Summer 2022

The LITIGATOR

VOLUME XIX OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION ISSUE 2

Inside

Making Progress Despite a Changed World

David Rosenthal
CCTLA President

It's hard to believe we are already one-third of the way through 2022. Times continue to be challenging not only with Covid and its aftermath, but with the war in Ukraine. This human travesty is a reminder to us all that despite our political and cultural divisions, we have a lot to be grateful for in the United States of America. It should also serve as a reminder of the dangers of dictatorships and authoritarianism, and create a renewed appreciation for democratic principles and the rule of law. I'm proud to say that no one appreciates those ideals more than trial lawyers.

Despite lingering warnings from health experts, it feels like the pandemic is winding down. Restrictions have been lifted and people are getting out. We had a great turnout for the Sonoma Travel Seminar in March with more than 150 lawyers in attendance. CCTLA was well represented, both by member speakers and attendees. The weather, food and drink were great, and everyone seemed happy to get out of seclusion. The highlight was the diversity, equity and inclusion panel put together by Wendy York. The discussion was honest and at times, very raw, something we don't often see at seminars. As was emphasized, it was a good starting point, but we need to keep these issues in our hearts and in the conversation moving forward.

Hopefully our ability to gather in person will not by interrupted again any time soon. In that regard, we have re-branded the Spring Fling to the Fall Fling, and it has been scheduled to take place on Thursday, Sept. 22, 2022, in East Sacramento. Chris Wood has generously agreed to host the event at his home, also known as the Lady Bird House in the fabulous 40s. This should be a great location, and the event committee, led by Justin Gingery, is working hard to make the event as spectacular as ever (See pages 21-23 for more information).

At our last Spring Fling, in 2019, CCTLA raised more than $130,000 for the Sacramento Food Bank, the non-profit that does great work assisting the poor find a path to financial independence and self-sufficiency. As usual, the money raised from Fall Fling this year will come from lawyer and non-lawyer sponsorships, a silent auction of donated items and via direct donations.

Sponsorships at varying levels are available for as little as $1,000 up to $10,000, and come with name recognition, admission to the event and other perks. Please sponsor if you can and/or contact a vendor or two who you think might like to make a tax-deductible donation to a worthy cause and attend a fun social event with 100-150 potential customers. In my experience, getting vendors to support the event is surpris-

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President's Message

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ingly easy. Direct donations of any size, as well as donated auction items, are needed for the event to be successful (see pages 21-23). Please do what you can and plan on attending!

While we are all dealing with the backlog in the courts created by the shutdown, anecdotally, it feels like the gears of justice are starting to turn, with courts assigning trial dates and cases getting out to trial.

As this was going to press, we got reports that member Shafeeq Sadiq had received a verdict of $23,965,999 in San Joaquin County on a major-injury motorcycle accident case and that past CCTLA president John Demas received a verdict of $6,678,026 in Stanislaus County in a rear-end neck surgery case, both excellent results in traditionally tough venues.

Another victory was recently announced by CAOC in the form of proposed legislation to modernize the Medical Injury Compensation Reform Act (MICRA), which has remained on the books unchanged since it was signed into law in 1975.

The proposed legislation, which came about as the result of negotiations between the stakeholders and that were spearheaded by CAOC, would increase the caps on non-economic damages to $350,000 in non-death cases and to $500,000 in death cases, as of January 1, 2023, with the respective caps increasing to $750,000 and $1,000,000 over the following 10 years. It also allows for separate caps for some defendants and changes the attorney fee cap to 25% for cases that resolve prior to litigation, and 33% thereafter. These proposed changes mark a major victory that was the culmination of a long, difficult battle by CAOC and its allies.

In the same vein, on April 20, 2022, CAOC helped get the Protect California Drivers Act (SB 1107, Dodd) through the Senate Insurance Committee with overwhelming support. This proposed bill would raise the mandatory auto insurance liability limits to $30,000 per person and $60,000 per occurrence for bodily injury, and $15,000 per occurrence for property damage. The current minimum limits of $15,000/$30,000/$5,000 have remained unchanged since 1967.

It will likely require another hard-fought battle to achieve these long overdue changes, and we should give CAOC our full support. If you are not already a member, please join and donate to their worthy efforts when you can.

We hope to see you on May 19 on Zoom at noon for our monthly educational course by Bob Bale on deposing PMQs (see back page for more information). In the meantime, stay healthy, and let's be careful out there.

Ensuring your firm is using all the best technological practices

By: Margot P. Cutter

The past few years have welcomed a change in the way many of us practice law. The onset of the pandemic ushered in a wave of attorneys and staff working remotely and relying upon technology to facilitate that transition.

Unfortunately, in the scramble to implement remote operations, technological security measures often took a backseat to functionality. Bad actors have seized on this vulnerability. Cyber criminals are always inventing new, creative ways to exploit vulnerabilities.

Cyber security attacks on law firms rose throughout the pandemic because many people were working on home computers that lacked the security measures of on their office computers. Each year, the ABA issues a cybersecurity report that shows just how common these breaches are.

In 2021, 17% of solo firms and firms with two to nine attorneys reported a security breach. Security risks increased with firm size–about 35% of firms with 10-49 attorneys experienced a breach, 46% of firms with 50-99, and about 35% of firms with had 100+.

While many courts and law firms are returning to in-person proceedings, many of the technological changes and advancements that were made during the pandemic look like they're here to stay. In this new legal landscape, it is vital that each of us to ensure that we're following best practices—not just to protect ourselves and our business, but to protect our clients whose private information we routinely store and communicate.

While many law firms have implemented strict security measures, we must remain vigilant as cyber threats and attack mechanisms are always evolving and changing.

This ethical duty is specified in Rule 1.1 of Professional Conduct, which addresses competency. Comment 1 states, *"The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology."*

While many law firms have implemented strict security measures, we must remain vigilant as cyber threats and attack mechanisms are always evolving and changing. The State Bar of California Standing Committee on Professional Responsibility and Conduct addressed this duty in great detail in Formal Opinion No. 2010-179.

This opinion provides a roadmap for attorneys to evaluate the security risks of new technology:

Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client's devices and communications.[1]

These rules aren't mere formalities. In 2017, DLA Piper, a firm with expertise in cybersecurity, suffered a significant ransomware attack. Within minutes, the firm's operations were stymied. TheirIt's telephones and most of its computers were disabled. It took them firm months to become fully operational again, and it cost tens of millions of dollars, in addition to reputational harm.

Margot Cutter, Cutter Law, PC, is a CCTLA Board Member

While it has become a basic expectation that attorneysSure, lots of us are aware that we need to have be using complex, unique, secure passwords to protect sensitive information, . But whatthere are many other tools can we use to ensure we are complying with our ethical obligations. ?To implement any of these tools, I strongly recommend that you consult with an information technology (IT) professional, but hopefully, the following list can hopefully provide you the basic information and options you can use to informprepare for that conversation.

DNS Filtering

A Domain Name System ("DNS") filter deems certain websites threats or dangerous and blocks access to them. This allows your firm to ensure that lawyers and staff are not accessing websites that may pose a threat to your network.

Antivirus Software

Antivirus software will scan your

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computer and detect malware or other problematic files. It will also help protect your computer from new attacks by flagging dangerous files and downloads.

Endpoint Detection and Response

Your network likely has many "endpoints." These include your desktop computers, laptops, iPpadstablets, cell phones, servers, and other devices that connect to the internetInternet. Endpoint detection and response systems monitor the behavior of those devices and collect data regarding their normal behavior. SThe security systems can then detect when a device is behaving abnormally. When such a detection occurs, the system flags a potential breach and initiates an automated response, such as logging the endpoint off of the network or notifying IT personnel. With the possible This provides the quick detection of a security breachafforded by this system and you have the opportunity to silo the a breach from the rest of your network.

Education and Cybersecurity Training

Your cybersecurity is only as strong as the people who have access to your network. One of the most important steps you can take to protect your firm is educating lawyers and staff about cybersecurity issues, prevention, detection, and reporting. Cybersecurity training will teach your team common attack methodologies and warning signs to look out for. It will also teach them to recognize when a breach has occurred, or an attack is underway. This is also an opportunity to remind employees that physical security is just as important as cybersecurity; employees must be cautious about locking the server room and safeguarding devices with access to your network.

