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Closing the book on an excellent CCTLA year

Lawrance Bohm
CCTLA President

Hello, everyone and Happy Holidays!!!! As we enter the last two months of the year, I am reminded of how quickly time can fly. This is my last message as CCTLA president, and it has truly been an honor and privilege to serve in this capacity. This year has been one of the busiest of my life—I have completed six civil jury trials this year, and only two were in the same court (San Diego), and none were in Sacramento.

Of the six trials, we prevailed in four, had one mistrial and one defense verdict (we settled with the co-defendant for $500k, so it definitely took the sting off losing). Ironically, winning creates much more work than losing!!! Still I would not have it any other way. The universe created me to do trial work. It is my passion, and I am grateful to be part of an organization of like-minded people.

Looking back on this year, I am extremely proud to be a civil trial lawyer. It is an awesome feeling to stand up for individuals and fight hard for their rights. I am very grateful to Capitol City Trial Lawyers Association (CCTLA) because it helped shaped me into the warrior trial attorney I am today.

I also am very grateful to CCTLA because my involvement on the board and in leadership has helped me to better understand the issues we confront as a group and that each of us has the ability to make a difference.

I am also proud to be a part of CCTLA because we have a social conscience that supports the legal and social community around us. This past year, we put on many amazing educational programs, and we worked hard to raise funds for our local community. We have a lot to celebrate as this year comes to an end.

Our end-of-the-year celebration will be held again at the Citizen Hotel. I hope you will join us on December 6 as we celebrate the announcement of our Judge of the Year, Advocate of the Year and Clerk of the Year. This event is always a personal highlight for me, and I look forward to seeing you all there.

Thank you again for allowing me the opportunity to serve.

Mike's CITES

By: Michael Jansen
CCTLA Member

Please remember that some 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.

Dagny Knutson v. Richard J. Foster
2018 DJDAR 7891 (August 8, 2018)

What Every Attorney Needs to Know: The Standard of Proof of Causation for Legal Malpractice Claims

FACTS: Dagny Knutson, while a high school student in North Dakota, was an internationally ranked swimmer. She was Swimming World magazine's high school swimmer of the year in her junior and senior years. In her junior year, she broke the American record in the 400-meter individual medley.

Instead of going to college, Knutson took an offer from USA Swimming's head coach at the Center For Excellence in Fullerton, CA, which included room, board, tuition and a stipend until she earned her Bachelor's degree. The agreement was oral.

Shortly thereafter, the head coach was terminated by USA Swimming. Knutson retained attorney Richard Foster to compel USA Swimming to honor the oral agreement made by the head coach. Attorney Foster was highly connected in the aquatics industry and was close with leaders at USA Swimming, a fact Knutson did not know. Foster was so closely connected to USA Swimming that he refused to represent the fired head coach in a wrongful termination of employment case. Foster had represented the fired head coach previously in 2006 on an unrelated matter.

Knutson testified that had she known attorney Foster previously represented the head coach or had the close, professional relationships with USA Swimming, she would never have hired him. Foster negotiated with USA Swimming regarding Knutson's case. Foster advised Knutson to enter into agreements with USA Swimming that were not in Knutson's best interests and were a bad deal for her. Foster convinced Knutson to settle and to waive any and all causes of action against Knutson's sports agent.

As a result, Knutson lost a scholarship to Auburn University that had been offered to her before the agreement with USA Swimming and lost the stipend from USA Swimming and the benefits of the bargain promised by the head coach. Shr developed an eating disorder caused by stress, dropped out of school and stopped swimming.

Knutson then learned of attorney Foster's conflict of interest and sued Foster for breach of fiduciary duty.

During the trial, the trial court granted non-suit as to Plaintiff's non-economic damages flowing from breach of fiduciary duty. The jury found in favor of Knutson, awarding her $217,810 in economic damages, past non-economic damages of $250,000, and future non-economic damages of $150,000. The jury awarded no punitive damages. Foster filed a motion for new trial, which the trial court granted. Both parties filed notices of appeal.

ISSUES: What is the standard of proof of causation applicable to legal malpractice claims as opposed to fraud and breach of fiduciary claims asserted against attorneys?

HOLDING: In a legal malpractice case based on negligence, a plaintiff must show that "but for the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." Viner v. Sweet (2003) 30 Cal 4th 1232, 1244. Attorney malpractice causation standards are different than the causation for intentional torts of fraudulent concealment and intentional breach of fiduciary duty. Thus, phrases such as

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ADA provides additional protections for plaintiffs with disabilities in premises liability cases

By: Joshua Watson, Arnold Law Firm

In a Nutshell

If you have an injury client who had disabilities at the time he or she was injured, consider using the Americans with Disabilities Act or California Unruh Act to seek a faster resolution, increased damages and attorney fees. Be mindful, however, of special notice rules that apply as a matter of professional ethics.

An Overview of ADA

The Americans with Disabilities Act ("ADA") was a landmark piece of legislation enacted in 1990 during the presidency of George H.W. Bush. Though sometimes discussed these days as left-leaning, the ADA set out a basic plan to improve the ability of persons with disabilities to participate equally in society.

The ADA is divided into three titles. Title I addresses employment rights. Title II addresses obligations of state and local governments. Title III prohibits discrimination in by places of public accommodation. (42. U.S.C. § 12182.) Several forms of discrimination are forbidden by the statute, including providing unreasonably different services for the disabled, denying participation, and refusing to reasonably modify policies.

For the purposes of premises liability cases, the most important aspect of Title III is its requirement that places of public accommodation remove architectural barriers that prevent disabled persons from full and equal access. (42 U.S.C. § 12182(b)(2)(A)(iv).)

Barrier removal is done in three ways. First, any new construction must comply with detailed design standards promulgated by the U.S. Department of Justice. Second, any substantial alterations of existing properties must bring the altered portions of the property into compliance with the design standards. Third, every business has an ongoing obligation to become as compliant with the design standards as is "readily achievable." (Id.)

This last standard is a very low one, yet it is violated with surprising frequency. To be complaint with the readily achievable standard, a place of public accommodation need only do that which is "easily accomplishable and able to be carried out without much difficulty or expense." 28 C.F.R. §36.304.

The U.S. Department of Justice publishes the standards online at: www.ada.gov. (Note that another agency, the U.S. Access Board also promulgates standards, but these are generally aspirational and non-enforceable, except as noted in the DOJ's standards).

There are two versions of the ADA standards. The current standards were promulgated in 2010, and are found online at: https://www.ada.gov/2010ADAstandards_index.htm. Older standards from 1991 still govern some properties and are found online at: https://www.ada.gov/1991ADAstandards_index.htm. The standards overlap substantially, but the 2010 rules provide some additional protections. It is a good practice to

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cite to both sets of rules in pleading and discovery. The design standards are very specific. They include objective standards organized by topic. Key topics in the regulations include accessible routes (including acceptable flooring surfaces, slopes, and ledge heights), grab bars, parking locations and measurements, restroom design, shower design, etc. Non-compliant businesses are known to complain that the standards are too detailed. To the contrary, the standards are precise and allow for a certain determination of compliance or non-compliance with a codified standard of care.

The ADA provides a private right of action, but only for injunction and attorney fees. (42 U.S.C. §§ 12188, 12205.) Pleading ADA will, for better or worse, allow your case to be removed to U.S. District Court on the basis federal question jurisdiction.

California's Heavy Hammer: The Unruh Act

California recognizes the importance of the ADA's principles in the Unruh Act. (Cal. Civil Code §51.) The Unruh Act forbids discrimination by business establishments operating places of public accommodation. With respect to disability discrimination, a plaintiff is not obligated to show any subjective intent to discriminate if the business has violated the ADA. (Cal. Civil Code § 51(f).)

The Unruh Act allows for the recovery of attorney's fees and exemplary damages of up to treble damages. The exemplary damages must be at least $4,000. (Cal. Civil Code § 52.)

Abuse and Reform of the Unruh Act

Businesses have long-complained that the Unruh Act is unfair in that it imposes such serious consequences. In the not-so-distant past, the business community faced a flood of litigation in which activist-plaintiffs sought out ADA violations, brought suit and obtained large awards for violations ranging from important (e.g. a lack of accessible parking, steps at the entrance) to allegedly trivial (e.g. ketchup dispensers slightly too high.) Calls for reform by the business community were met with resistance because ADA is an important and objective standard, and the Legislature recognizes that businesses have had ample opportunity to get compliant with this decades-old law.

However, businesses did obtain some very important reforms that you must be aware of if you are going to use the Unruh Act in your premises liability case.

To curb the ills of serial litigation, the Legislature issued some very specific rules. Non-compliance is a Business and Professions violation so it is critical to get familiar with them before incorporating Unruh Act into your litigation tool box.

