THE INJURED VICTIM'S HANDBOOK

A GUIDE FOR THOSE WHO ARE VICTIM'S OF WRONGDOING RESULTING IN INJURY OR DEATH

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Member, California and Indiana Bars

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PREFACE

The purpose of this handbook is to introduce you to the injury compensation system.

If you are reading this, you or your family is likely to have been affected by an injury or death resulting from a civil wrong. Whether it be an auto accident, medical malpractice or some defective product, you are likely to consult a lawyer to learn about your legal rights. What do I do? Who do I engage to help me? What is going to happen? How will this all end up?

Most likely, you have many questions that you want-and need-answered. This handbook may not answer them all, but it will give you some initial information that will help you get started with the process of both healing and obtaining compensation for the injury you or a family member has suffered at the hands of the wrongdoer.

Our system of justice is not perfect, but it has served us well for many years. There are various aspects of it that need reworking. For example, tort reform in the medical negligence area has resulted in a Draconian process with severe limitations on non-economic damages which unjustly and unfairly prevent those who are injured as a result of substandard medical care from seeking adequate compensation for their injuries.

This book is not intended to provide legal advice, but rather to serve as an introduction into the legal process of our civil system for those who are injured and wish to seek compensation for their injuries.

We at Kornblum, Cochran, Erickson & Harbison are committed to helping our clients resurrect their lives after devastating losses, injury

or death which significantly affect the family unit. Tragedy cannot be dealt with alone. While we cannot solve all the problems, we have the lawyers, staff and resources to assist our clients through their recovery, so that their lives and family can be stabilized and so that they can have the financial resources to deal with their new circumstances.

We welcome you to inquire if we can help you and your family in these difficult circumstances.

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I wish you the best, and hope this book helps to introduce you to the process of obtaining just compensation for wrongs you have suffered at the hands of others.

ABOUT GUY O. KORNBLUM

Guy O. Kornblum is a highly regarded, seasoned trial and appellate attorney with more than 45 years of experience. He has handled over 4,000 litigated matters to conclusion and has several million-dollar plus cases to his credit, including one of the largest settlements for a "golden years" client in a personal injury case. While concentrating in the torts and insurance field, he has handled a wide variety of cases including; complex insurance, personal injury, wrongful death, wrongful termination, real estate, medical and legal malpractice and commercial litigation. He has appeared as lead counsel in several landmark appellate court cases in California and before the Arizona Supreme Court.

Mr. Kornblum is certified in **Civil Trial Law** and **Civil Pretrial Practice Advocacy** by the prestigious **National Board of Trial Advocacy**, is a **Charter Fellow of the Litigation Counsel of America Trial Lawyer Honorary**, and a member of the **Multi-Million Dollar Advocates Forum** and **"Top 10"** and **"Top 100" Trial Lawyer** and a **Fellow of the American College of Certified Attorney Specialists**. He has been listed for over 35 years in Who's Who in America and Who's Who in American Law, as well as the Martindale-Hubbell **Register of Preeminent Lawyers** (highest rating). He also has been named as a Northern California **Super Lawyer** every year since 2006. Mr. Kornblum was selected by the San Francisco Chamber of Commerce as one of its featured law firms.

Mr. Kornblum is the co-author of three books: ***Negotiating and Settling Tort Cases***, published by the AAJ Press and Thompson West Publishing Company (4th Edition, 2018); ***Litigating Insurance Claims: Coverage, Bad Faith and Business Disputes***, published by Wiley & Sons (1991); and the ***California Practice Guide: Bad Faith***, published by The Rutter Group (since 1986). Mr. Kornblum has authored over

150 published articles on trial practice, discovery, civil procedure and insurance law and related topics. He served as assistant dean and professor in the early 1970s at University of California, Hastings College of Law, at which time he co-founded and administered the Hastings College of Advocacy. Mr. Kornblum is a well-known lecturer to bar associations and professional groups, having given over 400 presentations in 35 states and three foreign countries.

