a "highway" with a "roadway" not exceeding 25 feet in width.
4. An "intersection" is the joining of two "highways" at approximately right angles.
5. Pedestrians may not cross between two adjacent intersections controlled by traffic lights.
6. The alley is designed for and used by vehicles, thus, it is a "roadway. "
7. The alley and Cahuenga Boulevard are maintained by the government for public vehicle use, thus, they are "highways. "
8. The alley and Cahuenga Boulevard join at right angles and are "highways, " thus he was crossing at an uncontrolled "intersection. "
9. Since the alley and Cahuenga Boulevard form its own intersection without any traffic control, CVC Section 21955 could not apply given its specific reference to "adjacent intersections controlled by traffic control signals."

Most people, having lost in traffic court would pay the fine and call it a day. Mr. Blazina was not most people. He

Continued on page 14

Truth in Hollywood

Continued from page 13

demanded his right to appeal and spent countless hours in the law library and at his home preparing for his day in court. The resulting case is The People of the <u>State of California v. Hubert Eugene Blazina</u>, decided on Jan. 20, 1976, and cited as 55 Cal.App.3d Supp. 35.

The Appellate Department of the Los Angeles Superior Court heard Mr. Blazina's cogent argument and agreed with him. The court, in a two page decision, stated, "[T]he alley and Cahuenga Boulevard constitute an intersection…. We do conclude that the defendant did not cross between two controlled intersections, he is not guilty of jaywalking."

Mr. Blazina was thrilled with the result, vindicating him and all of the time that he had taken from his family to fight the case; a matter of principle that he could not give up on.

Which brings us to Lilly. She was shocked to learn that we had found a case that had litigated this issue, but she was not as shocked as opposing counsel and the court. All were in disbelief that the 2005 case we were working on could and would be decided by a 1975 jaywalking ticket…and it was. Our court found that Lilly had not jaywalked. The subsequent jury verdict was superb, and Lilly walked away satisfied.

. . . this story, of a pro per litigant opposing a jaywalking ticket, is the one that reminds me that important legal victories are sometimes found in the most humble venues.

But, how, you ask, do we know the details of Mr. Blazina's personal struggle? This is because, after our verdict, Lilly asked me to find Mr. Blazina and thank him on her behalf. Unfortunately, Mr. Blazina had passed, but I was able to make contact with his widow. I explained to her that Mr. Blazina's courage and resilience in fighting a simple jaywalking ticket had made an indescribable difference in Lilly's life.

As might be imagined, Mrs. Blazina was shocked to learn that her husband's efforts had made such a difference more than 30 years later. She had not thought about the case in years, but she very much appreciated hearing about Lilly's victory and she enjoyed telling me his story.

As a lawyer, I have had occasion to read the weighty decisions of some the greatest legal minds our country has produced. Yet this story, of a pro per litigant opposing a jaywalking ticket, is the one that reminds me that important legal victories are sometimes found in the most humble venues.

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CCTLA acts on challenge of fewer trials = less courtroom experience

2016 In Review — By: Travis Black, CCTLA Board Member and Secretary of the Board

Many citizens assume that a predictable outcome of suing someone —or being sued—is a day in court. After all, a trial by jury in most civil cases is a constitutional right under the Seventh Amendment. However, fewer and fewer civil suits are resulting in trials.

From 1992 to 2005, civil trials declined by more than 50% in the California courts. A generation ago, the plaintiff's bar was full of attorneys who had tried more than 100 cases before they were considered seasoned attorneys!

For a *USA Today* article headlined, "As jury cases decline, so does the art of trial lawyers," several senior trial lawyers were interviewed. They remembered a time when they would argue multiple trials in a week, but these days, they are lucky to have more than one trial a year! The trend of settling disputes through alternative means rather than a jury trial has been going on for more than two decades. Has the trend continued? And what are the consequences for attorneys? Capitol City Trial Lawyers (CCTLA) offered a problem-solving clinic covering the elements of trying a simple chiropractic case. John Demas, Rob Piering and Eric Ratinoff provided expert guidance for the 40 attendees, the whom had tried fewer than five trials.

In the absence of the trial experience, which forces lawyers to think on their feet without consulting the library, attorneys will be less prepared to handle those rare cases that do go to trial. If you don't try cases, then it's difficult to understand the importance of all the steps along the way.

As fewer and fewer cases are going to trial, and lawyers are getting less experience in trying cases, what can CCTLA do to address this very real problem? Dave Rosenthal arranged a CCTLA luncheon seminar and asked Robert Eglet, Esq., to talk on **The Disappearance of the Civil Jury Trial**. This really opened our eyes to the need to help our association members.

CCTLA's Board of Directors took this challenge very seriously last year and offered more than 18 seminars via our monthly CCTLA luncheon programs and our monthly problem-solving clinics: more than 27 hours of continuing education credits! This did not include close to 40 additional continuing education credits for our multiple-day programs!

A CCTLA luncheon seminar on "The Disappearance of the Civil Jury Trial" really opened our eyes to the need to help our association members

Our board recommended multiple sessions for a comprehensive approach to all segments of the trial process. We covered topics such as discovery, *voir dire*, opening, direct examination, cross-examination and closing.

Dave Rosenthal, in charge of the CCTLA luncheon seminars, did a fantastic job lining up some awesome speakers, including attorneys Patrick Becherer, Thornton Davidson, Anoush Lancaster and Valerie McGinty, who started 2016 off with **What's New in Tort and Trial: 2015 Review**. The year ended with Bob Buccola wrapping all it all up with the topic of **Closing**, using one of his firm's last big trials as a powerful illustration.

During the year, Steve Brady, Brady Law Group, put on an excellent clinic showing how animation can control the courtroom with **Controlling the Courtroom: Shock and Awe at Mediation**. Craig M. Peters with the Veen Firm put showed how his firm handles the general damages issues we all face with **Maximizing Human Loss Damages at Trial.**

Sacramento Superior Court Judge Judy Hersher took time from her busy schedule to discuss a topic we all find challenging: **Motions in Limine: Just How Much Can Really Get Accomplished?** Judge David De Alba presented a program called **Jury Selection 101.**

The CCTLA luncheon seminars also included Judge Kevin Culhane and Judge David De Alba, who provided us with some excellent information on the Sacramento Court: **The State of the Sacramento Court and Judiciary: 2016 and Beyond**. Judge Kenneth C. Mennemeir and our own Betsy Kimball did an excellent clinic on a very important topic: **Ethics and Lawyer Law —What You Need To Know Now and in the Year To Come**.

One of the areas where the black-hat insurance companies are challenging us in the damage or lack of damage to vehicles. Larry Neuman's clinic was **Fundamentals, Techniques and What's New in Accident Reconstruction**. We had a problem-solving clinic with John Martin of Blue Eagle, on **Finding Hidden Property Damage in Motor Vehicle Cases—What You Should Look For and What Your Experts Need to Know**.

Dave Rosenthal was able to bring some of the finest attorneys in California to speak to us. Robert T. Simon, Esq., from Southern California spoke at a CCTLA luncheon on **Introducing Medical Bills Into Evidence—Covert Ops**, and Craig M. Peters, The Veen Firm, on **Maximizing Human Loss Damages at Trial**.

In addition to the luncheons and problem-solving clinics, CCTLA co-hosted, along with CAOC, a three-day Sonoma travel seminar, where some of the top attorneys in the state provided multiple-track programs on topics that were cutting-edge.

In August, CCTLA arranged for Alejandro Blanco with the Trojan Horse Method to introduce our association to this new and dynamic trial-preparation procedure, speaking on **Welcome to the Trojan Horse Method—Structure, Framing & Delivery**. This was followed by a four-day intensive hands-on opportunity for our members to learn first-hand this trial method.

