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**Intangible Benefits**

*By Atticus N. Wegman, Esq.*

Recently, I spent time reflecting on where I am as a lawyer. My reflection led me to approve of some actions that I have taken, disapprove of others, and revisit what I like most about what I do. The permeating thought that brought a smile to my face and caused me to continue smiling was of all the different types of people I have been able to meet and represent.

I realized we are in a unique position, strapped with the powerful attorney-client privilege, whereby we can, and must at times, delve deeply into a stranger’s life. That stranger soon becomes our client and later maybe a friend, enemy, acquaintance, or the less-appealing title of former client. Regardless of the label, as attorneys we get the benefit of meeting some very interesting people. And depending on which side of the bar you sit on, we get the benefit and privilege of representing them for a just cause.

It truly is amazing to consider the information we learn as representatives of our clients. Through medical records, private conversations, investigations, expert opinions, and other means, we gain a very unique perspective on these people that we once regarded as strangers. In some cases, we are even lucky enough to form lifelong bonds with these people.

These strangers come in all walks of life. Some are more unique than others. Think about some of the most interesting people you have had the privilege of representing. In what other profession can you get so close to someone in such a short period of time? Easy answer: psychotherapist. OK, but other than psychiatry, psychology, and a few other professions, I think it is safe to say we are in a very select group.

Our unique relationship with others is probably what I like most about what we do. Whether representing a Navy Seal, deposing a landscaper who moved to the U.S. to start a new life where 10 years prior he was fighting Saddam Hussein in Iraq, or even just visiting with clients at their homes prior to trial doing nothing more than getting to know them, each experience is memorable in its own way. All of us have these experiences and we should be grateful for them.

After reading what I just wrote, I realized I might not be telling the full story. I am sure we all could talk about the difficult clients or those with unreasonable expectations. But if I write another paragraph about those stories, I might leave you with a frown on your face instead of the warm, fuzzy feeling that I know you have right now. :)

Point being, there are so many benefits that I think all of us receive from our clients. Maybe they taught us something, maybe they showed us something about ourselves that we did not know, but whatever the reason, the benefits gained are intangible and irreplaceable.
Together We Are an Ocean

H. Shaina Colover, Esq.
OCTLA President

We at the Orange County Trial Lawyers Association (OCTLA) recognize we are stronger, more knowledgeable, and more effective at representing our clients and promoting a fair justice system when we work together. To that end, I am proud to share some of the upcoming educational, mentoring, and consumer protection related activities offered by OCTLA this year.

Unrivaled Continuing Education Seminars

We started the year with “What’s New in Tort & Trial,” keeping our members updated on recent changes in the law affecting trial practice. This was followed by a specialty credit program in February, in time for the new MCLE Reporting period March 1, 2017.

Throughout the year, we have a number of useful programs in place as part of our new hands-on series called “Trying Your Case.” This series will start in March with opening statements, and will include programs on motions in limine, voir dire, direct and cross examination, expert examination, as well as a judge’s lunch program at the courthouse on “Getting Your Exhibits Into Evidence” and demonstrative evidence at trial. We have enlisted some of the most talented and experienced trial attorneys, as well as esteemed members of the Judiciary, to present at these monthly dinner programs. Please check out the calendar here in the Gavel or the OCTLA website (www.octla.org) for more information on our monthly dinner meetings and seminars.

In addition to providing MCLE credit, these monthly programs (meeting the 4th Thursday of the month) are great fun and offer networking and mentoring opportunities for all!

Justice Day

On Tuesday, May 2, 2017, OCTLA will again join forces with fellow trial lawyers from throughout the state to participate in the annual CAOC Justice Day in Sacramento. I have personally attended Justice Day numerous times over the years, and I always feel so energized from this amazing opportunity to take a first hand role in protecting the civil justice system and defending the rights of our clients at the Capitol. Justice Day is great way to connect with fellow consumer attorneys, learn about lobbying, and to meet with our local legislators on issues important to our clients and professions. No lobbying experience is necessary, you are provided with all the tools needed upon arrival.

Register Today! (See registration information on page 33.) Also, don’t miss out on our annual OCTLA Eve of Justice Day Margarita Mixer & Dinner at Vallejo’s in Sacramento, from 7:30-10:30 pm, Monday, May 1, 2017! For more information visit our website at www.octla.org.

Improved Website, List-Serve, & Trial Calendar

Over the last few years, we have taken steps to improve our website. This now includes an improved list-serve, where you can obtain important information from our members regarding questions you may have concerning your cases. Under the RESOURCES section, you will find the new OCTLA Trial Calendar, listing current trials in Orange County so our members can watch and learn from each other. To get your upcoming trials added to the calendar, send your trial info to: info@octla.org.

The OCTLA Deposition Bank is also filled with numerous defense expert depositions to assist our members on a daily basis. You can easily download the transcripts you need (at no cost) or upload your deposition transcripts to assist your fellow members when needed.

Social & Mentorship Events

This year we will be having many social and mentoring events to ensure our members and prospective members have plenty of opportunities to get to know and learn from each other. These include our annual Palm Springs Seminar (March 3-5), Bowling Event (April), Justice Day (May 2), a joint CAOIE and OCTLA Family Night at Angel Stadium (August), Del Mar Races Mixer with CAOC (August), Columbus Day Golf Tournament (October), and a summer Mentorship Mixer at Muldoon’s in Newport Beach (“speed dating” format) to bring newer and more seasoned attorneys together to share a pint and some wisdom.

Take Every Opportunity to Empower & Educate Our Community

I am so thankful for what OCTLA, its members, and my many mentors have taught me over the years. Often times we, as busy trial attorneys, find ourselves with too much to do and too little time. Requests by colleagues and associates to “help” are often met with the phrase, “that’s ok, I will handle it myself,” because the time it can take to educate someone on how to help often takes as long as just doing it ourselves. So, we fall into the, “I’ll just do it myself,” rut.

It is important that we fight against this urge. That is the perfect time to say: “Yes! Yes, I do need some help!” . . . then take those few extra moments to teach. My many years with OCTLA mentorship have shown me that this will be time well spent. Not only will others in our legal community now have the skills to be more effective and helpful in the future, they will be empowered by the knowledge you imparted and the fact that you trusted and respected them enough to educate and rely on them. In the wise words of Ryunosuke Satoro, “Individually, we are one drop; together, we are an ocean.”
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By Lawrence Strid

Many attorneys go to great efforts to secure a money judgment on behalf of their clients, either by default or trial, only to find thereafter that the defendant has not rushed to the post office to mail them a check in satisfaction of same.

This article is intended to address both the immediate and long-term steps that an attorney should take to protect the judgment for the best post-judgment enforcement prospects.

A. Notice of Entry of Judgment

Especially on default judgments, a Notice of Entry of Judgment should always be served on the defendant at its last known address. This is good practice for two reasons: (1) if it gets returned by the Post Office, then you are on notice that you have to take further steps to try and locate a better address; and, (2) service of the Notice of Entry of Judgment will trigger the initiation of the six month time limitation under Code of Civil Procedure section 473, subsection (b), in which to move to set aside the judgment, assuming the defendant wants to later contend that the entry of judgment against them was due to fraud, mistake, surprise, inadvertence, or neglect.

Bear in mind that there are other methods by which to challenge a judgment besides bringing a motion under this section, but service of the Notice of Entry of Judgment can help to defuse those contentions as well.

B. Recordation of the Judgment

If the attorney for the judgment creditor (“JC”) has reason to believe that the judgment debtor (“JD”) is on title to real estate and may transfer title to same to try and evade the judgment, then the most time-expedient maneuver is to obtain a certified copy of the judgment from the court clerk and record it with the county recorder’s office where the property is believed to be situated. A recorder’s recordation page should always be attached to the front of the document.

C. The Abstract of Judgment

If there is no reason to believe that the above may suddenly occur, then the attorney can dispense with the expedited recordation of the judgment, but should still take immediate steps to request the issuance of an abstract of judgment from the court clerk (the time frame in which the court will process an abstract can vary from court to court; in Orange County it may take approximately two weeks).

The abstract form (Judicial Council Form EJ-001) should always include either the last four digits of the JD’s driver’s license number (insert at Line 1b) or the last four digits of the JD’s Social Security Number (insert at Line 1c). This information is important if a title search is expected to ascertain the true identity of the JD.

If multiple abstracts are to be recorded, then depending on the need for immediate action, the JC’s attorney can either request the issuance of multiple abstracts from the court clerk at one time and then record them with various county recorders simultaneously, or alternatively request issuance of only one abstract at a time, and which can then be recorded with other county recorders when the original is returned to the JC’s attorney by the last county to record same (this may take approximately 30-60 days or so from the date that the abstract is first recorded).

The abstract should be picked up in any title search arising out of a legitimate transfer or re-financing of real property thereafter, although it won’t protect the JC from “friendly” transfers wherein there is no title search because the JD is transferring title to a family member or friend, just to try and evade the judgment. However, the recordation may still create title problems if a fraudulent transferee tries to engage in a legitimate transfer to a third party thereafter.

D. Notice of Judgment Lien

Regardless of the JD’s real property ownership, a Notice of Judgment Lien should always be filed with the California Secretary of State. This is an easy procedure to accomplish, as the forms are available for free on-line and the filing fee database programs can almost always supply a correct SSN on anybody.

The abstract should always be recorded in any county in which the JD is believed to own real property. If no real property ownership is known, then the abstract should at least be recorded in the JD’s county of residence, and if the judgment is large enough then thought should be given to recording it in other contiguous counties as well.

If multiple abstracts are to be recorded, then depending on the need for immediate action, the JC’s attorney can either request the issuance of multiple abstracts from the court clerk at one time and then record them with various county recorders simultaneously, or alternatively request issuance of only one abstract at a time, and which can then be recorded with other county recorders when the original is returned to the JC’s attorney by the last county to record same (this may take approximately 30-60 days or so from the date that the abstract is first recorded).

The abstract should be picked up in any title search arising out of a legitimate transfer or re-financing of real property thereafter, although it won’t protect the JC from “friendly” transfers wherein there is no title search because the JD is transferring title to a family member or friend, just to try and evade the judgment. However, the recordation may still create title problems if a fraudulent transferee tries to engage in a legitimate transfer to a third party thereafter.
is only $10.00.

Filing of the Notice of Judgment Lien is creates a lien in favor of the JC on all non-exempt personal property owned by the JD. See Civil Code section 697.530 for a list of the various types of personal property it can attach to.

Subject to certain exceptions specified in the statute, the judgment lien is good for up to five years. (Code Civ. Pro. § 697.510, subd. (b).) To be renewed, it must be re-filed in the last six months of the last five year period.

The judgment lien is most effective against a commercial JD who may have an inventory of equipment or merchandise that could be sold to a third party, the latter of whom would want to do a credit history search to ensure that the seller can convey good title to same.

However, the judgment lien can also be effective with an individual JD, at least if the latter cares about its credit rating and is trying to process a loan or credit application. Most legitimate lenders would do a credit history search for judgment liens against an individual before extending credit.

The judgment lien is supposed to be served on the JD by at least first-class mail, although a failure to serve it does not affect its legality. (Code Civ. Proc. § 697.560.) Service of the judgment lien is recommended, as it is another way to secure the JD’s attention about the on-going consequences of the judgment.

E. Renewal of Judgment

A judgment is good for ten years and will bear post-judgment interest at .10% per annum. However, the judgment can be kept alive indefinitely by promptly renewing it before the end of the last ten year period of entry or renewal, whichever time is more recent.

Renewing a judgment is relatively easy, and does not require a court order or hearing. The clerk of the court enters the renewal upon the JD’s application for same. When renewing the judgment, simply fill out the forms Application For and Renewal of Judgment (Judicial Council Form EJ-190) and a Notice of Renewal of Judgment (Judicial Council Form EJ-195).

2. Wage Garnishment

Among the more common means of judgment collection are the following:

1. Bank Levy: If it is known where the JD has a bank account, the lender can obtain a writ of execution from the court which rendered the judgment, and then submit it to the local sheriff’s office for service upon the debtor’s repository. This will cause the account to be frozen by the repository, until such time as it remits the amount due to the sheriff, who in turn remits it to the JC or its attorney. If no bank account is known to the JC, there are private investigative agencies who, for a reasonable fee, can conduct searches to identify accounts in the name of the debtor, although this usually requires having a current address on the JD and knowing its SSN.

Because it is a relatively fast procedure and may collect the entire amount of the judgment without advance notice to the JD, the bank account levy is a preferred method of judgment collection.

2. Wage Garnishment: If the JD’s employment is known, wages can be garnished for up to 25% of the JD’s net pay. This procedure doesn’t work if the JD is self-employed.

The JD can also claim hardship and file a request for partial or total exemption with the court, which may be granted in whole or in part, depending upon the JD’s financial circumstances and the number of the JD’s dependents. The JC can request an evidentiary hearing to contest the claim for exemption.

