Winter 2017

The LITIGATOR

VOLUME XII OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION ISSUE 4

Inside

Let's do what we do best: Fight the good fight

Bob Bale
CCTLA President

Well, I won't back down
No, I won't back down
You can stand me up at the gates of Hell
But I won't back down

— Tom Petty, "*I Won't Back Down*"

Tom Petty died on October 2, 2017. Great musician. Great lyricist. But everybody knows that. What a lot of people don't know is that Petty fought long and hard to protect his artistic control and artistic freedom. He stood up to mega-corporations to keep rights to songs he wrote and fought many battles against unfair ticket and album pricing (he thought record companies and show promoters were gouging the public).

In the process, he gained rebel status in the industry. He made a lot of enemies amongst the powerful, but he kept his artistic soul in the process.

Tom Petty was a lot like us. By "us" I mean attorneys who battle mega-corporations and fight to prevent insurance companies and tortfeasors from gouging our clients. We make enemies daily, but keep our souls in the process. As individuals and as a group, we don't back down, win, lose or draw. With one exception. *Howell*.

Howell. That one word says it all. Since 2011, our clients have borne the yoke of disparity imposed by bad law that has reaped massive windfall profit for the insurers of persons and companies who hurt others. This bad law not only punishes the injured but also harms health insurers, emergency medical providers and the State of California which does not enjoy any of the taxes on spending it would otherwise receive from persons who receive fair compensation in personal injury lawsuits. We complain about it. We curse and revile it. We wring our hands in despair. But for the most part, as individuals and as a group, we sit on our hands.

Why? We are members of a powerful trade organization that is in the business of fostering legislative change to benefit the private citizens of California. Consumer Attorneys of California (CAOC) works for us; it is a trade organization. The only reason it is around is to serve the interests of its membership. It cannot and should not have any other agenda.

Survey after survey of our members here in Sacramento and of CAOC board members statewide consistently rank *Howell* as the organization's Top Priority issue, at least, as far as members are concerned. But six years have passed in the shadow of *Howell* and its growing progeny, with no real, unified, substantive effort by CAOC to

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Mike's CITES

By: Michael Jansen
CCTLA Member

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

MICRA or NOT?
Claudia A. Johnson v. Open Door Community Health Centers
2017 DJDAR 8939; 2017 Cal. App. LEXIS 788 (September 11, 2017)

FACTS: When Plaintiff Claudia Johnson went to her medical clinic, Open Door Community Health Center, she was taken to a scale located against the wall in a hallway outside a treatment room, to be weighed. Afterward, Plaintiff entered the treatment room, consulted with the physician's assistant, and left. On her way out of the treatment room, she tripped over the scale, which had been moved during the consult so that it now partially obstructed her path from the room to the hall. She fell and suffered serious personal injuries.

Plaintiff filed a complaint for personal injuries against Open Door on a premises liability theory. Open Door sought summary judgment on the grounds it is a medical provider and a one-year statute of limitations (CCP §340.5) under MICRA applies. The trial judge granted the motion for summary judgment throwing Plaintiff out of court.

HOLDING: The appellate court reversed the trial judge's grant of MSJ. The California Supreme Court has described the boundaries between the normal duties owed by a health care provider and those a health care provider owes to its patients for professional services. *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal 4th 75.

In *Flores*, hospital staff had failed to competently carry out a doctor's orders to raise the bed rails on a gurney, and that caused injuries, which led to a one-year statute of limitations. *Flores* stands for the rule that if a medical provider is negligent in the use or maintenance of hospital equipment or premises in the rendering of professional medical services, that qualifies as professional negligence under CCP §340.5 and a one-year statute of limitations applies.

The Supreme Court provided the example in *Flores* of a collapsing chair in the waiting room. The waiting room chair is not provided for the purpose of rendering professional medical care. If it were to collapse when one sat, the resulting claim would be subject to the two-year statute of limitations, not the one-year.

RULE: "We must avoid a ruling which would make ordinary premises liability claims subject to the special one-year statute of limitations by differentiating between the special duties that medical providers owe to patients, on one hand, and those they owe, as property owners, to all invitees, on the other. (Citation omitted) Plaintiff alleges that Open Door negligently left a hazardous object in her path. Under these circumstances, the nature of the object does not matter—the scale could have just as easily been a broom or a box of medical supplies. What is material is that the duty owed by Open Door was not owed exclusively to patients."

SUMMARY JUDGMENT and EXPERTS
Mary Lyons v. Colgate-Palmolive Co.
2017 DJDAR 10103
(October 19, 2017

FACTS: Plaintiff Mary Lyons offered unrebutted and corroborated testimony that she had put Colgate Cashmere Bouquet talcum powder on her body from the time she was a baby in the early 1950s until the early 1970s. The product was marketed until 1995, when the United States Environmental Protection Agency reported that the presence of asbestos in the talc makes it carcinogenic. In October 2015, Plaintiff was diagnosed with malignant mesothelioma. She had not saved any of the Cashmere Bouquet talcum powder

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Can the defense attorney in my client's auto case blame the treating physician for complication injuries from treatment?

By: Daniel E. Wilcoxen
Wilcoxen Callaham, LLP,
and CCTLA Board Member

Many times our office is contacted by attorneys handling auto accidents or other personal injury cases because they believe their client was injured by malpractice of the treating physician arising from the personal injury case. Since often times there are complications in the care and treatment of an injured plaintiff, and our office does a significant amount of medical malpractice, we are contacted to bring a separate action on behalf of the client, to sue for medical negligence, while the plaintiff proceeds with their PI case.

Some plaintiff's counsel are surprised by the defense asking questions in Discovery about whether or not the client believed that his injury was worsened by the care and treatment from his medical providers after the original accident. They are further surprised when at time of trial, the defense tries to blame the treating physician for aggravation of the accident injury because of the medical provider's alleged malpractice.

Some attorneys are unaware of the case of *Henry v. Superior Court* (2008) 160 Cal.App.4th 440. This case discussed the traditional tort concept that tortfeasors are liable, not only for the victim's original personal injuries, but also for any aggravation caused by subsequent negligent medical treatment provided to the injured party. It is still widely believed that the original tortfeasor defendant is wholly responsible for subsequent aggravation of the injury caused by medical care. The *Henry* case discusses Civil Code §§ 1431.1 and 1431.2, and their effect on the defense's ability to bring before the jury malpractice of a subsequent medical care giver to dilute the responsibility of the original tortfeasor.

As we all know, in 1986, Proposition 51 (The Fair Responsibility Act of 1986) was passed and created Civil Code §1431.2 That section provides that "the liability of each defendant for non-economic damages shall be several only, and shall not be joint." The *Henry* case allows, in a lawsuit brought by the injured party against the original tortfeasor, the defendant to reduce their exposure for non-economic damages by proving the medical professional shares fault for the aggravated injuries suffered by the plaintiff if it amounts to medical malpractice.

In *Henry*, the Henrys hired Mr. Reinink to clean and repair their swimming pool. During his work, he tripped and fell over an unmarked, unlit concrete step on the walkway between the pool

Continued on page 4

and the access gate, injuring his shoulder. Thereafter he was treated by Kaiser for his shoulder injury, undergoing a series of surgeries wherein it was alleged that Kaiser fractured his shoulder in two locations, worsening his injury through medical negligence.

Plaintiff did not name Kaiser but only sued the Henrys. The Henrys sought to blame Kaiser for non-economic injuries, even though they had not brought in Kaiser by way of a cross-complaint. Defendant Henrys argued they were entitled to introduce evidence of Kaiser's negligence because their liability for Plaintiff's non-economic damages was limited to their proportionate share of fault in causing the injuries. Based on disagreements concerning motions in limine, the court granted a continuance so a writ could be filed concerning the Henrys' right to introduce evidence of Kaiser's negligence to limit their liability for non-economic damages to their percentage of fault.

In a long but well-written opinion, the appellate court held that the Henrys were entitled to introduce the evidence of Kaiser's alleged fault so as to reduce the non-economic damages attributable to the only named defendant, the Henrys.

It is advised that all PI attorneys read the *Henry* decision to thoroughly understand the historical background of the case law that brings us to the present day state of affairs which may force the plaintiff's attorney to either bring in potential defendant medical care provider to defend himself in the personal injury case, thereby helping the plaintiff's attorney place all the blame on the original defendant, or, name the medical care provider and let the defendant prove the medical negligence case against the medical care provider.

THE HISTORICAL BASIS OF APPORTIONMENT OF DAMAGES AMONG TORTFEASORS

American Motorcycle Association v. Superior Court (1978) 20 Cal.3d 578, 586, held that plaintiffs should not have the unilateral right to determine which defendant or defendants should be included in an action and that defendants who were sued could bring in other tortfeasors via a cross-complaint who were allegedly responsible for the plaintiff's injury to obtain equitable indemnity on a comparative fault basis, thus permitting a fair apportionment of damages among tortfeasors.

The case of *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, established that the principles set forth in *American Motorcycle* allowed a defendant to pursue a comparative equitable indemnity claim against other tortfeasors either by (1) filing a cross-complaint in the original tort action, or (2) filing a separate indemnity action after paying more than its proportional share of damages through the satisfaction of a judgment or a payment in settlement.

These cases sought to reduce the harshness of the original all-or-nothing common law rules of joint and several liability which sometimes produced situations in which defendants who were responsible for a small share of fault for an accident could be left with the obligation to pay all or a large share of the damages if the more responsible tortfeasors were insolvent. To attempt to remove this alleged inequity, in 1986, Proposition 51 (now Civil Code §§1431, 1431.1 and 1431.2) was passed by the electorate seeking to remove the deep-pocket defendant's full responsibility.

CC §1431.2 states: "In an action for personal injury, property damage, or wrongful death, based on principles of comparative fault the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault and a separate judgment shall be rendered against that defendant for that amount."

Non-economic damages were defined as "subjective non-monetary losses such as pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

CC §1431 retained the joint liability of all tortfeasors with respect to objectively provable monetary losses.

It should be noted that the term "joint and several liability" in the context of equitable indemnity is expansive and is not limited to the old term "joint tortfeasor" in that it can apply to acts that are concurrent or successive, joint or several, as long as they create a detriment caused by several actors.

The newer cases are essentially all on point in holding for purposes of joint and several liability that the plaintiff's injuries need only be causally interrelated, not physically inseparable. Joint tortfeasors may act in concert or independently of one another. What is important is the relationship of the tortfeasor to the plaintiff as the interrelated nature of the harm done. The concept is one of legal causation; that multiple tortfeasors are responsible for the plaintiff's injuries, not the precise nature of the resulting damage. The joint and several liability concept embodies the general common law principle that a tortfeasor is liable for any injury for which his negligence is a proximate cause and, unless damages can be divided by causation, the damages are indivisible and thus the injury is indivisible.