In March, CCTLA offered a one-day seminar featuring two accomplished trial attorneys, Dan Ambrose and Alejandro Blanco, who provided more information on **The Trojan Horse method**, and Keith Mitnik, who spoke about his book, "Don't Eat The Bruises." This was the largest and best-attended event ever put on by CCTLA!

CCTLA also has implemented a mentoring program to assist any member who has a trial question or needs help with a trial. CCTLA is interested hearing from our members. If you have issues or problems you would like discussed, let us know. We definitely are here to serve you.

Let's Keep Noël's Dream a Reality

By: Dan Wilcoxen, CCTLA Board Member

As I am sure many of you know, the Sacramento legal community recently lost one of its warriors, and for many of us, a friend.

Noël Ferris recently passed away from ALS (Amyotrophic Lateral Sclerosis), or Lou Gehrig's Disease. Generally, we think of ALS as a long-lasting, slow-moving but debilitating disease that afflicts people like it did Stephen Hawking but doesn't take people away rapidly.

That wasn't the case with Noël. She was diagnosed in mid-2016 and died at home on May 21, surrounded by family. Her funeral took place on May 30 at St. Francis of Assisi Parish in Sacramento. As to be expected, it was well-attended by her family, friends, colleagues and a great deal of the Sacramento judiciary, which attests to her impact on the Sacramento legal community.

Noël was a member of CCTLA for many years, and while it goes without saying that she was well-known to most of us in Sacramento, she also was well-known and well-respected throughout the state of California and beyond. I will not enumerate her many accomplishments here, but instead I want to talk about one particular aspect of her life.

She was a single mother when she met her husband, and fellow attorney, Parker White, while they were both attending McGeorge School of Law. After becoming lawyers and honing their skills for some time, they began working out of the same office, although they maintained separate practices. They both enjoyed very successful careers as plaintiffs' lawyers in our community.

PARKER WHITE AND NOËL FERRIS

As a result of being a single mother while going through law school and with the success she found as an attorney, Noël recognized the unique difficulties that single parents can have in trying to make a success of their lives. While Noël was more fortunate than some because she had a supportive family, many young, single parents don't have that kind of support.

Noël especially recognized the extreme difficulty single parents face in wanting to go to law school so she initiated a scholarship fund for them at McGeorge to assist with this financial burden.

Every dollar donated to this fund is being matched by the University of the Pacific Powell Endowment. Approximately $77,000 has been donated and will be matched, thereby actually raising more than $150,000 thus far. The American Board of Trial Advocates, one of her favorite organizations (and its Trial Lawyer of the Year for 2015), has made a significant donation to this scholarship fund, not included in the numbers above.

Many of us have donated to this worthy cause. If you wish to make a donation in Noël's name, call Mindy Danovaro, McGeorge's assistant dean of development, at 916-340-6096, or email her at mdanovaro@pacific.edu.

Let's see what we can do to support Noël's dream through her scholarship fund and provide hope and support to other single parents who have a dream, hopefully helping them to become as successful as Noël was.

We all will miss Noël.

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Spring Fling Success

CCTLA raised $81,000 for Sacramento Food Bank & Family Services with its annual Spring Fling, held June 8 at the home of Noël Ferris and Parker White.

Among the annual awards CCTLA announced was the Joe Ramsey Professionalism Award, presented posthumously to Noël. Chris Whelan and Amar Shergill were recognized with the Morton L. Friedman Humanitarian Award.

CCTLA President Bob Bale acknowledged the event was a great success due to the unrelenting hard work of Past President Margaret Doyle, Justice Art Scotland (ret.) and Executive Director Debbie Frayne Keller and Parker White's gracious hospitality.

CCTLA President Bob Bale, center, with Humanitarian Award winners Amar Shergill, left, and Chris Whelan

Patricia Tweedy and Judge Morrison England

Spring Fling site host Parker White and Justice Art Scotland (ret.)

Roger Dreyer, Margaret Doyle and Judge Ben Davidson

Judge Darrell Lewis (ret.), Hank Greenblatt, Tanya Davis and Judge Jim Mize

Above: Justice Art Scotland (ret.), Sue VanDermyden and Alexander Sperry

Above right: Judge Kim Mueller, Bob Bale, Eric Meyer and Ashley Meyer

Right: Kelly Siefkin and Nancy Cano, with Cleo

Verdict

Verdict: $678,469.89
Richard M. Wilson and Kathabela Wilson v. Arturo Robles

CCTLA Member John Roussas, Esq., of Cutter Law, PC, represented the plaintiffs in a lawsuit against the driver of a pickup truck who, on Nov. 14, 2014, struck a pedestrian who was in a marked crosswalk and crossing with the light in his favor. The 2017 jury verdict of $678,469.89 in damages was reached during a three-and-a-half day trial in Los Angeles County.

After Plaintiff Professor Richard Wilson was hit in the crosswalk by Defendant Arturo Robles' pickup truck, he was taken by ambulance to Huntington Hospital, where he was found to have sustained internal bleeding, a comminuted right iliac fracture extending to the right sacroiliac joint with right sacroiliac diastases and left 8th and 9th rib fractures. A few days later, he underwent an operative fixation of the anterior pelvic ring and percutaneous fixation of the posterior ring.

Then he underwent physical therapy, where it was determined that he couldn't bear weight on his left leg without significant pain. An MRI determined he also had sustained a left tibial plateau fracture and left intraarticular distal femur fracture in the collision.

After another surgery, Plaintiff was discharged from Huntington to Villa Gardens for in-patient physical therapy. He was discharged on Dec. 21, 2014, and by May 2015, Wilson was back to his pre-collision exercise routine of walking five miles per day, but with residual pain and limitations from his injuries.

Plaintiff made a demand on State Farm for the full amount of Defendant's $25,000 policy limits. When State Farm failed to timely respond or adequately advise its insured, Plaintiff filed suit against Defendant Robles, who denied liability from the time of initial discovery all the way through the conclusion of expert depositions.

Defendant's accident reconstruction exoert, Alvin Lowi, testified that Defendant was traveling between 15 to 20 miles per hour when he struck Wilson, throwing Wilson between 30 and 40 feet. He also testified that Plaintiff was at least partially responsible for failing to see Defendant's truck and taking action to avoid being hit. Defendant admitted liability after Lowi's deposition was concluded.

On Aug, 12, 2016, Plaintiff served a Code of Civil Procedure §998 Offer in the amount of $349,999, but State Farm allowed the offer to lapse with no response. On Feb, 24, 2017, Plaintiff made his final settlement demand for $699,989. State Farm allowed the demand to lapse. This demand was within 3% of the ultimate jury verdict.

The parties stipulated that the $78,469.89 paid by Medicare for Wilson's past medical bills represented the reasonable value of past medical expenses and proceeded to trial on the issues of Plaintiff's past and future non-economic losses, future medical specials and his wife's claim for loss of consortium. Plaintiff Wilson was retired at the time of the collision, so there was no past or future wage-loss claim.

Plaintiff's treating orthopedist, Dr. Mark Jo, testified that Wilson would benefit from conservative care, including physical therapy for the next five to 10 years, at which point Wilson would likely require a total left-knee replacement. Anne Barnes, RN, testified that the reasonable value for the specified conservative care was $10-$30,000 and $134,000 for the total-knee procedure.

Defendant retained orthopedic surgeon, Dr. Melvin Nutig, who testified that two-and-a-half years after the collision, Plaintiff's left knee was largely asymptomatic and that X-rays of the left knee showed well maintained joint spaces that were identical to the joint spaces on the un-injured right knee.

The jury returned a verdict of $678,469.89, which was within 3% of Plaintiff's last demand. The verdict included $25,000 for future medical expenses, $325,000 for past pain and suffering, $220,000 for future pain and suffering, and $30,000 for Kathabela Wilson's loss of consortium.

In closing arguments, Plaintiffs had suggested the jury award $1.9 million inclusive of an anticipated total-knee replacement. Defendant had suggested the jury award Plaintiffs no more than $228,469.89 because Wilson would not require a knee replacement, and no more than $292,793.10-$311,357.89, even if the jury concluded a knee replacement was likely.

