Fall 2019

The LITIGATOR

VOLUME XV OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION ISSUE 3

Inside

A Grand Slam at the Spring Fling!

Robert Piering
CCTLA President

For more than 100 years, a home run has been used in baseball to describe the individual might of hitting the ball out of the park. When you hear those words, no one doubts a significant measure of individual success has been achieved.

But even as impressive as a home run may be, it is the grand slam that is truly the penultimate measure of the success of the masses. The reason being is, of course, that so many things have to come together in that moment of time. In fact, nearly half of the players from the team batting need to be on the field before the magic of the grand slam can be made a reality. And when it happens it is pure magic. That very same sort of magic struck for the Capitol City Trial Lawyers Association (CCTLA) just as summer was set to begin this year.

On June 13, CCTLA held its 17th Annual Spring Fling and Silent Auction to benefit the Sacramento Food Bank & Family Services. As some may know, the Sacramento Food Bank & Family Services (SFBFS) is a local, non-profit agency committed to serving individuals and families in need. With a staff of 88 and a volunteer force over 9,000 annually, SFBFS provides free emergency goods and services to 150,000 men, women and children each month. SFBFS offers a safe space for hope to grow, without judgment, among neighbors that value every human experience.

For the last several years, CCTLA's Spring Fling has taken place among the lush grounds of the Ferris White home in the tree-lined neighborhood of the Fab 40s. It is truly a place to see and a special thanks is in order to our host for opening the Ferris White home once again to CCTLA and the SFBFS.

After checking in with our family of volunteers (Debbie, her sister Colleen and Debbie's daughter, Taylor), the more than 160 attendees were treated to several select options of chilled spirits and bountiful culinary treats. Thereafter, everyone

Continued on page 6

Mike's CITES

By: Michael Jansen
CCTLA Member

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

Samsky v. State Farm Mutual Automobile Ins. Co.
2019 DJDAR 5991 (June 26, 2019)

PLAINTIFFS SHOULD USE REQUESTS FOR ADMISSION AND MOTION FOR COSTS OF PROOF (CCP §2033.420)

FACTS: Plaintiff Samsky was rear-ended on July 27, 2015, and again on September 10, 2015. Samsky claimed he suffered concussions, traumatic brain injury and ulnar nerve injury in his wrist from the July incident and lower back injuries in the September crash. Both defendants paid their $15,000 limits, and Samsky looked to State Farm for his UIM policy limits coverage. State Farm paid the policy limits on the September crash and forced Samsky to arbitration on the July incident.

In the July wreck, State Farm contended that Samsky rear-ended the car in front of him first. State Farm also hired experts to testify that Samsky suffered from sleep apnea and repetitive use of his wrist which caused his symptoms, not traumatic brain injury and the crash.

Samsky propounded Request for Admissions to State Farm asking it to admit:

1. Samsky suffered a concussion,
2. The July incident was a substantial factor in causing Samsky's concussion,
3. Samsky suffered a traumatic brain injury as a result of the July incident,
4. The July incident was a substantial factor in causing Samsky's traumatic brain injury,
5. Samsky suffered an ulnar neuropraxis as a result of the July incident; and finally,
6. The July incident was a substantial factor in causing Samsky's ulnar neuropraxis.

State Farm denied all Requests for Admissions. The case went to a three-day arbitration that Samsky won. Samsky then moved for costs of proof pursuant to CCP §2033.420. The trial court denied Samsky's motion, stating that Samsky had the burden to prove that none of the exceptions as set out in CCP §2033.420(b) applied. Subpart (b) are exceptions allowing a party to deny requests for admissions, one of which is: "The party failing to make the admission had reasonable ground to believe that the party would prevail on the matter."

In denying the costs of proof, the trial court required Samsky to prove that State Farm did not have a good reason, or reasonable ground, to believe it would prevail.

ISSUE: Does a moving party for costs of proof under CCP §2033.420 have the burden to prove that none of the exceptions to an award of costs as set out in subdivision (b) apply?

HOLDING: No. Case reversed. "It is well-established in California that the party seeking to benefit from an exception to a general statute bears the burden to establish the exception. State Farm had the burden and failed to carry it.

REASONING: The burden of showing "reasonable grounds" of CCP §2033.420(b) is on the party seeking to avoid paying costs. They cannot simply state without elaboration that they are not responsible for the costs of proof on reasonable grounds basis without proving the reasonable grounds. Since the deny-

Continued on page 22

Consumer attorneys need to learn from labor leaders

By: Amar Shergill, CCTLA Board Member

Consumer attorneys represent Americans who are fighting for compensation often against insurance companies and corporations with immense financial resources and political capitol. Over several decades, the former have been losing a propaganda war waged by institutions like the U.S. Chamber of Commerce and the Republican Party that fabricate stories about frivolous lawsuits (Watch the documentary "Hot Coffee" for an illustration of the most infamous fabrication).

The Labor Movement has faced similar challenges while the Republican Party, mega-corporations and billionaires conspire to reshape legislatures and public opinion to undermine unions and worker rights.

Unions, however, have the displayed the will and ability to organize members, execute advocacy programs and hit the streets in numbers that make a difference. As a prime example, we have seen teachers across the country mobilize en masse to force conservative legislative bodies to accede to their demands.

Consumer attorneys can learn from labor leaders the value of grassroots mobilization. Natural allies are already mobilizing, and we can amplify our collective voice by joining them. When Black Lives Matters marchers are in the streets for basic human rights, they are joined by unions, labor councils and advocacy groups representing unparalleled diversity. When LGBTQIA organizations rally for Pride, right alongside them are the region's labor leaders.

When the Women's March, Cesar Chavez Day Festivities or the Martin Luther King Jr. Day March is under way, every major union is represented.

By standing shoulder-to-shoulder with oppressed communities, labor wins the hearts and minds of those who are already fighting the same battles against entrenched powers that are preserving the status quo at the expense of everyday people.

Although consumer attorneys have largely been absent from these battles, they need not be. Even where organizations like the CAOC and local trial attorney groups do not have the membership numbers to fill the streets, they do have the financial and political resources that other organizations desperately need. If consumer attorneys stand up in those fights, they will find that, over time, others will take the time to understand their legal advocacy challenges and stand up for them.

The alternative is to remain in the consumer attorney silo and remain quiet while others fight the same foes that are threats to us all. As Dr. Martin Luther King, Jr stated, "History will have to record that the greatest tragedy of this period of social transition was not the strident clamor of the bad people, but the appalling silence of the good people."

It's time for consumer attorneys to publicly declare their union with the good people who are fighting the good fight.

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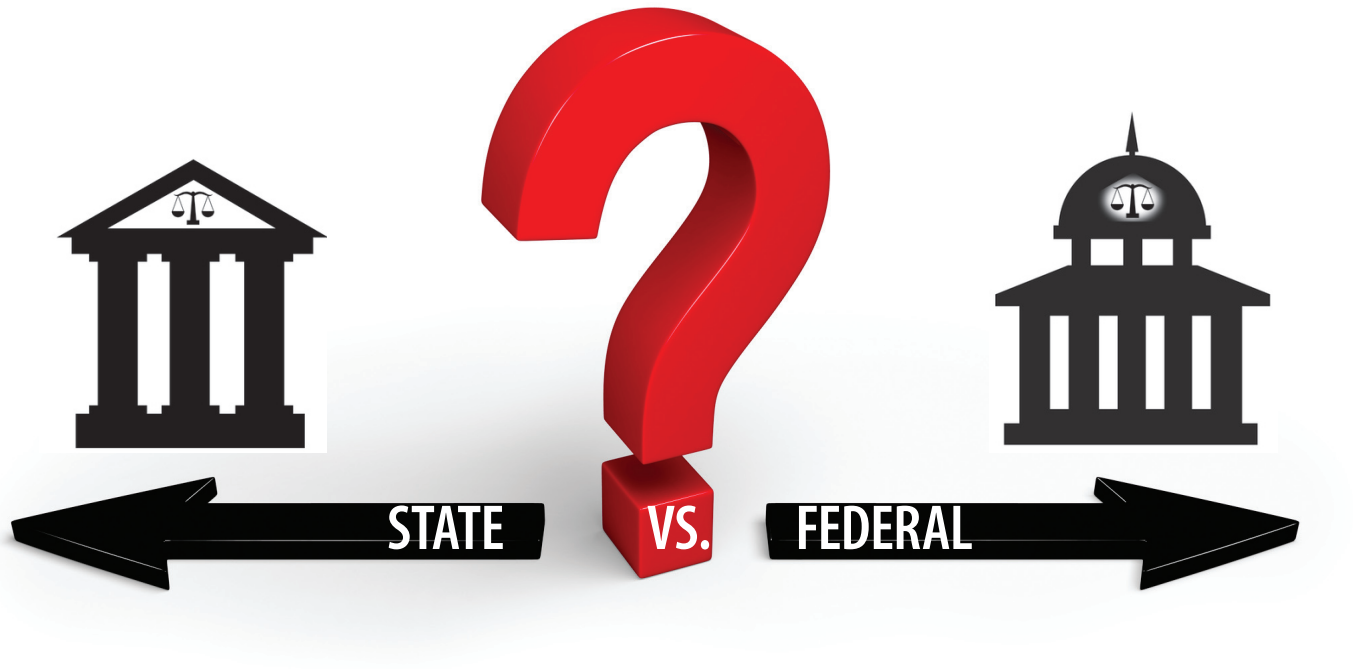
Amar Shergill, who in addition to being a CCTLA board member, is an Executive Board member of the California Democratic Party (CDP), chair of the CDP Progressive Caucus and board member of the American Sikh Public Affairs Association.



Factors to consider when selecting federal vs. state jurisdiction in personal-injury actions

By: John Stralen, CCTLA Board Member

Occasionally, we are preparing to file a case where we have an opportunity to select the jurisdiction of a case, between state or federal court. Under ordinary circumstances, state court is preferred over federal court by most plaintiff personal-injury attorneys when given the choice. Yet, a unique circumstance of a particular case might make federal court a better option. Sometimes the need to understand the differences arises because the case is removed to federal court by an out-of-state defendant.

In either situation, there are many procedural differences between the two venues that should be considered. Some of the variances are subtle, while others could make a significance impact on their own. Although an entire practice guide could be written on this subject, this is a summary of what I believe are a few of the more relevant differences between the two venues affecting plaintiff injury cases.

Rules of Evidence

It is well understood that once in federal court, California tort law will apply to a personal-injury case, and federal civil rules will be used. Yet, attention should also be given to the differences between the Federal Rules of Evidence and the California Evidence Code.

Under federal rules, these include the admissibility of conclusions in official reports, presumptive exclusion of felony convictions after 10 years and changes in the standard for admission of character evidence. One of the most relevant is the different standard for admitting expert testimony. Researching important evidentiary issues in advance will save you from unexpected grief and surprise as the case progresses.

Pleading Damages

In state injury cases, the amount of damages claimed, including punitive damages, are not stated in the complaint. However, damages must be pled in the prayer of a federal complaint. Additionally, California subjects punitive damage allegations to a heightened pleading standard.

"Doe" Defendants

State court rules allow the complaint to include Doe defendants while federal pleading rules do not. The only exception is with state complaints that are removed to federal court where the federal court will simply ignore fictitious defendants.

Anti-SLAPP Motion

State courtcases containing allegations of certain protected conduct are subject to a motion to strike under CCP § 425.16. However, such motions have been limited in federal courts. Anti-SLAPP motions have received "mixed results" in the 9th Circuit and have been rejected altogether in others.

Continuing Discovery Responses

In state court, there is no obligation to update written discovery responses. However, federal discovery responses must be timely updated by the responding party without the need to for the opposing party to serve supplemental requests.

Non-Response to Request for Admissions

In state court, a party who served a request for admissions and did not receive a timely response must move for

an order to have them deemed admitted. However, in federal court, a non-response results in automatic admission, and a delinquent responder must petition the court to be excused from the "deemed" admissions.

Expert Disclosures

In federal court, the need to retain experts and preparation for their disclosure needs to be explored well in advance of the disclosure date. Expert disclosure rules in federal court require that a retained expert submit a report at the time of disclosure that sets forth the expert's opinions and the basis for those opinions.

Diligent Prosecution Statutes

The California Code of Civil Procedure requires the complaint be dismissed for any defendants not served within three years of filing the complaint. Additionally, the case must be brought to trial within five years of filing. In federal court, defendants must be served within 90 days of filing. There is no five-year rule in federal court. However, be aware of federal district local rules that allow for dismissals when plaintiffs have been inactive. The absence of a five-year rule to bring the case two trial coupled with the shortage of federal judges might result in delays in getting a civil case to trial in federal court.

Attorney "Mistake"

Both state and federal trial judges may relieve a party from a judgment or order that resulted from "mistake, inadvertence, surprise, or excusable neglect." Yet, California courts must provide relief when the request is accompanied by an attorney's declaration of fault. There is no such mandatory relief process in federal court.

