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Stepping into a proud legacy

Joe Weinberger
CCTLA President

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Welcome to 2020!! I am proud and honored to be the president of this fantastic organization. It is an exciting experience to lead this organization as we embark on this new decade and the potential that this organization has to bring justice to our clients.

More than 30 years ago, I began working for 1986 CCTLA President Hartley Hansen. Many of you may not remember Hartley, but he was a prince among men. Hartley was one of the brightest and most insightful lawyers I have met during my career. He was a true gentleman, a leader and an inspiration for me to follow. I am proud to follow in his footsteps as president of this organization.

In the early 1970s, Hartley formed a law partnership with then City Councilman Robert Matsui. When Mr. Matsui was elected to Congress in 1978, Hartley became a founding partner of Hansen, Boyd, Culhane & Mounier, the firm he would lead for more than 25 years. With Hartley at the helm, Hansen Boyd would become one of the most respected law firms in the state.

Hartley believed he had an affirmative duty to give back to his community, and his profession. Hartley was actively engaged in continuing education and trial advocacy programs, mentoring younger attorneys and was known to lend a hand to anyone in need of his assistance. I am personally humbled that he chose to mentor me and guide me in the early days of my practice.

While Hartley was the smartest man I have ever known, I believe his greatest talent was the ability to take the complex and make it simple. He had a unique ability to describe life in terms of personal responsibility, loyalty and honor. This ability was rewarded time and again by juries who gave justice to his clients. In his career, Hartley was responsible for obtaining many multi-million dollar verdicts at a time when such

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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.

Handle Liens By Interpleader?

Kamyar R. Shayan v. Spine Care and Orthopedic Physicians et al.
January 9, 2020, 2020 DJDAR 135

FACTS: Plaintiff's counsel settled plaintiff's personal injury case. There were approximately $30,000 in liens outstanding to two lienholders: Spine Care and Orthopedic Physicians and C&C Factoring Solutions. Plaintiff's counsel took $10,000 from the $30,000 for his fee and deposited the remaining $19,365 with the court and initiated an interpleader action, naming his client, the plaintiff, Spine Care and C&C, as defendants.

All three defendants filed answers. A trial date was set by the court. Lienholders Spine Care and C&C did not appear at the trial, and the court proceeded to hear evidence and render a judgment. Needless to say, Spine Care and C&C did not recover on its liens, and the $19,365 was adjudicated to Plaintiff.

When Spine Care and C&C realized what had happened, they sought to set aside the judgment under CCP Section 473 for mistake, inadvertence and excusable negligent.

ISSUE:

(1) Can a defendant who fails to appear at trial set aside the judgment on grounds of CCP §473?

(2) Can liens be disposed of by interpleading the funds?

HOLDING:

(1) No. See Urban Wildlands Group, Inc. v. City of Los Angeles (2017) 10 Cal.App.5th 993.

(2) Maybe (it happened in this case).

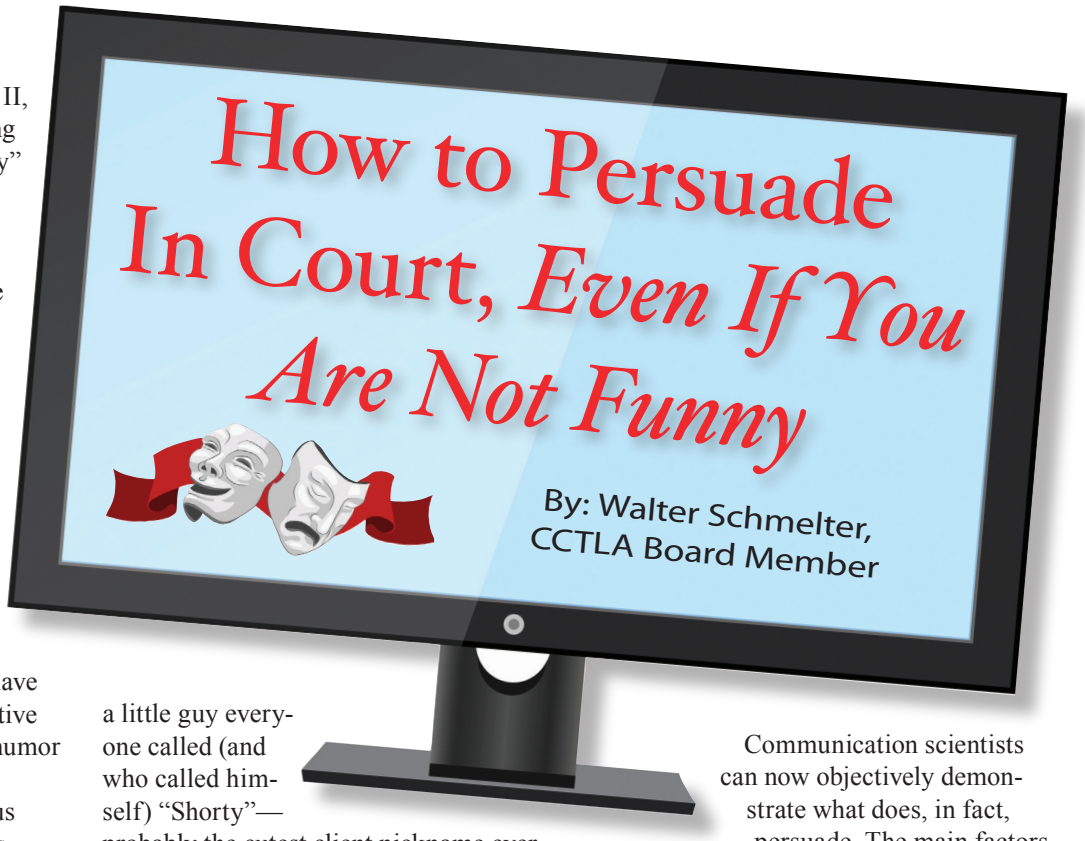
REASONING:

CCP §473 applies to default and not cases determined on their merit. CCP §473 allows for a default judgment or dismissal entered against a client to be set aside if the default or dismissal was the attorney's mistake, inadvertence, surprise or excusable neglect. However, this was an adjudicated trial on the merits, and therefore, CCP §473 does not apply. Plaintiff and plaintiff's counsel prevail.

Although not explained in the opinion, it appears in this case that Plaintiff's counsel represented Plaintiff, was a Plaintiff who sued Plaintiff, represented Plaintiff as a defendant in the interpleader action and recovered a fee (*whew, why not?*). It is not stated in the opinion whether Plaintiff's counsel took a fee on the rest of the recovery or if there was a large sum recovered.

[*Mike's note*: While I have successfully filed an interpleader action to deal with a lien in the past, I believe that the situation could create a conflict of interest. How can an attorney represent both sides in a lawsuit? Also, do you really want to sue your medical providers and the company who advanced money to your client? *"Yes, Mr. Client, I will be suing you, your doctors, and the company who gave you money to live; but don't worry, because I'll represent you, too. Just sign here that you understand and waive this conflict of interest. And I advise you that you can take this waiver to an attorney of your choice for advice."*]

How to Persuade In Court, *Even If You Are Not Funny*



Communication scientists have been studying factors influencing persuasion since at least World War II, when our government was evaluating efficacy of its "Support Our Military" ad campaign. Commercial ad campaigns wanted to know what would bring people to buy products.

About 30% of ads contain some humorous elements. In my opinion, humor makes for product identification more than persuasion. Remembering a product is difficult in a crowded market. Many products also use celebrities to enhance product memorability as well as favorable association.

Trial lawyers follow communication science, as well as their instincts toward learning what best persuades in the courtroom. I have often wondered if humor is an effective way to persuade. After all, doesn't humor increase likeability?

A 2018 metastudy of 79 previous studies on whether humor persuades shows that humor does, in fact, increase by an average of nine percent the chance of having a positive impact on behavior change—compared to the use of non-humorous attempts. Nine percent is statistically significant but considered a "weak effect." However, the study's lead author, Assistant Professor Nathan Walter, noted that humor that does not relate to the subject matter changes behavior only .1 percent, rising to 17% when the humor directly relates to the subject matter, concluding "…humorous messages are effective to the extent that they are able to complement the persuasive elements rather than trying to produce memorable punchlines." *Human Communication Research*, Volume 44, Issue 4, October 2018, Pages 343–373. https://academic.oup.com/hcr/article/44/4/343/4992917.

Humorous comments must be appropriate and never offensive on a sensitive subject matter, like someone's health. I suspect few were persuaded or impressed by President Trump's mocking impression of a disabled news reporter. Winning elections is easy. Comedy is hard.

Humor is not persuasive if using it appears at all inappropriate or forced. However, when something funny happens, go with it. CCTLA Past-President Jim Mart once spoke of his injured client, a little guy everyone called (and who called himself) "Shorty"—probably the cutest client nickname ever. By the end of the trial, the judge and even defense client were referring to Plaintiff as "Shorty," ending with a favorable result for Shorty and for Jim Mart.

My country-raised USDA expert witness chicken inspector (but amateur witness) became so frazzled by defense cross-examination that after he finished his testimony, on his way out of the courtroom he walked behind me (but in the presence of the jury) and nervously kissed my female trial assistant. The next day, with the court's permission, I called him back to the witness stand to explain that his anxiety was from listening intently and answering carefully to be sure he told the truth, and that he had no relationship with my assistant or me. He closed with: "I was so happy to stop testifying I would have kissed defense counsel sitting right there." The jury cracked up, which was the best result for me—the jury recognized my expert's earnest genuineness. When humor comes to you, go with it, and the jury will go with you.

But the humor that won the jury wasn't via any joke. The humor was in the humanity of my chicken expert, and of Plaintiff "Shorty." So perhaps the humor that best persuades is a light-hearted acknowledgment of our human foibles and our shared humanity.

Communication scientists can now objectively demonstrate what does, in fact, persuade. The main factors writ large are the characteristics of the communicator, the content of the message and the nature of the audience. Public speaking techniques one can learn via practice for free and study for little to lots of money (e.g., Toastmasters International and Trial Lawyers College). The content of the message reflects the realities of your case, but here you shine by putting the facts in the best light. The nature of the audience is a bit of a wild card but can be influenced to some extent via *voir dire*. Consider practicing every day your skill at reading people, toward being better at reading a jury and judge.

But that's the overview. Particular persuasion techniques are harder to come by. Just to have a *chance* to persuade, one must gain and keep the listener's attention. Presence, volume and pitch all play a part. In my experience, one should consider memorability of one's case from *voir dire* through Opening Statement through Closing Argument. In Closing Argument, counsel is permitted much breadth and freedom of expression in describing a case. Quotations and well-related humor that resounds to your particular case can make your presentation memorable.

You can enhance memorability and thus your persuasive power if you can

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describe your client's case in just a few words. Remember these? "If the glove doesn't fit, you must acquit!" "Don't do the crime if you can't do the time;" "Don't roll the dice if you can't pay the price." Try to avoid being trite, but choose, don't just use, words. Consider alliterations (e.g., "sweet birds sang") instead of quotes or rhymes—to convey your point in a memorable way. Choose simple words over complex ones.

