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Inside

CCTLA Navigating Continuing Challenges in a Positive Way

David Rosenthal
CCTLA President

As we head into 2022, CCTLA continues to navigate unprecedented territory with a deadly pandemic that is now in its third year. While Omicron seems to be milder in effect, and there are some signs that it will fizzle faster than its predecessor viruses, the future remains uncertain. Already there is news of a "stealth" variant, and we can only hope that it is less contagious than Omicron, less deadly than Delta, and that people continue to get vaccinated.

For CCTLA, most activities will continue virtually for the foreseeable future. The board of directors will continue to meet monthly by Zoom. It is my honor to serve as president this year, along with a great group of dedicated board members. Having been on the board for more thanr 10 years, I know the sacrifice in time and effort that each member makes to serve the organization.

Some board members were here before me and have returned religiously year after year, including Chris Whelan, Vice President Dan Glass, Secretary Glenn Guenard and Past-President Dan Wilcoxen. We are lucky to have new talent this year in Margot Cutter, Ognian Gavrilov and Jeffrey Schaff. In my experience, the dedication of all board members comes from a desire to promote our common interests and enhance the practice of law for all CCTLA members.

Most CCTLA education, including Tom Lytle Luncheons, Problem-Solving Clinics and Q&A Luncheons, will continue by Zoom. In January, more than 55 of our members attended the annual What's New in Tort & Trial. The first Tom Lytle Luncheon, on February 25, will be "The State of the Sacramento Court and Judiciary During the Pandemic: 2022 and Beyond" with Presiding Judge Michael Brown and Supervising Civil Judge Steven Gevercer.

Board members Peter Tiemann and Vice President Noemi Esparza are already hard at work on the Education Committee, putting together a slate of programs offering valuable practice tips we can all learn from while earning CLE credits. I encourage all members to attend as many of these presentations as possible since it is one of the few ways we can maintain our connection during these times.

One notable exception to virtual education will be the Sonoma Travel Seminar at the Sonoma Mission Inn on March 11 and 12. For many years, CCTLA has partnered

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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 for official citations before using them as authority.

"Mike's Cites" has been a treasure for *The Litigator* for many years. With humor and wit, CCTLA member Michael W. Jansen has been consistently updating the membership on the latest cases from the advance sheets of the *Daily Journal* in his regular page 2 column called " Mike's Cites." Mike is retiring from the practice of law and is starting the new adventure of retirement. This issue of *The Litigator* carries the final Mike's Cites, and it features three worthy and very interesting cases. Mike's contributions to CCTLA and *The Litigator* have been substantial. He will be sorely missed.
— Jill Telfer, Editor, *The Litigator*

Circumstantial Evidence of Negligence Overcomes Motion for Summary Judgment

Lydia Kaney vs. Marilyn Mazza
2022 DJDAR 828 (January 19, 2022)

FACTS: Plaintiff Kaney was visiting her sister, Marilyn Mazza, at Mazza's apartment in the city of Hermosa Beach. The apartment was owned by Defendant Carol Custance. The one bathroom in the apartment had a two-step stairway leading up to a platform upon which the commode sat. There was no handrail.

Plaintiff Kaney went to the restroom and as she began descending from the commode, the light in the bathroom went out. Kaney fell, and has no recollection of anything thereafter except of pain and injury.

Kaney sued Mazza and the property owner, Custance. for negligence and premises liability. Defendants filed a Motion for Summary Judgment on the grounds that Defendants had no duty to warn, the danger was open and obvious, there was no duty to remedy open and obvious dangerous conditions, the owner had no notice of the bathroom light failure, and the stairs did not violate any codes because defendants were grandfathered in. Defendants MSJ further argued that there was no triable issue as to the causation because Plaintiff/Appellant could not remember how she fell.

Brad Avrit, expert for Plaintiff/Appellant, testified that the commode on the deck violated the warranty of habitability and that the building was a nuisance, the stairway was a dangerous condition that was not open nor obvious, and the stairway violated the 2013 CA Building Code. Avrit further testified that the commode at the top of the steps was a dangerous condition of property in that the risers were more than eight inches, they differed by as much as 2.5 inches, and there was no handrail.

The trial court granted summary judgment and in its ruling stated: "Even though the property owner breached some duty to maintain or repair the stairs, the plaintiff had no idea how she fell, and the defendant has therefore met its' initial burden to show the plaintiff lacks evidence that the state of the stairs caused the fall," and thereby raise a triable issue of a material fact.

ISSUE: Is Plaintiff barred as a matter of law from proving causation in a slip-and-fall case if there were no witnesses to the fall and Plaintiff remembered being on the stairs, but cannot remember the fall?

RULING: No. MSJ reversed. Even if a plaintiff cannot remember falling, certain circumstantial evidence would permit a tryer of fact to conclude that the condition of the stairs, including the absence of a handrail and lack of light, was a substantial factor in the fall. [Good case for plaintiffs!]

REASONING: This is an ordinary negligence case based on premises liability. A plaintiff must prove a legal duty to use care, a breach of that legal duty and a breach that is a proximate cause of that injury. A landlord owes a duty of care to a tenant to provide and maintain safe conditions on the leased premises. This court relied on the *Rowland v. Christian*

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Trying Cases During COVID – Challenges and Lessons Learned

By Kirill B. Tarasenko

Karill B. Tarasenko, Gavrilov & Brooks, is CCTLA Board Member

For this issue of *The Litigator*, I wanted to share a hot-off-the-press impression of what it's like trying a case before a jury during the current environment with the Omicron COVID variant raging.

The Case:

Kelton v. Madrigal, Sacramento County

The underlying case was a pitbull mauling of a nine-year-old girl who was visiting the defendants' home with her family at the time of the attack. The young girl had previously met the dog, an adult male pitbull named Munch. The morning of the attack, the victim asked the homeowner if she could enter the dog's outdoor enclosure to play with the dog. The homeowner agreed, opened the sliding glass door and let the little girl outside. It was disputed whether the homeowner then shut the door completely behind the girl or whether she left it slightly ajar. In an unprovoked attack, the pitbull raised up on his back legs and bit into the little girl's jaw, with his lower canines entering her neck mere inches from her carotid artery.

He then took her down to the ground and began dragging her deeper into the enclosure, away from the glass door. The tiny victim weighed 57 pounds at the time, and Munch was estimated to weigh approximately 70-80 pounds. The victim's mother witnessed the attack from inside the house, ran outside, and likely saved her daughter's life. Even after adults intervened, the pitbull would not cease the attack on his own, resulting in further injuries to the little girl's back and rib area. The dog was almost immediately put down at the request of the homeowner.

The Allegations and Defense

Plaintiffs filed suit, alleging strict liability for the dog attack, as well as negligence causes of action. The mother had a bystander cause-of-action as well, as she was in the zone of

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danger and suffered emotional distress from witnessing injury to her daughter. Plaintiffs waived special damages and put on a general-damages case only.

Defendants denied ownership of the dog, claiming a tenant renting a room in their home had asked for permission to adopt Munch after the pitbull's prior owners needed to give him away. The defendants agreed to let their tenant adopt the dog and let it live in their home, but they denied ownership.

They also denied they were negligent in allowing an unneutered adult male pitbull into their home and in allowing a young child to be left alone in the dog's outdoor enclosure without so much as a re-introduction, despite the dog having not seen the child in about six months. Defendants claimed Munch had never bitten or attacked before, so they couldn't have known or foreseen the attack.

The Verdict

The verdict came in on Jan. 7, 2022, after jury selection on Dec. 30, 2021. With costs and interest, the total comes in right around $435,000. The insurance defense adjuster was present for the trial and offered the $300,000 home-owner policy immediately after closing arguments, putting the plaintiffs to quite a decision. Fortunately, our clients bravely made the right choice despite significant settlement pressure and obtained an excess verdict as a result. The following are some takeaways from trying a case during a pandemic.

Lessons And Impressions

1. Settlement Pressure - The pressure to settle otherwise triable cases during the COVID pandemic can be intense, and we felt it from all angles. From the defense attorneys and adjusters to the settlement judges, we felt everyone was attempting to force our clients to settle. This was where we really had to trust in our case and in the jury trial process, because it was clear that we would never obtain full justice if we were relying on judges and mediators to settle the case for us. The defense issued a CCP §998 offer for $150,000 immediately following settlement conference, and that's when the heat was really turned up.

- *It's a disputed liability case, you might lose, and then how would you feel knowing you could have settled for $150,000?*
- *You've already waived medical bills, how do you expect a jury to put a value on this case when the little girl just has a couple small scars left on her neck?*
- *Your clients never even saw a psychiatrist or therapist, how can you claim future damages?*
- *$150,000 is a LOT of money, this is just a dog bite, you might end up with $20,000 or worse – defensed, and owing them money. Take the money before you throw away your kid's college fund.*

After closing, the insurance adjuster finally offered what we had been asking for for years – the $300,000 policy. But the people we were representing were angry and rightfully so – you made us go through a full trial to get what we should have gotten from the start? The time for asking was over, we were no longer asking for anything. We were taking justice. It takes a client who really believes in their case and stands firm when most others fold to obtain full justice.

2. Dealing with Time Pressure - You better be prepared to let unexpected time limitations and procedural hurdles roll off you like water off a duck's back. Twenty-five minutes for *voir dire*, you say? A stopwatch on key witness cross examinations? Timed closing and rebuttal? Deal with it, because even the most well-meaning judge probably has their own marching orders during heightened points in the COVID pandemic to get the jury in and out of the courtroom as fast as possible. Our trial judge was great, but it was clear as day that wasted time would not be tolerated and the trial needed to happen at 1.5x speed. In fact, we lost a juror to COVID before opening even began and had to utilize an alternate! With Omicron cases exploding in Sacramento County, we weren't even sure we could get through the entire trial without losing jurors to infection or exposure or facing a total shutdown of the courthouse. A total courthouse shutdown is precisely what happened the following week.

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You better be prepared to let unexpected time limitations and procedural hurdles roll off you like water off a duck's back . . . A stopwatch on key witness cross examinations? Timed closing and rebuttal? Deal with it. . . .

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3. Minimum Effective Dose - You better be prepared to put your case on *fast*. What's the minimum effective dose we can offer with each witness without diluting the story? My co-counsel Bryan Nettels and I asked ourselves this question every step of the way and with every witness. What could we pare down without losing substance? How much excess weight could we drop without giving up anything we really needed? Did every witness even need to testify? Based on cues from the jury, we sensed that too many witnesses saying basically the same things from a different perspective was not going to go over well. The jury wanted the minimum effective dose and no more. So we made the difficult decision to not call two general damages witnesses, after realizing that their testimony might sound overly cumulative, and therefore not entirely necessary.

4. Your *Voir Dire* Better Be On Point – With a very short *voir dire* time limit—25 minutes in my case—you better have your key chapters thought out and well-versed. The judge conducted his own *voir dire* first, and then I was allowed follow up. It was basically impossible to keep track of juror names and locations, beyond the six in the box, because the seating chart kept changing. Jurors were scattered throughout the courtroom, about as physically far as could be from the podium the lawyers had to stand at, while other jurors were in an entirely different courtroom, watching us on video—while we couldn't see or hear them. Later, that panel from the other courtroom was brought in, and we were allowed to talk to them for a few minutes. With everyone wearing masks and sitting so far away, creating a connection was certainly challenging when all I saw was eyes and eyebrows above masks. Don't be scared to ask jurors to re-state their names when speaking with them if your seating chart goes awry, as mine did.

5. Are You Not Entertained?!? – Perhaps it's partly a function of people having shorter attention spans in general these days, but with masks on making it difficult to breathe, the jury really wants you to get to the point. In *voir dire* and in opening, I told them that we weren't seeking medical bills, and told them why – because we could get through the trial faster without wasting time on medical bills and because medical bills can be handled by a calculator, while human losses require a human jury. Valuing the human losses in this case required *them*. They understood and appreciated not sitting through a day or two of riveting testimony about CPT code modifiers and relative value units.

6. Everyone Loves a Little Bit of Theater - The cases we try are serious matters which can have serious effects on lives long after the trial is done. But good luck getting the jury to buy in and truly listen if you allow the pressure of the moment to turn you and your case robotic. Perhaps real trials aren't like on TV, but the jury wants some excitement and some theater, so give them what they want! In this trial, the defendant admitted on the stand that his tenant, the purported owner of Munch, the vicious pitbull, did not want to put the dog down after the attack, but the defendant homeowner did, and the dog was destroyed.

