Spring 2019

The LITIGATOR

VOLUME XV OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION ISSUE 1

Inside

CCTLA Membership: A Decision Never Regretted

Robert Piering
CCTLA President

I am honored by the opportunity to serve as the president of CCTLA this year.

It was just seven years ago that one of our members encouraged me to get on the board of CCTLA, and I agreed. To this day, it still stands out as one of the best decisions I've made as a member of the plaintiff's bar. Through the years, I've been lucky enough to meet and closely interact with some of the finest lawyers in the state, and I owe that good fortune to my decision to get involved.

So now as the president, it is my goal to do what I can to ensure that CCTLA continues to provide our members with the tools to spark creativity and the torch to keep the fire burning. Just as we have done for several years, we will continue to host a listserve that allows our members to reach out to others in community for advice, counsel, and yes, even the work product of other lawyers. When you're a member of CCTLA, you're a part of an organization of lawyers who are dedicated to the highest of legal standards, and our list serve has turned many sole practitioners into virtual legal powerhouses.

In addition to the listserve, members of CCTLA will continue to be provided with top-tier educational luncheons and seminars. In January, our annual Tort and Trial program drew 59 registered attendees. In rapid fire, the learned panel of lawyers succinctly summarized the 2018 judicial decisions affecting tort liability, procedure, arbitration and trial practice. They also discussed significant cases pending in the California Supreme Court.

Just around the corner, CCTLA and CAOC are hosting the Donald L. Galine Sonoma Travel Seminar. This event will be held March 8-10 in the world-renowned Sonoma Valley. It will feature a packed schedule of legal education led by some of California's finest trial lawyers. You will learn the rules

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Mike's CITES

By: Michael Jansen
CCTLA Member

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

Dionne Licudine v. Cedars-Sinai Medical Center
2018 DJDAR 70 (January 3, 2019)

998 Offer to Compromise

FACTS: In February, 2012, Dr. Gupta performed a surgery on Plaintiff and nicked a vein inside her abdominal cavity, causing substantial internal bleeding which necessitated a more invasive surgery to correct the negligence. The corrective surgery left a large scar and resulted in chronic painful abdominal conditions.

Eleven months later, Plaintiff filed a medical malpractice lawsuit against the hospital (Cedars), doctors and the regents of the University of California. In May, 2013, Plaintiff served her Complaint on Cedars, and Cedars filed an Answer on June 6, 2013. On June 11, 2013, Plaintiff served a 998 Offer to Compromise in the amount of $249,999.99, plus legal costs. Cedars objected to Plaintiff's 998 on the grounds that Cedars had answered only five days prior and that the hospital had not had an opportunity to fully investigate the case.

The case went to trial, and a jury awarded plaintiff $1,045,000. Both parties moved for a new trial, and a new trial on damages only was granted. In the second trial, a jury awarded $7,619,457, comprised of $5,344,557 in economic damages and $2,274,900 in non-economic damages.

Pursuant to Civil Code §3333.2, the trial court immediately reduced the non-economic damages verdict to $250,000, yielding a total verdict of $5,594,557.

Plaintiff filed a memorandum of costs seeking $2,335,929.20 in prejudgment interest from the date of the 998 offer to the date of judgment. Cedars objected to the memorandum of costs, claiming that the 998 was invalid because it was premature and Cedars had not had an adequate opportunity to evaluate the damages before the 998 offer elapsed. The trial court struck Plaintiff's request for prejudgment interest.

HOLDING: The 998 was not valid and made in good faith for the reasons stated below. A plaintiff is only entitled to interest at the rate of 10 percent, starting from the date of the 998 offer, if the offer is valid. *Barella v. Exchange Bank* (2000) 84 Cal App 4th 793, 799. Where underlying facts are disputed, the appellate court reviews the trial court's ruling solely for an abuse of discretion. *Timed Out LLC v. 13359 Corporation* (2018) 21 Cal App 5th, 933, 942. Such a trial court ruling will only be reversed if it is proven that the trial judge abused discretion.

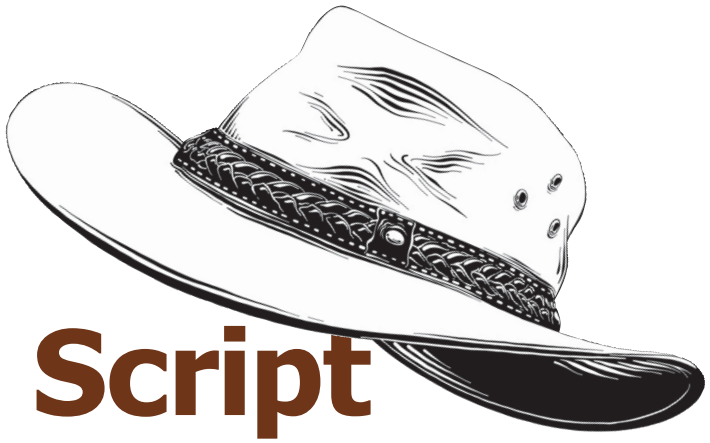
REASONING: A 998 offer is valid only if it is made in good faith. Regency Outdoor Advertising, Inc., v. City of Los Angeles, (2006) 39 Cal 4th 507, 531. An offer is in good faith only if it is "realistically reasonable under the circumstances of the particular case." The offer must carry with it some reasonable prospect of acceptance in order to be in good faith.

Although §998's text does not itself mention good faith, the requirement is implied by the statute's purpose to encourage the settlement of lawsuits prior to trial. "The courts have uniformly rejected an interpretation of §998 which would allow offering parties to . . . "game the system."" *Westamerica Bank v. MBG Industries, Inc.,* (2007) 158 Cal App 4th, 109, 129

While a 998 offeree generally has the burden of showing that the offer is valid, it is the 998 offeree who bears the burden of showing that an otherwise valid 998

Continued on page 35

A career defense attorney crosses the "v." and wishes he had done it sooner



Flipping the Script

By: Timothy Spangler, Demas Law Group

After 24 years in practice, all of it spent defending public entity clients in civil litigation, and most of it spent as in-house counsel, it was time for a change. Though there was a certain comfort in listening to the low hum of the slow-turning wheels of bureaucracy, as time went on, I found that having to explain the many nuances that impact case evaluation to a group of number crunchers began to feel like discussing poetry with an IRS auditor.

Though I've never really wanted to do anything in the law other than litigation, I never felt "destined" to be a defense attorney. As a government lawyer, I made it a point to seek out the truth, and this led to fair and reasonable results and good relationships with my colleagues and adversaries.

When I left government practice, one of those adversaries, John Demas, gave me a great opportunity to reinvent myself and my career.

From the outset of my new life, it was obvious that representing plaintiffs is significantly more difficult than defense work—it's always harder to create than to destroy. That truism aside, a couple of observations from a former outsider now on the inside:

1. I am now a much happier human being. As it turns out, carrying around the cynicism that is the hallmark of many defense lawyers can really mess up one's posture.

It doesn't take long on the plaintiff's side to see that most plaintiffs *really are hurt*. Some may not be as well-equipped to handle the adversity of being injured as others, but the default defense position that there is some exaggeration or malingering in every case is clearly misguided.

Helping a real person understand the legal system, insurance principles and medical jargon is unbelievably rewarding, regardless of whether they become a client.

2. The burden of proof really is quite a burden. It hangs over everything. I'm not suggesting it is ill-conceived or unfair, rather we have a brilliant system of civil justice. But, just as Half Dome is beautiful, it is treacherous to climb.

The often-used analogy of the scales of justice requiring only the slightest weight to tip ever so slightly in the plaintiff's direction is, of course, false.

The scales don't start evenly balanced—they start with the plaintiff's side completely unweighted. It is up to us to add weight until we surpass the weight built into the system. Now I see why so much time is spent in *voir dire* to root out bias built around attorney advertising, contingency fees, hot coffee spills and philosophical opposition to money for harm. Climbing a sheer rock wall is

daunting enough without having to do it in blinding rain or gusty wind.

3. Much of the defense dogma is simply wrong. By limiting the scope of a subpoena for medical records plaintiff's counsel is trying to hide something? Lien-based treatment is evidence of "attorney-directed treatment?" A Facebook post depicting the plaintiff smiling or traveling in the months after an accident is evidence of no injury? Gaps in treatment are gaps in symptoms? These well-worn myths are simply shortcuts to dealing with cases head-on.

4. A defense perspective in a plaintiff's firm is valuable—in moderation. No one is going to rank me as one of the great legal minds of our time, but I could write a Keenan & Ball-style practice guide on the things that terrify defense lawyers.

There is a vast difference between knowing where the pressure points are

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Flipping the Script

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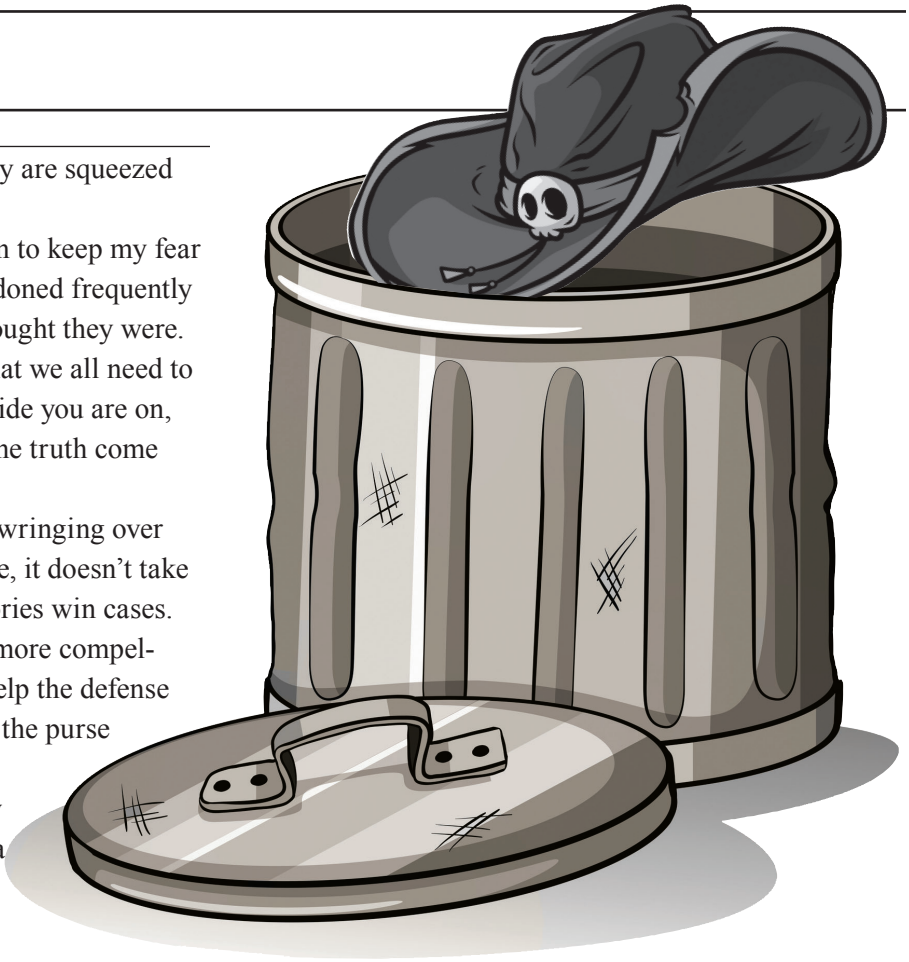
(seminar law), and the pain you feel when they are squeezed (battlefield law).

