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The LITIGATOR

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Inside

The state of the Court as Covid-19 continues to disrupt

Joe Weinberger
CCTLA President

Truckin', like the do-dah man
Once told me, "You've got to play your hand"
Sometimes the cards ain't worth a dime
If you don't lay 'em down

Sometimes the light's all shinin' on me
Other times, I can barely see
Lately, it occurs to me
What a long, strange trip it's been
—from "Truckin," by The Grateful Dead

As we move from summer into fall in the age of Covid-19, once again I am writing a far different President's Message than I intended. I hope that you all are staying safe and are finding ways to maintain your practices.

On Aug., 6, 2020, Presiding Judge Hom met with the Civil Advisory Committee to discuss the status of the Sacramento Superior Court and its plans to proceed forward with the Civil Bar. According to Judge Hom, 95% of the court system is operational. As you know, according to the March order of the Court, all civil matters were continued until further notice. This meant that approximately 950 trials were taken off the books. The Court is now attempting to put the cases back on schedule and to the extent possible, and keep the cases in order so that those that were approaching their trial dates will be given some degree of priority when rescheduling.

The Court is setting its first civil trials to begin on Jan. 21, 2021. Mandatory Settlement Conferences will start this November. The current plan is to reset matters in groups, starting mid-August. There will be 50 cases given notice of a trial-setting conference. The parties will be given one week to meet and confer on a trial and MSC date and make that choice using the Court's online program (This is the same process as existed prior to Covid-19). If a choice is not made by the parties, the Court will select dates on your behalf.

In addition, Department 47 will be hearing Motions for Preference for those parties that fit within the requirements of Civil Code §36. Department 47 will also entertain Motions for Preference on other special issues if the parties do not meet these requirement at the discretion of the court.

The Case Management Program is not currently operating since the process to

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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.

Required Vehiclel Use Exception to the Going & Coming Rule

Teresa Savaikie v. Kaiser Foundation Hospitals
2020 DJDAR 7447 (July 16, 2020)

FACTS: Steger voluntarily took his dog to Kaiser assisted living facilities in his personal vehicle to provide pet therapy to Kaiser patients. Kaiser did not require pet therapists to use their own vehicles; they could use any transportation available. Kaiser did not provide mileage reimbursement for pet therapists. Kaiser required pet therapists yearly to show they had a driver's license and proof of vehicle insurance. On July 16, 2015, Steger struck 14-year-old Wyatt Savaikie as Steger was driving home after providing dog therapy to a Kaiser patient at an assisted living facility.

Wyatt's mother, Teresa Savaikie, sued Kaiser. Kaiser moved for summary judgment on the ground that Steger was not at work, that Kaiser was not liable under the "going and coming rule."

ISSUE: Was Steger within the course and scope of his employment?

RULING: No. (Defendant wins.)

REASONING: The court found that Steger had left the location where he was providing dog therapy and had no intention of returning to work further that day. After the pet therapy session, Steger went to his credit union to make a deposit unrelated to his volunteer work for Kaiser. Steger had left the credit union and was on his way home at the time of the incident.

The court found no evidence that the required vehicle use exception to the going and coming rule applies in this case. Plaintiff argued that Steger's use of his personal vehicle provided an incidental benefit to Kaiser, and therefor Kaiser should be liable. This exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment. Hinojosa v. Workman's Comp Appeals Board (1972) 8 Cal.3d 150, 152. In the present case, however, Steger was not required to drive his own vehicle to therapy sessions. Kaiser did not encourage or rely on Steger's use of his own automobile. Additionally, there's no evidence Kaiser derived a different or additional benefit from Steger's use of his car to commute to the therapy session than it would have received had he used any other form of transportation.

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TO ZOOM OR NOT TO ZOOM, THAT IS THE QUESTION

By: Noemi Esparza, CCTLA Board Member

Almost overnight, the pandemic forced us into a virtual world with an over dependence on technology. While some of us have used technology in our practice, it has not been to the extent in which we have been doing so since the pandemic. I have read articles touting the use of technology and virtual depositions as if it is the wave of the future. Is it really? Perhaps, in some respects. We are certainly fortunate that we can use technology to proceed with our work when we are forced to do so remotely. However, remember that the practice of law is an art form; at least it is in our world. To be a great trial lawyer, you must perfect many skills. If you ever watch any of the best trial lawyers, the qualities you will always see are the ability to read people and the ability to connect with them. That is what jury selection is all about. Even before jury selection occurs, however, much preparation is required.

One of the key ways in which we prepare is by conducting depositions. While the use of virtual depositions, whether it be by Zoom or another platform, allows us to keep cases moving forward, it is not without disadvantages. The ability to read the room and size up the deponent or opposing counsel is limited when you are looking through a screen. There is also the inability to control situations. If you take a virtual deposition in which opposing counsel is in the room with their expert, for example, it is impossible to know whether opposing counsel is engaging in unethical or improper conduct. Beyond the human interaction limitations, there are technological issues to be aware of as well.

In most of the depositions I have had during the pandemic, technological glitches or delays have occurred. My first deposition during this pandemic was of my client. I was already apprehensive about not being in the same room as her, but I could not think of a reason not to move forward. The experience led me never to choose a virtual deposition, if given the choice now. For one, the court reporter had little to no control of the technological options because she was not the "host" of the meeting. Someone back in headquarters was the host. This meant that the court reporter had to call headquarters if we needed to make a change in the way the video was working. On this occasion, we immediately discovered that the video default as to who is shown on the biggest screen could not be changed. The big screen would show whomever uttered a sound, even a shuffling of papers. That meant that the screen bounced constantly from person to person, even when that person was only coughing. We had to wait while the court reporter called the court reporting office to make the change, which they decided was to keep the screen on the deponent. This was a better option, but I still could not see any of the other participants.

Another glitch involved a delay in the audio, which proved to be problematic in a number of ways. For example, when I objected, my client had already begun her answer. There was no time for my client to take a cue from my vague and overbroad objections that perhaps she needed to think about the question before spitting out an answer as if she were on a game show. In addition, the issue of talking over each other was worse because of the delay; it occurred much more frequently, and it became much more irritating. What could have been a smoother, shorter, deposition had we all been in the same room turned into a longer more challenging deposition. I was in another deposition where the screen froze. Fortunately, it was opposing counsel's screen that froze mid-sentence, and I was in the same room as my client. What if I was not with my client, and it was my screen that froze? How long would it have taken everyone to realize that I was no longer present while my client was being questioned?

Handling exhibits was another nightmare when opposing counsel did not provide all their expert's materials ahead of time as they were supposed to do per code. While that occurs whether you are virtual or not, it is much easier to skim through and organize the documents you will use when you have them physically in your hand. Additionally, handling exhibits through file sharing programs can be cumbersome. Regardless of the size of the

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screen, even a one-page document may require awkward scrolling, which is not what you want to be dealing with when you are trying to focus on the goal of your deposition. If you have never done a virtual deposition, and you do not know how to "share" documents or mark them as exhibits, then you are now wasting time doing so during your deposition, which means you are paying more for the court reporter and the expert's time.

THE SOLUTION?

There is not one catch-all blanket solution for all cases or scenarios except for avoiding the virtual deposition from the start, unless it is a client deposition. When my client is being deposed, I ask him if he is comfortable coming to my office where we can safely be socially distant. If so, then I have no problems with opposing counsel taking the deposition virtually. Technological glitches will not affect my ability to communicate with my client or protect him during the proceeding. This allows me to have much more control over the deposition environment.

If, however, your client is sheltering in place and it will be detrimental to postpone his deposition, then preparation is the key. This is especially so when you are taking a deposition of a witness or expert. The following are a few tips to make things run as smoothly as possible.