THE HENRYS ARE ALLOWED TO INTRODUCE EVIDENCE OF NEGLIGENCE OF KAISER

The court found that under the existing law, if the Henrys were found liable to Plaintiff Reinink, they would be entitled to file a separate action seeking partial equitable indemnification from Kaiser with respect to those damages for which the

The court found that under the existing law, if the Henrys were found liable to Plaintiff Reinink, they would be entitled to file a separate action seeking partial equitable indemnification from Kaiser with respect to those damages for which the Henrys and Kaiser were jointly and severally liable. The court found also that the Henrys were permitted to have the jury in the Reinink action allocate fault between the Henrys and Kaiser so that liability for non-economic damages is borne in direct proportion to the fault of each.

Henrys and Kaiser were jointly and severally liable. The court found also that the Henrys were permitted to have the jury in the Reinink action allocate fault between the Henrys and Kaiser so that liability for non-economic damages is borne in direct proportion to the fault of each.

Although Reinink attempted to establish that Kaiser's negligence was imputed or derivative and therefore outside the rules of CC §1431.2, the court disagreed, but it also found that there are certain situations in which §1431.2 would not apply, such as in the Doctrine of Respondeat Superior that imposes liability irrespective of the proof of the fault. Vicarious liability meant that the act or omission of one person is imputed by operation of law to the other. Vicarious liability is a departure from the general tort principle that liability is based on fault. Thus, §1431.2 does not apply when liability is imposed vicariously via employment or non-deligable duty doctrine.

Further, §1431.2 does not apply in product liability actions among defendants who are in the chain of distribution of a defective product in that modern justification for vicarious liability is a rule of policy which is a deliberate allocation of risk as a required cost of doing business. Thus §1431.2 has no application in strict liability cases where the plaintiff's injuries are caused by a defective product in that the liability is not based on comparative fault.

The court reasoned that in cases of subsequent medical malpractice after an accidental injury, the original defendant has no control over the subsequent treatment provided by the medical caregiver and does not participate in the injured plaintiff's care and thus has no opportunity to protect himself from said medical negligence.

Thus, the court found "whatever class of negligence is involved under Section 1431.2 in personal injury actions in which principles of comparative fault are implicated, the liability of a defendant for non-economic damages is several only."

Thus, even if you do not want to involve a health-care provider as a defendant in your case because it takes the focus off of the wrongful conduct of the accident causing defendant, you must consider whether or not the subsequent medical care caused additional injury allowing the defendant an opportunity to point the finger at the treating physician as opposed to the truly responsible party.

It should further be noted that there could certainly be a complication regarding exposure of the medical defendant for non-economic damages which are capped at $250,000 in a large case where the non-economic damages of $250,000 would not compensate the plaintiff.

A defense to an attempt by the defendant to claim a subsequent medical care giver is responsible for an increased injury to the plaintiff is the case of *Chakalis v. Elevator Solutions, Inc.* (2012) 2015 Cal.App.4th 1557. This case holds there must be expert medical testimony establishing medial negligence before a claim of increased injuries by medical aggravation of injury is allowed. Further, remember economic damages are still joint and several under CC §1431. So, the defendant with the deep pocket is still viable.

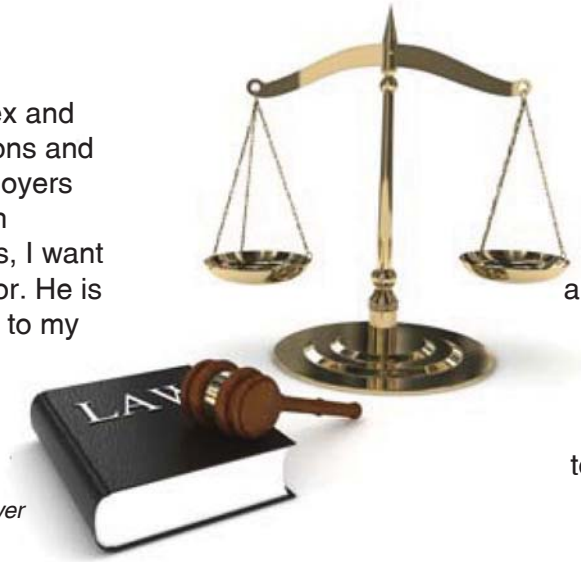
Thus, I think it is important for everyone to read the *Henry* case and be alerted to the fact that there may be a claim by the defendants that a doctor subsequently treating your client's injuries after the accident was a negligent cause of further injury to your client, thereby potentially taking the focus off of the original defendant. Ω

Hon. Darrel W. Lewis (Ret.) Mediator

The Judge

"Employment law is complex and requires marshalling emotions and expectations between employers and employees. When such difficulties arise in my cases, I want Judge Lewis as the mediator. He is **respectful and thoughtful** to my clients and me throughout the process, but he **gets people to move and to compromise.**"

— Plaintiff Lawyer



The Mediator

"This was a worrisome personal injury case, due to the lack of insurance for the defendant. **Judge Lewis persevered and convinced** my client (Plaintiff) and the defense lawyer to resolve the matter in an **amazingly short time**. Judge Lewis is truly a people person, which enables him to communicate with and to establish rapport with anyone."

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Re: *Howell* — Don't Back Down

Continued from page one

confront this issue and take up arms against it. We have, in short, backed down.

If you ask CAOC leadership why, get ready for a long discourse that, in front of a jury, would sound like excuses. In a nutshell, CAOC is reluctant to engage on *Howell* because it doesn't want to squander valuable political capital on a battle it doesn't think is winnable. As much as I admire CAOC's leadership, the organization itself and what is has accomplished, fear of losing cannot tell the tale.

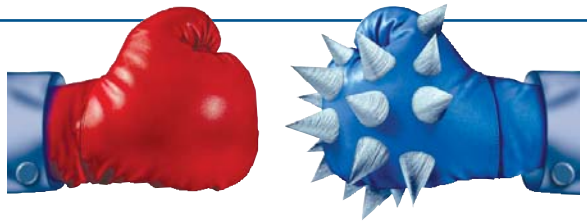
CAOC is an organization of TRIAL lawyers. It must always lead by example, which means it can't be afraid of getting its nose bloodied. That is not how CAOC's members lead their professional lives. If it was, we'd all be just insurance adjusters, not advocates. We are in this business to fight for the underdog, to stand up to The Machine, to try the unwinnable case. To Not Back Down. CAOC can do no less.

So what can be done? A lot. One of the challenges that CAOC laments is the lack of a legislative alternative to *Howell* that is "marketable" to the Assembly and Senate. Fortunately, one such alternative already exists: Government Code Section 985. That code section has been on the books since 1987.

In a nutshell, the heart of 985 provides as follows: "Any collateral source payment paid or owed to or on behalf of a plaintiff *shall be inadmissible in any action for personal injuries or wrongful death where a public entity is a defendant."* 985(b).

The statute defines "collateral source" as either, "the direct provision of services prior to the commencement of trial to the plaintiff for the same injury or death by prepaid health maintenance organizations," or, "monetary payments paid or obligated to be paid for services or benefits that were provided prior to the commencement of trial" by publicly funded health insurers including Medi-Cal, county health care, Aid to Family with Dependent Children, etc. 985(a)(1)(A)-(B); f(1)-(2).

The statute prescribes a process by which defendant *may* move post-trial to reduce the amount of any medical damages awarded by the difference between amounts paid and amounts charged. 985(b); (e)-(f). Such reduction is not mandatory, and is subject to specific statutory limitations. See 985(f); (g)-(i). It also allows for installment payments of any monies deemed owed for reimbursement of liens. 985(h).



According to the case law, this has the effect of barring any evidence of amounts paid for medical services on Plaintiff's behalf during trial. See, e.g., *Riddell v. Cal.* (1996) 50 Cal.App.4th 1607, 1613, so long as Plaintiff had the good fortune to have been injured or killed by a government employee or entity.

The code also conveys significant authority on the trial judge to deal with liens post-trial. For example, the statute does not require the trial court to reduce post-trial; such reduction is discretionary. Moreover, the statute imposes the following extraordinary limitation: "In no event shall the total dollar amount deducted from the verdict, paid to lienholders or reimbursed to all collateral source providers, exceed one-half of the plaintiff's net recovery for all damages after deducting for attorney's fees, medical services paid by the plaintiff, and litigation costs; however, the court may order no reimbursement or verdict reduction if the reimbursement or reduction would result in undue financial hardship upon the person who suffered the injury." 985(g).

According to its legislative history, Government Code Section 985 represents a compromise between public entities, which would like to have juries hear about collateral source payments, and the plaintiff's bar, which would like to keep that information out of the trial. The statute keeps the information out during trial, but gives the public entity the possibility of reducing after trial the amount of judgment by the amount of the collateral source payment.

CAOC is aware of this code provision, and the benefits that amending it to apply to all civil cases would bring to our clients and our membership. They know because I have spent considerable time and effort educating leadership about 985. So far, leadership is just not willing to engage. Maybe it is still recovering from the basting we received fighting the MICRA cap a couple of years ago. Maybe CAOC just feels this is too tough to sell, no matter what.

But the past is past. Just ask yourself how many times your client would have been left with nothing if you rolled over just because the case was tough, the issues impossible and the odds were long. As individual practitioners we fight those battles Every Single Day. That is what we were born and bred to do. Can we require any less of the organization that we created to advance our interests and that we fund? Tom Petty knew the answer to that question. So do each of you.

Send a message to leadership. Email your thoughts and your convictions to Nancy Drabble, Lea-Ann Tratten and Nancy Peverini. Reach out to Lee Harris, CAOC's incoming president for 2018. Stand up to your local CCTLA Board. It has a big dog in this hunt.

Your board lives in the Capitol City and has done a lot to try and change the tide on *Howell*, but it needs your help. You can just sit on the sidelines and complain, but that's not what the great beating heart of a trial lawyer allows. Stand up. Be a rebel. Make Demands. Fight the good fight.

But really, whatever CAOC ultimately does, each of you is an individual with a powerful voice and a "damn the torpedoes, full speed ahead" attitude. If enough of us knock on the doors of our legislators, buttonhole candidates who want our money and refuse to fund candidates who are not on board with changing this gaping hole in the fabric of California's tort recovery system, we can turn the tide.