Cybersecurity Insurance

While cybersecurity insurance isn't technically a protection, it plays a very important role in the event of an attack or a breach. Beware! Many legal professional liability insurance policies do not cover cyber-attacks and breaches. Cybersecurity insurance policies vary, but they can cover the costly process of loss containment and data recovery, third-party liability, regulatory defense and penalties, network and business interruption, extra expenses, cyber extortion, computer fraud, and improper electronic transfer of funds, among other things.

Dark Web Monitoring

Dark web monitoring allows you to catch and remedy vulnerabilities before they become an issue for your firm. These services scan the dark web for compromised employee data such as reused passwords, exposed personally identifiable information that could leave your firm vulnerable to phishing attempts, and signs of an internal breach.

Email Encryption

Email has become a leading mode of communication for lawyers. Indeed, lawyers often exchange pleadings, discovery, and other documents with clients, opposing counsel, the courts, and co-counsel via email. These documents contain a great deal of confidential and personally identifiable information about our clients, which could expose them to identity theft and scams. Encryption is a helpful tool to thwart malware and phishing attempts. It allows you to ensure that only your intended recipients are able to view the information in your emails. Email encryption essentially scrambles the contents of your emails, making them impossible to read without the key to decode the message. Most email platforms, including Microsoft Outlook and Gmail, have simple buttons you can click to encrypt an email.

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Email Backup

Backing up your email account, including email attachments, tasks, and calendars, in a secure, encrypted database provides you with important ransomware attack protection. Ransomware is a malicious software or malware that could hold your email and data hostage, demanding a ransom for their return. A backup of this data protects you from some of the harm such an attack may cause because you'll be able to easily restore your important data, emails, and files, without paying an exorbitant ransom fee.

Dual Factor Authentication and Multi-Factor Authentication

Dual Factor Authentication takes your security beyond a mere password. You likely have dual-factor authentication on some of your online accounts already. First, a user enters their username and password. Next, the user must navigate an extra layer of security. In some circumstances, this extra layer of security could be a secret PIN, an answer to a security question, or a number combination that is texted to you. These protections guard against cyber threats thatwho may have gained access to your accounts or a password. Dual and Multi-Factor Authentication can be applied to Microsoft, Gmail, and most other email and business suite providers.

Email Phishing Detection

Phishing is a social-engineering tactic by which an attacker poses as a person or legitimate institute (usually via email) in an effort to obtain sensitive information from the target. They seek passwords, banking information, addresses, social Social security Security numbers, and other information they can use to trick unsuspecting victims. While many of us have seen and recognized phishing attack attempts, the attackers are becoming more sophisticated, making it more difficult to identify these attacks. Phishing detection programs collect data and scan your inbox for suspicious or abnormal behavior. They These alert the user to the potential threat so that the user can examine the message more closely to determine its legitimacy.

Application Whitelisting

Application whitelisting allows only

specific programs to be downloaded and run on a device. This software contains an index of allowable, safe applications that can be run on a computer. This protects your network from malware, viruses, and ransomware.

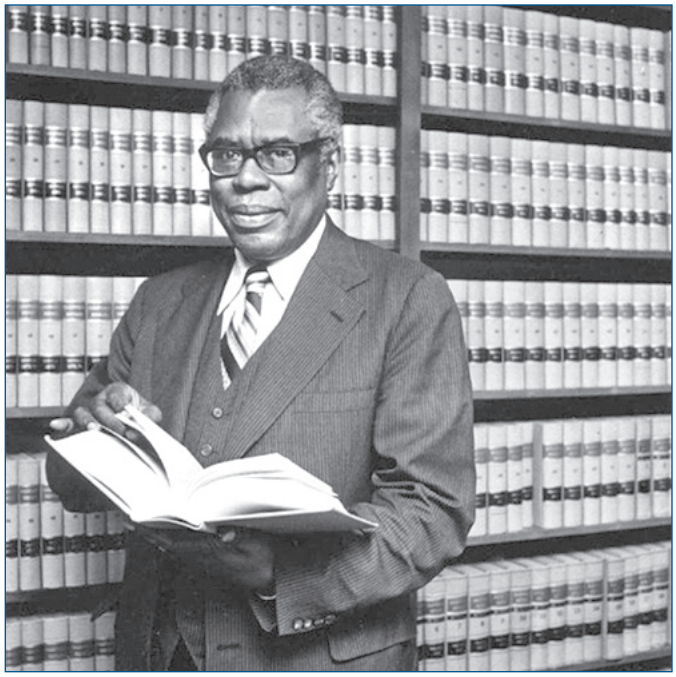
Of course, these are just a handful of the tools available to improve our cybersecurity protection. As Because the cybersecurity world changes daily, we must remain diligent in exploring and applying these solutions.

[1]The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2010-179 accessible at https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2010-179-Interim-No-08-0002-PAW.pdf

Nathaniel S. Colley posthumously receives ABOTA's Champion of Justice Award

By: Dan Wilcoxen

Dan Wilcoxen, Wilcoxen Callaham, LLP, is a CCTLA Board Member and Past-President



The late Nathaniel Colley has received ABOTA's Champion of Justice Award in recognition of his career as a trial attorney and his accomplishments in fighting social discrimination in California.

ABOTA's Champion of Justice Award recognizes those who advance ABOTA's overall purposes of the preservation and promotion of the civil jury trial. The award recipients have demonstrated through word and action an ongoing, strong and exceptional commitment to trial by jury. Their impact was noted for improving the ethical and technical standards in the practice of law, educating students and the public, advancing fair and diverse juries and preserving the quality and independence of the judiciary.

Earlier this year, I received unanimous support from the CCTLA Board of Directors to nominate Nathaniel "Nat" S. Colley for ABOTA's Champion of Justice Award in recognition of his career as a civil trial attorney and his accomplishments in fighting racial discrimination in California.

Walter Loving and I successfully lobbied in favor of Colley's receipt of the Champion of Justice Award before the National Board of ABOTA. Colley, along with Doris Cheng, of Walkup, Melodia, Kelly & Schoenberg, received the award on May 14, 2022. He passed away 30 years ago, on May 20, 1992, and was presented the award posthumously. His son, Nathaniel Colley Jr., was to be present at the award ceremony.

After obtaining a degree from Yale and passing the California State Bar, Colley opened his law practice in the 50s as Sacramento's only African-American attorney.

He was deeply involved in civil rights and fighting discriminatory practices. He fought for desegregation in all aspects of the community of Sacramento, including desegregation of police, fire, schools, housing, and retail.

In the 1954 case of *Ming v. Horgan*, Colley went after Sacramento realtors alleged to have entered into a secret discriminatory agreement against the sale of home to African-Americans.

Through his efforts in *Ming*, he obtained an order prohibiting the discrimination by the realtors against Ming and all those similarly situated who received funding from the Federal Housing Administration and Veterans Administration for the purchase of a home.

In 1960, California Governor Pat Brown appointed Colley to the State Board of Education, the first African-American to serve on the board. While there, he got textbooks changed, insisting the accomplishments of African-Americans be represented. He also acted as a special advisor to President John F. Kennedy and taught judicial philosophy part time at McGeorge School of Law alongside his friend, Professor Anthony M. Kennedy.

Nat Colley was also involved in the 1967 landmark United States Supreme Court case of *Reitman v. Mulkey* (1967) 387 U.S. 369. The *Reitman* case held the California Supreme Court correctly concluded that a statute added to the state constitution that allowed persons to sell, lease or rent property in their absolute discretion was invalid under Fourteenth Amendment of the Constitution of the United States as discriminatory.

The case ultimately went to the United States Supreme Court. The US Supreme Court held that the California Supreme Court correctly concluded that the statutory amendment did not just repeal existing law forbidding private racial discrimination, but also its authorization of racial discrimination in the housing market and the right to discriminate as a basic state policy.