Talk to Court Reporting Company

If you have never done a virtual deposition or never worked with that a particular court-reporting agency, talk to them in advance of your deposition. Ask for a tutorial. Practice sharing documents on screen and learn how to mark exhibits. Ask the court-reporting agency who will be controling the technological aspects during the deposition. If it is not going to be the court reporter, make sure you discuss how you want the video to work. It will not hurt to get the name and number of the person who will have the ability to make changes at the time of the deposition. Do not assume your court reporter assigned to your deposition will know.

Test the Connections

At least an hour before the deposition, test video and audio connections. Make sure you know who to call for any technical issues you cannot troubleshoot. If you are in the same room with your client and you both have a separate screen, it is highly likely that you will hear audio feedback, which will make it impossible to understand, let alone bear the noise. Telephone audio connection through a landline in this scenario is best. In most situations, you will have better sound through a landline phone connection.

Prepare Exhibits

Prepare exhibits beforehand, assuming you have them in advance. Mark them in advance, as well, if possible. Ideally, if you can distribute them beforehand to all parties, it will obviate the need to determine how to share them virtually, live. If that is not an option, plan how you will distribute them live. Decide whether you want to use a cloud-based file transfer service, such as ShareFile or Dropbox, and set up in advance, to allow you to send the documents via link to all participating parties. You can also show documents on screen for your deponent to see and discuss. Again, it is important that you learn how to navigate documents on screen in advance if you have never done so before. Court-reporting agencies equipped to conduct virtual depositions can show you how to utilize the screen-share feature to present documents and how to use the tools to mark exhibits or mark up the document.

OTHER MISCELLANEOUS TIPS

Client Depositions: Do not forget to mute your station when going on breaks. If you do not get into the habit of muting your station and your client's if they are in the room with you, you risk disclosing confidential conversations. If you are not able to be in the same room with your client, use hand signals to stop your client from answering prior to you making an objection. Prepare your client in advance to alert them to stop speaking if your hand goes up.

Witness Admonitions: Ask the deponent to agree not to communicate with others or seek answers in any way during the deposition. In an in-person deposition, you do not need such an admonishment, but in a virtual deposition with the many ways in which a deponent can have conversations via chat room or text during questioning, without your awareness, it is important you let the witness know that is unacceptable.

Participants to the Deposition: Make sure you know the identity of each participant to a virtual deposition. Given the ability to listen in without using a camera, it may escape you that someone is present that you do not know. An unknown number could be an unannounced person listening. You need everyone to be accounted for, whether he or she has a right to be there or not.

While this is not an exhaustive list of issues that can arise in a virtual setting, nor a list of all possible solutions, it may help you decide and plan your next deposition, especially those of you who have not yet participated in a virtual deposition. Like anything else in our practice, the decision should be made on a case-by-case basis. It may not always be a bad idea to go virtual. The question we must ask ourselves is whether it makes sense from a strategic standpoint to do it virtually in this case, for this deposition. If so, prepare, prepare, prepare.

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The state of the Court

Continued from page one

monitor cases is still being developed. Information regarding short-cause civil cases and examinations of judgment debtors will be coming soon.

The Court is willing to entertain Bench Trials on an expedited basis because it doesn't tax the system as much. With the absence of a jury, there is room to accommodate the cases in just one courtroom.

The logistics of having jury trials in the current building is somewhat daunting. It is anticipated that 14-16 jurors will be spread out, with up to four jurors in the jury box, and the remainder of the jury sitting in the audience chairs. This will mean that some jurors will be behind you as you try the case and some can be quite far away from witnesses. If you have a document-intensive case, you may want to consider bringing in additional monitors so that all of the jury can see the document as well as witnesses.

Jury selection will also be complicated. The courts will be using three courtrooms to fit in the jury pool, so that two sections of the jury will be observing the proceedings remotely. This will mean that as the jury pool is reduced, people from a different courtroom than you will be brought in. You may want to consider having a staff member sit in the remote jury rooms to observe the panel while you are in the live courtroom. To further complicate matters and to provide adequate social distancing, the court will only be having two jury panels per floor.

In other matters, the Court has placed the decision to have a dedicated Civil Bench on hold. We continue to express our concern to the Court that there is a lack of experience on the Bench with the issues of a civil trial. At this time, there are very few judges with a civil background. Most of the judges come from a criminal or bureaucratic background. We are hoping that with the development of a Civil Bench we can develop a rapport with the judges so that they become familiar with the intricacies of our cases.

Judge Brown discussed the state of the Law and Motion Department. It is currently hearing matters Tuesday through Thursday with each judge hearing 30 matters a day. It is also hearing ex parte matters five days a week.

As I already mentioned, Mandatory Settlement Conferences will restart this November. MSCs will be Monday through Thurs, at 9:30 am and 1:30 pm. Judge Davidian will be handling one matter each session; however, he still needs volunteer judge pro tems for other sessions. The program is currently designed so that the pro tem will travel to Department 59, where a computer monitor will be set up to allow for Zoom conferencing. At most, the department can handle up to four conferences per session. Judge Davidian has already sent out an email for volunteers to those who are currently on his list. If you would like to volunteer, please complete the online application. If you want to discuss this matter, I would be happy to talk with you.

The construction of the new courthouse continues to proceed. There has been some demolition work done on the property, and courthouse construction is in the bidding process. The Court still anticipates opening the courthouse as scheduled. In a mixed bag, Judge Perkins will be retiring from the bench on Sept. 30, 2020. We all wish him the best in his future endeavors. He has been a true asset to the bench and the Civil Bar, and his absence is a true loss.

So that is the state of things right now. We hope that we will be able to return to a more regular schedule in the months to come. In the meantime, please stay safe.

Think "BIG PICTURE" with the DME

Focus your time on making a few big points. Address those big points so when you come to trial, the jury will see and understand your point without having to follow a lot of detailed information.

By: Peter Tiemann, CCTLA Board Member

I am preparing to take a defense medical examiner's (DME's) deposition in a spine injury case. While it is good to have a detailed outline of the topics you must cover, focusing on hyper-technical points can distract you from your objective and give unintended credibility to the defense medical examiner. Careful thought and preparation are required to identify *prior* to taking the deposition what you want the jury to focus on, retain and use during deliberations. It is critical to think "big picture."

Focus your time on making a few big points. Address those big points so when you come to trial, the jury will see and understand your point without having to follow a lot of detailed information.

Let me give you one example of looking at the big picture and some points that you should be able to make with every defense medical examiner. You can always get the defense medical examiner to agree with basic medical principles, such as, there are many different potential pain generators in the spine, that car crashes can cause injuries, that if conservative treatment fails surgery can help, that asymptomatic disc can become symptomatic after trauma, that symptoms can wax and wane, and that patients can reasonably utilize conservative treatment for years and years.

Examining the defense medical examiner on general medical principles has the additional benefit of making a positive impression with the jury; that you have won the battle with the expert; that you extracted concessions. It is important to create the impression that you won the cross-examination fight, even if the expert maintains that your client was not seriously injured.

Establishing general medical principles can be easily and effectively done with most defense medical examiners. In addition, it has the added benefit that if done effectively it can buttress the financial bias argument that the defense medical examiner is a hired gun. The short examination below undermines most of the defense positions, and can be done calmly and without conflict, in a "soft cross" style. The questions individually seem benign, but when combined, the answers create simple, fundamental truths that support your case and your expert.

SPINE SOFTBALL

I think we all need to relax a little bit when taking the defense medical examiner's deposition. It's okay to use more than one approach during the examination, and a "soft cross" style is well-suited to getting the expert to agree with your questions. Also, since we are video-recording our expert depositions, the "soft cross" technique really makes you look reasonable and respectful, especially if you play this segment in your case and chief before they call their expert pursuant to California Code of Civil Procedure 2025.620. (*CCP 2025.620 allows you to play the experts deposition at any time when properly noticed*).

