

# The LITIGATOR

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ISSUE 1

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## CCTLA transitions from all-virtual to partially virtual world

Hello to my fellow CCTLA members. It is my pleasure and honor to serve as your 2023 president. I'm looking forward to a great year. I would first like to thank David Rosenthal for his service as CCTLA president last year and all the members of the 2022 board for your service to CCTLA. Your hard work and dedication helped us begin the transition from an all-virtual world to a partially virtual one.

As we begin 2023, it appears that COVID-19 is going to be a part of our daily lives for the foreseeable future. Fortunately, it also appears there are fewer and fewer serious cases and deaths. As such, it is my goal to have as many of our programs conducted in person as is feasible this year, with a Zoom option, if possible. We have already resumed our monthly in-person board meetings at Wilcoxon & Callaham, with a Zoom option for those board members who prefer or need to meet virtually.

I would like to welcome our newest board members: Virginia Martucci and Chris Wood. Thank you for agreeing to join us and make CCTLA an even-better organization. Chris has already helped us in a big way, by allowing us to have the 2022 Spring/Fall Fling at his home last year.

As we welcome these two board members, we say goodbye to Noemi Esparza, who stepped down from the board towards the end of last year. Noemi was a dedicated board member who was always willing to volunteer and always provided valuable insight and perspective. Her contributions will be sorely missed.

We are pleased to be able to offer many of our regularly scheduled programs this year. We already held the Tort & Trial Seminar, which took place on Zoom. The presenters did an excellent job informing those in attendance of the important new laws from last year.

On March 10 and 11, the annual CAOC and CCTLA Sonoma Travel Seminar returns and will be at the Sonoma Mission Inn—entirely in person. Wendy York and I, but primarily Wendy, have collaborated with CAOC to provide a great program with interesting topics and a diverse panel of speakers, including several from CCTLA. It will definitely be worth the price of admission. Also, please remember that it is a fundraiser for both CCTLA and CAOC. You should have already received registration information by email. See pages 36-37 in this issue of *The Litigator*. and there will be additional emails forthcoming.

One of my main goals this year is to help CCTLA connect with the three local law schools to ensure the students know that many of our attorneys and law firms are viable employment options, in addition to the corporate firms and government employers. I



Justin Ward  
CCTLA President

See PRESIDENT on page 4

# NOTABLE CITES



By: Marti Taylor  
and Daniel Glass



## *In CASE you missed it . . .*

### *Unzeta v. Akopyan*

2022 2DCA/7 California Court of Appeal,  
No. B313215 (November 7, 2022)

Pre-emptory challenges cannot be used to excuse jurors associated with a disabled person.

**FACTS:** Zulma Unzueta sued Asmik Skopyan, M.D., for medical malpractice. The case proceeded to trial, and during jury selection, the court denied a Batson/Wheeler motion filed by the Plaintiff based upon Defendant striking jurors because of the disability of a potential juror's family member. The case proceeded to verdict, and the jury found that the Defendant was negligent in the care and treatment of Plaintiff but that the negligence was not a substantial factor in causing harm to them.

Plaintiff appealed, arguing that it was error for the court to deny the Batson/Wheeler motion.

**ISSUE:** Under California law, may counsel strike a prospective juror based upon the disability of the juror's family member.

**RULING:** The trial court erred in denying Unzeta's Batson/Wheeler motion. The case was reversed and remanded with an order for a new trial.

**REASONING:** Although the excusals of the jurors was "race neutral" and is impermissible pursuant to California Code of Civil Procedure Section 231.5 and Government Code Section 11135. Said code sections prohibit using pre-emptory challenges to excuse potential jurors based upon their sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental and physical disability, medical condition, genetic information, marital status or sexual orientation. Nor can a pre-emptory challenge be based upon the perception the juror possesses one of these characteristics or because of the juror's association with someone perceived to have one of these characteristics.

\*\*\*

### *Fajardo v. Dailey*

2022 2DCA/7 California Court of Appeal,  
No. B314031 (November 10, 2022)

Size alone cannot determine if a defect is trivial as a matter of law, all factors and circumstances must be weighed to determine if a defect is a dangerous condition.

**FACTS:** In December 2018, Salvador Fajardo was on a walk in his neighborhood when he tripped and fell on a lift in the sidewalk in front of Cynthia Dailey's home. Fajardo filed

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suit in August 2019 against Dailey, the City of Monrovia and the County of Los Angeles for negligence in maintaining the sidewalk.

Dailey filed a motion for summary judgment on the grounds that the dangerous condition amounted to a trivial defect. She submitted the declaration of an expert who opined that the sidewalk complied with all applicable codes and presented no unreasonable safety hazard. He further opined that the lift in the sidewalk created a rise of less than an inch, and thus the defect was trivial.

In opposition, Fajardo disputed the height of the defect and further argued that the displacement along with other aggravating factors made the sidewalk defect non-trivial. This included factors such as an asphalt patch that was deteriorated, jagged and uneven with irregularly shaped edges, cracks and loose pieces of asphalt. Fajardo argued that this constituted a defect that was not trivial.

The court found that any defect under 1-2 inches was trivial and thus granted summary judgement for the defendant. Fajardo appealed.

**ISSUE:** Is a sidewalk defect trivial as a matter of law based upon height alone?

**RULING:** Defendant did not meet her burden on summary judgment to show that the defect was trivial as a matter of law. Even if Defendant had proved her burden, the Plaintiff created a triable issue of material fact that precluded summary judgment. Judgment was reversed, and Plaintiff was ordered his costs on appeal.

**REASONING:** Height alone is not determinative as to

See NOTABLE CITES on page 43



# Checking Your Gut: The Value of Focus Groups

By: Robert Nelsen

Peter Drucker, the founder of modern management, once said, “What gets measured, gets managed.” As trial lawyers, we know that our client’s eventual fate lies in the hands of 12 jurors whom we haven’t met before. In the buildup to that trial, we will have to make many strategic decisions that may, intentionally or not, determine the outcome of that case. Whether it is trial strategies, theme development or settlement decisions, our clients look to us to make the right decisions. How do we, as lawyers/advocates, do that when we are playing a game of chance?

Focus groups are a tested forum for trial lawyers to do evidence-based data gathering that will give you—and, by proxy, your client—a better sense of what those odds are. And I believe it makes you a better lawyer in the process.

I recently had the pleasure of working with Kate Ebert on a few focus groups. She is an associate at John Demas’s office. Prior to working there, she spent five years of consulting work with Focused Decisions where she put on mock juries and jury research for the plaintiff and defense bar to help with theme and theory development. I found her experience to be incredibly valuable and would recommend her services to anyone.

## What Is A Focus Group?

Focus Groups began in the 1940s as a means of doing market research for advertisers. They later gained recognition in the social sciences and, later, in usability engineering as a key medium for gathering qualitative data to try to predict how people will react to information or products. They are used by marketing professionals, politicians, software engineers, etc. It is also an aide for most of the top trial lawyers in our field.

Ognian Gavrilov did

numerous focus groups before his massive \$39-million verdict in Glenn County back in September, 2021. John Demas did two focus groups ahead of his big \$3.3-million verdict in a low-speed (3-4mph) rear-end crash case in October, 2022. Brian Panish, in seminars, regularly preaches using multiple focus groups. David Ball literally wrote a book and made a DVD specific to focus groups. The list goes on. It is a common trait of the biggest and best trial lawyers. But that doesn’t mean you need to have an eight-figure case to do one or even that you expect to go to trial on a case.

## When To Use a Focus Group?

While a lot of people think that a focus group is something you should do before trial, I would implore plaintiff lawyers to consider implementing focus groups as early and often as possible. One of the focus groups I did recently involved a very difficult causation/exacerbation case with a plaintiff who needed low-back surgery and, prior to my representation,

was coming up on mediation with some dishonest medical reporting. I obviously didn’t want to sell my client short, but I was also weary of signing that \$200k surgical lien without feedback on causation.

The mock jury saw a brief exam of my client, got to see a brief causation video from Plaintiff’s treating spine surgeon, as well as a few clips from the video deposition of the defense’s medical examiner. The feedback was invaluable. While the case did settle at mediation for a good result, the data was profoundly valuable in helping me know how best to advocate for my client. It also presented some themes that were used at mediation to get more value out of the case.

My firm also handles a lot of employment cases, many of which have numerous causes of action. We have used focus groups to decide whether it makes sense to drop a cause of action (with the clients consent, of course) so that it doesn’t distract from the bigger picture. I have also heard of lawyers using focus groups to make decisions about their demonstrative exhibits, testing how a *motion in limine* ruling might impact a jury’s decision, etc.

## What Makes for a Successful Focus Group

A good focus group really needs to come from a neutral place to ensure that the mock jury panel is comfortable sharing their overall impressions of the issues of your case, not

See FOCUS GROUPS, page 4



Robert Nelsen,  
Tower Law Group,  
is a CCTLA Board  
Member



# Focus Groups

*Continued from page 3*

simply nodding along with your argument. For this reason, it is often recommended that you—the plaintiff lawyer—play the role of the defense attorney in your case.

I can speak from experience that the process was extremely helpful to my growth as an attorney as well as my knowledge of my case. Having to stand up in a room full of strangers and put on the defense's case may feel a bit gross to us justice warriors, but no one wants to look like a fool. So, playing the role of the defense attorney really forces us to embody the defense arguments and embrace how they can effectively communicate their interpretation (or manipulation) of the facts. If a defense argument feels right coming out of your own mouth, maybe that's an argument you should be worried about.

Another key factor to a successful focus group is a strong moderator. In my recent focus groups with Kate Ebert, she acted as the moderator. She prepared the focused written questionnaires that the mock jury would fill out after hearing a neutral presentation on the case, then again after the plaintiff argument, and finally, again after the defense argument. These really honed in on the key information I was looking for in feedback and provided me with a sense of which pieces of information or arguments changed



the mock jurors' minds. Then the group discussion at the end really helped get a further look into their decision making.

As is always the case, the success of a focus group will really depend on how much work you put into it. And it is worth taking the time to limit the number of issues the mock jury will be deciding to make sure you get some reliable data to work with. Since your mock trial is only going to be a fraction of the time that a real trial will be, the more honed in you are in the disputed points, the better your outcome will be.

## The Best Results

In truth, there is no bad result that comes from a well-executed focus group.

Even if the feedback is negative for your case, that feedback will help you develop a new strategy to overcome that issue, or, at the very least, give you some data to use in your settlement calculation. That data will also give you a better sense of what type of jurors are going to be problematic for your case, should you still have to go to trial.

Sometimes the best results are the ones that never occurred to you. I recently did a focus group on a premises liability case with fairly clear liability facts and a video of the incident. The goal of the mock trial was to focus on causation, but one ancillary detail that came up during the discussion showed that a glare in the video prevented the jury from getting a full grasp on the area where the incident occurred. This suggested to them that my client was comparatively at fault. I had seen the videos so many times that this glare never stood out as an issue for me. This is a case that will likely go to trial, so I will have to ensure that the jury gets to see the other angles of the video before the one I showed to the mock jury to ensure this jury doesn't make the wrong pre-suppositions.

While it is important for trial lawyers to listen to their gut, it is just as important that we not put all of our faith in it. We have to gather as much data as possible to ensure our client gets the soundest advice. To that end, I would encourage each and every one of you to participate in focus groups as regularly as possible.

# President

*Continued from page one*

am very appreciative of Margot Cutter stepping up and leading the Membership Committee this year. It is our goal to host events with students from all three local law schools. We are scheduling an event with Lincoln Law School soon, and we also are planning events with UC Davis and McGeorge this year.

Daniel Wilcoxon will be conducting a Lien Seminar on Friday, May 12, from 10am to 2pm at McGeorge. Dan is one of the most knowledgeable attorneys in the state when it comes to how to resolve liens, and he has conducted prior lien seminars. Donald DeCamara and John Rice will be presenting with him. This is a seminar you definitely do not want to miss! It is well worth the price of admission because all attendees will receive a

booklet of sample lien reduction letters, case law, and other materials that have helped attorneys save their clients millions of dollars.

Daniel Glass and other CCTLA attorneys continue to host Question and Answer (Q&A) virtual luncheons once a month over Zoom. These Q&As are great for getting questions answered by seasoned attorneys in a judgment-free space. If you're not sure about something, write it down and ask about it at the Q&A. Also, if you think you might have something to add, please attend the Q&A to share your knowledge. Please check the calendar on the back page of *The Litigator* or the listserv for Q&A luncheon dates.

We are planning seminars, programs and events in addition to the ones mentioned here, including our annual Spring Reception & Silent Auction, our holiday

party, and more.

The CCTLA board and I would like to hear from you, our members. We want to make sure we are providing programs you want and in a format you are comfortable with. To that end, a survey has been sent to all members on the listserv. Please take the time to participate; there are only a few questions, and your responses will help CCTLA better serve you. You can also email me or any other board member directly to share your thoughts about past programs or programs you would like to see in the future. You can call (916) 443-2474 or email me at [justin@jlwardfirm.com](mailto:justin@jlwardfirm.com).

Finally, I want to thank each and every member of CCTLA for fighting for the rights of those who deserve justice. I am proud to lead this organization and stand alongside you.





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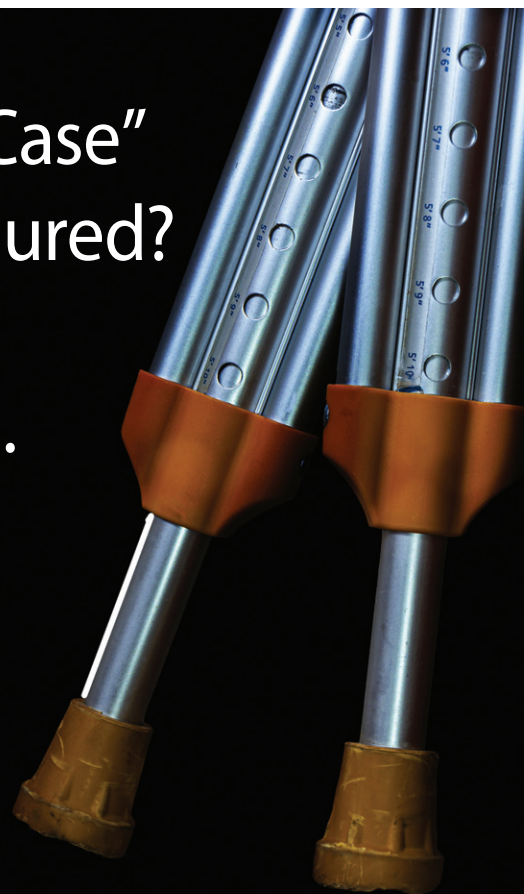
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# Are You “Working Up a Case” or Advocating for the Injured?

## Knowing the Medicine...

**By: Kelsey DePaoli**

Kelsey DePaoli,  
Law Office of Black & DePaoli,  
is a CCTLA Board Member



Are you “working up your case”? What does that mean? What does it look like to have your client’s case “worked up.” Many of us receive allegations from defense attorneys, stating, “It is attorney led care” or “treatment is driven by their lawyer” or “the lawyer is working the case up.”

In the world of personal injury lawyers who represent people who come to us in pain and who don’t know what to do next, we are placed in a unique position to help guide our clients with medical care.

Sometimes they don’t have a doctor; sometimes they don’t understand what the doctor said, and sometimes they feel like they are not getting the treatment they need since the pain won’t go away. When we help them with their care, does this mean that in a negative sense that we are “working up the case”, or are we helping an injured person who doesn’t know where to turn?

