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Inside

Spring Fling Supports Our Food Bank: Announcing the 'Giving Pool'

Lawrance Bohm
CCTLA President

Greetings to you all as we prepare to enter the Sacramento summertime. Before our leap into summer, it's time for our annual Spring Fling Reception & Silent Auction, on June 14. Proceeds from this event are contributed to the Sacramento Food Bank & Family Services. It has been my pride and joy to be a part of supporting this organization, and I am in the midst of a personal pledge of giving $1,000 per year in support of the Food Bank, for a minimum of 10 years.

I have seen first-hand that our Sacramento Food Bank is an incredible provider of food to those in need. Last year, it provided more than 20 million meals to those in need, including students, families, individuals and the elderly of Sacramento County. In addition, the Food Bank provides services including the provision of clothing, adult education, training and other services critically important to helping those in need. Approximately 140,000 people each month are provided assistance.

This year, we are very excited to announce that folks who are unable to be a Spring Fling sponsor can still show their support for the Food Bank and their concern for the needy—by dipping your toes into the "Giving Pool."

What is the Giving Pool, you ask? The Giving Pool has been created so everyone can flex and exercise their charity muscle. The minimum contribution to the Giving Pool is $5. The amount you donate will not be announced, but everyone who donates will receive a recognition button to wear at Spring Fling to acknowledge your awesome act of support. My daughter (a high school senior) has already pledged $20 to the Giving Pool and cannot wait to wear her ribbon at our event.

"Making a donation to the Giving Pool can be done by check, credit card (see page 22), at Spring Fling or by signing into www.venmo.com: search for SFBFS, and click on Devin Yoshikawa@SFBFS. If you have any questions or problems, contact our executive director, Debbie Frayne Keller, at debbie@cctla.com."

Donating to the food bank will put you into the Giving Pool and start you on the path of exercising your charity muscle. I will be encouraging all of my Sacramento staff to make a contribution to the Giving Pool, and I hope you do the same.

Please join me in supporting the hungry and those in need of assistance here in Sacramento. The Spring Fling's silent auction is always full of useful and enjoyable items. Spring Fling offers a great opportunity to get out there and meet other CCTLA members, members of the judiciary and other friends of our legal community. It has been a wonderful event every year.

It is my intention that CCTLA continues its tradition of zealously fighting to support our community. I look forward to seeing you all at our Spring Fling on June 14.

Mike's CITES

By: Michael Jansen
CCTLA Member

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

Hedwall v. PCMV, LLC, et al.
2018 DJDAR 3544 (April 19, 2018)

You Can't File a Second Amended Complaint Without Leave of Court

FACTS: PCMV sued Hedwall on an open-book account for $4,218.84. Hedwall filed a cross-complaint against PCMV and others for $70,000 and punitive damages.

Hedwall alleged that he is among the best golfers in the United States. In 2004, he joined the Valencia Country Club and made an oral agreement with the club's manager that he would get his $70,000 membership fee back if the golf course ever fell below then-existing standards. The country club then passed through several different entities' hands until 2014, when Hedwall claims PCMV and ForeGolf permitted the golf course to deteriorate. Hedwall told the golf course management he would not pay monthly dues until the course was restored. PCMV asserted a claim against Hedwall for unpaid monthly dues.

Hedwall failed a first amended complaint adding claims for conversion and declaratory relief to his previous claims of breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, unfair business practices (B&P Code §17200, *et seq.*) and intentional interference with contractual relations. CLP demurred as did some of the other entities. While the demurrers to the first amended complaint were pending, Hedwall filed a second amended complaint without leave of court.

In March 2016, on the hearing on demurrers to the first amended complaint, the trial court "cancelled" the filing of the second amended complaint on its own motion, stating that "there was no stipulation among the parties or court order allowing for such filing." Hedwall appealed, contending that the second amended complaint should not have been cancelled.

HOLDING: Hedwall loses. CCP §472 does not allow a second amended complaint to be filed.

REASON: Hedwall agreed that under CCP §472, a plaintiff has a right to file an amended complaint once as a matter of right. Hedwall argued that a plaintiff is not restricted to only one amendment to an amended version of the original complaint, only the original complaint. Hedwall argued that a plaintiff may amend one version of the operative complaint, first, second or whatever, as a matter of right provided that the first, second, or whatever, complaint is filed before any answer and within the specified time restrictions relating to demurrers. The appellate court rejected Hedwall's contentions.

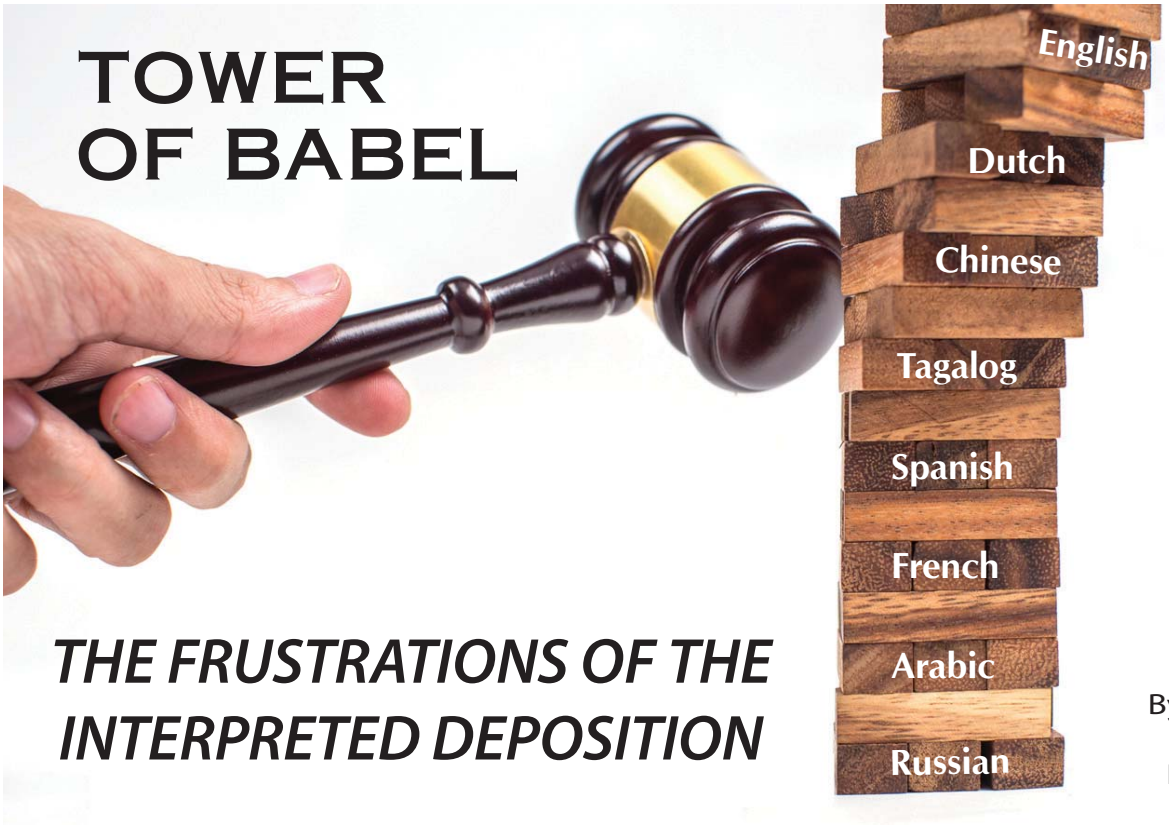
The Second Appellate District admitted there is no published decision squarely holding that a plaintiff may not amend a subsequent complaint as a matter of right. The appellate court looked to the legislative intent. The appellate court also pointed to CCP §420, which defines "pleadings." Thus, because the statute says the pleading, they are referring to the original complaint and not an amended complaint. Thus, a plaintiff may not amend subsequent amended complaints before they are answered as a matter of right.

The appellate court also pointed to CCP §430.42 which requires defendants to meet and confer with a plaintiff before filing a demurrer.

Practice Tip: While there is a liberal policy favoring amendment of complaints, a plaintiff must demonstrate the possibility that the amendment cures the complaint's defects. Thus, if a plaintiff fails to demonstrate that the defect in the complaint may be cured, the court may strike the amended complaint with impunity.

The plaintiff must specifically set forth applicable substantive law and the legal basis for the amendment, the elements of the cause of action and authority for it.

The plaintiff must also set forth factual allegations that sufficiently state all required elements of that cause of action and the allegations must be factual and specific, not vague or conclusory.



THE FRUSTRATIONS OF THE INTERPRETED DEPOSITION

By: Steve Davids,
CCTLA
Past President

Interpreted depositions are frustrating, and they remind me of George Bernard Shaw's the joke that Americans and Englishmen (and women) are divided by a common language. There was a British movie ("cinema," as the Brits call it) that involved a region in a working-class neighborhood where the English language was so difficult for movie watchers in the United States that there had to be subtitles for a movie made with actors speaking "English."

My purpose is not to get into the details of an interpreted depositions but to give you some anecdotes to show how tricky these depositions can be. In many ways the questioner needs to be very basic. Compound sentences, run-on sentences and other stuff can definitely make your transcript not what you think it was.

One of the best things you can do is to get the deponent in the right frame of mind. You need to tell the deponent how this works. Specifically, "Mr. Rosales, we have an interpreter sitting next to you to translate from English into Spanish, and Spanish into English. The interpreter has a very important role, and we couldn't do this deposition without him/her. But please, if you don't understand my question, *do NOT ask the interpreter to help.* Tell ME if you don't understand the question, and I will re-state it for you until we get it right." The witness should only converse with YOU—not the interpreter! In fact, the interpreter will probably be happy knowing his or her role is on the correct trail.

Sometimes, using the same language still has huge problems

For some strange reason, I remember a junior high school teacher giving us an exercise. He read a three-paragraph-long story about two elderly women taking a trip across the US, and their adventures. He read the story to the first student in the left-hand first row. That student then told the story to the person to their right (and at the end of a row, the recitals went in the opposite direction). This continued on and so on until everyone had both heard and then passed on the story.

The teacher then read the initial text, and many students laughed loudly. Why? Well, the student in the last seat stood up and said, "It's about a dog that did tricks." That's right: three paragraphs down to one sentence, and everything being lost in the "translation." And the students were all English speakers. Imagine how difficult it is to communicate with people speaking different languages.

There is no such thing as an exact interpretation

I sometimes smile to myself when lawyers are trying to deal with interpreted depos. The first problem is that lawyers, being very studious to make sure they use exactly the same question in a deposition, seem to think that there is a one-for-one equivalence: each English word has a 100%-accurate word that fits into Spanish. Or any other language. Not even close! Not only that, but all languages have their idiosyncrasies. And not to mention slang and idioms (Who you calling an idiom?!).

I remember being at an interpreted deposition involving a deponent from Fiji. The attorney asked a question about time, distance, etc., and then said, "Ballpark it for me." But that particular sports idiom doesn't translate in Fijian, even assuming there are ballparks in Fiji. The interpreter can't do that, and so therefore, you don't really get what the deponent is saying.

It's hard, but when doing an interpreted deposition, try as much as you can to get rid of idioms and slang. Make it simple and straight-forward.

Here's an example outside the realm of interpreted depositions. The great German poet and novelist Bertolt Brecht was working with his English translator on a poem. They had a spirited debate and conversation, and after about an hour, they took a break … and realized that they were still working to get the *first word* correctly translated! That might be

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apocryphal, but it rings true to me.

Good interpreting is critical. Back in the 1970s, President Carter took a trip to Poland. In giving his welcoming remarks (being interpreted by a Polish translator), he talked about leaving his country for this journey. But the translator somehow translated it into a word that denoted that the President had abandoned his country!

Does the interpreted language have the same concepts?

Let's use an example closer to home. I was in a courtroom a few decades ago: The defendant in a criminal case appeared to be Southeast Asian. The judge was doing an arraignment calendar, which goes fast. The judge went through the spiel very quickly, talking about probation, minimum and maximum penalties, etc., when the judge got pretty pissed because the translator wasn't translating. The poor dude was clearly at a loss.

The judge, bless his heart, didn't realize that the country the defendant hailed from likely did not have things such as probation, and minimum/maximum penalties for certain crimes. The concept of probation may well be completely different, or even unheard-of. I felt at the time that the interpreter wasn't at fault. The court staff that hired him probably assumed, like the judge, that the language he was using had words for things like probation and minimum/maximum sentences.