Colorful visuals persuade. "People retain about 85 percent of what they learn visually; retention of aural information is only about 10 percent. Hence, exhibits that pass the 'billboard test'—clear, immediate and attractive—have an extraordinary impact on jurors." *Fundamentals of Trial Technique*, by Thomas A. Mauet.

I once described the defense case with a projected image of bright red herring and told the jury how the phrase "red herring" got started—by escaping prisoners dragging a dead fish across the trail to throw off the tracking dogs and constables.

Fortunately for me, opposing counsel left that visual up for half his Closing Statement, which I found funny (but did not share at the time). Give your audience visible, tangible proof of your words by providing concrete evidence such as pictures of the scene or victim, and relevant documents.

Technology persuades. Command of your photos and docs on a viewscreen shows your own working expertise and competence and thus, enhances your own credibility.

Let the listeners persuade themselves. There is a reason attorneys on television and in movies ask pointed questions of a witness even if the witness doesn't know the answer and there is an objection. The persuasion is in the inference the jurors will draw from the question. Unlike TV attorneys, however, don't withdraw your question—if there is an objection, wait for the ruling. Consider asking defendant at trial about some complicated factual assertion made in a verified pleading or discovery: Was this your idea to come up with this (stated) factual argument? Sometimes the unspoken answer is clear, that the assertion was created by defense counsel.

Appeal to the jury's sense of fairness and justice in various ways. Begin this in Discovery, by asking questions that stretch your opponents opinions, speculations and understanding of the facts to the breaking point. Recall the unsuccessful plaintiff's counsel haunted by his expert's testimony that a toolbox should be able to be filled with solid lead or gold without the handle breaking.

Despite technique, nothing tops your client and your witnesses being likeable, sincere and believable people in the courtroom, revealing their humanity to the court. I do so by briefly eliciting good facts showing the witness' place and background in the community, such as a witness's military service with honorable discharge, their loving family members including dog "Sparky," the witness's long work history and the witness's charitable works. Clearly it is hugely important that you weave together a relatable sincere story.

I conclude that while I will persist in practicing appropriate persuasion, my odds of being nine percent more persuasive with humor are outweighed by the odds my humor will be only nine percent funny.

Stepping into a proud legacy

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verdicts were unheard of.

Hartley believed it was his role in life to use his skills to advocate on behalf of the underdog against those who chose to use their power to exploit those less fortunate. I recall two cases when working with Hartley. In the early 1990s, Hartley represented a number of farmers being sued by their bank regarding loans that had been procured under duress. Hartley countersued the bank and ultimately received a verdict in excess of $22 million in the early 1990s. This was a landmark verdict for individuals over a corporate defendant.

Hartley also represented a gym owner and his wife who were in the process of developing a gym in Sacramento. Just prior to opening, the investors excluded the developer and his wife from the gym and took over its operation. Over the next several years, Hartley was ultimately able to convince a jury that the investors had abused their position and wrongfully stole the gym from the couple who had devoted their time and money to its development.

Unfortunately, Hartley was diagnosed with cancer in 2002. As was his intrinsic nature, he fought with all he had. In November 2004, Hartley Hansen passed away. As his partner Kevin Culhane stated, "He was one of the giants of the profession; he was larger than life. He was what we all aspire to be. He will be missed by all of us whose lives he touched."

Hartley's legacy of working to achieve justice for our clients lives on in many of the members of this community. His legacy includes judges Kevin Culhane and Michael Jones (also a former CCTLA president). Esteemed members of CCTLA include Betsy Kimball, John Rueda and Larry Watson. I also count myself as one honored to be a representative of Hartley's legacy in this community and with this organization.

Today my goal as president of this organization is to continue the legacy of Hartley T. Hansen. Three years ago, my colleague Travis Black and I brought Keith Mitnik and the Trojan Horse to Sacramento to educate us on the subject of *voir dire* and analogies. Two years ago, Erik Roper and I were able to bring The Simon Law Firm to Sacramento to teach us about *motions in limine*.

This year, with the assistance of Dan Del Rio and the CCTLA board, we are working with Trial Guides to bring other nationally recognized personalities to Sacramento to make us all better lawyers. In addition, it is my personal goal to establish the Hartley T. Hansen Memorial Lecture as an annual event in which the best trial attorneys in this country will come to Sacramento.

This year, CCTLA has a number of outstanding events planned for our members. In January, 65 of our members were able to attend the "What's New In Tort and Trial." In March, CAOC and CCTLA will be hosting the annual Donald L. Galine Sonoma Travel Seminar. This event on March 13 and 14 will cover many topics including liens, law office management, auto accidents, trial skills and arbitration. This will be a valuable opportunity to learn from some outstanding litigators and enjoy the beauty of the Sonoma Mission Inn.

April 28 will be Justice Day. This is our best chance to meet with legislators on both sides of the aisle and discuss our issues and legislative agenda for the year. Of great importance this year is a bill to increase the minimum auto liability limits. As you know, California minimum limits have not changed for decades, and as you all know, one trip to UC Davis Medical Center can eat up $15,000 in the blink of an eye.

On June 4, we will be holding our annual Spring Reception. Through this event, we have been able to raise money for the Sacramento Food Bank. This event has continued to grow each year, and last year we raised in excess of $130,000 for the needy in this community. I am encouraging our board and our members to participate in this worthy event.

I truly look forward to this year and hope each of you will reach out to me in the near future. I encourage you to increase your involvement in CCTLA. Come to our events, lectures and seminars and then give back to the community we represent. I am forever indebted to Hartley Hansen for the attributes which he instilled in me. I look forward to following in his footsteps as president of this organization, and I am proud to be a product of the legacy he left among the trial attorneys of Sacramento.

RESOLVING *THAT* CASE

By: Daniel S. Gass, CCTLA Board Secretary

Those of you who know me know that I am a sole practitioner. No other attorneys in my office. I have the freedom to accept or not accept any potential case. I have the freedom to set and negotiate my attorney fee agreement—under what circumstances will I accept "this" case—on an hourly basis (rarely, but possible); on a contingency fee basis—usually, but what percentage? Freedom is good, but that also allows me the flexibility, smart or not, to accept a case to help a friend? family member? or just that this potential client was someone who I thought: They need help, and if I do not help, no one probably would?

One would think that by now, after practicing law for 30 years, about 25 of them on my own, that anything and everything beyond "this is a good case, and I want the usual contingency fee of one third before trial and 40% if we get within 60 days of trial" is the only way to go. But, I have not learned my own lesson, and at least a few times a year (I have a relatively small caseload) I find myself sitting at my desk staring at THAT case. The one I took "for a friend" or because I thought (at the time, at least) I just have to do this because "it's the right thing to do." From the "no good deed goes unpunished" file, I find myself staring at THAT case, and wondering, how/why did I get into this mess? But, since its well past my time to reverse that decision, it becomes, "How do I resolve this mess?"

To help define THAT case, I want to point out that this is not the situation where I just found out my client may not have been telling the truth, or for some other reason, my client is not the good person I thought he/she was (Admit it: This sometimes happens). Those are easy cases—withdraw or terminate the relationship.

This is the situation where you, the lawyer, still want to do right by your client but are just not sure how to get it done—how do you resolve THAT case?

I have found that most of the time, THAT case exists because the medical lienholders are relentless in demanding repayment of their liens, and those amounts exceed your ability to obtain settlement funds from the third-party carrier and/or the uninsured (or underinsured) motorist coverage your client has.

Of late, (the past five years. or so) I have found that the third-party carriers are not just demanding that your client "defend and indemnify," the third party and its insurer from any lien claims through a paragraph in the Release document. Now they are demanding to know what the lien amounts are, and who holds them, so they can add the lienholder's name to the settlement check.

Although it should be obvious, never let the insurer issue a single settlement check that includes the name of any lienholder to resolve a claim. In fact, it is improper for an insurer to add the lienholder's name to a settlement payment unless it was specifically agreed to at the time of the settlement. (See Karpinski v. Smitty's Bar, Inc. (2016) 246 Cal App 4th 456, where the court enforced a settlement between the parties and ordered the issuance of the settlement payment to Plaintiff without including Medicare or California Victims Compensation Board where Defendant knew of the liens at the time of settlement and did not address it properly at the mediation where the case was resolved).

The scenario is as follows: The third-party insurer, and/or the UM/UIM insurer, agree to settle the claim for "policy limits" but will not issue the settlement payment without adding the lienholders' names on any settlement check—clearly an unacceptable option since you will have to get some insurer, or MediCal, or Medicare, to endorse

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the check and then return the balance of funds owed to you and your client—a nightmare that is almost guaranteed to unfold on your watch.

As long as the medical liens are not being asserted by a self funded ERISA Plan,[1] I have found, on more than one occasion, the way to resolution is to adopt the position taken against us in other cases: DELAY, DENY and DEFEND, all within the bounds of the Rules of Professional Conduct, specifically Rules 3.1, 3.2 and 3.3). In other words, do onto the insurers, and Medicare, and the non-ERISA lienholders, that which the insurers have done to you. It's only fair.

Do not agree to settle with the third-party insurer (or UM/UIM carrier) until you have some commitment on how the liens will be resolved, or else you may find yourself without compensation for your firm and without a penny to give to your client.

I have had a number of cases where the medical provider, usually the ambulance/medic and the hospital, assert liens for their "full billed" charges—an amount far in excess of what they might receive if the charges for the medical services are submitted to a health insurer, Medicare or MediCal.[2]

When I receive these liens, I immediately embark on a campaign, in writing, directing the provider to submit their charges to your client's health insurance or MediCal or Medicare. Every time they send you a lien notice, or a statement, send a letter providing them with your client's health insurance information (if insured) or direct them to MediCal or Medicare. Wait it out. Repeat your position as often as necessary.

My favorite has been when the client is entitled to Medicare. I have found that Medicare reimbursement rates for ambulance and hospital care is about eight to 12 percent of the "full billed" charges. The medical providers do not want to accept such a small amount—but they must. Do not agree, certainly not at this point, to pay the lien even if they assert that they will wait until the case resolves. You cannot agree to repay a lien on behalf of the client without the client's written and informed consent, as you may be creating a "conflict of interest." You have a duty of loyalty to your client. When you agree to pay another person for medical services rendered, you have now assumed a duty to pay someone else with funds that potentially belong to your client—a conflict of interest. (See Rule 1.7 of the Rules of Professional Conduct).

This is different from when you assist your client in obtaining medical care on a

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[1] *That would be a difficult situation where the self-funded ERISA Plan truly may have a right to ALL the funds, pursuant to Mcdowell v. American Airlines, and its prodigy - an issue which can be the subject of a full seminar on ERISA lien resolution - a seminar conducted by Daniel Wilcoxen and Donald DeCamera on many past occasions, and will be offered in the future. Don't miss it if you want to have a chance of understanding this area of law.*

[2] *It appears that MediCal and Medicare end up paying only about 10% of the full billed charges. Thus, the ambulance company and the hospital are reluctant to accept only 10% if they think they can get much more by asserting the lien.*

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lien because in that situation, you would have obtained your client's approval in advance of the care to be rendered.