- *"Who ordered the destruction of the dog over the protests of your tenant, who you claim was the dog's owner?"*
- *"Who ordered the Code Red on Munch???" Because anytime you can quote "A Few Good Men" in a real trial, you just <u>have</u> to do it.*

7. Talking to the Jury After the Trial: Surprisingly, all of the jurors, save perhaps one, stuck around for nearly an hour after to chat with us and with defense counsel in the hallway. Talking to your jurors immediately after a verdict is one of the best ways to learn and get feedback on your performance and your strategy. The foreman said he had been a juror on criminal cases before but had never had as much fun in the courtroom as this case. He loved the action-packed cross-examination of the defense's dog behavior expert, and he really loved the movie references. The jury found our young dog mauling victim to be the best witness in the entire case, and all of them wanted her to know that she was an amazing young lady who they were certain would go on to do great things with her life. Pandemic or no pandemic, there is simply no substitute for having a well-prepared and genuinely likeable plaintiff.

See more on this case in Verdicts & Settlements, page 34

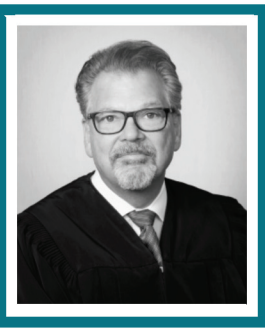
Based on cues from the jury, we sensed that too many witnesses saying basically the same things from a different perspective was not going to go over well. The jury wanted the minimum effective dose and no more.

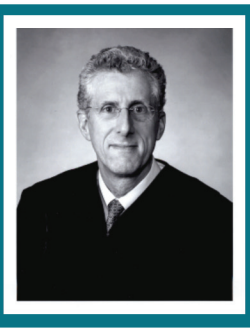
Capitol City Trial Lawyers Association invites you to attend:

Tom Lytle Luncheon

"THE STATE OF THE SACRAMENTO COURT AND JUDICIARY DURING THE PANDEMIC: 2022 AND BEYOND"

Friday, February 25, 2022 | 12 noon to 1:15 p.m. | Zoom | 1 MCLE Credit





Speakers: Presiding Judge Michael Bowman
& Supervising Judge of Civil, Judge Steven Gevercer

Judge Bowman and **Judge Gevercer** will address the challenges presented by COVID-19 and new protocols, trial procedures, and a new statute designed to meet those challenges. They will announce the latest civil department judicial assignments, talk about budgetary and administrative issues, and discuss the status of the new courthouse. The judges prefer a question-answer format. This is a unique opportunity to get an insider's view of the workings of the Sacramento County Superior Court.

Agenda: Introduction - 5 Minutes | Presentation - 60 Minutes
Live Q&A with the speakers | **Cost:** $25.00 (Member) & $35 (Nonmember)

RSVP: RSVP by email to debbie@cctla.com. Registration fee of $25 or $35 may be paid by mailing a check to CCTLA, P.O. Box 22403, Sacramento, CA 95822 or on-line at www.cctla.com.

Join the live program by registering and logging in using the unique link emailed to you from a computer or tablet with high-speed internet. Credit is only provided to registered attendees who click on the unique link and participate from their own computer or tablet. By using the unique link, your actual log in and log time out time will be recorded for your MCLE hours. CCTLA will send a certificate of attendance for the full credit. It is up to each attendee to advise CCTLA if you only attended a portion of the seminar. CCTLA cannot provide MCLE credit if you participate from a cell phone.

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Meeting Covid challenges in as positive a way as possible

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with CAOC to provide an educational weekend in a vacation setting. The decision was made to proceed with live attendance at this year's event with proof of vaccination required for all attendees and COVID safety protocols in effect.

Wendy York and Noemi Esparza have collaborated with CAOC to create a fabulous program with a wide range of topics and a diverse panel of speakers, including several from CCTLA. Please check the CAOC.org website for the program schedule; you'll also find it included in this issue, n pages 37-39. If you are able to attend, it will be well worth your while.

There will be some important transitions within CCTLA during 2022. Past President Margaret Doyle will be stepping down as organizer of the annual Spring Fling. For more than 20 years, Margaret has led a committee of volunteers that worked countless hours to put together the signature charity event that has raised hundreds of thousands of dollars for the Sacramento Food Bank. The board will be considering how to continue Margaret's legacy in the future. Thank you, Margaret, for your many years of hard work for CCTLA and for this worthy cause!

We will also be losing the contributions of Mike Jansen, a former board member who has authored "Mike's Cites" in *The Litigator* for the past eight years. Mike is retiring after many years in practice, and his shoes will be hard to fill. If any member has interest in taking over the quarterly summary of important cases, please contact Debbie Keller, CCTLA executive director. We wish Mike well in retirement!

Getting access to courtrooms will remain a challenge during 2022. At press time, there was a "mitigation" order in place, "greatly restricting" jury trial assignments in Sacramento due to the Omicron surge. Even when a courtroom is available, distancing, masks and barriers during trial make conditions for connecting with a jury less than ideal. Because of the backlog created by the closure, trial dates are now being set in the latter part of 2023. Defendants and insurance companies seem to be using trial delays to their advantage. The board will make every effort to communicate with the court to find ways to get cases to trial as soon as possible.

COVID is not the only threat to courtroom access. Late last year, we got the disturbing news that the Civil Justice Association of California (CJAC) submitted draft ballot initiatives that would cap all contingency fees for attorneys representing plaintiffs at 20%. CJAC (formerly the Association for California Tort Reform) "works to reduce the excessive and unwarranted litigation that increases" business expenses. In other words, it seeks to increase the profits of its big-business members by advocating for limitations on access to justice for those who are harmed by their unsafe business practices.

At press time, it appears that CJAC has stopped the signature gathering necessary to get the fee cap initiative on the ballot this November. However, this initiative is a sobering reminder that the enemies of justice are always ready to dispense with the rights of individuals in the name of profits, and that we will likely have to fight this battle in the near future.

On behalf of the board, I want to invite all members to provide your feedback and suggestions for any and all CCTLA business. We can be contacted directly or through Debbie Keller, debbie@cctla.com. In the meantime, let's all have a safe, healthy and prosperous 2022.

BY: Craig M. Peters,
President,
Consumer Attorneys
of California (CAOC)

Imagine if your contingency fee were limited to 20 percent. How many cases could your firm afford to take? How many California consumers would be left without recourse when they are injured or cheated?

We know the devastating effects on consumer access to the courtroom from fee caps. But this is the world that big corporations would like to create, to insulate themselves from accountability for wrongdoing. That's why, last October, the deceptively named Civil Justice Association of California (CJAC) submitted three ballot initiatives, each of which includes a 20-percent cap on contingency fees.

It's no mystery why CJAC is the face of this proposal. That organization is a front for corporations that are desperate to stay out of the courtroom and avoid accountability for their actions. Not so long ago, CJAC proudly listed the corporations on its board of directors on its website. But leading up to this initiative filing, that information was removed—because it's literally a "who's who" of corporate bad actors: tobacco, oil, pharmaceutical, insurance, banking, automotive and medical interests who all stand a lot to lose when they are held accountable for their products and practices that harm consumers.

With supporters like these, it's no wonder CJAC wants to keep them hidden. If Californians knew who is behind this effort to keep them out of the courtroom, they would surely be wary.

That's why CAOC launched a website, UnmaskingCJAC.com, to show Californians how the biggest multi-billion-dollar corporations on the planet are behind the effort to limit consumers' ability to fight back against injustice.

If any of the CJAC fee cap initiatives were approved, it would reshape our typical David vs. Goliath battles. In this new world, David wouldn't even get to have a slingshot, and Goliath would have a bazooka. This would be a real threat to your practice and to the ability of Californians to win justice when they are wronged.

CJAC recently put one of its initiatives out for signatures in an attempt to qualify it for the November 2022 ballot, but it soon put that effort on hold. As I write this in late January, it is unlikely any of these initiatives will be on the ballot this November, but that doesn't mean they won't resume signature gathering.

In fact, CJAC has publicly stated that it isn't stopping, it is just reloading. It seems likely that it is setting its sights on qualifying the measure for the November 2024 election, when Donald Trump may well be on the ballot, bringing out more conservative voters.

The main goal of these large corporations is, and always has been, to sharply limit contingency fees. They know how

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We're under attack — *again;* and we need everyone to help

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Under Attack

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much this would harm consumers' ability to fight them in court. But they also know that this is a result that will likely be lost on voters at the ballot. Many consumers will perceive a fee cap as being a benefit to them by reducing what they will have to pay to lawyers, never realizing that it will ultimately limit access to justice. This threat hanging over our practice will not go away. Not soon…not anytime. We are always under threat. We must always be prepared to do battle.

The good news is, we're used to fighting battles—and winning. And this is a battle we've fought before, several times. **But while our past success gives us confidence that this battle is one that we can win, these past successes came as a result of everyone pulling together to give of their time and their treasure—doing the hard work to expose these corporate raiders.** Our fundraising has been a visible show of strength in the fight against these initiatives. It may have been a factor in CJAC's decision to regroup and pause on collecting signatures. When our war chest is full, it is the best defense against our foes from pursuing these measures.

Help us fortify for the battle to come. Please consider a donation to CAOC's organizational and political efforts at https://seekingjustice-caoc.com. Just as it is in the courtroom, we are the ones who will lead the fight to protect our fellow Californians!

Don't Give Up. Adapt.

By: Kelsey DePaoli

Since it's the start of a NEW year, let's talk about what we want from our legal careers in 2022! What will make us better trials lawyers? What will make us feel as if we are doing the best thing we can for our clients? How can we do better to serve our clients? What can we do to better our justice system? It has been a difficult couple years in many ways, but let's try to shift our focus to how to make it better! How can we make sure we are doing everything we can to preserve our clients' rights to be heard?

Although we are still in the midst of what I call a partial virtual environment, we have seen some hope in that the courts have allowed us to start conducting in-person jury trials again. However, many of these trials look a little different from what many of us are used to. There has still been a strong virtual component in many recent trials. Some witnesses are appearing by Zoom, many depositions are still not in person, jurors and lawyers are still wearing masks.

However, the great news is: No matter the changes, trials have started to go forward, and that is the exciting part. Those cases you were supposed to try back in 2020 are now back on your calendar, and you finally get the opportunity to resolve it for your client who has been so patiently waiting for their day in court.

With our current virtual environment, we have seen many law firms implement changes to succeed, including new robust hardware, software and equipment for their employees to remain successful from home while still maintain a constant workflow. We all own webcams now and have become experts at screen sharing. All the changes have made some of our work as trial lawyers easier. We now have less of, or no commute, we don't have to wear a fancy suit or put on those high heels every day anymore. This time has granted us the convenience of doing out-of-town depositions without the expense of travel.

These trials may not look the same, and they may not feel comfortable, but if we don't try these cases, we risk serious threat to our justice system

Although, the courts have started some in-person jury trials again, these past couple years have put some strain on our ability to get back into the courtroom. As we have seen, courts have issued orders during the pandemic that have affected our trial calendars and our avenue for having our clients' stories heard. Courtrooms have been harder to obtain, our trial calendars are crazy since many of them were pushed out a year or two, continuances seem to be the norm now. Clients and their lawyers are frustrated.

What can we do about this? Sometimes not a whole lot. We are at the mercy of court orders, and as frustrating as it is, the ever-changing spikes in covid cases that impact what courts are doing are out of our control. The access to judges, jurors and courtrooms has not been as easy to get.

Courts in many counties have greatly restricted the number of jury trials assigned. There has been so much change, so much indifference, so much unknown these past two years. We have missed the courtroom, either because there was not one available, or because we were not ready and willing to try the case in these new times.

We have spent more time working remote, less time being trial lawyers. Now is the time to step up. It is our duty and calling to try cases right now. We, as trial lawyers, must protect our civil rights afforded to us. If you get the chance to call ready this month, this year, you must put aside your uncertainness and do it. These trials may not look the same, and they may not feel comfortable, but if we don't

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Kelsey DePaoli, Law Offices of Black & DePaoli, PC, is a CCTLA Board Member

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try these cases, we risk serious threat to our justice system.