Many thanks to a tremendous 2017 CCTLA Board and to the One and Only Debbie Keller. You've got a great board coming up in 2018, and I'll still be around, trying every way I can to continue the fight against *Howell*, to not back down, every day. I hope to see you out there.Ω

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— Nicholas K. Lowe
Mediator, Attorney at Law

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When The Money Pot Is Too Small To Take Care Of Everybody – A Short Primer On Interpleader

By: Alla V. Vorobets,
CCTLA Board Member

Your client, who barely made it out alive from a motor vehicle collision, incurs more than $500,000 in medical bills. The insurer is on the hook for the loss caused by: 1) the driver of the rental car that caused the accident, 2) the driver's brother who rented the car, and 3), the rental company—all of whom tendered their policies immediately after the conclusion of the police investigation. The limits on each policy is $15,000, and your client's UIM policy limit is $50,000. The individual defendants are judgment-proof. You settle the case for the policy limits.

Your contingency agreement does not include negotiation of the unpaid medical bills, liens, subrogation claims, etc. ("medical liens" for ease of reference). But, after your client requests help from her hospital bed, you roll up your sleeves and proceed with resolving medical liens for your client. At some point, you come to a dead end where 1/3 waive, 1/3 reduce and 1/3 absolutely require full payment of the outstanding amount of their respective medical lien claims.

The resulting math is way over the amounts available in the settlement money pot for payment of medical liens. Requiring your client to take responsibility for the balances remaining after the money pot is distributed is neither fair nor reasonable. Your client was low-income before the accident and was left permanently disabled as a result of the accident.

Moreover, failure to properly deal with medical liens may run afoul of ethics rules. The California State Bar has indicated that attorneys have a fiduciary obligation to a lien claimant and will be subject to discipline for failing to communicate with, and promptly pay, the lien claimant. See, Formal Opinion 2008-175 (State Bar of California Standing Committee on Professional Responsibility and Conduct). That opinion noted that "…[a]n attorney who settles a personal injury action and holds funds in her or his [trust account] is under a fiduciary duty to the medical lienholders." *Id*. at 3 (citing *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, 200.)

Personal injury lawyers run into this scenario with some frequency. Most of the time, we are able to plead, beg and otherwise resolve the medical liens for our clients. Sometimes, we can't. What to do?

To properly protect your client and discharge your ethical obligations, the only thing to do is to file an interpleader. Regrettably, it is a tool that is not widely used or understood by most attorneys.

Statutory Authority

The statutory authority for the interpleader is found in Code of Civil Procedure § 386-386.6. An interpleader is an equitable remedy. As such, the parties are not entitled to a jury trial, except as to issues of fact involved in determining whether there is a deficiency in deposit with the court or where the right to a jury is specified by law. See, Cal. Civ. Proc. Code §§ 386(e), 592.

In an interpleader action, a person holding property subject to multiple claims is called a "stakeholder," while the property is called a "stake." In our example, the stakeholder is the attorney who settles the personal injury case, and the stake is the disputed portion of the settlement money.

An interpleader allows a stakeholder to bring together all of the claimants in a single case to cause them to litigate their claims amongst themselves and thereby avoid multiplicity of claims/suits based on a single obligation. Cal. Civ. Proc. Code § 386(b); see also, *Hancock Oil Co. v. Hopkins* (1944) 24 Cal.2d 497, 508; *City of Morgan Hill v. Brown* (1999) 71 Cal. App.4th 1114, 1122.

If the interpleader is filed by the same attorney who obtained the personal injury

Continued on page 10

settlement, that attorney is the stakeholder/Plaintiff. That attorney will have to name all of the providers as claimants/Defendants, but also the attorney's own PI client as Defendant. Otherwise, an interpleader can be filed by another counsel on behalf of stakeholder attorney who settled the underlying personal injury case, or the PI client herself.

Filing and Service of Interpleader

An interpleader can be filed under either Cal. Civ. Proc. Code § 386, subsection (a) or subsection (b). In the context of personal injury settlement funds, an interpleader is properly maintained under section 386 (b).

An interpleader action begins like any other lawsuit, by filing a verified Complaint In Interpleader. Cal. Civ. Proc. § 386 (b) requires the stakeholder to file a verified pleading disclaiming any interest in the money or property claimed.

Depending on the amount of the stake funds at issue, the case is filed as either limited or unlimited action. The stake funds, which a stakeholder admits is payable on the interpleader action, may be deposited with the clerk of the court at the time of the filing of the complaint. Cal. Civ. Proc. Code §386(c). The stake funds can also be so deposited by court order, after the interpleader is filed.

An interpleader is also served like any other lawsuit.

Response

To continue asserting a claim against the stake, an interpleader Defendant must respond by usual means—Answer, Demurrer, Motion to Strike, etc. Defendant may also terminate his/her/its involvement in the case by withdrawal/waiver of his/her/its claim to the stake. The latter is one of the procedural peculiarities of an interpleader. Due to the cost of hiring defense counsel as juxtaposed with the amount of a particular claim, interpleader Defendants frequently withdraw/waive their claim(s) or fail to respond altogether.

Default

Another procedural peculiarity of the interpleader is the purpose and entry of the default judgment. As in any other lawsuit, an interpleader Defendant who fails to respond in any manner is subject to a default judgment. However, the purpose of the default judgment, in an interpleader context, is to provide Plaintiff with an ultimate relief from any claims by the defaulting Defendant against the stake funds, rather than a money judgment. In effect, a default judgment against an interpleader Defendant bars that defendant from recovering anything from the plaintiff on the obligation subject to the interpleader.

Burden of Proof

The interpleader statute does not specify the burden of proof or who bears it. However, California courts generally apply default burden of proof rules in an interpleader. Thus, in a rare case that an interpleader is actually tried, the burden of proof, by a preponderance of the evidence in accordance with Cal. Ev. Code §§ 115, 500, as to the validity and amount of claim, rests with Defendant(s). See, e.g., *Division Labor Law Enfmt. v. Brooks* (1964) 226 Cal.App.2d 631, 633 (interpleader funds 'must be disposed of, but only to a claimant who established his own affirmative right'); *Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (2006) 138 Cal.App.4th 373, 376.

The latter was recently reaffirmed in *State Farm Mutual Automobile Ins. Co. v. Huff* (2013) 216 Cal.App.4th 1463, 1470,

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where the court held that a defendant asserting a right to interpleaded funds under Cal. Civ. Code § 3045.1 – 3045.6 (Hospital Lien Act) has the burden to prove by a preponderance of the evidence, the amount of its lien consisting of the reasonable and necessary charges for services attributable to the accident.

Stakeholder's Discharge

An interpleader stakeholder can be discharged from the action by utilizing one of the following methods: 1) filing a Motion For Discharge of Stakeholder ("Discharge Motion"), 2) entering into a Stipulated Judgment In Interpleader ("Stipulated Judgment"), 3) prevailing on a Motion For Judgment On The Pleadings ("MJOP"); or 4), after a bench trial.

Liability Limitation/Immunity for Stakeholder

An interpleader Plaintiff enjoys immunity from any tort liability for naming claimants in an interpleader action. *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857. In affirming the lower court's decision to sustain interpleader Plaintiff's demurrer to interpleader's Defendant's claims for malicious prosecution, abuse of process and intentional infliction of emotional distress, the *Cantu* court concluded that, where a party disavows interest in the interpleaded stake, imposition of tort liability for filing interpleader is precluded. *Id*. at 873.

Likewise, any liability to a successful interpleaded claimant for interest on the money or damages for wrongful withholding of the stake funds terminates once stakeholder deposits them with the court clerk. Cal. Civ. Proc. Code § 386 (c); *Conner v. Bank of Bakersfield* (1920) 183 Cal. 199, 206.

Recovery of Attorneys' Fees and Costs by Stakeholder

Cal. Civ. Proc. § 386.6 (a) permits the stakeholder/Plaintiff to recover attorneys' fees and costs incurred in bringing the interpleader. The grant of such fees and costs is within discretion of the court and is awarded from the stake funds deposited with the court.

An award of attorneys' fees and costs by the stakeholder occurs at the time of stakeholder's discharge from the interpleader, and is allowed in spite of it further reducing the size of the stake to which Defendants are claiming.

To recover attorneys' fees and costs, the interpleader Plaintiff must include request for same in the prayer of his/her/its Complaint In Interpleader and complete all of the procedural steps set forth in Cal. Civ. Proc. §§ 386.5 and 386.6.

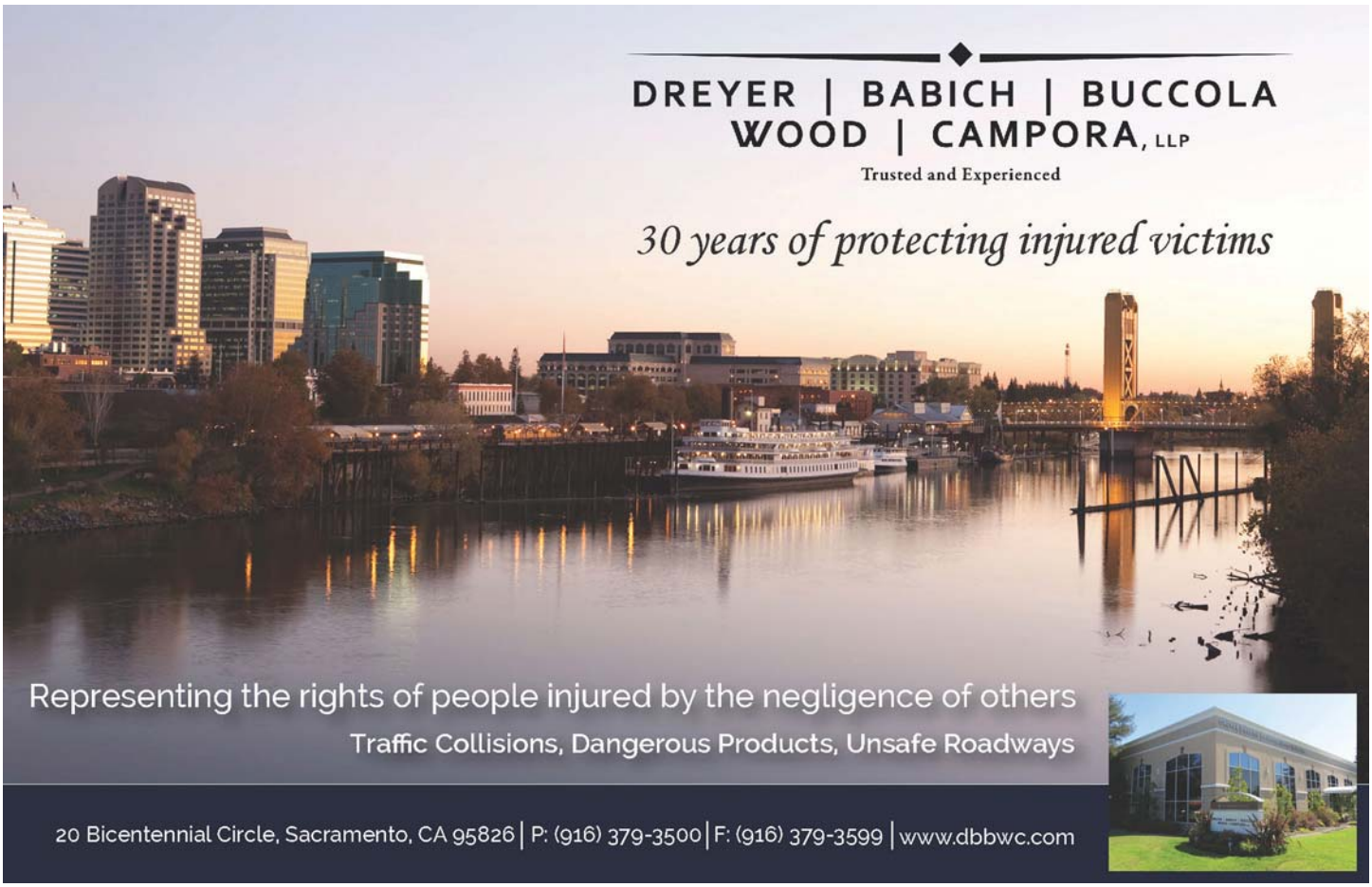
Even when a request for attorneys' fees and costs is properly pled, Plaintiff will be precluded from recovery if Plaintiff fails to deposit the stake funds with the court as required by Cal. Civ. Proc. §386 (c). See, *Wells Fargo Bank, N.A. v. Zinnel* (2004) 125 Cal.App.4th 393, 401 and 403 (legal fees can be awarded only out of deposited funds); *Tri-State, Inc. v. Long Beach Community College Dist.* (2012) 204 Cal.App.4th 224, 232 (Plaintiff denied recovery of its attorneys' fees and costs because it failed to interplead stake funds).