When Justice Kennedy was nominated for the United States Supreme Court in 1987, Colley testified in support of him at confirmation hearings held by the Senate Judiciary Committee and then-Senator Joe Biden.

When I began my career as a defense lawyer five years after the Reitman decision, I had the pleasure of meeting and getting to know Nat Colley. I was impressed by both his talent in the courtroom, but his presence as a person and as a friend. Over the years, I considered him not just a colleague, but as a leader in the community.

Even after his death in 1992, I continue to hear and tell stories about Nat Colley. It is truly impressive to be able to have such an impact on the Sacramento community that 30 years later, your accomplishments are still being recognized. Just last summer, the Nathaniel S. Colley Sr. High School was opened in his honor. I am proud for our part in nominating Colley to receive the well-deserved first Champion of Justice Award.

Historic MICRA Deal Crosses Major Hurdle in Assembly Judiciary Committee

Sacramento, CA – Assembly Bill 35, which contains a landmark compromise to California's Medical Injury Compensation Act of 1975 (MICRA), passed a critical test in the state's Assembly Judiciary Committee on May 11, 2022. The bill represents the culmination of a decades-long fight by the Consumer Attorneys of California (CAOC) to restore justice for injured patients.

Craig M. Peters, president of CAOC, said after the vote, "Today's vote in the Assembly Judiciary Committee reaffirms our conviction that injured patients deserve to be fairly compensated when their rights have been violated.

"As this historic agreement makes its way to Governor Newsom's desk, we are grateful for the determined efforts of injured patients and their families, who have fought against MICRA and have

CAOC's Unrelenting Fight to Balance the Scales of Justice for Patients Takes One Step Closer to Victory

been the spearhead of the 50-year fight to restore access to justice."

Tammy Smick, who lost her son Alex after he was administered a toxic overdose of medication in a hospital, said, "For the last decade, I have crossed the state to meet with organizations and legislators, urging them to join our fight for change. The journey has been challenging, but I vowed to never give up.

"With deep emotion and gratitude, I am honored to stand before the legislature today in memory of Alex, and thousands of other victims of medical negligence. I am thankful, knowing that others will receive the justice they deserve because of AB35."

This historic legislation improves justice for patients:

- Upon enactment, the current $250,000 injury cap will increase to $350k, or just over a million dollars depending on the number of defendants.
- In wrongful death cases, the cap increases to $500K, or up to $1.5 million depending on the number of defendants.
- And in 10 years, the cap will increase nearly tenfold (to $2,250,000) for injuries and twelve-fold ($3,000,000) for death.

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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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CCP § 377.34 and Getting Damages for Pain, Suffering or Disfigurement for a Deceased Plaintiff

By: Dan Del Rio

Dan Del Rio, Del Rio & Caraway, is a CCTLA Board Member

PRIOR LAW

Historically, non-economic damages such as pain, suffering, or disfigurement did not survive an individual's death, so if an injured plaintiff died during their case but before judgment, then their damages were truncated, and they lost non-economic damages. This was codified in California Probate Code 573(c):

> Where a person having a cause of action dies before judgment, the damages recoverable by his or her personal representative are limited to the loss or damage the decedent sustained or incurred prior to death including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, but not including any damages for pain, suffering, or disfigurement. (Emphasis added.)

The California Supreme Court affirmed Probate Code 573(c) in *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 920, when it adopted the trial court's ruling that because the plaintiff had died prior to trial, no damages for emotional distress were recoverable by her estate. This principle was recognized again in *Carr v. Progressive Cas. Ins. Co.* (1984) 152 Cal.App.3d 881, 832 and *Bartling v. Glendale Adventist Med. Center* (1986) 184 Cal.App.3d 961, where the court essentially stated that the claim for pain, suffering, emotional distress or disfigurement dies with the decedent.

This should be contrasted with wrongful death damages which include both economic damages such as the decedent's financial support, loss of gifts or benefits, funeral and burial expenses, and the reasonable value of household services along with noneconomic damages including the loss of the decedent's love, companionship, comfort, care, assistance, protection, affection, society, moral support, enjoyment of sexual relations, and loss of the decedent's training and guidance.

CURRENT LAW

Now, effective January 1, 2022, California Code of Civil Procedure § 377.34 has resurrected non-economic damages for injured plaintiffs who pass away during the pendency of their case so that their personal representative or successor in interest can now recover damages including pain, suffering or disfigurement. However, in order to claim these non-economic damages, one of two things must happen:

> (1) the action or proceeding was granted a preference pursuant to California Code of Civil Procedure § 36 before January 1, 2022, or
> (2) the action or proceeding was filed on or after January 1, 2022, and before January 1, 2026.

California Code of Civil Procedure § 377.34. Damages recoverable; actions or proceedings granted a preference; submission of information to Judicial Council

> (a) In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.
> (b) Notwithstanding subdivision (a), in an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable may include damages for pain, suffering, or disfigurement if the action or proceeding was granted a preference pursuant to Section 36 before January 1, 2022, or was filed on or after January 1, 2022, and before January 1, 2026.

This comes at a particularly apropos time when Covid has caused massive backlogs in personal injury cases and especially litigation. Now, the defense cannot simply wait out a plaintiff's claim with the knowledge that if the plaintiff happens to pass away then what is quite possibly the majority of the damages would disappear.

It should be mentioned that section CCP § 377.34 subsection (c) contains a mandatory reporting requirement to the Judicial Council for any judgment, consent judgment or court-approved settlement within 60 days of such resolution between January 1, 2022, and January 1, 2025, containing a copy of the judgment, consent judgment or court-approved settlement agreement, along with the coversheet detailing all of the following information:

> (1) The date the action was filed.
> (2) The date of the final disposition of the action.
> (3) The amount and type of damages awarded, including economic damages and damages for pain, suffering, or disfigurement.

On or before January 1, 2025, the Judicial Council is required to transmit to the legislature report detailing the reported information pursuant to subdivision (c).

Furthermore, subsection (e) specifically states that it does not alter the MICRA limits of California Civil Code § 3333.2.

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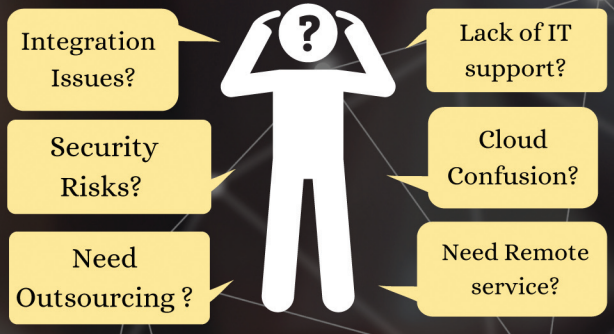

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Travis Black, Esq.
The Law Office of Black & DePaoli

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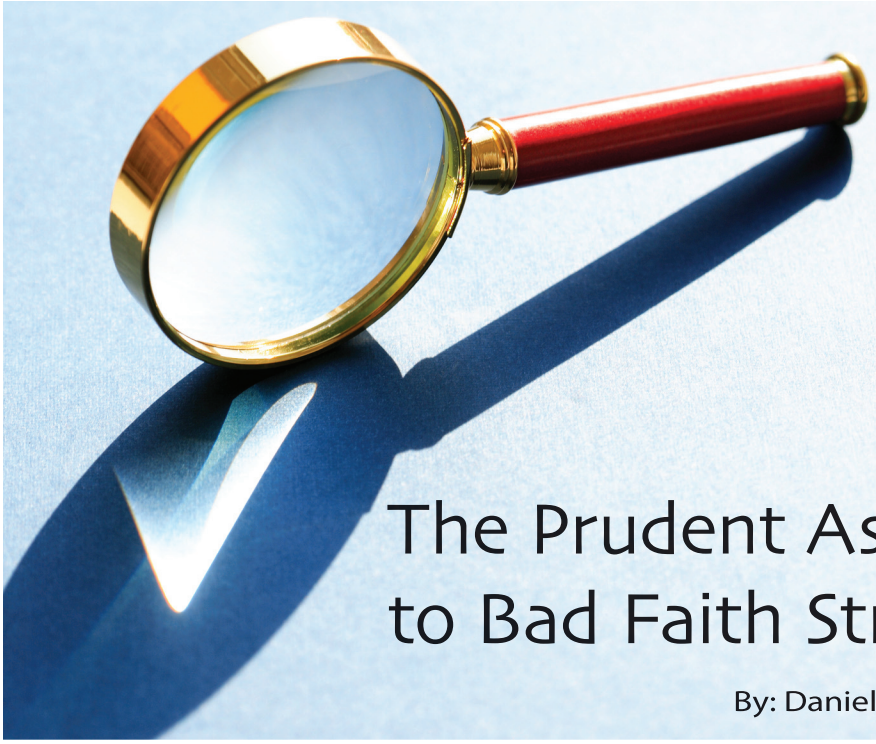

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Gingery, Hammer
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is a CCTLA Member

The Prudent Associate's Guide to Bad Faith Strategy — Part I

By: Daniel Schneiderman

This article is intended to be Part I of a three-part series. Part I will discuss fundamentals of bad faith, the second to focus on the demand and litigation phases, and the third will be pertaining to trial considerations, post-judgment discussions and other considerations.