However, the conservatism that I relied on to keep my fear in check as a defense attorney has to be abandoned frequently now. In short, cases are worth more than I thought they were.

5. Finally, I see even more clearly now that we all need to double down on civility. Regardless of what side you are on, the truth never damages a just cause. So, let the truth come out.

On the defense side, there is a lot of handwringing over "bad facts." When representing injured people, it doesn't take long to realize that facts don't win cases—stories win cases. Most of the time, the plaintiff has the better, more compelling story. But oftentimes it makes sense to help the defense tell your client's story to the people who hold the purse strings.

Give them the information that will allow the bean counters to put a face, a family and a life to a line on a spreadsheet. As for me, I'm happy to be throwing away the Black Hat.



Howell: Time to Take a Stand for Tort Law

By: Joe Weinberger, CCTLA President-Elect

Please forgive my soapbox rant. In 2011, our Supreme Court turned tort law on its head and created a fantasy world where insurance is and is not considered a collateral source. Effectively, the Supreme Court has said that in terms of simple economics; a plaintiff is best served by not providing for himself, not obtaining health insurance, and leaving to defendants and the state the costs of emergency medical care and follow-up care necessitated by the negligence of another.

The irony of such a position is easily illustrated. Twin brothers are involved in a motor vehicle collision. They each suffer identical injuries. The require a two-day stay in UC Davis Medical Center for trauma-related injuries. They each have a broken leg requiring open reduction and internal fixation which is accomplished at UCD four days post-collision. They each make a complete recovery with minimal residual issues. The first brother is covered by Medi-Cal, and his $145,000 UCD bill is reduced by Howell to $8,500. The other brother is totally uninsured and has an outstanding bill of $145,000. We can all calculate the difference these scenarios will result in at either settlement or verdict.

So what do we do?

Thanks to a number of fantastic trial attorneys, we have had good results in the court system. *Upenskaya v. Meline* held that a plaintiff's full medical bills are admissible to determine the reasonable value of an uninsured plaintiff's medical treatment received pursuant to lien agreements even if sold to a factor for less than face value. In *Bermudez v. Ciolek* the court held that an uninsured plaintiff may introduce evidence of the amounts billed for medical services to prove the services reasonable value. More recently, in *Pebley v. Santa Clara Organics* held that a plaintiff who is treating outside his insurance plan can introduce his medical bills. This means that all plaintiffs have a right to chose what they determine to be the best available care and are not limited by those doctors approved by a health insurance carrier.

But where do we go from here? It is time to work on our State Legislature and take advantage of a rare opportunity. Our State Senate is comprised of 28 Democrats and only 10 Republicans. Our State Assembly has 61 Democrats and 19 Republicans. Our governor is also a Democrat. This is an incredible opportunity to push our agenda and obtain justice for our clients. The numbers will not get better, and If not now, when?

Each and every one of us must demand that CAOC (Consumer Attorneys of California) step up to the plate and use all of its abilities to reverse this ill-conceived and unfair judicial decision. CAOC has championed dozens of causes in the past years, the majority of which benefit few, if any, of the grass roots attorneys who make up the bulk of the membership.

Causes which CAOC has supported in the past two years include protections from arbitrations for victims of Wells Fargo fraud, data protection privacy, prohibition against secret settlements in sexual abuse cases, elder abuse protections, and assistance for asbestos victims. All of these issues are certainly applauded, but how many actually assist the bulk of CAOC members?

We all remember the failed effort to repeal MICRA. Again, certainly a laudable position, but given the potential risk versus benefit, and the limited number of members that such effort would benefit, was this really the right thing to do for our members. How many of us still hear about greedy lawyers as a result of the negative advertising used to defeat this effort?

We must ask CAOC to take advantage of this once-in-a-lifetime opportunity, devote our resources to supporting the rank-and-file of the members—those of us in the trenches fighting for individuals and families, one or two at a time.

The millions of dollars available to asbestos attorneys, fire attorneys, Wells Fargo attorneys and Big Pharma attorneys is sufficient for them to fend for themselves. It is now time for our association to stand up and fight for each and every one of us.

I'm not sure how many of us will be affected by asbestos, Wells Fargo, or PG&E fires, but I can be very much assured that each and every one of us, our families, our friends and our clients will be affected by the dictates of *Howell v. Hamilton*.

IT IS TIME TO TAKE A STAND. I urge each of you to attend the CAOC board meeting at the Sonoma Seminar (see page 8), even if to just drive up for the day and make your voice heard.

President's Message

Continued from page one

of the road, the day-to-day workings of cases and countless nuggets to improve your cases and practices. Topics include, liens, auto cases, elder and dependent adult abuse, sexual harassment, jury preparation, trial skills and much, much more.

People come from all over the world to enjoy the scores of wineries, oak-crested hills and boundless golf courses. Just 45 minutes north of San Francisco and west of Sacramento, you will be deep into one of California's top food and wine destinations, home to more than 425 wineries, ranging from rustic to regal. Hike among towering redwoods, cruise along rugged Pacific coastline and get to know inviting small towns. Or, just sit back and take it all in, all the while getting educational insights from some of the best in our business.

April 29-30 is Justice Day. It is one of the best opportunities for our members to secure an audience with legislators and their staff members to discuss issues that are central to our practices. For years we have been overshadowed by the attorney attendees from Southern California, and we need to put this event on our calendars now to ensure that those of us here in the Capitol make our presence known. If you've got a bone to pick, this is your opportunity to get a seat at the table.

Then, on June 6, we'll have our annual Spring Fling to benefit the Sacramento Food Bank. This event has continued to grow in popularity, and we have been steadily increasing the money we raise every year, making the Spring Fling the Food Bank's second biggest fundraiser, second only to the Run to Feed the Hungry. This is a worthy cause, and we should be proud as a group of the good we are doing by sponsoring this event, donating auction items and purchasing at the auction.

Additional power-packed seminars will follow at various times this year, and we will continue to sponsor luncheons with timely topics ranging from court access, court funding and day-to-day instructional tools.

The education of our membership has always been the centerpiece of CCTLA, and you can be assured that I will continue that endeavor and seek avenues to expand the scope of services that we offer to our members.

I look forward to this year and encourage anyone to email or call me any time if I can be of any assistance.

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SCHEDULE

FRIDAY, MARCH 8

1:30 PM REGISTRATION

1:55 – 2:55 PM (1.0 General)

LIENS

Moderator: Michelle C. Jenni, Wilcoxen Callaham, LLP

ERISA Liens And Medi-Cal Liens
Daniel E. Wilcoxen, *Wilcoxen Callaham, LLP*

MediCare Liens, Disability Plan Liens And Balance Billing
Donald Mitchell de Camara, *Law Offices Of Donald M. de Camara*

3:15 – 4:30 PM (1.25 General)

TRACK 1 - PREMISES LIABILITY: CAUTION, SLIPS, TRIPS AND FALLS

Moderator: Daniel Del Rio, Del Rio & Associates, P.C.

Obstacles To Prepare For In The Unwitnessed Fall
Andje M. Medina, *Altair Law*

Pre-Trial Discovery
Robert Bale, *Dreyer Babich Buccola Wood Campora, LLP*

Premises Liability Cases And The Americans With Disabilities Act
Alexandra Hamilton, *The Veen Firm, PC*

Common Pitfalls In Cases Involving Falls From Height
Kimberly Wong, *The Veen Firm, PC*

3:15 – 4:30 PM (1.25 General)

TRACK 2 - CLASS ACTIONS AND DEFECTIVE PRODUCTS: HOW TO RECOGNIZE AND GET IN THE GAME

Moderator: Kristy M. Arevalo, McCune Wright Arevalo, LLP

Recalls
Jamie G. Goldstein, *Arias Sanguinetti Wang & Torrijos LLP*

Evaluating the Mass Tort Case
Alison E. Cordova, *Cotchett, Pitre & McCarthy, LLP*

Don't Get Preempted! What You Need To Know About Drug And Device Cases
Sarah R. London, *Lieff Cabraser Heimann & Bernstein LLP*

Interplay Between Personal Injury And Class Actions
Abbas Kazerounian, *Kazerouni Law Group, APC*

4:45 – 6:15 PM (1.5 General)

TRACK 1 - LAWYER TRIAL SKILLS

Moderator: Conor M. Kelly, Walkup, Melodia, Kelly & Schoenberger

Mini Opening
Christopher B. Dolan, *Dolan Law Firm, PC*

Cross-Examining Defense Experts - Focus On Foundation Under Sanchez
Christine D. Spagnoli, *Greene, Broillet & Wheeler LLP*

The Ingredients For A Savory Opening
Chantel L. Fitting, *Law Offices of Galine, Frye, Fitting & Frangos*

Closing Arguments: How To Prepare An Impromptu Speech
Duffy Magilligan, *Cotchett, Pitre & McCarthy*

4:45 – 6:15 PM (1.5 General)

TRACK 2 - EMPLOYMENT

Moderator: Sandra Ribera Speed, Ribera Law Firm

Trying Employment Discrimination Cases Against Public Entities
Jill Patricia Telfer, *Telfer Law*

Recognizing And Increasing The Value Of Sexual Harassment And Abuse Cases
John D. Winer, *Winer, McKenna, Burritt & Tillis LLP*

Bringing Retaliation Claims On Behalf Of In-House Attorneys
Tamarah Prevost, *Cotchett Pitre & McCarthy, LLP*

The "MeToo" Movement: Where We've Been And Where We're Going
Daren H. Lipinsky, *Rizio Liberty Lipinsky*

SATURDAY, MARCH 9

8:30 A.M. BREAKFAST

9:00 – 10:30 AM (1.5 General)

TRACK 1 - AUTO

Moderator: Lorraine D. Gingery, Gingery Law Group, PC

Starting The Auto Case
Robert A. Piering, *Piering Law Firm*

Selling Your Case In The Demand Letter
Ashley R. Amerio, *Amerio Law Firm P.C.*

30 Days Before Trial
John N. Demas, *Demas Law Group, P.C.*

How Culture Is Affecting Your Auto Case
Amar Shergill, *Shergill Law Firm, PLC*

9:00 – 10:30 AM (1.5 General)

TRACK 2 - THE ART OF PERSUASION: WHY SOME LAWYERS SEEM MORE EFFECTIVE

Moderator: Aimee E. Kirby, Dolan Law Firm, PC

What A Difference A Smile Can Make
Gretchen M. Nelson, *Nelson & Fraenkel LLP*

LESS IS MORE: Streamlining Your Story
Deborah Chang, *Panish Shea & Boyle LLP*

Powerful Connections You Need In The Courtroom
Craig M. Peters, *Altair Law*

10:45 – 11:45 AM (1.0 General)

TRACK 1 - SCHOOL ISSUES

*Moderator: Casey R. Johnson, Aitken*Aitken*Cohn*

Physical (not sexual) Abuse Cases Against Schools
Micha Star Liberty, *Rizio Liberty Lipinsky*

Sexual Abuse In Schools
Lauren A. Cerri, *Corsiglia McMahon & Allard, LLP*

Cultural Considerations Involved In Sex Abuse Cases For Purposes Of Evaluating Damages
Noemi Esparza, *Dreyer Babich Buccola Wood Campora, LLP*

10:45 – 11:45 AM (1.0 General)

TRACK 2 - ELDER ABUSE

Moderator: Eric J. Buescher, Cotchett, Pitre & McCarthy, LLP

Aiding And Abetting Liability For Financial Elder Abuse
Anne Marie Murphy, *Cotchett, Pitre & McCarthy, LLP*