Ethics Implications and Notes

Prior to filing, an attorney stakeholder/Plaintiff should write a detailed letter to his/her PI client explaining the implications of interpleader and providing notice that the attorney may have to withdraw from the interpleader.

Given that the attorney stakeholder/

Continued on page 13



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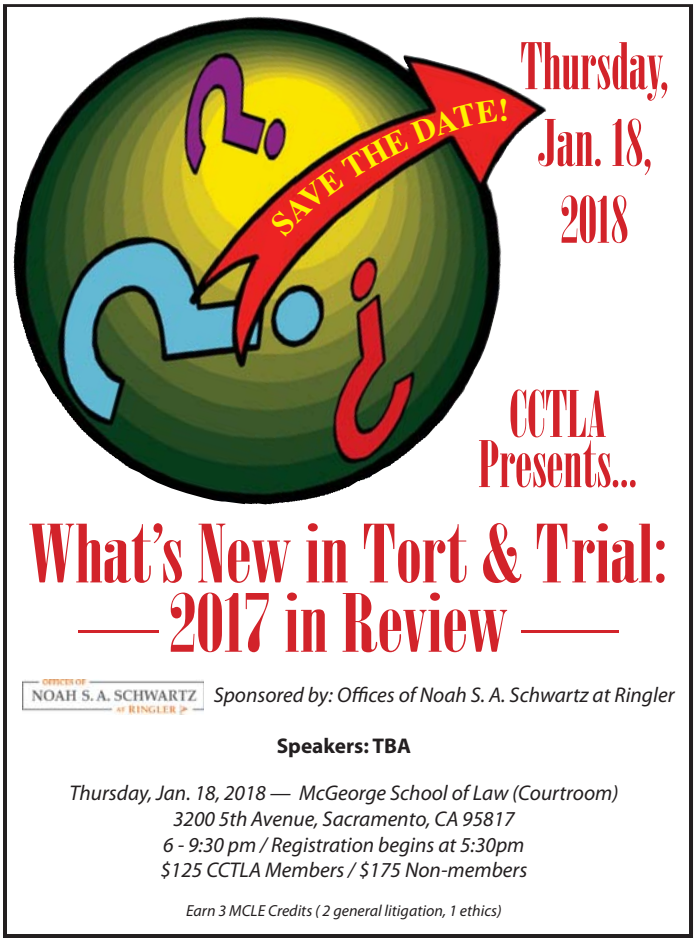

A short primer

Continued from page 11

Plaintiff owes duties to medical lienholders (re *Nunez*, above) and his or her PI client, the attorney filing interpleader can potentially put themselves in a position of having to withdraw from representation.

In light of the foregoing, the attorney stakeholder/Plaintiff should exit the interpleader as soon as possible after filing, through a Motion to Discharge a Stakeholder, a Stipulated Judgment or Motion for Judgment on the Pleadings.

If the stake funds are coming from the settlement attorney stakeholder/Plaintiff negotiated, the better practice is to deposit the stake with the court at the time interpleader is filed. Doing so allows the attorney stakeholder/Plaintiff to terminate his or her IOLTA accounting duties applicable to funds that are held in the IOLTA long term.

For the claim that is withdrawn or waived, best practice is to execute an ironclad agreement with the Defendant withdrawing/waiving his/her/its claim. The agreement should include language precluding Defendant from recovery of any amount outstanding against the PI client, the attorney that obtained PI settlement and their agents, employees, assigns, etc. in consideration of the plaintiff's dismissal of Defendant from the interpleader action.

Interpleader in Federal Court

Procedural and substantive rules that apply to interpleaders in the federal courts are governed by Federal Interpleader Acts (presently 28 U.S.C.A. §§ 1335, 1397, 2361) and Rule 22 of Federal Rules of Civil Procedure. They are outside of scope of this article and thus are not discussed here.

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CCTLA will again be contributing to Mustard Seed for the holidays and asks members to pitch in.
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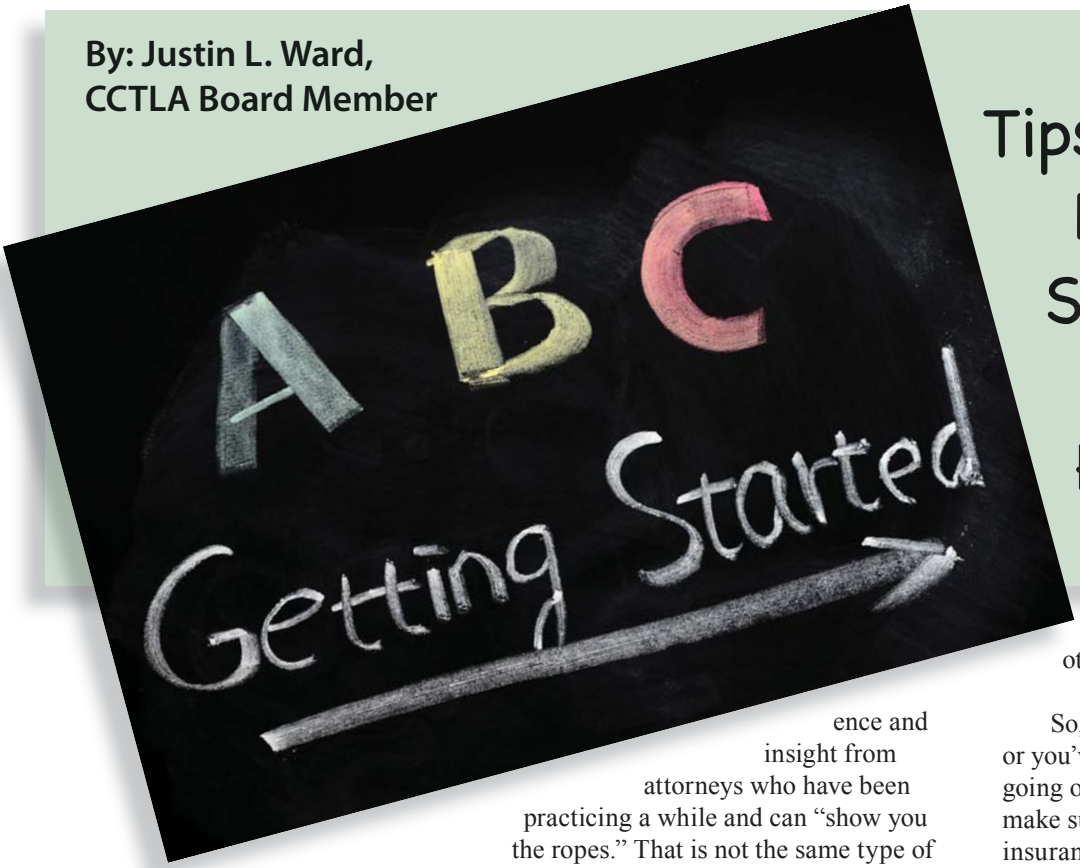
Tips for Newer Lawyers Starting a Private Practice

By: Justin L. Ward,
CCTLA Board Member



When I was trying to decide what to write about for my article, I thought about a friend who wrote an article for newer criminal defense attorneys in the *Los Angeles Daily Journal* many years ago, which I found to be very useful. Let me begin by saying that this article is primarily for newer attorneys in private practice, though some more experienced attorneys may find some of it useful.

Beginner Basics

My first bit of advice is to NOT go into private practice right out of law school. It is not the smartest way to do things. The main reason is that you don't know what you don't know, yet. I have been practicing for more than 13 years, and there are still things that I learn every day about the law and running a law practice. So, my first suggestion is that you spend a couple years working for a law firm or office where you can learn from experienced attorneys. This will serve a few purposes.

One, you will gain valuable experience and insight from attorneys who have been practicing a while and can "show you the ropes." That is not the same type of experience that you would get by calling a friend every now and then and asking for some help or advice. When you work at a firm or office, the other attorneys encourage you to become a good lawyer because it helps the firm thrive, and it helps make their jobs easier.

Working at a firm also allows you to be covered by the firm's legal malpractice insurance. While you hope you never need the coverage, it is always nice not to have to worry that a lawsuit will bankrupt your practice before you really get it going. The yearly cost of insurance varies based on the insurance provider and area of law, but a personal injury policy for someone in their first three years will probably cost about $1,000 a year.

And when you do leave the firm, make sure you get as many samples of documents as possible. Of course, your company's policy may vary, so do not get into trouble.

