Fall 2013

# The LITIGATOR

VOLUME X11 OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION ISSUE 3

## Inside This Issue



# The unjust nature of the MICRA cap affects all of us

**By: Cliff Carter**
**President, CCTLA**

Each of our personal injury practices is impacted by, and intertwined with, other lawyers' personal injury practices in Sacramento. All of our personal injury practices have been affected by the MICRA law passed in California way back in 1975. This is true even if your practice does not include any medical malpractice cases. If the unfair MICRA restrictions did not exist, your practice might include medical malpractice cases, and other attorneys might be able to focus exclusively on medical malpractice. Both of these scenarios impact your practice, and most importantly, the ability of those truly harmed by medical negligence to find quality representation.

After 38 years, there is a building groundswell of support to at least adjust the MICRA cap of $250,000 for inflation. While $250,000 may sound like a lot of money, when adjusted for inflation this number is actually under $60,000 today. I personally have handled wrongful death medical malpractice cases for senior citizens, and it is heartbreaking to tell a spouse, who "celebrated" her 49th anniversary on the day of her husband's death, that MICRA limits her recovery to $250,000. There is no good explanation why this cap is so low. The unjust nature of the cap can only be understood when you are "in the room," telling a family about the cruel realities of this law.

There have been several op-ed pieces written lately, both for and against the MICRA cap. Each of us needs to become aware of the arguments for and against MICRA so we can discuss it with non-lawyers. The public does not understand this law, or who really benefits from the law (insurance carriers) and who suffers due to the law (patients). They do, however, understand two basic truths: 1) $250,000 was a lot more money in 1974, and 2), arbitrary "caps" are not fair.

It appears that there may be an initiative on the November 2014 ballot to address

*Continued on page 10*

# Allan's CORNER

**By: Allan J. Owen**

Here are some recent cases I culled from the *Daily Journal*. 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. I apologize for missing some of the full *Daily Journal* cites.

This is my final Allan's Corner. I started reading and summarizing first the advance sheets (remember the white books that came with new cases every couple of weeks—before computer research?), then later the *Daily Journal*, in 1979 and haven't missed a month since. Now, as I slow down literally and figuratively, I gladly pass the torch on to Mike Jansen who is taking my place here in *The Litigator* and slowly but surely at Timmons, Owen & Owen. Thanks, Mike, for giving me some free time!

**Insurance Coverage.** In Mt. Hawley Insurance Co. v. Lopez, 2013 DJDAR 5615, the Second District agrees with the Ninth Circuit that Insurance Code §533 does not preclude an insurer from agreeing to provide a defense in a federal criminal prosecution.

**Civil Procedure.** In Las Canoas Co. Inc. v. Kramer, 2013 DJDAR 5877, the Second District holds that the non-noticing party challenging the "reasonable rate" charged by a court reporter for deposition transcripts in a pending action must move for an order pursuant to CCP §2025.510 in the pending action and may not bring a subsequent action to obtain restitution.

**Duty.** In Pedeferri v. Seidner Enterprises, et al., 2013 DJDAR 6190, commercial vendor loaded two motorcycles in the bed of a pick-up truck. Driver, who was most likely stoned out of his mind, was driving down the road, saw and heard the bikes moving around, got distracted and plowed into a vehicle on the side of the road, killing the driver of that vehicle and severely injuring a California Highway Patrol officer. Vendor argued it had no duty as a matter of law to do anything other than make sure the load was secured so it didn't fall out of the vehicle. Court of Appeal upholds trial court ruling that the vendor's duty was to act reasonably in loading the cargo to protect persons on or near the roadway and avoid securing the vehicle in a way that might cause a distraction for the driver. There is also an interesting discussion about superseding cause, but it doesn't add anything new to the law. Trial Court did allow an expert to testify that the marijuana was not a cause because this guy was a chronic user. Unfortunately, there was no evidence that this guy was a chronic user, and therefore it was reversed on this basis.

**Personal Jurisdiction.** In Bombarbier Recreational Products, Inc., v. Dow Chemical Canada ULC, 2013 DJDAR 6405, sole basis of jurisdiction alleged was that Dow knew its component part (fuel tanks) would be incorporated into personal watercrafts sold in the United States, including California. Third DCA holds that is not enough for minimum contacts.

**Alcohol Liability.** In Rybicki v. Carlson, 2013 DJDAR 6573, five young women, all under the age of 21 were partying all night and drinking alcohol at a friend's house. While their vehicle was being driven on the wrong

*Continued on page 19*

## 2013 CCTLA Officers & Directors

**President:**
Cliff Carter

**President-Elect:**
Stephen Davids

**Vice Presidents:**
Daniel G. O'Donnell
Michelle C. Jenni

**Secretary:**
TBA

**Treasurer:**
Bob Bale

**Parliamentarian:**
Travis Black

**Past-President:**
Michael W. Jones

**Board of Directors:**
John Airola
Lawrance Bohm
Lance Curtis
Jennifer Cutler
Lena Dalby
Linda Dankman
Glenn Guenard
Mike Jansen
Joseph H. Marman
Allan J. Owen
Rob Piering
Dave Rosenthal
Jack Vetter
Joseph Weinberger
Christopher Whelan
Daniel E. Wilcoxen

Executive Director: Debbie L. Keller
PO Box 541 • Sacramento, CA 95812-0541 • Website: www.cctla.com
916 / 451-2366 • Fax 916 / 451-2206
Editor, The Litigator: Jill Telfer • jtelfer@telferlaw.com


# I NEED THE STUFF, MAN

## Working up income loss for self-employed clients

**By: Steve Davids**

At initial intake with the client, find out if they are self-employed. Find out what form their business takes: a closely-held corporation, LLC, partnership, LLP, or sole proprietorship. I recommend that you begin putting together the documents you will use to show income loss before the defense even sends any discovery.