Rules for Demand Letters: (1) You may not include dollar amounts in demand letters alleging construction-related claims under the Unruh Act. (2) You must include your name and bar number in such a demand letter. (3) You must send a copy of your demand letter to the California State Bar and another copy to the California Commission on Disability Access. (Cal. Civil Code § 55.32) (Under an amendment to the statute effective in January 2019, you will no longer have to send a copy to the State Bar. Pre and post suit notices are still required to the California Commission on Disability Access.)

Rules for Complaints: In California State Court, you must: (A) Submit a copy of the complaint to the California Commission on Disability Access (ccda.ca.gov) and (B) Attach a copy of California Judicial Council Form DAL-001 (www.courts.ca.gov/documents/dal001.pdf).

Rules for Settlement: You must notify the California Commission on Disability Access of settlements, judgments or dismissals within five days. (Cal. Civil Code § 55.32)

Also, be aware that businesses may have their businesses audited by a state-licensed inspector under the CASp program. If a business has been audited, it may be entitled to stay your case for early ADR, and its exposure to exemplary damages may be impaired. Businesses have not taken full advantage of the CASp program, and experience suggests that non-compliant businesses rarely have a CASp certificate. (See, http://www.dgs.ca.gov/dsa/Programs/programCert/casp.aspx.)

Federal courts view the rules above as procedural under the Erie Doctrine and do not enforce them. You may wish to comply in any event out of an abundance of caution.

Putting It All Together In Your Premises Case

If you have a premises liability case with a plaintiff who was disabled prior to the subject injury, check the dangerous condition against the US Department of Justice design standards. You may find that your client fell because there was a protruding object in the accessible route. You may find that the walking surface was uneven or made from a non-stable material like gravel.

If you find that a violation of the ADA is factually related to your client's injury, you can reference negligence per se standards under Cal. Evidence Code § 669; Cal. Civil Jury Instruction No 418. Under negligence per se, a defendant's negligence is presumed where the defendant violated a statute/regulation, the violation was the proximate cause of injury, the injury is of a type the statute/regulation was designed to prevent and the person injured was within the protected class under the statute/regulation. These factors are all readily met where a person with a disability is injured on account of an ADA violation.

Note that to allege negligence per se, you do not need to also allege an Unruh Act violation. If sending a copy of your demand letter to the State Bar seems a little extreme for you, you can still help your client by locking in negligence under an objective standard.

If you are comfortable complying with the Unruh Act notice claims, or are comfortable in U.S. District Court, you can obtain attorney fees and exemplary damages.

Remember the statute of limitations: one year for the exemplary damages, three years for attorney fees, injunction and actual damages. (There is always a risk a court will interpret an injury case under the two-year rule, so do not wait for that last year unless you have to.)

And as a final practice pointer: If your client was injured by an ADA violation, it is worthwhile to ask him or her how many times this or another violation caused difficulty, frustration or embarrassment. In my experience, I have had more than one case where a defendant was compelled to promptly settle an injury claim without the standard run-around because the Unruh Act provided a $4,000 penalty for each documented visit to the defendant's place of business. (Think gym, supermarket, etc.)

Feel free to email me with questions or comments: Josh Watson, Arnold Law Firm, jwatson@justice4you.com.

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Prosecuting Transgender Employment Cases

By: Robert L. Boucher, CCTLA Board Member

California protects the employment of its transgendered citizens. Transgendered persons may not be denied employment, fired, demoted, paid less, or harassed because of the self-identified gender, or for reporting gender-based harassment. But this protection is misunderstood by attorneys. So, transgendered persons find it difficult to find representation. This short guide can help you identify viable cases of transgender discrimination so you can help them recover lost wages and non-economic distress associated with violation of the law.

A. What is the law on transgender discrimination, harassment and retaliation?

i. Title VII relies on gender-based discrimination as sex discrimination

Under Title VII, there is no separate category for "gender identity" or "gender expression." Instead, until very recently, caselaw stated that Title VII did not protect transgendered individuals. In 2012, the Equal Employment Opportunity Commission ("EEOC"), the administrative body which enforces Title VII, held that implicit in gender identity are long-held gender stereotypes. (Macy v. Dept. of Justice, 2012 WL 1435995.) Title VII protects women from gender stereotypes. So, Title VII must protect men from gender stereotypes. Thus, Title VII. protects all persons even if those stereotypes flow from biases toward the opposite gender.

ii. The Fair Employment and Housing Act ("FEHA") protects more

In 2011, the FEHA was amended to add "gender identity" and "gender expression" to the list of protected categories. (See 2011 Cal. AB 887, amending Gov. Code § 12940.) FEHA protects those categories from "discrimination," "retaliation" and "harassment" because of the protected category—gender identity or expression. Discrimination occurs when an employer materially and adversely alters the terms and conditions of employment ("adverse action"), including failure to hire, because of a person's gender identity or expression. Harassment occurs when other employees engage in severe or pervasive, negative behavior (amounting to adverse action) toward the transgender person affecting the terms and conditions of employment. Retaliation occurs when an employee complains about discrimination or harassment and the employer takes adverse employment action against that person.

iii. Administrative Exhaustion

To sue under Title VII, employees must first file with the EEOC. In California, employees have 300 days after the most-recent adverse action to file with the EEOC. To sue under the FEHA, employees must first file with the Department of Fair Employment and Housing within one year of the most recent adverse action. Complaints filed with the EEOC will be cross-filed with the DFEH automatically.

Once the complaint is filed, either department (either EEOC or DFEH) can reject, accept or prosecute the claim. If the claim is filed by an attorney, the department usually rejects the claim and issues a right-to-sue letter, but not always. If the claim is accepted, the department has many courses it can take. For purposes of private representation, though, all an employee needs is a "right-to-sue" letter from the appropriate department. Employees have some control over the process. At any time the employee may request the right-to-sue letter, and the department is obliged to provide it. (Navigating administrative exhaustion is a topic for another article.)

B. What is required to be considered a "transgender person"?

i. Self-identity is all that is required

There is no "test" that a transgendered person needs to take. In the past, gender status issues were considered to be a disorder, thus possibly qualifying as a disability under the statutes. Some proof of that disorder would have been required. The stain of "disability" often comes with stigma. Part of the reason California added gender identity and expression to the protected categories was to rid society of ugly stigma. Thus, all an employee needs to do is present as the gender of their choice to enjoy the protections of the statute. No prior notice or proof to the employer is required — and requesting such proof support discrimination lawsuits.

ii. Terminology

Most key terms are defined by regulation at 2 Cal. Code Regs. § 11030. (See also, Legislative Notes to Code Civ. Proc. § 1277.) Other terms in the list are not technically legal terms, but will be useful in briefing and in talking to transgender persons.

- Sex and gender in the context of FEHA cases are interchangeable terms.
- Gender includes both gender expression and gender identity.
- Gender identity means the gender an individual employee takes on themselves.
- Gender expression means an employee's outward appearance of gender.
- Transition is the process of changing from one's birth gender.
- Transgender refers to a person who presents as the gender opposite their birth gender, but transgender persons may also identify as "non-binary."
- Non-binary means identifying neither gender, and is also protected.
- Intersex may refer to a person with

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ambiguous or multiple gender characteristics.

• Cisgender refers to a person who presents as their birth gender.

• Transsexual is a catchall phrase covering all persons who transition from one gender to another; may be perceived to be derogatory in the context FEHA suit.

• Transvestite is a person who has not transitioned, but who may, from time to time take on the dress of the opposite gender; while not derogatory in itself, this is not an appropriate term for one who transitions in the context of FEHA suit.

• MTF means "male to female"; FTM means "female to male"; while not technical terms, clients may adopt them to refer to their own transition.

• Top surgery refers to breast surgery to adopt the appearance of the gender identity.

• Bottom surgery refers to genital surgery to adopt genitals which appear more like those of the gender identity.

iii. Pronouns

• He and she. Some transitioning and transitioned persons fully and completely adopt their new gender. In this case, the transitioned person is the new gender. Transitioned persons should always be referred to by the appropriate gender pronoun. That might not be obvious, so asking the question may be required. It would not be rude to ask, for instance, "Which gender pronoun do you prefer?" Once it is clear which gender pronoun to use, be consistent. Mistakes quickly become offensive when the client corrects you repeatedly. Indeed, pronoun misuse can be a viable way to prove your case.

• Ze. Some transitioning persons identify with their transition state or with no gender at all. Such persons may wish to coin their own gender pronouns. While not standard English, such a person may elect a new term, such as "ze." If your client requests to use such a pronoun, do your best to comply and to ask when there is confusion.

• They or their. Many style guides suggest the use of the plural pronouns when gender is unclear. In your formal writing, this may be a way around the confusion adopted pronouns such as "ze" generate. Again, ask your client which pronoun they prefer and stick to it.

iv. Sexual Orientation

You cannot assume your client's sexual orientation from his or her gender identity. Just as with any other client, prudence and the facts of the case will reveal if the client's sexual orientation is important for your case. Even if you know the gender of your client's husband or wife, you still cannot assume the person's sexual orientation. Your MTF client may have a male partner she has been with since before her transition and may, despite her new gender, consider herself "gay" or "queer." Likewise, your FTM client may embrace the gay community even though he doesn't have a partner. You cannot know. So when and if it is important: ask.