However, if you've done the work, you definitely should save it and keep a copy for yourself. As far as the work of others in the firm, that's up to you.

Malpractice Insurance

So, you've decided to leave the firm or you've disregarded my advice and are going out on your own right away. Well, make sure you purchase malpractice insurance. As stated above, you need the coverage in case you make a costly mistake. There are many different insurance companies out there, but my research found that Lawyer's Mutual had the best rates. And do not go through a broker. They will charge you a broker's fee. It is just as easy to go to the company's website directly. As a side benefit, many of the malpractice carriers provide free access to online CLEs.

Picking an Area of Practice

There are some people who begin their private practice taking whatever types of cases come through the door because they need to make whatever money they can. This is not well-advised. You need to know what you're doing before you just start trying to handle a matter. If you have no idea, then you better learn.

In deciding which areas of law to concentrate, my suggestion is that you pick an area of law in which you have some experience and that you enjoy it and hopefully, you can make a decent living doing it. While it is fun to do what you love, it is not fun to be broke. Finding an area that you like that will also allow you to make some decent money at the same time.

Referral List of Attorneys

Make sure you develop a referral list that you always have handy, so that when

Continued on page 16

My first bit of advice is to NOT go into private practice right out of law school . . . my first suggestion is that you spend a couple years working for a law firm or office where you can learn from experienced attorneys. This will serve a few purposes . . .

you get a call for a family law attorney and you practice estate planning, you can refer the caller to someone qualified to handle the matter. Ask the caller to tell the attorney that you referred them. Many attorneys will pay a referral fee, and if not a referral fee, they will at least send you some business in return.

Be sure to text, email or call the attorney to let him/her know to expect a call from the referral, in case the person forgets to mention you when they call.

Legal-Insurance Plans

Legal-insurance plans are now an included benefit that people have as part of their union dues or state employment. Some of the companies include ARAG Legal, Legal Shield, Workplace Options and Signature Legal Care. Sign up for al of them. The requirements to become a network attorney vary among plans.

Typically, you have to have at least three to five years of experience, no disc pline by the state bar, and you must carr at least $100,000 in legal malpractice insurance.

The benefit of signing up as a network attorney with these plans is that yc will get free referrals. The one negative about these plans is that you have to discount your fees for their members. Some of the plans will pay your discounted fee, while others have a set hourly fee that they will pay.

While you will receive less money than you would have received on a case, you are getting cases that you otherwise would not have received. A 25% contingency fee of $100,000 is better than a 33-1/3 % contingency fee of $0, right?

Find a Mentor

Mentors are invaluable. You always want someone you can call to ask questions. This should be someone who is experienced and willing to offer advice in a constructive manner. Your mentor also needs to be accessible. These traits are necessary for you to get the help you need. Of course, you as the mentee must be willing to listen, learn and be open to constructive criticism.

Remember, your mentor has likely dealt with all the situations you will deal with, so listen to what this person has to say.

A mentor should also be someone who you can bring into a case to litigate with you. This person has been around a while, so bringing him/her in would give you access to their resources in experts, etc., as well as to assist in funding the case. And remember, you're bringing this person in to litigate the case WITH you.

While he or she will take the lead on the representation, make sure that you are in the loop with what is going on. You should attend all depositions, mediations and other proceedings. He or she should forward you copies of all the motions they file.

You are not bringing this person in

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just for their deep pockets, but to learn from them.

Office Space

When looking for office space, first see if your mentor has any extra space in his or her office. This would be ideal for you because you can possibly rent space at a very low rate or even for free in exchange for you doing some work for him or her. This allows you to have the mentor nearby and to save money on rent.

If you do not have that option, another would be to look at a virtual office in order to save money. The benefit of the virtual office when you are first starting out in private practice is the cost. The companies may offer reception services as well. However, you can usually find an actual office space for the same or lower price than the virtual office, which may be better in the long run.

Join Bar Associations

Definitely join your local county bar association. It offers many activities that will allow you to network and to get some of your CLEs covered. The county bar associations also have divisions or sections based on practice areas. Pay the extra money to join the section that applies to

your area of law. This will give you access to more materials and more insight than if you were only a general member.

Not only do the bar associations have sections based on areas of practice but based upon gender, religious or ethnic groups, as well. Take advantage of the opportunity these additional sections provide to network with people going through similar experiences. The more networking you do, the more likelihood there is for you to get referrals as well.

If you practice personal injury law, for example, do not limit yourself to a personal injury lawyer group locally; rather, you should also look statewide and nationally. Regardless of the area of law you practice, these larger organizations will provide you with invaluable CLEs and insight from attorneys who have been doing for many years what you are now doing. The conferences they offer will be worthwhile professionally, and you will find friends and colleagues with whom you may develop lifelong connections.

Joining CCTLA and becoming an active member is also recommended. CCTLA provides resources, seminars, networking opportunities and more in valuable services and connections that can help you find success.

Advertising/Marketing

When first starting out, the most difficult aspect of private practice will be getting clients. You need to make sure that people know who you are and what you do. This does not necessarily mean that you are paying the yellow pages or some search engine optimization company. It means that you need to get the word out about your practice.

Much is out there on the Internet and social media, such as creating a Facebook business page for free as long as it is connected to your personal page.

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You will receive an onslaught of phone calls, emails and fax advertisements from all the companies that promise they will get you on the first page of Google. Ladies and gentlemen, you graduated from college, you graduated from law school, and you have passed the very difficult California Bar Exam. This is proof that you are intelligent. Do not allow yourself to be hoodwinked.

On the first page of Google, there are approximately 10 organic listings for Google results and another five paid advertisement links and then the map section. The companies cannot all be able to get everyone on the first page! Most of the companies are based outside of California, so if they do not deliver on their promise, you would likely have to sue them in Florida or wherever the hell

they are located. You are not going to do that, and they know it. Use a California-based company if you are going to pay any of them.

More importantly, talk to your colleagues to see who they recommend. And try to avoid any long-term advertising contracts. There is very little benefit to you to be in a contract. The companies will say that the price is lower, but you want the flexibility to cancel if they do not deliver on their promises.

Of course, you have to have a website, so make sure it is always up-to-date and looks good. If you do not know how to create websites on your own, this is one place to spend money and have a professional do it. Some of the advertising companies will set up your website as well as do the search engine optimization services. Just make sure that YOU own your site. Some companies try to own your content. Do not agree to that. That way, when you are ready to cancel their services, you can leave with your page.

Staff

If you are in your own office and are not with a more experienced attorney, then you will have to find your own employees. Initially, you will not have much money coming in, so you will not have any money to pay anyone. During that time, you will likely be your own receptionist, secretary, file clerk and paralegal, which is fine because you will have a lot of free time.

As you gain more clients, you will need to hire someone to help lighten the load. Try to find someone you can afford, but who is still experienced enough to catch your mistakes. There will be a lot of those in the beginning, probably. You may question whether or not you can afford to hire an assistant. Keep in mind that the more work someone else does for you, the more time you will have to work on other cases and therefore, make more money.

Hopefully these tips can help you to get your private practice off to a good start. Good luck!Ω

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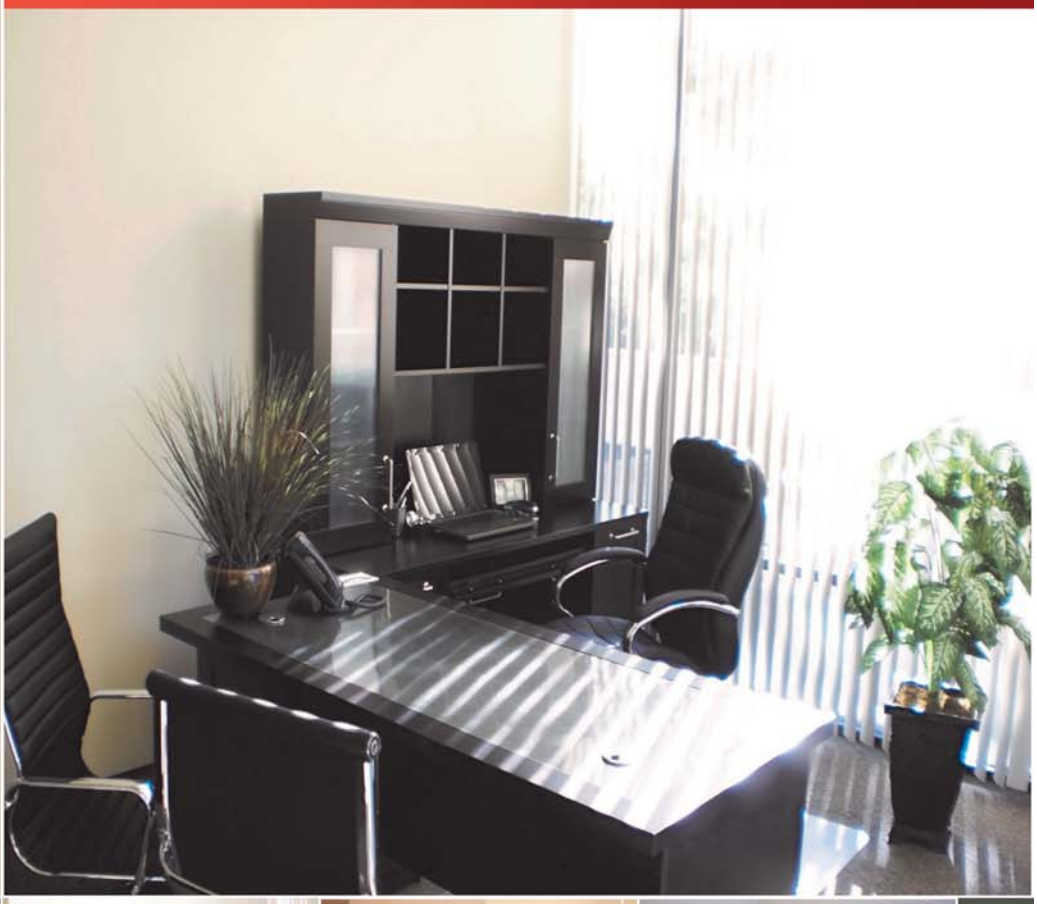

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Malice: A maliciously complex defamation issue

By: Christopher H. Whelan, CCTLA Board Member

Defamation has been described as ". . . a forest of complexities, overgrown with anomalies, inconsistencies, and perverse rigidities." (*McNair v. Worldwide Church Of God* (1987) 197 Cal.App.3d 363, 375.) One of the many reasons for this is that malice, a key defamation issue, is a homonym for three very different concepts. If you are not careful in a defamation case, you can mistakenly agree to prove a more difficult definition of malice and a higher burden of proof.