Plaintiff's experts: Mark Jo, M.D., treating orthopedic surgeon, Huntington Orthopedics, and Anne Barnes, RN, certified nurse life care planner. Defendant's experts: Melvin Nutig, orthopedic surgeon, defense medical examiner ;Alvin Lowi III PE, Collision and Injury Dynamics; and Henry Lubow, MD, utilization review

Plaintiffs have filed a cost bill to recover $70,822.08 in costs and will be pursuing a bad-faith case against State Farm.

Settlements

Wrongful Death—$9.75-million

CCTLA Past President John Demas of Demas Law Group represented a couple whose infant was fatally injured when a Sacramento police officer rear-ended their car and recently announced a $9.75-million settlement against the City of Sacramento obtained on their behalf.

The following article was published in the Sacramento Bee on July 18m, 2017, written by Nashelly Chavez:

After several miscarriages and the death of a newborn baby, Steve and Chrystal Saechao called their healthy nine-month-old son, Raiden, their "miracle baby." However, the child was fatally injured in 2013 when a Sacramento police officer rear-ended the family's car on Interstate 80. The City of Sacramento has agreed to pay $9.75 million to the couple—a sum that their law firm called a record in an infant death case.

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"He didn't take away all the pain, but he gave us hope," Steve Saechao said of Raiden in a press release issued by Demas Law Group. "His eyes and smile lit up our lives. Then in a split second, because of distracted driving, he was taken away from us."

The officer involved, identified as Greg Mark Halstead in court documents, was driving a blue 2013 Ford Explorer given to him by the Sacramento Police Department for work purposes at the time of the crash, said lawyer John Demas, whose Demas Law Group represented the couple and announced the settlement in a press release Tuesday.

The website Transparent California says Halstead worked as a police officer in 2014 and was promoted to a sergeant within the department in 2015. He held that title in 2016.

"With this settlement, the city acknowledged that police officers who are trained in protecting the safety and well-being of people can and should be held accountable when their reckless and careless behavior causes injury to those they are supposed to protect," Demas said in the release.

The crash occurred on Dec. 17, 2013. Steve Saechao was driving his family's white Toyota Scion in stop-and-go traffic in the slow lane of Interestate 80 in Rocklin. Raiden was strapped into a rear-facing car seat, in accordance with state regulations.

Saechao was stopped in the heavy traffic when Halstead's blue Explorer came from behind at more than 60 miles an hour, according to the Demas Law Group press release. The police officer did not slow down. He plowed into Saechao's car, thrusting it into a passing big-rig, a crash simulation showed.

Halstead also had children in his car, the Demas Law Group press release said. "The City of Sacramento initially denied that the officer was on the clock and working for the city at the time of the crash but later accepted liability," Demas said in the statement. "The police officer rear-ended a car, not because he was in pursuit, but because he was distracted or simply not paying attention."

Raiden was taken to UC Davis Medical Center with major head injuries from the crash. He died right before Christmas.

The Saechao family filed a civil case after the Placer County District Attorney's Office declined to file criminal charges against Halstead in the crash, the statement said. The settlement was agreed after a three-year court battle between the family and the city of Sacramento.

A call from the Sacramento City Attorney's Office was not returned (Tuesday). Sgt. Matthew McPhail said he does not know the specifics of the settlement but confirmed that Halstead continues to work for the Sacramento Police Department as a sergeant in the operations unit.

Attorney Phillip Bonotto, who represented Halstead in the case, denied a request for a comment (Tuesday afternoon), saying, "It's not my practice to comment upon litigation." Court files entered by Bonotto on behalf of Halstead in September 2014 say the officer denied all allegations against him in the case and that the family "failed to exercise ordinary care for Plaintiffs' own safety" at the time of the crash."

Lawyers representing Sacramento filed documents in court, denying that Halstead was working for the city at the time of the accident. The city's filing also asserted that the family did not have enough facts to support its claim against the city.

The law group said the Saechao family plans to donate a portion of the settlement to raise awareness about the dangers of distracted driving and cell phone use behind the wheel.

"I don't have the words to describe the pain and suffering we've endured for more than three years," Chrystal Saechao said. "Life can be very, very tough, and I had no choice but to get myself back up, to get out of bed and fight for Raiden. We had to prove that our son had value and that he meant something."

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Confidential Settlement

Acupuncutre Malpractice / Wrongful Death

CCTLA Past President David Smith and CCTLA member Elisa Zitano successfully prevailed in a confidential settlement for an unusual wrongful death case of a 41-year-old male chiropractor, attributable to acupuncture malpractice. The decedent left a wife of more than 20 years and three teen-aged children. Decedent had established a robust chiropractic practice and had significant annual earnings in the low six figures.

The decedent had a life-long severe skin condition diagnosed as atopic dermatitis or acute eczema, which was evidenced by chronic and acute pustules or funicles (similar to acute teen-age acne). These were particularly prevalent on his upper back, neck and shoulders. The condition was worse in hot summer months, and for decades, he had treated with hydrocortisone creams and antibiotic medications. Otherwise, he was in superlative health, had run several Sacramento marathons and was in active training for the 2015 race.

Then he sustained soft-tissue cervical injuries in a motor-vehicle collision. When chiropractic treatment did not fully resolve his symptoms, he sought treatment from a local solo practitioner acupuncturist trained principally by her mother, who had trained in China as a young woman before her family immigrated to the US.

Plaintiff's acupuncture experts opined that traditional acupuncture training in China does not emphasize hygienic practices or strict infectious disease protocols. Defendant was adamantine at her deposition that "acupuncture treatment cannot possibly cause any infections and that there are no reported cases ofinfections due to acupuncture treatments."

Decedent underwent four acupuncture treatments in a one-month period during the summer of 2013, at which time his dermatitis/eczema was particularly active and evident on his upper back and neck.

Plaintiff's expert acupuncturist stated that the inflamed and compromised skin in these locations were an

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MEMBER VERDICTS & SETTLEMENTS

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absolute contraindication to the placement of acupuncture needles in these areas—the areas that were most symptomatic for decedent's soft-tissue injuries. During four treatment dates, Defendant placed multiple steel needles into the upper back and neck. She then exponentially increased the risk of infection by massaging these areas at length after the needles had been removed, thereby likely projecting the bacteria on the decedent's skin into his subcutaneous tissues and vascular system.

Within 24 hours after the last acupuncture treatment, Decedent developed chills and a low-grade fever, and during the next 24 hours, his symptoms progressively worsened, and he was admitted to the Sutter Medical Center Emergency Room in advanced respiratory failure.

Diagnostic tests and blood cultures confirmed systemic bacteremia, MRSA pneumonia, bacterial endocarditis and multiple pulmonary emboli. Notwithstanding aggressive medical treatment, including intubation, IV antibiotic and multiple interventions, he died within a week of the ER admission.

Warning re "Policy Limit" Demand and "Burning" Liability Policies+: In response to early-form interrogatories, Defendant disclosed a professional liability policy with "policy limits of $1,000,000." Shortly thereafter, a CCP 998 for $1 million was served, along with a cover letter, offering to settle for the $1,000,000 policy limit.

Two years later, during mediation, Plaintiff's counsel asserted that the "lid was off the policy." At this point, defense counsel revealed for the first time that the defendant's policy was a "burning policy," which was reduced on an ongoing basis by "defense costs and litigation expenses" and that the available limits on the date of the CCP 998 and the formal demand was already below the $1M level, so there had "never been an offer to settle within the remaining policy limits."

On the date of the mediation, defense counsel asserted that the litigation costs were "well over $200,000," which was shocking since Plaintiff's costs at that point were approximately $50,000. The liability carrier was obviously deducting all of the marketing, underwriting, clerical and other company expenses from the "policy limits."