The firm founded over 35 years ago, is listed as one of the nation's prestigious law firms. Mr. Kornblum is recognized as "a.v." (preeminent) attorney by the Martindale Hubbell Law Directory rating service. While the firm has a strong track record in litigation, the emphasis is on a practical approach and problem solving in litigation, including cost-benefit analysis, as well as hard-nosed advocacy.

CHAPTER 1

Welcome to the Injury Compensation System

Nothing is more devastating to an individual than a serious injury. The totally unexpected circumstance of serious injury creates an emotional environment that puts enormous pressures on family units and friends of the injured victim. The great uncertainty of whether someone will recover or not, and whether the process of that recovery will result in serious physical and emotional impairments, produces levels of anxiety which have likely never been experienced by the victim and those close to him or her.

Once injured, the quest to find ways for financial support to pay the bills for healing and recovery, to replace lost income, and to pay for the extraordinary expenses for needed services and products begins. The system for supporting this recovery and finding resources for financial support is definitely complex; it involves public federal and state benefits, private insurance, and employer sponsored medical and disability programs. In many cases, the victim must enter the civil litigation system in search of compensation for injury at the hands of a tortfeasor, aka one who has legally wronged another and caused the victim damages, i.e. financial harm in the form of medical expenses, lost wages and other financial and emotional injury that would not otherwise have occurred.

Medical insurance, whether from an employee group or private, is the first source. Workers Compensation (which applies if the injury arises out of employment related duties) and, if necessary, public benefits, are also immediate sources for paying medical care, rehabilitation, and temporary financial support through benefits designed to replace lost income. The primary benefit of these sources is

that they do not depend on fault. Nonetheless, there are "conditions" to obtaining these benefits, which vary. For insurance, the accident must occur during the period of coverage. For government benefits, there usually must be a showing of an inability to recover through employer related or other private sources. For worker's compensation, the injury must be work related.

Medical Insurance: In order to afford medical care, the victim must look for medical insurance protection. If injury results from an auto accident, this may include medical payments coverage provided by the auto insurance policy for the vehicle in which the victim was riding, although this is usually a fairly modest amount, such as $5000.

If employed, the employer usually provides some type of "group" medical insurance. Those who work take it for granted. But there are pitfalls, such as enrollment and eligibility requirements and exclusions that apply. Plus, there are ways for insurance companies to "terminate" or limit coverage if there is a long-term injury. There can also be problems with "dependent" coverage, particularly for children who reach age 18 and who must continue financial dependence, be disabled or be a full-time student to be eligible under a parent's group policy through work. Medical insurance has deductibles, co-insurance provisions and other limitations. One such provision is the "reasonable and customary" clause, which gives the insurance company the opportunity to limit what is paid. There are also "caps" on total payments over one's lifetime, which makes long term coverage inadequate to meet the needs of the catastrophically injured. Normally the victim will not be made 100% whole and will incur additional charges which could be significant. Where serious injury occurs, it is important to have someone, such as a lawyer, insurance consultant or CPA, watch over the medical claims process and make sure that the insurance company does not improperly limit the claim or deny it.

Income Replacement and Disability Insurance: Other than one's own savings, sources of financial support while recovering are limited. Employer related disability programs usually have waiting periods before benefits begin, sometimes as long as 180 days from the date of injury. The group benefits programs have limits on the amount of benefits paid, normally two-thirds of the average monthly earnings for the previous 12 months. Plus, there are deductions from the total available benefit if there are sums paid from other sources, such as workers compensation. Private disability policies have shorter waiting periods and benefits are paid in full without deductions from other disability benefits sources.

In the instance the injury is permanent with the likelihood that the victim will not return to the work force, an application should be made to the Social Security Administration for disability and medical benefits. Medical benefits can be obtained through Medi-Cal, which administers state and federal funds to the disabled. Again, these benefits will integrate with other benefits for which the victim is eligible.

Other programs are available, such as for those VICTIM'S of a crime and who may claim benefits from the State Restitution Fund under a program administered by the State Board of Control.