C. Are surgeries required?

Transgender clients do not need to prove that they underwent any particular treatment to prove that they belong to the protected category. Thus, no surgery is required and should be irrelevant to prove that your client is transgendered. In FEHA cases, you'll find courts are apt to grant motions to compel the release of medical records. But the fact that your client did not have—or even refused—"top" or "bottom" surgery is not dispositive of whether he or she is protected. Fight any such arguments.

Also fight any argument that your client's emotional symptoms came from the surgery (or the transitioning process itself). Instead, the process of gender

transition is usually a great relief to the client. Before transitioning, clients can feel "trapped" in their bodies, uncomfortable or out of sorts presenting as their birth gender to others. Whereas, after transitioning, clients feel like themselves in a way—especially at work—they were unable to before.

D. Proof

There is not a lot of case law to guide you in proving your client's case. No California case law has yet ruled on the FEHA as amended by 2011 Cal. AB 887. The only case decided since 2011 ruled in favor of the cisgender employee, but based on perceived gay stereotypes, not transgender stereotypes. (See, Husman v. Toyota Motor Credit Corp. (2017) 12 Cal. App.5th 1168.) Thus, case proof will have to rely on regulation and the terms of key laws.

Foremost in proof is direct evidence of transgender discrimination or harassment: the bad acts taken against your client occurred directly because of his or her gender. Only rare cases have direct evidence, and most cases rely heavily on indirect evidence. In the case of transgender clients, there are several patterns of proof which show gender-based animus.

Employees in California must be referred to by the name and pronoun of their choosing. Employees may use the rest facilities which correspond to their gender identity. Employees may dress in accord with the employer's policies for gender-based dress, but for their chosen gender identity. Employees need not prove their gender identity to their employer. (See, e.g., 2 Cal. Code Regs. § 11031 (excluding these things as defenses).) Failure to allow any of these tends to show that any subsequent adverse employment action was taken because of the employee's gender expression or gender identity.

Employers must provide safe work environments to their employees. (Labor Code § 6400, et seq.) If an employer tolerates or participates in harassing behavior, this failure can form the basis of a claim, or can be used to support the FEHA claim.

E. Damages

FEHA cases present the full range of damages to employees. Often, economic damages amount to lost wages or benefits. Employees are entitled to "back pay" (plus interest), or wages the employee would have earned had they worked from the time of the adverse action to the date of decision. Employees are also entitled to reinstatement—to be returned to their job. Most employees refuse to return to work with harassers. In that case, employees are also entitled to "front pay," wages from the date of decision to some reasonable point in the future. As such, most FEHA cases will need an economic evaluation on the issue of economic damages.

FEHA plaintiffs may obtain emotional or physical distress damages. Emotional distress often includes the humiliation of being mercilessly harassed in the workplace, being deprived of livelihood, and being denigrated for intrinsic characteristics. Humiliation can lead to physical symptoms, such as nausea, IBS, sleeplessness, and the like. This emotional damage can also lead to cognitive dysfunction due to changes in brain chemistry. We typically use experts in bullying and psychology to prove these damages.

FEHA plaintiffs are entitled to recoup attorney fees. So when you get the inevitable motion for summary judgment, do not be overly alarmed—opposing counsel is helping you to justify your fee petition. Some costs are also available under Code Civ. Proc. § 1032(a). To recover expert fees, the Plaintiff will have to serve a successful section 998 offer on Defendant.

The FEHA makes gender identity and gender expression protected classes. When an employer subjects an employee to adverse employment action because of gender identity or expression, it will be liable for economic damages, emotional and physical distress damages, and attorney fees.

The employee prevails by showing that the employer failed to use the correct pronoun, failed to allow access to the bathroom corresponding to the employee's identified gender, or tolerated bullying and abuse. Because of the clear signs of discrimination, transgender suits are valuable, and attorneys should not be shy about taking on transgender clients.

After a successful battle against CDCR for transgender discrimination, Plaintiff Meghan Frederick celebrates with her legal team. From left, Frederick; Davey Baker, Boucher Law, legal assistant; Robert Boucher, of counsel with Lawrance Bohm, attorney and CCTLA board member; Junn Paulino, associate for Lawrance Bohm, attorney and CCTLA board president; and Pablo Colmenares, UC Davis School of Law and legal intern with Bohm.

Is attorney morality a barrier in understanding clients?

By: Amar Shergill, CCTLA Board Member

Early in my career, a new client with a sterling reputation within our immigrant community came to my office to discuss a personal injury case. I knew about his impeccable record of community service, his commitment to his friends and that he was a man whose word was his bond.

Yet, in our initial conversation, he asked me to direct him to say whatever would best serve his case, the clear implication being that he had no compunction about describing his injuries and symptoms untruthfully. I responded that our case would be built on the truth and that we had no need to construct any lies since the case would stand just fine on its own merits.

The conversation initially troubled me. I thought, "How could this man, whom I held in such high esteem, be prepared to follow such an unethical path?" His behavior was not the last time I encountered such a dichotomy. However, it is possible to reconcile why intelligent men and women with deep moral and ethical traditions risk their reputations in this manner.

In evaluating immigrant witnesses, we must understand their society and culture. They often come to the United States from countries that do not have the same respect for institutions and the law that we are accustomed to. In their native countries, corruption is an accepted part of everyday life. They think nothing of the idea that a civil servant must be bribed in order to accomplish even the most rudimentary tasks.

Their experience with law enforcement and the legal system is that both are institutions of oppression, routinely manipulated by those with the power and resources to do so.

So, when we ask these witnesses to swear an oath to tell the truth in an informal setting like a conference room, absent clear and repeated instructions to do otherwise, they will see the deposition as part of the bargaining process where they should embellish in order to improve their outcomes. Of course, as attorneys, we know that such embellishments are often the death knell of an otherwise solid case.

It is important for attorneys to recognize when our cultural experience is different from those of our clients. The client interaction described above is a representative example, but there are many situations wherein the absence of personal knowledge regarding our clients' family life and cultural practices make it impossible to properly present the truth regarding their damages in personal injury cases.

I will close with a word about the character of the client that I discussed at the beginning of this essay. My interactions with him as a client have not altered my high opinion of him as a member of our community. I know that if he gave me his word, he would do everything in his power to honor that commitment. In short, he is a credit to our community because of the morality he learned before he came to this country and not in spite of it.

***

Amar Shergill is a CCTLA board member, executive board member of the California Democratic Party, and a board member of the American Sikh Public Affairs Association.

Mike's Cites

Continued from page 2

"trial within a trial," "case within a case," . . . and "better deal" scenario describe methods of proving causation, not the causation requirement itself or the test for determining whether causation has been established. Viner at p. 1240.

In fraud cases, causation requires proof that the defendant's conduct was a "substantial factor" in bringing about the harm to the plaintiff. Thus, the standard of causation for fraudulent concealment is substantial factor while the standard of causation for attorney malpractice (negligence) is *but for*.

An extra goodie provided by this case: Foster argued on appeal that expert testimony connecting emotional distress and the defendant's conduct must be submitted to support non-economic damages. "The law in this state is that the testimony of a single person, *including the plaintiff*, may be sufficient to support an award of emotional distress damages." Emotional distress damages may be based on the testimony of non-expert witnesses, also. Testimony of an expert witness is required when the subject matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. Evidence Code §801(a).

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"MEDICAL LIENS UPDATE"

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Daniel E. Wilcoxen, *Wilcoxen Callaham, LLP*
Donald M. de Camara, *Law Offices of Donald M. De Camara*
John V. Cattie, Jr., *Cattie, P.L.L.C.*

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Date & Time: Friday, December 7, 2018 ~ 11:30 a.m. to 3:30 p.m.
Location: McGeorge School of Law (Courtroom)
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Broker and shipper can be additional "pockets" in trucking liability cases

By: Alla Vorobets, CCTLA Board Member

Under 49 U.S.C. §13102, a "motor carrier" is defined as "a person providing motor vehicle transportation for compensation." Trucking is an activity that "involves a risk of physical harm unless it is skillfully and carefully done." L.B. Foster v. Hurnblad, (9th Cir. 1969) 418 F.2d 727.

There are more than 500,000 trucking companies in the United States, with more than 15 1/2 million trucks on the road—with 2,000,000 being tractor trailers. Eighty percent of these trucking companies are regarded as small businesses, with six trucks or fewer.[1]

Accidents involving long-haul trucks quiet often involve injuries and/or damages that exceed available policy limits. The resulting personal injury lawsuit may, in turn, cause a trucking company (particularly a small-sized one) to go out of business and file for bankruptcy to immunize from liability flowing such an accident.

The trend has been to add the brokers and shippers who hire trucking companies as defendants to the personal injury litigation. There are a couple of different ways that plaintiffs may hold brokers and shippers liable for trucking accidents under California law.

