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Not resting on our laurels

Michelle C. Jenni
CCTLA President

It's been a busy first quarter for CCTLA and its members. First, CCTLA was called upon by Presiding Judge Culhane, as well as Judge Hight (ret.) and Justice Scotland (ret.), to lend its support as an organization to one of the three options being considered for approval by the Judicial Council for the new courthouse.

Among the options were a new 44-room courthouse, plus renovation of nine courtrooms in the Schaber Courthouse; a new 33-room courthouse, plus renovation of 20 courtrooms in the Schaber Courthouse; or a new 53-room courthouse, and sale of the Schaber Courthouse. The judges were attending a hearing before the Judicial Council and requested that CCTLA endorse the one-courthouse option, calling it the most fiscally responsible, as well as the most logistically feasible, option.

I am happy to report that the single-courthouse option was approved by the Judicial Council. Construction is slated to begin in Spring 2019 and hoped to be concluded by Summer 2022. The new courthouse will be located in the Railyards.

We also have had great success with our educational programs this quarter. In January, a luncheon seminar was held with Presiding Judge Culhane and Assistant Presiding Judge DeAlba as the speakers. The turnout was fantastic! An accident reconstruction seminar was held in March which also had a very good turnout.

Problem-solving clinics are held once a month, on Thursday evenings, and always offer good topics, great speakers and invaluable information. Also, don't forget that the Q&A lunch that is held every Tuesday at Shanghai Garden restaurant at Alhambra and H streets and is free to members. The only thing you need to bring is a problem or issue you would like to discuss.

In addition, CCTLA is pleased to be bringing Dan Ambrose and his "Trojan Horse" program to our members Aug. 18- 20. If you do not know about this program, I would urge you to take a look at the website at www.trojanhorsemethod.com. Those who have attended in other venues have nothing but fabulous things to say about it.

The CAOC/CCTLA Sonoma Travel Seminar was held on April 1- 2 at the Sonoma Mission Inn. This seminar has historically been held in Lake Tahoe, but with the lack of snow for the past four years, attendance was dwindling. I am pleased to announce we had 128 attendees this year, and the feedback on the new location has been great. We had a very good showing from Sacramento, as well as from the Bay Area and Southern

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Mike's CITES

By: Michael Jansen
CCTLA Member

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

Randall Blackwell v. Ray Vasilas
2016 DJDAR 869 [Jan. 26, 2016]

FACTS: Plaintiff Blackwell was hired by Defendant Vasilas as an independent contractor to repair/replace rain gutters around a rental structure that Vasilas owned. Another independent contractor (stucco worker Gomez) put up scaffolding to fix stucco on exterior of building. Blackwell, while working on the rain gutters, stepped from his ladder onto the scaffolding that Gomez had erected, and the scaffolding collapsed, causing Blackwell to fall 10 feet to the ground. Vasilas claimed he hired Gomez and Blackwell as independent contractors and exercised no control over their work.

Vasilas' insurance company succeeded on a MSJ, but the DCA REVERSED.

HOLDING: While Vasilas made a prima facie showing under common law that Gomez was an independent contractor, Labor Code Section 2750.5 codifies a general tort standard for independent contractor status. It provides a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to the Contractor's State Licensing Law is an employee rather than an independent contractor.

Since Gomez needed a contractor's license and did not have one, he was deemed an employee of Vasilas, and Vasilas was held liable under *respondeat superior*. *Privette* does not apply.

Teresa Burgueno v. The Regents of the University of California
2015 DJDAR 305 [Dec. 15, 2015]

FACTS: The UC Santa Cruz in 1973 constructed the Great Meadow Bikeway to provide a route for bicycle transportation to and from the central campus that is separate from automobile traffic. On Feb. 10, 2011, student Adrian Burgueno was fatally injured when he rode his bicycle down the hill from an evening photography class. There have been many bicycle crashes on the Great Meadow Bikeway. The UC regents filed a motion for summary judgment under Government Code §831.4 which provides "bicycle path" immunity. The trial court granted the motion for summary judgment, and the DCA affirmed.

HOLDING: Government Code §831.4 is the walkway/path immunity. Even though Burgueno was not using the bicycle path for recreational purposes, the governmental entity is still immune. Even if she had been a pedestrian, UC would be immune. Montenegro v. City of Bradbury (2013) 215 Cal.App.4th 924. The public policy is that there should be immunity for recreational activities on public land to encourage public entities to open their property for public recreational use.

Anthony Toste v. Calportland Construction, et al.
2016 DJDAR 2130 [Mar. 2, 2016]

CAUSATION: Toste, a job supervisor, was killed when he was backed over by a truck driven by an employee of the defendant who was hauling rock on a road construction project. The defendant's employee was drug tested immediately after the incident and had marijuana in his system. The jury found for the defendant based on lack of causation, and

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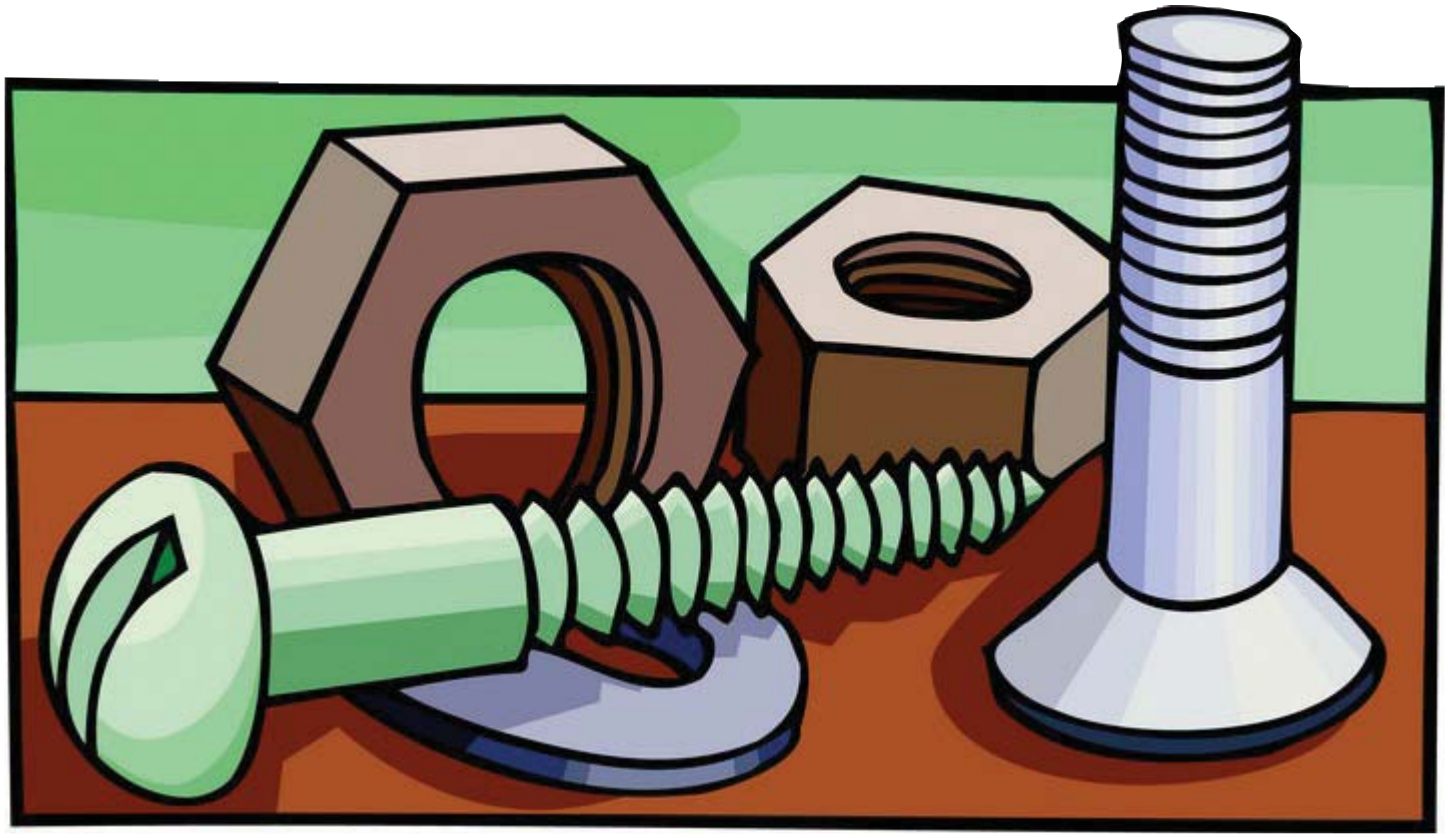
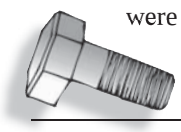


Nuts and Bolts of the Mental Exam

By: Joseph B. Weinberger, Esg. / Weinberger Law Firm

The cornerstone of litigation is that at all times you are the representative and protector of your client. You are there to guide your client through the intricacies of litigation and protect your client from the actions of the Defense Industry. At no point do you ever abandon your client to the clutches of the defense, with the sole exception of the mental examination permitted under Code of Civil Procedure §2032.010 et. seq.

In Edwards v. Superior Court (1976) 16 Cal.3d 905, the Supreme Court determined that "the presence and participation of counsel would hinder the establishment of the rapport that is so necessary in a psychiatric examination." For this reason, it is imperative that you zealously represent your client in advance of the examination and ensure that any violation of either the order or stipulation for the exam includes issue and evidence sanctions for the defense. In the absence of such extreme sanctions, the defense doctor is free to obtain admissions from your client that would never come out if you were present.



NO FREE PASS

Code of Civil Procedure §2032.220 provides for a physical examination of your client at the demand of the defendant. Such is not the case for a psychological examination. A mental examination requires leave of court. C.C.P. §2032.310. The motion further requires a good-faith effort to meet and confer. C.C.P. §2032.310(b). It is at this pre-motion time period that you have the ability to limit the scope and breadth of the examination and to place limitations upon the examiner in order to protect the interests of the client. It is also at this point that you can begin to set forth the foundations for issue and evidence exclusions should the examiner violate the terms of either the stipulation or court order.

In Edwards v. Superior Court (1976) 16 Cal.3d 905, the Supreme Court stated that "a psychiatric examination is almost wholly devoted to a careful probing of the examinee's psyche for the purpose of forming an accurate picture of his mental condition." This far-ranging explanation provides more than sufficient grounds for the examiner to delve into the recesses of your client's mind and explore issues that would never be appropriate in deposition or trial. Therefore, it is incumbent upon you as the attorney for your client to set forth the boundaries for such inquiry prior to the examination.

In discussing the refusal to permit counsel to attend a mental examination, the Supreme Court in Edwards also stated, "We do not suggest that the trial courts lack discretion to issue protective orders where necessary to safeguard the physical or mental condition of the examinee." The court went on to state, "Conflicts regarding the questions and answers elicited at the examination can be resolved through existing procedural methods."

Since the defense counsel and the examiner are more likely to ask for forgiveness rather than permission, it is important that you set the boundaries for inquiry as part of the meet-and-confer requirements. In order to further safeguard your client, it is suggested that the breach of the court order by the examiner should result in the exclusion of the examiner and his/her opinions and conclusions at trial. This type of liquidated damages clause can be part of the order, and a court will likely see the logical benefit of such order to enforce the determination of the court.