Creating A Successful Discovery Plan To Prove Up Your Elder Neglect Case
Wendy C. York, *York Law Firm*

The RCFE Point System Charade
Kathryn Stebner, *Stebner & Associates*

Litigating Long Term Care Sexual Assault Cases
Kirsten M. Fish, *Needham Kepner & Fish LLP*

12:00 – 1:00 PM (1.0 General)

LUNCH KEYNOTE

Moderator: Mike Arias, Arias Sanguinetti Wang & Torrijos LLP

What Every Judge Wishes You Knew
Hon. Steve K. Austin, *Contra Costa County Superior Court*

1:15 – 3:00 PM (1.75 General)

MASTERS ROUNDTABLE

Moderator: Sara Peters, Walkup, Melodia, Kelly & Schoenberger

Gadolinium Heavy Metal Injuries After MRIs
Zoe Littlepage, *Littlepage Booth*

Successfully Litigating Apartment Fire Cases
Sean M. Burke, *Law Office of Sean M. Burke*

Toxic Cabin Air: The Perils Of Air Travel
Rainey Booth, *Littlepage Booth*

PGE Wildfire Litigation
Frank Mario Pitre, *Cotchett, Pitre & McCarthy, LLP*

3:00 – 4:15 PM (1.25 General)

INNOVATIVE TECHNIQUES FOR WITNESS EXAMINATIONS

*Moderator: Megan Demshki, Aitken*Aitken*Cohn*

Witness Examinations
Niall P. McCarthy, *Cotchett, Pitre & McCarthy, LLP*

The Art Of Finding And Presenting The Surrounding Witness
Roger A. Dreyer, *Dreyer Babich Buccola Wood Campora, LLP*

Expert Witness Direct Examination
Daniel S. Robinson, *Robinson Calcagnie, Inc.*

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

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

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2019 SONOMA REGISTRATION

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Things I learned recently on the CCTLA Listserve

By: Walter Schmelter, CCTLA Board Member

The more extensive a man's knowledge of what has been done, the greater will be his power of knowing what to do.

Benjamin Disraeli
1804 – 1881, British Prime Minister

Information is not knowledge.

Albert Einstein
1879 – 1955, German-born theoretical physicist

Focused problem-solving experience collected from many illuminate the thinking of an individual. Think WikiPedia! Knowledge sharing is especially helpful with the esoteric knowledge of our profession. Ask my wife—not everybody speaks our language.

CCTLA's listserve is our portal to arcane ideas one cannot find in a book, knowledge fought to obtain, wrought from experience. Law is a practice because you get paid to learn new things. I am sometimes embarrassed to ask listserve questions, thinking: "I ought to be able to figure this out!" When I post, I find out other Listmates are also struggling with that same ambiguous statute or diverging case law or battling the same obtuse defense discovery tactic. I learn from CCTLA's listserve, or learn anew or reinforce or alter my knowledge of law and tactics.

Do not hesitate to ask your listmates to help you solve a problem you address, especially sharing. *"The greatest enemy of knowledge is not ignorance; it is the illusion of knowledge." Stephen Hawking.* Better to acquire needed knowledge before a noxious knock. Your questions can teach us all.

Thus I share some of the things I list-learned in the past year or so. Regrettably, space does not allow for attribution, but…a kindness is it's own reward.

❥ Be wary of Pyrrhic victories. To maintain your business, one must consider first the range of likely verdicts, the costs of proving the claim and the possibility of a comparative negligence setoff.

❥ A complaint to The Bureau of Automotive Repairs often

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helps consumers get results.

➧ New Sacramento Local Rule of Court §2.99.04 expressly allows video testimony of witnesses—*if* you follow the rules.

➧ Keep an eye on the 15-day discovery cutoff before non-binding arbitration, especially where defendants stonewall your discovery.

➧ Release of a negligent employee releases the employer, too, unless you have carefully pleaded employer-liability based on independent negligent (e.g., negligent hiring/supervision) or statutory grounds (e.g., strict liability).

➧ Use the Fair Claims and Practices Regulations, specifically especially §2695.4, to help with a multitude of insurer wrongdoings, e.g., and insurer exacting a settlement immediately after an accident. Ins. Code §791.08) (a) (2) can help get you a copy of your client's recorded statement to his insurer. There certainly can be "bad faith" in UM (and no reason why it does not apply to Med Pay) when the adjuster substitutes his/her opinion for a proper medical opinion. *Wilson v. 21st Century* (2007) 42 Cal. 4th 713, 721.

➧ When settling a civil case, reserve the right to restitution from criminal courts, where appropriate.

➧ Re psych records, take care answering Form Interrogatory 6.2 re: damages claimed. If limited to "garden-variety" emotional distress from an accident, prior psych history is generally excludable based on a party's right to privacy, *if* you make a timely objection.

➧ To counter lowball offers from insurance adjusters on UM/UIM cases, send a certified letter, return receipt required, demanding arbitration, but also stating that if the insurance company would like to settle, we are amenable. It cannot hurt to also send discovery with the demand to the defendant and his insurer, even if defense counsel is not yet appointed—toward making them move faster. But recall that a Demand for UM/UIM arbitration will not stop the running of the Statute of Limitations as to any liable third parties, should any later be discovered. Perhaps it is best to file the complaint and name unknowns as Doe defendants.

➧ If defendant dies, and the case proceeds against his insurance per Prob. Code §§550-55, a new case interpreting Code Civ. Proc. §998 permits an award exceeding insurance policy limits.

➧ The *Dynamex* case changes all the rules re: who is an employer, who is an independent contractor.

➧ Jury Instruction CACI 3903J was amended a few years ago to specifically permit damages for diminished value to property despite repairs. Most insurers still hate to pay it, but an expert report may help, and/or written offers from local dealerships reflecting a low offer for a fixed-up crashed car.

➧ When settling a case, include a declaration for adjuster to sign, stating that during the course of the insurance company investigation, they have not become aware of any other insurance coverage or responsible employers.

➧ When requesting photos in discovery, ask for exact copies of the original digital images in their native format with all original meta-data.

➧ One may not cite to the court unpublished appellate decisions (Rules of Court, Rule 8.1115 (a)), but one may request judicial notice of such an opinion for the limited purpose of any

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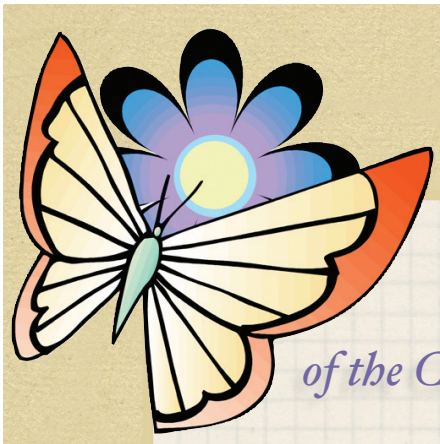
persuasive value of the analysis therein, of course acknowledging the case so noticed is not binding. Also, unpublished decisions may be helpful in settlement negotiations.

Here are a few CCTLA Listserve tips:

- When you see a good posting, add your client's name in front of the subject line, and forward it to yourself.
- Post your thanks privately to each sender, not to the group.
- If you have questions about how to join the listserve or search past postings, contact our Executive Director Debbie Keller.
- Share your ideas thus far, and your solutions. Our listserve is open only to CCTLA members, but please remember it is a public forum. As my father said: Use your good judgment.

If you have knowledge,
let others light their candles in it.

Margaret Fuller
1810 – 1850, Journalist, Critic
and Women's Rights Activist



President Robert Piering
and the Officers and Board
of the Capitol City Trial Lawyers Association
&
Sacramento Food Bank & Family Services

cordially invite you to the

17th Annual Spring Fling Reception & Silent Auction

June 6, 2019, from 5 p.m. to 7:30 p.m.
at the beautiful Ferris White home,
1500 39th Street, Sacramento 95816

Deadline for Reservations is Friday, May 24, 2019
Contact Debbie Keller: 916 / 917-9744 / debbie@cctla.com

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

Free Valet Parking

** Deadline for Auction Items:
May 24, 2019

CCTLA
Capitol City Trial Lawyers Association

Post Office Box 22403
Sacramento, CA 95822
Telephone: (916) 917-9744
Website: www.cctla.com

SACRAMENTO Food Bank & Family SERVICES

All Silent Auction proceeds benefit Sacramento Food Bank & Family Services, a local, non-profit agency committed to serving individuals and families in need.

In honor of Allan Owen & Linda Whitney

CCTLA'S Spring Fling Reception & Silent Auction June 6, 2019

All Silent Auction Proceeds Benefit Sacramento Food Bank & Family Services

Sacramento Food Bank & Family Services is a local, non-profit agency committed to serving individuals and families in need.

CCTLA
Capitol City Trial Lawyers Association

Post Office Box 22403
Sacramento, CA 95822
Telephone: (916) 917-9744
Website: www.cctla.com

Auction Donor Sign-Up Form

The committee is seeking donations of goods and services for the Silent Auction. Examples might include event tickets (sports, theater, etc.), golf at a private club, lessons (water or snow skiing, sailing, hunting, crafting, quilting, etc.), vacation home/timeshare, artwork, professional services, dining, wine, gift baskets, electronics.....just about anything you can think of!

If you are able to donate an item, please provide the necessary information:

Name:_____

Donated Item:_____

Item Description: _____

(with times, dates, limitations, if applicable): _____

_____

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_____

_____

_____

Value: $ _____

Minimum Bid Amount: $ _____

Donated items/certificates can be dropped off at Margaret Doyle's office, located at 901 F Street, Suite 120, Sacramento, CA 95814, by May 24, 2019. If you are unable to drop off your donation,

THANK YOU!

Sponsorship Opportunity

Spring Fling Reception & Silent Auction June 6, 2019

CCTLA is offering sponsorship opportunities for this event

For a $1,000 donation
to Sacramento Food Bank & Family Services, you receive:

- 2 quarter-page color ads in CCTLA's quarterly newsletter, The Litigator (3.65 in wide x 4.85 in high)
- Your name on event signage
- Your name announced at the reception
- A sponsor ribbon attached to your name tag
- Your name in an email blast to more than 6,000, by SFBFS

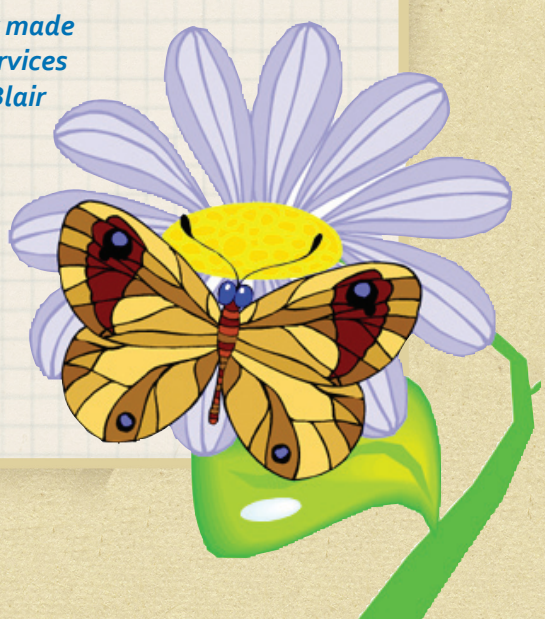
For a $2,500+ donation:
All of the above, including a full-page color ad in The Litigator (7.5 in wide x 10 in high) instead of the smaller ads and two "Run to Feed the Hungry" tickets.