In general, trucking companies get the loads they carry through freight/property brokers. In essence, a broker is the intermediary between the shipper (who needs goods delivered) and a carrier (trucking company). Brokers and shippers have duties that are distinct from those of carriers.

Federal regulations that govern brokers are set forth beginning in the Code of Federal Regulations (CFR), Part 371.

Under 49 U.S.C. § 13102(2), a broker is defined as "a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by a motor carrier for compensation." The definition of broker is further refined in 49 C.F.R. § 371.2(a) as "a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier.

Traditionally, the broker has avoided liability for any injuries caused by the driver transporting the load by demonstrating that the motor carrier was an independent contractor.

Acting in capacity of a carrier

Broker can be held liable for accident damages even if tractor-trailer is not owned by the broker and/or the load was not transported under that broker's carrier authority.[2] Restatement of Torts (second) § 428; Serna v. Pettey Leach Trucking Inc. (2003) 110 Cal.App. 4th 1475.

When the broker or shipper negotiates the final price and arranges for the transportation of the goods to the destination, they may effectively meet the federal definition of motor carriers and be subject to the DOT rules.

Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport." (Emphasis added). 49 C.F.R. § 371.2(a); Taylor v. Oakland Scavenger Co. (1941) 17 Cal.2d. 594; Lehman v. Robertson Truck-A-Way (1953) 122 Cal.App.2d 82; Gamboa v. Conti Trucking Inc. (1993) 19 Cal.App.4th 663.

Negligent Hiring and Retention

The broker may also be held liable under a negligent hiring theory if the broker did not properly screen the motor carrier and failed to investigate the carrier's safety record.

Negligent selection of an independent contractor applies to the trucking industry. Risley v. Lenwell et al. (1954) 129 Cal.App.2d 608, 622; Swearinger v. Fall River Joint Un. Sch. Dist. (1985) 166 Cal. App.3d 335 (negligent selection of student host drivers causing accident); Camargo v. Tjaarda Dairy (2001) 25 Cal.4th 1235 (negligent hiring of truck driver hauling manure.)

Prior to hiring a trucking company to transport a load, a broker must, at a minimum, check the general safety statistics and evaluations of the carrier and review any internal records of the carrier's safety performance that are maintained by the DOT. This information is accessible through Federal Motor Carrier Safety Administration website (FMCSA) database at https://safer.fmcsa.dot.gov.

A failure to properly evaluate a carrier's safety record will subject the broker to liability for negligent hiring.

The short of it is: It's not how one labels itself or how one is licensed; it's what one says and what one does that determines liability. Prussin v. Bekins Van Lines, Triple Crown Maffucci Storage Corporation, et al., 2015 WL 457470, 9-10 (N.D. Cal. 2015).

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[1.] Source of this statistical information is from www.truckingInfo.net.

[2.] Some brokers also have motor carrier authority issued to them by the DOT.

Calendar management key to many California inmate civil rights cases

By: Justin Ward, CCTLA Board Member and Treasurer

Those who handle jail and prison inmate civil rights cases regularly are likely aware of the various issues you must deal with: from deciding whether to file in state court or federal court to deciding which causes of action to file. One issue that will often come up is whether the plaintiff has complied with the requirements that he or she file a government tort claim within six months of the harm and whether he or she has exhausted their administrative remedies.

If you are filing a case alleging violations of California State law, you must file a government tort claim within six months of the date of the harm (California Government Code §§910, 911.2, 912.8, and 945.4 et seq.). Under Government Code §945.4, presentation of a timely claim is a condition precedent to commencing suit against a government agency (City of Stockton v. Superior Court, 42 Cal. 4th 730 (2007); United States of America v. State of California, 655 F. 2d 914, 918 (9th Cir. 1980) Moreover, "timely compliance with the claim filing requirements and rejection of the claim by the governmental agency must be pleaded in a complaint in order to state a cause of action." (Dujardin v. Ventura County Gen. Hosp., 69 Cal. App. 3d. 350, 355 (1977).

However, when dealing with inmate cases, there is another step that must be met before filing a lawsuit alleging violations of California law. Pursuant to California Code of Regulations §3084.1 and the Prison Litigation Reform Act, an inmate must exhaust his or her administrative remedies. Within the California Department of Corrections and Rehabilitation (CDCR), there are three levels of review. The inmate must appeal his or her denials after the first and second levels and then be denied in the third and final review. Once the Third Level Appeal is denied, the inmate has six months from that date in which to file their lawsuit.

Therefore, California inmates must both file a Government Tort Claim and exhaust all three levels of administrative review before filing their lawsuit. The administrative remedy exhaustion may extend beyond the six months' statute of limitations after the denial of the government tort claim. If so, the plaintiff is still within time.

In Wright v State of California (2004) 122 Cal.App.4th 659, the plaintiff timely filed his lawsuit within six months of the rejection of the government claim. However, he had not exhausted his third-level appeal. The lawsuit was dismissed because Plaintiff had filed his lawsuit before he exhausted his administrative remedy.

In dicta, the 3rd DCA noted that proceeding with his third-level appeal beyond the six months after rejection of the tort claim would not have barred Wright's lawsuit. The court stated, "[u]sually, a person has six months from the rejection of a government tort claim to file a court action. Cal. Gov't Code § 945.6(a)(1). However, since a litigant must exhaust administrative remedies before filing a court action, the court excludes the time consumed by the administrative proceeding from the time limits that apply to pursuing the court action. This procedure serves the orderly administration of justice. Thus, the court excludes the time during which a litigant reasonably pursues his administrative remedy from the six-month time limit for filing a court action after the State Board of Control rejects a government tort claim pursuant to [Cal. Gov't Code § 945(a)(1)]."

In conclusion, if you have a California inmate case, make sure your client has complied with the Government Tort Claim Act and its statute of limitations and has exhausted all of his or her administrative appeal remedies before filing their lawsuit.

Proper non-economic damages assessment requires *YOU* take the time to *KNOW* your client

By: Noemi Esparza, CCTLA Board Member

Measuring non-economic damages is a challenging task, IF you do it right. You can use the multiplier method that the insurance companies love to use. Multiply a plaintiff's economic damages by X. I have heard that before my day, it was times three. Now, we are lucky if it is by two. However, is that really a fair assessment of your client's non-economic damages? While that is the insurance company method, it should not be ours. Why would we buy into their methods?

Taking on this task is not easy, but if we will ultimately ask jurors to perform this important task, then we need to have done this task right ourselves; not just to be ready for trial, but to properly advise our clients. I have heard too many lawyers treat this exercise in the same cold, unfeeling, tired manner in which adjusters embark upon this task. They base the non-economic damages on the amount of medical expenses incurred, a method again used by the insurance carriers. That is a great disservice to your clients because too often this means you will undervalue your client's case.

I am not saying you do not consider the medical specials in your evaluation because the defendant surely will, and you need to be ready for some jurors buying their argument. What I am saying, however, is that you must not use that as the basis of your assessment.

Assessing your client's non-economic damages involves examining the impact of the injuries your clients sustained on the quality of their life. Assessing how you would present those to a jury and ultimately putting a number on it.

I think about it in terms of what would be fair for those X number of months the client was laid up in bed unable to work, to coach his children's games, depending on others for everything. To the breadwinner husband who takes great pride in his work and his role as the man of the family, this would be a great impact. Understanding that there is never an amount of money that someone would be willing to take in exchange for dealing with chronic pain, for example, what would be fair and reasonable under the circumstances?

There is no formula. You must make this careful assessment before you can ask anyone, a mediator, a jury, to believe and trust your assessment.

Making the assessment means you have to talk with client and develop a relationship with them. Sounds simple, but I am surprised at how many clients speak to the attorney's assistant more than they talk with the attorney. While we all need assistants to help us gather information because there just is not enough time for us to do it all ourselves, the assistant cannot become a substitute for us. Additionally, it will not be our assistant trying the case. Thus, we must get to know your client. We need to know what the client's life was like before the incident. How did they spend their time? How has that changed? It is also critical to speak with surrounding family members and friends as they often have the best picture of what your client has experienced based on their observations.

Beware the "Minimizer"

Inevitably, you will have clients who minimize their injuries and tell you only half of the story, or maybe less. I have had many clients who tell me they "learn to live with it." "All right," I tell them, "but that was not the question." The question is how has your life changed? What do you now have to do differently? Do you enjoy doing all the same things in the same way you did before the collision?

This is the conversation I often have in the pre-deposition meeting, not one I have 30 minutes before their deposition. Clients, I have seen, often do best if they have time to digest what you say. Giving them overnight or a few days to think about examples makes them better able to recall and articulate the impact at their deposition.

In my discussions with my client, obtaining updates of their injuries and treatment, is when I learn about their life

Continued on page 21

and personality. This helps me when I am arguing on their behalf in mediation, arbitration and/or trial.