The main purpose of "spine softball" is to get the defense medical examiner to agree with basic medical principles which are consistent with the defense medical examiner's own experience with his patients. For example, the history and onset of injury is the same, such as a car crash or some other traumatic event; the complaints and symptoms are the same, such as pain and radiculopathy; the diagnostic test results are the same, such as a positive disc-finding on imaging.

When playing spine softball with the defense medical examiner, you want to use the facts in your client's records while not using your client's name. Just as important is that you are

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creating with the jury the positive impression that the expert is agreeing with you. Look at the rhythm of this cross, which usually results in concession, concession, concession. I have used this technique with hardened defense medical examiners, with very little resistance.

Pain generators

- *Dr. Difficult, can we talk a little about the spine?*
- *Somebody can have low back pain, and that pain can be caused by a number of different pain generators. Would that be true?*
- *One pain generator can be muscle around the low back, true?*
- *One pain generator can actually be the vertebral bodies themselves in the lower back, true?*
- *Another pain generator in the low back can be the nerves in the lumbar spine, true?*
- *It can be a specific nerve that is next to a specific disc level, true?*
- *Would you agree that the disk itself, if it is damaged, can be a pain generator?*
- *That is sometime referred to as discogenic pain, true?*

. . .

Surgery

- *Have you seen surgeons operate on someone who has a discogenic pain? (in surgical case)*
- *And one surgical procedure that can be done to address discogenic pain would be a disk replacement.*
- *And one surgical procedure that can be done to address discogenic pain would be a fusion.*

...

Conservative care

- *If someone comes to you with low back pain, do you try and address their symptoms with what's known as conservative treatment first?*
- *And conservative treatment can be physical therapy, chiropractic care, rest, some light exercise, medication, true?*

....

Asymptomatic vs symptomatic

- *Can somebody have a disk herniation in their lumbar spine that is asymptomatic?*
- *Can somebody with an asymptomatic herniation in their lumbar spine, can that condition be made symptomatic in a traumatic event like an automobile crash?*
- *If a disc herniates without any nerve compression or nerve irritation, the disk itself can be a pain generator, true?*

...

Good and bad days

- *Have you had patients with symptoms that wax and wane over, say a day or a week?*
- *Have you also had patients who have had radicular symptoms that vary depending on the position their body is in?*
- *Have you had patients who complained that their radicular symptoms are worse if they sit for a long period of time?*
- *Have you had patients who have said their lumbar symptoms are worse if they stand for a long period of time?*
- *Did some patients tell you they get relief if they stand up and sit down frequently?*
- *Can a person manage chronic low back with conservative treatment?*
- *Have you had patients who have managed low back pain that is chronic in nature with conservative care for, say, over a 10-year period?*

...

Role of imaging

If a patient fails conservative treatment for, say, low back pain, and they are still symptomatic after the conservative treatment, would you recommend that the patient obtain some type of imaging studies like an MRI?

And the reason you would obtain some imaging studies like an MRI if the patient was still symptomatic after conservative care be to see if there's any pathology in their spine that correlates with their symptoms?

And imaging like an MRI can show if there is pathology at the disk, such as a herniation extrusion, protrusion, bulge, true?

An MRI can also show if there is foraminal stenosis, correct?

An MRI can also show if there is central canal stenosis, correct?

Fundamentals of symptoms and the path to surgery

Would you agree that radiculopathy can be any of the following symptoms: numbness, weakness, pain, or tingling down a specific dermatomal pattern?

Stenosis can produce radicular symptoms, correct?

If somebody has moderate foraminal stenosis, can that be a surgically correctible?

And if somebody has foraminal stenosis, say, on the right side, you would expect if that patient were to have any radicular symptoms and it was related to the right-sided foraminal stenosis, that their radicular symptoms would also be on the right?

If somebody fails conservative treatment and there is pathology seen on the MRI relating lumbar spine, one type of treatment that the patient can consider with their doctor is pain management treatment, meaning injections, correct?

And by spinal injections, there are two that are predominantly used for the spine. One would be epidurals and the other would be facet blocks, correct?

Would you agree that epidural injections can be both therapeutic and diagnostic in nature?

If a patient who has lumbar pain and radiculopathy, if they fail pain management such as epidural steroid injections, one option that may be available to them to treat their pain would be surgical intervention, true?

...

Once you have completed the defense medical examiner deposition and are at trial, approach your cross of the defense medical examiner from a "big picture" view. Being hyper-technical is a losing battle with a seasoned pro, and it can also leave the impression with the jury that you lost the cross-examination.

In conclusion, make big points from what the defense medical examiner has agreed with:

(1) a lot of things can generate pain in the back
(2) there are myriad different symptoms, including pain and numbness
(3) sometimes there is normal aging in the spine which is not painful, but trauma can make it painful
(4) when conservative treatment fails they have to do surgery
(5) symptoms fluctuate depending on what the person is doing
(6) MRIs can show the damage

Of course, he or she will maintain your client is not injured, but remind the jury that she is paid tens of thousands to say your client was not hurt, or has recovered.

***

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Common Pain Types

Neuromuscular Pain *causes muscle pain and nerve pain, can take place anywhere in the body.*

Neck Pain *causes the neck to be tense and stiff, making it difficult for one to move their head at all.*

Low Back Pain *creates difficulty performing easy everyday functions, like going to the bathroom.*

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Lessons learned from handling a traumatic brain injury case

By: Drew Widders, CCTLA Board Member

Last month, I resolved a minor impact UIM claim one day before the start of arbitration. The client came to my office just before the statute of limitations was set to run on the third-party claim. While I have handled concussion cases before, this is the first case I litigated where the client sustained a concussion/traumatic brain injury (TBI) from a minor-impact collision.

The collision occurred as my client was driving down a residential street. The client was sideswiped by a vehicle coming out of a grocery parking lot. The alleged delta-v to my client's vehicle was 1.6 mph. The client claimed some dizziness at the scene, but it was not documented in the records. The only complaint in the ER records attributable to a concussion was a mild headache. The client continued to have post-accident headaches and dizziness; however, the first time a concussion/TBI was diagnosed as a possible cause of the client's symptoms was 10 months post-accident. The client was also having some memory issues, but these were not diagnosed until a year post-accident. While there was significant UIM insurance, the carrier refused to offer much money, given the minor impact and 10-month delay in diagnosis.

One of the problems with a concussion/TBI case where the client suffers from lingering cognitive issues is that the concussion generally does not show up on a CT scan and most MRIs. Given the lack of a visible injury, adjusters, defense attorneys and juries seem to be very skeptical of the claimed long-term effects of the concussion, including deficits in perception, processing, and memory problems.

The defense may also argue, as they did in my case, that the lack of findings on a CT scan and a normal Glasgow Coma Scale score in the ER are evidence of no concussion/TBI. It should be argued in response that these two tests are limited to diagnosing a neuro-surgery emergency (e.g. brain bleed), not a concussion.

In any mild TBI case, early on you should get a good radiologist experienced with TBI litigation to review the imaging. For example, where an MRI is initially read as normal, the radiologist may be able to see subtle evidence of a brain injury. There are also newer MRIs that can be used by the expert radiologist to show visual signs of a mild-TBI including an MRI w/SWI and DWI. Obviously, showing a visible injury to the brain on an MRI would have a significant persuasive impact.

Without any visual evidence of a brain injury in my case, we relied on the traditional approach, the definition of a concussion backed up by expert support. The definition of a concussion has changed over the years.