Historian Robert Caro commented on the importance of going to the actual places that he was researching. Similarly here, I recommend that you meet with the client in their "natural habitat"—home, home-office, or wherever. You will get a better sense of how they conduct business, and that leads directly to the income documents that you will need to establish income loss.

The issue is that every self-employed has their own way to keep their financial records ("stuff"). Their "stuff" may be organized, or totally disorganized. You may have to help them get their "stuff" together so that it can be presented to the defense and an expert. You may have to spend time going through the "stuff" to see what is helpful and what is not. These cases challenge our creativity in coming up with ways to argue the client's income based on "stuff" that may be very incomplete. You may have to get testimonials from suppliers and customers who can testify that this person ran a good business and provided a good product and/or service.

Even though they may not be admissible or even discoverable, start with the tax returns. A sole proprietor (someone with a DBA) files a Schedule C with their tax return. Partners file a Schedule K. Corporations file their own separate tax returns. You may never produce them, but you definitely want to see them.

Are tax returns privileged? Wilson v. Superior Court (1976) 63 Cal. App. 3d 825: maintenance of the privilege was inconsistent with the plaintiff's claim that the defendant CPA committed malpractice in preparing a tax return. Wilson acknowledged a privilege, but found it did not apply given the facts of that case.

Cal. Rev. & Tax Code § 19542: "…it is a misdemeanor for the Franchise Tax Board or any member thereof … who in the course of his or her employment or duty has or had access to returns, … to disclose or make known in any manner information as to the amount of income or any particulars (including the business affairs of a corporation) set forth or disclosed therein." (Previously, this was denominated Rev. & Tax Code § 19282.)

Courts have read into § 19542 a privilege against disclosing tax returns. Webb v. Standard Oil Co. (1957) 49 Cal.2d 509, 513-514: "forcing disclosure of the information in the federal tax return would be equivalent to forcing disclosure of the state returns and would operate to defeat the purposes of the state statute. It follows that the trial court did not err in refusing to require production of copies of either the state or federal tax returns." The purpose of the privilege is to encourage voluntary filing of tax returns and truthful reporting of income, and thus to facilitate tax collection. (*Ibid.*)

Premium Service Corp. v. Sperry &

Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975) upheld the District Court's quashing of a discovery subpoena for tax returns, citing "a public policy against unnecessary public disclosure [of tax returns] aris[ing] from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns." Schnabel v. Superior Court (1993) 5 Cal.4th 704, 720, footnote 4: "Although the privilege [against disclosing tax returns] is not expressly stated in the statute, it is based on the statutory language and underlying policy."

However, some cases support the defense position that tax returns are discoverable when the plaintiff claims lost income. Newson v. City of Oakland (1974) 37 Cal. App. 3d 1050: trial court acted properly in requiring plaintiff to answer questions pertaining to the filing of federal and state income tax returns, overruling plaintiff's self-incrimination objection. Plaintiff's option was to withdraw his claim for earnings. He was self-employed, and claimed damages for loss of earnings, but failed to produce any records to substantiate his earnings prior to the accident.

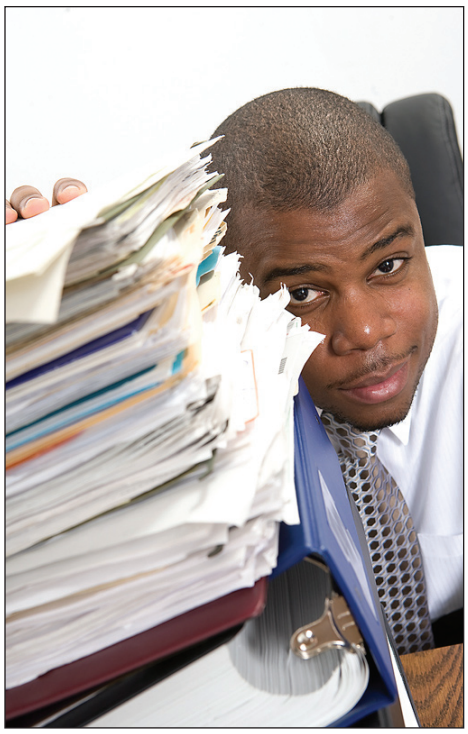
Weingarten v. Superior Court (2002) 102 CaI.App.4th 268, 274: court has broad discretion in determining the applicability of the privilege. And there are exceptions: if (1) the circumstances indicate an intentional waiver of the privilege; or (2) the lawsuit involves claims that are inconsistent with the privilege; or (3) a public policy greater than that of the confidentiality of tax returns is involved.

Federal cases are also pretty much along the same lines. Poulos v. Naas Foods, Inc., 959 F.2d 69,74-75 (7th Cir.1992); Young v. United States,149 F.R.D.199,205 (S.D. Cal. 1993): plaintiff waives any tax return privilege to the extent a plaintiff places tax records in issue by making a claim for lost income.