Introduction

When I bgan working as a plaintiff's civil trial attorney, myths of bad-faith verdicts of the past echoed through the hallways of my firm, with memorabilia of trial verdicts jeweling the walls of the corridors. Getting a carrier to pay above the policie's limits, due to their own conduct towards their own client, is the associate's golden ticket to trial—the fare for entry to the plaintiff trial attorney's promised land.

Despite its importance, a tangible description of what constituted bad faith often evaded me during my initial year as a civil trial attorney. I knew the basics. Policy Limits. Demand. Litigation. Discovery. 998 issued. 998 expires. Verdict. Judgment. Bad faith. Still, a true understanding of what constituted bad faith remained a bit of a mystery for some time. So let's talk first about what we know:

Party A pays a premium for "insurance coverage." Party B is injured by Party A. Party B ("the injured party") submits a claim for injury and damages and demands Part A's policy limits. Reasonable [and unreasonable] minds disagree.Party B proceeds with the filing of a complaint. The parties discover and dispute the factual allegations via written discovery followed by depositions. Once the primary depositions are complete, Counsel for Party B sends a Code of Civil Procedure 998 "Offer to Compromise" ("998") for the available policy limits. Opposing counsel either ignores or objects to the 998. Party A and Party B later try the case. Party B prevails and receives a judgment in excess of the policy limits. Party A yells at Party C ("the insurance carrier"), pleading with it for an explanation as to why Party A had the insurance in the first place if Party C was unwilling to protect Party A when they actually needed protection. Party A promptly assigns their prospective bad faith lawsuit to Party B.
Boom. Bad Faith. Magic.

Even with this "clean" bad-faith fact pattern, the prudent associate should be asking themselves several questions before they head down to the boss's office. In fact, your full analysis should and must include an evaluation of at least two key issues: 1) What is the nature of the contract (e.g., engagement letter, policy of insurance, etc.) between the involved parties, including, but not limited to, those between the insured(s), insured's counsel and the insurance carrier(s); and 2) What have those parties done since the occurrence of the incident that can be objectively seen as an unreasonable execution of their contractual, statutory and common law duties.

What is "Bad Faith"?

In practice, "bad faith" is typically seen, at least initially, as a contractual cause of action that one contracting party (e.g., the "insured") may bring against another contracting party (e.g., the "insurance carrier").

As explained by this article, the prudent associate will find this to be a limiting view, and ultimately, an inaccurate interpretation of what makes up a truly righteous bad-faith claim. (See *Graciano v. Mercury General Corp*. (2014) 231 Cal. App.4th 414, 425 and 433. See also CACI 2234, CACI 601, CACI 4106, CACI 325, CACI 1900, CACI 1903. See generally Administrative Code, Code of Reg. § 2695.1, et seq. – "Fair Claims Settlement Practices Regulations".)

Hitting the "Reasonableness" Target

To answer this question, we start with CACI 2234, sub-instruction number 4, which states that the jury must find "[t]hat the [Defendant Carrier's] failure to accept the settlement demand was the result of

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unreasonable conduct . . ."

So, what does "unreasonable conduct" look like?

CACI 2334 states, in part,

> *"A settlement demand for an amount within policy limits is reasonable if [the carrier] knew or should have known at the time the demand was rejected that a potential judgment against [Plaintiff] was likely to exceed the amount of the demand based on [Plaintiff]'s injuries or losses and [Plaintiff]'s probable liability."*

Even with these "clear instructions," the prudent associate knows that the demand and rejection of the demand alone are not enough sufficient to bring to the boss. (See *Pinto v. Farmers Ins. Exchange* (2021) 61 Cal.App.5th 676, 688 ["[T]he crucial issue is . . . *the basis* for the insurer's decision to reject an offer of settlement.], emphasis added.) Several other factors remain available to the prudent associate. For example, "[a]n insurance company's unreasonable conduct may be shown by action or by the failure to act." Even more, "[a]n insurance company's conduct is unreasonable when, for example, it does not give at least as much consideration to the interests of the insured as it gives to its own interests." (See *Id.*)

Another factor is the size of the future judgment. As stated by the *Crisci* Court, "[t]he size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim." (*Crisci v. Security Insurance Co. of New Haven, Connecticut* ("*Crisci*") (1967) 66 Cal.2d 425, 431.

These, and other factors, are well founded in California state law. (See *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659; *Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 429; *Johansen v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16; *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 724-725; *Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836. See also Administrative Code, Code of Reg. § 2695.1, et seq. – "Fair Claims Settlement Practices Regulations"), etc.

The Basics:
Writing and Documentation

But what is "reasonableness" in practice, and more importantly, how can a prudent associate go about finding and developing the evidence needed for a prospective bad-faith claim?

First, if your legal practice is not "in the practice" of writing A LOT of "custom" correspondence for your cases, the strategies detailed in this article may not work with your business model. However, if you are looking to pursue these types of matters, the written word will *always* be your primary asset. This is a tool that must be utilized and developed to document and provide a written record of plaintiff's counsel's perception of the litigation from "behind the pleading curtains."

This written record serves, in effect, as a timeline of issues for the fact finder (i.e., judge or jury) to focus on at the later bad-faith trial. Compare it to you getting those phone records from the adverse

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Share your experiences, verdicts, lessons learned

CCTLA is seeking legal-themed articles for publication in its quarterly publication, *The Litigator,* which presents articles on substantive law issues across all practice areas. No area of law is excluded. Practice tips, law-practice management, trial practice including opening and closing arguments, ethics, as well as continuing legal education topics, are among the areas welcomed. Verdict and settlement information also welcome.

The Litigator is published every three months, beginning in February each year. Due to space constraints, articles should be no more than 2,500 words, unless prior arrangements have been made with the CCTLA office.

The author's name must be included in the format the author wishes it published on the article. Authors also are welcome to submit their photo and/or art to go with the article (a high-resolution jpg or pdf files; website art is too small).

Please include information about the author (legal affiliation and contact and other basic pertinent information) at the bottom of the article.

For more information and deadlines, contact CCTLA Executive Director Debbie Keller at debbie@cctla.com.

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driver in your third-party auto case that proves they were texting while driving. That is what your writing and correspondence will be for that same third-party's future bad-faith attorney.

The need for documentation cannot be understated. With that in mind, professionalism and "good writing" are the name of the game. Assume all correspondence will be placed under the microscope, that you will be judged by it, and act accordingly.

Prior to Battle:
Divide Before You Conquer

Though I would say the mantra of this article has been to always develop and be on the search for additional facts to support any prospective future allegations of bad faith. Without a doubt, and for all that is loved and cherished, preserve and memorialize your actions on the written record! If you do not, the fact-finder will assume it did not happen.

Still . . . the most important goal remains: make sure the written record reflects that plaintiff's counsel acted reasonably over the course of litigation, and that you have highlighted the events where counsel hired by the insurer or the insurer itself did not.

This is not anything new, improper or mischievous. Rather, it all comes down to documentation and deadlines. At the end of the day, let the Code be your North Star. Repeat after me: "Just follow the Code!"