The defense expert in my case argued my client's symptoms did not support the diagnosis of a concussion. According to the defense expert, a broad consensus exists on the requirements for a diagnosis of a concussion. The expert asserted the World Health Organization, American Congress of Rehabilitation Medicine, American Psychiatric Association, and the CDC all require that at least one of the following be present to diagnose a concussion:

1. loss of consciousness
2. alteration of consciousness, such as confusion, disorientation, or inability to carry out a sequence of goal-directed actions
3. a gap in memory for events surrounding the concussion (post-traumatic amnesia)

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4. focal neurological signs, such as abnormal brain imaging or seizure

Their expert argued that per the CDC, symptoms such as headaches, memory difficulties, concentration problems, dizziness and blurry vision can be used to support a diagnosis of concussion, but they are not sufficient in themselves to make the diagnosis. The expert stated that because my client did not complain of any of the above four "requirements" and only complained of a headache in the ER, the client could not have had a concussion and therefore was not suffering from the lingering effect of a TBI.

The CDC statement their expert was relying on, however, was from a report to Congress in 2003. The CDC regularly submits reports to Congress on concussions/TBIs that are available online. Both my expert and the current CDC criteria as of 2015 used a broader definition that does not state that headaches, dizziness, etc., cannot be used to make a diagnosis of a concussion. My expert relied on the definition from the American Association of Neurological Surgeons that defines a concussion as any temporary loss of normal brain function.

The CDC, in a *2015 Report to Congress, Traumatic Brian Injury in the United States*, also defined a concussion broadly and stated that the "CDC defines TBI as a disruption in the normal function of the brain that can be caused by a bump, blow or jolt to the head or a penetrating head injury."

The CDC goes on to list signs of a concussion that are broad and would include the post-accident dizziness my client complained of at the scene. As stated by the CDC, observing one of the following clinical signs constitutes an alteration in brain function:

a. Any period of loss of or decreased consciousness;
b. Any loss of memory for events immediately before (retrograde amnesia) or after the injury (post-traumatic amnesia);
c. Neurologic deficits such as muscle weakness, loss of balance and coordination, disruption of vision, change in speech and language, or sensory loss;
d. Any alteration in mental state at the time of the injury such as confusion, disorientation, slowed thinking, or difficulty with concentration.

Given the above, my expert could state with confidence that my client's complaint of dizziness at the scene and headache at the ER supported the diagnosis of a concussion. My client also reported no loss of consciousness to the ER doctor. While this does not exclude a diagnosis of a concussion, when the medical records state no loss of consciousness, it is still important to question the client more about the facts surrounding the collision.

A client's inability to remember circumstances surrounding the crash, not recalling a loss of consciousness, and/or striking their head, can support the concussion element of a loss of memory of events before or after injury.

Another typical defense is that almost all single instances of a mild concussion resolve in three months. Much of the literature does not support this claim. For example, the defense expert in my case had strongly relied on the CDC's reports to Congress for the alleged requirements of a concussion/TBI. I found a 2013 report where the CDC stated that the estimates indicate that 10% to 50% of persons with a mild TBI experience long-term health issues such as persistent headache, difficulty with memory or concentration, or mood changes. (See *CDC Report to Congress on Traumatic Brain Injury 2013*, page 33.)

Another tool for cases where your client may have suffered a TBI is a checklist for your client and a family member / support person to fill out. Clients may not realize they are experiencing the lingering effects of a concussion until they sit down and go through the checklist. In addition, a family member / support person can add insight into how the traumatic brain injury is impacting the client.

If you would like a copy of a TBI checklists, just send me an email at dwidders@wilcoxenlaw.com.

In closing, a TBI can have a profound impact on someone's life, including the need for attendant care in the future. Recognizing a TBI case with the careful use of checklists, the appropriate experts, imaging and being prepared to respond to the typical defenses, will hopefully help resolve these cases for the compensation the client deserves.

***

Drew Widders, a member of the CCTLA Board, is associated with Wilcoxen Callaham, LLP. Widders can be reached at (916) 442-2777.

MENTORS CHANGE LIVES; Cliff Carter Changed Mine

By Amar Shergill, CCTLA Board Member

CLIFF CARTER

AMAR SHERGILL

Cliff Carter was my supervising attorney during my two years at the Arnold Law Firm, and he altered the course of my life for the better. He passed recently, leaving behind a loving wife, children, and all those whose lives he touched. Since his passing, I have learned from social media posts that there is a long list of people who Cliff graced with his passion to serve others. I am thankful to him for taking the time to make me a better attorney, one who understood the practice of law, the business of law, and how to build on both to serve the community.

Whenever I am asked to speak to young attorneys or law students, I always discuss "The Business of Law." It's a topic that is rarely addressed in law school but truly is the difference between a successful career that is fulfilling or the drudgery of a job that fills our days as a means to an end. I remember long conversations with Cliff as he explained how and why a personal injury law firm does what it does. Marketing, client management, cost control, investing in the business and attorney relationships were all topics that he would gladly entertain. He was direct, honest and practical with me and had the same reputation in our legal community.

What I learned in his presence is what I rely upon today to advocate for my community, serve my clients, and provide for my family.

As I type now, I am smiling because of the joy in Cliff's face when he regaled me with his latest litigation victory or laughed heartily as I told him about my own cringe-worthy error or triumph over opposing counsel. These are moments that I cherish. Cases take a long time to develop, and the machinations are truly only known to the attorneys on the case, and those, like Cliff, who take time to listen and understand.

During case reviews, Cliff would lay out the strategy, explain the likely opposition responses and pinpoint exactly how and where we would prevail. Far more often than not, he was right. My legal mind is thankful for every bit of the knowledge he shared; however, my heart reminds me that it was his joy in my success and commiseration in defeat which I valued most.

During my time at the Arnold Law Firm, Cliff encouraged me to seek opportunities to serve the legal community. I chose the novel path of working with a group of young attorneys to establish the South Asian Bar Association of Sacramento and to lead it as the founding president. I cannot tell you that this organization would not have been founded without the support of Cliff and our the firm, led by Clay Arnold, but it would have taken longer, and the fledgling organization needed the resources that the firm was happy to provide. At every step, Cliff was there to support the project because it held deep meaning for me, and he believed in me.

My legal mind is thankful for every bit of the knowledge he shared; however, my heart reminds me that it was his joy in my success and commiseration in defeat which I valued most.

When the time came for me to leave the Arnold law Firm, it was because I had

Continued on page 16

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grown as an attorney and wanted to build something for my community and my family that could not be accomplished without establishing my own firm. Perhaps the largest factor in that growth was the mentorship by Cliff Carter. I went to him first with my decision, and, although he was saddened by it, he was happy for me and encouraged me to do what he also saw as the best path towards my goals. While my decision was sure to affect his practice, he was never anything other than supportive and offered whatever aid he could.

As I mentor others in community leadership, the law and politics, I am thankful more and more for those who took the time to do the same for me. For those of you who are blessed with experience and patience, I encourage more of you to take on mentorship roles. It is our duty as one who has built on the success of others but you will also find it fulfilling in a way that few other professional tasks can offer.

For young attorneys, I offer the advice to seek out not the most successful attorney or the most driven, but instead, the ones who care about the people around them. They have the most to offer and are the most likely to share. It is my honor to be a part of an organization like the CCTLA that encourages these mentoring relationships and which was once led as president by my mentor, Cliff Carter.

Rest in peace and service, Cliff.

***

Amar Shergill, Shergill Law Firm, is the parliamentarian on the CCTLA Board and is an executive board member of the California Democratic Party, chair of the California Democratic Party Progressive Caucus, and managing committee member of the Sacramento Sikh Temple. He can be reached at (916) 564-5781.

