Winter 2019

The LITIGATOR

Volume XV Official Publication of the Capitol City Trial Lawyers Association Issue 4

Inside

Education is at the heart of CCTLA

Robert Piering
CCTLA President

Being at the helm of CCTLA this past year has been exceptional experience. I've been able to work closely with a board of directors that consist sof some of the finest lawyers in Sacramento, all working to meet the vision of CCTLA to educate and advance the development of its members. Individually and through its many committees, the board has worked tirelessly to ensure that our members receive the best in continuing education, while at the same time making sure that we serve and advance the social and geographic community that we call home.

Education is at the heart of the CCTLA, and for more than 50 years, we have been the voice of and for Sacramento trial attorneys. From our inception to the present, we've grown into an effective guild of trial advocates who serve our members as liaisons to the courts and the legislature. We are providers of meaningful continuing legal education, and as a network of lawyers who freely exchange of ideas and experiences, we constantly push our profession to higher and higher levels of performance.

In this year, we have provided countless programs, luncheons and seminars all dedicated to enriching the legal education of our more than 470 local and regional members. In that vein, we partnered again with our statewide organization, the Consumer Attorneys of California (CAOC), to provide the Sonoma Travel Seminar. The seminar was held at the world-renowned Sonoma Valley at the Fairmont Mission Inn & Spa and featured a packed schedule of legal education from some of California's finest trial lawyers. Rules of the road, the day-to-day workings of case files, and countless strategical nuggets were shared with the numerous attendees.

In addition to our commitment to education, we also shot far above the crowd in our growing effort to support our community. On June 13, CCTLA, its members and distinguished guests gathered for the 17th annual Spring Fling and Silent Auction to benefit the Sacramento Food Bank & Family Services (SFBFS). With the generous support from our membership and many notable donors, we raised a record $132,688.00 for the Sacramento Food Bank & Family Services. In addition to the Spring Fling, CCTLA has also donated, sponsored or supported countless other local events, including Stand Up Against Bullying, Rags to Riches, Mustard Seed, Justice Day, SCBA Bench/Bar Reception, McGeorge Advocacy Awards, Wiley Manual Bar and the Unity Bar.

Events such the travel seminars, programs and luncheons demand countless hours

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As many of you know, CCTLA is constantly trying to advance the rights of everyone in our community. Towards that end, CCTLA President Rob Piering (above) recently addressed student representatives from the Elk Grove, Natomas, Sacramento City, and San Juan unified school districts at the California Museum Unity Center during the seventh annual bullying prevention rally. The theme was "Stand Up, Speak Out Against Bullying." More than 120 participated in small-group tours at activity stations and interactive sponsor tables with fun prizes. Later, everyone assembled for a rally in the California Museum's inspiring courtyard. The collaborative anti-bullying efforts by districts throughout Sacramento County encourage kindness and promote anti-bullying messages. CCTLA proudly supports this noble and important goal of helping students feel safe, supported and encouraged at school.

CCTLA to support Mustard Seed playground project at annual meeting and reception

CCTLA again will be supporting Mustard Seed School (MSS) at this year's Annual Meeting & Holiday Reception, to be held Dec. 5 at the Citizen Hotel. This year, CCTLA is increasing its donation from $1,000 to $2,000, to assist with a new MSS project: the building of a welcoming outdoor play area and education space behind the classroom cottages at the school.

CCTLA Executive Director Debbie Frayne Keller said the annual event is open to members and invited guests, and individual contributions to MSS at the event are always welcome. For event information, see page 15 of this issue.

Mustard Seed School believes that a child in distress cannot be expected to focus on schoolwork. But where can a child experiencing homelessness be expected to relax and calm down? Students who live in motels play in tiny cramped rooms or parking lots. Those who sleep in cars or tents play on the side of the road or remain hidden in the woods.

This is where Mustard Seed comes in. MSS is a free private school for homeless children age three to 15. The structured academic program, personal attention and supportive family services give children a chance to escape briefly from the stress and instability of homelessness. MSS offers a safe, supportive space where students can exercise, interact with their peers, explore their creative minds—and, most importantly, set aside the chaos and uncertainty that homelessness forces on them.

The new outdoor play and education space will feature modern, colorful play equipment to support motor development, with creative play suitable for all student ages. Outdoor classrooms and a stage will allow for talent shows, theater productions, special assemblies and school celebrations. A quiet tranquility garden will give students a place to calm down and reconnect with themselves.

Kala Haley-Clark, MMS's development director, said CCTLA's donations to MSS "contribute to broader education, better play and brighter hopes. Your gift to our outdoor learning and play project helps our community's most vulnerable children by giving them the space to express themselves and to regroup when stresses overwhelm them."

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Executive Director: Debbie L. Frayne Keller
PO Box 22403 • Sacramento, CA 95822-0403
916 / 917-9744 • Debbie@cctla.com • Website: www.cctla.com

Editor, *The Litigator*: Jill Telfer: jtelfer@telferlaw.com

LIENS: Inquire Early in Order to Avoid Disaster Later

By: Martha A. Taylor, CCTLA Board Member

Liens in personal injury cases can be the bane of existence for a plaintiff's attorney. One can find themselves in that situation where they have obtained a great recovery for the client, only to be bogged down in unforeseen lien issues at the end of the case. Or even worse yet, have a lien issue arise after the case has settled and maybe even been disbursed. However, with some basic understanding of lien laws, early inquiry and action, most pitfalls can be avoided.

Although liens (and the cases and statutes that control them) can be a complex and confusing area of law, early identification of potential lien holders and contact with them can help you avoid disaster. Knowing the lien holders at the outset of a case, their reduction obligations and/or establishing an agreement with them from the beginning can go a long way in preventing delays in resolution. It can also help avoid any claims of ethical violations/malpractice or exposure to litigation with the lien holder.

When a potential client reaches out to your office with a case, one of the very first things you must do is to inquire about their medical insurance. Simply put... WHO PAID THE MEDICAL BILLS? Up front you need to know who the client's insurance carrier is and through what source that insurance was obtained (their employer, spouse's employer, government agency, etc.). This will allow you to identify who paid the potential client's medical bills and thus what liens may be lurking out there.

As we are all aware, liens can have a major impact on a case. A potential lien can affect the entire process—it can be an impairment to settlement, it can affect the client's bottom line and even determine if it makes sense to pursue litigation at all. Knowing what potential liens are out there will allow you to make an educated decision up front if you wish to become involved in a case.

Many of you know Dan Wilcoxen, senior partner at my firm and all-around lien guru. Dan is known in the Sacramento area as the "Go-To-Guy" regarding liens. At least once a year he gives a well-attended lien seminar aimed at helping his fellow attorneys in the plaintiff's bar understand lien claims and reduction schemes. We have all heard Dan's advice to "find out about the liens upfront."

Despite Dan's efforts, there are still attorneys among us who are waiting until the last minute to consider lien issues. Worse yet, there are attorneys out there being blindsided when an unexpected lien claimant comes out of the woodwork at the end of a case or after it has settled.

As plaintiff's lawyers, we must avoid this pitfall at all costs! The time to consider lien issues is at the outset of the case. Waiting until mediation, settlement or later to analyze lien issues is TOO LATE. Waiting until the end of the case will seriously impact your ability to negotiate a reduction and thus obtain the most favorable result for your client.