Before we get there, I would argue that the associate's next step would be to collect as much information as possible relative to the parties involved in the suit, including their representatives and carriers. I typically start this process at the beginning of a case. I identify the "inside counsel" attorney (e.g., USAA, AAA, etc.), the "outside counsel" attorney (e.g. State Farm), their respective employers (i.e., the insurance carriers) and review for excess or umbrella coverage representation (…and their respective carriers).

For cases involving multiple coverages, conflicts of interest, or attorneys retained by the insured, monitoring counsel, etc., I make an additional note for documentation purposes (i.e., CCing them on all pertinent coverage or offer-related emails and letters). I may also include their information in the eventual 998, agreeing to their dismissal with prejudice, if the 998 is accepted by the co-defendant.

To that effect, this is as good a place as any to note that these types of cases often include parties with conflicting positions and defenses. Spread those conflicts across multiple different sets of priorities, obligations and duties (i.e., the attorney's duty to the insured, the carrier, etc. for starters), the environment is fraught with potential tensions and disagreements. (See *Highlands Ins. Co. v. Continental Cas. Co.* (9th Cir. 1995) 64 F.3d 514, 518; *Aetna Cas & Sur Co v Superior Court* (1980) 114 Cal.App.3d 49.)

But let me pause here to state, once again—I am not advocating for you to go and declare war on anyone, despite some of the language in this article suggesting the contrary.

The point here is to ensure that you note, to you and your client's advantage, the differences between the different parties through the taking of written discovery and depositions. (See *Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 12 [stating that insurer may not consider coverage defenses in evaluating reasonable settlement demands within policy limits].)

Accentuating the factual circumstances, contractual rights, and statutory obligations of the parties involved is not improper conduct. Rather, I would think you are doing a disservice to your client *AND* the relevant third party if you do this, with the obvious caveat that such a tact is not always necessary in every case.

In Closing

Now that we have covered the basics, Part II will discuss third-party demand and litigation strategies the prudent associate can use to preserve a potential future bad-faith claim.

Accentuating the factual circumstances, contractual rights, and statutory obligations of the parties involved is not improper conduct. Rather, I would think you are doing a disservice to your client AND the relevant third party if you do this, with the obvious caveat that such a tact is not always necessary in every case.

President Dave Rosenthal
and the Officers and Board
of the Capitol City Trial Lawyers Association
&
Sacramento Food Bank & Family Services

cordially invite you to

CCTLA's 18th Reception & Silent Auction

Thursday, September 22, 2022

from 5 p.m. to 7:30 p.m.
at The Lady Bird House,
1224 44th Street, Sacramento 95819

Reservation Deadline is Friday, Sept. 16, 2022

Contact Debbie Keller: 916 / 917-9744 debbie@cctla.com

For nearly two decades, CCTLA has supported our community with its Auction & Reception, giving to those in need by raising funds for the Sacramento Food Bank & Family Services. This reception is free to CCTLA members, honored guests, reception sponsors and those who donate to the auction, with all proceeds benefiting those in need in our community.

Hosted beverages and appetizers will be provided, as well as valet parking.

In honor of Allan Owen & Linda Whitney

SACRAMENTO Food Bank & Family SERVICES

All Silent Auction proceeds benefit Sacramento Food Bank & Family Services, a local, non-profit agency committed to serving individuals and families in need.

CCTLA

Post Office Box 22403 Sacramento, CA 95822
Telephone: (916) 917-9744 Website: www.cctla.com

CCTLA'S 18th Reception & Silent Auction Sept. 22, 2022

All Silent Auction Proceeds Benefit Sacramento Food Bank & Family Services

Sacramento Food Bank & Family Services is a local, non-profit agency committed to serving individuals and families in need

Sponsorship Opportunities

You will be helping the Sacramento community, and you will enjoy exposure to all CCTLA members, the judiciary and more. A wonderful opportunity!

For a $1,000 donation to Sacramento Food Bank & Family Services (SFBFS):

- 2 quarter-page color ads in CCTLA's quarterly publication, *The Litigator*
- Your name on event signage
- Your name announced at the reception
- A sponsor ribbon attached to your name tag
- Your name listed as a sponsor by SFBFS on several social media sites

For a $2,500+ donation:

- All of the above, with 1 full-page color ad in *The Litigator* instead of the 2 smaller ads
- 2 "Run to Feed the Hungry" tickets

For a $5,000 donation:

- 2 full-page color ads in CCTLA's quarterly publication, *The Litigator*
- Your name on event signage & announced at the reception
- A sponsor ribbon attached to your name tag
- 6 registrations for "Run to Feed the Hungry"
- Your name listed as a sponsor by SFBFS on several social media sites

For a $10,000 donation (only one available):

- Company logo/name on wine glasses used at the reception
- 2 full-page color ads in CCTLA's quarterly publication, *The Litigator*
- Your name on event signage & announced at the reception
- A sponsor ribbon attached to your name tag
- 8 registrations for "Run to Feed the Hungry"
- Your name listed as a sponsor by SFBFS on several social media sites

Your donation is tax-deductible, either by check made payable to Sacramento Food Bank & Family Services and mailed to CCTLA, or pay online via https://support.sacramentofoodbank.org/CCTLA2022 or by credit card: Call Alliyah Muhammad at SFBFS: 915-456-1980, Ext. 2537

THANK YOU!

CCTLA

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Auction Donor Sign-Up Form

The committee is seeking donations of goods and services for the Silent Auction. Examples might include event tickets (sports, theater, etc.), golf at a private club, lessons (water or snow skiing, sailing, hunting, crafting, quilting, etc.), vacation home/ timeshare, artwork, professional services, dining, wine, gift baskets, electronics.....just about anything you can think of!

If you are able to donate an item, please provide the necessary information:

Name:_____

Donated Item:_____

Item Description: _____

(with times, dates, limitations, if applicable): _____

_____

_____

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_____

Value: $ _____

Minimum Bid Amount: $ _____

Donated items/certificates can be dropped off at 2114 K St, Sacramento CA, 95816 by September 16, 2022

If you are unable to drop off your donation, please contact Debbie at CCTLA: 916 / 917-9744 or debbie@cctla.com.

THANK YOU!

Post Office Box 22403 Sacramento, CA 95822
Telephone: (916) 917-9744 Website: www.cctla.com

Christopher Whelan, Law Office of Christopher Whelan, is a CCTLA Board Member

Document Discovery — Our Right to What's Left

By: Christopher Whelan

Below are some templates you can use to create quick "meet and confers" that require defendant's precise compliance with their statutory duties to produce all responsive documents. Quick "meet and confers," tightly focused on irrefutable statutory duties, pressure defendants to produce the required documents. If the defendant's responses do not comply with their statutory requirements, either (1) their attorneys do not understand the English language, or (2) they are using a muddled or "close enough" responses to hide key documents behind plausible deniability.

Like those who hide valuables in safes, the defense will initially try to hide damaging documents in "safes" built with ambiguous responses that superficially appear to comply with statutory requirements. The defense's reliance on avoidance, misinterpretation or rewriting the discovery statutes signal that your job is not over, and most likely, valuable documents have not been produced. It is our duty to crack these document "safes" and force the production of all responsive documents.

PLAINTIFF'S STATUTORY OBJECTIONS TOO EVASIVE OR INCOMPLETE RFPD RESPONSES

(General Objections) Separate Response to Each Category. "The party to whom a demand ...has been directed shall respond separately to each item or category of item..." (CCP§2031.210(a).)

Defendant Failed to Provide a Statement of Compliance. Defendant failed to include "A statement that the party will comply with the particular demand... by the date set for the inspection..." (CCP§2031.210(a)(1).)

Defendant Failed to Provide a Statement that it Lacks the Ability to Comply. Defendant failed to state it "lacks the ability to comply with the demand for inspection...of a particular item or category of item." (CCP§2031.210(a)(2).)

Defendant Failed to Respond Separately to Each Request. Defendant failed to "respond separately to each item or category of item" ... [with] "an objection to the particular demand for inspection...." (CCP§2031.210(a)(3).)

