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The LITIGATOR

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Inside This Issue

CCTLA's Outstanding October

Dan O'Donnell
CCTLA President

CCTLA and its members were busy in October. On Oct. 8, past president Jill Telfer hosted her 5th annual Wags to Riches fund-raiser. This event benefits Scooter's Pals, a Northern California non-profit with the goal of saving as many dogs as possible from needless death. Jill brought together members of the legal, political and rescue communities to raise more than $20,000 for pet rescue. Jill recognizes the sponsors of and donors to this event on page 22.

On Oct. 28, CCTLA made a donation to the Sacramento Regional Coalition for Tolerance. On that date, CCTLA past president Stephen Davids represented our organization by speaking to the 230 students from Ethel Philips Elementary School and Albert Eintein School who rallied on the west steps of the state Capitol in a stand of solidarity for diversity, tolerance and acceptance (See page 13).

CCTLA's much-anticipated Medical Liens Seminar was held Oct. 30 at the Holiday Inn in downtown Sacramento. Our outstanding panel of experts, led by CCTLA past president Dan Wilcoxen, shared the latest legal information regarding medical liens and provided our members with strategies for optimizing client compensation.

The record number of attendees clearly illustrates the impact medical liens have had on personal-injury law. The generous underwriting of this event by our sponsors The Alcaine Group/Baird and Creative Legal Funding helped make this exceptional educational opportunity occur (See page 17).

What an outstanding month! You all are to be commended for your community outreach efforts. These not only help just causes but have the added benefit of bolstering the oft beleaguered image of trial lawyers. Participation in educational programs such as the liens seminar certainly provides an opportunity to expand our networking base and, more importantly, has the obvious advantage of making us better advocates.

The year is not over, however. It's time for us to celebrate our accomplishments, recognize those who made a difference—and help CCTLA once again support the Mustard Seed School for homeless children. How, you ask? What better way to do that than to attend CCTLA's annual Holiday Party on Dec. 3 at the Citizen Hotel (See pages 5 and 26). Please join your fellow CCTLA members and our local judiciary for camaraderie and holiday cheer.

Mike's CITES

By: Michael Jansen
CCTLA Board Member

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

Diamond v. Reshko
(2015) DJDAR 9622
(Decided Aug. 20, 2015)

FACTS: Plaintiff was injured while riding as a passenger in a taxi that was involved in a collision with another car. The taxi passenger sought to hold both the taxi driver and the other vehicle responsible. Plaintiff settled with the taxi driver, and a motion for good-faith settlement was granted. The case proceeded to trial with the taxi driver's insurance company defending pursuant to the settlement agreement. In order to settle, the taxi company paid $400,000 to Plaintiff.

The plaintiff and taxi driver's attorney argued that it was the other defendant, Reshko's, fault. Plaintiff's counsel asked the jury to award $1.4 million to Plaintiff, and the Yellow Cab defendant argued $800,000. Reshko argued for $302,900.71.

The jury awarded $745,778, 40% to Yellow Cab and 60% to Reshko. Thus, the verdict against Reshko was $406,698, together with costs and interest.

ISSUE: Reshko argued that the jury should have been told that Yellow Cab settled for the amount it paid. By failing to disclose the settlement, defendant Reshko was prejudiced, and the complete picture was not presented for the jury's due adjudication.

The plaintiff Diamond/defendant Yellow Cab's settlement agreement required Yellow Cab to participate in the trial, which is justified to prevent the non-settling defendants from making an "empty chair" argument. However, pertinent authority establishes that while not per se improper, requiring a party to stay in a case after it has settled out requires the court to make the settling defendants' position clear to the jury to avoid committing a fraud on the court and permit the trier of fact to properly weigh the settling defendant's testimony. Pellett v. Sonotone Corp. (1945) 26 Cal.2nd 705, 713

The plaintiff and Yellow Cab defendant argued Evidence Code Section 1152 precludes evidence of a settlement to prove liability. The appellate court had no problem with this argument in that Reshko did not attempt to submit the settlement to prove liability of Yellow Cab. Reshko argued that evidence of the settlement was admissible to show collusion between the plaintiff and Yellow Cab defendant.

HOLDING: This court relied heavily on Everman v. Superior Court (1992) 8 Cal.App.4th 466, 472: "A settlement agreement which is "otherwise within the good faith "ballpark"… is not subject to disapproval solely because it provides for continuing participation in the trial of the lawsuit, i.e., settling defendant" but, "[a]s a general rule, the possible biased of such a participating defendant should be disclosed to the jury in order to avoid committing a fraud on the court." Everman at 473.

This appellate court went on to state that the determination of a good-faith settlement does not limit the trial court's authority to admit evidence of that settlement at trial. Second, a good-faith determination of a settlement agreement which contains a term requiring continued participation by a settling defendant is premised on a presumption that the jury will be made aware of the settlement in some way or else it is feared the settlement is collusive. The settlement agreement evidence when a settling defendant appears and fully participates at trial prevents collusion and assists the jury in making reasoned determinations regarding liability and damages by facilitating informed evaluations of trial tactics, the credibility of a party and their respective counsel, and ultimately, the substantial trial evidence.

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Etelvina Jimenez, et al. v.
24 Hour Fitness USA
(2015) 237 Cal.App.4th 546
(Filed June 9, 2015)

General presumption that fact-intensive gross negligence claims should proceed to a jury, especially where some

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Are Your Client's Medical Records Accurate?

By: Daniel S. Glass, CCTLA Board Member

We live in a particularly contentious environment. We all fight for our clients and certainly strive to get the best result possible. Of course, the defense attorney's definition of the "best result possible" is to not pay fair value for the claim. Whether they can get the plaintiff to accept less money through delay and forcing financial hardship on the client or by causing costs to escalate so much that in the end the client's recovery will be less does not matter. The defense goal is to not pay fair value.

One way the insurance companies try to harm plaintiffs is through the medical records. Now, I am not going to address Howell and the many ways that defendants attack medical billing. This is about attacking the medical records.

I would venture to suggest that every plaintiff's attorney who has defended their client at a deposition has, at some point, run into that defense lawyer who thinks he/she has that "silver bullet"—the one that is going to end the case and cause the plaintiff to admit they really were not injured in the accident. A modern-day "Perry Mason" moment. (For those of you less than 50 years old, go to Netflix or an "oldies" television station and find a 1950's or 1960's "Perry Mason" television show. With five minutes to go, the real "criminal" always stands up and admits they "committed the crime," and Perry Mason's client is always innocent).

What I am talking about is that after asking two to three hours worth of questions, the defense lawyers starts to go down the path of: (1) "Didn't you have problems with your low back before the accident?" and (2) "Didn't you receive treatment for that C-5 injury years before this accident?", etc.

Then, when Plaintiff denies it, the defense lawyer pulls out one page from a 15-year-old medical file, puts it in front of the client and confirms that the records refer to them. Ah ha, Mr./Mrs. Plaintiff, we now know you are a liar, so we don't have to pay you anything.

I recently had a personal medical encounter which brought this type of situation to light. On Sept. 30, I had what I thought was minor abdominal/chest pain when taking a deep breath. I would have done nothing, but my wife, who really wants me to work for at least 20 more years, until my four-year-old is through with college, told me to call my doctor. I did. I went in for a visit. He decided I might have something called pleurisy, which is an inflamation of the tissues surrounding the heart and lungs.

He said: you know, sometimes, a person with pleurisy might also have an undetected "pulmonary embolism." And, that is serious, so he said I had to go to the emergency room for a contrast CT. He said that if he "scheduled me" for a contract CT, and I really had a pulmonary embolism, I could die waiting for my appointment in a month.

He sent me to the ER with a specific prescription to "rule out pulmonary embolism," which in medical terms means, give me a contrast CT scan (By the way, I did not have a pulmonary embolism, and after five hours in the Sutter Roseville ER, I left with an Rx for 600 mg Motrin, which I took for a few days and I am fine—but I digress).

The part of the situation worth writing about is that a few days later, I obtained my medical records from my physician. In part, this is what was in my records:

"Daniel S. Glass is a 58-year-old male who presents with midepigastric chest pain for several weeks. . . ."

How could this be in my records? I was completely lucid and functional at all times. I drove to my physician. I remained there for half hour. I drove to the Sutter ER. I had, at most, mild pain only upon taking a deep breath. Otherwise, I had no other pain. But, most importantly, this was a Wednesday. Never in my entire life before the afternoon of Monday, Sept. 28, did I ever experience or complain of this pain. I never said anything about "gastric" anything. I felt perfect from a "gastric" standpoint. Yet, there it was, in my medical records, like it was gospel truth: "midepigastric/chest pain for several weeks."

I like to think I am relatively intelligent. I have a pretty good command of the English language. I speak with professionals, doctors, nurses, etc., almost every day. I did not think there was anyone at Sutter Roseville who disliked me or who intended to misrepresent my medical condition, but there it was.

Then, about a week later, I saw a recount by Adam Sorrels of a verdict he received in Placer County. A good result, but he was a little concerned going into trial because his client's medical records did not accurately reflect the car wreck, and there was a doctor visit that pre-dated the car wreck by two months. His client was a Hispanic individual whose "com-

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munication skills were not great."

I believe these types of misinformation are on the rise, and we need to be aware of them early on to diffuse the "Perry Mason" moment before it occurs.

In my case, someone at Sutter ER made a mistake. It could not have been intentional, but it clearly was not an accurate recitation of what I told them. There was absolutely no way I could have said that I had my pain for "several weeks." It simply did not happen, I had no reason to make it up, and I was completely lucid and focused at all times.

Imagine when a person has a serious accident and comes to the ER in pain, most likely after being administered narcotic medication at the scene, and then a party of nurses, doctors, technicians, and others who are legitimately trying to "save your life" takes your "history" or make entries in your medical file. Mistakes in making file entries happen all the time.

When they might affect your client's case, you need to address it, hopefully before trial. Now, I understand that challenging the "treating physician" about the accuracy of their work is probably not the best approach. The last thing we need to do is make the treating physician a hostile witness.

How about a more delicate approach. The physician most likely did not make the entry anyway. Find out who made the entry that is not accurate. Discuss the entry with your client before the deposition. Let them know that there could be questions about the entry. Confirm with the client that the entry is not correct and be prepared to deal with it in the client's deposition.

If the entry is very significant, like the client "has a long history of low back problems" when the reality is that the subject automobile accident was the first time the client experienced back pain in years, the entry must be addressed.