I think many plaintiff's attorneys avoid early consideration of liens because they view them as complicated. However, there are great resources out there that we can all turn to in evaluating liens and figuring out reduction schemes. The first is the various seminars given each year, as noted above. These seminars take the guesswork out of liens and provide you with up-to-date information on what you need to know. The second is the CCTLA List Serve where your Sacramento peers are always willing to answer your questions, assist you, or point you in the right direction.

Do yourself and your clients a favor—find out about the liens up front. This will save you time, money and a great deal of stress.

President's Message

Continued from page one

of planning and painstaking details, and just as I have been dependent upon the support of our board of directors, none of what we do would be possible without our executive director, Debbie Keller. In case you don't know, Debbie has held her position continuously for 39 years, and if you do not know her by name, everyone knows her by her cheerful demeanor and welcoming smile. Debbie's work and support makes everything that we do seamless. Speaking for our entire board and membership, I can assure you that CCTLA would not run as smoothly, or as successfully, without her enthusiastic efforts. She is the backbone of all that we do.

Our final event of the year is the Annual Meeting and Holiday Reception, to be held Dec. 5 at the Citizen Hotel. We will not only be celebrating the holidays and the installation of our new officers and board members, we will also be announcing the Advocate and Judge of the Year recipients.

So, now as we pier into our future, I want to thank you one and all for allowing me to be your president this past year. It has truly been an honor to work with my fellow board members and with the membership as a whole. The future of CCTLA is bright, and it will continue to shine brighrt within the able hands of our incoming president, Joe Weinberger.

Addressing *Lomeli v. DHCS*

California's Second District Court of Appeal has attempted to overrule the United States Supreme Court and ignore Welfare & Institutions Code Section 14124.76

By Daniel E. Wilcoxen, CCTLA Board Member

The case of *Ethan Lomeli, Plaintiff v. The Department of Health Care Services,* 36 Cal.App.5th 817 was decided on June 25, 2019, by the Second Appellate District, Division 8, by unanimous opinion from judges Wylie, Bigelow and Grimes.

The case arises out of a severe brain damage injury to Ethan Lomeli, as a result of alleged medical negligence at the time of his birth. Medi-Cal paid $367,646.60 between Jan. 24, 2014 and July 13, 2016. Steven B. Stevens of Los Angeles is well versed in Medi-Cal lien law and was successful in both *Lima v. Vouis* (2009) 174 Cal.App.4th 242 and *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744. He has on numerous occasions taught the subject of Medi-Cal and other liens and was the attorney representing the plaintiff in an attempt to reduce the Medi-Cal lien.

The outcome of the case seems bizarre at best in that the Second District ignored the holding of the United States Supreme Court in *Arkansas Department of Health and Human Services v. Ahlborn* (2006) 547 U.S. 268, interpreting federal Medicaid law and the statutory scheme of Welfare & Institutions Code Section 14124.76, which adopted by name the *Ahlborn* case; it also ignored the Second District, Division 8 case of *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, as well as the decisions in *Lima v. Vouis* (2009) 174 Cal.App.4th 242 and *Lopez v. Daimler Chrysler Corp.* (2009) 179 Cal. App.4th 1373. Both *Lima* and *Lopez* arose from motions to reduce Medi-Cal liens in early 2007 and were both on appeal at the same time. The Second District and Third District courts came to the same opinion, at the same time, without the benefit of knowing about the other.

Instead, the *Lomeli* court applied Welfare & Institutions Code Section 14124.72, with its 25% and pro-rata share of costs reduction, as a "common sense reality based methodology."

I tried to make sense out of the opinion, attempting to determine how they could overrule concepts established by a unanimous United States Supreme Court in 2006 interpreting Medicaid law. A law which was adopted by Welfare & Institutions Code Section 14124.76, enacted in 2007, specifically citing that our courts should follow *Ahlborn* and other similar law related to reducing Medi-Cal liens. W&I Section 14124.76 was amended to add that language on August 24, 2007, stating in pertinent part:

> In determining what portion of a settlement, judgment or award represents payment for medical expenses, or medical care, provided on behalf of the beneficiary and as to what the appropriate reimbursement amount to the director should be, the court shall be guided by the United States Supreme Court decision in *Arkansas Department of Health and Human Services v. Ahlborn* (2006) 547 U.S. 268, and other relevant statutory and case law.

Possible reasons for the Second District Division 8 changing its own prior opinion

It it is very confusing that the same court would come to a completely different result in *Lomeli* than it did in *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, which followed the *Ahlborn* case and reduced a Medi-Cal lien dramatically.

In *Lomeli*, the court seemed to conclude that the plaintiff changed his approach from the position argued in *Bolanos* to an argument that no liens apply at all. The court said, instead of the argument presented in *Bolanos*, in *Lomeli* the plaintiff argued that Welfare & Institutions Code Section 14124.72 violates the Supremacy Clause of the United States Constitution for cases involving benefits paid before October 1, 2017. In the *Lomeli* opinion, the court stated:

> *Lomeli's* argument relies solely on an analysis from the dissent in *Tristani ex rel. Karnes v. Richmond* (Third Circuit 2011) 652 F.3d 360, 379-387 (Tristani).

In *Tristani*, the majority opinion stated federal law does not prohibit liens such as the one in *Lomeli*. In *Lomeli*, the court went on to state:

> To effectuate Congress' goal in enacting the federal Medicaid program, the Tristani majority interpreted federal statutes as containing implied exceptions to provisions that would otherwise seem to bar the liens.

(See *Tristani, supra*, 652 F.3d at p. 370.)

I think it is possible that the court concentrated on the argument that federal statutes seem to state no liens are allowed, when historically liens have been allowed. Therefore the court went off on a tangent which seems to ignore the past cases allowing reductions, including the United States Supreme Court case of *Ahlborn*, and the state court cases of *Bolanos, Lima* and *Lopez*. Instead, in *Lomeli*, the court merely applied Welfare & Institutions Code Section 14124.72, ignoring the application of Welfare & Institutions Code Section 14124.76. Under section IV of the opinion, the *Lomeli* court stated:

> The trial court's lien calculation of $267,159.60 was correct. We independently review the court's approach to the lien calculation, which was proper as a matter of law. Substantial evidence supports the application of this approach in this case.
>
> We first explain the trial court's method which one can call a reality based approach.
>
> Here is what the court did. The trial court adopted the Department's approach. This approach was based in reality because it focused on Lomeli's actual medical costs. ... The costs total $367,646.60. The Department then reduced this gross total of $367,646.60 by 25 percent

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to account for a reasonable share of Lomeli's attorney's fee. A statute requires this 25 percent reduction. (§ 14124.72, subd. (d).) The Department further subtracted $8,575.35 to account for its share of Lomeli's total litigation costs of $93,300. This further reduction was also according to statute. ...

This reality-based approach yielded a lien sum of $267,159.60 ($367,646.00 - $91,991.65 - $8,575.35 = $267,159.60). ...

This approach is legally valid and was grounded in verified facts about this case. The law requires nothing more.

Lomeli's attack on this approach is in error. Lomeli cites five cases to contest this approach, but to no avail. This case differs because here the department did present solid evidence to support its reality based approach.

(*Lomeli*, at 822.)[1]

However, the *Lomeli* court states: "This case differs because here the department did present solid evidence to support its reality based approach."

