



Consolidated Consultants' Summer 2011 Newsletter

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Litigation and the Bicycle

Written by: [Bicycle Accident Reconstruction Expert No. 76](#)

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Many of us in the bicycle industry refer to cycling as the “The new golf.” The popularity of bicycles has expanded faster than any other participant sport in America. 2010 sales figures indicate a 33.2% increase in volume from just a year ago. To put that in perspective, there are far more cyclists in America than golfers, tennis players and skiers combined. The participation profile indicates many more adults; from their mid-twenties-through their mid 60’s are now riding bikes. While a lot of us are enjoying our bicycles, we cannot forget the ever present risks. Many of the new crops of mature riders are more secure financially, so those risks are worth calculating.

Part of the popularity of cycling comes from the vast array of new equipment offered. Serious riders frequently choose carbon fiber frames with multi-speed index shifting, often custom fit to accommodate varying body types. These machines carry hefty price tags easily ranging on the high side of 6-8 K, depending on how they are equipped. For street challenged riders desiring to go nowhere fast, there are thousands of fitness studios and gyms featuring group sessions using stationary bikes. Yet few of these clubs give any thought to the actual mechanical/biomechanical adjustment of the rider, and when these sessions become competitive, it is possible to injure a rider’s knees and back if the set-up is incorrect. Mountain bikes, recreational touring bikes, beach cruisers and hybrids are quite often ridden with saddles so low that knees often bear too much weight for older riders whose muscle range of motion and joint stability is often an afterthought. When an older rider’s knees are compromised, often they are unable to continue with—sighting my personal experience -- devastating mental and physical results. Of all the multi-dimensional cycling equipment available at your neighborhood bike shop, or at many online web store fronts, the actual mechanics of the body-bike interface is generally secondary to the actual product sale.

At the higher levels of the participation scale, racing activity has also experienced a rapid rise in participation. Unlike motor racing, where drivers are expected to demonstrate and practice their skill at a formal school, the powers that be that govern cycling require no such training of amateur’s racers, often with disastrous results ranging from skinned knees and elbows, broken bones and even death. With many new recreational riders, and would be racers training and racing on public roads, it would seem likely that some formal instruction should follow. No wonder the consumer products safety commission lists cycling at the top of its [injury accident](#) classification. Today’s recreational touring riders have many opportunities to participate in a vast number of cycling promotions benefiting worthwhile charitable causes. The problem becomes clear when a thousand or more untrained and lightly skilled weekend riders end up on the street together. While they may be having healthy fun, it can be likened to filling a blender and forgetting the top. On the industry front, touring and commuting sales volumes have increased at larger sales outlets and, out of necessity, new hires are often less experienced. These people are entrusted with the responsibility of complex system assemble,

demonstration, and sale of a full range of bikes and accessories. The obvious problem with this is that occasionally compromises in skill and safety can be contributing factors in bicycle accidents. In the manufacturing sector, quality control of bikes and equipment is sometimes an issue as components and frames are rushed into the market without sufficient test time to satisfy the ongoing consumer demand for “newer and lighter” equipment.

As for municipalities, with many cities facing budget cuts for road surfacing, frequently more public roads are poorly surfaced. A minor pot hole that is not likely to effect a motor vehicle can be a death trap for a racing bike with a tire less than ¾ of an inch of rubber on the ground.

As a cycling advocate, my main concern is insuring rider safety. The vast number of new riders simply lack essential training in basic on-road skills. I believe that learning these skills is just as important as learning to ride in the first place. Our Street Survival Training course offers riders an opportunity to quickly gather experience in such critical functions as cornering, climbing, emergency braking, group skills, and riding in traffic. We also explain the entry/ exit strategy for high tension release pedal systems as part of our curriculum. Any rider who has ever found himself in the middle of heavy traffic and felt intimidated can appreciate the need for applying basic skills. Even experienced riders need to brush up on their technical riding to enhance their envelope of [safety](#).

As a trial qualified [bicycle](#) expert, national and world champion racer, world record holder, Olympian, coach and anatomical bike fitting specialist with over 35 years of experience, I have worked cases involving road conditions, alleged rider and driver error, inattention issues, doors opened into the path of passing cyclists, road rage, spontaneous front wheel release, unsafe roadways, improper turns and unsafe passing. Standard of care and due care are considered in each case. Design criteria, and engineering experience in a broad variety of exotic materials are all part of being a good expert. Further experience in virtually every known bicycle component failure or alleged failure under a variety of road and off-road conditions are also qualities for a dangerous bicycle expert. Consultation and test experience with bicycle manufacturers and other experts is an imperative quality of a competent and effective expert.