During this process of learning about them is when I learn if they are minimizers. Most of them are usually minimizers who need to learn that you are not asking them to complain; rather, you are simply asking them for what is factually true. They need to understand that minimizing is the same as exaggerating, i.e. it is not accurate or truthful. If they do not learn this early on, then you will have medical records in which their doctor states that their patient reported they are doing fine which then gets translated into the client is no longer having any problems from the collision.

In reality, however, the client has significant issues resuming household chores because they can no longer bend over since the collision. Once they understand the concept of reporting what is factually true as opposed to what they think of as "complaining," they will be much better at communicating to you and during their deposition about the impact to their quality of life.

Guiding Your Client

In order for your client to help you, it is important to guide them. It is not easy for anyone to suddenly have to examine what they do, how they do it, and how that has changed. This is an exercise they often have never had to do before the collision.

If I have not done so earlier in the process, I ask client in our pre-deposition meeting to think of their activities in categories, e.g. work, home, relationships, outdoor activities, etc. Have there been any changes in their ability to perform their job duties? Any changes in the way they are able to maintain their household. I also ask if they have experienced any changes in their ability to be mom, dad, husband or wife? I ask them to think of all examples within each of those categories.

If I have a mom who has neck pain, I can almost guarantee she has a tough time with household chores. I take her through all the chores she does at home to find out. If I have a client who is a mom who has back pain and has young children, I can almost guarantee it weighs on her that she cannot pick up her child every time he wants to be held. My son is six years old and still wants to be picked up when he is afraid or in pain or simply wants some TLC. Thus, I know these are questions I need to ask my mom clients.

If you are not a mom, that just means you need to spend more time finding out what a "mom's" life is like. Ask your own mother, wife, mom friends. In the end, this will make you a more enlightened attorney and better able to argue your case when the time comes.

The Cynical Adjustor, Defense Lawyer, Mediator

Arguing for non-economic damages certainly means you will be battling with the cynical adjuster, the tired defense lawyer, and the uncaring mediator. If you are not ready to battle for your client, then maybe you need to find another area to practice in. To be a plaintiff's personal injury lawyer, you must be a warrior who believes his client. If you do not believe your client, then you probably should not have taken the case.

The point here is that you cannot let your cynical audience convince you that you should agree to their valuation of the non-economic damages because they will often be wrong. In the past two years, I have obtained a six-figure verdict in non-economic damages for a six-year-old boy who had $4,000 in medical specials. Now, he was not the main case, but before trial, no one bothered to make an offer to him or even think about his case. Why would they waste time discussing a minor with $4,000 in medical specials? I am sure to the adjuster and defense lawyer, that case was not even worth talking about.

This year I obtained a non-economic damages verdict for my client that was unexpected by everyone I spoke to before trial. My client was a woman in her 30s with three children and had been left with a chronic neck and back pain condition. She dared to have her third child after the incident which defense loved to take issue with, as did their defense medical expert. I had a tough jury that did not give my client what I asked for, but ultimately it was a lot more than anyone expected, especially by the defense attorneys.

In both of these examples, I met much cynicism from others in their evaluation of the case. In each case, I got to know my clients, developed a relationship with them, spoke to friends and family and was able to argue passionately about the impact based on my assessment.

The bottom line is there is no formula and there is no easy shortcut for assessing non-economic damages. There are no single strategies that will unlock the door to a great verdict.

It is a matter of spending the time with your client and surrounding witnesses to understand the impact to your client's life to give you the information you will need to fight for your client.

Capitol City Trial Lawyers Association

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CCTLA again will be contributing to Mustard Seed for the holidays and invites members to pitch in. A representative from Mustard Seed will be on hand to accept donations.

Dogs and the law

By: Steve Davids, CCTLA Past President

I like to walk my dog, Winston, usually in the mornings. He's a little shih-tzu dude, black and white, with a very nice demeanor. He never barks, unless there's something he really, really wants. I've had exactly two confrontations regarding Winnie, and both of them involved dog leashes. Yup, Win is a leashless dog. My daughter (who no longer lives with me, smart for her!) was the one who trained him to walk without a leash. All you need to tell Winston is, "Stop," and "Okay," which means he can continue walking. Win is great with this.

Not too long ago, I was walking Winnie at Campus Commons, not far from my house. We were in a public area on a street, well actually on the sidewalk. Winnie crossed over to the other side of the street, and started smelling an apparently wonderful fern of some kind. He loves ferns. I noticed a man on the other side of the street with a big German Shepherd that started barking like crazy and rearing up.

His owner appeared to be struggling to keep his dog docile. It wasn't working. What was interesting was that between loud barks from the dog, the owner started in on the fact that Winnie wasn't on a leash. "Put your dog on a LEASH! There's a LEASH LAW in this city!" I did the only thing I thought best: I kept watching Win, who was taking his time with his fern girlfriend. I parted company with the somewhat rude fellow with the German Shepherd, and took Winnie from away the fern and continued our walk.

I thought this was an anomaly, but a few weeks back, Winnie and I had a different encounter with a personage while walking in Hagan Park in Rancho. Win and a lady friend were with me. Win was close to me, but a few steps away. From the other direction came the gentleman who started looking at the three of us. The interesting thing was that when he opened his mouth, he didn't direct his comments to us. Instead, he seemed to be talking to some invisible personage (Most people like this are usually visiting with psychiatrists). He was speaking to himself, but also to us, and I'll try to remember his brief monologue/missive: "It's just unbelievable that people choose to completely disobey the law."

Unlike the guy yelling about leash laws in Campus Commons, this gentleman just kept on walking. I started to walk toward Win to put his leash on (I always have it over my shoulder), but by then, the gentlemen had basically finished his business and was on his way.

The a-hole in me (and it's there!) wanted me to walk up to the gentleman and say, "Sir, is it a fair statement that at least once in your legalistic life that you exceeded the posted speed limit, for whatever reason, and/or for however long? And if you did so, did you get yelled at by an a-hole like your good self?"

Recently, on a beautiful Saturday morning on the levee next to Sac State, Win and I were heading to the Guy West Bridge. As we approached the bridge, we had to make a 45-degree angle. I noticed a bicycle coming up behind us. Since we were both closing onto the bridge, I decided to pick Winston up. Yes, I stopped in my tracks and held him. The bicyclist continued to do his right turn onto the bridge when he let out a difficult-to-hear statement: something about "dog leash."

WINSTON

Let me get this right: I was holding my dog in my arms and standing still. He was much safer being held than walking (on a leash) to make the 45-degree turn onto the bridge while a cyclist was making the same maneuver. It looks like that a dog leash is a shibboleth. And I often watch dogs on extended leashes that allow them to almost run free such that their master would have a hard time getting to them if a pit bull was on the prowl.

I don't get it: leashes are required but picking up my little dog is somehow frowned upon. There's something about the leash law that gets everyone hot and bothered. Yes, he has to be on a leash even though I'm carrying him, which is more safe. We are a citizenry of lawyers.

Here's another story that I heard from a friend, and it's not about dogs, but you'll get the idea about how the laity deals with the lawyer system. A very qualified bicyclist was pedaling down Northrop Avenue close to where I live.

There was a stop sign at Bell Avenue. It was in the early morning, and there was literally no one around. No cars in any direction, and no pedestrians or other cyclists. She figured it would be okay to just run the stop sign. Well, one person was around: the eagle-eyed Sac P.D. officer who handed her a citation (moving violation) that was going to mess up her insurance for quite a while.

I wonder about these kinds of things and why we get so exercised. Unfortunately, the poor cyclist was dealing with the county revenue stream, and these moving violations are monetary issues. But take a step back. She did not disturb (or even come close to) injuring or frightening anyone. In what moral universe did she do something wrong? But it doesn't matter. When a tree that falls in the forest where no one is around there is literally no sound that emanates from that collision. But if that eagle-eyed law enforcement officer had turned his gaze for a second or so, the cyclist would have been good.

Let's go back to the leash-law par-

tisans. Yes, my dog was not on a leash. But fealty to the law doesn't mean the law acts irrationally. In both doggie situations, my doggie was completely under control. He wasn't even moving in the fern-sniffing situation. The other one in the park, he wasn't causing a ruckus, other than the words from the gentleman who was very concerned about observing the law. In what way was Winnie causing any harm? At some point, common sense should trump the law, but too many of us just stick to the facts, ma'am. My dog is off-leash because he has the ability to not physically disturb people (Not too long ago, we were on the Guy West Bridge, and I didn't notice a cyclist coming at us. I was slow on the uptake and tried to grab Win, but the cyclist made sure, in a strong voice, "Leash your dog!" I didn't bother to tell him that "leash" is not a verb).

I just find it really interesting that people get all haywire when it comes to the law. I walk with Winnie on University Avenue on the long stretch between Campus Commons and the bridge. There are several commercial buildings in that area, and virtually all of them display large and menacing signs about trespassing and all the fines and imprisonment involved. Well, Winnie and I often wander into those condominium office parks. No one seems to care, not even when Win isn't on leash, which is most of the time. Why post a sign if you don't have the gumption to actually enforce it? It's probably because it features that very legal statement about trespassing and what the penalties are.