IS THE ENTRY ADMISSIBLE AT TRIAL?

Clearly the medical record entry is hearsay. Defendant will seek to introduce the entry as a hearsay exception. Only two exceptions possibly apply: Evidence Code Sec. 1235—inconsistent statement and/or Evidence Code Sec. 1271—admissible business record.

In either case, there must be some foundation laid for the medical entry. If the entry was addressed in the client's deposition, and the client denied making it, then it is not his/her prior inconsistent statement. Unless the defendant can lay a proper foundation for the entry, it should not be admitted and should be the subject of a Motion in Limine.

As for the business record exception, a business record is only admissible if all of the following conditions are met:

(a) The writing was made in the regular course of a business;

(b) The writing was made at or near the time of the act, condition, or event;

(c) <u>The custodian or other qualified witness testifies to its identity and the mode of its preparation</u>; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness. *Evidence Code sec. 1271 [emphasis added].*

Subdivision (c) is the critical foundation point that defendant will have a difficult time establishing and should be the reason to keep the medical entry away from the jury's ears.

Like in my personal experience, and as I have seen in so many hospital records, it is difficult to identify exactly who made the entry. Multiple nurses, technicians, etc., make computer-based entries, and they are not always identified. Without being able to bring in the person who made the entry, Evidence Code sec. 1271's foundational requirements have not been met.

CONCLUSION

More and more, emergency rooms are overcrowded, people are admitted to the Emergency Department and remain there for hours; most time, more than six hours for even moderate illness or injury. During those hours, they are probably seen by health care professionals for 5-10% of the actual time they are there. The hospital staff can easily make an erroneous entry, mostly due to the volume of work and not for any nefarious reason.

If the medical entry is detrimental to the very foundation of your case, you should deal with it in Discovery and be well prepared to address it by Motion in Limine. A deposition of the hospital staff person or persons may go a long way to derailing the foundational requirements defendant will need for the "business record" exception.

A deposition of the hospital staff person may be enough to show that maybe the entry was an error. Thus, your client's testimony becomes much stronger. And, without sufficient foundation, defendant may not even try to introduce the medical entry.

Brown signs bill simplifying medical records requests

CAOC-backed AB 1337 ends paperwork nightmare for patients

Gov. Jerry Brown has signed a bill sponsored by Consumer Attorneys of California (CAOC) that will help simplify the process for patients seeking their medical records.

AB 1337, authored by Assemblyman Eric Linder (R-Corona), will streamline what is now a paperwork nightmare for patients seeking their own medical records by allowing for the use of a standardized medical records request form that can be submitted to any health care provider.

The forms now in use are specific to each facility and can vary significantly. The use of provider-specific forms leads to delay in obtaining records, especially when patients must request records from multiple facilities to gain their complete medical care history.

"This is one of those simple steps that will go a long way to helping patients, and we thank the governor and Assemblyman Linder," said CAOC President Brian Chase. "Patients hunting down their records for a court case are already dealing with the stresses of serious illnesses, let alone efforts to seek justice in court. Anything government can do to make life easier for these folks is welcome relief."

Consumer Attorneys of California is a professional organization of plaintiffs' attorneys representing consumers seeking accountability against wrongdoers in cases involving personal injury, product liability, environmental degradation and other causes.

For more information:

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Reprinted from the caoc.com website.

Year-end event will salute CCTLA honorees

CCTLA's Annual Meeting and Holiday Party, to be held on Dec. 3 at The Citizen Hotel, will again raise funds for the Mustard Seed School for homeless children and will recognize this year's honorees for judge, clerk and advocate of the year.

President Dan O'Donnell will recognize Judge Judy Holzer Hersher and Clerk Alicia Cruz and announce the Advocate of the year from among these finalists:

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Larry Lockshin and Kristoffer Mayfield received a $5.6-million verdict in Sacramento County in favor of a former Amtrak railroad engineer who sustained a beating when he was attacked on the job by a West Sacramento street gang. Amtrak was negligent for not providing a safe place to work. Amtrak's attorneys threw gasoline on the fire by arguing that Plaintiff should not have left the train to find out why someone was standing on the train tracks.

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Mark Velez and Kelsey A. Webber eceived $4.75-million verdict in Sacramento in an employment case. Plaintiff was a former branch manager at Bass Underwriters, Inc., and was first hired in 1999 to establish a presence in California. Several of Plaintiff's relatives worked at Bass, but then went to Yates, a competitor. Bass then terminated the plaintiff, blaming her for her children's exodus from the company. During the litigation in verified discovery, Bass' executives maintained that Plaintiff voluntarily quit. But an honest Yates employee testified that Plaintiff directly told him that she had been fired. Bass was despicable, because after Plaintiff went to work at Yates, Bass defamed her to Lloyds of London, telling this carrier not to enter into a contract with Yates because Plaintiff was responsible for high fire losses in California.

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Jason Sigel and Hank Greenblatt, received a $3.7-million verdict in Amador County when a 53-year-old defendant (who had been a Type 1 insulin-dependent diabetic since the age of 14) blacked out from low blood sugar while driving, injuring Plaintiff. The plaintiff underwent a single-level cervical disc replacement surgery. She still suffers from her injuries and may need a double-level fusion surgery sometime in the future. In a strategic move, Plaintiffs stipulated with Defendant that there would be a finding of $1 for punitive damages. This prevented any post-trial issues on punitive damages and allowed all of the Defendant's bad conduct to come into evidence.

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Ed Smith, Alex Lichtner & Steve McElroy obtained a $3.7-million verdict for their client in a rear-end traffic collision. The plaintiff underwent a C5-6 disk replacement. The policy limits were $1.1 million. There was moderate property damage to Plaintiff's vehicle. Medical care included Dr. Anthony Bellomo at Sacramento Spine Care, diagnostic facet blocks and eventual radio-frequency ablations bilaterally at C4, C5 and C6 by Dr. Thomas Mowery, and surgical consultations with Dr. Justin Paquette. Dr. Philip Orisek performed a C5-6 disc replacement in 2013.

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Kirill Tarasenko and Ognian Gavrilov obtained a $ 577,000-verdict in conservative Orange County for a young man (soccer player) run over by an SUV. Plaintiff dreamed of playing soccer at the Division 1 level. Plaintiff's injuries were primarily bulging discopathy and radiating symptoms down the right leg from a foraminal herniation at L5-S1. Defendant had video surveillance showing physical movements deemed inconsistent with his injuries. Plaintiffs argued that the defense was over-reading the surveillance and also claimed that Plaintiff had an identical twin brother who could easily have been the subject on the video.

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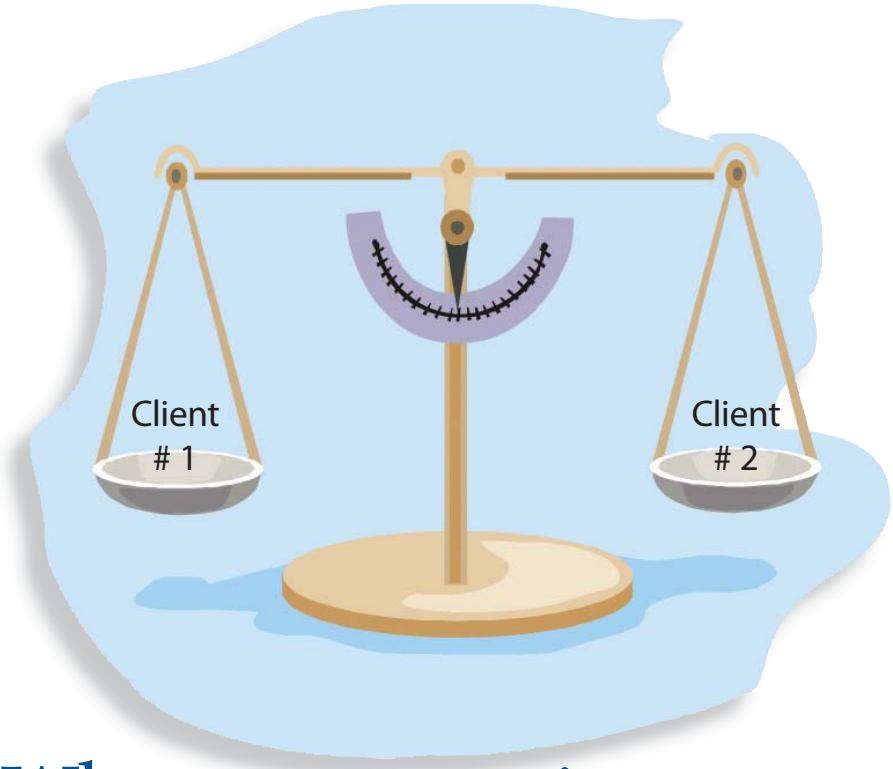
For more information on the holiday event, see page 26.



You must explain that you cannot favor one client's interest over that of the other. You must also explain the potential that the clients' objectives or interests might change in the future. For example, they could give you conflicting instructions, e.g., "I need money now, so please settle the case ASAP" versus "I want to get every dollar possible, and I don't care how long it takes."

When representing more than one client, should you use a conflict waiver?

By: Betsy S. Kimball

Two brothers limp into your office. They had the green light when T-boned by another driver. They want to sue, and you want to take their case. You remember reading about "conflicts waivers" but are not sure whether you need one, and, if so you, how exactly to get it.

Yes, you do need one. Rule 3-310(C) of the Rules of Professional Conduct states: "A member shall not, without the *informed written consent of each client:* (1) accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or (2) accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict." (*Italics added*) The comments to this rule make it clear: it applies to all joint representations.

"Informed written consent" means each client's written agreement to the representation following written disclosure[;]" and "[d]isclosure" means "informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client[.]" *(Rules Prof. Conduct, 3-310(A)(1) & (2).)*

How do you handle this? First of all, do not bother with a standard form. The content of your written disclosure must be determined by the facts of your clients' situation.

Here are the things that your written disclosure must address: the prospect of a future conflict, confidentiality, and—believe it or not—how the original client file will be handled.

You must explain that you cannot favor one client's interest over that of the other. You must also explain the potential that the clients' objectives or interests might change in the future. For example, they could give you conflicting instructions, e.g., "I need money now, so please settle the case ASAP" versus "I want to get every dollar possible, and I don't care how long it takes."