Sometimes the best outcome of a JDE is to reach an agreement with the JD to voluntarily remit installment payments or a lump sum toward satisfaction of the judgment, in consideration for a discount on the judgment and/or staying further enforcement procedures.

Outside of preserving the judgment, the best thing about the renewal application is that it partially compounds the post-judgment interest, as the post-judgment interest to date is added to the principal amount of the judgment when the renewal application is submitted, and the sum of these two figures then generates post-judgment interest at .10% thereafter. This can significantly increase the amount required to satisfy the judgment thereafter.

Because of this, once a judgment has been renewed it cannot be renewed more frequently than every five years thereafter. (Code Civ. Pro. § 683.110, subd. (b).)

Once the renewal application and service of same is perfected, the JC’s attorney should record a certified copy of the renewal application with all relevant county recorders, in order to extend the ten year period of the judgment as a lien on any real estate in the name of the JD. (Code Civ. Proc. § 683.180, subd. (a).)
paycheck is relatively small, and because pro-
longed wage garnishment can give the JD an
incentive to file for bankruptcy or to change
employment, wage garnishment is generally
not that effective in satisfying a large judg-
ment within a reasonable period of time.

Even if the judgment is not against the
JD’s spouse, those wages may be garnished
because the spouse’s earnings are commu-
nity property. This requires the bringing of
a motion to obtain a court order (Code Civ.
Proc. § 706.109.)

3. Judgment Debtor Examination
(“JDE”): The JD may be served with a
court order to appear in court for a JDE, in
order to be cross-examined by the JC or its
attorney as to the JD’s financial situation. If
they are also served with a subpoena duces
tecum, then the JD’s financial records can
be compelled to be produced as well. This
procedure can only be utilized once every
120 days (Code Civ. Proc. § 708.110), but
it can also be utilized against third parties
who may have control or possession of
property belonging to the JD (Code Civ.
Proc. § 708.120).

Depending upon the circumstances
and the amount in question, thought should
be given to bringing a court reporter to
record the JDE hearing, as the court will
not supply one. Bear in mind that depend-
ing upon any given courthouse’s facilities,
most JDEs end up being heard in a court
hallway or cafeteria. The judge will not get
involved in conducting the hearing unless
the JD refuses to answer certain questions
that the JC deems to be relevant, and the
JC’s attorney brings such resistance to the
court’s attention to be addressed.

Sometimes the best outcome of a JDE
is to reach an agreement with the JD to
voluntarily remit installment payments or a
lump sum toward satisfaction of the judg-
ment, in consideration for a discount on the
judgment and/or staying further enforce-
ment procedures.

As a cheap alternative to a JDE,
written interrogatories and a demand for
production of documents may be served
upon the JD (Code Civ. Proc. §§ 708.020,
708.030), but if the JD elects to ignore such
creditor discovery then there isn’t much
that can be done to press the issue on a
practical level.

4. Seizure of Motor Vehicle: Pursuant to
a writ of execution and instructions to the
local sheriff’s office, a JC may seek to have
the JD’s motor vehicle seized and sold at
a judicial auction. This requires being able
to identify the motor vehicle, and having it
accessible in a known location. The JD is
entitled to an exemption of $2,300 (Code
Civ. Proc. § 704.010) from the sales pro-
ceeds, but given the required up-front fee to
tow away a motor vehicle (at least $800 or
more, depending upon the county) and the
difficulty in getting a fix on the site of the
motor vehicle, this is not a preferred means
of collection.

5. The Long Wait: Sometimes it can literal-
ly take years to collect a judgment, depend-
ing upon how pro-active the JC is willing
to be, and given the financial responsibility
and known whereabouts of the JD.

Conclusion

At a bare minimum, record an
abstract of judgment and diary the event
accordingly for renewal. Passive pa-
tience thereafter can sometimes be more
effective and less costly than aggressively
pursuing various judgment enforcement
procedures in the short-term, depending
upon the JC’s legal budget and the JD’s
known financial circumstances.

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SUMMARY:
What’s New in Tort & Trial

By Andje Morovich Medina

If you missed the OCTLA What’s New in Tort and Trial Seminar last month, here are a few takeaways that should help you in your everyday practice.

Excluding Witnesses
We’ve all received motions in limine to exclude a plaintiff’s damages witnesses that were not previously disclosed in response to Form Interrogatory 12.1. We can now file those in the trash. Well, technically it’s worth an opposition, but it will be a canned opposition going forward. The court in Mitchell v. Superior Court (2015) 243 Cal.App.4th 269, clarified that Form Interrogatory 12.1 seeks the identity of percipient witnesses, meaning witnesses who were at the scene immediately before or after the incident and those privy to statements by percipient witnesses and those who have personal knowledge of the accident. The interrogatory is not intended to encompass all persons who may testify regarding plaintiff’s injuries. Exclusion of plaintiff’s non-percipient witnesses on this basis is not allowed.

Mental Exams of Children
In those sensitive instances when you have a child client with a mental or emotional injury claim that prompts a mental examination, the examiner does not automatically get to talk to the parents. The court in Roe v. Superior Court (2015) 243 Cal.App.4th 138, overturned a trial court’s ruling on a motion to compel that granted defense doctors the right to interview the parents of a sex abuse victim. The court held that nothing in Code of Civil Procedure section 2032.020 contemplates a collateral interview of a minor’s parents as part of a mental examination. You are still free to stipulate to allow these collateral interviews, but defendants don’t automatically get them.

Limiting Howell
A small victory on the Howell v. Hamilton Meats (52 Cal. 4th 541) front came late last year in Moore v. Mercer (2016) 4 Cal.App.5th 424, when the court confirmed that the appropriate value of past medical specials is what plaintiff has to pay, not what a medical provider ultimately receives for the services provided. In Moore, a woman used MedFin to fund her spine surgery. MedFin purchased the lien from the provider for a reduced amount, but plaintiff was still accountable to MedFin for the full amount. The court, highlighting Hanif v. Housing Authority (200 Cal.App.3d 635), noted that the focus is on the cost to the plaintiff, not the ultimate payment to the provider. The cost to the plaintiff is what the tort recovery is designed to reimburse.

Attorney-Client Privilege
There is no show-and-tell in state court. The court of appeal in DP Pham, LLC v. Cheadle (2016) 246 Cal.App.4th 653, clarified that a court may not review the contents of a communication to determine whether the attorney-client privilege protects that communication. Once the proponent makes a prima facie showing of a confidential attorney-client communication, it is presumed privileged. The opponent cannot simply rely on the communication’s content to make that showing.

CCP § 998
Take a quick look at your Code of Civil Procedure section 998 template and make sure you have not included any uncertainty...
that will make the offers invalid. An offer that requires the other party to execute a written settlement agreement and general release with undefined terms is void for uncertainty according Sanford v. Rasnick (2016) 246 Cal.App.4th 1121. Because the parties don’t know what exactly would be included in the agreement the offer is too indefinite. Also, be sure you are not including language that covers claims that might not be connected to the incident giving rise to the suit. Those are void too according to Ignacio v. Caracciolo (2016) 2 Cal.App.5th 81.

Encumbered Settlement Checks
If your client executed a release stating she would be responsible for paying liens and would hold defendant harmless do not allow the defendant to list lien holders on the settlement funds. Unless an encumbered check was part of the settlement deal, defendants have no right to issue encumbered funds according to Karpinski v. Smitty’s Bar, Inc. (2016) 246 Cal.App.4th 456.

Five Years to Trial Rule
Code of Civil Procedure section 583.310 provides that an action shall be brought to trial within five years after the action is commenced against a defendant. This is a hard and fast rule. There are a few tolling exceptions, but read them carefully. You can toll the deadline to participate in mediation within the last six months before the five year deadline. But, as the plaintiff learned in Castillo v. DHL Express (USA) (2016) 243 Cal.App.4th 1186, that only applies to court-ordered mediation, not private mediation. You also can stipulate to a stay of all proceedings and an extension of the five year deadline. But, as the plaintiff learned in Gaines v. Fidelity National Fire Ins. Co. (2016) 62 Cal.4th 1081, it must be a true stay of all proceedings. You cannot continue discovery or that constitutes a partial stay and the five year clock continues to tick.

583.330 you can enter into a stipulation to extend the time within which the action must be brought to trial. Keep it simple and enter a clear stipulation.

Respondeat Superior / Going-and-Coming Rule
Two tough cases came out addressing the going-and-coming rule last year. In Jorge v. Culinary Institute of America (2016) 3 Cal.App.5th 382, the court analyzed the required vehicle exception to the going-and-coming rule. Defendant worked at the Culinary Institute and was driving home from his shift when he hit plaintiff. Plaintiff sued the Culinary Institute under a theory of respondeat superior liability arguing the required vehicle exception. Plaintiff developed evidence that defendant had work tools...
and uniforms in his car and used his car from time to time for consulting jobs. The jury awarded plaintiff nearly $1 million at trial. But the verdict was taken away by the court of appeal which found that defendant was not using his car for consulting work *on the day of the incident* and was not generally required to have the car available during the day for use. This is a tightening of the analysis on the required vehicle exception.

Then in *Pierson v. Helmerich & Payne Internat. Drilling Co.* (2016) 4 Cal. App.5th 608, the court found that an oil rig worker involved in a car accident while driving his co-worker and his supervisor to their employer-paid hotel at the end of a workday was *not* in the course of his employment. Summary judgment was upheld under the going-and-coming rule. The court acknowledged that carpooling by employees raises special issues with regard to the going-and-coming rule. The court provided guidance on areas that must be developed to get around the rule. A few examples provided include: whether the employer required or requested the driver to provide transportation to coworkers, whether the employer was significantly involved in the pooling arrangement, whether employees were paid for participating in carpooling, whether the employer exercised control over the commute, whether the employer enjoyed an incidental benefit, and whether the arrangement required a significant deviation from the driver’s usual route home. Use these specific examples provided by the court when developing discovery in cases involving a commuting defendant.

**Negligent Exercise of Retained Control**

Two important retained control cases were decided last year. The first, *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, affirms that CACI 1009B is sufficient to instruct on negligent exercise of retained control and further special instructions with the “affirmative contribution” language would be misleading. The case also confirms that a hirer’s negligent exercise of retained control is *not* limited to affirmative acts. In *Regalado*, the failure to act (omission) was found to be negligent. But, be certain that the failure to act is a *specific* failure and not a more generalized one. Because the court in *Khosh v. Staples Co., Inc.* (2016) 4 Cal. App.5th 712, drew a distinction between retaining a general duty to prevent accidents and undertaking a duty to perform a specific safety measure. The Kosh court affirmed summary judgment for a general contractor who had assumed a general duty for safety, but had not failed to perform any identifiable task that contributed to plaintiff’s injuries. A subtle but important distinction is drawn in these cases. Be careful when pleading a retained control claim and try and develop specific promises and not overall safety promises.

The above cases are just a small sampling of important decisions that came out last year. Hopefully some of them will help you in your everyday practice. Next year, be sure to attend the full *What’s New in Tort and Trial Seminar*!
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There is a fascinating interplay that occurs when Code of Civil Procedure section 998 interacts with section 1033, subdivision (b)(1). (All statutory references are to the California Code of Civil Procedure unless otherwise indicated.) This was recently exhibited in a 4th Appellate District, Division 1, unpublished decision involving a Federal Employment and Housing Act ("FEHA") discrimination claim filed as an unlimited civil matter.

In this case, Plaintiff Employee asserted a pregnancy discrimination claim buttressed by seven other causes of action. After a fourteen-day trial, the jury awarded Plaintiff a mere $8,640 in damages on her pregnancy discrimination claim and $1,008 after Defendant conceded on the waiting time penalty. The jury voted unanimously in favor of Defendant on the remaining seven causes of action. Although Plaintiff was awarded less than $10,000, she incurred close to $277,000 in attorney’s fees to recover that amount. To add insult to injury, the Court exercised its discretion and deemed Defendant the prevailing party. Plaintiff did not appeal the jury verdict but, unsurprisingly, sought review of the failure to award her attorney’s fees.

**How Did Defendant Turn A Small Defeat Into Victory?**

FEHA contains a “one way” attorney’s fee provision allowing a prevailing Plaintiff to recover attorney’s fees. Section 1032 states, in pertinent part:

(a) As used in this section, unless the context clearly requires otherwise:

1. “Complaint” includes a cross-complaint.

2. “Defendant” includes a cross-defendant or a person against whom a complaint is filed.

3. “Plaintiff” includes a cross-complainant or a party who files a complaint in intervention.

4. “Prevailing Party” includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs

By Janice M. Vinci & Steven A. Fink
who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the “prevailing party” shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034.

(b) Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.

(Code Civ. Proc. § 1032, italics added.) Here, Plaintiff Employee clearly obtained a net monetary recovery. However, there are at least two significant exceptions to the prevailing party determination.