If you are not careful in a defamation case, you can mistakenly agree to prove a more difficult definition of malice and a higher burden of proof.

Malice in a Private-Person Plaintiff, Private Matter Non-media Defendant Defamation Case

This type of defamation case is commonly seen in the employment setting where a false accusation or "pretext" is used to cause or justify a termination of someone in a protected group. For instance, a pretextual accusation (e.g. theft) is sometimes used to cause or justify the termination of a recently disabled employee.

Another not uncommon use of defamation in the workplace is when a subordinate, facing discipline or termination, utilizes an "offense as the best defense" for corporate survival and races to H.R. with a defamatory accusation (e.g. sexual harassment) against the dissatisfied supervisor. (*Cruey v. Gannett* (1998) 64 Cal. App. 4th 356.)

In private-person/matter defamation cases, malice is not an element of defamation. It is a response to an affirmative defense of conditional privilege (CC § 47(c)) which the defendant has the burden to plead and prove. (*Fairfield v Hagan* (1976) 248 Cal. App. 2d 194, 204.) Malice necessary to overcome a conditional privilege is defined as "a state of mind arising from hatred and ill will evidencing an intent to vex, annoy or injure." (*Brown v Kelly Broadcasting Co.* (1989) 48 Cal. 3d 711,745; *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 944-945.)

Plaintiff's burden of proof to establish this type of malice is by a preponderance of evidence, (*Roemer v. Retail Credit Co.* 44 Cal. App.3d 926, 933; Ev. C. § 115), and its existence can be established circumstantially. (*Khawar v. Globe Internat., Inc.* (1998) 19 Ca1.4th 254, 275.)

The courts have found malice can be circumstantially established in many ways, including through evidence of a reckless investigation into the truth or falsity of the claimed defamatory material (*Widener v. PG&E* (1977) 75 Cal. App.3d 415, 434-435); or if the publication was motivated by anger, hostility, ill will or any prior grudge, dispute or rivalry (*Larrick v. Gilloon* (1959) 176 Cal.App. 2d 408, 416); or if the publisher so lacked reasonable grounds for belief in the truth of the publication (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 552; *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 418).

Courts also have found malice can be circumstantially if it lacked reasonable grounds to believe the statement to be true (*Cuenca v. Safeway S.F. Employees Fed. Credit Union* (1986) 180 Cal.App.3d 985, 997); or if the publisher failed to interview obvious witnesses, or consult relevant documents that could have confirmed or disproved the statements (*Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 276); or where the publication was based on information from a source known to be hostile to the subject against whom the material is used (*Fisher v. Larsen* (1982) 138 Cal. App. 3d 627, 640).

Malice in a Public Figure/Official, Matter of Public Concern, or Media Defendant Case

In this type of defamation case, the courts have determined First Amendment rights are involved; therefore greater protection for this speech is justified. (*Brown v. Kelly Broadcasting Co.*, supra, 721-723). Unlike private figure/matter cases in a First Amendment case, malice is an element of defamation that the plaintiff must prove, and it is not merely a response to an affirmative defense (*Masson v New Yorker Magazine* (1991) 501 U.S. 496,

Continued on page 22

510; *Khawar v. Globe Internat.*, supra, 273-774).

Malice in these cases means "that the defamatory statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" (cite omitted.) Reckless disregard, in turn, means that the publisher "in fact entertained serious doubts as to the truth of his publication." (*Khawar v. Globe Internat.*(1998) 19 Cal. 4th 254, 275)

To prove this malice, also known as "actual malice," "New York Times" or "constitutional malice," a plaintiff must demonstrate with clear and convincing evidence (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 342) "that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement." (*Khawar v. Globe Internat.*, supra, p. 275)

A Third Definition of Malice for Punitive Damages

Frequently, punitive damages under Civil Code § 3294 are involved in defamation cases, and this introduces a third possible definition of malice into the case. For punitive damages, malice is defined as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code § 3294 (b)) Punitive damages can be awarded only when a jury finds malice, oppression or fraud by clear and convincing evidence (Civ. Code § 3294 (a); *Stewart v Union Carbide Corp.* (2010) 190 Cal. App. 4th 23, 34).

Battles over the definition of malice and the appropriate burden of proof for defamation frequently arise for the first time at the jury instruction conference, hours before the jury is instructed. At that point, everyone's patience for fine legal points is impeded by the fog of war, exhaustion and a need to focus on other matters such as final arguments. That is not the time to trace 100 years of confusing legal decisions.

Malice Confusion Has Been Long Recognized by the Courts

The courts have recognized this confusion and have repeatedly addressed the malice "jumble." For instance, in *Burnett v. Nat'l Enquirer* (1983) 144 Cal. App. 3d 991, the court stated at p. 1006 n.7:

So, it has been remarked that: "The jumble in some modern text books on slander and libel concerning malice, actual malice, malice in law, malice in fact, implied malice, and express malice (all derived from judicial utterances, it is true) is a striking testimony of the limitations of the human mind." (cites omitted)

Further attempts to correct the problem include those by the court in *Masson v. New Yorker Magazine*, supra, which stated at p.510-11:

Actual malice under the New York Times standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will (cite omitted). We have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputation, and we continue to do so here. But the term can confuse as well as enlighten. In this respect, the phrase may be an unfortunate one (cite omitted). In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.

Conclusion

Battles over the definition of malice and the appropriate burden of proof for defamation frequently arise for the first time at the jury instruction conference, hours before the jury is instructed. At that point, everyone's patience for fine legal points is impeded by the fog of war, exhaustion and a need to focus on other matters such as final arguments. That is not the time to trace 100 years of confusing legal decisions. Therefore, to avoid the potential damage caused by the application of erroneous definitions and burdens of proof, you need to alert the court, provide the correct authorities and discuss these issues at the earliest possible time.

Avoiding this confusion is critical in performing our important duty of protecting our clients' reputations that were "built up by a lifetime of conduct" and are "...probably the dearest possession that a man has, and once lost is almost impossible to regain." (*McCoy v. Hearst Corp. (1986), 42 Cal.3d 835, 858, fn 22.)* Ω

Avoiding this confusion is critical in performing our important duty of protecting our clients' reputations that were "built up by a lifetime of conduct" and are "... probably the dearest possession that a man has, and once lost is almost impossible to regain." (*McCoy v. Hearst Corp. (1986), 42 Cal.3d 835, 858, fn 22.)*

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Verdicts

$1.34-Million for Injuries in Traffic Collision

Stephen McElroy and Ashley Parris of Carpenter, Zuckerman & Rowley partnered with the Law Offices of Edward Smith to take on State Farm and their attorneys in a two-week trial in Yolo County that ended in a $1.34-million verdict for their client injured in a minor-impact traffic collision.

The case involved a 50-year-old career physical therapist with a long history of a pinched nerve in her low back, spinal canal stenosis in the neck, and right arm weakness due to thoracic outlet. The collision caused a bruise on her spinal cord in the neck, and she developed myelopathy. Her Kaiser doctors gave her the runaround for months until an outside doctor got involved and forced them to take a better look. At that point, Kaiser surgeons did a two-level fusion.

State Farm offered $100,000 going into the trial. The parties delayed the trial a week to allow State Farm to re-evaluate the case and attempt settlement, at which point Sate Farm suggested it would increase its offer to $125,000. McElroy indicated that the plaintiff would agree to a high-low of $500,000 to $1.5 million. State Farm refused to negotiate unless the plaintiff made a demand under $300,000. McElroy then demanded that the case proceed to trial and a verdict. Defendant driver admitted fault for the collision, confessing on the stand that he had stayed up late the night before to read a book he got caught up in. Defendant rear-ended the plaintiff's car while Plaintiff was stopped behind another car at a mid-block crosswalk in Davis. Plaintiff was a single mom of three young daughters and had two of her girls in her minivan at the time of the collision. The collision was minor but pushed the plaintiff's car into the stopped car ahead.

State Farm hired Dr. Benjamin Ewers as its biomechanical engineer. Ewers opined that the minor forces in the collision were insufficient to cause a cervical disc herniation. However, no one claimed a disc injury. Plaintiff moved to exclude Ewers' testimony as irrelevant and more prejudicial under 352. The court allowed him to testify after a 402 hearing, but precluding any testimony about the spinal cord because he didn't offer any opinions about the cord injury at Deposition.

When Ewers violated the court's order in response to the first question on cross-examination, stating that the forces were inconsistent with a cord contusion, Ewers was immediately dismissed from the courtroom, and his entire testimony was stricken.

In another bizarre twist of events, the plaintiff's Kaiser surgeon, Dr. Hans Bueff, clearly hostile to the plaintiff's case, testified that the plaintiff had mild myelopathy, and surgery was an elective procedure due to a narrow spinal canal.

Experts disagreed about the existence of a cord contusion on MRI two months after the injury. No Kaiser doctor identified a cord injury. Both defense experts, doctors Alegre and Hoddick, testified that Plaintiff did not have a cord contusion and that her cord compression pre-existed the collision. This was a rare case in that a pre-accident MRI had been taken four weeks before the collision and showed a narrow canal and mild compression of the cord.

Plaintiff's experts included Dr. Philip Orisek, spine surgery; Dr. Brian King, neuroradiology; Dr. Gary Rinzler, physical medicine and rehab; Carol Hyland, future-care costs; and Dr. Rick Sarkizian, vocational rehabilitation. Orisek, King and Rinzler all identified a mild signal change in the cord as a cord contusion consistent with symptoms of progressive myelopathy.

Defense Attorney Henry Williams argued the jury should award zero damages in every category. However, the jury awarded $1,340,015: past loss of earnings: $150,318; future loss of earnings: $236,213; future medical expenses: $159,599; past pain and suffering: $228,125; and future pain and suffering: $565,760. Total: $1,340,015.

The jury composition was seven women and five men. The decision was 12-0 on all answers.

$600,000 Premises Liability & Negligence

CCTLA member **Daniel Schneiderman** of Dreyer Babich Buccola Wood Campora achieved trial victory and $600,000 for his client in a premises liability and negligence case on Oct. 11, 2017 with zero comparative fault in the challenging venue of Stanislaus County in *Lefebvre v. NC Valley Baseball, LLC.* His 23-year-old client was standing in walkway area between two batting cages when he was struck in the groin by a ball that had traveled through the batting cage netting, causing injury. The judge was the Hon. Timothy Salter, and the trial lasted eight days. The jury deliberated for an hour and 45 minutes.