A scenario that you probably dread is that, after some discovery, you conclude that your driver-client was also at fault for the MVA. Now your passenger-client has a claim against your driver client. And then there is the nettlesome problem of underinsurance. You must identify potential conflicts such as these, and explain how you will handle them. This includes the fact that, if a future issue cannot be resolved, you may be forced to withdraw.

You must inform the clients about the joint client exception to the attorney-client privilege *(Evidence Code section 962).* The clients need to understand that you cannot keep one client's information secret from the other, and if the information is material to your representation, you will likely have an obligation under Rule 3-500 to disclose it to the other client.

Your written disclosure needs to address the clients' respective rights to your file. *See Rule of Professional Conduct 3-700(D).*

Your written disclosure must be in layperson language—no jargon or "legalese." Write in plain English. Have the disclosure translated, if necessary.

Finally—and the importance of this cannot be overstated—you must give the clients a reasonable opportunity to consider: (1) what has been disclosed, and (2) whether to give consent. Handing a disclosure and a pen to the clients across the desk to sign on the spot is a bad idea.

Sometimes I am asked about the necessity of advising would-be clients

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Conflict waiver

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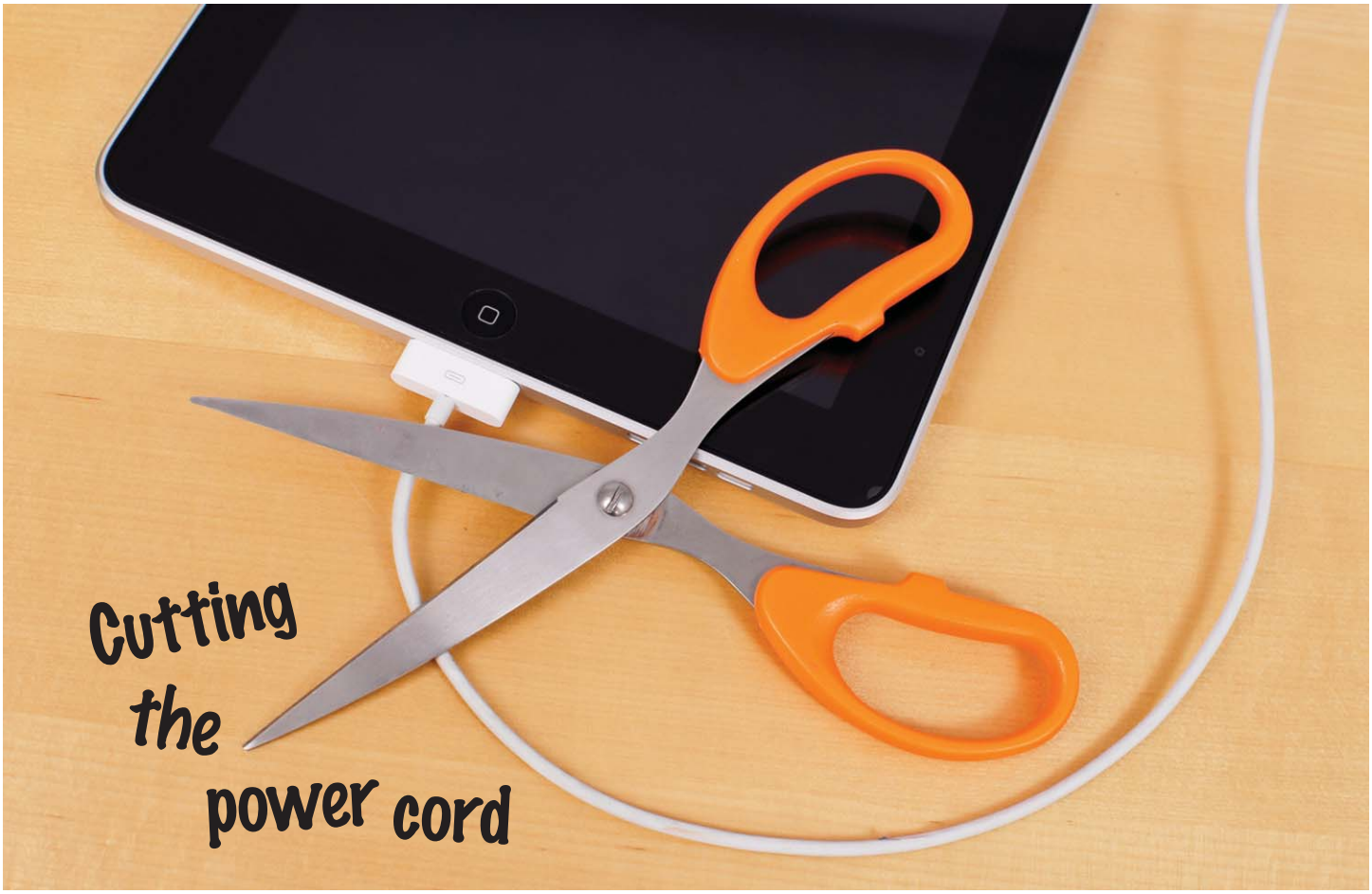
that they have the right to consult with independent counsel. I understand that this business is competitive. Nevertheless, my advice is that, right now, advising clients that they may consult with independent counsel is not uniformly required by the Rules of Professional Conduct. But it is the best practice.

Also, there may be circumstances in which advice from independent counsel is required to allow the client to receive informed written consent to the joint representation.

Here's an example: If it appears that there will not be enough insurance proceeds to pay both clients' claims, is it really in each client's best interest to be represented by one lawyer who cannot advance one client's interest over the other? You cannot advise on that decision.

If later you are sued (or receive a State Bar complaint) by the more badly injured client ("I was hurt way worse, and I never understood that my lawyer could not put my interest ahead of my brother's"), you will be in much better shape if you have advised the clients at the outset that they should consult with independent counsel before deciding whether to be represented jointly by you.

Betsy S. Kimball is certified as a specialist in legal malpractice law by the State Bar of California. She may be contacted at kimballlawyer@gmail.com.



How to Set Up and Use an iPad to Wirelessly Present a Case

By: Drew M. Widders, CCTLA Board member

Having been to a few "Technology at Trial" seminars at CCTLA/CAOC conventions, I was impressed by the ones using a wireless iPad setup. That is the setup where the presenter walks around the room with the iPad and can change what is shown on the screen through the iPad. There still are plenty of cords used behind the scenes, but the iPad presents wirelessly so you are not tethered by a cord to any specific location.

Being a bit of a tech guy, I decided I wanted to figure out how to present a trial I had in San Francisco, including PowerPoint and exhibits, wirelessly with my iPad. The purpose of this article is to save you some of the time and money I expended in figuring out a relatively budget-friendly setup that allows you to use an iPad to wirelessly present a case.

With as little as $325, you will have the ability to present from your iPad wirelessly to a projector, TV and/or computer monitor. This setup includes the ability to have a backup system so you can switch, with the push of a button or a remote, to either an ELMO or a PC. This is important if you have an issue with your iPad or simply need to switch to a paper exhibit to present on your ELMO without fumbling around with cords. This setup will also include the ability to share the court projector, TV or computer monitor with opposing counsel at a push of a button of the remote.

With this setup you also will have the ability to present the identical exhibit or PowerPoint from your iPad simultaneously to several different projectors, TVs or computer monitors. For example, you can set up an extra monitor for counsel's table or for the witness that would simultaneously present the same exhibit that is being presented to the jury through the main courtroom projector, TV or computer monitor.

With Apple's relatively easy-to-use interface, once setup is complete, the presentation process is fairly user friendly.

Below is a list of the items you will need and their estimated prices at the time of writing this article. Pictures of the devices and the complete setup, along with links on where to purchase the items can be found on CCTLA's website. Please visit CCTLA's website, log-in with your username or password (ask debbie@cctla.com if you are unsure) and go to the new CCTLA expert deposition bank page. This will then take you to a Dropbox page where all the deposition are now stored. I placed a folder on the page called iPad at Trial. The folder contains the pictures and links relevant to this article. On a side note, please email me, dwidders@wilcoxenlaw.com, with copies of any depositions or IMEs you have to share with our new deposition bank.

Devices you will need:

1. Apple TV, $65. This allows you to send whatever is on the iPad screen to a projector, TV or computer monitor.

2. Apple Airport, $90. This allows your iPad to connect to your Apple TV wirelessly.

3. HDMI Switch, $30. This allows you to switch between different devices with the click of button on the remote. For example, your wireless iPad setup, ELMO, PC, wired iPad or opposing

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counsel's PC.

4. HDMI Splitter, $40. This device allows you to present what is on your iPad or other device on multiple projectors, TVs, or computer monitors simultaneously.

Cords you will need:

HDMI to VGA cord, $20. This cord is only needed if you have an old projector or monitor that does not support an HDMI cord. For example, some courthouses only have a VGA input at counsel's table to present to an older courtroom projector or TV. This cable will allow you to use this system with your wireless setup.

Surge protector, $30
Ethernet cord, $5
One 25-foot HDMI cord, $15
Six nine-foot HDMI cords, $30
Total investment to present wirelessly: $325

How to make it work:

Labels are critical to following the step-by-step process and for ease of future setup. I have placed numbers on the above devices (1-4). The cords that correspond with devices are labeled with the device number and a lower case "a" or "b." For example, a cord that goes into Apple TV (device 1) will be labeled (1a) or (1b). Again, the pictures of the various devices and labels are available in the CCTLA expert deposition bank and will make following along with the below process much easier.

Step 1: Plug the Ethernet cable (1a) into Apple TV (1a). Plug the other end of the Ethernet cable (2a) into your Apple Airport (2a).

Step 2: Plug an HDMI cable (1b) into your Apple TV (1b). Plug the other end of the HDMI cable (3b) into your HDMI switch (3b).

Step 3: Plug an HDMI cable (3a) from the output of your HDMI switch to the input of your HDMI splitter (4a).

Step 4: Plug an HDMI cable from any HDMI output on your HDMI splitter (4) into whatever device you will use for your presentation. For example, a projector, TV or computer monitor.

Plug everything into your surge protector, and turn the surge protector on. None of the devices above have on/off switches, so your setup is now ready to present wirelessly from any iPad. You can plug other devices into the HDMI switch, such as an ELMO, PC, wired iPad or opposing counsel's computer. You can then use the HDMI switch's remote to switch between the different devices. I would suggest labeling the remote with the corresponding devices.

