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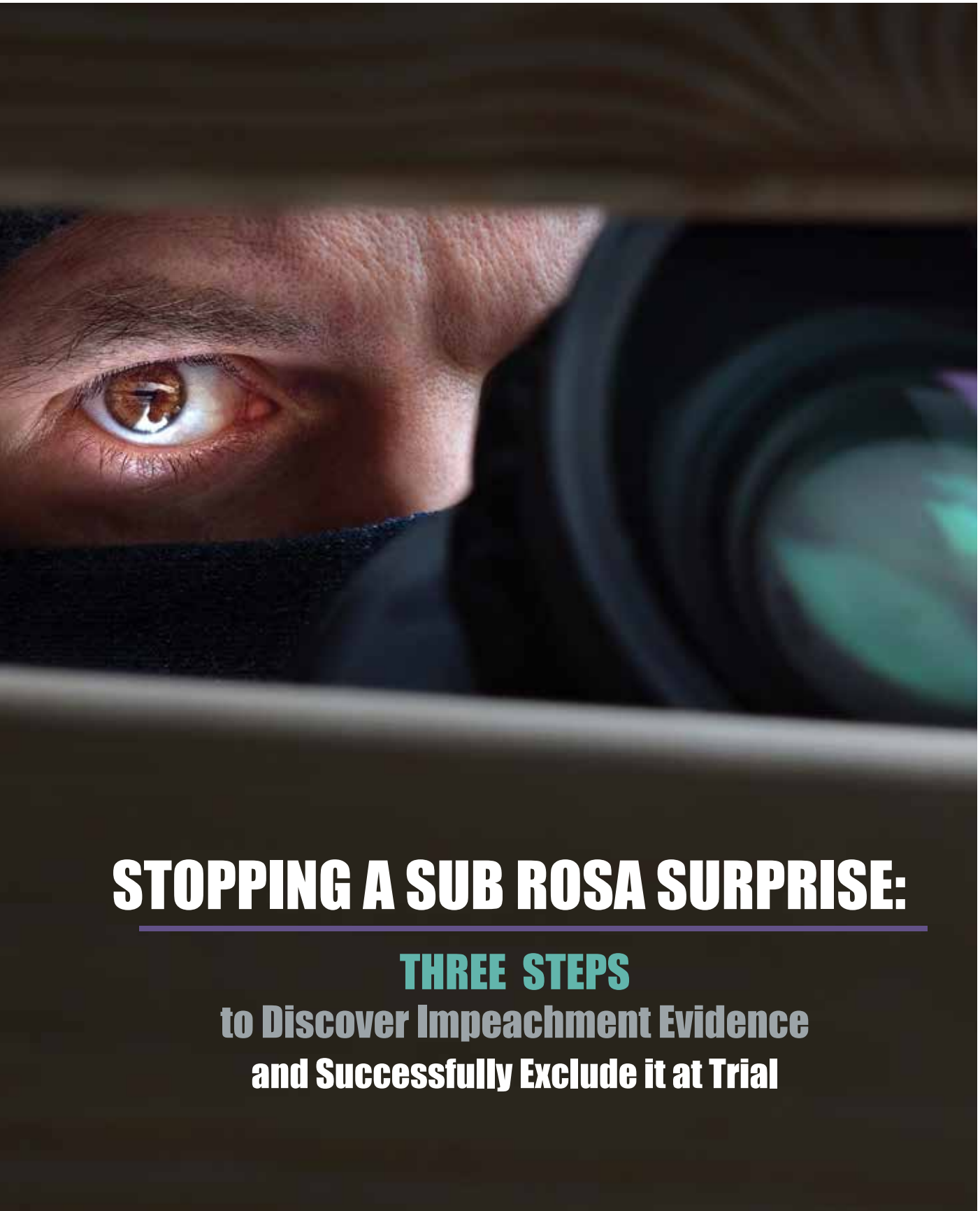

STOPPING A SUB ROSA SURPRISE:

THREE STEPS
to Discover Impeachment Evidence
and Successfully Exclude it at Trial

OCTLA
SPRING 2022

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Springing Forward Together

By **Edwin Hong, Esq.**
***Gavel* Editor**

With the greatly successful (and fun!) Installation Ceremony behind us, I eagerly look to another successful year with the Orange County Trial Lawyers Association. Though we may never get back the hour lost with Daylight Savings, the year holds a fantastic lineup of speakers and seminars over the coming months, covering topics such as mediation, UIM coverage in Rideshare and Food Delivery cases, and of course, the ever-amazing Palm Springs Seminar. Until then, our great members continue to contribute to our community with thoughtful and informative articles that help us be the best advocates we can be for our clients.

Clare Lucich and Farnaz Salessi share their tips and tricks on discovering and attacking the inevitable sub rosa surprises that lurk in the shadows in nearly every case.

With traffic returning to pre-COVID levels, Rob Marcereau shares his experience in empaneling a jury ripe with disdain for motorcyclists who seem to weave seamlessly ahead.

As the convenience of remote work comes to an end and employees return to their offices, Reza Torkzadeh and Allen P. Wilkinson dive into the many ways to maximize recovery for injured workers with different theories of liability.

Consumer attorneys and our partners continue to challenge the decades-old MICRA that unjustly limits our clients' rights to recovery. As the fight continues, Elizabeth Teixeira explains the parameters of seeking recovery with medical malpractice setoffs and MICRA reductions.

Finally, Ben Ikuta and Greyson Goody share their thoughts on "Nuclear Verdicts", providing the tools to disarm the techniques raised in this new defense playbook.

Don't miss our spotlight on the wonderful Keith More, whose dedication, charisma, and kind heart help OCTLA and its various featured charities continue to grow and flourish, whether by launching signed footballs at a Top Gun Dinner or encouraging our fellow lawyers to do the same.

Hope to see each and every one of you at our upcoming events! As always, if you are interested in writing for The Gavel, or have information to add to our regular columns, please reach out to me at Edwin@justiceteam.com

Be Kind

By **Douglas Vanderpool, Esq.**
OCTLA President

I have a sign hanging above my desk: It says: "**Be kind. Everyone you meet is fighting a hard battle.**" This is attributed to Plato, but I have not verified that.

In the midst of all of these global crises, kindness may be too easily dismissed as a "soft" issue, or a luxury to be addressed after all of the other urgent problems are solved. But kindness is the greatest need in all those areas - - kindness to the needs of those are who are suffering. Until we reflect basic kindness in everything we do, our political gestures will be fleeting and fragile.

Although I am not a particularly religious man, I have studied the Great Books of most religions. One theme that runs through all of the world's great philosophies is giving and generosity, especially to the most downtrodden, the most despised. The Bible is replete with instructions to give freely:

"Truly I tell you, whatever you did to one of the least of these, you did to me." Matthew 25:35-45.

"Good will come to those who are generous and give freely, who conduct their affairs with justice." Psalm 112.

The Buddha taught: "If you knew as I know the benefit of generosity, you would not let an opportunity go by without sharing." The Buddha taught and lived what is really a "way of life": giving and receiving—the practice of dana. The cultivation of dana offers the possibility of purifying and transforming greed, clinging, and self-centeredness, as well as the fear that is linked to these energies of attachment. Generosity is the ground of compassion; it is a prerequisite to the realization of liberation.

The Tibetans have a practice to cultivate generosity. They take an ordinary everyday object such as a potato or a turnip, and hold it in one hand and pass it to the other hand, back and forth, until it becomes easy. They then move on to objects of seemingly greater value, such as a mound of precious jewels or rice. This "giving" from hand to hand ultimately becomes a symbolic relinquishment of everything—our outer material attachments and our inner attachments of habits, preferences, ideas, beliefs—a symbolic "letting go" of all the ways that we create a "self" over and over again.

"Indifference, to me, is the epitome of evil. The opposite of love is not hate, it's indifference. The opposite of art is not ugliness, it's indifference. The opposite of faith is not heresy, it's indifference. And the opposite of life is not death, it's indifference." - Elie Wiesel.

Islam encourages this concept of generosity so much so that it is embedded in one of the five pillars of Islam, the obligatory charity known as Zakaat. In Arabic, the term Zakaat literally means purification of the heart. However; it is also the payment, from surplus money, of an obligatory charity designed by God to provide for all the needy members of the community.

Whenever I see someone who has, for whatever reasons, has ended up on the streets, I think: "There but for the grace of God go I." As I have written in this Column previously, my theme for this year is Generosity. We all know that one kind word, one small gesture, or one helping hand can change a life. Can save a life.

At the OCTLA Installation on February 12, I told the story about a little girl. Her birth mother gave her up for adoption. Unfortunately, even though she was very lucky to be adopted, her adoptive parents wanted boys, not girls. Even worse, this little girl was repeatedly abused physically, mentally, emotionally and verbally. She endured things that we really don't want to think about. One day at the age of 14, she realized she had to make a decision. She could stay there and continue to be abused, or she could leave. When she told her adoptive mother that she was leaving, she was handed a suitcase and told to get out. This 14-year-old girl landed on the mean streets of Long Beach, California.

This innocent 14-year-old girl couch surfed when she could, but more often than not she ended up sleeping on people's lawns, in unlocked laundry rooms, porches, and on the beach. At the age of 15, she had her first child. Eventually, she was put in foster care, and then a group home for unwed mothers. At 16, she was told she would now be legally

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emancipated. She was given 12 days' notice, and had to leave the group home. She again had nowhere live.

One kind word, one kind deed, one helping hand.

One of the defining moments in her life came after meeting with a career counselor who encouraged her to join the military. She joined the Marines, and this helped to change her life. She had her second child at the age of 21. After leaving the Marines, she started working at Horton Barbaro & Reilly while also going to school at Golden West Community College.

This young woman had such will power, such strength of character, in spite of all that had happened to her. She decided to go straight to law school without receiving her undergraduate degree. She graduated from Western State, and after passing the bar exam, worked as an associate for Frank Barbaro, then started her own law firm.

We all know who I am talking about. Kim Valentine.

Kim knew, that one kind word, one kind gesture, one helping hand, can change a life, can save a life. Kim didn't want to start a charity for some sort of accolades. She just wanted to do something to make a difference in people's lives. She did it quietly, privately. Because it was the right thing to do. To set an example for her children.

Kim decided she wanted her son Cory to see a different Orange County, So she got together some of his friends, and they filled 50 brown bags with hygiene items and blankets. They went down to an encampment in San Diego, and let the kids lead the way.

Later, they switched to backpacks, with the assembly taking place in Kim's garage. Their first time back, 100 backpacks were distributed. The next time, 250, and the next, 500. Operation Helping Hands - OHH - was born.

Kim will tell you about one of her most memorable moments. They were handing out backpacks and blankets, and had one left - - A PINK BLANKET. Kim handed it to a homeless man, and she apologized for the color. **He responded "Cold doesn't have a color" .**

OHH is now going beyond backpacks. OHH is now funding year long scholarships for students who are housing insecure. OHH can pay the rent for one of these students for one year, with just a $10,000.00 donation. We are very excited to have selected Operation Helping Hands as the recipient of our Top Gun silent and live auction proceeds this year. Kim's story leading her to start this charity and the time, heart and soul she dedicates to strengthening and broadening its mission moved our hearts tremendously and we are honored to be able to give back to Operation Helping Hands. The spirit of giving and generosity was so palpable at our Installation that it appears we have already raised more than Fifty Thousand Dollars for OHH in less than a week. The Top Gun event will take place on Saturday, November 12th at The Westin South Coast Plaza in Costa Mesa.

Please join us in celebrating and raising funds for **Operation Helping Hands** by donating an item, vacation getaway, night out on the town, fine wine, concert or sporting event tickets, etc. for our silent auction taking place at our annual Top Gun Awards Program on November 12th. Our auction donation form is on the opposite page.

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EVENT DATE: NOVEMBER 12, 2022

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Estimated fair market value of your donation: $ _____ Suggested minimum bid: $ _____

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How and when can we expect your donation delivered? _____

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City: _____Zip:_____ Phone: ( ) _____

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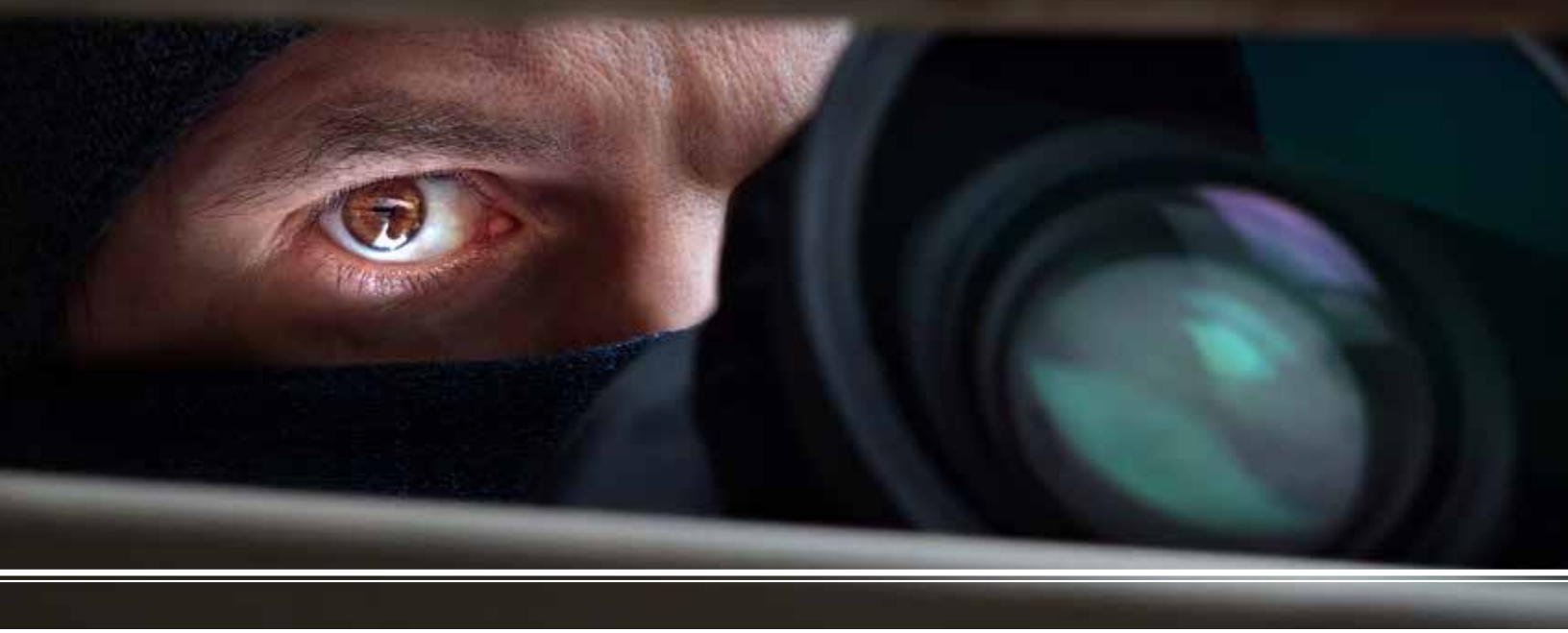
THANK YOU FOR YOUR SUPPORT

Stopping a Sub Rosa Surprise:

Three Steps to Discover Impeachment Evidence and Successfully Exclude it at Trial

Clare Lucich, Esq. and Farnaz Salessi - Bentley & More LLP



There's nothing quite like the potential for a sub rosa surprise at trial to get your heart racing as a plaintiffs' attorney. And with the prevalence of smart phones and social media, it is now easier than ever for the defense bar to cherry-pick unflattering information to showcase to the jury. Though many lawyers believe such impeachment evidence—including sub rosa surveillance footage, photographs, and social media posts—is not subject to pre-trial discovery, a wealth of Federal authority confirms that impeachment evidence is discoverable when responsive to a specific discovery request. Despite the limited California authority discussing this issue, because courts recognize that the Civil Discovery Act was modeled after the Federal Rules of Civil Procedure, case law discussing the Federal discovery statutes is persuasive here.

This article will detail the definition of impeachment evidence, methods that can be used to obtain that evidence notwithstanding the defense's objections, and, ultimately, methods to exclude impeachment evidence at trial.

What is Impeachment Evidence?

"To give evidence the label of 'impeachment,' does not always make it 'impeachment evidence.' In the law, we are more concerned with substance and merit, than we are with form and appearance." (*Newsome v. Penske Truck Leasing Corp.* (D. Md. 2006) 437 F.Supp. 2d 431, 433.) Under California law, for a witness's prior statement to be properly subject to impeachment, the prior statement must be "clearly inconsistent" with the evidence being proffered for impeachment purposes. (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 699; see also, Cal. Evid. Code, § 780; 3 Witkin, Cal. Evid. (5th ed. 2012), § 351.) In other words, unless the sub rosa or social media post shows your client doing something he *explicitly* said that he *cannot* do, it is not impeachment evidence. Such evidence would have zero probative value and would only be offered to imply your client is dishonest, malingering, or exaggerating his or her injuries. This would be misleading and confusing to the jury.

Worse yet, so-called "impeachment evidence" is often taken out of context. For example, a defense investigator may follow your client for days and obtain several hours of footage that *supports* your client's injury

claim. Instead of presenting a complete and accurate picture to the jury, the defense will seek to offer into evidence one short video clip, taken out of context, to give the impression that your client is not in pain, and in turn must be exaggerating his injuries. Oftentimes, this footage is not only misleading, but fails to impeach your client. For example, if your client testified that he could kneel, but it would cause him some discomfort, footage of him kneeling for a short time period is *not* clearly inconsistent with his testimony—and thus does not constitute impeachment evidence.