The court's statement that the DHCS presented solid evidence is present in every case where the *Ahlborn* and W&I Section14124.76 approach is used; there is always proof of exactly what the medical expenses were. As such, the problem with the court's reasoning is simply that the total lien will always represent the amount of medical expenses paid by DHCS. What the court failed to consider was the *value of the other recoveries for pain and suffering, future medicals, and lost wages.* Those are the items that must be considered and compared to the actual recovery and what those values would have been had the case proceeded to trial (in a special verdict form in which those damages must be set forth). *Lomeli* further states:

> Lomeli critiques the trial court order in another way. As an alternative to the *reality-based approach*, Lomeli proposes what can be called a "best-case scenario" approach. ... Reduce the department's lien by hypothesizing Lomeli's best-case scenario for his tort suit. Using this hypothetical best-case scenario, creates the following fraction:
>
> (Amount of actual settlement)
> divided by
> (Hypothetical best-case scenario).
>
> Then multiply the Department's medical costs expenditures by this fraction to calculate the Department's lien.

(*Lomeli*, at 824.)

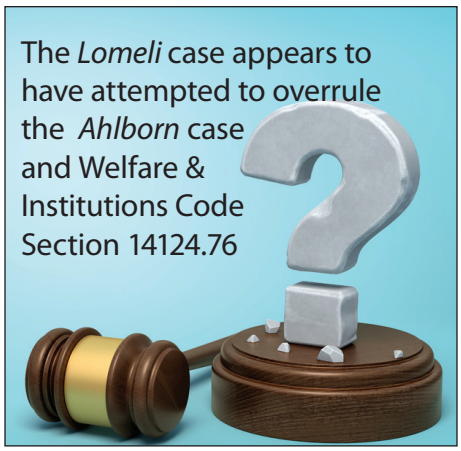
However, this "best-case" scenario is exactly what Welfare and Institutions Code Section 14124.76 and the *Ahlborn* case require.

The court goes on to state:

> In this case, Lomeli says his best-case scenario would be a recovery of $18.9 million.
>
> First, this approach is based on a hypothetical number rather than an actual number. Lomeli's $18.9 million number has not been tested by stipulation or by trial. The number is Lomeli's alone. His $18.9 million is a hypothesis that assumes (1) the odds Lomeli can prove liability are 100 percent and (2) the fact finder would award Lomeli every dollar of damages Lomeli has conceived and requested. These assumptions are unreal. If Lomeli's lawyers had believed them, they would not have settled an $18.9 million sure thing for $4 million.

(Id., at 825.)

The court goes on to make statements that experts will say anything they are paid to say. So, the *Lomeli* case appears to have attempted to overrule the *Ahlborn* case and Welfare & Institutions Code Section 14124.76. It has basically said, take the amount of the settlement, which is the maximum value of the case (regardless of policy limits, regardless of liability aspects of the case, and regardless of the equities) and use what was recovered as the reasonable value of the case regardless of those other limitations that have always interfered with the recovery values in all of the cases that have decided this issue, i.e., *Ahlborn, Bolanos, Lima, Lopez*, and use only W&I Section 14124.72 as the reality based approach.



What do we do? There are various quotes in the *Lomeli* case, such as: "There was no stipulation in this case"; "the trial court did not err by preferring a reality-based approach over Lomeli's best-case scenario proposal"; "experts testified elaborately but baselessly that damages exceeded one billion dollars." (Citing *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747.)

Thus, it appears the most appropriate way to get around this case is: (1) Don't be in the Second District; 2) Make a stipulation with the defendants as to value of the case; 3) Point out the policy limits were limited; 4) Point out the liability aspects of the case that reduce the value; 5) If you are in a mediation and the defense wants to settle the case, get them to stipulate to binding arbitration and have the arbitrator make awards of each classification of damages, i.e., past meds, future meds, lost wages and pain and suffering, to verify what the actual recovery for each classification of damages was, including the reasonable value of the meds in appropriate relationship to the pain and suffering, future meds and lost wages.

With any luck, this case will be overturned by the California Supreme Court (a petition for review has been filed by Steven Stevens) but, until that time, be advised that on Wednesday, July 10, 2019, I spoke to a California assistant attorney general who was bragging about the *Lomeli* case, suggesting that DHCS was delighted with the opinion and will use it in every opposition to a W&I Section 14124.76 motion.

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[1]The five cases identified in the quote are those cited above, *Ahlborn, Bolanos, Lima, Lopez* and *Aguilera v. Loma Linda University Medical Center* (2015) 235 Cal.App.4th 821, 826.

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Daniel E. Wilcoxen, with Wilcoxen Callaham, LLP, in Sacramento, is a pioneer in the area of lien law and has had much success in getting liens waived and reduced. www.wilcoxenlaw.com.

Proposed Rule Changes: Raising or lowering the bar?

By Dan Schneiderman

This article is Part One of an anticipated two-part series following the proposed rule changes offered by the State Bar of California's Board of Trustees.

Since its inception, the State Bar of California (the "State Bar") has maintained a consistent purpose of protecting the integrity of the licensed practice of law. This purpose is codified at the very beginning of the California Rules of Professional Conduct. Rule 1.0, titled "Purpose and Function of the Rules of Professional Conduct," states:

> "The following rules are intended to regulate professional conduct of lawyers through discipline. They have been adopted by the Board of Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 ***to protect the public, the courts, and the legal profession; protect the integrity of the legal system; and promote the administration of justice and confidence in the legal profession.***"

For the first time, the State Bar may be changing this purpose, under the premise of providing improved access to justice and adoption of technological innovations in the legal field.

INVOLVED PARTIES AND RELEVANT STATISTICS

The California State Bar

The State Bar of California (the "State Bar") was created on July 29, 1927, following passage of the State Bar Act. The State Bar of California is the largest state bar in the United States, with approximately 170,000 active members as of May 2018.[1] It is headquartered in San Francisco and maintains branch offices in Sacramento and Los Angeles.

The State Bar Board of Trustees

The State Bar Board of Trustees (the "Board") develops the guiding policies and principles underpinning its regulatory mission for the State Bar of California. Prior to 1975, only attorneys could be appointed to the Board. This changed after the enactment of Section 6013.5 of the California Business and Professions Code, which, in its current form, allows the governor, Senate Committee on Rules, and Speaker of the Assembly to appoint six total board members.

The current full 13-member board is comprised of:

- Five attorneys appointed by the California Supreme Court, who will serve four year terms;
- Two attorneys appointed by the Legislature, one by the Senate Committee on Rules and one by the Speaker of the Assembly; and,
- Six "public" or non-attorney members, four appointed by the Governor, one by the Senate Committee on Rules and one by the Speaker of the Assembly.

The board roster, as it exists now, includes Jason P. Lee (Supreme Court appointee), Alan Steinbrecher (Supreme Court appointee), Mark Broughton (Supreme Court appointee), Hailyn Chen (Supreme Court appointee), Juan De La Cruz (Assembly appointee, public member), Sonia T. Delen (Governor appointee, public member), Ruben Duran (Assembly appointee), Renée LaBran (Governor

appointee, public member), Debbie Y. Manning (Senate appointee, public member), Joanna Mendoza (Elected member), Joshua Perttula (Senate appointee), Sean M. SeLegue (Elected member), and Brandon N. Stallings (Supreme Court appointee).

The board meets approximately 12 times a year, alternating between the State Bar's San Francisco and Los Angeles offices and via teleconferences. Meetings are open to the public except for closed sessions that are allowed by law.[2]

California: By the Numbers

California is the most populous state in the nation. As of July 1, 2018, California's total population is approximately 39.8 million.[3] This includes almost 30 million adults.[4]

The ratio of attorneys to California residents is approximately 1:235. The ratio of attorneys to California adults is approximately 1:175.