The civil justice system is a resource, but to recover compensation, fault must be established and there must be a causal relationship between fault and the injuries suffered. The process of recovery in the civil justice system requires lawyer representation, which means the lawyer is paid a contingency fee out of any monies recovered by way of settlement or judgment after a trial. It is much longer process, and requires the lawyer in most cases, to "front" the costs. These costs are paid back when the case resolves. The goal of the system, once fault is established, is to compensate the victim for the injuries caused by the

wrongdoer and to make the injured victim whole. Compensation will include; past and future medical expenses, lost earnings, impairment to future earning ability, and pain and suffering which includes both physical and emotional pain as well as any "loss of enjoyment of life" (called "hedonic" damages).

One final point: if there is a recovery in a civil lawsuit; medical insurers, Workers Compensation and sources of government benefits may have a right to assert liens against the proceeds and recover those sums which they have paid for the victim's benefit or directly to the victim. We will discuss this in chapter 8.

The injury compensation system is not user friendly, but a trained, experienced and qualified lawyer can provide the leadership, guidance and advocacy to get you successfully through the process.

CHAPTER 2

How to Find the Lawyer You Need for *Your* Case

An Introduction

For most people, finding a lawyer is a new experience. They have no idea where to go or what to consider in making a selection. Since lawyers are permitted to advertise, and certainly do, there are plenty of "ads" out there soliciting you as a potential client. However, advertisements only provide names and phone numbers. These ads do not provide more in the way of information you can use in selecting the lawyer.

Another option is to call your local Bar Association. While that may provide you some names and some self-advertised specialties, a Bar Association is not going to tell you who is qualified and who is not. It is up to you to make the decision.

You can rely on instinct and even personal references from friends, family members or business colleagues, but that still does not provide the basis for selecting a lawyer to represent you, your business or your family in a lawsuit which you are considering bringing or which has been brought against you.

You need criteria for the selection and to know what questions to ask in order to get the information needed to apply your criteria. You need to find a lawyer who has experience and standing with a reputation that can help you. One of the most powerful advantages you can have is a lawyer known to have skill and experience, and who is respected by his or her colleagues. You have a better chance of your case resolving before trial with someone with a strong reputation for getting good results both in and out of court.

Sources of Names in the Trial Field

First, let us discuss where to go to get the names of lawyers from sources other than personal references. You can search the Yellow Pages, which will give you many names usually listed by categories of specialty practice (i.e. personal injury, insurance, etc.). You can go to the internet and search for lawyers, also by specialties. Although these options are convenient, they only provide you with names and specialties, and possibly some background information regarding education, publications, and associations. You still need to know how to get other information about a lawyer you are considering.

One way to obtain information is to ask the attorney or receptionist when you call an office. For instance, we have a number of people contact us through our internet placements on various browsers. We try to provide the information they need about us and their case, and, if we cannot help them, we try to get them in the hands of someone who can.

You can also search the rolls of various trial lawyer groups, some of which are available on the Internet, such as the Consumer Attorneys of California[1] or the American Association for Justice[2], both of which are organizations of trial lawyers who represent individuals and claimants as plaintiffs (the party who brings the case) in civil lawsuits. These groups are important because they provide seminars and publications to keep their members informed on new developments and emerging legal issues, as well as provide resources for finding experts in technical and medical areas to assist in evaluating and presenting your case.

Still, one of the best places to sufficiently locate a lawyer to represent you in lawsuits is the National Board of Trial Advocacy (the "NBTA") which "was created in the public interest to identify lawyers who demonstrate that they are skilled, capable, ethical trial lawyers."[3] If you go to the NBTA Website at www.nbtanet.org and click

on "Find Qualified Counsel," you can find a list of certified attorneys in your geographical area. The NBTA certification process is similar to the process of certifying doctors in their specialty. It is based on; documentation of substantial experience before judges and juries in the trial courts, references from judges and lawyers who have seen the lawyers in court, a review of written legal work, a day-long written examination, and compliance with continuing education requirements.