Heck, think of our own language: a "minimum/maximum sentence" sounds like a small and large sentence, meaning a sentence being a collection of words. Why would you call a length of incarceration a "sentence"? It makes no sense when talking regular old English. At the end of the arraignment, the judge told his clerk that the interpreter was to be banned from the judge's courtroom. I understood the frustration, but frustration is exactly what translation has to deal with.

Is the Deponent talking to the Interpreter?

Just recently, I was looking over the transcript of a deposition I attended. While it's not a big deal, it could have difficulty at trial. Here is a snippet:

Q. "If you can't give an estimate, that's okay."

A. "Well, it is better for me not to give it then."

Q. "So is it that you can't, or you don't want to? "

A. "Not that I don't want to. It's just that—well, he is intelligent, and he probably needs to know what the estimate would be based on this. Do you understand?"

What I didn't realize at the deposition, since I know no Spanish, was that the deponent was in some way *treating this as a conversation with the interpreter* and what "he" (the deposing lawyer) was asking about. This puts the interpreter in an interesting and very difficult position. The interpreter is just supposed to translate from one language to another. But I'm saying that the interpreter should have done something else.

But it's an interesting situation. I can envision the interpreter going off the record and telling the deposing lawyer: "You know, the witness is treating this as a conversation with me, and he is commenting on some of your questions. If you want, either you or I can tell the deponent that he needs to pretend that the interpreter is not in the room, and he (the deponent) needs to have a one-on-one

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conversation with the deposing lawyer."

Layers of translation are a bad thing

Years ago, I was at deposition in a wrongful death case. The deposing witness was one of the defendants in a multi-car crash close to the Yolo Causeway. The defendant truck driver who triggered the collision spoke only Spanish. Interestingly, the CHP was able to find a Spanish-speaking officer who took the defendant's statement. But it was the typical CHP statement: not word-for-word. Just a summary. The defense attorney (a really, really good lawyer) then had an interpreter translate the Spanish summary statement into English. But remember it wasn't a word-for-word, tape-recorded statement. It was the usual CHP generalized statement.

The defense lawyer did the best he could, but it was clear after five minutes or less that he was never going to be able to use the interpreted Spanish statement from the truck driver for impeachment.

The lawyer told me afterwards that with these kinds of cases with interpreted testimony, you NEVER really get the "whole truth and nothing but the truth." Especially in trial. It just doesn't work out for impeachment. We are a species that is torn apart by our commonality of language.

The interpreter sometimes helps the deponent

Is helping the deponent appropriate? You probably have to attend enough interpreted depos to know that there are times when a question is made by the attorney. The witness and the interpreter take about five minutes or more talking with each other. The interpreter then looks at the deposing attorney and says, "No." Like that's your answer after five minutes of talking back and forth?! Fortunately, most interpreters I have met are very good about making sure this kind of stuff doesn't happen.

A good interpreter provides linguistic context

The other thing about interpreted depos is that there can be nuances and contextual stuff. The best interpreter I have seen was just a few months ago, translating for a Spanish-speaker. At a point in the discussion, she stopped, on-the-record and went into English and explained that a word or words used by the deponent had certain nuances that might not come out in the cold record. There wasn't much to be done about it, but at least she gave the attorneys information that might (or might not) have been important concerning the deponent, who was the plaintiff in an eye-out injury.

Cultural Aspects

Years ago, I was at an interpreted deposition of my client. The defense attorney was going through what the client's family and friends knew about the collision, and the injuries. We were discussing what the plaintiff wife could no longer do with some of her domestic responsibilities, as well as her job. She testified that there are people she knows who have a great deal of esteem for her family. The defense attorney didn't get it. We learned off the record that there is something in Hispanic culture called a *co-madre* or *co-padre*, people who are linked very closely to, but not family, necessarily.

Be inquisitive, even if it means going off the record to figure out you are dealing with.

Conclusion

I leave you with what would be a humorous anecdote, had not the case have been so tragic. It was a homicide involving Southeast Asian kids and Anglo kids who got into a fight that resulted in a shooting.

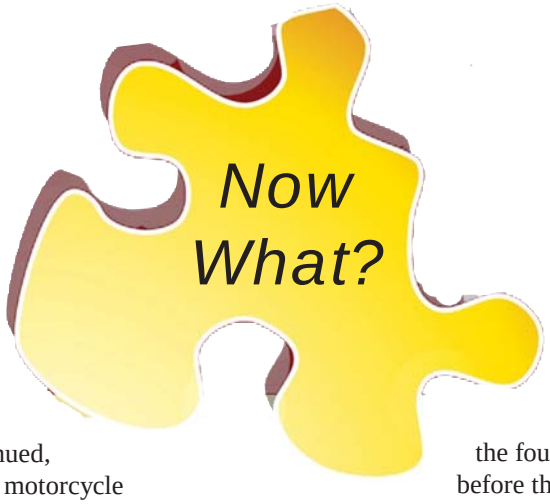
One of the Asian witnesses was on the stand, and his English was not good enough for testimony, so he was testifying through an interpreter. The DA was walking him through the details of the situation. Before the shot was fired, the kids were hurling profanities. The DA asked the witness what one of the Anglo kids said. Without looking at the interpreter, the witness said, in English, "Fuck you." There was a pause. The interpreter figured he had to do his job, so he looked at the DA and said, "Fuck you." Didn't really need to interpret that.

A good interpreter really helps the parties. But attorneys need to know that languages are not just bundled computer input. Languages are living things that mutate and change, and just in our lifetimes.

My older sister would have said, "peachy-keen," as opposed to awesome. A new catch-phrase is always being born. The trick for the interpreted deposition is to keep things simple and to always avoid things that don't translate well. It can be done. And now it's time for me to shut up about all of this, and (like President Carter) abandon my firm to go home for dinner.

For the last 16 years, CCTLA has recognized the trial advocacy award winners at McGeorge School of Law. This year's ceremony was held in the courtroom at McGeorge on April 26. CCTLA President-elect Rob Piering attended the ceremony and presented a plaque and a $150 check to each of the top performers: Megan Thomas, First Honors, Student Trial Advocate for Fall 2017; and Sydnie Reyes and Erin Riswold, First Honors, Student Trial Advocate for Spring 2018 (tie). Congratulations to these McGeorge students! Pictured from left to right: Rob Piering, Erin Riswold, Megan Thomas and Sydnie Reyes.

Half Way In, the Defendant Claims to be Incompetent



By: Rob Piering,
CCTLA President-Elect

Not too long ago, we were deep in the trenches of a case involving a collision between a shuttle bus and motorcycle. Just 45 days outside of trial, the defense moved for the appointment of a *guardian ad litem* for their defendant bus driver and asked the court to set aside discovery responses and potentially strike his deposition testimony. Here's how it went.

Initially, the police concluded our client (motorcycle rider) caused the crash. Smith, the defendant shuttle bus driver, was 74 and claimed the motorcycle rider ran into the back of the shuttle bus as the motorcycle was weaving in and out of traffic. The only witness to the incident, who was driving directly behind the crash, said the plaintiff motorcyclist was riding recklessly, weaving in and out of traffic and speeding. Because of a significant traumatic brain injury, Plaintiff had no memory of the event.

We filed and served a complaint, alleging bus driver Smith made an unsafe lane change and cut Plaintiff off in doing so. The initial round of written discovery yielded little help, so we set the videotaped deposition of Smith. In deposition, Smith came across as sincere and someone who honestly felt bad about the incident. However, he held firm to his testimony that the motorcycle ran into the back of the bus.

But as our inquiry continued, we discovered Smith saw the motorcycle as he was getting on the freeway, and when Smith entered the freeway, he did so at what he estimated to be 20 miles per hour. That was significant because there was very little traffic, and entering the freeway at such a slow speed could obviously force those already on the freeway to substantially adjust their speed or change their lane position.

Smith also said he lost sight of the motorcycle while he was in the number three lane of the freeway and agreed he should have waited to make his lane change until he knew where the motorcycle was. Still at 20-25 miles per hour, Smith attempted to change from the number three lane to the number two lane, and within moments thereafter, he felt what he described as a bump to the back of the bus.

Done with Smith, we still had to face the testimony of the independent witness. He was in his 50s, smart and a long-time motorcyclist. Initially, the witness all but crucified Plaintiff, but during cross exam, he said he had been on the freeway for at least four miles before the crash and the shuttle bus had been with him the entire time. We knew, however, from Smith's deposition that the bus had only been on the freeway less than a quarter mile before the crash. So we neutralized the witness by getting him to admit he was as certain about the bus being on the freeway for the four miles before the crash as he was about the motorcycle speeding, weaving in and out of the lanes and causing the crash.

After these depositions, we neutralized most of the officers involved in the investigation and showed that none of them were qualified to provide expert testimony as to speed or accident reconstruction. Things were looking up, and we served some follow-up discovery, including request for admissions.

Surprisingly, Smith failed to respond to the discovery in any respect at all. The defense claimed Smith was no longer competent to answer discovery and they were excused from providing responses of any kind. We filed a motion to have the discovery answered and the admissions deemed admitted. The court granted our motion, and the defense promptly moved for the appointment of a *guardian ad litem* and asked the court to set aside the deemed admissions.

Notably, there was substantial evidence that Smith did not lack legal capacity. For example, Smith's personal physician evaluated him just seven months earlier and concluded he had no memory problems. A social worker also concluded that Smith had "good communication skills" and was "able to make realistic plans." Similarly, his best friend and housemate, who was also the proposed

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guardian, testified that he had no concerns about Smith's mental abilities.

The only evidence supporting the claim that Smith lacked legal capacity was a report by a consultant hired by the defense. Her findings, as expected, were at odds with those of the independent medical professionals and with the testimony of Smith's best friend and housemate. The conflict certainly seemed to raise serious concerns regarding whether Smith genuinely lacked legal capacity, especially in light of the ongoing discovery dispute, which would be directly affected by findings regarding Smith's legal capacity.

Legally, the appointment of a *guardian ad litem* is governed by Code of Civil Procedure § 372. Section 372(a)(1) defines the persons for whom guardians shall be appointed as "a minor, a person who lacks legal capacity to make decisions, or a person for whom a conservator has been appointed . . . ." In our case, Smith was neither a minor nor a person for whom a conservator has been appointed. Therefore, appointment of a guardian required a showing that Smith "lacked legal capacity to make decisions." The standard the courts have applied in determining the need for a guardian under section 372 is "whether the party has the capacity to understand the nature or consequences of the proceeding, and is able to assist counsel in preparation of the case." In re Jessica G. (2001) 93 Cal.App.4th 1180, 1186; In re Christina B. (1993) 19 Cal. App.4th 1441, 1450.

As the court noted in re Sara D. (2001) 87 Cal.App.4th 661, 672, there is very little case law discussing the standards or procedures for appointment of a *guardian ad litem* for an adult. However, the trial court does have the "duty . . . to clearly bring out the facts," regarding legal capacity. In re Conservatorship of Pamela J. (2005) 19 Cal.App.4th 807, 827-828. The court's own observations of and interactions with the person can be important to the determination of legal capacity. Guardianship of Walters (1951) 37 Cal.2d 239, 249. In AT&T Mobility, LLC v. Yeager (E.D.Cal. 2015) 143 F.Supp.3d 1042 (discussing California and federal law), the court relied in part on its own interactions with the plaintiff over a series of hearings to determine he lacked competency.

The court also noted that the plaintiff could not answer why he was in court and could not recall the date, year, or current president of the United States. Based on its own observations, and the plaintiff's inability to answer such basic questions, the court found appointment of a guardian to be necessary.

In the case of a minor or of a person who is under a conservatorship, appointment of a *guardian ad litem* is routine and non-controversial. Different issues arise, however, when an adult who has not previously been found to lack legal capacity seeks appointment of a guardian ad litem, since it raises questions about that person's obligations as a party.

In Regency Health Services, Inc. v. Superior Court (1998) 64 Cal.App.4th 1496, 1500, the court expressed concern about the use of a *guardian ad litem* to evade discovery obligations. "If a party could obtain a broad exemption form discovery obligations simply by obtaining appointment of a guardian ad litem, applications for such appointments would expectably be a major battleground, since such applications would serve as de facto motions for exemptions from discovery." The court noted that inevitably, such a rule would, "generate many additional *guardian ad litem* appointment applications, with the applying party arguing for incompetency at lower and lower levels of impairment."

In attempting to avoid discovery obligations, the defense argued that Smith had been legally incompetent since the time of his deposition. We responded that if that were true, it is inconceivable that any competent attorney, acting in good faith, would delay *nearly a year* before filing an Application for Appointment of a Guardian Ad Litem. The defense further argued that Smith's incapacity was conclusively established by the report written by their paid consultant.