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Settlement: $1.25-Million
Wrongful Death

CCTLA member Rob Piering of Piering Law Firm secured a $1,250,000 wrongful-death settlement for the five siblings of 67-year-old pedestrian hit by a vehicle making a righthand turn on rainy night in Sacramento.

The decedent was never married, had no children and was not working at the time of the incident. Oftentimes, the decedent was homeless. He did, however, stay in contact with his siblings and would generally make family gatherings and holiday celebrations.

There were no witnesses to the event. During a winter downpour, Defendant was stopped at a red light a few cars back from the intersection where she intended to make a right turn. From there, she had a view of the intersection, pedestrian crosswalk and sidewalk. She said the decedent was not standing at the corner and that she did not see him at any time prior to hitting him as he was crossing the street.

Defendant said that as she was making her right turn, she had a green light, and the pedestrian signal facing the decedent read "Don't Walk." Defendant claimed Decedent "darted out" in front of her, against that "Don't Walk" signal and was wearing dark clothing.

The decedent was in and out of consciousness at the scene and unable to give any information about what happened. While en route to the hospital, he lost consciousness. He died a few weeks later as a result of head trauma.

The traffic collision report was inconclusive. However, traffic signal phase diagrams obtained from the city showed that if the defendant had a green light, it was likely that the decedent had a "Walk" signal at the time Defendant entered the intersection.

The defendant's primary limits of $250,000 were tendered in response to a conditional-limits demand that required disclosure of all other coverages. Defendant had an excess policy of $1,000,000, which was tendered, along with the primary limits.

Arbitration

Binding Arbitration Award—$1,625,000
Medical Malpractice

CCTLA members David Smith and Elisa Zitano of the Smith Zitano Law Firm won a $1,625,000 wrongful-death award in a binding Kaiser arbitration on behalf of the surviving widow and two adult children of Robert Martin, a Sacramento County public defender

Martin died on Aug. 24, 2014, from a myocardial infarction within two weeks of a Kaiser South Emergency Room examination and an ER follow-up exam with his Kaiser PCP. Kaiser ER physicians and Martin's Kaiser PCP negligently attributed his symptoms to "gastroenteritis" and failed to order necessary follow-up diagnostic testing, either in the ER or on an out-patient basis.

The arbitrator was **CCTLA member Ernest Long**. Kaiser had never made a settlement offer. Plaintiffs had filed a CCP 998 for $995,000, and costs and interest will add approximately $100,000 to the arbitration award.

Facts: Prior to this fatal heart attack, Martin had a history of ischemic heart disease as early as 2005, documented by a left-heart catheterization showing a 100-percent occlusion of his right coronary artery.

On Aug. 10, 2014, he experienced constant burning chest pain and shortness of breath, accompanied by nausea, vomiting and diarrhea and was driven to the Kaiser South emergency room, where he was evaluated by Kaiser ER physicians Dr. David Higgs and Dr. Joshua Bigler.

During a nearly 10-hour ER visit, these physicians failed to order multiple necessary and available diag-

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nostic tests to reasonably "rule out" a heart attack or other acute ischemic cardiac event—the most potentially lethal or life-threatening condition on their differential diagnosis.

Instead, after a single resting EKG and a single Troponin I blood test, the ER physicians attributed his symptoms exclusively to a non-lethal and non-life-threatening condition: viral gastroenteritis.

Both physicians failed to order either a repeat or "serial" Troponin I blood test or a repeat resting EKG in the ER. Further, and in violation of the applicable gold standard of ER care, and in violation of Kaiser's own established "Clinical Practice Guideline—Acute Coronary Syndromes," both doctors failed to either order or obtain a stress/exercise treadmill test (ETT) prior to ER discharge or to specifically schedule one for Martin within one to three days of his ER discharge. The discharge instructions were to call his PCP or to return to the ER if his GI symptoms returned and to follow up with his PCP.

Martin appeared for the "soonest available" follow-up visit with his Kaiser PCP, Dr. Andy Hamadi Vila, on Aug. 18, 2014. Vila failed to carefully review the Aug. 10, 2014, ER notes and to appreciate that at the time of Martin's Aug. 10, 2014 ER visit, he had manifested signs and symptoms of an ischemic cardiac event—specifically the burning chest pain and shortness of breath. Vila focused exclusively on the GI symptoms of nausea, vomiting and diarrhea, all of which had resolved.

Vila also failed to order either an exercise treadmill test and did not refer Martin for a stat cardiology consultation, which were required by the applicable standard of care, as well as Kaiser Clinical Practice Guidelines to "rule out" ischemic heart disease as the cause of Martin's continuing intermittent chest pain and discomfort.

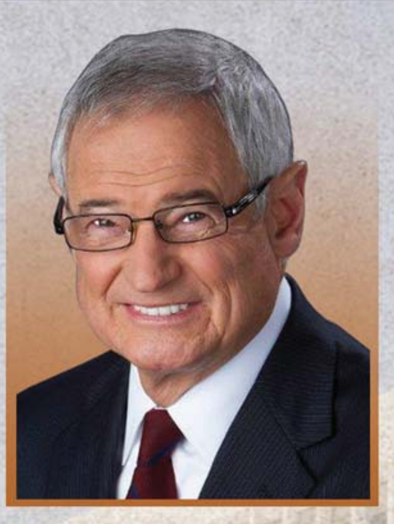
Early on Aug. 25, 2014, Martin suffered a heart attack and collapsed, and after transport to Kaiser South ER by ambulance, he was declared dead due to a "myocardial infarction."

Damages: The arbitration award included $1,050,000 for past and future loss of income, $325,000 for loss of household services, less personal consumption, and $250,000 for non-economic losses for wrongful death even though "the claimants have sustained non-economic damages in an amount far exceeding the statutory cap."

Plaintiff's expert witnesses were Dr. Marc Snyder, San Francisco, emergency room medicine; Dr. Steven H. Fugaro, San Francisco, PCP/internal medicine; Dr. Kent Gershengorn, San Rafael, cardiology; and Craig Enos, CPA,Sacramento, forensic accounting.

Hon. Brian R. Van Camp

Superior Court of CA, County of Sacramento (Ret.)



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‘Request for Admissions’ can put the defendant in a

By: S. David Rosenthal, Esq., CCTLA Board Treasurer

Litigating the average case in today’s personal injury world requires controlled aggression. Insurance companies rarely make reasonable pre-litigation offers. Getting fair value for the client requires litigation, and sometimes trial, in cases that used to be settled favorably for your client early on. One litigation tool that can streamline litigation and trial, and create the potential to make the defendant liable for plaintiff’s trial costs and attorney’s fees, is a “Request for Admissions” (RFA) pursuant to C.C.P. §2033.010, *et seq.*

RFAs technically are not a discovery device. Their purpose is “[t]o obtain admission of uncontroverted facts learned through other discovery methods, and thereby to narrow the issues and save the time and expense of preparing for unnecessary proof.” (Fredericks v. Kontos Industries (1987) 189 Cal.App.3d 272, 276.)

The power of RFAs lies in your ability to ask the defendant to admit almost anything. Section 2033.010 allows you to ask the defendant to admit facts, opinions relating to facts or applications of fact to law. Accordingly, your admissions should cover all of the essential facts and issues of liability, causation and damages. RFAs require the defendant to choose between admitting these facts or issues or facing a post trial motion pursuant to §2033.420 for an award of costs and attorney’s fees associated with their proof at trial.

In drafting RFAs, my approach is to ask the defendant to admit a sequence of foundational facts that lead to an inevitable conclusion on a legal issue. For instance, based on information contained in the police report, I might ask the defendant to admit in a series of requests that the speed limit was 30 mph, that he was driving behind the plaintiff at 40 mph, that he looked down at his cell phone, that when he looked back up plaintiff was slowing for traffic and that he was unable to stop before striking plaintiff’s vehicle from behind. I then ask him to admit that the collision occurred because he was driving at an unsafe speed, because he was distracted by his cell phone, because he was inattentive, because he was negligent and as a result of his violation of V.C. section 22350. The same method can be used for other liability scenarios.