**The solution is to produce non-privileged income and expense records that are not tax returns**. You will stand a better chance of not needing to produce the tax returns if you have income and expense documents.

How do you get those documents? As Hamlet said, "there's the rub."

1. Find out early who does the client's taxes. If it's a professional tax preparer, you probably want to talk to them, and get all of their records using your authorization.



2. Ask the client, "Give me all the documents that you give your tax preparer." The tax preparer will need to know all the information about receipts (money coming in) and expenses (money going out).

3. If you are unlucky, the client does

his / her own tax returns.

4. There are circumstances in which you will want to produce the tax returns, but this does not happen often.

5. I recommend a heart-to-heart conversation with the client about how they, as a small businessperson, take advantage of tax breaks afforded to the self-employed. They are not lying on their taxes, they're just accepting a tax reduction that the government allows.

An example is the ability to write off your mortgage payments if you use your home for your business. This isn't really a business expense that would show up on a balance sheet, because the client needs to live somewhere. The problem with producing the Schedule C is that your economic damages expert will have to explain why the expenses really aren't as high as they appear. This has the potential to make it look like your client is pushing the envelope to lower his / her tax burden.

This stuff should be kept out under Evidence Code section 352 because it will consume undue time on a collateral issue, will prejudice your client, and will result in jury confusion. (See People v. Hoze (1987) 195 Cal.App.3d 949, 954: "'Prejudice' in the context of Evidence Code section 352 refers to the possibility of misuse of the evidence -- use of the evidence by the trier of fact for a purpose for which the evidence is not properly admissible." In other words, the jury could falsely conclude that the client was a tax cheat.)

6. Ask the tough question: do you honestly and accurately report your gross sales receipts to the IRS? Most self-employeds underestimate it as much as possible. Get the client to be honest with you, so you know what you're dealing with.

7. Same question about expenses: do you honestly and accurately report your actual business expenses? Or do you bend the rules a little, and take the family out to dinner using your business ATM or credit card? More on this later.

8. Some clients will try to reconstruct what they made in the past and type it into a memo. That won't work. We need to focus them on getting documents that were created at the time, and not after the injury. "I need to see whatever you have that shows money coming in and money going out on a monthly and/or yearly basis for at least 5 years before the injury."

9. If the client has been smart enough to buy business software like Quicken, then reports can be printed out. But many sole proprietors don't invest money in software.

10. The nature of the business often dictates the types of records. A cosmetologist may have nothing more than appointment books showing customers' names and days of the week / month that they made appointments. The client will then have to testify that Mr. X is always charged $X, and Ms. Y is always charged $Y, *etc*.

11. Some clients prepare income and expense summaries (or profit and loss statements) that they give to their tax preparer. These can be handy, but we also have to make sure we interpret them correctly. They may show no profit, but if you look closely, the client paid themselves a "salary" or "draw" that has to be added to the net profit.

12. Talk to the client about their business, and think about what people have to do in their line of work. "As a truck driver, you have to pay for gas. How do you track that? Credit card receipts? Cash?"

13. Maybe the client can't show a diminution of income because they continued to make money after the injury. But they had to hire full-time and/or

part-time employees to pick up the slack. If their income grew during this period, the defense will argue there is no loss. But they incurred extra labor expenses to cover the work demand. This can be a difficult causation issue: did the client hire the extra labor because they couldn't have done it even if they were uninjured, or did they hire the extra labor because they couldn't physically do all the work because of the injury?

14. Bank statements can be used to document income loss. The first issue is whether the client comingles business and non-business income, business and non-business expenses. ("Do you buy groceries using your business ATM card?") If they do, then you and the client have to sit down and figure one what items on the bank statements were personal, and what items were business-related. If the client can't remember, then Houston has a problem. Fortunately, at least some bank statements contain the payee names.

15. In the bank statements, sometimes there are entries for periodic payments to an IRA or other savings or investment plan. Those should not be considered business expenses, which would reduce the profits. Instead, these are business profits being invested.

*Bank statements can be used to document income loss. The first issue is whether the client comingles business and non-business income, business and non-business expenses. ("Do you buy groceries using your business ATM card?")*

16. If the client doesn't keep bank statements, use your authorization to get them from the bank.

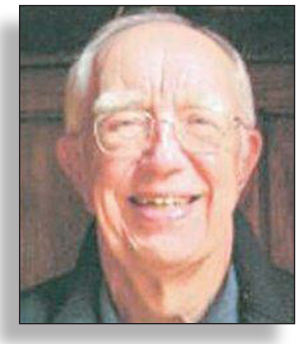
17. In going over the records, be attentive to business trends. Cross-examine the client about the fact that his / her gross receipts declined after the injury. How does he / she know this was from the injury, as opposed to clients or customers not purchasing their goods / services? You want the client to be ready when the defense asks this question at deposition.

18. Look at previous years when income fell. Were there consistent reasons for business ups and downs? This can be a vexing issue, because it is not unusual for self-emloyeds to experience significantly fluctuating receipts and expenses from year to year. After you've done this work, you have to figure out how to transmit it to an expert. If you just give them all the "stuff," expect a big bill. This will happen if all you have are bank statements. You may want to provide your summary—your work product—to the expert and ask them to assume it's true. If the jury believes your client is a credible person, they will have no problem with the fact that your expert relied upon your client's representations about income and expenses.