If you are fearful of trying cases, call in someone to help you, don't do it alone. There are so many lawyers who are willing to help. There are people who have tried many more cases than you and are willing to offer their help.

We need to be persistent, relentless and powerful. We need to give our clients a voice. If you have not done a jury trial since the pandemic began, research helpful tips. Let's help each other get back in there and fight for justice. Have your tech team on speed dial or with you, practice showing witness documents remotely, make sure your witnesses have hard copies of exhibits at their location, be short and to the point. Some jurors are fearful to be in a courtroom full of people because they are very worried about their exposure to COVID. However, there are still jurors stepping up ready and willing to hear your case. So, lets rise and get back in the ring and push forward. We can do this together!

For some of us, changes can be intimidating, while some of us welcome the challenge, but one thing we can all certainly gain from change is experience and knowledge! We now have the power to become better, more informed and educated in the technical world in which we live. Knowledge is power, and the more we learn and adapt to the situations that arise, the better we will be for it! Our world is ever-changing; evolving with the times and adapting can only strengthen our ability to help our clients. Let us remember to help our fellow trial lawyers, let's remain steadfast in our effort to maintain our justice system that we must protect, let's fight for it, changes, and all! We deserve it, and more importantly, our clients deserve it!

VIRTUAL JUSTICE

Remote Technology in the Courtroom

By: Walter J. (Lee) Schmelter

Virtual justice—that phrase sounds like what you get when you win almost all your case, but not everything, not even remotely. Yet virtual justice was the subject matter of a January webinar sponsored by the Sacramento County Public Law Library. Judge Hom, immediate past Sacramento Superior Court presiding judge, presented *"Virtual Justice—Remote Technology in the Courtroom."* Here are my takeaways, and sometimes my stray observations, about what is and what might be.

Lee Schmelter, Law Office of Lee Schmelter, is a CCTLA Board Member

Remote tech in differing forms has been a part of California justice for years. In many counties, one can now access most court case indexes by party name and case number from one's computer, and can often view case documents in recent civil cases, at least.

Only 10 years ago, I had to travel to Mariposa County to access some old court records toward expunging my civil client's related criminal conviction. The scenic ride there and my successful appearance in Mariposa County Superior Court (the oldest continuously operating court west of the Rocky Mountains), made my time spent worthwhile, but I spent hours for a 10-minute court appearance.

In recent years, we've had CourtCall for court appearances almost everywhere throughout the state, and fax filing of court documents—still allowed in Sacramento County and some others, though my own dedicated fax landline has gone the way of my Blackberry. When will Sacramento County shift to e-filing? Not soon, per Judge Hom, because other needed court tech transitions have taken the fore. Not like e-filing is a panacea—it has its own problems, especially because the systems are not uniform statewide.

Just as Californians can now ski and surf in the same day, attorneys can now appear virtually in Sacramento in the morning and L.A. in the afternoon. Matters formerly not worth one taking a day off to travel at rush hour for a half a day wait and 15 minutes of courtroom time can now be handled via a Zoom call. A small claims or traffic contest formerly required a day off work and mustering of witnesses at the courthouse—often not worth one's time.

Advantaged are small claims litigants wanting to present not declarations, but live testimony by a third-party witness (including expert) testimony. It is harder to get in-person testimony from the auto mechanic or contractor who corrected the defendant's deficient work than to get that expert to log into a website at a particular time and describe his/her qualifications and the defendant's deficiency/breach/damages.

And why appear in traffic court if it costs you a half day's wages to even state your case? So, remote technology clearly has benefits. But doubtless, there will be lots of transitional hassles, especially for the poor, the tech ignorant and those with certain disabilities. For these, says Judge Hom, the court will carve out exceptions for good cause to avoid "tech barriers."

Technical Barriers to Remote Technology in the Courtroom

Issues raised by remote technology in court proceedings include asking too much of sometimes tech-ignorant parties, attorneys and judges. These issues vary by county, but Judge Hom believes barriers will fall as the technology improves, further simplifying ease of access, and as Californians advance in tech knowledge, and as access to high-speed internet becomes ubiquitous.

Per one study, 97% of people in Sacramento County have access to such "broadband" service, compared to only 11.2% in Plumas County. Judge Hom said in his experience, economic and technological hurdles to pro per litigant and witness court appearances are often overcome via a friend with a cell phone. In the future, satellite arrays will help pro-

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vide access to more rural locations. He believes remote access to courtrooms improves, not detracts from, access to justice by litigants, attorneys and witnesses.

Judge Hom provided as a humorous example of difficulties in remote technology in the courtroom a video clip of the Texas attorney appearing virtually in court with a "filter" that gave that attorney a cat head avatar onscreen. Google "I'm not a cat" for an unbelievable two-minute groan and grin.

Judge Hom noted that tech issues are tough for everyone, including judges, and the court is fairly understanding of such problems. That doesn't resolve the time spent trying to resolve tech issues, or the delay that might be caused by a key witness whose internet connection fails. My own fiber optics connection, augmented by my phone's "mobile hotspot," sometimes quits unexpectedly. An internet connectivity glitch is the new flat tire on the way to the courthouse, the stuff of attorney nightmares.

"An Old Woman's Disposition of Her Grindstone

~Sara L. Vickers Oberholtzer, *Souvenirs of Occasions*, 1892

That's jist the way the times will change.
The old folks long a-slumber;
While wonders wakened since they went
Puzzle my brain tu number.
There's telegraphs, an' telephones,
An' lightnin' train expresses,
Electric lights, an' phonographs,
An' things nobody guesses.
Discoveries is hatchin' fast,
And peckin' fur existence.
The hen of years has set her time
With patience an' persistence...
We're lucky if we git along,
Among these hatched inventions,
'Thout being lost or gobbled up
Tu feed their best intentions...
We'll du our duty, as I said,
Nor hug old-fashioned notions.
The world ain't goin' tu stop fur us
Its various locomotions.
We'll jog along as best we kin,
An' call the changes pleasant;
Because there ain't no age, ye see,
Like this 'ere blessed present...

Legal and Practical Barriers to Use of Remote Technology

Even absent tech barriers, legal and practical barriers exist regarding one's constitutional right to appear in court and "confront" witnesses who appear remotely. Criminal defendants must consent to remote appearances. *People v. Sekhon* (2018) 26 Cal. App.5th Supp.26, (Judge Hom noted this was a pre-COVID case).

Civil attorneys face similar problems confronting/cross-examining a witness appearing remotely—perhaps even a witness wearing a mask. Judge Hom believes the judge and jury will be able to ferret out the truth regardless of lack of physical presence in the courtroom, despite some admitted problems with such remote testimony. Personally, I question any court's ability to evaluate credibility of a masked witness testifying remotely.

In the past, non-party witnesses were physically excluded from the courtroom on motion and prohibited from communicating with other witnesses re: their testimony. Judge Hom believes similar court orders will suffice for remote testimony. In my opinion, some deceptive tortfeasors or contract breachers will ignore court orders because they now can, and read/use prepared notes while testifying, or even have other witnesses present behind the scenes.

Safeguards discussed were pre-testimony orders prohibiting texting while testifying, barring testifying from undisclosed prepared documents and a before-and-after camera sweep of the room in which the remote witness is testifying.

This last approach is used for remote SAT (college) testing, with third party proctors observing for those trying to cheat the system. A camera sweep is the *least* attorneys should demand of remote testimony by an adverse witness, in addition to the other orders/witness admonitions.

Another practical obstacle discussed about remote testimony for any court proceeding is document handling. Supposedly, counsel should agree on document handling, because documentary exhibits for intro at trial are normally required to be submitted in advance. Documents to impeach a witness need not be submitted in advance, however. So how to confront a remotely testifying witness with such documents during their testimony? Judge Hom says anticipated impeaching documents are to be physically submitted under seal to the court in the court's drop box and introduced as necessary and as allowed by the court. He also mentioned emailing such documents during trial to the opposing party and the court clerk, but it was unclear exactly how this could be done in an ongoing trial.

Public Access Issues

Other problems with remote tech involve the public's right to access the courts, to ensure fairness. The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness. *Press-Enterprise Co. v. Superior Court of California for Riverside County* (1986) 478 U.S. 1, 7. Public viewing of *voir dire* also promotes fairness. *Id*., at 508.

More than 10,000 members of the public viewed via livestream YouTube the East Area Rapist/Golden State Killer proceedings in Sacramento. No way could such public access be accommodated except through remote technology in the courtroom.

This *general* rule of public access is codified in California: "Except as provided [by law], the sittings of every court shall be public. Code Civ. Proc. Sec. §124. Public access can raise issues of fairness and privacy as to some litigants, and trade secret, copyright, and even profanity issues.

The Law on Remote Appearances

Emergency Rules of the Court, local and otherwise, emerged to deal with Covid concerns. Emergency Rule 3 now covers all

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criminal remote appearances. New (effective January 1, 2022) Code of Civ. Proc. §367.75 now permits remote appearances by a party who gives notice to all of that intent, for conferences, hearings and proceedings.

Physical appearance may be mandated if the court lacks effective technology or if the court determines on a hearing-by-hearing basis that an in-person appearance would materially assist effective case management or resolution—except that experts may appear remotely absent good cause to compel in-person testimony.

Subd. (d) permits remote trials or evidentiary hearings, absent "a showing…why a remote appearance or testimony should not be allowed. The court must inform all parties of the implications of remote technology, including possible delays due to, e.g., audibility issues. Importantly, subd. (f) says clearly: The courts shall not require a party to appear via remote technology. Subd. (f) says a self-represented party may appear remotely only if they agree to do so. There's more re: juvie proceedings; read the statute.

Amended Rules of Court, Rule 3.672 (effective January 1, 2022), says essentially the same thing. New Judicial Council forms re: remote appearances are available. What's clear is that the court and attorneys will have to do some difficult navigation through the remote waters ahead. For cat's sake, check the local rules for your own court re: tech requirements and parameters, and take care and learn early, lest *you* wind up on YouTube.

Thank You to Mustard Seed School Donors

Thank you to all who donated to the Mustard Seed School during the holidays. Since 2001, CCTLA has consistently donated to Mustard Seed School to help assist with educating homeless children with a major fundraising push during the annual holiday event. Due to continuing COVID restrictions, that event was not held in 2021.

Mustard Seed School is a program of Sacramento Loaves & Fishes, a 501 c(3) charitable non-profit organizaton dedicated to serving the homeless. It's Mustard Seed School is an emergency school that provides a Montessori-style quality education for children three to 15 years old in a safe, structured, and nurturing environment while their families seek stable and permanent living situations. Students receive meals, backpacks with supplies, clothing, counseling, health screenings and access to routine and/or urgent health care.

SACRAMENTO LOAVES & FISHES

CCTLA members' tax-deductible donations make a difference for Mustard Seed School. Donations can be made online at https://secure.sacloaves.org/np/clients/sacloaves/survey.jsp?surveyId=1& (Select Campaign "Mustard Seed School").

CCTLA 2021 ADVOCATE OF THE YEAR: BOB BALE

The Sacramento Legal Community's Prolific 'Paul McCartney'

Bob Bale is no stranger to CCTLA. As a former president, when he isn't trying massive, disputed liability cases against corporate defendants, he is lobbying for the rights of injury victims. When he isn't lobbying, he is giving instructional seminars. When he isn't teaching, he's writing/performing music for local events, and 2021 was a perfect example of how much you can do when you put as much energy into it as Bob Bale does. CCTLA is proud to honor Bob Bale as its 2021 Advocate of the Year.

The tragic case that led to Bob's much-deserved award is Oakland's Ghost Ship Warehouse case, where he served on the executive steering committee for the litigation. This is the well-known, much-publicized and tragic death of 36 people, and countless injured, in an unlicensed, uninspected live/work space that included artist studios in an abandoned warehouse. Every defendant denied liability. Prosecution of the case involved battling numerous demurrers by the City of Oakland, appealed unsuccessfully all the way to the California Supreme Court, as the city tried to invoke a slew of immunities to circumvent any liability for its failure to protect the victims.