Recovery of Fees and Costs to Prevailing Party Where Judgment Could Have Been Rendered in a Limited Civil Case

First, when “a prevailing party recovers a judgment that could have been rendered in a limited civil case,” and the action was not brought as a limited civil case, section 1033, subdivision (a), states that “[c]osts or any portion of claimed costs shall be as determined by the court in its discretion . . . .” (Chavez v. City of Los Angeles (2010) 47 Cal.4th 970, 975 (hereafter Chavez)).

Likewise, under section 1033, subdivision (b)(1), when a prevailing party in a limited civil case recovers a judgment that could have been rendered in a small claims court, “the court may, in its discretion, allow or deny costs to the prevailing party, or may allow costs in part in any amount as it deems proper.”

Here, Plaintiff Employee appealed based on her net monetary recovery and because she could not have foreseen such a low verdict based on similar cases of pregnancy discrimination. Respondent Employer argued that based upon the jury verdict, it was clear that Plaintiff Employee should have brought her action in small claims court in accordance with section 1033, subdivisions (a) and (b).

(1). Plaintiff Employee’s failure to do so set the stage for the trial court, in its discretion, to deny Plaintiff’s request for attorney’s fees and costs amounting to $277,000.

Plaintiff Should Not Recover Costs & Fees Pursuant to Code of Civil Procedure § 998

Second, under section 998:

“If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her post offer costs and shall pay the defendant’s costs from the time of the offer.”

(Code Civ. Proc. § 998, subd. (c) (1), italics added.) Additionally, under Code of Civil Procedure section 998, subdivision (e):

“If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the costs under this section, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the defendant and judgment or award shall be entered accordingly.”

(Id., subd. (e), italics added; see also Pomeroy v. Zion (1971) 19 Cal.App.3d 473.)

It is important to note that section 998 “was designed to create economic incentives on both parties to settle rather than try their lawsuits, and to further that goal, both sides must face some economic consequences if it turns out they miscalculate and lose.” (Christine Holman v. Alitana Pharma US, Inc. (2010) 186 Cal.App.4th 262, 283–284 (hereafter Holman).)

Both of these statutory exceptions and the Holman case apply here as Plaintiff received a judgment which was not only below the jurisdictional...
minimum for this court, but was actually well within small claims jurisdiction. Further, the $9,680 award was far less favorable than Defendant’s section 998 pre-trial offer that Plaintiff rejected.

The case of Steele v. Jensen Instrument Co. (1997) 59 Cal.App.4th 326 (hereafter Steele) is virtually identical to the case at bar. Steele was a pregnancy discrimination case under FEHA filed as an unlimited civil matter. Defendant made a statutory offer of compromise for $40,000 and the jury awarded the plaintiff damages of $21,078. The trial court denied the plaintiff her costs, did not award her attorney’s fees, and awarded the defendant its costs.

On appeal, the plaintiff argued that she was entitled to attorney’s fees and costs under Government Code section 12965, subdivision (b) and, added to her damage award, she exceeded the amount of the section 998 offer. In rejecting this argument, the court stated:

The interplay of these statutes [Code Civ. Proc., §§ 998 & 1033, and Gov. Code, § 12965] is complex. However, we conclude Jensen [defendant] was properly awarded costs in this case . . . Steele obtained a judgment of only $21,078 against defendant employer which was less than the jurisdictional limit of the municipal court and less than the pretrial settlement offer. Thus, the trial court did not abuse its discretion in denying an award of costs and attorney’s fees to Steele.

That being the case, Steele had no costs or attorney’s fees to add to the judgment of damages for purposes of determining whether Jensen was entitled to its costs pursuant to Code of Civil Procedure section 998, subdivision (c). Therefore, the judgment of $21,078 was not more favorable than the Code of Civil Procedure section 998 offer of $40,000 and Jensen was entitled to its costs.

(Steele, supra, 59 Cal.App.4th at pp. 330-31.)

The facts in our appellate case are similar to Steele as the interplay among the three statutes is identical. Plaintiff Employee did not better the section 998 offer. Plaintiff did not even exceed the jurisdictional limits of small claims court. As in Steele, Defendant Employer argued, Plaintiff should be denied her fees and costs.

Plaintiff Ignored the Interplay of Government Code § 12965 and Code of Civil Procedure §§ 998, 1033(a) & (b)(1)

The Holman case concerned a FEHA discrimination claim made under Government Code section 12965 in which an award for expert witness fees was granted for the prevailing employer after the plaintiff rejected a prior section 998 offer. The appellate court affirmed the award based upon that rejection.

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(but remanded the case to the trial court for the purpose of scaling down the amount awarded to defendant because the plaintiff was indigent and receiving social security disability benefits).

In Holman, the threshold question for the court was whether a prevailing employer in a FEHA case must show that “the plaintiff’s case was frivolous before it may recover expert witness fees under Code of Civil Procedure § 998.” (Holman, supra, 186 Cal.App.4th at p. 277.) Although the Defendant Employer in our case did not attempt to recover fees or costs under section 998, the Holman court made it clear that, the requirements for recovery of costs and fees under [Code of Civil Procedure section 998] must be read in conjunction with [Code of Civil Procedure section 1032, subdivision (b)], including the requirement that [Code of Civil Procedure section 998] costs and fees are available to the prevailing party ‘[e]xcept as otherwise expressly provided by statute.’ ([Code Civ. Proc., § 1032, subd. (b)], italics added.). (Holman, supra, 186 Cal.App.4th at p. 279, first italics added, second italics in original.)

Here, Plaintiff Employee’s claim to recover her attorney’s fees and costs was based upon an analysis under Government Code section 12965. Defendant Employer argued that Plaintiff Employee ignored the other statutory legs as if they would somehow disappear and the now one-legged tripod would still stand. Defendant Employer further argued that Plaintiff Employee’s FEHA only analysis must be read in conjunction with sections 998 and 1033, subdivisions (a) & (b)(1). It is this component of the analysis that showed Plaintiff Employee’s claim was as unsupportable as a one-legged tripod.

Similarly, of the twelve cases and five statutes Plaintiff Employee cited in her opening brief, the Steele case is the only one that analyzes Government Code section 12965. Not surprisingly, the Steele court’s final ruling supported Defendant Employer’s position in our case as stated herein.

The Trial Court Has the Discretion to Determine the Prevailing Party under Code of Civil Procedure § 998

Citing Christiansburg Garment Co. v. EEOC (1978) 434 U.S. 412, 421, the Plaintiff in the Holman case noted that the U.S. Supreme Court affirmed that a court “may in its discretion award attorney’s fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.” (Italics added). These factors are known as the “Christiansburg standard.” The Christiansburg court’s conclusion relied upon the legislative history of section 706(k) of title VII of the Civil Rights Act of 1964, which made clear “that while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis.” (Christiansburg, 434 U.S. at p. 420.)

Notwithstanding that Plaintiff Employee was not the prevailing party under section 998, the trial court also had the discretion to determine whether Plaintiff’s case was unreasonable based upon the Christiansburg factors, including considering the burdensome litigation the Defendant Employer had to endure.

In applying the Christiansburg factors, the unreasonableness of Plaintiff Employee’s case was illustrated by: (1) the filing in unlimited civil; (2) the failure to accept a section 998 offer 50% greater than the less-than $10,000 Plaintiff was awarded; (3) Plaintiff’s short term employment of less than five
months; and (4) Plaintiff’s lack of any evidentiary corroboration to support her testimony.

Defendant Employer argued that it was not incumbent upon the trial court or the Defendant in its case to compensate Plaintiff’s counsel for her miscalculation of Plaintiff’s case. It was clearly unreasonable to litigate Plaintiff’s case in an unlimited civil jurisdiction. The extra depositions merely increased the attorney’s fees Plaintiff incurred without improving the amount of the jury verdict. It was equally unreasonable to reject a fair section 998 pre-trial offer that greatly exceeded the verdict. Plaintiffs’ attorneys doubled their bets, rolled the dice, and ended up with snake eyes. Most importantly, in this time of budgetary restraints within our court system and the budgetary impact upon our jurors, Plaintiff’s counsel should not be rewarded for wasting the court’s and jurors’ time in bringing the equivalent of a small claims case in an unlimited civil court. The jury verdict spoke volumes to this fact.

Defendant Employer further argued that Plaintiff’s right to litigate a FEHA claim was never at risk. Plaintiff had access to justice in the limited civil jurisdiction court. It begged the question whether a $9,680 case was brought into our unlimited jurisdiction court to protect the Plaintiff’s rights or simply to gouge the employer’s pockets to subsidize an attorney’s $277,000 hope for a windfall.

The Chavez Factors Are Inapplicable and Moot

Plaintiff Employee asserted that the trial court abused its discretion by failing to apply the Chavez factors in its analysis. Defendant Employer argued that the fact that the court chose not to engage Plaintiff’s oral argument in the manner that Plaintiff demanded was the sole support for her argument. However, in the written order submitted almost three weeks after the hearing, the court cited Chavez, Steele, and section 1033, subdivisions (a) and (b)(1) to support its right to exercise its discretion and deny fees and costs.

Defendant Employer further argued that the Court also referred to the fact that the fees and costs requested appeared to be excessive. Under Chavez, the court has discretion to deny a request for attorney’s fees on that basis alone. (Chavez, supra, 47 Cal.4th at pages 990-91, quoting Serrano v. Unruh (1982) 32 Cal.3d 621, 635.)

The Chavez factors were also moot, Defendant Employer argued, if Plaintiff was unable to first establish that she was the “prevailing party” under section 998, which she had failed to do as discussed above. The Chavez factors are further moot in light of Plaintiff Employee’s decision to litigate this matter in an
unlimited civil jurisdiction and incurring excessive attorney’s fees and costs in disregard of section 1033, subdivisions (a) and (b)(1). Finally, an analysis under the Chavez factors was irrelevant where the Plaintiff’s case was an unreasonable endeavor based upon the case facts, the rejection of a fair section 998 pre-trial offer, and a complete miscalculation of the case value by Plaintiff Employee’s counsel.

Consequently, in our case the appellate court ruled in favor of Defendant Employer on the bases that the trial court: (i) did not abuse its discretion since it provided an *express finding* that the fees and costs requested by Plaintiff Employee’s attorneys appeared to be excessive under Chavez; and, (ii) provided an *express finding* that the judgment could have been rendered in a limited civil case or in a small claims court.

**Conclusion**

This discussion is a three-fold warning to plaintiff and defense counsel alike. First, be very careful when choosing the proper jurisdictional venue for your cases. Second, be very careful when presented with a section 998 offer by thoroughly analyzing the risks and benefits of such an offer and the impact upon which such an offer could affect your client and your case. Third, it is an equally important lesson in defending an action. Had Defendant Employer not submitted a section 998 offer in excess of the amount awarded Plaintiff Employee, the Court had the ability to exercise its discretion to award fees to Plaintiff. Thus, make sure to submit a section 998 offer in a reasonable amount in order to tip the scales in your favor.
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Every personal injury case is comprised of three elements: 1) liability, 2) damages, and 3) collectability. If one of these elements is missing, you will not be able to obtain justice for your client and there will be no recovery. Dog attack claims can be one of the easiest type of cases to prove because strict liability under Civil Code Section 3342 makes establishing liability almost effortless. Additionally, your client’s injuries are almost always to the outside of the body and are clearly visible, verifiable, and you’ll rarely need to overcome a “pre-existing injury” defense.

But what do you do when your client wasn’t bitten by the dog? Or what if the dog owner’s homeowners’ insurance policy contains an exclusion for the breed of dog that bit your client? Or what if the dog owner is a renter and has no insurance and little or no personal assets from which to satisfy a judgment? In these situations, collectability will be a significant hurdle and you’ll need to find another defendant to sue or pursue a negligence theory against the property owner.

Whether your theory of recovery sounds in strict liability or negligence, gathering enough evidence to prove your case can also be difficult. The tools and tips discussed in this article will help win your dog attack claim against any defendant under any theory of liability.

Finding Defendants

First, you’ll need to determine who can be liable for the attack. The owner of the dog will be the first defendant to locate. Typically, this will not be difficult, perhaps because most people love their pets and wouldn’t deny owning them, even if it meant facing legal liability. County ordinances also require dogs to
be licensed and registered. For instance, Orange County Code of Ordinances 4-1-70 provides: “Every person owning or having custody of any dog four (4) months of age or older shall procure for said dog an Orange County dog license. Such license shall be procured within fifteen (15) days after the date on which it becomes due.” O.C.C.O. 4-1-70. See also LA County Code 10.20.030 et. seq. Some counties also require dogs to be microchipped, which can help you identify the owner when the dog that bites your client was wearing a collar and name tag. But if no one claims ownership of the dog, or if it appears to be a stray, you’ll need to hire an investigator to speak with neighbors and local animal shelters or pet clinics to try to locate the owner. More often, though, the challenge isn’t finding the owner but rather collecting from the owner as discussed below.