Now you need to connect your iPad to the wireless system by connecting your iPad wirelessly to your Apple Airport's Wi-Fi. You should just be able to connect to it with your iPad by looking for Airport in your Apple iPad settings under Wi-Fi. The Apple Airport does not have a Wi-Fi password by default. I strongly suggest adding a password to your Apple Airport, or anyone with an Apple device could possibly use your system and interrupt your presentation.

To present wirelessly from your iPad, you simply need to swipe your finger up from the bottom of your iPad. You then press the Airplay button on the menu that appears on your iPad, click on Apple TV and click on mirroring. You should now see what is on your iPad screen presented to your projector or computer monitor.

Apple now has applications for Microsoft Office, including PowerPoint. Installing PowerPoint allows you to present your PowerPoint wirelessly through your iPad while not being stuck at a podium or counsel's table. In addition to PowerPoint, I would suggest giving TrialPad, TrialDirector or TrialTouch a try.

In my next article, I will discuss adding Internet and using Dropbox with other applications to publish your exhibits to the jury through your iPad.

Public Justice waging anti-bullying campaign

Resources available to plaintiffs' counsel

Reprinted from publicjustice.net

School administrators and teachers play a crucial role both in preventing bullying and stopping bullying when it does occur. But eight out of every 10 times a student gets bullied, no adult intervenes. Despite anti-bullying laws and policies across the country, many principals, teachers and other adult leaders turn a blind eye. They simply are not doing enough to make schools safe for our children. Our job is to make sure they do. Public Justice's Anti-Bullying Campaign is designed to hold schools accountable when they fail to protect our children and force them to take appropriate steps to respond to bullying.

What Public Justice Is Doing

When schools fail to protect our kids from bullying, Public Justice uses litigation to:

• Seek justice for bullying victims and their families;

• Effect systemic change within school districts through injunctive relief requiring training and education programs for school administrators, teachers, students, and others in the school community; and

• Develop good federal and state case law to better protect bullying victims.

Public Justice believes litigation is a critical tool in helping to solve school bullying. It can motivate school officials to insist that bullying is confronted rather than ignored, put teeth into school policies, require training programs, and teach tolerance. In short, it can help create systemic change in the culture of school districts, so they do a better job of preventing bullying in the first place and responding appropriately when bullying does occur.

Public Justice is involved in the following anti-bullying cases: a lawsuit on

behalf of five Jewish students subjected to virulent anti-Semitic harassment in a school district in New York's Hudson Valley; a lawsuit on behalf of five boys in a Chicago suburb who were physically and

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sexually assaulted by senior members of their high school athletic teams as part of a hazing ritual directed by their coaches; a federal lawsuit on behalf of a student in Tennessee subjected to sexual harassment and assault; a state lawsuit on behalf of a student in Tennessee subjected to sexual harassment and assault; a lawsuit on behalf of a student in Ohio subjected to anti-Semitic and gender-based harassment; and an amicus brief in the U.S. Court of Appeals for the Eleventh Circuit on behalf of an Alabama middle school student who was sexually assaulted after her school used her as bait to catch a known harasser.

Public Justice's Anti-Bullying Campaign also serves as a resource for plaintiffs' attorneys handling bullying cases.

The Public Justice website offers Public Justice's primer on litigating bullying cases, "Bullying and the Law: A Guide for Parents "(August 2015) and access to the Public Justice list of bullying verdicts and settlements.

The website is located at http://www.publicjustice.net/what-we-do/anti-bullying-campaign#sthash.unvoq9nl.dpuf

CCTLA takes role in anti-bullying effort in Sacramento schools

By: Steve Davids

Steve Davids, with Winston, speaks at the Stand Up, Speak Out rally held recently in Sacramento.

Due in part to the generosity of the CCTLA board, the third annual Stand Up, Speak Out anti-bullying rally on the steps of the state Capitol on Oct. 29 was a great success. The board's donation enabled a group of about 200 third, fourth and seventh graders from the Sacramento City Unified and Elk Grove Unified school districts to attend the rally.

For many of these students, it was likely their only field trip of the year, due to budget cuts.

Representatives of the two school districts were joined by Sheriff Scott Jones, US Attorney Benjamin Wagner, State Senator Dr. Richard Pan and Assembly member Kevin McCarty, all of whom spoke inspirationally. Sheriff Jones asked all the kids to raise their right hands and swear an oath to combat bullying in their schools. A black-and-white 13-pound shih tzu was also in attendance, and his story of dealing with bullying big dogs seemed to resonate with at least some of the younger students, most of whom wanted to pet him.

This is the second year of CCTA's sponsorship of the anti-bullying rally, and it marks another foray into the wider Sacramento community. CCTLA was praised by several of the speakers for making the event a success. We all look forward to next year's rally.

Sacramento students at the Stand Up, Speak Out anti-bullying rally.

Veto of workers' rights bill "profoundly disappointing"

Reprinted from CAOC.com

Calling Gov. Jerry Brown's Oct. 11 veto of a bill to protect the legal rights of California workers "profoundly disappointing," Consumer Attorneys of California president Brian Chase said the governor missed a chance to protect the rights of California working women and men.

"We're disappointed that Gov. Brown's veto statement mischaracterizes AB 465," Chase said. "Contrary to the claims of corporate interests that have consistently misled Californians about the bill, AB 465 would not have prohibited the use of arbitration in California employment agreements. What it would have done was put employers and employees on equal footing, eliminating employers' ability to offer workers no choice in giving up their legal rights in order to take a job. This veto is a slap in the face of working Californians."

AB 465, sponsored by the California Labor Federation, AFL-CIO, and authored by Assemblyman Roger Hernandez (D-West Covina), would have ensured that crucial employment rights and procedures could not be surrendered without the knowing and voluntary consent of employees. Employers routinely force workers to sign contracts requiring that labor disputes be settled through arbitration, a process that many studies have shown favors the employer. AB 465 would have allowed workers to have a choice to settle labor disputes through an unbiased forum, such as a jury trial or the state Labor Commissioner.

CAOC-backed AB 465 would have put workers, employers on equal ground

"This veto is another example of big corporations and rich executives getting their way in government," Chase said. "Corporations can now write the Labor Commissioner out of business through arbitration clauses in employment contracts. Workers with a grievance can be required to go before an arbitrator who is not required to follow the facts or the law and whose decisions are not open to public review or appeal. Employers shouldn't be the only ones who have a choice as to whether to use arbitration to resolve disputes."

Consumer Attorneys of California is a professional organization of plaintiffs' attorneys representing consumers seeking accountability against wrongdoers in cases involving personal injury, product liability, environmental degradation and other causes.

For more information:
J.G. Preston, CAOC Press Secretary, 916-669-7126, jgpreston@caoc.org
Eric Bailey, CAOC Communications Director, 916-669-7122, ebailey@caoc.org

Sponsors for the "Medical Liens Seminar" were thanked for their support of the CCTLA-hosted event. Above left, Carlos Alcaine of The Alcaine Group/Baird, with CCTLA president Dan O'Donnell; above right, Bret Hansbery and Jennifer Andrade of Creative Legal Funding.

Almost 100 participate in CCTLA-hosted medical liens seminar

"Medical Liens Update," a seminar hosted by Capitol City Trial Lawyers Association on Oct. 30, drew 98 participants and was hailed as an informative and excellent program.

Panel experts were, pictured from left, below: Ahmad Zeki, Garretson Resolution Group; Donald M. de Camara, Law Offices of Donald M. de Camara; and Daniel E. Wilcoxen, Wilcoxen Callaham LLP.

"Special thanks to our sponsors, The Alcaine Group/Baird and Creative Legal Funding," said CCTLA Executive Director Debbie Frayne Keller, "and to our speakers Dan, Don and Ahmad."

The liens book is available for $100. Contact Debbie Keller: debbie@cctla.com.

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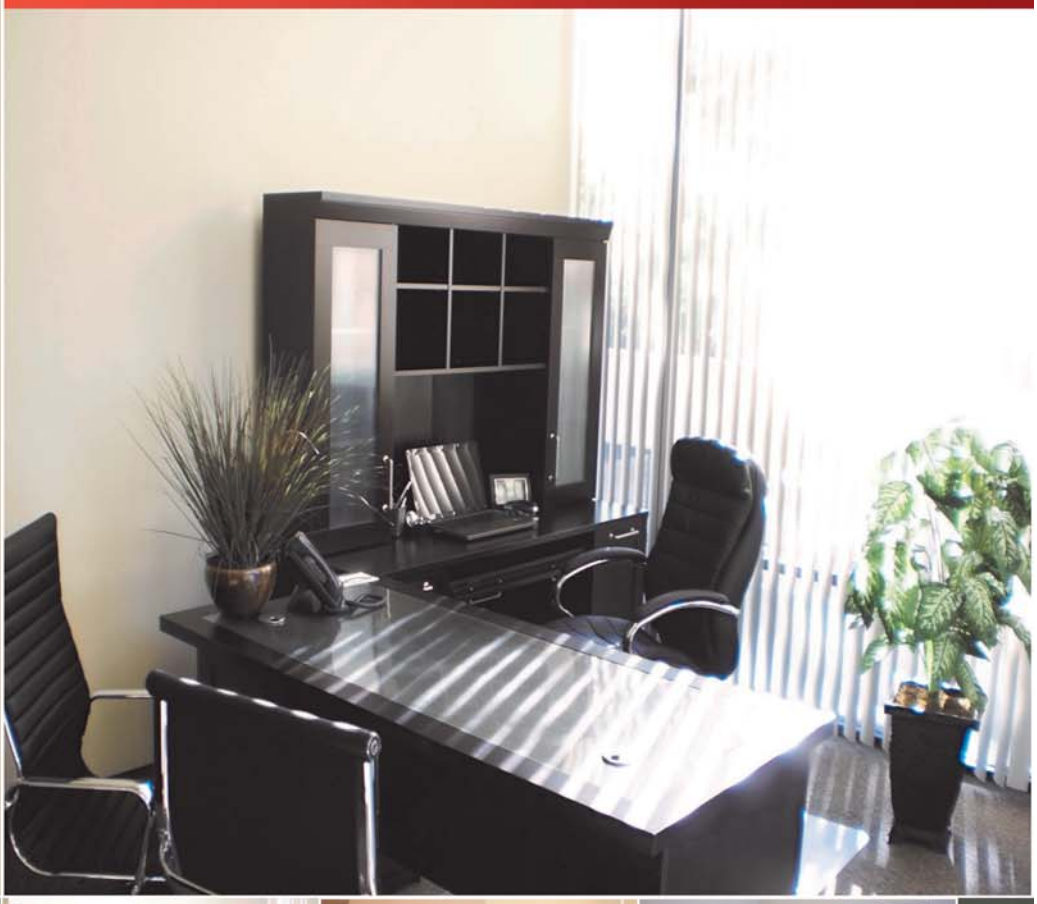