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See the CCTLA Comprehensive Mentoring Program box, adjacent. It regularly appears on the back page of each issue of The Litigator, featuring participating CCTLA mentors and their contact information.

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:

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Linda Dankman:
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Tribute to Judge James L. Long

By: Donald H. Heller

Judge James L. Long (above) died peacefully on June 30, 2020, from complications of chronic obstructive pulmonary disease at the age of 82. Judge Long, or just "Jimmy" to the legion of people who simply knew and loved him over the past seven decades. Out of respect for that long tradition, I will refer to him as "Jimmy," unless otherwise indicated in respect to his office.

Jimmy was a person who cannot be enlarged in death more than he was in life, an extraordinary man of intelligence, compassion, kindness, competence and fundamental decency and whose passing left a great void in the lives of so many people of all walks of life and professions. These include judges, professors, lawyers, court personnel and the homeless who congregated at Caesar Chavez Park at lunch time and where Judge Long, on clear and warmer days, sat and ate his lunch and smoked a cigarette or two while providing a kind word of hope and occasional a few dollars.

The common denominator remembered is kindness–as Mark Twain remarked, "Kindness is the language which the deaf can hear and the blind can see." Jimmy's kindness touched people from all social and economic strata of life, all of whom were friends, but special to Jimmy were the poor and disadvantaged and to whom, Jimmy throughout his adult life made efforts both publicly and privately to benefit.

He was born in Wintergarden, FL. on Dec. 27, 1937, to James and Susie Long—as Susie recalled to this writer, "on the wrong side of tracks." The Longs had three children. June and Jimmy were born in Florida, and Elton was born in Sacramento in 1943. In 1942, the Longs drove across the country to McClellan Field (later McClellan Air Force Base) with June and Jimmy.

In Sacramento, the Longs found a better life and a place to raise their children, away from the overt bigotry that existed in the South when they lived there. James Long held multiple mechanic's jobs during and after World War II, both at McClellan and around Sacramento. Susie worked part-time in a local cannery and as a housekeeper.

Jimmy Long, despite poverty and racial injustice, was fortunate to have Susie Long—"Miss Susie" as she was known—dedicating herself to making her children successful by inspiring their education, which she had been denied by circumstance and skin color in Florida. Each of her children received a Catholic education, from elementary though high school. She worked two jobs to make that happen.

The results of Miss Susie's dedication was profound. Jimmy, Elton and June became successful lawyers, and Jimmy a successful judge. Elton retired as a highly regarded professor of criminal justice at Sacramento State University and passed in 2011. June served as a deputy attorney general in California and retired from that position after years of dedicated service. She lives in retirement in Sacramento County.

Jimmy attended Christian Brothers High School, not far from the family home in Oak Park. Hey was a good student and played baseball and basketball for Christian Brothers, and the school motivated Jimmy towards high achievement. He loved Christian Brothers High School and has given much back in gratitude. Jimmy was scouted by the Philadelphia Phillies; however, he decided to pursue a college education, as recommended by Miss Susie. Jimmy was affected by the reality that he had trouble hitting a curve ball, but was a "vacuum cleaner at shortstop."

He attended San Jose State College and received a Bachelor of Arts in psychology in 1960. After graduation, he became a Juvenile Hall counselor in Sacramento County, from 1961 to 1962, and then a deputy probation officer for the county.

In February 1961, Jimmy joined the U.S. Army Reserve Corps, serving honorably for eight years and achieving the rank of second lieutenant. He knew that if he wanted it, he could have had a very fulfilling career in the Army. However, his time in the military and work at the Juvenile Hall and as a probation officer had triggered an interest in the law, and helping others.

Inspired by his love of history and inspired by the civil rights' leaders of the early 60s, including Dr. Martin Luther King Jr., and the brilliant civil rights activist lawyer, Thurgood Marshall, later a justice of the United Supreme Court, Jimmy applied for and was accepted at Howard University Law School in Washington, D.C., which he attended from 1964 to 1967. Upon graduation, he received a Juris Doctor degree and returned to Sacramento to pursue his career.

In Sacramento, he worked as an assistant clerk for the State Assembly and later, the California State Legislature Counsel Bureau. He later worked as legal assistant for the Legal Aid Society in Sacramento. Jimmy opened his law office in Oak Park on Broadway in 1970, intent on serving the community where he had been raised.

In his solo practice, he handled civil and criminal matters, predominantly for the residents of Oak Park. Jimmy oftentimes determined that his clients had a case but were indigent; nonetheless, he

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never turned anyone away, working many hours each week to represent his clients—a labor of love for him, In so doing, he was able to earn a living, supplemented by his work representing indigent defendants through assignment from the Indigent Defense Panel of the Sacramento County Courthouse and representing criminal defendants at the U.S. District Court for the Eastern District as a member of the Federal Criminal Justice Act Panel. Jimmy's law practice grew, and soon he was getting new cases from outside of Oak Park.

Jimmy also litigated personal injury cases and developed a fledgling federal civil rights practice. In 1974 or 1975, he and his lifelong friend in Sacramento, attorney John Virga, successfully represented a young African-American man who had been beaten about the head with a flashlight by a police officer, under circumstances Jimmy found to violate the Civil Rights Act. The trial achieved a significant verdict for his client from a federal jury and attorney's fees from the trial judge.

Jimmy's active law practice instilled in him the aspiration to become a Superior Court judge in Sacramento. He believed being a judge of color provided him with the opportunity to give back to his community and serve as a role model. After 12 years of practice, Jimmy applied for and was appointed to the Sacramento Superior Court by Governor Jerry Brown in 1982.

In 29 years on the Sacramento Superior Court, Judge Long presided over hundreds of criminal and civil jury trials, covering a range of state crimes from first-degree murder (seven death-penalty verdicts) to less traumatic offenses such as grand theft. He sat as a trial judge in cases involving criminal malfeasance by elected officials as well as healthcare-fraud crimes. Judge Long tried hundreds of civil cases ranging from simply personal injury to complex products liability cases, as well as breach of contracts, partnership disputes to complex class action cases including multiple consumer fraud actions involving some the most prominent national corporations that were publicly traded and represented by prominent national and California lawyers.

In a class-action case assigned to him, Judge Long settled the case and avoided a trial and he ordered the multi-million-dollar settlement proceeds to be distributed to the members of class that was defrauded. After the order of distribution of the recovery, a significant excess, in the approximate sum of $1,300,000, remained in the trust account because some claimants never made their respective claims.

In 2001, lawyers asked Judge Long to distribute the excess sum to the remaining claimants or return the sum to the culpable defendant corporation. He ruled tit would be "unjust enrichment" to distribute the balance of the excess funds, pro rata to claimants who were compensated by the distribution, and at the same time refunding a portion of his determined sum of damages to the culpable corporation; that it essentially would allow the corporation to profit from its own wrongdoing.

After research, Judge Long decided to use the legal doctrine of *cy pres. Cy pres*, is a French term for "close as possible." Explained in lay terms, Judge Long's decision found that the purpose of the awarded of damages was to punish the corporation for "cheating consumers," and since some of the victims did not make claim, then the court should find a viable alternative for effectuating the purpose of his earlier determination. He decided that the excess sum could and should benefit consumers and future consumers by benefiting the disadvantaged, including children at St. Hope Academy in Oak Park and Loaves and Fishes Mustard Seed School in Sacramento. The balance was donated to the Legal Aid of Northern California, which provided legal services to the underserved and homeless in Sacramento County.