Step One: Request Impeachment Evidence in Written Discovery

It is critical to propound early requests for potential impeachment evidence using the various tools at your disposal. Start with form interrogatories, including the thirteen series. Simultaneous with your form interrogatories, propound requests for production seeking both the production of all documents identified in response to form interrogatories, as well as all photographs, video, audio, social media posts, and surveillance footage of your client. Before your client's deposition, be sure to propound follow-up requests seeking the production of any videos or photographs generated after the date defense served initial responses. In addition to these sets, propound supplemental discovery requests pursuant to section 2031.050, which is permitted once prior to and once after the initial setting of a trial date.

Evaluate the defense's responses carefully, and if there is any doubt as to whether responsive information is being withheld, make sure to meet and confer and demand a privilege log. Remember that the mere existence of a document that purportedly contains privileged information is not privileged. (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 293.)

Common Defense Objections and How to Overcome Them

Defendants will often object and refuse to respond to requests for surveillance footage, photographs, or social media posts relating to your client. These objections typically include claims that the information is subject to the attorney-client privilege or the work product doctrine, is equally available, or constitutes non-discoverable impeachment evidence. We tackle each of these objections below.

The Attorney-Client Privilege and the Attorney Work Product Doctrine

Any claims that the attorney-client privilege or attorney work product doctrine prevent discovery of photographs, surveillance videos or social media is without merit. In *Suezaki v. Superior Court of Santa Clara County* (1962) 58 Cal.2d 166, the California Supreme Court struck down the defendant's claims that sub rosa films of the plaintiffs were privileged, as the films were "not a graphic representation of the defendants, their activities, their mental impressions, anything within their knowledge, or of anything owned by them"—rather, the films were deemed to be representations of the plaintiffs, not of the defendants. (*Id*. at 177.) The California Supreme Court further found that the plaintiffs' need to protect against surprise at trial constituted good cause for compelling production of the footage, and was entirely consistent with the purposes of the Discovery Act. (*Id*. at 172.)

The *Suezaki* ruling is also instructive for requests for impeachment evidence obtained from social media posts. Social media posts, like sub rosa footage, are "not a graphic representation of the defendants, their activities, their mental impressions, anything within their knowledge, or of anything owned by them." Social media posts are generated by, and procured from, unrelated third party sources, and thus arguably cannot reflect the mental impressions of defense counsel. Just as photos of evidence are non-derivative (i.e., are only evidentiary in character, and don't reflect the attorney's evaluation or interpretation of the law or the facts) and therefore discoverable, social media posts and photos of parties are also non-derivative. (Cal. Prac. Guide Civ. Pro. Before Trial Ch. 8C-4, §§ 8:219, 8:234.1.).)

Equally Available

Defendants commonly object to our requests to produce social media information on the grounds that the information sought is equally available, but this argument fails to find support in either the Code or case law. For example, the only Code of Civil Procedure section that refers to information that is equally available is section 2030.220, which relates to interrogatories and concerns situations in which the responding party does not have personal knowledge sufficient to respond. In contrast, a party responding to a request for production must produce *all* responsive documents or other specified material within its "possession, custody, or control." (Code Civ. Proc., § 2031.010.)

Other courts have held that an "equally available" objection is insufficient to resist a discovery request. (*See, e.g., City Consumer Services v. Horne* (D.Utah 1983) 100

F.R.D. 740, 747 [stating that it is "not usually a ground for objection that the information is equally available to the interrogatory or is a matter of public record," citing *Petruska v. Johns–Manville* (E.D.Pa. 1979) 83 F.R.D. 32, 35]; *Associated Wholesale Grocers, Inc. v. U.S.*, (D.Kan. June 7, 1989) 1989 WL 110300 at *3 [finding that the defendant's argument of equal accessibility was insufficient to resist discovery].)

As such, the fact that certain information may be available online does not relieve defense of its obligations under the Code when faced with a proper request for production.

Impeachment Evidence is Not Discoverable

When arguing that impeachment evidence is discoverable, it is important to distinguish between evidence that is exclusively for impeachment purposes and evidence with substantive value. If the evidence sought is both responsive to a discovery request *and* has a substantive purpose, the evidence is discoverable, even if defense intends to use it for impeachment at trial. (*Newsome v. Penske Truck Leasing Corp*. (D. Md. 2006) 437 F. Supp. 2d 431, 434.) The *Newsome* Court explained that impeachment evidence is offered with the purpose of discrediting a witness, while substantive evidence operates to establish the truth of an issue that will be determined by the trier of fact. (*Id.* at 435.) Oftentimes evidence has both a substantive and impeachment purpose. Thus, if impeachment evidence relates to the parties' claims or defenses, it likely has a substantive purpose. The Court provided an example of impeachment evidence that held no substantive value, citing a party who confesses in a prior proceeding that he is always dishonest when he testifies. (*Id.* at 435.) Contrast that statement with evidence that tends to prove or disprove an element of the plaintiff's damages, such as surveillance footage or social media showing what the plaintiff is or is not able to do, which is clearly relevant to the plaintiff's damages and therefore has a substantive purpose.

Other courts across the country have found that impeachment evidence, including sub rosa, is discoverable and must be produced in response to a specific discovery request. "[T]he recipient of a properly propounded document request must produce all responsive, non-privileged documents without regard to the recipient's view of how that information might be used at trial." (*Varga v. Rockwell Int'l. Corp.* (6th Cir. 2001) 242 F.3d 693, 697.) Indeed, a party "may not, under any circumstances, hold back materials responsive to a proper discovery request because it prefers to use the evidence as surprise impeachment evidence at trial." (*Id.*; see also, *Gutshall v. New Prime, Inc.* (W.D. Va. 2000) 196 F.R.D. 43 [surveillance evidence discoverable despite intention to use it solely for impeachment]; *Gardner v. Norfolk Southern Corp.* (D.N.J. 2014) 299 F.R.D. 434, 437-438 ["because the surveillance evidence directly relates to Plaintiffs' physical conditions, it constitutes evidence relevant to the subject matter of this action, and (is) discoverable"].)

Where a party erroneously designates evidence as "impeachment evidence" to prevent disclosure, the consequences can be severe. "If the impeachment evidence was discoverable and wrongfully withheld, the prejudiced party could move to compel production or seek to have the evidence excluded from trial. If the impeachment evidence has a substantive purpose, a party cannot hide the ball in discovery, then produce on the day of trial." (*Newsome*, *supra*, 437 F.Supp. 2d at 438.)

If the defense stands firm in its objections, you must file motions to compel.

Step Two: Utilize Notices to Produce at Trial to Obtain Impeachment Evidence After the Close of Discovery

Defense's opportunity to gather social media and sub rosa evidence does not stop at the close of discovery—such evidence can, and will, be obtained up to and during trial. Thus, it is important to not only request this evidence in written discovery, but to follow up those requests with a notice to produce at trial pursuant to section 1987(c). (Remember that your notice to produce *must* be issued concurrently with a notice to appear pursuant to section 1987(b), as it is not capable of standing alone.) This will allow you to obtain any impeachment evidence generated after the close of discovery and up to the start of trial.

The Code requires that you serve a notice to produce at least 20 days before trial. The notice should specify the "exact materials or things desired." Defense has only five days to serve written objections to this notice unless the court specifically extends that time. (Code Civ. Proc., § 1987(c).) Within your notice, include specific requests for impeachment materials, such as:

- All video taken by YOU of Plaintiff following the INCIDENT DATE through and including the start of trial.
- All photographs taken by YOU of Plaintiff following the INCIDENT DATE through and including the start of trial.
- All audio recordings of Plain-

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tiff not previously produced in this matter.

- All social media posts, messages, or comments which YOU contend were authored or posted by the Plaintiff.
- All social media posts, photographs, comments and messages that refer or relate to Plaintiff.
- All photographs of Plaintiff taken in 2019.
- All videos of Plaintiff taken in 2019.
- All photographs of Plaintiff taken in 2020.
- All videos of Plaintiff taken in 2020.
- All photographs of Plaintiff taken in 2021.
- All videos of Plaintiff taken in 2021.
- All photographs of Plaintiff taken in 2022.
- All videos of Plaintiff taken in 2022.

If the court continues your trial date, be sure to serve a new notice to produce that corresponds with the new trial date.

Step Three: Move to Exclude Impeachment Evidence at Trial

At this point, you have propounded extensive written discovery, met and conferred, filed motions (if necessary), and served a notice to produce at trial to each defendant. The stage is set to file a motion in limine seeking to exclude evidence of social media, sub rosa, and photographs not produced in response to discovery. Attach the discovery requests, the defendant's responses, and your notice to produce at trial as exhibits to your motion. Your motion should seek to exclude any videos, photographs, and social media posts not produced in discovery based on Evidence Code section 352, existing California case law, and the Discovery Act, as outlined in more detail below.

Within your motion in limine, argue that admission of any surveillance video or photograph of the plaintiff taken before the start of trial, which the defendants repeatedly failed to disclose in their verified responses to written discovery or in response to the plaintiff's notice to produce pursuant to C.C.P. § 1987(c), would constitute "trial by ambush" and must not be allowed.

Argue that the court has the power to bar testimony and evidence that was "excluded from an answer to an interrogatory." (*Thoren v. Johnson & Washer* (1972) 29 Cal.App.3d 270, 273.) The *Thoren* Court noted that "one of the principal purposes of the Civil Discovery Act is to do away with the sporting theory of litigation—namely, surprise at trial." (*Id*. at 274.) The act of failing to disclose information in discovery "deprives [the] adversary of the opportunity of preparation which would disclose whether the witness will tell the truth and whether a claim based upon the witness' testimony is a sham, false or fraudulent." (*Ibid*.; see also, *Crumpton v. Dickstein* (1978) 82 Cal.App.3d 166, 170.)

These arguments are not limited to interrogatory responses. In *Deeter v. Angus* (1986) 179 Cal.App.3d 241, the trial court's denial of a party's request to introduce a tape recording into evidence despite that party's failure to produce the tape in response to pre-trial discovery was affirmed. In so doing, the *Deeter* Court cited *Thoren*, *supra*, with approval and held that there was "no reason why the same rule should not apply to the willful withholding of evidence such as the tape here at issue." (*Id*. at 254-255.)

Repeatedly remind the court that the withholding of impeachment evidence clearly violates the purpose of the Civil Discovery Act, which at its core is "designed to… eliminate the need for guesswork about the other side's evidence, with all doubts about discoverability resolved in favor of disclosure." (*Glenfed Development Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1119.)

To summarize, the arguments in support of exclusion include:

- The court can bar evidence excluded from discovery (*Thoren v. Johnson & Washer* (1972) 29 Cal.App.3d 270, 273.)
- Impeachment evidence is discoverable (*Newsome v. Penske Truck Leasing Corp*. (D. Md. 2006) 437 F.Supp. 2d 431, 434; *Varga v. Rockwell Int'l. Corp.* (6th Cir. 2001) 242 F.3d 693, 697.)
- Sub rosa photos and films of the plaintiff are subject to discovery (*Suezaki v. Superior Court* (1962) 58 Cal.2d 166.)
- Even if the court finds that impeachment evidence is not discoverable, only evidence that is clearly inconsistent qualifies as impeachment (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 699; see also, Cal. Evid. Code § 780; 3 Witkin, Cal. Evid. (5th ed. 2012) § 351.)
- The probative value of the evidence is substantially outweighed by the prejudicial effect and would necessitate the undue consumption of time (Evid. Code, § 352.)

Conclusion

Following these three steps will provide you with the best opportunity to exclude irrelevant "impeachment evidence" at trial, including social media evidence. At the very least, these steps will allow you to ascertain what evidence the defense has before it is shown to the jury—thereby avoiding the dreaded day-of-trial sub rosa surprise.

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Help!
The Jurors Don't Like My Client:
How to Conduct Voir Dire in Motorcycle Cases

by Rob Marcereau, Esq.

Ahhh, voir dire. For most lawyers, it's the least practiced (and most hated) part of any trial. Cross-examining expert witnesses is fun. Closing argument is fun. But having a conversation with a bunch of strangers who already don't like your client? Not so much. If you're going to be a trial lawyer, however, learn to love voir dire because it's the single most important part of every case. This is especially true when you represent a client who most people already view in a negative light. About 70% of my cases involve motorcycle accident victims, and after talking to thousands of prospective jurors, I can confidently say that anti-motorcycle bias is very real. With the following tips, however, you can weed out problem jurors and actually turn anti-motorcycle bias into a strength for your case.

I Want Motorcyclists On My Jury, Right? Maybe Not

Fun fact: motorcyclists are extremely judgmental of other motorcyclists and will often hold your client to a higher standard than non-motorcyclist jurors! If you have a case where liability is contested, be very wary of including motorcyclists on your jury. I had a case in Riverside a few years ago in which my client, who was lane-splitting, rear-ended a car which cut in front of him. It was a very difficult fact pattern. (To make matters worse, my client had head-to-toe tattoos and was a convicted felon!) Nevertheless, we won 12-0 on liability, and won 11-1 on comparative fault. The lone holdout? The only motorcyclist on the jury! When I chatted with that juror afterward, he passionately described how he would have seen the accident coming and avoided it, and that motorcyclists must be more wary than people in cars.

If liability is an issue in my case, I typically don't like motorcyclists on my jury, all other things being equal. If liability is admitted, however, motorcyclists can be good jurors, as they may be less prone to discounting the plaintiff's injuries. (More on this below.) Pro Tip: If you decide to ding a motorcyclist juror, don't burn a challenge on them until the very end. Most likely, the defense will get rid of them for you!

"If He Hadn't Been On a Motorcycle, He Wouldn't Have Been Injured"

One of the most important topics you need to cover in voir dire for motorcycle cases is the concept of "discounting" damages because your client was on a motorcycle. Everybody knows your client would have suffered far less serious injuries if they had been in a car rather than on a motorcycle. You must acknowledge this fact to the jury and deal with it. When I'm talking about damages during voir dire, at some point I make a general statement to the jury such as: "If [client] had been in a great big SUV instead of a motorcycle, he probably would have walked away without a scratch." Then I ask somebody: "Mrs. Smith, would the fact that [client] was injured while on a motorcycle cause you to discount his damages, because he wouldn't have been hurt if he had been driving an SUV?" I then follow up with this: "Mrs. Smith, you'll be given instructions that the law doesn't look at an injured motorcyclist any differently than somebody who was injured while driving a car. Could you allow the full amount of damages for [client's] injuries, without discounting them because he was on a motorcycle?" Time permitting, I question the rest of the jurors on this same issue. This line of questioning will weed out

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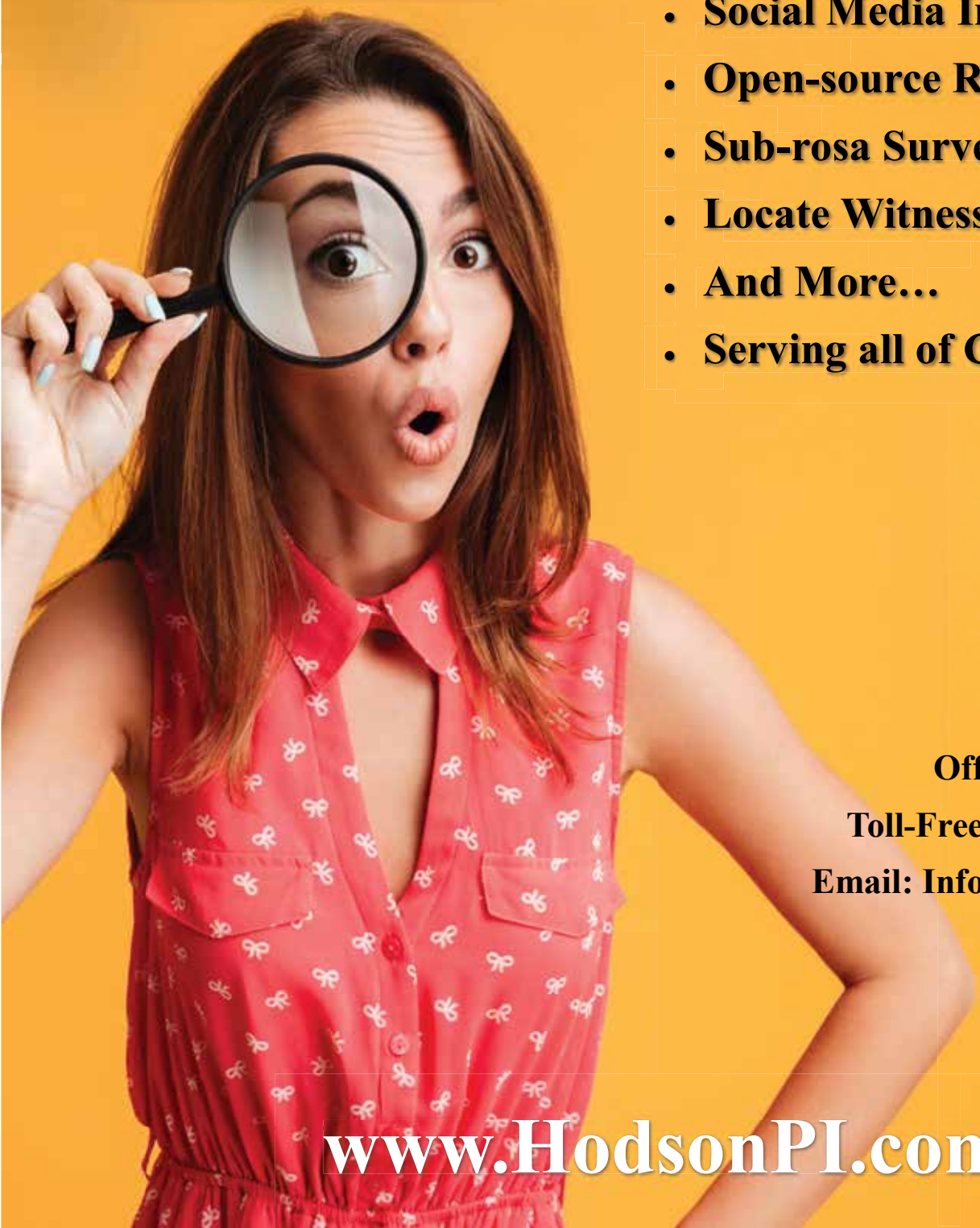

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problem jurors, while at the same time reinforcing the concept that motorcyclists should be treated the exact same as any other motorist.