Bicycles and personal injury [litigation](#) representing both the defense and plaintiff perspective is a rapidly expanding field and there is no substitute for multi-faceted experience and a skillfully applied declaration of facts. Numerous regional cycling and triathlon newsletters, both direct mail and online as well as national and international publications now feature regular columns on bike litigation. A scan of advertisers will yield many law firms offering tips on what to do in the event of an accident. The connection with cycling is a natural one for many PI Attorneys. Hopefully this will serve as both a source of preventive care for those who ride, and provide some provocative information for attorneys looking to connect with the various cycling related entities.

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Medication Errors: Do No Harm

Written by: [Registered Pharmacist and Diabetes Educator Expert Witness No. 3591](#)

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Medication errors are a primary source of patient injury that plague our healthcare system. According to the [Physicians Insurers Association of America](#), in 2008, 334 claims closed with a medication error. Medication errors related to the treatment of diabetes are more common than one would like to think. This is in part due to the many facets involved in diabetes treatment from insulin administration to blood sugar monitoring both at home and in the hospital setting.

A central problem with our health care system is our ability (or lack of ability) to handle medical information. Electronic medical records are becoming more the norm which makes transfer of care from home to [hospital](#) more seamless. In the treatment of the patient with [diabetes](#), teamwork is essential. [Nursing](#) ratios should be higher for patients with diabetes in the hospital setting. There is an implied need for frequent glucose monitoring, dietary planning, and monitoring for infection, just to name a few. There is no room for egos and turf wars when specialists and hospitalists need to work side by side for the best interest of the patient.

Insulin is one of the most dangerous drugs used in the hospital setting, because when a mistake is made severe injury or death can occur within minutes. There need to be safety checks and sign-offs in place every step of the way so that an insulin order does not get misinterpreted. Strict protocols should be adhered to with regard to units of insulin not being mistaken for ml. Insulin syringes should always be used and insulin pens must never be shared among patients.

A large majority of medication errors are a result of employees who are not licensed and not adequately proctored or trained. Staff training and retraining is a basic tenant of risk management. Medical staff must always keep in mind the 5 R's; Right patient, Right medication, Right route, Right dosage, Right time.

Without written protocols for patients with diabetes there is huge risk of [liability](#) and more importantly, patient harm. A Certified Diabetes Educator should be on call at all times to review orders and make recommendations to the team to improve patient care. We don't want to put up the traffic light because there have been too many accidents. My goal as a Diabetes Educator is to help keep patients with diabetes safer in the Health Care Setting.

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Promissory Notes - Traps & Tips

Written by: [Real Estate Broker, Promissory Note, Mortgage Financing Expert No. 83](#)

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The Trap

Although appearing relatively simple in concept, a promissory note and the accompanying loan documents can be very complex in construction. Additionally, the attorney must insure that its terms and conditions of the note and other [loan documents](#) comply with all federal and state laws.

Most attorneys are trained to draft promissory notes and loan documents that are enforceable in a court of law. But, that is only providing one-third of the necessary valuation features that the client actually needs. The additional valuation features required are that the note be collectable and marketable.

Most attorneys have little actual experience in structuring notes and loan documents for collectability and marketability--and, generally, attorney's do not considered doing so to be their responsibility. But, the client implicitly does hold the attorney responsible.

Most clients are essentially uninformed and inexperienced with promissory notes and loan documents---they assume that the attorney is "taking care of them"—100%. They assume that the attorney will provide them with all of the necessary document features that they will need in the future.

Consequently, when the note and loan documents are being drafted, there is a serious disconnect between what the attorney believes to be his responsibility—enforceability only—and what the client believes the attorney is providing him—enforceability, collectability and marketability.

Normally, neither the attorney nor the client has a clear understand of these three distinct attributes. Therefore, neither party clearly states to the other exactly what they expect to result from the drafting of the note and the loan documents. But, in the future, if or when the client needs to collect on the note from a non-paying borrower, or needs to pledge the note to his [bank](#) as collateral for a loan, or needs to sell all of part of the note to raise cash, then the missing attributes—the deficiencies--become vividly clear to both parties. That is when the trap is sprung.