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Mental exams

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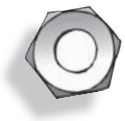
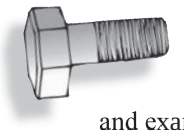
The court should further order that the examiner sign and acknowledge receipt of the court order for the examination, so that there are no questions as to whether the examiner knew and understood the limitations to the examination.



LENGTH OF EXAMINATION

While there is no set time for the length of a mental examination, it is not unusual for defense counsel to indicate that the examination will take eight or more hours. In light of the statutory limitation on depositions to seven hours, the length of the examination typically sought appears on its face to be unreasonable. To date, no appellate decision has touched upon a reasonable length of time for a mental examination. The closest case is Edwards v. Superior Court, which cited to the code and indicated that "the trial court shall specify in its order the conditions under which the examination is to be conducted, and the fixing of these conditions is a matter entrusted to the sound discretion of the trial court. " In Edwards, the court determined that four hours was sufficient time to conduct an examination. It is suggested that this should be the outer limit of time that the mental examiner should be free to conduct the examination of your client in the absence of counsel.



RECORDING

Code of Civil Procedure §2032.530 authorizes both the examiner and examinee to record the mental examination by audio tape. Efforts to record the proceeding by court stenographer and videotape have been unanimously rejected by the courts. In Golfland v. Superior Court (2003), the court stated that "it is advisable to make [the examiner] as the health-care practitioner conducting the examination, responsible for audiotaping it in its entirety...Having [the examiner] do the taping is more likely to avoid disruption of the examination, and his office is almost surely properly equipped to perform this task, which is a common feature of psychological practice." It is suggested that this course of action be included in the stipulation or order of the court. If possible, having your client record the proceedings as a backup is probably a good idea.

THE TESTS

Code of Civil Procedure §2032.320(d) provides that the order for a mental examination shall specify the "diagnostic tests and procedures." This means that the party demanding the examination must set forth the names of the specific tests that will be conducted during the examination (Carpenter v. Superior Court (2006) 141 Cal.App.4th 249). Typically, a demand for the mental examination will only indicate that non-intrusive, non-painful diagnostic tests and procedures will be conducted. This broad general language does not meet the requirements of the code. Thereafter, counsel will bombard you with an endless list of diagnostic tests that "may" be given. Such a far-ranging list again does not comply with the requirements of the code. Further, when given a laundry lists of tests that may be given it becomes apparent that the time to conduct these tests will exceed any reasonable examination. Research the tests and determine the recommended length of time that the examinee should be given to complete the test. It will quickly become obvious that in order to complete the tests, the exam will take 10-12 hours. In your meet-and-confer efforts, point this out to counsel and cite them to the Carpenter case. You are entitled to know specifically which tests *will* be given to your client.

COPYRIGHT

In order to effectively evaluate the defense examiners opinions and conclusions, it is required that you have not only the tests that were administered to your client, but the answer sheets and notes as well. This demand is frequently met with an objection that the testing materials are copyright protected. While it is true that most psychological exams (such as the MMPI or Wechsler Memory Scale) are copyright protected, this is not the end of the inquiry.

As set forth in Carpenter, "even if it could be presumed that all "written standardized tests" evaluating emotional and cognitive functioning were subject to copyright protection, it was not established that providing a copy of the test questions...would violate copyright law in every instance." It should be noted that the holders of the copyright, typically Pearson and Harcourt, both have indicated that the provision of the tests and answers to counsel or a designated psychologist, along with other safeguards would not violate the copyright. Further support for such a position has been set forth by the Committee on Legal Issues of the American Psychological Association.

Note: This article is for information and is solely the product of the author. Joseph B. Weinberger can be reached at (916) 357-6767 or by email at joe@weinbergerlaw.net.

DO YOU KNOW YOUR INSURANCE POLICY?

By: Daniel Glass

Who cares? As plaintiff's counsel in personal injury matters, all we usually need to know is the policy limit so we can make a demand within the limit and get the insurer to pay whatever our judgment is, regardless of the limits—right?

Well, for many cases that might be true, but not always. Within the past month, members of CCTLA have asked for the collective opinions of the membership on issues such as: (1) *My client was bitten by a dog. The homeowner has a standard homeowner policy with a $300,000 personal injury limit, but the insurer has told me that because the insured had a pit bull, there is only $50,000 worth of coverage;* (2) *While cleaning a home, my client was bitten by a dog. After some litigation, the defendant's attorney just told me that my client's exclusive remedy is "workers compensation" under the homeowner's policy coverage for "residence" employees. Can this be true?*; and, (3) *Can an insurer refuse to provide coverage for an accident where the insured gave her friend permission to drive the vehicle?*

In all fairness, most times in automobile personal injury cases, all we need to know is accomplished through Form Interrogatory 4.1—is there coverage, is there a reservation of rights and what are the policy limits.

However, the issues are much different for general liability matters, commercial liability cases and, especially, first-party insurance coverages.

The responses to the above questions by our collective membership was always the same—the defense lawyer is wrong; they may not be telling you the truth; and, *what does the insurance policy say?*

It is not possible to discuss every aspect of every insurance policy in anything less than a treatise. Thus, this article will provide some basic pointers for you to consider.

PERSONAL AUTOMOBILE POLICIES

If you do not have a copy of your client's policy, or the defendant's policy, go home and get your policy. Read it—cover to cover—so you know what's in it. The same basic concepts are found in most personal auto policies. Insurers are copycats. They do not reinvent the wheel every time they create a policy. (*Caveat:* every once in awhile, an insurer comes up with an "EZ Reader" type policy. They use them to sell their product. They use them until a court tells them that the policy is so broad that there is coverage for something the insurer did not want to cover—so they go back to the regular, fine-print policies).

Every policy will have a declarations page. Although the immediately important information on the dec page will be the policy limits, the dec page will also have notes about discounts, lienholders and potentially, a list of endorsements. Endorsements are add-on pages to the policy. It is here where you will find specific policy pages that might increase coverages or restrict coverages. Endorsements may change the policy as to certain named individuals, certain risks and certain coverage limitations (*A commentary about limits:* Everyone reading this article should have policy limits of at least $300,000, and more likely $500,000 for each person—including UM/UIM coverage in that amount. I am certainly not in favor of helping insurers make a profit. But the difference in cost to you for a liability policy with limits of $50,000/$100,000 and a combined single limit of $500,000 is minimal—highly unlikely it will be more than $50/month. Adding those limits to UM/UIM is for *YOUR* benefit, not the insurer's or "the other guy.").

Most auto policies also have coverage for "medical payments." We all recently have seen how insurers attempt to not pay these limits by having their "people" review the medical bills and decide that the so called "reasonable charge" should have been "X," so that's all they pay. Disputing the potential reduction will not be addressed herein. However, with so many people having high-deductible health insurance these days so that their health insurance premiums are less than $2,000/month, higher "medical payments" limits on your policy will also protect you and your family from incurring the significantly high deductible charges if the fam-

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Insurance

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ily is involved in an automobile accident.

I began this section by stating that you should get the policy and read it. I will end by suggesting that, just because it is written in the policy does not mean it is enforceable.

The Civil Code addresses the creation and interpretation of contracts (Civil Code secs. 1549, et. seq.). If you believe the insurance policy is ambiguous, or if one section of the policy conflicts with another section, review Civil Code secs. 1635, et. seq., with regard to the interpretation of contracts. Civil Code sec. 1643 requires that an ambiguous contract be interpreted in favor of there being a contract. Civil Code sec. 1654 requires all ambiguities to be interpreted "most strongly against the party who caused the uncertainty" (The insurance company).

The Insurance Code is also your "friend." For instance, Ins. Code sec. 11580.2 sets forth the insurers obligation to provide, or not provide UM/UIM coverage in an auto policy. It provides what coverages must exist. If the policy you have is less favorable to the insured than what Ins. Code sec. 11580.2 mandates, the policy will be conformed to follow the law. For instance, if the policy does not provide UM/UIM coverage, the insurer must be able to produce a waiver of that coverage, signed by the insured. Without such a waiver, coverage is included. (See Enterprise Ins. v. Mulleague (1987) 196 Cal.App. 3d 528).

HOMEOWNER'S POLICIES

Same rules apply. Get the policy. Read the declarations page. Make a list of all the endorsements listed on the dec page. Make sure you have each one of them—they change the body of the policy. They can change "definitions" that are found in the policy. When deciding if there is coverage for a potential "liability" event, every word is important and can be critical.

In Minkler v. Safeco (2010) 49 Cal 4th 315, the California Supreme Court was asked to answer a certified question about coverage sent to it by the Ninth Circuit Court of Appeal. The issue in the case was whether there could be coverage for one insured (the wife) who was jointly insured with her husband. The allegation was that the husband molested a child. This act was clearly excluded due to the "intentional acts" exclusion of the policy and Insurance Code sec. 533. However, the wife was allegedly "negligent" for not preventing her husband from engaging in his intentional, very bad, conduct.

> The Supreme Court answered "no" to the following question: Where a contract of liability insurance covering multiple insureds contains a severability clause, does an exclusion barring coverage for injuries arising out of the intentional acts of "an insured" bar coverage for claims that one insured negligently failed to prevent the intentional acts of another insured? The court held that an exclusion of coverage for the intentional acts of "an insured," read in conjunction with a severability or "separate insurance" clause like the one at issue here, creates an ambiguity that must be construed in favor of coverage that a lay insured would reasonably expect.

The ultimate decision turned on whether the policy insured "an insured" or "the insured."

HEALTH INSURANCE POLICIES

Although most of these are "group"

policies and may be subject to ERISA, basic rules of contract interpretation still apply. Although there is some disagreement as to whether an ERISA Plan must be interpreted according to any particular "state law," is it beyond dispute that the courts have adopted the rule of "contra proferentem."

> "...the contra proferentem rule is followed in all fifty states and the District of Columbia, and with good reason. Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters' expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence. Moreover, once the policy language has been drafted, it is not usually subject to amendment by the insured, even if he sees an ambiguity; an insurer's practice of forcing the insured to guess and hope regarding the scope of coverage requires that any doubts be resolved in favor of the party who has been placed in such a predicament. Were we to promulgate a federal rule, we would find these common-sense rationales sound. Indeed, it would take a certain degree of arrogance to controvert an opinion held with such unanimity in the various states and to adopt a contrary view as the federal rule. We hold, therefore, that the rule of contra proferentem applies to the case at bar, regardless of whether it applies as a matter of uniform federal law or because federal law incorporates state law on this point." Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 540 (9th Cir. 1990).

The moral of the story is: If there is any question about insurance coverage in a case, always get the relevant insurance policy, or policies. Always get all the endorsements. If there is an ERISA Plan and a Summary Plan Description, get them all. Read them all. It may seem routine enough, but it does not always happen.

Case on point, the infamous U.S. Airways v. McCutchen, (2013) 133 U.S. 1537. This matter was before the federal district court; it was before the U.S. Court of Appeal for the Third Circuit; cert was granted by the United States Supreme Court. Oral argument before the USSC occurred. Yet, the final opinion, in footnote 1, noted: "...Only in this Court, in response to a request from the Solicitor General, did the plan itself come to light.." No one had ever referred to the actual ERISA plan. It is possible no one read the actual plan throughout the litigation.

Look at the Insurance Code for explanations and minimum coverage requirements. Review the relevant Civil Code sections.

If you do not have the exact policy to start with, find your own home or auto or health or life policy and look for the sections that may apply to your situation. Then, get the actual policy applicable to your case.