We all hear arguments from the defense stating that our client didn’t go by ambulance, they waited to be treated, their pain levels were low initially so they were not “that” hurt. Or, that the find-

ings in the MRI are all age-related and not from trauma. We know this is simply not true. Injuries come in all forms, and they develop differently for many. There are reasons that people wait to be treated; there are reasons people refuse to go by ambulance, just as there are reasons pain gets worse over time.

We as lawyers representing the injured need to make sure we lead the insurance adjuster, adverse lawyer, or jury on the path to understanding this. Let’s ask ourselves what it means if someone refused an ambulance or waited to get care, or if they chose conservative care before seeking pain management or surgeon? Think about you, or someone close to you.

The general population doesn’t want to believe they are seriously injured, even if they are. They don’t want to think about surgery, hospital stays, being off work, away from family, the million things on the to-do list, not to mention the expense. Do they have health insurance, what is the deductible? Maybe a large bill will send them over the edge, or they simply don’t have the money. Maybe their culture or mindset is to push through

pain, or they can’t spend the time off or away from other duties. It is not out of the ordinary for injured people to try and rest and seek limited care, hoping that they are not seriously hurt and that the pain will go away.

Most of us doing personal injury are dealing with spine-injury cases. These are very serious injuries that can affect a person’s quality of life for the rest of their life. Thus, it is critical to have a working knowledge of these injuries. We must never stop learning medicine and how to apply it to our cases. If we are taking these cases, and the medical becomes intimidating, we need to discuss it with lawyers who have a better understanding. We need to talk to the doctors who are willing to spend the time to teach us. We need to do the research.

We cannot adequately represent injured parties without having a good understanding of the medical treatment. This does not mean you need to be familiar with all the medical articles out there. We are lawyers, not doctors. But we need to have the ability to articulate the injury and the care that was required and

*See ADVOCATING, page 8*



# Advocating

*Continued from page 7*

rendered.

Many times, after a crash or some type of spine injury, the initial care is what we call “conservative care,” consisting of medication, rest, ice, chiropractic, physical therapy, or some type of HEP program. When clients who have spine injuries seek treatment, it is not uncommon for those injuries to be missed, or undiagnosed. Many only get X-rays; however, most of the injuries we encounter won’t be revealed on an X-ray but rather require an MRI to evidence those injuries.

What we need to understand and teach is that all bodies react differently to injury. That all herniations, impingements, etc., feel and look different. A disc’s primary function is a joint that allows for slight mobility in the spine. When it gets out of position, it can do many things, including compressing a nerve immediately or slowly over time.

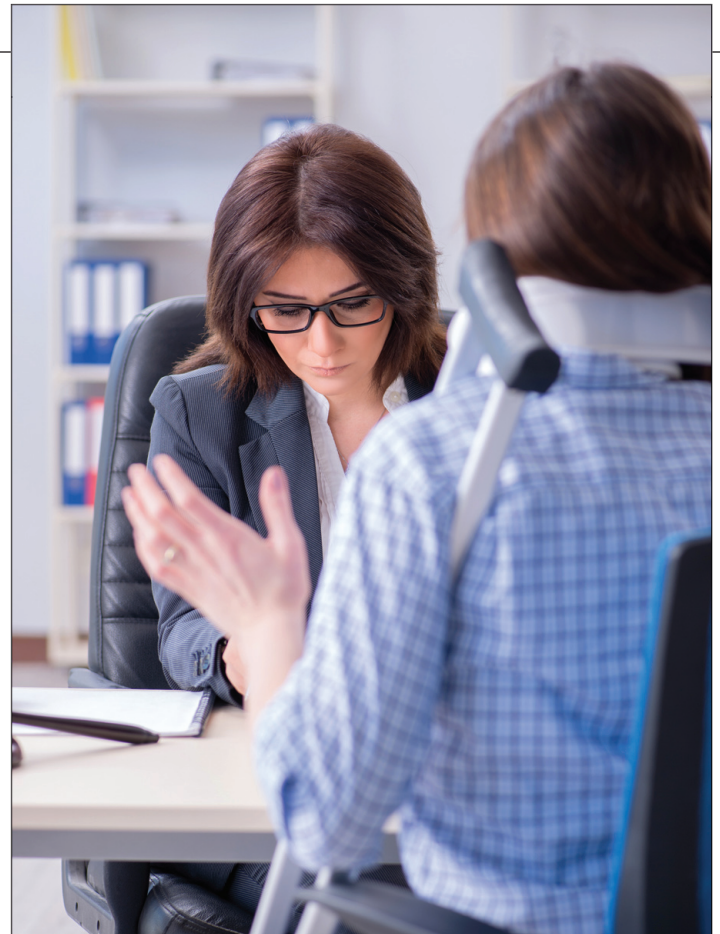
For many, the inflammatory process brought on by trauma may take hours or days. It simply may not push on a nerve at first, but over time it worsens and results in radicular symptoms. An X-ray will not show this, and an MRI is the best tool to reveal what’s truly going on.

Sometimes, as time goes on, the pain gets worse. It is also important to understand chronic pain. Sometimes the pain may not actually be getting worse, but the patient is becoming less tolerant of the pain. Sometimes it is the actual pathology progressing, but in other cases, it can be that the client has been in pain so long that their coping mechanisms for the pain are no longer there. This is important to understand, especially when teaching a jury about pain and treatment choices.

What if the MRI does not match the subjective complaints? We all must deal with this as well. Does a negative MRI mean they are not injured or not in pain? Of course not. Sometimes MRIs do not reveal all the damage to a disc or nerve, and there is a possibility that there is an injury to a facet joint. This means that your client might need your help digging into the “why” of their pain even more. If it is a facet injury, they need a pain doctor to do some diagnostic studies to determine if that could be the issue. They may need nerve blocks, radiofrequency ablations and they might get a lot of relief, but often times those nerves grow back and they will need ongoing intervention for pain.

Thus, this negative phrase and inference that we, as lawyers, are “working up a case” is unfounded. Maybe we are simply working on the case as we should be, in the best interests of our client. Perhaps we should not be frustrated or offended by the phrase since we understand that it means we know the medicine and know how to help advocate for our client’s health. It means that we are doing our job to aid our clients to be as pain free and as medically stable as possible.

The bottom line is we are advocates for the injured and are responsible for their well-being. We need to be familiar with the injuries when we take the cases, and we need to be willing to teach others why there may have been a delay or hesitation in care. We are not leading the care, but rather advocating for our injured clients who are in pain and don’t know what to do. Know the medicine, and don’t be afraid to have others help you.



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# Deal or No Deal?



## Newly Enacted CCP Sections 999.1 et. seq. in Civil Code

From 2005-2010, NBC had a television game show called “Deal or No Deal.” The premise of the show, which was hosted by Howie Mandel, was that there were 26 very shiny metal briefcases. Each case had a dollar amount inside, ranging from one cent to one million dollars. At the beginning of the show, the contestant got to pick one of those shiny cases. He or she now owned that case and whatever dollar amount was contained therein. However, the contestant could not open the case until the very end.

In the meantime, the other 25 cases were on display and were held by attractive young women—beautiful people holding beautiful cases with unknown amounts of money (actually, no cash, just a number). The contestant had to pick cases—sometimes one at a time, sometimes multiple, and those cases had to be opened to display their dollar amount. By displaying the dollar amounts in the 25 display cases, the contestant then knew that those displayed amounts were NOT in his/her case.

After a series of cases were opened and displayed, a mystery “banker” would call Howie Mandel and tell him that the mystery banker would buy the contestant’s case and put an end to this episode for “X” dollars. The amounts for all cases which had been opened are displayed. Needless to say, if, for instance, the \$1,000,000; \$750,000 and \$500,000 cases had already been opened, then, by elimination, the contestant’s case could not contain those numbers, and his/her case

could not be worth \$500,000 or more. So the banker offers numbers that are less, and the contestant must either take what is offered or take a chance on the value of his/her case. The process continues with multiple offers. If the high-value cases have not been opened and disclosed, they might be in the contestant’s case, and the banker’s offers might go up.

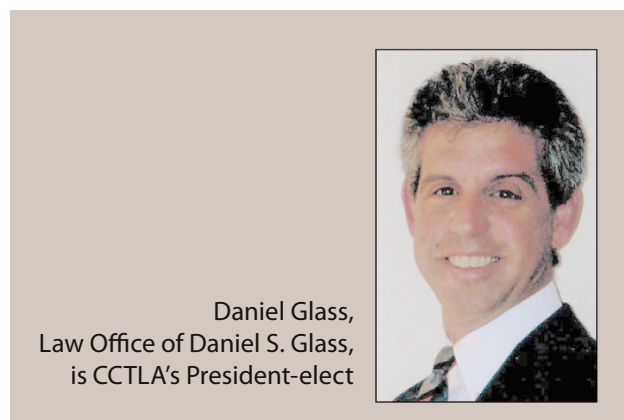
Isn’t this EVERY ONE OF YOUR CASES? As a lawyer, you sign up a new client, and hence, you now have your “shiny new case.” You think you know what’s in your case, but as your lawsuit moves forward, things change—your client might need surgery, so the value hidden inside your case just went up. Then you find out the amount of insurance the defendant has, and you might stay and play or take the DEAL, i.e., take the policy limit and run. Defendant insurance company has your client examined—and they say, no surgery necessary; in fact, it’s merely “soft tissue.” So the value of your case goes down—at least according to the insurance company—and the insurance company mystery “banker” offers you something to purchase your “case.” NO DEAL.

If at some point there is agreement—DEAL—case sold. If not, trial and 12 strangers decide what was inside your “case.” Could be the \$1,000,000 or the \$0.01 . . .

Of course, ours is a game of insurance. Who needs a \$10,000,000 verdict against a person who has no insurance, works for minimum wage and cannot pay? A long time ago, insurance companies and their attorneys used to try to settle cases. Now, there are no settlement discussions without a mediator, and, although we have always been parties to an “adversary system,” today’s litigation is much more adversarial than it was 20 years ago. When was the last time you served a Code of Civil Procedure section 998 Offer to Compromise and did not receive objections in response? For that matter, even the noticing of depositions seems to be met with objections.

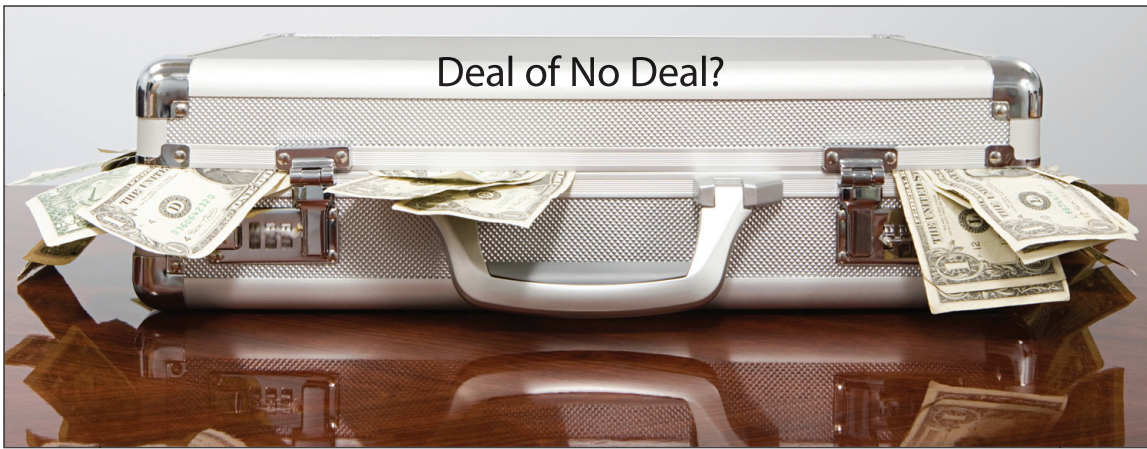
Insurance companies are supposed to act fairly and reasonably. Without a doubt, they must treat their insureds fairly and reasonably or be subject to actions for “bad faith” in addition to breach of contract. However, since the Supreme Court

*See DEAL, page 12*



Daniel Glass,  
Law Office of Daniel S. Glass,  
is CCTLA's President-elect





the Legislature even used the word “clear,” how can a plaintiff make a demand “within policy limits” if the insurer has not disclosed the policy’s limit? Maybe in the \$10,000,000 injury with a \$50,000 policy limit, it would be “clear” and the insurer has to call up and say, we only have \$50,000 and here it is.

## Deal

*Continued from page 11*

of California decided that the insurance company does not have the same duty of fairness and reasonableness towards “third parties” (see Moradi Shalal v. Fireman’s Fund (1988) 46 Cal.3d 287 which overruled Royal Globe Ins. v. Superior Court (1979) 23 Cal.3d 880), insurers have mostly been unreasonable in their approach to third-party claims.

In an attempt to put third-party bad faith back in play, plaintiff’s counsel has utilized the concept of settlement, stipulated judgment, covenant not to execute and assignment.

They (we as plaintiff’s counsel) have also made demands on insurers for “policy limits” in many circumstances, hoping that the insurer would not pay that which was obviously due so plaintiff’s could assert that the stated policy limits were no longer the maximum amount the insurer would have to pay for the claim, or eventual judgment. NO DEAL - let’s go to trial now that the “lid is off the policy.”

But, not so fast... Last year, a Court of Appeal decided Pinto v. Farmers Insurance Exchange (2021) 61 Cal. App. 5th 676 - a case which, on the one hand stood CACI 2334 “on its head” by requiring the trier of fact to make a specific determination as to whether the insurer’s conduct was “unreasonable” when it was presented with a “reasonable” demand for settlement within policy limits. (See The Litigator, Spring 2022 issue for a discussion of Pinto). In effect, the Court of Appeal added an element to the Special Verdict Form which was simply not there.

Well, it appears that in response to Pinto, which overwhelmingly helped insurers avoid exposure to an “open” policy, the Legislature decided to codify

a procedure for “time limited demands” with Senate Bill 1155 and the creation of Code of Civil Procedure sections 999.1 et. seq.

I do not know if these sections were a “defense” or “plaintiff” idea, but it seems that they are just going to lead to another point of contention. Like the multiple objections asserted in response to Code of Civil Procedure sec. 998’s, I predict there will be multiple delays and objections to all “limited time demands” made under these statutes, and it will ultimately result in more, and not less, “bad faith” litigation where there is a verdict in excess of the stated insurance policy limits, and here’s why.

The premise of the sections, as stated in SB 1155, is to provide a framework to settle a liability claim. As a practical matter, it will eliminate the potential “game playing” discussed in Pinto where plaintiff’s counsel had a client with a \$10,000,000 injury and, knowing that there was inadequate insurance coverage, tried to create a situation where the insurer would be liable for damages far in excess of the policy limits through a time limited demand sent via U.S. Mail, which had to be accepted in 15 days. Those 15 days included the July 4th holiday, giving the insurer what was probably an unreasonable 10 or less days to make a decision.

The only clear part of CCP sec. 999.1 is that the insurer MUST be given no fewer than 30 days to act on the time limited demand. (Subd. (a).

Subd. (b) is opaque, rather than clear. It requires the demand to have a “clear and unequivocal offer to settle all claims within policy limits, including the satisfaction of all liens.”

While that might appear “clear,” and

But in most circumstances, the insurer’s claim representative mantra is—We cannot tell you the insurance policy limits without permission from our insured, so we will contact them and get back to you, and maybe we can do it in 30 days, but we need more time—This is the first level of “delay” which will be asserted by the insurer.