In the area of damages, I ask the defendant to admit plaintiff sustained each of the claimed injuries as a result of the collision, that each form of treatment was reasonable, and necessary and the reasonable cost or Howell number for each form of treatment.

The three permissible substantive responses, outlined in §§2033.210-220, must be as straightforward as the information **reasonably available permits**. This is an important feature of RFAs since a responding party has a duty to investigate the facts before answering a request for admissions. (Wimberly v. Derby Cycle Corp. (1997) 56 Cal.App.4th 618, 634.)

Based on that investigation, the responding party must either: A) **admit** the request as phrased or as qualified; B) **deny** any part that is untrue; **or** C) state that reasonable inquiry has been made but the **information known or readily obtainable is insufficient to allow the party to admit**. An admission conclusively establishes the fact or issue against the admitting party in the pending case. This means that the defendant may not offer evidence to contradict the admission, although the court has discretion to determine its scope and effect. (Burch v. Gombos (2000) 82 Cal.App.4th 352, 359-360.)

The post-trial cost and fees consequences are triggered only if “a party fails to admit” a fact or issue that is later proved at trial. Accordingly, the key to evaluating any response by the defendant other than an admission, and determining whether to meet and confer or file a motion to compel a further response under §2033.290, is whether the defendant has given either a substantive denial or failure to admit for insufficient information.

A substantive denial will trigger the cost and fees consequences even if the defendant the defendant asserts boilerplate objections with the response. (See American Federation of State, County & Municipal Employees v. Metro. Water District of So. Cal. (2005)126 Cal.App.4th 247, 268, “without waiving these objections.”) However, costs and fees are not awarded if an objection is later sustained or the requesting party waives the opportunity to get a further clarifying response. More often than not, defense counsel will give substantive responses on foundational facts but will object to requests relating to important facts or ultimate issues.

> One litigation tool that can streamline litigation and trial, and create the potential to make the defendant liable for plaintiff’s trial costs and attorney’s fees, is a ‘Request for Admissions’ (RFA) . . . The power of RFAs lies in your ability to ask the defendant to admit almost anything . . . Accordingly, your admissions should cover all of the essential facts and issues of liability, causation and damages. RFAs require the defendant to choose between admitting these facts or issues or facing a post trial motion . . .

Popular objections are:

- ***Lack of personal knowledge.*** (A party may not refuse to admit or deny matters set forth in a request for admissions because he lacks personal knowledge if the means of obtaining knowledge of the fact are reasonably within his power. International Harvester v. Superior Court (1969) 273 Cal.App.2d 652, 655; Lundgren v. Superior Court (1965) 237 Cal.App.2d 743, 746.)
- ***Calls for a legal conclusion.*** (Improper under §2033.010 - “when a party is served with a request for admission concerning a legal question properly raised in the pleadings he cannot object simply by asserting that the request calls for a conclusion of law. He should make the admission if he is able to do so and

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Using an RFA

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does not in good faith intend to contest the issue at trial, thereby ‘setting to rest a triable issue.’ Otherwise, he should set forth in detail the reasons why he cannot truthfully admit or deny the request.” Burke v. Superior Court (1969) 71 Cal.2d 276, 282.)

• ***Vague and ambiguous.*** (Should be deemed improper because responding party can admit or deny so much as is true or false, and otherwise qualify or explain their answer—Cembrook v. Superior Court (1961) 56 Cal.2d 423, 429-430.)

• ***Truth of the matter is known by the requesting party***. (Improper objection under Hillman v. Stults (1968) 263 Cal. App.2d 848, 885.)

Perhaps the most misused “objection” is lack of sufficient information to admit or deny. As noted above, this is actually a substantive response as described in §2033.220(c), and the defense should not be allowed to frame it as an objection.

At a minimum, §2033.220(c) requires the defense to represent that after making a reasonable inquiry, the information readily available is insufficient to allow it to admit a request. If you then “prove” this fact or issue at trial and seek costs and fees, it will be up to the court to decide whether the defendant should have made the admission based on the information reasonably available at the time.

In order to tap the full power of the RFAs, it is essential that you follow up with a letter and/or a motion to persuade or compel the defense to provide substantive responses. There is a strong judicial policy in favor of shortening trials by eliminating undisputed issues. If you show the court that the defendant is unreasonably refusing to admit facts or issues, it should lean towards ruling in your favor. This can certainly come into play if you file a motion for further responses under 2033.290, which allows the court discretion to award sanctions if it finds the defendant’s opposition unjustified. And if the defendant then fails to obey an order to serve a further response that complies with §§2033.210-220, the court may go a step further and deem the requests admitted.

Keep in mind that all substantive responses must be verified, and an unverified substantive response is equivalent to no response at all. (See Allen-Pacific, Ltd. v. Superior Court (1997) 57 Cal.App.4th 1546, 1551.) If you receive unverified substantive responses, or no responses at all, you should immediately send a meet-and-confer letter, followed by a motion to have those matters deemed admitted pursuant to §2033.280. Such a motion must be granted unless a response substantially complying with §§2033.210-220 is served by the hearing.

In a situation where unverified responses have been served, consider preparing a separate statement and moving in the alternative to compel further responses since defense counsel will probably just serve a verification prior to the hearing rather than change the responses. Even if verified responses that substantially comply with §§2033.210-220 are served prior to the hearing, sanctions must still be awarded once the motion is filed.

Your reward for serving requests for admissions will vary from case to case. Some defense firms readily admit liability when there can be no dispute. Others will not even admit the obvious, which can only work to your advantage. If used diligently, RFAs are one weapon in the arsenal needed to get a just outcome for your clients.

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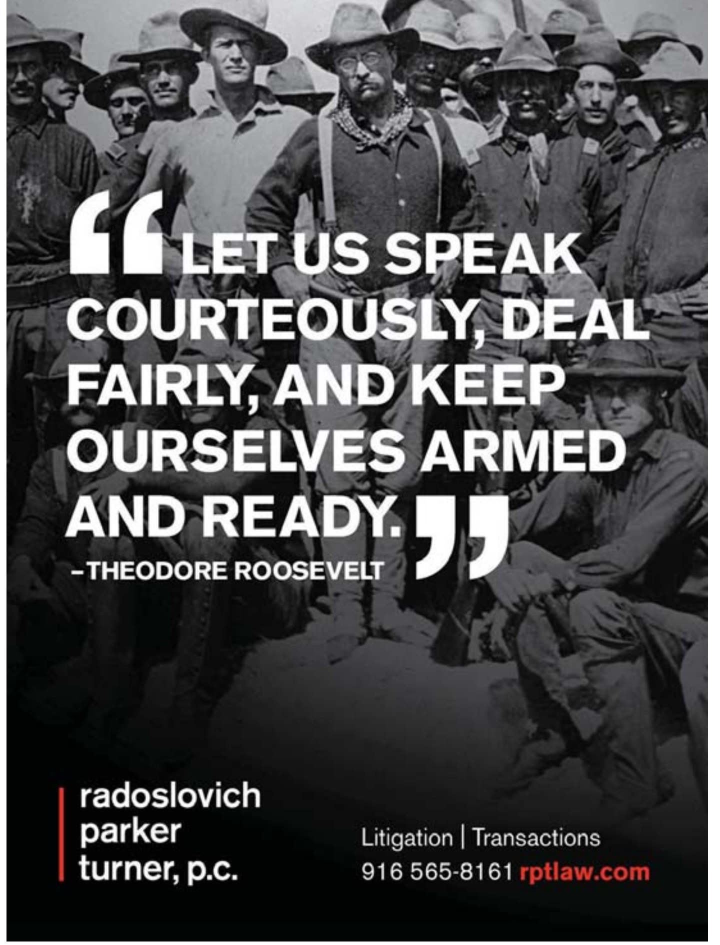

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Amberger-Warren for authority allowing this court to decide this unclear and ambiguous law by looking at policy reasons why certain trails should or should not be immunized.