You may also consider using a jury verdict service, which can provide you with the names of lawyers who have tried certain types of cases, their results in trials, and monetary settlement figures in those cases.

The Six Criteria for Selection of a Trial Lawyer to Represent You

The public needs some criteria in order to make a judgment about whether a lawyer is the right one -- competent, ethical, respectful, and able. Here are my Six Criteria, which I believe should be used in finding the lawyer to represent you in your case:

1. Knowledge and Experience in the Type of Case. Make sure the lawyer you select is experienced and knowledgeable in the type of case you have. Do not be hesitant to inquire of any lawyer as to his or her experience with the type of case you have. In personal injury, some lawyers handle more routine cases (e.g. soft tissue injuries), while other lawyers are experienced in cases involving more complex injuries such as those involving permanent injuries to the spine or head. In health and disability insurance matters, where insurance is provided by an employer, the case might fall under the Employment Retirement Income Security Act (ERISA), a federal statute. If it is a private policy, you need a lawyer experienced with insurance coverage and bad faith where the action is brought under state common law not a federal statute. In some fields, such as workers' compensation or Social Security claims you need someone who specializes only in that field.

2. Reputation Among Lawyers and Judges. Inquire about a lawyer's general reputation for fairness in dealing with clients, other lawyers and the courts. Inquiries of this nature require information from many sources including, former clients, colleagues in the bar, judges or others who know the person or general sources such as Martindale-Hubbell. Some of these sources provide an assessment of a lawyer's abilities. For example, an "a.v." rating in Martindale is of some value, and is based on questionnaires sent to determine how a lawyer is viewed by his or her peers.

It is important to make sure you find a lawyer who does not have frequent fee disputes, complaints against him or sanctions imposed by the State Bar (prior suspension or probation), or just bad results. If you have friends who are in the legal field, see if they can provide information on the lawyer you are considering. The State Bar of California maintains a website, www.calbar.org, where you can determine a) if a lawyer is a member in good standing, and; b) if there are any disciplinary matters which have been brought or which are pending. That is a start.

3. Advocacy skills and judgment. This area is the most difficult to assess. How effective will the lawyer be in your matter? Does the lawyer have sound and tested judgment which will give you the best possible result under the circumstances? How does the attorney determine whether, when and where to sue; whether to defend a disputed matter; whether to settle or not; or what risks there are in going to trial, including the prospects on appeal. Again, checking with local bar associations, judges, the State Bar (to make sure the lawyer is in "good standing" with the bar and has no past or pending disciplinary complaints), and even the newspapers (using the Internet) might assist you in locating information.

Here your personal instincts are probably the best. If the lawyer assumes representation and there are questions in your mind about

whether the lawyer is effectively representing you, stop the process and evaluate. Don't be fearful of calling a halt and re-evaluating your selection. A lawyer's services are terminable at will and that may be the best course if the representation is not to your satisfaction.

4. Fees charged. Check with other lawyers or the State Bar in order to determine a proper price for what is being done. Ask the lawyer to give you a sense of what representation will cost, and request that you be advised if the estimate is going to be exceeded. Fee agreements over $1000 must be in writing, make sure this is done.

Contingency fees are negotiable. The usual fee is 1/3 or 40% depending on the complexity of the case. In some cases, lawyers will take a larger share of the result, for example, if punitive damages are recovered and received. Punitive damages are difficult to obtain and keep, so it may be appropriate to charge more. They are taxable as ordinary income to the client, and they are awarded only in rare cases of serious intentional misconduct. While they are a "windfall," they are appropriate in cases of fraud, malice or oppression by the defendant. Thus, they justify a larger fee because more work and more of the attorney's time is expended.

In the instance of fee sharing among lawyers, which is normally due to a referral of a case by one lawyer to another, the client is to be given notice of the fee sharing arrangement. The fee shared cannot increase the fee agreement between you and the lawyer.