Anyway, the gist of resolving that claim, for me, was recently the resolution of a case where my client was hit on his bicycle by a motorist who had a measly $15,000 policy and no other assets. The client was taken to Mercy San Juan (MSJ) from the scene. He incurred $118,000 in charges at MSJ, and MSJ refused to bill Medicare for the treatment. My client was 85 years old, and his only coverage was Medicare. The client, when released from MSJ, was transferred to a Dignity care facility, where he incurred another $100,000 in charges. The care facility submitted its care charges to Medicare and was eventually paid about $18,000. However, the hospital not only refused to submit their charges to Medicare, when I pressured them to do that, they retained counsel in Los Angeles to assert the lien. The lawyers placed the third-party insurer on notice of the lien and for months, they pressed their lien. As a result, the third-party insurer refused to pay its $15,000 unless MSJ and Medicare were also listed as payees. That was clearly unacceptable.

For months I told the attorneys that we were not paying and they had to submit the bill to Medicare. They did not want to do that because they knew that the $118,000 bill would be reduced (in this case) to about $4,000.

MSJ's attorneys were repeatedly told, by my office, in writing, that they were REQUIRED to bill Medicare because, even though Medicare was a "secondary payor," it had been more than 120 days since the charges were incurred, and no third party had made a payment. Medicare's rules permit a "Conditional Payment" be made if "the claim is not expected to be paid promptly" by other potential payors. "Paid promptly" under Medicare rules means within 120 days. (See 42 U.S.C. sec. 1395y(b)(2). In addition—and this is the important factor—if a claim is not presented to Medicare for payment within one year of when the services were rendered, Medicare can deny payment.[3]

In the 11th month, MSJ recanted and submitted the bill to Medicare. I waited them out, called their bluff and their lien went away—I received a Notice of Withdrawal of Lien.

By the way, even though I knew the third-party carrier was ready and willing to pay its $15,000 policy limit, I did not accept—mostly because they declared that we would only be paid by multiple-party check, which I declared would be unacceptable.

Next step, start working on reducing, or eliminating, the Medicare lien. The same "campaign." Repeated letters to Medicare addressing its asserted $45,000 lien—and telling Medicare that my client has a $600,000 injury but is only going to recover $15,000—a mere 2.5% of the value of his injuries, but offering twice that, or 5% of Medicare's $45,000: $2,250. Months of unanswered letters, then rejection of our offer. Persistence, more requests and a detailed analogy for a "hardship" waiver pursuant to Medicare's own rules.

Then, Medicare took the odd position that until we actually received the settlement funds, they would not tell us if the lien would be compromised or waived. In fact, at one point, knowing that the third-party settlement would be $15,000, Medicare sent a Notice demanding the payment of $10,000 within 30 days.

But again, more letters and demands for the "hardship waiver" (The hardship waiver requirements are found at section 1870 of the Medicare Act, also codified at 42 U.S.C. sec. 1395gg). Finally, a phone call from an actual person at Medicare—jackpot—someone who wanted to actually resolve this. It was 18 months post accident. This Medicare person explained that Medicare would not fully address the lien until there was an actual third-party settlement. But, I explained, we cannot have a settlement and obtain settlement funds because the third-party insurer refuses to issue a check unless they put Medicare's name on it, which would make it useless to my client.

The ultimate "procedure above substance" like only the federal government can do. But, this Medicare person actually had a solution. First, he said that he was "inclined to grant our request for a hardship waiver," but he was not allowed to officially commit to that until the case is settled with the third-party insurer. He explained that if we signed a Release with the third party, and we sent Medicare that Release, Medicare would then tell us if its lien would be waived or reduced. He promised that Medicare would provide a number so if the lien was not waived, we could then request the third-party insurer issue one check with Medicare as one payee and a separate check payable only to my client and my office. Although the Medicare person

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[3] *I have tried to locate the U.S. Code citation for this rule and just cannot seem to locate the exact section. However, this is clearly understood to be the law and is found in multiple Medicare publications. For example: https://www.cms.gov/Outreach-and-Education/Outreach/CMSFeeds/Downloads/New-Maximum-Period-for-the-Submission-of-Medicare-Claims.pdf*

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said he could not promise a "waiver" until the signed release was received, he said he would "try" to push this through. But, if he did not have the signed release in two weeks, he would be required to send out a letter rejecting our request for a "hardship waiver" on the grounds that the settlement was not completed. I found myself having to trust an unknown government worker—but, I had a good feeling that he was being honest.

The release was obtained from the third-party insurer, signed and sent ONLY to Medicare at that time. Within days, Medicare sent out the APPROVAL of the "hardship waiver." In that letter, Medicare clearly stated: "Waiver Granted, Case Closed."

Success. By waiting out the MSJ lien claimant and then obtaining a "hardship waiver" from Medicare, about $170,000 worth of medical liens disappeared, and my client will receive some compensation.

I have done this similar process on other cases over the years and have found, at least in the relatively smaller cases, the lienholders "give up" if you wait them out. Unlike our extraordinary group of plaintiff lawyers, who sometimes prosecute cases because they just need to be done even if the financial reward is not great, my experience with defense counsel is that if they are not paid their hourly rate, be it big or small, there will be no work performed. To the extent a medical lienholder wants to pursue their lien, they must hire counsel and pay an hourly rate for the chance of a recovery—most will not do it because the attorney fees charged will cause there to be little to no recovery anyway.

Delay is not usually part of our nature—justice delayed is justice denied—but, in some circumstances, this might be the only way for your client to receive some compensation. Think about it next time you look over at the corner of your desk and see THAT case, and say: How do I resolve this mess? The answer may just be: Wait a little longer (of course, not past the statute of limitations) but with a good campaign of telling the lienholder you cannot resolve the underlying third-party case without them being VERY reasonable, and then not resolving the underlying case for the first year, there is a good chance that they will be worn down and come to their senses. Like MSJ did in my client's situation.

President Joseph Weinberger, the Officers and
Board of the Capitol City Trial Lawyers Association
in association with
Sacramento Food Bank & Family Services
cordially invite you to the

18th annual

Spring Fling Reception

& Silent Auction

June 4th, 2020
from 5:00 pm - 8:00 pm

At the beautiful
Ferris White Home
1500 39th Street
Sacramento, CA 95816

Contact Debbie Keller at (916) 917-9744 or **debbie@cctla.com**

This reception is free to
honored guests, CCTLA members (one guest per invitee)
Hosted beverages and hors d'oeuvres will be provided

All sponsorships and silent auction proceeds benefit Sacramento Food Bank & Family Services, a local nonprofit agency committed to serving individuals and families in need.

CCTLA's What's New in Tort & Trial: 2019 in Review

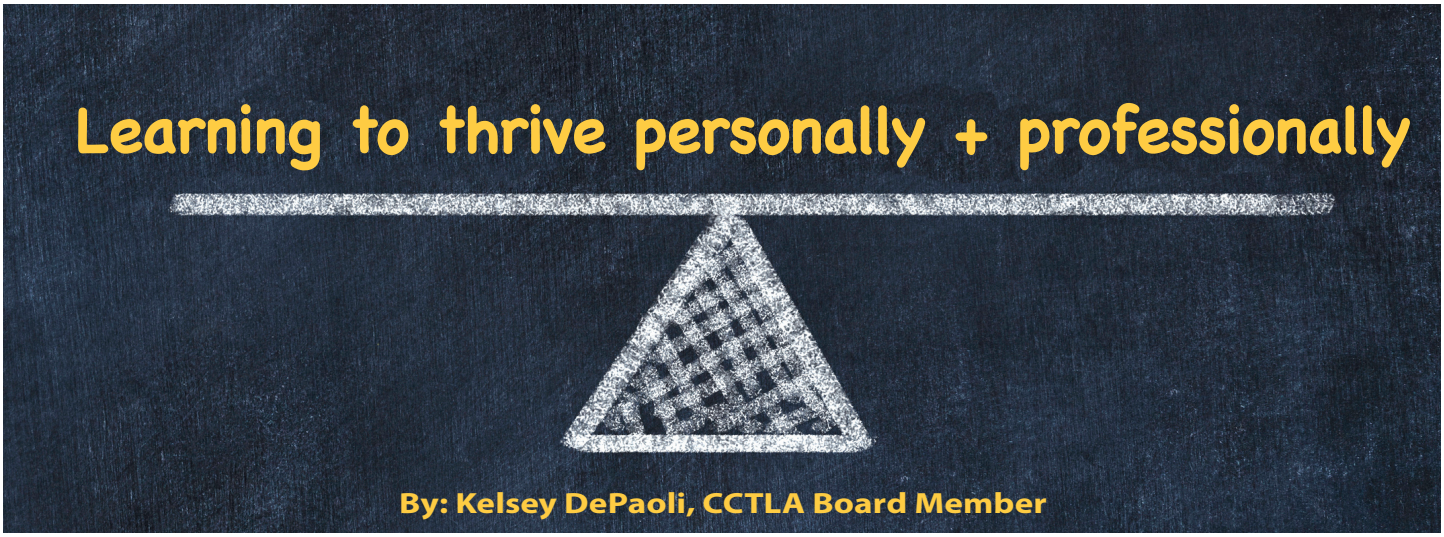
CCTLA' s 37th annual Tort & Trial program at McGeorge School of Law in January drew 65 people who learned from speakers Kirsten Fish, Anne Kepner, Ray Mattison and Kimberly Wong.

The speakers for "What's New in Tort & Trial: 2019 in Review" came to the Bay Area to provide this informative and valuable program, and CCTLA thanks them for their participation.

Special thanks to Noah Schwartz, Offices of Noah S. A. Schwartz, for his continued and generous sponsorship of this popular program.

Materials from the program are available for purchase for $50. Mail your check, payable to CCTLA, to P.O. Box 22403, Sacramento, CA 95822.

Learning to thrive personally + professionally



By: Kelsey DePaoli, CCTLA Board Member

Learning to thrive personally and professionally as a lawyer is a goal many of us seek. With the arrival of the New Year, it is a time of reflection. How can I be better, is there something I can change, what are the things I like or dislike in my life right now? For me, I always feel as if I am being pulled in a million different directions, always trying to give attention to so many areas and not drop the ball in any of them.

The struggles of balancing a career that gives you so much fulfillment while also giving as much of yourself to committees/groups you are involved with, and family and personal time. The balance of trying to give your clients the attention they deserve but not forgetting your personal life. As a woman who likes to try cases, this can become very demanding of your time. Women and men of any experience level practicing law and having a family know what the demands are like and the pressure to do it all.

Currently, I am in a position of trying to improve my experience and maximize our firm's potential but at the same time, trying to keep up with all the other groups, be a wife, mother, daughter, sister and a friend. Sound familiar? I know that each of us has the power to achieve what we put our minds to, but sometimes it feels like there just is not enough time for it all.