Still, Bob and the executive committee were able to navigate a very nuanced interpretation of the city ordinances to secure a global settlement of over $32,000,000, in addition to contributions from the building owner, as well as PG&E. His four years of work on this case with the executive committee earned him a nomination as CAOC's Consumer Attorney of the Year. Bob, and fellow ExCom members Tom Brandi, Chris Dolan and Mary Alexander, received the annual California Lawyer of the Year Award from the *Daily Journal*.

Bob is as likely to write a song as he is to write a brief. He is well known for his diversity of music, from caustic social commentary about the *Howell* decision to a "roasting" of outgoing CAOC President Debbie Chang at 2021's CAOC Annual Convention. It is only a matter of time before Bob Bale sings his closing argument to a jury or oral argument before a court of appeal.

But Bob is no "one-trick pony" as to his performances.

In early 2021, Bob co-tried a very difficult aviation case with partner Roger Dreyer against Beechcraft Aviation Company, over six years in the making. Plaintiffs alleged Beechcraft negligently designed an exhaust valve that overheated during take-off from a high-density altitude airport, causing a sudden loss of compression and power, which led to a tragic crash and the deaths of the occupants of the plane. Plaintiffs were the three adult children of the two decedents, their parents. Beechcraft simply alleged pilot error. After a multi-week bench trial, the court ruled in Plaintiffs' favor, with a judgment against Beechcraft for over $21,000,000. Most importantly, after six years of Beechcraft blaming their father, the pilot, for crashing the plane and killing their mother, the court apportioned zero fault to decedents.

Of course, no attorney works alone, and Bob is quick to point out the powerful guidance and mentoring from trial attorney Roger Dreyer. In 2018, Roger, Bob and fellow partner Noemi Esparza secured a $36,000,000 verdict in a product-liability case against Nissan.

CCTLA President David Rosenthal and CCTLA's 2021 Advocate of the Year Bob Bale, of Dreyer Babich Buccola Wood Campora and a past CCTLA president

Nissan appealed, against a CCP Section 998 demand that Nissan had rejected, but that Plaintiffs exceeded at trial. The interest on that demand was $10,000 a day. In December, 2021, after three years, the Third DCA affirmed the trial court's verdict. With interest, the total verdict rose to $52,000,000.

Not only did Nissan spend millions on experts to defend the case, it also attempted to minimize Plaintiff's damages, due to his immigration status. Accordingly, when faced with such an insurmountable hurdle, Bob drafted legislation to exclude such evidence. Along with Noemi and the pros from CAOC, Bob lobbied the state legislature to change the law to preclude the discovery of a plaintiff's immigration status in personal-injury or wrongful-death cases.

That law is now codified as Evidence Code section 351.2. Through all of this, Bob is quick to compliment his partners and his amazing support staff, including his secretary of more than a decade, Heather Maxey.

Roger and Bob share a long string of successful trial outcomes, from a $50,000,000 punitive damage award against Ford, to the highly publicized water intoxication radio station contest wrongful-death case, and the tragic death of a child due to peanut exposure at a local recreational camp, despite knowledge of the child's allergy. All of these outcomes prompted

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CCTLA 2021 JUDGE & CLERK OF THE YEAR

Judge Allen Sumner and Clerk Melissa Garcia

CCTLA has voted its one of its highest awards to the Honorable Allen Sumner—as the 2021 Judge of the Year for Sacramento Superior Court in California. Also receiving honors for 2021 is Melissa Garcia, recognized by CCTLA as Clerk of the Year.

Judge Sumner is well deserving of this award due to his ability to stay impartial and professional in his capacity as a trial judge. If you have been in his courtroom, you saw a knowledgeable, meticulous, open-minded, detailed judge who made you feel comfortable to try your case. He knows the rules on evidence and expects the lawyers to be prepared and organized, while maintaining control of his courtroom.

He is respected by attorneys in the community for his integrity and ability to uphold the law. He is extraordinarily patient with young lawyers who are learning to try cases, but he also maintains his courtroom with diligent and evenhanded administration of justice.

Although, it has been an odd time for many in the legal field with the effects of COVID-19 impacting our justice system, Judge Sumner gave his time and experience to projects assigned while trials were on hold. He maintained the minors' compromise calendar to keep cases for children moving. He has done the state hospital calendar via Zoom over the last year to ensure the patients were being heard,

From left: 2021 Clerk of the Year Melissa Garcia, CCTLA 2021 President Travis Black and the 2021 Judge of the Year: the Honorable Allen Sumner.

Judge Sumner has stayed involved and provided litigants and their lawyers a safe place to be heard. He has provided constant leadership, in his efforts to resolve cases when possible, and to move cases to obtain justice when he can.

His staff describes him as kind and funny, but very organized and detailed. He makes sure he gets it right the first time.

Along with Judge Sumner is his invaluable, wonderful clerk Melissa Garcia, CCTLA's Clerk of the Year honoree for 2021. Melissa is the point of contact for all of those in need. She is exceptional. She does not hesitate to provide direction and goes out of her way to provide guidance and keep the court organized.

She is kind and professional and always assists the attorneys and litigants. She is patient, down-to-earth and keeps the department flowing smoothly.

If you have been in this courtroom, you were lucky enough to experience two professionals who are willing to help make the process comfortable and supportive.

Outgoing CCTLA President Travis Black presents 2021 Presidential Awards to David Rosenthal and Peter Tiemann.

Advocate of Year

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changes by each defendant in steps taken to protect the public.

Bob's true strength comes from his relationship with his wife, Patricia. The two were high school sweethearts growing up in Phoenix but then went their own separate ways and lost touch. But Bob always kept in contact with Patricia's father, an Arizona judge. Ultimately, they rekindled their relationship, wrote their own love song and have been together for more than 20 years. Patricia describes Bob as "all in" for finding a solution for whatever needs to be fixed. He has boundless energy and creativity, particularly in helping others.

If that isn't enough, Bob is literally the lead singer for rock-n-roll band Res Ipsa Loquitur. The band plays classic rock covers and original songs. Many of those originals are written by Bob to celebrate people or highlight issues important to our profession and to society. Pre-COVID, Bob and Patricia hosted jam sessions at their home, where 10-15 local musicians would gather to share dinner and play music. By the end of the night, this group that has never played together is jamming in unison. Patricia says they cannot wait for COVID to pass so the couple can resume these musical events. Similarly, Bob can walk into a room of small children and within minutes, have them playing percussion and singing holiday songs.

CCTLA's 2021 President Travis Black (center) holds his appreciation plaque. At left is CCTLA's 2022 President David Rosenthal, with CCTLA Board Member Peter Tiemann, right.

Hank Greenblatt, a long-time Dreyer Babich partner, is also a founding member of Res Ipsa Loquitur and plays rhythm guitar in the band. According to Hank, "No one is like Bob Bale. No one can keep up with him. He is a true advocate for the underdog who needs a voice. He is a tireless advocate for those in need."

Now, Bob continues his fight advocating legislative change to correct the damaging effects of *Howell* and its progeny. He is also focused on alerting our profession to the State Bar's sandbox proposal, a new proposed regulatory scheme that would allow non-attorneys to practice law without obtaining a JD or taking the bar, as a "gig economy" approach to legal services.

Bob is always on the front line, protecting the rights of others, particularly with our area of specialty always under attack. Yet, Bob remains one of the kindest, friendliest people you will meet. If you ask him, he'll tell you that he's equally proud of his legal and musical accomplishments, and the serendipitous way they have managed to intersect in his life.

What's New in Tort & Trial

2021 A YEAR IN REVIEW

There were 545 attendees for the Joint TLA virtual 39th annual Tort & Trial program held Jan. 25. Many thanks to the speakers who spent countless hours reviewing cases to provide this informative program: Anne Kepner, Kirsten Fish, Valerie McGinity, Jeremy Robinson and Mark Davis.

Thank you to all the sponsors of this year's program:

SPECIAL THANKS TO CCTLA'S SPONSORS OF THIS YEAR'S TORT & TRIAL PROGRAM:

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The insurance company did not pay my 'reasonable' demand; The limits are waived, and it's bad-faith time — or is it?

By: Dan Glass

Dan Glass, Law Office of Daniel S. Glass, is CCTLA Second Vice President

As many of you may know, a good part of my practice is insurance bad faith. Certainly at this point, all lawyers must know that "third-party" bad faith came to fruition in California in 1979 as a result of the California Supreme Court case of *Royal Globe Ins. Co. v. Superior Court of Butte County* (1979) 23 Cal.3d 880.

Yes, that was a somewhat "local" decision coming out of the Third District Court of Appeal from Butte County and involved some local counsel. It was, in my opinion, the classic example of "bad facts make bad law." Only this time, it was only bad for the insurers. They treated a plaintiff so badly in refusing to resolve her claim that the Supreme Court decided it was time to hold the insurers accountable. It was great law for plaintiffs.

At the time, I had just graduated college and was at my second "real job"— as an insurance claim representative working for Royal Globe Insurance Company. I don't think I handled a single liability case where, at some point, I did not receive the "Royal Globe" letter.

Anyway, third-party bad faith existed for 10 years, the entire time between when I graduated college and then graduated law school. In fact, according to court records, a mere two months after I graduated law school and months before I became an attorney who might be able to use the *Royal Globe* decision for profit, the Supreme Court took it away in *Moradi-Shalal v. Fireman's Fund Insurance* (1988) 46 Cal.3d 287. *Moradi Shalal* gave insurance companies a renewed right to treat third-party plaintiffs, and their lawyers, poorly, or as this article will discuss: "unreasonably."

Of course, now that I am a "plaintiffs lawyer" and realize not only how tough it is to be the plaintiff's representative, but also how tenacious one must be to handle plaintiff cases, I also understand how and why plaintiff's lawyers were able to effectively "create" a third-party bad faith claim through stipulated judgments and assignments even though the California Supreme Court decided that such a claim cannot exist (This concept, in and of itself, it worthy of its own article. It will not be explored here).

Which brings us to the crux of the article—a 2021 decision styled *Pinto v. Farmers Insurance Exchange* (2021) 61 Cal. App. 5th 676. A devastating decision for plaintiff (Mr. Pinto) and his counsel, but really a road map for all future insurance bad-faith actions.

On the surface, the facts of the auto accident giving rise to the insurance claim were horrendous, but not particularly complex. Young adults Alaxandrea Martin, Dana Orcutt, Anthony Williams and Alexander Pinto were party "animals." They drank and did drugs at a Lake Havasu party. There is no specific discussion about the amount of alcohol and drugs that were consumed, but the opinion leaves little doubt that there were

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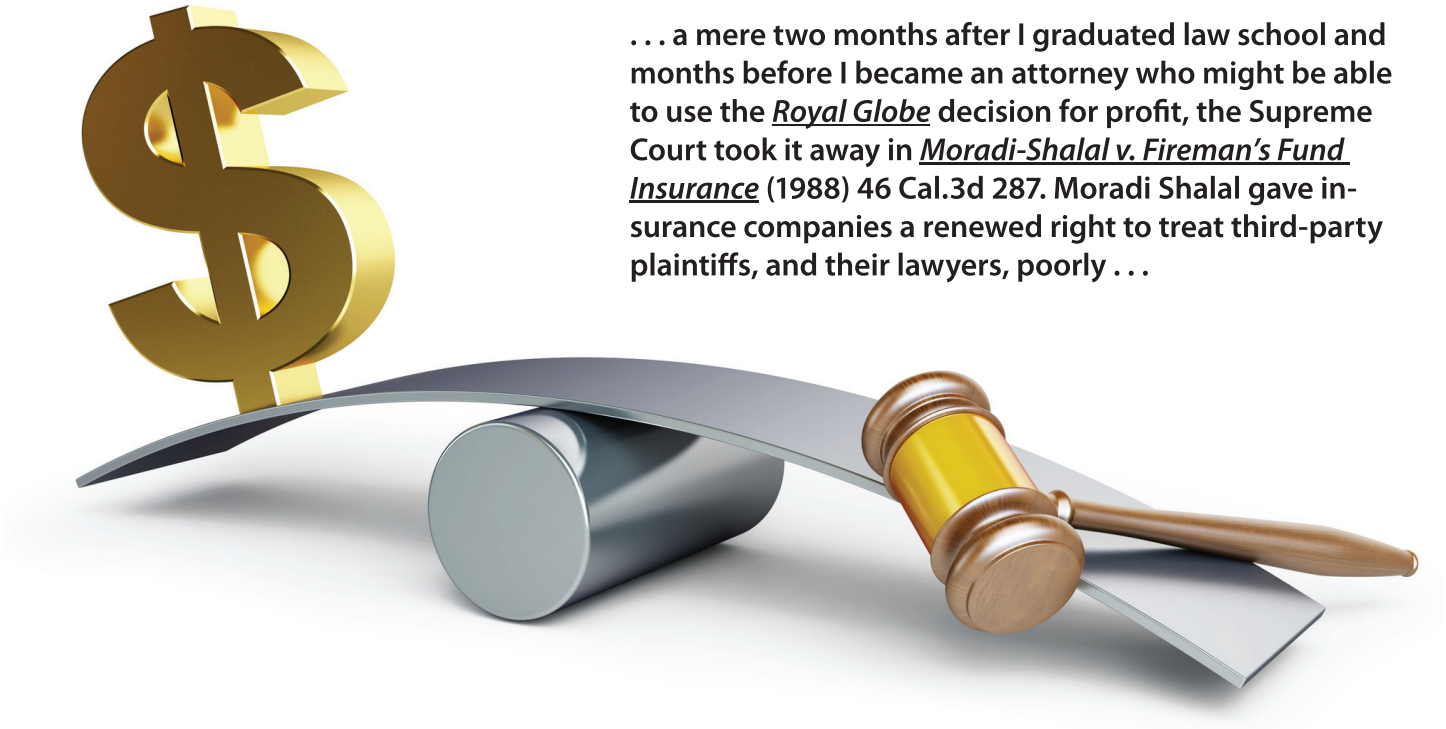