This court decided the Brookside Golf Course does not pass the relatedness test because the trail and the golf course had nothing to do with each other. Since the golf course was a commercial enterprise that generates revenue, Brookside Golf Course could pay for safety features such as safety nets, and it could pay for insurance, lawyers and judgments.

This court decided that despite the close proximity of the golf course and the trail, it is not likely that liability will cause the city to close the trail. Moreover, "A bulwark to our conclusion is that recognizing immunity here would give city a disincentive to correct a dangerous condition of the Brookside Golf Course, even if the course is revenue generating." Lastly, if the path was allowed immunity, the city could still be liable for protecting people using the loop from getting hit by an errant golf ball except if they were using the walkway, a seemingly contradictory finding.

This court distinguishes Prokop because the gate and the bikeway were both part of the bikeway and unlike Jacobo's case, the gate was not a separate, commercially operated property that could finance safety measures.

Lastly, Leyva provides no assistance to the city because that condition of the golf course could not be dangerous but for the trails. In this case, the danger posed by the Brookside Golf Course would exist even if the walkway did not. There would still be a danger of errant golf balls hitting motorists. Also, in this case, there is an issue as to the adequacy of the fences and trees protecting people outside the golf course as opposed to their absence in Leyva. Finally, the Leyva court was concerned that liability in that case would discourage private landowners from granting easements for public use but that is not a concern in Jacobo's case.

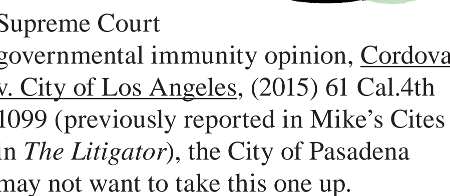
This case announced a new rule: A public golf course cannot assert a trail immunity defense when: 1) The golf course is adjacent to a trail abutting a public street; 2) the golf course is a commercially operated, revenue-generating enterprise; 3) the golf course has a dangerous condition that exposes people outside it to a risk of harm from third parties hitting errant golf balls; and 4), the dangerous condition of the golf course caused harm to the user of a trail.

Cases holding that a mixed use of the trail does not matter and the trail still has immunity (Burgueno v. Regents of the University of California, (2015) 243 Cal App 4th 1052, and Hartt v. County of Los Angeles, (2011) 197 Cal App 4th 1391) were given short shrift by this court because neither case analyzed causation, as this court did. Shin v. Ahn, (2007) 42 Cal 4th 482 was distinguished by this court because Jacobo was not a participant in the sport of golf at the time of the incident.

This court sidestepped McGuire v. New Orleans City Park Improvement Association, (2003) 835 So.2d 416, where the defense argued a jogger assumed the risk he would get hit by a golf ball when he jogged on a golf course and therefore, could not sue. This court said assumption of the risk was not an issue because appellants were not aware of the risk and did not willingly encounter it. Even if they had, it would only establish secondary assumption of the risk, which would not justify dismissal.

Finally, the city sought summary judgment under various other statutes, including design immunity. This court overcame the design immunity defense by finding that while the city proved design immunity of the walkway, it did not prove design immunity of the golf course. "A commercially operated and revenue-generating golf course should not be absolved of liability if it would not otherwise qualify for design immunity on its own merit simply because a dangerous condition of that golf course happens to cause harm on an adjacent trail." The city did not prove discretionary approval of the plan for the Brookside Golf Course prior to construction and substantial evidence supporting the reasonableness of the golf course design.

This case is a major departure from case law on governmental immunity. It may be that this is not the last we have heard of Jacobo Garcia. Based on another unanimous California Supreme Court governmental immunity opinion, Cordova v. City of Los Angeles, (2015) 61 Cal.4th 1099 (previously reported in Mike's Cites in *The Litigator*), the City of Pasadena may not want to take this one up.



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Brian Lewis, et al., v. William Clarke
2017 DJDAR 3953 (April 25, 2017)
US Supreme Court Makes Loophole in Tribal Sovereign Immunity

FACTS: Defendant William Clarke drove a limousine owned and operated by the Mohegan tribe of Indians Tribal Gaming Authority in Connecticut. While transporting gamblers from the casino to their homes on an interstate highway in Norwalk, CT, Defendant Clarke in the limousine rear-ended Plaintiffs Brian and Michelle Lewis. The Lewises filed suit against Clarke in his individual capacity in Connecticut state court, and Clarke moved to dismiss on the basis of tribal sovereign immunity. Clarke argued that the gaming authority, as an arm of the tribe, has sovereign immunity and therefore, he has sovereign immunity acting within the course and scope of his employment with the gaming authority.

Defendant also argued that because the gaming authority was obligated to indemnity him pursuant to Mohegan tribe code sections, it would end up paying the damages and therefore, the Lewises were barred from bringing their personal injury lawsuit by sovereign immunity.

The trial court denied Defendant's motion to dismiss on the basis of sovereign immunity. The Supreme Court of Connecticut reversed, holding that tribal sovereign immunity did bar the suit. The US Supreme Court granted certiorari to consider whether the tribal sovereign immunity bars the Lewises' suit against Clarke.

HOLDING: The United States Supreme Court reversed the Connecticut Supreme Court and held that sovereign immunity does not erect a barrier against suits to impose individual and personal

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Mike's Cites

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liability.

REASONING: The court distinguished official-capacity claims from personal-capacity claims. In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation.

In personal-capacity suits, on the other hand, plaintiffs seek to impose individual liability upon a government officer for actions taken under the color of state law. Individuals sued in their personal capacity come to court as individuals and the real party in interest is the individual, not the sovereign. Thus, defendants in an official-capacity action may assert sovereign immunity while officers in an individual-capacity action may not. The officers may assert personal immunity defenses but sovereign immunity does not apply.

The current suit is not against Clarke, the limousine driver, in his official capacity; it is against him for his negligence and tortious conduct. The judgment will not operate against the tribe. "We are cognizant of the Supreme Court of Connecticut's concern that Plaintiffs not circumvent tribal sovereign immunity. But here, that immunity is simply not in play. Clarke, not the gaming authority, is the real party in interest."

In this case, there were indemnity agreements by the tribal gaming authority protecting Clarke. Indemnity statues extending immunity from the sovereign to individuals cannot extend the sovereign's immunity. This decision is consistent with law and decisions assessing diversity jurisdiction. The courts look to real parties in the controversy, and the fact that a third-party indemnifies one of the named parties in a case does not influence the diversity analysis.

This decision was by Justice Sotomayor. Roberts, Kennedy, Breyer, Alito and Kagan joined. Thomas concurred because in his view, tribal immunity does not extend to suits arising out a tribe's commercial activities conducted beyond its territory, and for that reason only.

Court of Appeals shoots down harassing debt collection practices

Reprinted from Public Justice.org

June 23, 2017: Say you're struggling to make ends meet, and you can't pay your condo fee until your paycheck arrives. Or maybe the condo association says you're behind on fees, but you're sure you paid. In situations like these, should a late payment force you to walk a mile to get home?

On June 23, the Court of Appeals unanimously answered that question with a resounding, "No."

In Elvaton Towne Condominium v. Rose, the court held that condo associations cannot restrict a unit owner's access to common areas, such as parking spaces and a community pool, as a form of punishment for past-due condo fees unless these types of debt-collection practices are explicitly provided for in the condominium's declaration. These tactics are designed to intimidate and generally affect low- to moderate-income unit owners disproportionately. The court's decision put an end to harassing debt-collection practices employed by condominiums that infringe upon the property rights of condo owners, such as William and Dawn Rose.