The conditions set out in subdivisions (c), (d), (e) and (f) can most likely be met without much issue.

However, subdivision (g) is the top of the “slippery slope” of compliance. It requires that the “time limited demand” provide “reasonable proof, which may include, if applicable, medical records or bills sufficient to support the claim.”

As a practical matter, plaintiffs will provide directly relevant medical records and the full cost of medical care. Insurers will undoubtedly counter with “we want the “Howell” number and ALL medical records so we can decide what is relevant.” Hence, the first question on the ultimate Special Verdict form: Did plaintiff provide reasonable medical records and bills to support their demand? If the answer turns out to be “no,” so much for the “open policy” and you had to try the case to get there. Also, realize this is your SECOND trial. The first one was to get the verdict in excess of policy limits. You got there by playing the “game” and standing on NO DEAL, no matter how much the mystery banker (insurance company) offered over the past few years.

Code of Civil Procedure sec. 999.2 is another interesting twist. It directs the claimant to send the time limited demand to either the claim representative, if known (subd. (b)), or to the e-mail address or physical address designated by the liability insurer to the Department of

*See DEAL, page 13*

# Deal

Continued from page 12  
Insurance.

Amazingly enough, many insurers have complied with this directive and have provided information to the Department of Insurance—and—the department's website readily directs you to a "Notice" which was sent to insurers seeking addresses (<http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/sb-1155-insurer-designated-addresses-for-time-limited-demands.pdf>). It also directs you to the actual address list for insurers. <http://www.insurance.ca.gov/01-consumers/upload/SENATE-BILL-1155-update-1-26-23.pdf>

The list is six pages in length, and most physical addresses are not in California. Hence, the "set up" for a cry of "Wwe need more time." Most companies have an e-mail address. However, and most notably, three of California's biggest automobile insurers: USAA, Interinsurance Exchange of the Automobile Club and GEICO, do NOT provide an e-mail address.

Midway through the "slippery slope"

is CCP sec. 999.3 - acceptance of the demand. An insurer may accept the demand in its entirety. (Subdivision (a)—easy, one would think - just say DEAL). I am sure the insurers will, in the most obvious of cases. But, if there is any hesitation.....i.e., maybe the damages aren't that great (in their opinion) or there are liability issues - NO DEAL..

What (a) might give in clarity, subdivision (b) takes away. This subdivision permits the insurer to seek clarification or additional information or an extension of time due to the need for further investigation. I do not know about your practice, but I rarely, maybe never, have a case where I file the civil action, serve it and defendant answers the complaint within 30 days of service. I say 99% of my cases result in either my need to threaten default to get an answer on file or a last minute call from defense counsel who says they just received the case and they need more time to respond.

If I was able to predict the future, my bet is on the fact that most, if not all, insurers, upon receipt of a time limited demand, are going to have a "form letter"

where the claim person just fills in the blanks to request extensions and/or more information to delay the process and make sure that nothing will really happen within 30 days. Besides, CCP sec. 999.3(b) gives the insurer a "free pass" on time since the section specifically states that requests for extension and/or more information shall not, in and of themselves, be deemed a counteroffer or rejection.

The final slide down the slippery slope of whether plaintiff's compliance with the statute will be

challenged is Code of Civil Procedure sec. 999.4(a):

"In any lawsuit filed by a claimant, or by a claimant as an assignee....a time limited demand that does not substantially comply with the terms of this chapter shall not be considered to be a reasonable offer to settle ....within the insurance policy limits for purposed of any lawsuit alleging extracontractual damages against the tortfeasor's liability insurer."

This section can, in my opinion, only lead to a Motion for Summary Judgment, for a pretrial determination, as a matter of law, whether everything plaintiff's counsel sent to the insurer "substantially complied" with the statutes.

In summary, I cannot understand how these statutes are helpful to plaintiff attorney's practice of law. The statutes attempt to codify what is a valid "time limited demand," but they give the insurer so many avenues to challenge the demand that the only way the insurer's conduct will end up before a jury is if the conduct was egregious. Minor delays of 30 or 60 more days are going to be routine. If plaintiff's counsel does not give more time or more documents, they will be cast as the "unreasonable" litigant.

I suggest that these "time limited demands" are still a necessary part of plaintiff's case and plaintiff attorney's practice of law. Perhaps, since there obviously are no cases interpreting these very new statutes, I suggest that plaintiffs making these time limited demands keep a copy of the Fair Claims Settlement Practices Regulations (10 CCR sec. 2695.1, et. seq.) handy when writing the initial demand and when responding to the insurer's requests for more time and/or more information. Specifically, 10 CCR sec. 2695.4(a), which requires an insurer to disclose to a first-party claimant all benefits and coverage that is available (Does not apply in third-party cases but might be persuasive). Section 2695.5(b), which requires an insurer to respond to communications, including those from a claimant, within 15 days, and section 2695.7 - Standards for Prompt, Fair and Equitable Settlements.

As Tarzan used to say, it's a jungle out there, Jane.... let's all be precise, make the best of these statutes and maybe the insurers will find a way to act promptly and in their insured's best interest—to avoid exposing themselves to significantly more payouts than they bargained for.

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# Is Civil Code §3045.1 et. seq. constitutional when a hospital seeks to bill its full charges for care of a minor who is a Medi-Cal beneficiary?

*A real case with names changed*



By: Daniel E. Wilcoxon

Daniel Wilcoxon,  
Wilcoxon Callahan, LLP,  
is a CCTLA

Board Member and Past President

**Editor's Note: The "exhibits" referenced in this article are not actually included; the notations are retained to indicate the exhibits were used in preparing the article.**

Attached hereto as Exhibit 1 is the declaration of Mary Jones, the mother of Kyle Jones and Raymond Jones. She states that on or about June 20, 2021, at approximately 6:30 p.m., Joseph Johnson was driving a Nissan Altima, license no. 5BAD752, on Manzanita Avenue through its intersection with Cohasset Road approaching Pillsbury Road in Chico, California, when Johnson was blinded by the setting sun, causing him to lose control of his vehicle, leave the roadway and strike a double stroller being pushed by Mary Jones with three-year-old Kyle sitting in one seat and two-year-old Raymond in the other seat. Jones was able to avoid being struck by the car, but the vehicle driven by Johnson struck the stroller, injuring Kyle and Raymond. (See the police report pertaining to the incident, attached hereto as Exhibit 2)

Mary Jones, Kyle and Raymond are

all insured by the Medi-Cal program. First Responders EMS Inc. responded to the scene and transported Kyle and Raymond to Enloe Medical Center for treatment and care. EMS Inc. charged \$3,355.01 for Kyle's transportation and \$3,280.01 for Raymond's transportation, all paid by Medi-Cal (Exhibit 3). Enloe Medical Center billed Mary Jones the total sum of \$71,795 for the medical treatment provided to Kyle, despite the knowledge that she and her children were insured under Medi-Cal (Exhibit 4). The hospital listed "Unlisted Auto Insurance Adjustments" of \$51,795 as the amount they anticipated collecting from Johnson's insurance policy (Exhibit 5). Kyle was also billed \$2,797 under "Unlisted Auto Insurance" by Enloe Medical Center (Exhibit 6). Also attached are Health Insurance Claims forms created by Enloe Hospital for both Kyle and Raymond showing that during

the above referenced treatment Enloe Hospital knew they were insured under Medi-Cal (Exhibit 7).

Despite the knowledge that all of the injured parties were insured by Medi-Cal, Enloe Hospital is now attempting to obtain 50% of the net proceeds available to Raymond and the full billed amount from Kyle in proposed litigation that could arise from the auto-collision, from Johnson's Jipo, Inc. insurance policy of \$50,000/\$100,000 covering the automobile driven by him at the time of the accident.

## Points and Authorities in Support of Quashing Lien

Welfare & Institutions Code § 14019.4, subdivision (a) states in pertinent part, "A provider of health care services who obtains a label or copy from the

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# Real Case

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Medi-Cal card or other proof of eligibility pursuant to this chapter shall not seek reimbursement nor attempt to obtain payment for the cost of those covered health care services from the eligible applicant or recipient, or a person other than the department or a third-party payor who provides a contractual or legal entitlement to health care services.”

Subsection (c) states in pertinent part, “In addition to being subject to applicable sanctions set forth in law or regulation, a provider of health care services who obtains a label from, or copy of, the Medi-Cal card or other proof of eligibility pursuant to this chapter, and who subsequently pursues reimbursement or payment for the cost of covered services from the beneficiary or fails to cease collection efforts against the beneficiary for covered services as required by subdivision (d), may be subject to a penalty, payable to the department, not to exceed three times the amount payable by the Medi-Cal program.”

The Third District Court of Appeal case of *Palumbo v. Myers* (1983) 149 Cal. App.3d 1020, 1022, held, “Welfare and Institutions Code § 14019.4, subdivision (a), prohibits a physician from attempting to obtain payment for the balance of his fee from any person except a ‘third party payor who provides a contractual or legal entitlement to health care services.’ The question turns on whether a tortfeasor is such a statutory third-party payor. The trial court held that the phrase ‘contractual or legal entitlement’ did not include tort recoveries and that plaintiff therefore could not recover the balance of his fee from the patient’s personal injury settlement. We agree and shall affirm.”

Page 1024-1025 in said case also stated, “The Department further argues that a provider of Medi-Cal services may not ‘balance bill’ under any circumstances where the service in question was a covered benefit of the Medi-Cal program as to that beneficiary. We conclude that

the Department is correct on both counts.”

The *Palumbo* court stated at page 1025, “Title XIX of the Social Security Act authorizes the federal Secretary of Health and Human Services to make payments to states whose medical assistance plans meet the requirements of the federal statute. (42 U.S.C. § 1396; *Morris v. Williams* (1967) 67 Cal. 2d 733, 738-739.) The required contents of state plans for medical assistance are set forth in 42 United States Code section 1396a. Under that federal statute the plan must provide ‘such methods of administration ... as are found by the Secretary to be necessary for the proper and efficient operation of the plan ....’ (42 U.S.C. § 1396a(a)(4)(A).) One of those methods of administration found necessary and proper is contained in 42 Code of Federal Regulations, section 447.15 (1982): ‘A State plan must provide that the Medicaid agency must limit participation in the Medicaid program to providers who accept, as payment in full, the amounts paid by the agency.’ In compliance with this federal regulation, California adopted Welfare and Institutions Code § 14019.3, which decrees that ‘Payment received from the state in accordance with Medi-Cal fee structures shall constitute payment in full.’ These restrictions are commonly known as the prohibition against ‘balance billing.’”

The California Supreme Court case

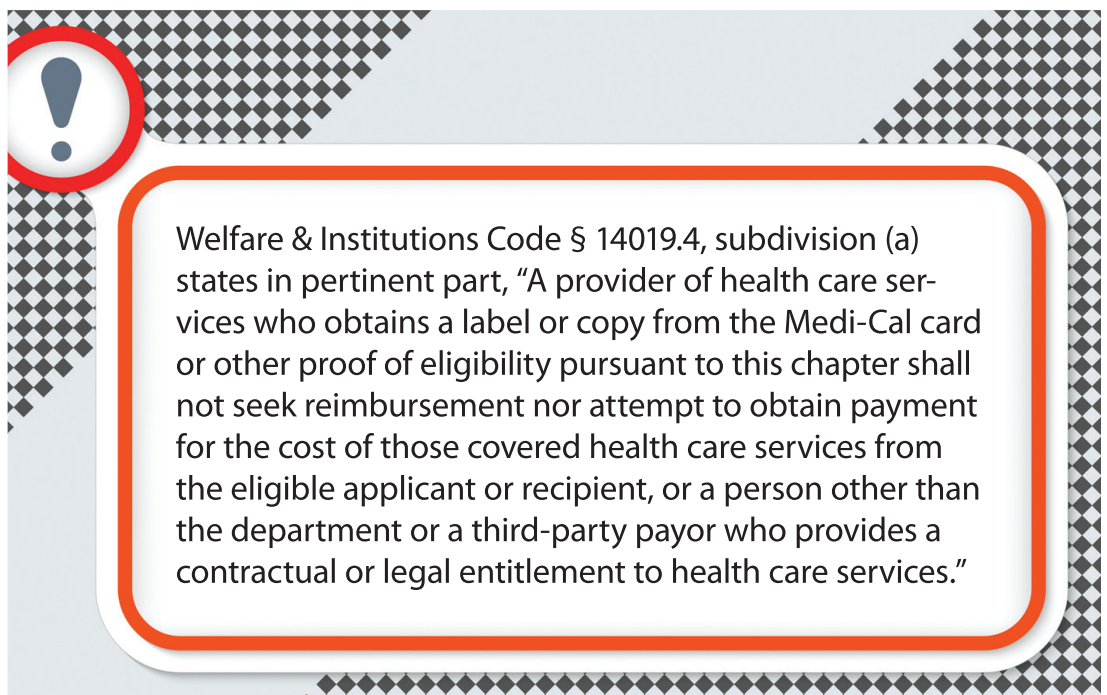
of *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798 considered whether or not CA Welfare & Institutions Code §§ 14124.791 and 14124.74 were preempted by the United States laws based on their conflict with Medicaid statutes intended to pay for medical care for low-income families. “Olszewski (plaintiff) is a minor and a Medi-Cal beneficiary who received emergency medical care from Scripps Health (defendant), a medical care provider that participates in the Medi-Cal program.” “...Medical Liabilities Recoveries, Inc. (MLR) (collectively defendants), also asserted a lien against ‘the personal injury claims, judgments or settlements of plaintiff pursuant to **Welfare and Institutions Code § 14124.791 and Civil Code § 3045.1.**’” (p. 806) [Emphasis added]

*Olszewski*, at page 809, stated:

“Plaintiff concedes that California law permits provider liens against ‘the personal injury claims, judgments or settlements’ of Medicaid beneficiaries. She, however, contends these liens, **such as the liens filed by defendants, are unenforceable because federal law preempts the statutes authorizing these liens. We agree.**”...[Emphasis added]

“The Medicaid program . . . is a cooperative endeavor in which the Federal Government provides financial assistance to participating States to aid them in

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Welfare & Institutions Code § 14019.4, subdivision (a) states in pertinent part, “A provider of health care services who obtains a label or copy from the Medi-Cal card or other proof of eligibility pursuant to this chapter shall not seek reimbursement nor attempt to obtain payment for the cost of those covered health care services from the eligible applicant or recipient, or a person other than the department or a third-party payor who provides a contractual or legal entitlement to health care services.”



# Real Case

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furnishing health care to needy persons. Under this system of ‘cooperative federalism,’ [citation] if a State agrees to establish a Medicaid plan . . . the Federal Government agrees to pay a specified percentage of ‘the total amount expended... as medical assistance under the State plan. ...’ (See *Harris v. McRae* (1980) 448 U.S. 297, 308.) Participation is voluntary, but ‘once a State elects to participate, it must comply with the requirements of Title XIX.’” (Id. at p. 301.)

At page 811, *Olszewski* stated:

“Because ‘Medicaid is essentially a payer of last resort’ (*Rehabilitation Assn. of Virginia, Inc. v. Kozlowski* (4th Cir. 1994) 42 F.3d 1444, 1447.), federal Medicaid law requires state plans to recover from liable third parties whenever possible. A ‘[t]hird party’ is ‘any individual, entity or program that is or may be liable to pay all or part of the expenditures for medical assistance furnished under a State plan.’ (42 C.F.R. § 433.136.) The state Medicaid agency must ‘take all reasonable measures to ascertain the legal liability of third parties. . . .’” (42 U.S.C. § 1396a(a)(25)(A).) “[I]n any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual...the State or local agency [must] seek reimbursement for such assistance to the extent of such legal liability. . . .” (42 U.S.C. § 1396a(a)(25)(B).)