. . . a mere two months after I graduated law school and months before I became an attorney who might be able to use the *Royal Globe* decision for profit, the Supreme Court took it away in *Moradi-Shalal v. Fireman's Fund Insurance* (1988) 46 Cal.3d 287. Moradi Shalal gave insurance companies a renewed right to treat third-party plaintiffs, and their lawyers, poorly . . .

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great quantities involved, and it was not the first time these individuals partied and then drove a vehicle.

The young adults were in a vehicle owned by Laura Martin (Alaxandra's mother). The vehicle and its occupants were involved in a horrific single-vehicle accident in Arizona on their way back to California. Alaxandra Martin was in a coma. Alexander Pinto was paralyzed, most likely a quadriplegic.

After the tragedy, no one actually admitted being the driver of the vehicle, but it was certain that Pinto was not driving. It was ultimately believed that Alaxandra Martin gave the keys to her mother's vehicle to Pinto to drive. However, it was believed that Pinto then gave the keys to Orcutt to drive. However, Orcutt denied being the driver and told the police she "believed Williams was supposed to be driving." It was the issue of "who was actually driving" that caused the first set of problems with the case.

The Martin vehicle was insured with Farmers and had a $50,000 per person and $100,000 aggregate policy limit. No one disputed the fact that Pinto's injuries were catastrophic and that he was not driving the vehicle. Pinto retained counsel.

Since the value of Pinto's case was so far beyond any potential policy limits, his counsel set out to do what most plaintiff's lawyers would do: try to set up the insurer (Farmers) in such a way that their policy limits would be waived by not accepting that "reasonable" settlement demand. The attorney sent a letter to Farmers on July 1, 2013, that generally demanded the $50,000 policy limit but included a demand that Farmer's *". . . insured provide a release, a declaration that the insured had not been acting within the course and scope of her employment at the time of the accident, and a copy of any applicable insurance policy."*

The offer was to expire in 15 days. However, the court noted that it was placed in regular US Mail on July 1, 2013, and addressed to Farmer's mail depository in Oklahoma. It was not served directly on the local Farmers adjuster who had been handling the case. The July 4th holiday in the middle caused further delay in processing—giving Farmers a mere eight work days to act on the demand.

Even on such short notice, Farmers retained counsel who had a dialogue with Pinto's attorney. They discussed whether the most likely driver (Orcutt) would be included in any release and other questions—to which Pinto's attorney did not provide very succinct responses. Part of Pinto's demand in order to accept the $50,000 policy limit was for Farmers to produce a declaration from Orcutt.

However, at this point, despite Farmers' retention of a private investigator, Orcutt could not be found and/or was not cooperative. No declaration from Orcutt could be obtained. Nevertheless, Farmers caused a $50,000 policy limits check and a release of all claims against Martin and Orcutt to be delivered to Pinto's attorneys office before 5 p.m. on July 16, 2013 — thus complying with Pinto's lawyer's 15-day limit.

Pinto's lawyer rejected the payment and proceeded to file suit against Martin and Orcutt for negligence. That suit was settled with an agreement for a stipulated judgment of $10,000,000 against Martin/Orcutt and an assignment of Martin's rights against her insurer to Pinto—thus, in effect, creating a "first-party" bad faith claim from the "third-party" accident where Pinto sustained his catastrophic injuries. Pinto's bad-faith lawsuit against Farmers was subject to trial by jury. Special verdicts were returned against Farmers as follows:

1) Pinto made a reasonable settlement demand;
2) Farmers failed to accept a reasonable settlement demand;
3) A monetary judgment had been entered against Martin in Pinto's earlier lawsuit;
4) Orcutt failed to cooperate with Farmers;
5) Farmers used reasonable efforts to obtain Orcutt's cooperation; and
6) Orcutt's lack of cooperation prejudiced Farmers.

Pinto, supra. at p. 686

However, the biggest issue in the case was not what the jury decided, but what it was not asked to decide: ". . .did Farmers act unreasonably in any respect?"

Farmers' counsel repeatedly argued that the jury had to make a finding that Farmers' conduct was "unreasonable" in order for there to be a finding of "bad faith." Farmers wanted that language in the special verdict form.

Pinto's counsel fought against any such finding. Pinto's counsel repeatedly demanded that the Court adopt CACI 2334, modified only as to party names—

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and NOT include in the verdict form a specific question regarding "unreasonable" conduct because such was not part of CACI 2334.

The trial court entered judgment for Pinto, against Farmers, in the amount of $9,935,000.

Farmers' appealed, and the issue on appeal was framed as:

> "The issue is whether, in the context of a third-party insurance claim, failing to accept a reasonable settlement offer constitutes bad faith per se. We conclude it does not."
> *Pinto*, supra at p. 687

One would think that when the reviewing court finds error in the jury instructions used, it would reverse the trial court decision and remand the case for a new trial—BUT NOT HERE. The court not only took away Pinto's $9,935,000 verdict, it remanded the case with instructions to enter a new judgment for Farmers, and Farmers was to recover its costs on appeal. In order to reach this extremely poor result for Pinto, the court ". . . conclude[d] the defective verdict was accomplished at Pinto's behest. Not only did he fail to propose an appropriate verdict, he also vigorously opposed Farmers' attempts to clarify the erroneous verdict." (*Id* at p. 694)

LESSONS TO BE LEARNED

1) As far as insurance "bad-faith" litigation goes, "reasonableness" has always been the rule in first-party and these "failure-to-settle" third-party assignment cases. If plaintiff cannot show that the insurer's conduct was "unreasonable," plaintiff is not going to prevail. This is really not a new concept. In *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal. App. 4th 335, the courts first recognized the "genuine dispute" doctrine. This case allowed insurers to, in my opinion, "weasel out" of their bad faith by attempting to show that the "law" in a particular area of policy interpretation was not well settled—so if the insurer's conduct was reasonable in light of the conflicting laws, it was NOT "bad faith"

Chateau Chamberay, supra, was later expanded further to apply to "factual disputes" as well as policy interpretation disputes. (See *Fadeeff v. State Farm* (2020) 50 Cal. 5th 94, at 101. Thus, insurers claimed "reliance on the advice of counsel" as a defense; they supported the denials with opinions from their hired physicians about injuries, etc. For the most part, they lost—but they did it anyway.

However, in light of these exceptions, and with a more conservative court, *Pinto* decision is established "case law" that an insurer's refusal to accept an offer of settlement within policy limits is NOT, "per se" bad faith. There must be a specific finding of "unreasonable conduct" by the insurer, and merely passing up a settlement demand within policy limits is not enough.

Here, I can only guess that Pinto's injuries were worth $10,000,000 and, like his lawyer thought, getting Farmers to miss its opportunity to settle for their $50K policy limit would "open the policy." It didn't—despite astronomical damages and clear liability.

2) Jury instructions are not always right. I suggest that this is the bigger issue of the decision. I have always been told, and always try to, use the CACI instructions as they are. Altering them is more likely to lead to reversible error. Most judges do not want to stray too far from them, which, I venture to guess, is what happened here.

But if you as the lawyer who has been litigating your case for years, have some reason to think that the evolving state of the law MIGHT require some adjustment to the otherwise applicable CACI instruction, and the other side is pushing hard for an adjustment, learn from the fate of Pinto's counsel. He fought hard against a modification of the instruction and special verdict to keep out a specific finding of "unreasonable" conduct—and it cost him and Pinto everything.

The court's opinion leaves the impression that had there been some "give and take" on the creation of the special verdict and there was some agreement by the parties on a modification—which turned out to not be a correct statement of the law—Pinto would have gotten a new trial.

3) BE REASONABLE. The court's opinion does not specifically state that Pinto's counsel was not reasonable. But the fact that the court devoted a full paragraph to explain that Pinto's counsel sent his demand on July 1 to Farmers' Oklahoma address and not directly to the local adjuster he had been dealing with, and that it was sent over the July 4th holiday and that it resulted in only eight working days for Farmers to act, coupled with the actual delivery of the funds by Farmers within the 15-day deadline, which Pinto then rejected anyway, certainly suggests that the court was not enamored with the conduct of Pinto's counsel. This had to factor into the ultimate decision to enter judgment for Farmers rather than remand for a new trial to give Pinto a chance to prove Farmers did act unreasonably.

But, if you look closely at the facts, there is probably good reason why Pinto's counsel fought so hard to NOT give the jury the chance to decide if Farmers' actions were "unreasonable. If the jury was presented with all of the evidence about the exchange between Pinto's lawyer and Farmers, and then presented with the question about being "unreasonable," it is possible, and in my opinion, probable, that the jury would have decided that Pinto's lawyer was the one who was "unreasonable."

After all, he had the funds in his office by his demand date. He had the release to sign. The only thing he was missing was a declaration from Orcutt—a declaration Farmers tried to get within the time frame but could not due to Orcutt's refusal to cooperate. Then, Pinto's lawyer refused to give Farmers more time and refused to accept its policy-limit money.

If you have a situation where you are planning to make an offer to resolve a case within policy limits but really hope that the insurer does not accept your offer so "the lid can be off the policy"—think again. Act "reasonably" so that if the matter is ever presented to a jury, YOU are clearly the "reasonable" one. If not, you might suffer the same fate as Pinto and his lawyer.

For the record, the California Supreme Court denied review of the *Pinto* matter (2021 Cal. LEXIS 4340 (June 23, 2021). There are no other court of appeal decisions which have further addressed this issue but, based on this opinion, CACI 2334 and a verdict form based on that section will need to be modified to provide for a jury to specifically determine if the conduct of the insurer was "unreasonable."

Merely not accepting a "reasonable" settlement demand that is within policy limits is no longer enough for a finding of "bad faith" after a stipulated judgment and assignment.

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Continued from page two

factors. An exception to the Open and Obvious Rule is when it is foreseeable that the danger may cause injury despite the fact that is open and obvious. Defendant's open and obvious argument failed because the defense failed to offer any evidence that when it is so blatantly obvious and therefore foreseeable that a person would be hurt, that there was no triable question. Moreover, Defendant knew there was no handrail, knew that the stairs were an open and obvious danger and yet did nothing about it.

The trial court concluded that Plaintiff/Appellant's inability to remember the fall meant that she lacked non-speculative evidence of causation. That was an error. A trip-and -fall plaintiff need not remember her fall to recover damages provided the evidence gives rise to a reasonable and probable inference that defendants' negligence was a substantial contributing factor.

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Deny Requests for Admission At Your Peril

Spahn v. Richards

2021 DJDAR 12194 (November 30, 2021)

FACTS: Plaintiff Spahn purchased property in Berkeley, intending to demolish the existing structure and build a new residence. Spahn contacted Defendant Richards, a licensed contractor, who discussed demolition for $12,500 and a new residence construction for $515,000. Plaintiff obtained architectural renderings and showed them to Defendant contractor. The architectural drawings were not adequate for contractor to bid on because they were not specific plans. After the parties' discussion regarding the $515,000, Plaintiff continued to seek other contractors bids. Ultimately, Plaintiff paid $1,000,000 for the construction by another contractor.