Other Jurisdictions

Every jurisdiction has a rule against the unauthorized practice of law, prohibiting certain conduct by both non-lawyers and lawyers who are admitted to other bars. This is true but for one exception, the Bar of the District of Columbia.

HISTORY OF THE PROPOSED RULE CHANGES

On July 11, 2019, Justice Lee Edmon, chair of the Task Force on Access Through Innovation of Legal, and Randall Difuntorum, the program manager of the Office of Professional Competence, issued an "Open Session Agenda Item" to members of the State Bar and the board.[5] This agenda Item followed an initial planning session that took place in January 2018, in which the board discussed and directed "the study of online legal service delivery models to determine if regulatory changes are needed to support or regulate access through the use of technology."[6] The purpose of this study was to help the board pursue "Goal 4" of the State Bar's 2017-2022 strategic plan, "[s]upport access to justice for all California residents and improvements to the state's justice system.

As a result of this planning session, the State Bar contracted with Professor William D. Henderson, a professor on staff at the Indiana University Maurer School of Law, "to conduct a landscape analysis of the current state of the legal services market, including new technologies and business models used in the delivery of legal services, with a special focus on enhancing access to justice."[7]

The results of Professor Henderson's study, identified as the "Legal Market Landscape Report" (the "Report") were published to the board on or before July 19, 2018.[8] Based on the Report, the board "authorized the formation of a Task Force to analyze the landscape report and conduct a study of possible regulatory reforms, including but not limited to the online delivery of legal services, that balance the State Bar's dual goals of public protection and increased access to justice."[9]

The Task Force was formally named the "Task Force on Access Through Innovation of Legal Services" ("ATILS"). The ATILS consisted of 23 members, "a majority of which are non-attorneys."[10] This included 11 public members, 10 lawyers and two judges.[11]

As to the composition of the ATILS, the ATILS Task Force Fact Sheet provided by the California State Bar stated, "A non-attorney majority helps ensure that the recommendations of the Task Force are focused on protecting the interests of the public."[12]

After five general meetings and three subcommittee meetings, the ATILS provided the Board with "The Complete List of Tentative recommendations" (the "Recommendations") on July 2, 2019.[13]

ATILS' RECOMMENDATIONS[14]

The Recommendations provided by the ATILS are not limited to "non-profit" entities.[15] As stated by the ATILS, "the [proposed] models . . . would include individuals and entities working for profit and would not be limited to not for profits.[16] With that in mind, the ATILS proposed, in part, the following changes to the California Rules of Professional Conduct:

2.0 - Nonlawyers will be authorized to provide specified legal advice and services as an exemption to UPL with appropriate regulation.

2.1 - Entities that provide legal or law-related services can be composed of lawyers, nonlawyers or a combination of the two, however, regulation would be required and may differ depending on the structure of the entity.

2.2 - Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/approved entities to use technology-driven legal services delivery systems to engage in authorized practice of law activities.

3.1 - Adoption of a proposed amended rule 5.4 [Alternative 1] "Financial and Similar Arrangements with Nonlawyers" which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1 amendments would:

> (1) expand the existing exception for fee sharing with a nonlawyer that allows a lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and
> (2) add a new exception that a lawyer may be a part of a firm in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm's sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.

3.2 - Adoption of a proposed amended rule 5.4 [Alternative 2] "Financial and Similar Arrangements with Nonlawyers" which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike the narrower Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer's fee sharing arrangement with a nonlawyer.[17]

In short, the recommendations, if imposed, would allow the unlicensed practice of law and fee splitting with nonlawyers. The ATLIS recommended these changes stating, "Task Force believes that individuals in the middle class have access to justice concerns that could be addressed by the activities of a new form of for-profit provider. The success of online businesses, such as LegalZoom, provides anecdotal support for this proposition. Furthermore, to the extent for profit entities may already be engaging in these types of practices, providing regulatory parameters will improve public protection

and the administration of justice."[18]

The ATLIS also noted that changing the fee-splitting and profit framework is "intended to facilitate the ability of lawyers to enter into financial and professional relationships with non-lawyers who work in designing and implementing cutting-edge legal technology," and "that by expanding the kinds of situations under which nonlawyers can share in the profits and ownership of entities that deliver legal services," the deterrent to "the adoption of technology will be removed and the concomitant practice efficiency enhancements will increase access to legal services."[19]

As to potential "Cons," ATLIS acknowledged the following, in part:

• The recommendations would mark a fundamental change in the ability of corporations to practice law in contrast to certain nonprofits that are currently authorized to practice law in California.[20]

• Absent a thoughtful or directed regulatory framework, it is not clear that legal technology innovations developed in the for-profit sector would have a significant benefit to those impacted most by the justice gap.[21]

• Defining the permissible scope of practice for legal services delivered by nonlawyers may be challenging and could also lead to overregulation.[22]

• Critical aspects of public protection, including the maintenance of client confidentiality and the avoidance of conflicts may be compromised.[23]

• The regulatory scheme required to monitor unlicensed participants may stifle innovation.[24]

• There is no mechanism for regulating nonlawyers because it does not provide the incentives as in rule 5.1 and 5.3 for lawyers to supervise the conduct of nonlawyers.[25]

• There is little or no concrete evidence that this proposal would increase access to justice.[26]

• Any development of a new rule based on Model Rule 5.7 might present a challenge in codifying or changing the public protection presently found in California case law. In this area of attorney conduct, a one-size-fits-all rule might not afford adequate public protection.[27]

NEXT STEPS

Following the July 11, 2019 Board Meeting, the board authorized a "60-day public comment period and a public hearing on the tentative recommendations" of the ATILS.[28] The board further noted that this "authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed changes."[29] Following the 60-day public comment period, the board will convene to formally approve of the proposed rule changes.

If the recommendations are authorized by the board after the 60-day public comment period, they will then be submitted to the California Supreme Court for final approval.

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[1] https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new_aba_data_reveals/
[2] http://www.calbar.ca.gov/About-Us/Who-We-Are/Board-of-Trustees
[3] California's Population Increases by 215,000, Continuing State's Moderate Growth Rate," Released by the Department of Finance, December 21, 2018.
[4] https://www.census.gov/quickfacts/fact/table/CA/AGE295218#AGE295218
[5] July 11, 2019 Agenda Item
[6] July 18, 2018 Agenda Item, p. 1
[7] July 18, 2018 Agenda Item, p. 1
[8] July 18, 2018 Agenda Item. See also July 11, 2019 Agenda Item [identifying Prof. Henderson's report as the "Legal Market Landscape Report].)
[9] July 18, 2018 Agenda Item, p. 3
[10] ATILS Task Force Fact Sheet, p. 2
[11] July 11, 2019 Agenda Item
[12] ATILS Task Force Fact Sheet, p. 2
[13] The Complete List of Tentative Recommendations, dated July 2, 2019. Note that the Board also considered ATLIS memorandums provided on January 9, 2019, January 17, 2019, February 25, 2019, two on June 18, 2019, and two on July 1, 2019.
[14] For a complete list of the recommendations and commentary, the writer recommends that the reader review the July 11, 2019 Agenda Item pages 5-7.
[15] July 11, 2019 Agenda Item, p. 5
[16] See Id.
[17] See Id. at p. 6-7
[18] See Id. at p. 20
[19] See Id. at p. 20
[20] See Id. at p. 9
[21] See Id.
[22] See Id.
[23] See Id. at p. 13
[24] See Id. at p. 15
[25] See Id. at p. 23
[26] See Id. at p. 23
[27] See Id. at p. 24
[28] See Id. at p. 26
[29] See Id. at p. 26