I represented a motorcyclist in Santa Rosa a few years ago who fractured several ribs after being sideswiped by a car, resulting in chronic rib pain. If he had been in a car, he would have suffered no injuries at all. I was able to get two jurors out for cause after they told me that my client "assumed the risk" of greater injury, and that they would have trouble allowing all of his claimed damages. End result: we won almost a million dollars for chronic rib pain, in a venue that my opposing counsel said wouldn't go higher than $250,000 on my best day.

The Same Rules of the Road Apply Equally to Everyone

As a follow-up to the topic of "discounting damages," I pose this question to the jury pool: "Does anyone think that because [client] was on a motorcycle, he needed to be more careful than other motorists on the road?" You might get lots of hands. Talk to the jurors and get their thoughts. Don't argue with them! At some point, you can ask a juror something like: "Mrs. Smith, you will be instructed in this case that the same rules of the road apply equally to both the defendant, who was in a car, and [client], who was on a motorcycle. Will you be able to apply the same standard to both the defendant and [client], and not apply a higher standard to [client] because he was on a motorcycle?" Rinse and repeat with all the jurors. Once again, you are emphasizing that motorcyclists must be treated equally.

Make A Distinction Between Reckless Motorcyclists and Safe Ones (Like Your Client)

Many people think that motorcyclists are reckless and dangerous, in part because they've had negative experiences with motorcyclists on the road. If possible, you need to distinguish between these irresponsible hooligans—who we all agree are dangerous—and your client, who was a safe, responsible motorcyclist. (Cue the heavenly music and halo around your client's head.) The lane-splitting case I had in Riverside is a perfect example. My client was lane-splitting about 10 mph faster than the flow of traffic – a totally legal and reasonable practice. But people hate lane-splitters, so I needed to draw a contrast between what my client was doing ("safe" lane-splitting) and what is considered dangerous. I asked the jury this: "Show of hands, who's been driving on the freeway in heavy traffic, and suddenly had a motorcycle blow by them about 100 miles-an-hour and scare the heck out of them?" I used gestures and made a sound effect: "vroooooommmmmm!" EVERYONE's hand shot up. We all had this shared experience of some nutjob on a motorcycle blowing past us on the freeway. "We all agree that kind of lane splitting is crazy and unsafe, right?" Everybody nodded their heads. "What about if a motorcyclist is slowly moving between the lanes, only slightly faster than the flow of traffic. Is that a different story? Mrs. Smith, what do you think?" And off we went. This opened up a great discussion and got jurors thinking differently about lane splitting and about motorcyclists in general. All of a sudden, my client was no longer lumped in as just another crazy motorcyclist—he was a responsible rider who shared the jury's disdain for reckless motorheads. We were all on the same side!

Conclusion

We've covered the main points to

emphasize in voir dire for motorcycle cases. Obviously, all the usual voir dire topics for PI cases still apply, such as burden of proof and general damages. (*David Ball on Damages* is a great resource on these subjects).

Motorcycle accident cases can be challenging, but they also provide an opportunity to achieve outstanding results. Police reports are often adverse to your client, and defense lawyers and adjusters typically discount claims for motorcyclists, thinking that jurors will be biased against them. This leads to open policies and potentially big recoveries. My opposing counsel in the Riverside lane-splitting case (an in-house attorney at State Farm) turned down our $250,000 policy demand and smugly offered $109,000 as her last, best and final. My client's medical bills were almost $120,000! We ended up winning over $750,000 at trial—which was nice—but the cherry on top was the additional $150,000 we got on our motion for costs and pre-judgment interest for beating our 998. I don't always relish drafting law and motion, but that one was fun.

Rob Marcereau, Esq.
Marcereau & Nazif

Rob Marcereau is a partner at Marcereau & Nazif, headquartered in Orange County, and the founder of RiderzLaw. His practice focuses on motorcycle accidents and general, personal injury. He can be contacted at rmarcereau@mncalaw.com or www.mncalaw.com

In Memoriam: William J. "Bill" Howard

(1939 – 2022)

OCTLA Past President William "Bill" Howard passed away on January 10th. He was 82 years old.

Bill joined the Navy at age 17 and said that he grew up that first day of boot camp. After the Navy, he held various jobs including working at Atlantic Richfield Company in Los Angeles where he met Jean, his wife of 56 years. With three kids and a wife at home he worked as a delivery driver for Mother's Cookies while putting himself through law school. He graduated from Western State University College of Law and was later inducted into the WSU Hall of Fame.

Bill started his legal career as a defense attorney with Kinkle, Rodiger and Spriggs – and he was very good, however, his heart was with the plaintiff's bar. So he joined Hews, Munoz and Howard. Eventually, Bill opened his own law firm and later partnered with his son Brad to form Howard & Howard.

Bill was President of the Orange County Trial Lawyers Association in 1983 and a member of American Board of Trial Advocates (ABOTA).

OCTLA past President Mark Edwards recalls when he first met Bill Howard, he was an insurance defense lawyer. They tried many cases together but he remembers this story Bill told him about a case where he represented a tour bus company where many passengers were injured in a bus crash. Everyone recalled the bus traveling at 65 to 70 mph. Bill's defense was that the buses are equipped with a governor that prevents the accelerator from going over 60 mph. So, Bill asked for a jury ride in a bus so they could see that it cannot exceed 60 mph. As Bill told the driver to accelerate showing the speed could not go past 60, another tour bus from the same company was gaining on his jury demo and passed their bus in the fast lane going 70 to 75 mph. The other driver was waving at the jury bus driver and needless to say, the case settled.

Mark describes Bill as the most conscientious, cordial, and thorough lawyer he had ever worked with.

OCTLA Past President Troy Roe remembers Bill as a man with great passion and tenacity.

After his wife Jean passed away in 2016 from ovarian cancer, Bill, along with the support from friends and family, established The Jean Howard Infusion Center at Saddleback Memorial Hospital in Laguna Hills. Love is kind.

BREAKING THE BONDS OF WORKERS' COMPENSATION:

OBTAINING MAXIMUM RECOVERY FOR INJURED WORKERS

by Reza Torkzadeh, Esq. and Allen P. Wilkinson

Because workers' compensation benefits are notoriously and woefully inadequate for fully compensating the injured worker for his injuries -- or compensating the family of a deceased worker for their loss -- it is essential that counsel explore all possible avenues of potential civil liability, be it the employer, a fellow employee, or a third party.

It is elementary law that, where the "conditions of compensation" exist (Labor Code § 3600), an employee who is injured in the scope of his employment due to the negligence of his employer or a fellow employee ordinarily may not bring an action in tort against such wrongdoer, his exclusive remedy against such an actor being benefits under the workers' compensation system. (Labor Code § 3601 (fellow employees) and 3602(a)(employers).) Workers' compensation is based on a no-fault system and allows the injured employee to receive benefits regardless of whose fault it was.

However, in exchange for guaranteed remuneration, workers' compensation benefits are limited but, unlike tort damages, are not designed to make the injured person "whole." Benefits are usually limited to payment of many medical expenses, some wage replacement, and retraining when appropriate. They do not compensate the injured worker for all his lost past and future wages or lost earning capacity, nor does it pay the worker for noneconomic damages, such as pain and suffering, loss of enjoyment of life, emotional distress and mental anguish, loss of consortium, and so forth. Punitive damages also are not compensable. Additionally, workers' compensation benefits do not compensate the injured worker's spouse or domestic partner for the loss of affection, comfort, society, sexual relations, services (that is, loss of consortium), damages that he or she suffers and which are fully compensable in a traditional tort action.

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Because workers' compensation benefits are notoriously and woefully inadequate for fully compensating the injured worker for his injuries -- or compensating the family of a deceased worker for their loss -- it is essential that counsel explore all possible avenues of potential civil liability, be it the employer, a fellow employee, or a third party.

CIVIL LIABILITY OF AN EMPLOYER

Labor Code § 3602(a) provides that workers' compensation benefits are generally the exclusive remedy of an employee against an employer for injuries sustained while on the job. The threshold question is, of course, whether the injured or deceased person was indeed an employee of the employer. (Labor Code §3600.) This issue most often arises when a distinction is being made as to whether the injured or deceased person was an employee of the employer -- in which case the exclusive remedy provisions would apply -- or an independent contractor -- who would be free to file an action at law.

Labor Code § 3351 defines "employee" as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed …." An independent contractor, on the other hand, is defined by Labor Code § 3353 as one "who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not to the means by which such result is accomplished."

Workers' compensation is a no-fault system that permits the injured worker to collect limited benefits for on-the-job injuries without having to prove negligence or other fault of the employer. Indeed, the worker is allowed to collect workers' compensation benefits even if his injuries were due to his own negligence. However, there are several exceptions to this exclusivity rule that allow the injured employee to bring a civil tort action against his employer and recover all the traditional damages of a civil action. Here are some examples of the more common grounds for bringing a traditional civil tort action against the employer:

The employer does not carry workers' compensation insurance ("fails to secure the payment of compensation"), in which case the worker or his dependents can collect benefits from the uninsured workers' compensation fund and sue the

employer at common law (Labor Code § 3706);

The employer willfully physically assaults the employee or ratifies an assault on the employee by another worker (Labor Code § 3602(b)(1));

The employer knowingly removed or failed to install a point of operation guard on a power press or authorized its removal or failure to install where he knew or should have known such action or inaction would probably cause serious injury or death, and the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of the guards and this information was conveyed to the employer (Labor Code § 4558);

The employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the injury, in which case the employer's liability is limited to the aggravation proximately caused by the employer's fraudulent concealment; however, the employer has the burden of proof on the apportionment between the original injury and the subsequent aggravation thereof (Labor Code § 3602 (b)(2);

Where the employee's injury or death is proximately caused by a defective product made by the employer and sold, leased, or otherwise transferred for valuable consideration to a third person, and that product is thereafter provided for the employee's use by a third person (Labor Code § 3602(b)(3)).

Unlike a workers' compensation claim for benefits, unless it is an action against an employer for not having workers' compensation insurance, in a civil tort action the injured worker bears the burden of proving that the employer was negligent or otherwise at fault. The employer can raise the employee's own negligence or assumption of risk as the sole or a contributing cause of the injury to reduce or nullify its exposure.

If the action is against the employer for failing to secure the payment of compensation, an injured employee or his dependents may bring an action at law against the employer for damages as if the workers' compensation exclusivity rule did not apply. In such an action, there is a rebuttable presumption that the injury to or death of the employee was a direct result of the employer's negligence. The employer cannot raise the defense of the employee's contributory negligence or assumption of the risk of the hazard complained of, or that the injury was caused by a fellow servant. (Labor Code § 3708.)

FELLOW EMPLOYEES

An employee generally is not directly or indirectly liable in a civil action for injuries to or death of a fellow employee while acting within the scope of his employment. The two exceptions to this rule of nonliability are:

Where the injury to or death of the employee is proximately caused by the willful and unprovoked physical assault of the other employee (Labor Code § 3601(a)(1)); or

The injury to or death of the employer is proximately caused by the fellow employee's intoxication. (Labor Code § 3601(a)(2).)

THIRD PARTY LIABILITY

Much more frequent than civil tort actions against a worker's employer or fellow employee are actions against third parties. The fact that an employee has made a claim for or received workers' compensation benefits does not affect his right (or the right of a deceased employee's dependents) of action for all damages proximately resulting from the injury or death against any person other than the employer. (Labor Code § 3852.)

Some of the examples of third-party liability are so obvious and have been written about so frequently that to repeat them here seems superfluous. These include where a worker is injured or killed due to:

An automobile accident caused by a third party while the worker is acting within the course and scope of his employment, for example, making deliveries or running errands for his employer; dangerous conditions of property owned or maintained by another, resulting in the worker being injured when he slips and falls on premises of another due to, for instance, an unlevel surface, a hidden danger, a slippery or icy floor or walkway, or a loose stair board; being bitten by a dog while making a delivery to a customer's home; a defective forklift, skip loader, delivery van or truck; the defective design or manufacture of a machine that results in injury to the employee; defective tools, for example, a power saw, drill, or staple gun; and exposure to toxic substances, such as asbestos, lead-based paint, arsenic, or other poisonous or toxic gases, fumes, or substances.

An often-overlooked third-party action involves medical malpractice committed by the doctor the employer or its insurance company sends the injured worker to for evaluation and treatment of a work-related injury. While the doctor is not liable for the nature and extent of the original injuries when the employee first visits him, he is liable for any negligent act(s) that aggravate the seriousness of the injury or result in an injury to another part of the employee's body.

Failure to pursue a third-party action in such cases where it is warranted by the extent of the employee's injuries could be considered prima facie malpractice.

THE PECULIAR RISK DOCTRINE

At common law, a person who hired an independent contractor generally was not liable to third parties for injuries caused by the contractor's negligence in performing the work. The rationale for this rule was that a person who hired an independent contractor had no right of control over the mode of performing the work contracted for. So many exceptions to this rule have been created that more than one court has commented that "the rule is now primarily important as a preamble to the catalog of its exceptions." (*Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 252.)

One of these exceptions is for contracted work that imposes some inherent risk of injury to others, that is, a "peculiar risk." Under the peculiar risk doctrine, a person who hires an independent contractor to perform work that is inherently dangerous can be held liable for tort damages when the contractor's work causes injuries to third persons. A peculiar risk is not one that is abnormal to the type of work being done, nor is it a risk that

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is abnormally great. It simply means a special recognizable danger arising out of the work itself, a "special risk." The peculiar risk arises from either the nature or the location of the work and is one that a reasonable person would recognize the necessity of taking special precautions to avoid injuring others.

Although the peculiar risk doctrine is often defined as being the imposition of a nondelegable duty, it is in effect a form of vicarious liability. The purpose of the peculiar risk doctrine is to ensure that persons injured by an independent contractor's performance of an inherently dangerous activity on the owner's land do not have to depend on the contractor's solvency to receive compensation for their injuries. After compensating the injured victim, the owner can then seek indemnification from the independent contractor. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659; *Privette v. Superior Court* (1993) 5 Cal.4th 689, 694.)

EMPLOYERS OF INDEPENDENT CONTRACTORS

Privette v. Superior Court (1993) 5 Cal.4th 689 is an important case in California regarding the liability of a hirer of an independent contractor for work-related injuries suffered by the independent contractor or its employees. In *Privette*, the Supreme Court concluded:

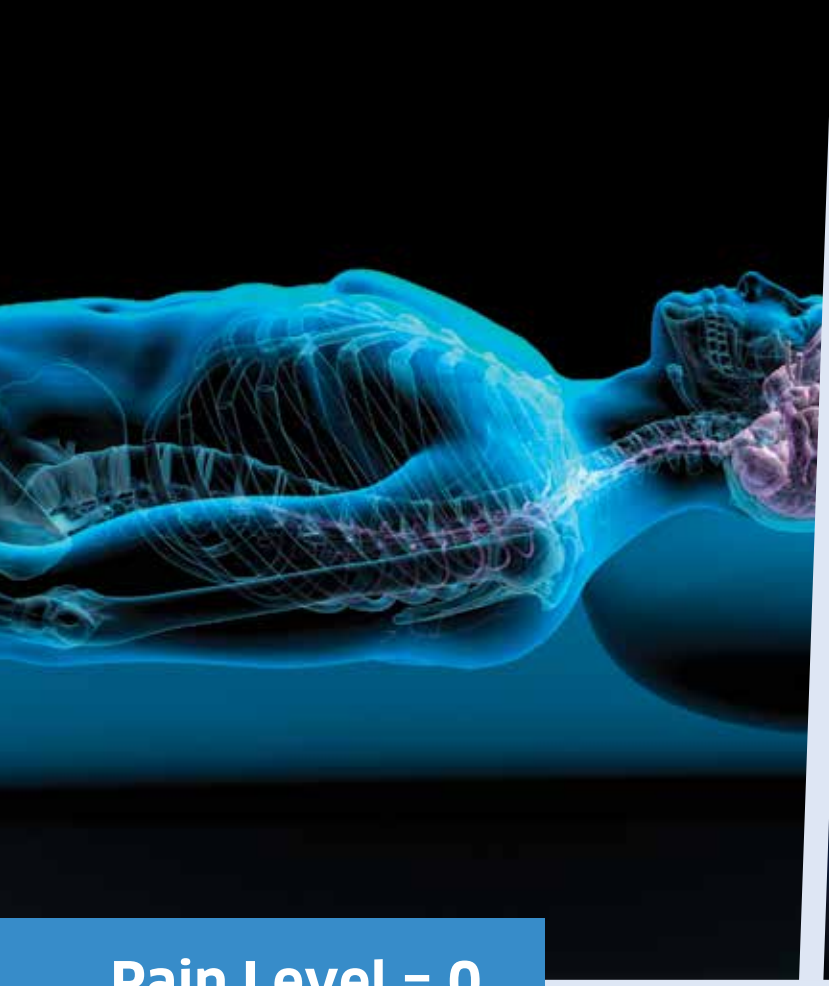
When . . . the injuries resulting from an independent contractor's performance of inherently dangerous work are to an employee of the contractor, and thus subject to workers' compensation coverage, the doctrine of peculiar risk affords no basis of the employee to seek recovery of tort damages from the person who hired the contractor but did not cause the injuries. (Id. at 702.) There is a strong presumption under California law that the hirer of an independent contractor delegates to the contractor all responsibility for workplace safety and is therefore not liable for on-the-job injuries suffered by the independent contractor or its employees. By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract. That implicit delegation includes any tort law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements. (*Seabright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590.)