Jury Trials

California civil juries consist of 12 persons, and nine must agree on any one issue. Federal civil juries often consist of six members, and a unanimous verdict is required absent a stipulation to the contrary. *Voir dire* is often limited in federal court.

Also, you must request a jury trial in your complaint or within 10 days after being removed in federal court, or otherwise you waive your right to a jury trial even if you requested a jury trial on your civil cover sheet filed with the complaint. In state court, there is no such requirement

CCP § 998 and Federal Offers of Judgment

Federal rules allow a defendant to make a Rule 68 offer of judgment. However, one of the most problematic issues I have found with injury cases in federal court is that there is no federal equivalent to a CCP § 998 offer. Thus, there is no method for recovering expert fees or interest on a judgment. This can make an expert intensive case with only moderate damages difficult to pursue in federal court.

For a detailed analysis of this subject see Slomanson, William R., California-Federal Procedural Contrast: A Proposal (2018). 327 Federal Rules Decisions 1301 (2018).

President's message

Continued from page one

mingled and watched over their favorite silent auction items to ensure they were not outbid for one of the many activities, adventures or products graciously donated by people who are too numerous to count, but very special.

In the meantime, our master of ceremonies, Justice Art Scotland (Ret.), introduced the many judges and other dignitaries in attendance, and we all were treated to one of the many success stories that grow out of the work done each day at SFBFS.

Thereafter, our annual member awards were presented to attorneys Bill Kershaw and Steven Davids. Bill was awarded the Morton L. Friedman Humanitarianism Award that is given annually to a lawyer who through their heart and soul has demonstrated a passion as a trial lawyer in service to our community.

Steve was presented with the Joe Ramsey Professionalism Award that is given to an attorney in "recognition of their civility, honor, helpfulness, legal skills, and experience."

After that, we got down to the business of raising money for the SFBFS. And money we raised. This year, CCTLA and its members and distinguished guests rose far and beyond to bring together a record $132,688 for the Sacramento Food Bank & Family Services. I, for one, have been on CCTLA's Board of Directors for more than seven years, and I can tell that CCTLA, its members and spectacular committee hit a grand slam by any measure of success.

In addition to the many notable donors, the Spring Fling Committee, consisting of Margaret Doyle (chair), David Foos, Jill Telfer, Lori Gingery, Michelle Jenni, Marti Taylor, Justin Gingery, Blake Young, Devin Yoshikawa, Blair Hillis, Kelly Siefkin, Kirill Tarasenko, Ashley Amerio, Debbie Frayne Keller and Justice Art Scotland (Ret.), gave selflessly of their time, effort and commitment.

It takes hours and hours of time to gather sponsorships, organize vendors and ensure that everyone is treated to an evening to remember. I applaud and thank you, one and all, for giving so much to make this event the success that it was.

Finally, our marque sponsors who gave with incredible generosity must not be overlooked. They include Kayvan D. Haddadan, M.D. (Advance Pain Diagnostic & Solutions); Wilcoxen Callaham, LLP; Offices of Noah S. A. Schwartz at Ringler; Healthcare Financial Solutions (HFS); and Expert Legal Nurses, LLC. Their generosity was substantial and will help so many in our community in need of our support and compassion.

So as we now gradually turn our attention to the third quarter of this year, CCTLA continues to promise its commitment to making our community a better place for one and all.

We will maintain our mission of providing first-class continuing education to our members and work towards making the law and the place we call home a better place each and every day.

Health Insurance vs. Balance Billing Hospital Liens

By Dan Del Rio, CCTLA Board Member

Anyone familiar with personal injury work has likely run into the Hospital Lien Act. The Hospital Lien Act was first established in 1961 and amended in 1992 as California Civil Code 3045.1 et al. Through it, a hospital could put a lien for emergency and ongoing medical treatment on 3rd-party personal injury case. This by itself is nothing new, but it certainly became more complicated after the California Supreme Court case of Parnell v. Adventist Health System West (2005) 35 Cal.4th 595. In this case, the court ruled that once a hospital accepted a health insurance payment and wrote off the balance then there was no debt owed which could be attached by a lien. However, in dicta the court added that:

> If hospitals wish to preserve their right to recover the difference between the usual and customary charges and the negotiated rate through a lien under the HLA, they are free to contract for this right. Our decision does not preclude hospitals from doing so. (*Id.* At 611.)

This dicta has resulted in almost 15 years of fights over balance billing as immediately publication every hospital had a third-party right of recovery for balanced billing written into every health insurance contract from that day on.

As a result, in July 2006, Governor Schwarzenegger signed Executive Order S-13-06 ordering the director of the Department of Managed Health Care to: "Take all steps necessary to protectCalifornians from balance billing, including the full and complete enforcement of existing regulations and the promulgation of additional regulations to further protect Californians from balance billing, if necessary."

The Department of Managed Health Care took action creating California Administrative Code title 28 § 1300.71.39, effective October 15, 2008, which defined balanced billing as an unfair billing practice.

Then, the California Supreme Court stepped in again in case of Prospect Medical Group, Inc. v. Northridge Emergency Medical Group (2009) 45 Cal.4th 497, wherein the court definitively concluded that the Knox-Keene Act does not permit balanced billing by stating:

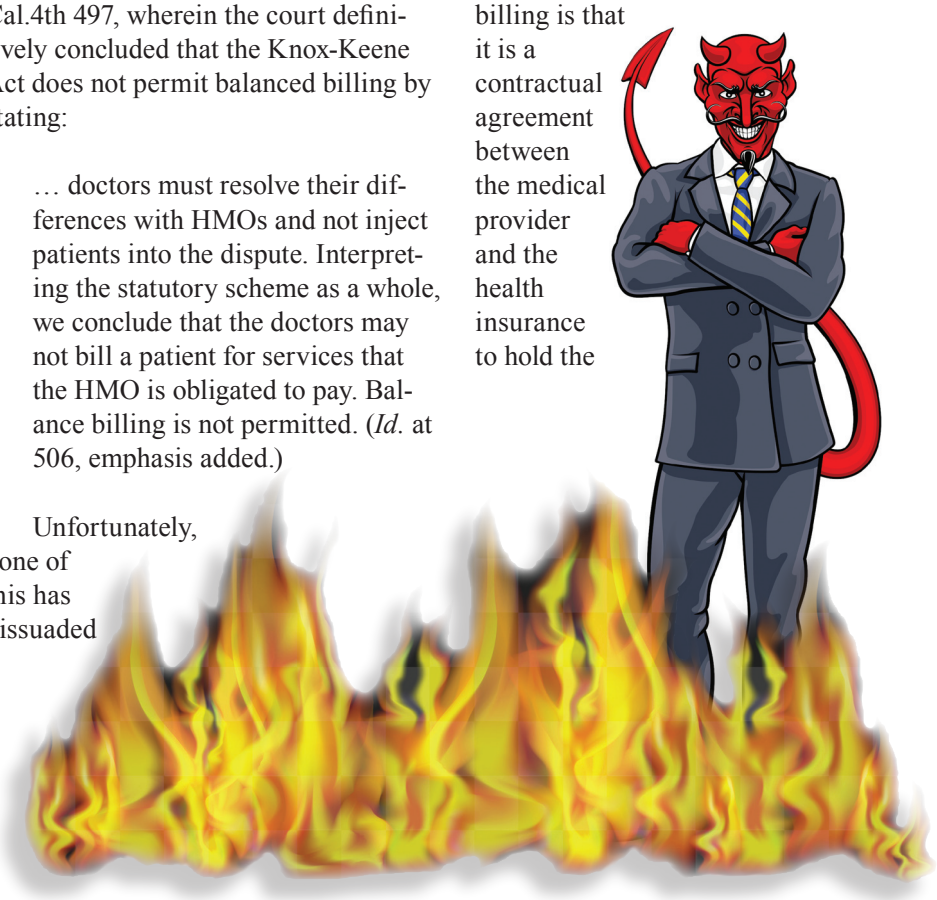
> … doctors must resolve their differences with HMOs and not inject patients into the dispute. Interpreting the statutory scheme as a whole, we conclude that the doctors may not bill a patient for services that the HMO is obligated to pay. Balance billing is not permitted. (*Id.* at 506, emphasis added.)

Unfortunately, none of this has dissuaded the hospitals and their subrogation groups from aggressively asserting that Parnell still allows them to contract with the health insurance companies to allow for balance billing in a third-party personal injury case.

The Solution - The Devil Is In the Details

One strategy that has been effective in dealing with these balance billing hospital liens is to show where they are in direct conflict with the plaintiff's health insurance policy.

The general problem with balance billing is that it is a contractual agreement between the medical provider and the health insurance to hold the



patient responsible for more costs of care but entirely without any involvement or agreement by the patient.

So instead of the well-known principle of a third-party benefit, we have the patient receiving a third-party detriment in the form of an alleged obligation to pay additional costs. However, this alleged detriment is often in violation of the patient health insurance policy plan language.

Copayment Maximums

A common conflict will be between the annual copayment/out-of-pocket maximum and the amount of the balance billing lien. Below is an example of typical language in a health plan:

> Individual Out-of-Pocket Maximum—Except as noted, a Covered Person will not be required to pay more than $3,500 in any Calendar Year toward his share of Eligible Expenses that are not paid by the Plan. Once he has paid his out-of-pocket maximum, his Eligible Expenses will be paid at 100% for the balance of the Calendar Year.

As such, once the patient has fulfilled the annual copayment maximum, anything above that is either the responsibility of the plan or in violation of the plan.

Limits on Rates of Reimbursement of the Plan

Another common conflict will be between the plan's language conveying its right of reimbursement and the hospital lien which is attempting to skirt those limits. Typical language will look like this: "The plan's right of subrogation is limited to the benefits paid by the plan."

As such, the combination of these two means that the agreement with the patient is constrained to the annual copayment/out-of-pocket maximum and subrogation of what the plan is paid for, not the portion of the bill written off as above the agreed-upon payment between the health insurance and the provider.

Emergency Care

Additional ammunition can be found for emergency medical treatment where the plan specifically states that emergency care will be covered by the plan at its normal rate regardless of where that emergency care occurs. Typical language can look like this:

> Emergency Care—In a Medical Emergency, a Covered Person should try to access a Network provider for treatment. However, if immediate treatment is required and this is not possible, the services of non-Network providers will be covered until the patient's condition has stabilized to the extent that he/she can be safely transferred to Network provider care.

Again, this is evidence that the patient has no expectation of costs beyond the annual copayment/out-of-pocket

maximum. This fits right in line with the California Supreme Court case of Prospect Medical Group, Inc. v. Northridge Emergency Medical Group (2009) 45 Cal.4th 497, where the court specifically stated that balance billing is not permissible with HMOs and emergency services.

Federal Pre-emption

Perhaps the one time that anything involving an ERISA health insurance plan has been beneficial to a plaintiff was in the case of Kennedy v. Plan Adm' r for Dupont Sav. & Inv. Plan (2009) 55 U.S. 285, where the court concluded that the health plan documents and forms controlled and pre-empted outside agreements such as a waiver of benefits in a divorce settlement.

Following this line of argument, a contract between a medical provider and the patient's health insurance that attempts to alter the rights or obligations of the ERISA contract, such as increasing the obligation of the patient, would be pre-empted.

Is the Hospital Lien Amount Reasonable?

In the more recent case of State Farm Mutual Automobile Insurance Co. v. Huff (2013) 216 Cal.App. 4th 1463, the Court of Appeal held that the hospital failed to meet its burden of proving the reasonableness of its lien when it relied solely upon the unpaid amount of the bill.

The court specifically referenced Parnell but made it clear that a hospital asserting a lien must introduce competent expert testimony on the reasonable value of the services provided and that the bill alone "is not an accurate measure of the value of medical services." (Huff at 1472 [quoting Corenbaum v. Lampkin (2013) 215 Cal.App.4th 1308, 1326.])

In this situation, we might actually be able to use a defense argument in that pursuant to Howell v Hamilton Meats & Provisions, Inc. (2011) 52 Cal. 4th 541, we can contend that the amount paid by the health insurance plan is the reasonable and necessary amount if lien argument were to proceed to trial.

In the end, these are just a few arrows in our quiver, but it should demonstrate that by paying careful attention to the details and reading through the plaintiff's health insurance contract, we can make a real fight against these unjust liens.

By: David Rosenthal, CCTLA 2nd Vice President

During the last two decades, many changes in the practice of personal-injury law have made things more difficult for plaintiffs and their lawyers. One such insidious change has been the standardization of indemnity and hold harmless clauses in releases and settlement agreements. In this context, indemnification essentially means that the plaintiff and/or her lawyer agree to pay any liability and the cost of defense of a described claim brought by a third-party against the defendant or the insurance company (See Civil Code §§2772 & 2778).