Again, we asserted serious questions were raised by Smith's medical records. Those records showed that Smith's attorney sent him for evaluation by Smith's own personal physician to determine whether he was competent to be a witness and participate in the case. The personal physician conducted memory tests and evaluated Smith's ability to testify, and concluded that Smith had no serious mental deficits and was competent to testify as a witness. The doctor specifically wrote he found "no signs of memory loss," "memory is at baseline level" and specifically noted that Smith "recalls details of accident four years ago well." Notably, this evaluation was conducted less than three months before the paid consultant made her report.

Smith's medical records also revealed that he was hospitalized for an unrelated physical ailment just a month after the paid consultant issued her report. At that time, a social worker evaluated Smith and concluded that he had "positive coping skills," "good communication skills," that he was "able to make realistic plans," and had a "willingness to seek help as needed." The social worker further concluded that Smith was "oriented X3, pleasantly conversant," and "engaged in [the] assessment."

Thus, two neutral and unbiased medical professionals had evaluated Smith and found that he had no significant memory problems and no other condition that would make him unable to give evidence. One of those evaluations was shortly before the paid consultant's report; the other was shortly after. These independent and unbiased evaluations of Smith raised grave doubts about the conclusions of defense counsel's hired consultant. In addition, our retained consultant found that the cognitive tests administered by the defense consultant were not the type of tests which can imply that an individual is incompetent or lacks the ability to testify accurately and truthfully.

As the Regency Health Services court explained, the courts must be wary of the use of the *guardian ad litem* process as a means of avoiding discovery obligations, so that such motions do not become "*de facto* motions for exemptions from discovery," with parties applying for a guardian "arguing for incompetency at lower and lower levels of impairment." In the context of the present case, this is a very real concern.

In these highly unusual circumstances, with substantial evidence that Smith was legally competent and very little credible evidence that he was not, we asserted the court should deny the Application for Appointment of Guardian

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Medi-Cal lien reductions in medical malpractice cases

By: Daniel E. Wilcoxen,
Wilcoxen Callaham, LLP, & CCTLA Board Member

The recent case of Martinez v. State Department of Health Care Services (decided by the 2nd Appellate District on December 13, 2017) discussed whether under the Ahlborn theory, and Welfare & Institutions Code §14124.76(a), the $250,000 cap for non-economic damages limits the amount of the true total value of the case, and further whether or not a Medi-Cal lien can be reduced not only under the Ahlborn theory as adopted in W & I Code §14124.76(a), but also reduced by W & I Code §14124.72.

The 2nd District found the trial court did **not** err in not valuing the plaintiff's non-economic damages at $2.5 million because the court limited those damages to $250,000, which is the maximum allowed for non-economic damages under the Medical Injury Compensation Reform Act (MICRA). Further, the trial court did not allow the 25% reduction and pro-rata share of costs available under W & I Code §14124.72, in addition to the reduction allowed under W & I Code §14124.76. The 2nd District found the trial court **erred in failing to further reduce the amount of lien by 25% for attorney's fees**, as required by W & I §14172. The State Department of health Care Services **conceded** the point.

Also see Lopez v. Daimler Chrysler (2009) 179 Cal.App.4th 1373, also allowing for Medi-Cal lien "reduction," by both W & I §14124.76 (Ahlborn) and W & I §14124.72 plus pro rata costs reduction.

Incompetency claim

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Ad Litem. Alternately, we requested the court direct the defense to produce Smith at the hearing which would allow the court the opportunity to speak with Smith directly and to determine for itself whether, as Smith's own physician concluded, he meets the standards of legal capacity and is able "to understand the nature or consequences of the proceeding, and is able to assist counsel in preparation of the case."

Unfortunately, the court took the defense, bait, hook, line and sinker. It granted the application and did not as much as request Smith to appear to make at least some inquiry into the veracity of the claims being made. It then allowed Smith to rescind the deemed admissions and allowed him to provide responses through his *guardian ad litem* to the contested discovery.

It was, for us, a blow to what we felt to be the duties of the court and spirit of the law. But it also reinforced one of many imperatives of discovery: Videotape every deposition you take because you never know when you are going to need it. Fortunately for us, we did in fact videotape Smith's deposition, and it provided all that we needed for trial. And because Smith made substantive verified changes to his deposition testimony during the period allowing that to take place, we knew at least that aspect of our discovery would go unchanged.

In the end, we secured a substantial seven-figure settlement for our client who, to add fun to the party, had five prior felony convictions, all of which bore on moral turpitude.

CCTLA thanks Motions in Limine program sponsors and speakers

CCTLA's Motions in Limine program drew almost 90 people to McGeorge School of Law on April 20. Special thanks go to the program speakers, Robert Simon and Brandon Simon, who came from Southern California to provide this extraordinary and informational program.

Also, CCTLA especially thanks the seminarr sponsors:

Platinum sponsors: Noah Schwartz, Offices of Noah S. A. Schwartz at Ringler and Patrick Faber, Atlas Settlement Group

Gold Sponsor: Charleen Inghram, RN, BSN, CLNC - Expert Legal Nurses

Silver Sponsor: Carlos Alcaine and Steven Halterbeck, The Alcaine Halterbeck Group.

Above: Brandon and Robert Simon, the speakers for CCTLA's Motions in Limine program at the McGeorge School of Law.

Above, Charlene Inghram of Expert Legal Nurses, with Carlos Alcaine of The Alcaine Halterbeck Group.

Above left: Lindy Torgerson of Offices of Noah S. A. Schwartz at Ringler. Above right: Brad Inghram, Charlene Inghram and Alyssa Inghram of Expert Legal Nurses. Far right: Mark Morales of Atlas Settlement Group.

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MODERN DAY SCALPING AT THE SALON

By: Glenn S. Guenard,
Guenard & Bozarth, LLP,
and CCTLA Board Member

We recently concluded a case involving a hair weave that went terribly wrong. Our client was a young lady, an aspiring model, who experienced pressure necrosis from a tight weave, and it changed her life. She was left with a permanent bald spot the size of a playing card on the top of her head.

Hair weaves and exotic hair braiding have become more popular in recent years, and more and more shops are opening up to meet the demand. What you may not know is that this is a completely unregulated industry. The California Board of Barbering and Cosmetology, which tests and regulates barbers and cosmetologists, does not test or regulate braiding and weaving. This means no license is required to perform these services.

More importantly, the technique is not taught in cosmetology school. Individuals learn the trade from friends, family and on the job—from others who learned it from their friends, family or on the job. What this creates is an inconsistent and blurry standard of care because the methods vary from region to region and household to household. These conflicting methodologies are then put to practice in neighborhood salons.

One major issue we had to overcome in the case, which is always present in purported independent contractor versus employee disputes, was course and scope of the individual stylist. The stylist had signed a "Hair Salon Booth Rental Agreement" that illuminated her understanding that she would operate as an independent contractor. Nonetheless, we were able to use the facts and the agreement language to overcome the independent contractor presumption and have the salon owner's insurance pick up the claim.

On the surface, this lack of regulation, training and industry standards may not seem like a big deal. However, once you become aware of what can occur if a weave or braid is done incorrectly, you might change your mind. When done correctly, these hairstyles cause no damage to the hair or scalp. When done incorrectly, permanent hair loss and scaring can occur.

There is a misconception in the industry that to be done correctly, the braiding and weaving need to be extremely tight. Sayings such as, "the tighter the braid the better the weave" or "if it ain't tight, it ain't right" are often the colloquial expressions amongst stylists installing the weaves. When faced with these industry philosophies, we knew we were likely dealing with a case of first impression.

Based on the opinions from our client's medical providers and our experts, when braids are done excessively tight, the gradual tension on the hair follicle causes pain and can stress the follicle beyond its biological tolerance—causing it to die. The result is permanent baldness. It is common to see women with what appears to be a receding hair line or thinning hair around the edges. This is called "traction alopecia" where "traction" is the tension caused by the braid and "alopecia" is the medical term for hair loss.

More serious injuries can also occur, but are less common. One example is pressure necrosis of the scalp. To install a weave, the stylists often use a braiding pattern called a beehive or spiral braid, that starts at the edge of the hair by the ear and continues in a spiral pattern ending at the crown of the head. If done too tightly, the braids act like a series of tourniquets on the scalp—which decrease the blood-flow.

As the braids get closer to the crown of the head, the blood-flow can be reduced to the point where tissue begins to deteriorate. When this happens, the scalp starts to rot and the hair follicles die. What is left is a large open wound beneath the weave—often as big as eight to ten centimeters in diameter. This is similar to a bed sore and is often not painful at all. After the wound heals and scars, the unfortunate result is a large circle of permanent baldness—akin to modern day scalping.

Most people who install weaves or do braiding are completely unaware that this can occur. This ethos is bred from inconsistency in the industry and lack of licensing and regulations. The lack of regulation is surprising given the fact that conservative estimates value the African-American hair industry as a multi-billion dollar a year enterprise.

Due to the embarrassing nature of this injury, it often goes unreported. Further, in recent years there have been some case studies in medical journals addressing this problem.

As a result, it will not be surprising if we see more of these types of cases in the future.

A 2017 Sex Harassment Case Worth Knowing in the #MeToo Era

By: Erik M. Roper, Esq., CCTLA Board Member

On Jan. 18, 2018, I attended the annual What's New in Tort & Trial presentation. As a lawyer who exclusively represents workers in employment cases, I was disappointed when the panelists arrived at the section on employment cases and informed the attendees they were not going to address any of them, and that we should read them.

While I have yet to make it through all 65 of the cases presented in the employment section of the written materials, I have read several of them and would like to share one that stood out to me in light of the recently relevant #MeToo movement.

"The #Me Too movement was founded in 2006 to help survivors of sexual violence, particularly young women of color from low wealth communities, find pathways to healing."[1] Additionally, the #MeToo movement seeks to cause long term, systemic change.[2] While the case addressed here does not involve sexual violence per se (at least, not as that term is commonly understood), the workplace misbehavior seen in it demonstrates that we as a society still have a long way to go in the journey towards a future when all women will be able to enjoy workplaces free of sex-based harassment and discrimination.

Zetwick v. County of Yolo

In Zetwick v. County of Yolo,[3] Plaintiff Victoria Zetwick, a county correctional officer, alleged that the county's sheriff, Edward Prieto, created a sexually hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the state Fair Employment and Housing Act ("FEHA"), Gov. Code § 12940 *et seq.*, by giving her unwelcome hugs over 100 times over 12 years. Plaintiff appealed the ruling by Judge Nunley in the United States District Court for the Eastern District of California granting Defendants' motion for summary judgment ("MSJ"). The United States Court of Appeals for the Ninth Circuit reversed and remanded.

Critical to the Ninth Circuit's ruling was Plaintiff's allegation that while she often saw the sheriff hug and kiss several other female employees, she never saw him hug male employees. Rather, he would only shake hands with male employees. The Zetwick court held that the district court's grant of summary judgment was inappropriate because "a reasonable juror could conclude that the differences in hugging of men and women were not, as the defendants argue, just 'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.' " [4] Additionally, the court held "that the district court's contrary conclusion may have been influenced by application of incorrect legal standards."[5]

Application of Incorrect Legal Standards

The Zetwick court found that the district court had applied two incorrect legal standards. First, it found that the district court was in error when it applied what it erroneously believed to be a black letter rule "that courts do not consider hugs and kisses on the cheek to be outside of the realm of common workplace behavior."[6] The district court cited three cases in support of that proposition.[7] However, the Ninth Circuit unequivocally held that "[n]one of these decisions states or properly stands for that proposition."[8] This conclusion results from the relied upon cases all being factually distinguishable to the extent that none enumerated how many unwelcome hugs occurred or the period of time over which they occurred.