You will be helping the Sacramento community, and you will enjoy exposure to all CCTLA members, the judiciary and more. Don't miss this great opportunity!

Your donation is tax-deductible, either by check made payable to Sacramento Food Bank & Family Services and mailed to CCTLA, or by credit card: Call Blair at SFBFS at (916) 313-7621 or bhillis@sacramentofoodbank.org

CCTLA Capitol City Trial Lawyers Association

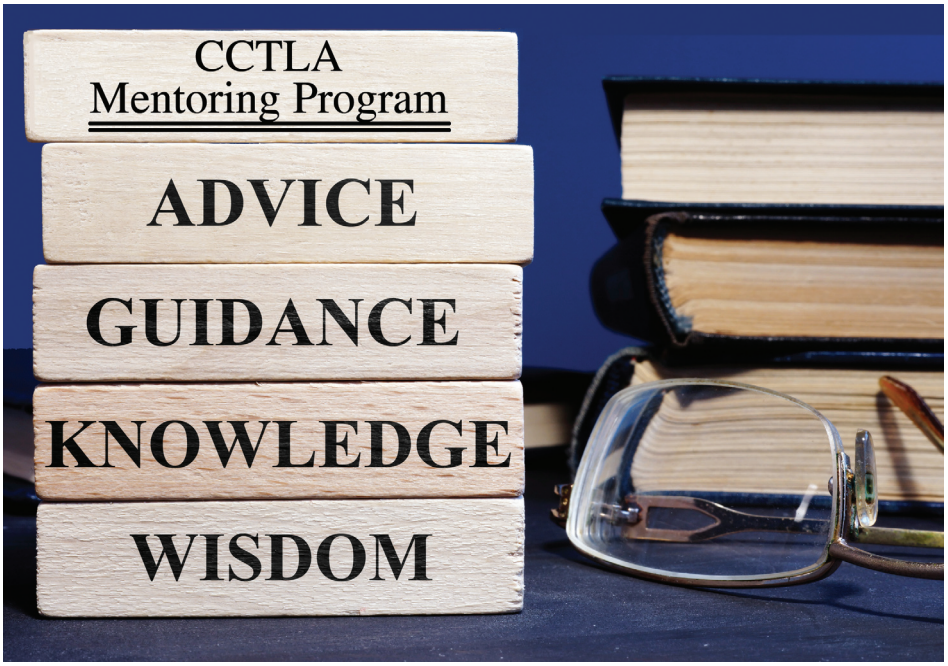
SACRAMENTO Food Bank & Family SERVICES



THANK YOU!

Do you need a mentor?

Mentor: Definition - an experienced and trusted adviser



By: Dan Glass, CCTLA Treasurer

Mentor, schmentor, I don't need no stinking mentor;[1] the State Bar says I'm a lawyer, so I got this— or do you?

I began practicing law 30 years ago, 1989 B.C. (before computers). Life was different then. I had little trouble getting a job at a big law firm after law school. Jobs were easy to get, mostly because the pay was unbelievably terrible—$32,000/year for a first-year associate at a major insurance defense firm waiting for bar results, and a whopping raise to $36,000/year when I passed and got sworn in.

But, what I did get—since it was not money, it had to be something else—mentoring or how to be chastised for what I did not learn in law school. I was the 50th lawyer at this particular firm. We had multiple partners who had each tried more than 50 cases before I even got there. Good or bad, these men and women knew what happened in a courtroom. They knew what law school never told you—and what you could not figure out in law school even if you were a diligent student.

To those beginning the practice of law as a civil litigator, I suggest that 85% of what you need to be a good trial lawyer is not even available at the best law schools.

I wrote my first trial brief for an upcoming trial the senior partner was about to start. He read my brief and said, "Did you look at BAJI to figure out the elements of Plaintiff's claims to put in the brief?" I said, "Uhhhh, no, and, what's BAJI?" (*For those not practicing for more than 15 years, BAJI was the acronym for Bar Approved Jury Instructions—the predecessor of CACI, California Civil Jury Instructions).*

The point being, this seasoned trial lawyer kept BAJI on his desk. He looked at those books every day for each case because that was what the jury was going to hear at trial—and I never heard of them through four years of evening law school and the bar examination. Law school did not spend any time with California's Code of Civil Procedure, so I had no clue about how to do discovery (law school for me was only the Federal Rules of Civil Procedure) and depositions—you mean I have to actually know how to ask non-compound, generally relevant questions?

I will never forget my first deposition, a construction-defect case. I was one of maybe eight defense lawyers in the room. When it got to be my turn, I knew all about construction, I had studied the file, I had a brilliant question, and one of the lawyers in the room said, "Objection, lacks foundation." I must have turned red/purple. What? Is the witness going to answer my question? Am I stupid? Should I ask another? The witness answered, and I moved on, asked my written down questions (basically the "note from my mommy" aka, partner, who told me to ask x, y and z). I survived. I got better with practice, time and age.

So, Do you need a mentor? Depends. If you left law school and got a job at a big firm, or you were recruited/hired by a small firm and at least one of the attorneys in the hiring firm cared about whether you would ever be a good lawyer, and you worked with that lawyer for at least two years - you probably don't need a mentor now - you got it. But, once again, maybe. I took or defended more than 50 depositions my first year of practice. In recent years, I have met relatively new attorneys who have been practicing for more than five years, on their own straight out of law school, and they have not yet taken or defended 50 depositions.

Defense firms are notorious for being large. Some national firms have 1,000 or more lawyers. Insurance companies have staff counsel, again potentially 1,000s of lawyers across the country. The lawyers at those firms have access to each other for guidance, to answer questions, to train the newly hired.

Now look at the plaintiff's bar: Can you name a half dozen plaintiff firms in the Sacramento area with 20 or more attorneys? I don't think there are more than six.

Welcome to CCTLA: YOUR "big firm" for some help and guidance. CCTLA has a formal mission statement but its true mission is to help make every one of its members better lawyers than they were when they first joined. If you are just starting out as a lawyer, CCTLA, and its education programs, listserve and mentor program will help you become better.

[1] Pun on, and misquote of "Badges, we don't need no stinking badges" from 1948 movie adaptation of *"The Treasure of the Sierra Madre."*

If you are not just starting out and were a good lawyer when you joined, CCTLA may be able to help you become great, or, no matter what—better.

I did a survey for this article: CCTLA has about 20 members on its board, plus, all past presidents are members for life—about 45 people. About half responded to my survey. The "big firm" of CCTLA's board and past presidents, based on my actual survey and doubling it to cover the half who did not respond, has 1,000 YEARS of law practice under its belt and more than 800 jury verdicts. Talk about experience! No "big firm" matches us.

Now, I am not naive, and you should not be, either. The mentor program is not going to assign a lawyer with 40 years experience to you to manage your practice and tell you everything about how to get that $1,000,000 verdict on all your cases. He/she is not going to work at your office or give you 10 hours/week, every week, of training for free. To get long-term, individual "mentoring," you have to pay the price: the daily grind of employment at a firm with experienced lawyers who are willing to teach.

But, CCTLA's offer is to those who are interested in a "sounding board" for what ails you. Have you only taken a few depositions in your career and have a big one coming up? We can find an experienced attorney to sit down with you, go over your case and provide guidance. Don't know how to really deal with an expert in YOUR case? Having a difficult time with the other attorney? We will match you to a CCTLA mentor to discuss your situation.

The difference between CCTLA's mentor program and general education programs is: The general programs talk about the general process. They provide great "war stories" of how great lawyers dealt with difficult cases or difficult situations, but they don't let you ask about YOUR case or your specific situation.

Many of our members use our listserve for general advice - i.e., defense attorney did "X," and they are demanding I do "Y" - do I have to? Should I? What's my alternative? But, because the listserve is semi-public, details are not disclosed. Situations are discussed in the abstract to protect confidentiality. Conversely, a mentor can be told actual facts, in confidence as an attorney consultant and provide specific suggestions and help.

In all candor, trying a case is not about what you learned in law school. We all go to continuing legal education because we want to learn more, and because the State Bar requires we attend. Each time, we listen intently for that one tidbit of information that's going to make us better at trial. How to do jury selection, Opening, Direct Examination, Cross Examination, Experts, Closing Argument, and what about the medical bills at trial and dealing with the liens during the case and after trial?

For 2019, the State Bar has promulgated revised and new Rules of Professional Conduct. Although it has always been known that an attorney must be competent and able to handle the matters they take on, Rule 1.1 of the Rules of Professional Conduct, which stems from, and is slightly revised from, prior Rule 3-110 [added words are underlined], states:

(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

(b) For purposes of this rule, "competence" in any legal service shall mean to apply the (I) learning and skill, and (ii) mental, emotional, and physical ability

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reasonably* necessary for the performance of such service.

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (I) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.

(d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that which is reasonably necessary in the circumstances.

So what's in it for me? One thing I have unfortunately experienced for any case where I ultimately did not prevail is this: At some point, be it a non-bind judicial arbitration; mediation or settlement conference, some lawyer told me I was not going to do well here. My response: "How dare you tell me that? I have been working on this case for more than a year, and you've known about it for two hours. You can't be right."

Lesson to be learned: Sometimes an unbiased, fresh and new opinion is really important to help the lawyer over their bias, and that person whose only known about the case for two hours just could be right.

A mentor can be that person before it's too late to save your case; someone to whom you can tell your story, show some evidence and ask for direction. Discuss a real discovery plan. Discovery can be reviewed. Depositions needed? Depositions which may not be necessary.

A mentor can be that person who says, "Why are you going to do that?" OR, "Really, your case is great; you should do [this or that] to help show its true value."

Maybe as a lawyer you already know what you think you need to know—but having a mentor does not cost you anything for a second opinion. Or even that "first opinion," if you want it. It's common knowledge that insurance companies review cases in a "round table" environment where lawyers and probably claims people sit around and discuss/evaluate cases, so why shouldn't you?

Being assigned to an experienced lawyer for guidance can be invaluable. Having a person to talk to, especially if you are a sole practitioner like me, is beyond invaluable.

CCTLA is available to help those members who want it and to encourage those who think they might want help, but are reluctant, to step up and ask. You may be a good lawyer on your own, but I guarantee, no matter how good you might be on your own, you can be better with the assistance of CCTLA.

Known and respected lawyers in Sacramento provide insight about lawyering.

Roger Dreyer, of Dreyer, Babich, Buccola, Wood and Campora, handled a nationally recognized case involving water intoxication. A woman consumed large amounts of water for a morning radio show contest called, something like, "Hold your wee for a Wii." She actually died of water intoxication. Dreyer tried the case,and his client received a $16,000,000 verdict against the radio station.

At a luncheon discussing the facts and circumstances after the case was finished, Dreyer suggested that his verdict in that case helped all plaintiff lawyers. My first reaction was how does it help me? That's ridiculous. But, was it? After short thought, I believe it is true: Every successful verdict helps all those who practice because it at least makes insurers think that things can go really bad for THEM in trial.

Verdicts go into their computer models for valuation. I believe the converse is also true—every "defense' verdict hurts all plaintiff lawyers because it empowers

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CCTLA's Mentoring Team

Our Mentoring Committee consists of Daniel S. Glass and Christopher Whelan, Glenn Gunnard, Robert Piering, Alla Vorobets and Linda Dankman. Plus, we have commitments from other members who have agreed to donate time to help those who ask.