One last-ditch solution, if the client has no useful records, is to retain a vocational rehabilitation expert to testify to the salaries that the plaintiff could expect to earn if he / she were working for someone else. If the client is a self-employed truck driver, then what would they likely earn as an employee for a trucking company? What would they be paid as a framer by a construction company? If the client runs his / her own restaurant, what would a restaurant pay them to be a general manager? This is admittedly not optimal, but in some cases there is not much of an alternative.

In a forthcoming article, we will discuss claims for loss of earning capacity when the client was injured before they had an opportunity to earn money. If you have questions or comments, feel free to email me: sdavids@dbbwlaw.com.

# Ray Ball will be remembered as much more than a friend



**By: Laura Bean Strasser, Esq.**

If I were to sit down and think about the people who have impacted my life, Ray Ball would be at the top of that list. Sadly, Ray passed away on July 27, 2013, after practicing law for over 40 years.

There is no doubt in my mind that he influenced the lives of many family and friends, clients, and those of us in this profession who were lucky enough to have worked with him. I had the privilege of first meeting Ray back in the 90s when I was a paralegal working for another attorney in the same office. Ray was the first to introduce himself and warmly welcomed me into his office to chat. I'm sure my nearly hour-long "chat" would not have sat well with my new boss if he had been in the office, but Ray was just too addicting—well worth the risk!

He spoke of his wife and family and laughed at assorted stories we shared. That was back when he was getting ready to go through a kidney transplant, receiving a kidney that his wife was so generously donating. Despite his illness, he persevered with his typical positive attitude and boulder-like strength. One would never know what he had been through.

During the next 10 years of working in the same office together, I figured out that Ray was the go-to guru of personal injury law. But, no matter how much I worshipped him or bribed him, he never made it easy for me when I came to him with a question. He nicknamed me "Dirt Kicker," opining that I would kick and scream like a two-year-old until I got answers to every legal theory there was (I really didn't!). But in his typical calm fashion, his usual response was: "What do *YOU* think?' This was usually jokingly followed by: "Don't let your blonde hair fool you!"

Eventually, after the torture session, he would guide me to a book or sample form and would share his own experience dealing with the same issue. No matter the lesson he tried to teach me, it was always about integrity, character and class—exactly the way he ran his practice and his life.

Eventually, Ray became the voice of reason and encouragement during the insanity of my law school years, bar exam blues and the stark reality of becoming a new attorney and starting my own personal injury practice.

I never did stop going to my guru for guidance. Days before his passing, we exchanged e-mails about a legal procedural issue. Little did I know it was going to be our last such exchange. If I could have just one more exchange with Ray, I would thank him for seeking me out on my first day, for being the great mentor that he was, for passing on lessons not only about law but about life, for introducing me to his amazing wife, Linda, and for being such a good friend to my family and me.

I would also let him know that some of the best e-mails I ever opened came from him. He never just forwarded great e-mails, but he added his own lighthearted commentaries—however politically slanted, patriotic, humorous and/or sometimes sentimental they may have been. They always brought a smile to my face and to the faces of others. Ray's gentle spirit, love of life and infectious laugh will be missed by all of us, and the footprint he left behind will be cherished for years to come.

## *FULL-SERVICE EXECUTIVE SUITE*

- Reception Service
- Conference Rooms
- Specialized Legal Equipment
- 3 Networked Color Copier/Printer/Scan/Fax
- 24 Hr. Surveillance
- 11.5 Feet Windows
- Exterior Patio Access
- Basic Law Library
- Break Room (coffee/tea service)

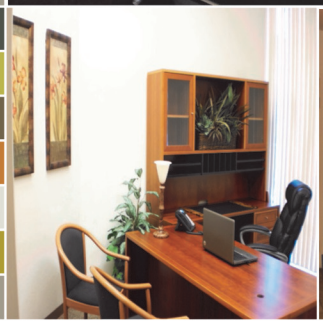
**Available for a nominal fee:**

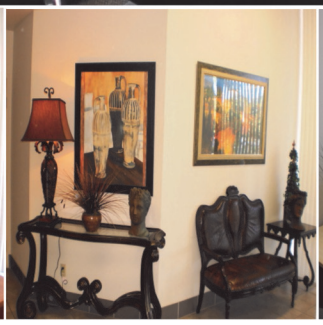
- Lexis Nexis Research Pkg.
- Postage Machine
- High Speed Internet

FLEXIBLE PACKAGES DESIGNED TO FIT **ANY** BUDGET... CALL TODAY!

Tired of the bad economy, high rent... Contact the **Wong Center Legal Suite** today and take advantage of our new **Stimulus Package**

WONGCENTER Legal Suite





331 J Street, Suite 200, Sacramento, CA 95814

www.wongcenterlegal.com

WONGCENTER Legal Suite

**PART-TIME OFFICE PACKAGE**

Create an impressive professional image without the expense of running a full-time office. Part-time office plans are available today to fulfill all of your business needs and provide you with all of the accommodations of a traditional office at a fraction of the cost.