Absent some advance agreement, insurance companies and defense counsel now take it for granted that the plaintiff will indemnify the insured and the insurance company against any and all liens that may exist against a recovery. Settlement agreements and releases typically expressly state that plaintiff assumes all responsibility for any Medicare, Medi-Cal or Civil Code §3045.1 liens.

However, the language of these clauses often broadens the potential indemnity exposure to "any and all claims or losses whatsoever" to the lawyer or law firm representing plaintiff and to the "defense" of any claims or litigation brought against the indemnified parties. Indemnification has even found its way into some mediators' standard settlement agreements.

Of course, an indemnity clause is a negotiated contract which is subject to the rules of contractual interpretation, including enforcing the intent of the parties based on the entirety of the contract. (Hot Rods, LLC v. Northrop Grumman Systems Corp. (2015)242 Cal.App.4th 1166, 1179.) Where the language of the indemnity clause is broad, e.g., "any claims, demands ... liability, damages, losses ...," the extent of the indemnification will be broadly enforced (*Id*. at p. 1182).

In a personal injury case, the injured party claims the legal right to recover damages for medical expenses, lost income and pain and suffering directly from the defendant. Typically, the lawsuit does not directly determine the rights or liabilities of plaintiff or defendant as to third parties. Therefore, in theory, the scope of the settlement agreement should be limited to the amount paid as consideration for promise not to seek additional damages.

In practice, unless a lawyer wants to take the time and effort to overcome the defense insistence on indemnification in every case, most of us will continue to approve, sign and have our clients sign settlement releases with indemnification clauses in some cases.

Here are some suggestions in considering whether to agree to an indemnification clause:

1. If there are no statutory liens, point out to the defense that since there is no risk of liability to a third party, indemnification for liens is unnecessary, and any broader indemnification language is therefore totally outside the scope of the settlement agreement and not supported by any consideration;

2. If there are statutory liens, e.g., Medicare, Medi-Cal, CC §3045.1, the only reason to agree to indemnification would be to avoid having to wait for the final lien before receiving the settlements. If the defense wants an indemnification clause, it should agree to pay the full amount of the settlement immediately to the plaintiff without naming the lienholder. Point out that they can't have an indemnification clause **and** wait for the final lien to issue a separate check;

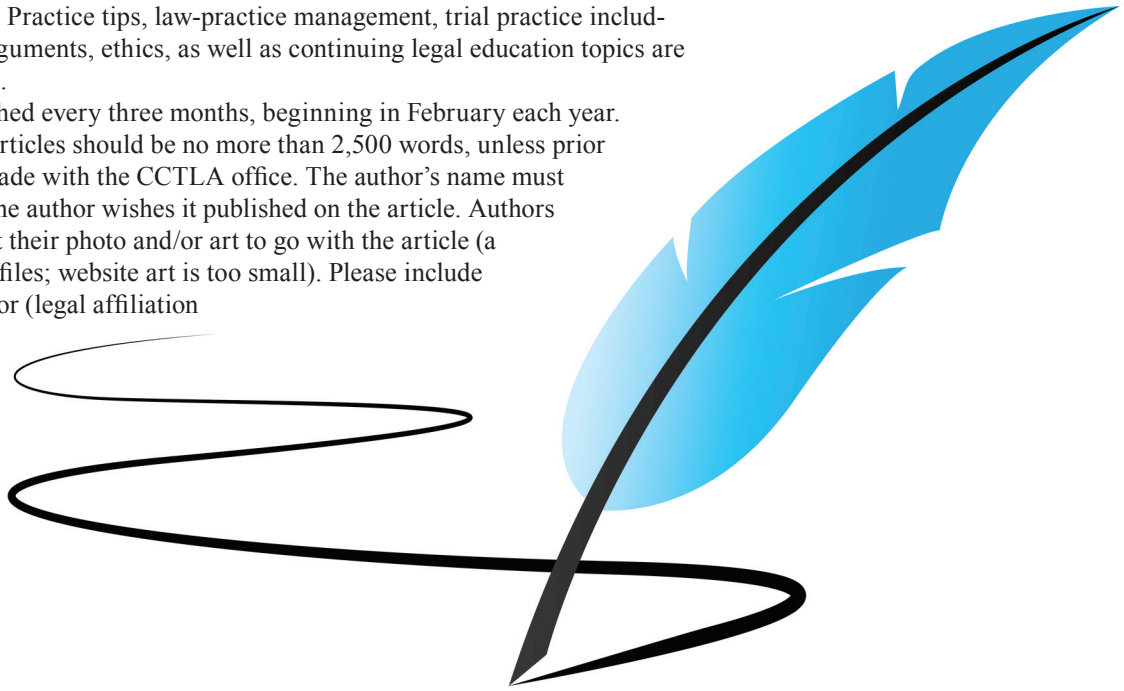
3. Regardless of the reason for indemnification, have the scope of the language tailored as narrowly as possible for the situation. If particular liens have been asserted, have the indemnification clause apply only to those specific liens. Make sure that indemnification comes from the client and not the attorney or the law firm, which are not parties to the underlying dispute. Eliminate any clauses that would require your client to provide a defense or pay attorneys fees for enforcement of the clause.

4. Make sure that you have informed consent from your client and that it is confirmed in writing before agreeing to offer indemnification by him or her as part of the settlement.

Share your experiences, thoughts, lessons learned

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

The Litigator is published every three months, beginning in February each year. Due to space constraints, articles should be no more than 2,500 words, unless prior arrangements have been made with the CCTLA office. The author's name must be included in the format the author wishes it published on the article. Authors also are welcome to submit their photo and/or art to go with the article (a high-resolution jpg or pdf files; website art is too small). Please include information about the author (legal affiliation and other basic pertinent information) at the bottom of the article. For more information and deadlines, contact CCTLA Executive Director Debbie Keller at debbie@cctla.com.



Cross-examination/deposition of the "independent medical exam" doctor

By: Travis Black, CCTLA 1st Vice President

This article is going to cover the cross examination of the defense IME doctor. You cannot prepare for this examination without having taken the doctor's deposition. This is the time where you can look for inconsistencies, areas of agreement and areas where the doctor wasn't paying attention.

About a year ago, I was walking through the halls of the Sacramento Courthouse and found a trial in progress. The plaintiff attorney had just started his cross-examination of the defendant's IME doctor. There were three things that were immediately apparent:

Stock photo used for illustrative purposes

The plaintiff's attorney felt he was making hamburger out of the IME doctor—he was toe-to-toe and challenging everything the doctor was saying. The doctor was on a roll and taking every question as an open-ended question and running 100 yard dashes with his answers.

1) The plaintiff's attorney felt he was making hamburger out of the IME doctor—he was toe-to-toe and challenging everything the doctor was saying.

2) The doctor was on a roll and taking every question as an open-ended question and running 100 yard dashes with his answers. He was also using medical terminology that didn't make sense, but it was well over this young attorney's head to understand this.

3) The jury was not listening, not taking notes and appeared to be totally tuned out. Further, this young attorney never looked at the jury to see what was going on.

There are a few things I have learned in my journey of practicing law, and with more preparation, this young attorney could have stood a better chance.

ATTORNEYS ARE NOT SMARTER THAN THE DOCTOR

It would be great to ask the question and hear the IME doctor say, "I never thought about it that way; you're right. I need change my entire opinion on this case. Yes, the plaintiff was injured, the treatment was reasonable and necessary, oh, and by the way, I think he needs two additional surgeries that have not been discussed!" This will never happen.

We are not as smart as the IME doctor. This is difficult to accept. No matter how smart we think we are, we will never be smarter than the doctor who has probably been in practice 25+ years and has testified hundreds of times in cases exactly like yours. The doctor has been asked all the questions you intend to ask and has polished his presentation.

We need to learn to change the playing field by looking for things we can agree on to help our case as well as find inconsistencies where we can show the doctor's biases and maybe any serious mistakes the doctor has made.

We know that the IME doctor's presence in court is to minimize the plaintiff's damages. If allowed, they will take every question that is asked act like it is an open-ended question and turn it around to the defendant's advantage. We can't expect them to give an honest answer or to be fair.

I attended Gerry Spence's Trial Lawyers College in 2004. We spent a lot of time on this subject. What I came away with is that the shorter the cross-examination is, the better it will be. The longer we keep the doctor on the stand, the more chances we're giving him to hit home runs for the defense. You need to get in, get out, sit down and shut up! Forget the urge to ask "just one more question."

CROSS-EXAMINATION OUTLINE

What I have seen (and I am guilty of doing in the past) is making a huge questionnaire. You end up asking questions, not listening to the answers, and then just asking the next question. At the end of the deposition, you don't have anything that will help you.

I suggest preparing an outline covering the topics you want to cover so your cross-examination will be more fluid. You will hear what the doctor is saying, and you follow up with questions that fit within your outline.

POINTS OF AGREEMENT

You will always find things within

the doctor's IME report that you can both agree on. In fact, you might start your questioning off with, "Let's talk about things we can agree on." You agree that a traffic collision occurred; that the plaintiff states she felt immediate neck pain; that she went to the ER hours after the crash. You might be surprised how much the IME doctor will give you.

In order to do this, however, you must spend a lot of time digging into the IME report and comparing it to client's medical records. Our office uses a service that takes all the medical records, puts them into chronological order and puts the information down in such a manner that even an attorney can understand what's in the record!

I then have my paralegal type in the far-right column what the IME doctor says verbatim about that specific visit or finding. You can easily see what the doctor agrees with, what they don't agree with, and more importantly, what they are leaving out. I have never seen an IME report where the doctor doesn't leave important facts out, especially in their medical record review. I think this review is a gift. This will be discussed later as an area of cross-examination that will show bias.

Another area of agreement is the extent and the length of the doctor's relationship with defense counsel. Again, you need to do your homework. Ask other attorneys for depositions, IME reports, etc., that they have. Spend some time reading these. See who hires this doctor and how often the doctor is hired. Find out how much the doctor says they make, how often they are called in to do IMEs, etc. Learn how long they have been working for insurance companies and defense firms. Now you can get the doctor to agree to these facts. These are great to use in your closing.

During Trial

Gerry Spence teaches that you cannot attack someone on the stand unless you have the jury's permission. If defense has an IME doctor who is-well educated, has been practicing for years, has some grey hair and speaks softly and has done several hundred or even thousand IMEs, you can't start your cross off by attacking them. The jury will get upset and will hold it against you. Remember, juries want to believe that doctors do good.

One of the best instructors on how to cross-examine an IME doctor is Maren Chaloupka, who is on the Board of Directors of Gerry Spence Trial Lawyers College. She teaches that it is your job to be the guide—the person to whom the jury looks to find the truth. Her simple approach is as follows.

Using your butcher-paper pad, write the word INDEPENDENT at the top and ask the doctor what that means to them, since they have authored the "Independent Medical Exam." The doctor will usually say something like, "I call it like I see it. I just use my training and experience to be fair." Write that down after the word INDEPENDENT. Then start off by asking the doctor it they were independent in forming these opinions.

Under this definition, make a T-square and on the top left side of this square write, Defendant, and on the right-side, Plaintiff (see adjacent sample).

On the left side of this T-square, put down part of the question that you ask the doctor.