Judge Long received multiple awards based on his service as a judge, including Sacramento County Bar Association's 1998 Judge of Year, American Board of Trial Advocates (ABOTA) Trial Judge of the Year 2007 and countless of distinguished awards. The uniform and overwhelming consensus among prosecutors, defense lawyers on the criminal side and civil lawyers from the plaintiffs' and defense bars was that Judge Long was an exceptional judge: competent, industrious, courteous and always well-prepared. In carrying out his duties as a judge, he did so by treating all parties and lawyers with respect and dignity.

A prominent lawyer summed it up perfectly, "No matter whether you win or lose a particular case, you always leave Judge Long's courtroom knowing you received a fair trial or hearing." In the last analysis, there is no higher compliment you can pay to a judge. Between his service as a lawyer and as a judge, Judge Long had a long and distinguished career. His many acts of kindness, decency and mentorship made our judicial system better, as he inspired young people to seek a better world for themselves and others through the law.

At the courthouse, Judge Long's door and telephone were always open to other judges, young and old, for sage counsel on a variety of topics. Young lawyers in various local bar associations, such as the Wiley Manual Bar Association, the Asian Bar Association and La Raza (now the Cruz Reynoso Bar Association), who met Judge Long at events and lectures and who sought him out afterwards, were almost always given his court or home telephone number to call him with questions. Jimmy loved mentoring young law students and young lawyers.

In the last weeks of his life, Jimmy was deeply troubled by the racial division that engulfed our country. His hope was that it will end in decisive change. He knew he would not live to see it, but in the same conversation with this writer, he recalled his upbringing, and he never forgot and the racial injustice he encountered.

Jimmy was grateful to his mother, "Miss Susie," who sacrificed and dedicated herself to encouraging her children to succeed. But he recognized that a large portion of the underserved and disadvantaged do not have a "Miss Susie" in their lives. As with the legal issues he decided as a judge, he stated that ". . . where bright and competent lawyers often found resolution in compromise, . . . [he] hoped that competent and motivated people can find a way to bring positive change."

In my next-to-the-last telephone conversation with Jimmy, he mentioned: "I hope that people will remember me as trying to do good and was always fair." My answer was yes, they would because that was how you conducted yourself and why so many people love you, and I recite a passage from Shakespeare's *"Romeo and Juliet"* to complete this tribute to a man whom I loved as a brother:

"When he shall die,
Take him and cut him out in little stars,
And he will make the face
of heaven so fine
That all the world will be in
love with night
And pay no worship to the garish sun."
Romeo And Juliet' (1595)
act 3, sc. 2, l. 17

Member verdicts & settlements

Settlement: $3,475,000 — Wrongful Death

Condell v. Short, et al., Sacramento Superior Court No. No. 34-2018-00231623
Attorneys: S. David Rosenthal, Rosenthal Law; Jeff Davis, The Davis Law Firm

This wrongful-death case was brought on behalf of a woman whose 51-year-old husband was killed by a drunk driver on the shoulder of Highway 50 on April 24, 2016. They were driving to Sacramento from Los Angeles in separate vehicles when she ran out of gas and pulled onto the shoulder. Her husband parked behind her to put in some gas. As they were getting ready to merge back onto the highway, a vehicle weaving in and out of traffic at 80 miles per hour veered out of the traffic lanes and rear-ended the husband's vehicle, causing his death and injuring the wife. The driver's blood alcohol level was .36 percent.

The drunk driver, who had just left his job as the head chef at a mid-town Sacramento restaurant and was on his way home, was convicted of vehicular manslaughter, and his insurance tendered the policy limits.

The wife's attorneys filed against the restaurant, alleging that the negligent act was his becoming intoxicated, which was while working in the course and scope of employment, and therefore the restaurant was vicariously liable even though its chef had left the restaurant and was driving home. The primary authority for this argument was Purton v. Marriott International (2013)2018 Cal.App.4th 499 and cases it relied on.

The chef had two prior DUI convictions, including one with a blood alcohol level of .38. The wife's attorneys, David Rosenthal and Jeff Davis, took close to 20 depositions of past and present restaurant employees, who were protective both of the chef and management. Nevertheless, each deposition gave a small piece of a puzzle, which showed that the chef was addicted to alcohol and partied regularly with the staff after hours. Within a couple of weeks before the incident, he had started to unravel emotionally, and his alcohol consumption increased significantly after a relationship with a married co-employee did not work out.

Plaintiff's counsel contended there were signs at work that he was spinning out of control, including at least two occasions where he was intoxicated at work.

The defense argued the chef was satisfactorily performing his duties at the restaurant, which did not include driving. Defense claimed no awareness by supervisors that he was using or abusing alcohol at work. Defense also claimed that the going-and-coming rule took him out of the course and scope of employment once he left the restaurant.

Plaintiff attorneys Rosenthal and Davis were able to defeat summary judgment and reach a settlement at mediation with Nick Lowe, who worked overtime to get the case resolved.

***

Have you won a verdict or a settlement? You are invited to share the information with The Litigator. Contact Editor Jill Telfer at Jtelfer@telferlaw.com. The Litigator is published four times a year, and the next issue will be published in November. Articles should be no more than 1,500 words, if possible.

Thank you

Thank you to those who have donated to Sacramento Food Bank & Family Services so far in 2020!

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3333 Third Avenue, Sacramento, CA 95817

Sacramento Food Bank & Family Services Needs Our Help Now, More Than Ever

By: Margaret Doyle and Art Scotland

Challenging times can yield positive outcomes. With your help, let's turn a negative into a positive.

Among the casualties of the coronavirus was CCTLA's Spring Fling 2020, planned for June 24 but canceled due to health guidelines during the pandemic. Always a fun event in the beautiful backyard of the Ferris White home, the Spring Fling is an *essential* fundraiser to help Sacramento Food Bank & Family Services (SFBFS) serve families and individuals in need.

With "dignity, encouragement, and acceptance," SFBFS is a "nonprofit provider of basic human needs" to "the poor and working poor in Sacramento County," supporting them with resources and "tools they may need—food, clothing, education, technology, or just plain kindness—as they move toward a path of financial independence and self-sufficiency."

The pandemic not only has dramatically increased the essential needs of those SFBFS serves, it has had a negative impact on SFBFS's ability to obtain the financial resources necessary to provide those services.

For example, because of the generous donations of members of CCTLA and others in our legal community, the Spring Fling raised $130,000 last year, making it the second largest fundraiser helping SFBFS serve those in need. With no Spring Fling this year, SFBFS will have far fewer funds to meet the greatly expanding needs for its services.

FACTS

Before the COVID-19 pandemic began, 150,000 people (including more than 40,000 children and more than 32,000 seniors) were served by SFBFS through direct distributions and partner agencies. This need has grown 100%, with SFBFS now serving more than 300,000 seniors, families, and children per month. Donating just $1 equals five meals for a family.

Please open your hearts and wallets by making a tax-deductible charitable contribution to Sacramento Food Bank & Family Services. We hope those who were $1,000 sponsors of last year's Spring Fling will donate the same amount this year to SFBFS. And we hope others will do so in amounts that work for you.

Contributors of $1,000 will be recognized by name in a future edition of CCTLA's "*The Litigator*," as well as on SFBFS's website.

With our financial help, SFBFS will continue to provide essential food, clothing, educational and family services and more to the poor and working poor of our community.

Contributions can be made online at https://support.sacramentofoodbank.org/CCTLA2020 or by check payable to Sacramento Food Bank & Family Services, mailed to Melanie Flood, Director of Development & Communications, Sacramento Food Bank & Family Services, 3333 Third Avenue, Sacramento, CA 95817.

Thank you for your consideration of this request at a time when SFBFS and those it serves need your help more than ever.

***

Margaret Doyle, a CCTLA member and past president, is a principal in Doyle & O'Donnell and can be reached at (916) 922-9301. Art Scotland, is a friend of CCTLA and a retired presiding justice of the Court of Appeal, Third Appellate District.