*To arrange a private tour, please contact: Ted Rivera 916-442-0482 trivera@wongcenterlegal.com*

# How To Ease into Retirement

**By: Allan Owen**

**ALLAN OWEN EASES INTO RETIREMENT**

In 1994 or thereabouts, I left the first and only job as a lawyer I had ever had up to that point. During the 15 years or so I worked for Mort Friedman, I had all the joys a young lawyer could have: news I actually passed the BAR exam, raises, my first successful jury trial verdict (contrary to the rumors, it wasn't my last), and my first oral argument before the Court of Appeals (yes, I really did yell at the court for suggesting that biting the head off of a live bird and drinking it's blood was not enough to put the psychiatrists on notice that perhaps Richard Chase needed to stay in confinement a bit longer).

I also went through the tribulations of a young trial lawyer working 70-80+ hour weeks, the first defense verdict against me (thanks, Bill Callaham), the second defense verdict (at that point I had more defense verdicts than most defense attorneys), divorce, drug rehab...

On my way home from my last day at Mort's office, I stopped at Arden Fair Mall (where else would a Friedman alumni shop?) to have my ear pierced. I felt free; like a rebel again. The next Monday, I entered into what can only be called a dream job: practicing law with my brother, Bill Owen (yes, my blood brother, and comrade in arms for the last 20 years) and my secretary, Robyn Horn ,who came with me from Mort's and is still with me today (Robyn was a 19-year-old file clerk at Mort's when I started there. Other than her days in college, we have been together my entire career). And, of course, the part-time bookkeeper who has become my office manager, Patti Harmon. What a ride it has been.

But I didn't get to wear the earing to work. Clients don't like it. Roger Dreyer pointed out early on that no jury would take me seriously with it in. Oh, I got to play rebel without a clue on weekends and at parties, but mostly I got to work.

At times I have heard others complain that we trial lawyers have become glorified collection agents for hospitals and insurance companies. I never felt that way. I have always been proud to represent injured individuals. I have always felt like we really do make a difference. I have always tried to fight the good fight and to remain true to my beliefs.

But, like my old friend John Poswall, I have come to believe that work is overrated! So, as of 7/15/2013, I am happy to announce I am "of counsel" to the law firm of Timmons, Owen & Owen. Mike Jansen has joined the firm; we are now better than ever. I am still around. I still work here at the office. I am still available if you need a consult or a laugh. I can still work with you on your cases if you need me. I will still be on the list serve to help and to chastise you when you forget we are better than that.

I hope you won't forget me. I hope you won't forget some of the lessons I have tried to pass on from my teachers—who were, after all, the best trial lawyers in Northern California. Last year at the Kennedy Inn of Court Judge Hersher said the most difficult thing for a lawyer was figuring out how to retire and keep the respect of his or her peers. Judy, turns out it is easy. You just turn off the light, and leave the door open behind you. If I had your respect before, I hope I still have it. If I didn't, what difference does retiring make?

Hope to talk to each of you soon.

# MICRA CAP

*Continued from page 1*

MICRA. Between now and then, we all need to educate our peer and social groups about why this law must change. Fairness dictates this change.

Our clients are the victims of both medical malpractice and then of the MICRA cap. Explaining why the malpractice occurred usually involves explaining that the doctor made a serious and grievous error. Explaining why MIRCA limits the recovery is much harder to explain and even harder to justify.

I urge each of you to become involved in this issue. To start with, go to 38istoolate.com for great information on this topic. Your support is something that will have a positive impact on many of our clients' lives.

# Moving on . . .

# DISPUTE AVOIDANCE

**By: Betsy S. Kimball**
**Certified Specialist, Appellate Law & Legal Malpractice Law**

I am excited about some new and exciting opportunities offered to me, but the responsibilities that come with them mean this must be my final article for *The Litigator*.

At the conclusion of a chain of events that would make Rube Goldberg proud, I became the latest editor-in-chief of the *Sacramento Lawyer*, which is the bimonthly publication of the Sacramento County Bar Association. For many years, that magazine published articles written by Sacramento County Superior Court law and motion judges.

More recently, Sacramento County civil trial judge Judy Hersher has published a great series of trial practice articles there. I also recently started a series of "ethics" articles in the *Sacramento Lawyer*, reviewing the Rules of Professional Conduct. Like my articles here in *The Litigator*, my purpose in writing on the rules is to keep my friends, colleagues and clients out of trouble. I want there to be no more legal malpractice or ethics claims to defend so that I can be an appellate lawyer when I grow up.

My plan is to continue writing the ethics series in the *Sacramento Lawyer*. As it happens, my next article, for the November/December issue, will be about the fee splitting and fee sharing rules. So technically, I am keeping my "promise" to you, made at the end of my last article in this fine publication, that I would next cover "fee sharing." Thanks for reading. If what I have written here in *The Litigator* has kept anyone out of trouble, then my time has been well spent.

*Betsy S. Kimball is a certified specialist in appellate law and legal malpractice law, State Bar of California Board of Legal Specialization, and part of Boyd & Kimball, LLP, in Sacramento, phone: (916) 927-0700.*

# CCTLA Honors Eric Ratinoff, Jack Vetter for Exceptional Efforts

**HONOREE ERIC RATINOFF**
with Brooks Cutter

Eric Ratinoff and Jack Vetter were recognized during CCTLA's 11th annual Spring Reception and Silent as the 2013 Morton L. Friedman Award winner and the 2013 Joe Ramsey Professionalism in Law Award winner, respectively. During the event, hosted by Allan Owen and Linda Whitney at their home, almost $32,000 was raised for Sacramento Food Bank and Family Services.