QUESTIONS

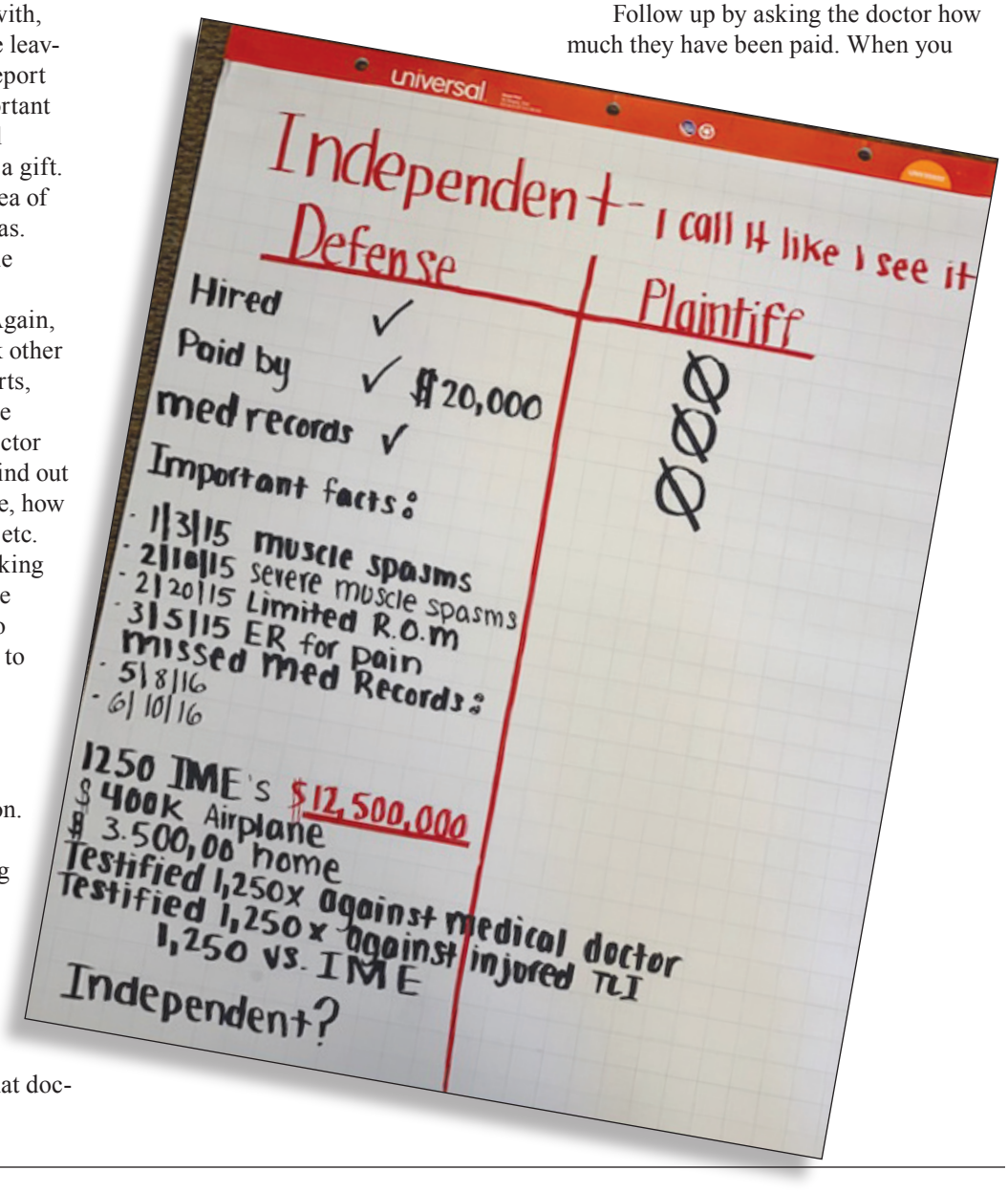
The following types of questions will show bias:

Hiring

"Doctor, the jury needs to know how you were hired to work on this case. Does the California Medical Board use some type of lottery to pick doctors to do this kind of work?" The answer will be "no," to which you can follow up with, "Did our judge hire you?" Again, the answer will be "no."

Now ask who hired the doctor. When the answer is that the defense hired them, write down on the left side of T-square something like: "Hired by Defense." Put a check mark on the defendant's side and a crossed out zero on Plaintiff's side.

Follow up by asking the doctor how much they have been paid. When you



are given the answer, put it down on the Defendant's side and ask, for example, "Are you saying you were paid $20,000 by defense, nothing by me, but you're still INDEPENDENT?" That will be your go-to question throughout the cross-examination.

Medical Records

"Doctor, did you review the medical records?" Follow up with, "I'm assuming you called the plaintiff's treating doctors and asked them for their record, correct?" Answer: No, defense gave them to me.

"Did you call my office and ask me for medical records to make sure you got all of them?" Answer: No. Put a check next to defense and a crossed-out zero on the plaintiff's side

Often you will find that defense didn't give the doctor all the medical records. If this is the case, now you have an arrow to shoot. You can show the doctor is the "missing" records and ask how important it is to look at all the medical records to form a full, fair and independent opinion. Make sure you ask these arrow questions to the jury, so they are looking at you. No matter the answer, the jury knows the truth.

In almost all cases, the doctor will

Stock photo used for illustrative purposes

Often you will find that defense didn't give the doctor all the medical records. If this is the case, now you have an arrow to shoot. You can show the doctor is the "missing" records and ask how important it is to look at all the medical records to form a full, fair and independent opinion. Make sure you ask these arrow questions to the jury, so they are looking at you. No matter the answer, the jury knows the truth.

ignore important facts in the plaintiff's medical records. Ask the doctor if they reviewed all the records. Follow up by asking, "You would never intentionally leave out important parts of medical records to help defense, true?" The answer: Of course not. Now this is where your homework will help.

Let's say that a certain medical record dated 1/5/16 lists the plaintiff's complaints as headaches, neck pain, upper and lower back pain. The treating doctor notes "severe muscle spasms, limited range of motion," but the IME doctor only lists the subjective complaints. Have this record, present it to defense and the doctor, and present it to the jury, showing the objective findings.

Point out that fact and get the doctor to concede that the objective findings of severe muscle spasm and limited range of motion is important. Under the T-square, put the date and the objective finding down under defense. You might say something like, "I'm sure that it's easy to miss one important fact. Let's see what else you may have missed." Now you can have some fun, especially if you find 10-15 other important facts that the doctor has left out, and I can almost guarantee that if you do your homework, you will find these. Though you may feel you are driving your point home, remember to get in and get out.

Don't stay at this very long. You might show the doctor two to three more important facts that they have left out, put the dates down under the T-square, and say something like, "Doctor, I have 10 more pages of medical records where you have left out important facts. Can we agree that you didn't read these records very well?"

Again, looking at the jury, read from the T-square all the points you have made and ask, "Doctor, after all of this, are you still saying you're INDEPENDENT?" Despite the response, the jury is starting to build their perception of "Biased Doctor!"

Number of Times Testifying for Defense

You did your homework, read numerous depositions/trial transcripts and know that the doctor does 90% defense work, with at least five IMEs a week for 25 years, earning $10,000 each time each time he testified. Ask those questions, clarify those points and put them down under the T-square with check marks under defense.

This butcher-paper T-square may end up being several pages long. Remember, this is a huge part of your closing. If you have found that the doctor has made some serious mistakes, make sure you bring them out and put them down on the T-square.

Take, for example, an IME doctor who lives in a $3.5-million-dollar house in Arizona which we have pictures of thanks to a real estate value website. We have pictures of his airplane that he flies up to testify, and voter registration that shows he has been registered to vote in Arizona for the last five years but he has testified that he lives in Alameda County.

What if we end this cross-examination with going over how much the doctor has earned in the last 25 years, then showing a picture of his $450,000 plane and asking, "What you have earned by testifying for insurance companies and defense firms has paid for your airplane, correct?" Again, Despite the answer, look at the jury when you ask this question. They will get the idea that when you are looking and talking to them, you have something important for them to hear. Put on the T-Square a picture of his plane!

What if we show a picture of his $3.5-million-dollar home and ask something like, "Isn't it true that working for insurance companies and defense firms paid for this home? Testifying against injured plaintiffs paid for this home? Always saying the treating doctors are wrong, paid for this home? Let's do the math doctor, in 25 years, doing five IMEs a week, you have worked on at least 1,250 cases where you have said the treating doctors were wrong and you were right, correct?"

Put this information down under the T-square. Put down the $12,500,000 he has earned. Then look at the jury and ask the doctor, something like, "After all of this information," pointing at your butcher-paper piece of art, "Doctor, are you still telling the jury that you are INDEPENDENT?" Sit down and say," I have no further questions."

A couple of years ago, my associate Kelsey Depaoli and I used this method on Ed Younger M.D., owner of MRK, who had testified 25 times for a defense counsel. He volunteered that he earns $250,000 a year treating patients that he cared about and loved. He testified that he earns $750,000 working for insurance companies and defense firms. I followed this outline, and using some simply awesome facts that Matt Donahue had obtained about the doctor through a deposition, I was able to completely bring to light these biases to the jury (This is why you read other depositions).

In the end, I never saw a reason to attack the doctor and never felt I had permission from the jury to attack him. I never raised my voice. We just had a conversation. What did the jury think of the doctor? What did the jury think about me? I only needed to direct the jury to the simple truth, and they understood.

This butcher-paper T-square may end up being several pages long. Remember, this is a huge part of your closing. If you have found that the doctor has made some serious mistakes, make sure you bring them out and put them down on the T-square.

In the beginning of this article I said that you are not smarter than the IME doctor. By not going toe-to-toe with the doctor and exposing bias, you don't need to be smarter, you just need to lead the jury to the truth.

In the end, I never saw a reason to attack the doctor and never felt I had permission from the jury to attack him. I never raised my voice. We just had a conversation. What did the jury think of the doctor? What did the jury think about me? I only needed to direct the jury to the simple truth, and they understood.

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Mike's Cites

Continued from page 2

ing party is in the best position to explain the reasons for their denial, they have the burden, and State Farm did not carry its burden in this case.

State Farm relied upon an out- of-court statement by the driver that Samsky allegedly rear-ended her before he was rear-ended in the July crash. That driver could not be located at the time of the arbitration hearing, and the driver's hearsay statements were properly excluded.

Thus, there was no evidence at the time, and State Farm did not offer proof of the testimony to deny costs of proof. The appellate court herein stated, "At some point, State Farm's inability to locate Jensen [the driver Samsky allegedly rear-ended] rendered unreasonable its reliance on her as a basis to deny the RFAs."

Additionally, State Farm argued that it had three experts who stated Samsky could not have suffered brain injuries. However, State Farm did not show whether it relied on those expert opinions when it denied the RFAs, and therefore State Farm did not prove what facts it did or did not have when it responded to the RFAs and what reasonable grounds it had for its failure to admit the RFAs.

State Farm also argued that the arbitrator failed to consider State Farm's accident reconstruction and biomechanical experts. The appellate court pointed out that State Farm failed to prove when it obtained those opinions and how those opinions contributed to State Farm's "reasonable" denial of the requests for admission.

Thus, a denier of Requests for Admissions must be prepared to prove to the trial court on a motion for costs of proof by the opposition:

1) when the information relied upon was received; and
2) why the information was reasonable grounds to deny the RFA.

Boilerplate general objections in written Discovery responses are prohibited by code

By: Peter Tiemann, CCTLA Board Member

Discovery is arguably the most important phase of litigation. Plaintiff attorneys often spend countless hours crafting thoughtful and strategic interrogatories, requests for production, and admissions. The process is tedious and challenging.

The effort can be frustrating when the answering party requests multiple extensions, and when the responses finally arrive in the mail, they are filled with meritless objections and nearly no substantive information is produced.

It has become common practice for responding parties to insert a "preamble" into their discovery responses, titled "General Objections and Reservations" or sometimes just "preamble." What then follows is a page of boilerplate objections.

Additionally, too often, each of defendant's responses to discovery are conditioned with general objections, meritless objections and objections that are copy-pasted to each individual item of discovery.

The Code of Civil Procedure however, explicitly states that general objections are prohibited by statute.

Specifically, Civil Code of Procedure section 2030.210(a) states: "The party to whom interrogatories have been propounded must respond in writing under oath separately to *each* interrogatory by the following methods:

1.) An answer containing the information sought to be discovered
2.) An exercise of the party's option to produce writings
3.) An objection to the particular interrogatory

Additionally, Civil Code of Procedure section 2031.210(a) (request for production of documents) states: The party to whom a demand for inspection, copying, testing, or sampling is directed must respond *separately to each item* or category of item.

Lastly, Civil Code of Procedure section 2033.210 (Request for Admissions) states: The party to whom requests for admission have been directed shall respond in writing under oath *separately to each request;* Each response shall answer the substance of the requested admission, or set forth an objection to the particular request.

It has become common practice for responding parties to insert a "preamble" into their discovery responses, titled "General Objections and Reservations" or sometimes just "preamble." What then follows is a page of boilerplate objections.

Additionally, too often, each of defendant's responses to discovery are conditioned with general objections, meritless objections and objections that are copy-pasted to each individual item of discovery.

Case law also supports this position. In Smith v. Superior Court In and For San Joaquin County (1961) 189 Cal.App.2d 6, 13, the court reasoned that general objections that stated that interrogatories were compound were insufficient. Additionally, boilerplate general objections are sanctionable in California per Korea Data Systems Co. Ltd. V. Superior Court (1997) 51 Cal.App.4th 1513, 1516 and may result in waivers of privileges in the 9th Circuit per Burlington Northern & Santa Fe Ry Co. v. U.S. Dist. Court. F.3d 1142.

In plain English, a responding party cannot use general objections in discovery responses. Regardless, general objections are a common practice among answering parties, and they are almost always overlooked. This can become a serious issue later on in the case because the responding party will include a catch-all phrase that reserves the right to modify their response and raise any objection at any time, including trial, with no consequences. The requesting party is left with meaningless responses and the responding party can change their answers at any time.

Therefore, if discovery responses begin with a "general objection," it is critical to have the court address these objections.

First, send a meet-and-confer letter requesting defense counsel to remove the general objections and cite to the above-mentioned codes and case law. Assuming that defense counsel refuses to remove the general objections, file a motion to strike out the general objections.