After entering into what the plaintiff claimed was an oral contract, Plaintiff and the architect compiled information about the construction costs in a written contract they hoped that Defendant contractor would sign, but he recoiled from the document and refused to execute it.

During the litigation, Defendant contractor propounded requests for admissions, asking Plaintiff to admit the parties did not enter into an alleged oral contract and did not have a meeting of the minds as to that alleged contract. The Requests for Admissions also asked Plaintiff to admit that the oral contract was not binding or enforceable. Plaintiff denied the RFAs.

The case went to trial, and a jury rendered an award in favor of the Defendant contractor. Defendant moved for costs of proof under CCP 2033.420. The trial court awarded Defendant $239,170.86 in attorney's fees and costs of proof. Plaintiff appealed.

ISSUE: Were the ultimate issues of whether a contract was entered into and whether the contract was enforceable subject to post-trial RFA sanctions?

RULING: The appellate court looks to see whether there was an abuse of discretion by the trial judge in awarding costs of proof. The trial court was thus upheld in granting Defendant's motion and awarding $239,170.86 in attorney's fees and costs of proof.

REASONS: If a requesting party proves the truth of a Request for Admission previously denied by the opposing party, the requesting party may move the court for an order requiring the opposing party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. *Doe vs Los Angeles County Child and Family Services* (2019) 37 Cal. App.5th 675, 690. The trial court shall grant a motion for costs of proof unless: 1) an objection was sustained to the request or the response was waived; 2) the admission sought was of no substantial importance; 3) there was reasonable ground to believe the party refusing to admit the matter would prevail at trial; 4) there was other good reason for the failure to admit.

The parties' reliance on self-serving testimony is not sufficient to establish reasonable grounds to deny a Request for Admission.

In this case, Defendant contractor made a Motion for Summary Judgment that was denied. When it came time to defend the Request for Admission denials, Plaintiffs contended that because they won the MSJ, costs of proof could not be awarded. However, the standards are different, and MSJ may be denied and the Request for Costs of Proof granted. *Regents of the University of California vs. Superior Court* (2018) 4Cal5th 607, 618.

Summary Judgment is appropriate where no triable issue of material facts exists, and the moving party is entitled to judgment as a matter of law. Costs of Proof are granted when the responding party could not have entertained a good-faith belief that the party would prevail on the issue at trial.

Defendant also made a Motion for Directed Verdict that was denied. Likewise, the standards are different. In ruling on a Motion for Directed Verdict, a trial court has no power to weigh the evidence, and may not consider the credibility of witnesses, whereas the trial judge does weigh evidence and witness credibility in the RFA sanctions motion.

The trial court's decision in favor of the Defendant contractor is subject to an abuse of discretion standard and will be overturned only if it exceeds the bounds of reason. Thus, an appellate court will uphold a trial judge's determination even if they disagree with it. In light of the evidence in this case—that there was no discussion of specific costs or a pay-

Continued on next page

ment schedule for the oral contract—the trial court could reasonably conclude the claimed oral contract lacked essential and sufficiently definite terms that would establish the existence of a meeting of the minds.

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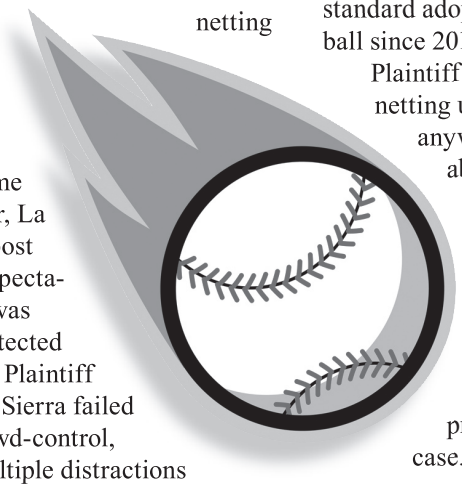
That's Baseball

Monica Mayes vs. La Sierra Univ.
2022 DJDAR 340 (January 7, 2022)

FACTS: Monica Mayes, plaintiff and appellant, went to La Sierra University's baseball diamond to watch her son pitch for Marymount University. Mayes and her husband noted that the bleachers were rickety, full of people, and therefore, they put their folding chairs on the third base line behind the dugout so that they could see the pitcher's mound.

Plaintiff Mayes was struck by a line drive which caused serious injuries, including broken facial bones, lacerations, eye damage, contusions and brain damage. She sued La Sierra University for negligence because there was no protective netting behind the dugout and the above-ground dugout blocked her view of home plate. Moreover, La Sierra did not post signs or warn spectators and there was not enough protected seating. Lastly, Plaintiff alleged that La Sierra failed to exercise crowd-control, resulting in multiple distractions that increased the risk of harm.



La Sierra moved for Summary Judgement on the ground of primary assumption of risk, "The Baseball Rule." Defendant argued that La Sierra did not sell tickets or otherwise charge admission and did not tell spectators where they could sit at the baseball games. That Plaintiff was a veteran of 300-400 baseball games and therefore, she should have expected to suffer such injuries. Moreover, La Sierra's athletic director stated that since 2009, there had been no reported incidents of a spectator being hit by a foul ball.

La Sierra also argued that the only crowd control that they provided was when an umpire requested it and argued that there was no requirement for a California Pacific Conference or a NAIA Institution such as La Sierra to put netting over the dugouts of their baseball fields, and it was a normal occurrence for balls to be batted from the field of play into the spectator seating areas.

Plaintiff's expert, Gill Fried, stated the grassy area along the third-base line, where Plaintiff set up her folding chairs, was too close to the playing field and violated the standards of a college baseball field under NCAA rules. Plaintiff's expert also testified that these dugouts and a lack of crowd control are dangerous because they block spectators' views and allow spectators to walk around freely, thereby blocking others' views of the field.

Plaintiff's expert also testified that the standard of care required La Sierra to install protective netting for the most dangerous parts of the field, including the areas above the eight-foot high dugouts, a standard adopted by Major League Baseball since 2019.

Plaintiff's expert testified that putting netting up would not alter the game anyway because no player is able to jump eight feet in the air across the depth of the dugout to try to catch a foul ball. Such netting would cost between $8,000 to $12,000.

The trial court granted the MSJ as a "textbook primary assumption of the risk case."

ISSUE: Does primary assumption of risk and "The Baseball Rule" prevent plaintiffs who are spectators struck by foul balls from bringing personal injury claims?

RULING: The trial court's granting of the summary judgment was reversed by the appellate court.

REASONS: Plaintiff raised triable issues of material fact whether Defendant had a duty to install protective netting above the dugouts to protect spectators.

A seminal case in this area is *Summer J. vs. United States Baseball Federatio*n (2020) 45 Cal.App.5th 261. Like this case, the trial court in *Summer J.* ruled that "The Baseball Rule" prevails. The Baseball Rule arose in *Quinn v. Recreational Park Association* (1935) 3 Cal.2d 725. "It has been generally held that one of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls; that the management is not required, nor does it undertake to ensure patrons from injury from such a source. All that is required is the exercise of ordinary care to protect the patrons from such injuries [citations] and in doing so the management is not obliged to screen all seats…".

However, the trial court in granting the MSJ in this case did not consider the second phase of Assumption of the Risk defenses enunciated in *Knight v. Jewett* (1992) 3 Cal.4th 296,318: the defendant's duty to take reasonable steps to increase safety and minimize the risk of injury if it could do so without changing the nature of the game or the activity of watching the game.

Defendant La Sierra and the trial judge relied on The Baseball Rule and an oversimplified interpretation of the primary assumption of risk doctrine. There was evidence to show questions of fact regarding La Sierra's duty of care and breach for failing to install protective netting, warn spectators, provide a greater number of safe seats, and exercise crowd control, all of which did not affect the game. Thus, the MSJ should not have been granted.

Moreover, even the "open and obvious" defense does not work here to bar Plaintiff because whether the danger is "open and obvious" is a question of fact.

Member Verdicts & Settlements

CCTLA members are invited to share their verdicts and settlements: Submit your article to Jill Telfer, editor of *The Litigator*, jtelfer@telferlaw.com. The next issue of *The Litigator* will be the Summer issue, and all submissions need to be received by April 30, 2022.

REAR-END COLLISION

CCTLA members George Chryssafis and Jeff Fletterick, of Edward A. Smith Law Offices, were successful in representing a plaintiff after a rear-end traffic collision. Initially, a demand for insurance policy limits of $15,000 was submitted.

Plaintiff had roughly $7,000 in medical specials, yet the opening offer from the adjuster from Fred Loya Insurance was only $2,000, citing minimal "visible" property damage to Plaintiff's vehicle.

Liability was not in dispute, as this was a clear rear-end collision where the defendant had failed to see traffic at a stop ahead and rear-ended Plaintiff at a high rate of speed. Plaintiff was driving a custom-lifted Chevy pickup with a heavy drop-down tow hitch package on the rear. The adjuster refused to budge from his nuisance value offer, sticking to his theory of questionable causation and leaving no choice but to file the lawsuit.

During Discovery, it was revealed a third-party vehicle suffered serious damage to its front end, clearly showing evidence of a substantial impact. He also was driving a full-size Chevy Silverado pickup. Litigation dragged on for months as in-house counsel for the insurance company was clearly overworked and unavailable most of the time. Other than initial discovery and depositions, no efforts were done to defend the defendant or make any meaningful settlement offer.

In early December, the court requested the parties attend an in-person Mandatory Settlement Conference. The conference was on a Thursday, and the trial scheduled for the following Monday in San Joaquin Superior Court.

On the eve of the settlement conference, defense counsel called and offered $9,000, which was promptly rejected. The CCP 998 demand made by Chryssafis and Fletterick for the policy limits of $15,000 had expired months earlier, so they informed the defense the policy was open, and the case was going to trial. Ultimately, at the Mandatory Settlement Conference, defense counsel agreed to pay double the policy limits and drafted a release for $30,000.

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ZOOM ARBITRATION

The Smith Zitano Law Firm and co-counsel Monrae English of Tower Law in Fresno received a significant award in a three-week long Kaiser Zoom arbitration involving shoulder dystocia, brachial plexus nerve injury, phrenic nerve injury and other physical injuries. The "interim award" is $716,429.72. There was no pre-arbitration offer by Kaiser, and claimants' CCP 998 was for $499,999.

When the prevailing-party costs, expert-witness fees for beating the CCP 998 and the 10% statutory interest are added into the interim award, the final award should exceed $850,000. The neutral arbitrator was retired 3rd DCA Justice Fred Morrision.

A macrosomic infant (large for gestational age) who was just a few grams shy of 11 pounds at birth was delivered *vaginally* at Kaiser Fresno after a protracted induced labor in a morbidly obese mother. There were no pre-natal warnings by the Kaiser providers of a possible macrosomic infant, and the parents were never offered the option of a C-section, even during the protracted and stalled labor.

In addition to the stretching of the brachial plexus nerves during the delivery, the infant also suffered a stretching of the adjacent phrenic nerve, which caused paralysis of the diaphragm, significantly compromised respiration and necessitated the surgical placement of a tracheostomy tube and the placement of a gastrostomy tube for nearly two years.

Claimants' experts testified that the only explanation for the concurrent brachial plexus nerve injuries and the phrenic nerve injury was excessive traction during the protracted vaginal delivery of the nearly 11-pound infant. The delivering ob/gyn and the defense experts had no alternative explanation for the concurrent brachial plexus and phrenic nerve injuries. The delivering ob/gyn was assessed 100% responsibility for the injuries. It is noteworthy that the Kaiser Epic EMR "Delivery Note" template has the phrase "gentle traction" included in the note drop-down menu.

Special damages included nearly two years of round-the-clock bedside parental attendant care of the infant to monitor the tracheostomy tube and the gastrostomy tube to insure there was no respiratory failure due to a compromised or occluded trach.

Total "special damages" were $216,429; general damages were awarded to the infant in the maximum MICRA amount of $250,000 for pain and suffering; and $250,000 general damages were also awarded to the mother for the negligent infliction of emotional distress (NIED).