Overall you should have a sense that the fee is fair. Remember in most contingency situations, the lawyer is risking the costs advanced to maintain your case. That is a big risk, for if there is no recovery, the lawyer is out both time and money in pursuing your cause.

5. Level of Client Communication. You have to get along with your lawyer. He or she should be supportive of your position and be

able to communicate with you about your case. Your lawyer should also keep you informed about your cases status. In some instances you may not always talk directly with your lawyer, but you may talk to an associate or staff member. Make sure your lawyer has an office staff that is receptive to reasonable inquiries and has access to the important information you need to satisfy any inquiries.

Sometimes the biggest problem with a lawyer is the failure to keep clients advised of the status of a client's case or matter. A lawyer should not be so busy that clients are left in the dark about their own legal problems for which they sought representation. Paralegals are now so competent and well trained, that they frequently talk directly to clients, and should be able to maintain communications in a large number of a busy attorney's matters. There simply is no excuse for not communicating. So, when a client interviews a lawyer, the manner of keeping the client informed should be discussed.

6. Knowing the Difference Between the Need for a Fight and an Amicable Resolution. The biggest criticism I have of lawyers today is that they often feel that confrontation is the essential ingredient to any client matter. Some clients think that the lawyer should huff and puff in dealing with any adversarial matter. Today, that is contrary to the process. Exploring an out of court resolution is not a sign of weakness. If a lawyer is an effective advocate, then advocacy in mediation and settlement negotiations can be just as positive as beating up an opponent in court. I like to think that I know when to agree and when to disagree. If the latter, a lawyer should take the high road. You can be an effective and strong advocate and still maintain a high level of professionalism. Ask any lawyer you are considering about his or her attitude toward this subject. You should know by the response if you are in the right law firm or lawyer's office.

A Final Comment

Your lawsuit it important. It is "your" lawsuit. Your lawyer should recognize that and perform accordingly. There is intimacy and privacy built into the lawyer-client relationship. This allows frank and open discussions. Overall, you should feel comfortable and confident with your lawyer as your advisor, counselor and advocate.

CHAPTER 3

Expectation of the Victim of Injury:
What Happens When You Sue?

Introduction

This chapter will focus on the amount a victim of an injury can recover in a lawsuit (a civil action) against the wrongdoer, (which I previously mentioned is known as the "tortfeasor") in which the victim claims "money damages." Usually this claim results from an auto accident, a slip and fall, an injury from a defective product or another type of "personal injury" claim. While medical negligence – aka medical malpractice – claims are also a type of personal injury claim, they have special rules which we will discuss in a later chapter.

Three Components of an Injury Case

An injury case has three components: *liability*, fault or legal responsibility; *damages* or injury which results from the liability; and *collection*, a source of recovery of the amount of money which results from a settlement or judgment in the case. That is, if you have liability and damages, but no one who has any insurance or money to collect from, you will not be adequately compensated for any wrong done.

The System for Compensating Civil Wrongs – "Torts"

Essentially, the "tortfeasor" is the person or entity responsible for the injury to the victim. The "tortfeasor" can be an individual or a corporation, with the latter acting through its employees or agents for whom the corporate employer or "principal" can be held responsible.

In the "tort system," the goal is to compensate the victim for the injuries resulting from the wrong committed. The "measure" of this compensation is in money, even though dollars and cents can never make up for the injury caused, particularly in cases in which there are severe permanent injuries, such as quadriplegic or paraplegia, scarring, psychological injuries, or physical impairments to one's enjoyment of life.

The "damages" allowed usually include *medical expenses*, *past wage or income loss*, *future medical expenses*, and an amount to compensate the victim for any impairment to his or her earning ability in the future. This latter category usually requires an analysis by an expert, such as a labor economist. The expert will determine what future the victim has in the labor market, to what extent that future income has been impaired (based on the medical opinions as to physical, mental and emotional injury), and what the "value" of that impairment is as it relates to what the victim can earn versus what that victim could have earned had the injury not occurred. However, this loss of earning power can be inferred from the nature of the injury and without proof of actual earnings or income either before or after the injury. It is based on the jury's evaluation, based on the injuries and evidence presented at trial regarding the "value" of the loss of the victim's ability to earn money in the future as a result of the injuries suffered. These are usually referred to as "economic" damages.