Educating the Trial Lawyer

By: Dave Rosenthal, CCTLA First Vice President

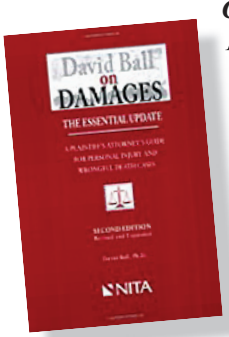
When it comes to learning to be a trial lawyer, nothing is more valuable than actually trying cases. But sometimes, for instance during a pandemic, it's all but impossible to get in front of a jury to try a case or even to attend a trial skills seminar. In these times, learning trial skills is more about reading some of the many good practice guide books or attending virtual seminars.

There are too many valuable resources for the plaintiff's personal injury lawyer to cover in one article, but the following is a summary of some of the sources I have found most useful.

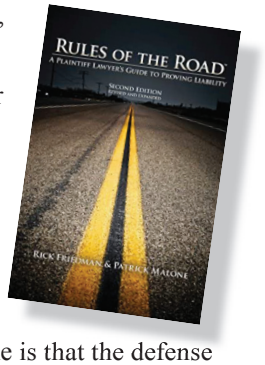
Every trial lawyer has to start somewhere, and for someone looking for the nuts and bolts of a personal injury trial, there is no better place to start than the books on damages by David Ball. Ball is a leading trial consultant, researcher and trial advocacy instructor who has spoken at CCTLA events.

For an admitted liability case, ***David Ball on Damages 3*** (NITA, 2011) is all you need for much of the structure and strategy necessary obtain a good damages verdict. The book provides a comprehensive approach to maximizing damages including how to identify bad jurors and leaders in *voir dire*, how to structure your opening, and how to prove non-economic damages.

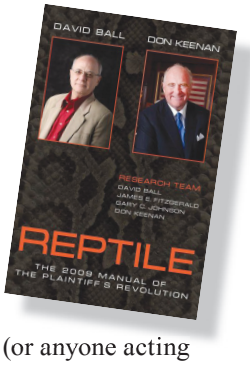
It's worthwhile to see the evolution of Ball's ideas by reading his previous versions, the original ***David Ball on Damages: A Plaintiff's Attorney's Guide for Personal Injury and Wrongful Death Cases*** (NITA, 2001), and ***David Ball on Damages, The Essential Update*** (NITA 2005). While much of the material is repetitive, there are a few tidbits unique to each version. Of course, the damages concepts, focusing as they do on "harms and losses," are equally applicable to disputed liability cases.



For disputed liability cases, one of the best trial guides is ***Rules of the Road*** (Trial Guides, 2006) by Rick Friedman and Patrick Malone. This book focuses on techniques to be used throughout a case for finding, defining, simplifying and incorporating in your case the "rules" the defendants violated in causing your client's injury. It offers examples for every phase of the case including discovery, handling experts, opening and closing. The overriding theme is that the defense thrives on creating complexity, confusion and ambiguity, and the plaintiff wins by showing the defendants' rule violations to the jury in as simple and clear terms as possible.



Another essential read for liability is ***Reptile: The 2009 Manual of the Plaintiff's Revolution*** (Balloon Press, 2009) by David Ball and Don Keenan. While it's arguable whether the book started a revolution, there's no question that it has helped plaintiff lawyers frame the issues at trial to focus first on how dangerous the defendant's conduct was, not just to the plaintiff that was injured in the particular case, but to everyone in society every time it occurs. In its most general form, the concept is that when you show the defendant (or anyone acting similarly) has unnecessarily endangered the plaintiff (or any member of society), the jurors sense danger to themselves, and a subconscious "reptilian" response is triggered. The jurors can then be empowered to stamp out the danger by returning a substantial verdict for the plaintiff.



As ***Rules of the Road*** and ***Reptile*** demonstrate, there are many common threads that run through the fabric of trial theory. Some of the most enduring threads were created by Moe Levine, a legendary trial lawyer from New York who taught trial skills in the 50s and 60s.

Levine is credited with originating the empowerment technique of charging the jury with acting as the "conscience of the community." He also developed the

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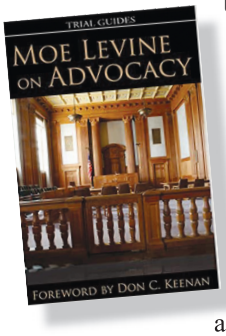
"whole man theory," which posits that you cannot injure just part of a person. When you injure a person's body part with resulting loss of ability and mobility, you injure the whole person's ability to function in life and in relationships.

Although it's apparent by his words and manner of speaking that Levine lived in a different time, the concepts he taught are timeless and still used by some of the best trial lawyers today. Two books that contain his works are ***Moe Levine on Advocacy*** (Trial Guides, 2009) and ***Moe Levine on Advocacy II*** (Trial Guides, 2009). In my opinion, you cannot fully appreciate Moe Levine unless you hear him speak, so I highly recommend ***Moe Levine: The Historic Recordings*** on CD or digital recording.



Another institution that has had a profound influence on the trial lawyer community over the years is **Trial Lawyers College**, founded by Gerry Spence. There are several graduates within CCTLA and many graduates around the country who have achieved notable trial success and currently teach trial skills. The curriculum is not limited to what many would consider conventional trial skills, and includes tribe building, story telling and psychodrama. Spence preaches that the key to being a better lawyer is being a better person, and in order to tell our client's stories well, we have to be familiar with our own. The true trial college is a three-week course at Spence's Thunderhead Ranch in Wyoming, where students stay in dorms without Internet, television or cell phones. The course is said to involve a lot of soul-searching and introspection, and some graduates claim the results are life changing.

I am not a TLC graduate, but I have attended one of the three- to four-day day regional courses that TLC offers on a specific curriculum topic. If you are thinking of going to Wyoming, a regional course is a good way to get a better feel for the program. TLC has adapted to the pandemic by offering some virtual seminars.

Within the last several years, **Trojan Horse Method** has established itself as a leader in trials skills workshops and trial consulting. The founder, Dan Ambrose, is a TLC graduate who put together a program that emphasizes presentation skills in all phases of trial. Seminar participants practice the skills in front of groups as they are taught during the workshops.

One of the overriding principles is that the lawyer's delivery and the testimony of witnesses must be "emotionally congruent" with the case in order to establish a connection with the jury that will motivate them to help the plaintiff. Lawyers are taught methods to "create space" where things happen and fill the space with "dialogue" so the juror is "transported" and personally experiences the key events of the case.

THM also teaches *voir dire* scripts, structuring of openings and closings and witness preparation. One of the great features of THM is the in person skills practice in front of groups which, of course, has been put on hold by the pandemic.

Even before the pandemic, some THM instructors left to establish a new trial skills and consulting firm, **Trial Structure**. Alejandro Blanco, another TLC graduate, was primarily responsible for developing the "betrayal" trial

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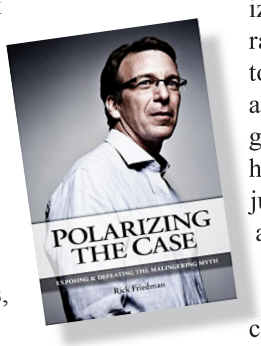
structure he taught at THM and continues to teach with the new group. The theory behind why the structure works is sometimes difficult to follow, but Blanco claims it is based on solid scientific foundation and works in every case. In my opinion, Chuck Bennett was the best THM instructor on structure, and he is now with Blanco in the new group. **Trial Structure** has been offering free Zoom seminars during the pandemic.