Tips to Avoid the Trap

Value Compared to Price

We are all trained to assume that “value” and “price” are normally the same or are equal. And, in most (but not all) cases that is true. Examples: a hundred dollar bill has a value of one hundred dollars of purchasing power; a hundred dollar doctor’s invoice probably provided a hundred dollars of value to the ill patient; a \$45.00 price tag on a pair of Levi’s probably represents \$45.00 of value to the purchaser.

But, there are many exceptions—Examples: a thousand dollar corporate bond may not trade at one thousand dollars after its initial offering; the price of a share of common stock today may be significantly different tomorrow; the purchase price of a diamond ring today may be far different tomorrow. All of these differences between price and the market value are real and they are routinely accepted as being “normal”.

Now, let’s explore why there is this discrepancy between price and value in the realm of promissory notes. Part of the explanation, as we previously learned, is that the Fair Market Value of a promissory note is dependent on three key elements—enforceability, collectability and marketability. We can now understand that if one or more of these elements are deficient, then the value of the note will be negatively impacted—its market value will be different than its price—a \$100,000.00 note may be worth much less than \$100,000.00 because it has deficiencies. Generally, promissory note valuation engagements require the appraiser to determine the Fair Market Value of the note. The “price” (face amount or unpaid balance) may be \$100,000.00, but its Fair Market Value may be substantially less.

Fair Market Value Definitions

To add a major complication to this market valuation challenge, we must determine in every case exactly what definition of Fair Market Value we are going to base our conclusions on. The specific Fair Market Value definition selected will have an impact on the ultimate market value of note. Examples of some of the most common valuation definitions that are most communally used are:

[Fair Market Value Definition \(Glossary of Business Valuation Terms\)](#)

[Fair Market Value-Definition \(Gift Tax\)](#)

[Fair Market Value Definition \(Estate Tax\)](#)

[Fair Market Value Definition \(Charitable Contributions\)](#)

[Fair Market Value \(Private-Party Promissory Note\)](#)

[Fair Value \(Shareholder Dissent and Oppression Litigation\)](#)

[Fair Value \(Financial Reporting under U.S. GAAP\)](#)

Market

One of the most vexing problems that the [appraisal expert](#) must deal with is that there is no recognized market place where private promissory notes are bought and sold.

There are stock markets, bond markets, wheat markets, cocoa markets, and many other types of markets, but there is no private promissory note market. These notes change hands informally, based on one-on-one negotiations, between the parties. In order to even obtain a tentative offer or quote from a potential buyer, the seller must first locate the correct person or entity that understands the specifics of the note being offered, and who has the capital to fund the

purchase, and who has an interest in purchasing that specific loan package, and who is willing to make a bona fide purchase offer.

Typically, note buyers tend to be specialists, because the individual notes are each specially tailored to a specific business transaction—each note is unique. As an example there are farm and ranch note buyers, single family home note buyers, business sale note buyers, commercial and industrial note buyers, and mobile home note buyers. Some note buyers only deal with individual notes, some only with packages of notes, some only with small denomination notes, and some with only large denomination notes. Some only deal in one state, some only in one region, and some deal nationally.

Collateral Security

Another major challenge that the valuation expert must deal with is the analysis and evaluation of each and every promissory notes collateral security. What are the quality and the quantity of the collateral security? Has the collateral security been intelligently valued by a competent third party appraiser? In most instances the valuation of the collateral security supports the value of the promissory note. If it is deficient, then the value of the note probably will be deficient.

Loan Documents

The type and the quality of the loan documentation are critical to the market value of the note. There are numerous and specific documents and information that are required for each particular type of promissory note. By way of example, each of the following type of note will require some specific loan documents to establish its market value: Note secured by farm or ranch land; Note secured by water rights; Note secured by furniture, fixtures and equipment; Note secured by another note; Note secured by a lease; Note secured by future earnings; Note secured by a mobile home.

In each of the above examples the attorney drafting the loan documents is dealing with a potential “trap” if his work is not done properly.

Being a Promissory Note Expert as a Consultant to the Attorney, is as Much an Art as a Science

Remember, each note has its own unique terminology, collateralization, and history. Each note is custom drafted to the particular situation. The [valuation](#) of a [promissory note](#) is influenced by many, many facts, documents, and assumptions. Further, it should be clear that the “value” of any note is tied to the valuation definition being used.