You won't want to miss CCTLA's Annual Meeting and Holiday Reception Dec. 5, 2019

See page 15

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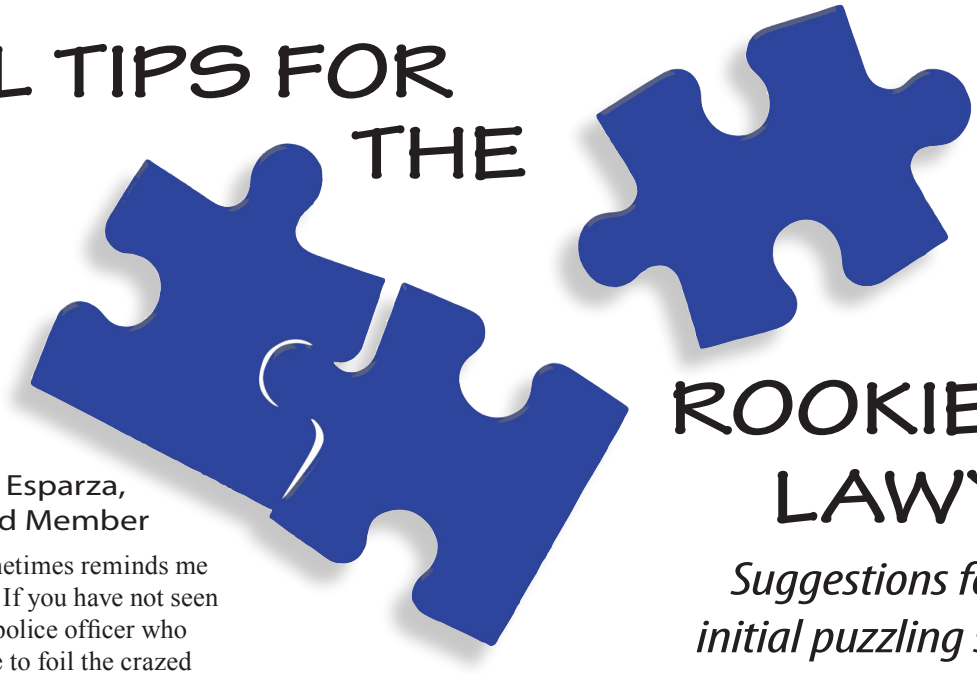
TRIAL TIPS FOR THE ROOKIE LAWYER



Suggestions for those initial puzzling situations

By: Noemi Esparza,
CCTLA Board Member

Being in trial sometimes reminds me of the movie "Speed." If you have not seen the movie, imagine a police officer who must race against time to foil the crazed plan of an insane bomber/extortionist. As part of training, the officers are given a fact pattern and then asked, "WHAT DO YOU DO?!"

Now, our work is not that dramatic and intense, but it can sure feel like a pressure cooker at times. You are presented with unanticipated situations that you need to respond to immediately. The less experienced you are, the more difficult it is to know what to do when you are under pressure. Thus, for younger lawyers, here are a few situations you may confront trying your first personal-injury case and potential solutions.

Scenario 1: *You have a small-damages case for which you could not afford to hire a medical expert, and you never anticipated the case would go to trial. Nevertheless, the defense left you no choice but to proceed to trial. Your client is a Kaiser patient whose physicians have been advised by Kaiser legal counsel not to provide any opinions. This is the only medical doctor you have. Your other witnesses include a physical therapist and a chiropractor. You are now at trial with only these medical witnesses. What do you do?*

• Put all of the treating care providers on the stand. Your medical provider may not provide opinions, but you can examine her as to all the complaints by your client and the medical care she provided. Use the other healthcare providers to establish causation and prognosis. While the defense will try to discredit them because they do not have a medical degree, jurors may not hesitate to rely on your chiropractor's opinion.

After all, many folks these days believe and rely on alternative forms of treatment such as chiropractic care. Not ideal, but if you are caught in this difficult situation, as I was, you make the best with what you have. In my trial, I was successful using this approach in this frustrating situation.

Scenario 2: *You are in the middle of your case with an unreasonable judge. You receive word that your next witness cannot make it. You ask your judge for a break until your next witness can show, or in the alternative, end the day early and begin promptly the next day. The judge denies your request because he does not want to waste any time. What do you do?*

• You could offer to use up the rest of the time in addressing housekeeping matters that were going to be addressed later. If that is not an option, and the judge insists you call a witness, you can call the defendant as an adverse witness, under EC 776, or call your client. These are two witnesses that you can take out of order and fill in the gap if you can make it work in a way that it will not negatively impact your flow in a significant way. This assumes you have prepared your client in advance for her direct exam. Additionally, these are two witnesses that would always be available to call any time, assuming they are always present. Again, not ideal, but it solves the problem when you are under the gun.

Scenario 3: *Defense counsel is cross-examining your client's treating physician. She directs the doctor to look at the "subjective complaints" paragraph and asks him, "Isn't it true that Jon Smith did not make any shoulder complaints?" The doctor responds, "Yes, that is true." Meanwhile you know that in the same record, under "physical exam," the doctor noted "pain on palpation" and "limited ROM." Of course, defense counsel does not ask the doctor about that, and now the inference is that your client was not in pain and therefore, she is now lying. What do you do?*

• Obviously, you need to address and clean that up. During your exam, do not lose the opportunity to expose the defense counsel's tactics. "Doctor, this was not asked of you in Mr. D's exam of you, but please tell us what you noted on 'physical exam' " or, "Let me point out something that Mr. D didn't ask you when he examined you…did Mr. D ask you in your deposition if my client demonstrated he was having any pain on physical exam? If he had asked you that question, what would you have responded? How do you reconcile the fact that Mr. Smith did not report complaints, but on exam it was clear he was symptomatic?" This line of questioning not only exposes defense counsel's tactics of being incomplete and taking things out of context, but it also gives you an opportunity to show that your client's under-reporting of complaints is not because she is lying, rather she is a

minimizer who does not like to complain, even to her doctor.

Scenario 4: *The defense-hired medical expert is notorious for giving non-responsive self-serving statements in cross-examination. He demonstrated it to you when you deposed him, and you anticipate he will do it at trial. What do you do?*

• Inform the judge that this expert was evasive in his deposition, and you anticipate he will be the same during trial. Even a conservative judge will want to know and may help you keep him in line. If the expert behaves this way during your exam, make a motion to strike his answer or any portion of his answer that was non-responsive.

Scenario 5: There is certain irrelevant information *that the defense expert volunteered in his deposition, which you do not want him to do at trial. You file and win a motion in limine on the topic. However, you anticipate that the defense lawyer may "forget" to communicate the ruling to his expert or that the expert will volunteer the information despite knowing about the ruling. What do you do?*

• Right before the expert takes the stand, communicate your concerns to the judge. Request that the defense lawyer inform and instruct the expert not to volunteer the information and put that on the record. If, despite the instruction, the expert volunteers the information, stop the exam. Ask for a side bar, at which time you request the judge admonish the expert in front of the jury. Also, request the judge let the jury know that he violated a court order. While this may not "unring" the bell, it may discredit the expert in the eyes of the jury or the defense lawyer in the eyes of the judge.