(General Objection) Objections Must Bear the Same Number as Item/Category in Demand. Each statement of compliance, representation and objection "in the response shall bear the same number and be in the same sequence as the corresponding item or category in the demand...." (CCP§2031.210(c).)

Defendant Failed to Properly Object to a Request for ESI Information. Defendant failed to "preserve any objections" relating to ESI since it failed to "...identify in its response the types or categories of sources of electronically stored information that it asserts are not reasonably accessible...." (CCP§2031.210(d).)

Defendant Failed to Provide a Statement of Compliance in Full or in Part. Defendant failed to affirm that it "will comply with [this] particular demand"... "either in whole or in part, and that all documents . . . in the demanded category that are in the possession, custody, or control of [Defendant] and to which no objection is being made will be included in the production." (CCP§2031.220.)

Defendant Failed to Affirm a Diligent and Reasonable Search for Responsive Documents. Defendant failed to "affirm that a diligent search and reasonable inquiry has been made in an effort to comply with that demand," to support it alleged "an inability to comply." (CCP§2031.230.)

Defendant Failed to Explain Why Responsive Documents Cannot Be Produced. Defendant claimed "an inability to comply" with this demand but failed to specify why, e.g. the responsive documents "never existed, has been destroyed, has been lost, misplaced, stolen, or has never been, or is no longer, in Defendant's possession, custody, or control...." (CCP§2031.230.)

Defendant Failed to Confirm that All Responsive Non-Objected to Documents Will Be Produced. Defendant partially objected to this request or category but failed to include a "statement of compliance" with respect to the remaining responsive documents. (CCP§2031.240(a).)

Defendant Failed to "Identify with Particularity Any Document" Objected to and Withheld Documents. Defendant failed to "identify with particularity any document...falling within any category of item in the demand to which an objection is being made." (CCP§2031.240(b)(1).)

Defendant Failed to State the Specific Grounds for the Objection. Defendant failed to set forth "clearly the extent of, and the specific grounds for the objection." (CCP§2031.240(b)(2).)

Defendant Claimed a Privileged Without Stating the Particular Privilege Invoked. Defendant asserted "an objection based on a claim of privilege" but failed to state "the particular privilege invoked." (CCP§2031.240(b)(2).)

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An Objection is Based on Work Product Must Be Expressly Stated. An objection based on work product "shall be expressly asserted." (CCP§2031.240(b)(2).)

Defendant Failed to Provide "Sufficient Factual Information for [Plaintiff] to Evaluate the Merits of That Claim." Defendant claimed a privilege [or work product] without providing "sufficient factual information for [Plaintiff] to evaluate the merits of that claim, including if necessary a privilege log." (CCP § 2031.240(c)(1).)

No Verification Included. All responses shall be "under oath unless the response contains only objections." (CCP§ 2031.250(a).)

Any Responsive Documents Shall be Identified with the Specific Request Number to Which the Document Responds. Any responsive documents or category of documents "...shall be identified with the specific request number to which the documents respond." (CCP § 2031.280(a).)

Responsive Documents Previously Produced in Response to Prior Requests. This subterfuge violates the requirement that any responsive documents or category of documents "...shall be identified with the specific request number to which the documents respond." (CCP § 2031.280(a).)

Any Responsive Documents Shall Be Produced on the Date Specified in the Demand. "The documents shall be produced on the date specified in the demand..., unless an objection has been made to that date. If the date for inspection has been extended pursuant to Section 2031.270, the documents shall be produced on the date agreed to ..."(CCP § 2031.280(b).)

ADDITIONAL COUNTERS TO TYPICAL EVASIVE RFPD RESPONSES

Assertion of Privilege to "Preserve and Not Waive an Unidentified Privilege" as to an Unidentified Document that May Be Discovered in the Future.

Frequently, defense tries to create ambiguity in its responses by asserting unidentified privileges to allegedly protect unknown and yet-to-be discovered documents by "asserting a privilege so as to avoid waiving it." This intentional ambiguity can be eliminated with the following response.

Defendant claims an unidentified privilege(s) for an unidentified and apparently still unknown document(s). That violates CCP§2031.240(b)(2) since that response fails to state the particular privilege invoked. Defendant's objection to the production of some document(s) without identifying them violates CCP§2031.240(b)(1). Also, this violates CCP§2031.240 (c)(1) since it asserts a privilege without providing "sufficient factual information for [Plaintiff] to evaluate the merits of that claim,..."

There is no statutory authority allowing the assertion of a privilege to prevent a future wavier of an unidentified privilege to unknown or non-existent documents. In *Bihun v. AT&T Info. Systems, Inc.* (1993) 13 Cal.App. 4th 976, the court at p. 991 at fn. 5 made clear that an attorney's assertion of a privilege, privacy or objection to the production of a non-existent document was made "in bad faith" and "in violation of the ethical duty of an attorney '[t]o employ ... such means only as are consistent with truth." [CC§128.5; B&P Code 6068(d).]

Claim of Attorney/Client Privilege

The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise. (*Citizens for Ceres v. Sup. Ct.* (2013) 217 Cal. App. 4th 889, 911.) California law has long recognized that otherwise unprivileged communications or other documents that are forwarded to an attorney do not thereby become privileged (see, *Wellpoint Health Networks, Inc. v. Sup. Ct.* (1997) 59 Cal. App. 4th 110, 119), nor do communications on which an attorney was simply "cc'd" if the substance of the communication does not include legal advice. (*Costco Wholesale Corp v. Sup. Court* (2009) 47 Cal. 4th 725, 735; *Caldecott v. Sup. Ct*. (2015) 243 Cal. App. 4th 212, 227). Similarly, the attorney-client privilege does not protect underlying facts which may be referenced within a qualifying communication. (*State Farm Fire & Cas. Co. v. Sup. Ct.* (1997) 54 Cal. App. 4th 625.) And it does not protect communications where the relationship between the parties to the communication is not one of attorney client such as when an attorney acts merely as a negotiator or provides business advice. (*Caldecott v. Sup. Ct.*, supra, 227.)

Redact the Attorney Client Communication and Produce the Rest

The attorney-client privilege is a privilege against disclosure only of "a confidential communication between client and lawyer." Cal. Evid. Code § 954; *State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 639 ("the attorney-client privilege only protects disclosure of communications between the attorney and the client"). The privilege does not extend, and cannot be extended, to anything else. *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 739 ("the statute is to be strictly construed against the claim of privilege"); *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal. App.4th 1229, 1236 ("In California, the attorney-client privilege is a legislative creation. (See §§ 950–962.) The courts of this state have no power to expand it"); Cal. Evid. Code § 911(b) ("Except as otherwise provided by statute ... No person has a privilege to refuse to disclose any matter or to refuse to produce any writing").

Within the foregoing subject and scope of the privilege, some communications between non-attorneys can be privileged, but only to the extent that they actually discuss or contain legal advice from counsel. Only if "legal advice is discussed or contained in the communication between [non-attorney] employees,

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The defense's reliance on avoidance, misinterpretation or rewriting the discovery statutes signal that your job is not over, and most likely, valuable documents have not been produced. It is our duty to crack these document "safes" and force the production of all responsive documents.

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then to that extent, it is presumptively privileged." *Zurich Am. Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1502 (emphasis added).

To the extent any non-attorney communication sets forth other matter, it is in no way or sense "a confidential communication between client and lawyer," and it is notprivileged. See *id*. Thus, where a non-attorney communication includes, in part, "a confidential communication between client and lawyer," that part may be redacted, and the rest of the document must be produced.

This conclusion is plain and unavoidable, as similar federal cases also show. See, e.g., In re *Premera Blue Cross Customer Data Security Breach Litigation* (D. Or. 2017) 296 F.Supp.3d 1230, 1250 ("Plaintiffs argue that Premera may redact documents that contain some privileged and some nonprivileged information and must then produce the nonredacted portions. The Court agrees. When an email chain contains an email that is privileged or contains privileged information and the remaining emails in that chain do not contain privileged information, the privileged material may be redacted, but the remaining material must be produced"); *U.S. v. Chevron Corp.* (N.D. Cal. March 13, 1996) 1996 WL 264769, *5 ("If non-privileged material is contained in a document which the Magistrate finds to be privileged, then that material should be disclosed").