**THANK YOU TO OUR SPRING RECEPTION SPONSORS**

Arnold Law Firm
Baird
Bohm Law Group
Clancey, Doyle & O'Donnell
Econ One
Five Star Bank
Gingery Firm
Kershaw, Cutter & Ratinoff, LLP
Laborers Local Union 185
Darrel Lewis
MedFin
Moe's Process Serving
Piering Firm
Ringler Associates
Telfer Firm
Timmons, Owen & Owen
University Medical Imaging
Wilcoxen Callaham, LLP

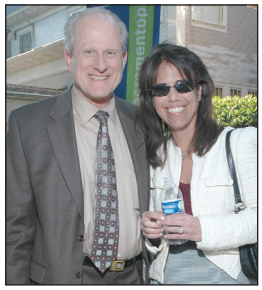
**HONOREE JACK VETTER**

From left: John Demas, Judge Brian Van Camp, Shelleyanne W. L. Chang and Rob Piering.

Above left: Judge Allen Sumner, Debbie Keller and Judge Robert C. Hight. Above right: Justice Art Scotland and Linda Whitney.

From left: Rana Gerges, Wendy York, Rick Crow and Assemblymember Roger Dickinson.

Below, from left: Jeremiah Rhine, Erik Kintzel, Genevieve Deignan and Rob Levy.



Far left: Allan Owen; center left: Judge Jim Mize and Associate Justice Elena Duarte; near left: Steve Halterbeck, Judge David Brown, John Demas (back), Lawrance Bohm and Patrice Ratinoff. Right: Jo Pine and Bill Seabridge.

Former CCTLA President **Eric Ratinoff** of Kershaw, Cutter and Ratinoff, and CCTLA member **John Parker** earned a $596,000 verdict in San Francisco Superior Court in a motor vehicle collision, with the 10% comparative fault to the plaintiff who was driving a motorcycle.

***

Smith Zitano law firm with former CCTLA president and current board member **Dave Smith** and CCTLA member **Elisa Zitano** have three interesting and notable settlements to report:

**• Product Liability – Bicycle Chain Failure**
**Rotator Cuff Tear - $300,000 Settlement**

A 22-year old male firefighter trainee sustained a severe rotator cuff tear when the KMC bicycle chain on his new Pacific Cycle Mongoose mountain bike separated due to defective manufacture and assembly, causing a chain link pin to pull out of the chain plates. Plaintiff had purchased the Mongoose mountain bike at Wal-Mart the day of the accident and had ridden the bike less than 250 yards when the chain failed, causing him to be thrown over the handle bars and landing on the asphalt roadway. He suffered severe shoulder injuries. The Chinese bicycle chain manufacturer, KMC, is the world's largest bicycle chain manufacturer–90 million chains a year worldwide—and the defective chain was a low-end mass-produced model. Defendants KMC and the Chinese bicycle manufacturer, Pacific Cycle, each claimed that the other failed to properly "seat" the chain link pin during the assembly process. Discovery and document production was "interesting" to say the least, since most of the design and production documents were in Chinese. Plaintiff's excellent bicycle expert was Scott Ganaja of San Luis Obisbo.

As a result of the rotator cuff tear, Plaintiff was not able to complete his firefighter academy training, and he still needed the surgical repair as of the date of the settlement—three years post-accident. Plaintiff's $150,000.00 wage loss claim included a three-year delay in starting his firefighting career. Past and future medical specials were approximately $30,000. Plaintiff's expert orthopedist was Dr. Amir Jamali.

One caveat: Defendant KMC delayed payment of its 60% portion of the settlement for months and months, with specious claims of "currency regulations" and other stalling maneuvers. Plaintiffs' attorneys who must deal with self-insured Chinese manufacturers are encouraged to include stiff penalties and liquidated damages clauses for delayed payment in settlement agreements.

**• Medical Malpractice**
**Fall from Operating Room Table**
**Rotator Cuff Injury – Confidential Settlement**

A 21-year-old firefighter trainee sustained rotator cuff injuries when he slid off the operating room table during an emergency laparoscopic appendectomy. Defendant HMO's surgeon and OR nurses claimed that while Plaintiff may have "slid off" the OR table because he was not properly secured to the table with straps and guards, the plaintiff was "caught" mid-slide by the OR staff and was "gently" eased down to the OR floor. Plaintiff had to be lifted back up onto the OR table and re-draped, the surgeon and OR nurses had to re-scrub, and the appendectomy was then completed without further incident. Upon awakening in the recovery room post-operation, Plaintiff's initial remark was, "Why does my shoulder hurt so much?" Plaintiff made a wage-loss claim for a two-year delay in completing his firefighter training and for past and future medical and surgical expenses.

**• Medical Malpractice – Wrongful Death**
**Confidential Settlement**

A 59-year old male died from septic shock as the result of an undiagnosed and untreated throat abscess. Decedent left a widow of 40 years and two adult children. He was employed full time, very active and in good physical condition when he developed a high fever, sore throat and a stiff and painful neck (torticollis). After several days off work, he went to his HMO's walk-in clinic for an exam and reported his symptoms. The examining family practitioner inexplicably failed to examine decedent's throat or to perform a basic HEENT exam during the less than 10-minute encounter with the decedent. The physician also failed to order blood work or other lab or diagnostic tests to rule out any infectious process, such as meningitis, which was high on the differential diagnosis. The defendant examining physician diagnosed decedent with "pneumonitis" and sent him home.