For these reasons, I have decided to be better about setting intentions. I am doing my best trying to find ways to implement a daily plan that works for me. One that makes me feel like I hit all my goals that day and didn't leave anyone out. Since having my son eight months ago, the one thing I have learned is flexibility. Like many of you, we have to put in a lot of hours, but I find the eight-to-five job does not work for all. For me, I realized is it's quality over quantity. I work my cases, I get to know my client's story, I do everything that needs to be done on that case. It is about making the best of your time and carving out appropriate time to do it all.

My goal is to try more cases. Upon intake of the case, it will be a must that I prepare it for trial from the start. I know, and have learned that when I do this on cases, they usually settle because I am ready, it's a good case, there are not many holes to poke, I have figured out the problems and explanations. Picking your cases and spending the right amount of time on them is imperative in our profession. Some weeks you feel like all you did was work, but other weeks you get to breathe.

What I found to be important moving forward is to determine: How many cases do you want to carry at one time? What kind of cases? How many cases do you want to try every year? If you own your firm, how much money do you need to make every month? What amount of time do you need to be at home with your family to feel fulfilled? What amount of time do you need to dedicate to "you," whether that's for exercise, health care, vacation etc.?

I have realized that when I implement some sort of health care in my day, no matter if it is 20 minutes or two hours, I sleep better, I feel more relaxed, and my body thanks me. Which brings me to health: Without health, we really have nothing. One thing I believe many lawyers lack is self-care, and I don't just mean massages and vacations, but exercise, meditation, rest. The world around us is moving so fast there is never enough time, but the one thing I think everyone can agree on is they want to "feel good" with the days we have here on this Earth. We want to wake up feeling refreshed, healthy, ready for another day.

I used to do yoga and bootcamp regularly, and it was the best I ever felt. I was able to rest better, think better, felt like I was on top of my game. It's been hard to get back into after having a baby, but I have started attending these classes and can feel the difference already. A clear mind, better sleep (when the baby allows); just an overall better feeling.

On the topic of self-care, one thing I have noticed that really helps me with productivity is not just the exercise and health part, but appearance, too. It's odd that I mention this, and maybe it should not matter, but I think it does. If I feel good about myself, my energy is different, and I am more productive. Getting up and getting ready for the day is important to me. There are days I am rushed and throw myself together, and those days are always less productive. I call it dressing the part.

I do think it's a little more difficult for women than for men. Trying to figure out the right outfit with the right shoes, the right hair style, the right nails, the right jewels. Especially in court. Do you wear a dress, a pant suit, what's too short, what's too long? What heels can I walk in all day or will a jury care that I chose flats? What if my nail polish is chipped during *voir dire,* do jurors care? Maybe some do, maybe they don't. I don't have the answers, but I know when I do self-care and I feel good, I feel more confident and probably am a better lawyer. These things are not talked about and maybe they should be. I think it is important to care about your appearance for self

Continued on page 15

Continued from page 14

esteem and confidence.

If you don't care about yourself, how can you care for others?

Caring for others, as in your clients, is so important. I often wonder how many lawyers really spend the time getting to know their client and their story. I have always thought this is something our firm is good at. One thing moving forward that I think will help all of us is really checking in with yourself. Ask yourself the hard questions:

- Do you know your client?
- Do you know their story?
- Are you the right person to represent this client?
- Are you working their case as hard as you could?
- Should you be settling that case for more than you just did?
- Should you be litigating that case?
- Have you told your client all the risks and acknowledged them yourself?
- Have you spent enough time prepping the case for trial?
- Is this a case you need help with?
- Are you able to take this case on and still take care of you?

In setting intentions for 2020, if you are not asking yourself all of these questions and really checking in, are you doing enough? The client is trusting us to make the best decisions. Can we be better? The answer is yes. We can always be better; we can always learn and grow.

The best thing you can do for yourself is to make a plan and work hard at it every day. This article isn't intended as a New Year, New Me, it is just about getting what you want out of life and feeling like you are thriving professionally and personally. Cheers to setting goals and crushing them!

Early Considerations and Action In a Defamation Case

By Christopher H. Whelan,
CCTLA Board Member

In defamation cases there are many unique issues regarding the elements of the cause of action, pleading, burdens of proof and available damages that depend on whether the publication is oral or written, whether the defamed is a public or private figure, if the subject of the publication is a private or public matter, or if the publisher is a media defendant. If these issues and differences are not appreciated at an early stage avoidable errors may occur, or unwinnable cases may be accepted. Therefore, it is essential from the start to understand what type of defamation you have and what path you will be taking. Set forth below are some issues you should look for.

Libel (written) vs. Slander (oral) Defamation

Defamation is a an intentional written (CC§45) or oral (CC§46) publication of an unprivileged statement that has a natural tendency to cause injury or that causes special damage.[i]

Public Figure, Public Concern, Media Defendant vs. Private Person, Private Concern

In cases involving public figures, public concerns or media defendants "actual malice," is an element of the cause of action, and it must be proven with clear and convincing evidence. That malice requires publication "with knowledge that it was false or with reckless disregard of whether it was false or not." [ii]

However, actual malice is not an element of defamation in a private person, private concern defamation case. Also proof of the elements of such a case must only meet a preponderance of evidence standard.[iii] Therefore, when arguing against MSJ, MIL or jury instructions, pay careful attention to the cases cited by defense when it argues the elements of defamation or burden of proof. If you don't, you may wind up having to prove unnecessary elements or meet an unnecessary clear and convincing standard.

Another distinction is that in public figure/public concern/media cases, the plaintiff has the burden to prove falsity of the statements,[iv] but for private person/private matter cases falsity is presumed, and truth is an affirmative defense for which defendant has the burden of proof. [v]

Correction Demand Action Within 20 Days of Publication by a Media Defendant

Pursuant to CC§48a, if the publishing defendant is a newspaper or radio broadcaster, the plaintiff can recover "no more than special damages" (e.g. no general or punitive damages) unless the plaintiff, within 20 days after knowledge of the publication, makes a written demand to defendant for correction, and the defendant fails to publish or broadcast the correction. The loss of general and punitive damages will make most defamation cases not worth pursuing.

Pleading of Slander vs. Libel

Allegations of libel should set out the exact defamatory words used;[vi] however, "slander can be charged by alleging the substance of the defamatory statements." [vii] There is no requirement to plead special damages for slander per se (CC§46),[viii] but such pleading are required for libel per *quodix* (extrinsic facts and context necessary to establish defamatory nature of the words).

Anti-SLAPP Motion to Strike ((CC§425.16)

This statute was enacted to allow the striking of a complaint at the earliest pre-discovery stage if meritless litigation is being used to interfere with the rights of freedom of speech or to petition in connection with a public issue.[x] A two-stage analysis is used. First, the defendant must demonstrate that the acts complained of were in furtherance of the defendant's right of petition or free speech under the US or California Constitution. (CC 425.16, subd.(b)(1). If that stage is met, then the court's next step is to considers if the plaintiff has demonstrated that "the complaint is both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." [xi] If that minimal standard cannot be met, the complaint is considered a SLAPP and subject to being stricken.

Malice" May Have Different Meanings and Different Burdens of Proof

"Actual malice," or publication "with knowledge that it was false or with reckless disregard of whether it was false or not," [xii] is an element of the cause of action and must be proven with clear and convincing evidence in a public person/ public matter/media defendant case. In addition to the obvious, this malice can be established by establishing the publisher knew of but failed to interview or review relevant witnesses or documents. [xiii]

Confusingly, a different "malice" is a necessary to overcome an affirmative defense of a qualified or conditional privilege (CC§47(c)) in a private person/private matter case. This malice merely requires a showing of publication with "hatred and ill will evidencing an intent to vex, annoy or injure," [xiv] to a preponderance of evidence.[xv]

This malice may be evidenced by: (1) a reckless investigation into the truth or falsity of the claimed defamatory statements; [xvi] or (2) where the statements was motivated by anger, hostility, ill will, or any prior grudge, dispute or rivalry; [xvii] or (3) the publisher had knowledge of the statement's falsity, or lacked an honest belief in the statement's truth, or so lacked reasonable grounds for belief in the truth of the statements that it was published in reckless disregard of the plaintiff's rights; [xviii] or (4) by evidence that the publisher had no belief, or no reasonable grounds for believing, or no probable cause for believing the statements to be true; [xix] or (5) the statements were so inherently improbable that only a reckless person would put them into circulation; [xx] or (6) there was a failure to interview or consult readily available and obvious witnesses, or relevant documents or other evidence, that could have confirmed or disproved the statement(s); [xxi] or (7) where the statements were based on information from a source known to be hostile to the plaintiff, or from a source known to be biased against the plaintiff; [xxii] or (8) any speech or action by defendant which evidences a willingness to vex, annoy, or injure plaintiff. [xxiii]

This is another area were great attention is necessary to make sure defense does not successfully argue to apply the wrong definition and burden of proof for malice in your case.

Conclusion

Since defamation is ". . . a forest of complexities, overgrown with anomalies, inconsistencies, and perverse rigidities" [xxiv] you need to know what forks in the road you will be taking before you enter that forest. Yogi Berra's approach of "when you come to the fork in the road take it" [xxv] will not work.

Citations and Sources

[i] Gilbert v. Sykes (2007) 147 Cal. App.4th 13, 27
[ii] Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3rd 244, 256
[iii] Roemer v. Retail Credit Co. (1975) 44 Cal.App.3d 926, 931-932; Ev. Code §115
[iv] Nazam-Aldine v. City of Oakland (1996) 47 Cal. App. 4th 364, 375-379
[v] Gantry Const. Co. v. American Pipe & Constr. Co. (1975) 49 Cal. App. 3d 186, 194
[vi] Hecimovich v. Encinal School Parent Teacher Org. (2012) 203 Cal.App.4th 450, 477 fn.1
vii Okun v. Superior Court (1981) 29 Cal.3d 442, 458
[viii] Contento v. Mitchell (1972) 28 Cal.App.3d 356, 358.
[ix] Smith v. L.A. Bookbinders Union (1955) 133 Cal. App.2d 486, 495
[x] Sipple v. Foundation for Nat. Progress (1999) 71 Cal.App.4th 266, 235
[xi] Navellier v. Sletten (2002) 29 Cal.4th 82, 88-89
[xii] Reader's Digest Assn. v. Superior Court (1984) 37 Cal.3rd 244, 256
[xiii] Khawar v. Globe Internat. (1998) 19 Cal. 4th 254, 276
[xiv] Agarwal v. Johnson (1979) 25 Cal.3d 932, 944-945
[xv] Roemer v. Retail Credit Co. (1975) 44 Cal.App.3d 926, 931-932; Ev. Code §115
[xvi] Rollenhagen v. City of Orange (1981) 116 Cal. App.3d 414, 423; Widener v. PG&E (1977) 75 Cal.App.3d 415, 434-435
[xvii] Larrick v. Gilloon (1959) 176 Cal.App.2d 408, 416
[xviii] MacLeod v. Tribune Publishing Co. (1959) 52 Cal.2d 536, 552; Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal.2d 412, 418;Boyich v. Howell (1963) 221 Cal.App.2d 801, 803.
[xix] Inst. of Ath. Mot. v. U. of Ill. (1980) 114 Cal. App.3d 1, 12; Cuenca v. Safeway S.F. Employees Fed. Credit Union (1986) 180 Cal.App.3d 985, 997; Roemer v. Retail Credit Co. (1975) 44 Cal.App.3d 926, 936; Brewer v. Second Baptist Church (1948) 32 Cal.2d 791, 797; DiGiorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal.App.2d 560, 574-575
[xx] Reader's Digest Assn. v. Sup. Ct. (1984) 37 Cal.3d 244, 257; Mullins v. Brando (1970) 13 Cal.App.3d 409, 420; Cuenca v. Safeway S.F. Employees Fed. Credit Union (1986) 180 Cal.App.3d 985, 997; MacLeod v. Tribune Publishing Co. (1959) 52 Cal.2d 536, 552
[xxi] Harte-Hanks Communications v. Connaughton 491 U.S. 657 p. 682-684 [109 S. Ct. at p. 2693]; and Khawar v. Globe Internatl., Inc. (1998) 19 Cal.4th 254, 276.
[xxii] Fisher v. Larsen (1982) 138 Cal. App.3d 627, 640.
[xxiii] Agarwal v. Johnson (1979) 25 Cal.3d 932, 944-945.
[xxiv] McNair v. Worldwide Church Of God (1987) 197 Cal.App.3d 363, 375
[xxv] The Jurisprudence of Yogi Berra 46 *Emory Law Journal* 697, 711

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CCTLA Salutes 2019's Best at annual Holiday Reception

CCTLA recognized the best of the best for 2019 at its Holiday Reception held Dec. 5, 2019 at The Citizen Hotel. The event was attended by 210 people, including 20 judges.