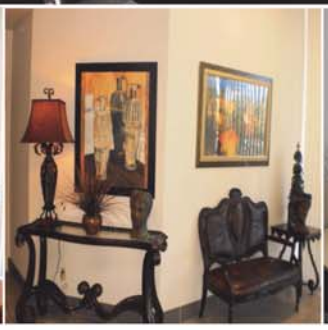

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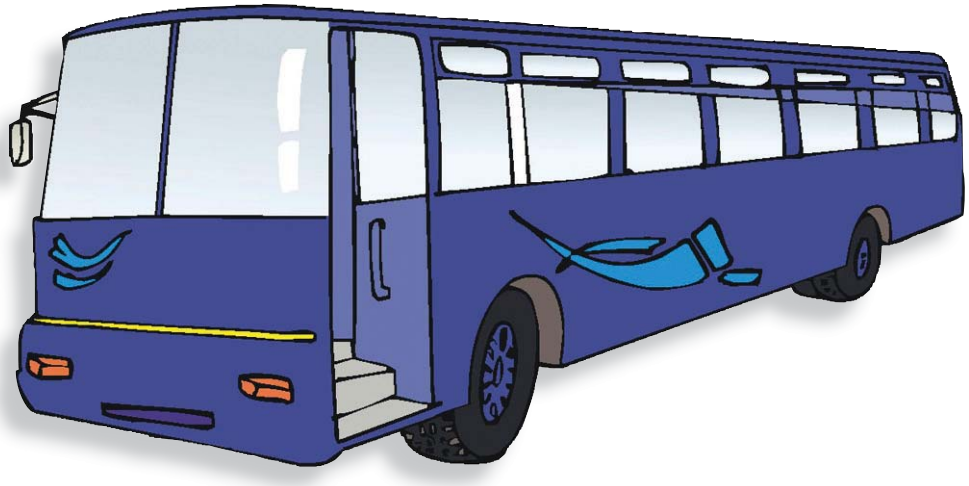


Vanpools and Shuttles: Course and Scope?

By: Steve Davids

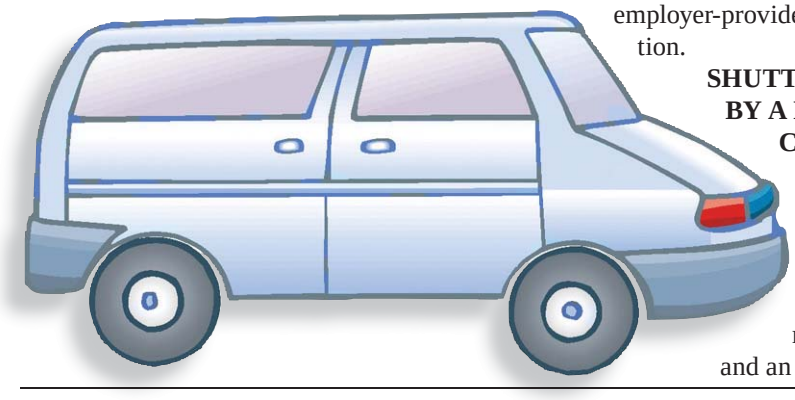
Employers are finding innovative ways to transport their workers: just google buses! These arrangements challenge the traditional going-and-coming rule involving employer liability for an employee who is on the way to work. The going-and-coming rule says the employee isn't in the course and scope of employment while going to and from work.

VANPOOLS

An unpublished case called Wurm v. California Institute of Technology, 2009 Cal. App. Unpub. LEXIS 3983 affirmed a summary judgment in favor of CalTech. The van was operated by "Vanpool 36," an association of Caltech employees who leased the van from Enterprise Vanpool, a division of Enterprise Rent-A-Car. A 2003 Ford model E-350 van left the roadway on State Route 2 in the Angeles National Forest, rolled over and down an embankment, injuring eight and killing three of the van passengers.

Vehicle Code section 12804.9(j) provides that the driver of a vanpool vehicle may operate with a Class C license but "shall possess evidence of a medical examination required for a Class B license when operating vanpool vehicles." In 2004, Caltech provided the required medical examination for potential vanpool drivers at no cost to the drivers. However, the driver operating the vanpool at the time of the collision had a lapsed medical certificate and was therefore not entitled to drive the van.

The Caltech employees using the vanpool were paid a $50 travel allowance, but this was not enough for the "travel expense exception" to the going-and-coming rule. The rationale of the travel expense exception has been stated in Hinman v. Westinghouse Electric Co. (1970) 2 Cal.3d 956, 962: the employer benefits by reaching out to a labor market in another area, or to enlarge the available labor market by providing travel expenses and payment for travel time.



Where the employer and employee have made the travel time part of the working day by their contract, the employer should be treated as such during the travel time, and it follows that so long as the employee is using the time for the designated purpose, to return home, the doctrine of respondeat superior is applicable.

The unpublished Wurm case held that the $50 subsidy had "no connection with, or relationship to, the considerations underlying the travel expense exception." (*Page 24*) The subsidy was not paid to make the travel time part of the working day, but to encourage participation in vanpools. The beneficiary of the vanpool program was not Caltech but the public at large: vanpools reduce solo driving, and therefore the volume of traffic.

If you have a vanpool case, look carefully into all vanpool arrangements, rules and regulations to see if the employer has extended the work day to cover the employer-provided transportation.

SHUTTLES USED BY A HYPOTHETICAL EMPLOYER

A large, institutional employer has both a medical facility and an educational program in the same urban area. The employer benefits from the "synergy" created when teachers at the educational program consult at the medical facility. The two locations are several miles apart, and a fleet of shuttle buses circulates teachers, students and members of the public (patients of the medical facility) between the two facilities.

A teacher at the education facility has twice-a-week clinical duties in the medical facility. He lives only a few blocks from the shuttle bus pick-up at the educational facility across town. He boards the 6 a.m. shuttle on a public street adjacent to his employer's education facility. He goes earlier than his assigned shift so that he can work on other projects. Some of these projects are not directly employment-related. *En route* to the medical facility, there is a terrible accident when a large vehicle strikes the shuttle, and the teacher is badly hurt.

There is an exception to the going-and-coming rule if the employee's compensation covers the commute time. (Zenith National Insurance Co. v. WCAB (1967) 66 Cal.2d 944, 946-947.) But in our hypothetical, the teacher was using his employer's transportation. There is an exception if the employee's compensation covers the times of going-and-coming to and from work.

To make the commute a part of the

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work day requires an express or implied agreement between employer and employee. (Kobe v. Industrial Accident Commission (1950) 35 Cal. 2d 33, 35.) Under Zenith and Kobe, employer-furnished transportation does not automatically nullify the going-and-coming rule. The employer's website in our hypothetical restricted shuttle usage: *The shuttle program is not designed or offered as a home commute program for employees; rather, the purpose of this program is to facilitate transportation between the employer's two locations.*

1. Does the going-and-coming rule apply to the teacher, considering he is riding the shuttle as part of his morning commute?

The employer admits that *even if an employee is not on the job, or not working, they are still able to ride the shuttle*. The employer takes no steps to enforce ridership eligibility. Members of the public who live in the area can (and do) hop the shuttles for personal reasons.

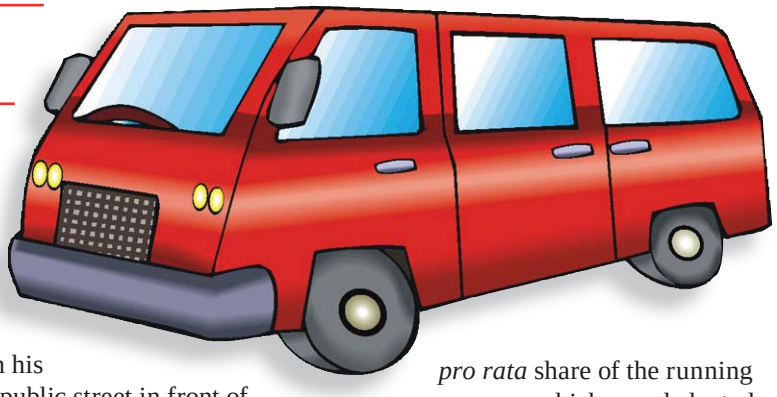
The teacher has a contract with his employer, which mentions nothing about the shuttle service. He was therefore not on the job. (Kobe v. Industrial Accident Commission, supra., 35 Cal. 2d at page 35.)

2. Has the teacher "arrived at work"?

Since the shuttle is *not* for commuters going to and from work, the employer argues that the teacher "arrived at work" because he was standing on a public street next to the education facility. He did not enter the education building on the morning of the collision. He did not enter any of his employer's facilities. He had no work commitments at the education building that morning.

In Lewis v. WCAB (1975) 15 Cal.3d 559, an employee parked in the employer's garage, but had to walk three blocks to work. After two blocks, he fell while crossing an intersection. The employee was deemed in the course and scope of employment. But the teacher in our hypothetical never enters his employer's property before he is injured.

A. General Ins. Co. v. WCAB (1976) 16 Cal. 3d 595 involved an employee struck and killed by a passing motorist as he alighted from his automobile in a public street in front of the employer's premises. The employer furnished no employee parking, and the employees therefore parked their automobiles on public streets. The going-and-coming rule applied: the employee was on a public street outside his employer's premises, just like the teacher.



B. Van Cleve v. WCAB (1968) 261 Cal. App. 2d 228 involved a city police officer who attended a mandatory morning briefing and injured her back while getting out of her car in the parking lot. She was in the course and scope. But the teacher had arguably not reached his place of employment: he had no business at the educational facility where he caught the shuttle bus.

C. In North American Rockwell Corp. v. WCAB (1970) 9 Cal. App. 3d 154, an employee was injured when he was struck by a co-worker's automobile in a parking area provided by the employer. He was assisting another employee in starting his stalled vehicle. Workers' compensation was available, because the injury occurred on the employer's property.

3. Is the commute part of the work day?

The going-and-coming rule is not in effect when the employer and employee agree to make the commute part of the work day. (Zenith National Ins. Co. v. WCAB, supra., 66 Cal.2d 944, 946.) The construction worker in Zenith had to travel 130 miles to the job site, for which his employer paid him $10 per day "to cover transportation costs and living expenses."