Non-owners that could potentially be liable include landlords, animal shelters, pet grooming establishments and veterinarian clinics. As discussed below, establishing liability against non-owners can be very difficult and you will likely need to overcome a motion for summary judgment before a non-owner will compensate your client for their injuries.

Establishing Liability

The owner of the dog will be the first defendant to pursue because strict liability under Civil Code Section 3342(a) will allow you to establish liability fairly easily. Civil Code Section 3342(a) provides:

“(a) The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner’s knowledge of such viciousness. A person is lawfully upon the private property of such owner within the meaning of this section when he is on such property in the performance of any duty imposed upon him by the

laws of this state or by the laws or postal regulations of the United States, or when he is on such property upon the invitation, express or implied, of the owner.” Civ. Code §3342(a).

Even under Civil Code Section 3342(a) there are some critical facts you need to learn about the attack before accepting a case. When you interview your potential client, make sure to confirm that they know whose dog bit them. Often, a client will be injured in a dog attack when they intervene in a dog v. dog attack, such as when attempting to save their small dog from being attacked by a bigger dog. In these cases, it is crucial that your client knows that it was the defendant’s dog that bit them. If your client testifies at deposition that they cannot remember which dog bit them because “it all happened so fast” your client has just testified their way out of strict liability. The only way, then, to salvage your strict liability claim may be to hire an expert to examine the size of the puncture wounds on your client’s body and compare them to the size of the dog’s teeth to opine that it was defendant’s dog who bit your client. This, of course, will be costly and can be avoided with careful case selection and preparation of your client before deposition.

Additionally, if your client wasn’t bitten you will not be able to sue under a legal theory of strict liability because the statute only applies to bites. Sometimes, a dog will jump on or lunge at your client. Fending off the dog from biting them will often cause your client to stumble or fall, resulting in rolled ankles, sprained wrists, broken bones, and in severe cases head trauma including traumatic brain injury. In these cases, you’ll need to allege negligence against the dog owner. If the attack happens off the owner’s premises, local leash laws can help you establish negligence per se. For example, Orange County Code of Ordinances 4-1-45 provides:

“No person owning or having charge, care, custody, or control of any dog shall cause or permit, either willfully or through failure to exercise due care or control, any such dog to be upon any private property unless such dog be restrained thereon by a fence, wall, substantial chain, leash not exceeding six (6) feet in length, other appropriate physical restraint, or is under the charge of a person competent to exercise care, custody, and control over such dog.

No person owning or having charge, care, custody, or control of any dog shall cause or permit, either willfully or through failure to exercise due care or control, any such dog to be upon any private property unless such dog be restrained by a substantial chain, or leash not exceeding six (6) feet in length, and is under the charge of a person competent to exercise care, custody, and control over such dog.

Your client might need professional counseling and therapy after a dog attack, and proving your client’s emotional trauma will add significant value to the case.
permission for such dog to be on such property without such chain or leash.”

O.C.C.O. 4-1-45.

Establishing liability against a non-owner is even more challenging. Landlords especially resist liability, because a lease transfers the right of exclusive possession to their tenants and they do not retain or exercise control over the property.

In Uccello v. Laudenslayer, (1975) 44 Cal.App.3d 504, 515, the court established when a landlord owes a duty to a third party for the actions of his tenant’s dog. The court held that “a duty of care arises when the landlord has actual knowledge of the presence of the dangerous animal and when he has the right to remove the animal by retaking possession of the premises.” Uccello at 507. The court in Uccello made clear that a duty will not arise simply if the landlord could or should have known about the tenant’s dangerous dog.

Yet, actual knowledge can be difficult to establish for civil litigators because proving what someone knows is as difficult, if not more, than it is for criminal prosecutors to prove mens rea for many intent-based crimes. The court in Donchin v. Guerrero (1995) 34 Cal.App.4th 1832, 1848 emphasized, however, that actual knowledge “can be satisfied by circumstantial evidence the landlord must have known about the dog’s dangerousness as well as direct evidence he actually knew.” Donchin at 1838.

In Donchin, the defendant denied knowing of the dog’s existence and its vicious nature. Later, the defendant admitted he knew of the dog’s existence but maintained that he didn’t know the dog was dangerous. The court held that the plaintiff raised a triable issue of fact as to whether defendant must have known about the dog’s dangerousness because other independent third parties (a UPS deliveryman and a neighbor) had had encounters with the dog where the dog behaved aggressively. The court also reasoned that a self-serving exculpatory statement (“I didn’t know anything about the dog”) can be proven false either by a later recantation by the defendant or other extrinsic evidence that challenges the credibility of the declarant. See, e.g. People v. Mendoza (1987) 192 Cal.App.3d 667 (holding that exculpatory statements that conflict with other inculpatory evidence can show consciousness of guilt of the declarant).

Consequently, to prove circumstantially that a landlord must have known about the dangerous dog in your case you’ll need to speak with independent third parties such as neighbors or delivery persons. Consider submitting a federal FOIA request (Freedom of Information Act) to the local United States Postal Office that delivers mail to the residence where the attack occurred. Sometimes, residences will be flagged as “post office only” for package pick-up due to a mail courier’s previous violent encounter with a dog on the premises. Also, consider
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subpoenaing the meter readers for the local water and power districts to obtain their testimony regarding the dog from their visits to the premises. As you can see, gathering this evidence is not easy but your client’s recovery may depend on your ability to uncover this evidence.

Remember, “barking or jumping against [a] fence…are harmless activities ordinarily associated with, and expected from, dogs.” Nava v. McMillan (1981) 123 Cal.App.3d 262, 268. By contrast, behaviors such as growling, snarling, baring teeth, and “ramming” a fence are behaviors associated with viciousness. See, e.g., Donchin v. Guerrero (1995) 34 Cal.App.4th 1832, 1848. If you can provide evidence of such behavior to an animal behaviorist, his expert opinion will bolster your claim that the dog was vicious and that the landlord must have known about it.

Even if you can prove the landlord had actual knowledge of the dog’s presence and viciousness, you still need to prove that he could have done something to remove the dog. Some leases contain provisions expressly permitting a tenant to keep a dog on the premises. In these situations, it will be very difficult to prove this element. But, if the lease does not contain this type of provision you can establish retained control and power by showing that the landlord had a right to repossession of the premises. “It may reasonably be said that by virtue of the right of termination, respondent had sufficient control over the premises so as to bring the case within an exception to the general rule of nonliability.” Uccello v. Laudenslayer (1975) 44 Cal.App.3d 504, 515. In other words, “a month-to-month lease is sufficient indicia of control to establish a landlord’s liability to third parties for injuries his tenant’s dog might cause.” Donchin v. Guerrero (1995) 34 Cal.App.4th 1832, 1847.

Although proving liability against a landlord can be challenging, utilizing these strategies to gather key evidence will likely allow your client’s case to survive a motion for summary judgment.

Proving Damages

Finally, you’ll need to prove your client’s damages. Most dog attacks result in puncture wounds, lacerations, and scarring that are visible. Dog leashes can also become entangled around your client’s arm during the attack and causing strangulation wounds to nerves. These injuries are often permanent. Additionally, dog attacks can cause significant acute fright and long-term emotional trauma. The conventional wisdom to protect your client’s privacy rights by not placing their mental health at issue may be worth setting aside in dog attack cases. Your client might need professional counseling and therapy after a dog attack, and proving your client’s emotional trauma will add significant value to the case.

These winning strategies for finding defendants, establishing liability, and proving damages will put teeth into your dog attack claim and give you the necessary evidence to obtain justice and secure a recovery for your client.
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Introduction

In the field of personal injury, the plaintiff’s physical and mental condition is threshold to the determination and evaluation of a case. For this reason, the law provides the defense an opportunity to have a physician examine the plaintiff to formulate their own evaluations and conclusions of the plaintiff’s injuries. Coined an “independent medical examination” (or “IME”), these defense examinations are anything but “independent.” Most defense examiners are bent for the defense, whose examination and conclusions will almost certainly weigh against the plaintiff’s injury claims.

In spite of the biased nature of this examination, there are a number of ways plaintiff’s counsel can counterbalance the defense medical examination to strengthen the client’s case. This article touches on the legal basis for the medical examination followed by some practical pointers to assist a plaintiff’s attorney in making the most of the defense medical examination.

Part I: Legal Basis

Physical Examination

The defense may choose a “licensed physician” to examine the plaintiff’s condition in controversy. (Code Civ. Proc., § 2032.020; Pratt v. Union Pacific R.R. Co. (2008) 168 Cal.App.4th 165, 181.) The examination must take place within 75 miles of the plaintiff’s residence (Code Civ. Proc., § 2032.220, subd. (a)), unless good cause is shown for required travel, in which case the plaintiff is entitled to reasonable travel expenses. (Code Civ. Proc., § 2032.320, subd. (e)(2).) While the Code expressly limits the defense to “one physical examination” (Code Civ. Proc., § 2032.220, subd. (a)), upon a showing of good cause, the court may require multiple examinations. (Shapira v. Super. Ct. (Sylvestri) (1990) 224 Cal.App.3d 1249, 1256.) Such generally occurs when plaintiff’s condition worsens, or when different types of injuries are in issue, requiring examinations from different medical specialists or sub-specialists (e.g., orthopedic and neurologic specialists).

The examination can “not include any diagnostic test or procedure that is painful, protracted or intrusive.” (Code Civ. Proc., § 2032.220, subd. (a).) However in Abex Corp. v. Super. Ct. (Crousan) (1989), 209 Cal.App.3d 755, 758, the court permitted submission to procedures involving local anesthetics.

Plaintiff’s attorney is entitled to attend all physical examinations and to record the exam with an audio device or court reporter (Code Civ. Proc., § 2032.510, subd. (a)), but may not videotape. (Ramirez v. MacAdam (1993) 13 Cal.App.4th 1638, 1641-42.) If plaintiff wishes to have their own doctor present, this should be cleared with opposing counsel in advance as such is discretionary with the court. (Long v. Hauser (1975) 52 Cal.App.3d 490, 493.) A representative may attend the examination in the place of the plaintiff’s attorney so long as he or she presents written authorization from plaintiff’s attorney at the examination. (Code Civ. Proc., § 2032.510, subd. (a).) On behalf of the defense, the only persons entitled to be present at the examination are the examining physician and persons working under the general direction. (Reuter v. Super. Ct. (Tag Enters.) (1979) 93 Cal.App.3d 332, 339 [nurse or x-ray technician permitted to be present].) Non-licensed vocational rehabilitation or non-licensed life care planners are not permitted. (Browne v. Super. Ct. (Reeves) (1979) 98 Cal. App.3d 610, 615.)

Mental Examination

Where plaintiff places his or her mental condition in controversy, such as in an emotional distress or mental injury claims, the defendant is entitled to take a psychiatric or psychological examination. (Edwards v. Super. Ct. (Santa Clara...
examiners must be licensed as a physician or surgeon under the Medical Practices Act. (Reuter, supra, 93 Cal. App.3d at 339.) While the same recording rules apply to both physical and mental examinations, the presence of counsel is not permitted at a mental examination; however, courts have discretion to permit counsel to attend “when needed.” (Golfland Entertainment Centers, Inc. v. Super. Ct. (Nunez) (2003) 108 Cal.App.4th 739, 748.)

The Code does not distinguish between plaintiffs and defendants. As plaintiff’s counsel, you can demand the defendant undergo a medical examination if the defendant’s mental or physical condition is in controversy, often vision tests in automotive cases. While plaintiff is typically the examinee, these rules apply to any examinee.

The Examination Report

Plaintiff is entitled to a copy of the examiner’s report (Code Civ. Proc., § 2032.610) as by conducting the examination, the defense waives any work product privilege that may apply to his or her own medical examinations related to the same physical or mental condition, making the information derived from such examinations equally discoverable to the defense. (Code Civ. Proc., § 2032.630; Queen of Angels Hospital v. Super. Ct. (Jones) (1976) 57 Cal.App.3d 370, 374-75.)

Scan and save all materials obtained at the exam and put them in your case file on this doctor. Create a redwell on the defense medical examiner to keep all materials, photographs, video and everything else you collected at the examination. You never know what will become an advantageous picture or exhibit in trial.

Part II: Preparation Is Key
Plan To Attend the Examination

After you receive a Demand for a Defense Medical Examination, immediately review the Demand to ensure the defense complied with all mandates as a delay waives the right to object. (Code Civ. Proc., § 2032.240, subd. (a).) Promptly make sure the date and time is convenient for you and your client as you do not want to be exposed to any costly cancellation fees or sanctions for failure to appear. Always plan on attending the examination. Your presence not only permits you to record, take photographs and notes for points on cross examination, it also gives you the opportunity for a face-to-face meeting with defendant’s medical expert, to talk and listen to them, and to observe and evaluate them, their staff, and their facility, all in their own element. If you cannot make it, make sure a qualified representative is present in your place.