To continue to obtain good results for your clients, use this approach for any insurance issues you are faced with.

Note: This article is for information only and is solely the product of the author. Daniel Glass can be reached at dsglawyer@gmail.com.

A Trip Inside the Mind of Lawrance Bohm

Interview by: Lorraine Gingery

Lawrance Bohm has appeared on our radar recently with huge crazy verdicts, and stories about his technological prowess have been told by him and discussed amongst ourselves. You may have wondered, who is this guy? How is he doing what he is doing? I caught up with him in mid-April at Bella Bru in Natomas to get answers to these questions and more.

Q Let's start at the beginning, Why did you become an attorney?

A My Dad's best friend was an attorney, and he seemed like a really fun guy. I thought attorneys must be funny and likeable. I can do that! I was eight years old, and that was important to me. My Dad was a doctor, and I didn't want to do that. It occurred to me that attorneys had rules to play by, and I figured it's more fun to play when you know the rules.

Q Where did your career start?

A I started out in employment law. I had been interested in that area since college. I had also worked at an insurance defense firm and then decided to get into personal Injury. I like helping people, and my background in dealing with big corporations made it feel like a good fit.

Q Fast forward to the day you decided to hang out your own shingle. What does that look like?

A It's 2005, in June actually, and my office is in my house in Natomas. A year and a half go by, and it's just me, working alone before I hire any help. In fact, I didn't hire my first associate attorney until 2010.

Q I think your office is a little larger now. What happened?

A People needed help! Specifically, they needed my help. I was surprised by the growth and even a little scared, but I had no choice. I have 20 attorneys working with me now, and we are still growing. I mean, it's more about the love of the job, but I feel like people need good representation, and if they come to my firm, we're going to help them. There is so much to do compared to what we use to do.

Q You say "we" a lot. Tell me about your staff.

A First you need to know that one of my strengths is identifying great people. I'm a people person; I'm good at reading people. When I find the right person, I throw them immediately into whatever work I feel they can accomplish. Even if they're a new employee, if I feel they can go right into a trial and succeed, that's where I put them. Lately, I spend more of my day teaching; for example, how to do a depo. I do everything I can to help my staff excel at whatever they are doing. We succeed together as a group, or we fail together as a group. The biggest compliment I receive is when a client tells me how great the people who work with me are. Every single person who works with me strives to be the best they can be.

Q From a management perspective, how do you make that work?

A We all engage in a uniform strategy. All of our litigation tactics, processes and procedures and ways of doing things are "The Bohm Way." For example, we have a policy of "every client every month." Every client hears from an attorney at least once a month. No person goes more than a maximum of 59 days without hearing from us.

Q How do your clients find you?

A Internet mostly. There are articles about large verdicts. I have some Spanish speakers in my office and have advertised that as well. Speaking of Spanish, I have just started "Me Centro Legal" (My Legal Center) in San Diego. That office will be able to find justice in the areas of personal injury and employment

law for Spanish speakers throughout San Diego. My hope is to pull these offices up the state and make this help available for everyone.

Q How do you accomplish spreading "The Bohm Way" all throughout the state?

A Technology! I know a bit about it [laughs]. Obviously Skype, cellphones and the like are available. I'm also looking into moving into the Monterey area in the next two to three years. I hear there is a need for great representation in the employment law area there. I have been in contact with an attorney there, and we will see what happens.

Q What else should we know about you?

A I have to reiterate: I love people, I'm definitely a people person, and when a human being needs legal help, I am going to be there for that person. I have fun doing what I do, and I work hard to bring up the people around me, and I think they do the same for me. I also teach a week-long clinical boot camp at my alma mater, Tulane Law School.

CAOC-backed bill protecting elders passes Senate

SB 1065 will limit delays in hearing nursing-home abuse cases

A bill co-sponsored by Consumer Attorneys of California (CAOC) that will hasten justice for California seniors in elder-abuse cases against nursing homes was passed by the California Senate on May 2 with bipartisan support.

SB 1065, by Sen. Bill Monning (D-Carmel) and co-sponsored by the Congress of California Seniors and California Advocates for Nursing Home Reform, will prohibit defendants from appealing a judge's denial of forced arbitration in cases filed under the Elder and Dependent Adult Civil Protection Act. The bill does not create a blanket ban on forced arbitration in elder abuse cases, nor would it prevent the defendant from appealing the final judgment. Defendants would also retain the right to seek a writ of mandamus for appellate review of denial of arbitration while the case moves forward.

The bill is needed because defendants take advantage of the process to put off going to trial, a tactic that has delayed, and in some instances denied, justice for elderly Californians facing their final days.

Under current law, plaintiffs aren't allowed to appeal a trial judge's ruling that arbitration may proceed, but defendants may appeal if a judge declares that a forced arbitration provision is "unconscionable" and the case should be decided in court. SB 1065 will put both parties on equal footing by prohibiting defendants from appealing "unconscionable" rulings. Defendants have abused the practice to drag out cases in a hope that an elderly plaintiff dies before a dispute is resolved.

"We have seen cases in which the appeal of an arbitration denial can delay the resolution of an elder-abuse case by as much as two years," said CAOC president Elise Sanguinetti. "That's time these elderly victims just don't have."

SB 1065 next will be heard by the Assembly Judiciary Committee.

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

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From the president

Continued from page one

California.

The speakers were fantastic, and our keynote speaker, Randi McGinn, was awe-inspiring. If you are not familiar with Randi, I would highly recommend hearing her speak if you get the chance. In addition, she has written a book titled *Changing Laws, Saving Lives* — it's a must read!

Also really picking up speed is the CCTLA mentoring program, headed by Jack Vetter, Lori Gingery, Glenn Guenard and Chris Whelan. This year, each board member is being teamed with a new CCTLA member to help with whatever needs that member may have, from maximizing the benefits of CCTLA membership to shadowing an attorney for a day and more. We are very excited about this program, and I, for one, cannot wait to get my assignment!

Finally, CCTLA is sponsoring the 14th annual Spring Fling on June 16 to benefit the Sacramento Food Bank and Family Services (see page 14). Thanks to our generous members and vendors, this fundraiser has continued to grow every year and has become the second largest fundraiser for the SFBFS—second only to Run to Feed the Hungry. We as an organization should be incredibly proud!! Sponsorships and/or donations for the silent auction are always welcome. Let's make this the biggest year yet!

In reading over my message one final time before submitting it, I thought that maybe my use of the explanation points might seem a little excessive. Upon further reflection, I decided to leave it just the way it was because it really has been an exciting year so far, and I do believe it will be just as exciting in the months to come. So . . . . I hope you have enjoyed and benefitted from the events you have attended so far this year, and I hope to see you at many more in the future!!!!!

Admission

I knew that feather really belonged in my cap, *but*...

By: Linda Dankman

In 1977, I was a naive 24-year-old graduate of Boalt Hall. I passed the California bar but refused, on principle, to interview with big law firms. Feeling adventurous, I decided to go to Connecticut with my law-school boyfriend, who had secured a plum yearlong clerkship with Judge Blumenfeld in the Eastern District of Connecticut.

I packed all my earthly possessions in one suitcase and settled into a dank and dark basement apartment in Hartford. After a couple of weeks, pasting découpage on boxes, I took some part-time clerk jobs with various law firms and, out of pure boredom, decided to take the Connecticut bar exam.

The Connecticut bar had a terrifying number of subjects (more like 16 compared, to the six or so covered by the California bar exam), including bankruptcy, creditors' rights and commercial paper. I studied for a few weeks and headed off to Yale one snowy morning for the first day of the exam.

On the way to New Haven, my boyfriend's little compact car broke down. Running out of time, we decided to try to flag a ride. It was then, shivering in the fresh-fallen snow on the side of the road, that I realized something was wrong: I was getting sick. But I remained determined, and luckily enough, we managed to catch a ride to Yale just in time for the test.

I pushed through the first day, feeling sicker and sicker, and a visit to a doc-in-the-box that evening revealed that I had developed a serious case of strep throat. My temperature: 104. The doctor's advice: go to bed and take the exam when it's given again in the spring. But not me. No way. I had invested all the money I had in the exam fee, and I was determined to complete it. Endurance is a gift of youth, and I finished the exam and passed.

Judge Blumenfeld graciously offered to swear me in to the Connecticut bar in a private ceremony in his chambers. So, off to Filene's Basement I went to buy something more decent for the ceremony than the faded pair of jeans and tee shirt I must have worn during my entire law-school career.

It was an intimate, but sweet ceremony: just me, my boyfriend, Judge Blumenfeld and his clerk. I was then able to get a job in a law firm as a full fledged member of the Connecticut bar. I was an oddity—one of the youngest lawyers around the Hartford courthouses and one of very few women lawyers. But that gig didn't last long. At the end of his clerkship, sadly, my boyfriend returned to his home in Washington, and I returned to Sacramento to reunite with my family.

Fast forward: About five years ago, during a typically hectic day in my solo law practice, I took a call from a representative of Avvo. Typically, I would have ignored the call, judging it a promotional nuisance. But I answered.

The Avvo representative stated that my resume represented that I was a member of the state bar of Connecticut, inactive. "That's right," I retorted, proudly. "Well," he said accusatorily, "you are not." Indignantly, I asked him what he knew. "Well," he said, "I checked with the State Bar of Connecticut, and you are not a member, inactive or otherwise."

Vowing to correct this inaccuracy, I called the Connecticut State Bar. "One moment, please, while I check our card catalogue," said the bar employee, who put me on hold after listening to my tale of woe. She returned a few minutes later to tell me that she had indeed found an index card that confirmed that I had passed the Connecticut State Bar in 1977, but that I had never been sworn in.

"Au contraire," I protested. "I have a picture to prove that I was sworn in by Judge Blumenfeld in his chambers, demurely wearing my new dress from Filene's Basement."

"Pictures don't count," the clerk quipped. "Furthermore, even if Blumenfeld swore you in," she advised haughtily, "the rules provide that a state court judge, not a federal judge, must do the swearing in."

I offered to fly to Connecticut the next week to be sworn in, but bar rules required that the candidate be sworn in within one year of passing the bar, and since I had passed it decades ago, I would have to retake the bar, she admonished.

I was aghast. I did not have the time or the inclination to take another bar exam. I called the law firm for which I had worked that year in Connecticut. For a retainer of $5,000, they said they would try to help me gain admission to the bar but offered "no guarantees."

After forlornly taking the sage advice of my father, who counseled me to pick my battles (after all, I didn't plan on practicing in Connecticut any more, and he could think of several more satisfying ways to spend $5,000), I decided to remove any mention of the Connecticut bar from all my websites and resumes, including Avvo.

That was a time-consuming and

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Admission to the Bar: I *knew* it wasn't a dream...

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depressing task. But as my father predicted, after getting over the initial disappointment of it all, my life had not been impacted in any truly negative way. And life went on as usual.

About a year later, my oldest child, Aaron, who was furnishing a new apartment at the time, came by on a Friday night to visit for the weekend and to look for some framed artwork to decorate his new room. Magnanimously, I offered him any of the framed pieces that might be stored high up in the hallway cabinets. He was having a grand time reminiscing over the pieces he found in the cabinet—my mother's certificate of admission to the California State Bar, my Phi Beta Kappa certificate, my mother's diploma from law school, etc.