Facts and Background: On Jan. 21, 2016, Plaintiff, a then 23 year-old coach of Defendant's U-10 baseball team, was preparing to leave Defendant's

batting cage. As Plaintiff walked through a walkway area that separated the netted batting lanes, a parent of one of Plaintiff's U-10 players, approached him. While Plaintiff spoke to the parent, a player hitting batting practice truck a ball that traveled through the safety netting that ran between the batting lane and the walkway area. Though it was unknown whether a hole in the safety netting preexisted the foul ball, it was uncontested that a ball traveled through the netting.

The trajectory of the ball continued past the netting and struck Plaintiff in the groin, causing his right testicle to fracture. Plaintiff underwent a scrotal exploration at the Kaiser Permanente emergency room to repair the right testicle. The repair resulted in a testicular volume loss of approximately 30%-50%. Following the surgery, Plaintiff developed symptoms consistent with "chronic orchialgia," or chronic pain of the testicle. Plaintiff's treating Kaiser physicians testified that Plaintiff would potentially benefit from a spermatic cord denervation or orchiectomy, but they could not testify that these procedures would occur in the future "to a degree of medical certainty."

It was determined at trial that Defendant had installed used, donated netting during the initial installation of the facility in 2012. Despite a minimum of 30 repairs to the netting in the next three and a half years, Defendant never replaced the netting. In addition to other deficiencies (signage, warning, instruction), Defendant also testified that it had no inspection procedure for the netting, no documentation to track repairs and no formal instruction relative to use of the walkway area.

The nets were ultimately destroyed 10 days following the subject incident when Defendant changed to a new facility, and there was evidence that Defendant had new nets available to install at the time of the incident. Defendant's director of day-to-day operations and person most knowledgeable regarding safety, protocol and procedure also testified that "double netting," something that was present between the batting lanes but not along the walkway area, would have reduced the possibility of injury to 0%.

Plaintiff's Contentions:

Plaintiff claimed that Defendant had notice of the defective nature of the nets and that a reasonable inspection procedure or safety program would have revealed the dangerous condition prior to the incident. Plaintiff also contended that Defendant failed to properly design the facility, both in its placement of the walkway between two batting lanes and its failure to "double net" the walkway area.

Defendant's Contentions:

Defendant contended that it was well known and "common knowledge" for people at the facility to not use the walkway area during active batting practice between those lanes. Defendant also contended that it was "common sense" not to stand in the area during active batting practice and that Plaintiff was 100% at fault due to his extensive baseball experience and time at other batting cages.

Plaintiff suffered a testicular rupture/fracture of the right testicle. This required a scrotal exploration, leading to a bilateral orchiopexy and unilateral repair of the right testicle with debridement. Plaintiff claimed that he would require additional conservative care as well as future surgical procedures to resolve his ongoing chronic pain symptoms.

Special damages claimed: past medical: $18,242; future medical: $386,080

Plaintiff pre-trial §998 demand: $417,500

Defendant's pre-trial offer at mediation: $25,000

Defendant Pre-Trial §998 offer: $101,000

Gross verdict or award: $600,000

Contributory/comparative negligence: 100% to defendant; 0% to plaintiff.

Past economic damages: $18,000; future economic damages: $104,000; past non-economic damages: $100,000, future non-economic damages: $378,000

Jury polls: 10-2 on negligence of NC Valley Baseball, 9-3 on negligence of Craig Lefebvre, 9-3 that Craig Lefebvre's negligence was not a substantial factor.

Plaintiff's medical expert(s): Sarah Chan, M.D., urology, Modesto; Adam Bellinger, M.D., urology, Santa Rosa; and Louis Giorgi, M.D., urology, Danville.

Defense counsel was James Burns, Esq., of Kronenberg Law Firm. Defendant's medical expert: Patrick Bennett, M.D., urology, Walnut Creek.

Plaintiff's billing expert: Agnes Grogan, R.N., past and future medical billing, Orange County. Plaintiff's safety expert: Thomas Jennings, C.S.E., safety engineer, Utah.

Settlements

$300,000 Insuance Policy Limits

CCTLA member **Sam Fareed** settled a case that upon first glance appeared to have zero value, but after persistent hardwork, he was able to obtain the $300,000 policy limits for his clients. His client's family recently migrated to U.S. from Afghanistan

Continued on page 26

after the husband had received a visa for helping the U.S. Army. The wife and children spoke virtually no English.

They arrived here in February, and the accident happened in May when the mother and three children were jaywalking eastbound Watt Avenue near Arden Way and were hit by a sedan. Watt Avenue has three lanes in each direction, with a raised center divider.

Fareed was able to obtain a video of the accident from a nearby car wash that shows the family successfully making it to the middle divider. The family then enters northbound Watt where, on the number one lane, a minivan is seen coming to a full stop. On the number two lane, a pickup truck is seen slowing down. The family makes it all the way to the last lane when they were hit by a 21-year-old.

Mercury immediately denied liability. The police report was 100% adverse to his clients. The mother admitted that she was unfamiliar with the laws in California and didn't understand using a crosswalk.

Fareed spent hours taking the video of the accident apart and was able to video-sequence the analysis, breaking it into a step-by-step analysis showing the family entering the intersection while the defendant's car is nowhere in sight.

They proceed towards the middle of the roadway, and the defendant's car is still not in the picture. Suddenly, Defendant's vehicle is not only shown entering the scene but passing all other vehicles until the point of impact. This was further corroborated by Defendant's statement to the police that she saw all the vehicles slow down but because her lane was clear, she kept going.

The mother was diagnosed with a fractured pelvis and fractured tibial, the oldest daughter with subarachnoid hemorrhage and the youngest daughter with broken femur. The combined Howell number for all injuries was approximately $112,000.

SETTLEMENT:

After preparing a very detailed demand letter and providing the video sequence, Mercury changed its stance and offered the defendant's policy limits of $300,000.

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Above, CCTLA First Vice-President Robert Piering and Steve Halterbeck, of The Alcaine Group/R.W. Baird & Company, event sponsor.

CCTLA's Medical Liens Update program, held in September, drew 93 attendees to hear speakers Dan Wilcoxen and Don de Camara provide an outstanding program. Attendees received a 240-page syllabi filled with important information and sample forms. "CCTLA thanks Dan and Don for a phenominal program," said Debbie Frayne Keller, CCTLA executive director. She also thanked Carlos Alcaine and Steve Halterbeck of The Alcaine Group/R.W. Baird & Company) for sponsoring the program and providing lunch.

Left photo, pictured from left, speaker Donald M. de Camara, Law Offices of Donald M. De Camara; CCTLA First Vice-President Robert Piering: and speaker: Daniel E. Wilcoxen, Wilcoxen Callaham, LLP.

SAVE THIS DATE!!

CCTLA's Annual Meeting and Holiday Reception & Installation of the 2018 CCTLA Officers and Board

Date: Thursday, December 7, 2017
Time: 5:30 p.m. to 7:30 p.m.
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NEWS FROM CAOC

Wells Fargo-inspired arbitration bill signed into law

SB 33 allows consumers defrauded by banks to go to court

SACRAMENTO (October 4, 2017) – California Gov. Jerry Brown has signed landmark legislation to prevent another Wells Fargo-sized scandal by allowing consumers to fight financial institutions in court instead of secretive arbitration over cases involving bank fraud.

Senate Bill 33 by Sen. Bill Dodd (D-Napa), co-sponsored by Consumer Attorneys of California, was sparked by Wells Fargo's scandalous behavior in creating at least 3.5 million fraudulent bank accounts and credit cards in order to meet company sales goals. Those accounts harmed consumers by generating fees and damaging credit ratings.

Consumers have been trying to sue Wells Fargo over the fraudulent accounts since at least 2013, but the bank has been able to successfully argue that arbitration agreements in legitimate accounts also apply to accounts that customers didn't ask for and didn't even know existed. By forcing customers into arbitration, behind closed doors and out of the public eye, Wells Fargo was able to evade full accountability even as more customers were affected.

When SB 33 takes effect on Jan. 1, 2018, California consumers will be able to pursue fraud and identity theft cases in the public setting of a court instead of secret arbitration hearings that favor big businesses that hire the arbitrator.

"Just this week, Wells Fargo's CEO made it clear in congressional testimony that the company intends to continue barring customers from taking the bank to court when they've been cheated," said Consumer Attorneys of California President Greg Bentley.

"We thank Gov. Brown for helping make it clear that this attitude and attempts in the future to hide bank fraud in secretive arbitration will not be tolerated in California."

Senate Bill 33 was also sponsored by California Treasurer John Chiang and the Consumer Federation of California. The legislation triumphed over an all-out statehouse lobbying campaign by business groups, led by the California Chamber of Commerce, in an attempt to allow forced arbitration to survive even in cases of clear wrongdoing by major banking corporations.

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: J.G. Preston, CAOC Press Secretary, 916-669-7126, jgpreston@caoc.org; Eric Bailey, CAOC Communications Director, 916-669-7122, ebailey@caoc.org.

Reprinted from CAOC.org.

Two CAOC-sponsored bills signed

AB 644, SB 658 address issues in the civil justice system

SACRAMENTO (Sept. 27, 2017) – Two bills sponsored by Consumer Attorneys of California to reform civil procedure in California have been signed by Gov. Jerry Brown.

Senate Bill 658, by Sen. Scott Weiner (D-San Francisco), was signed Sept. 27. The bill will revise the current statute to address the issue of unreasonable and arbitrary restrictions on attorney examination of potential members of a jury in civil trials during the process known as voir dire.

The current statute was intended to prohibit these limitations, but its enforcement has eroded in the quarter century since its passage, and attorneys have reported that in some courts there are arbitrary limits of as little as 30 minutes for questioning potential jurors. Such questioning is crucial in revealing potential juror prejudice, and it benefits both plaintiffs and defendants.

SB 658 retains judicial discretion but specifies mandatory factors that must be considered when evaluating the time and extent of voir dire. Often unforeseen issues arise once jury selection has begun, and the bill addresses this by requiring judges to reevaluate how much time is needed and allow for supplemental time if warranted.

Assembly Bill 644, by Asm. Marc Berman (D-Palo Alto), was signed Sept. 26. The bill, co-sponsored by the California Defense Counsel and the California Judges Association, is a court efficiencies measure that requires counsel for parties in civil litigation to engage in a meet-and-confer process before pleadings of motions to strike and motions for judgment on the pleadings, just as they already must before demurrer.

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: J.G. Preston, CAOC Press Secretary, 916-669-7126, jgpreston@caoc.org; Eric Bailey, CAOC Communications Director, 916-669-7122, ebailey@caoc.org.