Appropriate diagnostic and laboratory tests, including blood work and a head and neck x-ray or CT scan would have revealed the abscess. Decedent's throat abscess (in the retropharangeal space) was medically treatable with surgical drainage of the abscess, appropriate antibiotics and rehydration. Decedent died approximately 24 hours following his exam at the urgent care clinic. Special damages, including a 10-year future income loss and loss of domestic services exceeded $600,000. Plaintiff's experts included ER specialist Dr. Steven Gabaeff, infectious disease specialist Dr. Patrick Joseph, internist Dr. Dean Nickels and CPA Craig Enos.

# SAVE THE DATE!

# SIXTH ANNUAL JAMS SACRAMENTO MCLE DAY

## WEDNESDAY, JANUARY 29, 2014

### Embassy Suites | 100 Capitol Mall
### Sacramento, CA 95814

*A variety of morning and afternoon sessions will be offered at this complimentary event.*

THE RESOLUTION EXPERTS JAMS®

***Space is limited. For registration and complete details about this event, visit www.jamsadr.com/sacramento-mcle-day-2014***

# Allan's Corner

*Continued from page 2*

side of the road, it collided with a bicyclist, who was seriously injured. Bicyclist sued all occupants in the car, and trial court entered judgment for the four passengers. The question presented on appeal was whether the four women who were not driving but who were alleged to have supplied some of the alcohol that was consumed at the friend's house can be held liable for the injuries and the trial court's answer under Civil Code §1714 is no. Here, no adult or parent furnished alcoholic beverages at their home as is required by the statute.

**Elder Abuse.** In Winn v. Pioneer Medical Group, Inc., 2013 DJDAR 6679, the court holds that a physician does not need to have provided custodial care of a patient in order to be guilty of elder abuse but instead care, in and of itself, is enough. The question is whether they engaged in the type of reckless neglect required for elder abuse as opposed to simple professional negligence.

**Insurance Coverage.** In American Way Cellular, Inc. v. Travelers, 2013 DJDAR 6830, Plaintiff was insured by Travelers. Broker on application said they had fire sprinkler system; they did not. Policy requires the insured premises to contain automatic sprinklers by endorsement and therefore Travelers won at trial. American Way appealed, claiming that broker was an actual or ostensible agent of Travelers, and the court holds that the evidence shows that as a matter of law, the broker was not an actual or ostensible agent. Here, the "agent" was clearly an insurance broker and not a Travelers agent. Nice discuss of the law in this area if you need it.

**Evidence.** In Nevarrez v. San Marino Skilled Nursing and Wellness Centre, 2013 DJDAR 7223, trial court in an elder abuse case allowed in evidence a DPH citation which included not only hearsay statements and the opinions of the investigating officer who did not testify, but also the plan of correction. Court held that this was absolutely error and reversed the verdict.

**998.** In Martinez v. Brownco Construction Company, 2013 DJDAR 7341, the California Supreme Court held that where a plaintiff makes two consecutive 998 offers and the defendant fails to obtain a verdict more favorable than either, the plaintiff can collect expert fees incurred after the first offer as that is most consistent with the statutory policy behind CCP §998.

**Hospital Lien.** In State Farm Mutual Automobile Insurance Company v. Huff, 2013 DJDAR 7379, hospital in an interpleader action was awarded a portion of the damages Plaintiff recovered in a personal injury action. Hospital had filed a Hospital Lien Act (Civil Code §3045) lien. Plaintiff contends district was not entitled to any award because it did not prove that the charges for its services were reasonable and necessary. The case against third party had proceeded to trial. State Farm as insurer filed an interpleader action due to the hospital lien. Four witnesses testified. District director of patient accounting authenticated the bill and the fact that it was unpaid. He testified that the itemized charges were based on standard rates applicable to all patients. Director admitted he is not a doctor or nurse and never met or talked to the plaintiff.

District's former patient financial counselor testified that Plaintiff told her he didn't have any insurance and she needed to bill the person responsible for the accident. General manager of collection agency acting on behalf of the hospital testified about serving the lien notice, etc. He admitted he had no personal knowledge about the services performed for Huff, and the attorney who° represented Huff in the action against the third party testified that he did introduce evidence of all medical expenses Huff incurred during the hospitalization and laid the foundation for the jury verdict. Trial court ruled the district met its burden to establish the lien and granted the hospital payment in full. Court of Appeal reversed finding that a hospital needs to prove that the claimed charges are reasonable and necessary and that here, the hospital failed to sustain its burden of proof. Court held that the full amount billed by medical providers is not an accurate measure of the value of medical services because so many patients pay discounted rates, etc., based on Howell and its progeny. Hospital presented no evidence of the reasonable value of its services and therefore was not entitled to payment in full.

**Negligence.** In Southern California Edison Company v. City of Victorville/Laabs v. Southern California Edison Company, 2013 DJDAR 7770, the appellate court holds that the PUC does not have exclusive jurisdiction over the placement and location of street lights and utility poles and thus reversed a grant of judgment on the pleadings.