California Casualty Indemnity Exchange v. Industrial Accident Commission (1942) 21 Cal. 2d 461, 462 involved a stenographer and several other employees who lived 33 miles from their work. The employer purchased an automobile to transport them, and those who used it were charged $4 a month, representing a *pro rata* share of the running expenses, which was deducted from their wages. "The fact that the charge was deducted from the employee's wages definitely indicated the connection of the transportation with her contract of employment."

In our hypothetical, employees were not charged a pro rata share of the shuttle expenses. The employer neither (1) compensated employees for riding the shuttle (Zenith), nor (2) deducted a pro rata cost of the transportation from the teacher's wages (California Casualty).

Kobe v. Industrial Accident Commission, supra. involved a death and injuries to roofers driving home with fellow employees. Since the employees were paid an extra hour each day to compensate them for the time spent in travelling to and from work, the going-and-coming rule did not apply, because there was an explicit agreement to extend the work day to include transportation.

Kobe said that the employer and employee can expressly or implicitly agree to extend the work day to include the employer's commute.

However, Kobe also said that "an agreement may also be inferred from the fact that the employer compensates the employee for the time consumed in traveling to and from work."

Unlike the laborer in Zenith National, the clerical worker in California Casualty, and the roofers in Kobe, the teacher was neither paid for the extension of his working day nor was he charged for a *pro rata* share of shuttle expenses. The use of the shuttle was neither a part of his compensation, nor the conditions of his employment.

4. Is there a "white collar" exception to the going-and-coming rule?

The teacher often calls and texts work colleagues from the shuttle. But the fact

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that an employee does work at home—or during his or her commute—is irrelevant. (Santa Rosa Junior College v. WCAB (1985) 40 Cal. 3d 345: community college professor was not in the course and scope of employment as he drove home, even though he graded student papers and did other work at home.)

5. Was the provision of the shuttle a "mere gratuity," or a condition of employment?

Humphreys v. San Francisco Area Council, Boy Scouts of America (1943) 22 Cal. 2d 436, 442 held that transportation provided to a fellow employee was not gratuitous, and instead was "an inducement to the employment or was otherwise a part of a business relationship...A benefit would be received if the transportation was within the terms of the employment, or part of the agreed consideration for the work, or was directed by the employer during working hours, or was furnished to facilitate or speed a task the employee was to perform [citations omitted]; but none of these factors is found in the present case…"

In Duff v. Schaefer Ambulance Service, Inc. (1955) 132 Cal. App. 2d 655, 676, the issue was whether work-

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ers compensation "would be present if the trip served to accomplish a purpose of, or was of benefit to, the [employer], but that it would be lacking if the motivating influence for the ride was merely the extension of a personal courtesy or an accommodation solely for [plaintiff's] convenience." This was deemed a jury issue.

In Benjamin v. Rutherford, (1956) 146 Cal. App. 2d 561, an employer furnished cars for employees to ride together during a transportation strike. The employer paid for gas, bridge tolls and other expenses, but there was no monetary compensation for the commute. The use of the service was voluntary, and there was no agreement that the employer would furnish transportation. The DCA held that there were triable issues as to whether the provision of transportation was a "business relationship." This is always an issue of fact, not of law.

In Duff v. Schaefer Ambulance Service, Inc. (1955) 132 Cal. App. 2d 655, 676, the court said the rule was whether "the trip served to accomplish a purpose of, or was of benefit to, the [employer], but that it would be lacking if the motivating influence for the ride was merely the extension of a personal courtesy or an accommodation solely for [plaintiff's] convenience." This was deemed a jury issue.

6. Is there a benefit to the employer?

In Fields v. State of California (2012) 209 Cal. App. 4th 1390, a cook was driving her own vehicle to work from a workers' compensation medical appointment. She was not in the course and scope: the trip was not a benefit to the employer. The teacher in our hypothetical was taking advantage of a gratuitous provision of the shuttle service provided a benefit to the employer. But did the employer show that its gratuitous shuttle service created an exception to going-and-coming?

7. Is the teacher circumventing the exclusive remedy doctrine?

The employer is not required to provide the shuttle service. If it wants protection from third-party liability claims from its own employees, it should run the shuttle as an exclusive employee shuttle. It then either compensates or charges the employees for use of the shuttle. (Zenith National Ins. Co. v. WCAB, supra., 66 Cal.2d at page 946: employer paid employees $10 per day "to cover transportation costs and living expenses"; California Casualty Indemnity Exchange v. Industrial Accident Commission, supra., 21 Cal. 2d at page 462: employer purchased an automobile to transport employees to and from work during a transit strike, and those who used it were charged $4 a month.)

The employer is under no legal requirement to provide free shuttle services to non-employees. While it was magnanimous to broaden the scope of ridership to non-employee students, patients, family members of patients and members of the community at large, the shuttle was not just for employees.

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SETTLEMENT

Joshua Edlow, of Dreyer Babich Buccola Wood Campora, LLP, won a settlement of $1.75 million in Chaisson v. Amador County Unified School District, et. al.

On April 2, 2013, Matthew Chaisson fell from a four-foot high landing, missing a handrail on one side that was connected to a mobile office building. The office building stood in a maintenance yard connected to Argonaut High School in Amador County. The school district leased the building from Mobile Mini, Inc.

The fall resulted in a left rotator cuff tear, inguinal and umbilical hernias, and significant neck and back pain. The hernias and rotator cuff tear were surgically repaired within two months of the incident. Plaintiff also underwent an epidural steroid injection in his lumbar spine, as well as radiofrequency ablations in his cervical and lumbar spine.

Despite his extensive treatment, his pain continued. His physicians believed that his pain had become chronic and would preclude him from ever returning to work as a carpenter.

Defense claimed that the absence of a handrail was open and obvious, and it also disputed the injuries. The district had designated Joe Pechette, director of maintenance and operations, as the person most qualified for safety procedures even though he had a general contractor's license, but no knowledge of building codes related to handrails.

He also testified that he worked inside the mobile unit at the time of the incident, and had done so for 10 weeks, but he had never noticed that the handrail was missing. The district also hired Joseph McCoy, M.D., to evaluate the plaintiff. McCoy stated his opinion that Plaintiff was greatly exaggerating his injuries.

Medical bills were $129,962.13, of which $75,306.88 was paid. There was $12,339.11 in balance billing. There was about $200,000 in wage loss at the time of settlement.

The case was set for trial Nov. 3, 2015. The parties stipulated to mediate in lieu of a mandatory settlement conference, and the case resolved for $1.75 million in advance of mediation. The mediator was Nicholas Lowe.

The case was venued in Amador County. Defense counsel was Luther Lewis of Johnson, Schacter and Lewis.

VERDICTS

Glenn Guenard won a verdict of $2.9 million in Schoonover v. Elford.

Defendant Elford was 17 years old and intoxicated when he caused a head-on crash on Roseville Road at 11 p.m. in July, 2012. Elford lived in Citrus Heights, which allowed the case to be filed in Sacramento. Judge Gerrit Wood presided over the trial that trial lasted from Oct. 6-19. There was a total of 8 trial days and 1.5 days for deliberation.

Plaintiff went to Sutter Roseville for 15 days where he had surgeries to repair compound fractures to patella and calcaneous. He will require subtalar fusion in the future. In exchange for Plaintiff waiving future medical expenses of about $15,000, Defendants stipulated to full amount of medical expenses (Plaintiff did not have health insurance).

The jury awarded about 80% of past wage loss and 100% of loss of earning capacity. Since Plaintiff hadn't really worked in past 10 years because of some failed business ventures, the wage loss was based on the fact he had accepted a sales job at a Mercedes dealership and literally was going to start the next day after the accident. He eventually got a job at another dealership a couple years later, making almost the same. But he will have a limp for the rest of his life.

Defense fought hard on the wage loss and brought a witness from Texas to basically say Plaintiff could have been working within a few months with accommodations and would not lose anything in future. Plaintiff's medical experts were two orthopedic surgeons from the ER, doctors Finkemeier and Neiman. Defendant hired Dr. Ghalambour, who was actually a better witness for Plaintiff than Plaintiff's own physicians.

Defense counsel was Raymond Gates and Robert Smith from the Lauria Gates firm. They offered the 100,000 policy limit, but client wanted to pursue the case since Defendants apparently have assets, and the judgment against the driver is not dischargeable through bankruptcy, due to the finding that he was driving under the influence of alcohol.

The jury found Defendant's mother negligently entrusted her vehicle to him: Eight months before, Defendant was caught drinking beer with his buddies in the car (they were not driving). Three months before the subject collision, Defendant was again caught drinking in the car (again not driving) and smoking marijuana. His mother testified she had punished him by taking the car away for six weeks and had imposed other consequences. The jury found this was insufficient.

Defendant's mother filed an indemnity cross-complaint against the person who purchased the beer, and the jury found that person 30% at fault.

USAA was Defendants'insurer.

***

Mark Velez and Kelsey A. Webber won a verdict of $1,188,000 past and future lost wages and $812,000 emotional distress in Anderton v. Bass Underwriters.

Barbara Anderton, a former branch manager at Bass Underwriters, Inc., in its Sacramento office, began working for Bass in 1999, and was instrumental in its initial presence in California. Bass sells high-risk property

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business liability fire and loss insurance.

Several of Plaintiff's children, who had worked at Bass, left to work for Yates, a competitor. On May 14, 2013, Bass' leadership team held a meeting to discuss the future of the Sacramento office, terminating the plaintiff, who said they blamed her for her children's exodus from the company.

During the litigation, Bass's executives maintained that Plaintiff voluntarily quit, also to go to work for Yates. However, on the afternoon they alleged she quit, they promoted Kevin Cullinan, an underwriter (age 30). Cullinan, an honest witness, testified that Plaintiff came out of her office and stated she had been fired. During the Bass CEO's videotaped deposition, he testified that they had investigated Plaintiff's claims with the group involved in the firing.

After being fired, Plaintiff said she did go to work for Yates in order to rebuild her book of business. Bass's leadership then defamed her to Lloyds of London, and told them not to enter into a contract with Yates, because Anderton was responsible for high fire losses in California.

The trial judge was Hon. Shellyanne W.L. Chang. Defendant's offer at the mandatory settlement conference was zero dollars, then raised to $50,000 by way of a CCP section 998 offer. The offer was again raised, this time to $75,000, before trial. Plaintiff opted to proceed with the trial, and won the large verdict.