If you want help, ask. It's confidential. It's available to members only. If you have friends who need this and are not members, get them to join CCTLA and then they, too, can ask.

In addition to mentoring, if you just want to discuss your case with others, or you have a specific question or problem, we have informal monthly Question and Answer sessions on the second Tuesday of each month at Shanghai Gardens, H and McKinley streets, Sacramento.

CCTLA also offers Problem Solving Clinics on Thursday evenings—usually once a month with a speaker on various topics and many general education topics through luncheons once a month and other specially set seminars.

To participate in the mentoring program, send an e-mail to me at dsglawyer@gmail.com.

Suggest what guidance or mentoring you are seeking, and I will arrange for a CCTLA member with experience related to your situation to contact you and arrange to help.

There are no requirements on the mentee. If you want to meet once a month, or just once, its up to you. By the way, this does not have to be solely related to how to prepare and try your cases. It could be for general information about setting up your practice, about insurance for your practice, Client Trust Accounts or anything that you think will help make you a better lawyer. Because, in the end, if our members are better lawyers on an individual basis, CCTLA will be a better, and even more respected, part of lawyering in the greater Sacramento area.

For more information or if you have a question with regard to one of your cases, please 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.

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insurers to deny claims.

CCTLA wants it members to be the ones who get the successful verdicts and not be those who are defensed. I once heard a lawyer say, "I'm going to try the case because it's small, and I need the trial experience." Wrong. You should never try a case because YOU need it.

Your "experience" will probably not be good. And, if you do that too many times, even though you now have "trial experience," the insurance companies will know of your history. Rather than taking you as more serious, they may believe there is a better chance you will lose, so they offer less. Try cases that need to be tried for the client, because the client wants to go to trial, and because the case cannot resolve for a fair amount.

I was once told that a well-known Sacramento lawyer, the late Mort Friedman, had maintained (although I did not hear him say this - classic hearsay), something to the effect of "Any lawyer can get a $1,000,000 verdict . . . . on a case that's worth $10,000,000." CCTLA does not want you to be that lawyer, either.

The new Rule of Competence broadens what you have to do when accepting a case. If you have a big case, you better be able to finance it, or associate in someone who can. Or, now the Rule specifically suggests referring it to someone you believe is competent to handle it. If the subject matter is well outside your area of personal injury practice (think ERISA, workers compensation, bankruptcy, complex product liability, medical malpractice), a mentor might save you from the proverbial "I'll just stick with it for a while and see how it goes" because by the time you realize its not going well, it might be too late.

Access Insurance went belly-up and now the UM carrier denies your claim:

How do you get the UM carrier to extend coverage when it denies the claim, but so does CIGA?

By: Kirill Tarasenko, CCTLA Board Member

Preliminarily, how do you know if the case qualifies as a "covered claim" for which CIGA is responsible or if uninsured motorist (UM) coverage is responsible for covering the claim?

First, the California Insurance Guaranty Association ("CIGA") is not an insurance company, but rather, it is an entity created by law. The scheme contemplates that CIGA will pay the "covered claims" of insolvent insurers because by statute, the obligations of CIGA are limited to the payment and discharge of only "covered claims."

Before CIGA will cover a claim, it will first look to the availability of uninsured motorist (UM) coverage from the claimant's own carrier. It's when the claimant's own carrier denies the UM claim and sends you back to CIGA that things get a bit complicated.

The term "covered claim" is defined, limited and restricted by Article 14.2 of the California Insurance Code, beginning with Section 1063. "Covered claims" are defined as the "obligations of an insolvent insurer…." Subject to several restrictions and limitations. (Ins. Code §1063.1(c)(1). An "insolvent insurer" is defined as "an insurer that was a member insurer of the association…. Against which an order of liquidation with a finding of insolvency has been entered by a court of competent jurisdiction." (Ins. Code §1063.1(b).)

Insolvency of Access Insurance

Access was declared insolvent on March 13, 2018, pursuant to a liquidation order in the District Court of Travis County Texas, in case # D-1-GN-18-001285, and is therefore an "insolvent insurer." Uninsured motorist coverage is applicable where the insolvent insurer becomes insolvent within one year of the accident. (Ins. Code §11580.2(b)(2).

But if the accident took place more than one year prior to March 13, 2018, many UM carriers have taken to denying the claim, under the following (or similar) policy language:

Uninsured Motorist Vehicle means:

A land motor vehicle, the ownership, maintenance and use of which is:

a. Not insured or bonded for bodily injury liability at the time of the accident; or

b. Insured or bonded for bodily injury liability at the time of the accident; but

1. The insuring company:

c. *Is or becomes insolvent within one year of the accident.*

What the UM carrier is really saying here in denying the claim is that since the accident occurred more than one year prior to March 13, 2018, the date when Access was formally declared insolvent, is that it has no obligation to cover the claim. That's not necessarily true, and hopefully, you will find this information useful to help you fight back.

Declaration of Insolvency for Access Does Not Establish Date of Actual Insolvency for UM Coverage Under Insurance Code §11580.2(b)(2)

The operative phrase in both the insurance policy itself and in the Insurance Code is "because of insolvency." Section 11580.2 does not define "insolvency," but Insurance Code §985 does:

…..[i]nsolvency" means either of the following:

(1) Any impairment of minimum "paid-in capital" or "capital paid in," as defined in Section 36 , required in the aggregate of an insurer by the provisions of this code for the class, or classes, of insurance that it transacts anywhere.

(2) An inability of the insurer to meet its financial obligations when they are due.

Courts have interpreted the intent of the Legislature in defining "because of insolvency" for purposes of triggering uninsured motorist coverage to mean actual insolvency precipitating non-payment of a claim within a year, regardless of whether any court or insurance commissioner took the formal step of ordering that insurer into liquidation.

By this definition, the reason

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that *Romano* wasn't paid was indeed "because of insolvency," thus she was owed coverage under her uninsured motorist coverage from Mercury. (*Romano v. Mercury Ins. Co.* (2005) 128 Cal.App.4th 1333, 1341.

In the *Romano* case, Mercury Insurance denied its insured UM coverage under Ins. Code §11580.2(b)(2) because the tortfeasor's insurer was declared insolvent in the liquidation order entered more than one year after the accident. However, within four months of the accident, financial statements of the tortfeasor's insurer showed its net worth to be negative: -$293 million.

Both the trial and appellate courts concluded that Mercury's denial of coverage to its own insured was improper and even went a bit further than that in analyzing the complex statutory construction argument Mercury put forth to justify denying coverage to its own insured:

.... Mercury's 'statutory construction' approach is the only approach that can possibly win for Mercury. If a court were to apply the standard common law approach to insurance contract interpretation [citations omitted], ... The only real issue would be whether Mercury's denial of the claim was so lacking in legal force as to be frivolous – this might be a bad faith case instead of a technical coverage case. Id.

So When Did Access Become Insolvent for Purposes of Filing UM Claims?

Access was apparently insolvent long before the formal liquidation order was entered on March 13, 2018, likely going back to September 30, 2017, or earlier. In reviewing Orders to Show Cause re: Cease and Desists issued to Access Insurance by the California Department of Insurance, one can find that Access submitted a reporting package stating that as of December 31, 2017, it had a negative surplus of -$27.6 million, and as of January 21, 2018, it had a negative surplus of -$29 million.

Prior to this, the California Department of Insurance filed an Amended Order to Show cause concluding that as of September 30, 2017, Access had an adjusted surplus of -$14.48 million.

Although the Department of Insurance is still investigating when exactly Access Insurance became insolvent, it is clear that claims initiating within one year of September 30, 2017 (and likely earlier) should be "covered claims" under UM coverage. And, as many of us know, the now insolvent Access tended to write minimum $15,000 per person/$30,000 per accident policies.

If the limits of the UM insurer's uninsured motorist coverage were equal to or greater than the maximum "covered claim" payable under the Access policy (15/30), then the statutory credit under Insurance Code §1063.2(c)(1) extinguishes the "covered claim" otherwise payable by CIGA. (*California Ins. Guarantee Assn. v. Liemsakul* (1987) 193 Cal. App.3d 433, 439.

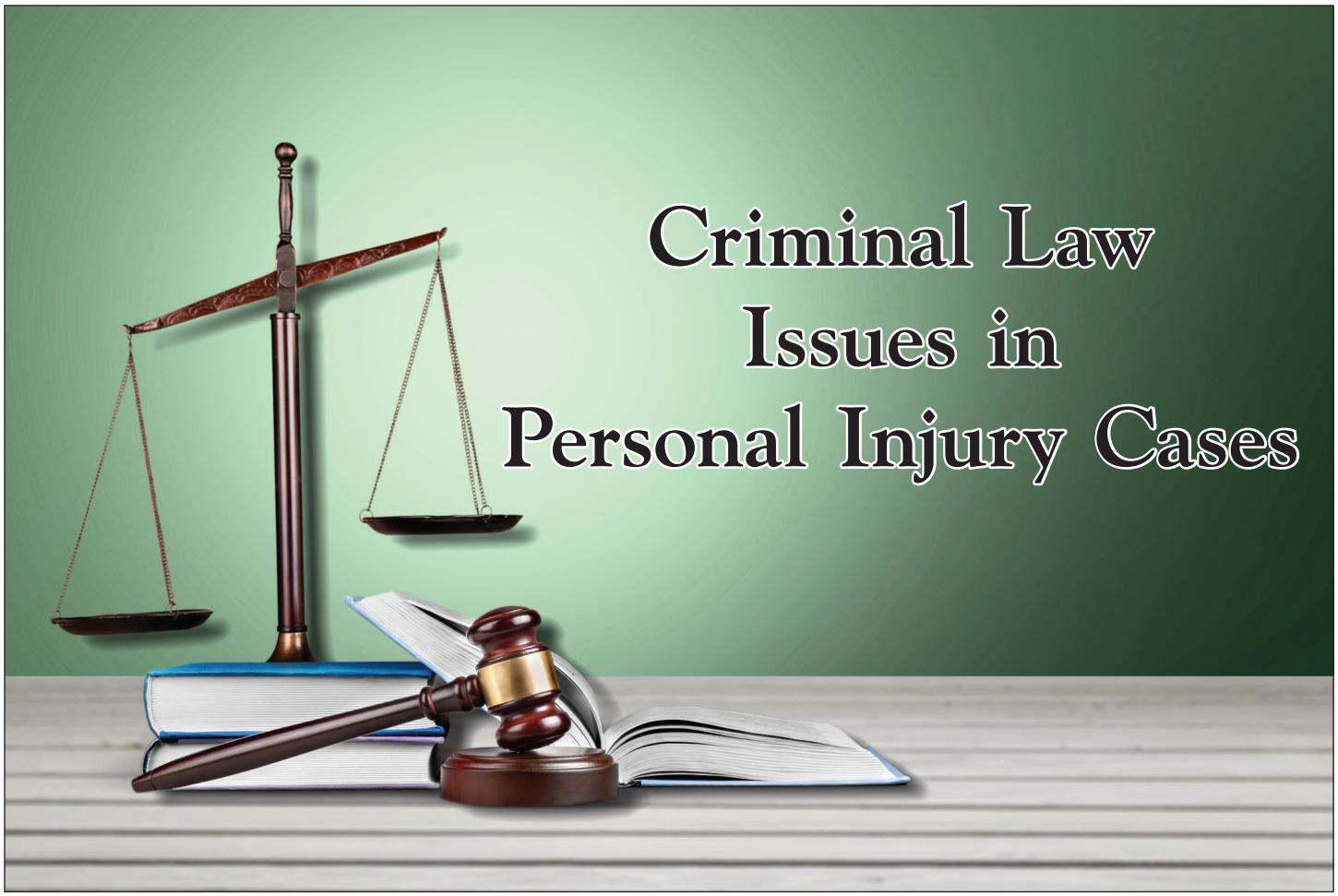
This means that if Access was actually insolvent within one year of the accident in a given case, then there is no "covered claim" remaining for CIGA to pay, and the matter should instead be turned over to the UM carrier for payment.