There are two exceptions to the rule that the hirer of an independent contractor is not liable for the injuries to or death of an employee working for the independent contractor:
If the hirer of an independent contractor retained control over safety conditions at a worksite and negligently exercised that retained control in a manner that affirmatively contributes to the worker's injury (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198); or

The landowner that hires an independent contractor is liable to that contractor's employee if the landowner knew or should have known of a latent or concealed preexisting hazardous condition on the property, the independent contractor did not know of and could not have reasonably discovered the hazardous condition, and the landowner failed to warn the contractor of the hazard. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 664.)

In *Gonzalez v. Mathis* (2021) 12 Cal.5th 29, the California Supreme Court refused to carve out a third exception to the Privette doctrine. The Court held that a landowner is not liable for injuries to an independent contractor or its workers that result from a known hazard on the premises where there were no reasonable safety precautions the independent contractor could have adopted to avoid or minimize the hazard.

The Supreme Court emphasized that its holding does not apply to unknown and undiscoverable hazards. Rather, the ruling is limited



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to hazards on the premises of which the independent contractor is aware or should reasonably detect. Landowners can rely on the expertise of their independent contractors, who are in a better position to determine whether they can protect themselves and their workers against a known hazard on the worksite and whether their work can be performed safely despite the hazard.

SPECIAL EMPLOYEES

In a number of situations, especially those involving construction, an employer (the "general employer") may lend an employee to another employer (the borrowing, or "special employer") to work. As the United States Supreme Court stated way back in 1909, "[o]ne may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation." (*Standard Oil v. Anderson* (1909) 212 U.S. 215, 220.)

"In California when a general employer lends an employee to another employer and relinquishes all right to control over the employee's activities, a special employment relationship arises between the borrowing employer and the employee. (*State of Calif. ex rel. CHP v. Superior Court* (2015) 60 Cal.4th 1002.) During the period of time the employee works for the special employer, the special employer becomes solely liable for the borrowed employee's job-related torts under the doctrine of respondeat superior.

When the employee of a general employer becomes a special employee of another employer, the question arises as to what remedies may the special employee avail himself of if he is injured due to the negligence of the special employer or its employees. In such a situation, if the injured worker is found to be a special employee of the borrowing employer, he cannot bring a common law tort action against the special employer or its employees for injuries caused by their negligence under the exclusivity provisions and fellow servant rule provisions of the Labor Code. (Labor Code § 3601(a).) Similarly, a regular employee of the special employer cannot bring an action for personal injuries against the special employee or the general employer for injuries resulting from the special employee's negligence in the scope of employment. However, if the worker is not deemed to be a

special employee of the borrowing employer, he may file a common law tort action for injuries negligently inflicted by the borrowing employer or its employees.

The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved is not sufficient. While the right to control is an important element in determining whether a worker is a special employee, it is not alone determinative. The following factors are also considered by California courts in determining whether a worker is a "special employee": whether the person performing the work is engaged in a distinct occupation or business; the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; the skill required in the particular occupation; whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; the length of time for which the services are to be performed; the method of payment, whether by time or by the job; whether or not the work is a part of the regular business of the principal; and whether or not the parties believe they are creating the relationship of employer-employee. (*State of Calif. ex rel. CHP v. Superior Court*, supra, 60 Cal. 4th at 1013-1014; *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532.)

Evidence of the following factors tend to negate the existence of a special relationship where the employee is: not paid by and cannot be discharged by the borrower; a skilled worker with substantial control over operational details; not engaged in the borrower's usual business; employed for only a brief time; and using tools and equipment furnished by the lending employer. (*State of Calif. Ex rel. CHP*, supra, 60 Cal.4th at 1014; *Marsh v. Tilley Steel Co.* (1980) 26 Cal.3rd. 486, 492-493.)

Additionally, where the servants of two employers are jointly engaged in a project of mutual interest, each employee ordinarily remains the servant of his own master and does not thereby become the special employee of the other. (*State of Calif. ex rel. CHP v. Superior Court*, supra, 60 Cal.4th at 1008; *Marsh v. Tilley Steel Co.*, supra, 26 Cal.3d at 494-495.)

IS IT WORTHWHILE TO PURSUE A THIRD-PARTY CLAIM?

Because the workers' compensation insurance carrier and/or employer will be seeking reimbursement in one way or another for benefits paid to an employee who is injured by the negligence of a third-party, before agreeing to represent the employee in a third-party case counsel must ask whether it is worthwhile and in the best interests of the client. If the employee's injuries are relatively minor, it may not make economic sense for the employee to file a third-party lawsuit, because after the lawyer has been paid his contingent fee and the insurer or employer has been reimbursed for the amount paid to the employee, the employee's recovery may be minimal or even nothing. While it may be enticing to the lawyer to accept the case and take a third or 40% fee of the recovery, if the client is going to wind up with only a nominal sum unless the lawyer is willing to reduce his fee, it may not be in the client's best interests to prosecute the case.

In cases involving more serious injuries or death, the potential net recovery to the client even after the carrier or employer and the client's own attorney have been paid will likely justify acceptance of the case for prosecution.

Both attorneys who handle workers' compensation cases and those that practice general personal injury need to be aware of the potential for civil tort claims against employers, fellow employees, and third parties in the case of a worker who was injured or killed on the job to ensure that the worker or his family is fully and fairly compensated for his injuries or the family's loss.

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Collins v. County of San Diego

Medical Malpractice Setoffs and MICRA Reductions

By Elizabeth Teixeira, Esq.

Imagine being so gravely ill you are hallucinating homeless people are in your bedroom and that you are hanging out with famous celebrities in your living room. You stumble out into the street where you ask a Good Samaritan to call for help. They do. The paramedics arrive, and soon after the police do too. Before the paramedics can take you to the hospital, you are arrested for drunk in public. After the jail nurse deems you "fit," you spend hours in jail, where you fall due to your declining medical condition, striking your head and causing a hemorrhage in your brain. Another jail nurse puts a Band-Aid on your forehead and sends you back to your cell despite the fact you are still hallucinating and think the FBI is after you. After another fall the next morning, you are taken to the hospital where they find your sodium level to be one of the lowest ever seen. The medical providers then raise your sodium too quickly causing a second injury to your brain stem. The combination of these two brain injuries leaves you with devastating, lifelong disability. In *Collins v. County of San Diego*, these tragic errors led to a lawsuit against both the County for their deputies' and nurses' negligence and the treating physicians and hospital for medical malpractice.

After settling with the hospital and three physicians, Collins took the County of San Diego to trial for the negligence of the two arresting deputies and two nurses who saw him in the jail. The jury found against the County and awarded Collins total damages of $12,617,674 [$4,617,675 in economic damages and $8,000,000 in general damages]. The jury also apportioned the two jail nurses 70% at fault and the two deputies 30% at fault for Collins' injuries.

Post-trial, the parties agreed that the nurses' apportionment of noneconomic damages would be reduced pursuant to Civil Code §3333.2 enacted as part of MICRA [reducing $5.6 million, or 70% of the total $8 million, to $250,000]. However, Collins argued that pursuant to *Rashidi v. Mower* (2014) 60 Cal.4th 718, this reduction should take place *after* the court decided the setoff for the hospital and physician settlements. The County argued that the reduction should come first or an alternative hybrid theory. Both of the County's calculations would result in the County being responsible for less economic damages – giving the deputies an advantage they would not have if their co-tortfeasors were not medical providers. The trial court ruled in Collins' favor and made the setoff calculation before the MICRA reduction. The County appealed.

The California Court of Appeal affirmed the judgment and in doing so confirmed once again that MICRA affects judgments – not settlements. The court held that "***Rashidi* strongly suggests that application of MICRA before calculating the setoff is not required because MICRA applies to damages awarded at trial and not settlements, which are**

'not the same as damages.'" (*Collins v. County of San Diego* (2021) 2021 WL 612570, * 20, citing *Rashidi, supra,* 60 Cal.4th at *724.) This ruling provides a setoff methodology that not only gives medical providers their rights under MICRA, but also holds defendants responsible for their share of the economic damages.

California law regarding settlement setoffs makes it clear that the *Collins* ruling was correct and provides a pathway to future victims to obtain the maximum economic recovery allowed when a case involves MICRA caps.

Special Damages Setoff Under *Espinoza*

Unless court-approved at the time of settlement, the settlement setoff amount is typically determined in the same proportion of the jury's verdict. This commonly used formula from *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268 determines an allocation by calculating the percentage of the verdict representing economic damages, thus mirroring the jury's apportionment of damages. (See *Espinoza, supra,* Cal.App.4th at *276-277, holding because economic damages comprised 29% of total verdict, 29% of pretrial settlement should be attributable to economic damages.)

For example, a client settles with Defendant Fred for $2,000,000 and proceeds to trial with Defendant Sam. If the jury awards the client $750,000 in economic damages and $2,500,000 in noneconomic damages, then 23% of the verdict is for economic damages ($750,000 / ($750,000 + 2,500,000) = 23%). Applying that to the settlement, the court should determine approximately $460,000 of the settlement was for economic damages and subtract that out from the $750,000 in economic damages awarded by the jury. This leaves a judgment of $290,000 in economic damages and $2,500,000 in noneconomic damages. If there is a finding of comparative fault on the verdict, then the noneconomic damages would be adjusted based on that percentage under Prop. 51.

MICRA's Inapplicability to Settlements

In an attempt to stretch the implications of the MICRA cap, tortfeasors argued that if the settling defendant is a medical provider and therefore potentially subject to MICRA, the noneconomic portion of any settlement can only be $250,000 (the statutory cap on noneconomic damages under MICRA). With this scenario, the result would greatly inhibit any recovery of economic damages against cotortfeasors at trial. Using the example above, if the settlement were for $2,000,000 and the court held only $250,000 of that settlement was allocated to noneconomic damages, the resulting $1.75 million economic damages setoff would wipe out the economic damage verdict in its entirety. Thankfully that argument was quelled in *Rashidi v. Mower* (2014) 60 Cal.4th 718.

The California Supreme Court held in *Rashidi* that the cap imposed by Civil Code §3333.2(b) applies only to judgments awarding noneconomic damages and not settlements. In determining the MICRA cap should not be applied to settlements, the Court set forth its rationale that if non-settling defendants were assured a setoff of noneconomic damages regardless of their degree of fault, an agreement with one defendant would diminish the incentive for others to settle. Based on the plain language of Civil Code §3333.2, which refers explicitly to damages, not losses, the court held that MICRA did not require noneconomic losses to be subject to a settlement setoff. In reviewing the legislative history of Civil Code §3333.2 the court also noted that the Legislature had jury awards in mind when it enacted the MICRA cap, and that only a collateral impact on settlements was contemplated. The Legislature was primarily concerned with capricious jury awards when it established the MICRA cap. The *Rashidi* court held that allowing the proportionate liability rule of section 1431.2 (Prop. 51) to operate in conjunction with the cap on damages imposed by section 3333.2 enhances settlement prospects. (*Rashidi, supra*, 60 Cal.4th at pp. *726-727.)

Under the rationale of *Rashidi*, the fact that the settling defendants were medical providers, who would have been subject to MICRA had a judgement been rendered against them in a trial, should be immaterial to the determination of a setoff.

Collins Upholds the *Rashidi* Rationale

In *Collins*, the County argued that the verdict against a medical provider should be reduced for the MICRA cap before the *Espinoza* ratio calculation is made. This argument was the opposite side of the coin to *Rashidi* where the question involved whether the settlement should be subject to the MICRA cap. In *Collins,* the MICRA cap applied to the verdict against the nurse. The question was whether that reduction occurred before or after the allocation was calculated to determine the settlement setoff. If the County's argument was adopted, this method would be lucrative for defendants in any case involving a medical malpractice defendant at trial. In this scenario, if verdict of $2,000,000 in noneconomic damages was reduced to $250,000 first, the setoff ratio would then be 750,000/(750,000 + 250,000). In applying a straight *Espinoza* calculation, this would mean 75% of your pretrial settlement would be considered economic damages and would wipe out your entire economic damages' verdict.

This was not the first time the issue was brought to the appellate level. A similar scenario was discussed in *Francies v. Kapla* (2005) 127 Cal.App.4th 138, where the plaintiff asserted the trial court erred in the calculation of recoverable economic damages. Pursuant to Code of Civil Procedure section 877, the trial court deducted 22 % of the $203,035 Francies recovered in the prior proceedings from the award of economic damages. The court calculated the percentage based on what it found to be the ratio between Francies' economic damages and the total award. However, in determining this ratio, the court first reduced the amount of noneconomic damages from $425,000 to the $250,000 maximum recovery permitted by MICRA**.**

Francies contended on appeal that the trial court should have calculated the ratio before, rather than after, applying the MICRA cap to the noneconomic damages. The Appellate Court's response: "We agree." (*Id.* at *1386.) The Court's rationale was that the objective of this calculation is to determine the proper allocation between economic and noneconomic damages of the amounts previously recovered:

The MICRA cap had no effect on the amounts recovered either from Francies's employer or as workers' compensation benefits. In using the allocation of damages made by the trier of fact in the current proceedings as the appropriate allocation of the amounts previously recovered, **the relevant ratio is the actual economic damages as a percentage of the total damages suffered by Francies, not the ratio between the economic damages and the amount of damages that Francies can recover from Kapla.** (See *McAdory v. Rogers* (1989) 215 Cal. App.3d 1273, 1277–1278, [MICRA cap was intended to limit the *recovery* of noneconomic damages rather than limit the damages the plaintiff actually suffers].) (*Id*. at *1387. [Emphasis added, internal citations omitted.)

The court held that the prior recoveries should have been allocated based on the ratio between the economic and noneconomic components of Francies' total damages before taking into account any limitation on recovery imposed by MICRA. *Id.*

The trial court in *Collins also* agreed with this rationale and applied the *Espinoza* calculation before reducing the nurses' portion of responsibility for noneconomic damages to $250,000. The Court of Appeal held that the *Rashidi* case supported the calculation used by the *Collins* trial court, where the setoff calculation was made *before* the reduction of the noneconomic damages for MICRA. (*Collins, supra,* 2021 WL 612570 at *19.)

Their rationale reiterated that damages that are awarded during a trial are not the same as a settlement. *Id.* at *20, citing *Rashidi*, *supra*, 60 Cal.4th at *724. The court went on to state that "[w]hat the trier of fact would have awarded Collins for the settling defendants' conduct, and what portion of fault it would have allocated to them is entirely speculative." *Id.* In finding the trial court had not abused its discretion, the appellate court affirmed the *Collins* judgment with the setoff and held the County, and particularly the deputies, responsible for the economic damages they would be required to compensate regardless of whether the co-tortfeasors were medical providers.

Future Setoffs

Whenever a setoff is requested in a case involving allegations of medical malpractice, the MICRA reduction should always be made *after* that setoff. The public policy implication of this is obvious. Defendants, especially non-medical providers, should not be given any benefit of MICRA that is not strictly construed by the language of the statute. If the court had followed the County's arguments, the County, including the non-healthcare provider deputies, would have received a windfall by not being held responsible for economic damages they caused. This defeats the clear intention of MICRA's Civil Code §3333.2 which only applies to health care providers and only to the noneconomic damages awarded in a jury's verdict. The methodology adopted by the *Collins* court is a step forward to maximize plaintiffs' recoveries and allow pretrial settlements with some defendants to proceed without jeopardizing recoveries against cotortfeasors at trial.