Public Justice Center Murnaghan Fellow Anthony May, along with Phillip Robinson of the Consumer Law Group, represented the Roses in their appeal to Maryland's highest court, arguing that their condominium association's practice of forcing condo owners to park outside of the condominium development and prohibiting families from using a community pool for allegedly past-due condo fees violated the Maryland Condominium Act.

In siding with the Roses, Chief Judge Barbera wrote: "Restricting a condominium unit owner's access to communally held property is a significant infringement of the owner's property rights—so significant that the General Assembly found it appropriate to require that such a restricting may be authorized only through a provision in the declaration[.]"

The court rejected the condo association's argument that broad language in its declaration gave it general authority to write such policies whenever it wanted. The court held that the condo association acted "beyond [it's] power" when it implemented a rule restricting access to these areas, regardless of whether that restriction was temporary or permanent, without first obtaining consent from all unit owners.

The court's ruling was a victory for the Roses, as well as other condominium owners in the state who, having fallen on hard times or involved in a legitimate dispute over what they owe, have been hassled by their condo associations and, in some instances, forced to walk long distances on dangerous roads just to make it home.

CAOC-sponsored bill to protect abused seniors wins key approval in CA Senate

AB 859 addresses intentional destruction of legal evidence

SACRAMENTO – A measure sponsored by Consumer Attorneys of California (CAOC) that gives physically abused seniors a better shot at justice when nursing homes intentionally destroy legal evidence won approval in the Senate Judiciary Committee on July 18.

Assembly Bill 859, authored by Assemblymember Susan Eggman (D-Stockton), was passed by the committee on a 5-to-2 vote.

Normally, a victim of elder abuse must show "reckless neglect" by clear and convincing evidence. Some nursing homes, however, intentionally destroy that evidence after a suit is filed, to prevent victims from proving their case. Under AB 859, when a judge has found that a nursing home has intentionally destroyed legal evidence, the victim's burden of proving the case is reduced to a preponderance-of-evidence standard, a lower standard of proof.

"This is a very, very narrow and elegant solution to the problem" when a elder care facility destroys evidence to hide its culpability, said Kathryn Stebner, an elder abuse attorney and CAOC board member.

AB 859 is co-sponsored by the California Alliance of Retired Americans and the Congress of California Seniors and is backed by AARP and other senior groups. The bill is expected to be heard on the Senate floor after the summer recess.

***

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

For more information: Eric Bailey, CAOC communications director, 916-669-7122, ebailey@caoc.org.

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There is No Substitute for Experience

Governor signs CAOC-backed bill boosting fair treatment of immigrants in civil court

AB 1690 prevents queries of immigration status in most liability cases

SACRAMENTO (July 31, 2017) – A measure sponsored by Consumer Attorneys of California (CAOC) that ensures fair and equal treatment in civil liability cases regardless of a plaintiff's immigration status has been signed by Gov. Jerry Brown.

Assembly Bill 1690, authored by Assembly Judiciary Chairman Mark Stone (D-Scotts Valley) and other members of the Assembly Judiciary Committee, will halt inquiries into immigration status during most civil liability proceedings involving consumer protection, civil rights, labor and other laws.

The measure received unanimous approval at each step through the legislative process. It goes into effect Jan. 1, 2018.

California's Legislature and state courts have consistently recognized that legal discovery aimed at immigration status violates public policy. But attempts to use inquiries into immigration status persist in civil cases and can act to deter plaintiffs from meritorious claims.

That fear factor among immigrants about seeking accountability and damages in state courts has only been amplified by the Trump Administration's hard-line stand on immigration.

AB 1690 will prevent such inquiries by declaring that a plaintiff's immigration status is irrelevant to the issue of liability under the state's consumer protection, labor, employment, civil rights and housing laws, unless necessary to comply with federal immigration laws.

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Reprinted from CAOC.org website. For more information: J.G. Preston, CAOC press scretary, 916-669-7126, jgpreston@caoc.org or Eric Bailey, CAOC communications director, 916-669-7122, ebailey@caoc.org.

Judy H. Rothschild, Ph.D.
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Brown signs CAOC-backed bill providing new protections for child sex-abuse victims

SB 755 limits marathon psychological examinations of vulnerable youths

SACRAMENTO (July 25, 2017) – Gov. Jerry Brown has signed a bill sponsored by Consumer Attorneys of California (CAOC) protecting child sex-abuse victims from abusive marathon psychological examinations. Senate Bill 755, authored by Sen. Jim Beall (D-San Jose), will put limits on lengthy psychological examinations of children under age 15 who have suffered suspected sexual abuse.

Civil lawsuits are often the only way a victim and the family can seek justice and the compensation needed to offset the costs of treating mental and physical trauma caused by abuse. But attorneys who represent children in such civil cases report a disturbing practice: defense team experts who conduct unnecessarily long and abusive psychological exams.

SB 755 will help address such injustices by putting a limit of no more than three hours, inclusive of breaks, on any psychological testing of a child who is the victim of suspected sexual abuse.

One particularly awful case stands out: A therapist conducting an exam denied a six-year-old boy a bathroom break until he wet his pants. The therapist then angrily accused the child of lying about the alleged abuse. The exam was stopped only after the child's attorney heard yelling through the door. Defense teams have conducted marathon examinations even in cases involving abusers already in prison after criminal trials established most of the facts for a civil case.

For example, after a summer camp aide in Morgan Hill was sentenced to 60 years in prison for molesting a three-year-old girl, a defense psychologist in the subsequent civil case interrogated the child for five hours about her parent's separation, connecting her parents' marital problems to the molestation. The little girl was left an emotional basket case. By setting a time limit, SB 755 will help prevent the sort of trauma that can be inflicted on very young children already suffering because of sexual abuse.

"Gov. Brown has taken an important step to help protect the most vulnerable among us—our children," said CAOC President Greg Bentley. "SB 755 will put in place common-sense limits that will ensure sexually abused children don't become victims anew as their families seek civil justice."

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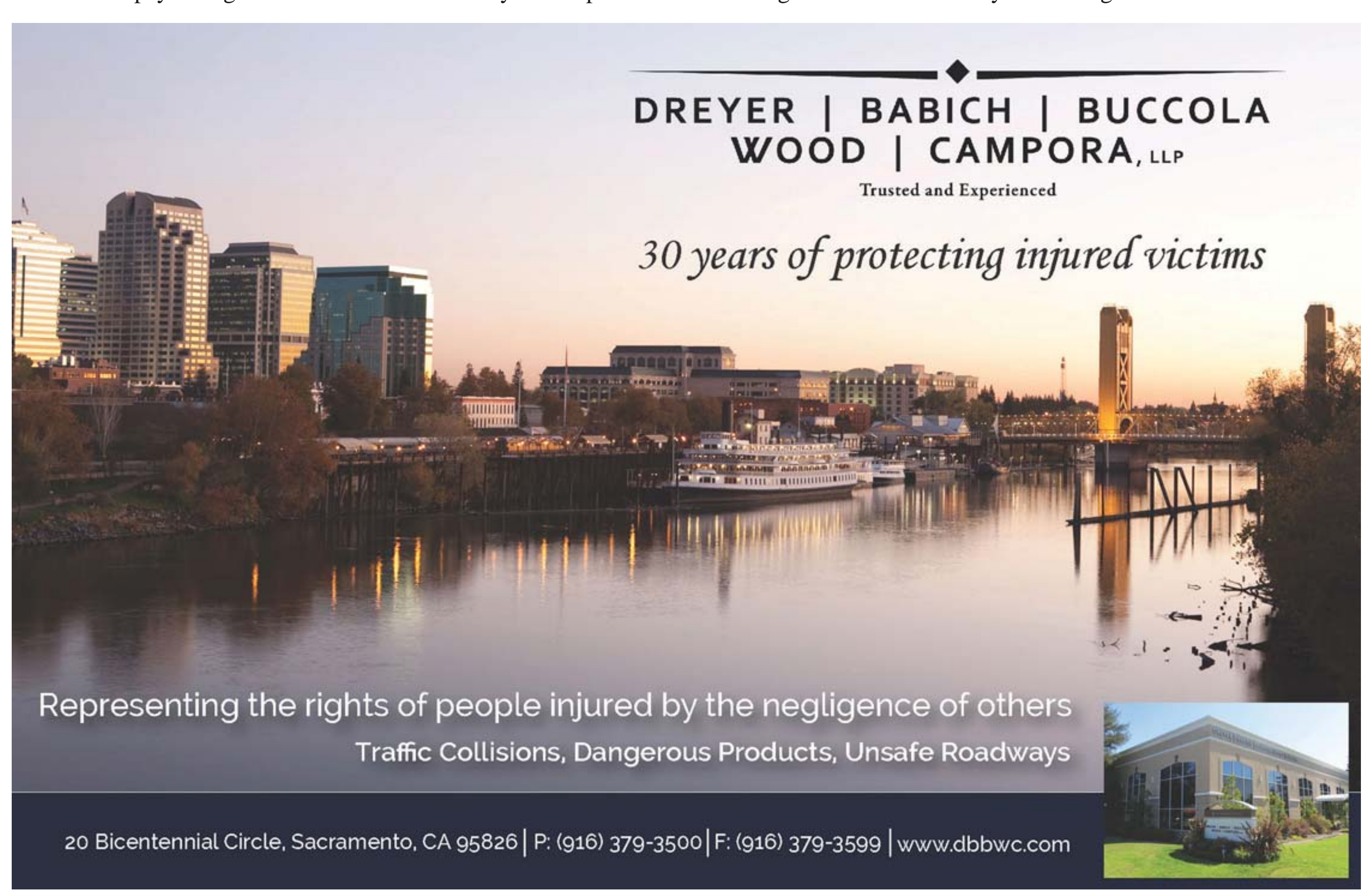
Reprinted from CAOC.org. For more information: Eric Bailey, CAOC communications director, 916-669-7122, ebailey@caoc.org.