After sending a meet-and-confer on this issue, you must bring a motion to strike the general objections. Once the court rules in your favor, defense counsel must serve responses without the "general objections." Once the defendant complies with the order, it is more than likely that defense will respond to each interrogatory/production/admission request with separate objections. From here, each improper objection should be addressed through meet-and-confers and the appropriate motions.

This being said, it is important to incorporate this position with plaintiff's own discovery responses and to be familiar with the code of civil procedure. Do not make objections unless you believe in good faith that a basis for the objection exists. Of course, several interrogatories, requests for production of documents and requests for admissions may be objectionable. However, making the lead-off objection "general objection" is a losing objection and explicitly prohibited by code.

Thank You!

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CCTLA thanks everyone who supported The Giving Pool and donated items for the silent auction! This year, we raised $132,688 for Sacramento Food Bank & Family Services, and we couldn't have done it without all of you!

SACRAMENTO Food Bank & Family SERVICES

CCTLA Capitol City Trial Lawyers Association

Spring Fling 2019

The Capitol City Trial Lawyers Association presented awards to two members at its 17th Annual Spring Fling and Silent Auction—and raised more than $132,688 for Sacramento Food Bank and Family Services. This annual event, a benefit for SFBFS, was held June 13 at the Ferris White home with more than 160 guests in attendance. Stephen Davids, a CCTLA past president and former co-editor of CCTLA's The Litigator, was this year's recipient of the Joe Ramsey Professionalism Award. William A. Kershaw was the recipient of the Morton L. Friedman Humanitarianism Award.

Photography by Joseph Potch of Ana Maria Photography

Above, the Spring Fling 2019 Committee with their extra large check for Sacramento Food Bank and Family Services. front from left: Rob Piering, CCTLA president; Ashley Amerio; Justin Gingery; and Lori Gingery. Middle from left, Melanie Flood, SFBFS; and Margaret Doyle. Back, from left, Justice Art Scotland (Ret.); Blake Young, SFBFS president/CEO; and Debbie Keller, CCTLA executive director.

Additional photos on page 26

Above, from left: Parker White, who hosted Spring Fling 2019 at his home, and Tom Nielsen.

Stuart Talley, who accepted the Morton L. Friedman Humanitarianism Award on behalf of recipient William A Kershaw, and Rob Piering, CCTLA president.

Left: Steve Davids, recipient of the Joe Ramsey Professionalism Award.

Spring Fling 2019

Above: Bill Seabridge, Margaret Doyle, Jo Pine and Carole Paddelford.

Above left: Margaret Doyle and Blake Young, SFBFS president/CEO, and above right: Alisa Razumovsky, Judge Robert Hight (Ret.) and Sue Ann Van Dermyden.

Above from left: Justice Art Scotland (Ret.), Charleen Inghram and Rob Piering, CCTLA president.

Left: Judge Ben Davidian and Judge Morrison England.

Below: A Sacramento Food Bank and Family Services family enjoying the event.

Above, from left, Nima Hosseini, M.D.; Noemi Esparza, Ognian Gavrilov, and Ari Resnik.

Riight: Judge David Brown and Justice Art Scotland (Ret.)

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Come sip, swirl and swig
(even bad dogs get to have fun)

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100% of Proceeds Benefit Abused, Neglected & Abandoned Dogs

Verdicts

Verdict: $476,773.47
Injuries resulting from a motorcycle accident

CCTLA Board Member Kirill Tarasenko recently won a $476,773.47 verdict for his client, who was injured in a motorcycle accident that occurred Sept. 26, 2014. The case, Scaturro v. Garcia, was tried before Judge Gerrit Wood. Plaintiff suffered many injuries and had to undergo multiple bilateral shoulder surgeries as a result. The verdict breakdown was $76,773.47 in lost earnings, $300,000 in past pain and suffering, and $100,000 in future pain and suffering.

COLLISION FACTS: Plaintiff Scaturro, while riding a motorcycle and wearing a helmet but no other protective gear, had to swerve to avoid a young driver who began to stall. Scaturro hit the median, flipped over the handle, braced his fall with his hands, tumbled about five times along the concrete and lost consciousness.

He sustained road burn over much of his body, including deep road burns on the sides of both hips, all over his elbow and forearms, and the palms of his hands. He also fractured his right great toe. ER physicians were concerned with infection, so they removed the toe nail and bandaged his whole right foot.

At the ER, he was diagnosed with lots of abrasions, road rash, broken toe, possible LOC, and noted left shoulder pain. However, there was no note of right shoulder pain. He was given some sort of left shoulder immobilizer and sent him.

He spent the next several weeks at home, with his wife changing his bandages, and basically immobilized following the right toe surgery. He couldn't use crutches because the palms of his hands were so deeply burned, and he couldn't put body weight from his shoulders on the crutches because those hurt, too. He also couldn't use a wheelchair around his house (a fixer upper he and his wife had moved into short term while they remodeled) because it was a split-level.

Plaintiff had right shoulder tenodesis surgery, which means his biceps and labrum were re-attached after two screws were put into the bone. A tough recovery period that takes almost six months before one is back to any sort of physical activity. This first surgery was done in January 2016, about 16 months after the crash.

His left shoulder was operated on in January 2018, two full years after the first surgery on the right shoulder. The left one was also read as "wear and tear." Once the surgeon got into the shoulder arthroscopically, he saw indications of trauma. To make matters worse, even with a successful surgery, the left shoulder now had Grade 4 chondromalacia (the highest level) of cartilage loss, meaning bone-on-bone findings.

Plaintiff's Expert was Dr. Dennis Meredith.

Defense attorney was Benjamin Ratliff, and defense expert was Dr. Peter Sfakianos.

Liberty Mutual was the insurance carrier.

Share your successes here

CCTLA members are invited to submit summaries of their legal cases resulting in verdicts, settlements or other. Optimum length is 500-2,000 words. The Litigator is published four times a year, generally in February, May, August and November. For more information, contact Litigator Editor Jill Telfer at jtelfer@telferlaw.com or CCTLA Executive Director Debbie Keller at debbie@cctla.com.

Lessons from the Other Side of the "V"

By: Lawrance A. Bohm, Esq., Past CCTLA President
President Bohm Law Group, Inc.

While I am known for my advocacy of wrongfully terminated employees and negligent-injured people, my "super lawyer" origin story began on the defense side. After five years working on the defense side, I changed to plaintiff work and never looked back. Fifteen years later, circumstances compelled me to dust off my defense skillset and defend the trial of civil case to verdict. A close personal friend and colleague of mine asked me to take over as lead trial counsel when it became clear his testimony would be required as part of the case.

As a teacher of trial advocacy, this opportunity seemed likely to provide a unique "behind enemy lines" view of litigation that could assist my clients, students and peers going forward. Before agreeing to take over, I considered whether it was OK to oppose my attorneys-in-arms whom I have consistently supported. I decided my involvement could only be a good situation for the Plaintiff's attorneys I was up against who I did not know prior to this experience. I look upon my consumer attorney colleagues with a presumption of respect and kindness. Often, our career adversaries do not regard us with the same positive bias. Similarly, my assessment of liability and damages were based upon my past experience as a consumer attorney. More often than not, I am forced to prove cases that were not reasonably evaluated by the defense.

I have written this piece to share lessons learned so all who read it can improve in their practice (There are 30 invaluable lesson in all!). It is my passion to study, teach and practice plaintiff trial advocacy. Out of respect and so I can be brutally honest, I am not identifying the plaintiff attorneys who worked this case (The purpose of this piece is not to embarrass, but rather to educate those interested in ideas about how we may improve in our quest for justice).

I will say that the plaintiff team was jampacked with "super lawyers," some with many decades of litigation experience. Any super trial lawyer will tell you, the study of trial and quest for improvement never ends. My opinions and observations are akin to any I would give teaching trial advocacy. Normally it pains me to report the defense of a case brought to recover harm to a California consumer. However, as attorneys we have an obligation to evaluate cases based upon fact and not emotion. Not every witness tells us the truth.

Not every case should be tried. We advocate for consumers. This includes a vulnerable elderly man falsely accused of molestation and under siege by the alleged victim's mother and father who made it clear their goal was to financially ruin him, his family business and his heirs. Eleven jurors agreed no molestation ever occurred (one juror did not vote because she couldn't decide).

I understand this report is lengthy but the trial was more than 17 court days. Also I want to ensure the maximum learning experience. How often, if ever, has a "defense attorney" given a report that includes lessons to improve the plaintiff's bar?

SEXUAL ASSAULT—CHILD MOLESTATION
Defense Verdict, Liability Question 1
(Did Defendant intend to touch Plaintiff?)
Plaintiff's lowest settlement demand: $9,000,000
Defendant's highest offer: $250,000 (Per CCP 998)
Defense trial counsel: Bohm Law Group, Inc.

CASE OVERVIEW

The mother of a six-year-old girl (Plaintiff) allegedly saw two instances of lewd touching—first, the buttocks, and then vagina, by a 76-year-old man toward her daughter. Plaintiff initially denied inappropriate touching to responding law enforcement. Two days later, Plaintiff disclosed to a child services advocate lewd touching "all the time" "every time" she saw Defendant since age three. Defendant was charged with felony sex crimes and pled no contest to a reduced felony requiring no sex offense registration or jail time.

Subsequently, a civil lawsuit was filed for sexual battery and intentional infliction of emotional distress (IIED was dismissed at trial). Plaintiff sought millions in compensatory and punitive damages, with her mother serving as *guardian ad litem*. Defendant denied any lewd touching occurred.

GENERAL FACTS

A longtime employee (Plaintiff's father) of a wealthy business owner (Defendant) did side jobs over the years at the defendant's home. Over time, the employee married and had twins (one boy and one girl: Plaintiff) in October 2010. The mother had three children from a prior marriage (ages 10, 8, 6) when the twins were born. The employee and his new wife were treated like extended family by Defendant. Each year, Defendant bought the employee and his children gifts for the holidays.

The employee was free to bring his children with him to the defendant's home when he came over to do side jobs. The children played around the house, using toys and games left at the home by other family grandchildren. The twins were encouraged to call Defendant "Papa," as he came to be known to the children.

In 2012, Defendant gave Plaintiff's mother and father $10,000 to help them get a larger van when they disclosed

they were having another baby. This child was lost due to delivery complications, and the employee's family was struggling after this loss. Mother decided to home-school the twins. Mother does not keep records of the courses of study as required.

[Lesson 1 - When our clients home-school. we should ensure that they are keeping proper records and that the children have been tested for educational ability. The information is easy to find online. Proving non-economic harm is greatly assisted by educational records and the independent observations of educators. I would suggest a weekly in-home tutor to supplement home-school study, if possible. Expect defendant to seek the required affidavit, and be sure it is correctly completed.]

Mother claimed Plaintiff was educationally impaired as a result of the incident although this was not confirmed by any expert at trial. Plaintiff, now age 8, is unable to spell her last name, and frequently writes letters backward (Mother told the jury she was unaware of Plaintiff's inability to spell her last name and never had her child evaluated for education impairment). Psychiatric experts for both sides testified that inadequate home schooling was causing harm. Plaintiff's therapist testified she believed Plaintiff was "extremely gifted" but immediately took back that testimony after agreeing Plaintiff has never been tested and should be able to correctly spell her own name.

In addition to home school, mother teaches her children that having a job is not the only way to become wealthy. She teaches her young children that the goal in life is to become wealthy and financially free.

[Lesson 2 – Expect competent defense counsel to investigate our client's social media history, including the obvious Facebook, Instagram, Twitter, etc. Gothcha! The "etc." can be equally important and should not be overlooked. Smaller lesser-known social media applications, such as "Vimeo," may also be used. Even though most of the information may be inadmissible, it doesn't take much to cause substantial damage to our cases. Also, if our opponents are reviewing this information and we are not, then we they will have a different understanding of our client's public and private persona. I do all I can to avoid situations where the other side knows more about my client than I do. A thorough search includes review of videos photos, "re-posts," likes/dislikes, previously deleted materials, and a list of all linked users, some of whom may be cooperative with investigators. Some may even share emails and other information your client never told you about. If your client is a heavy user of social media, the risk must be expertly assessed. Most likely, defendants may not seek or review such information until after close of discovery, but the safest practice is to assume from the beginning that it has been mined and preserved by your opponent. We have all been warned. Again.]

Evidence suggested unorthodox and potentially unsafe rearing of the children. At ages 5 through 8, mother and father leave their young twins without any adult supervision for periods longer than a half hour to teach them independence. Parents claim Plaintiff is afraid to be alone as a result of the alleged touching, but parents also admit to leaving her frequently unsupervised for extended periods of time.

Mother and her ex-husband have a toxic relationship. In early 2016, the three older siblings of the twins refused to continue visiting mother and her husband because they did not feel safe or properly cared for in the home. The oldest sibling stopped living in the home after he was caught going to adult websites. He has not seen the family much since that time. Plaintiff's estrangement from her brother was disclosed as a source of sadness during her mental examination.