Beth Teixeira, Esq.
Law Offices of Robert Vaage

Beth Teixeira is an attorney at the Law Offices of Robert Vaage, where her practice focuses on representing plaintiffs in catastrophic injury cases including product liability, medical device and physician fraud, and medical malpractice. She may be reached by email at eteixeira@vaagelaw.com

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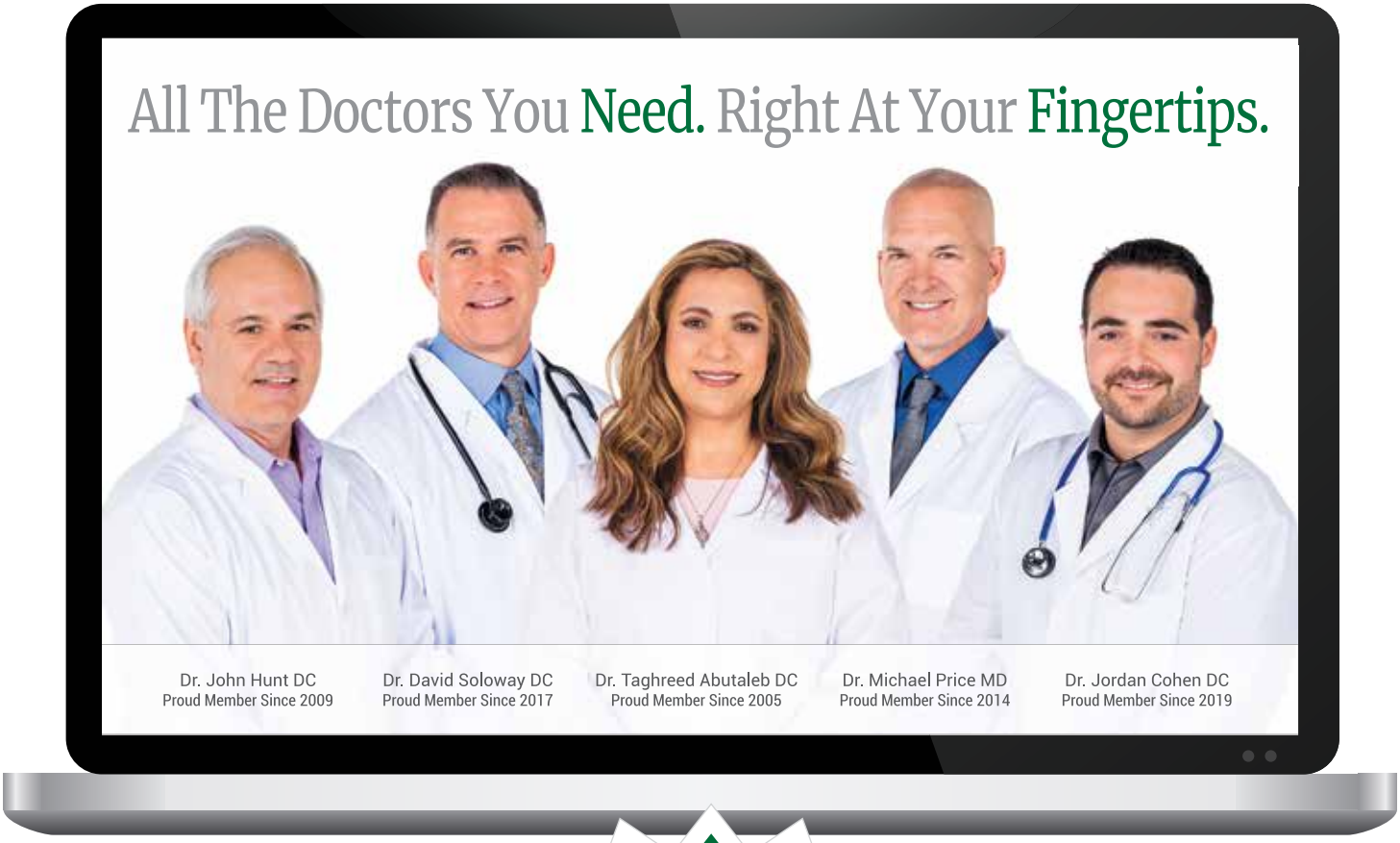

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OCTLA CONGRATULATES AND WELCOMES THE FOLLOWING JUDICIAL APPOINTMENTS

Judge Adrianne E. Marshack, 44, of Irvine, has been appointed to serve as a Judge in the Orange County Superior Court. Marshack has been a Partner at Goodwin Procter LLP since 2021. She was a Partner at Manatt, Phelps & Phillips LLP from 2016 to 2021 and was an Associate there from 2009 to 2014. She was Counsel at Greenberg Gross LLP from 2015 to 2016 and Partner at Katz Yoon LLP from 2014 to 2015. Marshack was an Associate at Hodel Briggs Winter LLP from 2008 to 2009 and at Morrison & Foerster LLP from 2007 to 2008. She earned a Juris Doctor degree from the University of California, Los Angeles School of Law. Marshack fills the vacancy created by the retirement of Judge Sheila Fell. She is a Democrat.

Judge Yolanda V. Torres, 48, of Huntington Beach, has been appointed to serve as a Judge in the Orange County Superior Court. Torres has been a Sole Practitioner since 2008. She was an Adjunct Professor at the Western State University College of Law from 2017 to 2021. Torres was an Associate at the Law Office of Patrick A. McCall from 2003 to 2008, at Hughes & Sullivan from 2002 to 2003 and at Alexandra Leichter Law Offices in 2002. She was a Law Clerk at the Orange County District Attorney's Office in 2002. Torres earned a Juris Doctor degree from the University of the Pacific, McGeorge School of Law. She fills the vacancy created by the retirement of Judge Mark Millard. Torres is registered without party preference.

Judge Fernando Valle, 44, of Santa Ana, has been appointed to serve as a Judge in the Orange County Superior Court. Valle has been a Senior Deputy Public Defender at the Orange County Public Defender's Office since 2021, where he has served in several roles since 2004. He was an Intern at the Sacramento County Public Defender's Office from 2003 to 2004. Valle earned a Juris Doctor degree from the University of California, Davis School of Law. He fills the vacancy created by the retirement of Judge Gary L. Moorhead. Valle is a Democrat.

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LEGISLATIVE UPDATES

Governor Gavin Newsom Signs SB-447 (Laird) Into California Law on October 1, 2021

On October 1, 2021, ***SB-447 (John Laird)*** was signed into California law by Governor Gavin Newsom. The passage of SB-447 amends C.C.P. §377.34 to allow for ***recovery of pain, suffering or disfigurement sustained or incurred before death by a decedent*** in an action by a decedent's personal representative or successor in interest on the decedent's cause of action, ***if the action was granted preference before January 1, 2022, or was filed on or after January 1, 2022, and before January 1, 2026***. C.C.P. §337.34(b).

In addition, the new law ***mandates*** that a plaintiff who recovers damages for pain, suffering or disfigurement sustained or incurred before death by a decedent ***must within 60 days after obtaining a judgment, consent judgment, or court-approved settlement agreement*** submit to the Judicial Council a copy of the judgment, consent judgment, or court-approved settlement agreement along with a cover sheet detailing the date the action was filed, the date of the final disposition of the action and the amount and type of damages awarded, including economic damages and damages for pain, suffering, or disfigurement. C.C.P. §337.34(c).

The Plaintiffs' Bar and Consumer Attorneys of California (CAOC) Continue Their Efforts to Stop State Bar from Licensing Paraprofessionals to Practice Law in California As Part of State Bar's *Experimental* California Paraprofessionals Working Group (CPPWG)

On December 9, 2021, CAOC authored an open letter to the State Bar opposing the CPPWG's recommendations to license paraprofessionals to practice law in California without attorney supervision. Amongst CCPWG's recommendations were: (i) allowing paraprofessionals to own up to 49% of law firms, (ii) allowing fee splitting between paraprofessionals and lawyers within the same firm, and (iii) allowing paraprofessional representation in the areas of general civil, consumer debt and creditor harassment cases. The Plaintiffs' Bar and CAOC recognize the potential for conflicts of interest and ***serious irreparable harm to consumers if the CPPWG's recommendations are accepted***. The Plaintiffs' Bar and CAOC continue to advocate for bringing more lawyers and nonprofit organizations into legal aid instead of CCPWG's approach of creating an entirely new class of profit-driven legal service providers who are less qualified than attorneys and will undoubtedly cause harm to many consumers.

Increasing Minimum Financial Responsibility Limits and Addressing Uninsured/ Underinsured Motorist Issues – A Priority In 2022

California auto insurance minimum financial responsibility limits are currently $15,000 for a single injury or death; $30,000 for injury to, or death of, more than one person; and $5,000 for property damage. ***These minimum limits have been in place since 1967*** and an increase to the minimum financial responsibility limits is long overdue. Too many motorists are left victim to hundreds of thousands of dollars in unpaid medical bills and lost wages when they are hit by a motorist with minimum auto insurance bodily injury limits. According to the Bureau of Labor Statistics, today's prices are ***8.47 times higher*** than average prices in 1967. (https://www.bls.gov/data/inflation_calculator.htm).

Californians are also not getting what they pay for when purchasing uninsured/underinsured (UM/UIM) motorist coverage. "Stacking" UM/UIM motorist policies with underlying third-party policy limits is not permitted in California and the result is ***extremely unfair to injured and insured drivers*** who aren't allowed to take full advantage of the benefits that they are paying for. Nineteen other states allow stacking. Many consumers don't fully appreciate how "stacking" rules work against them and in favor of the insurance companies when purchasing UM/UIM coverage in California. California needs to address this loophole and allow "stacking," mandating that insurance companies provide the full breadth of UM/UIM benefits that consumers pay for and should be entitled to.

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PALM SPRINGS

MAY 19 | GOLF • MAY 20-21 | SEMINAR

PALM SPRINGS TOPICS & SPEAKERS

FRIDAY, MAY 20

Maximizing Client Recovery: Popping The Policy, (Damages) & Negotiating Liens
Srinivas "Vas" Hanumadass, Kristin Hobbs, John J. Rice, Bibianne U. Fell

Tips & Tricks On How To Handle Every Day Challenges
Garrett R. Chambers, Brian Shapiro, Michelle M. West, Aaron T. Hicks

The New World We Now Practice In: Virtual Depositions, Mediations & Trials
Taylor DeRosa, Hon. Gil G. Ochoa, Angela Bruno, William D. Shapiro

Law Practice Management In A Virtual World
Whit D. Bertch, Justin H. King, Kenny S. Ramirez, Evangeline Grossman

Fireside Chat: The Benefits of Cross Generational Mentorship
Douglas B. Vanderpool, Deborah Chang, Sarah Scheckel Kim, Keith P. More, Nico Mamone, Darren M. Pirozzi, Lauren Vogt, Roger A. Dreyer, Natalie M. Dreyer

Picking A Jury: An Interactive Workshop
Jason R. Sanchez, Kristy M. Arevalo, Brian G. Hannemann, Ricardo Echeverria, Rahul Ravipudi, Mary E. Alexander, Carl E. Douglas, Craig M. Peters

The Power Of The Pen: MILs, MSJs, & Other Motions
Michael Jeandron, Christopher Weaver, Brooke L. Bove, Benjamin Ikuta, Edie Mermelstein, Hon. Bryan F. Foster

Learn From My Mistake: Dilemmas In The Practice Of Law (Ethics)
Brynna Popka, Ted B. Wacker, Kelly Winter Weil, Ibiere Seck, Douglas S. Saeltzer, Hon. Chad Firetag

SATURDAY, MAY 21

Tactics For Maximizing Damages Workups
Lindsey Aitken, Geoffrey S. Wells, Wylie A. Aitken, Kimberly Valentine

Win Your Case During Discovery
Jonathan J. Lewis, Jean-Simon Serrano, Cynthia A. Craig, Puneet K. Toor

Avoiding Pitfalls & Picking The Right Government Tort Case
Gabriel S. Barenfeld, Mark P. Robinson, Jr., Gregory L. Bentley, Yoshiaki C. Kubota, Megan Demshki

Employment Law Updates
James G Perry, Veronica Cutler, Darren J. Campbell, Daren H. Lipinsky, Maryann P. Gallagher

Elimination of Bias/Diversity
Kristin Hobbs, Gregory G. Rizio, Justice Richard T. Fields

Laying A Strong Foundation: Tips For Building Your Case From Day One
Geraldine G. Ly, Christa Haggai Ramey, Manny Bustamante, Jr., Allegra Rineer, Jamon R. Hicks, Vincent D. Howard, Hon. Brian S. McCarville (invited)

Mini Med School For Lawyers & Attacking The Defense Medical Exam
Bryan L. McNally, Patricia A. Law, Jennifer R. Johnson, Richard A. Cohn, Eric D. Paris, Esq., Greyson M. Goody, V. Andre Rekte

Trial Skill Strategies
Jason Nicholas Argos, Virginia Blumenthal, Siannah Collado Boutte, Cory R. Weck, Brian D. Chase

COVID SUCKS! A Roundtable For Small And Mid-Sized Firms On What To Do About It
Steve Geeting, Micha Star Liberty (invited), Casey Johnson, Sahm Manouchehri, Ben Coughlan

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2022 TOP GUN TRIAL LAWYER OF THE YEAR Nomination Form

Each year the Orange County Trial Lawyers Association recognizes and honors local trial attorneys for their exceptional trial skills over the past 12 months. These attorneys not only show courage and commitment to their clients, but also demonstrate truly exceptional skill, ability, preparation, and professionalism to obtain outstanding results on behalf of their clients. Outstanding results are not limited to the size of a verdict, but may include additional factors such as length of trial, complexity of liability or damages, the impact of the result beyond the case itself and any other unique identifying characteristics. Results can include jury verdicts, arbitration awards and bench trial awards. Current OCTLA Attorney Members are eligible to submit a nomination.

I hereby nominate the following individual for Trial Lawyer of the Year:

_____

Personal Injury

_____

Business Litigation

_____

Medical Malpractice

_____

Employment Litigation

_____

Other Area (specify)

In selecting the Trial Lawyer of the Year, the nomination committee may consider the following criteria:

1. *That the individual be an excellent advocate;*
2. *The individual's reputation of civility, ethics and fair play in and out of the courtroom;*
3. *The individual's reputation and standing in the community;*
4. *The individual has meaningfully participated in an outstanding recent verdict as lead trial attorney.*

Nominations are also being accepted for the following categories:

_____

Young Gun. *The individual meets criteria 1-3 above, has been practicing law for 10 years or less and displays a consistent desire to try cases to conclusion, regardless of outcome.*

_____

Distinguished Achievement. *The individual meets criteria 1-3 above and has achieved an outstanding result through settlement, appeal or litigation that has significant impact for a consumer, the community or the civil justice system.*

Please include supporting material such as verdict reports, articles and/or a resume or biography that includes work history with dates. Whether an award winner is selected in any given category is at the sole discretion of the nomination committee and the Board of Directors.

_____ _____

OCTLA Member Signature OCTLA Member Name (print clearly)

All nominations must be received by July 31, 2022 to be considered

Email your nomination and supporting documents to info@OCTLA.org or FAX to (949) 215-2222
or Mail to: OCTLA Nomination Committee, 23412 Moulton Pkwy, #135, Laguna Hills, CA 92653

OCTLA MEMBER SPOTLIGHT

KEITH MORE

Keith More has spent decades, and untold time, talent, and treasure, in pursuit of helping others. Whether it is serving as OCTLA's premier auctioneer to raise hundreds of thousands for charity, painting masterpieces to donate to worthy causes, or fiercely advocating for those injured in the workplace, Keith's dedication and force of personality have long been a fixture in Orange County. In this Spotlight, we are proud to highlight an OCTLA Past President and four-time OCTLA Top Gun Award Winner, for his extraordinary results in Workers Compensation, who enshrines all the promise and ideals of OCTLA.