***

Tim O'Connor recently tried a motor vehicle collision case in conservative San Diego County (Vista courthouse). The case did not go to trial until 3.5 years post-collision, and it went out on the 6th time up for trial. GEICO defended the case by denying any liability, contesting causation, and disputing damages.

Tim served a CCP Section 998 offer for $150,000, and then reduced it to $75,000 when discovery revealed a probable 50/50 comparative fault verdict. Defendant served 998s at $25,000, then $35,000 and finally, $55,000.

One of Tim's major hurdles at trial involved allegedly unreasonably high medical bills (by a factor of at least 50%). The only authority for the value of the bills was an arrogant treating doctor who said he was worth the amount charged. This doctor is in the cross-hairs of several insurance companies in the San Diego area. A major flaw in the treating doctor's opinion, as pointed out by the defense, was that the doctor only provided the actual treatment for about 1/10 of the total billed amount. As a result of Tim's advocacy, the jury gave Plaintiff 100% of the billed amount, apparently rationalizing that the Plaintiff did not determine the amount of the medical specials and should not be held responsible for their payment.

The verdict was $165,000, but was cut in half for 50/50 liability. With CCP section 998 interests and costs, the net judgment was $110,000. One wrinkle: The jury agreed to pay for necessary future medical damages but neglected to award any damages for future pain and suffering. Tim filed a motion for Additur and/or new trial. The motion will be heard in early December. Thank you to Stan Parrish for helping with the description of the case.

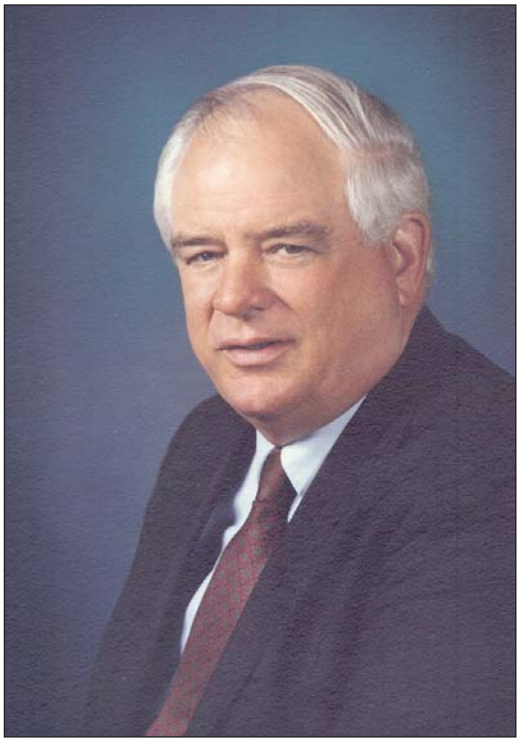
***

CCTLA member **David Foos** prevailed for his client in a case involving a business tort: misappropriation of trade secrets. Foos represented a small businessman whose former employee spun off a company and started soliciting all of the Plaintiff's clients and customers. The defendant also undercut Plaintiff's pricing structure.

Foos reports this was a difficult case because Plaintiff never took stringent measures to protect the confidentiality of his book of business, clients' identities, inventory practices and pricing structures. The jury awarded full past damages of $28,000, but no future damages. The jury concluded that the future loss of business was too speculative.

George Jouganatos was Plaintiff's expert. The jury trial was presided over by the Hon. Richard Sueyoshi.

In memory of a respected friend and colleague



Tom Lytle

CCTLA members were saddened to learn of the recent death of Tom Lytle, a longtime member of the Capitol City Trial Lawyers Association. Several years ago, CCTLA named its educational luncheon seminars the Tom Lytle Luncheons.

Tom graduated from USF Law School in 1961 and began practicing in Sacramento. He joined a law partnership that included Dick Crow, one of CCTLA's founders, and now-retired Judge Lloyd Phillips.

Tom became a partner with several other attorneys in the same law firm, including two others who eventually became judicial officers: Rothwell (Roth) Mason and Robert (Bob) Schleh.

With a great respect for the court system and the law, Tom represented clients who had suffered serious injuries; many of whom were unable to return to their previous jobs. Many of his clients worked on the railroads in California's Central Valley. According to Rick Crow, Tom's clients often knew that he was their only hope, and he would work hard, giving them his best efforts.

"Tom was always a man of many stories," Rick said. "He had a great dry humor. He was calm, with a quick wit. And he continued to have a fantastic memory up until his passing last month."

CCTLA members will miss his emails where he would openly help all of the members who used the CCTLA's List Serve, asking for help and opinions.

His primary passion outside the law was golf. A longtime member of the Valley Hi Country Club, Tom twice was the club champion, the senior champion and its president.

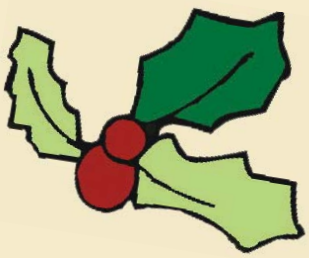
To all members of the
Capitol City
Trial Lawyers Association
& those who make our jobs possible ...

CCTLA and President Dan O'Donnell cordially invite you to attend the Annual Meeting / Holiday Reception and the Installation of the 2016 CCTLA Officers and Board

Thursday, December 3, 2015
5:30 to 7:30 p.m. at The Citizen Hotel
Terrace Room • 7th Floor
926 J Street, Sacramento

The Annual Meeting & Holiday Reception is free to honored guests, CCTLA members and one guest per invitee

Reservations must be made no later than Wednesday, November 25, 2015, by contacting Debbie Keller at 916-917-9744 or by email at debbie@cctla.com



During this holiday season, CCTLA once again is asking its membership to assist The Mustard Seed School for homeless children. CCTLA will again be contributing to Mustard Seed for the holidays, and a representative from Mustard Seed will attend this event to accept donations from the CCTLA membership.

CCTLA thanks you in advance for your support and donations.

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Mike's Cites

Continued from page 2

deviation from 'industry standard' can be shown.

Etelvina was running on a moving treadmill in the 24 Hour Fitness aerobics room. Etelvina fell backwards and sustained severe head injuries when her head hit the exposed foot of a leg exercise machine that was 3-feet, 10 inches behind the treadmill. Etelvina alleged premises liability, general negligence and loss of consortium. 24 Hour answered claiming a liability release and other boiler plate affirmative defenses.

Unfortunately for 24 Hour Fitness, Etelvina did not speak or read English. Nobody at 24 Hour spoke Spanish, and it was clear that Etelvina had no idea that she had signed a release of liability.

Another fact that was developed in the lower court was that the treadmill manufacturer's owner's manual instructed at least a six-foot safety clearance area behind the treadmill (much more than 3 ft., 10 in.).

Defendants nevertheless moved for summary judgment. Etelvina argued that 24 Hour was grossly negligent and the release had been obtained through fraud. The trial court pointed out to Plaintiff's counsel that gross negligence was not specifically alleged in the complaint. Plaintiffs responded, and the Appellate Court agreed, that gross negligence is not a separate cause of action in California. Rosencrans v. Dover Images, Ltd. (2011) 192 Cal.Appl.4th 1072, 1082. 24 Hour argued to the trial court that there could be no evidence of gross negligence because the plaintiff could not remember what happened. 24 Hour also responded to the fraud/misrepresentation argument by stating that "there was no 'affirmative act to deceive.' "

A release is an express assumption of a risk that negates the defendant's duty of care. However, a release cannot absolve a party from liability for gross negligence.

Gross negligence is defined as the want of even scant care or an extreme departure from the ordinary standard of conduct.

The Appellate Court ruled that Plaintiffs created a triable issue of act as to whether the failure to provide the minimum six-foot safety zone constituted an extreme departure from the ordinary standard of conduct.

***

Stacey Chavez v. 24 Hour Fitness USA, Inc.
(2015) DJDAR 7930 (Filed July 8, 2015)

Gross negligence saves the day

Stacey Chavez, plaintiff, was working out on a "FreeMotion" cable crossover exercise machine when a back panel broke loose, struck her in the head, causing traumatic brain injury including lapses of consciousness, severe headaches, photophobia, poor memory, stuttering, dizziness, nausea, changes in her ability to taste, decreased appetite, and personality changes that have interfered with her work, marriage and other relationships.

24 Hour Fitness moved for summary judgment on the grounds that declarations they submitted from equipment maintenance people described reasonable repairs and maintenance of the machine, and Plaintiff signed a general release.

The motion for summary judgment was granted by the trial court, and the Appellate Court reversed and remanded.

"Gross negligence is pleaded by alleging the traditional elements of negligence: duty, breach, causation, and damages. [Citation omitted.] However, to set forth a claim for 'gross negligence' the plaintiff must" also allege conduct by the defendant involving either "want of even scant care" or "an extreme departure from the ordinary standard of conduct." Rosencrans v. Dover Images, Ltd. (2011) 192 Cal.App.4th 1072, 1082; City of Santa Barbara v. Superior Court (2007) 41 Cal.4th 747, 754.

Generally, it is a triable issue of fact, whether there has been such a lack of care as to constitute gross negligence.

The Appellate Court herein therefore found that the maintenance notations without dates showed that no maintenance had been conducted just prior to the incident and therefore the inference of gross negligence was supported.

Furthermore, it could be inferred from the evidence that 24 Hour Fitness

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Mike's Cites

Continued from page 29

failed to perform regular preventive maintenance, which showed "scant care" or "demonstrated passivity and indifference towards results."

The Appellate Court reversed the judgment and instructed the trial court to grant Plaintiffs' request for a continuance to take a key witness' deposition.

***

Antonio Cordova v.
City of Los Angeles
California Supreme Court
(2015) 61 Cal.4th 1099
(Filed Aug. 13, 2015)

To support tort claim against city where negligent third-party actor caused Plaintiff to encounter dangerous condition in public space, Plaintiff need not show dangerous condition caused third party's negligence.

Two cars were driving down a busy Los Angeles boulevard, side by side, in excess of the speed limit. One of the cars veered into the other car's lane, clipping the second car. The car that was hit spun out of control and hit a huge magnolia tree planted in the center median, killing three of the car's four passengers and severely injuring the fourth. A criminal jury convicted the vehicle that veered of vehicular manslaughter without gross negligence.