Second, the Zetwick court found that the district court applied the wrong standard for hostile work environment sexual harassment cases. The applicable standard is whether the defendant's allegedly harassing conduct was severe ***or*** pervasive.[9] However, here, the district court's MSJ ruling "'f[ound] that Defendant Prieto's conduct in this case was not severe ***and*** pervasive.'"[10]

Improper Analysis of the Record

The Ninth Circuit rejected the district court's conclusion that Zetwick failed to state an actionable claim of sexual harassment. The court found that:

> "[a] reasonable juror could credit Zetwick's testimony that Prieto's conduct 'was sufficiently severe or pervasive to alter the conditions of [Zetwick's] employment and create an [objectively and subjectively] abusive working environment.'" Craig v. M & O Agencies, Inc., 496 F.3d 1047, 1055 (9th Cir. 2007). This is so, where her testimony is that Prieto hugged her more than one hundred times over the period from 1999 to 2012, that he hugged female employees much more often than male employees and, indeed, from Zetwick's observations, he hugged female employees exclusively.
>
> ...
>
> More specifically, while it may appear that Prieto's hugs were 'common' in the workplace, and that some other cross-gender hugging occurred, neither of those things demonstrates beyond dispute that Prieto's hugging was within the scope of 'ordinary workplace socializing.' A reasonable juror could find, for example, from the frequency of the hugs, that Prieto's conduct was out of proportion to 'ordinary workplace socializing' and had, instead, become abusive. See Arizona ex rel. Horne v. Geo Grp., Inc., 816 F.3d 1189, 1206 (9th Cir. 2016) (parenthetical omitted). ("Geo Grp.")
>
> ...
>
> [I]t is not possible to determine whether the environment was 'hostile or abusive' without considering the cumulative *effect of the conduct at issue* to determine whether it was suf-

Continued on page 16

Harrassment

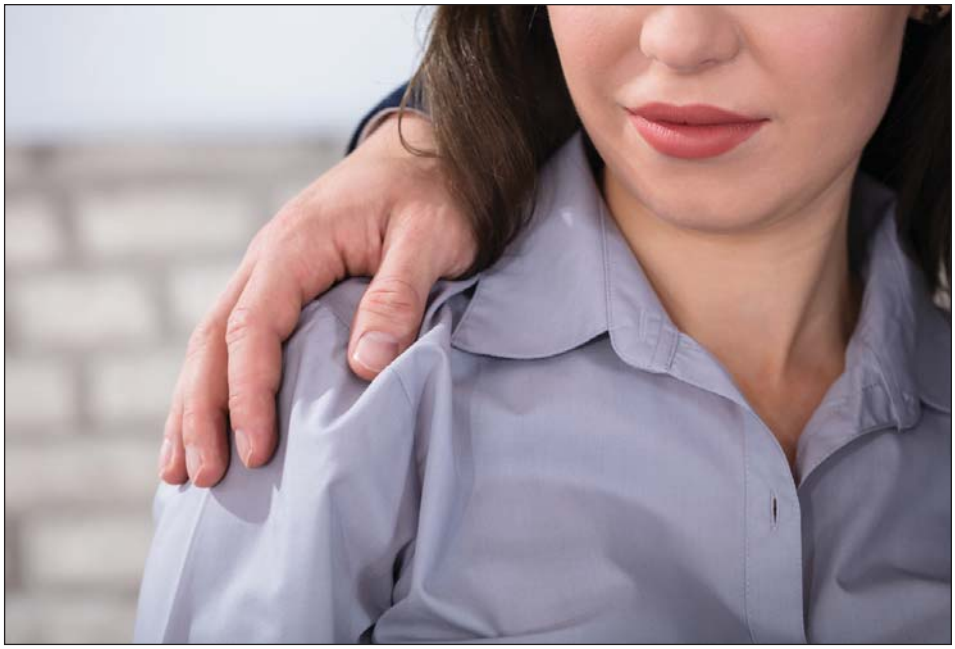
Continued from page 15

ficiently 'severe or pervasive' to alter the conditions of the workplace. *Id*. at 1207."[11]

The Ninth Circuit also found the district court to have erred when it tried to apply a mathematically precise test to determine if Zetwick had established a genuine dispute of material facts based on how many times Prieto gave unwelcome hugs. The court pointed out that such mathematically precise tests were found inappropriate by the U.S. Supreme Court in Harris v. Forklift Sys., Inc., 510 U.S. 17, 22-23 (1993).

The district court's reliance on an improper mathematically precise test demonstrated that it had not given proper consideration to the cumulative effect of the conduct at issue, as required by the court in the Geo Grp. case (*supra*).[12] Regardless of how many unwelcome hugs happened, the court determined that there was a dispute of facts as to how many occurred, when they happened, in what settings, etc.

The court found that the district court had not properly considered the totality of the circumstances because, for example, it failed to consider whether a reasonable juror could conclude that Prieto's unwelcome hugging as alleged by Zetwick, could create a hostile work environment.[13] The court reiterated its long-held stance that "a hostile work environment is ambient and persistent and that it continues to exist between overt manifestations" and that was "yet another reason why simply looking at the number of hugs over the period of time did not adequately address whether Zetwick had generated genuine issues of material fact that the environment she faced was sexually hostile."[14]



The court also took issue with the

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Harrassment

Continued from page 16

district court's apparent failure to appreciate how when the alleged harassment is coming from a supervisor it can have a greater impact on the workplace.

> "The Supreme Court has recognized that 'acts of supervisors have greater power to alter the environment than acts of coemployees generally.' Faragher v. City of Boca Raton, 524 U.S. 775, 805 (1998). Indeed, the Court has recognized that "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998). Thus, Prieto's position as Zetwick's supervisor was significant to whether or not a reasonable juror could find the hugs and the kiss to which Zetwick was subjected created an abusive environment."[15]

The court found that the district court failed to grasp the importance of the fact that Zetwick had testified that going to work was hard for her because she was constantly stressed and in a state of anxiety (presumably because of Prieto's hugging). The court found that this evidence could give a reasonable juror a foundation upon which to build the conclusion that the work environment was abusive.[16]

Finally, the court also determined that the district court erred by disregarding Zetwick's evidence that Prieto hugged and kissed other female employees. "We have long recognized that '[t]he sexual harassment of others, if shown to have occurred, is relevant and probative of [a defendant's] general attitude of disrespect toward his female employees, and his sexual objectification of them.' Heyne v. Caruso, 69 F.3d 1475, 1479-81 (9th Cir. 1995); see also Dominguez-Curry v. Nevada Transp. Dep't, 424 F.3d 1027, 1036 (9th Cir. 2005) (concluding that evidence that other women were harassed showed that hostility pervaded the workplace and helped show that it was hostile)."[17]

Ten Practice Pointers When Opposing an MSJ Involving Sex Harassment

➢ Review and utilize the case law on sexual harassment cited by the Zetwick court in its ruling;

➢ Argue the proper standard for sexual harassment cases: severe **or** pervasive, not, severe **and** pervasive;

➢ Support your opposition with evidence that the allegedly harassing conduct was outside of the scope of "ordinary workplace socializing";

➢ Argue that in order for the court to determine whether the environment was "hostile or abusive" it must *consider the cumulative effect of the conduct at issue* to determine whether it was sufficiently "severe or pervasive" to alter the conditions of the workplace;

➢ Argue that mathematically precise tests were found inappropriate by the U.S. Supreme Court in Harris v. Forklift Sys., Inc.;

➢ Argue that the court must consider the totality of the circumstances in its analysis of whether the alleged harassment could create a hostile work environment;

➢ Argue that "a hostile work environment is ambient and persistent, and that it continues to exist between overt manifestations";

➢ Argue that "acts of supervisors have greater power to alter the environment than acts of coemployees generally";

➢ Support your opposition with evidence of how the allegedly harassing conduct impacted your plaintiff emotionally, thereby providing prospective jurors the evidentiary basis needed to find that the work environment was abusive; and, finally,

➢ Argue that evidence that other women were harassed showed that hostility pervaded the workplace and helped show that it was hostile.

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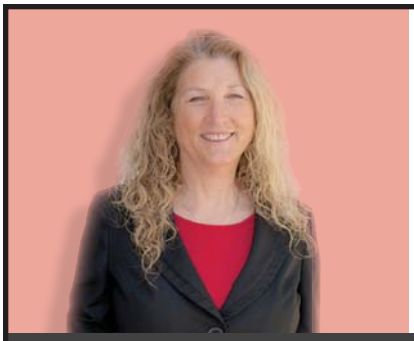
[1] https://metoomvmt.org/
[2] *Ibid.*
[3] 850 F.3d 436 (9th Cir., Feb. 23, 2017)
[4] Zetwick v. County of Yolo, 850 F.3d 436, 442 (Ninth Cir. 2017).
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*, citing Lefevre v. Design Prof'ls Ins. Cos., No. C 93-20720 RPA, 1994 U.S. Dist. LEXIS 22012, 1994 WL 514020 (N.D. Cal. Sept. 15, 1994); Graves v. City of Durant, No. C 09-0061, 2010 U.S. Dist. LEXIS 20335, 2010 WL 785850 (N.D. Iowa Mar. 5, 2010); and Joiner v. Wal-Mart Stores, Inc., 114 F. Supp. 2d 400, 409 (W.D.N.C. 2000).
[8] *Ibid.*
[9] (emphasis added here) *Id.* at 443.
[10] (emphasis added here) *Ibid.*, citing Zetwick 66 F.Supp.3d at 1285.
[11] Zetwick v. Cnty. of Yolo, 850 F.3d 436, 443-444.
[12] *Id.* at 444.
[13] *Ibid.*
[14] *Id.* at 444-445, citing Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 1108 n.1 (9th Cir. 1998).
[15] *Id.* at 445.
[16] *Ibid.*
[17] *Ibid.*



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From one young lawyer to the next

By: Kelsey D. DePaoli, CCTLA Board Member

Most brand-new lawyers who wish to litigate are intimidated by the litigation process. Usually, we get minimal exposure to "actual" litigation in law school, and then we pass the bar exam and are expected to just jump in a courtroom and know what to do.

Many judges don't give you a pass because you are new, although some might be a little more patient! The bottom line is, you are expected to jump right in and know how the process works and what needs to be done. Courtrooms are so full these days that judges and their staffs don't have time for amateur mistakes and a hundred questions.

If you are in your first few years of practice and are nervous about the demands of litigation and fitting in to the real world of lawyering, then I have a little advice for you.

I certainly will not pretend to have, nor do I have, all the answers because I am still learning daily, but here are some helpful hints for anyone in his or her first few years of practice and wishing to litigate cases.

1. Spend as much time as you can with lawyers who have a lot of trial experience. These people have more real-life knowledge and application than any book you will read.

2. Go to seminars that teach you how to be a "trial" lawyer. Attend the seminars that make you get up in front of your peers and practice. Yes, it will be awful, but so worth it.

3. Go and watch trials in your local courtrooms. Watch the whole trial, so you know how it works from beginning to end.

4. Ask the questions, even if you feel like you should know. You will be surprised how many veteran lawyers are willing to talk to you.

5. Build relationships with the mentors in your lawyering community and ask to second-chair cases with them—even if it's only there to take notes—and take one or two witnesses. This experience is invaluable.

6. Go to depositions with a seasoned attorney. Find out why they ask the things they ask.

7. Ask your mentors if you can attend their mediations and settlement conferences with them. This allows you to be a part of conversations you normally would not be involved with. In these situations, you get to talk about why a case is great, or not so good, what venues are good and why. All stuff you want to know when you are going to be trying cases.

8. Spend time with your client before you go into a courtroom. You need to really know your client. Go to the client's house, meet the family; know what you are fighting for! It helps!

9. Last, but certainly not least, don't be afraid to try a case. Everyone started somewhere. The best way to learn is by doing it. Have another lawyer there to help you if you get overwhelmed. There is no reason you need to try cases alone.

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See page 22 for details

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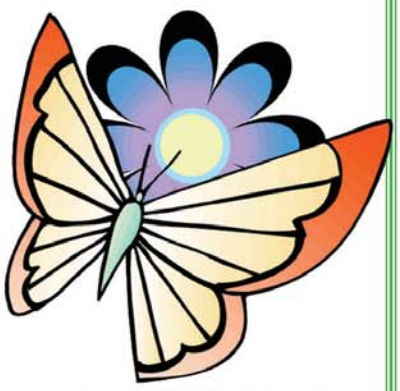

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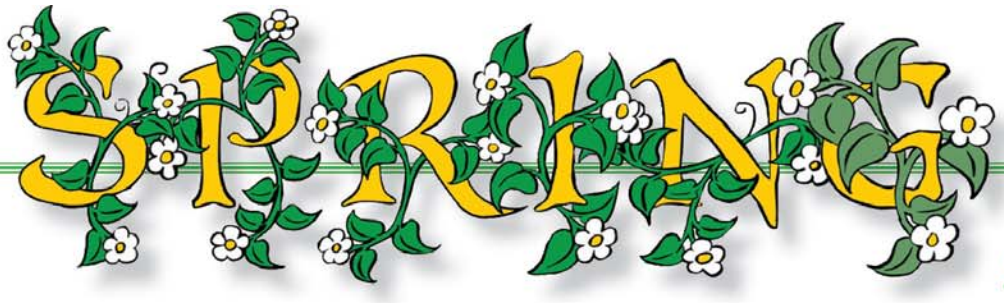

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What to do with the defense Reptile motion

How to defeat Defendant's improper motion in limine to exclude the use of the Reptile strategy at trial

By: Joseph B. Weinberger, CCTLA Vice President

After CCTLA's Motion in Limine seminar, I received a number of inquiries regarding a standard defense *motion in limine* being filed to preclude either The Golden Rule or Reptile argument. Let's start from the beginning and understand that this is not an attack to preclude evidence but rather an attack upon you as the trial attorney, claiming that you intend to violate the law by the very fact that you intend to argue on behalf of your client.