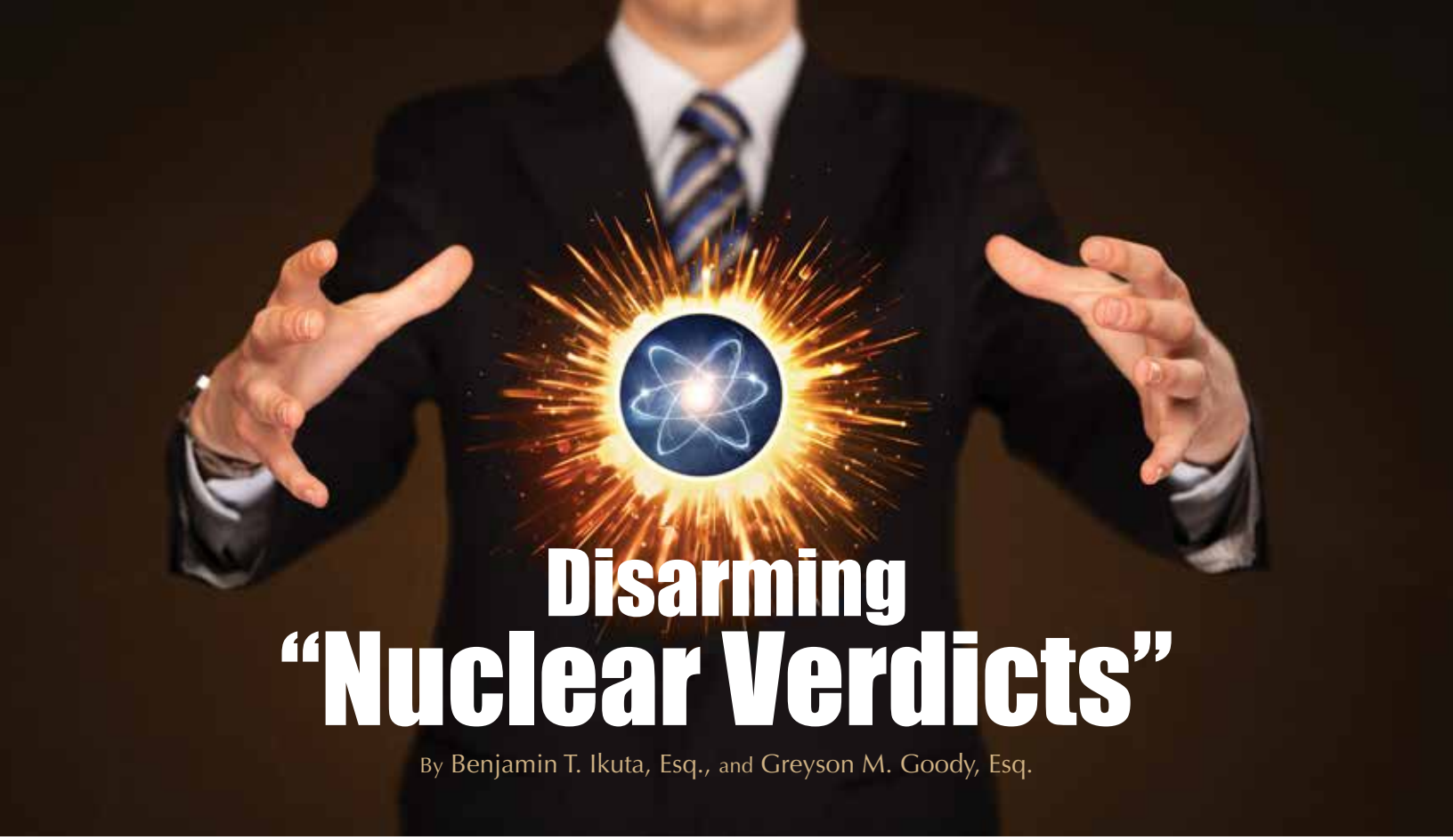
Keith was born and raised in the suburbs of Chicago. At just eight years old, Keith knew he would grow up to pursue one of two career paths: a professional baseball player or a lawyer. Compelled to be an advocate for others, and influenced by early experiences watching lawyers advocate for their clients, Keith focused his sights on becoming an attorney. Following a bachelor's degree at the University of Illinois, Keith graduated with honors from DePaul University College of Law. Fortunately for all of us, Keith moved from the frigid climes of Chicago out to California to practice law in 1989.

Following years as the managing partner at one of California's preeminent workers' compensation firms, Keith and Greg Bentley joined forces to cofound Bentley & More LLP in Newport Beach in 2016. There, he has continued to fiercely advocate for injured workers and consumers throughout California. That fierce advocacy secured a number of large settlements and verdicts that changed his clients' lives for the better, including recovering the largest settlement in California workers' compensation history at that time for his severely injured client. Keith has worked tirelessly to maximize benefits for those injured in the workplace and is well known for the personal hands-on approach he takes to each case. Keith explains "to advocate for your clients' needs, you need to know them and understand them." Keith puts this into practice on each case, taking the time to visit his clients at home, meet with their families, and attend team meetings with his clients' treating physicians. Keith says: "You never know what they are going through until you see it with your own eyes." That passion and approach is reflected in Bentley & More's tagline: "Telling Your Story."

When not advocating for injured workers, Keith enjoys spending time with his family (including his three daughters Paige, Layne, and Camryn, as well as his exuberant girlfriend Tracey) and dedicates much of his remaining time to charitable organizations. Keith sits on the board of the Lucky Duck Foundation (a San Diego charity that works to alleviate homelessness) and The Harold and Carole Pump Foundation (a nationwide charity that raises funds for cancer treatment by engaging sports leaders and celebrities). In addition to sitting on two boards, Mr. More also supported his daughter Paige, who co-founded "The Breasties"—a non-profit organization that builds a community and provides resources for those impacted by breast and gynecological cancers. His daughter discovered the need for an organization like this when she decided to have a preventative double mastectomy after discovering she carried the harmful BRCA1 gene mutation. Through this process she realized the need to build support for this community of people, ultimately leading her to cofound the charity organization. Keith has been instrumental in supporting both Paige, as well as her organization for survivors all over the country.

Keith also enjoys painting and collects artwork. Over the years, he has painted many sports figures—including some of the baseball greats like Babe Ruth, Pete Rose, and Willie Mays. He has long donated his paintings to charity, with those he hasn't donated adorning and adding joy to the Bentley & More offices. Finally, and as well known, Keith has served as the primary auctioneer for OCTLA's charity events, helping to raise hundreds of thousands of dollars for worthy causes.

OCTLA is honored to spotlight Keith More who, in addition to zealously representing his many worthy clients, has generously given his time to our organization, to many charities, and to our community in need. Thank you Keith!



Disarming "Nuclear Verdicts"

By Benjamin T. Ikuta, Esq., and Greyson M. Goody, Esq.

Nuclear Verdicts: Defending Justice for All has been marketed as a "groundbreaking book" by the defense bar. Tyson/Mendes, Robert Tyson's Firm, has hailed it as the defense's version of "The Reptile," by David Ball. *Nuclear Verdicts* is full of helpful hints for defense attorneys. Unfortunately, it also advocates disregarding the rules of evidence in an effort to minimize verdicts for deserving injury victims. This article will give you a blueprint on how to disarm *Nuclear Verdicts*, overcome defense tomfoolery, and get the justice your clients deserve.

Nuclear Verdicts recognizes plaintiff attorneys' ability to be creative, novel, and influential in crafting argument. As plaintiff attorneys, we incorporate positive ideas and memorable themes into our openings, cross-examinations, and closing arguments. We work together and share our knowledge in conferences. We do not simply regurgitate what we learn but integrate it to fit our own personal styles. *Nuclear Verdicts* raises new obstacles for us to overcome and pushes us to continue evolving. It was a pleasure reading it, and even a greater pleasure beating it.

In late 2021, Greyson Goody obtained a nuclear verdict against Tyson/Mendes' 'Halo Team.' A fellow plaintiff lawyer brought *Nuclear Verdicts* by Greyson's office so he could prepare for the 'Halo Team' tactics. Armed with the playbook, he was able to secure a verdict $6,430,168.47 from a Westminster jury in Orange County. The case involved a gay, Hispanic client, with nearly non-existent findings on imaging studies, who underwent a lumbar fusion. Implementing the below tactics will hopefully help you overcome long odds in your cases, especially where the deck is stacked against you.

This article will review the *Nuclear Verdicts* defense tactics. Our goal is to teach you how to disarm the tactics – both proper and improper – made by the

Best Lawyers BEST LAW FIRMS U.S.News & World Report 2022

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Gerald A. Klein

Mark B. Wilson

Michael S. LeBoff

Klein & Wilson achieved a 2022 Best Law Firms "Tier One" ranking in Orange County, California in the categories of **Commercial Litigation, Real Estate Litigation, and Intellectual Property Litigation.**

Mark B. Wilson and Gerald A. Klein also were listed in the 2022 Super Lawyer lists for Top 100 attorneys in Southern California and Top 50 attorneys in Orange County, California.

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book. Our hope is that our brothers and sisters in the plaintiff community stand up and fight the impropriety and get the justice their clients deserve.

Motions in Limine

While *Nuclear Verdicts* has a lot of useful information for defense attorneys, it is also full of dangerous information. Some of the tactics advised are inadmissible, prejudicial, and border on attorney misconduct. For example, *Nuclear Verdicts* recommends asking irrelevant and prejudicial questions for the jury to hear. If the plaintiff's attorney objects, even better. The jury will believe they are hiding something and lose trust in the attorney.

The best way to get ahead of these issues is a motion in limine. In Greyson's trial, he filed a motion in limine to preclude the below questions and it was granted. If you give the judge a preview of what defense plans to do, particularly if they've asked the same questions in discovery, you have a better chance of limiting these improper tactics at trial.

Howell v. Hamilton Meats

Unless you know nothing about California law on medical expenses over the past 15 years, you can probably skip this portion of the book. In it, the author brags about how he argued *Howell* to the California Supreme Court and was thus able to save corporations and insurance companies "$10 billion a year!" He neglects to mention the hallmark cases of *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311 and *Pebley v. Santa Clara Organics, LLP* (2018) 22 Cal.App.5th 1266 both of which benefit injury victims.

Disarming *Howell v. Hamilton Meats*

One of the best skills for any trial attorney is to have an intricate knowledge of the law governing their case. Whenever we argue motions in limine we have our arguments, backed up by law, as well as arguments to counter the defense claims. If you show a judge, mediator, or defense attorney you know what you are talking about right up front, your credibility will soar. Additionally, you need to make sure you make a great record for appeal. For an in-depth discussion of these cases, check out "Forget Howell, These are Pebley Meds" in The Gavel's Fall, 2021 edition.

Accepting Responsibility

This is arguably the strongest mes-

sage in *Nuclear Verdicts*. Defense attorneys can seriously undermine their cases by arguing about every small point, no matter how relevant (or irrelevant) they are. In doing so, they lose credibility with the jury. Instead, *Nuclear Verdicts* advocates attorneys see the forest through the trees by focusing on the big picture. The attorney who is the kindest, most reasonable, and most honest, will win the jury's trust. Ultimately, that's what wins cases.

To solidify this mantra, the author recommends apologizing and accepting responsibility. In essence, this is an admirable quality in a defense attorney. The primary cause of big verdicts is not sympathy for the plaintiff, but jurors angry at the defense nonsense. Anger comes from a constant failure to accept responsibility. Where *Nuclear Verdicts* goes squirrely, however, is pushing acceptance of responsibility on irrelevant issues.

For example, the author advocates accepting responsibility for a client putting a safe product in the stream of commerce after thousands of hours of research into safety design. All the while, he disputes liability for that product causing injury. It's accepting responsibility without really accepting anything. Another example is having the defendant apologize for the plaintiff's injuries, while disputing other injuries, even though an apology has no bearing on the claims or defenses in the case.

Disarming The Acceptance of Responsibility

Accepting responsibility for irrelevant issues is a cheap trick. The end goal is to fake the jury out, increase sympathy, and bolster the Defendant's credibility. Per *Nuclear Verdicts*, "[I]t makes the defense team seem reasonable, it defuses anger, and it shifts the focus to other culpable parties." Needless to say, there are several ways you can combat this. Start with the motion in limine discussed above.

If that doesn't work, try to flip the apology in your favor. For example, say the defense decides to admit liability the first day of trial, essentially precluding you from arguing they failed to take responsibility for causing the incident which led to your client's injuries. In that case, I would withdraw the motion to preclude apologies and wait for the defendant to apologize on the stand. By apologizing, they open the door to cross-examination on the issue. Here are a few questions you could consider:

1. You are genuinely sorry for

causing this crash aren't you?

2. Clearly, you were at fault?
3. You didn't see the red light and drove through it, didn't you?
4. You've known you were at fault from the day this crash happened, correct?
5. Did you apologize at the scene of the collision?
6. Did you apologize when Mr. Plaintiff underwent his first spine surgery?
7. Did you apologize ever, throughout this entire trial, when Mr. Plaintiff and his doctors were testifying about the injuries he sustained?
8. Isn't it true the very first time you apologized for causing this crash was one week ago today, the first day of trial?
9. And in fact, you specifically stated in discovery that Mr. Plaintiff was responsible for this collision as late as one month ago, true?
10. And you are saying you are sorry now, as a cheap attempt to curry favor with our jurors, aren't you?

Additionally, if you hired a crash reconstruction expert make sure you call him or her to testify. You can always argue the magnitude of the crash is relevant to injury causation, especially since the defense is disputing injuries. Simply do a direct on the crash reconstruction expert describing the collision. Inevitably, the defense attorney will ask how much money the expert was paid by the plaintiff. If that happens, it opens the door to WHY the expert was hired. Because defense disputed liability until trial and plaintiff had to prove her case.

There are other ways to preempt an apology as well. In jury selection, establish that accepting responsibility means not just saying "I'm sorry." Instead, it is understanding what you've done; the damage you've caused; and doing everything in your power to make it right. Ask the jurors: If a boy breaks a window, is it enough to simply say he's sorry, or should he pay for the window? What if it is a beautiful stained-glass window, and it costs a lot of money to fix? If the defense attempts to apologize and take responsibility for irrelevant issues, show the jury their crocodile tears.

Always Give a Verdict Number, No Matter How Low

In this part of the book, the author uses a sad story about a jury awarding less than $500,000 to a 12-year-old suffering 3rd-degree burns over his entire body when liability was clear. He uses the story as an example of the effectiveness of priming a jury to award little damages early and often. The message is to say the defense number (even if $0) in jury selection, opening, throughout the case, and in closing. If the defense lawyer does not "prime" the jury, then springs the small number for the first time in closing, they will look unreasonable.

Nuclear Verdicts is right and, frankly, this is helpful advice for defense attorneys. It is very effective to stand up in rebuttal when the defense lawyer brings up an insultingly low number in closing argument for the first time and say: "You just heard the defense lawyer say award the plaintiff $0. Now you all know why we are all here. Why we all had to go through this trial because the defense simply refuses to accept responsibility." Therefore, defense attorneys should prime the jury as much as possible.

Disarming the Low Verdict Prime

In my experience, you can flip the defense number on its head a few different ways. First, ask your treating physicians and experts hypotheticals using the defense number. Ask if the jury awarded the defense number, whether Ms. Victim would be able to pay her medical bills. Ask whether she'd be in debt for the past medical bills. If there are future visits recommended, ask whether she would be able to pay for those future visits when her pain lights up and she needs help. Finally, ask the treating doctor what would happen if Ms. Victim couldn't pay her bills – would he put her in collections? Of course, make sure you talk to the treating physician beforehand so he or she is not blindsided.

As a backstop, go back to your general theme: the defense failing to accept responsibility and asking for discount justice. They hit her, they hurt her, they blamed her, and now they want her to be in debt for the rest of her life. They want to refuse her the right and opportunity to get future care due to these injuries, which were thrust upon her through no fault of her own. Also use CACI 3927 and 3928 along with the window

analogy if the defense is discounting damages due to priors. What if that stained glass window was old and weak with a hairline crack in it, but functioned as a proper window? Aren't they still responsible for breaking it?

Prejudicial and Irrelevant Questions

Nuclear Verdicts provides specific questions defense lawyers should ask in written discovery, depositions, and trial. These questions are irrelevant, prejudicial, and asked only to send a message to your client and the jury. We frequently see these questions asked in depositions and discovery, but rarely in trial because we cut that off with a motion in limine. Here is a list of the questions:

1. What will you use your verdict money on?
2. How much is your pain and suffering worth?
3. What do you hope to get out of this lawsuit?
4. Do you blame anyone for the accident?
5. Who do you blame for the accident?
6. Who do you think is responsible for the accident?
7. Do you hold any ill will towards Defendant because you think they are to blame?
8. Do you understand Defendant is sorry for your injuries?
9. When did you hire an attorney?
10. Why did you hire an attorney?
11. How will the defense number have an impact on you and your family?

Disarming Prejudicial and Irrelevant Questions

Do not allow defense attorneys to ask these questions. Object to them in depositions and discovery. Especially given that this relates to non-economic damages, these questions are all completely inappropriate. Under California law and CACI 3900, an award of damages is to reasonably compensate a plaintiff for the harm, not to determine how the plaintiff would spend an award of non-economic damages. At deposition, such questions are improper contention interrogatories violative of *Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255.

Greyson prefers instructing clients not to answer these because they are wholly irrelevant to any claims or defenses and violate the plaintiff's right to privacy. He also files a motion in limine to alert the judge to potential issues. He explains that such questions are no different than the plaintiff's lawyer eliciting from plaintiff that she intends to give away any noneconomic damages awarded to her to a charity.

As a medical malpractice attorney, Ben instead allows his clients to provide answers, but thoroughly prepares them in advance. For example, he prepares his client to respond to the "why did you file this lawsuit?" question with: "So that this harm does not happen to anyone else." A defense lawyer would not dare ask the same question at trial.

Defense's Ask and its Impact on the Victim

Next, *Nuclear Verdicts* advocates showing how the low defense number will impact the victim's life. For example, if the defense number is $100,000, the lawyer will argue how much money can be made investing it. If invested wisely, the victim can make $5,000 a year. This can provide them with a luxurious trip to Hawaii, a host of surf boards, and Disneyland tickets.

Disarming Defense's Ask and Its Impact on the Victim

If the defense says the plaintiff can take vacations, buy cars, and invest the money, you must object. Then make sure you tell the jury the whole story. Explain that the money the defense wants you to award doesn't even get the victim back to $0. That money goes to Dr. Fixer and the victim will have to forego her child's education to pay for the treatment she needed due to defendant's carelessness.

Fully understanding and preparing for the Nuclear Verdicts playbook is critical to achieve justice for your clients.

The victim won't be taking any trips, surfing, or going to Disneyland. She will be working through pain to pay the debts thrust upon her.

The true impact on this victim is that she will be in pain for the rest of her life. The defense wants to take away her right and opportunity to get the treatment she needs. All the treating doctors agree and they have no skin in the game. Should she not be provided with this opportunity, it would be a grievous miscarriage of justice.

Using Plaintiff's Salary as an Anchor

Next, the author suggests using plaintiff's pre-incident salary as an anchor. By referencing the plaintiff's salary, the defense attorney can do two things: (1) make a point that saving $100,000 would take them years, and; (2) the verdict the plaintiff is asking for is beyond anything the victim would ever make if she worked her entire life.