Pre-Exam Meeting with Client

Several weeks before the exam, set a meeting with your client to go over what they can expect. They will be comforted to know you will be there the entire time. Brief them on the importance of being early, how to dress and what to bring or not to bring. Approximate how long the exam will be and stress nothing will be painful or intrusive. Arrange to meet them in the parking lot before the examination begins as a common goal throughout all cases is making the client feel comfortable and confident.

Your client’s primary goal on examination day is to make the best impression possible. This is not a time to “sell,” over-state or whine about their injuries. Explain the doctor in many respects is testing credibility and integrity. Your client should present in a calm and respectful manner, not be rude nor over-dramatize their injuries, residuals or any aspect of their life. It doesn’t matter whether your client has suffered a broken leg or a catastrophic injury, when people are nice and act positive, others, including the adverse doctor, will truly respect them. People who like people subconsciously want to help them; so often this is true with juries, the same with doctors.

After discussing attitude and presentation, it is important to go over each of your client’s injuries and physical limitations. They should be ready to provide a truthful and honest description of their injuries, and the effect of the injuries, in a very factual way. There
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is a balance between giving an honest description of injuries and whining; your client should never seem whiny.

Remind your client to be on guard for questions about the accident, liability and causation. Explain they are not there to discuss the liability aspects of the case or fill out any forms. When asked about what happened, they should only give a basic statement of the incident such as “on April 1, 2015, I was involved in a traffic accident.” Let them know if the examiner probes too deep into the facts of the case, you (the attorney) will step in to let the doctor know, “we’re not going to get into the facts of the incident.” Your client needs to know this is not a traditional medical exam where their doctor is trying to help them. The examining doctors are often hired guns; there is no need for small talk, no need to talk at all unless they are answering medical-related questions. Everything they say can and will be used against them later on.

Before the end of the pre-examination meeting, your client should know how to dress, who should attend, the fact that liability and causation will not be discussed and they are not to complete any forms. Explain the defense’s right to a medical examination is a fair rule, that when claims of injuries are made, it is only fair both sides have the opportunity to objectively evaluate the injuries in issue. Often during this stage of the case, your client will realize the limitations of their claims, and will come to a more realistic expectation of their case. With proper preparation, clients are usually ready and prepared for their defense medical examination.

Research the Doctor

Today, Google and other search engines empower us to do extensive research on the examining doctor. Start your file on this “professional witness” long before the examination takes place. Go online, ask colleagues, search the cases to see what activities this doctor has been engaged in. While you are preparing for the exam, you are
also preparing for cross examination. If they advertise, get the ads. If they have written books, articles, seminar materials or the like, get these writings. Try to get past medical exam reports they have written and past depositions. Legal organizations have information banks or blogs where information can be obtained on these doctors. Research their credentials, board certifications and any issues they have had with any organizations. Determine if the doctor has a clinical practice or are they only doing defense medical exams. Suffice to say, get as much information about the doctor as possible, both good and bad. Remember: on many occasions, it is the defense medical examiner who is your best damage witness.

Part III: Be Active On Examination Day

The Defense Medical Examination is not only useful for establishing injuries, it is a great way to investigate the defendant’s medical expert and gather more information for cross examination. Focus on gathering information and protecting your client’s interests from the moment you arrive until the moment you leave.

Showing Up At the Exam, Photographs and Materials

Like your client, you should be there early. Meet in the parking lot so you can

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walk in together as a team. Use your phone to take pictures of everything from the moment you arrive until the moment you leave the premises: the building’s exterior, any exterior signs, interior signs, placards, the office, the doctor, the examination room and anything else unique or out of place. Don’t be blatant, but take them; pictures are great to include on your opening statement PowerPoint. Take a copy of all promotional materials in the office and get the doctor’s business card, as these may provide hidden gems for cross examination.

**Doctor’s Staff, Waiting Room**

When you arrive at the doctor’s office, always be polite and courteous to everyone in the office even though sometimes staff can be hostile. There are times when staff will be very courteous and you can gain good information in small talk about the doctor’s practice. While in the waiting room, look to see who is there; often times these doctors set multiple defense medical exams on the same day and you will see other lawyers with their clients or just people holding letters where it’s clear this doctor has scheduled multiple defense medical exams that day. Depending on the doctor, it might be a good idea to subpoena the doctors calendar for the day of the exam which may not only establish the number of “clients” they examined on one day, but also the amount of money the doctor is making in doing defense examinations.

**No Forms Completed**

Sometimes the doctor’s staff will hand your client a clipboard full of forms just like any normal doctor’s visit. There is no need for filling out forms. In a courteous manner, advise the staff it is best to just ask questions and take the notes. Notes taken by staff are fine but depending what they say, forms in your client’s own handwriting can be devastating when published to a jury. Filling out forms is not necessary and will, more often than not, do more harm than good.

There may be times the doctor has your client write something down as part of the examination of motor skills. Make sure to get a photograph of any such writing for your own records and while the audio recording is on, request the doctor keep the writing and include it in his or her report.

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and announce things as they happen like creating a record in trial, “We arrived at the office, it’s 10:05,” and “It’s 10:23, we are going in the examination room.” An old non-working smart phone is discreet, you are assured no one will call and interrupt the recording and it serves as an extra camera if necessary. Before you end the recording, make sure to request copy of the doctor’s entire report and ask the doctor what he has received before the exam, try to get a list of everything the doctor received as of the date of examination.

**Limit Who Is Present**

Depending on the severity of the injuries, the defense may request other professionals be present during the examination such as life care planners, vocational rehabilitation specialists or others. Sometimes it is best to limit the other professionals in the room. While non-physicians are not permitted to examine the plaintiff (see Reuter and Browne, supra), there may be times when such is appropriate for your case. If you do permit others to attend, make sure to get their full name and contact information, credentials and take a photograph of everyone just in case, and do not permit any discussion between anyone other than the designated examining doctor and your client.

**Liability or Causation Will Not Be Discussed**

As was discussed during the pre-exam meeting with your client, causation or liability will not be discussed. This is important. If the doctor starts to ask questions about the details of the incident, you can step in. The purpose of the examination is for the defendant’s examiner to assess your client’s ‘then medical condition,’ not to determine what happened in the accident or what caused the injuries. If the doctor begins asking questions about the accident or in any way alludes to the topic of liability, cordially advise the doctor we are not going to discuss what happened. This generally can be taken care of with one respectful but pointed comment.

**If You Cannot Attend**

There will be times where busy schedules prevent you from attending. In such case, have another attorney in your office or colleague attend. Alternatively, there are experienced nurses who are available to accompany your client to the examination. Make sure you meet with the person standing-in and go over with them these basic guidelines. Exchange cell phone numbers in case any emergency or unforeseen event arises. Always provide your stand-in with a written authorization signed by both you and the client. It’s a good idea to introduce the nurse or other attorney to your client before the examination. Ideally, have them attend the pre-exam meeting with your client.

**Polite, Courteous and Cooperative**

It’s always important to be polite courteous and cooperative at all phases of a case and the defense medical exam is no exception. Remember if the doctor likes you and likes your client, they are more likely to be favorable toward them.

**Part IV: The Finish**

**Demand a Copy of the Report**

After the examination is complete, serve a formal written demand for a copy of every written report prepared by the doctor as a result of the exam. The codes specifically states you are entitled to a report that sets forth the “history, examinations, and findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner.” (Code Civ. Proc., § 2032.610.) Request a copy of all writings and materials including Review of Records, and any reports the doctor has prepared, every version and every draft of every report. You should also demand a copy of all writings and materials the examiner reviewed in preparation for the examination. This way, there will be no surprises at trial.
Save All Materials
Scan and save all materials obtained at the exam and put them in your case file on this doctor. Create a redwell on the defense medical examiner to keep all materials, photographs, video and everything else you collected at the examination. You never know what will become an advantageous picture or exhibit in trial.

Conclusion
This overview of medical examinations was intended to provide a basic foundation of the legal basis, preparation for the examination, your activity on examination day and how to finish the process. A defense medical examination is an exceptional opportunity to establish credibility for all aspects of your case, all while spreading good news from the doctor to the defense lawyer that your client is a great person.

William D. Shapiro and Brian D. Shapiro with the Law Offices of William D. Shapiro handle catastrophic injury and wrongful death cases. Reach Bill or Brian at bill@wshapiro.com and brian@wshapiro.com.

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Introduction

Each year, the Orange County Trial Lawyers Association selects a charity to be the recipient of the proceeds raised during the annual Top Gun Awards ceremony. This year, many worthy organizations were carefully considered and thoroughly vetted. In the end, OCTLA selected The Eli Home because its mission to “welcome, shelter, comfort, heal, encourage and strengthen homeless victims of child abuse and family violence, and prepare them to reenter the community to lead stable, non-violent lives, free from fear and intimidation” closely aligned with OCTLA’s mission to “protect the rights of people who have been harmed by the wrongful acts of others.” (OCTLA By-Laws, Article II).

About Eli Home

The Eli Home was founded in 1983 by Lorri Galloway, who had a vision to provide a “place to call home” for abused women and children in Anaheim. The organization’s objectives include independent living through permanent housing, jobs, and mental health. At Eli Home, homeless abused children and their mothers who have been driven from their homes by violence receive housing (2-12 months), and extensive program services. Eli additionally provides a shared housing setting for mothers and their children who cannot locate affordable permanent housing. The Eli Home accepts families of all racial, religious, and economic backgrounds as long as at least one child in the family between 0 and 12 years old is a victim of abuse and neglect.

Eli’s core program is a comprehensive case-managed transitional shelter program. What started as a small volunteer group has blossomed into a multi-faceted non-profit organization consisting of two shelter homes, corporate offices, walk-in center, two social enterprise, place-based initiative, professional counseling staff and hundreds of volunteers. Since this 33-year journey began, Eli Home has proudly helped 37,926 children and their families.

Making A Difference

The stories of Patricia, Eva, and Chaundra are just a sample of the many ways The Eli Home makes a difference in every life it touches.

91 Freeway-

“My name is Patricia. I’m standing barefoot, in the rain, on the side of the 91 freeway.

My 9-year-old son and 5-year-old daughter stand with me. We are all shoeless. My husband had too much to drink and we had a fight. I didn’t want him to drive. He was driving aimlessly and I was worried for the children and for all of us. I told him to stop at the next exit and he lost his temper and began to punch me over and over. He stopped on the side of the freeway in Anaheim and screamed at me to get out and pushed me out the door as the rain poured even harder. The children were crying and terrified. He grabbed them and pushed them out of the car as well. Somehow my son’s shirt was ripped off and he had bruises on his face trying to protect me. My husband drove away and left us. An Anaheim police car is stopping. The officer is kind and helpful. He says he knows about a shelter home, not far away and he can take us there.

Patricia and her two children came into the Eli Home in the middle of the night. We received them with open arms and provided them with the safety they needed to begin rebuilding their lives. After a period of time residing at Eli Home, Patricia and her children were safely relocated to another state so that they could continue to live their newfound violence-free lives.

Continued on Page 48
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**Reptile = Black Letter Law**

*By H. Gavin Long*

Many defense lawyers object to the use of legal principles and theories discussed in a book titled *Reptile*. *Reptile* is nothing more than applying Black Letter Law. Support for the use of rules, recognition of the deterrence function of tort law, and reminding the jury of their role as the voice of the community is rich in the textbooks we studied in law school, found in decades of California case law, and embraced by the United States Supreme Court and the majority of state courts around the country.

### Safety Rules

*Black’s Law Dictionary* defines “rule” as “generally, an established and authoritative standard or principle. It further defines “standard” as a “measure or rule applicable in legal cases, such as the standard of care in tort actions.” (Black’s Law Dict. (8th Ed. 2004).)

<table>
<thead>
<tr>
<th>Case Study</th>
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In *Dillenbeck v. City of Los Angeles* (1968) 69 Cal.2d 472, the court found that City bulletins should have been admitted upon the grounds that: (a) they constituted evidence of the standard of due care applicable to the course of conduct of the defendant officer; and, (b) the officer’s failure to follow the safety rules promulgated by his employer constituted evidence of his negligence. Even “discretionary rules” are admissible as employer safety rules.

In *Powell v. Pacific Electric Ry. Co.* (1950) 35 Cal.2d 40, the court held that the trial court properly allowed into evidence a train operating rule requiring motormen to reduce their speed “a sufficient distance in advance” of a highway crossing to allow the train “to coast on approach to crossing, to enable full braking power being obtained in emergencies.”