The key is to think ahead

Scenario 6: *You are finished presenting your case but you have lost track of the evidence and whether all your exhibits have been admitted. What do you do?*

• Ask the judge for a break to go over your exhibit list and ensure you have moved all exhibits into evidence. During the break, confer with the clerk to see what she has on her record as to evidence admitted. Regardless of what your list says, if the clerk's list does not show your exhibit as being admitted, then it was not admitted, and you need to cure this. In the alternative, you can inform the judge that you are resting subject to moving into evidence any outstanding exhibits. Regardless of how you decide to ensure all your evidence has been admitted, make sure you take the time to do it. Throughout presentation of your case, get in the habit of identifying your exhibit, laying the foundation for it with your witnesse(s), and asking for it to be admitted into evidence.

These suggestions are not exhaustive of your options in each scenario. These suggestions are simply meant as arrows to put in your quiver should you be confronted by any of these situations. The key is to think ahead. As with anything in life, just when you think you have prepared for things to go a certain way, the universe has a way of showing us that we are not always in control. Thus, you need to be prepared for anything. As I tell my kids when they make a mistake or they are confronted with something they did not anticipate happening, "Work with it!"

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THE MECHANICS OF THE CLRA CLAIM

By: Alla Vorobets, CCTLA Board Member

The California Legal Remedies Act (CLRA) has been around since 1970 and offers California consumers a potent way to hold businesses liable for engaging in unethical and/or unfair practices.

The CLRA statute is found in the Civil Code, §§ 1750 through 1784. Currently, there are 27 specific "unfair methods of competition" and "unfair or deceptive acts or practices" in connection with the sale or lease of goods or services to California consumers that are actionable under the CLRA. It is a sister statute to the California's Unfair Competition Law (UCL), found in Business and Professions Code §17200, et seq. Both statutes are frequently utilized by plaintiffs in the product liability actions and address many of the same unfair and/or unethical acts of business competition.

The two statutes, however, are different in several important ways. The scope of the UCL claim is far broader than that of CLRA, which is limited to the redress of enumerated business acts. Yet, while the UCL provides only for restitution and injunctive relief, the CLRA allows recovery of actual and punitive damages and attorneys' fees, in addition to the equitable relief.

It is of note that, under CLRA, the prevailing plaintiff can recover attorneys' fees and costs, while a prevailing defendant can do so only if the plaintiff did not prosecute the action in good faith. Additionally, senior citizens and disabled consumers may recover additional damages of up to $5,000 if they have suffered substantial physical, emotional, or economic damage as the result of the defendant's conduct. Civ. Code §1780(b).

In that sense, as to the 27 enumerated business acts and/or practices prohibited by CLRA, as stated in section 1770, the CLRA offers a more effective redress.

However, pursuing a CLRA claim can be a trap for the unwary. The statute has a built-in "remedial provision" that must be exhausted before the plaintiff can proceed to filing an action to redress a CLRA wrong. Specifically, Civil Code section 1782 states that a CLRA action for damages cannot be maintained unless:

(a) the plaintiff has made an appropriate pre-filing demand that the defendant "correct, repair, replace, or otherwise rectify" the violation; and

(b) the defendant failed to "give" the consumer "an appropriate correction, repair, replacement, or other remedy ... within 30 days after receipt of the notice."

The Mechanics of the Pre-Filing Demand

The statute provides specific procedural requirements applicable to the making of the pre-litigation CLRA demand.

*** Writing:** The demand must be in writing.

*** Claimant:** The demand can only be made by a consumer who has suffered actual damages from the prohibited business practice. A "consumer" is defined in section 1761(d), as "an individual who seeks or acquires, by purchase or lease, any goods or services for person, family, or household purposes." The distinction is important. A business cannot make a CLRA claim against another business. Neither can an individual that purchased goods or services for a business purpose. Only the individuals that purchased the goods or services for their individual use may make the demand.

*** Defendant:** The demand must be made to the business that engaged in one of the enumerated wrongs at either – a) Defendant's principal place of business in California, or b) to the place where the transaction at issue actually occurred.

*** Basis:** The demand must identify one of the 27 unlawful business practices set out in Civ. Code §1770. The letter must also demand that defendant remedy the wrong.

*** Safe Harbor:** The demand must provide Defendant with 30 days from receipt to remedy the consumer injury that forms the basis of the demand.

*** Mailing:** The demand must be sent to Defendant by certified or registered mail, with return receipt requested.

Unless the demand is made and 30 days has passed since defendant's receipt but without a remedial action by the defendant, a consumer plaintiff cannot file a lawsuit to enforce his or her CLRA rights.

The Mechanics of Remedial Action

Under the statute, the defendant is entitled to 30 days from its receipt of the demand letter to undertake a remedial action. If defendant's response to the demand falls on a Saturday or another holiday, the defendant has until the following business day to make a timely response. *Valdez v. Seidner-Miller, Inc.* (2019) 33 Cal.App.5th 600; CCP §12a(a)

Most CLRA violations are cured through defendant's repair, replacement, or refund of the product; defendant's fixing of the problems caused by defendant's service; or defendant's disclosure of further details on a good or a service to its customers.

A defendant's offer to correct the CLRA violation is invalid, however, if it is conditioned on claimant's release of his or her non-CLRA statutory or common law claims for the same conduct. Valdez, 33 Cal.App.5th at 615.

On the other hand, defendant's timely correction or even a good faith attempt to offer an appropriate "correction, repair, replacement or other remedy" will terminate the claimant's right to initiate action under the CLRA. *Benson v. Southern California Auto Sales, Inc.* (2015) 239 Cal. App.4th 1198, 1212.

Governor signs bill that ends abuse of arbitration

SACRAMENTO (October 13, 2019) –Gov. Gavin Newsom has signed legislation that will prevent businesses from gaming the forced arbitration system to delay and deny consumers and workers a shot at justice.

Senate Bill 707 by Sen. Bob Wieckowski (D-Fremont) and Sen. Robert Hertzberg (D-Van Nuys), co-sponsored by Consumer Attorneys of California and the California Employment Lawyers Association, is known as the Forced Arbitration Accountability Act.

In recent years, some businesses that have forced a consumer or employee into arbitration then strategically withhold payment to the arbitration service provider to obstruct the proceeding. Under SB 707, if the fee required to begin the arbitration process isn't paid within 30 days, a company would be in material breach, allowing consumers or employees to withdraw from arbitration and instead go to court. Alternatively, they could seek a court order to compel arbitration.

SB 707 also addresses an alarming lack of diversity in the arbitration industry, which is 74% male and 92% white, a disparity that poses problems when arbitrators are asked to resolve cases involving sexual harassment and discrimination. The bill will require the same demographic data on arbitrators as California currently requires of judges.

It becomes law Jan. 1, 2020.

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In Memoriam: John P. Timmons

Sacramento attorney John P. Timmons passed away at 60 years of age on Aug. 8, 2019. He is lovingly remembered by his wife of 37 years, Tamala L. Timmons, his family, friends and the Sacramento legal community. John was a devoted father and husband and a partner in Timmons, Owen, Jansen & Tichy Inc., a highly regarded employment law practice.

He lived his life exuberantly. He loved a good scotch and a good debate. His home was always full of life, including an impressive array of saltwater fish, exotic cats and fluffy dogs.