The Honorable Kathleen M. White, judge of the Yolo County Superior Court, was presented with the award for Judge of the Year. Her clerk, Caretha Lau, received the Laura Lee Link Clerk of the Year award.

Glenn Guenard, CCTLA board member, was recognized as Advocate of the Year. The Honorable David W. Abbott was presented with the Distinguished Judicial Service award, and Margot Cutter, of Cutter Law, received the Award of Merit.

During the event, $3,910 was raised for the Mustard Seed program, with $2,000 donated by CCTLA and $1,910 donated by CCTLA members and sponsors who attended.

"Thank you to those who donated to this worthy cause, and special thanks to the many generous sponsors of this reception," said Debbie Frayne Keller, CCTLA executive director.

More photos on page 20

Above: Mike Montero, Noemi Esparza, Clerk of the Year Caretha Lau, Judge of the Year Kathleen White, 2019 CCTLA President Rob Piering, Roger Dreyer and past CCTLA President Bob Bale

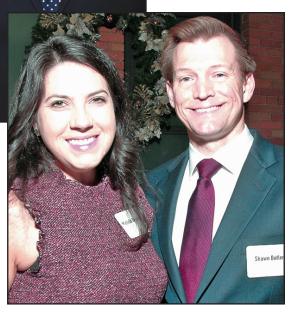
Above: Brooks Cutter, Award of Merit honoree Margot Cutter and Celine Cutter

Above: 2019 CCTLA President Rob Piering with Judge David Abbott, who received the Distinguished Judicial Service Award

Right: Judge Allen Sumner, Elizabeth Bacon, Judge David Brown and Cecilia Uribe

Right: Roger Dreyer, Wendy York, Linda and Chris Whelan

Above: Steve Halterbeck, Jack Vetter, past CCTLA President Kyle Tambornini, 2019 CCTLA President Rob Piering and Nick Lowe



Right: Michelle Reynolds and Shawn Butler

Above: Autumn Culbreth, Dawn McDermot and Craig Sheffer

More CCTLA Holiday Glitter...

Continued from page 19

Above: Judge Allen Sumner, Judge David DeAlba, Jeffrey Owensby, Rena and Judge Ben Davidian

Above: Cynthia and past CCTLA president Rick Crow

Left: Alexis Roberts and Alisa Razumovsky of JAMS

Above: from left to right: Aryn Nunez, Jordan Dixon, Rachael Del Rio and Jeffrey Meisner

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FRIDAY, MARCH 13 | 1:30 PM REGISTRATION

2:00 PM – 3:00 PM / MCLE: 1.0 General

Liens
Moderator: Joseph Weinberger, Weinberger Law Firm
Are You Being Overbilled On A Lien
Daniel Wilcoxen, Wilcoxen Callaham, LLP

3:15 PM – 4:30 PM / MCLE: .25 General; .5 Bias; .5 Competence Issues

Law Office Management/Competence Issues
Moderator: Craig Peters, Altair Law LLP
Independent Contractors vs. Employee
Adam Zapala, Cotchett, Pitre & McCarthy, LLP
Making Your Law Firm Bullet Proof: Sexual Harassment Policies In Law Firms (Bias)
Micha Star Liberty, Liberty Law
20-20 Vision in 2020: New Employment Laws That Law Firms Need To Know (Bias)
Tamarah Prevost, Cotchett, Pitre & McCarthy, LLP
Coping Skills For The Legal Professional: Avoiding Burnout And Anxiety (Competence Issues)
Richard Carlton, Coping Skills for Legal Professionals

3:15 PM – 4:30 PM / MCLE: 1.25 General

Trial Skills Quick Hits
Moderator: Sukhtej Atwal, Piering Law Firm
JUUL
Sarah London, Lieff Cabraser Heimann & Bernstein LLP
How To Make Your Lawsuit Against Uber Or Lyft A Five-Star Ride
Robert Bale, Dreyer Babich Buccola Wood Campora, LLP
Water, Water, Everywhere
Eric Buescher, Cotchett, Pitre & McCarthy, LLP
Emerging Practice Area: HIV Drug Litigation
Kristy Arevalo, McCune Wright Arevalo, LLP

4:45 PM – 6:15 PM / MCLE: 1.5 General

Tough Topics in Auto Cases
Moderator: Parisima Roshanzamir, The Roshanzamir Law Firm
Everything You Ever Wanted To Know About UM/UIM in 18 Minutes
Hank Greenblatt, Dreyer Babich Buccola Wood Campora, LLP
Cross Examination Of A Bio Mechanical Engineer
Robert Piering, Piering Law Firm
The Eggshell Plaintiff: Handling Pre-Existing Injuries
Deborah Chang, Panish Shea & Boyle LLP
Holding Employers Accountable For The Actions Of Their Employees
Ilya Frangos, Law Offices of Galine, Frye, Fitting & Frangos

4:45 PM – 6:15 PM / MCLE: 1.5 General

Arbitration – Strategies For Keeping Yourself Out and Winning If You're Stuck In It
Moderator: Casey Johnson, Aitken*Aitken*Cohn
When In Arbitration With Different Rules
Kathryn Stebner, Stebner & Associates
Nuts & Bolts Of Fighting Arbitration
Abbas Kazerounian, Kazerouni Law Group, APC
Federal Law Update
Guy Wallace, Schneider Wallace Cottrell Konecky Wotkyns LLP
Avoiding Arbitration In The Class Action Setting
Robert Nelson, Lieff Cabraser Heimann & Bernstein LLP

SATURDAY, MARCH 14 | 8:30 A.M. BREAKFAST

9:00 AM – 10:30 AM / MCLE: 1.0 Bias; .5 Ethics

Implicit And Overt Bias In The Courtroom (Bias/Ethics)
Moderator: Sandra Ribera Speed, Ribera Law Firm
Implicit Bias
Nanci Nishimura, Cotchett, Pitre & McCarthy, LLP
(Chair, Commission On Judicial Performance)
Hon. V. Raymond Swope
Bias From The Perspective Of The Jury Consultant
Sonia Chopra, PhD, Chopra Koonan Litigation Consulting

9:00 AM – 10:30 AM / MCLE: 1.5 General

Government Tort
Moderator: Justin L. Ward, The Ward Firm
The Nuts And Bolts Of Proving A Dangerous Roadway Case Involving An Injured Bicyclist
John Feder, Rouda, Feder, Tietjen & McGuinn
Discovery In A Dangerous Condition Case
Thomas Brandi, The Brandi Law Firm
What Is The Duty? Protection vs. Not Increasing The Risk Of Harm
Alison Cordova, Cotchett, Pitre & McCarthy, LLP
Beware Of The Immunities:
An Overview Of The Top Ten 2019 Decisions Addressing Immunity Defenses
Anne Kepner, Needham Kepner & Fish LLP

10:45 AM – 11:45 AM / MCLE: 1.0 General

Predicting The Path Out Of Bankruptcy: The Wine Country And Camp Fire Claims Resolution Process (Roundtable Discussion)
Moderator: Jennifer Fiore, Fiore Achermann, ALC
Frank Pitre, Cotchett, Pitre & McCarthy, LLP
Steven Campora, Dreyer Babich Buccola Wood Campora, LLP
Michael Kelly, Walkup, Melodia, Kelly & Schoenberger

10:45 AM – 11:45 AM / MCLE: 1.0 General

Sanchez: Is It A Sword Or A Shield?
Moderator: Geoffrey Wells, Greene Broillet & Wheeler, LLP
How To Prepare Your Experts For Sanchez Objections
Jonathan Davis, Arns Law Firm
How To Limit The Defense Experts Using Sanchez As A Sword
Elise Sanguinetti, Arias Sanguinetti Wang & Torrijos LLP
The Good, The Bad And The Ugly About Experts And Sanchez
Gretchen Nelson, Nelson & Fraenkel LLP
Understanding *People v. Sanchez*
Duffy Magilligan, Cotchett Pitre & McCarthy, LLP

12:00 PM – 1:00 PM / MCLE: 1.0 General

Keynote Lunch

Moderator: Micha Star Liberty, Liberty Law
A Social Worker's Approach to Lawmaking: Taking On Homelessness, Mental Health And Other Challenges of Our Time
Assemblymember Susan Talamantes Eggman

1:15 PM – 3:00 PM / MCLE: 1.75 General

Masters Roundtable
Moderator: Anne Marie Murphy, Cotchett, Pitre & McCarthy, LLP
Treating Physicians As Experts: Rules Of The Road
Amy Eskin, Schneider Wallace Cottrell Konecky Wotkyns LLP
Jury Selection And The Use Of Mini Openings
Roger Dreyer, Dreyer Babich Buccola Wood Campora, LLP
The Dos, The Don'ts And Turning Common Defenses Into An Ally With Your Treater
Wendy York, York Law Firm
Treating Physicians In Device Cases
Khaldoun A. Baghdadi, Walkup, Melodia, Kelly & Schoenberger

3:15 PM – 4:30 PM / MCLE: 1.25 General

Trial Skills: Rising Stars
Moderator: Noemi Esparza, Dreyer Babich Buccola Wood Campora, LLP
Maximizing Your Client's Recovery: How To Try An Effective Case Against Multiple Defendants
Emanuel Townsend, Cotchett, Pitre & McCarthy, LLP
Turning Facts Into Opinions: 10 Tips To Get The Most From Your Experts - And Theirs - At Trial
Jason Sigel, Dreyer Babich Buccola Wood Campora, LLP
Delivering A TKO Opening Statement: How to Make Sure The Defense Never Gets Up Off The Mat
Jesse Chrisp, Law Offices of J. Chrisp
Direct Examination: The Old One-Two – Story Telling and Demonstrative Evidence
Chantel Fitting, Law Offices of Galine, Frye, Fitting & Frangos

6:30 TO 7: 30 P.M. WELCOME RECEPTION

6:00 TO 7:00 P.M. CLOSING RECEPTION

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Double taxation of attorney fee awards leaves wronged consumers in the cold: *S. 2627* can fix that

Excerpted from PublicJustice.net

Russell and Jennie Kinney thought they had achieved the American Dream. Although they are of modest means and rely on what Russell is able to make as a mechanic in their small town in rural Maine to get by, they were able to save enough to buy a home together. They financed their home purchase through Bank of America, and started off making timely payments on their mortgage.