In *Powell* the court went on to state “the rule was properly admitted in evidence as bearing on the standard of care respondent thought appropriate to insure the safety of others at its track crossings.” (*Powell, supra*, 35 Cal.2d at p. 46; see also *Beal v. Blumenfeld Theatres, Inc.* (1960) 177 Cal.App.2d 192, 194; *Davis v. Johnson* (1954) 128 Cal.App.2d 466, 472; cf. *478 James & Siggers, Particularizing Standards of Conduct in Negligence Trials* (1952) 5 Vand.L.Rev. 697, 710—712; 2 Wigmore, Evidence (3d ed. 1940) 282; *Witkin, Cal. Evidence* (2d ed. 1966) pp. 483-84; Note: 50 A.L.R.2d 16.) The safety rules of an employer are thus admissible as evidence that due care requires the course of conduct prescribed in the rule.

Rules are extremely useful to the trier of fact, who, applying the amorphous standard of “due care,” must strike a fair balance between the reduction of the risk to the public and the assurance of an effective use of an emergency vehicle.

In *Davis v. Johnson* (1954) 128 Cal. App.2d 466, the employer required that a trainman be stationed on the rear of the train “when practicable,” a rule which the court found was properly admitted. In *Torres v. City of Los Angeles* (1962) 58 Cal.2d 35, the court allowed the admission of fire department rules for emergency vehicles.

In *Simon v. City and County of San Francisco* (1947) 79 Cal.App.2d 590, the court held that plaintiff was then permitted.
One of the Primary Purposes of Tort Law: Deterrence

Deterrence of careless, harmful conduct is one purpose behind American tort law. Trouble can arise when the defense tries to combine deterrence and punishment as the same thing. “Deterrence” and “punishment” are two separate and distinct legal principles. It is well settled law in California and in most states throughout the country, at both the state and federal court level, that deterrence is a fundamental component of tort law, in non-punitive damage cases.

The prophylactic factor of preventing future harm has been quite important in the field of torts. The Courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decision of the Courts becomes known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm.

(W. Page Keeton, et al., Prosser & Keaton on Torts (5th Ed. 1984) § 4, p. 25, italics added.)

“(T)he law of torts is concerned not solely with individually questionable conduct but as well with acts which are unreasonable, or socially harmful, from the point of view of the community as a whole.” (Id. § 3, p. 15.) “Courts and writers almost always recognize that another aim of tort law is to deter certain kinds of conduct by imposing liability when that conduct causes harm.” (Dan B. Dobbs, The Law of Torts (1st Ed. 2000) p. 19, italics added.)

In the Reporter’s Notes to Section 3, comment d, of the Third Restatement of Torts – Physical and Emotional Harm (2010), the deterrence function of tort law is recognized as one of the “considerations to be balanced” against the foreseeable risk created by the actor’s conduct. “To some extent, at least, every tort rule is designed both to deter other wrongdoers and to compensate the injured person.” (Restatement Second of Conflict of Laws (1971) §145, comment at page 416.)

“One of the purposes of tort law is to deter future harm.” (Burgess v. Superior Court (1992) 2 Cal.4th 1064, 1081, italics added.)

In Gu v. BMW of North America, LLC (2005) 132 Cal.App.4th 195, the court stated “we recognize that, as our Supreme Court has stated, ‘[o]ne of the purposes of tort law is to deter future harm.’” (Italics added.)

One of the “public policies underlying our tort system . . . [is] . . . as a general matter . . . to maintain or reinforce a reasonable standard of care in community life.” (City of Santa Barbara v. Superior Court (2007) 41 Cal.4th 747, 755, italics added.)

“The overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible.” (Cabral v. Ralphs Grocery Co., (2011) 51 Cal.4th 764, 781, italics added.)

“It is manifest that one of the primary purposes of a statute creating a cause of action in the heirs for the wrongful death of the decedent is to deter the kind of conduct within its borders which wrongfully takes life.” (Hurtado v. Superior Court (1974) 11 Cal.3d 574, italics added.)

California Civil Code section 1714 is a “basic policy of this state . . . the major [considerations] are the foreseeability of harm to the plaintiff, . . . the policy of preventing future harm . . . .” (Rowland v. Christian (1968) 69 Cal.2d 108, 112-13, italics added.)

“(T)ort law is primarily designed to vindicate ‘social policy.’” (Foley v. Interactive Data Corp. (1968) 47 Cal. 3d 654, 683.) It is a recognition that the law should
encourage safe choices when danger is foreseeable. (See Isaacs v. Huntington Mem. Hosp. (1985) 38 Cal.3d 112, 125-26 [“the policy of preventing future harm”].) Deterring conduct is preventing future harmful behavior by holding wrongdoers accountable for the actual harm they cause—not punishment.

“Send a Message”

The defense knee jerk reaction to the phrase “send a message” is that this phrase is only proper for punitive damage cases. Like “deterrence” and “punishment” discussed above, “sending a message” about careful behavior and sending a message about punishment are separate and distinct legal principles. “Sending a message” about how careful a defendant must be in the community is permissible. “Sending a message” to inflate a verdict beyond actual damages, in non-punitive damages cases, is not permissible. As a practical matter, the jury’s verdict is going to “send a message” no matter what—it’s just a matter of whether that message is directed at the plaintiff or the defendant.

It is permissible to ask the jury to “send a message” to a defendant, as long the statement is based on the evidence presented, is in reference to holding the actual defendant in the case accountable and is not in the context of inflating the verdict amount. (See Nishihama v. City and County of San Francisco (2001) 93 Cal.App.4th 298, 205-306.) “The suggestion that the jury should send a message to the City through its award of damages was, in context, less a plea for punitive damages than a plea for a verdict that promotes the public policy of overtime laws by holding [defendant] accountable for the full amount of overtime compensation owing to the plaintiffs” and that this argument did not suggest “that the jury should inflate the damage award or award the equivalent of punitive damages.” (Ibid.)

**Foreseeability**

Plaintiffs have to prove causation in tort cases. CACI 430 - Causation: Substantial Factor states: “A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.” (Italics added.)

The defendant’s conduct is not the cause of the harm where the evidence indicates that there is less than a probability, but a mere chance the harm would have occurred. (Bowman v. Wyatt (2010) 186 Cal.App.4th 286.) “A mere possibility . . . of causation is not enough.” (Raven H. v. Gamette (2007) 157 Cal.App.4th 1017, 1030, citing Prosser & Keaton on Torts, supra, at § 41, p. 269.)

If the plaintiff can only show that it was “remotely” possible that defendant’s conduct would have harmed the plaintiff in the manner in which he or she was harmed, plaintiff loses.

A person acts negligently if the person does not exercise reasonable care under all of the circumstances. Primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm. (Rest. 3d Torts, §3 Negligence.)

The Restatement Third of Torts, section 3, comment b, states: “In many other situations—especially those involving highway traffic—the conduct of the actor imperils both the actor and third parties. In such situations, all the risks foreseeable resulting from the actor’s conduct are considered in ascertaining whether the actor has exercised reasonably care.”

The Restatement Third Torts, section 3, comment h, states: “There may well be a range of foreseeable harms; and the actual harm suffered by the plaintiff may, depending on the circumstances, be either on the high end or the low end of this range.” “As a general principle, a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.” (Tara-soff v. Regents of University of California (1976) 17 Cal.3d 425, 434-35; Dillon v. Legg (1968) 68 Cal.2d 728, 739.) In the Palsgraf case taught in law school, Justice Cardozo established the “zone of foreseeable victims and foreseeable injuries” for conduct to be actionable. (Palsgraf v. Long Island R. Co. (1928) 248 N.Y. 339.)

So, by showing that plaintiff was among the people foreseeably at risk from defendant’s conduct and the foreseeable consequences of that conduct, the plaintiff proves causation.

**Conscience of the Community**

Our California Chief Justice and the Judicial Council of California tell our jurors that they will make important decisions affecting issues that concern their community. A pamphlet distributed to prospective jurors by the Judicial Council of California, Administrative Office of the Courts, entitled “Jurors: Serving Justice,
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.

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, 2017 to be considered
FAX this signed nomination form and any attachments to (949) 215-2222, email to info@OCTLA.org or mail to: OCTLA Nomination Committee, 23412 Moulton Pkwy, #135, Laguna Hills, CA 92653
Serving the Community” states “All persons accused of a crime or involved in a civil dispute have a constitutional right to have a jury decide their cases. When you serve on a jury, you make important decisions affecting people’s lives and issues that concern your community.”

We learned in law school that it’s the jury’s job to speak for their communities and apply the community standard.

The entire point of our civil justice system and the right to a trial by jury is to invite jurors to apply community standards and safety rules in determining its verdict. (See Prosser & Keeton on Torts, supra, § 37, p. 237 [“our legal system has entrusted negligence questions to jurors, inviting them to apply community standards”].) Public safety concerns permeate nearly every jury trial that involves violent crime, careless driving causing death and serious injuries, unreasonably dangerous products, and substandard medical care. If juries were not intended to speak for their respective communities and determine the applicable standards or rules for safety, then there would be no reason for juries instead of judges, venue rules that require trials to be held where the alleged wrongdoing occurred, or a requirement that jurors be peers selected from the same community as the defendant.

Over 140 years ago, the United States Supreme Court recognized that the jury is the conscience of the community. Though it did not use that phrase, it adopted the philosophy that the jury is in the best position to determine what members of that community should expect from each other. (Railroad Co. v. Stout (1873) 84 U.S. (17 Wall.) 657 [affirming a judgment finding a railroad negligent in its maintenance of a turntable, which injured a child, reposed its trust in the jury to determine what safety it expects from the companies operating in the community].)

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

(Id. at 664, italics added.)

Justice Mosk, in his concurring opinion in Ballard v. Uribe (1986) 41 Cal.3d 564, expressed the same philosophy and did characterize it with the now familiar shorthand, the “conscience of the community:”

A jury has also been frequently
described as “the conscience of the community.” . . . In addition, courts have long recognized that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation . . . .

The very purpose of the right to trial by a jury drawn from a representative cross-section of the community is to achieve an overall impartiality by allowing the interaction of the diverse beliefs and values the jurors bring from their group experiences.

(\textit{Id. at 577}.)

In \textit{People v. Gamache} (2010) 48 Cal.4th 347, the California Supreme Court expressed its frustration with litigants objecting to the phrase “conscience of the community.” Such an objection is an implied admission that what the objecting party is doing is unsafe or contrary to the well-being of the community.

When Gamache objected to characterizing the jury as the “conscience of the community” on the ground it would likely cause the jury to substitute what they perceived to be the community’s views for their own, the California Supreme Court stated:

We have on numerous occasions considered this turn of phrase and rejected the contention that it invites jurors to abrogate their personal responsibility to render an appropriate verdict in light of the facts and the law. [Citations.] Jurors are the conscience of the community. It is not error to tell them so in closing argument. [Citations.] (\textit{Id.} at 389, citations omitted.)

The jury is a repository of collective wisdom and understanding concerning the conditions and circumstances of everyday life that it can bring to bear on the determination of what conduct is reasonable. As the conscience of the community, the jury plays an essential role in the application of the reasonable person standard of care. (See \textit{Prosser & Keeton on Torts}, supra, § 32, p. 175 [the “reasonable person” is “a personification of a community ideal of reasonable behavior, determined by the jury’s social judgment”]; id., § 37, p. 237 [“the public insists that its conduct be judged in part by the [person] in the street rather than by lawyers, and the jury serves as a shock-absorber to cushion the impact of the law’’].)

\textbf{Misconception About the “Golden Rule”}

Defense motions blur the line between a prohibited Golden Rule argument and advocating that the jury serves as the voice and conscience of the community.

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A “golden rule” argument occurs when an attorney asks the jurors to step into the shoes of the plaintiff. (See Newman v. Bishop (1976) 59 Cal.App.3d 541, 548.) “The ‘golden rule’ argument, also known as the ‘surrogate victim’ argument, is made when ‘counsel asks the jury to place itself in the victim’s shoes and award such damages as they would charge to undergo equivalent pain and suffering.” Collins v. Union Pacific Railroad Co. (2012) 207 Cal.App.4th 867, 883.

“The Golden Rule prohibition cannot be rationally stretched to include arguments about the unreasonableness of the defendant’s choices, or the dangers those choices exposed the public to, even if the implications of that argument are that, with different choices, the entire community will be safer.” (Steven B. Stevens for Consumer Attorneys of California as Amicus Curiae in support of Plaintiff, Hudson v County of Fresno (2014 Fifth Dist. F067460).)

The Golden Rule argument asks the jurors to place themselves in the position of the plaintiff and ask themselves how much money they would want to go suffer the injuries that she has suffered. The argument is improper because “[h]ow others would feel if placed in the plaintiff’s position is irrelevant.” (Cassim, supra, 33 Cal.4th at 797 n.4.) Reminding the jury that it does speak for the community when it determines what is reasonable, dangerous or otherwise wrongful conduct, or how an injury should be compensated, does not violate the prohibition of “Golden Rule” arguments.

Acknowledging that the jury is acting for what is best for the community is not similar to a Golden Rule argument since it does not ask the jury to consider the plaintiff’s perspective. It asks the jury to consider the community perspective.