At page 813, the court further stated:

“To comply with these federal requirements, Medi-Cal has imposed certain limitations on provider reimbursement. Under section 14019.3, subdivision (c), ‘[u]pon presentation of the Medi-Cal card or other proof of eligibility, the provider shall submit a Medi-Cal claim for reimbursement...’” Any provider of health care services who obtains a label or copy from the Medi-Cal card or other proof of eligibility . . . shall not seek reimbursement nor attempt to obtain payment for the cost of those covered health care services from the eligible applicant or recipient, or any person other than the department or a third-party payor who provides a contractual or legal entitlement to health care services.” (§ 14019.4, subd. (a).)

At page 814, the court further stated:

“As acknowledged by plaintiff, Wel-

fare and Institutions Code §§ 14124.791 and 14124.74 authorized the liens filed by defendant. Nonetheless, plaintiff contends the liens are unenforceable because federal Medicaid statutes and regulations limiting provider reimbursement — title 42 United States Code Service § 1396a(a)(25)(C) and 42 Code of Federal Regulations parts 447.15 and 447.20 — **preempt these California statutes. We agree.**” [Emphasis added]

At page 819, *Olszewski* stated:

**“As evidenced by this legislative history, the Secretary clearly intended to bar a health care provider from recovering from a Medicaid beneficiary any amount exceeding the cost-sharing charges allowed under the state plan. The Secretary found it necessary to impose this limitation on provider recovery in order (p. 820) to effectuate Congress’s intent and to insure medical care for the needy. (Yanez v. Jones (D.Utah 1973) 361 F. Supp. at p. 706) As noted earlier, the Secretary has ‘broad authority’ to effectuate Congress’s intent in this context, and we must give its regulations ‘legislative effect.’”** (*Schweiker*, supra, 453 U.S. at pp. 43-44.)... [Emphasis added] “Where, as here, probable liability of a third party cannot be established at the time the claim is filed, the state agency must pay the full amount due under its payment schedule. (See 42 C.F.R. § 433.139(c).) Under 42 Code of Federal Regulations part 447.15, the provider must ‘accept’ this payment plus any cost-sharing charges allowed under the plan as ‘payment in full.’” **“...Read together, these statutes and regulations are unambiguous and limit provider collections from a Medicaid beneficiary to, at most, the cost-sharing charges allowed under the state plan, even when a third party tortfeasor is later found liable for the injuries suffered by that beneficiary. (See *Mallo v. Public Health Trust of Dade Co.* (S.D.Fla. 2000) 88 F. Supp.2d 1376, 1385 (Mallo)[ 42 U.S.C. § 1396a(a)(25)(C) requires ‘the health care provider to collect from the Medicaid patient no more than the amount of the Medicaid payment’].) Thus, a health care provider may, at most, recover a ‘nominal’ amount from the beneficiary. (42 U.S.C. § 1396o(a)(3) [‘any deduction, cost sharing, or similar charge imposed**

under the plan . . . will be nominal in amount’].) [Emphasis added]

*Olszewski* continued at page 820:

“By contrast, under sections 14124.791 and 14124.74, a provider, after refunding the Medi-Cal payment, may recover the full customary charge for its services through a lien on the beneficiary’s property—i.e., his or her recovery for lost wages or pain and suffering. Because this customary charge is usually, if not always, greater than the amount payable under Medicaid (see *McAmis v. Wallace* (W.D.Va. 1997) 980 F. Supp. 181, 182), **these sections allow the provider to recover from the beneficiary an amount greater than the nominal cost-sharing charges allowed under the state plan. Because sections 14124.791 and 14124.74 allow the provider to recover more than these cost-sharing charges from the beneficiary, they cannot coexist with federal law and stand as an obstacle to the accomplishment of Congress’s intent.**” (See *English v. General Electric Co.* (1990) 496 U.S. 72, 79) [Emphasis added]

The *Olszewski* court went on to state at page 821:

“Recovery on a provider lien filed (under the statutes described) comes from the beneficiary — and not from the third party tortfeasor — for purposes of federal law.”

At page 826, *Olszewski* went on to state:

**“In any event, federal law is not ambiguous and unequivocally prohibits California from authorizing provider recovery on liens against the entire judgment or settlement obtained by a Medicaid beneficiary from a third party tortfeasor. (See ante, at pp. 820-822.) We therefore conclude that federal law preempts Welfare and Institutions Code §§ 14124.791 and 14124.74 (*Christensen v. Harris Co.* (2000) 529 U.S. 576, 588 [holding that deference to an agency’s interpretation of its regulations is only appropriate where the regulation is ambiguous].) These provider lien statutes are therefore unconstitutional, and the California statute limiting provider recovery from Medicaid beneficiaries in accordance with federal Medicaid law controls. This statute prohibits provid-**

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ers from attempting to obtain payment for their services directly from Medicaid beneficiaries. (See Welf. Inst. Code, § 14019.4, subd. (a).)

Because defendant's lien against plaintiff constitutes such an attempt, it is invalid, unenforceable, and uncollectible." [Emphasis added] Not only do the laws in the state of California make it abundantly clear that Civil Code § 3045.1 cannot be interpreted to allow any hospital to recover greater than the amount a Medicaid patient has incurred as expenses for care and treatment for injuries caused by a third party, the recent United States Supreme Court case of *Gallardo v. Marsteller, Secretary of the Florida Agency for Health Care Administration* (2022) 142 S. Ct. 1751 makes it abundantly clear that the United States Supreme Court does not allow any recovery of any funds paid to an injured party by the person causing the injury (Medi-Cal) from having other than the Medi-Cal benefits paid recovered by any alleged lien holder. Under the statement of the case, I. Legal Background, A. Federal Medicaid Statutes, in pertinent part, the *Gallardo* case states, "A State may not impose a lien on a Medicaid beneficiary's property, or otherwise seek to recover the State's payments for medical assistance. This prohibition appears in the Medicaid Act's anti-lien and anti-recovery provisions, respectively:

- 'No Lien may be imposed against the property of any indi-

vidual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan.' § 1396p(a)(1).

- 'No adjustment of recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made.' § 1396p(b)(1).

*Gallardo* goes on to state, "...Both provisions have been part of federal Medicaid laws since its inception in 1965."

"Next, the implied exception: When a third party has made a payment on account of its liability to pay for medical expenses paid by Medicaid, a State may seek reimbursement of its past Medicaid payments to the extent of the third party's legal liability to pay for care and services **paid for by Medicaid**...'where payment has been made under the State plan for medical assistance in any case where a third party has legal liability to make payment for *such assistance*.' § 1396(a)(25)(H) [Emphasis in original and added.] In that event, state Medicaid laws must provide that, 'to the extent that *payment has been made* under the State plan for medical assistance for *health care items or services furnished* to an individual, the State is considered to have acquired the rights of such individual to payment by any other party *for such health care items or services*.'" [Emphasis in original.]

Thus federal law does not allow any state law to recover **more** back from an injured party than the amounts that were paid for by the Medicaid program.

It is obvious that any statutory scheme (and Civil Code § 3045.1 is mentioned herein as one type of such statute) is unconstitutional as described in *Olszewski*.

The case of *Palumbo*, supra, stated at page 1034:

**"We hold that a settling third party tortfeasor is not a 'third-party payor' as the term is used in Welfare and Institutions (p. 1035) Code § 14019.4 and that therefore a provider under Medi-Cal, such as plaintiff in this case, is not entitled to any money over and above his Medi-Cal fee."** [Emphasis added]

Further, the case of *Goldberg v. Superior Court* (1994) 23 Cal.App.4th 1378 stated at page 1381:

"The question before us is the scope of Probate Code fn. 6 section 3601. Section 3601 provides: '(a) The court making the order ... [approving a minor's compromise], as a part thereof, shall make a further order authorizing and directing that such reasonable expenses (medical or otherwise and including reimbursement to a parent, guardian, or conservator), costs, and attorney's fees, as the court shall approve and allow therein, shall be paid from the money or other property to be paid or delivered for the benefit of the minor....'"

At page 1382, *Goldberg*, supra, went on to state:

"The statute describes what the court may do, not simply where the order is directed. It bestows broad power on the court to authorize payment from the settlement — to say who and what will be paid from the minor's money — as well as direct certain individuals to pay it. The plain language of the statute permits the court to make an order authorizing 'such reasonable expenses' as it 'shall approve and allow' to be paid from the settlement proceeds going to the minor."



## Medical Liens Update

(In-Person Seminar)

### Featured Speakers



Dan Wilcoxon



Don de Camara



John Rice

Friday, May 12, 2023 — 10 a.m. to 2 p.m.  
McGeorge School of Law

Cost: CCTLA Member \$185  
CCTLA Member Staff \$135

Non-Member (Plaintiff Attorney): \$285

**Additional details coming soon!**



There were 510 attendees for the Joint TLA virtual annual Tort & Trial program held Jan. 25, 2023. Many thanks to the speakers who spent countless hours reviewing cases to provide this informative program: Anne Kepner, Kirsten Fish, Valerie McGinity, Jeremy Robinson and Mark Davis.



Mark Davis



Kirsten Fish



Anne Kepner



Valerie McGinity



Jeremy Robinson

a joint TLA event

## What's New In Tort & Trial 2022 A Year in Review

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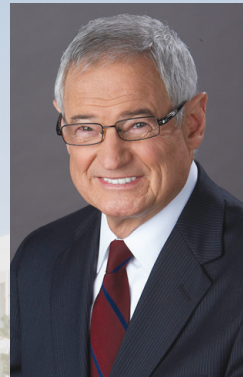


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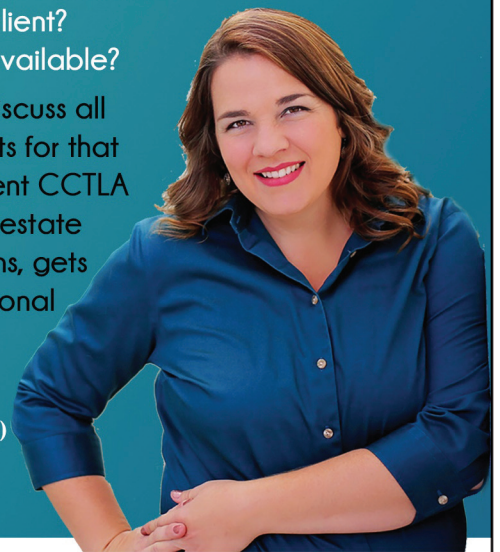
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# CONSUMER ATTORNEYS OF CALIFORNIA

*Seeking Justice for All*

## New Bill Blocks Corporations from Abusing the Court System to Delay Justice for Workers and Consumers

Sacramento, CA – On Feb. 10, Senator Scott Wiener (D-San Francisco) introduced SB 365, legislation co-sponsored by Consumer Attorneys of California (CAOC) and the California Employment Lawyers Association

(CELA) aimed at protecting workers and consumers from the delay tactics corporations use when a court rules that an arbitration agreement is invalid, or that a signed agreement does not exist. Too often, corporations will file an appeal solely to delay a victim's case – sometimes for years on end. SB 365 would allow the case to move forward even if a company files such an appeal.

"SB 365 levels the playing field for consumers and workers, who sometimes spend years in court over obviously invalid or inapplicable forced arbitration clauses," said Senator Wiener. "By delaying justice for consumers and workers, we are denying them justice. SB 365 will prevent corporations from abusing the appeals process when trying to enforce invalid contracts."

When a worker or consumer signs a "forced arbitration" agreement with their employer or with a corporation, it generally means they waive their right to pursue any claim against

*SB 365 Ensures Victims' Court Cases Continue to Move Forward – Even When Corporate Bad Actors File Appeals Intended to Pause a Worker or Consumers' Case*

the corporation in court. In some cases, however, the court might find the agreement is invalid. Current law incentivizes bad actors to delay justice for workers and consumers by filing appeals, which pause the case from

moving forward and adding years to the process.

"Workers and consumers deserve a speedy pathway to justice when their rights have been violated," said Greg Rizio, President, CAOC. "Unfortunately, current law in California favors big corporations who stand to benefit from delaying court proceedings for years at a time simply by filing an appeal. SB 365 would allow those cases to move forward, protecting meaningful access to justice for countless Californians, and we are proud to co-sponsor this important bill."

The impact of these delay tactics on workers and consumers can be devastating. In one instance, a cryostorage tank failure at a fertility center in San Francisco damaged or destroyed hundreds of frozen eggs and embryos. When the court ruled that the tank manufacturer could not force the victims into arbitration, the manufacturer filed an appeal that delayed justice for the victims for more than two years.

## Victims of Financial Elder Scams Could See Renewed Access to Justice

Sacramento, CA – On Feb. 1, Senator Bill Dodd (D-Napa) introduced SB 278, legislation aimed at protecting California's aging population from rampant financial abuse. The bill, co-sponsored by Consumer Attorneys of California, the California Low-income Consumer Coalition and the Elder Law & Advocacy Center clarifies existing law (SB 1140, Steinberg) to ensure a victim's ability to hold negligent banks accountable for assisting in financial elder abuse.

"Banks must do a better job of preventing the most vulnerable Californians from getting ripped off," Senator Dodd said. "This bill clarifies that if these institutions assist in financial elder abuse – either knowingly or otherwise – they can be held liable. It will motivate them to

*Senator Dodd's SB 278 Clarifies Existing Law, Allowing Victims to Hold Negligent Banks Accountable for Assisting Scammers*

detect predatory practices before victims are robbed of their resources, dignity and quality of life – losses from which they may never recover."

"At a time when online and phone scams, specifically designed to defraud senior citizens, are running rampant – banks are on the front line as mandated reporters to protect seniors from devastating losses of their life savings," said Kathryn Stebner, President-Elect, Consumer Attorneys of California. "By adding a simple clarification to existing law – SB 278 will assure justice for countless vic-

tims of financial elder abuse."

"Older Californians are the fastest growing segment of our population and face a particularly high risk of financial fraud and abuse," said Caleb Logan of Elder Law & Advocacy and bill co-sponsor California Low-Income Consumer Coalition.

"Fortunately, banks can prevent seniors from losing their life savings to a scam. SB 278 will clarify existing law to revitalize important safeguards against financial abuse. We are proud to support this important bill and applaud Senator Dodd's efforts on behalf of seniors throughout California," he said.

SB 278 will face its first hurdle before the Senate Judiciary Committee in the coming weeks.

**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. Visit the CAOC website at [www.CAOC.org](http://www.CAOC.org).**



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May 26, 2023

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# *Spring Fling Is Back!*

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from 5 p.m. to 7:30 p.m.  
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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.

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*In honor of Allan Owen & Linda Whitney*



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



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**CCTLA'S  
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June 1, 2023**



**All Silent Auction  
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# CCTLA'S 19th Reception & Silent Auction June 1, 2023



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*THANK YOU!*



# Negotiating to Win a Good Settlement

By: Walter Schmelter



Walter Schmelter,  
Law Office of  
Walter Schmelter,  
is a CCTLA  
Board Member

in a law school course or in a short article. Winning a fair settlement requires *continuing demonstration* of your determination to win the case; proper pleadings knowledge; prompt discovery; negotiation and settlement knowledge and finesse; and willingness to take a case to trial.