Then it all came crashing down around them. Without explanation, their monthly payment skyrocketed. At first, they tried to keep up, but they quickly fell behind. They found themselves on the verge of losing their home to foreclosure.

The Kinneys ultimately discovered that the sudden increase in their monthly payment amount was illegal. Even though the bank had clearly violated the law, it denied doing anything wrong and put up a number of defenses, claiming various technicalities.

They were able to find a lawyer to take their case. Their lawyer helped them file a lawsuit against the bank, alleging that the bank had violated numerous state and federal consumer protection laws, including the Fair Debt Collection Practices Act ("FDCPA") and Maine's Consumer Credit Act. The bank eventually settled with the Kinneys, allowing them to stay in their home and avoid foreclosure. As a part of that settlement, the bank also agreed to pay the attorney fees the Kinneys' lawyer had earned during the ordeal.

But the Kinneys' ordeal was not over.

Current Tax Law Considers Attorney Fee Awards to be Income and Taxes Them Twice

Because of how the IRS has interpreted the tax code, the attorney fees the Kinneys received as a part of their case would be considered taxable income. This means that the Kinneys would be forced to pay taxes on the attorney fees awarded as part of their settlement, even though those fees had already been earned by, and would go directly to, their lawyer. In the Kinneys' case, the taxes they would owe on the attorney fee amount would wipe out the money the Kinneys won in their case, and drain their limited income.

The Kinneys are just one example. Under the U.S. Tax Code, attorney fee awards are considered "income" for the plaintiff who receives them, even though the plaintiff cannot keep the money and may never even see it, as it goes directly to the attorney. Such attorney fee awards are also considered income for the attorney who ends up with the funds, meaning that, in the end, the fees are taxed twice.

Treating attorney fee awards as a plaintiff's income for tax purposes causes a number of harms. Most obviously, plaintiffs are left with potentially huge tax bills, on money that isn't actually theirs. Because unraveling unjustified corporate defenses often requires a lot of attorney time and effort, these bills can sometimes dwarf what the plaintiff won.

For some individuals, an attorney fee award can make it look like they have far more income than they actually do, and can render them ineligible for important programs, like the Earned Income Tax Credit (EITC). The EITC has been called one of the "largest anti-poverty programs" in our nation's history. Through it, many families see their monthly incomes boosted by more than $250 per month. Being rendered ineligible for this benefit because of an attorney fee award would be a serious economic hardship for many Americans.

Double Taxing Attorney Fee Awards Undermines Federal Law

Turning attorney fee awards into tax liabilities undermines federal law by making it more difficult for individuals to vindicate important rights. Congress has repeatedly recognized that some laws depend on everyday people being able to enforce them in court. But doing so would often be impossible without the assistance of a qualified and knowledgeable attorney. So for many of these laws, Congress has authorized courts to award attorney fees to plaintiffs who win their cases. These "fee shifting provisions" are included in dozens of statutes throughout the U.S. Code, including those designed to protect people from discrimination, labor abuses, environmental harms, unfair debt collection and credit reporting practices, and much more. Without these provisions, the substantive laws would be "but an empty gesture" because no one could afford to go to court to enforce them.

In some cases—especially those that arise under the consumer protection laws—the amount of money that it costs to litigate the case will be greater than the amount the person who was harmed is owed. This is not a bug in the system, it is a feature.

As a Michigan appellate court judge recognized in Jordan v. Transnational Motors Inc., "if attorney fee awards in these cases do not provide a reasonable return, it will be economically impossible" for people hurt by these illegal schemes to find attorneys to represent them. The point of fee shifting provisions is to make it possible for individuals to vindicate their rights. By incentivizing lawyers to take these cases, the law works as an equalizer, putting power back into the hands of consumers, and giving them tools to fight back against corporate abuses.

But the current tax treatment of attorney fee awards takes away that power. That's why Public Justice is supporting a new effort to find a legislative solution to this problem.

On Oct. 17, 2019, U.S. Sen. Catherine Cortez-Masto (D. Nev.) introduced the End Double Taxation of Successful Civil Claims Act (S. 2627). This would change the law to provide an "above-the-line" deduction so that attorney fee awards will not count towards a plaintiff's adjusted gross income for tax purposes. The solution S. 2627 proposes simply extends a legal fix Congress used to preserve discrimination and whistleblower claims to other types of civil cases. In 2004, through the American Jobs Creation Act (118 Stat. 1418), Congress amended the Tax Code to provide an "above-the-line" deduction for fee awards recovered through certain discrimination and whistleblower cases: those sums would not count towards the individual's adjusted gross income (the relevant number for tax purposes).

Why Now?

Although the 2004 fix did nothing to protect plaintiffs in other types of cases, until recently they also had a partial—if imperfect—solution: they could use the Miscellaneous Itemized Deduction to reduce their tax burden and obtain at least partial relief. This solution was far from perfect. For instance, it did not necessarily allow winning plaintiffs to deduct the entire amount of their attorney fee award. And because it relied on plaintiffs using a "below-the-line deduction," attorney fee awards were still considered income for certain purposes, like calculating eligibility for the EITC.

But with the Tax Cuts and Jobs Act of 2017, even that imperfect solution has evaporated. It suspended plaintiffs' ability to deduct personal litigation expenses, meaning that successful plaintiffs now have to pay the full amount of taxes owed on attorney fee awards, even when the money goes directly to their lawyers. They may end up owing more than they gained by winning their lawsuit. This harms everyday Americans, and strips those statutes that depend on private enforcement of their power. It means people with meritorious claims will be discouraged from bringing those claims to light, and corporate wrongdoers will be let off the hook. That's why [Public Justice] added [its] voice in support of the End Double Taxation of Successful Civil Claims Act (S. 2627). The bill is currently before the Senate Finance Committee.

Loss of two Sacramento Trailblazers to be felt by many

By Jill Telfer, Past CCTLA President and Editor, *The Litigator*

The Sacramento legal community has suffered the great loss of two amazing trailblazers: Nancy Sheehan and Jed "Skip" Scully have left their mark, impacting thousands and making the world, including the Sacramento community, a much better place.

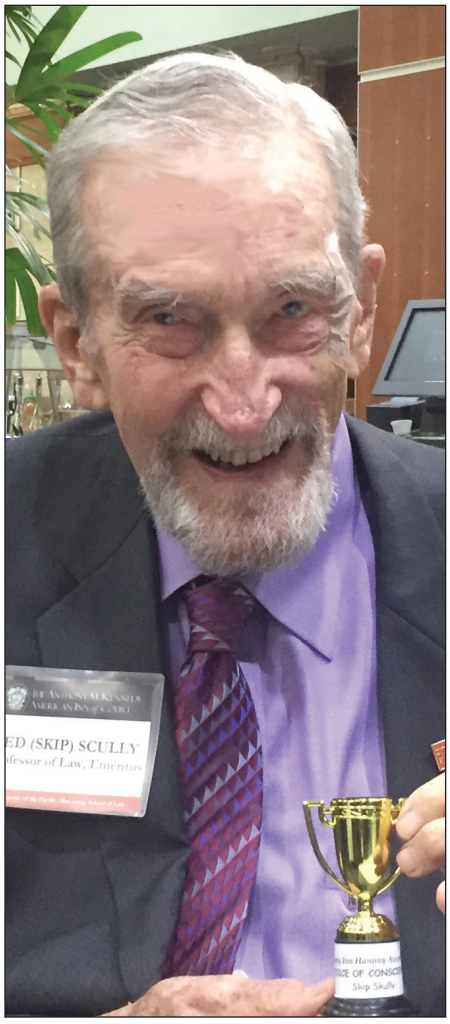
Nancy Sheehan was a fair, funny and formidable defense employment and civil rights litigator. She exemplified everything that is good and honorable about our profession. She was civil, professional, hardworking, groundbreaking, fearless and extremely witty. Nancy litigated with grace and humor, even when she battled breast cancer in 2008 and again in 2019, upon learning the cancer had returned and had metastasized.

During her 34-year career at Porter Scott, Nancy was admitted to the top peer-review organizations, including the American College of Trial Lawyers, the International Academy of Trial Lawyers and the International Society of Barristers.

She also was a member of the American Board of Trial Advocates (ABOTA) and served as a president of the Sacramento Valley chapter. In 2010, she received the chapters Civility Award for her professionalism in dealing with council and the courts and was named the chapter's Trial Lawyer of the Year in 2014, the first woman to receive that honor.

Nancy treated all within the profession with respect, no matter if you were a young associate from a little known firm or the managing partner of the elite. She has been referred to as "the cleaner," because she was brought into very difficult and contentious cases, where she found a common ground and got to the heart of the matter. She brought out the best in her adversaries and friends alike. She accepted victory and defeat the same, always with a smile and a handshake. Nancy, who was married to Rich Simpson, will be sorely missed.

NANCY SHEEHAN



JED "SKIP" SCULLY

Jed Olaf "Skip" Scully, known as Skip, was a highly respected attorney and educator. He was known for his warm sense of humor, booming laugh, sharp intellect, erudite and insightful essays, deep love for his family and friends and a lifetime commitment to teaching and mentoring generations of law students.

He dedicated the majority of his professional career to education, holding a number of collegiate teaching and administrative positions. In Sacramento, we know the great work he did as a professor of law at McGeorge Law School. In addition to serving as a xhair of the Academic Council at the University of Pacific, he was also one of the founders of the Sacramento's Anthony Kennedy Inn of Court.

After serving more than five decades in higher education, he retired but remained an active member in the Kennedy Inn and was a member of its executive committee as well as that of the University of Pacific's Emeriti Society.

Skip had a zest for life. He should be known as a renaissance man since he was interested in all facets of life. He was born in Paris, France, in 1931 and spent his youth primarily in Hollywood, CA. He served as an ROTC commander prior to joining the US Air Force. Between active duty and National Guard service, Skip spent 36 years in the Air Force, eventually reaching the rank of brigadier general prior to retiring from service. Thereafter, he received his JD degree from UCLA Law School.

He and his wife, Glee, made Sacramento their home in 1979 when he was appointed a professor. Skip had seven children and 10 grandchildren. Skip and Glee spent a part of each year in Montigny, France, but they enjoyed many happy times with close French friends and American visitors traveling and enjoying the historic French countryside. Skip was immensely kind and will be missed by all.