Fortunately, Winston doesn't bother a damn. He just knows that food and/or treats are on tap when he gets home from his trespassing and non-leashed walk is over!

I've noticed a couple of other related phenomena that I find interesting, and dangerous:

1. Red-light runners. I think that everyone knows that on major thoroughfares, there is an "all-red" phase of the traffic signals to accommodate drivers who are running the yellow/red light. Why do we coddle people who speed up when they see a yellow light, as opposed to beginning to stop? It just means more work for personal injury lawyers, and there's nothing wrong with that.

2. Jaywalkers. I live in the Arden/Fulton area. On Fulton, there is a two-way left turn lane that goes from pretty much Fair Oaks Boulevard in the south to Highway 80 in the north. The law's purpose for the two-way left-turns is to help keep traffic moving. But in my neighborhood, too many people break the law (jaywalking) and use the two-way left-turn lanes as ways to get across Fulton. Specifically, they jaywalk from the east sidewalk to the two-way left turn lane, stop and then wait for the north- or southbound traffic. In no way is this safe for pedestrians. But giving them a citation only makes them engage even less and less with law enforcement, and the larger community.

These jaywalkers are a very mixed group of folks, and I have not noticed any kind of demographic: everybody jaywalks, and that includes me. And Winston. I have seen huge numbers of people (including myself) engage in jaywalking. But jaywalkers are taking their lives in their hands. I have also seen jaywalking within literally and only a few feet from the marked crosswalk. Even though I have done it, it sure is not consistent with the law. We just decide it is something we can do to flash our middle fingers to overweaning government, … as we endanger ourselves. Very smart!

I don't know if this is a form of retaliation against what people think is considered a stupid law, like jaywalking. Underclass and/or homeless folks have much more important things to worry about other than jaywalking. I fear that these folks are not rebelling, just checking out, and not participating in the polity. It is a blight on our society, and we need to recognize it, and do something about it. I wish I knew how. The hardest aspect of this is that they probably think that a death now will get them into heaven, if there is one.

I'd like to think there's an answer. At least it isn't as bad as an anecdote that my Dad often mentioned. He was a refugee from Nazi Germany and was amazingly saved by the Children's Transport that got youngsters out of the Third Reich and to England. He was also amazingly able to reunite with his parents there. Anyway, the anecdote is that during the war (or perhaps before), an unfortunate Jewish woman (yet another escapee from Nazi Germany) decided to steal a bottle of milk. The English judge's sentence was for her to be deported...back to Nazi Germany.

There clearly comes a time when the importance of the "law" has to bow to humanitarianism and just good old Yankee horse sense (which my Mom always talked about). Along the same lines, don't yell at people just because their dog isn't on a leash (as long as the dog is well-behaved). But do help spread the word about the dangerous red-light runners and the take-my-life-in-my-hands jaywalkers.

We'll all be better off.

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The Significance of the Signup:

There is no case to be had without the signup

By: Justin Gingery, CCTLA Board Member

The most prevalent comment I have received from colleagues throughout my career is that my signups take too long. Truly, the shortest signups take at least an hour, and the longest sign up lasted nearly six hours. The logical argument for investing time is that the sign up is the most important part of any plaintiff's case. There is no case to be had without the signup. This article is meant to be an incomplete argument for why the sign up might be the most important process of any case.

Historically, the signup acts as a filter of the meritorious and not so meritorious cases intending to access the court system. The attorney's job as gatekeeper is a very important one. In the United Kingdom, most attorneys are Solicitors, and their most essential job is gatekeeper. Once a case has been decided to be meritorious by the Solicitor, the case is investigated, filed and litigated up to trial. If the case is unable to be decided, it moves on to the Barrister to be tried. So, while only the Barristers have access to the courtroom, they will only take cases from the Solicitors. As an officer of the court, the American lawyer is charged to perform in both capacities.

The basic stages of a signup consist of the following: asking questions of the potential client; going over the contract, admonitions and authorizations; and answering questions. The first two stages usually comprise the majority of the time spent, but each stage is of equal importance. In fact, investing more time in the third stage usually saves more time during the prosecution of the case and increases stability in the attorney-client relationship.

Even the record setters of the speedy signup spend most of the time in stage one. The most limited exam requires parties' contact and insurance information, date of incident, general understanding of the facts and nature of the injuries. However, a deeper understand of the facts and evidence, as well as a thorough examination of the nature and history of the claims and injuries, are better to obtain during the signup rather than later on. Oftentimes, getting that information from the client is easier said than done after memories have faded along with the initial emotions and motivation to pursue justice from the wrongdoer.

There are ways to get the potential client to open up about those prior injuries and claims they may normally feel compelled to conceal. Inform the potential client that the insurance companies have been indexing and sharing claim information for over half a century and explain to the potential how important it is to tell the truth throughout, especially to you, who can offer the strongest privilege under law. No matter if the facts are strong, the case will unravel at the seams if the potential is determined to be untruthful. All worker's compensation claims and claims for property damage alone should be ferreted out because it may assist the potential client in remembering prior injuries.

It is imperative to get the potential client's related and nearly unrelated injury history. Explain that even though the potential client may not have a claims history, the insurance companies assume that anyone of a majority age has a medical history. The last answer you want to list in Form Interrogatory 10.1 when your client is over 30 years of age is "No." Even providing a response about a seemingly insignificant injury is indicative of a willingness to disclose facts and a likely aversion to concealing them.

Once you obtain a claims and injury history, you should devote time to the current treatment, incident related injuries and medical providers. All too often, we quickly obtain the primary incident related injuries. Time should be spent getting the secondary injuries, as well as those smaller injuries that have already resolved. A comprehensive list of all the injuries allows for a more compelling general damages argument. More importantly, this information is easier for the potential client to remember closer in time to the incident rather than months later during discovery when some of the injuries may have subsided.

It helps to finalize this first stage by asking the potential client about expectations. With the newly obtained information, you should have some semblance of an idea as to what you can do for the potential client. The signup is the best time to find out if you are going to have any chance of meeting the potential's expectations, or if you are able to taper them closer to yours. Having a shared expectation at the onset allows you a better chance of maintaining the attorney-client relationship necessary to resolve the case. A difference in expectations can be a vast

Continued on page 31

Are you aware of your clients' alternatives?

For more than 30 years, The Alcaine Halterbeck Group has worked with plaintiffs and attorneys to implement comprehensive investment plans, structured settlements and much more. Structured settlements are a great strategy for catastrophically injured people with a serious dependency on their settlement for recovery, as well as those who cannot manage a large sum of money and run the risk of being a spendthrift. Do you know someone who could benefit from our services?

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canyon to navigate once the case is in litigation.

After the first stage is complete, you have most likely decided that you want to take on the potential as a client. You must spend a moment going over the admonitions and authorizations. Take some time to warn the potential about how insurance companies investigate claims through social media, instruct the potential to follow doctor's orders, remind the potential to keep engaging in the prescribed medical care so long as they continue to experience incident related symptoms and inform the potential of the consequences for failing to heed the same.

With the determination that the case is meritorious and that the expectations can be met, it is time to turn the potential into a client. While the contract usually speaks for itself, it helps to take time to, at least, summarize the nature of each paragraph and explain the practical reason why it is in the contract.

This is especially important where the contract requires an additional place for the potential to provide initials. Explain that most medical liens need to be repaid from the settlement, that the legal costs are in addition to the attorney fee and the other frequently occurring misunderstandings that clients have about legal representation in a civil case. This usually limits the client's questions regarding the terms of the contract in the future and can facilitate the disbursement.

Before the potential client signs and dates the contract, it helps to open the floor to questions about any aspects that have yet to be addressed. If you have invested enough time, the potential should have very few. If the frequently asked questions have not been asked or addressed, this would be a perfect time to discuss them. This final stage of allowing the potential to ask questions, and even suggest a few, builds confidence in the potential client of your knowledge and abilities.

Further, the potential client knows that you are willing to spend any time necessary to address concerns and that you are dedicated to the case. Most important, in my experience, the more time you spend answering questions at the beginning, the less time you will have to spend answering those same questions later in the case.

Finally, you are in the place to finalize the attorney-client agreement. The signing should be a ceremonious moment with symbolic meaning. By signing your name to the contract, you impress upon and inform the client that you are willing to invest in their case, incur the risk of failure with them and believe that your efforts will be successful.

More importantly, that you, as the gatekeeper, agree to give the client access to the court system and to zealously prosecute their case in an effort to justly compensate the client for all meritorious damages. By signing the contract, the client agrees to allow you the honor of representing their interests and all the benefits and obligations that representation entails.

It would seem close to impossible to expect to complete every stage of the signup in less than an hour with the attention referenced in this article. Depending on the age and history of the potential client and the detailed facts of the case, it is easy to conclude that a signup of this detail could take multiple hours. Naturally, this type of signup is not necessary to effectuate meaningful representation and may not be feasible every time. Sometimes, potential clients will tell you that their time is limited or they don't need you to explain everything which can result in a more expedited process. However, even in that situation, you still incur the benefit of the client knowing that you are willing and able to spend as much time as necessary to make them as comfortable with the process and your representation as possible.