**Med Pay.** In Barnes v. Western Heritage Insurance Company, 2013 DJDAR 7802, Plaintiff was injured and sued the folks who caused his injury and settled that claim. Five years later, he sued the insurer who refused to pay his med pay under the policy that covered the third party who caused the accident. Trial court granted summary judgment finding that collateral estoppel barred the claim because the medical bills were covered in the underlying case and also there was no equitable estoppel to assert the policy's one year deadline as a defense in the med pay claim. Plaintiff claimed that insurer had failed to notify him of the one-year limitation and the trial court held they did not need to do so and Plaintiff did not rely on the failure to notify him to his detriment. The court holds that collateral estoppel cannot apply because the issues involved in the med pay claim were not litigated or decided in the underlying action. The court held that an award in this case would not result in impermissible double recovery because the insurer owed him a separate and direct duty under the med pay provision distinct from the duties owed to the insured who caused the accident. Court finds that other states that have heard the issue are split in authority, and the court holds here that it would not lead to an impermissible double recovery because there is a separate duty. The court also holds there was no equitable estoppel because the insurer was required to notify him of the one-year statute and did not do so leaving triable issues as to equitable estoppel.

**Wrongful Death.** In Ceja v. Rudolph & Sletten, Inc., 2013 DJDAR 7973, the California Supreme Court holds that in order to qualify as a putative spouse under CCP §377.60(b), a subjective standard applies focusing on the alleged putative spouse's state of mind. The reasonableness of the claimed belief in a valid marriage is a factor properly considered; however, there is no objective - reasonable person - test that is to be applied as the qualification is based upon the reasonable belief of the alleged putative spouse. This is a California Supreme Court opinion.

**Assumption of the Risk.** In Cann v. Stefanek, 2013 DJDAR 8709, Plaintiff was injured when the defendant dropped a weight during a mandatory UCLA swim team workout session. Trial court granted summary judgment based on assumption of the risk, and the appellate court affirms. Plaintiff argued that assumption of the risk does not apply because she and the defendant were not interacting and were not co-participants in any competitive sport at the time of the injury (Defendant was lifting weights, Plaintiff was doing pushups) and there was evidence of reckless behavior on the part of Defendant because she positioned herself too close to where Plaintiff was doing pushups and dropped a weight on her head. The court found that the two were co-participants in a training session and further that primary assumption of the risk is not limited to situations where the two parties are engaged in the exact same activity. The court further found there was absolutely no evidence of reckless conduct since both Plaintiff and Defendant were instructed by the coach to drop the weights if they lost their balance, which is exactly what happened here.

Page 3:

# Determining Income Loss for Your Self-Employed Clients

Capitol City Trial Lawyers Association
Post Office Box 541
Sacramento, CA 95812-0541

## SEPTEMBER 2013

**Tuesday, September 10**
**Q&A Luncheon**
Noon, Vallejo's, 1900 4th Street
CCTLA Members Only

**Thursday, September 19**
C**CTLA Problem Solving Clinic**
Topic: TBA—Speaker: TBA
Arnold Law Firm, 865 Howe Avenue, 2nd Floor
5:30 to 7 p.m.
CCTLA Members Only - $25

**Friday, September 20**
**CCTLA Luncheon**
"It's All About the Science: Understanding the Biomechanical Approach to Motor Vehicle and Pedestrian Injuries, Including Spinal Injuries and TBI."
Speaker: Andrew Rentschler, Ph.D., ARCCA, Inc., Reno
Firehouse Restaurant - Noon
CCTLA Members - $30/Non-members $35

## OCTOBER 2013

**Tuesday, October 8**
**Q&A Luncheon**
Noon, Vallejo's, 1900 4th Street
CCTLA Members Only

**Wednesday, October 9**
**CCTLA Problem Solving Clinic**
"Minding Medicare's Interests: Liens and Set-asides in Liability Cases, including Recent Medicare Legislation"
Speaker: Brett Newman, Managing Partner,
The Lien Resolution Group
Iron Steaks Restaurant, 2422 13th Street
5:30 to 7 p.m.
CCTLA Members Only - $25

**Friday, October 18**
**CCTLA Luncheon**
"Every Lawyer's Top-10 Must-Have Apps"
Speakers: John Airola & Lawrance Bohm
Firehouse Restaurant - Noon
CCTLA Members - $30

## NOVEMBER 2013

**Thursday, November 7**
C**CCTLA Problem Solving Clinic**
Topic: TBA—Speaker: TBA
Arnold Law Firm, 865 Howe Avenue, 2nd Floor
5:30 to 7 p.m.
CCTLA Members Only - $25

**Tuesday, November 12**
**Q&A Luncheon**
Noon, Vallejo's, 1900 4th Street
CCTLA Members Only

**Friday, November 15**
**CCTLA Luncheon**
Topic: TBA- Speaker: TBA Restaurant - Noon
CCTLA Members - $30

## DECEMBER 2013

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

**Tuesday, December 10**
**Q&A Luncheon**
Noon, Vallejo's, 1900 4th Street
CCTLA Members Only

## JANUARY 2014

**Wednesday, January 22**
**CCTLA Seminar**
"What's New in Tort & Trial: 2013 in Review"
Speakers: TBA - Location: TBA
6 to 9:30 p.m.
$125 CCTLA Member / $175 Non-member

Contact Debbie Keller at CCTLA , 916/451-2366 or debbie@cctla.com for reservations or additional information about any of the the above activities.

**CCTLA COMPREHENSIVE MENTORING PROGRAM**

The CCTLA board has 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

# CCTLA Calendar of Events