Discovery Seeks Irrelevant Documents

The target of discovery is relevant if it is "reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.010.) "Under the Legislature's "very liberal and flexible standard of relevancy," any "doubts as to relevance should generally be resolved in favor of permitting discovery.(Cite omitted.)" (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 542.)

Discovery is "relevant to the subject matter of the litigation" if it possibly assists the party in evaluating the case, preparing for trial, or aids in settlement of the case (*Gonzalez v. Superior Court* (1995) 33 Cal. App.4th 1539, 1546), or merely assists a party in evaluating the case and preparing for trial "that is enough to justify discovery." (*Lipton v. Superior Court* (1996) 48 Cal. App.4th 1599,1616.)

Discovery is Burdensome

An objection based on burden is only valid when the burden is shown to result in injustice since a "burden" is inherent in responding to all discovery demands. (*West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, 418; *Pantzalas v. Superior Court* (1969) 272 Cal.App.2d 499, 504.)To suffice as a valid objection, "burden" must be supported by some showing of injustice. (*Durst v. Superior Court* (1963) 218 Cal.App.2d 460, 468.) All discovery imposes some burden, therefore to support an objection of oppression there must be some showing that the ultimate effect of the burden is incommensurate with the result sought. (*Mead Reinsurance Co. v. Supt Ct.* (1986) 188 CA3d 313, 318.)

Clarifications and Explanations in Meet and Confer Responses

Keep in mind that unsworn clarifications, concessions and explanations by attorneys in "meet and confer" emails, letters and conversations have no evidentiary value, and before the process is complete, the sworn RFPD responses should include them.

Member Verdicts & Settlements

CCTLA members are invited to share their verdicts and settlements: Submit your article to Jill Telfer, editor of *The Litigator*, jtelfer@telferlaw.com. Submissions for the next issue need to be received by July 25, 2022.

VERDICT: $23,965,999
Motorcycle vs SUV Accident

CCTLA member Shafeeq Sadiq, of Sadiq Law Firm, P.C., prevailed on what appears to be the largest personal injury verdict in the history of San Joaquin County at $23,965,999. Factoring in costs and CCP 998 interest, the total judgment is expected to exceed $30 million in favor of the 36-year-old Plaintiff against Union Pacific Railroad Company (UPRR) and Central California Traction Company (CCTC) in a motorcycle vs. SUV case.

The defendant driver, an employee of CCTC, was driving a 2007 Ford Explorer leased to UPRR. Defendant turned left in front of Plaintiff, who was riding a Suzuki GSX750R motorcycle. The defendant driver alleged in written discovery that Plaintiff was speeding, weaving in and out of traffic and that he was passing on the right. Defendant also testified at deposition that he had stopped for a minute, waited for traffic to clear and then made his left turn. The black-box data revealed that Defendant driver did not actually stop, but instead slowed to 12 mph and began his left turn. Plaintiff's accident reconstructionist placed his motorcycle within the lane, at 30 mph prior to braking and at 22 mph at impact. Despite this, liability and causation were only admitted shortly before trial.

CCTC is a subsidiary of UPRR. UPRR owns two-thirds of CCTC's stock and controls two-thirds of the seats on its board. The Ford Explorer was leased by UPRR, even though it was being used as a CCTC company car. The general manager of CCTC was a full-time employee of UPRR and had never been paid a single paycheck by CCTC. The insurance policy for the Ford was paid for by UPRR, who denied that CCTC was its alter ego.

After a failed summary judgment motion, UPRR moved, *in limine*, to bifurcate on the alter ego issue. Their motion was granted, and Judge George Abdallah held a one-day court trial on the issue prior to the jury trial. He found that the corporate veil had been pierced and that CCTC was the alter ego of UPRR. The jury trial proceeded against UPRR, CCTC and Defendant driver.

Plaintiff suffered serious injuries as a result of the crash. His helmeted head hit the right A-pillar of the Explorer. A short list of his injuries include traumatic brain injury, hemiplegia due to a stroke that he suffered while in the hospital, facial fractures requiring hardware, a hip fracture requiring hardware, frontal lobe syndrome, and post traumatic depression and anxiety. The defense argued that Plaintiff made a good recovery considering his injuries and given that he was able to get married after the crash and able to take trips to Hawaii and Apple Hill.

Plaintiff was 30 years old at the time of the crash and was 36 at the time of trial. He had a four-year-old son and a three-year-old daughter, who are 10 and nine today. Because Plaintiff was not legally married at the time of the crash, there was no loss-of-consortium claim. Plaintiff and his family are Chicano and live in a poor area of south Stockton. Plaintiff and his wife both dropped out of high school after the 11th grade. They speak both English and Spanish at home. At the time of the crash, Plaintiff was making $15 per hour working maintenance at a warehouse.

After the first settlement conference, CCTC served a CCP 998 of $3.5M. After mediating unsuccessfully, Plaintiff responded with a $10M 998 on Dec. 27, 2019. CCTC then served a $5.5M 998 in 2021 and a $9M 998 in 2022.

Shortly before trial, UPRR finally disclosed a $30M excess insurance policy through Zurich. At the beginning of trial, Zurich offered $11M to settle on behalf of all defendants. The night before closing summation, Zurich offered $15M and informed Plaintiff that the offer would be withdrawn upon the first question received from the jury. The matter then proceeded to verdict.

TOTAL: $23,965,999: past loss earnings $225,432; future lost earnings $1,567,322; past attendant care services $594,465; future attendant care services $6,456,889; past medical expenses: waived; future medical expenses: $1,621,891; past non-economic damages: $5,000,000; future non-economic damages $8,500,000.

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VERDICT: $6,678,026
Motor Vehicle Collision

CCLA Past President John Demas and Board Member Kelsey DePaoli prevailed with a verdict of $6,678,026 in a rear-end motor vehicle collision on Interstate 5 near Patterson that occurred on November 21, 2016. Defendant was driving home from work in a company SUV. He was not in the course-and-scope of employment but he was covered under the company's Nationwide policy. When traffic stopped suddenly, Plaintiff 's fiancé, who was driving, came to a quick stop. The rear-end impact pushed them into the car in front of them and totaled Plaintiff's car as the airbags deployed with the second impact. Defense admitted liability and wanted to limit the facts of the collision. Judge allowed limited testimony about the crash as relevant to Plaintiff's general damages. Photos from both vehicles were admitted.

The plaintiff saw spinal surgeon Dr. Ardavan Aslie in December, 2017, and ultimately had a L5/S1 fusion w/hardware in October, 2018. She had a difficult recovery for a few months, but the surgery overall was a success. The only other treatment post surgery was some follow-up with the surgeon, X-rays and an S1 injection in June 2020. Plaintiff retained Dr. Lemons and life-care-planner April Stallings, and called Dr. Aslie as non-retained treater. Defense retained Dr. Ehsan Tabaraee, a local spinl surgeon who works through Meridian and does 100% defense work.

Verdict: past meds: $313,000 (everything I asked for; defense argued for 70k); future meds: $649,122 (everything I asked for; defense said zero); past generals: $940,00 (I asked for $940-$950k); I gave them a couple of options: I used the past meds as an anchor and told to multiple by three and gave an hourly per diem (defense said 50k); future generals: $4,775,000 (I asked for $4.775m to $5m; defense said 200k)

TOTAL VERDICT: $6,678,026 with $5.7 million of that in general damages. A two-year-old §998 which with costs will push the number to about $8,300,000. There are two policies in play, totaling $8,000,000. Defense offered $800k at the Mandatory Settlement Conference. Plaintiff made a demand on the first day of trial, good for one day, for $1.85 million. Defense countered with $1 million.

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VERDICT-$2.166 Million
Disability Discrimination

CCTLA Past President Lawrance A. Bohm, Kelsey K. Ciarimboli and Andrew C. Kim, of Bohm Law Group, scored another multi-million dollar win for California Healthcare Workers

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Member Verdicts & Settlements

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when UCI Irvine Medical Center was tagged with a $2.166-million disability discrimination verdict for a illegally terminated nurse. The psychiatric nurse was fired in 2013 for using FMLA and refusing to work with violent patients due to his industrial disabilities.