The Supreme Court reversed summary judgment. Whether a condition of public property creates a substantial risk of injury when used with due care is a separate question from whether the injury was proximately caused by the dangerous condition. A condition of public property may constitute a dangerous condition even though it does not proximately cause injury in a particular case.

Conversely, a condition of public property may proximately cause injury in a particular case even though it is not a dangerous condition within the meaning of the statute.

The trial and appellate courts had ruled it is not enough for the plaintiffs to establish that a dangerous condition of property contributed to the injuries, Plaintiffs must also establish that the condition caused the third-party negligence that precipitated the incident. The Supreme Court ruled that Government Code Section 835 requires a plaintiff to show that the public entities' property was in a dangerous condition at the time of the injury and that the injury was proximately caused by the dangerous condition. Thus, nothing in the statute requires plaintiffs to show that the allegedly dangerous condition also caused the third-party conduct that precipitated the incident.

Attorneys for the city argued that the "there must be something dangerous about the public property that caused the third-party conduct to occur." The Supreme Court opinions do not so state.

Justice Kruger disagreed with the "sky is falling" bleetings by the governmental entities that a plaintiff will prevail whenever they run into a fixed object near a roadway. Justice Kruger pointed out that there are various governmental code immunities that routinely derail plaintiff's cases in favor of the government.

Moreover, the remand by the Supreme Court was for the lower court to decide whether the plaintiffs presented sufficient evidence to create a triable issue as to whether the configuration of the roadway was in fact a dangerous condition. If a jury could not reasonably conclude that the configuration of the roadway created a substantial risk of injury when the roadway was used with due care in a manner in which it was reasonably foreseeable that it would be used, the lower court could again kill the plaintiff's case.

***

Miriam Navarrete v.
Hayley Meyer
(2015) DJDAR 7012
(Filed June 22, 2015)

Passenger may be liable for encouraging driver to race through dips, causing car to go airborne and fatally strike plaintiffs' father.

Defendant Meyer was the front passenger in a vehicle driven by her friend Coleman. Meyer instructed Coleman to drive his car at a high rate of speed onto Skyview Drive where there were dips. Meyer told Coleman to go faster and faster until he was going at a speed of 81 miles per hour. Coleman lost control of his vehicle and hit Plaintiffs' father, killing him. Plaintiffs, heirs of the decedent, sued Coleman and the County of Riverside.

Plaintiffs allege that Meyer willfully interfered with Coleman or the mechanism of the vehicle in such a manner as to affect Coleman's control of the car. Plaintiffs also allege that there were physical features of Skyview Drive that increased the dangers to decedent. Plaintiffs allege that Coleman and Meyer formed an oral/or implied agreement to commit a wrongful act which included driving at an unsafe speed on Skyview Drive, to wit: conspiracy and agreement.

Meyer moved for summary judgment, arguing that she did not affect Coleman's control of the vehicle and that she was not in a conspiracy. The trial court granted summary judgment of the case against Meyer because there was no evidence to suggest that Meyer's act of telling Coleman to drive faster affected Coleman's control over the vehicle.

This appellate court had no problem finding that Meyer aided and abetted Coleman's reckless driving under the Sindell v. Abbott Laboratories (1980) 26 Cal.3d 588 standard of "concert of action" doctrine in that "those who in pursuant of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him."

The court also discussed civil conspiracy, which is not an independent cause of action. The court felt that the evidence raised a triable issue for a jury as to Meyer's co-equal liability on a theory of civil conspiracy.

Lastly, the trial court's granting of the motion for summary judgment was reversed because Plaintiffs alleged violation of Vehicle Code Section 21701 and negligence per se.

The allegations created a question of fact as to whether the actions committed by Meyer caused Coleman to act in the way he did. Meyer knew that going fast on Skyview Drive could cause the car to become airborne, and she directed Coleman to go there and go fast. Arguably, Meyer thus caused Coleman to lose control of the

vehicle in violation of V.C. 21701.

***

S.M., a minor, v. Los Angeles Unified School District
(2015) DJDAR 10620
(Filed Sept. 16, 2015)
OUTRAGEOUS

FACTS: S.M. was a 13-year-old student in the 8th grade at Edison Middle School in the Los Angeles Unified School District. S.M.'s math teacher was Elkis Hermida, who sexually molested S.M. Hermida started with social networking, progressing to hugging and kissing, and ended up having intercourse with S.M. on four occasions. One of S.M.'s friends reported to another teacher that S.M. did not wish to be in such a relationship with Hermida. Hermida was arrested and pled no contest to one count of Penal Code Section 288.

S.M. brought suit against the school district for negligent supervision. The district did not investigate that teacher's allegations against Hermida. Plaintiff's expert on teacher conduct testified that it was an overall lack of concern for the Teacher's Code of Conduct, and facts came out that Hermida (1) hugged female students, and (2) was alone with female students in a locked classroom. These were red flags. Plaintiff offered a board-certified psychologist on the issue of damages who testified that Plaintiff will need counseling later in her life when she encounters issues and that she was brought up to believe in authority and that Hermida abused her as an authority figure.

After a two-week trial, the jury returned a verdict in favor of the district. The DCA reversed.

The mere fact a plaintiff was claiming emotional distress damages does not justify the use of prior sexual conduct. *Evidence Code §1106.* "We cannot agree that the mere initiation of a sexual harassment suit, even with the rather extreme mental and emotional damage Plaintiff claims to have suffered, functions to waive all her privacy interests, exposing her persona to the unfettered mental probing of Defendant's expert." Vinson v. Superior Court (1987) 43 Cal.3d 833, 841. The district's expert, Dr. Katz, testified at his deposition that he could not know how traumatized she was without knowing her prior sexual history.

However, the Appellate Court pointed out that the school stands *in loco parentis* to all of its students, and a child under the age of 14 cannot consent to sex. Thus, there could be no comparative fault. Even if the minor was a willing participant in the sexual conduct because she wanted to please her teacher, she is still a victim. The Appellate Court pointed out what some might think is obvious: The law puts the burden on the adult to avoid a sexual relationship with a child. Since S.M. was under the age of 14, consent is not a defense. The child victim of a crime does not bear any responsibility for the harm she suffers from the crime.

The trial court also gave a superseding cause instruction, CACI #433, that the district was not responsible for Plaintiff's harm if the district proved that the criminal conduct of Hermida happened after the conduct of the district.

The DCA ruled that when a defendant's liability is based upon his or her exposure of the plaintiff to an unreasonable risk of harm from the actions of others, the occurrence of a type of conduct against which the defendant had a duty to protect the plaintiff cannot properly constitute a superseding cause that completely released the defendant of any responsibility for the plaintiff's injuries. Lugtu v. California Highway Patrol (2001) 26 Cal.4th 703, 725.

Defense verdict for the district was reversed. Case remanded back to the trial court so S.M. can go through another two-week trial.

***

The Regents of the University of California (UCLA) v. Superior Court of LA County
Katherine Rosen, Real Party in Interest
(2015) DJDAR 11195 (Oct. 7, 2015)

A University has no duty to prevent attacks by students on students, therefore there is liability.

FACTS: Rosen, a student at UCLA, suffered severe injuries from a knife after being attacked by another student, Thompson, during a chemistry laboratory.

ISSUES: Rosen filed a tort action against Thompson, the regents of the University of California and several UCLA employees. UCLA filed a motion for summary judgment arguing that colleges and universities in the State of California do not have a legal duty to protect their adult students from criminal conduct perpetrated by other students.

Secondarily, UCLA argued that even if it did have a legal duty to protect its student from foreseeable criminal conduct, the undisputed evidence demonstrated that university personnel had acted appropriately in addressing the potential threat that Thompson posed to the campus community. UCLA submitted experts' declarations for that second argument.

The trial court denied summary judgment, concluding that UCLA had a duty to warn Rosen or take reasonable steps to prevent the threat Thompson posed to her. The trial court found that a "special relationship" existed between the parties based on Rosen's status as a student.

UCLA filed a writ of mandate seeking an order directing respondent superior court to enter summary judgment in its favor, and this court, the Second Appellate District, Division 7, granted the writ.

HOLDING: This appellate court concluded that UCLA did not owe a legal duty to protect Rosen from third-party criminal conduct because she was a university student. Crow v. State of California (1990) 222 Cal.App.3d 192. See also Tanya H. v. Regents of the University of California (1991) 228 Cal.App.3d 434.

The appellate court also cited an intramural soccer game case, Ochoa v. California State University (1999) 72 Cal. App.4th 1300 for the proposition that colleges have abandoned the *in loco parentis* theory of supervision of adult students and therefore there is no general duty of care to supervise student activities.

Presiding Justice Perluss wrote a dissenting opinion: While previous case law held that the university did not have a general duty of care to students, the Supreme Court recognized that a special relationship could arise.

Given the Supreme Court's recent distinguishing of Zelig in a recent motion for summary judgment case, it is hoped that the California Supreme Court will take up this case and give Rosen her day in court.

Are your client's medical records accurate?

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

CCTLA Calendar of Events

November

Thursday, November 19
CCTLA Problem Solving Clinic
Topic: "Direct Examination"
Speakers: John Demas, Travis Black & Rob Piering
5:30-7:30 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only - $25

Friday, November 20
CCTLA Luncheon
Topic: "Bad Faith Cases: The Ups and Downs of Litigating Against Insurers"
Speaker: Brian S. Kabateck, Esq.
Firehouse Restaurant, Noon
CCTLA Members - $30

December

Thursday, December 3
CCTLA Annual Meeting & Holiday Reception
The Citizen Hotel - 5:30 to 7:30 p.m.

Tuesday, December 8
Q&A Luncheon
Shanghai Garden, Noon
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

January

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

Thursday, January 14
CCTLA Seminar
Topic: "What's New in Tort & Trial: 2015 in Review"
Speakers: TBA
6 to 9:30 p.m. Capitol Plaza Holiday Inn
CCTLA Member - $150
Nonmember - $175

Friday, January 29
CCTLA Luncheon
Topic: TBA
Speaker: TBA
Firehouse Restaurant, Noon
CCTLA Members - $30

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 COMPREHENSIVE MENTORING PROGRAM

The CCTLA board has developed a program to assist new attorneys with their cases. If you would like to learn more about this program or if you have a question with regard to one of your cases, please contact Jack Vetter at jvetter@vetterlawoffice.com / Linda Dankman at dankmanlaw@yahoo.com / Glenn Guenard at gguenard@gblegal.com / Chris Whelan at Chris@WhelanLawOffices.com