## Know Your Case From the Start

Entire seminars focus on demand letters, discovery issues, and settlement issues. Key to demand letters is to neither overstate nor undervalue your client's claim. But don't shoot yourself in the foot. Overly aggressive demand letters can even harm you and your client if they constitute extortion. See "Demand Letters as Extortion," by Zachariah D. Baker, *California Lawyer* magazine, August 2014. "Consumer debt" cases (generally, debt incurred for broadly defined "household purposes") require knowledge of both federal and state fair debt collection law. In general, communication of demands to debtor involving consumer debt should come from the client, not the attorney.

Hopefully tortfeasor defendant will have ample insurance that covers the damage caused, and injured plaintiff will have good uninsured/underinsured motorist coverage. One would think that good insurance would speed along settlement, but because auto insurance defense attorneys are paid hourly, even personal injury cases with clear liability and damages are often contested. Classically, auto accident

cases are filed unverified, defense answering with an unverified General Denial, then using tactics to deny, delay, and deflect claims from even reasonable injured plaintiffs.

## Challenge Improper Pleadings

Too often Affirmative Defenses claimed are just wrong — e.g., waiver and estoppel alleged in an auto accident case. I *still* see Statute of Limitations being pleaded generally without the facts alleged or specific reference to the applicable statute *and subsection*. Affirmative defenses must plead *specific facts* in defense, not generalized conclusions. Waiver requires facts alleged showing clear and convincing evidence of a waiver. All Affirmative Defenses must specify the cause of action to which they respond, and at minimum, allege facts suggesting a relationship to your case. The best treatise here is California Affirmative Defenses by Ann Taylor Schwing, a three-volume set worth a trip to the law library. Shows your legal acumen and improve favorable settlement prospects with an immediate (and required!) "meet and confer" (by phone or letter), then a Demurrer/Motion to Strike improper pleadings.

In contract cases, attorney fees must be pleaded to be awardable, but are often improperly claimed by a party even if not allowed by contract or statute. Attorney fee claims have a huge impact on negotiations and case economics. Evaluate that expensive issue closely, early and strategically. An improper claim of contractual attorney fees against someone not a party to the contract (e.g., a non-signatory spouse) puts the claimant at risk of paying them. California Attorney Fees Awards by R. Pearl is an excellent treatise on attorney fees.

## Obtain Witness Information Early

Improve your negotiating position



early on by taking statements of witnesses even before you file suit, (ideally, consensually recorded, or written and signed). Noticing the deposition of opposing party at first opportunity, 20 days after service of the Complaint (Code Civ.Proc. §2025.270), cements in defendant's early statements and version of the facts before they can think of "alternative facts" that better suit defense claims. You might not find out a defendant was late to work and trying to make up time unless and until you take driver's deposition. Remember you can notice production of documents to a depo via Request to Produce Documents at Deposition. In contract cases with many complex documents you may wish to first obtain and review them via Notice to Produce Documents, then set the depo. You can use both procedures at different times in your case; they are not mutually exclusive.

Interrogatory Answers and objections and answered Requests for Admissions are created with advice of counsel, and are too often vague or incomplete. Insisting on fair responses via immediate meet and confer phone call or letter bolsters your credibility and your case. Show strength and tenacity by moving to compel further answers to your fair discovery requests. Obtaining proper complete and specific answers helps you develop your

See *NEGOTIATING*, page 28

# Negotiating

*Continued from page 27*  
case.

## **Economic Realities and Settlement**

Hopefully, before even taking a case, a plaintiff's attorney has considered whether a judgment will be collectible. Regardless of plaintiff's damages, availability of insurance and the amount of defendant's assets sets a real economic ceiling on value of many settlements because judgments in excess of insurance are often uncollectible. In auto accident cases, too often a plaintiff's sole source of collection is from defendant's insurance policy—if there is one. About 19% of California drivers are uninsured. Other states are even worse: Mississippi at 29.3%, and Michigan at 25%. Hopefully, your client has uninsured/underinsured motorist coverage on their own auto policy, because collecting from a tortfeasor is not assured.

Fewer than 55% of Californians live in homes they or their families own, the second lowest rate of any state. California homes have a statewide median value of \$523,000. California's homestead exemption from execution on a judgment increased, effective 2021, to the countywide median, up to a \$600,000 max. (Civil Code §704.730). Ten percent of Californians are on food "stamps." The gig economy and "side hustles" mean fewer real paychecks a creditor can levy on by wage assignment. Insurers are required to, and often do, tender policy limits if demanded and case facts warrant—usually only after defense counsel works the case a while to see if plaintiff dies, settles, or goes away.

When plaintiff sues for breach of contract and/or a willful act causing damage, there is no insurance coverage—so be careful not to plead yourself out of insurance coverage; always plead alternative causes of action for negligence where you can. Even reckless or grossly negligent ostensibly willful acts (e.g. shoving someone into a pool) are covered by homeowner's insurance if no serious harm was intended or highly probable to occur. Insurance policies exclude defense for breach of contract, making plaintiff's settlement calculus tough—will the debt be uncollectible for lack of assets? Will defendant discharge his debt in bankruptcy? Only individuals can claim exemp-

tions from execution and bankruptcy exemptions, but many small corporations and LLC's have no net value, and many of these simply dissolve, falsely filing a statement that all corporate debts are satisfied.

## **Defendant's Bankruptcy Options**

So think carefully when taking a case, even if client has a legally meritorious claim. How will your client get paid? How will you get paid? Is it likely worth it to you and your client? Explain to your client in writing "risks of collection" to see if client wants to spend money for your attorney fees in light of that. Where defendant's fraud induced plaintiff to enter into a contract to plaintiff's loss, bankruptcy is less of an option to defendants, because fraud judgments and willful torts and DUI's are nondischargeable debts, but fraudsters are inherently slippery and mobile.

Defendants might offer to settle before you file suit for a promised sum plus payments over time, then file bankruptcy, discharging your settlement agreement as a contract obligation. Settle such cases only after you have your case on file with a plausible fraud cause of action alleged and the court case referenced in your settlement agreement, and the agreement conditional on the state court reserving jurisdiction to reopen the proceedings. Be sure to actually request that reservation in your Notice to the court of Conditional Settlement, and get an order so stating. If defrauding defendant then files bankruptcy, plaintiff can respond by filing an Adversary Complaint in bankruptcy court under 11 U.S.C. §584 to have plaintiff's claim excluded from bankruptcy discharge. Prompt association of a bankruptcy attorney is highly recommended. You can get to trial in bankruptcy court in about a year, or request the bankruptcy judge to allow the case to proceed in state court. Unlike state court, the bankruptcy court can even award attorney fees in fraud adversary complaint trials, under 11 U.S.C. §105.

## **Settlement Documentation**

If your case involves multiple defendants, settle conditioned on approval as a "good faith settlement" (Code Civ. Proc. §877.6), and Motion for, obtain, and serve a court order determining that your settlement is in "good faith." California law requires a fair apportionment of liability and payment among defendants

based on a reasonable assessment of the facts and claimed liability/claimed defenses—an "in the ballpark" standard. A court determination that a settlement is in good faith bars co-defendants from seeking contribution and/or indemnity from the settling defendant. Failing to obtain a good faith determination order can undo your bargained settlement. California Forms of Pleadings and Practice has good info and forms re settlements.

Both parties want to insert into a settlement agreement clauses that benefit them, including without limitation confidentiality clauses, indemnity clauses protecting defendant from challenges to the settlement, attorney fees clauses, and arbitration clauses. Most defense attorneys claim to have "standard" settlement agreements. Only in the simplest cases it might be appropriate to dismiss a case in exchange for a check. Creating your own more comprehensive settlement document forces you to consider all factors. Sending your proposed settlement document sets a negotiating template—discussions about settlement are then focused on your document, not your opponent's. There may be give and take about your settlement document, but at least you have already written into it provisions and even nuances that favor your client's position—e.g., an attorney fee and costs provision if defendant fails to make payments as agreed. Be sure releases in a case against your client including releases of client's attorneys, employees, assigns, etc.

## **Negotiation Skills Are Learned Continuously**

Negotiation toward settlement starts with your first phone call or letter to defendant or opposing counsel, with your position strengthened by an early deposition of opposing party, and tolerating no nonsense in discovery. My favorite negotiation author/speaker is John Patrick Dolan, Esq., best listened to, but also a good read. Stock negotiation tactics and responses should be memorized, e.g.: "You'll have to do better than that." Response: "Just how much better than that do you think I need to do?" Such phrases are simple and do not always work—but in my experience, are often effective, and at least, you should recognize your opponent's tactic when employed against you and know the counter-phrases.

Though most cases settle, you must

*See NEGOTIATING, page 29*



# Negotiating

*Continued from page 28*

always prepare your case for trial, as early on as possible. If your opponent detects you are unwilling or unable

to go to trial, your perceived negotiating power is hampered from the start. Obtain the admissible evidence you need ASAP. Press your discovery. Write the proposed

settlement document. Then, just before trial, you might receive a suitable offer in response to your demand. If not, you are ready!

## MAN v. MACHINE: How ChatGBT wrote the above article

*Walter Schmelter, author of the article above, is a member of the CCTLA's Technology Team. "As an experiment, after writing my article, I produced the parallel article here, entirely via artificial intelligence (AI), using a program called ChatGBT." His prompt was: "Write an article of about 1800 words for a California personal injury plaintiff's magazine regarding negotiating for a good settlement." Here is the AI response:*

### Negotiating for a Good Settlement in California Personal Injury Cases

Personal injury cases are often complex, stressful, and time-consuming. Many plaintiffs are not sure what to expect during the negotiation process, which can be a daunting experience for those unfamiliar with the legal system. But with the right preparation, plaintiffs can navigate the process and come away with a fair and reasonable settlement.

The following are some key tips to help California personal injury plaintiffs negotiate a good settlement:

#### 1. Gather Evidence

The strength of a personal injury case depends largely on the evidence that is presented. Evidence can include medical records, witness statements, photographs, and any other documentation that supports the plaintiff's claim. The more evidence that is available, the stronger the case will be and the better the plaintiff's bargaining position.

#### 2. Determine the Value of the Case

To get a good settlement, it is important to understand the value of the case. This involves calculating the economic damages, such as medical expenses, lost wages, and property damage, as well as non-economic damages, such as pain and suffering and emotional distress. An experienced personal injury attorney can help calculate the value of the case and advise the plaintiff on a fair settlement amount.

#### 3. Consider the Other Side's Position

It is important to understand the other side's position in order to negotiate effectively. This involves looking at the strengths and weaknesses of the plaintiff's case, as well as the defendant's position and motivations. For example, if the defendant is a large corporation, they may be more motivated to settle quickly to avoid negative publicity or a lengthy trial.

#### 4. Communicate Effectively

Effective communication is key when negotiating a settlement. The plaintiff should be clear and concise when presenting their case, and be prepared to listen to the defendant's position. Both parties should be respectful and professional, and avoid becoming confrontational or aggressive.

#### 5. Be Prepared to Compromise

Negotiating a settlement is often a give-and-take process.



Most everyone knows the tale of John Henry, a railroad worker who challenged the then-new technology of the steam drill to a "man versus machine" race, only to die with a hammer in his hand as his heart gave out.

The plaintiff should be prepared to compromise, especially if the defendant is unwilling to offer a fair settlement. This may involve reducing the amount of damages sought or making concessions on other terms. The key is to find a solution that is acceptable to both parties and provides a fair resolution for the plaintiff.

#### 6. Know When to Walk Away

Finally, it is important to know when to walk away from the negotiation table. If the defendant is unwilling to offer a fair settlement, the plaintiff may need to consider taking the case to trial. However, this should only be done after careful consideration and consultation with an experienced personal injury attorney.

Negotiating a good settlement in a California personal injury case can be a complex and challenging process. But with the right preparation and a professional approach, plaintiffs can increase their chances of a successful outcome.

If you have been injured in a personal injury accident in California, it is important to seek the assistance of a qualified personal injury attorney. An experienced attorney can help you navigate the negotiation process, gather and present evidence, and negotiate for a fair and reasonable settlement. With the right representation, you can get the compensation you deserve and move on from your injury with confidence.

*Currently, you can go to the website, [openai.com](https://openai.com), and test AI ChatGBT for free. In my opinion, there will come a time when legal briefs are at least drafted by AI, and beyond that, a time when economics will compel many litigants to agree to elect advisory or binding AI decision on stipulated facts.*

— Walter Schmelter

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# CCTLA's holiday installation, honors and seasonal cheer

After a two-year hiatus, CCTLA held its Annual Meeting and Holiday Reception Dec. 8, 2022, at The Sutter Club and recognized the best of the best for 2020-2022. The event was attended by 160 people, including 19 judges. Outgoing president Dave Rosenthal presented the awards and then turned the gavel over to 2023 President Justin Ward.

Judge of the Year for 2022: the Honorable Michael Bowman, Sacramento County Superior Court. His clerks, Patricia Banks and Dessie Rogers, received the 2022 Laura Lee Link Clerk of the Year awards. CCTLA member Shafeeq Sadiq was recognized as CCTLA's 2022 Advocate of the Year.

Recognized as Judge of the Year for 2021 was the Honorable Judge Allen Sumner; CCTLA's Bob Bale as 2021 Advocate of the Year.

Recognized as Judge of the Year for 2020 was the Honorable Russell Hom; CCTLA's Ognian Gavrilov as 2020 Advocate of the Year.

CCTLA presented Mustard Seed School with a \$1,000 donation, and several attendees donated to the school as well.