Conclusion

Access Insurance actually became insolvent long before the formal liquidation order was entered on March 13, 2018, likely going back to September 30, 2017, or earlier.

Many UM carriers have taken to denying their insureds' claims by focusing on the "is or becomes insolvent within one year of the accident" language in the policy, where the third party was insured by Access. The UM carrier thus leans on the formal order of liquidation in the Texas court in attempting to avoid paying its own insureds' claims, thereby leaving them in the lurch.

Through detailed analysis and argument based on the *Romano* decision, counsel can encourage and ultimately convince UM carriers to extend coverage for claims that the insolvent carrier otherwise would have been responsible for. Few carriers will continue down the bad-faith slope once the argument is properly laid out, but for those that stubbornly continue to deny UM coverage, your remedy is to compel arbitration and arbitrate the coverage issue and denial.



By: David Foos, CCTLA Board Member

We all run into issues in our personal injury cases that have elements of criminal law. Following is an effort to discuss the law in some of the most frequent situations.

Impeachment by Prior Convictions

The question is, when can a witness in a personal injury trial be impeached by a prior criminal conviction? First of all, the law seems to be clear that a prior misdemeanor conviction, even if it is a crime of moral turpitude, cannot be used to impeach a witness (Evidence Code Section 787, 788). However, a felony conviction, if it is one of moral turpitude, and otherwise meets the test of Evidence Code Section 352, more probative than prejudicial, can be used to impeach.

An easy way around this, however, is that if one is granted an expungement under Penal Code Section 1203.4. Then the conviction cannot be used for impeachment (Evidence Code Section 788). Assuming that one successfully completes probation, expungements can be relatively easy to obtain (The witness can also petition to have "wobbler" felonies reduced to misdemeanors pursuant to Penal Code Section 17).

Nevertheless, a felony conviction is subject to challenge in several ways. First of all, the conviction must be one evidencing moral turpitude. Moral turpitude is not necessarily dishonesty, but rather is defined as a willingness to do evil. *People v. Castro* (1985) 38 Cal.3d 301. The list of crimes involving moral turpitude is long, and it is best to consult a criminal law text to determine if the crime qualifies (See California Criminal Law Procedure and Practice, CEB (2017), page 682-683).

Furthermore, the conviction must survive a balancing test under Evidence Code Section 352, that it is more probative than prejudicial. Factors that the court will look to will be the age of the prior, the witness' subsequent rehabilitation or continuance to lead a life of crime, and the number of prior convictions (See *People v. Beagle* (1972) 6 Cal.3d 441; *People v. Castro*, supra). Suffice it to say, if you have a witness with a prior felony conviction, you should file a motion in limine in an effort to exclude the prior.

Punitive Damages

Punitive Damages are not awarded to compensate the plaintiff, but instead are exemplary damages, to punish the tortfeasor. Punitive damages are only awarded when the defendant has been shown to have engaged in particularly reprehensible conduct (oppression, fraud, or malice) as defined in Civil Code Section 3294. Such conduct must be proven by clear and convincing evidence.

An intentional tort warrants a finding of malice. Therefore, criminal conduct such as "sexual battery," assault, battery and manslaughter, would all support a finding for punitive damages (CACI 3940, 3941). In those cases, Plaintiff need not prove evil intent but only that the defendant intended to do the offensive act. Also, civil punitive damages are awardable against a criminal defendant that is punished criminally for the same behavior (*Shore v. Gurnett* (2004) 122 Cal.App.4th 166, 173-176)). (Vehicular Manslaughter case—Defeating 5th Amendment Double Jeopardy challenge and 8th Amendment

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Excessive Fines challenge).

But also, non-intentional torts have been held to be malicious and support a finding of punitive damages. Malice is defined as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civil Code Section?3294, subd. (c)(1).) An automobile claim against an intoxicated driver *may*, but not necessarily *will*, support a claim of maliciousness.

In the seminal case of Taylor v. Superior Court (Stille) (1979) 24 Cal.3d 890, the California Supreme Court found that where the defendant was an alcoholic, had already caused one accident while intoxicated, had numerous conviction for D.U.I. and was under the influence at the time of the accident, that the court could infer that the defendant was completely aware of the possible consequences of his acts, and therefore, the actions amounted to more than mere recklessness.

The Taylor court found that the defendant exhibited a total disregard for the consequences of his actions and a total disregard for the safety of others, and it upheld a jury finding of punitive damages.

Following, in the Lackner case, the court found that unintentional malice must be based on despicable conduct. Lackner v. North (2006) 135 Cal.App.4th 1188, 1211 (See Sumpter v. Mattteson (2008) 158 Cal.App.4th 928, 936)(Jury finding of no malice where Defendant was driving under the influence of methamphetamine and ran a red light, causing a crash, not to be disturbed by the court).

What seems evident from the cases is that while driving while impaired, within itself, may not support a claim for punitive damages, driving while impaired, with aggravating factors, may support such a claim (See Dawes v. Superior Court (1980) 111 Cal.App.3d 82 (Defendant intoxicated, weaving in and out of cars, reaching speeds of 65 mph in a 35 mph zone); (See also Peterson v. Superior Court (1982) 31 Cal.3d 150; Defendant reaching speeds of 100 mph while intoxicated).

Another question, is whether other forms of distracted driving, with the most serious being texting while driving, will support a claim for punitive damages. Such action implies a reckless lack of concern for the consequences of one's actions. Although, such a claim would be of first impression, it is likely that the court would consider whether there were aggravating factors in making such a determination, such as the speed of the driver, whether the driver had prior convictions of texting while driving, and other signs of reckless driving.

...the California Supreme Court found that where the defendant was an alcoholic, had already caused one accident while intoxicated, had numerous conviction for D.U.I. and was under the influence at the time of the accident, that the court could infer that the defendant was completely aware of the possible consequences of his acts, and therefore, the actions amounted to more than mere recklessness.

Finally, there is the question of whether such vehicle code violations as hit-and-run driving would support a claim for punitive damages. This writer would think that such a claim is only supportable if aggravating factors existed such as the driver was aware of substantial injury to the other party, such as a pedestrian, yet failed to stop and render aid.

Victim Restitution

In criminal cases where the victim has suffered a loss, the defendant is required to make full restitution to the victim. Victim restitution orders should be made as part of the defendant's conditions of probation. Article I, section 28, subdivision (b) of the California Constitution. Penal Code Section 1202.4(f)(3)(A)-(K) lists factors the court may take into consideration when determining victim restitution, but the list is not exclusive. Restitution may cover among other things, lost wages and profits, medical costs, mental health costs, attorney's fees, property damage, and costs of attending court. The existence of a civil remedy is irrelevant when determining victim restitution (People v. Petronella (2013) 218 Cal.App.4th 945).

A likely situation where we may run into these issues is when there has been an automobile accident caused by someone driving under the influence. Assuming a criminal conviction and a restitution order in the criminal courts, the victim can be awarded her medical costs (at the Howell figure), her loss of income, the cost of her automobile repair and her attorney's fees. Although the personal injury attorney pursued both economic and non-economic damages in the personal injury case, the court has held that the victim may recover the full amount of the attorney's fee as restitution. People v. Fulton (2003) 109 Cal.App.4th 876.

A common scenario that we may encounter is where our client is injured by the negligence of a DUI driver, and there is a minimal policy, for instance, $15,000, but post-Howell medical costs that equal $10,000. We are able to obtain a settlement for the entire $15,000 policy. Our fee agreement entitles us to 33 & 1/3rd % of any recovery. It would be incumbent on us to come to some calculation of what portion of the recovery was for economic and what portion of the recovery was for non-economic damages.

What might be effective with the courts is to use a formula that general damages equal some multiplier of the cost of the economic damages; for sake of our example, one to one. Therefore, in the civil case, $5,000 of the recovery would be for medical costs, $5,000 for general damages, and $5,000 would be for attorney's fees. In the criminal case, our client, the victim, could then collect the $5,000 cost of attorney's fees as well as the additional $5,000 in medical costs that were not obtained through the civil case.

The amount of restitution may be modified while the person is on probation. Penal Code Section 1202.4(f)(i). The victim has a right to counsel of her choosing to pursue restitution in the criminal courts. A probation order will expire once the probation terminates, but the order also serves as a civil judgment and all typical collection vehicles may be used, including an earnings' withholding order, or a bank levy. Furthermore, restitution is not dischargeable in bankruptcy. Once ordered, restitution will accrue interest of 10% per annum.

***

David Foos practices personal injury law and criminal defense in Sacramento. Foos was a deputy public defender for eight years and then served as a Sacramento Superior Court commissioner for 16 years before retiring from the bench and going into private practice. He can be reached at 916-779-3500 or on the web at david@foosgavinlaw.com for any criminal law-related questions.

Verdicts

Products Liabiity—$36,093,664
Aguirre v. Nissan North America, Inc.

CCTLA Past President Bob Bales and CCTLA members Roger A. Dreyer and Noemi Esparza, of Dreyer Babich Buccola Wood Campora, LLP, won a $36-million bench verdict in Yolo County in a case where a Nissan accelerator pedal was found to be found defective after the driver crashed on his employer's lot and claimed the car accelerated when he was braking.

Gross Verdict or Award was $36,093,664. Plaintiff settled with the seller of the used car pre-trial for $200,000. Trial or arbitration time: 36 court days.

FACTS AND BACKGROUND:

On August 29, 2012, Plaintiff Jose Aguirre entered the lot of his employer's large, commercial nursery in Vacaville at approximately 6:30 a.m. at the wheel of a 2001 Nissan Xterra that he had bought used three years prior to this incident. He was employed there as a minimum-wage laborer and lived with his significant other and their two small children.

Plaintiff alleged that as he crossed the dirt-and-gravel lot at approximately 10-15 mph, the vehicle accelerated suddenly and without warning between 100 and 200 feet away from an elevated dirt ramp that was bordered by a short concrete wall. The ramp was 40 feet wide. A 53-foot-long trailer was parked on the opposite side of that ramp.

Plaintiff alleged that he applied the brakes and tried to control the Xterra's path but the Xterra hit the concrete ramp at a speed of 30-35 mph, then vaulted up and onto the dirt ramp, where it touched down before dropping onto the ramp's opposite side.

Responding law enforcement personnel did not adequately document the scene, including witness marks on the ramp.

After striking the ground on the other side of the ramp, the Xterra submarined under the trailer and continued forward until the vehicle's A-pillars met the sides of the trailer. The front of the Xterra above the doorsills were crushed in, accordion-style. There was also massive crush damage to the area of the driver's footwell.

Specifically, the impact with the trailer and a spare tire carrier mounted under the trailer crushed the engine compartment and, ultimately, the firewall downward, rearward and toward the outboard side of the driver's side sufficiently to entrap plaintiff's lower body in the vehicle, requiring a lengthy extraction by first responders.