This *in limine motion* is without substance and indeed is promulgated for the sole purpose of causing the trial judge to condemn your actions before you utter a single word. This attack needs to be shown to the court for what it is, and more importantly you need to take this opportunity to educate the court that you intend not only to follow the law, but also that your use of this theory is indeed the highest tribute to the calling of our profession.

This is not a proper motion. Kelly v. New West Federal Savings (1996) 49 Cal. App.4th 659, 670 stands for the proposition that a *motion in limine* that seeks a declaration of existing law is improper. It further holds that a *motion in limine* must be directed to specific evidence. Clearly, argument is not evidence and for this reason alone the court should deny this motion.

Should the court entertain this personal attack on your ethics and strategy, I am including language from a well-edited and circulated opposition. Read the cases. It is clear that not only is your use of the Reptile theory appropriate, but it is supported by black-letter law. Let the court know that you intend to follow the law and have no intention of compromising your ethics or obligations to the court. You should further advise the court that a jury's sole purpose is to speak for the community. It is for this very purpose that we select a jury from a pool of people that comprises our local neighborhood. It is why we don't go to Los Angeles of Bakersfield for our juries. If your case is venued in Sacramento, get a copy of the video shown to the jury and point out to the court that former Sacramento Judge and now California Supreme Court Justice Tani Cantil-Sakauye speaks about how jurors represent the community.

It is vital that each and every one of us stand up for our clients and establish that the defendant has violated the standards of our community and through his/her negligence has not only endangered each and every one of us, but has actually caused harm to a member of the community. The substance of the opposition is below:

I. DEFENDANT'S MOTION MUST BE DENIED AS A MATTER OF LAW BECAUSE IT IS TOO VAGUE TO DECIDE AND DOES NOT SEEK TO EXCLUDE ANY ACTUAL EVIDENCE.

A *motion in limine* is "a pretrial request that certain inadmissible evidence not be referred to or offered at trial." Black's Law Dictionary (8th ed. 2004). By definition, a *motion in limine* must seek to exclude from evidence something "certain." In contrast, a *motion in limine* that merely seeks to enforce a basic principle of law and does not identify the specific evidence it seeks to exclude, is improper. Kelly v. New West Federal Savings (1996) 49 Cal.App.4th 659, 670 ("many of the motions filed by Amtech were not properly the subject of *motions in limine*, were not adequately presented, or *sought rulings which would merely be declaratory of existing law* or would not provide any meaningful guidance for the parties or witnesses") (italics added).

Here, as a threshold matter, this motion is improper because it does not seek to exclude any evidence. Rather, it vacillates between a vague claim of wanting to preclude "Reptile arguments" (whatever that means) to a request that

Continued on page 28

This attack needs to be shown to the court for what it is, and more importantly you need to take this opportunity to educate the court that you intend not only to follow the law, but also that your use of this theory is indeed the highest tribute to the calling of our profession.

Defense Reptile Motion

Continued from page 27

the court not allow "Golden Rule" violations. Even though it cites to the Evidence Code, Defendant's motion fails to identify any specific evidence it seeks to exclude. Instead, most of the motion discusses an unidentified, ambiguous array of unspecified trial techniques labeled by Defendant as "the 'Reptile theory,'" "the so-called 'Reptile' approach" and the "powerful reptilian imperative." Deft. Mtn. at xxx. xxx.

Plaintiffs could no more ask this court to exclude general defense strategies recommended in recent defense lawyer CLEs or conventions, such as "muddy the waters," and "slander the plaintiff." Plaintiffs could file a *motion in limine* seeking to preclude defendants from using any trial techniques espoused by the Defense Research Institute which were developed to prey on juror's fears regarding tort reform.

Like Defendant's pending motion, such a motion, if filed by the plaintiffs, would be entirely unworkable and a waste of time. The motion must be denied as exactly that.

II. COUNSEL MUST BE GRANTED WIDE LATITUDE TO ADVOCATE FOR THE CLIENT. THE COURT SHOULD NOT IMPOSE PREDETERMINED LIMITS ON ADVOCACY BUT INSTEAD SHOULD SIMPLY ENSURE THAT NO IMPROPER ARGUMENTS ARE MADE

A. Counsel is permitted wide latitude in arguing a case with creative approaches or arguments. This vague motion seeks to handcuff Plaintiff's counsel contrary to the law permitting wide latitude in presenting and arguing a case.

Counsel must be given wide latitude in discussing the merits of a case and "only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy." Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780, 781. "In conducting closing argument, attorneys for both sides have wide latitude to discuss the case...'The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide...The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury. . .Counsel may vigorously argue his case and is not limited to 'Chesterfieldian politeness.'" Cassim, 33 Cal.4th at 795.

Counsel's argument may be "as full and profound as his learning can make it; his illustrations as various as the resources of his genius; and he may, if he will, give play to his wit, or wings to his imagination." People v. Molina (1899) 126 Cal. 505, 508. Resort to "colorful terms," "descriptive comment," and "epithets" that are reflective of the evidence (or inferences) is permitted. People v. Williams (1997) 16 Cal.4th 153, 221 (referring to a defendant as an "animal" regarding his viciousness, or a "weasel" regarding his credibility, or a "laughing hyena" regarding his behavior may be proper); see also People v. Rodriguez (1970) 10 Cal.App.3d 18, 36 (referring to defendant as "a smart thief and a parasite on the community" was not misconduct); People v. Vickroy (1919) 41 Cal.App. 275, 278

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(not misconduct to refer to defendant as "a moral leper," a "Hun," "a vile ulcer" and "a moral cancer on the breast of humanity."); People v. Ross (1960) 178 Cal.App.2d 801, 808 (stating defendant in a statutory rape case "has the sexual appetite of a barbarian or an ape" not misconduct).

Because counsel has wide latitude in arguing a case, "[o]nly the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety." Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 798-799. In fact, "[i]t is the privilege of an attorney to draw any inference with respect to the facts or the credibility of witnesses of which the evidence is reasonably susceptible." McCullough v. Langer (1937) 23 Cal.App.2d 510, 522.

Here, through its motion, Defendant essentially requests a gag order in an attempt to quash Plaintiff's ability to persuasively advocate and to put the jury's role in our system into proper context. There is no legitimate justification for handcuffing counsel in this manner before the trial actually begins. Nor does Defendants' counsel's stated concerns about so-called "Reptile arguments" justify such an order.

B. Community arguments do not violate the "Golden Rule."

Defendant's motion equates the "Reptile theory" with "The Golden Rule argument." Deft. Mtn. at xxx-xxxx. Defendant further argues that the goal of the "Reptile approach" is for the "plaintiff's lawyer to convince the jury that a verdict for the plaintiff will make the community safer..." and that this is an attempt to resurrect impermissible "Golden Rule" arguments. Deft. Mtn. at xxx-xxxx.

In any event, so-called "Reptile arguments" do not violate the Golden Rule. A "Golden Rule" argument occurs when an attorney asks jurors to step into the shoes of the plaintiff and to award such damages as the juror him- or herself would charge to undergo equivalent pain and suffering. Neumann v. Bishop (1976) 59 Cal.App.3d 451, 483. The argument is improper because "[h]ow others would feel if placed in the plaintiff's position is irrelevant." Cassim, 33 Cal.4th at 797 at n. 4. Plaintiff's counsel will neither ask the jurors to "step into the plaintiff's shoes" or to award such damages as they would charge to undergo equivalent pain and suffering.

In contrast to a "Golden Rule" argument, there is nothing improper with reminding the jury that it is the "conscience of the community," explaining to the jury their role in deciding what we as a society accept and do not accept, what we as a society value and do not value, etc. . . it prompts the jury into thinking about the effect their verdict would have on society...

In contrast to a "Golden Rule" argument, there is nothing improper with reminding the jury that it is the "conscience of the community," explaining to the jury their role in deciding what we as a society accept and do not accept, what we as a society value and do not value, etc. Explaining the effect of a proper verdict on the community as a whole does not place the jury in Plaintiff's shoes. Instead, it prompts the jury into thinking about the effect their verdict would have on society, which in no way equates to asking the jury, "If you were Plaintiff, how much would you ask for?" 75 A. AM. Jur.2d Trial §547 (discussing improper golden rule arguments: what would jury want for compensation if they had a similar injury, what would they want for pain and suffering, whether they would want to go through life in the Plaintiff's condition, etc.).

Reminding the jury that it does speak for the community when it determines what is reasonable, dangerous or otherwise wrongful conduct, or how an injury should be compensated, does not violate the prohibition of "Golden Rule" arguments. Indeed, over 140 years ago, the United States Supreme Court recognized that the jury is the conscience of the community. Though it did not use that phrase, it adopted the philosophy that the jury is in the best position to determine what members of that community should expect from each other. Sioux City & P. R. Co. v. Stout (1873) 84 U.S. 65 (affirming a judgment finding a railroad negligent in its maintenance of a turntable, which injured a child, reposed its trust in the jury to determine what safety it expects from the companies operating in the community):

> *Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. Id. at 663-664.*

Likewise, Justice Mosk, in his concurring opinion in Ballard v. Uribe (1986) 41 Cal.3d 564, 224, expressed the same philosophy and did characterize it with the now familiar shorthand, the "conscience of the community":

> *A jury has also been frequently described as "the conscience of the community." . . . In addition, courts have long recognized that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation . . .. The very purpose of the right to trial by a jury drawn from a representative cross-section of the community is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences. Ballard, 41 Cal.3d at 577 (J. Mosk, con.) (citations and internal quotations omitted).*

More recently, in People v. Gamache (2010) 48 Cal.4th 347, the California Supreme Court expressed its frustration with litigants objecting to the phrase "conscience of the community" on grounds that the phrase could cause the jury to

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substitute what they perceived to be the community's views for their own: "We have on numerous occasions considered this turn of phrase and rejected the contention that it invites jurors to abrogate their personal responsibility to render an appropriate verdict in light of the facts and the law. Jurors are the conscience of the community. It is not error to tell them so in closing argument." Gamache, 48 Cal.4th at 389 (internal citations omitted); see also, U.S. v. Grauer (8th Cir. 2012) 701 F.3d 318, 324 (holding that it was not improper for the prosecutor to conclude his closing argument by stating that the jury acts as the "conscience of the community"); U.S. v. Williams (9th Cir. 1993) 989 F.2d 1061, 1072 (prosecutor's appeal to the jury to act as a "conscience of the community" is acceptable); Ballard v. Uribe (1986) 41 Cal.3d 564, 577 (the court stated a jury has also been frequently described as "the conscience of the community.").

Thus, whether called a "Golden Rule" argument, a "Reptile argument" or otherwise, there is nothing wrong with reminding the jury that it speaks as the voice of the community or the "conscience of the community" by its verdict.

While there are some limits on what counsel can argue – *e.g.*, appeals to bigotry or prejudice, Kolaric v. Kaufman (1968) 261 Cal.App.2d 20, or direct appeals to self-interest of jurors as taxpayers, Du Jardin v. Oxnard (1995) 38 Cal. App.4th 174, 179 – it is not improper to advocate safety or any other appropriate standard (such as non-retaliation rules) as the standard to be expected of all people in the relevant community.

In addition to setting liability standards, the commonsense judgment of the community holds true for a jury's determination of damages. The jury is uniquely qualified to determine which injuries are tolerable or intolerable and, as to the latter, what is fair compensation.

It is not a "Golden Rule" argument to implore a jury to be the conscience of the community and set a value for a plaintiff's particular injury. See Mary Beth G. v. City of Chicago (7th Cir. 1983) 723 F.2d 1263, 1276 (rejecting appeal asserting excessive damages awarded to women subjected to unlawful strip and body cavity searches, "[t]he jury is the collective conscience of the community, and its assessment of damages must be given particular weight when intangible injuries are involved."); Leather v. Ten Eyck (S.D.N.Y. 2000) 97 F.Supp.2d 482, 488 (jury, as conscience of community, can work to defendant's advantage; reduced compensatory award to plaintiff arrested in violation of Constitution but who was driving under influence; "[t]he jury expresses the conscience of the community, and this court must refrain from placing unreasonable restrictions on its power to do so, or second guessing its conclusions.").