Then he brought me the coup de gras—a framed certificate of my admission to the State Bar of Connecticut, replete with a gold seal and the original signature of the clerk of the court in New Haven.

Time sure does pass slowly when anticipation looms, and it was like a slow-motion movie before Monday morning rolled around. Exactly at 5 a.m. California time, I placed another call to the Connecticut State Bar, armed this time with an iPhone photo of the framed certificate. "You'll have to talk to the clerk of the court in New Haven," the bar employee irritably responded. So I got in touch with him.

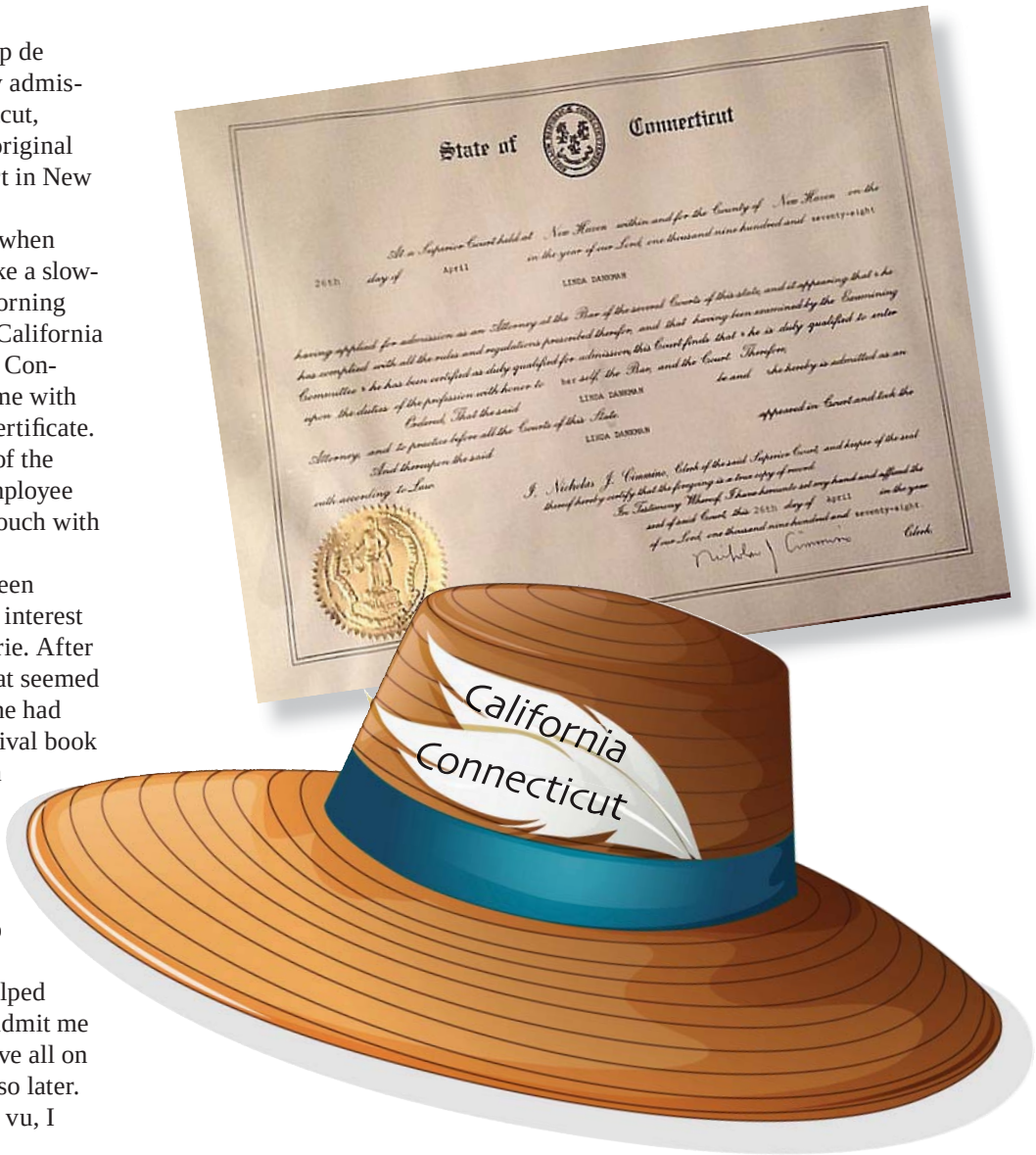
Lucky for me, he also had been admitted in l978, and he took an interest in my plight. I felt the camaraderie. After again putting me on hold for what seemed like an eternity, he told me that he had found and dusted off an old archival book which contained a line item with my signature, the signature of the clerk of the court and Judge Blumenfeld's signature, proving unequivocally that I had legitimately been sworn into the Connecticut bar in l978.

He took up my cause and helped get the Connecticut bar to both admit me to the bar and retire me as inactive all on that same day, some 35 years or so later.

With a kind of inverted deja vu, I spent several hours reinserting my inactive membership in the Connecticut bar in my resumes and websites. Certainly, this was not to impact my life in any substantial way, nor was it any great victory or cause celebre such as winning a large personal injury verdict. But, there was a slight spring in my step that day; I was able to put that feather back in my cap.

Linda Dankman is a sole practitioner in Sacramento, whose practice focuses on probate law, including conservatorships, guardianships, decedent's estates and trust litigation, and plaintiff's personal injury cases.

LINDA DANKMAN



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In honor of Allan Owen & Linda Whitney

Opinion

By: Jonathan Marcel and Steve Davids

In Dickens's *Oliver Twist* (1839), the poor main character is mistreated at an orphanage. He escapes, only to fall in with a group of pickpockets. When he is eventually rescued, the proprietors of the orphanage (Mr. and Mrs. Bumble) are accused of pilfering personal items that Oliver's mother left with him.

"It was all Mrs. Bumble. She would do it," urged Mr. Bumble, first looking round, to ascertain that his partner had left the room. "That is no excuse," returned Mr. Brownlow [Oliver's new gurardian.] "You were present on the occasion of the destruction of these trinkets, and, indeed, are the more guilty of the two, in the eye of the law; for the law supposes that your wife acts under your direction." "If the law supposes that," said Mr. Bumble, squeezing his hat emphatically in both hands, "the law is a ass—a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience—by experience."

We wonder if Justice Holmes was thinking of Mr. Bumble when he wrote, "The life of the law has not been logic; it has been experience...The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." (Oliver Wendell Holmes Jr., *The Common Law*, 1881)

Not a very flattering comparison, in our Bumble opinion. But the justice is getting at something important, and very normative: what is right and just? Our personal view is reductive: treat every situation differently, based on its unique facts. Eschew over-arching ideologies. Interact with and touch the lives of people. They are human, meaning fallible and filled with foibles. The judicial branch is the only one that directly affects individual citizens. The other correlative branches deal with the larger society.

Very intelligent people say very unintelligent things about the law, and it may be due to unintentional ignorance of the true distinction about law and equity.

During her confirmation process, Supreme Court Justice Elena Kagan said that she "revered" the law. We can't help but wonder if her reverence extends to her colleagues' decision to strike down portions of the 1965 Voting Rights Act. We often hear lawyers say they love the law. It is strange that these transcendental emotions are applied to what are a series of books containing rules for behavior. What we love is not the process, but the times that the right and just result prevails. That's what *equity* is about.

But what do we do about the times when this is not the case? We shrug our shoulders and say, "The jury has spoken." That's the attitude of the law courts, but equity should never countenance such a response. Equity assures us with religious reverence that truth and right will prevail. We don't provide justice, we provide a mechanism under which people ignorant of the facts and unschooled in legal principles make decisions of life, death and money. This is because we have forgotten the true and important realm of the equity courts.

Chief Justice Roberts promised in his confirmation hearing that he would only call balls and strikes. That's great, but the baseball strike zone is not even close to being the size of the legal strike zone, where even the most outlandish interpretation can gain a majority. The baseball metaphor only points out how the law is a process. When it is value-neutral, or value-relative, then it fails us, and we fail it.

A large part of the problem is the umpires. Most judges come from the ranks of lawyers, who are used to manipulating facts and inventing arguments to obfuscate the truth of what happened. Personal injury lawyers never refer to an "accident," because of the implication that no one was at fault. Instead, they refer to an "incident," which carries a connotation of improper behavior. The imbedded assumption is that juries and judges will be influenced by these nuances. This is "process" at its worst.

While the US Supreme Court "got it right" in the same-sex marriage case, our guess is that there were seven justices (excepting probably Justice Kennedy and the Chief Justice) who had already 100% decided the issue before coming to oral argument.

A late and very dear friend once

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Opinion: Justice

But the justice is getting at something important, and very normative: what is right and just? Our personal view is reductive: treat every situation differently, based on its unique facts. Eschew over-arching ideologies. Interact with and touch the lives of people. They are human, meaning fallible and filled with foibles. The judicial branch is the only one that directly affects individual citizens. The other correlative branches deal with the larger society.

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worked at the Second Appellate District and wrote a draft opinion reversing a trial court judgment in a real estate dispute in which the judgment was under $10,000. The issue on appeal was the propriety of awards of costs and interest under CCP section 998. The presiding justice (he/she who shall not be named) flatly stated that his/her court would not reverse a judgment for that small an amount. We created courts to provide a measure of reliability and fairness in the regulation of human interaction. The monster is now attacking Frankenstein. It has a life and a *raison d'etre* of its own.

This is not a new phenomenon. President Lincoln was willing to bathe the fragile country in the blood of 600,000 citizens for an idea that can be considered courageous or morally repugnant, given one's orientation. But irrespective of the odiousness of slavery, the Lincoln program was that the edifice of the union, as a religious and spiritual entity, was worth the sacrifice of human life. On the UC Berkeley campus is a bust of Lincoln on a tall pedestal adjoining the Campanile bell tower. The bust has not aged well, and corrosion or other chemical processes have made part of Lincoln's head green. These processes made it appear that Lincoln was slowly disappearing into the edifice of the Campanile wall. The metaphor was extremely effective.

One summer long ago, we were unpaid interns at the State Capitol. The Library and Courts Building on Capitol Mall has a towering marble-columned foyer. On the west wall, high above the tiled floor is a sculpture of a lamp, like the old Aladdin lamps. A somber inscription above read something like: "This house of peace will forever stand as long as young men are willing to sacrifice their lives in its defense." As with Lincoln and the law, the edifice is all. It trumps any individual life. And the edifice exacts sacrifices from individuals who know or care not what it is. This is the counter-revolution of the Enlightenment, where the primacy of the individual was celebrated. Where Descartes could "doubt away" everything around him, and all observable phenomena. What he was left of human experience was only this: I am a living being, and I am doubting.

Returning to Chief Justice Roberts, does anyone really think that his lead opinion in the Obamacare case was what he really felt? That the taxing power of the federal government allowed the individual mandate to exist? No, he just didn't want his court to be pilloried for striking down a significant piece of social legislation that had been enacted by Congress and signed by the President. He felt history would not have looked favorably on such an outcome. The edifice had to stand, even if it meant a "wrong" decision from its chief's perspective.

Personally, we enjoy Justice Kennedy, even as doctrinaire as his consistent libertarian approaches may be. At least he is an example of a jurist who has a "take" (libertarianism) on how government should operate. He is not willing to always be pulled by the temptation of process, over what is just.