In conclusion, the single most important element throughout the process of a case is the attorney-client relationship. The relationship begins during the signup, and mutual trust is the foundation of that relationship. Most potential clients do not trust attorneys for all the truths, lies and stereotypes abound. While you can endeavor to gain the client's trust as the case progresses, the sooner you earn the client's trust the sooner it will be mutual.

Investing the time at the signup has been invaluable to every relationship I have ever had with my clients, has minimized the time that I have spent answering questions and concerns throughout the process and has made every step of the representation (from representation letter to trial and everything in between) easier.

Why You Must Always Seek Court Approval in a Minor's Case

By: Martha A. Taylor
CCTLA Board Member

I have noticed a question that seems to circulate every couple of years and causes confusion amongst some plaintiff's attorneys. The questions is; "When is it necessary to petition the court for approval of a settlement in a minor's case?"

The question generally revolves around whether or not there is a monetary threshold that requires seeking said approval. The short answer is as follows: You MUST always seek court approval when compromising the disputed claim of a minor.

There are two statues that set forth the law regarding claims on behalf of minors: California Code of Civil Procedure §372, which deals with the appointment of a Guardian Ad Litem, and **California Probate Code §350**0, which deals with settling the disputed claim of a minor.

California Probate Code §3500 states:

"(a) When a minor has a disputed claim for damages, money, or other property and does not have a guardian of the estate, the following persons have the right to compromise, or to execute a covenant not to sue on or a covenant not to enforce judgment on, the claim, unless the claim is against such person or persons:

(1) Either parent if the parents of the minor are not living separate and apart.

(2) The parent having the care, custody, or control of the minor if the parents of the minor are living separate and apart.

(b) The compromise or covenant is valid only after it has been approved, upon the filing of a petition, by the superior court of either of the following counties:

(1) The county where the minor resides when the petition is filed.

(2) Any county where suit on the claim or matter properly could be brought.

(c) Any money or other property to be paid or delivered for the benefit of the minor pursuant to the compromise or covenant shall be paid and delivered in the manner and upon the terms and conditions specified in Chapter 4 (commencing with Section 3600).

(d) A parent having the right to compromise the disputed claim of the minor under this section may execute a full release and satisfaction, or execute a covenant not to sue on or a covenant not to enforce judgment on the disputed claim, after the money or other property to be paid or delivered has been paid or delivered as provided in subdivision (c). If the court orders that all or any part of the money to be paid under the compromise or covenant be deposited in an insured account in a financial institution in this state, or in a single-premium deferred annuity, the release and satisfaction or covenant is not effective for any purpose until the money has been deposited as directed in the order of the court." *(Emphasis added.)*

As we are all undoubtedly aware, minors are not capable of forming contracts (**See California Civil Code §1556**). Thus, when seeking to contract with a minor to settle the minor's claims in a personal injury matter court approval is required.

Probate Code §3500 clearly states that a settlement on behalf of a minor is not valid unless the settlement is approved by the court. Thus, any failure to get court approval on behalf of a minor could potentially result in the settlement later being undone since the minor would not be bound by the settlement/contract. Worse yet, the attorney could later find themselves the subject of a malpractice claim.

Over the years, there seems to be a misconception that has developed that has been adopted by many insurance adjusters and followed by some attorneys. There is a mistaken belief that if a case on behalf of a minor settles for $5,000 or less, court approval is not necessary. This is absolutely false and not supported by the law.

The misconception seems to stem from the language contained in **California Probate Code §3401**, which states as follows:

"(a) Where a minor does not have a guardian of the estate, money or other property belonging to the minor may be paid or delivered to a parent of the minor entitled to the custody of the minor to be held in trust for the minor until the minor reaches majority if the requirements of subdivision (c) are satisfied.

(b) Where the minor has a guardian of the estate, all the money and other property belonging to the guardianship estate may be paid or delivered to a parent entitled to the custody of the minor to be held in trust for the minor until the minor reaches majority if the requirements of subdivision (c) are satisfied.

(c) This section applies only if both of the following requirements are satisfied:

(1) The total estate of the minor, including the money and other property to be paid or delivered to the parent, does not exceed five thousand dollars ($5,000) in value.

(2) The parent to whom the money or other property is to be paid or delivered gives the person making the payment or

delivery written assurance, verified by the oath of such parent, that the total estate of the minor, including the money or other property to be paid or delivered to the parent, does not exceed five thousand dollars ($5,000) in value."

Simply stated, **Probate Code §3401** does not abrogate the requirement set forth in Probate Code §3500 that settlement of a minor's case is only valid after there is a petition and approval from the court. Probate Code §3401 deals with how settlement funds of a minor can be disbursed and has nothing to do with obtaining court approval of the settlement.

Some adjusters and attorneys argue that obtaining court approval for settlements $5,000 and under is burdensome given the low amounts of the settlements. This can be remedied in several ways, including seeking fee waivers of court costs in some instances where circumstances warrant. Also an Expedited Petition to Approve Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment for Minor of Person with a Disability can be sought in certain instances, which can be approved by the court with the need for a hearing. (See form MC-350EX)

This exact issue has been addressed by at least one judge of the Sacramento County Superior Court. In October 2011, the Hon. Judge Judy Holzer Hersher published an article in the *Sacramento Lawyer* magazine titled "View from the Civil Trial Bench: The Pitfalls of Neglecting a Court Approved Settlement in a Minor's Case." The article contains an in-depth analysis of the law regarding this issue and emphatically states that court approval must be sought in cases involving minors. Her article can be found online at https://www.sacbar.org/userfiles/newsletter/Judge_Judy_Hersher_Article_Collection_online.pdf.

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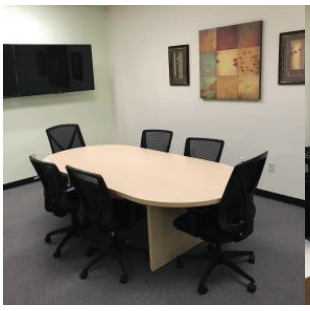

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The Justice Centers of California is offering individual office and secretarial workstations for short or long-term lease at our Sacramento facility. This location also currently hosts our training hub where focus groups and trial-readiness exercises are conducted, and statewide trainings are hosted.

Contact Seth Webster:

Email: Swebster2@bohmlaw.com **Phone: 916-873-3895**

Verdict: $1,552,000+ $70,000

Jan Weber v. County of Santa Clara, Case No. 1-15-CV-287977 COUNTY OF SANTA CLARA

Employment: Retaliation, Employment, Whistleblowing

CCTLA President Lawrance Bohm and a team of attorneys from the Bohm Law Group obtained a verdict of $1,552,800 in compensatory damages, plus approximately $70,000 in prejudgment interests, costs and potential attorneys fees in a case where the chief of child and adolescent psychiatry was wrongfully terminated after reporting unsafe treatment of children by Santa Clara County.

The case was tried in Superior Court of California, County of Santa Clara, before the Honorable Sunil R. Kulkarni. **Lawrance Bohm**, lead trial counsel, and Kelsey K. Ciarimboli, second chair, both of the Bohm Law Group, were assisted by Bradley J. Mancuso, Christina R. Kerner and Andrew Kim, all of the Bohm Law Group. Defense Attorneys were Aryn Harris, County Counsel, San Jose; and Steve Schmid, County Counsel, San Jose.

Facts & Allegations

Dr. Jan Weber, a Stanford Fellow who worked at Santa Clara Valley Medical Center Hospital and Clinics (SCVMC) was chief of child and adolescent psychiatry for five and a half years before he was illegally terminated on Nov. 18, 2014. This was shortly after making protected complaints about the county's unsafe care of children and adolescents and unsafe work conditions.

SCVMC is the second largest public health system in California. As the chief of child and adolescent psychiatry, Weber supervised approximately eight child and adolescent psychiatrists in the Mental Health Department. SCVMC is the "Safety Net" care provider for the underserved and indigent population of Santa Clara County.

Beginning in November 2009, Weber made numerous complaints regarding unsafe and substandard care to patients in the SCVMC health system and submitted a formal complaint to County Executive Jeff Smith, MD. Consequently, Weber was transferred from his assignment working with children in various outpatient clinics to a position within the hospital providing consultation services to children, adolescents and young adult patients.

It was known and expected that this move would reduce the number of hours Weber would be able to spend treating patients. In this role, Weber would be completely separated from working in the outpatient clinics he complained about. (At trial, Weber's medical whistleblowing complaint was excluded based on the length of time between the complaint and his termination. Instead, the medical whistleblowing complaint was re-labeled as "bad blood" between Weber and the director of the outpatient clinics, Dr. Tiffany Ho.)