How to Respond in Discovery When the Defense Seeks the Identity of "General Damages" Witnesses

By: Kirill B. Tarasenko, CCTLA Board Member

I recently had the opportunity to litigate consecutive cases against the same defense firm, with the first case proceeding to verdict and the second heading that way soon. Despite what some people say, insurance defense lawyers *are* capable of learning from their mistakes and changing up their strategies, and there are numerous examples I saw of just that in these two cases. One issue that came up in the two cases is what I decided to write about here, which is how to handle Discovery pertaining to the identity of "general damages" witnesses, something that can prove to be very significant in a trial, yet may often be overlooked.

In the case that went to trial, the defense never asked for the identity of general damages witnesses, and as it turned out, one of the three witnesses my client wanted to call, an old softball buddy, was unavailable the week of trial. Therefore we set up the witness's videotaped deposition, and proceeded with the videotaped testimony over defense counsel's objection.

Defense counsel refused to even ask the witness any substantive questions, instead asking only questions related to why he could not be present at trial, followed by filing a motion *in limine,* seeking to exclude the witness "because he was not disclosed in Discovery." Essentially, the defense's argument was that the general damages witness's name never showed up in Discovery, including in response to Form Interrogatory 12.1, and therefore, the witness should be excluded because his testimony would constitute "unfair surprise" to the defense.

Despite the defense's protests, the Court correctly ruled in favor of allowing the witness to testify, given the fact that the defense never made any effort to specifically seek the identities of general damages witnesses and because Form Interrogatory No. 12.1 does not require a plaintiff to disclose witnesses who may testify to the impact of plaintiff's physical injuries or disabilities on the plaintiff's life. Mitchell v. Superior Court (2015) 243 Cal.App.4th 269). Mitchell holds that Form Interrogatory 12.1 only applies narrowly to the disclosure of percipient witnesses to the incident itself:

> We read interrogatory No. 12.1 to seek the identities of percipient witnesses, witnesses who were at the scene immediately before or after the accident, those privy to statements by percipient witnesses to an accident and those who might have personal knowledge of the accident itself. The interrogatory does not seek the identity of witnesses—such as those whose testimony was excluded by the trial court—who may testify to the physical injuries or physical disabilities suffered by a plaintiff as a result of the accident. *Id. at 272.*

The second time around, the defense made sure to serve the following special interrogatory: "Please IDENTIFY (meaning to state the name, address and telephone number) any witnesses to your pain and suffering (i.e., general damages) as a result of the subject incident."

I considered this interrogatory and decided it could be problematic because of how it was phrased. Was this interrogatory seeking the identities of *any and all* witnesses to Plaintiff's pain and suffering, even those Plaintiff would never call at trial? If the question is interpreted that way, then literally anyone Plaintiff encounters as he goes about his daily business could be considered a witness, whether a family member, a coworker or Johnnie down at the gas station who sees Plaintiff wince in pain as he runs a squeegee across his windshield.

Alternatively, if the interrogatory is interpreted to mean identity just those who Plaintiff *will be calling as witnesses*, then the interrogatory is arguably premature, as well as violative of the attorney work product doctrine. Given that defense attorneys always ask plaintiffs who lived with them at the time of the incident and similar questions in depositions, I figured it was the witnesses that Plaintiff would be calling at time of trial that the defense was really after with this interrogatory.

Well, we did not know who we would be calling as general damages witnesses yet, and given that Plaintiff had identified his family members during his deposition, thereby putting the defense on notice as to who may have knowledge of his general damages, we responded to the interrogatory by stating that it was not yet determined who exactly Plaintiff would be calling as general damages witnesses, and that the identities of such witnesses would be provided when determined, or on Plaintiff's witness list before trial.

Of course, the defense never bothered taking depositions of any of the family members that had been identified during Plaintiff's deposition. Later, out of an abundance of caution and before the close of Discovery,

Continued on page 30

...the Court correctly ruled in favor of allowing the witness to testify, given the fact that the defense never made any effort to specifically seek the identities of general damages witnesses and because Form Interrogatory No. 12.1 does not require a plaintiff to disclose witnesses who may testify to the impact of plaintiff's physical injuries or disabilities on the plaintiff's life.

Continued from page 29

we supplemented the response with names of individuals that Plaintiff was considering calling at trial, including the family members previously identified, although we weren't sure which of these people we would actually call at trial.

The defense did not meet and confer about the issue of general damages witnesses. They did not seek to take the depositions of the family members, and they did not seek any court order compelling discovery of witness identities. Instead, they sought to block Plaintiff from calling *any* general damages witnesses by way of a motion *in limine*, claiming massive prejudice, and arguing that "Plaintiff's family members were presumably known to him."

In effect, the defense was seeking a terminating sanction against Plaintiff, despite no violation of a court order. The "general rule [is] that a terminating sanction may be imposed only after a party fails to obey an order compelling discovery . . . ." (New Albertsons, Inc. v. Superior Court (2008) 168 Cal.App.4th 1403, 1426.

While doing research for our response, I was surprised at the paucity of authority on the subject, before coming across the seminal 1976 decision in City of Long Beach v. Superior Court(1976) 64 Cal.App.3d 65, 71. In that case, the interrogatory read as follows: "List the witnesses whom you intend to call at the time of trial herein, and the nature and extent of the testimony which will be offered by or though said witnesses." Responding Party objected, stating "Objection is made to this interrogatory as it does not solicit information which may be given by answers to interrogatories and on the further ground that it is attorney work product." [Citing to outdated CCP code sections]. The Requesting Party filed a motion to compel further responses to interrogatories, arguing that the information sought was not attorney work product.

At a hearing on the motion, the Superior Court granted the motion. The Court made a formal order requiring petitioner to further answer fully and completely the [interrogatory at issue]. Responding Party then filed a writ petition, which was granted directing respondent Court to vacate the order granting the motion to compel further responses. Thus, the matter was taken up by the Court of Appeals of California, Second Appellate District, Division Three.

The Appellate Court took up the question as a matter of first impression, as no prior California cases were cited nor found that directly answered the questions raised as to whether (1) the identity of non-expert witnesses whom the adverse party intends to call at trial, and (2) the nature and extent of those witnesses' expected testimony, fall within the definition of attorney's work product. [64 Cal. App. 3d 71].

After a lengthy discussion and analysis of what constitutes word product, the Appeals Court held that the names of all percipient witnesses (i.e., those with knowledge of relevant facts) must be disclosed, but that compelling a party to identify which

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of all of the potential percipient witnesses the party will be calling at trial violates the work product privilege. "The exact witness by whom a relevant fact may be proven at the trial must depend, after consideration of many questions, upon the judgment, discretion and mental processes of the legal counsel who will actively conduct the litigation." McNamara v. Erschen (D.Del. 1948) 8 F.R.D. 427, 429.).

The Court further explained, "Clearly, the complete list of trial witnesses sought in this case is a derivate product developed as a result of the initiative of counsel in preparing for trial. The forced revelation of this list would violate the work product doctrine because counsel's decision in this respect is strategic, it necessarily reflects his evaluation of the strengths and weaknesses of his case. The threat of disclosure would inevitably chill his willingness to 'investigate not only the favorable but the unfavorable aspects of such cases' [Citing to outdated CCP code sections], because his adversary could deduce, form the identity of witnesses listed as having knowledge of relevant facts but left out of the trial list, where his case was weakest. A list of persons with knowledge of the relevant facts is quite different in its effect; it does not, of itself, reveal the strategy of the attorney. [64 Cal. App. 3d 74].

The Court considered just such a situation in its analysis, reviewing the arguments posed by Judge Weinfeld as quoted in 4 Moore's Federal Practice, section 26.75(4) footnote 11, pages 26-209 to 26-210: "As to the first point, if we assume that the libellant knows of 10 witnesses but for reasons satisfactory to trial counsel he intends to rely upon five to establish his case, the answer to the interrogatory as framed would give the respondent only the names of those five witnesses. Omitted from the list would be the remaining five witnesses who may have information of much value [or] whose testimony may lead to information of much value, in aid of the respondent's case. [64 Cal.App. 3d 76]. Thus, a major purpose of the deposition-discovery procedure would be frustrated rather than advanced by the service of such a list." Continuing, Judge Weinfeld stated:

"Moreover, there is inherent disadvantage to a party to compel him to state in advance of trial those witnesses he intends to call. In the practical conduct of trials, circumstances may cause an experienced trial lawyer to dispense with a witness' testimony after first contemplating it. Reasons readily suggest themselves. The testimony of a witness may be cumulative; his version may be hearsay or inadmissible upon the trial, although for purposes of deposition-discovery procedure, entirely relevant to the subject matter of the action; a witness may have turned hostile; a witness, as sometimes witnesses do, may have suffered a lapse of memory on the event of trial, or his testimony, while generally supporting the version of a party's other witnesses, may in a single aspect differ and be contradictory and so harmful rather than helpful to the theory of his case. Thus, a litigant would be placed in the position of explaining away the failure to call an announced witness when events subsequent to the service of the list warranted dispensing with his testimony, especially if the other party were to contend that he was misled and had relied upon his adversary to produce the witness at the time of trial."

The Appeals Court in City of Long Beach v. Superior Court agreed and drew a distinction between persons having knowledge of relevant facts and witnesses who will be called to testify at the trial. "According to the great weight of authority pretrial discovery rules such as ours which allow the discovery of the identity of persons with knowledge of relevant facts do not sanction compelling the disclosure of the non-expert witnesses intended to be called at trial." [64 Cal. App. 3d 78].

The Appellate Court did not find California appellate case law squarely on point, holding that the identity of non-expert witnesses intended to be called at trial is non-discoverable but noted that commentators on California law assumed and categorically stated that a party "cannot be compelled to disclose the identity of lay witnesses who will testify at trial." (Citing Brosnahan, Jones & Rantzman, Cal. Civil Discovery Practice (Cont. Ed.Bar 1975) Interrogatories, §8.10, Powers, A Guide to Interrogatories in California Practice, 48 So.Cal.L.Rev. 1221, 1232, 1253). Such a list as sought here generally has been deemed non-discoverable in California practice. (See 13 Grossman & Van Alstyne, Cal. Discovery Practice (1972) §30, p. 84).

According to Louisell (Louisell, Boalt & Wally, Modern Cal. Discovery 92d ed. 192) Interrogatories to Parties, §5.12, p. 336), "most California courts do not require this disclosure because they believe such to be in violation of the attorney's work product." *Id. at 79.* As such, the City of Long Beach Appeals Court held that "The identity of the intended trial witnesses cannot be compelled without a showing that denial of such discovery will "unfairly prejudice the party seeking discovery or will result in an injustice." [Citing to former Code Civ. Proc. §2016(d)].