John often enjoyed outside pursuits including golf, cycling and skiing. He also was a man of fortitude. He once tore a knee ligament while skiing on expert terrain. He finished the run anyway.

He found the joy in the little things in life. It was infectious, and he will be sorely missed. CCTLA remembers the kindness John showed our members through the years.

John received his B.A. with honors from the University of California, San Diego. He earned his law degree from the University of Pacific, McGeorge School of Law in 1985, gaining admission to the State Bar of California later that year. He also was admitted to practice law in the United States District Court, Eastern District of California.

After joining what would become Timmons, Owen, Jansen & Tichy Inc. as an associate in 1985, John soon established himself as an attorney to be reckoned with. After only three years, he was made partner. He practiced workers' compensation law for more than 20 years and most recently, served as judge pro tem for the Workers' Compensation Appeals Board of the State of California. He held memberships in the State Bar of California, Sacramento County Bar Association, California Applicants' Attorneys Association and the Consumer Attorneys of California.

Make Sure You File Your Request for Entry of Default and Entry of Default Judgment

By: Justin Ward, CCTLA Board Member

All of us plaintiff's attorneys have been faced with the issue of a non-responsive defendant. You have served them, and for whatever reason, they do not forward the complaint to their insurance carrier or lawyer, and no answer is filed within 30 days. If you're like me, you call the defendant or their insurance carrier and ask if they plan on filing an answer. That usually works. They will ask for an extension of time and then an answer gets filed, and the case gets litigated. Every so often, that does not work.

Your options are to either keep contacting them or to file your request for default.

Most plaintiff's attorneys do not want to file requests for entry of default because that means they will have to serve the defendant with notice of the request, and the defendant will usually file an answer at that point. Attorneys do not like doing more work than is necessary.

However, if the defendant does not file an answer after you have made multiple attempts to get them to do so, then file the request for entry of default. That will get the case moving along towards the default or prompt the defendant to finally get an answer on file. Do not wait too long. Many courts, including Sacramento, generate the first Case Management Conference (CMC) based on the complaint being filed, not the answer. If you wait too long, the CMC will be held without a defendant, and you will have to explain to the judge why the defendant has not answered or why you have not yet filed for an entry of default.

Some courts are more lax when it comes to setting CMCs. Those courts can be your downfall. We all get busy, and things get put on the back-burner, and next thing you know, you are getting an Order to Show Cause from the court regarding dismissing your case for failure to prosecute. You will then have to explain to the court why you have delayed pursuing the default. The court may dismiss your case on its own motion pursuant to California Code of Civil Procedure §583.410(a), which states, "The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case."

In addition to issues with the court, you can have issues with the State Bar. California Rule of Professional Conduct Rule 1.3 states, "(a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client. (b) For purposes of this rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer."

If you do not want to do too much work and believe the defendant will likely file a motion to set aside the entry of default, then just file the motion for entry of default. You have the option to file the request for entry of default judgment at the same time as the entry of default or you can wait and file it later. Most of the time, the defendant is going to file a motion to set aside the request for entry of default. If the defendant does not file a motion to set aside the default timely, then make sure you file the motion for entry of default judgment as soon as you are allowed.

After the motions are granted, the next step is to enforce the judgment.

$10,175,000 verdict
Case: *Korsmo v. Ashby*
Accident Injury: bike vs. pedestrians

CCTLA Past President John Demas and CCTLA member Tim Spangler prevailed for their clients with a $10,175,000 verdict in an accident injury case. Judge Geoff Goodman presided. Defense counsel was David Belofsky.

In June 2014, around 7:30 p.m., a young couple (Julio, 19 and Maddie,16) are on their first date walking on the American River bike trail when a tandem bike (Ken, 64 and Carol, 67) comes out of a curve behind them. Ken rings the bell on his bike, and Julio moves to the left/shoulder, and Maddie moves to the right. Ken moves to the middle a little and tries to ride in between them; however, there is a lot of overgrown ivy on the right side of the trail, which makes the trail significantly narrower. When Julio sees Maddie move to the right, he tells her she needs to be to the left (consistent with the rules of the trail), and she moves to the left as Ken is about to pass them. The bike hits her, and Ken and Carol crash off the side of the trail.

Ken is momentarily knocked out, but Carol is seriously injured. She has a GCS of 6 (severe TBI), a CT done on admission reveals a subarachnoid hemorrhaging, and she spends three weeks at Mercy SJ and another three weeks at Sutter Rehab. She is left with permanent physical issues (gait problems, double vision in one eye, headaches, etc.,) and cognitive issues (mostly short-term memory.

Verdict: Total economic damages: $3.05 million; total non-economic: $7.125million.

F**ault apportionment/final numbers:** The jury placed 16% fault on Defendant Julio, 60% on Defendant Maddie and 24% on Plaintiff Ken. The final verdict against Defendant Julio is approximately $5million. Defendant Maddie settled for her policy limit of $300,000 after testifying at trial.

Liability: Julio and Mercury, his insurance company, where denying ANY liability. Julio had his parents' $500,000 homeowners' policy in effect at the time. There were no coverage issues. Mercury's position was simple: 1) Julio was walking on the left where he was supposed; 2) he tried to get Maddie to walk to the left when the heard the bike; but instead she went right and then left; 3) there was no impact with Julio; 4) he was faced with an emergency/imminent peril; 5) this all happened very fast (3-5 seconds) and 6), he was just trying to do his best and now is getting sued.

After Julio's deposition was taken in July 2015, Plaintiffs' counsel served him with a §998 for the 500,000 policy limits. Mercury served a §998 settlement offer for $150,000, and at settlement conference indicated it may pay $200,000 if it would settle the case.

Liability experts: Mercury hired four liability experts: Larry Newman to discuss the rules of the trail; William Woodruff, accident recon; Tate Kubose (human factors); and Doug Shapiro (bike safety expert). They also hired Mark Johnson with visual law, and the entire crew conducted an attempted video re-enactment at the scene. Ultimately, only Woodruff and Kubose testified at trial.

Neumann's deposition was a turning point in the case from Plaintiff's perspective—but not Mercury's. He was hired to discuss the rules of the trial and their applicability AND whether they were violated (obviously not usually permitted grounds for expert testimony). Despite his best efforts, Neumann conceded the written rules regarding shoulder use was violated by both Maddie and Julio (if there was shoulder available, which was at issue) and that the single file use was violated.

Plaintiff did not move to exclude this testimony even though it would have likely been excluded. The issue was most people would understand the rule to stay left (Julio was left and therefore in compliance) but would not understand or expect people to know about the requirement to use the shoulder and walk single file. Kubose broke down the timing/perception-reaction times to try to show there was not a lot of time for the pedestrians to respond.

Damages experts: Plaintiff retained: Dawn Osterweil Ph.D. (neuropsychologist); Dr. Deborah Doherty (PM&R); Carol Hyland (LCP) and Chip Mahla (economist). Plaintiff treater providers: radiologist who read initial CT; initial trauma doctor; current UCD neurologist.

Defense retained: Joann Berg Ph.D (neurpsych)—not called at trial; Dr. Mark Strasberg; Jill Moeller (LCP) and Gerald Udinsky (economist)—not called to trial.

Past meds both plaintiffs: stipulated at $635,000; past wages both: $327,000; future lost earnings/retirement: $88,000. Future meds: big battle here. Plaintiff claimed that she needed 24/7 care though she has not had any attendant care (other than her husband helping a lot) in 5.5 years. This was 95% of the life-care plan and the numbers varied based on hiring directly ($1.85m) or using an agency ($3m).