In November 2016, mother, father, the twins (age 6) and their two half-siblings went with the defendant to his cabin in Arnold, CA. The family arrived at the cabin on Nov. 11, in the evening, when Defendant and his wife were having dinner. After dinner, everyone sat at the table and played a board game. Mother alleges that she noticed Defendant (age 76) had his hand too low on her daughter's back.

Mother alleges she got up, walked behind where Defendant was seated and observed his hand down her daughter's pants, on her buttocks. Mother claims she immediately grabbed her daughter and took her upstairs to bed. Mother noticed her daughter's underwear disheveled and pulled down. Mother testified the image of the disheveled underwear was burned into her memory and could not be forgotten (Mother was impeached when shown her sworn testimony in the criminal preliminary hearing where she twice denied noticing anything unusual about her daughter as they went upstairs. Mother could not explain why her testimony was now different).

[Lesson 3: Our client's need to review and practically memorize their prior testimony. If, at deposition, they are going to say something different from a prior sworn statement,

it should be acknowledged and explained. It is true people forget things. When our client is repeatedly impeached on material information from a prior transcript they could have read or studied, there is a big problem. Once our client commits to one story as being true and correct, it hurts to change the narrative without good explanation. BTW, saying that the transcript "was a lot to read" is not a good explanation for contradicting the testimony.]

Mother said nothing to her child, her husband, Defendant, his wife, or any of their children about what she claimed had happened. Mother claims she did not report the touching because she was in shock and uncertain what action to take.

[Lesson 4 - Beware implausibility. Juries appreciate when things make sense. They more you ask a jury to accept a weird or implausible fact, the less likely your chances of success. These parents made so many bad decisions they made a point on direct exam to say they thought of themselves as the "worst parents."]

[Lesson 5 - No matter how bad your client's parents look, do not have them admit they are bad parents. Also, do not use the theme "we don't get to choose who our parents are" when asking for millions in compensation during closing argument.]

The following morning, the mother tells her husband what she allegedly saw the night before. Father is upset and shocked by the news. He, too, believes his child has been molested, but they decide to "salvage the fun" of the weekend and remain at the cabin with the alleged molester.

[Lesson 6 - If "salvage the fun" was an attorney-created theme for the parent's strange decision, then it should have been left on the cutting room floor. If it was not an attorney-created theme, then it needed one. Both parents said essentially the same thing at deposition.]

The parents decide not to report to the police because it would ruin the fun of the weekend. Parents claim they planned to keep Plaintiff away from Defendant but did not tell anyone of the concern or the need to keep Plaintiff away from Defendant. That evening, the parents left Plaintiff alone. At trial, mother testified she asked the older half-sister to watch Plaintiff and keep her upstairs until dinner was ready. In the interim, mother went to the basement for 10 minutes to check on her husband to tell him dinner was almost ready. Mother claims it was on her way upstairs from the basement when she saw Defendant with his hand down the front of her daughter's pants with his hand on her vagina (This testimony was impeached with mother's "diary" which told a different version of events where the half-sister was with her in the basement and not asked to keep Plaintiff upstairs).

[Lesson 7 - To protect our clients from attacks on credibility, we must respect their "diaries" and other statements our clients write before (or sometimes during) our representation. If we take on the case, and sworn testimony already conflicts with the diaries, a huge red flag is apparent. Sometimes damage control is possible—people forget things. No matter what, you have to get out in front of it. Do not leave it for your adversary to point out. It is far better to control the narrative then to allow your adversary to point out more inconsistent information. In this case, the diaries were never mentioned by Plaintiff's counsel. I waited until mother was at the end of the tree limb before sawing it down with her own diary. Hopefully, this never happens to any of us again.]

Although the location of the alleged touching happened in the middle of the cabin visible by all, only the mother saw this alleged touching. After allegedly seeing a second incident of touching, mother put Plaintiff in a chair near Defendant and told her to "stay." Then she left Plaintiff alone for approximately five minutes while she spoke to her husband privately in the bathroom. Once again, father is shocked, but they decide to stay for dinner because they did not want to make a scene.

After dinner, mother takes Plaintiff upstairs. While in the shower together, mother claims she asked her daughter whether she had ever been touched in her "privacy." She said her daughter says she has been touched by Defendant on her vagina all the time and for a long time. Later that night, mother and father discuss the situation and decide next steps.

They decide to confront Defendant alone. The parents also decide to spend the night because they didn't want to explain why they would be leaving early (The family lives an hour and 20-minute drive away). They claimed they promised the children a trip to a nearby souvenir store and did not want to disappoint. They also decided not to contact law enforcement. Mother decides she will use her laptop to create a "diary" of the events (Mother's diary only includes events from Nov. 11 to Nov. 16).

At trial, the mother testified she and her husband

decided not to report the incident at that time because they were in shock. Mother also claimed 1) she "did not know" how to report the incident, 2) the WiFi was not working so she could not get on the Internet, 3) she was not sure if 9-1-1 worked in Arnold, CA, and 4) she was not sure if it was a sheriff or police situation.

These reasons were not included in mother's diary, which stated other reasons parents decided not to report including: 1) they were worried father may lose his job working at Defendant's business, 2) Defendant had been generous in the past, 3) they did not want to ruin Defendant's life, and 4) they did not want their daughter dragged through a legal process. The diary made no mention of not knowing how to report. Father testified they knew how to report and this was not a true reason why they failed to report.

Sunday, Nov. 13, in the morning, the parents allegedly met with Defendant alone outside on the porch where no one could hear. The parents claim they told Defendant everything they saw and heard. The parents allege that Defendant immediately admitted to everything and that it had been going on for the past "two months."

The parents also allege Defendant stated he could "fix it" and made comments about starting bank accounts, college funds and donations to charity (The diary makes no mention about an admission of conduct for "two months" or offering to "fix it."). Mother was further impeached by her preliminary hearing testimony where she denied knowledge of Defendant offering to "fix" things.

After the initial confrontation with Defendant, parents left for the souvenir store. Mother testified there was only one meeting in the morning; however, according to her diary, a second discussion happened, just after breakfast (This was never explained by Plaintiff).

Although they were packed to return home when they left, the parents claim they returned to the cabin after souvenir shopping to say goodbye to Defendant's wife. When asked if she had lunch with the man she was accusing of molestation, Mother's testimony was, "Hell no!" Once again, mother was impeached with her diary, which clearly indicated she and her family had lunch at the cabin after they returned from souvenir shopping. No explanation for the inconsistency was offered.

[Lesson 8 - Attorneys should expect that the "failure to explain or deny evidence" CACI instruction will be used as to important unexplained facts. You cannot simply pretend bad testimony did not happen. Of course, if you have no explanation, then your case may be in the process of being blown out of the water.]

The family returned home Sunday and made no report to police. The next day, father claims Defendant met him at work and asked to have another meeting to "fix the problem." Parents wanted to meet with Defendant and his wife so they could tell her about the alleged molestation. Parents met with Defendant and his wife at his home. When the wife heard the allegations, she immediately became angry and demanded the parents leave her home. The parents left Defendant's home and still made no report to the authorities.

[Lesson 9 - Five days is too long to wait to report ongoing child molestation for a period of months. If this was the only terrible fact, it may not be fatal, but it is certainly a terrible fact. Since this was one of many terrible facts, it should have been given more weight in determining litigation strategy.]

On Tuesday, Nov. 15, in the afternoon, parents decide to contact authorities. The same day, San Joaquin County Sheriff deputies arrive to take a statement from the parents and the Plaintiff. The deputy's interview with the child is audio recorded. Mother and father are sitting in the room with the child while she's interviewed.

On the recording, the child denies being touched on the vagina or buttocks. The child denies any inappropriate touching.

Neither parent attempts to direct the child to what she allegedly told the mother. The parents don't mention or offer the "diaries" they each prepared to record what allegedly happened. After the deputies leave the home, mother and father claim to have discovered recorded messages from Defendant offering to "fix things," "no questions asked."

Mother testified the messages were deleted after deputies left because she was too emotional when she heard Defendant's voice. Mother claimed she couldn't remember if she deleted all the messages at once. Mother was impeached by her deposition testimony where she testified that she saved the messages for two hours before deciding to delete them all at once.

[Lesson 10 - Clients should be prepared to confront the obvious facts harped on by Defendant. Given mother's clear testimony on this point, a new story at trial was ill advised. Obviously, witnesses should be given their depositions long before their trial date and encouraged to read and annotate the deposition. Of course, the best witnesses tell the same story, repeatedly negating any potential credibility problems. If a witness is struggling in spite of our best practices, another red flag should be unfurled.]

Mother and father claim that after Plaintiff denied any lewd touching to the deputy, they did not speak to the child about her denial. According to mother, no conversations about the touching occurred until the child was interviewed two days later by Child Advocacy Services. In this recorded interview, the child claims that her vagina was touched by Defendant every time she saw him, since she was three or maybe even a baby. The interviewer did not ask what, if any, information had been told to her by her mother or father.

After the mother's allegations and the child's statement, Defendant was arrested and incarcerated for approximately one week while he waited to post bail. During his incarceration, Defendant had communications with his wife and son over the visitor phones. During these calls, Defendant says he "basically confessed to everything." The tapes do not say what was included in "everything" or what specific facts were included in his "confession." Plaintiff argued this recording was proof that everything mother claimed was admitted to by Defendant. Plaintiff also played Defendant's deposition where he denied inappropriately touching the child.

[Lesson 11 - Plaintiff's use of the "jail tapes" was excellent and powerful. This evidence was certainly my least favorite evidence for Defendant in the case. Kudos to Plaintiff's third-party presentation person, who used trial director very effectively to assist the Plaintiff's case. Display of transcript with media is by far the most effective means of presentation.]

Approximately one year later, a preliminary hearing was conducted in San Joaquin County Superior Court. Mother, daughter and the initial investigating deputy testified. Following the preliminary hearing, Defendant was charged with four counts of violating Penal Code section 288(a) lewd act with a child under 14 years of age. Conviction would require registration as a sex offender and lengthy incarceration.

After the preliminary hearing, the District Attorney and Defendant reached a plea agreement in April 2018 where the four counts of 288(a) would be dismissed with prejudice in exchange for Defendant's agreement to plea "no contest" to one count of 261.5(c) felony sexual intercourse with a child more than three years younger than Defendant. Although no sexual intercourse occurred, this new charge did not require registration as a sex offender, and Defendant would not require incarceration beyond 90 days home detention and five years informal probation.

Rather than risk dying in prison, Defendant accepted the plea agreement (As it turns out, within one year Defendant would be in a wheel chair and incapable of testifying due to his poor health.) On the record, Defendant's attorney stipulated that the preliminary hearing provided a "factual basis" for the plea.

In the later civil trial, Plaintiff strenuously argued that this stipulation meant Defendant admitted to the unlawful sexual touching. To the contrary, Defendant argued that sexual intercourse never happened, hence the factual basis was to a legal fiction. Ultimately, the court decided the jury would be told that the plea could be considered as an "admission" by Defendant, which they could consider in deciding whether a sexual battery occurred. The jury was also told that the admission did not prevent Defendant from contesting the facts of the alleged sexual battery.

Around this same time in 2018, mother and father learned they would have to move out of their rental home because it was being sold by the owner. Ultimately, mother and father found a new home that was much smaller and did not allow pets. Moving required Plaintiff to give up her favorite dog, Nacho Libre, which she referred to as her "baby." This was another stressor identified by Plaintiff during her mental health evaluation.

In May 2018, after the plea agreement and before the sentencing, mother and father hired a civil attorney. From the time of the incident up to that point in time, mother and father had not noticed any problems with their daughter. Father admits that free mental health counseling was offered by the county in connection with the alleged molestation but they never thought it was needed for Plaintiff.

In spite of these facts, mother and father testified that there were problems from the time of the incident. This testimony was impeached by letters to family and friends sent in October 2017 (a year after the incident), indicating that their daughter was doing "great" and had "no problems" as a result of the alleged molestation.

In May 2018, the family hired a therapist to treat Plaintiff. Mother claimed that the timing was coincidental to the hiring of an attorney. Mother also claimed manifestation of her daughter's emotional problems was also coincidentally in the same month. Father impeached this testimony by confirming he took the child to therapy because he learned from his attorney that he would have "no case for money damages" unless his daughter was in therapy (No objection based on attorney/client communication was asserted).

A civil action related to the alleged sexual battery was filed the same month, seeking compensatory and punitive damages. The action was initially brought on behalf of mother, father and the daughter. The parents later dismissed their claims when the court ordered mother and father to participate in mental examinations (The jury was not permitted learn this information). At the time of trial, only the child's claims were asserted.

Plaintiff's therapist told the jury that she did not want to get involved with treatment of the child because children

do not improve from therapy if they are in litigation (Nevertheless, 24 sessions of therapy followed). The therapist implied that she had been misled about the civil litigation and agreed to treat the child without realizing the child would be involved in the case.