Furthermore, the so-called Reptile argument does nothing more than advocate for holding a defendant liable for illegal, unreasonable or unsafe conduct. A defendant is still free to present defenses and attempt to persuade the jury with whatever permissible arguments he or she desires. Ultimately, the jury as the "conscience of our community" in this case will have the duty of providing a just and fair verdict. And reminding the jury that it does speak for the community when it determines what is reasonable, dangerous or otherwise wrongful conduct, or how an injury should be compensated, does not violate the prohibition of "Golden Rule" arguments.

Purchase insurance, pay premiums, and you're covered, right? Think again

By: Daniel S. Glass, CCTLA Parliamentarian

My first real job out of college was as a claims investigator for a small insurance company at Wilshire and Western avenues in downtown Los Angeles. I had just moved to Los Angeles from just outside New York City on the recommendation of a friend from high school and college. He had graduated the year before me, and his friend was starting UCLA Law School in 1978, which got him to Los Angeles. My friend landed a great (??) job. It was 1978 when he entered the insurance world. It was October, 1979, when I arrived. I interviewed, at the age of 22, and was hired. My first day of work they gave me a brand new car to drive (for free). Neither I nor my parents had ever had a brand new car. This was great.

Here I was in beautiful Los Angeles, living in a one-room place that technically had a Marina del Rey address, a quarter mile from the Pacific Ocean with a new car and a fulltime job with a guaranteed salary.[1]

I drank the Kool Aid. I was doing justice and settling personal injury claims made against the tractor trailer trucking companies my insurer specialized in insuring. It was truly great. I had a "pager." When a truck had an accident, the driver radioed "Dispatch." Dispatch called the insurance company phone number. Someone took a report, paged me (or one of the other five 20-something-year-old investigators), and we were in our Ford Granadas, cameras in hand and at the scene, meeting witnesses, taking photographs, talking to the CHP. They told us, with the Kool Aid, that we were smarter than all the plaintiffs' lawyers who presented claims against us because we were at the scene and no lawyers were there. Although partly true, it was part of Kool Aid mix.

In any case, at the onset, our first bit of "investigation" was to check the company records (which had to be done manually by going upstairs to underwriting) to see if the truck in the accident was listed on the policy. If it was, it was insured, and we handled the claim. Few "first party" claims were denied and, since the litigation world was just introduced to Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, and "third-party bad faith" actions were real; many of the cases resolved. We were doing justice.

Being a small company, the actual president of the company, who was in the building, would occasionally come down to the Claims Department to talk to his "investigators." He would quiz us about insurance policies. What do they contain? I became exposed to insurance. I took a few Insurance Education Association classes. I learned Declarations; Definitions, Insuring Agreement; Exclusions and Conditions. Seemed simple.

I never got sued, or even participated in, a "bad faith" lawsuit. Went to law school in the evening. Got my first legal job at what was a well-known, fairly large, Sacramento "insurance defense" law firm. This was great? Or was it?

For the first time, I learned about "billable hours." I learned, unlike my entire claims experience, that "defense" law firms did not have the same desire to resolve and close cases that I had been taught as an adjuster. They had to "work" the cases regardless of the potential for settlement—and the insurers, and their "coverage counsel" lived to find technical reasons why they would NOT defend their insureds or resolve claims. The Kool Aid began to taste funny.

By 1996, I was no longer an "insurance defense" attorney—I started to actually help people get the insurance coverage they paid for. That change caused me to read insurance policies with new vigor—and to truly notice—where has all the coverage gone?

Today's insurance policies are incredibly complex, and the insurers who sell them have become much more bold about using the fine print to avoid paying claims.

The courts have routinely held that unless the language of the policy is against public policy or actually conflicts with a specific provision of the insurance code, it is enforceable. There is a presumption that an insured has read their insurance policy.[2]

It has become my opinion (which I am sure is no great revolution) that insurers do not exist to help people. They exist for huge profits. Insurance is a very unique industry. It is mandated by laws and public policy. People must buy insurance for their property (to protect the mortgagee) for their vehicles (to protect the public) and workers compensation (to protect employees). Insurers advertise and purport to sell "security" and "peace of mind." However, they routinely deny coverage to their insureds.

Over the past 39 years of seeing insurance in action, I have learned that the insurance profit motive operates in two worlds: profit from selling insurance and having a good (few) loss ratio, and investment income. In times of high investment income returns, insurers do anything to sell insurance so they get the cash in their accounts to invest, and make real money. Even if they have some high-risk insureds, they make so much money on the investment side the "claims paid" is not that big of a deal.

Then you have times of low investment income returns, like now and the past 10 years. Under these conditions, insurers need to make their profit from claims, as well as their investment income—hence, more claim denials.

Although this is surely no surprise to anyone receiving this publication, Allstate is not the "good hands" people if you are making a claim. Nationwide is not "on your side" when you are making a claim, and my favorite commercial of all time—Farmerswhere they show bizarre scenarios (like the dogs who fill the living room with water, or the ocean wave which fills a vehicle with water and fish by accident) and then advertises how they have seen a lot so they cover a lot, is really nice—until you are the one making the

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Insurance pitfalls

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bizarre claim, and, if they do pay it in the end they certainly treat you like a criminal during the investigation process.

Every piece of paper they send you will state "For your protection, California law required the following to appear on this form - Any person who knowingly presents false or fraudulent claim for the payment of a loss is guilty of a crime and may be subject to fines and confinement in state prison." It's not really for your protection; it's to intimidate you and hope you will lessen the amount of your claim or just "forget about it" and let the insurer off the hook, but I digress.

Although I have not researched the specifics, what I have seen with all insurers is that once they have more than a few claims in a certain area, they find a way to make that area an "exclusion." The best and fairly recent example in homeowner policies was "mold" claims. For years they were covered. Now, every homeowner's policy has a mold, fungi and dry rot exclusion.

At best, the insurers have simply reduced their risk through the creation of special "sub limits" in their policies. Thus, they would cover "mold" but agree to pay no more than $5,000 for your entire mold claim. After that, you are on your own. There are lots of "sub limits" in homeowner's policies—jewelry, money, gold, electronics, business property, securities, firearms and others.

By the time a case "walks into" our office, the insurance, or lack thereof, has already been solidified. Although we may not know what insurance, if any, a defendant or potential defendant my have had, or what first-party coverage our client might have, what he/she did have on the date of the accident/incident will control the case.

If there is a valid exclusion which removes coverage for the accident/incident, then there will be no coverage, and we cannot change the past.

To the extent we are not just "litigation attorneys" but also "counselors at law," I suggest that to better protect ourselves and our past, present and future clients, everyone reading this should go home and take a look at your insurance policies—home, auto, life, disability

because these are the documents which protect you and your family.

AUTOMOBILE INSURANCE

Take a look at the Declarations. Do you have at least $100,000 per occurrence and $300,000 aggregate in coverage? You should. The difference between minimal policy limits and 100/300 will not be more than a few hundred dollars/year. Uninsured Motorist—again 100/300 absolute minimum.

Realistically, if at all possible and affordable, single limit of $500,000 or more is advisable. It has become obvious that California is not going to permit "stacking" of uninsured or underinsured motorist coverage at any time in the near future. So, this is the coverage that will protect you and your family when the "other guy" has minimal policy limits, or no insurance. This is the coverage which will take care of the medical bills that the health insurers refuse. This is the coverage which might be needed if there are multiple family members in the vehicle.

In general, and there may be exceptions. That "umbrella" policy you bought to cover the catastrophic damages you were so worried about will NOT be an umbrella over your uninsured or underinsured motorist coverage. That "umbrella" only protects you from a suit by others. Take a look at it: the exclusion for damage to insureds and family members is probably in there.

Do you ride a bicycle— for commuting or recreation? Hit by an uninsured or underinsured vehicle while on your bike? YOUR uninsured/underinsured motorist coverage is there to protect you, but only if you have it.

Review the Declarations to see who is the named "insured." Husband and wife? Domestic partners? If the vehicle is owned by only one person, make sure all persons who drive the vehicle on any type of regular basis, or even have regular access to the vehicle, are at least listed as "drivers." I am currently handling a matter when my client bought insurance from one of those "we insure anyone" bargain insurance agents. He bought coverage for his vehicle. He was presented with an electronic "signature pad" for his signature on all documents. He was never presented with a full and complete copy of his application for insurance.

Seven months later, he let his brother use his vehicle one day. His brother had an accident. Claim presented. Insurer denied. They contend that one of the pages signed by client listed all the persons who lived in the home with the client (his entire family) and that they were all specifically "excluded" drivers. The application had every birthdate of each family member wrong, even the insured and his wife.

Client contends he never saw that document, never signed it and would never have given wrong information about each family member (some dates were wrong by 20 years). But, his signature is on a page the agent printed from its computer—most likely due to electronic signature pad affixed to a document not given to the insured. Nevertheless, collision coverage on the vehicle and liability coverage to the other party has been denied.

Find out what your "application" for the insurance looked like. What I have not yet seen as a coverage issue, but expect in the future, is the present application process where the insurer demands that you tell them how many miles per year you operate the vehicle. The insurer pre-

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Insurance pitfalls

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sumes 12,000/year. You can tell them more or less—but you better be close to right. My prediction: At some point, someone is going to have that huge accident in a relatively new vehicle that has 150,000 miles (indicating it was driven three or four times the 12,000-mile per year average), and the insurer is going to find an application that said the vehicle was only driven 12,000 miles/year. Now that the insurer can prove an average of 40,000 miles/year, they will deny coverage, claiming the insured made a "material misrepresentation" in their application.

Another very serious pitfall of automobile insurance: Does your teenage child use your, or any, car to make a few extra dollars by delivering pizza? As soon as the pizza enters the car, all insurance disappears.

Maybe the employer covers the vehicle. Of course, they should, and most of the big chains, like Round Table, seem to have their own cars. But, what about the new wave of food delivery services? (Door Dash or GrubHub) Quick money for your child—until there is an accident—then, no coverage, no physical damage coverage for the vehicle. Nothing.

UBER or LYFT: Immediately no coverage when the "app" is on, and it's all recorded to the second. Through the miracle of technology, even though you pay premiums and think you are a good insured, YOU can immediately remove your insurance coverage through your smart phone. Auto policies are now being rewritten to specifically exclude the use of a personal auto in connection with a "transportation network company."

Although most policies will insure a vehicle while it is not being used as part of a "transportation network company," some insurers will not insure a vehicle at all if it is ever used as part of a "transportation network company." The pitfall, when you obtained the insurance, no UBER or LYFT was even on the horizon. Then the vehicle owner loses their job, or needs extra money, or lets their child, brother, sister or family member borrow the car—and they use it for UBER or LYFT. Then, when taking a break from UBER or LYFT, an accident occurs. Potential for claim denial, and probable policy rescission, if the original application said: never used for "transportation network company." If it was not addressed, still not covered, but probably no rescission but certainly a notice of nonrenewal or future cancellation in the mail.

HOMEOWNER'S INSURANCE

First, review the amount of insurance. In the past, insurers required a homeowner to have insurance in an amount which was at least 80% of the value of the home. In extreme cases, for instance, if a $500,000 home only had $200,000 worth of coverage and had $100,000 in fire damage, the insurer might assert that it only insured 50% of the home and the homeowner "self insured" the other 50% by not purchasing adequate insurance. Thus, the insurer would only pay 50% of the loss.

Now, insurers are seeking coverage amounts equal to 100% of the rebuild costs of the home. Construction repair costs are "up" due to the rising Sacramento, and California, real estate markets. Contractors are busy, and as a result, are bidding "high" on jobs. $100/sq. ft. is most likely inadequate for most property, but $200/sq. ft. should be considered. Aand if the home has marble, granite, lots of custom woodwork and cabinets, even more than $200/sq. ft. Once again, an extra $100,000 or even $200,000 worth of homeowner's coverage on the structure will also increase all your other coverages (because they are usually a multiple or percentage of the main coverage) and will not cost very much. In Sacramento, $500,000 in homeowner's coverage can be purchased for $1,000-$1,300 per year, and $1,000,000 worth of coverage most likely will not cost more than $1,600-$1,750 per year; a minimal investment in case disaster strikes.