Conclusion
The Reptile book pulled together several fundamental concepts such as highlighting the use of rules and reminding us of the purpose of our jury system and the job of the jury. While these concepts may have gone unused for some time, they are backed up by solid, Black Letter Law that follows many years of tradition. The Reptile could just as easily have been called A Refresher on Black Letter Tort Law, but that title would not be as catchy.

H. Gavin Long is a trial lawyer at Bisnar | Chase in Newport Beach and 2016 OCTLA Trial Lawyer of the Year. He can be reached at (949) 203-3814.
By John Michael Montevideo

We have a lot to be excited about this year, and given what is happening in Washington it is more important than ever to keep up our consumer protection efforts on the state level here in California. Last year the Consumer Attorneys of California (“CAOC”) had six of their eight bills signed into law, and we want to keep that effort going. The following bills are being introduced at the end of February 2017:

**AB 859 (Eggman) - Protecting Seniors**

Lower the standard of proof from clear and convincing to preponderance of the evidence in cases brought under California’s Elder & Dependent Adult Civil Protection Act alleging physical abuse of elderly and dependent adults when it is proven that the defendant facility had intentionally destroyed evidence. AB 859 is co-sponsored by the Congress of California Seniors and the California Alliance for Retired Americans.

**SB 33 (Dodd) - Fighting Forced Arbitration**

Prohibits financial institutions from forcing customers to give up their legal rights when the bank has committed intentional fraud or identity theft. At least 3,500 Wells Fargo employees fraudulently opened 1.5 million bank accounts and 565,000 credit cards without the consent of their customers. Wells Fargo targeted the most vulnerable victims: immigrants who spoke little English, older adults with memory problems, college students opening their first bank accounts, and even small businesses owners with several lines of credit. Then the bank had the audacity to argue that claims brought over the fraudulent accounts were bound by the secret and private arbitration provisions the customer signed in the underlying account. Even more audacious was that some courts bought those arguments. The Wells Fargo scandal has given us the evidence we need illustrate for lawmakers the horrors that occur in forced consumer arbitrations.

**Enforcing Legal Rights of Immigrants**

CAOC is also sponsoring a bill to clarify that California Civil Code section 3339, which states that a person’s immigration status is irrelevant to liability issues, applies to consumer protection laws in addition to the listed labor, employment, civil rights and employee housing laws. Here’s an example why we need this clarification: An immigrant sued a car dealer for warranty violations and the defendant claimed that because consumer protection laws (such as Business and Professions Code section 17200) are not specifically listed, the victim’s immigration status was relevant to liability issues. We intend to fix that.

**Ensuring Fair and Impartial Civil Juries**

Senator Scott Wiener (D-San Francisco) is carrying a CAOC bill to address issues where judges are ignoring current law stating that, in order to select a fair and impartial jury, each party in a civil case has the right to examine prospective jurors without a blanket time limit. We have heard from more and more of our members that judges throughout the state are arbitrarily limiting voir dire. Please contact us if this has happened in your cases.

**Preventing Grueling Depositions of Dying Asbestos Victims**

Senator Bill Monning (D-Monterey) is authoring a CAOC bill to clarify that dying asbestos victims receive the benefit of current law that provides a presumptive time limit of a seven hour deposition for dying victims.

**Helping Sexually Abused Children**

Senator Jim Beall (D-Santa Clara) is authoring a CAOC bill to place a presumptive time limit on defense psychological exams of sexually abused children under 15.

**AB 644 (Berman) - Assisting Practitioners in Everyday Court Proceedings**

Co-sponsored by CAOC and the California Defense Counsel as a vehicle to address civil procedure and court function issues such as limits on depositions, meet and confer requirements prior to specified motions, the redefinition of drafts as work product and minors’ compromise reforms.

As always, CAOC is continuing to look for opportunities to fix the underinsured / uninsured motorist and lien issues. CAOC has task forces on both of these issues and will continue to prioritize them.

**Join Us to Represent OCTLA at CAOC’s Justice Day in Sacramento**

- Meet with state legislators and key members of staff in their Capitol offices.
- Learn about the ways of the Capitol from our outstanding lobbying team.
- Connect with fellow consumer attorneys.
- Protect the civil justice system and defend the rights of your clients at the Capitol.

**Space is limited so register early. You must register by Monday, April 24, 2017 to be guaranteed legislative meetings. Register at www.caoc.org or email Grassroots Coordinator at pwoods@caoc.org.**

**Join Us For A Party In The State Capitol!**

OCTLA invites all attorneys attending Justice Day to join us on Monday, May 1st for a Networking Dinner & Margarita Mixer on the Eve of CAOC’s Justice Day at Vallejo’s Mexican Restaurant/Sacramento.

**When:** Monday, May 1, 2016, 7:00 p.m. - 10:00 p.m.

**Where:** 1100 O Street, Sacramento, CA 95814

Hosted Fiesta Buffet & Margaritas Please R.S.V.P. to Janet Thornton online at www.OCTLA.org or call or email at (949) 916-9577 or info@octla.org.

**John Michael Montevideo** specializes in personal injury and products liability litigation. He can be reached at (949) 298-7579.
Judicial Profile

Honorable James L. Crandall

By Steve Bell

Judge James L. Crandall received his Bachelor of Economics from San Jose State University in 1967, and his J.D. from Loyola Law School in 1970. After law school Judge Crandall became an accomplished litigator, trying 164 cases to verdict of which 153 were jury trials. He was a founding partner of Crandall, Wade & Lowe, where he worked from 1976 until being appointed to the bench by Gov. Brown in 2012. Judge Crandall is a Diplomat of the American Board of Trial Advocates and a Fellow of the American College of Trial Lawyers.

How did you first become interested in the law?

After I earned my economics degree, my father asked me what I planned to do with it. At the time, I thought I’d either teach or become a financial advisor. Then my football coach suggested law school and I decided to give it a try. I absolutely loved it, and I found that the analytical skills I’d developed studying economics served me well in law.

Did you have any mentors who influenced your legal career?

Yes, two who stand out are George Hillsinger and John Costanzo, true gentlemen who exemplified honor, integrity, and treating people with respect.

What has the transition from attorney to judge been like for you?

It’s been an invigorating challenge. As a litigator my focus in trial was the outcome; as a judge I’m in charge of the process, not the outcome. It’s a transition from being a player on the field to being a referee. One of the most difficult parts for me is to refrain from asking questions of expert witnesses.

What is your favorite part about being a judge?

The law and motion calendar. It allows me to delve into legal analysis. As a trial lawyer, I dealt with the facts, and my associate attorneys prepared the briefs. Now I have the time to study the detailed legal analysis. I find it allows me to keep a finger on the pulse of the law, to see where the law is moving.

What assignments have you held as a judge in Orange County?

My first assignment after taking the bench was in criminal court. I spent four years there before moving to civil court last year.

After a career in civil litigation, what was criminal court like for you?

It was a real challenge – but very energizing, too. The first criminal trial I ever saw was also my first trial as a judge. I remember having experienced criminal attorneys before me making a motion by number, and I had to stop them to ask what that number meant. Being on the criminal bench brought home to me in a very real way the important role judges can play in people’s lives, how my actions could put someone on a different path in life. I started an informal program that my clerk called “Crandall’s College Club”. I would offer to suspend sentences for certain young probation violators if they would enroll in college. They had to return every semester to show me that they were still in school. I tracked their progress in a notebook I still have in my chambers. It was very rewarding.

What advice would you give attorneys trying a case in front of you?

Civility is the key. Never motivate the opposition. As a very young attorney I was unexpectedly thrust into a trial my firm believed would settle for our client insurer’s policy limits. Opposing counsel, an experienced litigator, treated me with such disdain and condescension that I was motivated to stay up all night finding a way to beat him – and I did. I resolved to never make the mistake he did.

I think all attorneys in my courtroom should read Abraham Lincoln’s address to new members of the Illinois Bar, words just as true today as they were in 1860: “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser, in fees, expenses, and waste of time. As a peace-maker, the lawyer has a superior opportunity of being a good man.” I used to pass out copies of this speech to new associates who joined our firm.

What are your pet peeves in court?

Sniping at opposing counsel. It’s not becoming and it’s not productive. It makes the sniper look like a whiner to the judge and the jury. My father used to tell me, “You catch more bees with honey then with vinegar,” and it’s true. Opposing counsel
Do you have any advice about jury selection?

- During voir dire, I see too many attorneys talk to prospective jurors about themselves, their families, and their personal lives. Such vouching not only shows a lack of refinement, it’s also misconduct under the California Rules of Court, Standards of Judicial Administration 3.25(f). I often read 3.25(f) to counsel before jury selection.

What are your favorite activities outside of the courtroom?

- My wife and I enjoy the great outdoors and traveling. Our airplane, a Cessna 182 Skylane, has allowed us to explore this beautiful country. We flew to Mackinac Island in Michigan last year, and plan to fly across the country to Maine this summer. We have also flown to Canada and Mexico. We also like to fly fish at our ranch in Wyoming. I also compete in Masters track and field meets, the 100-meter and 200-meter sprinting events.

Do you have any final words for our readers?

- I’m surprised by the number of attorneys who don’t use available technology. Everybody knows how to use a computer and they should do so in trial. Use PowerPoints, display documents digitally on a screen. Most attorneys still come into court with boxes of documents: boxes for themselves, for opposing counsel, for the judge, for the witnesses. The only paper document you need in my court is the one the clerk has to file. Everything else should be on a memory stick.

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Verdicts & Settlements

Do you know of an exceptional verdict worthy of a Top Gun award? If so, please send your nomination along with the case information to info@OCTLA.org for consideration in this year’s Top Gun Awards.

Sean M. Burke and Heather J. Higson of the Law Offices of Sean M. Burke secured a $700,000 settlement for a 29-year-old man negligently discharged from a residential treatment center. Plaintiff, intoxicated and depressed but denying suicidal thoughts, was admitted to the center by administrative staff and suffered withdrawal-like symptoms all night. The center then permitted plaintiff to discharge before being assessed by a licensed clinician. Upon arriving home, plaintiff became intoxicated and attempted suicide, but was resuscitated. Plaintiff claimed that the center violated the standard of care by permitting plaintiff’s discharge before evaluation by a clinician, which would have resulted in admission to a detox facility and prevented the suicide attempt and consequential devastating anoxic brain injury. Defense argued that clinic had no duty to prevent plaintiff’s discharge beyond encouraging him to stay at the center.

David A. Berstein of Myers Berstein secured a seven-figure settlement in a Central District of California lawsuit involving claims of copyright and trademark infringement, misappropriation of trade secrets, breach of contract, civil conspiracy, and fraud. Mr. Berstein represented the plaintiffs, two domestic companies, one located in Tustin. Defendants were multiple foreign companies including the Tustin plaintiff’s former parent corporation in Florence, Italy. Additionally, defendants brought counterclaims against Mr. Berstein’s clients, including the Tustin company’s CEO, which were efficaciously defended and dismissed with prejudice months before the mediation resulting in the settlement.
The judge granted Eva’s temporary restraining order. Her husband served time in jail. After graduating from the Eli Home programs, she became an active member of the Eli Home Board of Directors for several years. The National Institute of Justice estimates that 70% of children exposed to domestic violence are also victims of child abuse. With your donation, families who come to The Eli Home never have to go to court alone.

GOT THE JOB-
“My name is Chaundra. I’ve been at The Eli Home for the past year. Nine months ago I started a program at the Culinary Arts Institute with the hopes of becoming a chef at a nice restaurant. I want to be able to support myself and my 4 children without needing financial assistance from others. It has not been a cakewalk to go to school full time and participate in all of the classes that the courts required me to do to get my children back from foster care, all while living at The Eli Home. But today, my heart is full of joy because my children are back with me; I’ve finished all of my court requirements, and I just got the call from Rainforest Café that I got the job as a chef’s apprentice which is the first step in becoming a sous chef.”

The Eli Home provides financial assistance for mothers to have vocational training with the goal of having a career, not just a job. Your support enables people like Chaundra to realize their dreams and to become financially independent.

Chaundra completed The Eli Home programs and she and her 4 children moved into their own apartment 3 years ago. Now Chaundra is the Sous Chef at Rainforest Café here in Orange County.

Eli Needs Our Support
Stories like those of Patricia, Eva, and Chaundra remind us of the difference an organization can make in the lives of individuals. Yet, this year Eli Home needs our help. Recently, the State Legislature diverted funds away from transition homes like Eli Home and reallocated the funds to homeless shelters. As a result, Eli Home was stripped of a $500,000 grant that it had received annually for more than ten years. Consequently, Eli has been forced to significantly reduce its resources.

Despite this setback, Eli is determined to find a way to continue helping women and children. Stories like the Patricia, Eva, and Chaundra will continue to be possible with the help of OCTLA.