Case: *Peter Albrecht v. UC Irvine Medical Center,* Case No. 30-2013-00685473-CU-WT-CJC tried in Orange County in front of the Hon. Randell Wilkinson.

Plaintiff Peter Albrecht was a stellar psychiatric nurse. In 2007, he placed himself between a violent patient and two young medical students, undoubtedly saving his young colleagues from significant physical harm. In the process, he suffered multiple life-changing injuries, including a detached retina, a torn ACL and the exacerbation of a congenital back condition—forcing him to take multiple medical leaves of absence and have a knee replacement surgery.

Plaintiff returned to work, but he was physically disabled. Work restrictions prohibited Plaintiff from lifting, pushing or pulling greater than 50 pounds, and Plaintiff's doctor certified FMLA leave on an intermittent basis, one or two times per month for one or two days per flare up. Rather than support an injured worker, Defendant violated the law and university policy by terminating Plaintiff's employment because of his protected medical leave. Plaintiff sought and recovered past and future monetary losses and emotional damages.

After his termination, Plaintiff and his union grieved the decision but were unable to have the termination rescinded. By June 1, 2013, Plaintiff had given up hope and cashed out his UC retirement in an effort to mitigate his financial losses, and unemployed and disabled, Plaintiff was unable to afford living in Southern California. The termination exacerbated his back condition, and mental-health struggles led to a point of complete disability.

Plaintiff's sister testified to the immense physical and emotional impact the termination had on the plaintiff. Neuropsychologist Dr. Richard Perillo opined that the the termination caused a cascade of harm, including chronic exposure to stress, which ultimately caused physical changes to Plaintiff's brain. Plaintiff's economic expert determined Plaintiff's economic damages to be approximately $1 million.

Defendant denied any wrongful conduct and further asserted that even if it had discriminated toward Plaintiff, the university would have fired him anyway for violating the workplace attendance policy. Defendant also claimed Plaintiff was not harmed by the termination because he had pre-existing conditions and other stressors impacting his life. Defendant also claimed Plaintiff failed to mitigate his damages. The jury rejected all of these defenses.

TOTAL VERDICT: $2,166,000; economic damages: $1,016,000; non-economic damages: $1,150,000; counsel for University of California Irvine Medical Center: Sandra L. McDonough, Joanne A. Buser, and Eva Adel of Paul, Plevin, Sullivan & Connaughton, LLP; Plaintiff's experts: economist Charles Mahla, Ph.D.; vocational rehabilitation: Ricky Sarkisian, Ph.D.; and neuropsychiatry: Richard Perrillo, Ph.D.; Defendant's experts: economist: Brian Bergmark; psychiatrist: Mark Kalish, M.D.; and vocational rehabilitation: Roger Thrush, Ph.D.

Litigation Details: Action Filed November 5, 2013. Initial Trial Date: June 13, 2016. Appeal Opinion: August 23, 2018, Albrecht v. Regents of University of California (Cal. Ct. App.) WL 4042481. Second Trial Date: April 8, 2022.

CONFIDENTIAL SETTLEMENT-$2.7 Million
Vehicle vs. Dog Walker

CCTLA Board Member Daniel Del Rio, of Del Rio & Caraway, PC, successfully reached a confidential settlement of $2.7 million against a private mail delivery company when their box truck struck our client while she was walking her dog.

Plaintiff had approximately $400,000 in *Howell* medical specials, and the prelitigation offer was $750,000. Liability was not in dispute as it was conceded that the box truck was stopped at a stop sign, with the driver looking to the left for a break in traffic when driver accelerated to try to get through in the traffic without realizing Plaintiff was crossing the street in front of the truck, in the crosswalk. Plaintiff went to the ER two days in a row due to severe neck pain and then began chiropractic care before being referred out for pain management. Following unsuccessful injection therapy, Plaintiff underwent a multilevel spinal surgery.

The case was mediated in front of the Honorable David W. Abbott, retired. Defense attempted to argue that Plaintiff was comparatively at fault for not confirming the driver's attention, that disc abnormalities found on MRI were due to degeneration, that surgery was not necessary, and that future medical care was speculative. Mediation reached a successful confidential settlement of $2.7 million.

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ARBITRATION: $350,000
Loss of Consortium

CCTLA Past President Michelle Jenni, of Wilcoxen Callaham, LLP, successfully arbitrated a medical malpractice case against Kaiser, for the $250,000 MICRA limit for patient Plaintiff and another $100,000 for the husband on a loss-of-consortium claim. The case involved a 36-year-old woman whose OB/GYN recommended medically necessary labiaplasty due to ongoing pain and irritation due to unilateral labial hypertrophy. The OB/GYN said she did not do those surgeries but there were OB/GYNs within Kaiser who specialized in this type of surgery. The patient met with the "specialist" and agreed to move forward with the procedure. The procedure chosen by the surgeon involved excising a "v" shape, or a wedge, of tissue from the labia and then reapproximating the wound. Very shortly following the procedure, the incision completely broke down, leaving the patient with a large wedge defect in the labia and hypersensitivity in the area.

However, the "expert" that Kaiser provided the patient was only four months out of residency, and this was the first time she had performed a "wedge labiaplasty." There are two acceptable types of labiaplasty techniques: the wedge technique used by the surgeon and a much less complicated linear procedure. The surgeon never explained that to the patient, nor did she inform the patient of the differences in the difficulty of the procedure and the differences in the restrictions after healing.

Plaintiffs' expert, who fortunately had seen the patient for a second opinion within two weeks after the surgery, testified that based on what he observed at the time of his examination, the surgeon had not sutured the wound properly, causing it to come open. In addition, Plaintiff's expert testified that the surgeon had incised too deeply, removing too much skin and invading the nerve supply of the tissue. As a result, following healing of the area, claimant continues to suffer with labial disfigurement and chronic nerve pain to the present day.

Defense counsel was Christopher Lustig of Craddick, Candland & Conti. The arbitrator was Patricia Tweedy, Esq. Claimant's last demand to Kaiser was for $225,000 for both claimant and her husband. Kaiser offered nothing.

Document Discovery

Our Right to What's Left

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Capitol City Trial Lawyers Association
Post Office Box 22403
Sacramento, CA 95822-0403

CCTLA COMPREHENSIVE MENTORING PROGRAM — The CCTLA Board has developed a program to assist new attorneys with their cases. For more information or if you have a question with regard to one of your cases, contact: Dan Glass at dsglawyer@gmail.com, Rob Piering at rob@pieringlawfirm.com, Glenn Guenard at gguenard@gblegal.com, Chris Whelan at Chris@WhelanLawOffices.com or Alla Vorobets at allavorobets00@gmail.com

Thursday, May 19
Luncheon Webinar, noon-1pm
Topic: Deposing Persons Most Qualified (To Make Your Case): A Strategic Approach (with Nuts and Bolts on the Side)
Speaker: Bob B. Bale, Esq.
CCTLA Members Only: $25
1.0 MCLE credit.

Tuesday, June 14
Q & A Problem Solving Lunch - noon
CCTLA Members Only - ZOOM

Thursday, June 16
Problem-Solving Clinic Webinar, 5:30-7pm
Topic: Motorcycle Crash: How a Sole Practitioner Obtained a $24M Verdict in Stockton
Speaker: Shafeeq Sadiq, Esq.
CCTLA Members Only: $25
1.5 =MCLE credit

Tuesday, July 12
Q & A Problem Solving Lunch - noon
CCTLA Members Only - ZOOM

Tuesday, August 9
Q & A Problem Solving Lunch - noon
CCTLA Members Only - ZOOM

Tuesday, September 13
Q & A Problem Solving Lunch - noon
CCTLA Members Only - ZOOM

Thursday, September 22
Fall Reception benefitting
Sacramento Food Bank & Family Services
5 to 7:30pm at The Lady Bird House

CCTLA Calendar of Events