California has highly unfortunate examples of appellate authority that in our view abrogates common sense or fairness. Here are three examples:

1. One of the uninsured motorist (UM) provisions (likely drafted by insurance lobbyists) deprives an innocent victim of compensation if another unidentified vehicle ran the victim off the road. The idea, as expressed in the legislative history, was that these "phantom car" claims had the potential for fraud. Anyone could claim injury because an unidentified car swerved toward them but never made physical contact. The legislation says that injuries caused by unidentified drivers are only compensable if there was physical contact between the two vehicles. This, the Legislature reasoned, is enough to ensure that the claim is not fraudulent.

This is a dubious conclusion, but we will adopt it for the current discussion. The problem is how the courts react to the legislation. In Orpustan v. State Farm Mutual (1972) 7 Cal.3d 988, the California Supreme Court decided that UM benefits could not be paid to Mrs. Orpustan, whose driver/husband was killed when an unidentified car ran them off the road. However, there was an eyewitness who testified that poor Mr. Orpustan swerved his car to avoid the offending vehicle, identified only as a Rambler.

In the Orpustan case, the California Supreme Court had a chance to do what was (in our personal opinion) right and just, but decided not to. The plaintiff had presented evidentiary proof that there was indeed a car that ran Mr. Orpustan off the road, therefore satisfying the public policy against fraudulent claims. An independent witness confirmed the lack of any fraud. But the Supreme Court said that the Legislature required physical contact. This is the ultimate triumph of process and rule over the just. When the reason for the rule does not exist, should the rule still be followed?

2. Thanks to Dillon v. Legg, California allows for a bystander/close family member to recover emotional distress when they witness their loved one injured through the negligence of another. They must be contemporaneously aware of the injury to their loved one, as opposed to learning about it later. In Fortman v. Forvaltningsbolaget Insulan AB (2013) 212 Cal.App.4th 830, a brother suffocated to death in front of his sister because of a defect in his SCUBA. His poor sister thought he was having a heart attack.

We have no idea how the poor plaintiff's attorney was able to convey to the sister why she lost her case. If she had thought there was a defect in the brother's SCUBA, she would have won. But because she thought it was a heart attack, she lost. But the effect is the same: she personally witnessed her dear brother die

right in front of her eyes. What frustrates us is that the rule effectively promotes dishonesty.

A less-scrupulous lawyer would have asked the client, "Are you ABSOLUTELY SURE that there at least some tiny particle of your brain that suggested the possibility that your brother died due to his SCUBA?" Why should lawyers and clients be driven to such ridiculous extremes? If we have a doctrine that says bystanders can recover, then let bystanders recover. It doesn't matter to them if it was a heart attack or a SCUBA defect.

We understand the argument that such claims need to be limited and restricted, because otherwise they could mushroom into infinity. But we respectfully disagree. If you witness the death or injury to a loved one, you should recover under Dillon. Stop making unsupported distinctions that do not honor the analysis of Dillon and all of the cases relying upon it. No one in Dillon argued that the little girl might have stepped in front of Mr. Legg's car because she suffered a spontaneous epileptic fit that caused her to enter the intersection.

3. Cassel v. Superior Court (2011) 51 Cal. 4th 113 and Amis v. Greenberg Traurig (2015) 235 Cal.App.4th 331 involved the mediation immunity. In both cases, plaintiff lawyers conveyed absolutely awful advice to their clients and/or used deception and coercion to settle the respective cases. In Amis, the attorney forgot to mention to the client that the client was subject to personal liability if the client accepted the offer. But they were both at a mediation, and as a result of the mediation privilege, there was no liability. This is beyond absurd. The reason for mediation confidentiality isn't to allow attorneys to give 1,000% negligent advice. It's to make sure that the opposing party can't mention any concessions made at the mediation when the case proceeds.

We have heard mediators say that confidentiality is important so that everyone at the mediation feels safe in saying anything they want, engaging in a full, fair, and frank discussion. But Messrs. Cassel and Amis sure weren't feeling safe when their respective lawyers completely bungled their cases. If we were the clients in this situation, we would likely feel that "justice" was a very fluid and capricious concept that can be manipulated for no-good.

If you have the time and patience, take a look at the movie *Sleepers* from 1996. Four young men are sent to a juvenile reformatory after a pre-teen prank went horribly and deadly wrong. At the facility, they were physically and sexually abused by their guards. Fast-forward a few years, and one of the four is a D.A. (played by Brad Pitt), and another is a journalist (by Jason Patric). The remaining two are street thugs (by Ron Eldard and Billy Crudup.) One night in a bar, the thugs accidentally come across their chief tormenter from years ago (by Kevin Bacon), and they plug him full of bullets. There are several witnesses to the crime. Pitt's and Patric's characters decide that Pitt as the D.A. will volunteer to try the street thugs' case as the prosecutor, with the understanding that he will "throw" it such that the thugs will be acquitted. Thanks to the Roman Catholic priest (by Robert De Niro) who mentored the four boys, perjured testimony from the priest helped seal the acquittal.

Any lawyer would be horrified by this movie. It perverted justice in a way that allowed two merciless thugs to even a decades-long score (and avoid going away for life) in a perversion of the legal process. Or did it? Normatively, did the chief tormentor's abusiveness mean that he deserved to die? Did the thugs do the right thing by killing their rapist? We think these aren't easy questions. And what about the priest? He testified as a character witness for the murderers and lied under oath that he had been with them at Madison Square Garden, watching a basketball game with the thugs on the evening in question. The priest, in court, places his hand on the Bible and takes the oath of a witness. And then lies, to settle the score for these four whom he had nurtured since they were very young and when they had no parental authority figures in their lives. Who did the right thing here, and who was the criminal?

We are sometimes concerned about moral relativism. What is and is not just about this movie? The question to ask is: When is morality ever truly black-and-white? There is always a different side. Living the ambiguity is hard, but it forces us to pursue who and what we really are. The priest was anguished about committing perjury, but he did what he thought was right to avenge his friends' humiliation and molestation so many years before.

At the end of the movie, we learn that the thugs, after being acquitted, both met violent ends soon after their trial. Perhaps it's the ultimate statement of "justice." What was it all about?

An easy way to introduce medical records and billings at trial

By: Stephen J. Dougan / SJD & Associates

When preparing for trial, there is always myriad large and small issues or details to which you must attended. One of those details often overlooked by hard-working counsel is the rudimentary concern of laying the proper foundation for the admissibility of medical records, bills or other business documents.

In essence, prior to calling your medical or billing experts to provide their opinions predicated on their review of your client's records, you must first ensure these business records are properly before the court; i.e., the records have been authenticated.

The last thing you want is some experienced opposing counsel, in the midst of a critical part of your direct examination of your medical expert, objecting on the grounds the records lack foundation.

In order to avoid this type of time-consuming and distracting objections designed to derail yours and the jury's concentration, I recommend a basic practice, during motions *in limine*, of filing an Evidence Code §1560, *et seq.* motion.

Essentially, this motion requests the court to grant a pre-trial order permitting the introduction of "certified copies of medical bills and records" into evidence pursuant to the Business Records Exception to the Hearsay Rule.

Evidence Code §1562 provides "[i]f the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, and if the requirements of Section 1271 have been met, *the copy of the records is admissible in evidence. The affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the matters so stated are presumed true…..*" [Also see In re Troy D. (1989) 215 Cal.App.3d 889].

So how does this work in practice?

In brief, you contact Compex or another reputable service and ask the service to provide all the business records you wish to use at trial be delivered to the court under seal with the appropriate affidavit per Evidence Code §1561. The service does the heavy lifting, and when you get assigned on the first day of trial, you simply provide your copy of the service's declaration to the court's clerk to confirm the records have made it to the department. Then, you request the judge to rule on your motion, and throughout the balance of the trial, you need not concern yourself with evidence objections as to the records unless raised during the motions *in limine* [*Note*: There still may be other valid hearsay objections.]. Once the pre-trial motions are handled, you can simply focus on the million-plus other multi-tasking problems that exist at trial.

NOTE: This is offered as information and is solely the product of the author. Stephen J. Dougan can be reached at (916) 752-7104 or by email at sjd@attydougan.com.

Ninth District, after Gomez, says defendant can't avoid class action by making deposit into court-controlled account

By: Jessica Karmasek

SAN FRANCISCO (Legal Newsline), Apr. 19, 2016—In April, a federal appeals court ruled that defendant Allstate Insurance Company cannot put an end to a class action lawsuit by depositing $20,000 in a court-controlled, bank escrow account.

Allstate argued the amount would moot the named plaintiff's claims.

The U.S. Court of Appeals for the Ninth Circuit affirmed an order by the U.S. District Court for the Northern District of California denying Allstate's motion to dismiss.

"Under Supreme Court and Ninth Circuit case law, a claim becomes moot when a plaintiff actually receives complete relief on that claim, not merely when that relief is offered or tendered," Circuit Judge Raymond C. Fisher wrote in the panel's 27-page ruling. Judges Barry G. Silverman and Richard C. Tallman joined in the April 12 opinion.

"Under Supreme Court and Ninth Circuit case law, a claim becomes moot when a plaintiff actually receives complete relief on that claim, not merely when that relief is offered or tendered."

— Ninth Circuit Judge Raymond C. Fisher wrote in the panel's 27-page ruling against Allstate's argument, on April 12, 2016

The U. S. Supreme Court, in a January ruling, confirmed that an unaccepted settlement offer has no force, upholding the Ninth District's 2014 decison in Campbell-Ewald Co. v. Gomez:

"Where, as here, injunctive relief has been offered, and funds have been deposited in an escrow account, relief has been offered, but it has not been received."

Fisher said plaintiff Florencio Pacleb's individual claims are not now moot. The appeals court, in its opinion, also declined to direct the district court to moot them.

"Because Pacleb has not yet had a fair opportunity to move for class certification, we will not direct the district court to enter judgment, over Pacleb's objections, on his individual claims," Fisher wrote for the panel.

In 2013, Pacleb and Richard Chen filed a class action complaint against Allstate, alleging they received unsolicited automated telephone calls to their cell phones in violation of the Telephone Consumer Protection Act. The TCPA restricts telephone solicitations, i.e. telemarketing, and the use of automated telephone equipment.

In particular, the law limits the use of automatic dialing systems, artificial or prerecorded voice messages, SMS text messages and fax machines. It also specifies several technical requirements for fax machines, autodialers and voice messaging systems—principally with provisions requiring identification and contact information of the entity using the device to be contained in the message.

Generally, the act makes it unlawful "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party" except in emergencies or in circumstances exempted by the Federal Communications Commission.

The law permits any "person or entity" to bring an action to enjoin violations of the statute and/or recover actual damages or statutory damages ranging from $500 to $1,500 per violation.

In this case, Chen alleged he received eight calls from Allstate, while Pacleb alleged he received five such calls. In Pacleb's case, the automated calls asked for an individual named Frank Arnold.

Before any motion for class certification had been made, Allstate, in April 2013, made an offer of judgment to both Chen and Pacleb: The company offered to allow judgment to be taken against it by Chen and Pacleb on their individual claims in the amount of $15,000 and $10,000, respectively, together with reasonable attorneys' fees and costs.

Chen and Pacleb declined the offer. At that time, Allstate sent Plaintiffs' counsel a letter extending the offer of judgment "until such time as it is accepted by plaintiffs or Allstate withdraws the offer in writing."

The next day, the company moved to dismiss the complaint for lack of subject matter jurisdiction. It argued the plaintiffs' claims are moot because it made an offer of judgment "more than sufficient" to satisfy the plaintiffs' damages and requests for relief.