We can make a difference this year by helping Eli Home secure the financial resources it needs to continue its mission to restore safety and hope to the lives of women and children in Orange County.
**Attorney Admission Fee Increase**

Pursuant to 28 U.S.C. § 1914(b), the Judicial Conference of the United States approved several changes to the Central District Court’s miscellaneous fee schedule, effective December 1, 2016. One of the changes is the fee for original admission of attorneys to practice. The total fee for admission to the Bar of the Central District of California Court shall be as follows, effective March 17, 2017:

- Lawyers Admitted to the California Bar – Fewer than 3 Years: $231
- Lawyers Admitted to the California Bar – 3 or More Years: $281

**Public Notice of Intent to Consider the Reappointment of United States Magistrate Judge Patrick J. Walsh**

Notice is hereby given that a panel of citizens has been established to submit a recommendation to the Court regarding the matter of the reappointment of Patrick J. Walsh to an additional eight (8) year term. The current term of Magistrate Judge Patrick J. Walsh expires July 17, 2017.

The duties of the Magistrate Judge position are wide-ranging. These duties are set forth in Central District General Orders 05-07 and 06-01, available on the Court’s website. Basic jurisdiction of United States Magistrate Judges is specified in 28 U.S.C. § 636. Comments from members of the Bar and public are invited as to whether the incumbent Magistrate Judge should be recommended by the panel for reappointment by the Court.

**State Bar Of California Encourages Attorneys To Provide Pro Bono Service And Support Legal Aid**

In response to a recent increase in attorneys seeking to do pro bono work, State Bar President James Fox and Executive Director Elizabeth Parker said today:

“We applaud the recent wave of attorneys throughout California looking to provide pro bono legal services around immigration and other legal concerns. The State Bar of California strongly supports access to legal services as a core part of our public protection mission. We support the promise of justice for all, including for low-income people who too often have no choice but to navigate the legal system alone.

We encourage attorneys licensed in California to provide pro bono support to help bridge the gap in access to justice. While upholding ethical standards for attorneys and regulating the legal profession is a core focus of the State Bar’s work, it’s equally critical to ensure that all of California’s residents have access to high-quality attorneys when the need arises.

In addition to the donation of time, a donation of financial assistance can make a huge positive impact, especially with a shifting political landscape. Please consider making a donation to the State Bar’s Justice Gap Fund or directly to your local legal aid provider to help make sure individuals and families who need legal assistance can get help when they need it.

**2017 Justice Day in Sacramento**

Justice Day begins on Tuesday, May 2, 2017 from 7:30 a.m. - 5:00 p.m. Space is limited so register early. You must register by Monday, April 24, 2017 to be guaranteed legislative meetings. Please email Paul Woods at pwoods@caoc.org. Justice Day allows attendees to meet with state legislators and key members of staff in their Capitol offices, learn about the ways of the Capitol from our outstanding lobbying team, connect with fellow consumer attorneys, and protect the civil justice system and defend the rights of your clients at the Capitol!

**Judge’s Courtroom Lunch Seminar**

**How to Successfully Introduce Evidence in Your Trial**

Presented By
Judge Gail A. Andler (Ret.)

May 10, 2017 ■ 12:00-1:00pm

Orange County Superior Court
700 Civic Center Drive, Santa Ana
Verdicts & Settlements
Continued from page 48

minutes. Defendant had offered $5,000 by way of a 998; plaintiff responded with a 998 for $8,000.

Mark Wilson of Klein & Wilson secured a $407,500 settlement in a legal malpractice action arising from a breach of commercial lease involving a tenant with a guarantor. The breaching tenant cost the plaintiff landlord $850,000 in damages. The landlord’s law firm recommended settling with the tenant for just $40,000 because the tenant had no assets, then pursuing the guarantor for the remainder. Unfortunately, the law firm drafted a settlement resulting in the release of the guarantor, leaving the landlord with no ability to recover. Mr. Wilson filed a malpractice claim against the responsible lawyers, who had no malpractice insurance, and after protracted discovery and law-&-motion two of the responsible lawyers paid

$407,500. However, before trial the most responsible attorney filed for bankruptcy; Mr. Wilson is pursuing that defendant in the bankruptcy court.

Paul J. Molinaro, M.D., J.D. of Fransen & Molinaro obtained a confidential settlement in the low six figures for a plaintiff who suffered soft tissue injuries after a diagnostic machine malfunctioned in a medical office. The medical care insurer’s lien was under $2,500 and the disability insurer’s lien was under $7,000. After discovery, Dr. Molinaro filed a motion to amend the complaint to reinstate punitive damages which earlier had been stricken. Ultimately, the settlement was obtained from both the healthcare provider and the diagnostic machine manufacturer.

Alex Conti of Conti Law obtained a $2.45 million settlement for two elderly beneficiaries of a trust. The beneficiaries’ younger siblings were co-trustees, and they refused to act to liquidate the trust

and distribute the proceeds to their older siblings. Plaintiffs believed that their younger siblings were waiting for them to die in order to take all of the trust assets for themselves. Six months after filing a petition to remove the co-trustees for breach of fiduciary duty, and after deposing the co-trustees for several days, the matter settled.

Sean M. Burke and Heather J. Higson of the Law Offices of Sean M. Burke secured a $500,000 settlement with an Assisted Care Facility based on elder abuse and concealment claims arising out of a several month parasitic outbreak within an Alzheimer’s Unit. Plaintiff, the estate of an elderly woman with Alzheimer’s Disease, contended that residents, including the deceased, suffered horribly for months from itchy parasitic rashes resulting from the facility’s delayed and unsystematic approach to treating the residents and eradicating the outbreak. At times, the decedent’s entire body was covered with

OCTLA Welcomes These New Members

ATTORNEY MEMBERS
Assal Assassi
Siannah Collado
Jeffery Crissman
Travis Davis
Frank Fasel
Steve Geeting
Grayson Goody
Danielle Guerrero
Christopher Guldjian
Benjamin Ikuta
Rudy Loewenstein
Joseph Lovretovich
Vic Merjanian
Keith Rodenhuis

PARALEGAL MEMBER
Lux Gibbs

AFFILIATE MEMBERS
Lex Specialty Group
CPT Group, Inc.
Atlas Settlement Group, Inc.
First Legal Network
Legal Connect Consultants

Thank You for Your Referrals

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

- Alan Brown
- Pat Farber
- Samer Habbas
- Daniel Hyun
- Casey Johnson
- Traci Kaas
- Susan Katz
- Abbas Kazaromian
- Whitney Kumar
- Kevin Liebeck
- Geraldine Ly
- John Shaver
- Brad Simon
- Ted Wacker
- Briny Woods
parasitic rashes, causing constant itchiness, sleepless nights, agitation, bloody scratch marks, emotional upset, and weight loss.

Keith More and Alexander Avery of Bentley & More secured a $290,000 settlement on behalf of a family of three who sustained injuries in a T-bone auto collision. Plaintiff mother and father each received the $100,000 policy limit, and their infant child received $90,000. The father’s paid medical expenses were less than $7,000 for a metatarsal fracture, and the infant child’s paid medical expenses were less than $1,900. Defendant insurer initially offered only $7,100 for the infant child.

Thomas Luebke of Prestininzi & Luebke secured a $75,000 settlement for a disabled plaintiff who was injured on the street outside his school. Plaintiff had cerebral palsy and was confined to a wheelchair. He was attending special education classes and had a companion hired to monitor/assist him during the school day. The companion walked away from plaintiff in his wheelchair without locking the wheels. The chair rolled off the sidewalk into the street and fell over with plaintiff still strapped to it, causing both emotional and physical injuries.

Keith Bruno and Angela Bruno of BRUNO | NALU received a $520,500 verdict (20% comparative against the plaintiff) in a defective sidewalk case against the City of Los Angeles. Plaintiff tripped on an upturned crack in the sidewalk while walking her two dogs. The defect was caused by tree roots. Plaintiff admitted that she had walked that very sidewalk thousands of times in the past. Eighteen months after her fall, the plaintiff underwent a cervical fusion. She had previous treatment on her neck before the accident (injections) due to degenerative disease. She recovered completely from the cervical fusion, but 2½ years after fall she underwent a lumbar fusion. Defendant city had offered zero before trial.

Whit Bercht of the Law Offices of Ted B. Wacker secured a $250,000 settlement for a woman who was sideswiped by a semi-truck on a residential street in Barstow, CA. Plaintiff suffered a torn meniscus and disc bulges to her cervical and lumbar spine. She underwent arthroscopic surgery to repair her torn meniscus and received epidural injections for her back pain. She had pre-existing conditions to each of these body parts. Defendants initially denied liability alleging that the semi-truck maintained occupancy of both lanes of travel and that Plaintiff was negligent in failing to yield to the semi-truck, which was attempting to make a wide left turn. Defendants’ offer was $0 prior to Whit taking over the case.

Alex Conti of Conti Law obtained a $300,000 settlement from a government entity in favor of a factoring company that was defrauded by a client. The client had assigned to the factoring company the right to collect its receivables from the government entity. Under Article 9 of the Commercial Code the government entity could only discharge the assigned obligation by paying the assignee factoring company. Through the discovery of electronically stored information it was proven that the government entity was on notice of the assignment to the factoring company triggering its obligation to pay the factoring company even though it already had paid the fraudster.

Michael A. Penn of Aitken Aitken Cohn obtained a $255,000 settlement for a 31-year-old man arising out of two separate consolidated cases, a vehicle collision and a dog attack. Plaintiff contended that both incidents independently were substantial factors in causing his lower back injuries, an enlarged central disc herniation requiring surgical repair. Plaintiff was asymptomatic in the affected areas for nearly five months prior to these two incidents. Defendants disputed that plaintiff’s need for lower back surgery was caused by the incidents and was instead related to a degenerative condition.

Chris Purcell of Purcell Law obtained a $1.184 million verdict in for a 44-year-old driver struck by a school bus. Plaintiff’s car was stopped, waiting for another
vehicle to turn left when Defendant school bus driver rammed him from behind. Defendant initially told officers he was traveling 45 mph prior to impact, but at his deposition said it was just 15-20 mph and further claimed that Plaintiff had swerved around the left-turning vehicle causing the collision. Plaintiff had a history of prior lumbar surgery, a fusion with installation of hardware, but following the collision had to undergo surgery involving L4-5 hardware removal and revision. Defendant had sub rosa video of Plaintiff, post-surgery, lifting his band equipment into and out of his truck. Defendant offered $38,000 prior to trial, then increased the offer to $300,000 during trial.

Lawrence Strid of the Law Offices of Lawrence A. Strid secured a $1 million mediated settlement for a 59-year-old woman injured in a two-vehicle collision. Plaintiff suffered a partial rotator cuff tear and a chronic post-concussion syndrome in the collision, and contended that she was permanently disabled from further employment. Defendant claimed she was capable of immediately returning to work. Plaintiff had $22,378 in Howell medical bills, and a loss-of-earnings claim for $1.439 million. The case settled on the Friday before a jury trial was to commence on Monday.
January MCLE Program – What’s New in Tort & Trial? 2016 Year in Review

February MCLE Program – Tackling Issues of Competence and Bias
Presented by: Justice Eileen C. Moore, Steven Geeting, Esq. and Greg Dorst, J. D.
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**Business Fraud**

Beckman Coulter vs. Flextronics
$934,000,000
Largest Jury Verdict in OC History

**Personal Injury**

Neria vs. Bradshaw
$50,000,000
Largest Personal Injury Settlement in US History

**Insurance Bad Faith**

Surgin Surgical vs. Farmers Insurance
$58,000,000
Largest Insurance Bad Faith Judgment in OC History

**Employment**

Class Action vs. OC Register
$38,000,000
Largest Class Action Settlement in OC History

**Personal Injury**

Dean vs. Allied Trucking
$28,000,000
Truck Accident

**Personal Injury**

Vincent vs. Public Entity
$17,000,000
Bus Accident

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What would your referral fee be?

Multiple 8 - Figures
Seatback Failure - Auto Defect

8 - Figures
Caustic Ingestion - Premises Liability

Multiple 7 - Figures
Airbag/Restraints - Auto Defect

Multiple 8 - Figures
Burn Injury - Product Defect

8 - Figures
15-Passenger Van - Auto Defect

Multiple 7 - Figures
Door Latch Failure - Auto Defect

Multiple 8 - Figures
Dangerous Condition - Gov’t Entity

Multiple 7 - Figures
Rollover/Roofcrush - Auto Defect

Multiple 7 - Figures
Seat Belt Failure - Auto Defect

Brian Chase
President
CAOC - 2015

Product Liability
Trial Lawyer of the Year
OCTLA - 2014

Trial Lawyer of the Year
CAOC - 2012

Trial Lawyer of the Year
Nominee
CAALA - 2012

President
OCTLA - 2007

Product Liability
Trial Lawyer of the Year
OCTLA - 2004