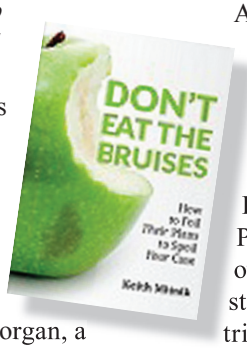
Some of the best trial guides focus on techniques for countering the anticipated defenses to the case. One such book is ***Polarizing the Case - Exposing & Defeating the Malingering Myth*** (Trial Guides, 2007) by Rick Friedman, which hones in on the most often-used defense strategy of attacking the plaintiff's character by insinuating that he or she is not hurt, is not as hurt as much as he or she says, is motivated by a big payday, and is playing the system through their lawyer.



Friedman points out that most of the time the defense will not make these accusations directly to the jury, but will try to lead sympathetic jurors to the those conclusions through testimony of the IME doctor or by pointing out otherwise innocuous "inconsistencies" in the records.

Friedman suggests that the plaintiff's lawyer must attack this strategy by forcing the defense throughout the case to acknowledge that they believe the plaintiff is "a liar, a cheat, and a fraud," and then proving that the client is in fact a person of good character who does not deserve to be attacked in this way.

In my opinion, one of the most practical of all of the trial guides is ***Don't Eat the Bruises—How to Foil Their Plans to Spoil Your Case*** (Trial Guides, 2015) by Keith Mitnik. As many will recall from his presentation to CCTLA a couple of years ago, Mitnik is a masterful and entertaining speaker. He is the lead trial attorney for Morgan & Morgan, a Florida-based firm that touts itself as the largest personal-injury firm in America.



According to Mitnik, he is constantly in trial, and it's not unusual for him to be in two to three different trials *per month*.

From this vast trial experience, he lays out a treasure chest of strategies to "dismantle" the defense case within the framework of the plaintiff's case. This is done by eliminating, owning, or putting into context the best defense facts, or "bruises," if you will, throughout plaintiff's case.

One of the biggest gems in Mitnik's treasure chest is his approach to educating jurors about bias and identifying biased jurors during *voir dire*.

If you have never compared being a juror to eating pie, you should familiarize yourself with Mitnik's analogy of randomly being selected at the county fair to judge in a pie contest. This particular analogy may be easier for a southern gentlemen to pull off, but it's easy to see how the concept is effective in allowing jurors to see bias as part of human nature and not necessarily a bad thing, making it easier to confess. After all, who doesn't have a preference between apple and cherry pie?

Once jurors are comfortable with the concept of bias, Mitnik lays out a system for getting jurors to rate their bias against personal injury cases on a scale of 1-10. The system is brilliant in making it easy for potential bad jurors to admit and talk about their biases, laying the foundation for cause challenges.

Mitnik is currently working on a practice guide titled ***Deeper Cuts*** that is scheduled to be out by the end of this year.

As bad as the pandemic has been, there have been some positive side effects, including less traffic, less pollution and the ability to wear shorts and t-shirts at work. For learning trial advocacy, it also spawned some of the most valuable training I have ever seen through Dan Ambrose's **Case Analysis**.

For the last several months, Ambrose has hosted free Zoom seminars almost daily that feature some of the best trial lawyers in the country, including Brian Panish, Mark Lanier, Adam Slater, Keith Mitnik, Rex Parris, Joe Fried, Dale Galipo and our own Chris Whelan, breaking down their strategies and performances in actual trials.

In normal times, these lawyers would be too busy to dedicate two to three hours to webinar presentations, but during the pandemic, these masters have dedicated countless hours to sharing their techniques with the rest of us.

Case Analysis has presented on almost every aspect of litigation and trial, including videotaped expert depositions, creation of power points and focus groups. But the most effective presentations by far have been the self-critiques by lawyers of their own trials resulting in multi-million-dollar verdicts through the use of footage from **Courtroom View Network**.

Where else can you watch the actual closing argument, clip by clip, by Mark Lanier in a talc case resulting in a $4.69-billion verdict, and have Lanier comment on the thinking behind the legendary performance?

Case Analysis continues to provide free webinars. However, if you missed some of the past gems, you can still pay to get all of the presentations, including all transcripts, notes and power points, through Ambrose's **Trial Lawyer University**. Current pricing is $1,000 per year.

CVN itself provides access to footage from hundreds of trials and allows subscribers to watch great trial lawyers in action in trials from across the country resulting in substantial verdicts. The cost of subscription is well worth it for any trial lawyer looking to learn from the best.

I still remember the look on my wife's face many years ago when I read my draft opening that told the jury their job was to "fix the harms that can be fixed, help the harms that can be helped, and make up for the harms that can't be fixed or helped." It was straight out of David Ball. She didn't like it. If she didn't like it, the jury wouldn't like it. That led to the realization that I couldn't expect a trial guide to tell me exactly what to say in my trial, and I couldn't just repeat what another lawyer said in another case.

Since then, I have heard many successful trial lawyers emphasize that you must be genuine, you must be yourself.

So while the above are all good resources, they are only starting points for developing your own skills and style.

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Dave Rosenthal of Rosenthal Law, is a member of the CCTLA Board, serving as first vice president, and can be reached at (916) 461-8897.

SFB&FS Needs Our Help Even More in the Covid Era

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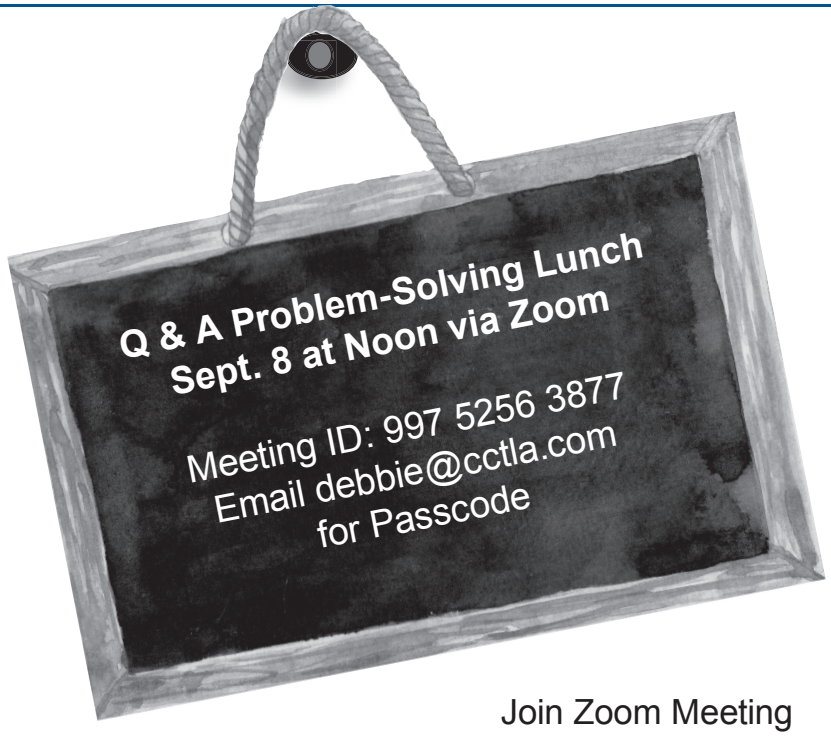
CCTLA COMPREHENSIVE MENTORING PROGRAM — The CCTLA Board has developed a program to assist new attorneys with their cases. For more information or if you have a question with regard to one of your cases, contact: Dan Glass at dsglawyer@gmail.com, Rob Piering at rob@pieringlawfirm.com, Glenn Guenard at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



CCTLA's programs and events have been postponed due to current events and will be rescheduled as soon as possible.

We'll post more information via www.CCTLA.com as it becomes available.

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CCTLA Calendar of Events