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Mike's Cites

Continued from page 2

cans that were manufactured by Colgate-Palmolive from 1871 to 1985 to prove they contained asbestos.

Plaintiff offered expert testimony that traced the original sources of talc used by Colgate in its Cashmere Bouquet and testified that all of the sources of the talcum powder had significant amounts of asbestos in them (The expert's declaration in this case is an excellent compilation of the requirements of a plaintiff's expert's declaration in a products liability case).

Defendants filed a motion for summary judgment arguing that since Plaintiff could not produce any of the Cashmere Bouquet talcum powder cans she had used she could not prove the talcum powder was the source of the asbestos causing her mesothelioma (In other words, in a products liability case, keep the product). That argument made sense to the trial judge, who granted Defendant's motion for summary judgment.

HOLDING: While Colgate submitted numerous written objections to Plaintiff's evidence, Colgate did not assert its objections at the hearing so the objections were waived. CCP §437c(b)(5). The appellate court reversed the trial court's finding that there was not triable issue of material fact in that Plaintiff's expert submitted evidence that created more than an unsupported possibility, but instead created a clear question of fact in the case. Additionally, the cases cited by Colgate and relied upon by the trial court were readily distinguishable from this case.

RULE: Plaintiff's expert's declaration made it clear there was no question that Plaintiff was exposed to Colgate Cashmere Bouquet talcum powder that was alleged to contain asbestos. The only question here is whether the Cashmere Bouquet actually contained asbestos. While Colgate produced evidence tending to show that the talcum powder did not contain asbestos, the testimony of Plaintiff's expert unquestionably stated the talcum powder did, and thus created a triable issue. The motion for summary judgment should have been denied.

ARBITRATION CLAUSE DEFEATED

Maya Baxter v. Genworth North American Corporation
2017 DJDAR 10357
(October 26, 2017)

FACTS: After five years of her employment, Plaintiff Maya Baxter's employer was purchased by another company that required Baxter to sign an arbitration agreement as a condition of employment.

After another five years of employment with the new company, Baxter's job expanded to include supervisory responsibilities including hiring and review of applicants for employment. She alleged that she expressed concern about employee evaluation forms that included information regarding race, age and gender.

Baxter, an African American woman, opposed and protested employer's evaluation protocol based upon her good faith belief that evaluating employees on the basis of age, race and gender was discriminatory and unlawful. She was admonished by her supervisors and subjected to ongoing harassment and retaliation as a result of her concerns about the evaluation protocol.

In early 2013, after 12 years of employment with the company, Baxter requested and was granted a medical leave of absence under the California Family Rights Act (CFRA) in order to care for her ailing mother. Prior to her return from CFRA leave, her employer notified her that her position was eliminated immediately.

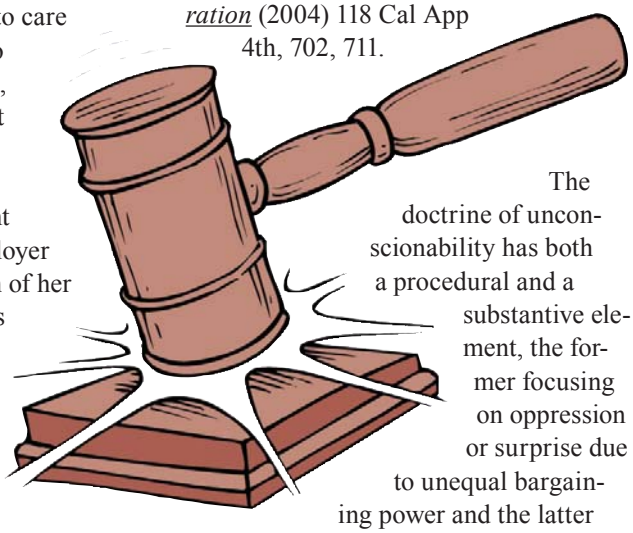
Plaintiff filed a complaint for damages against her employer arising out of the termination of her employment including causes of action for associational discrimination in violation of the Fair Employment and Housing Act, retaliation in violation of CFRA, retaliation and violation of FEHA, retaliation in violation of Labor Code §1102.5, discrimination based upon race in violation of FEHA and wrongful termination.

Employer filed a motion to compel arbitration and argued that the arbitration agreement meets the minimum fairness requirements established by California law and that Plaintiff could not file a lawsuit. The trial court denied employer's motion to compel arbitration.

HOLDING: The appellate court affirmed the trial court's denial of employer's motion to compel arbitration.

REASONING: Arbitration agreements are enforceable and irrevocable and favored under California and federal law. Nevertheless, courts may invalidate an arbitration agreement if it contains provisions that are unconscionable or contrary to public policy. *Armendariz v. Fountain Health Psychcare Services, Inc.,* (2000) 24 Cal 4th 83, 113-114.

Unconscionability refers to an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. *Fitz v. NCR Corporation* (2004) 118 Cal App 4th, 702, 711.



The doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power and the latter on overly harsh or one-sided results. *Baltazar v. Forever 21, Inc.* (2016)

Mike's Cites

62 Cal 4th 1237, 1243. Both procedural and substantive unconscionability must be present for a court to refuse to enforce contractual arbitration although they need not be present in the same degree.

Unconscionability is a question of law reviewed by an appellate court *de novo*. If the trial court's determination on the issue turns on the resolution of contested facts, the appellate court would review the court's factual determinations for substantial evidence.

Thus, the appellate court will not reverse the trial court's decision unless an abuse of discretion is shown. *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal App 4th 74, 83.

Procedural unconscionability focuses on unequal bargaining power which results in no real negotiation and an absence of meaningful choice. (Such as an employment agreement exists where the employee is given no real opportunity to negotiate or eliminate the arbitration clause.)

Substantive unconscionability focuses on overly harsh or one-sided results that shock the conscience. The substantive unconscionability doctrine is concerned not with a simple old fashioned bad bargain, but with terms that are unreasonably favorable to the more powerful party. *Sonic-Calabasas A, Inc. v. Moreno*, (2013) 57 Cal 4th 1109, 1145.

The appellate court found as the trial judge did that the arbitration rules favored the employer and hurt the employee thus leading to the conclusion of unconscionability. The appellate court also found the prohibition against the employee contacting other employees contributed to unconscionability.

The appellate court also found the time limitations imposed by the arbitration agreement were unreasonable because they shortened the statute of limitations.

Brown vetoes bill to protect abused seniors from unscrupulous nursing homes

SACRAMENTO (October 2, 2017) – Gov. Jerry Brown has vetoed a bill designed to help better protect vulnerable senior citizens from elder abuse when nursing homes intentionally destroy evidence of harm.

Assembly Bill 859, authored by Assemblymember Susan Eggman (D-Stockton) and co-sponsored by Consumer Attorneys of California, the California Alliance of Retired Americans and the Congress of California Seniors, would have changed the burden of proof in civil cases when facilities destroy evidence that would prove their culpability.

Normally a victim of elder abuse must show "reckless neglect" by clear and convincing evidence, a relatively high legal standard. Under AB 859, when a judge determined that a nursing home destroyed evidence to prevent an abused senior from proving their case, the victim's burden of proof would have the normal preponderance-of-evidence standard.

Brown said that existing law gives judges enough tools to properly sanction nursing homes that destroy evidence. But in numerous cases of abuse, nursing homes have avoided sanctions, even when the proof is clear.

The governor was under pressure to veto by a broad coalition of nursing home and health industry lobbyists.

"We are disappointed that the governor chose to put the bottom-line interests of nursing homes and health industry lobbyists ahead of the protection of abused seniors," said Greg Bentley, CAOC president. "Many Californians will spend their final days in nursing homes, and as a society we owe them the best possible protection from abuse. By rejecting AB 859, the governor has demonstrated a lack of compassion for our elders."

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

Reprinted from CAOC.org.

Congress, Trump just killed consumers' right to a day in court — but fight not over yet

By: Paul Bland, Executive Director, Public Justice

EDITOR'S NOTE: On Nov. 1, President Trump signed the bill that killed the Consumer Financial Protection Bureau's arbitration rule and referenced in Paul Bland's article on the PublicJustice.net blog, reprinted here.

(October 30, 2017) – Last week, 50 US senators joined Vice President Mike Pence to kill one of the most important advances in consumer rights in years.

By casting the tie-breaking vote to kill the Consumer Financial Protection Bureau's arbitration rule—which allowed consumers to band together to sue banks, financial institutions and credit card companies—Pence showed just how much power Wall Street has amassed on Capitol Hill and on Pennsylvania Avenue. It also unmasked the alarmingly cozy relationship between GOP leaders and the bank executives who defrauded millions of consumers and exposed their most important information to Equifax hackers.

Public Justice was proud to be a leading voice in the effort to defend the CFPB rule and help consumers fight back against the big banks that defraud their own customers. But make no mistake: This vote was a big setback for consumer protection, but it did not kill the resolve of those of us who will continue to fight alongside the CFPB in order to give Americans their day in court.

Now that consumers have learned what's at stake, there's going to be more pressure from constituents for lawmakers to stop the kinds of behavior we've seen from Wells Fargo and Equifax, among others. This vote, though heartbreaking for those of us who believe in protecting the little guy, may well turn out to be a huge catalyst for future change.

With your help, we will keep fighting to keep the courthouse doors open. Support Public Justice today and help ensure that, even though we lost the battle, we have the resources to win the war.

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

CCTLA COMPREHENSIVE MENTORING PROGRAM — The CCTLA Board has developed a program to assist new attorneys with their cases. If you would 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

NOVEMBER

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

Friday, November 17
CCTLA Luncheon
Topic: SUBSTANCE ABUSE IN THE LEGAL PROFESSION: PREVENTION, DETECTION AND TREATMENT
Speaker: Jerry Braun, of Farella, Braun & Martel (San Francisco)
Noon, Sacramento County Bar Association
CCTLA members, $35

Wednesday, November 29
CCTLA Problem Solving Clinic
Topic: TRAUMATIC BRAIN INJURY
Speaker: Cassie Spaldind-Dias, M.D.
Arnold Law Firm
5:30-7 p.m., 865 Howe Avenue, 2nd Floor
CCTLA members only, $25

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

Tuesday, January 9
Q&A Luncheon
Noon - Shanghai Garden
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA members only

Thursday, January 18
CCTLA Seminar
Topic: WHAT'S NEW IN TORT & TRIAL: 2017 IN REVIEW
Speakers: TBA
McGeorge School of Law (Courtroom)
$150 CCTLA members; $175 non-members

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

CCTLA Calendar of Events