Interestingly, the Court of Appeals took even more issue with the portion of the interrogatory seeking the Plaintiff to describe the "nature and extent of the testimony which will be offered by or through said witnesses." The Appeals Court held, "Such an interrogatory clearly calls for production of a writing reflecting the attorney's impressions, conclusions and opinions and thus falls within the absolute work product privilege." *Id. at 80.*

"We hold that the order entered compelling the petitioner to answer [the interrogatory at issue] is contrary to the

The Appeals Court in City of Long Beach v. Superior Court agreed, and drew a distinction between persons having knowledge of relevant facts and witnesses who will be called to testify at the trial. "According to the great weight of authority pretrial discovery rules such as ours which allow the discovery of the identity of persons with knowledge of relevant facts do not sanction compelling the disclosure of the non-expert witnesses intended to be called at trial." [64 Cal.App. 3d 78].

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clear legislative proscriptions against disclosure and discoverability of writings embodying an attorney's impressions, conclusions, opinions, research or theories 'under any circumstances.' Further, its enforcement would thwart the legislatively expressed policy 'to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases." [Citing to former Code Civ. Proc. §2016(g)] Such an order, whatever its momentary advantage, is not calculated to improve the adversary process. Let a peremptory writ of mandate issue as prayed."

With the City of Long Beach v. Superior Court decision in mind, how should plaintiffs answer interrogatories aimed at discovery of their general damages witnesses? As always, the answer is going to depend partly on the phrasing of the interrogatory. If the interrogatory specifically seeks the identities of general damages witnesses *who Plaintiff intends to call at time of trial*, then clearly the response should consist of an objection based on work product privilege, as discussed in the opinion above. If the interrogatory seeks the identities of witnesses having knowledge of relevant facts pertaining to Plaintiff's general damages, then Plaintiff's counsel may be remiss in blowing off the question entirely, as there may be some judges who agree with the defense and issue a ruling that plaintiffs may not appreciate.

Going forward, it is probably wise to learn from clients at an earlier stage in discovery who in their life has knowledge about their damages and provide the identities of these people in response to interrogatories such as those listed above, subject to work product objections pertaining to who Plaintiff will be calling at trial. That way, the defense will have no chance to block general damages witnesses.

Going forward, it is probably wise to learn from clients at an earlier stage in Discovery who in their life has knowledge about their damages and provide the identities of these people in response to interrogatories such as those listed above, subject to work product objections pertaining to who Plaintiff will be calling at trial. That way, the defense will have no chance to block general damages witnesses. And if the defense wishes to depose damage witnesses earlier in litigation? So be it. Chances are, we learn valuable information about our case at an earlier stage, and that's always a good thing.

***

Kirill B. Tarasenko is a CCTLA Board Member. He can be contacted at at (916) 542-0201 or at Kirill@tarasenkolaw.com.

CCTLA members: Share your experiences, verdicts, lessons learned

CCTLA is seeking legal-themed articles for publication in its quarterly publication, *The Litigator,* which presents articles on substantive law issues across all practice areas. No area of law is excluded. Practice tips, law-practice management, trial practice including opening and closing arguments, ethics, as well as continuing legal education topics, are among the areas welcomed. Verdict and settlement information also welcome.

The Litigator is published every three months, beginning in February each year. Due to space constraints, articles should be no more than 2,500 words, unless prior arrangements have been made with the CCTLA office.

The author's name must be included in the format the author wishes it published on the article. Authors also are welcome to submit their photo and/or art to go with the article (a high-resolution jpg or pdf files; website art is too small).

Please include information about the author (legal affiliation and other basic pertinent information) at the bottom of the article.

For more information and deadlines, contact CCTLA Executive Director Debbie Keller at debbie@cctla.com.

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

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Verdict: $1.4 Million

CCTLA Past President Rob Piering and John Beals won a $1.4-million jury verdict after a seven-day trial for a six-car motor vehicle collision where the defense offer was $150,000, and the plaintiff served a $349,000 CCP 998 demand.

In 2016, a propane truck rear-ended one car, which was pushed into another car and then into the plaintiff's vehicle. Dash camera footage from the truck was extremely beneficial for the plaintiff despite that fact the defense went all in with an accident reconstruction expert, biomechanics and full animated simulation. Piering and Beals used that to their advantage as much as possible, suggesting the high-tech defense was nothing more than a red herring.

Plaintiff denied any injuries at the accident scene, but six days after the crash, presented to a chiropractor. In his initial appointment, Plaintiff did not complain of any low-back pain. The chiropractor, however, felt there were spasms in the low-back region and diagnosed a lumbar strain.

After several months of chiropractic care, Plaintiff was referred for pain management and underwent a lumbar MRI. That revealed herniations at L3/4 and L4/5. All other regions of the lumbar spine were clean, and the treating pain management doctor concluded the herniations arose out of the crash. Plaintiff received eight epidural steroid injections in the four years leading up to trial and also was seen by a spinal surgeon, who opined our client would need a two-level fusion within the next seven to 10 years.

Plaintiff was 28 at the time of the crash, worked as a delivery driver for a local printer and had no pre-existing back issues. He did have an admitted two-year history of insidious neck complaints but no real treatment though he was involved in a minor crash a year before the subject crash and had four chiropractic sessions for neck and mid-back pain. He was married with two young children and had not worked since the date of the crash.

There was no claim for past or future loss of earnings because it was obvious he could work: he chose not to do so after the crash and became a homemaker. The biggest challenge to any quality of life impairment arguments (general damages) was his passion for outdoor activities, including camping, fishing and deer hunting. Despite all of our written instructions and constant advice to the contrary, Plaintiff posted pictures of himself camping, fishing and hunting after the date of the subject crash.

The court excluded pictures of the plaintiff with any (dead) deer, but the defense was able to get a picture into evidence showing him standing on a mountainous peek with his deer rifle. That photo was a centerpiece of the defense's closing. Knowing the defense would seize on the activities which the plaintiff was able to continuously engage in after the crash, Piering and Beals decided to embrace Plaintiff's passion and the effort to live life to the best of his ability from the moment they began *voir dire* through closing.

Defense's accident recon/biomech concluded the rear impact to Plaintiff's car was 11.2 mph and frontal impact into the car in front of him was 8.0 mph. He suggested the forces were consistent with strain/sprain injury. Piering and Beals contrasted those opinions with the dash-cam footage of the incident, vehicle photographs and the defense medical examiner's opinion.

Defense IME testified the plaintiff had a chronic low-back injury from the crash, and while he opined the herniations were not caused by the crash, he did admit they were made symptomatic by the crash (bingo!). Defense IME also opined any future surgery would be due to pre-existing degenerative issues as opposed to the crash. The defense IME was a general orthopedic, as opposed to an orthopedic spine surgeon, and Plaintiff's attorneys made much of that because they had the future surgery opinion.

Plaintiff had no health-care insurance so all past meds were on a lien. He sought past meds of $89,000 ($14,000 was chiro) and future meds of $355,000-$415,000. Defense had billing expert Tami Rockholt testify that past meds should be $40,000 and future meds should be no more than $115,000. She came across very poorly in trial, wasn't able to tell how much work she had put into the file, wasn't able to tell what the cost of local pain management services were, testified an ESI should be $750 whereas an MRI $3,900, and used the 85th percentile from a database that she knew very little about as a magic number for the cost of all past and future meds.

Plaintiff asked for $1.6 million, and after a day of deliberations, the jury awarded $1.4 million. Past medicals were $89,000; future meds $400,000; past general damages $150,000; and future, $760,000

Defense argued $40,000, at most, for past meds for soft-tissue injury, $5,000 for future meds and nothing for future surgery. Defense gave no numbers for general damages and argued client's activities were no different after the crash, so if anything was awarded, it should rather minimal.

Resolving THAT Case: Sometimes It's Worth Waiting It Out

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Capitol City Trial Lawyers Association
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CCTLA COMPREHENSIVE MENTORING PROGRAM — The CCTLA Board has developed a program to assist new attorneys with their cases. For more information or if you have a question with regard to one of your cases, contact: Dan Glass at dsglawyer@gmail.com, Rob Piering at rob@pieringlawfirm.com, Glenn Guenard at gguenard@gblegal.com, Chris Whelan at Chris@WhelanLawOffices.com, Alla Vorobets at allavorobets00@gmail.com or Linda Dankman at dankmanlaw@yahoo.com

FEBRUARY

Friday, Feb. 28
CCTLA Luncheon, Noon
Topic: *"The State of the Sacramento Court and Judiciary: 2020 and Beyond"*
Speakers: Judge Russell Hom and Judge Michael Bowman
Sacramento County Bar Association
CCTLA Member Cost: $35; Non-member, $40

MARCH

Tuesday, Mar. 10
Q&A Luncheon: Noon
Shanghai Garden,
800 Alhambra Blvd.
(across H St from McKinley Park)
CCTLA Members Only

Fri-Sat, Mar. 13-14
CAOC/CCTLA Sonoma Travel Seminar
Contact CAOC for details: 916-442-6902

Thursday, Mar. 26
CCTLA Problem Solving Clinic
5:30-7pm
Topic: *"How to Deal with Difficult Case Facts and Challenges"*
Speaker: John Demas
Location: Arnold Law Firm
CCTLA Members Only; $25

Friday, Mar. 27
CCTLA Luncheon, Noon
Topic: TBA; Speakers: TBA
Sacramento County Bar Association
CCTLA Members Only; $35

APRIL

Tuesday, Apr. 14
Q&A Luncheon: Noon
Shanghai Garden,
800 Alhambra Blvd.
(across H St from McKinley Park)
CCTLA Members Only

Thursday, Apr. 16
CCTLA Problem Solving Clinic
5:30-7pm
Topic: *"Taking on the Defense Biochemical Engineer*
Speaker: Travis Black
Arnold Law Firm
CCTLA Members Only; $25

Friday, Apr. 24
CCTLA Luncheon, Noon
Topic: *Voir Dire*
Speaker: Lawrance Bohm
Sacramento County Bar Association
CCTLA Members Only; $35

MAY

Tuesday, May 12
Q&A Luncheon: Noon
Shanghai Garden,
800 Alhambra Blvd.
(across H St from McKinley Park)
CCTLA Members Only

Friday, May 15
CCTLA Luncheon, Noon
Topic: TBA; Speakers: TBA
Sacramento County Bar Association
CCTLA Members Only; $35

Thursday, May 21
CCTLA Problem Solving Clinic
5:30-7pm; Topic: *"Interpleaders"*
Speaker: Matthew Erickson
Arnold Law Firm
CCTLA Members Only; $25

JUNE

Thursday, June 4
5-7:30pm
CCTLA's 18th Annual Spring Reception & Silent Auction
Ferris White Home
1500 39th Street, Sacramento

Thursday, June 9
Q&A Luncheon: Noon
Shanghai Garden,
800 Alhambra Blvd.
(across H St from McKinley Park)
CCTLA Members Only

Thursday, June 18
CCTLA Problem Solving Clinic
5:30-7pm; Topic: TBA
Speaker: TBA
Arnold Law Firm
CCTLA Members Only; $25

Friday, June 26
CCTLA Luncheon, Noon
Topic: TBA
Speakers: Bob Buccola, Ryan Dostart and Robert Nelsen
Sacramento County Bar Association
CCTLA Members Only; $35

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