***

Verdict: $48,903
***Ramos v Davis*, San Joaquin County**
Accident injury: horse vs. vehicle

CCTLA Board member Glenn Guenard, of Guenard & Bozarth, LLP, won a $48,903 verdict in an accident injury case tried before Judge Michael Mulvihill on Oct. 9. Defense counsel was Devereaux Rendler, Law Offices of Melanie Johnson from San Jose (Allstate house counsel). Verdict breakdown: past meds, $6,423; past wage loss, $14,160; past non-economic, $28,320.

The plaintiff, a 63-year-old Mexican-American who speaks little English, was driving his 2000 pick-up to work at 3 a.m. in rural San Joaquin County. A horse runs in front of him, is hit and rolls up on hood and cracks the windshield, then runs away. Horse was 29 years old and still living now.

Guenard took over this case two months prior and

was not able to do any discovery, but he did get defense to stipulate to negligence a few days before trial.

Plaintiff's vehicle was not drivable and ultimately was deemed totaled since the $3,500 estimate was more than value of the vehicle. Plaintiff told CHP he was not injured, but he goes to his primary-care physician a few hours later. PCP orders cervical, lumbar and R knee X-rays, which show lots of degeneration, and refers him to a chiropractor where Plaintiff gets treatment to his neck and back and is released three months later. Chiropractor writes a report to Plaintiff's former attorney in L.A. that says Plaintiff was released to pre-injury status, with no restrictions and no future treatment.

A month later, that attorney refers Plaintiff to Dr. Wilker in Brentwood, who orders lumbar and R knee MRIs and proceeds with five lumbar ESIs at same procedure, for a cost of $55,000 for the surgery center and $14,000 for Wilker (this does relieve LBP). Wilker also recommends R knee surgery for torn medial meniscus. Plaintiff wanted a second opinion on the R knee so attorney referred him to Dr. Reisch in Encino, who scoped medial meniscus. His fees were $28,000; surgery center, $38,000. Plainiff had no complaints or treatment of R knee symptoms from first day of chiropractic until he sees Wilker four months later (doctors Wilker and Reisch testified by video).

Defense hires Dr. Roland Winter, an ortho from Stockton, who only relates the first three months of chiropractoc and says there were no acute findings on X-rays and MRIs, as does defense's neuroradiologist, Dr. Robert Schick, from Walnut Creek. More issues include Plaintiff was involved in a motor-vehicle collision 10 months before this one, where his vehicle was totaled, and that he had four months of chiropractic and was doing fine in the months before this crash.

Total meds after chiropracatic were about $150,000 all on liens. Judge denied Plaintiff's MIL to exclude liens but granted MIL on attorney referrals to doctors (But jury said they figured it out by process of elimination). Plaintiff hired DJ Apuna-Grummer as a billing expert. She was precluded per *Sanchez* to testify that she had called providers in same area to support her opinions, but Plaintiff got around that by focusing on her education, training and experience and also doing research and making calls on prior cases, so then it was not case specific. Doctors Wilker and Reisch also testified that their bills and the surgery centers' bills were in line with community charges, so the billing expert was overkill.

Defense hired Bonnie Dean, RN, who said all the bills only had value of $64,000 because CPT codes were not proper and unbundling, etc. She was excluded from using FAIR HEALTH database per *Sargon* but was still allowed to testify about her education, training and experience as a medical bill auditor (She's always worked for insurance companies trying to limit payment of bills). Jury never got to the billing issue since they didn't find anything related after three months of chiropractic.

Defense 998 was $23,000 two weeks before trial, and Plaintiff's demand was $33,000. Four days into trial, Plaintiff agreed on a confidential high/low. It was a challenge to explain the chiropractor fully releasing Plaintiff and trying to relate it to the crash. Chiropractor testified that after they are released, a third of his patients return for more treatment, also that he had taken Plaintiff as far along as he could from a chiropractic perspective and that it was not unusual for patients to also seek treatment with orthos and other providers. Plaintiff was off work for year. He made more than $5,000 a month as a union laborer.

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Settlement: $1.6 million
Accident Injury: car vs. pedestrian

CCTLA member Mike Schaps and Rachel Vida of The Schaps Law Office, A.P.C., obtained a $1.6-million settlement for their 97-year-old client who was hit by a car while traversing a crosswalk in Davis. The mediation was with Nick Lowe.

Plaintiff suffered a dislocated left elbow, a small degloving of the left hand, and a head impact that caused probable loss of consciousness. He was transported by ambulance to UC Davis Med Center, where he underwent surgery to repair his arm and hand. He then spent a few days in the hospital and two weeks at a rehabilitation facility. Although his billed medicals were around $200,000, Medicare paid only about $35,000.

Defendant was an elderly woman who told police the sun was in her eyes, and she did not see anyone in the crosswalk. She also said she was traveling around 30 mph at the time of the collision. Fortunately, only the edge of the front corner of her car hit Plaintiff, and Defendant carried a $1-million policy with a $5-million umbrella.

Plaintiff is a remarkable man. Before the accident, he was still living independently, actively gardening, reading voraciously and enjoying his life. The accident—in particular, the head impact—markedly changed his quality of life, and he now requires 24-hour in-home care.

Plaintiff's counsel retained neuropsychologist Stephen Rapaski and physiatrist Jeffrey Krauss, both of whom were very good. Rapaski was able to confirm that the head impact caused a TBI that substantially impaired Plaintiff's cognition, memory and balance. Krauss opined that Plaintiff would need 24-hour in-home care for the rest of his life and that the TBI had reduced hiss life expectancy by six months, leaving him only an estimated 2.5 years to live. His care for that time was estimated at about $500,000. Past and future medicals, including in-home care to date, totaled roughly $700,000.

The lawsuit was filed in August and almost immediately brought an *ex parte* application for trial preference, which was granted. Trial was set for this December. Opposing counsel deposed the plaintiff's daughter but did not deem it necessary to depose Plaintiff himself or to conduct a DME before mediation.

The Mechanics of the CLRA Claim

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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

NOVEMBER

Thursday, November 7
CCTLA Problem Solving Clinic
"Hidden Money, Hidden Danger in UM/UIM Cases"
Speakers: Matt Donahue & Jack Vetter
5:30 to 7 p.m.
Sacramento County Bar Association
CCTLA members only: $25

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

DECEMBER

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

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

JANUARY

Tuesday January 14
Q&A Luncheon
Noon, Shanghai Garden
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA members only

Thursday, January 23
CCTLA Seminar
Topic: "What's New in Tort & Trial: 2019 in Review"
Speakers: TBA; Location: TBA
$150 CCTLA members; $175 non-members

Friday, January 31
CCTLA Luncheon
Topic: TBA; speakers: TBA
Noon, Sacramento County Bar Association
CCTLA members only, $25

FEBRUARY

Tuesday, February 11
Q&A Luncheon
Noon, Shanghai Garden
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA members only

Thursday, February 20
CCTLA Problem Solving Clinic
Topic: TBA; Speakers: TBA
5:30 to 7 p.m.
Sacramento County Bar Association
CCTLA members only, $25

Friday, February 28
CCTLA Luncheon
Topic: TBA; Speakers: TBA
Noon, Sacramento County Bar Association
CCTLA members only, $25

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