The Xterra was equipped with a manually operated, mechanical Accelerator Pedal Arm "APA"). Two principal original Nissan components were at issue in this case: the APA and its subcomponents, and the Parking Brake Bracket ("PBB").

On the evidence adduced at trial, Nissan's design and manufacture of these two components was defective. Nissan's design required installation of the APA with less than 10 mm (1/3") of distance between these two components. Variations in tolerances of these components reduced that distance by as much as six mm or less; in some exemplars the clearance was zero mm.

Plaintiff's liability experts demonstrated in exemplars, including exemplars owned by Nissan, that foreseeable operation of the accelerator pedal caused entrapment in roughly 25% of Xterra models with these components.

The evidence at trial was that Plaintiff drove at 15 mph across the lot, the parking brake bracket trapped the outside right edge of the accelerator pedal, causing the Xterra to accelerate. The strongest evidence of this: the accelerator pedal was trapped on top of the brake bracket post-collision.

Plaintiff's first language is Spanish. During the next two years, various doctors asked him to describe what happened in the crash. He was unable to recall or report much in the way of detail. Over time, his memory of events gradually improved. By the time of his deposition in April, 2016, he was able to articulate an increasing number of details related to the sudden unintended acceleration event. By the time of trial, six years post-event, he was able to recall even more.

PLAINTIFF'S CONTENTIONS:

• That, by design, the distance between the outermost right edge of the top of the accelerator pedal arm and the outermost left edge of the parking brake bracket was 10 mm, or 1/3". Plaintiff claimed that as part of the manufacturing process, variations in the top of the pedal arm could reduce that distance by an additional 4-6 mm.

• That the vehicle driven by Plaintiff was between 107 and 203 feet from the side of the concrete wall adjacent to the ramp when the vehicle began to accelerate.

• That the close proximity of the accelerator pedal and parking brake bracket created a significant risk of a sudden unintended acceleration event.

• That anticipated tolerance variations in the manufacturing process could further reduce the nominal 10 mm clearance between these two critical components, further increasing the likelihood that the parking brake bracket would entrap the accelerator pedal arm during foreseeable operation of the gas pedal, leading to a sudden unintended acceleration event.

• That the parking brake bracket trapped the accelerator pedal in Plaintiff's Xterra as he was crossing the lot at 15 mph, causing the vehicle to accelerate suddenly to a speed of 30-35 mph and that sudden acceleration began so close to the ramp's cement wall that Plaintiff was unable to avoid a collision.

• That crash testing conducted by Defendants was not sufficiently similar to the subject incident to have any

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evidentiary weight at trial.

• That Defendant's accelerator pedal studies were inherently flawed because: 1) they were conducted in a vehicle where foreseeable operation of the accelerator pedal could not possibly result in contact between the pedal and brake bracket; 2) Nissan owned exemplar vehicles in which contact would occur but did not use those vehicles; and 3) because the study did not measure the effect of foreseeable pedal operations on actual clearances between the accelerator pedal and brake bracket, and were thus meaningless.

DEFENDANT'S CONTENTIONS:

• That the accident was the result of driver error.

• That the subject acceleration event started at least 400 feet from the concrete ramp.

• That the evidence showed Plaintiff was applying the accelerator pedal and failed to control the speed and direction of the vehicle by braking or steering away from obstacles. Plaintiff testified that when he applied the brake, the vehicle went faster. He also testified that he did not attempt to turn the wheel to one side or the other to avoid the impact with the ramp.

All testing showed that brake application would stop or significantly slow the Xterra, even if the accelerator pedal were simultaneously applied. And plaintiff's experts conceded that there was no evidence of failure in the brake or steering systems in the vehicle. Despite this, with the acceleration event beginning at least 400 feet from the ramp, plaintiff had a minimum of eight seconds to react, brake, or move his vehicle to the right in this extremely wide area, which was over 200 feet wide, to avoid the crash, but failed to do so.

• Nissan also contended that the post-crash positions of the accelerator pedal and parking brake bracket proved Plaintiff was pressing the accelerator pedal—not the brake—when the Xterra hit the trailer.

Nissan's evidence showed that the post-crash position of the accelerator pedal arm and parking brake bracket required depression of the accelerator pedal of at least 30% of pedal travel, and that the crush damage to the engine compartment and driver footwell area caused the parking brake bracket to move toward the driver, down, and toward the outboard side of the driver's side of the vehicle. This allowed the parking brake bracket to move between the top of the pedal arm and the firewall, because the pedal was depressed at the time the crush occurred.

• Further, that crash testing demonstrated the pedal arm would not have remained caught on the parking brake bracket throughout the crash sequence and also demonstrated that the Xterra hit the wall at roughly 50 mph.

• Nissan objected to Plaintiff's experts' demonstration of catching the top of pedal arm on the parking brake bracket on the grounds that the demonstration involved an unnatural pedal movement and application of significant lateral force when there was no evidence of such a motion by Plaintiff.

Nissan's evidence showed that the repeated efforts of Plaintiff's experts to attempt to catch the pedal on the parking brake bracket, sometimes using their hands to do so, deformed the pedal arm and made it capable of catching in a way not seen in the design condition.

INJURIES AND OTHER DAMAGES:

Plaintiff sustained loss of consciousness, a concussion, scalp avulsion, cervical spine fractures, spinal cord injury with incomplete quadriplegia, abrasions, and left second finger avulsion and fracture. Plaintiff underwent a C5 corpectomy and C6 partial corpectomy; microdissection with decompression of spinal cord; anterior C4 to C6 arthrodesis/instrumentation; posterior C4 to C7 arthrodesis/instrumentation; and left frontal scalp irrigation and closure, followed less than a month later by an anterior cervical decompression and fusion of C4 to C6 and a posterior spinal fusion C4 to C7.

An incomplete quadriplegic, Plaintiff is permanently wheelchair bound. He has extremely limited use of his right hand and requires 24/7 attendant care.

Nissan stipulated to the costs of past medical care of $2,599,000. Although Nissan disputed the future costs of Plaintiff's care, Defendant did not dispute the general nature of Plaintiff's injuries. Plaintiff received and continues to receive workers' compensation benefits, including all current medical care.

DEMANDS AND OFFERS:

Plaintiff §998 Demand: $17,500,000
Plaintiff Demand during trial: $30,000,000
Defendant final offer before trial: Confidential mediation offer.

COURT'S DECISION:

Yolo County Superior Court assigned the case to the Hon. Kathleen White on April 9, 2018. The judge spent three days on motions in limine. The court called a jury panel, which filled out juror questionnaires, by just before the court summoned the panel, Plaintiff waived jury. Nissan then also waived jury. As a result, Judge White sat as the trier-of-fact.

\The court found that: 1) Nissan defectively designed the product; 2) Nissan defectively manufactured the product; and 3) Nissan was negligent in product design and manufacture. The court did not apportion any fault to plaintiff.

Defendant has filed a Notice of Appeal.

ADDITONAL INFORMATION:

Economic Damages: Past medical:$2,599,000; Future medical and life care expenses: $15,333,652 ; Past lost earnings: $108,000; Future lost earnings/capac-

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ity: $709,612

Non-Economic Damages: Past: $2,117,000; Future: $15,330,000. **Statutory Damages:** Defendants rejected Plaintiff's pre-trial statutory offer to compromise for $17,500,000.

Because the verdict amount exceeded the §998 demand, the court awarded Plaintiff an additional $613,649.59 in costs, plus $3,508,078.05 in past interest, and interest at the calculated rate of $10,060.41 per day in post-judgment interest.

Attorney for the Plaintiff:
Dreyer Babich Buccola Wood Campora, LLP, by Roger A. Dreyer, Robert B. Bale, and Noemi Esparza, Sacramento.

Attorney for the Defendant:
Bowman & Brooke LLP, by Vincent Galvin, Jr. and Lindsey Adams-Hess, San Jose.
Bowman & Brooke LLP, by Karl Viehman, Dallas, TX.

THE EXPERTS:

Plaintiff's medical expert(s):
Alex Barchuk, M.D., spinal cord injuries, Kentfield.
Carol Hyland, M.A., M.S., C.D.M.S., C.L.C.P., life care planning, Lafayette.
Defendant's Medical Expert(s):
Allen Kaisler-Meza, M.D., PMR, defense medical examination, Los Gatos.
Miranda Van Horn, RN, BSN, CLCP, life care planning.
Plaintiff's Technical/Liability Expert(s):
Eric Rossetter, Ph.D., P.E., accident reconstruction/vehicle design, San Francisco.
Neil Hannemann, vehicle design, Santa Ynez.
Toby Hayes, Ph.D., biomechanics and human factors, Corvallis, OR.
Micky Gilbert, P.E., vehicle handling and dynamics, Arvada, CO.
William Kitzes, product safety.
Barry Ben Zion, Ph.D., economics, Santa Rosa.
Defendant's Technical/Liability Expert(s):
James Walker, accident reconstruction/vehicle design/vehicle handling dynamics, Houston, TX.
Michael B. James, vehicle design, Orem, UT.
Douglas E. Young, human factors and biomechanics, Los Angeles.
David Weiner, M.B.A., AM, economics, Los Angeles.

Settlements

Settlement: $1,750,000
Premises Liability, Sacramento County
Truhillo v. McKinley Holdings I, LP

CCTLA member Edward A. Smith, Law Offices of Edward A. Smith, and Stephen McElroy of Carpenter, Zuckerman & Rowley, resolved a complex premises liability claim at a special settlement conference on the first day of trial in Sacramento County for $1,750,000.

FACTS & ALLEGATIONS:

On July 19, 2014, Plaintiff, age 41, an environmental field technician, was injured while moving furniture out of a rental home in Vacaville, CA. Plaintiff, a Placer County resident, had leased the premises as weekday housing while on a long-term project in the Vacaville area but had discovered numerous, significant deficiencies in the structure during the time he had been residing in the property.

In the midst of an ongoing disagreement with the landlord's property manager as to the situation, Plaintiff decided to vacate the premises. While moving a heavy dresser on a furniture dolly, the flooring beneath him broke, and Plaintiff's foot and leg went entirely through the floor, up to his hip, and the loaded furniture dolly landed on his abdomen and his lower spine when hitting the floor.

INJURIES/DAMAGES:

In addition to immediately apparent but less serious injuries to the leg that had penetrated the flooring, Plaintiff sustained injuries to his lower back, cervical spine, and abdomen. Initial treatment was through Kaiser and Sutter Health. Later care was with spine surgeon Philip Orisek, M.D., and physical medicine and rehabilitation specialist Topher Stephenson, M.D. Lumbar MRIs revealed an extruded, herniated disc at L5-S1 with severe symptoms of lumbago, weakness, tingling, and numbness into his legs. Plaintiff's primary care physician declared him totally and permanent disabled as of January 2015 due his lumbar herniations.

Multiple conservative treatments were attempted, including chiropractic care, physical therapy, massage therapy and acupuncture without anything other than temporary symptomatic benefit. Two epidural injections reduced his radiating pain but without long-term improvement. Surgery in the form of L5-S1 anterior fusion was performed by Orisek in March 2017. Plaintiff's lumbar symptoms improved but were not resolved by the surgery.

A cervical MRI revealed a C5-6 herniation with some impingement. Surgery on Plaintiff's cervical spine was also recommended but had not taken place by the time of settlement. Additionally, Plaintiff had numerous serious gastro-intestinal problems appearing post-incident. Medical expenses (not including the disputed gastro-intestinal problems) were approximately $195,000 and the claimed lost wages/earnings through the time of trial were approximately $240,000. Plaintiff was permanently disabled and at age 45 at the time of settlement.