When the civil case was initially filed in May 2018, it was defended by the same Stockton attorney that handled the criminal defense of the alleged molester. In October 2018, Plaintiff's counsel moved to prioritize the case such that it would have to be heard in 90 days. A frenzied rush of discovery and expert work up followed. During this time, local Stockton counsel brought in a larger San Diego firm to assist.

Plaintiff took depositions of Defendant's family and business representatives. Plaintiff was permitted to engage in punitive damage related discovery and hired numerous experts to value Defendant's business and personal assets. As the months progressed, Defendant's dementia and physical condition worsened such that he could not participate or assist with trial at all.

TRIAL IN STOCKTON

Judge Roger Ross Presiding

Trial of this case began with jury selection on May 29. Plaintiff counsel told the potential jury Defendant pled guilty to child molestation as well as other facts likely to pre-condition the panel. Not surprising, I was greeted with a chilly reception by the panel.

[Lesson 12 - Resist the temptation to overly sell your case during *voir dire* because it will cause the elimination of jurors who might have been on your side. After hearing favorable case facts, some jurors will say they cannot be fair because they believe the information you disclosed in *voir dire*. Many judges have strict rules about "conditioning." This court allowed much more sharing of "case facts" than usual. If misused, this can result in plenty of rope to hang your own case.]

Defense *voir dire* focused on fairness, parents who exploit their children, liars, cheaters, plea agreements and other subjects related to the actions of the parents. Defense repeatedly reiterated these were hypothetical questions and not facts from the case. Although several very bad jurors for Plaintiff were in the main jury panel, Plaintiff ended selection with two potential challenges remaining. Surprisingly, Plaintiff was assisted by a professional jury consultant.

Motions in limine before trial resulted in disappointing rulings for both sides (in other words, it was like most in limine hearings). The court denied Plaintiff's request to admit the testimony of two women who were allegedly inappropriately touched by the Defendant when he was 16. Noting the events were over 60 years old, the court found the probative value was outweighed by the prejudice. The court reasoned that this case was about what happened to the child and not to others, especially so long ago. The court also denied Defendant's request to admit information that Plaintiff's half-sister reported her stepfather to the police for inappropriately touching her breasts on two occasions after this incident and mother did nothing. Again, the court wanted the case limited to things that impacted this child.

A couple of months before trial, Plaintiff's mother posted a Go Fund Me web page to her Facebook. Mother received a Facebook ad informing her of a talent competition to discover child entertainers. Mother and father decided to enroll their children.

At the competition, their children were selected to participate in a larger talent completion that would take place in Los Angeles mid-June (It actually took place during the trial). Mother and father spent $8,000 to enroll the twins in the LA competition, including headshots and weekly training with acting coaches to prepare. The Go Fund Me site was to raise funds to reimburse the family for its $8,000.

Mother brought her twins to various businesses and residences, seeking sponsorship for their effort to become child entertainers. Mother also offered to have her eight-year-old twins do yard work to raise funds. One post on the site showed the work permits mother obtained for her children to become child entertainers. The site also included numerous video recordings of Plaintiff dancing, playing piano, "runway" walking, delivering scripted lines, improvisational fake commercials and doing yard work.

In one video, Plaintiff dances to the song Sunflower that includes the lyric, "I want to ride you like a cruise ship." None of this information was disclosed to Defendant or mentioned by Plaintiff's experts. This information was found by reviewing the mother's public Facebook page, which contained many other useful postings providing insight to who she was a parent and community member.

[Lesson 13 - We must review the Facebook of our clients and adjust the case narrative accordingly. Assuming it was reviewed, Defendant should not have been afforded the opportunity to be first in bringing this to the jury's attention. Which is exactly what happened!]

Plaintiff's opening statement focused on the conviction, the "confession" tapes, mother's accusations, and the lifelong damage to Plaintiff cause by the alleged molestation. Plaintiff made no mention of the information regarding her recent decision to become a child entertainer.

Defendant's opening statement focused on the mother's bias, lack of reliability, and inconsistency in reports.

[Lesson 14 - It is extremely difficult to craft an effective opening statement on the defense side. If you are worried about your case after hearing the statement of defense counsel, it would be wise to evaluate your litigation strategy. Opening statement is not a good time to be learning about new adverse case information.]

After opening statements, Plaintiff called her first witness, Dr. Lenore Terr, an 83-year-old psychiatric expert with very good credentials and experience. Terr opined Plaintiff had a clear case of post-traumatic stress disorder due to sexual abuse and that Plaintiff would need lifelong treatment. According to Terr, Plaintiff would be plagued with problems her whole life. Terr based some of her opinions on drawings made by the child during her evaluation. Terr performed no psychological testing.

[Lesson 15 - Choose experts who opt for transparency and accountability. In this day and age, there is no good reason not to record (by audio or video).]

On cross-examination, Terr acknowledged that she chose not to audio or video record her examination. She acknowledged such recordings are required by the parameters published by her own organization but dismissed them as guidelines and indicated that she did not need to follow them.

Terr also admitted to considering no other explanations for the alleged harm to the child. According to Terr, a differential diagnosis was not performed because the diagnosis was "so obvious." Terr assumed the truth of the information provided by the mother as well as the confession of Defendant. She provided no testimony regarding the cost of care.

Plaintiff next played video recorded deposition testimony of Defendant being questioned about the jail tape confessions. Defendant appeared diminished and confused in the video. At one point, Defendant confusedly states he does not know where he is. Defendant never explains his "confession."

Plaintiff also played the video-recorded deposition of the deputy who initially interviewed the child. The deputy confirmed the initial denials made in front of the parents. Plaintiff also played the video-recorded testimony of Plaintiff's expert psychologist who opined children sometimes falsely deny molestation and that parents sometimes delay reporting because they were in shock.

In rebuttal, Defendant read testimony from the witness where she admitted not reviewing any of the video recordings in the case. The expert also confirmed she never met the mother, the father or the alleged victim.

[Lesson 16 - If possible and necessary, have experts talk to the client or guardian so they can at least say they did and have improved foundation for testimonial opinions. Also video recording your own expert can come in handy for scheduling problems. I did not typically do this; however, given availability issues (and managing expense) I may do so in the future.]

The next live witness called by Plaintiff was her mother—the only adult witness to the conduct and the alleged report of the conduct by Plaintiff. Mother appeared coached and extremely nervous while testifying. On direct examination, she admitted to teaching her children that it was not necessary to have a job because there were other ways to get money. Mother explained her belief was from bestselling author Robert Kiyosaki who's book, "Rich Dad Poor Dad," is like the "Book of Mormon" for the financial world.

Mother went on to recount her experiences and observations, including the terrible damage to her daughter. Mother made no mention of her child's efforts to become an entertainer or to seek money. To the contrary, mother described how her daughter had anxiety, low self-esteem, had become violent with outbursts, nightmares and was uncomfortable around strange men. Mother also indicated concern that her daughter acts more sexual and wants to dress more sexual. The direct examination lasted approximately four hours.

[Lesson 17 - Bad facts are made worse if not addressed head on. Defendant spent significant time during cross-examination informing the jury about information not disclosed or addressed by Plaintiff.]

Mother was cross-examined for approximately 15 hours over several days (Due to scheduling issues, mother's testimony did not end until the day before the very end of the trial). It was clear from the video-recorded depositions that mother made a terrible witness. Since she was the main witness in the case as to liability and damages, there was much to discuss.

In addition, mother's ex-husband provided substantial information relating to mother, including her attitudes about child rearing, activities as a parent, communications about the health of her daughter and behavior toward Plaintiff.

[Lesson 18 - Do not underestimate how disas-

trous an ex-spouse or boy/girlfriend can be to a case. The existence of such a person should be a red flag considered when developing litigation strategy.]

After establishing foundational facts and context about mother and her family, Defendant confronted Mother about the Go Fund Me web page and her daughter's involvement. After initially denying, mother admitted to using her children to try to regain money spent to pursue the children's entertainment career.

Mother also acknowledged leaving her twins unsupervised to go shopping. Repeatedly, mother was impeached or contradicted by her own prior testimony.

Mother became increasingly defensive and hostile as the hours of cross-examination steam rolled forward, with repeated instances of inability to understand straight forward questions, impeachment, self-contradiction, implausible explanations, "I don't know" to obvious questions and damning admissions. At one point, Mother became so hostile Plaintiff's attorneys asked for a break only 10 minutes after the court already returned from a lengthy recess.

[Lesson 19 - Plaintiff's counsel did the right thing to interrupt the testimony of mother. She was imploding. Unfortunately, it also looked bad to the jury that the witness needed rescuing. A required rescue from the witness stand is another red flag to consider for litigation strategy.]

It was clear that mother answered questions differently depending on who was asking. Building to the conclusion of the cross-examination, Defendant confronted mother with her diary, which contradicted much of the testimony given on prior days. It looked terrible that the existence of the diary had not been mentioned by the Plaintiff during the very long trial. When confronted with implausible facts mother remarked she was a terrible parent.

[Lesson 20 – We can achieve better results for our clients if we have a strong sense of how they will perform at trial. Although that can be difficult to know, I did not see this situation as particularly hidden or difficult to detect. If the main witness is weak, this should be considered in formulating litigation strategy. A good trial attorney will sense the blood in the water and attack that weakness.]

Because of scheduling, other witnesses were interspersed within the testimony of Plaintiff's mother. This included the testimony of Plaintiff's therapist and Plaintiff's father. Due to scheduling, Defendant also called witnesses out of order, including Plaintiff's half-sister and Defendant's psychiatric expert.

The direct examination of Plaintiff's therapist was largely done by playing video-recorded testimony from Defendant's deposition of the therapist.

However, the therapist was also subpoenaed to court by Defendant for further examination. Prior to trial, the therapist signed two different declarations seeking to protect Plaintiff from the litigation process, including the forensic psychiatric evaluation by Defendant's expert and testifying in her case in chief (In one declaration, the therapist said she reviewed Plaintiff's deposition. During cross-examination the therapist claimed she did not review the deposition. When confronted with her declaration she said it was mistaken and that she had not reviewed the deposition).

Out of the presence of the jury, Plaintiff moved the court to prevent Defendant from calling Plaintiff to trial due to medical unavailability because substantial trauma would occur if Plaintiff were required to testify about the molestation in court. Citing extreme credibility problems of the therapist the court denied the Plaintiff's motion to deem Plaintiff medically unavailable.

Although the therapist's records showed no PTSD, the therapist told the jury she added the PTSD diagnosis after her deposition. On cross-examination, the therapist admitted the she changed her diagnosis the night before her trial testimony. The therapist based her analysis on the child being six years old at the time her treatment began. On cross-examination, the therapist admitted she was wrong about the child's age. She was seven at the time of treatment. The therapist did admit that she did not know if the child needed any future treatment (The jury was reminded of this specific testimony after the Plaintiff's counsel requested $5,110,000 for future non-economic damage).

[Lesson 21 - Many treaters are "shy" or "avoidant" of civil litigation. Where possible, these treaters should be left alone because they are more likely to say or do something that will harm the case.]

On direct, Plaintiff's father initially appeared credible. He claimed the large beard he had grown for years was recently trimmed because he was looking for a new job and had nothing to do with trial. He acknowledged not seeing any of the conduct and that he was surprised by the information from his wife. Father cried as he recalled the damage to his daughter.

On cross-examination, father admitted telling a coworker he shaved his beard to "tame his look" for trial as suggested by his attorney. Father could not recall crying

at his deposition as he did at trial. Father stated he had not left the twins without supervision for more than a half hour since 2019 started. However, when challenged that such a lack of supervision happened that same morning, father admitted it indeed happened that morning. Father's bias and damaged credibility were apparent by the end of cross-examination. Father said he felt like a terrible parent, looking back on the bad/implausible decisions made by him and his wife at the time.

[Lesson 22 – Don't email opposing counsel uninformed accusations that they orchestrated your client's lack of parental supervision. This email was how Defendant learned parents left their children without supervision and impeached the father.]

Before trial, Defendant subjected Plaintiff to a court-ordered forensic child psychiatric evaluation by Professor Charles Scott, MD, director of Forensic Psychiatry at UC Davis. Scott video and audio recorded his interview with Plaintiff. Scott also administered three age-appropriate psychological tests.

Scott addressed the importance of parameters for the completion of psychiatric examinations and opined, based on testing and his clinical examination, he was unable to confirm any of the problems that mother claims affect her child. Even if the molestation happened, there was no lasting or detectable harm to the child. If asked to believe the harm reported by mother, a differential diagnosis still rules out PTSD, ADHD and Oppositional Behavior Problems, leaving only Parent Child Relational Problem as the appropriate diagnosis.

[Lesson 23 - Defense audio and video recordings from mental health evaluations are admissible non-hearsay by party opponents. If the "victim" is not expressing indications of harm, this information is a red flag and should be factored into developing litigation strategy.]