I will save commentary on life and disability insurance for a later article. Health insurance, quite frankly, is so convoluted, confusing and expensive, it can never be discussed in a short article. The purpose of this article is to "poke the bear." I assume that everyone reading this has some connection to the world of litigation. I further assume that all CCTLA members have some part of their practice, maybe 100% of their practice, devoted to litigation which causes insurance carriers to pay money to their clients.

The amount of money we all receive through litigation resolved against insurers must generate much more money than we pay for our various insurance coverages. I, like I am sure everyone, do not desire to give money to insurers. However, the insurers dislike giving money back to resolve claims a lot more than we dislike giving it to them in the first place.

Being vigilant and pro-active in keeping proper insurance in place for yourselves, your family, your past, present and maybe future clients is important to our financial survival. Don't give an insurer a reason to deny your claim before the claim even exists. Be truthful in your applications, even if it results in higher premiums. Have enough insurance to protect you and your family from catastrophe.

May you never need to use your insurance, but if you do, it is much better to be on the "high road"—where you have been squeaky clean. First, it is less likely your claim will be denied. But, more importantly, if the insurer is bold enough to deny the claim anyway, the "bad faith" claim will be much better.

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[1] In retrospect, this was a warped perspective because my job paid $850 a MONTH, and the car was a 1979 silver Ford Granada with red cloth brocade seats. What cool 20-year-old Los Angeles woman wouldn't want to date a guy with so much money and such a cool car? But that's another story.

[2] ". . . a policy provision limiting liability is not invalid simply because it could have been made easier to find. [citations omitted]. Thus, a coverage provision in the text of an insurance policy need not expressly reference the provisions that modify or limit it [citations omitted] and a limiting provision need not be mentioned on the declarations page of a policy in order to be valid [citations omitted]. Instead, the controlling concern is whether the insuring document, construed as a whole, puts the average insured on reasonable notice of its provisions and limitations. . . In determining whether an insurance policy provides reasonable notice of a lawful limiting provision, we assume the insured reads the entire policy. (See Fields v. Blue Shield of California (1985) 163 Cal. App. 3d 570, 578-579 [insured has a duty to read the policy and is bound by all of its conspicuous, plain, and clear provisions].) . . . Haynes v. Farmers Ins.(2004) 32 Cal. 4th 1198, 1216 - 1217.

Technology Update for CCTLA Members

By: Drew Widders,
CCTLA Board Member

This article is meant to give on overview on the CCTLA's Technology Committee's efforts to provide additional benefits for CCTLA members. Toward that goal, CCTLA's Technology Committee has been working to improve CCTLA's online presence and is implementing several new features that should be of assistance to our members.

Social Media

In addition to our website at www.cctla.com, we have created new social media sites on Facebook and Instagram. You can visit those sites at www.instagram.com/cctla/ and www.facebook.com/CapitalCityTrialLawyersAssociation/. On those sites we will be providing news on upcoming events and an area for people to communicate with each other. Check out these pages, comment on them, and let us know of how they can be improved.

Online Seminar Videos for Purchase

We have added a feature to CCTLA's website for the online purchase and viewing of future CCTLA seminars. Members unable to attend seminars will have to opportunity to watch them online. We plan to add past recorded seminars to the website.

Brief Bank and Expert Depositions

This is a currently available feature we hope to improve over the next couple of months. Go to www.cctla.com, and from there log into your CCTLA account. Then click on the Benefits drop down menu and choose Document Bank. We have folders for motions, expert depositions, litigator articles and tentative rulings. A limited search feature is available to assist you in finding relevant documents. The Technology Committee is working on adding a much more robust Google-type search feature for more usable search results. For example, similar to a Google search, you could search for a *motion in limine* on Howell, and you would retrieve all matching results along with a brief preview to help quickly determine if the results are relevant to your search. This feature, it should significantly increase the usefulness of the CCTLA Document Bank.

Access to Archived Listserv Emails

It has been brought to my attention that members may not realize that CCTLA's entire email listserv is archived and can be searched through Google Groups. This allows a search of all the past emails, similar to what CAOC offers for its listserv. To access and search the emails, go to https://www.google.com/. From there, click on "Sign in" in the upper right corner. You then sign in with your email that you use on the listserv. You may need to create an account if you have never done so. Also, if you already have a Google account and are logged in, you will probably need to sign out before you can add your listserv email to your Google account. Once you have logged in or created an account and logged in, type google groups in the Google search bar or go directly to www.groups.google.com. Then click on "My groups," and you should see the CCTLA Group. Once you click on the CCTLA Group, you will see all the most recent messages posted and be able to search for any past topic of interest such as available experts, expert depositions, motions, etc.

Trial Calendar

Board member Erik Roper is working on adding a trial calendar to the website. With the calendar, members can post the time, location, etc. of any cases they know of that are going to trial or are in trial. CCTLA members will then have a central location where people can go to find out where you can learn from other members by watching them in trial.

If anyone has any questions on the above, or additional features you would like to see added, feel free to contact me at dwidders@wilcoxenlaw.com.

Verdicts

VERDICT: $732,878.76

Richard M. Wilson and Kathabela Wilson v. Arturo Robles

Vehicle vs. Pedestrian, Pasadena, CA

CCTLA member John Roussas, Esq., of Cutter Law, P.C., obtained a verdict of $732,878.76 in a case that was the result of a vehicle vs. pedestrian accident. The award included damages to the plaintiff and his wife for past and future economic loss and medical expenses, among others. The jury trial was held before Judge Joseph Kalin in Los Angeles County, and it took the jury three hours to reach a verdict.

On Nov. 14, 2014, Professor Richard Wilson was a pedestrian crossing Del Mar Boulevard at Wilson Avenue in a marked crosswalk with the crossing light in his favor when he was struck by Arturo Robles' pickup truck. Robles' accident reconstruction expert, Alvin Lowi, testified that Robles was traveling between 15-20 miles per hour when he struck Wilson, throwing him between 30 and 40 feet.

Plaintiff was taken by ambulance to Huntington Hospital where he was found to have sustained internal bleeding, a comminuted right iliac fracture extending to the right sacroiliac joint with right sacroiliac diastases, and left 8th and 9th rib fractures. On Nov. 17, 2014, he underwent an operative fixation of the anterior pelvic ring and percutaneous fixation of the posterior ring.

Plaintiff then underwent physical therapy, where it was determined he could not bear weight on his left leg without significant pain. An MRI was performed on the left leg, and it was determined he had also sustained a left tibial plateau fracture and left intra articular distal femur fracture in the collision.

On Nov. 26, 2016, Plaintiff underwent an operative fixation of the left distal femur fracture, arthrotomy and exploration of the left knee, operative fixation of the left lateral tibial plateau fracture and debridement of the bone and soft tissues.

On Dec. 1, he was discharged from Huntington to Villa Gardens for in-patient physical therapy and discharged home on Dec. 21, 2014. By May 2015, he was back to his pre-collision exercise routine of walking five miles per day but with residual pain and limitations from his injuries.

Plaintiff made a demand on State Farm for the full amount of Defendant's $25,000 policy limits. Among other things, State Farm failed to timely respond or adequately advise its insured. Plaintiff therefore filed suit against Robles.

Defendant denied liability from the time of initial discovery all the way through the conclusion of expert depositions. Defense accident reconstruction expert testified that Plaintiff was at least partially responsible for failing to see Defendant's truck and taking action to avoid being hit. Defendant admitted liability after the expert's deposition was concluded.

On Aug. 12, 2016, Plaintiff served a Code of Civil Procedure §998 Offer in the amount of $349,999. State Farm allowed the offer to lapse with no response. On Feb. 24, 2017, Plaintiff made his final settlement demand for $699,989. tate Farm allowed the demand to lapse. This demand was within 3% of the ultimate jury verdict.

The parties stipulated that the $78,469.89 paid by Medicare for Plaintiff's past medical bills represented the reasonable value of past medical expenses and proceeded to trial on the issues of his past and future noneconomic losses, future medical specials and his wife's claim for loss of consortium. Plaintiff was retired at the time of the collision, so there was no past or future wage loss claim.

Plaintiff's treating orthopedist, Dr. Mark Jo, testified Plaintiff would benefit from conservative care, including physical therapy, for the next five to 10 years, at which point he would likely require a left total knee replacement. Anne Barnes, R.N., testified that the reasonable value for the specified conservative care was $10-$30,000 and $134,000 for the total knee procedure.

Defense-retained orthopedic surgeon Dr. Melvin Nutig, testified that two and a half years after the collision, Plaintiff's left knee was largely asymptomatic, and X-rays of the left knee showed well-maintained joint spaces that were identical to the joint spaces on the uninjured right knee.

In closing arguments, Plaintiffs suggested the jury award $1.9 million inclusive of an anticipated total knee replacement. Defendant suggested the jury award professor and Kathabela Wilson no more than $228,469.89 because Wilson would not require a knee replacement, and no more than $292,793.10-$311,357.89 even if the jury concluded a knee replacement was likely.

The jury returned a verdict of $678,469.89, which was within 3% of Plaintiff's last demand. The verdict included $25,000 for future medical expenses, $325,000 for past pain and suffering, $220,000 for future pain and suffering, and $30,000 for Kathabela Wilson's loss of consortium. Plaintiffs have been awarded $54,408.87 in costs. Plaintiffs will be pursuing a bad faith case against State Farm.

Defense attorney was John T. Farmer, Esq., of Farmer Case & Fedor, San Diego, CA.

Plaintiff's experts were Mark Jo, M.D., treating orthopedic surgeon, Huntington Orthopedics; and

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Anne Barnes, R.N., certified nurse life care planner.

Defendant's experts were Melvin Nutig, MD, orthopedic surgeon; Alvin Lowi III, PE, collision and injury dynamics; and Henry Lubow, MD, utilization review.

VERDICT: $239,331 (actual: $332,000)
Maricela Sotelo v. Julia Holland and Brooke Holland
Rear-ender Multiple Vehicle, Santa Barbara County

CCTLA member Glenn S. Guenard, Guenard & Bozarth LLP, and John B. Richards, Law Offices of John B. Richards, won a $239,331 verdict in Superior Court of Santa Barbara County, before Judge Colleen K. Stern in 12-day trial over a rear-ender multiple motor vehicle crash in which the plaintiff claimed spinal injuries. The actual verdict ended up being $332,000.

FACTS & ALLEGATIONS: On Feb. 12, 2013, Plaintiff Maricela Sotelo, 45, a certified nursing assistant, was driving in Santa Barbara when her vehicle was rear-ended by a vehicle operated by Brooke Holland. Plaintiff claimed injuries to her neck and back and sued Holland and her mother, Julia Holland, the owner of the vehicle. Sotelo alleged that Brooke Holland was negligent in the operation of her vehicle and that Julia Holland was vicariously liable for her daughter's actions. The defendants admitted negligence.

INJURIES/DAMAGES: The day after the accident, Plaintiff presented to Santa Barbara Cottage Hospital emergency room, with complaints of neck and back pain. The hospital diagnosed her with a neck strain, prescribed Ibuprofen, and instructed her to return if her pain did not resolve.

Her attorney referred her to an orthopedic surgeon, who first saw her on March 4, 2013, three weeks after the accident. The treating orthopedist sent Plaintiff to physical therapy for four months, but when she did not improve, she was referred for a lumbar MRI, which showed a central disc bulge at L2-3 and severe spinal stenosis at L4-5 and LS-Sl.

On June 6, 2014, the treating orthopedist performed an epidural steroid injection, but it failed to relieve Plaintiff's lower back pain, which allegedly had radiating symptoms down her legs.

Plaintiff claimed that her neck injury was resolved, but that her back injury had not. She claimed that as a result, her treater recommended in June 2014, that she undergo a microdiscectomy at L4-5. As a result, On April 28, 201S, she underwent the microdiscectomy at L4-S and was off of work for 10 months.

At the time of trial, Plaintiff was 48 years old, divorced and with one child, a daughter, who was in college studying to be a registered nurse. She claimed that prior to the subject incident, she had no neck or lower back injuries or treatment of any kind and that her lower back injury was caused by the subject accident. She also claimed all of her resulting medical care was reasonable and necessary.

In addition, Plaintiff claimed that despite returning to work as a certified nursing assistant, working 30 hours per week since approximately June 2016, she continues to suffer from lower back pain and that as a result, she takes 90 pain pills a month. She further claimed that her limitations include lifting, bending, stooping and standing for more than an hour at a time.

Thus, Plaintiff sought recovery of approximately $51,000 in past medical costs that were on a lien, approximately $45,000 in past lost income, and approximately $507,000 in future lost income.