While the motion to dismiss was pending, Chen accepted Allstate's offer. Pacleb did not.

The district court denied Allstate's motion to dismiss and then granted the company's motion to certify an order for interlocutory appeal. The court said it "would welcome" an opinion from the Ninth Circuit on the matter.

While the appeal was pending, the U.S. Supreme Court decided Campbell-Ewald Co. v. Gomez. The high court, in its January ruling, confirmed that an unaccepted settlement offer has no force.

The court, in a 6-3 ruling, upheld the

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Ninth Circuit's 2014 decision in Gomez v. Campbell-Ewald Co. The Ninth Circuit vacated and remanded a summary judgment ruling in favor of the defendant in a case brought under the TCPA.

However, Justice Ruth Bader Ginsburg, in the majority decision, noted that the court would not decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount—as in Pacleb's case.

"That question is appropriately reserved for a case in which it is not hypothetical," Ginsburg wrote in the Jan. 20 opinion.

Shortly after the Supreme Court issued its decision in Gomez—no doubt taking a cue from the Supreme Court case—Allstate deposited $20,000 in escrow "pending entry of a final district court order or judgment directing the escrow agent to pay the tendered funds to Pacleb, requiring Allstate to stop sending non-emergency telephone calls and short message service messages to Pacleb in the future and dismissing this action as moot."

The company, pointing to their actions, argued the Ninth Circuit should reverse the denial of its motion to dismiss and remand the case to the district court to order disbursement of the tendered funds to Pacleb, the entry of judgment in favor of Pacleb and the dismissal of the class action as moot.

The Ninth Circuit disagreed.

"In Allstate's view, if it is able to fully satisfy Pacleb's individual claims, the action as a whole will also be moot," Fisher wrote. "We disagree.

"Even if, as Allstate proposes, the district court were to enter judgment providing complete relief on Pacleb's individual claims for damages and injunctive relief before class certification, fully satisfying those individual claims, Pacleb still would be entitled to seek certification."

Among those representing the plaintiffs: national public interest law firm Public Justice and the Law Offices of Todd M. Friedman PC. Friedman, a Beverly Hills-based consumer protection attorney, is known for frequently filing lawsuits over unwanted telephone solicitations.

Attorneys with Ballard Spahr LLP represented Allstate. They declined to comment on the Ninth Circuit's ruling or plans for an appeal.

Reprinted from Public Justice.net's "In the News" section. From Legal Newsline.
Reach Jessica Karmasek by email at jessica@legalnewsline.com

Guest Opinion

The Legislature, the Law — And What You Can Do

By: Noemi Esparza

Handling personal injury cases has drastically changed in the last few decades. I have personally witnessed these changes, and they are largely for the worse. The question typically raised is: "Can it get any more depressing than Howell?" Yes. But it is not only recent case law that makes our practice challenging. What about those laws that have existed for some time but should absolutely be changed, such as anti-stacking laws that do not allow individuals to receive the benefit of their bargain? Not to mention MICRA and the minimal 15/30 auto coverage.

I challenge everyone to ask themselves in John F. Kennedy's famous words in his 1960 convention acceptance speech: "It is time, in short, for a new generation of leadership. [These are people] who are not blinded by the old fears and hates and rivalries—young [people] who can cast off the old slogans and the old delusions…For I stand here tonight facing west on what was once the last frontier. From the lands that stretch three thousand miles behind us, the pioneers gave up their safety, their comfort and sometimes their lives to build our new West…They were determined to make the new world strong and free…The New Frontier is here whether we seek it or not…Recall with me the words of Isaiah that, 'They that wait upon the Lord shall renew their strength; they shall mount up with wings as eagles; they shall run and not be weary.'"

I challenge each of you to not think about what our state is doing, but what you can do for our state. This includes our clients and our justice system as a whole. It can be participating in politics and/or in legislative advocacy at the statewide level. That is where we can make a significant impact. Yes, *YOU* can make a significant impact.

There are not many lawyers in the Legislature, and therefore not many legislators who will understand our cause. It is incumbent on us to educate them. The number of subjects, issues and topics they have to evaluate would make us dizzy. They cannot possibly gain a thorough understanding of all topics. They rely on lobbyists, interest groups, and constituents to help them decide which way to vote. Similar to juries, legislators like a good story, and the best stories are those from constituents. Legislators care about their constituents because those are their voters. This is why we all must be involved.

There are several stages at which your participation will be important. First, it is important to understand the life cycle of legislation. After a bill is introduced, the first opportunity to vote on the bill is in the first policy committee in the house of origin. The house of origin will depend on who "authors" the bill. If it is an Assembly member, it will first go to the Assembly Policy Committee. If it is a senator, it will first go to the Senate Policy Committee. It will be assigned to the committee whose jurisdiction covers

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the subject area of the bill. There may be occasions when a bill will be referred to multiple committees if the bill covers topics that overlap. Legislators will hear debate on the bill and will vote on it.

Since legislators may often have already decided how they want to vote by the time it reaches committee, it is important that support or opposition to a bill reach their office well in advance. If it is a hot-topic issue, we must speak to legislators in advance and organize to testify in committee. If you learn about important legislation being debated—such as legislation that affects our clients—it is critical that you speak up by sending letters of support to your legislator or even visiting them at the Capitol.

If the bill has any fiscal impact to the state, it will go to the Appropriations Committee after passage from the Policy Committee. Many bills die in Appropriations. There are many behind-the-scenes negotiations and deals that allow bills to die in Appropriations. It is important to continue sending letters and advocating for passage (or death) of a bill even after it has passed out of a policy committee. If the bill is lucky to survive Appropriations, it must go to the Assembly floor for a vote by the full Assembly, assuming it originated in that house. It is the same process on the Senate side. This is again another great opportunity to continue sending letters of support or opposition to a bill. If it is legislation favorable to our clients, this is another opportunity for our opposition to attempt to kill the bill. If the bill is passed by the house of origin, the bill then begins this process all over again on the opposite side. If it passes the second house, it will go back to the house of origin for concurrence in any amendments made by the other house.

The last step is the Governor's desk. The Governor then signs or vetoes the bill. This is the final step for a bill—and yet another potential roadblock for any bill.

There are numerous ways that CCTLA members can get involved in legislative advocacy. Our lobbyists at CAOC are fighting hard. But they cannot do it without our knowledge, skill, expertise and involvement. They need our personal stories of our clients' challenges in pursuing what is right and fair. I urge you to take the initiative to get involved and to fight with us when you are called upon for help.

As Tennyson's Ulysses said, "Come, my friends, 'tis not too late to seek a newer world...Though much is taken, much abides … that which we are, we are: one equal temper of heroic hearts…strong in will to strive, to seek, to find, and not to yield."

In our hands rest the success or failure of our practice. Do it not for yourselves, but for all of our clients.

Verdict

Jury Verdict: $2,880,984...plus

CCTLA board member **Lawrance Bohm** (lead) and CCTLA members **Maria Minney and Junn Paulino**, all of the Bohm Law Group, Inc., won a jury verdict of $2,880,984, plus $936,000 (CCP §998 interest, 24k/month) and expert costs, decided in Judge David De Alba's court. The case involved the nature and extent of damages from an auto collision.

On Dec. 4, 2010, Defendant driver Susan Van Rein's car struck the passenger-side front quarter of the vehicle being driven by Plaintiff Kimberly Muniz, age 26. Plaintiff's airbag deployed, and the seatbelt functioned properly, but Plaintiff's knees hit the interior of the driver compartment. Although Defendant admitted negligence, the nature and extent of Plaintiff's injuries were disputed. Experts for both sides described a "moderate" impact collision involving a change in velocity of 12 to 15 miles per hour in a tenth of a second.

The traffic collision report indicated a report of pain to Plaintiff's neck, back and legs. EMT records and emergency room records mentioned only knees.

A month later, Plaintiff sought treatment at a clinic, but Plaintiff's questionnaire indicated no low back or neck issues. Plaintiff's mother testified that back and neck problems were raised at the clinic. Plaintiff's left knee bruise and shins were the focus of the initial clinical treatment.

Immediately after the collision, Plaintiff developed an acute fear of driving or riding in any vehicle and began experiencing memory problems, anxiety panic attacks and chronic sleep disturbance. Pre-collision records revealed Plaintiff suffered from a brain-seizure disorder as a child and was placed in special-education classes up to high school graduation.

Eight months after the collision, the clinic treating Plaintiff's knees referred her to a staff chiropractor for low back and neck complaints. Plaintiff had four sessions of chiropractic therapy over four weeks. Eleven months after the collision, Plaintiff was released from further medical treatment of her knees at the clinic, although Plaintiff still complained of lingering pain in her knees.

A year after the collision, Plaintiff's mother arranged consultation with the family chiropractor because of continued complaints of pain in the low back, neck and knees. An MRI confirmed an alarmingly large herniation, blocking 80% of the spinal canal. Orthopedic surgery was recommended immediately. however, financial constraints, delayed the surgery an additional year.

Due to an emergent onset of lost sensation, Plaintiff had emergency surgery, a microdiscectomy, by Dr. Phillip Orisek of Folsom, CA. At trial, Orisek testified that it was 95% likely the herniation he operated on was caused by the collision. In addition, he said, it is certain Plaintiff will require fusion surgery to remove the remaining disc and improve.

Surgery was successful in reducing acute low-back pain symptoms; however, Plaintiff's physical and mental function decreased below the sedentary work standard, the lowest Department of Labor standard. Plaintiff had worked as a dental technician for five years before being laid off the year prior to the collision.

Defendant stipulated that Plaintiff's post-surgical pain complaints and lack of function were legitimate. Defendant did not offer evidence to contradict Plaintiff's claimed incapacity to work. However, Defendant argued that the herniation, discovered a year after the collision, could not have been related to the collision. According to Defendant's expert neurosurgeon, Kawanaa Carter, who never met the plaintiff, the collision could not have been a factor in causing the herniation because back problems were not documented in medical records until the clinic chiropractor noted them eight months after the collision. Carter further testified that every-day events, such as bearing down on a bowel movement, could cause a large herniation.

Sacramento physiatrist Dr. Christopher Stephenson provided expert forensic medical opinion testimony linking the collision to Plaintiff's various injuries, including the herniation. Based upon his physical examination and interview of the patient, Stephenson recommended lifetime treatments for Plaintiff's chronic pain and limited function, including trigger-point injections, four hours daily home-health aide assistance and a service animal for life.

Plaintiff's expert neuropsychologist, Dr. Richard Perrillo, offered testimony and evidence linking the collision to the loss of 24 IQ points for Plaintiff's auditory working memory. Perrillo's diagnostic impression included panic attacks, PTSD and brain dysfunction caused by severe emotional disturbance imposed on an unusually susceptible abnormal brain. He recommended three to five years of therapy and treatment and endorsed home health and a service animal for the Plaintiff's safety and well-being.

Defendant neuropsychologist Dr. John Wicks testified he was unable to complete his examination of Plaintiff but his incomplete diagnostic impression was that Plaintiff is possibly schizophrenic and not brain-injured.

Life-care planner Carol Hyland offered testimony regarding cost of future medical needs which were evaluated by economist Dr. Charles Mahla. Defendant offered reduced life-care plan numbers through Vicky Schweitzer and economist Karl Erik Volk. Defendant further argued that Plaintiff's unemployed status at the time of the collision negated Plaintiff's claim for future lost wages.