In front of the jury, Scott reviewed numerous video clips of Plaintiff during his examination where she states repeatedly positive descriptions of herself and her future. Scott found the child to have some educational impairment likely related to home-schooling and unrelated to the allegations. He also reviewed the information from the Go Fund Me page and opined that the activities engaged in by Plaintiff and her family were not what you would expect given the problems reported. Dancing to the song "Sunflower" was particularly inconsistent behavior. These activities could also contribute to the problems described by mother.

Scott also opined that the initial denial by Plaintiff did not meet any of the seven criteria associated with false denials. Further opinion testimony offered factual support for memory influence, false memory and confabulation. During the evaluation and in deposition, the child admitted that her attorney told her not to say, "I don't know" in response to questions by the psychiatrist. In deposition testimony, Plaintiff recalled being shown photos of the cabin by her mother. Plaintiff also testified at the preliminary hearing that her mother told her information about the case.

During Scott's testimony, Plaintiff's half-sister took the stand and testified against the family, noting Plaintiff is a normal girl with no problems. Plaintiff's sister also testified: 1) she is afraid to be around her stepfather, 2) mother tells stories that are not true about the children, 3) parents have left the twins without supervision for more than 30 minutes numerous times, 4) she does not feel safe in the home because of the lack of parental supervision, 5) Plaintiff recently reported parents left her without supervision for six6 hours, and 6) mother upsets the children by keeping donuts frozen in the fridge that are just for her until she eats them in front of the children after dinner.

On cross-examination, Plaintiff's attorney inquired about debts the ex-husband owed mother for child support. Scott re-took the stand, citing the testimony of the half-sister as further support for his conclusions.

He also testified that information regarding abandonment for six hours was reportable neglect and that he was in contact with the university to discuss logistics of reporting (This conduct was eventually reported).

[Lesson 24 - If family members are going to testify against our clients, it is going to be difficult if not impossible to win. If this happens, this is a huge red flag, and immediate course correction is advised. Also, it is always bad if "reportable" conduct is disclosed about our clients during trial.]

On cross-examination of Scott, Plaintiff focused on the money paid by Defendant to the university for Scott's work on the case. Scott confirmed that allegations of child molestation are usually true and confirmed that studies show criminal defendants will sometimes falsely confess for various reasons, including a good plea deal and a fear of dying in prison.

[Lesson 25 - University employees are immune to the typical money bias we enjoy using against the defense hired guns. The money goes to the regents, and the experts have no say in setting their rate or payment terms. Attack-

ing the university as having a bias in the case seems implausible and unlikely to yield and jury suspicion. This could backfire and cost us credibility.]

After Plaintiff's case, Defendant presented the testimony of two remaining witnesses: a co-worker of the father and the attorney who represented Defendant in the criminal and civil proceedings. The coworker provided testimony that after driving father to and from work nearly every day for 10-plus years, she was unaware of any problems with Plaintiff.

Defendant's criminal attorney confirmed the terms of the plea deal offered and his observations of the physical condition of Defendant at the time of trial.

On cross-exam, Plaintiff focused on the amount of money paid to the attorney by Defendant for his work on the criminal and civil cases. Plaintiff counsel also pointed out the witness's family was sitting in the gallery watching his testimony. The jury was also informed the witness worked as a plaintiff attorney on cases with Defendant's lead trial counsel. This was the second time the jury learned the case was being defended by a career plaintiff side attorney.

[Lesson 26 – Failed attempts to show bias are unfortunate to watch. The fact a witness has family in the audience should not be brought to a jury's attention because – who cares? In this circumstances, the wife worked with her husband, and both children in attendance were in law school. Also, the fact the case was being defended by a Plaintiff side attorney would have been a good topic for *Motion in Limine* instead of inviting the information into the case.]

The presentation of evidence concluded just before the Fourth of July holiday. Plaintiff never testified or even entered the courtroom. Plaintiff brought no other family member or family friend to testify as to Plaintiff's harm. The jury was asked to return six days later on July 9th for closing arguments.

The theme for Plaintiff's closing was that the criminal justice system let the child down by allowing Defendant his plea deal. Plaintiff's attorney passionately argued that civil litigation was the jury's opportunity to correct the criminal system. Citing "victim shaming," Plaintiff's counsel attacked Defendant's case as a baseless smear campaign. When counsel remarked that we "don't get to choose our parents," it appeared as though Plaintiff conceded her parents were terrible.

Counsel also accused Defendant's attorneys of playing "tricks" and setting up circumstances in court, including Scott's testimony about a mandated report (One alleged "trick" used by Defendant's attorney was writing on poster paper). Counsel argued that the likelihood of a false allegation by the child and a false conviction was rare, "like a unicorn."

[Lesson 27 - It is never a good idea to accuse defense counsel of tricks during the first closing. It always looks bad for an attorney to draw first blood. It certainly opens the door to a counter attack. I always recommend saving these kinds of attacks for rebuttal and only if first brought up by the Defendant. Also, unicorns are not "rare," they are fantasy.]

Plaintiff's attorney further argued Defendant should not be permitted to admit guilt in one court and claim innocence in a different court, which was a repeated theme. Plaintiff played the jail tape "confession." Plaintiff argued the case was obvious and brushed aside mother's numerous inconsistencies and impeachment as "quibbling."

As to damages, Plaintiff dropped all claims for economic damages leaving only non-economic damages at play. Counsel invited the jury to "imagine" the extensive harm to Plaintiff as she grows into her older years. Plaintiff requested approximately $700,000 for past non-economic damage and $5,110,000 for future emotional distress. Plaintiff also requested a punitive damage finding because the case was so clear and obvious it met the higher standard.

[Lesson 28 – Never use the word "imagine" when describing harm to our client because it implies falsity in my opinion. I use the word "consider" or "picture."]

Defendant's closing theme was "tell Plaintiff's mother and her attorneys No." The large monetary request by Plaintiff's counsel played neatly into Defendant's theme that this case was an effort to acquire wealth. It was actually Defendant and his family who were the victims of mother's effort get money. The jury was reminded Plaintiff was seeking nearly $6,000,000 for a child they never met and only appears normal in every photo and video they have seen.

Since economic damages were dismissed, defense argued, "This is not money to help or fix." For approximately two hours, the jury was shown pertinent jury instructions and then shown testimony and evidence relating to the instruction.

Regarding evaluation of witnesses, the jury was shown testimony from trial where mother and father were impeached on numerous important points. According to De-

fense counsel, since the only adult witness lacks credibility and reliability, Plaintiff cannot meet her burden. The jury was reminded of their vow from *voir dire* to tell Plaintiff "no" if she did not meet her burden.

Plaintiff's counsel presented rebuttal for almost two hours, repeating much of the information presented in the initial closing argument. At the beginning of rebuttal, counsel published pages from the preliminary transcript that were not in evidence and had been redacted by stipulation. The court sustained Defendant's objection and reported the error to the jury and instructed them to disregard counsel's rebuttal argument up to that point. After a lunch break, Plaintiff's counsel suddenly ended his rebuttal argument when it appeared before lunch, he had much more to say.

[Lesson 29 – Juries hate lengthy rebuttal. I have been told this many, many times. I generally keep my rebuttal to 20 minutes or less. This jury said they felt like they were being punished by the rebuttal.]

The jury deliberated for 90 minutes until it reached a verdict, "No" to question no. 1, "Did defendant intend to touch Plaintiff?" The verdict was 11-0-1(undecided). When the court asked each juror how they answered the question, most of the jurors looked directly at Plaintiff's parents and attorneys when they said, "No."

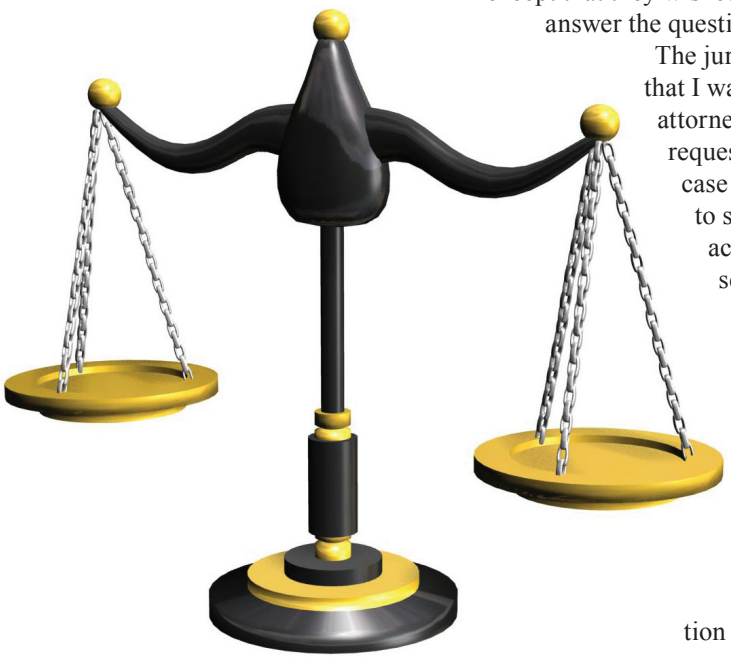
POST VERDICT JURY INPUT

Post-verdict discussion with jurors revealed that the numerous inconsistencies completely undermined the mother and father's credibility. The jury believed they were bad parents. The mother's credibility was particularly destroyed.

Many of the jurors were concerned for the daughter and her obvious need for help dealing with her parents. The jury found the video footage and Go Fund Me information very damaging to Plaintiff's case because she looked healthy, and it did not seem like an activity a sexual assault victim would take on.

The jury also could not rely on Plaintiff's expert because she did not audio or video record her examination. In addition, relying on a drawing for a diagnosis was likened to tarot card reading, according to one juror. Jurors also remarked that the large number of trial objections by Plaintiff's counsel was distracting and appeared unprofessional. They further remarked that Plaintiff's closing argument was off-putting because it seemed to play to the jury's emotions more than focus on evidence.

The jury remarked that frequent under-the-breath comments, body language and behavior by Plaintiff's counsel was distracting and created a negative vibe. Counsel calling opposing counsel "tricksters" and then misusing evidence looked bad to the jury as well. Even at 15 hours, the jury did not have any problem with the length of mother's cross-examination except that they wished she would just answer the question asked.



The jury did not care that I was a plaintiff side attorney; however, most requested my card in case they ever needed to sue someone. I have actually obtained several clients this way.

The jury found the opinions of Defendant's university professor very credible. In addition, the portions shown of his examination and testing was very persuasive. One juror stated that she thought Plaintiff's mother made the whole thing up because she saw an opportunity to get rich quick (This was one of the jurors who for sure could have been excused. There was no clear reason to keep this person. That is not to say the outcome of the trial would have been different).

[Final Lesson 30 – I can only speculate why this case made it all the way to verdict without damage control. Once there was an opportunity to get some positive money and maintain the narrative. After a total loss, the value is destroyed. Post-trial motions and appeals only have teeth when the case is otherwise strong. Mother will never be a good witness. A retrial would only invite deeper investigation into her and her husband's life. Mother likely cannot resist or avoid social media during the time consumed by appeal. The huge threat has quickly devolved into a nuisance suit. A better outcome was certainly possible. Defendant Offered to Compromise for $250,000 months before trial. Before things went south at trial, and even just before verdict, there was still probably a possibility of resolving. If it means anything, the *guardian ad litem* (mother) should be looking to protect Plaintiff from the adverse cost shifting consequences of the loss and not further subjecting her daughter to a harmful narrative.]

Consumer Attorneys Need To Learn from Labor Leaders

page 3

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

AUGUST

Thursday, August 29,
CCTLA Problem Solving Clinic
Topic: "Light Up the Dark Side: How Understanding the Defense Mindset and Methods Can Lead to Better Settlement and Trial Results"
Speakers: John Demas & Timothy Spangler
Arnold Law Firm
CCTLA members only, $25

SEPTEMBER

Tuesday, September 10, 2019
Q&A Luncheon
Noon, Shanghai Garden
800 Alhambra Blvd
(across H St from McKinley Park)

Thursday, September 12,
CCTLA Problem Solving Clinic
Topic: Hidden Money, Hidden Danger in UM/UIM Cases
Speakers: Matt Donahue & Jack Vette
Sacramento County Bar Association
CCTLA members Only - Cost: 25

Friday, September 27
CCTLA Luncheon
Topic: A Review of Ethical Dilemmas in Mediations
Speakers: Judge Frank C. Damrell Jr. (Ret.)
& Judge Robert Hight (Ret.)
Sacramento County Bar Association
CCTLA members only, $35 / Non-member: $40

OCTOBER

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

NOVEMBER

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

DECEMBER 2019

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

Tuesday, December 10
Q&A Luncheon
Noon, Shanghai Garden
800 Alhambra Blvd
(across H St from McKinley Park)

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

CCTLA Calendar of Events