She also sought recovery of $500,000 to $1.5 million in damages for her past and future pain and suffering (Plaintiff's counsel noted that they served their c.c.P. § 998 demand and Kahmann's recommendation to the defense, but the defendants refused/declined to accept).

Defense counsel contended that the subject collision on Feb. 12, 2013 caused less than $1,000 in damage to the rear bumper of Plaintiff's vehicle and that four months later, on June 14, 2013, she ran a stop sign and was broadsided on her driver's side door by a sport utility vehicle. Counsel contended that her second accident occurred during the course of her physical therapy, but that she did not tell the physical therapist nor the orthopedist about the second accident.

Defense counsel also contended that although Plaintiff's treating orthopedist recommended that Plaintiff undergo a microdiscectomy in June 2014, she was still working at two different facilities, 60 to 80 hours per week at that time. However, counsel noted that on Feb. 15, 2015, she fell from an exam table at her doctor's office and allegedly sustained injuries. Thus, defense counsel contended that she underwent the microdiscectomy in April 2015, more than three years after the two car accidents, and just two months after the fall from the exam table.

In addition, counsel noted that Plaintiff underwent a neck surgery in November 2015, but her treating surgeon claimed that was unrelated to her two car accidents three years earlier.

Defense counsel argued that the minor rear-end accident was not a substantial factor in causing Plaintiff's lower back injury. Instead, defense counsel argued that her lower back surgery was caused

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by a pre-existing congenital defect of her spine which caused severe stenosis and severe degenerative disc disease.

Counsel also argued that her alleged neck and lower back injuries were caused or contributed by the subsequent collision on June 14, 2013 and/or by her fall from the doctor's exam table on Feb. 15, 2015.

RESULT: The jury found that Defendant's negligence was a substantial factor in causing harm to Sotelo. It also determined that Plaintiff's damages totaled $239,331. Demand: $300,000; offer: none reported; Insurer: Farmers Insurance Group of Cos. for both defendants.

Defense attorneys were Daniel J. Carobini, Engle Carobini & Coats, LLP, and Benjamin J. Engle, Engle Carobini & Coats, LLP.

Plaintiff's experts were Richard D. Kahmann, MD, orthopedic surgery, Santa Barbara, CA (treating doctor); Philip S. Lewis, Ph.D., vocational rehabilitation, Ventura, CA; and Mark Schniepp, Ph.D., economics, Santa Barbara, CA.

Defense experts were: Cary D. Alberstone, MD, neurosurgery, Oxnard, CA; Gene Bruno, M.S., C.R.C., C.D.M.S., vocational rehabilitation/counseling, Encino, CA; and Jennie M. McNulty, CPA, M.B.A., economics, Los Angeles, CA

POST-TRIAL: The total verdict amount was reduced to $225,537 to adjust the award for future lost income to present value. Plaintiff then sought recovery of prejudgment interest and costs, which the defense disputed. Defendants' insurer ultimately agreed to settle for $332,000.

Settlements

SETTLEMENT: Confidential
Susan Paynter and Bill Paynter
v. Tom jones and Does 1-100, Inclusive
Animal Control/Real Property/Trespass

Judge Kevin R. Culhane rendered a defense verdict in Superior Court of Sacramento County on Jan. 1, 2018, after the plaintiff claimed injuries as a result of a cow's escape. Defense claimed cow's escape was unpredictable. Plaintiff's attorney was CCTLA member Glenn S. Guenard, Guenard & Bozarth LLP, and the defense attorney was Jeffrey M. Schaff, Tiza Serrano Thompson & Associates.

FACTS & ALLEGATIONS: On May 14,2014, Plaintiff Susan Paynter, 70, was sitting in her living room in her house in Wilton while her husband spoke with Tom Jones and his ranch hand, who were asking for help in wrangling an escaped cow. Jones had been attempting to inoculate 12 newly purchased cows. However, while he was attempting the inoculation of the subject cow, the squeeze chute—which is a piece of equipment used to hold in cows—broke, and the cow escaped, running over Jones' wife and out a gate that Jones had left open.

Defendant and his ranch hand chased the cow for about a mile before the cow entered Plaintiff's property through an open gate, which was typically closed 363 days out of the year. That's when Defendant asked Plaintiff's husband for help wrangling the cow.

Plaintiff came out to the field in her flip-flops and a dress and yelled at Defendant's ranch hand, whom she believed was throwing rocks at the cow. Defendant and the ranch hand allegedly yelled at Plaintiff to stay back whens she ducked under a five-foot steel pipe fence and began marching across the field. The cow charged her at full speed from approximately 300 feet away and knocked her to the ground, and she sustained injuries to her left ankle.

Plainitff sued Jones, alleging that he was negligent for failing to shut a gate near the squeeze chute. She also alleged that he was liable for the trespassing animal. Defendant denied negligence and claimed that the series of events was unpredictable and out of his control.

INJURIES/DAMAGES: Plaintiff sustained a trimalleolar fracture just above the ankle as a result of being struck by the runaway cow. Her husband took her to a hospital immediately after the incident where she underwent emergency surgery to have the fracture set and screwed in place. She remained in the hospital for four days before being discharged and then remained non-weight bearing for 10 weeks. A year later, she underwent a subsequent surgery to remove the hardware, which was causing discomfort.

Plaintiff sought recovery of $24,580.03 in past medical costs, which were stipulated as reasonable and related to the incident. She also sought recovery of $130,000 in past non-economic damages and $180,000 in future non-economic damages.

RESULT: The jury rendered a defense verdict, finding that Defendant was negligent, but that his negligence was not a substantial factor in causing harm to Plaintiff. Jury Vote: 9-3 (negligence); 11-1 (substantial factor); 10-2 (strict liability).

Plaintiff expert: Steven J. Barad, M., orthopedic surgery, Sacramento, CA. Defense: None reported.

POST-TRIAL: The parties settled post-trial, based on a previously established, confidential, high/low agreement.

Continued om page 39

SETTLEMENT: $1.3 million
Motorcycle v. Minivan Accident

CCTLA member Adam Sorrells settled a motorcycle v. minivan for the policy limits of $1.3 million. The collusion happened June 1, 2017, and Plaintiff sustained a severe foot and ankle injury, ultimately leading to a below-knee amputation. The minivan at fault was a plain, unmarked minivan, and the police report listed the defendant as an individual. Defendant had State Farm Insurance, which eventually disclosed that it had a single $300,000 limit, that there was no other insurance on behalf of its insured and offered to tender the limits.

Knowing that $300,000 was not gong to provide enough money to take care of his client, Sorrells did some research and found out the defendant operated a small courier business as a sole proprietor out of his home. The single-limit policy clued him in that this was a commercial policy. He determined the non-delegable duty line of cases applicable to big rig trucks could be a working theory for a courier company.

Suit was filed, and discovery disclosed that indeed, the unmarked minivan had been delivering goods for another courier company. The second courier company had a $1-million policy. Extensive briefing was supplied to the second courier company, and after the minivan driver's deposition, both policies were tendered.

PARTIAL SETTLEMENT: $2.535 Million
Tire tread separation

CCTLA member William C. Callaham of Wilcoxen Callaham, LLP, obtained a partial settlement of a case against several defendants regarding a tire tread separation resulting in loss of control and rollover of an SUV. Passengers sustained multiple injuries and there were three deaths. Two of the defendants have settled for a total of $2,535,000.

GLOBAL SETTLEMENT: $2 Million
Medical malpractice

CCTLA member William C. Callaham of Wilcoxen Callaham, LLP, settled a case against nine different physicians, hospitals and groups as a result of delayed diagnosis of cauda equina syndrome.

SETTLEMENT: $1.5 Million
Automobile manufacturer liability

CCTLA members Daniel E. Wilcoxen and E.S. Ted Deacon of Wilcoxen Callaham, LLP, settled a case involving a single vehicle rollover accident, with admitted speed of 71 mph, apparent loss of control/falling asleep at the wheel, resulting in multiple rollovers, with the driver being ejected from the car and found in the roadway. Plaintiff, a 52-year-old female, who suffered multiple serious injuries, claimed the seatbelt failed. Defendant claimed Plaintiff was not using her seat belt.

SETTLEMENT: $1 Million
Wrongful death on-the-job injury

CCTLA members Daniel E. Wilcoxen and Martha Taylor of Wilcoxen Callaham, LLP, settled a case involving an independent contractor working on the premises of employer and injured in a fall, resulting in death.

SETTLEMENT: $500,000
Product Liability

CCTLA members Daniel E. Wilcoxen, Drew M. Widders and Carl Blaine of Wilcoxen Callaham, LLP, settled a case arising from the death of a 72-year-old female as a result of a house fire alarm company's failure to have operative equipment, resulting in a failure to notify the fire department of the fire. Defendant claimed the equipment was not maintained and/or operated appropriately by the decedent.

SETTLEMENT: $487,500
Slip and fall

CCTLA member William C. Callaham of Wilcoxen Callaham, LLP, settled a case resulting after a cleaning crew working after hours left residual soap and water on the floor and failed to post warnings of the slippery condition. Plaintiff, working the night shift, sustained a fractured tibia and anterior cruciate ligament rupture.

Mediation

MEDIATION: $2.5 Million
Automobile manufacturer liability

CCTLA members Daniel E. Wilcoxen and E.S. Ted Deacon of Wilcoxen Callaham, LLP, settled a case at mediation involving a 17-year-old male passenger in a single-vehicle rollover accident. Defendant claimed the accident resulted from a high-speed loss of control by a 15-year-old-driver without a driver's license who had a minimal policy that was tendered immediately. The passenger (Plaintiff) suffered an axial C-spine loading, resulting in a fracture at C4-5 and quadriplegia. Plaintiff claimed roof crush caused the vehicle to not be crashworthy.

Halfway in, the defendant claims to be incompetent

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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. If you would likemore information regarding this program or if you have a question with regard to one of your cases, please contact Jack Vetter at jvetter@vetterlawoffice.com, Lori Gingery at lori@gingerylaw.com, Glenn Guenard at gguenard@gblegal.com or Chris Whelan at Chris@WhelanLawOffices.com.

MAY 2018

Thursday, May 31
Monthly Membership Mixer
6 to 7:30 pm., Justice Centers of California,
3835 North Freeway Blvd., Suite 210, Sac.
CCTLA members only. Free

JUNE 2018

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

Thursday, June 14
CCTLA's 16th Annual Spring Reception & Silent Auction
5-7:30pm
Ferris White Home,
1500 39th Street,
Sacramento, CA 95816

Thursday, June 21
CCTLA Problem Solving Clinic
Topic: TBA; Speaker: TBA
5:30-7pm, Arnold Law Firm,
865 Howe Avenue, 2nd Floor
CCTLA members only, $25

Thursday, June 28
Monthly Membership Mixer
Program: 4:30-6pm & Mixer: 6-7:30pm
Justice Centers of California,
3835 North Freeway Blvd.
Suite 210, Sacramento 95834
CCTLA members only. Free

Friday, June 29
CCTLA Luncheon
Noon, Topic: TBA; Speaker: TBA
Sacramento County Bar Association
CCTLA members, $35

JULY 2018

Tuesday, July 10, 2018
Q&A Luncheon
Noon, Shanghai Garden,
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA members only.

Thursday, July 19
CCTLA Problem Solving Clinic
Topic: TBA; Speaker: TBA
5:30-7pm, Arnold Law Firm,
865 Howe Avenue, 2nd Floor
CCTLA members only, $25

Thursday, July 26
Monthly Membership Mixer
Program: 4:30-6pm & Mixer: 6-7:30pm
Justice Centers of California,
3835 North Freeway Blvd.
Suite 210, Sacramento 95834
CCTLA members only. Free

Friday, July 27
CCTLA Luncheon
Noon, Topic: TBA; Speaker: TBA
Sacramento County Bar Association
CCTLA members, $35

AUGUST 2018

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

Thursday, August 17
CCTLA Problem Solving Clinic
Topic: TBA; Speaker: TBA
5:30-7pm, Arnold Law Firm,
865 Howe Avenue, 2nd Floor
CCTLA members only, $25

Friday, August 24
CCTLA Luncheon
Noon, Topic: TBA; Speaker: TBA
Sacramento County Bar Association
CCTLA members, $35

Thursday, August 30
Monthly Membership Mixer
Program: 4:30-6pm & Mixer: 6-7:30pm
Justice Centers of California,
3835 North Freeway Blvd.
Suite 210, Sacramento 95834
CCTLA members only.

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