With less clinical work available, Weber took on increased administrative duties, including implementation of an new electronic health record system, redesign of the family and children division, utilization reviews and participation as lead negotiator for the United Association of Physicians and Dentists (UAPD) union which represented most county psychiatrists. Weber's administrative time was approved by Chair of Psychiatry Dr. Michael Meade, who was also Weber's direct supervisor.

Shortly after moving to the inpatient position, Weber and Meade tried to increase Weber's productive time by having him work more time in the outpatient clinics. Weber was permitted to work only a half day in a clinic that was not a part of the mental health department, called the Pediatric Specialty Clinic, located directly across the street from the main hospital.

Throughout 2012 and 2013, Meade, Weber and other hospital leaders repeatedly requested that Weber be permitted to treat children outside of the hospital. At all times, the need for psychiatric services for children and adolescents was very high. Appointments for these patients were backlogged seven weeks or more, causing a severe delay of care. Repeated requests were made by the chair of psychiatry directly to then Director of Mental Health Dr. Nancy Pena.

Email communications revealed these requests were denied by Pena and Labor Relations, a department directly led by County Executive Jeff Smith. At trial, Meade testified Director Pena refused to let Meade move Weber into the outpatient pediatric clinics unless Labor Relations approved. When Meade reached out to Labor Relations, they blew him off and never got back to him. According to Meade, this was the only time in his career with the county that Labor Relations had done this to him.

In January 2014, Chair of the Department of Pediatrics Dr. Stephen Harris pushed for Weber to increase his clinical time at the Pediatric Sub-specialty Clinic. Harris advised both Medical Director of Ambulatory Services Dr. Paul Russell and Chief Medical Officer Dr. Jeffery Arnold that Weber's low productivity was a result of limited opportunity for inpatient productivity and the inability to place Weber in outpatient clinics because of a "significant Labor Relations/HR issue." In spite of this request, Weber was never allowed to increase his clinical hours for treating children and adolescents in an outpatient clinic setting.

In February 2014, Weber reported to hospital leadership that Mental Health Urgent Care was turning away pediatric and adolescent patients seeking care for emergency psychiatric conditions. Weber believed this to be a potential violation of the Emergency Medical Treatment and Active Labor Act (EMTALA), a federal law prohibiting patient dumping and refusal of appropriate care for psychiatric emergency. Weber was specifically concerned about an adolescent female who heard voices telling her to "kill herself." This child was not seen by a psychiatrist and only provided a cursory screening by support staff.

In March 2014, Weber emailed Director Pena and Meade regarding the medico-legal implications of refusing to provide care to kids and adolescents at Mental Health Urgent Care. Weber again stated this could be a potential EMTALA violation resulting in significant fines. At trial, Chief Medical Officer Dr. Arnold testified that complaints about EMTALA violations cause a "huge uproar" within the hospital system.

Also during March 2014, hospital leadership began

pushing for increased productivity from all of the doctors, and in particular, the psychiatrists. Drs. Meade, Weber, Harris, and other hospital leaders again attempted to increase Weber's productivity by increasing his clinical time outside the hospital in the pediatric subspecialty clinic.

Again, Director Pena denied the request but suggested any such plan would require that Weber be demoted from his position as chief of child and adolescent psychiatry. At trial, Chief Medical Officer Dr. Arnold described Director Pena's reaction to be "insane." This insane reaction came only two weeks after Weber's reported EMTALA violation.

In June 2014, Weber completed a review and examination of the county's use of pepper spray on juvenile detainees. Based on his review of medical literature, Weber concluded "the use of pepper spray cannot be recommended from a child psychiatric perspective." This information was sent to Director Pena, Chief Medical Officer Dr. Arnold and Dr. Paul Russell. In response, Director Pena told Weber to not send the report to a "broader audience."

In August 2014, Weber and his UAPD negotiation team was the lead negotiator for an employee group bringing forth safety concerns related to the clinical practice of mental health at Santa Clara Valley Medical Center and its clinics. This included outdated safety policies, non-functioning panic buttons and the need for public safety officers at mental health clinic locations. Weber was particularly outspoken about these issues and raised these safety concerns repeatedly in the past.

Doctors Meade and Ho attended this safety meeting with Weber and other physicians. Meade then reported the contents of this safety meeting to Director Pena, Arnold and Labor Relations. One week later, Arnold and Russell emailed County Counsel and Labor Relations to determine if Weber was an at-will employee.

On Sept. 10, 2014, Weber was elected by his peers to serve as the vice-chair of psychiatry. Despite being elected, Arnold refused to appoint Weber to the vice-chair position. At trial, Meade testified that it was probable the elected vice-chair would assume Meade's position of chair of psychiatry once he retired.

In mid-September 2014, Weber met with Chair of Pediatrics Dr. Harris, Meade and Russell to discuss a plan to increase the number of clinical days in the pediatric sub-specialty clinic. By mid-October it seemed as though the repeated requests to increase the number of days Weber could see patients at the pediatric subspecialty clinic was approved. However, before the increased clinical days were implemented, Weber was terminated.

On Oct. 23, 2014, Weber's first patient, a new intake slotted for two hours, was 27 minutes late. At that time, the pediatric subspecialty group had a policy for dealing with late patients. According to this policy, the physician is supposed to be informed of the reason the patient was late and asked how they wanted to work the patient into their schedule that day. This did not happen.

Also according to the policy, if a patient is not seen by the provider, an RN "will assess the patient for illness or urgency" and make a report. This also did not happen.

As a result, Weber only knew the patient was late and that he had another patient scheduled after this new patient. Weber applied the Mental Health Department Policy of rescheduling any patient who is more than 15 minutes late. (In mental health, practitioners typically do not allow for very late arrivals because it fails to establish appropriate boundaries for individuals who require structure as part of their mental health recovery). The patient was rescheduled by front office staff for an appointment in mid-December.

Immediately after this event, and without speaking to Meade (Weber's supervisor) or Weber, Russell and Arnold sought to terminate Weber.

On Nov. 18, 2014, Weber was terminated without warning—foregoing any kind of progressive discipline—for "lack of productivity" and "lack of professionalism," which referred to Weber's rescheduling of the late patient.

At trial, during four days of testimony, Meade confirmed Weber's continuous requests to increase his clinical time to improve his productivity. Meade further indicated that the barriers preventing Weber's increased productivity were not his fault. Meade testified that Weber was never unprofessional and was a hard-working, ethical and honest employee who cared for his patients. Meade also testified that Weber was an excellent child and adolescent psychiatrist.

In regards to the termination, Meade testified he was not given the opportunity by hospital leadership to provide any input. Meade stated this was the first termination of a psychiatrist in his department where he was not involved in the decision. Meade has been with Santa Clara Valley Medical Center for over 30 years. Meade went on to testify he would not have made the decision to terminate Weber, and he believed the termination to be unfair and undeserved.

In an attempt to discredit Meade, County Executive Dr. Jeff Smith testified that Meade really was not Weber's supervisor (contrary to numerous documents and hours of testimony by Meade). Smith additionally testified that he was involved in and approved the termination decision. Smith also testified that he had implemented a Just Culture (a culture of trust and fairness which recognizes that sometimes physicians make mistakes) at Santa Clara Valley Medical Center in an effort to improve patient satisfaction. However, in direct contradiction to this culture, Smith testified it was a practice of the county to terminate its physicians without warning and without informing them of the termination reasons because they were at-will employees. Smith then testified that he believe everything regarding Weber's termination was fair.

Weber sought recovery for past and future economic loss and past and future emotional distress, and the jury found for him on his whistleblowing claim and awarded him $552,800 in economic loss and $1,000,000 in emotional distress. The jury also awarded him prejudgment interest on his past economic loss. Past wage loss: $250,000; other past economic loss: $2,800 (unreimbursed expenses); future economic loss: $300,000; past non-economic loss: $750,000; future non-economic loss: $250,000.

Prosecuting Transgender Employment Cases,

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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.

DECEMBER 2018

Thursday, December 6
CCTLA Annual Meeting & Holiday Reception
The Citizen Hotel - 5:30 to 7:30 p.m.
CCTLA members & guests only

Friday, December 7
CCTLA Program
MEDICAL LIENS UPDATE
Speakers: Daniel E. Wilcoxen, Donald M. de Camara and John V. Cattie Jr.
McGeorge School of Law (Courtroom)
11:30 a.m. to 3:30 p.m.
CCTLA members only
Cost: CCTLA members $150 & member staff $100

Tuesday, December 11
Q&A Luncheon
Noon - Shanghai Gardens
800 Alhambra Blvd (across H St from McKinley Park)
CCTLA members only

JANUARY 2019

Tuesday, January 8
Q&A Luncheon
Noon - Shanghai Gardens
800 Alhambra Blvd (across H St from McKinley Park)
CCTLA members only

Thursday, January 24
CCTLA Program
Topic: "WHAT'S NEW IN TORT & TRIAL: 2018 IN REVIEW"
Speakers: TBA
Location: TBA
Cost: TBA

FEBRUARY 2019

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

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

CCTLA Calendar of Events