Disarming the Salary Anchor

First off, the anchor argument is improper in a case where you waive loss of earnings. We recommend waiving loss of earnings in cases unless it is a really strong claim – the juice is sometimes just not worth the squeeze. Second, even if you are pursuing a loss of earnings claim, you can combat this in several ways. We like to ask jurors about the issues in jury selection:

1. Can we all agree that an executive making $1,000,000 per year would have a higher loss of earnings than a minimum wage laborer, if they both missed 10 years of work?
2. What about if we compare pain? Does anyone here believe the high-paid executive's pain is

worth more than the laborer's pain?

3. What about the scars on their bodies; are they worth more to the executive than the laborer?

4. What if I told you that we believe the harms and losses for the laborer were far in excess of the amount of money he would make over the course of his lifetime? Who thinks that's crazy, farfetched, or maybe just unreasonable?

The point is, you want to deflate the argument as early as possible and get jurors thinking that lost earnings are complete and separate from pain and suffering damages. Additionally, the high-paid defense lawyer working for the corporation will advocate for low pain and suffering damages by virtue of an analogy to lost earnings and ability to save. I bet you my bottom dollar he also believes his pain is worth more than the laborers, which is clearly shown by his low defense number. You should point that out.

Also consider using CACI 117 ("Wealth of Parties") to show the defense is inappropriately trying to get a discount by arguing that a person's health is worth less simply because they make less money. If they make that argument, they open the door to you arguing about the impact the verdict would have on a multi-billion-dollar company who puts profits over safety.

Defeating Plaintiffs' Pain and Suffering

The author does a good job describing strategies the plaintiff bar uses to show the value of a loss. He focuses heavily on the 'Wanted Ad' argument where the attorney tells a story about the victim before the incident. In it, the plaintiff has the choice to either be awarded money or suffer the injury and the impact on their health. If given the choice, the plaintiff would refuse the money in exchange for her health, showing that the suggested dollar amount is reasonable.

In response, *Nuclear Verdicts* argues the 'Wanted Ad' violates the Golden Rule and to object. We don't believe this is true, as this specific argument has been upheld on appeal countless times. If the objection fails, the defense attorney is instructed to argue that the Ad is a ridiculous scenario and would never happen. It argues that no one purchased the Ad and that the injury was an accident and a mistake, not purposeful. He advocates demeaning and attacking the plaintiff's lawyer as a dishonest officer of the court who is preys on the jurors emotions and sympathy.

Disarming the Wanted Ad Attack

In response, tell the jury the defense is right; nobody posted this ad because it's cruel and unusual punishment. Nobody would ever post a job like that, and sure as hell nobody would ever take that job. But the victim didn't have a choice to decline, the defendant made that choice for her. We would also point out that this wasn't an accident or mistake; the defendant made a conscious decision to drive dangerously, put a dangerous product in the marketplace, or operate on the wrong leg.

You can also tell the jury it's your job to give them benchmarks to evaluate damages; it would be unfair to simply come out with a number with no explanation. Harken back to voir dire where the jury was so concerned about determining pain and suffering damages. You told them then, just like now, that you would provide context for the number you asked for. Establish further cross-context by breaking down your number to an hourly rate for only waking hours for the rest of the victim's life. An award of $15/hour often adds up to millions and is extremely reasonable.

Defense Themes

The author next argues defense lawyers should develop themes in their cases. We wholeheartedly agree. Instead of providing helpful themes, however, the author tells a war story to gloat about an employment defense verdict over a poor Hispanic laborer. He explains in detail that his rich clients even waited to fire the housekeeper until after she cleaned their dirty mansion for the day.

Disarming Defense Themes

Nonetheless, good defense attorneys provide themes. Do your best to flip these themes on their head and adopt the defense theme as your own. For example, a recent case I tried had the defense attorney saying this was a "common sense" case early on. He took every record out of context and I busted him lying in opening. I snapped up his theme of "common sense" and made it our own with a twist. We began to say this case is about "common sense and context," and throughout the trial worked hard with every witness to put all his arguments in context instead of on an island.

Personalizing Corporations

Nuclear Verdicts strongly recommends personalizing corporations. In doing so, it wants defense attorneys to tell the jury about how great the corporation is; its good deeds, the charity donations, and helping the community. Nonetheless, the book argues there are "no excep-

tions" to humanizing the corporate client and the defense lawyer must do so in opening statement even if there is no actual good faith intent on introducing any evidence to corroborate the statements.

Disarming Personalizing Corporations

Obviously, this is entirely improper character evidence, irrelevant, and prejudicial. If a corporation wants to be treated as a person, it should abide by the rules of evidence. Furthermore, it is misconduct for an attorney to argue a fact without a good faith basis it will be substantiated at trial. If a defense attorney does this, make sure you object to relevance and character and make a good record.

If the defense is permitted to go into this character evidence, then by the rules of evidence you are entitled to attack the corporation. Bring up every lawsuit, injured victim, and effort to avoid taxes to show the big company is not as it was claimed by the defense. Make sure to address the defense attorneys' comments in that they are just another attempt to have the jury sympathize with the defendant and discount Mrs. Victim's injuries. I like to write down the broken promises from the defense attorney's opening statement and use them in closing to show their deceit.

Attacking the Reptile Theory

Nuclear Verdicts suggests attacking the reptile theory in discovery. It encourages defense witnesses to never answer "yes" to any yes-or-no questions involving safety. It then suggests the deponent respond with "I don't know how to answer that question." If that does not work, the book instructs the defense lawyer to object and instruct the witness not to answer. The book also promotes "reverse reptile" to prove Mrs. Victim's comparative negligence. He explains community safety and danger in attacking a plaintiff in closing. Nonetheless, he offers no guidance on how to overcome the Reptile.

Disarming The Attack on the Reptile Theory

Obstructive defense lawyers in deposition and discovery are the bane of my existence. It can be very frustrating to navigate depositions and written discovery when you have someone refusing to answer and a lawyer instructing not to answer legitimate questions. Do not hesitate to file a motion. I cannot push this enough – oftentimes we get busy, but this is so important if you want to prove your case and settle, or win at trial. Do not let them bully you, file your motion, and request sanctions for this obstructionism.

The Doom and Gloom Plaintiff

Nuclear Verdicts suggests that defense lawyers counter a plaintiff lawyer's doom and gloom outlook. In doing so, they do two things. First, they attack both the plaintiff herself and the plaintiff's attorney for providing such a negative point of view. Indeed, in a recent trial involving Arash Homampour, a well-known defense attorney started his closing with "Wow, that was quite a tale of woe!"

Second, the defense will attempt to paint a positive, optimistic picture of plaintiff's recovery. And in

sum, they try to show that awarding the plaintiff too much money is in effect doubting the abilities of the plaintiff's ability to recover. This is helpful advice for all of us.

Disarming the Doom and Gloom Plaintiff

We've run into this tactic before and have been burned by it. The important take from this is that the story you tell at trial is not a 'woe is me' story. It needs to be a story of success; of overcoming all odds, working hard, and believing that someday, Mrs. Victim might make it back to a fraction of what she was.

When your plaintiff takes the stand, they should be strong. Juries love a good success story. Juries hate whiners, complainers, and victims. Any limitations of what the plaintiff cannot do should be primarily through the testimony of the spouse, friends, and family. Of course, we must mention what the plaintiff cannot do, or has trouble doing, but we also have to highlight what they can still do and how hard they are working to get better. This is inspiring. The jury looks up to someone who has been seriously hurt but has a positive attitude and wants to get better.

In his trial, while Arash Homampour certainly had to highlight his client's significant brain injury, he also showed an amazing representation of true love. He told a compelling story of not just the devastating loss, but the continued and unending love between his client and her husband. The result? A nuclear verdict of $60,000,000.

Closing Argument

This part of the book focuses almost entirely on "silent witnesses." *Nuclear Verdicts* advocates using CACI 203 (Party Having Power to Produce Better Evidence) and asking the jury why the plaintiff did not call a variety of witnesses, such as her primary care physician, her neurologist, her friends, her coworkers, etc. *Nuclear Verdicts* advocates bringing up what they *could* have said that would have been harmful to the victim and tell the jury that a silent witness if often the loudest.

Disarming the Closing Argument

First, this is extremely improper and you must object. Attorneys are not permitted to comment on witnesses who were not called, as both parties have the ability to subpoena them to trial. (See *People v. Phillips* (Cal. Ct. App., Feb. 28, 2022, No. A156387) 2022 WL 588943, at *16.)

If permitted, however, you can flip that argument on it's head. Mention the witnesses the defendant did not call. Tell the jury they had the ability to call these witnesses to undercut the victim's case, but they failed to do so. I promise the jury in opening statements that I am here to prove my case as quick and painlessly as possible, so that they can get back to the things that matter to them the most. In closing, reiterate this promise and let them know that you could have called 20 more witnesses to verify the victim's injuries, but you aren't here to waste their time.

Also focus on the fact that the defense is relying entirely on smoke and mirrors. If the testimony was so valuable for the defense, then why didn't the defense call that witness? Focus on the fact that the defense is still avoiding responding and failing to take accountability by just making up facts and trying to distract the jury by focusing away from the evidence.

Conclusion

Since being published in early 2020, Defense lawyers have zealously followed Nuclear Verdicts and its tactics. Fully understanding and preparing for the Nuclear Verdicts playbook is critical to achieve justice for your clients.

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info@OCTLA.org for consideration in next year's Top Gun Awards.

Arash Homampour of **The Homampour Law Firm** and **Matthew B. F. Biren** and co-counsel of the **Biren Law Group** obtained a $60 million jury verdict in a traumatic brain injury case. Plaintiff's wife suffered an aneurysm in her room at Defendant hotel. Plaintiff, unable to reach his wife by phone, called Defendant hotel which assured him it would conduct a welfare check. Defendant was negligent in carrying out the welfare check, leaving Plaintiff's wife undiscovered and unattended on the floor of her room overnight. The main issue was whether Plaintiff's injuries stemmed from the aneurysm itself or from the long delay in receiving medical care. As a result of the incident, Plaintiff suffers from permanent short term memory loss, among other disabilities. Plaintiff received $50 million and her husband $10 million for loss of consortium. They expect to recover another $30 million in CCP § 998 interest.

William Collins of **The Law Offices of Marshall Silberberg** secured a $7,500,000 settlement in a medical malpractice case against a local hospital. Plaintiff, a child, was admitted to Defendant hospital for severe dehydration, secondary chronic diarrhea. The emergency room doctor recommended admission for fluid resuscitation. Rather than sending Plaintiff to the PICU, a resident physician admitted Plaintiff to the floor with orders for routine fluid administration. Despite noting constant fluid loss in the form of vomiting and diarrhea, nurses failed to properly document and report negative fluid balances for three days. As a result, Plaintiff became so dehydrated that he suffered venous sinus thromboses, leading to multiple strokes, resulting in permanent brain damage.

Brandon Simon of **The Simon Law Group** and co-counsel obtained a $1,750,000 settlement of in a disputed liability traffic collision case. Defendant attempted a left-hand turn into the pathway of Plaintiff's pick-up truck. Plaintiff suffered an aggravation to his pre-existing lumbar and cervical spine conditions, resulting in fusion procedures. Defense argued that Plaintiff was comparatively at fault for the crash due to unsafe speed and that Plaintiff's spinal conditions pre-existed the crash.

Douglas B. Vanderpool and **Michael J. Fairchild** of the **Vanderpool Law Firm** recently obtained a judgment for an individual business owner (Petitioner) in a multi-million dollar alter ego case. A northern California-based Indian tribe sought to amend a $4,000,000 judgment it obtained against one of its prior business, naming Petitioner individually as a judgment debtor based on an "alter ego" theory of liability. However, Petitioner successfully argued that there was no basis to impose individual liability under either California or Delaware substantive law.

Geoff Rill of **Kerr & Sheldon** obtained a $1,259,162 jury verdict in a premises liability case. Plaintiff, a 74-year old woman, tripped on an uneven doormat as she entered a medical building. The mat had been installed improperly and developed a buckle when the sun hit it directly, creating a tripping hazard. Plaintiff tripped and fell, fracturing her C2, and was forced to undergo two surgeries, the second of which was a multilevel fusion. Defense argued trivial defect, comparative fault, and contested the need for Plaintiff's surgeries. The jury awarded $178,882 in past medicals, $1.5 million in general damages, and assigned 75% of the fault to Defendants. The highest pre-trial offer by Defendants' insurance company was $350,000.

Samer Habbas of the **Law Offices of Samer Habbas & Associates** secured a $1,700,000 mediated settlement

on a third-party liability claim. Plaintiff fell off a forklift due to a subcontractor's lack of safety inspection, suffering permanent nerve damage to their arm as a result of a compound fracture. Defendant construction company filed for summary judgment, arguing that they were not liable for the subcontractor's negligence. After this motion was denied, mediation quickly settled the matter.

Jeffrey A. Milman of **Hodes Milman Ikuta** and co-counsel resolved a medical malpractice matter for $1 million. Plaintiff, an autistic man in his forties, presented to Defendant primary care provider and Defendant hospital on multiple occasions complaining of chronic middle back pain. Despite troublesome imaging, neither Defendant made a timely diagnosis of the etiology of Plaintiff's pain: an epidural abscess. By the time he obtained adequate treatment, Plaintiff was paraplegic.

Brian K. Brandt of the **Law Offices of Brian Brandt** secured a $6 million wrongful death settlement against a dairy farm. Plaintiffs were the wife and two adult children of Decedent, a 55-year-old welder who was crushed to death by a piece of farm equipment he was working on. Plaintiffs asserted that Defendant dairy failed to implement and follow proper "lock out" and "tag out" procedures for this type of equipment. Defendants argued that Decedent was also responsible for making sure the equipment was safe before working on it.

Arash Homampour and **Scott Boyer** of **The Homampour Law Firm** secured an $8 million settlement in a dangerous condition and wrongful death case against Cal-Trans. Plaintiff was a passenger in a vehicle that left the roadway after traveling through a curve and going down an adjoining embankment. Although the weather was clear and sunny, the investigating officer noted ice on the roadway. The driver was ejected from the vehicle and died. Miraculously, Plaintiff survived with minor injuries. The driver was determined to be the sole cause of the incident for driving at a speed greater than was reasonable for highway conditions. Cal-Trans denied liability and contended the driver caused the accident. Cal-Trans also contended that it was immune for its roadway design and conditions caused by the weather.

Doug Vanderpool of the **Vanderpool Law Firm** obtained a $5,605,878 judgment against a drug dealer under the Drug Dealer Liability Act ("DDLA"). Plaintiff's son had been clean and sober for two years when Defendant, an old "friend," convinced him to buy "a dub of china and a dub of black." The drugs were laced with fatal amounts of fentanyl, and Plaintiff found her son dead the next morning. Filed in 2018, the case was heavily litigated until Defendant ultimately was sanctioned for discovery abuses and his answer stricken. The judgment included $1.4 million in economic damages and $4.2 million in non-economic damages, along with costs and attorney fees authorized by the DDLA.

William Collins of **The Law Offices of Marshall Silberberg** secured a $3,000,000 settlement in a

medical malpractice case. Plaintiff, a 21-year-old woman, was involved in a motor vehicle accident resulting in a fracture of her cervical spine, specifically a dens fracture. Defendant neurosurgeon evaluated Plaintiff and recommended surgical fixation of her fracture, noting she remained neurologically intact. Over the next three months, Defendant performed four cervical spine surgeries, all of which failed due to negligence. During the third procedure, Defendant failed to notice the spinal canal was critically narrow and placed a bone graft which compressed the spinal cord. The following morning, Plaintiff complained of numbness, tingling, and difficulty breathing, but Defendant did not come to the hospital. An hour later, Plaintiff suffered cardiopulmonary arrest and was returned to surgery to decompress the spine.

Brandon Simon of **The Simon Law Group** and co-counsel secured a $1,100,000 settlement in a bus collision matter. Plaintiff was a passenger on an LACMTA bus that rear-ended another vehicle. The force of the impact caused Plaintiff to slam her head off of the metal seat pole in front of her, resulting in injuries that required cervical disc replacement surgery. Defendants argued that the imaging did not demonstrate significant findings and a surgery was not necessary.

Brian D. Chase and **Tom G. Antunovich** of **Bisnar Chase** settled a medical device products liability case for a confidential amount. Plaintiff, an 81-year-old woman, was forced to undergo a revision surgery as a result of her faulty hip implant. Plaintiff alleged that the faulty hip implant was defective in design, causing her to suffer cobalt and chromium poisoning and associated pain. After surgical removal of the hip implant, Plaintiff's cobalt and chromium levels returned to baseline and her pain subsided. Liability and causation were disputed by the defendant hip manufacturer.

Doug Vanderpool of the **Vanderpool Law Firm** obtained a pre-litigation mediated settlement of $300,000 in an employment case. Plaintiffs, two female cannabis dispensary employees, were subjected to a barrage of sexual innuendo, sexual advances, and a hostile work environment, which resulted in their constructive termination less than 9 months after starting work. Plaintiffs had voluminous documentation, text messages, pictures, and videos to establish the harassment. The case was mediated shortly after the demand letter was sent.