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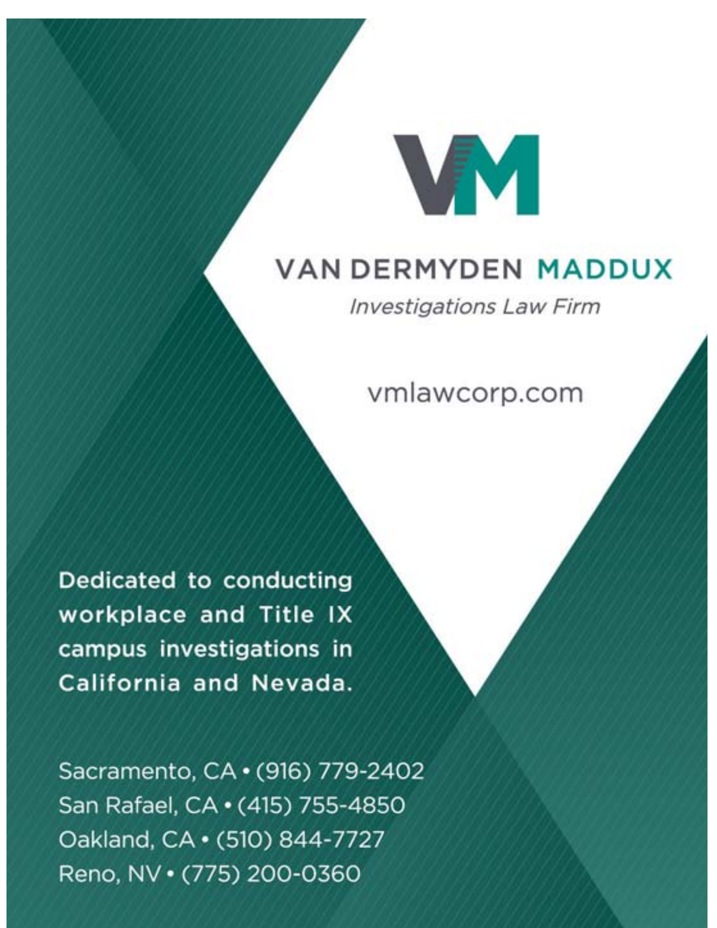

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1401 21st Street, Suite 400
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linda@norcalappeals.com
norcalappeals@gmail.com

www.NorCalAppeals.com

Linda J. Conrad is an Appellate Specialist, certified by The State Bar of California Board of Legal Specialization, handling civil and family appeals and writs for appellants and respondents in the First, Third, and Fifth District Courts of Appeal and the California Supreme Court. Certified Appellate Law Specialists have demonstrated their commitment to maintaining their proficiency in handling all matters relating to an appeal, including:

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Snares for the Unaware:

Pitfalls for Even Prudent Practitioners

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Capitol City Trial Lawyers Association
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CCTLA COMPREHENSIVE MENTORING PROGRAM — The CCTLA Board has developed a program to assist new attorneys with their cases. If you would likemore information regarding this program or if you have a question with regard to one of your cases, please contact Jack Vetter at jvetter@vetterlawoffice.com, Lori Gingery at lori@gingerylaw.com, Glenn Guenard at gguenard@gblegal.com or Chris Whelan at Chris@WhelanLawOffices.com

AUGUST

Friday, August 25
CCTLA Luncheon
Topic: THE FUTURE OF SPINAL DIAGNOSTIC DIAGNOSIS AND TREATMENT
Speaker: Pasquale X. Montesano, M.D.
Noon, Sacramento County Bar Association
CCTLA members only, $35

SEPTEMBER

Tuesday, September 12
Q&A Luncheon
Noon, Shanghai Gardens
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA members only

Friday, September 15
CCTLA Seminar
MEDICAL LIENS UPDATE
Speakers: Daniel Wilcoxen & Don De Camara
Noon-3:30 p.m.
McGeorge School of Law (courtroom)
CCTLA members $150; CCTLA member staff $100; non-member plaintiff attorney $250 (latter includes CCTLA membership (must meet CCTLA's membership criteria)

Friday, September 22
CCTLA Luncheon
Topic: TBA
Speaker: Ardavan M. Aslie, M.D.
Noon, Sacramento County Bar Association
CCTLA members, $35

OCTOBER

Thursday, October 5
CCTLA Problem Solving Clinic
Topic: THE FINAL 100 DAYS BEFORE TRIAL
Speakers: Rob Piering & John Demas
5:30 to 7 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA members only, $25

Tuesday, October 10
Q&A Luncheon
Noon - Shanghai Garden
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA members only

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

Thursday, October 26
CCTLA Problem Solving Clinic
Topic: MAJOR BENEFIT PROGRAMS (Medicare, Medicaid, SSI and SSDI) & CASE FLOW STRATEGIES
Speaker: Joe Anderson, Medivest Benefit Advisors
5:30-7 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only, $25

Friday, October 27
CCTLA Luncheon
Topic: TBA - Speakers: TBA
Noon, Sacramento County Bar Association
CCTLA members, $35

NOVEMBER

Tuesday, November 14
Q&A Luncheon
Noon, Shanghai Garden
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA members only

Thursday, November 16
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
Arnold Law Firm
5:30-7 p.m., 865 Howe Avenue, 2nd Floor
CCTLA members only, $25

Friday, November 17
CCTLA Luncheon
Topic: SUBSTANCE ABUSE IN THE LEGAL PROFESSION: PREVENTION, DETECTION AND TREATMENT
Speaker: DAVID MANN
Noon, Sacramento County Bar Association
CCTLA members, $35

DECEMBER

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

Tuesday, December 12
Q&A Luncheon
Noon, Shanghai Garden
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA members only

JANUARY

Thursday, January 18
CCTLA Seminar
Topic: WHAT'S NEW IN TORT & TRIAL: 2017 IN REVIEW
Speakers: TBA - Location: TBA
$150 CCTLA members; $175 non-members

CCTLA Calendar of Events