ISSUES & RESULT:

Plaintiff was in the midst of a landlord-tenant dispute at the time of his injury, and significant liability issues arose as to Plaintiff's awareness of the defects in

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the premises flooring, as well as prior notice of those defects on the part of the landlord and the property management company. The nature of this residential dispute was also apparent in Plaintiff's initial post-incident medical records, which further clouded matters. Surveillance video of Plaintiff presented additional challenges, as did the uncertain etiology of his gastro-intestinal problems and the ongoing cervical spine symptoms at the time the matter was resolved.

Defense final offer was stuck at $800,000 for several months. At the scheduled settlement conference, there was some indication that the landlord's excess carrier was willing to make an additional contribution; however, it did not have a claims representative with settlement authority available as directed for the settlement conference. Subsequently, the court ordered the excess carrier representative appear personally for a special settlement conference set for the morning of the first day of trial, at which time the matter settled for $1,750,000.

Settlement: $1.75 million
Traffic Accident

William J. Owen, of Timmons, Owen, Jansen & Tichy, Inc., obtained a $1.75-million settlement for his client in a motorcycle vs. pickup case.

A pick-up truck driver fell asleep at the wheel, crossing double yellow lines and hitting a motorcyclist. The crash occurred on April 4, 2017, on Grant Avenue, approaching Main Street in Winters, CA. Plaintiff was driving his 2016 Triumph motorcycle westbound on Grant Avenue, following a 2015 Ford truck towing a boat. Defendant was driving a pick-up truck eastbound on Grant Avenue when the collision occurred. The pick-up's driver told the CHP officer he fell asleep, crossed the median line and struck the boat and motorcyclist.

The truck and boat ahead of Plaintiff was owned by the California Department of Fish & Game, and Plaintiff's counsel, under the Freedom of Information Act, requested and received that driver's statement and photographs of the damage to the boat. The electronic data recorder was retrieved from Defendant's truck, which noted the truck was drifting to the left at the time of impact. Plaintiff motorcyclist suffered numerous injuries, including a left open humerus fracture, left open ulna fracture, pelvic fracture, left distal radius fracture, right radius fracture, right ulna fracture, left radius fracture, left distal ulna fracture and numerous fractured fingers and toes.

All of Plaintiff's treatment was at Kaiser. After numerous operations, including internal and external fixation, Plaintiff, who was a large-animal veterinary technician, was able to return to work within six months, with accommodations. However, he can no longer work with the large animals because of his crash injuries. Plaintiff continues to have problems with his left hand in such capacities as opening jars and gripping items, and he is not yet back to full activities such as surfing and running. However, he is able to accomplish daily activities of living.

Plaintiff's medical bills exceeded $600,000; Kaiser reduced its subrogation claim by more than 50 percent. This case was settled pre-litigation by mediator Nick Lowe. With preparation by Plaintiff's counsel, the motorcyclist made a great impression and spoke with defense counsel and the adjuster from the defendant's insurance company, enhancing case value.

Settlement: $800,000
Wrongful death
Mann, et al. v. Moradi, Sacramento Superior Court No.
No. 34-2016-00205589

Attorney S. David Rosenthal, Rosenthal & Kreeger and CCTLA Vice President, obtained an $800,000 settlement in a wrongful-death action brought on behalf of 27-year-old Sonny Mann, whose 51-year-old mother, Inderjeet Virk, was killed in an auto collision near the merge of the northbound Highway 65 off-ramp onto Blue Oaks Boulevard in Roseville on March 31, 2016.

At the scene, there were no independent witnesses. The only persons giving statements were the driver and passengers of the Ford F-150 that hit Virk's Mustang. According to their statements, Defendant Moradi was driving westbound on Blue Oaks at 35-40 mph over the crest of the overpass leading up to the off-ramp merge lane. As they approached the merge lane, the Mustang appeared suddenly in front of their vehicle from the right, essentially at a right angle to the F-150, and there was a t-bone collision near the driver's door resulting in Virk's death. They speculated at the scene that Virk was attempting to make a U-turn from the westbound merge lane to proceed eastbound on Blue Oaks. Although the vehicle damage seemed out of line with a 35-mph impact, other physical evidence did not contradict the defendant's version or suggest an alternative scenario as to how the collision occurred.

Immediately after being retained, Rosenthal was able to purchase the event data recorder (black box) from defendant's partially dismantled F-150 as it was being parted out. The black box established that 16 seconds prior to impact, the defendant had rapidly accelerated to a maximum sustained speed of 60 mph up until one second prior to impact, when the anti-lock brakes were activated. This served as the basis of Plaintiff's claim that even though Virk had been attempting an illegal U-turn, Defendant was driving 15 mph over the posted speed limit and at a speed that was unsafe given the distance to, and visibility of, the merge lane from the crest of the overpass. The settlement represented a portion of the primary policy limit of $1,000,000, which was also shared with Virk's husband at the time of the collision and a passenger in the Defendant's vehicle.

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CCTLA thanks all who made Tort & Trial seminar a success

CCTLA's recent What's New in Tort & Trial: 2018 in Review drew almost 60 people to McGeorge School of Law. CCTLA thanks speakers Kirsten Fish, Anne Kepner, Andje Morovich Medina and Ray Mattison, who came from the Bay area, to provide this annual informational program to CCTLA members.

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

If you missed this year's program, materials are available for purchase for $60. Mail your check payable to CCTLA to Post Office Box 22403, Sacramento, CA 95822.

Medical Liens Update Seminar Well-Attended

Justin Ward, right, introduces panelists including Don de Camara and Dan Wilcoxen, seated behind.

CCTLA's Medical Liens Update program drew more than 80 people to McGeorge School of Law on Feb. 8. Special thanks to speakers Dan Wilcoxen, Don de Camara, John Cattie and Jim Butler, who provided pertinent information regarding liens and also provided a 396-page book with important information and forms.

CCTLA also sincerely thanks Noah Schwartz, Offices of Noah S. A. Schwartz at Ringler, for his sponsorship which provided lunch and the materials for all participants.

If you missed this program, materials are available for purchase for $100. Mail your check payable to CCTLA to Post Office Box 22403, Sacramento, CA 95822.

Lindy Torgerson and Noah S. A. Schwartz, of the Offices of Noah S. A. Schwartz at Ringler, which sponsored the seminar.

Panelists Jim Butler, Don de Camara and in back, Dan Wilcoxen.

Mike's Cites

Continued from page 2

offer was not made in good faith.

THE TEST:

1. ***How far into the litigation was the 998 offer made?***
2. ***What information bearing on the reasonableness of the 998 offer was available to the offeree prior to the offer's expiration?***
3. ***Did the offeree alert the offeror that the offeree lacked sufficient information to evaluate the offer and if so, how did the offeror respond?***

1. How far into the litigation: The appellate court did not accept the plaintiff's argument that Cedars clearly knew that they and Gupta had malpracticed in the first surgery, performed a subsequent surgery and the plaintiff was still in a great deal of pain. The court seemed to believe that cases start with the filing of a complaint.

2. Reasonableness of the 998 offer: After a year of follow-up treatments and subsequent surgery, Cedars and Gupta did not know the nature of Plaintiff's medical treatment, pain and suffering.

The 998 was in the amount of the statutory limit for general damages omitting the medical bills entirely, which the appellate court felt conveyed no information to the defense.

3. Did offeree object, and how did offeror respond: Cedars had 9,662 pages of medical chart but claimed that because the plaintiff did not point out which doctor, Gupta or Carroll, was primarily negligent, Cedars couldn't figure out liability and Plaintiff's extent of damages. Cedars' argument that it did not have an adequate opportunity to evaluate the case was accepted by the appellate court.

PRACTICE POINTER: When you get the defense's answer and a 998 for $0, a "waiver of costs," or some other non-starter, be sure to object and ask for more time and why. 998 offers must be valid and made in good faith to be enforceable.

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From left, Bryan Delgado, Haven De Pietro, Patti Andrews, Henry Schultz Jr., honoree Clerk of the Year Casey Schultz, honoree Judge of the Year Kimberly Mueller, Charleen Inghram, Maria Buxton, Kyle Owen and Beth Patel.

Honoree Advocate of the Year Michelle Jenni and Kirk Jenni.

Above, 2018 CCTLA President Lawrance Bohm (far right) introduces 2019 President Rob Piering (center). Also pictured: Marti Taylor, Drew Widders and Joe Weinberger.

From left, Judge David Brown, Kyle Tambornini, Judge David De Alba and Seth Bradley.

From left, Justin Ward, Jesse Atwal, Amar Shergill and Goldy Shergill.

CCTLA Annual Meeting & Holiday Party

CCTLA once again recognized the best of the best for 2018 during the CCTLA's Annual Meeting and Holiday Reception, held Dec. 6 at The Citizen Hotel.

The Honorable Kimberly J. Mueller, judge of the United States District Court, Eastern District of California, was recognized as CCTLA's Judge of the Year.

Advocate of the Year was Michelle Jenni, of Wilcoxen Callaham and a CCTLA past president. Clerk of the Year went to Casey Schultz, courtroom deputy of the United States District Court, Eastern District of California.

CCTLA made a donation of $1,020 to the Mustard Seed program. Almost 160 persons attended the event, including 18 judges.

More photos on page 38

From left, Dr. Leonard Wong, John Beals, Ruby Tumagan and CCTLA President Rob Piering.

From left, Brianne Burkart, Judge Joe Orr and Margaret Doyle.

CCTLA Annual Meeting & Holiday Party

More photos on page 37

From left, Judge Richard Sueyoshi, Bill Kershaw and Judge Robert Hight.

Taylor Keller and CCTLA Executive Director Debbie Keller.

From left, Aesara Rhys, Rachael Del Rio and Mia Lam.

From left, Beth Patel, Marissa Ronquillo and Bryan Delgado.

John Demas and Dr. Leonard Wong.

Switching Hats: From Defense to Offense

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

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

MARCH

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

Thursday, March TBA
CCTLA Problem Solving Clinic
Topic: Vehicle Event Data Recorders
and Crash Data Retrieval
Speaker: Kent E. Boots, ACTAR
Arnold Law Firm
CCTLA Members Only, $25

APRIL

Tuesday, April 9
Q&A Luncheon
Noon, Shanghai Garden
800 Alhambra Blvd (across H St from McKinley Park)
CCTLA Members Only

Thursday, April 18
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
Arnold Law Firm
CCTLA Members Only, $25

Friday, April 26
CCTLA Luncheon
Topic: TBA - Speaker: TBA
Sacramento County Bar Association
CCTLA Members Only, $35

MAY

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

Thursday, May 16
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
Arnold Law Firm
CCTLA Members Only, $25

Friday, May 31
CCTLA Luncheon
Topic: TBA - Speaker: TBA
Sacramento County Bar Association
CCTLA Members Only, $35

JUNE

Thursday, June 6
CCTLA's 17th Annual Spring Reception
& Silent Auction
5 to 7:30 p.m. Ferris White home
1500 39th Street, Sacramento

Tuesday, June 11
Q&A Luncheon
Noon, Shanghai Garden
800 Alhambra Blvd (across H St from McKinley Park)
CCTLA Members Only

Thursday, June 20
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
Arnold Law Firm
CCTLA Members Only, $25

Friday, June 28
CCTLA Luncheon
Topic: TBA - Speaker: TBA
Sacramento County Bar Association
CCTLA Members Only, $35

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

CCTLA Calendar of Events