Samer Habbas of the **Law Offices of Samer Habbas & Associates** secured a $925,000 settlement for a low-impact rear-end traffic collision. Plaintiff was stopped at a red light when Defendant struck them from behind. Plaintiff had a long history of chronic back pain that stretched over 20 years. The low-speed impact, very minimal property damage, and Plaintiff's back history provided Defendant with several challenges that had to be overcome. The case resolved before trial for an amount well above Defendant's initial offer of $50,000, the last offer made at mediation.

Jeffrey A. Milman of **Hodes Milman Ikuta** and co-counsel secured a $1.1 million settlement in a personal injury case. Plaintiff, a retired airline pilot in his sixties, was eating lunch on a restaurant's outdoor patio his chair collapsed. Although the chair was warrantied for three years of use, Defendant restaurant had stored it outside for more than five years, allowing it to deteriorate. Plaintiff's injuries required cervical spine surgery, resulting in right vocal cord immobility and a CSF leak.

Samer Habbas of the **Law Offices of Samer Habbas & Associates** obtained a settlement $865,000 on a rear-end collision involving a rideshare vehicle. Plaintiff was a passenger in a rideshare vehicle that was rear-ended on the freeway. Defendant driver had fallen asleep behind the wheel. Plaintiff sustained an acute meniscus tear, which previously healed from an ACL reconstruction surgery two years prior. Defendant's full policy limits was $15,000, and the first offer from the UIM carrier was $450,000. Through arbitration, Defendant's UIM carrier raised its offer three times, ultimately reaching $850,000 which, together with the original policy limits, resulted in a global settlement of $865,000.

Douglas B. Vanderpool and **Michael J. Fairchild** of the **Vanderpool Law Firm** secured summary judgment in a highly contentious and extremely technical data breach case dating back to 2010. A city attorney, on behalf of the State of California, sought hundreds of millions of dollars in civil penalties stemming from the alleged data breach. In securing summary judgment, the Vanderpool Law Firm both defeated the city attorney's own dispositive motion and secured an affirmative judgment on behalf of its clients, concluding nearly a decade of conflict arising from the actions of a convicted cyber-criminal.

Samer Habbas of the **Law Offices of Samer Habbas & Associates** recovered an $800,000 mediated settlement on a bus collision claim. Plaintiff's vehicle was t-boned by a bus that failed to stop at a posted stop sign. As a result of the collision, Plaintiff suffered cervical and lumbar spine trauma, which led to a lumbar surgery at L4-L5. Defendant was the bus driver's employer because the driver was operating the bus within their scope of employment. Defendant initially presented a $50,000 offer in an attempt to dispute the extent of Plaintiff's injuries and damages.

Jeffrey A. Milman of **Hodes Milman Ikuta** and co-counsel obtained a $1 million policy-limits settlement in a medical malpractice matter. Plaintiff, a firefighter in his fifties with a wife and two teenaged children, underwent a health and wellness exam for his employer. Defendant health clinic ordered labs that showed an elevated prostate-specific antigen (PSA) level of 6.3 but failed to inform Plaintiff. A year later, his PSA skyrocketed to 15.3.

Defendant's failure prevented Plaintiff from obtaining treatment when his prostate cancer was curable. Instead, Plaintiff is left with a 5-year maximum life expectancy.

Sean Burke of Burke Argos and Mark Spencer of **Spencer Law** secured a $3,600,000 mediated settlement in a medical malpractice and wrongful death. Plaintiff's wife, a 30-year-old artist, died following surgery to remove a brain tumor called a central neurocytoma. Plaintiff alleged that 36 hours after the surgery, while Decedent was in an induced coma, a respiratory therapist negligently initiated a procedure to wean her off the ventilator, leading to severe anoxia and brain damage from which she never recovered. Defendant strongly contested causation, arguing that imaging studies showed Decedent would have had deficits from the brain tumor and its removal even if she had survived the ventilator weaning procedure. Defendant also challenged her future earnings because she only had one year's worth of earnings history.

Brian K. Brandt of the **Law Offices of Brian Brandt** obtained a $1 million settlement in a negligent representation and supervision matter. Plaintiff, a 63-year-old woman with a history of benzodiazepine dependency and bipolar disorder, had previously attempted suicide by jumping out of a second story. Plaintiff's family placed her in Defendant detox facility, which promised to place Plaintiff in a single-story building. Despite those assurances, Plaintiff was placed in a two-story home and she again attempted suicide by jumping from a flight of stairs resulting in multiple fractures requiring surgical repair. Defendants argued that Plaintiff's damages were limited by MICRA. Plaintiff asserted that MICRA only applies to "health care providers" and that Defendant facility is not a health care provider pursuant to Health and Safety Code § 11834.02.

Daniel Hodes of **Hodes Milman Ikuta** obtained a $225,000 settlement in a medical malpractice case. Plaintiff, a man in his early sixties, underwent a colonoscopy that reported a tubular adenoma, which is a pre-cancerous polyp. The pathology report was clear that the adenoma was incompletely removed. Two years later, Plaintiff was diagnosed with a rectal cancer in the same area from which the adenoma was resected. It was alleged that the incompletely resected adenoma evolved into a Stage II invasive cancer, which is likely curable.

WELCOME NEW MEMBERS

ATTORNEY MEMBERS

DAVID DWORAKOWSKI
MARGARET ELDER
ALEXANDER FELDMAN
GREGORY GRIGORIAN
ELIZA JASINSKA
MACKENZIE JOHNSON
ALLISON MELENDEZ
LIZETH PERALES
FABY RIVERA
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ZHIMING WANG

AFFILIATE MEMBERS

MIKE JONES, CARTIGA

PARALEGAL MEMBER

MAI TRAN

LAW STUDENT MEMBERS

TRISTAN CAMPBELL
WESLEY SWEGER
DANIEL ZUNIGA

THANK YOU!

We acknowledge the following OCTLA Members who have referred one or more New Members this past quarter:

CHRIS ANDAL
MICHAEL BERRY
CYNTHIA CRAIG
SAMER HABBAS
EDWIN HONG
MICHAEL JEANDRON
ROBBIE MUNOZ
HON. DANIEL PRATT (RET.)
STEPHANE QUINN

Security Breach Leads to Disclosure of Confidential Attorney Discipline Cases

The State Bar initially described it as a "hack," but eventually admitted it was an "unknown security vulnerability" in its own database that led to the accidental disclosure of 260,000 confidential attorney discipline cases.

Judyrecords.com published the confidential documents along with approximately 60,000 public State Bar court cases.

An outside IT firm was hired to investigate the breach, and they revealed a vulnerability in the case management portal that allowed an outside entity to sweep up attorney discipline records that should not have been available to the public. The case management portal is maintained by an outside vendor, Tyler Technologies, who has issued a statement saying they are investigating the issue.

The breach was discovered when the state bar received a complaint from a complaining witness in one disclosed case. The witness discovered that confidential attorney discipline records were available on judyrecords.com, which purports to have more than 630 U.S. courts cases in its free database. The administrator of judyrecords.com, who runs the site anonymously, later confirmed to the bar that those confidential records had been available to users from Oct. 15, 2021, until they were taken down on Feb. 26, 2022.

Under California Business and Professions Code 6086.1(b), all disciplinary investigations are confidential until the time that formal charges are filed, and all investigations are confidential until a formal proceeding is instituted.

The information on judyrecords.com included case numbers, file date, case types and names of respondents and complaining witnesses. It did not, however, include full case records, according to the state bar.

"Our obligation and responsibility are to the respondents and witnesses whose nonpublic information may have been shared, and again I apologize to them for this breach," California Bar executive director Leah Wilson said in a statement.

It appears that by the end of February 2022, all State Bar records, confidential and public, have been removed from the site. The State Bar has set up a webpage to provide ongoing updates and answer questions about the data breach: calbar.ca.gov/data-breach

Judicial Appointments

Supreme Court Appointment

A public hearing was held on March 22, 2022, in the Supreme Court Courtroom to consider the appointment of **Justice Patricia Guerrero** to the Supreme Court of California. Justice Guerrero has been appointed by the Governor, and now, pursuant to the California Constitution, she must be confirmed by the Commission on Judicial Appointments.

Chief Justice of California, Tani G. Cantil-Sakauye (Chair), California Attorney General Rob Bonta, and senior Presiding Justice of the state Court of Appeal, Manuel A. Ramirez will consider the appointment.

Justice Guerrero would replace Associate Justice Mariano-Florentino Cuéllar, who left the bench effective October 31, 2021.

Justice Guerrero has served as an associate justice at the Fourth District Court of Appeal, Division One since 2017. She is a native of the Imperial Valley raised by immigrant parents from Mexico. She began working in a grocery store at the age of 16 and graduated as co-valedictorian in high school. She continued working to help pay for her education while attending the University of California, Berkeley and Stanford Law School, where she earned a Juris Doctor degree. Justice Guerrero was active in the Latino Law Students Association and helped fellow students at the recruitment and retention center.

Prior to her appointment to the Fourth District Court of Appeal, Justice Guerrero served as a judge at the San Diego County Superior Court from 2013 to 2017 and was supervising judge for the Family Law Division at the court in 2017. Justice Guerrero was hired as an associate at Latham & Watkins and became a partner in 2006. She served as an assistant U.S. attorney at the U.S. Attorney's Office, Southern District of California from 2002 to 2003.

This appointment is celebrated by the Consumer Attorneys of California, who have called the appointment "historic." CAOC President Craig M. Peters stated "Too many Californians know what it's like to feel underrepresented in our court system; to feel like the doors of justice swing open for some, and close for others just because of where they come from or the color of their skin. But today, for the first

time, countless Californians will look at Patricia Guerrero – a Latina, a daughter of immigrants, a highly accomplished legal professional who overcame significant adversity – and see themselves."

California Courts of Appeal Appointments

In a recent hearing, two nominations to the California Courts of Appeal were confirmed after a unanimous vote of the same three-member commission made up of the Chief Justice Tani G. Cantil-Sakauye, Attorney General Rob Bonta and a Presiding Justice of the Court of Appeal.

Judge Maurice Sanchez was confirmed as Associate Justice of the Fourth District Court of Appeal, Division Three (Santa Ana). He fills the vacancy created by the retirement of Justice Raymond J. Ikola. He has served as an Orange County Superior Court judge since 2018. Judge Sanchez was a partner at Nelson, Mullins, Riley and Scarborough (2017-2018) and at Baker and Hostetler (2005-2017). He was a shareholder at Alvarado, Smith and Sanchez (1993-2005) and managing counsel at Mazda Motor of America Inc. (1991-1993). Judge Sanchez was senior counsel at Hyundai Motor America (1986-1991) and an associate at Rutan and Tucker (1981-1986). He earned a Juris Doctor degree from the University of California, Berkeley School of Law

Judge Laurie M. Earl was confirmed as Associate Justice of the Third District Court of Appeal (Sacramento). She fills the vacancy created by the retirement of Justice M. Kathleen Butz. Judge Earl has served as a Sacramento County Superior Court judge since 2005. She was senior assistant inspector general at the Sacramento County Office of Inspector General (2004-2005) and a deputy district attorney at the Sacramento County District Attorney's Office (1995-2004). She served as an assistant public defender at the Sacramento County Public Defender's Office (1989-1995). Judge Earl earned a Juris Doctor degree from the Lincoln Law School of Sacramento.

Budget Proposal for the Judicial Branch

The budget proposed by Governor Newsom for use by the Judicial Branch includes $890.6 million in new funding for the judicial branch, reflecting priorities of Chief Justice Cantil-Sakauye to advance equal access to justice for all Californians.

The proposal includes:
Funding for 23 new trial court judgeships.

Technology Modernization: $34.7 million in fiscal year 2022-23 (increasing to $40.3 million in 2025-26) has been allotted to support technology modernization throughout the judicial branch. Investments would also support initiatives that promote public access to digital records and court proceedings by expanding electronic case filing, digitizing court documents, enabling online dispute resolutions, and enhancing remote proceedings.

Remote Access: $33.2 million is allotted each year for two years and $1.6 million annually after that to implement and support remote access to courtroom proceedings. These resources will be used to provide a publicly accessible audio stream for every courthouse in the state.

Critically Needed New Courthouses: Funding for five new courthouse projects as been allotted. These projects include: a new Santa Clarita Courthouse (Los Angeles), and improvements to Quincy Courthouse (Plumas), Solano Hall of Justice in Fairfield, the Fresno Courthouse, and San Luis Obispo Courthouse.

The proposal also includes funding for three previously approved projects: the new Ukiah Courthouse (Mendocino), and Juvenile Hall renovations in Butte and San Bernardino counties.
California Chief Justice Tani G. Cantil-Sakauye issued a statement that said: "I welcome the Governor's continuing commitment to sustainable funding in his budget proposal for the judicial branch. He clearly recognizes how important equal access to justice is for all Californians. We look forward to working on this landmark budget proposal with his administration and the Legislature in the next few months as the budget becomes finalized."

Diversity on the Bench

For the 16th straight year, California's judicial bench has grown more diverse, according to new data released by the Judicial Council.

The Judicial Council surveyed California judges and justices in December 2021 to get a snapshot of the demographics of the California bench—including gender, ethnicity, and sexual orientation. Responding to the questionnaire was voluntary for judges, and the data only reflects the responses provided, but it is encouraging.

According to the data gathered, female judicial officers constitute 38.6% of judicial officers across all court levels, a 1% increase over the prior year and an increase of more than 11 percentage points since 2006—the first year that data were collected for this purpose.

The bench also has continued to become more racially and ethnically diverse. The proportion of white judicial officers has declined 7% since 2006. The percentage of Asian, Black, and Hispanic judicial officers has nearly doubled over the same time period, and now 35% of current justices and judges identify as non-white.

The Judicial Council has developed a Judicial Diversity Toolkit, which encourages courts to reach out to underrepresented groups—which include individuals with diverse racial and ethnic backgrounds, disabilities, and sexual orientations—to educate and advise them about pursuing careers in the law.

In addition, last summer Governor Newsom announced the California Judicial Mentor Program described as a statewide undertaking between the executive and judicial branches to develop and recruit qualified and diverse judicial applicants.

Of Governor Newsom's 169 appointments during his first three years in office, 49% were women and 58% identified themselves as Asian, Black or African American, Hispanic, or Native Hawaiian or other Pacific Islander. Governor Newsom recently nominated Justice Patricia Guerrero to the California Supreme Court, who if confirmed would become the court's first Latina justice. Newsom also appointed Justice Martin Jenkins two years ago to the California Supreme Court, the court's first openly gay justice and third African American man ever to serve on the state's highest court.

California Courts' Efforts to Achieve Climate Sustainability

California Courts are responsible for maintaining more than 21 million square feet of space in roughly 450 facilities statewide, and therefore they can have a significant impact on the environment. Recognizing this opportunity, the court system has a plan for achieving climate sustainability.

The proposed plan expands on prior judicial branch initiatives to more closely align with broader executive and legislative directives by reducing energy use, lowering greenhouse gas emissions and moving toward "clean energy."

One strategy deployed to reach these goals included replacing existing fluorescent lighting at courthouses with energy-efficient LED lighting. Thus far the judicial branch has retrofitted the lighting in 38 courthouses, saved $1.5 million in annual electricity costs, and reduced annual carbon dioxide emissions by 2,306 metric tons.

The state Judicial Council, which is charged with maintaining and building new courthouses, is also installing automation systems to better regulate and track energy use at individual courthouses. The council plans to increase its communication with courts throughout the state about their energy use and provide conservation tips.

In addition to improved energy-saving equipment, practices, and education, the California court system will need adequate funding for infrastructure repairs and upgrades to its building systems to meet its sustainability goals. According to the Governor's latest infrastructure plan, the state's judicial branch needs $5 billion in deferred maintenance, only topped by the University of California and the Department of Transportation.

EVENTS CALENDAR

FOR MORE DETAILED INFORMATION, CHECK OUT THE EVENT CALENDAR ON OUR WEBSITE:

OCTLA.ORG

APRIL 28, 2022
6:00pm - 8:00pm
Tustin Ranch Golf Club
Mediating Your Case from a Plaintiff, Defense and Mediators' Perspective

MAY 20 - 21, 2022
Omni Rancho Las Palmas
CAOIE/OCTLA/CAOC Palm Springs Seminar

MAY 26, 2022
6:00pm - 8:00pm
Tustin Ranch Golf Club
Rideshare/Food Delivery Cases – UIM with Uber/Lyft

JUNE 1 - JULY 1, 2022
Second Harvest Food Bank
Food from the Bar Campaign

JUNE 23, 2022
6:00pm - 8:00pm
Tustin Ranch Golf Club
Lien Resolution

JULY 28, 2022
6:00pm - 8:00pm
Tustin Ranch Golf Club
Mini Opening/Voir Dire

AUGUST 11, 2022
Tavern Bowl
Member Bowling Night

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Employment	**Personal Injury**	**Personal Injury**
Class Action vs. OC Register $38,000,000 Largest Class Action Settlement in OC History	Dean vs. Allied Trucking $28,000,000 Truck Accident	Vincent vs. Public Entity $17,000,000 Bus Accident

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Dangerous Condition - Govt. Entity

8 - FIGURES
Caustic Ingestion - Premises Liability

8 - FIGURES
15-Passenger Van - Auto Defect

8 - FIGURES
Rollover/Roofcrush - Auto Defect

MULTIPLE 7 - FIGURES
Airbag/Restraints - Auto Defect

MULTIPLE 7 - FIGURES
Door Latch Failure - Auto Defect

MULTIPLE 7 - FIGURES
Seat Belt Failure - Auto Defect

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