After one day of deliberation, the jury awarded $2,880,984. The verdict came in as follows: past economic damages: $298,759 (medical expense and wage loss combined), future economic damages: $1,332,225 (medical expense and wage loss combined); past pain & suffering: $250,000; future pain & suffering: $1,000,000. Total: $2,880,984; Interest: $936,000; Expert Costs: $60,000 (Note: the jury included two criminal law attorneys and an estate planning attorney).

Settlement Efforts: In December 2012, Plaintiff offered to compromise (per CCP section 998) the case for Defendant's Geico policy limit of $100,000. As a result, Plaintiff is also entitled to an additional $936,000 in interest, plus recovery of expert-related expenses of ap-

proximately $60,000. Defendant's CCP 998 offer to compromise was $70,001.

Defendant's counsel: Brad Thomas, Esq., John Bridges, Thomas Law Firm

Settlements

In a confidential settlement, wherein the plaintiff and the defendant's names are not disclosed, **Daniel Wilcoxen and Martha Taylor**, of Wilcoxen Callaham, LLP, handled and resolved a medical malpractice case for $3,875,000. This case was turned down by two lawyers as being too difficult to win. It involved an injury to a minor, causing brain damage.

Michelle Jenni of Wilcoxen Callaham, LLP, settled a medical negligence case involving a plaintiff who underwent knee surgery after which he was not prescribed prophylactic anticoagulation therapy to prevent DVTs. Further, the treaters failed to recognize his presenting signs and symptoms of a DVT, which resulted in a massive pulmonary emboli. In an effort to treat the pulmonary emboli, the plaintiff suffered a subarachnoid hemorrhage, rendering him a quadriplegic. He also has the inability to speak. One defendant settled his exposure for $975,000, and the case is proceeding against the remaining two defendants. This case has now settled in full for $2.25 million.

Daniel Wilcoxen of Wilcoxen Callaham, LLP, recently settled a failure-to-diagnose-stroke case against one of the plaintiff's health-care providers, in a confidential settlement, for $1,500,000. Upon admission to the emergency department, the plaintiff was diagnosed with vertigo and sent home. Thereafter, he developed worsening symptoms, and it was discovered by a second hospital that he had suffered a stroke that had gone undiagnosed, causing disabling injuries. The case is ongoing as to other health-care providers.

CCTLA member **Galen Shimoda** secured a $950,000 settlement for 411 hourly paid vehicle valet and limousine driver class members in Aanrud et al. v. Neumann Ltd., following a mediation with the Hon. Ronald Sabraw. Plaintiffs claimed they were deprived of overtime, meal and rest periods, unlawful deduction of wages and violation of the wage statement law. Judge Cadei gave final approval of the settlement and awarded named representatives $15,000 each. Plaintiffs' attorneys were awarded $380,000 in 40% continency fees.

Ted Deacon of the law firm of Wilcoxen Callaham, LLP, recently resolved an auto case with a settlement for $375,000. The plaintiff suffered a back injury without surgical intervention. The original attorney handling this case recommended to the plaintiff that she accept $3,000 in full settlement of the case. The client was unhappy with this recommendation and sought out a different lawyer, who referred her to Wilcoxen Callaham, where Ted Deacon handled the case.

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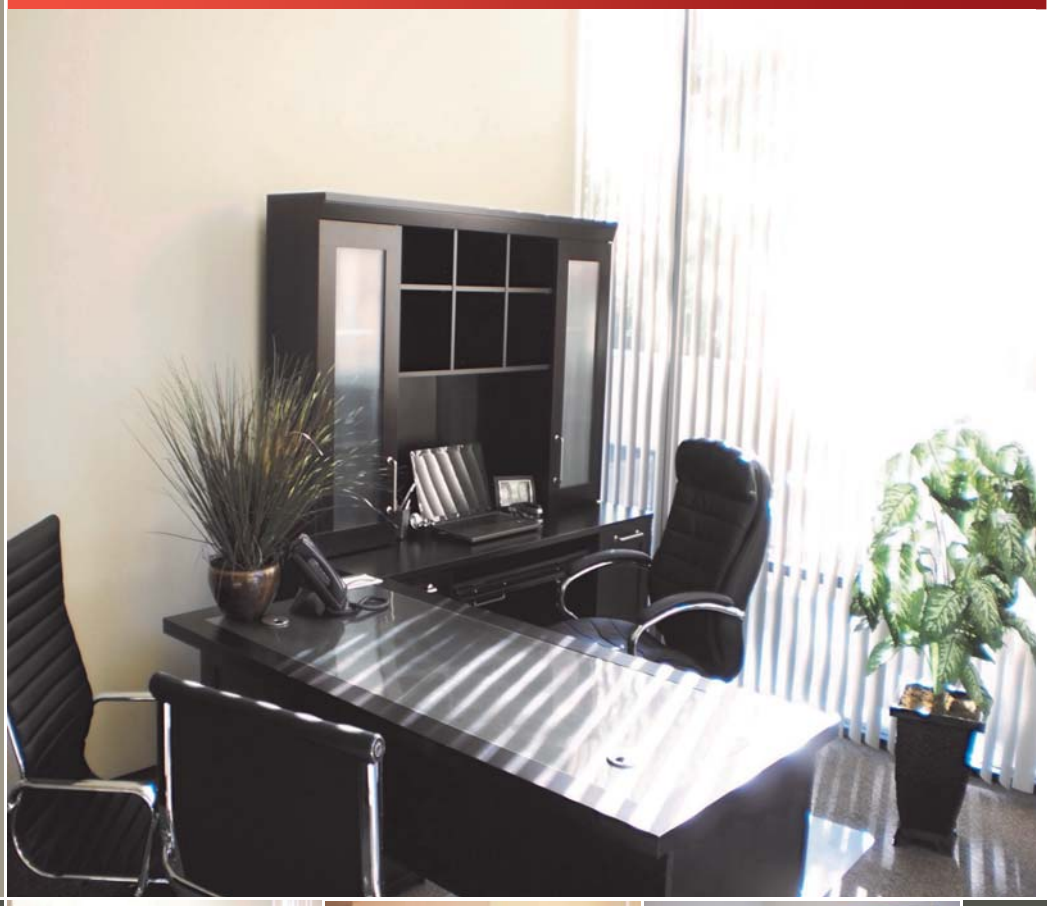

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Mike's Cites

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the DCA affirmed.

Plaintiff wasn't able to prove causation that marijuana in the truck driver's system was a substantial factor in bringing about the harm.

The DCA stated: "Our courts, however, have long since abandoned the liability-without-causation theory that appellant proposes. There is no liability without causation."

We all should always keep in mind the following: "Even in cases where the evidence is undisputed or un-contradicted, if two or more different inferences can reasonably be drawn from the evidence, this court is without power to substitute its own inferences or deductions for those of the trier of fact." **Jonkey v. Carignan Construction Co.** (2006) 139 Cal.App.4th 20, 24.

998 AND EXPERT WITNESS FEES: Defendants made a CCP §998 offer of $200,001 contingent upon the approval of a good-faith settlement and that Plaintiff indemnify and hold Defendants harmless against third-party claims.

The appellate court ruled that such a CCP §998 offer is invalid because a conditioned release that requires Plaintiff to hold Defendants harmless against all third-party claims renders the offer difficult to accurately value as to the monetary terms of the offer. McKenzie v. Ford Motor Company (2015) 238 Cal. App.4th 695, 706. See also Hutchins v. Waters (1975) 51 Cal.App.3d 69, 73.

This court cited Berg v. Darden (2004) 120 Cal.App.4th 721, 728 for the proposition that "an otherwise clear §998 offer is not rendered invalid simply because it does not track precisely the language of the statute."

As long as an offer to compromise is not ambiguous, incapable evaluation or requires a release of an insurance bad-faith claim, it is valid. Linthicun v. Butterfield (2009) 175 Cal.App.4th 259, 271.

However, the language in a CCP §998 offer to compromise that requires plaintiff to be responsible for any and all medical expenses/liens is "nothing more than a reminder of appellants' (plaintiffs') obligation to pay the medical expenses and liens" and is therefore valid.

Note: CCP §998 was amended effective Jan. 1, 2016 to treat plaintiffs and defendants equally.

Wilson Dante Perry v.
Bakewell Hawthorne, LLC
2016 DJDAR 1161
[Feb. 3, 2016]

TRAP FOR THE UNWARY OBJECTOR

FACTS: Plaintiff brought an action for personal injuries sustained on an exterior stairway owned by Defendant #1 and occupied by Defendant #2. Defendant #2 served a late demand for exchange of expert witness information pursuant to CCP §2034.210. Defendant #1 never demanded disclosure of experts. Plaintiff objected to the demand for disclosure of experts on the ground that it was untimely. Both defendants exchanged expert witness information, and Plaintiff did not.

Defendants moved for summary judgment. Plaintiff offered declarations of experts to rebut the motion for summary judgment. Defendants objected to the plaintiff's expert declarations, arguing that Plaintiff had failed to disclose expert witness information which precluded the plaintiff from using the declarations to oppose the summary judgment.

The trial court sustained Defendants' objections and granted the motion for summary judgment.

HOLDING: Dismissal affirmed. The present statutory scheme for the disclosure of expert witnesses does not provide for objections to demands. Cottini v. Enloe Medical Center (2014) 226 Cal. App.4th 401, 419. Plaintiff should have filed a motion for a protective order.

A court is authorized to exclude Plaintiff's expert declarations pursuant to Section 2034.300 when a party has unreasonably failed to disclose expert witness information.

Haeger v. Goodyear Tire
& Rubber Company
[Feb. 16, 2016]

Fraud & Deceit: The Way of Doing Business in America

The nightmare began in June of 2003 when a Goodyear G159 tire failed, causing a motorhome to leave an Arizona highway and overturn. There were serious personal injuries to the four occupants. The case finally came to a conclusion on Feb. 16, 2016: *13 years.*

The injured victims obtained a $2.7-million sanction for Goodyear's fraud and deceit in the course of the litigation. Goodyear violated discovery orders and lied in open court to the federal judge. The district court took extraordinary steps to order Goodyear and its attorneys into court to explain what they had done.

When plaintiffs took one of the defense expert's depositions, they found that Goodyear had conducted additional tests to justify a speed rating of the G159 tire at 75 miles per hour. Shortly after that deposition, Hancock assured the court that there were no other tests in existence beyond those that were already produced to the Haegers.

On the first day of trial, the case settled in a confidential amount. The district court judge later made a determination that the Haegers settled for a small fraction of what they might otherwise have if Goodyear and its attorneys had not lied.

The district court judge issued a proposed order sanctioning Goodyear based on Goodyear's failure to produce the heat rise tests and the repeated representations made by Hancock in court that all responsive documents had been produced. In response to the proposed order, Goodyear accidentally

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Mike's Cites

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disclosed the existence of additional G159 tests: the crown durability, bead durability and DOT endurance tests, none of which had been mentioned or produced in the litigation. Goodyear also disclosed that Goodyear's expert knew about, but failed to mention, these additional tests at his deposition.

As a result of the district court's findings, the judge held that Plaintiffs should be awarded all of their attorney's fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' first request for discovery. The trial court judge also noted that while it would be impossible to determine how the litigation would have proceeded if Goodyear had made the proper disclosures, the case more than likely would have settled much earlier and for considerably more money.