The mother had suffered shoulder dystocia at birth, was terrified of the possibility of such a dystocia for her child, and she testified that when "shoulder" was verbally declared during her labor, she suffered acute anxiety, especially when her son was delivered cyanotic and had to be resuscitated in front of her in the labor room. Father/husband's NIED claim was denied, even though he was also present at the delivery.

By the time of the arbitration hearing, the claimant child was nearly five years old, and the brachial plexus and phrenic nerve injuries and the over three-year profound expressive speech deficit were all essentially resolved, to the considerable relief of the parents. Because of essentially a full recovery, claimants did not claim future medical expenses or any future income impairment.

Total litigation costs through the arbitration hearing

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Member Verdicts & Settlements

Continued from page 33

exceeded $135,000, including the extraordinarily high expert witness costs. Even though these costs are recoverable, they confirm the expense and the risks of litigating medical malpractice cases in the continuing MICRA world of damages caps and limited fees.

The Zoom arbitration hearing was conducted with 15 full days of testimony, with 15 Fresno medical providers, the claimant parents and 12 expert witnesses on behalf of both Claimants and Defendant. Had this been an in-person arbitration hearing in Fresno, litigation costs would have been considerably higher.

Three take-away pointers in every Kaiser birth injury case:

• Always request the seven- or eight- page "Labor Events" aka "Delivery Details" which lists provider participants in the delivery room as well as the time and duration of the "shoulder dystocia" and maneuvers attempted;

• Be aware that the EMR template for the "Delivery Note" includes the phase "gentle attempt at traction, assisted by maternal expulsive efforts" in the drop-down menu. This phrase will be in EVERY Kaiser delivery note, no matter how severe the brachial plexus injuries.

• The medical providers in the Kaiser Labor and Delivery unit will be "on call" OB/Gyns, CNMs, or even Family Practice MDs, who essentially serve as midwives in the L & D unit and during delivery. It is rare for the ob or CNM who provides pre-natal care to be "on call" during their patient's labor and delivery.

Claimants' testifying expert witnesses were: Dr. Howard Mandell, ob/gyn; Dr. Ira Lott, pediatric neurology; Dr.Douglas Li, pediatric pulmonology; and Dr. Jerome Barakos, neuro radiology

Defense testifying experts were: Dr. Juan Vargas, ob/gyn; Dr. Donald Olson, pediatric neurology; Dr. David Cornfield, pediatric pulmonology; Dr. James Brunberg, neuro radiology; Dr. Maurice Druzin, peri-natology (withdrawn); Dr. Mitul Kapadia, P M & R; and Carina Grandison, Phd., pediatric neuro psychology.

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DOG BITE INJURIES

CCTLA Board member Kirill Tarasenko and Bryan Nettels prevailed in a dog-bite jury trial involving a young girl and bystander mother with a verdict, CCP 998 costs and interest of $435,000, against a $300,000 homeowner's policy. The case was tried in Dept. 27 in front of the Honorable Steven M. Gevercer (*Editor's note: for the COVID challenges that impacted this case in the courtroom, see the article on page 3 of this issue of The Litigator*).

Defendant homeowners filed for contribution and indemnity against their housemate, whom they alleged was the owner of the dog that attacked the little girl who was visiting the homeowners as an invited guest. The housemate never appeared in the action, and the Liberty Mutual attorneys defaulted him. Defense wanted to call the housemate to testify that the dog was his.

Ultimately, the judge ruled he could testify, but the housemate never appeared. He was judgment proof and had already been defaulted.

Despite this, defense wanted this housemate to appear on the verdict form because there were two causes of action: one for strict liability as dog owners and one for negligence because it was the homeowner who opened the sliding glass door for the young child to go outside and into the adult male pitbull's outdoor enclosure and then shut the door behind her. The girl was attacked by the dog moments later. The girl weighed 57 pounds, and the dog weighed 70-80 pounds. The attack could have been much worse had her mother and other adults not intervened when the dog had the little girl by the neck and began dragging her deeper into the yard.

Defense wanted the housemate to appear on the verdict form because they wanted to argue comparative fault. This did not make much sense because if the jury found that the homeowners were owners of the dog, then it's strict liability and there would be no percentage to split. If they're not owners of the dog, then there's nothing to split, either.

On the negligence cause of action, the judge ruled there was no substantial evidence (in reality, no evidence at all) that the housemate had been negligent; he was sleeping when the homeowners decided to let the child play with a dog they claimed was not theirs. The jury determined the homeowners were negligent, but were not the owners of the dog.

Tarasenko and Nettels waived special damages. They presented the young plaintiff, her mother (who had suffered bystander emotional distress), a dog behavior expert, a plastic surgeon and Defendant homeowners under Evidence Code 776. Defense presented their own canine behavior expert and their own plastic surgeon.

The cross of the defense's canine behavior expert was theatrical. The defense expert claimed the Plaintiff's expert was merely a dog trainer, who could teach a dog to sit but could not tell you *why* a dog acted a certain way. The defense expert stated he had a PhD. in animal behavior and could determine the reason behind the attack. His ultimate opinion was that he did not know why the dog attacked the child but that Plaintiffs' expert was wrong in concluding that it was either territorial aggression or predatory aggression.

Tarasenko and Nettels discovered the defense expert's PhD. was related to hamsters. The man spent the entire decade of the 1970s feeding cockroaches to golden hamsters and studying the hamsters' predatory behavior.

Upon cross examination, that defense expert admitted his only formal education into dogs was when he attended a three-month dog *training* program, which he did not finish, and he never received a certificate. He claimed to be an expert on the evaluation of dog bites and wounds but did not know how many teeth a dog has. Tarasenko informed the defense expert all breeds have the same amount: 20 in top jaw and 22 on bottom.

Taresenko then asked the defense expert if he would have been able to tell the jury the reason for the attack had it been a golden hamster attacking the throat and neck of a cockroach instead of a pitbull on a child, and he responded: "Yeah! Then I'd tell you! I know all about hamsters!"

Deposition disruptions: Knowing when they become discovery abuse

By: Robert Nelsen

At one of our recent attorney meetings, an attorney at our office discussed a really disruptive defense attorney out of L.A. who he had to deal with at a recent depositions—speaking objections, corrections to the witness's testimony, taking breaks, etc. The works. That prompted a discussion—and a research assignment for me—to cover the parameters that exist for attorneys taking and defending depositions, as well as the remedies for those who are victims of discovery abuse in that setting.

I figured this research might be helpful for any attorney, as it is important to know what your rights are when dealing with an obstreperous opponent, or, for those more obstreperous-leaning types, the risks you face when intervening in a deposition you are defending.

This article is intended to provide a summary of State and Federal cases and statutes to help understand where the lines are for attorneys defending depositions and perhaps to serve as a cheat-sheet for some to keep on hand at depositions if needed in case you want to preserve your record as well as possible.

One thing that is important to note is that you won't see a steady flow of published cases coming down on this issue. Discovery disputes rarely make it that far due to the delay it causes a case. So a lot will depend on your judge and his or her tendencies.

Instructing a Witness Not to Answer:

According to the CEB treatise, **California Civil Discovery Practice**, "Instructions not to answer are among an attorney's most important judgment calls. If counsel allows the deponent to answer certain improper questions, an important privilege may be waived. But counsel who is mistaken in instructing a client not to answer not only runs the risk that the deponent will be reexamined but also chances the imposition of sanctions if counsel's instruction and deponent's refusal are found to be without substantial justification." I agree.

CCP 2025.460(b) essentially tasks an objecting attorney with allowing the deposition to proceed subject to their objection or demanding an immediate suspension of the deposition to permit a motion for a protective order. However, 2025.460(e) still allows the asking party to seek a motion to compel any unanswered questions if they choose to still proceed with the deposition.

What is clear from the caselaw is that a lot of the behavior we have become used to (or even the behavior(s) we are used to engaging in ourselves) violate the rules of civil procedure.

There are, of course, exceptions to this rule: under CCP 2025.420(b), it is proper to instruct a witness not to answer a question that would result in a waiver of a privilege—including constitutionally protected rights, such as privacy (*Tylo v. Superior Cour*t (1997) 55 Cal.App.4th 1379) or the 5th Amendment privilege against self-incrimination). Further, a witness can be instructed not to answer questions that call for legal contentions/conclusions (*Rifkind v Superior Court* (1994) 22 CA4th 1255). Finally, under *Stewart v Colonial W. Agency, Inc.* (2001) 87 CA4th 1006, 1015, the court absconded an attorney who instructed their witness not to answer, but said it would not be impermissible to do so when the nature of the questioning "[R]eaches the point where it could legitimately be said that counsel's intent was to harass, annoy, embarrass, or oppress."

Robert Nelsen, Dreyer Babich Buccola Wood Campora, is a CCTLA Board Member

The Federal equivalent—FRCP Rule 30(c)(2)—is even more clear on this issue. It specifically states that, "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion [to terminate or limit the deposition]."

The Eastern District issued a published opinion on this issue that has been cited favorably by every district throughout the 9th Circuit, in *BNSF Ry Co. v. San Joaquin Valley R.R. Co.* (2009) U.S. Dist. LEXIS 111569 (Hereafter BNSF). There, they treated the deposition testimony the same as trial testimony and sanctioned the attorney for instructing a witness not to answer, requesting breaks, requesting to confer with the witness with a pending question (although that only would have been permitted if, and only if, there is a concern that the forthcoming testimony would violate a privilege or court order), request clarification on a question in a way that suggests an answer to the witness, among other things.

What is clear from the caselaw is that a lot of the behavior we have become used to (or even the behavior(s) we are used to engaging in ourselves) violate the rules of civil procedure.

Taking Breaks:

CCP 2025.470 prohibits a court reporter from suspending the proceeding (i.e. going off the record) without a stipulation by all parties. And FRCP Rule 30(c)(1) instructs the reporting officer to proceed as they would at trial once the witness has been sworn in. There is no authority entitling a witness to a break, except when one is necessary to prevent the inadvertent waiver of a privilege or violation of a court order.

Federal District Courts around the country and other state courts have considered partial waivers of the attorney client privilege for discussions between an attorney and client while on a break. The Nevada Supreme Court actually held that an attorney-client privilege shall only apply when the attorney affirmatively

Continued on next page

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states on the record, (1) the fact that the conversation took place, (2) the subject of the conference and (3) the outcome of the conference relative to the issue of privilege. While there are no California opinions standing for this precedent, there seems to be a movement this way judicially and it is something to be cognizant of if you force a break to confer with your client, or vice versa.

Remedies:

In both Federal and State court, the remedy for this type of behavior is typically monetary sanctions, but can rise to the level of issue sanctions should repeated offenses occur which impinge a parties ability to prosecute or defend the matter. For the monetary sanctions, the Eastern District in BNSF requested further briefing beyond the $10,000 originally sought to ensure the moving attorneys' time for (1) the taking and preparing for all of original deposition, (2) the preparation of the motion, (3) the time preparing for the hearing on the motion, and (4) the time to prepare and take the newly awarded deposition.

These sanctions can add up, too. In a recent discovery dispute on a mass tort case out of Los Angeles, a defense firm/Defendant was sanctioned more than $500,000 because of the wasted time by the Plaintiffs' attorneys and was ordered to pay for all of the additionally needed depositions, including attorney time. There can be real consequences, financially, for these matters, and I personally feel that it would be really satisfying to be taking a second deposition on the Defendant's dime, having also been compensated for everything thus far.

But, as I said before, these are not black and white matters. So if you encounter a situation like this, I would highly recommend taking the time to lay a good record. If you are taking the deposition, narrate the actions and statutory violations of your obstructive opponent, remind them of the basic ground rules for a deposition, show a willingness to proceed if his or her behavior is modified, while also identifying your intention to file your motion to compel in the future, and stay cool and collected. A good record is your best chance to prevail in law and motion, and you always want to come across as the reasonable one who is more interested in getting the discovery completed than having a personal vendetta.

The same advice applies if you are defending a deposition. Do everything you can to be (or at least pretend to be) the reasonable person in the room. Narrate or explain how the opposing attorney's behavior is harassing, intimidating, being conducted in bad faith, etc. I would also recommend indicating how your client is here and willing to be deposed, so you'd prefer not to stop the deposition all together to seek a protective order. Make sure to put all of that on the record to have the best chance of avoiding sanctions, because, from my reading of the statutes and caselaw, the burden is really on the party who elects not to answer or proceeds with an unstipulated break to show that doing so was necessary and that no other option existed.