Above left: CCTLA's 2022 President Dave Rosenthal, Executive Director Debbie Keller and 2023 President Justin Ward. Center, Rosenthal with the 2022 Clerks of the Year: Dessie Rogers and Patricia Banks



Left Advocate of the Year Shafeeq Sadiq and his family. Right: Judge of the Year Michael Bowman and wife Michelle. Below, Judge David de Alba (Ret.), Judge David Davidian (Ret.) and Past CCTLA Pres. John Demas



Above: 2023 CCTLA President Justin Ward and Daya Horton of Jams, an event sponsor



Above, from left: Board members Robert Nelsen and Ognian Gavrilov, Judge Russell Hom (Ret.), Judge Geoffrey Goodwin (Ret.) and 2023 CCTLA President Justin Ward

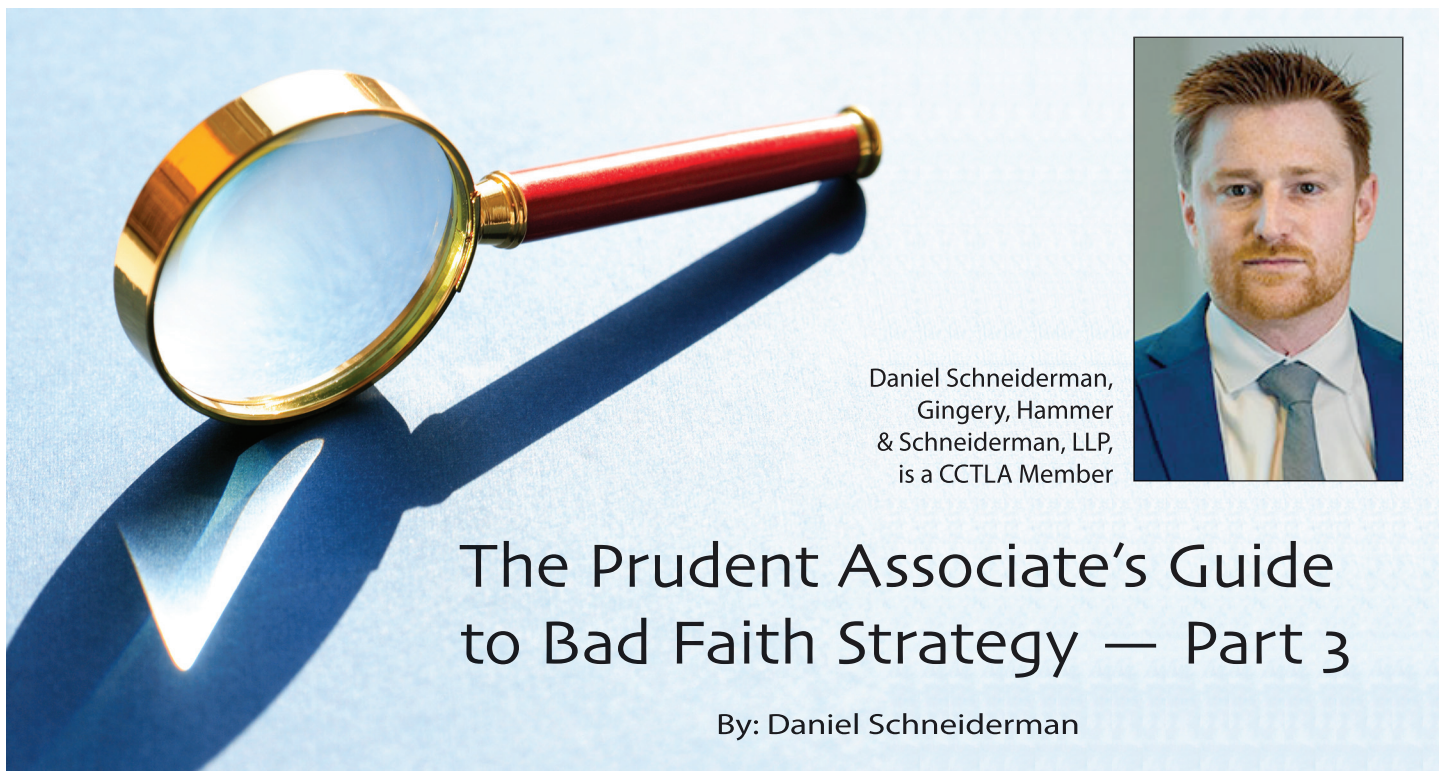


Above, from left: Kellen Ray, Blair Widders, Board Member Marti Taylor, Walter Loving, Past President Michelle Jenni, Board Member Drew Widders and Ted Deacon



Judge David Abbott (Ret.), Judge Jill Talley and Judge Lauri Damrell





Daniel Schneiderman,  
Gingery, Hammer  
& Schneiderman, LLP,  
is a CCTLA Member

# The Prudent Associate's Guide to Bad Faith Strategy — Part 3

By: Daniel Schneiderman

*This article is intended to be Part 3 of a 5-part series to be read from the new or aged associate's point of view. The first section, Part 1, provided a 20,000-foot view of third-party bad faith strategy for the prudent associate. Part 2, which appeared in the Fall 2022 Litigator, focused on the demand phases and should be considered as a continuation of Part 1. This segment, Part 3, addresses the relationship of the C.C.P. Section 998 to investigation and discovery. Part 4 will discuss late-stage litigation and alternative dispute resolution. Part 5 will pertain to post-judgment discussions, potential assignment, and final thoughts.*

## I. The Litigation Workflow

In my experience, actualized, or actionable, bad-faith situations stem from clear and set expectations and communications from plaintiffs' counsel. Once those expectations and communications are ignored, often repeatedly, actionable bad faith starts to take form. There is no one-size-fits-all. Each case is different. However, once in litigation, the seeds of bad faith typically grow, in my experience, from memorialized acts of reasonableness (i.e., conveying your case and deadlines) by plaintiff's counsel.

Despite that reality, it is not unusual for an adjuster, primary counsel or conflict counsel to claim that you "trapped

them" or "set them up" for a bad-faith lawsuit. Such claims are inevitable, as this is the fundamental defense to any allegation with a standard of "reasonable" action. With that in mind, you must be prepared to substantiate your actions and the reasons for your deadlines, statutory or otherwise.

In my opinion, this strategy always involves a high level of transparency and cooperation, and sometimes even extensions to allow defense counsel a true and reasonable opportunity to perform.

## II. Discovery and the 998

For any civil attorney, let alone the illustrious prudent associate, it is vitally important to note the importance of the Code of Civil Procedure section 998 in the process of evaluating, attempting, and effectuating a resolution, especially one involving a policy limit. Written discovery and depositions (i.e., any process where each side has to say or do anything, under oath with penalty of perjury) are only some of the natural junctures of a case that present opportunities to memorialize the unreasonableness of an "OPC" (i.e., opposing counsel or character).

Therefore, it is important to understand the inherent relationship between basic discovery procedures (i.e. written discovery, depositions, IMEs) and your policy limit demand, which [depending

on the circumstances] will take the form of a Code of Civil Procedure section 998 "Offer to Compromise" once in litigation. This relationship was explained in *Najera v. Huerta* (2011) 191 Cal.App.4th 872, 879. In that case, the court made a determination regarding enforcement of an early expired 998.

In coming to a decision to affirm the lower court's ruling and not enforce 998-related penalties, the court referenced a dissent from *Barba v. Perez* (2008) 166 Cal.App.4th 445, 453. In that excerpt, the court re-stated "why it is ordinarily not reasonable to expect defendants to jam basic discovery into the 30 days following the service of a summons and complaint in order to respond to a section 998 offer ... As a practical matter, here is what typically has to happen within 30 days following service of a personal injury complaint upon a defendant: (1) The defendant has to deliver the summons and complaint to his insurance carrier; (2) A claims adjuster for the insurer has to review the allegations of the complaint with the insured; (3) The claims adjuster has to line up counsel for the defendant; (4) Defense counsel has to discuss the allegations of the complaint with the insured and prepare an answer."

This language is not cited to as a cautionary warning regarding timing. Rather,

*See BAD FAITH, page 35*



# BAD FAITH

Continued from page 34

it is intended to provide a guide as to the micro-factors a court, or later a jury, may consider when gauging your good-faith actions relative to the 998, an in the event of a “lid off” situation, the policy limits. Make sure to consider, use and take the next logical leaps necessary when timing your policy limit 998 around the discovery process.

### III. Reasonableness of the 998

But sending out a 998 is not enough. These interactions must be documented (i.e., highlighted through writing[s]) to preserve your client’s future leverageable options, especially those geared towards pre-trial resolution. As in any negotiation, leverage and diligence are reasonable means to accomplish a good result for your client. Any attorney that ignores those elements due so to their own, and their client’s detriment.

To that effect, for any defense attorney out there who would like to attempt to use such a reality against the prudent associate, I would simply advise them that

the written theatre of bad faith is, again, focused on one thing: showing reasonable or unreasonable conduct. One way to memorialize this? Showing that your actions are effectuating the purpose of the 998, i.e., to promote early and efficient resolution of matters prior to trial.

In this regard, “the policy is plain.” Section 998s are meant to encourage a settlement by “providing a strong financial disincentive to a party.” (*Bank of San Pedro v. Sup.Ct.* (1992) 3 Cal. 4th 797, 804, 12 CR2d 696, 700-701.) This is true despite the party status, i.e., “whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent’s settlement offer.” (*Id.*) “This is the stick. The carrot is that by awarding costs to the putative settler the statute provides a financial incentive to make reasonable settlement offers.” (See *Id.* [emphasis added]. See also *Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.* (1999) 73 Cal. App. 4th 324, 331, 86 CR2d 398, 401 [citing text].)

In case it is not clear, bad-faith “strat-

egy” is and should be focused on one question: “What is reasonable?” Depending on the circumstances, this question may arise at different stages of pre-litigation and litigation, and sometimes repeatedly.

Ultimately, especially when discussing the timing of 998s with a policy limit demand, it is important to treat any situation as if you are being judged by it in front of a judge and/or jury. In this specific but not exclusive manner, a reasonably timed 998 is the perfect tool to accomplish or encourage each of these goals.

### IV. Timing, Extensions and Repeats A. Early 998s

Despite the statutory and legal authorities that delineate the “earliest” a 998 may be sent, there are extenuating circumstances that may affect the enforceability of an early 998. For example, if you have memorialized the steps taken with the carrier pre-litigation, such a showing may be sufficient to avoid a taxa-

See BAD FAITH, page 36

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# BAD FAITH

*Continued from page 35*

tion of costs following judgment. In the event that your 998 matches the pre-litigation policy limit demand (i.e., the “last chance 998”), your opposition to a motion to tax will be even more persuasive, assuming you have put this chronology in writing.

In short, if you are ever asking yourself whether you have provided enough time and information to the other side, or you believe there are other extenuating circumstances that take your matter outside the limitations of the statute or authorities, make sure you commemorate that on the written record.

## B. Extending 998s

There are many ways to utilize policy limit 998s to progress discovery. Consider keeping the 998 open through mediation. Send an early 998, but provide that additional extension when requested on condition that they provide, in writing, EXACTLY what they require to make a reasonable determination during the extended time-period. The goals here are simple: take reasonable and necessary steps to resolve the matter, i.e., do not obstruct the discovery and deposition process, and get the other side the information they need to make a reasonable determination.

That being said...I want to make one thing clear...again...we ARE NOT talking about “setting the other side up.” The name of the game when it comes to bad faith, what “opens the policy up,” is being, in fact, reasonable, in action and word. This, or course, is ultimately a question for the jury, but it is shown through your reasonable action throughout litigation.

## C. Lowering 998s

To that effect, reasonableness is a two-way street. If a defendant serves an unreasonably low section 998 offer

**I want to make one thing clear...again...we ARE NOT talking about “setting the other side up.” The name of the game when it comes to bad faith, what “opens the policy up,” is being, in fact, reasonable, in action and word. This, or course, is ultimately a question for the jury, but it is shown through your reasonable action throughout litigation.**

based on the damages of the plaintiff, the plaintiff’s attorney may want to object to that offer citing a lack of information about liability to be able to properly evaluate the offer.

This objection should cite to the need to request more time for discovery and identify the additional information they need to evaluate the offer. Then again, the prudent associate also knows that an unreasonably low 998 can be used as a double-edged sword, especially when more unreasonably low 998s (i.e., the “I hope they take it 998s”) follow.

But what happens to a plaintiff that reduces their 998 to under the policy limits? Does a 998 under the policy limits evidence unreasonableness of your previous offers? The frank answer: yes, it can have an impact...but if used appropriately with the correct memorialization of events...it shouldn’t.

There are simply too many possible circumstances/combinations of what happens between prelitigation and litigation to identify a clear and concise workflow for all situations. However, to avoid the situation described above, and depending on the liability facts/damages, I will often send a 998 at the top of my value range. This value may very well be in excess of the policy limits, and that in of itself is obviously important. That being said, in the event your 998 drops under the policy

limit, it is important to pair that with a letter clearly delineating that the 998 is being provided for the purpose of early resolution vs. reasonableness.

This is especially relevant for purposes of finding a “trial 998.” When the other side has set their stakes into the ground, and you have a real idea of where they want to resolve the case (assumedly at an unreasonable value), always keep the methodology of reasonableness in mind. If you are changing your valuation, express the reason for it in your paired letter. If that reason is consistent with the scope and intention of the 998 (i.e., encouraging reasonable attempts at resolution prior to trial), you can avoid any later claims that your initial 998s were unreasonable or reflected a pattern of unreasonableness.

## V. Conclusion

The message of this article: find a reasonable position, document, repeat. Do so knowing that your actions will be reviewed and analyzed. Always maintain professionalism but spell out what you want and why you need it in writing. If defense says they need something, comply to the degree that is reasonable and document where required for objection or limitation. Use the Code of Civil Procedure and its deadlines as an ally and effectively combine your procedure workflows with your demand workflows.

**It is not unusual for an adjuster, primary counsel or conflict counsel to claim that you “trapped them” or “set them up” for a bad-faith lawsuit. Such claims are inevitable, as this is the fundamental defense to any allegation with a standard of “reasonable” action. With that in mind, you must be prepared to substantiate your actions and the reasons for your deadlines, statutory or otherwise.**



# SONOMA

## MARCH 10 - 11, 2023 SEMINAR

MCLE: 12.5  
(including  
1.25 Bias)

### PROGRAM • FRIDAY, MARCH 10

(REGISTRATION 11:00 AM TO 6:15 PM)

#### 11:30 AM - 12:30 PM / MCLE: 1.0 GENERAL

##### **TRACK 1: Pre-Litigation Tactics from Intake through Mediation**

MODERATOR: Kelsey DePaoli • The Law Office of Black & DePaoli  
**Tactics for Innovative Pre-Litigation Discovery**  
 Megan Demshki • Aitken\*Aitken\*Cohn  
**Strategies for Successful Pre-Litigation Settlement Demands and Mediation**  
 Kimberly Wong • The Veen Firm, PC  
**12 Tips for Successful Client Intake & Investigation**  
 Oscar Rene Gutierrez • Law Offices of Oscar H. Gutierrez, APC

##### **TRACK 2: Auto — Discovery Through Pre-Trial**

MODERATOR: Paul Matiasic • The Matiasic Firm, P.C.  
**"Fight for 15.1" — Meet and Confer to Motion to Compel**  
 Andrea R. Crowl • Dreyer Babich Buccola Wood Campora, LLP  
**Preparing for a Defense Medical Exam**  
 Jamie G. Goldstein • Arias Sanguinetti Wang & Torrijos LLP  
**Preparing the Plaintiff for Deposition in an Auto Case**  
 S. David Rosenthal • Rosenthal Law

#### 12:45 PM - 1:45 PM / MCLE: 1.0 GENERAL

##### **TRACK 1: Damages**

MODERATOR: Douglas S. Saeltzer • Walkup, Melodia, Kelly & Schoenberger  
**To Bifurcate or Not to Bifurcate?**  
 Jamon R. Hicks • Douglas Hicks Law  
**How to Avoid Anti-SLAPP Defenses and Issues in Your Damages Claims**  
 Sarvenaz (Nazy) Fahimi • Cotchett, Pitre & McCarthy, LLP  
**Do's and Don'ts of Noneconomic Damage Witnesses**  
 Ilya D. Frangos • Law Offices of Galine, Frye, Fitting & Frangos

##### **TRACK 2: Avoid Pitfalls of Discovery: Do It Once, Do It Right**

MODERATOR: Jason N. Argos • Kohan & Bablove, LLP  
**Preparing Your Client for Deposition**  
 Jessica Dayton • ADZ Law LLP  
**Drafting Targeted Discovery**  
 Daniel P. Jay • York Law Firm  
**Responses Are Due: Now What; Responses Come In: Now What**  
 Jill P. Telfer • Telfer Law

#### 2:00 PM - 3:00 PM / MCLE: 1.0 GENERAL

##### **TRACK 1: Workers' Comp — PI Crossovers**

MODERATOR: Anderson Lam • Law Offices of Galine, Frye, Fitting & Frangos  
**Identifying Workers' Comp and PI Crossovers**  
 Anthony Modarelli • DiMarco | Araujo | Montevideo  
**Hidden Treasure: The Credit Trial, A Case Study**  
 Jennifer E. Scotto • Law Offices of Vincent J. Scotto, III  
**Obtaining Just Compensation in Your Client's Third Party Case — Dealing with WC Liens, Working with the WC Attorney and Avoiding Credit Rights**  
 Christopher A. Viadro • Butler Viadro, LLP