The investors—individuals or business entities---that comprise the market for these individual notes consist of small, fragmented, and specialized groups of specialized investors. The various techniques one can use in determining the value of a note are like mechanic's tools. The one you use depends on the situation and your goal. Just as no tool is appropriate for every mechanical job, neither is any valuation technique appropriate for every situation. Each technique has advantages and disadvantages and most are only useful in a narrow range of circumstances.

It is not enough to do your best; you must know what to do, and then do your best. - W. Edwards Deming

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Sexual Harassment and Preventative Medicine

Written by: [Workplace Psychology Expert Witness No. 149](#)

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When companies consider the impact of [sexual harassment](#) they probably think of being legally defensible. Not bad thinking. But a better thought is -- why not prevent the problems of sexual harassment in the first place?

A true story

Two partners in a large consulting firm, Frank and Jessica, considered themselves friends and were notorious for teasing each other in the office. In one incident Jessica put up a picture of a bodybuilder flexing his muscles and pasted a photo of Frank's head on it. Frank responded by putting up a picture of a girl in a bikini posing by a car and pasted her head on the picture.

Months later Jessica left the firm and did not like the way her separation was handled. The firm was notified that Jessica was going to bring charges of sexual harassment. The basis of this threat? Frank putting her photo on the bikini-clad girl. The Managing Partner and his Executive Committee knew about the incident and did not feel that what had happened was sexual harassment. On the other hand if Jessica continued to press the issue legal fees would be incurred, people would gossip and it might reflect badly on the firm, etc. The decision was made to settle the issue by paying her one tenth of her annual salary: not a huge number but not small either.

A few weeks later at a company party one of the employees complained that Frank had told her a very crude sexually joke. Frank protested that he seldom told off-color stories to female staff and that this was the first such complaint in his years with the firm. On the other hand he admitted that he had been somewhat inebriated and did not remember what did transpire. The other partners were upset; after all this was the second instance of harassment (having forgotten that they originally felt that the first complaint was invalid.) Frank was ordered to get some sort of treatment for his problem.

The result

Frank was publicly embarrassed and labeled as a "harasser." The firm spent money it did not have to spend. And there were bad feelings in the office. Our clients who have "won" lawsuits almost always say that while it was the best outcome of a bad situation it was still a bad situation. Even more to the point [legal](#) claims can be a problem even if no one ever goes to court. And legality aside, sexual harassment makes people uncomfortable – even if the harassment

stories are distortions of the truth. Most people don't investigate every rumor they hear so there is usually a lingering feeling that something is off.

What can you do to avoid sexual harassment problems?

Don't be silly but do be circumspect – Some workshops and seminars will leave participants thinking that if a man looks at a woman it constitutes sexual harassment. That is not the case. But consider what was happening at Frank's firm prior to any allegations: people commonly and openly emailed each other jokes involving pictures of scantily clad women; and, at one birthday party Jessica had given Frank a very pornographic magazine – all in the sense of joking – and reportedly everyone laughed at how witty she was.

But some people are offended by that level of joking. Of course some people are always easily offended. But why take a chance? [Work](#) doesn't have to be staid and stifling but it can operate well without even the mildest of [pornography](#) – and that goes for texting too. Use the wife/mother/daughter/female client rule of thumb – would you want someone showing this group these “jokes?”

Be aware of organization rank – Of course people fraternize with people who are lower on the organizational hierarchy. But that disparity in rank can be a problem. Jessica and Frank were both partners – but she said Frank was more senior in tenure and reputation and was therefore in some sense her organizational superior.

Watch company parties – The office Christmas party is so sacred to some firms that it will always be a part of their culture. And for some folks that party is no doubt fun and a chance to get to know their coworkers better. Be aware that some people do not enjoy office social events yet feel pressured to attend and, as a result, are sometimes hypersensitive. Combine that hypersensitivity with a tendency to lower your guard at social events—sometimes even saying or doing inappropriate things—and you have the perfect storm for problems of this kind.

Watch drinking – Some people enjoy a moderate amount of alcohol and behave well; but, as most of us can attest, some people get inebriated and do—or say—inappropriate things. Did Frank drunkenly ask something he should not have? Maybe. Did the offended person drunkenly imagine something was said that was not. Maybe. Would the problem have been averted if there had been no drinking? Quite possibly.

Get consultation on the front end – Your attorney is there to defend you if suit is brought; but, he or she can also help you avoid legal problems. Legality aside, there are psychological consequences of harassment, discrimination, [wrongful termination](#) and other issues. Get professional consultation in a preventative manner and save yourself time, money and stress.

END

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