I do not think for a moment that this article will cause each reader to never instruct their client not to answer a question, or that there will be no further breaks to confer with clients. Depositions can be intense, and it is our job to protect our clients from harassing tactics. Hopefully these guiding points will at least assist with how you frame things moving forward, whether taking or defending the deposition.

THE DONALD L. GALINE SONOMA TRAVEL SEMINAR — MARCH 11 – 12 2022 — PROGRAM

MCLE: 12.25 Credits (inc. 1.25 Bias)

FRIDAY, MARCH 11

REGISTRATION 11:00 AM

TRACK 1 / 11:30 AM - 12:30 PM

LIENS UPDATE 2022

Moderator: Kirill B. Tarasenko, Gavrilov & Brooks

Practical Approach To Handling Liens
Brad A. Schultz, Demas Law Group, P.C.

Life After Liens: Trust And Settlement Planning
Tanis Kelly, Esq., Sage Settlement Consulting

Lien On Me
Amanda Greenburg, Archer Systems

TRACK 1 / 12:45 - 1:45 PM

STRATEGIES FOR ADVANCING CASES IN 2022 (EMBRACING VIRTUAL PRESENTATIONS)

Moderator: Oscar R. Gutierrez, Law Offices of Oscar H. Gutierrez, APC

Presenting Witnesses Virtually For Trial: Why, How And What To Avoid
Elise R. Sanguinetti, Arias Sanguinetti Wang & Torrijos LLP

Use Of Technology In Litigation In The Pandemic Age
Abbas Kazerounian, Kazerouni Law Group, APC

Making The Best Impression In Virtual Hearings In State & Federal Court
Gretchen M. Nelson, Nelson & Fraenkel LLP

TRACK 2 / 12:45 - 1:45 PM

FIVE THINGS TO THINK ABOUT WHEN PRESENTING A LOSS OF CONSORTIUM CLAIM AT TRIAL: A ROUNDTABLE

Moderator: Bobby Thompson, Thompson Law Offices, P.C.
Doris Cheng, Walkup, Melodia, Kelly & Schoenberger
Kelly Hanker, Trial Lawyers For Justice
Craig M. Peters, Altair Law LLP

TRACK 1 / 2:00 - 3:00 PM

INVESTIGATING LIABILITY THEORIES IN AUTO CASES

Moderator: Anderson Lam, Law Offices of Galine, Frye, Fitting & Frangos

Auto Accidents And The Dangerous Condition Of Public Property Cases
Geoffrey S. Wells, Greene Broillet & Wheeler, LLP

Examining Your Case Theories On Day One
Alexandra Hamilton, Fiore Achermann, A Law Corporation

Liability In DUI Cases – Punitives To Course And Scope
S. David Rosenthal, Rosenthal Law

TRACK 2 / 2:00 - 3:00 PM

CLASS ACTION AND MASS TORT LEADERSHIP – MAKING STRIDES IN DIVERSITY ROUNDTABLE

Moderator: Simone White, Gibbs Law Group, LLP
Amy Eskin, Schneider Wallace Cottrell Konecky Wotkyns LLP
Sarah R. London, Lieff Cabraser Heimann & Bernstein LLP
A.J. de Bartolomeo, Tadler Law LLP

TRACK 1 / 3:15 - 4:30 PM

UM/UIM CHALLENGES

Moderator: Kelsey D. DePaoli, The Law Office of Black & DePaoli

Avoiding Traps & Maximizing Recovery In UM/UIM Cases
Hank G. Greenblatt, Dreyer Babich Buccola Wood Campora, LLP

Holding Carriers To Their Obligation Of Good Faith & Fair Dealing In UM/UIM Cases
Ognian A Gavrilov, Gavrilov & Brooks

Credit Issues In Um/UIM Claims
Matthew P. Donahue, Donahue Law Corporation PC

UM/UIM - Arbitration Do's And Don'ts
Robert A. Piering, Piering Law Firm

TRACK 2 / 3:15 - 4:30 PM

ELDER ABUSE

Moderator: Margot Cutter, Cutter Law, P.C.

Making Dollars And Sense Of Financial Elder Abuse Cases
Kirsten M. Fish, Needham Kepner & Fish LLP

Don't Forget About The Emails!
Daniel P. Jay, York Law Firm

Spotlighting COVID And Understaffing For The Jury
Karman Guadagni, Stebner Gertler Guadagni & Kawamoto APLC

How Government Funded Senior Care Is Creating Billionaires
Kimberly Valentine, Valentine Law Group, APC

TRACK 1 / 4:45 - 6:15 PM

SEX ABUSE

Moderator: Douglas Saeltzer, Walkup, Melodia, Kelly & Schoenberger

Maximizing Damages and Prosecuting Plaintiff Cases Against Large Institutions
John C. Manly, Manly, Stewart & Finaldi

How Do We Hold Mandated Reporters Accountable
Jessica Klarer Pride, The Pride Law Firm

Don't Blow It: Know Your Statute and Claim Filing Obligations In Abuse Claims
Christa Haggai Ramey, Ramey Law, PC

Trauma Informed Interviewing and How It Informs Crafting Your Case
Nabilah Hossain, Cotchett, Pitre & McCarthy LLP

Ostriches And Enablers: How To Demonstrate Liability Against Non-Perpetrator Defendants
Paul Matiasic, The Matiasic Firm, P.C.

TRACK 2 / 4:45 - 6:15 PM

EMPLOYMENT CASES LITIGATED, ARBITRATED, AND TRIED DURING THE PANDEMIC, AND RECENT DEVELOPMENTS IN EMPLOYMENT LAW

Moderator: Mari Bandoma Callado, Dolan Law Firm, PC
Lawrance A. Bohm, Bohm Law Group

Retaliation Against Third-Parties Reporting Harassment
Michael Bracamontes, Bracamontes & Vlasak, P.C.
Micha Star Liberty, Liberty Law
Ji-In Lee Houck, The Houck Firm

Sex Harassment, Non-Disclosure, and Other Increased Protections to Employees in 2022
Tamarah Prevost, Cotchett, Pitre & McCarthy, LLP

6:30 - 7:30 PM
WELCOME RECEPTION

CAOC.ORG/22SONOMA

SATURDAY, MARCH 12

TRACK 1 / 9:00 - 10:00 AM

TRIAL SKILLS IN THE AGE OF COVID

Moderator: Jacqueline G. Siemens, Demas Law Group

Tale Of 2 Cities: A Discussion Of The Differences/Commonalities Of Our Trials In Different Venues
Brett Schreiber, Singleton Schreiber McKenzie & Scott and J. Kevin Morrison, Altair Law LLP

Reaching Your Zoom Jury During Voir Dire, Opening, And Closing
Jamie G. Goldstein, Arias Sanguinetti Wang & Torrijos LLP

TRACK 2 / 9:00 - 10:00 AM

QUICK HITS: ENVIRONMENTAL

Moderator: Cabral Bonner, Bonner & Bonner

Wire, Wire, Catch On Fire – Origin And Cause Investigations
Andrew McDevitt, Walkup, Melodia, Kelly & Schoenberger

California Laws That Have An Impact On Global Pollution: And A Review of SB 343
Tyson C. Redenbarger, Cotchett, Pitre & McCarthy, LLP

"but for" No More: Proving Causation In Toxic Tort Cases
Sara Peters, Walkup, Melodia, Kelly & Schoenberger

TRACK 1 / 10:15 - 11:30 AM

AUTO - ESSENTIAL LITIGATION SKILLS

Moderator: Sarvenaz (Nazy) Fahimi, Cotchett, Pitre & McCarthy, LLP

Proving Future Medical Expense - Considerations In Establishing The Life Care Plan
Jason N. Argos, Burke | Argos

Combatting The DME From Start To Finish
Christopher B. Dolan, Dolan Law Firm, PC

Using *People v. Sanchez* as a Sword and a Shield
John N. Demas, Demas Law Group, P.C.

PMQ Depos
Robert Bale, Dreyer Babich Buccola Wood Campora, LLP

TRACK 2 / 10:15 - 11:30 AM

LOOKING FORWARD POST-COVID

Moderator: Michelle C. Jenni, Wilcoxen Callaham, LLP
Amanda M. Karl, Gibbs Law Group, LLP
Brian S. Kabateck, Kabateck LLP
Justin Berger, Cotchett, Pitre & McCarthy, LLP
Elizabeth Cabraser, Lieff Cabraser Heimann & Bernstein LLP

TRACK 1 / 11:45 AM - 1:00 PM

BIAS IN THE LEGAL PROFESSION

*Moderator: Casey R. Johnson, Aitken*Aitken*Cohn*
Wendy C. York, York Law Firm
Carl E. Douglas, Douglas/Hicks Law
Judicial Appointments Secretary, Luis A. Céspedes

TRACK 1 / 1:15 - 3:15 PM

MASTERS ROUNDTABLE

Moderator: Kathryn Stebner, Stebner Gertler Guadagni & Kawamoto APLC
Niall P. McCarthy, Cotchett, Pitre & McCarthy, LLP
Mary E. Alexander, Mary Alexander & Associates
Michael Kelly, Walkup, Melodia, Kelly & Schoenberger
Thomas J. Brandi, The Brandi Law Firm
Deborah Chang, Chang Klein LLP
Bruce A. Broillet, Greene Broillet & Wheeler, LLP

TRACK 1 / 3:30 - 4:30 PM

TRIAL SKILLS WORKSHOP

Moderator: Ryan Dostart, Dreyer Babich Buccola Wood Campora, LLP

Mini Openings And Voir Dire – Facing Blemishes In Your Case Head-On
Sarah A. Havens, Phillips & Pelly

Voir Dire – Peremptory Challenges/Batson-Wheeler Motions
Duffy Magilligan, Cotchett Pitre & McCarthy, LLP

Opening Strategies – It Doesn't Have To Be By The Book – A New Approach To Storytelling
Sylvia Torres-Guillén, Andrade Gonzalez LLP

The Ugly Truth – Telling Your Story Through Demonstratives And Witnesses
Ilya D. Frangos, Law Offices of Galine, Frye, Fitting & Frangos

5:00 - 6:00 PM
CLOSING RECEPTION

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Virtual Justice:

Remote Technology in the Courtroom

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

CCTLA COMPREHENSIVE MENTORING PROGRAM — The CCTLA Board has developed a program to assist new attorneys with their cases. 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 or Alla Vorobets at allavorobets00@gmail.com

Friday, February 25
Luncheon, noon – Zoom
Topic: The State of the Sacramento Court and Judiciary During the Pandemic: 2022 and Beyond
Speakers: Presiding Judge Michael Bowman and Supervising Judge of Civil Judge Steven Gevercer
$25 Member; $35 Non-member

Tuesday, March 8
Q & A Problem Solving Lunch, noon
CCTLA Members Only—Zoom

Thursday, March 17
Problem-SolvingClinic Webinar, 5:30-7:15pm
Topic: How to Avoid Pitfalls & Maximize Recoveries in Today's Personal-Injury Practice
Speakers: Glenn S. Guenard, Esq; Jacqueline G. Siemens, Esq; and Ryan L. Dostart, Esq.
$25 / CCTLA Members Only / 1.5 MCLE credit

Tuesday, April 12
Q & A Problem Solving Lunch, noon
CCTLA Members Only—Zoom

Thursday, April 21
Luncheon Webinar, noon-1pm
Topic: Recognizing and Proving Up the MTBI Case
Speaker: Roger A. Dreyer, Esq.
$25 / CCTLA Members Only / 1.0 MCLE credit

Tuesday, May 10
Q & A Problem Solving Lunch, noon
CCTLA Members Only—Zoom

Thursday, May 19
Luncheon Webinar, noon-1pm
Topic: Deposing Persons Most Qualified (to Make Your Case); A Strategic Approach (with Nuts & Bolts on the Side)
Speaker: Bob B. Bale, Esq.
$25 / CCTLA Members Only / 1.0 MCLE credit

Tuesday, June 14
Q & A Problem Solving Lunch, noon
CCTLA Members Only—Zoom

CCTLA Calendar of Events