##### **TRACK 2: Employment**

MODERATOR: Justin L. Ward • The Ward Firm  
**Quick Hits: State and Federal Updates to the Employment Claims We All Know and Love**  
 Tamarah Prevost • Cotchett, Pitre & McCarthy, LLP  
**Effective Tips in Employment Mediations**  
 Ji-In Houck • The Houck Firm  
**Creative Strategies in Employment Cases Involving Sexual Harassment/Assault**  
 Micha Star Liberty • Liberty Law

#### 3:15 PM - 4:30 PM / MCLE: 1.25 GENERAL

##### **TRACK 1: Trial Skills Quick Hits**

MODERATOR: Michael Bracamontes • Bracamontes & Vlasak, PC  
**Closing Arguments**  
 Arnaldo Casillas • Casillas & Associates  
**Opening Statements**  
 M. Lawrence Lallande • Lallande Law, PLC  
**Direct/Cross Examination**  
 Nabilah Hossain • Cotchett, Pitre & McCarthy LLP  
**Jury Selection**  
 John M. O'Brien • O'Brien & Zehnder Law Firm

##### **TRACK 2: Emerging Trends in Elder Abuse (Roundtable)**

MODERATOR: Mikayla G. Kellogg • Kellogg & Van Aken LLP  
 Kathryn Stebner • Stebner Gertler Guadagni & Kawamoto APC  
 Wendy C. York • York Law Firm  
 Jody C. Moore • Johnson Moore  
 Kimberly Valentine • Valentine Law Group, APC

#### 4:45 PM - 6:15 PM / MCLE: 1.5 GENERAL

##### **TRACK 1: Virtual Presentation Techniques in PI Cases**

MODERATOR: Kimberly E. Levy • Dolan Law Firm, PC  
**Use of Technology with Experts**  
 Tobin M. Lanzetta • Greene Brillett & Wheeler, LLP  
**Technology in Mediation**  
 Elinor Leary • The Veen Firm, PC  
**Use of Technology in Discovery**  
 Robert Bale • Dreyer Babich Buccola Wood Campora, LLP  
**Use of Technology in Telling Your Client's Story**  
 Steven J. Brady • Brady Law Group  
**Use of Technology in Closing**  
 Candice S. Klein • Chang Klein LLP

##### **TRACK 2: Auto/PI Meet Sanchez**

MODERATOR: Jason Flores • Jason Flores Law, PC  
**Expect the Unexpected!**  
 Christopher W. Wood • Dreyer Babich Buccola Wood Campora, LLP  
**Smuggling Hearsay: Sanchez and its Progeny**  
 Duffy Magilligan • Cotchett Pitre & McCarthy, LLP  
**Handling Sanchez in Trial**  
 Sevy W. Fisher • The Simon Law Group  
**The Enemy of My Enemy is My Friend: Using Sanchez as a Sword**  
 Bibianne U. Fell • Fell Law, PC  
**Your Friend, the Treating Physician**  
 June P. Bashant • Rouda, Feder, Tietjen & McGuinn

#### 6:30 PM - 7:30 PM

##### **WELCOME RECEPTION**

CAOC.ORG/23SONOMA

March 11 Program & Schedule, See Page 38

# SONOMA SEMINAR March 10-11, 2023

## PROGRAM • SATURDAY, MARCH 11

(REGISTRATION 8:30 AM TO 5:00 PM)

### 9:00 AM – 10:00 AM / MCLE: 1.0 GENERAL

#### **TRACK 1: Presenting a Credible Auto Accident Case to the Jury**

**MODERATOR:** Anne J. Kepner • Needham Kepner & Fish LLP  
**Building Credibility through Voir Dire, Opening and Client's Testimony**

Ryan L. Dostart • Dreyer Babich Buccola Wood Campora, LLP  
**Damages – Preparing a Valid Damage Presentation**  
Chantel L. Fitting • Law Offices of Galine, Frye, Fitting & Frangos  
**Compelling Cross-Examination of Defendant's Accident Reconstructionist**

Conor M. Kelly • Walkup, Melodia, Kelly & Schoenberger

#### **TRACK 2: Medical Malpractice Update**

**MODERATOR:** Brooks Cutter • Cutter Law, PC  
**Use of Experts in Medical Malpractice Litigation**  
Michelle C. Jenni • Wilcoxon Callahan, LLP

**The 2023 MICRA Revisions: Brief Overview of Ambiguities, Uncertainties and Cautionary Notes for Future Med Mal Case Filings**

David E. Smith • Smith Zitano Law Firm

**Alternative Methods of Care to Periodic Payments: Key Trial Pleadings in Medical Malpractice Cases**

Amy R. Martel • Law Office of Amy Martel

### 10:15 AM - 11:30 AM / MCLE: 1.25 GENERAL

#### **TRACK 1: Traumatic Brain Injury**

**MODERATOR:** Alexis Stewart • Piering Law Firm

**Building Damages in Traumatic Brain Injury Cases**

Craig M. Peters • Altair Law LLP

**Admissibility of DTI Evidence**

Christopher L. Kreeger • Kreeger Law Firm

**Overlooked Injuries Secondary to Traumatic Brain Injuries**

Christine D. Spagnoli • Greene Broillet & Wheeler, LLP

**Analogies, Metaphors, and Final Argument in Traumatic Brain Injury Cases**

Michael Kelly • Walkup, Melodia, Kelly & Schoenberger

#### **TRACK 2: Recent Trends and Developments In Mass Torts and Class Actions (Roundtable)**

**MODERATOR:** Sarah R. London • Lief Cabraser Heimann & Bernstein LLP

Amy Eskin • Schneider Wallace Cottrell Konecky LLP

Abbas Kazerounian • Kazerouni Law Group, APC

A.J. de Bartolomeo • Tadler Law LLP

Gretchen M. Nelson • Nelson & Fraenkel LLP

### 12:00 - 1:15 PM / MCLE: 1.25 ELIMINATION OF BIAS



#### **LUNCH KEYNOTE: Mikaila Brown, PhD Constructive Communication**

**MODERATOR:** Gregory G. Rizio • Rizio Lipinsky Law Firm

### 1:15 PM - 3:15 PM / MCLE: 2.0 GENERAL

#### **Wisdom of the Sages**

**MODERATOR:** Alexis R. Gamliel • Gamliel Law, P.C.

#### **Mistakes Made, Lessons Learned**

Thomas J. Brandi • The Brandi Law Firm

#### **Finding Ways to Spot the Bad Eggs: Lessons Learned in Voir Dire**

Deborah Chang • Chang Klein LLP

#### **Moving to Quash Balance Billing Liens**

Daniel E. Wilcoxon • Wilcoxon Callahan, LLP

#### **Collapsing the Defense**

Lawrence A. Organ • California Civil Rights Law Group

#### **Overcoming and Capitalizing on the Natural Fear of Trial**

Richard Schoenberger • Walkup, Melodia, Kelly & Schoenberger

#### **Advice to My 30-Year-Old Self: Including the Best and Worst Advice I Ever Received**

Maryann P. Gallagher • Law Offices Of Maryann P. Gallagher

### 3:45 PM - 5:00 PM / MCLE: 1.25 GENERAL

#### **Trial Skills Workshop**

**MODERATOR:** Jenna D. Edzant • Greene Broillet & Wheeler, LLP

#### **Getting General Damages in a Conservative County – A Case Study**

John N. Demas • Demas Law Group, P.C.

#### **The View From 10,000 Feet – Lessons Learned**

Cynthia McGuinn • Rouda, Feder, Tietjen & McGuinn

#### **Experts: From Retention to Testimony**

Kelsey J. Fischer • Dreyer Babich Buccola Wood Campora, LLP

#### **Strategies for Cross Examination**

Amy M. Zeman • Gibbs Law Group, LLP

### 5:00 PM - 6:00 PM

#### **CLOSING RECEPTION**

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*March 10 Program & Schedule, See Page 37*



# 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](mailto:jtelfer@telferlaw.com). The next issue of *The Litigator* will be the Summer issue, and all submissions need to be received by May 1, 2023.

## VERDICT

### Wrongful Death \$30,912,802

#### *Sam Rios, Jr., et al. v. Pine Creek Care Center, et al.* Sacramento County Superior Court Case No. 34-2018-00244263

Attorneys Edward P. Dudensing, Jay P. Renneisen, and Andrew J. Collins prevailed at trial for their clients in this wrongful death action with a verdict of \$30,912,802—\$5,912,802.24 in compensatory damages and \$25,000,000 in punitive damages.

Eighty-six-year-old Sam Rios Jr. was a patient for two weeks in April 2017 at the skilled nursing facility known as Pine Creek Care Center in Roseville, CA located in the greater Sacramento region. He was severely neglected. As a result, Rios developed two unstageable heel pressure sores, one of which was discovered to be a “to-the-bone” Stage IV pressure sore that he had to live with until he died in March 2018.

The main reason for the extreme failures in Rios’ care was understaffing at the facility by its owners and corporate overseers, Plum Healthcare Group, LLC, and Bay Bridge Capital Partners, LLC. Plaintiffs further maintained the understaffing was the result of financial pressure by the private equity firm GI Partners, LLC, in San Francisco and the largest owner of the Plum nursing home chain at the time. Defendants denied all of plaintiffs’ contentions as to liability and causation.

Plaintiff’s widow and his eight children filed suit against the facility and its corporate overseers, alleging claims for elder abuse and neglect, constructive fraud, violation of patient’s rights and wrongful death based on pressure sores that were discovered after Rios was discharged from the facility.

#### Total Verdict Breakdown:

- a. \$2,750,000 to Sam Rios Jr.
- b. \$212,802.25 medical expenses to Sam Rios Jr.
- c. \$25,000,000 in punitive damages to Sam Rios Jr.
- d. \$1,750,000 wrongful death damages to Christina Rios
- e. \$1,200,000 wrongful death damage to eight children (\$150,000 to each)

The trial lasted 10 weeks, with the jury deliberating 2.5 days for liability phase. and 1.5 hours for the punitive damages phase.

The case was tried before the Honorable Steven M. Gevercer in Sacramento County Superior Court. Defense counsel: Robert W. Harrison, Dawn Phleger and Mark Ginella.

Plaintiffs’ experts: Kathryn Locatell, MD; Mary Louise Fleming, RN, PhD; Christopher Stephenson, MD; S. Kwon Lee, MD; Ronald Pomares, CPA; and Robert A. McLaughlin.

Defense Experts: David M. Young, MD; Karen Josephson, MD; Heidi A. Capela, RN; John Bowlblis, Ph.D.; Michael Lesnick; and David Mervyn Oatway.

Defendants made a pre-trial CCP section 998 offer of \$1,079,999.00 for all claims.

Plaintiffs will be filing a post-trial motion for attorney’s fees pursuant to California’s Elder Abuse Act. The trial judge has not yet ruled on alter ego liability claims against all defendants, including defendants Flower Farm Group, LLC; OpCo Holdings, LLC; and California Opco, LLC, which were not included for the jury’s determination. The jury found the corporate overseers, Plum Healthcare Group, LLC, and Bay Bridge Capital Partners, LLC, directly liable for the full amount of the verdict as well as under theories of aider and abettor and co-conspirator liability.

## VERDICT

### Vehicle Accident \$2,109,000

Dan Schaar, of Shaar & Silva, and Richard Antoine, of Law Offices of Richard Antoine, obtained a \$2,109,000 jury verdict before Judge Kenneth C. Mennemeier. A Brink’s truck rear ended the plaintiff, resulting in two separate cervical disc replacements. Brinks was represented by L.A. attorneys Sheldon Warren and Dani Rogers, and local defense counsel was Jim Henderson.

Brinks admitted liability and “causation” of the first surgery but tried to claim the second was the product of degenerative disc disease, even though the plaintiff was 28 at the time of the injury. This included calling the fire captain who wrote the response report and CHP officer who responded to the scene to testify, in essence, that no occupant of the plaintiff vehicle showed signs of obvious injury or stated that they were injured at the scene.

The challenge in the case was that Plaintiff had no income loss. She was a student at the time of the accident but then became a certified Residential Care Facility for the Elderly (RCFE) and enjoyed a good income. She completed her school with excellent grades and started nursing school, limiting her ability to attend the trial.

Further, she posted a number of photos and videos on a public Instagram account. The defense found these, and among other things, showed a video at trial of her happily walking down a stairway in Europe, carrying a large Louis Vuitton purse, and at the bottom, blowing a kiss to the camera operator. She is an attractive woman and from her glamorous, smiling photos, could be confused with an Instagram

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# MEMBER VERDICTS & SETTLEMENTS

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influencer. The defense view was essentially, how can she have chronic pain if she is so successful at school and in her career and looks so happy?

Plaintiff's experts called to trial were Phillip Orisek, surgeon, and April Stallings on billings. Both presented as very impressive witnesses, according to the jury. Defense retained Bruce McCormack, MD, out of San Francisco. Through a *motion in limine*, Defendant was precluded from using him as a billing expert. Thereafter, the defense chose to not call him as a neurosurgeon expert.

Prior to *voir dire*, Judge Mennemeier gave an impressive PowerPoint and verbal explanation of the process, the importance of jurors in society, etc. After which, no one sought to excused for hardship!

## VERDICT

### **Everlasting Gifts, Inc. v. Eckhardt,** **Case No. SCV0041292 (Placer)**

Shimoda & Rodriguez Law, PC, just tried a case to verdict in front of a jury and won on all counts. The trial team of Brittany Berzin and Renald Konini worked hard for client Eckhardt and successfully defended her against all claims. The employer was represented by Lukas Clary at Weintraub Tobin. Trial lasted little more than one week.

On June 6, 2018, Everlasting Gifts, Inc. (Everlasting), an employer, filed a lawsuit against Eckhardt, a former employee for misappropriation of trade secrets, unfair competition, intentional interference with prospective economic relations, breach of fiduciary duty, and injunctive relief. This lawsuit was filed two months after the California Labor Commissioner made a determination that Everlasting had unlawfully retaliated against Defendant for exercising her right to use accrued sick leave.

Everlasting alleged Defendant unlawfully used its vendor and customer information to start a competing business and unlawfully solicited customers. Defendant denied these allegations and asserted Everlasting failed to act fairly or in good faith in the matter, among other affirmative defenses. Throughout the litigation, Everlasting asserted it was entitled to all of Defendant's business income and its own alleged lost profits, among other items of damages.

Defendant did not have many options as she was attempting to represent herself. Shimoda & Rodriguez Law, PC, picked up her representation *pro bono* and endured multiple trial continuances in a case that had lasted almost five years. The firm spent well into six figures in fees and costs for this righteous cause. Ultimately, the jury found in Defendant's favor on all claims asserted by Everlasting.

## SETTLEMENT

### **Traffic Accident** **\$1,500,000**

Shafeeq Sadiq of Sadiq Law Firm, PC, just honored as CCTLA's 2022 Trial Lawyer of the Year, was able to secure a \$1,500,000 settlement for his client this past January in a case venued in San Joaquin County.

The case stemmed from a rear-end traffic collision that occurred on July 25, 2017, in Tracy, CA, when Plaintiff was she was rear-ended by an AAA-insured in a 2013 Acura MDX. Plaintiff, 43 at the time, was at a complete stop at the time of impact. Both vehicles had moderate damage and were deemed total losses.