The Haegers' counsel submitted extensive time sheets with painstaking attention to detail regarding the time spent fighting Goodyear's false objections. The district court judge found the Haegers should be reimbursed $2,741,201.16 in attorney's fees and costs. Hancock was assessed 20% responsibility while Musnuff and Goodyear were held jointly responsible for the remaining 80% of the fees and costs.

This is a very unusual case because the plaintiffs' attorney brought the motion for sanctions after his case was over. It is very unusual because the federal trial court judge undertook evidentiary hearings to put on the record who knew what when. It also is very unusual because the trial court judge actually sanctioned a lying, cheating defense attorney. And it is a very unusual case because the appellate court upheld the trial judge's sanction. Unfortunately, this is not an unusual case on the part of Goodyear and other corporations, who got caught *in this one.*

Henry Castillo v.
DHL Express (USA), et al.
2016 DJDAR 469 [Jan. 14, 2016]

FACTS: Plaintiff Castillo and others similarly situated had a wage-and-hour class action case against KWK Trucking, Inc., and DHL Express. The parties agreed to go to private mediation during the final months of the five-year period that cases must be brought to trial pursuant to CCP Section 583.310. The case did not settle at mediation, and the five-year statute lapsed. Defendants made a motion to dismiss, which was granted. Plaintiff argued that CCP §1775.7(b) automatically tolls the five-year period while the mediation is conducted.

HOLDING: Since the trial court did not order the parties to mediation pursuant to CRC Section 3.1891(a)(1), CCP Section 1775 et seq. does not apply. This appellate court ruled that the automatic tolling provision of Section 1775.7 does not apply when parties engage in private mediation that was not court-ordered. Equitable estoppel and judicial estoppel do not apply because there was no evidence that Castillo or any of the class members relied to their detriment upon anything the defendants did or said.

Maureen DeSaulles v. Community Hospital of The Monterey Peninsula
2016 DJDAR 2364 [Mar. 10, 2016]

Winners or Losers?

FACTS: Plaintiff DeSaulles was hired by defendant Community Hospital of The Monterey Peninsula in February 2005 as a part-time patient business services registrar. In June of 2005, DeSaulles began complaining about her job assignments. In January of 2006, the hospital placed DeSaulles on leave of absence and terminated her employment in July of 2006.

The hospital made a motion for summary judgment, and all but the third and fourth causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing were eliminated. The parties entered into a settlement of those two causes of action for the payment $23,500. Judgment was entered in the superior court, and DeSaulles filed an appeal from the amended judgment.

The court of appeal affirmed the judgment. The parties returned to the superior court, each claiming to be the prevailing party entitled to recovery of costs. The trial court exercised its discretion in determining that the hospital prevailed on significant causes of action and thereafter entered into a settlement on the remaining causes of action. The trial court awarded the hospital costs of $12,731.92 and denied DeSaulles request for costs.

The court of appeal reversed, concluding that DeSaulles had obtained a net monetary recovery and therefore was the prevailing party.

HOLDING: The theory upon which costs are allowed to a plaintiff is that the default of the defendant made it necessity to sue him. The theory upon which costs are allowed to a prevailing defendant is that the plaintiff sued him without cause. Thus, the party to blame pays costs to the party without fault. **Purdy v. Johnson** (1929) 100 Cal.App. 416, 418. CCP Section 1032 provides a default rule; when parties settle a case, they are free to allocate costs in any manner they see fit. [*Word to the wise: The settlement agreement should waive costs or indicate who is the prevailing party.*]

Dissenting opinion by Justice Kruger: the next sentence of 1032 permits the trial court, "in situations other than as specified," to determine which party has in fact prevailed and to allocate costs accordingly. Thus, Justice Kruger reads the statute as not treating settling plaintiffs as automatically entitled to costs but permits courts to take into account special circumstances that may render a cost award inequitable or unjust. Thus, Justice Kruger would have remanded this case to the trial court to determine who the prevailing party was.

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Mike's Cites

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Charles Steven Sanford v.
Jacy Leann Rasnick, et al.
2016 DJDAR 3975
[Filed Apr. 25, 2016]

FACTS: Defendant Rasnick ran a stop sign and hit plaintiff Sanford, who was riding a motorcycle, causing serious personal injuries. Sanford sued Rasnick and her father, who owned the car. Defendants made a joint 998 offer to Plaintiff in the sum of $130,000. Defendants' 998 offer required Plaintiff to execute a notarized written settlement agreement and general release.

The case went to trial, and the net award was $115,036 plus Plaintiff's recoverable pre-offer costs for a total judgment of $122,000, painfully less than the 998 offer.

Defendants filed a Memorandum of Costs seeking $28,150.02, and Plaintiff filed a Memorandum of Costs seeking slightly less than $8,000. Both parties filed motions to tax. The trial court granted Defendants' motion to tax costs and denied Plaintiff's motion to tax costs.

HOLDING: Plaintiff won, trial court reversed and remanded the case. According to this court, the best case summarizing the rules for recoverable costs is Ladas v. California State Automobile Association (1993) 19 Cal.App.4th 761. The best case setting out the rules governing costs recovery in 998 offers is Barella v. Exchange Bank (2000) 84 Cal.App.4th 793.

Defendants argued that the settlement agreement was the same thing as a release, a common aspect of automobile accident cases. Case law does allow execution of a *release* to be a condition in a 998. Linthicum v. Butterfield (2009) 175 Cal.App.4th 259; Goodstein v. Bank of San Pedro (1994) 27 Cal.App.4th 899. However, case law does not allow a *settlement agreement* to be a condition of a 998. This court agreed with Plaintiff that the condition of entry into a *settlement agreement* would create uncertainty, "havoc would ensue" and is "an invitation to open a Pandora's box of post-trial litigation and appeals…"

T. H., a minor, etc. v. Novartis Pharmaceuticals Corporation

SUMMARY: This case presented the following question: "May Novartis Pharmaceuticals Corporation (Novartis), a former manufacturer of a brand-named asthma medication, be liable in negligence for neurological injuries allegedly sustained by twin minors in utero after their mother was prescribed and consumed a generic form of the medication nearly six years after Novartis sold its interests in the medication?" The answer is: "Yes."

FACTS: Terbutaline was FDA-approved as a bronchodilator (for asthma) in the 1970s. In 1976, a Swedish physician, allegedly with ties to the drug manufacturer, published results of a study indicating Terbutaline was safe and effective for preventing or inhibiting pre-term labor. Terbutaline was never FDA-approved for use in inhibiting pre-term labor. Over the years, evidence mounted that Terbutaline should not be used to inhibit pre-term labor. Novartis filed a demurrer to the plaintiffs' complaint, and the trial court sustained the demurrer without leave to amend concluding Novartis owed the twins no duty as a matter of law for claims that arise from the prescribing of Terbutaline medication in 2007.

HOLDING: The plaintiffs' claim that they can allege that Novartis should have warned in their package insert and in a corresponding entry in the Physicians Desk Reference to include warnings of potential fetal harm if Terbutaline is used to inhibit premature labor. The plaintiffs could allege that if these warnings had been made before Novartis divested itself of Terbutaline, doctors would not have used it, and fetuses would not have been harmed. Demurrer reversed.

This is a great case discussing duty and breach of duty juxtaposed with

causation. It seems that the defense and some courts conflate, misunderstand and misapply duty and causation.

Keith Karpinski v.
Smitty's Bar, Inc.
2016 DJDAR 3528
[Filed Apr. 12, 2016]

FACTS: Plaintiff sued two individuals and Smitty's Bar, Inc., after the individuals beat up the plaintiff. The complaint alleged causes of action for negligence and assault and battery. The individuals defaulted, and Plaintiff took judgments in the total amount of $1,430,968.84.

Plaintiff negotiated and settled with Smitty's for the sum of $40,000. Smitty's and Crusader Insurance Company, however, refused to pay until the liens held by Medicare and the State of California were shown to be satisfied. Plaintiff moved under CCP §664.6 to enforce the settlement agreement.

HOLDING: Plaintiff wins!
The release, like many we see, provided in at least three places that the plaintiff and/or his counsel would be responsible for any and all liens. However, the settlement agreement did not require the negotiation of those liens *prior* to the payment of the settlement funds. The trial court ordered the $40,000 settlement to be paid, and awarded $2,200 in attorney's fees to Plaintiff. The appellate court affirmed the trial court's ruling.

PRACTICE POINTER: The insurance companies cannot require the negotiation and proof that the liens had been paid prior to payment of the settlement given the language that we see in our releases today. However, expect after Karpinski that the express language that the liens will have to be negotiated before the settlement is paid will be inserted in the release.

Nuts & Bolts of the Mental Exam

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CCTLA COMPREHENSIVE MENTORING PROGRAM

The CCTLA board has developed a program to assist new attorneys with their cases. If you would like to receive more information regarding this program or if you have a question with regard to one of your cases, please contact Jack Vetter, jvetter@vetterlawoffice.com; Lori Gingery, lori@gingerylaw.com; Glenn Guenard, gguenard@gblegal.com; or Chris Whelan, Chris@WhelanLawOffices.com

MAY

Friday, May 20
CCTLA Luncheon
Topic: The Disappearance of the Civil Jury Trial
Speaker: Robert Eglet, Esq.
Firehouse Restaurant, Noon
CCTLA Members - $35

Thursday, May 26
CCTLA Problem Solving Clinic
Topic: Controlling the Courtroom 4: "Shock and Awe" at Mediation
Speaker: Steve J. Brady, Brady Law Group
5:30 to 7:30 p.m., Arnold Law Firm,
865 Howe Avenue, 2nd Floor
CCTLA Members Only: $25

JUNE

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

Thursday, June 16
CCTLA's 14th Annual
Spring Reception & Silent Auction
5:30-7:30 p.m. at the home
of Noel Ferris & Parker White
1500 39th Street, Sacramento

Thursday, June 23
CCTLA Problem Solving Clinic
Topic: TBA / Speakers: TBA
5:30 to 7:30 p.m., Arnold Law Firm,
865 Howe Avenue, 2nd Floor
CCTLA Members Only: $25

Friday, June 24
CCTLA Luncheon
Topic: TBA
Speaker: Robert T. Simon, Esq.
Noon, Firehouse Restaurant
CCTLA Members: $35

JULY

Tuesday, July 12
Q&A Luncheon
Noon, Shanghai Gardens,
800 Alhambra Blvd
CCTLA Members Only: $25
(across H St from McKinley Park)
CCTLA Members Only

Thursday, July 21
CCTLA Problem Solving Clinic
Topic: TBA / Speakers: TBA
5:30 to 7:30 p.m., Arnold Law Firm,
865 Howe Avenue, 2nd Floor

Friday, July 29
CCTLA Luncheon
Topic: TBA
Speaker: Richard P. Carlton, acting director of the Lawyer Assistance Program of the State Bar of California
Noon, Firehouse Restaurant
CCTLA Members: $35

AUGUST

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

Thursday, August 18
CCTLA Problem Solving Clinic
Topic: TBA / Speakers: TBA
5:30 to 7:30 p.m., Arnold Law Firm,
865 Howe Avenue, 2nd Floor
CCTLA Members Only: $25

Friday, August 19
CCTLA Luncheon
Topic: TBA
Speaker: Alejandro Blanco, Esq
Noon, Firehouse Restaurant
CCTLA Members: $35

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

CCTLA Calendar of Events