Plaintiff initially was seen in the emergency room and was instructed to follow up with her primary care physician. She followed up with an urgent care provider and then with a chiropractor for neck and back pain. After having diagnostic MRIs, she was treated by Dr. Carl Shin at the Center for Interdisciplinary Spine, who provided facet blocks and epidural steroid injections for her neck and back. The injections only provided temporary relief. She then tried acupuncture, also unsuccessful. She eventually underwent a cervical disk replacement and a lumbar fusion.

The vast majority of Plaintiff's treatment was on a lien. The total medical specials were \$230,241.98. Because she was not working at the time of the collusion, Plaintiff did not make a wage loss claim.

Defendants retained Dr. Hamidreza Aliabadi, who blamed Plaintiff's symptoms on pre-existing degenerative disk disease and chronic pain. He based this, in part, off the fact that Plaintiff had 11 chiropractic visits in 2015 after injuring her back while taking a dish out of the oven. He wrote, "There was no clinical indication for facet blocks and there was no indication for spine surgery in this case despite Dr. Orisek performing both a cervical artificial disc replacement surgery followed by a lumbar fusion surgery. Such surgeries would be futile in the treatment of the plaintiff's likely underlying tendinopathy and soft tissue complaints. As a matter of fact, as expected, the plaintiff notes no improvement of her pain with neither the cervical spine surgery nor the lumbar fusion surgery."

The parties mediated the case unsuccessfully in August 2021. In September 2021, Plaintiff served a \$1,750,000.00 CCP 998 offer to compromise, and Defendant responded with one for \$425,000. Neither offer was accepted.

In December 2022, the parties mediated again, this time with the Hon. Leslie Holland. When the case didn't settle that day, Plaintiff served a \$1,500,000 CCP 998 offer to compromise, with the indication that the matter would proceed to trial in March 2023 if it was not accepted. Three weeks later, AAA agreed to pay \$1,500,000 in exchange for a release and dismissal.

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# MEMBER VERDICTS & SETTLEMENTS

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## VERDICT

### Traffic Accident \$1,567,226

Paul Caleo and Emily Genge of Gordon & Rees (Oakland) and CCTLA Member Ian Barlow of Kershaw Talley Barlow, PC, won a \$1,567,226 jury verdict for their client, who was injured in a motor vehicle accident. Defendant was the Sacramento Housing and Redevelopment Agency (HAI Group Insurance). It should be noted this was Barlow's first trial.

#### Facts:

On July 2, 2018, the plaintiff, a 55-year-old woman, was rear-ended by a utility van owned by the Sacramento Housing and Redevelopment Agency. She declined emergency transport and drove herself home before going to urgent care later that day, complaining of pain in her left elbow, neck, right knee, and lower back.

#### Treatment:

Plaintiff came to our firm just before the expiration of the six-month Government Tort claim period. Although her primary complaint was the right knee, she had been receiving continued

physical therapy and acupuncture for the neck and low back.

Plaintiff did not want a lien-based work up and instead took the lead to push UC Davis to order MRIs and get a spine work up. She eventually found her way to Chris Sterling Shin, MD, at the UC Davis Spine Clinic. Shin is a PM&R but has a half a dozen leadership positions with UC Davis and teaching positions with Spine Fellows. Shin order trigger points injections and ordered MRIs. The trigger points were not effective. MRIs revealed a disc bulge at C4-C5 but did not signal change or clear signs of traumatic change. Shin opined at that time that the MRI was consistent with age-related degeneration and the on-going pain was likely myofascial.

Plaintiff returned to Shin in May 2021, reporting worsening neurological deficit, including reported falls. Shin found a positive Hoffman's sign and some hyperreflexia. He referred the client to a neurosurgeon within UC Davis, Dr. Kee Kim, who also found objective evidence of neurological deficit but felt client was not surgical and that they should continue to monitor. Plaintiff continued with physical therapy and acupuncture.

Shin was deposed in February 2022 on Plaintiff's notice. He testified that he reviewed all of Plaintiff's medical records, including two post-MVA MRIs and found a osteophyte formation at C4-C5 that was causing cord compression. Shin felt that the rapidity of the growth between 2019 and 2021 indicated a

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# MEMBER VERDICTS & SETTLEMENTS

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clear traumatic process, and the cord compression was responsible for the neurological deficits. Shin opined the MVA caused increased stress and therefore was responsible for the compression and need for surgery.

Plaintiff was seen by Dr. Eric Klineberg, orthopedic surgeon, at UC Davis in April 2022. Klineberg found the same positive Hoffman's and hyperreflexia. He ordered a lumbar MRI because he was concerned the falls could be related to something in the low back. Plaintiff returned to Klineberg in June 2022; he confirmed the cervical compression and found spondylolisthesis at L4-5.

Klineberg was deposed in early July 2022. He recommended a cervical fusion at C4-C5 and C5-C6 and stated he anticipated doing a fusion at L4-L5 after Plaintiff healed. He declined to comment on causation. Surgery was scheduled for December 14, 2022.

## Expert Discovery:

Plaintiff retained neurosurgeon Andrew Fox, M.D., neurologist Selena Ellis, and neuroradiologist Murray Solomon. Fox opined to causation on the cervical and lumbar surgeries. Ellis provided testimony regarding the natural course of nerve compression and linked the early complaints to the current neurological deficits. Solomon was dropped: he felt there was no osteophyte growth and disagreed with Shin's causation theory.

Defendant retained Dr. Edward Younger for a DME, neurologist Dr. Mark Strassberg, and neuroradiologist Jerome Barakos. The defense contended that Plaintiff's condition was the result of degeneration and that there was no evidence of a traumatic process.

A theme developed during expert discovery surrounding Plaintiff's generic condition, Ehlers Danlos Syndrome (EDS). EDS is a connective tissue disease that impacts the laxity of joints. She was diagnosed with EDS in the late '80s and has lived her entire adult life with the understanding that this condition would impact her life, but she remained uncertain how. Her medical records reflected a diagnosis of EDS, and doctors Shin and Klineberg were taking into consideration how EDS would impact the surgeries.

Doctors Fox and Ellis felt that the laxity of joints, including in the spine, likely resulted in more stress on the spine and contributed to the development of her condition. Defendant, however, denied that Plaintiff had active EDS, including Dr. Barakos testifying that there was no evidence on the MRIs that EDS impacted the spine.

## Trial:

Trial was in Sacramento County with Judge Lauri Damrell. We were pre-assigned, so MILs were argued a few weeks before jury selection. Jury selection started on November 28, 2022. On December 1, 2022, Judge Damrell notified the parties that she had COVID. The morning session was canceled, and we scrambled to figure out what to do. The parties stipulated to proceed

with Judge Damrell presiding over the case remotely; she was at home while the parties and jury appeared in court. We had a few technological hiccups as we adjusted and ended up having to call two experts much later in the case than anticipated—essentially blending Plaintiff's case-in-chief with Defendant's case. We ended up burning through three alternate jurors during the trial. Even with masks required in the courtroom, folks were dropping left and right.

The matter was argued and submitted to the jury on Thursday, December 8, 2022. Plaintiff argued for a verdict in the range of \$4,100,000 to \$5,100,000. Defendant argued for a verdict of \$75,000, based on past damages only, but if jury found causation of future harms, that damages should not exceed \$500,000. On December 9, 2022, jury returned the following: past non-economic damages: \$305,505; future economic damages: \$392,729 (two of the three surgeries requested); future non-economic damages: \$868,992.

Plaintiff Experts—Non-Retained: Dr. Alla Blinder, Tonya Tocchini (Physical Therapist), Dr. Chris Shin, Dr. Eric Klineberg; Retained: Dr. Andrew Fox (neurosurgery), Dr. Selena Ellis (neurologist), April Stallings (LCP)

Defendant's Experts—Dr. Edward Younger (orthopedic surgeon), Dr. Mark Strassberg (neurologist), Dr. Jerome Barakos (neuroradiology), Stephanie Volk (LCP), Karl Volk (economist)

## Settlement Offer History:

- a. February 1, 2022: \$225K: Plaintiff 998 (before depo of Dr. Shin)
- b. September 9, 2022: Defendant 998 for \$445k
- c. November 28, 2022: \$700k: Defendant offer before opening statement
- d. November 28, 2022: \$995k: Plaintiff offer before opening statement

## Take aways:

1. Reinforcing the long game.
  - a. Plaintiff was very averse to litigation and trial but also very firm on her take-home number. Managing the plaintiff was almost as difficult as managing the trial.
2. Understanding unusual pre-existing conditions and comorbidities
  - a. The EDS issue became a trial within the trial. Defendant pushed their theory that Plaintiff did not have active EDS symptoms by asking each of the treaters to explain her symptoms; all the treaters basically said "she was diagnosed with it." We were able to get positive testimony from some of them, and certainly the client's testimony helped but this definitely could have gone the other way.
  - b. In hindsight, we should have hired an expert to testify explicitly on EDS. As much as we understood about EDS, we never consider the possibility that Defendant would argue Plaintiff did not have it.



# NOTABLE CITES

Continued from page 2

whether there is a dangerous condition and is not trivial by itself. Although a defect's size may be one of the relevant factors, the court must also consider all of the circumstances surrounding the accident that might make the defect more dangerous than its size alone would suggest. Thus, all factors must be evaluated to determine if a defect is trivial or there exists a dangerous condition.

**Valdez v. Costco Wholesale Corp.**  
**2022 2DCA/2 California Court of Appeal,**  
**No. B315309 (November 18, 2022)**

A gas station attendant who stopped fight between gas station patrons was immune from liability based upon the Good Samaritan statute

**FACTS:** On January 19, 2018, Mark Valdez was a customer at Costco gas station when he saw his neighbor, Joseph Lizarraga, with whom he had been in feuding. The two men got into a fist fight. Daniel Terrones, a Costco employee, was on duty at the gas station, in his Costco uniform. Upon witnessing the fight between two customers, he radioed for assistance and then proceeded to demand that the men stop fighting. Fearing that Valdez and Lizarraga would hurt each other further or endanger customers, he decided to intervene to stop the fight. In the process of separating the two men, Valdez sustained a shoulder injury.

Valdez sued Costco on the basis that he had been intentionally injured by their employee.

Costco filed a motion for summary judgment, arguing that its employee was immune from liability based upon the Good Samaritan statute. The court agreed and granted summary judgment. Valdez appealed.

**ISSUE:** Does the Good Samaritan statute extend to persons who intervene in a fight?

**RULING:** Yes. A fight is an emergency situation, and intervening to provide non-medical assistance does fall within the Good Samaritan statute.

**REASONING:** California Health and Safety Code Section 1799.102 sets forth the Good Samaritan Statute. It states in pertinent part: "No person who in good faith, and not for compensation, renders emergency medical or nonmedical care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission."

The court found that the undisputed facts established that the fight at the gas station constituted an emergency as defined by Health and Safety Code Section 1797.70. Section 1797.70 states "Emergency" means a condition or situation in which an individual has a need for immediate medical attention, or where the potential for such need is perceived by emergency medical personnel or a public safety agency."

The court found that by intervening in the fight, Terrones acted in good faith and was attempting to render emergency non-medical assistance while at the scene of an emergency.

**Chen V. Bmw of North America**  
**2022 6DCA California Court of Appeal,**  
**No. H048257 (January 23, 2023)**

A 998 offer was sufficiently specific to be deemed enforceable.

**FACTS:** Daniel Chen sued BMW of North America for breach of warranty and violations of the Song-Beverly Act related to defects he alleged with a new BMW he had purchased.

A year into the case, BMW made a 998 offer of \$160,000 to Chen. Plaintiff Chen did not accept the 998 offer. Two years later, the case resolved by way of a settlement for \$160,000, and the terms of the settlement were virtually identical to those contained in the earlier 998 offer.

After the settlement, Plaintiff Chen moved as a prevailing party for attorney's fees and costs in the amount of \$436,071.82. The trial court awarded just \$53,509.51. The court arrived at the number by including only fees and costs accrued through July 2017, 45 days after the section 998 offer was made. Chen appealed the court's decision, arguing that BMW's 998 offer was not valid because its terms were too vague.

**ISSUE:** Was BMW's section 998 offer from June 2017 valid?

**RULING:** BMW's 998 offer was clear and specific enough for Chen to understand what was being offered and to weigh that against his prospects at trial. Affirmed.

**REASONING:** The purpose of Code of Civil Procedure section 998 is to promote early resolution of litigation by encouraging parties to make—and accept—reasonable settlement offers. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1114.) The statute encourages acceptance of reasonable offers by penalizing a party who does not accept a settlement offer and then fails to achieve a better result through continued litigation. (Code of Civ. Proc. § 998, subd. (c)(1).) In such a case, the non-accepting party cannot recover litigation costs, including attorney fees, accrued after the date the offer was made. (*Scott Co. v. Blount, Inc.*, at p. 1112.)

To invoke the statutory mechanism, the offer must be in writing and must "allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time." (Code of Civ. Proc., § 998, subd. (b).) It must "include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted." (*Ibid.*) BMW's offer complied with those requirements.

An offer is sufficiently specific if it contains terms making it "exceedingly difficult or impossible to determine the value of the offer to the plaintiff." The section 998 offer was clear and specific enough for Chen to understand what was being offered and to weigh that against his prospects at trial. He did not accept the offer and later agreed to a settlement that provided no greater benefit. There was no error in enforcing the statutory prohibition against awarding post-offer attorney fees and costs.

# When A Minor Is A Medi-Cal Beneficiary

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**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](mailto:dsglawyer@gmail.com), Rob Piering at [rob@pieringlawfirm.com](mailto:rob@pieringlawfirm.com), Glenn Guenard at [gguenard@gblegal.com](mailto:gguenard@gblegal.com), Chris Whelan at [Chris@WhelanLawOffices.com](mailto:Chris@WhelanLawOffices.com) or Alla Vorobets at [allavorobets00@gmail.com](mailto:allavorobets00@gmail.com)

## **MARCH**

**Fri/Sat March 10 – 11**

**CAOC/CCTLA Sonoma Travel Seminar**

Fairmont Sonoma Mission Inn & Spa  
(See pages 37-28)

**Tue, March 14**

**Q & A Problem Solving Lunch**

Noon - CCTLA members only - Zoom

## **APRIL**

**Tue, April 11**

**Q & A Problem Solving Lunch**

Noon - CCTLA members only - Zoom

**Tues, April 25**

**CAOC Justice Day - 7:45 a.m. - 5 p.m.**

1220 9th Street, Sacramento, CA 95814

For more information: [www.caoc.org/23JusticeDay](http://www.caoc.org/23JusticeDay)

To RSVP: <https://www.caoc.org/?pg=events&id=263675&evAction=regV2>

## **MAY**

**Tue, May 9**

**Q & A Problem Solving Lunch**

Noon - CCTLA members only - Zoom

**Fri, May 12**

**CCTLA Seminar – 10 a.m. to 2 p.m.**

Topic: Medical Liens Update

Speakers: Dan Wilcoxon, Don de Camara and John Rice

McGeorge School of Law

## **JUNE**

**Thu, June 1 (See pages 24-27)**

**19th Spring Reception & Silent Auction,**

benefiting the Sacramento Food Bank & Family Services

5 p.m. to 7:30 p.m. at The Lady Bird House

**Tue, June 13**

**Q & A Problem Solving Lunch**

Noon - CCTLA members only - Zoom

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of future programs

# CCTLA CALENDAR OF EVENTS