In addition, the victim is entitled to recovery of "non-economic" damages, which consist of past and future "pain and suffering." Such damages include pain, discomfort, fears, anxiety, and other mental and emotional distress suffered by the victim and caused by the injury, which have been suffered or which are reasonably likely to be experienced in the future. There is no definite standard to be applied in measuring "pain and suffering." However, the jury is instructed that they must "exercise their authority with calm and reasonable judgment and the damages they fix shall be just and reasonable in light of the evidence."

In injury cases in which a spouse (the jury is out on gay couples – that is an issue arising out of dog-mauling Whipple case) is injured, the non-injured spouse can recover damages for the loss of consortium, or loss or damage to the relationship.

Wrongful Death Cases

Likewise, in "wrongful death" cases, the "heirs" (usually the spouse, domestic partners and children, including adopted children and children born out of wedlock, children of deceased children, or successors in interest[4]) are entitled to recover economic and non-economic damages. In those cases, the heirs must combine to bring one lawsuit, either in their own names or in the name of the personal representative, the executor or administrator of the estate. The "damages" awarded for "loss of consortium" do not include injuries to the deceased victim, nor the "grief or sorrow" of the heirs, but are based on the combined value of the loss of love, companionship, comfort, affection, society, solace or moral support, including sexual enjoyment[5]. It also includes the loss of physical assistance by the deceased victim in maintaining a home. In the case of a deceased parent, compensation for the loss of support, such as help in school, coaching or other assistance in simply growing up, is permitted. Once the jury returns its verdict, the court then oversees the disbursement of the wrongful death proceeds.

Loss of Consortium

"Loss of consortium" in an injury case is somewhat the same. However, the spouse is the only one entitled to recovery for the damaged relationship, which is impaired to the extent the injuries suffered diminish the relationship due to less companionship, support, and affection, including injury to the sexual relationship or other aspects of a couple's relationship. Curiously, while in a death case the children of a deceased victim are part of the wrongful death claim, which has loss of consortium aspects, they do not have a claim for loss of consortium when the injury is to a parent. That has been the law since a key California Supreme Court case in 1977, which held that a child does not have a legal right to recover for loss of parental consortium resulting from wrongful injury to the parent through the negligence of a third party.

Punitive Damages

A final point: ordinarily, a victim of personal injury cannot recover punitive damages in an ordinary injury action. Punitive damages are not based on compensation, but are allowed only in cases of malicious, fraudulent or oppressive conduct, or against a drunk driver. They require a higher degree of proof – "clear and convincing" evidence – from the normal burden of proof of a "preponderance" of the evidence. Their purpose is not to compensate but to punish the wrongdoer for egregious, despicable or intentional conduct, and to make an example of that person. They are assessed at the discretion of the jury and based on the level of reprehensibility of the wrongdoing, the wealth of the defendant, and the amount of the money damages obtained by the victim.

CHAPTER 4

Communicating With Your Lawyer:
A Critical Aspect the Attorney-Client Realtionship

Not too long ago, I met with a group of professionals whom I ultimately represented in connection with potential claims they had against a corporate insurance broker, investment houses, an insurance company, as well as lawyers and tax professionals arising out of various tax exempt and tax deferred programs, which were challenged by the government. It is not clear that this challenge has merit, but my clients were concerned. Initially, one of them came to me for guidance. I started by assessing what the problem was, what was being challenged and why? I realized I really did not know, nor did I have the expertise to find out. As is often the case with lawyers who handle litigated matters, I needed the help of experts in the various financial and tax fields. I made contacts and put together a "team".

Meanwhile, my client talked with other professionals who had invested in the same programs, they also wanted me to help them. I decided to help them as well since this was going to be a relatively expensive venture and if I could jointly represent them, they could share the fees and costs.

This is not an easy task to undertake. There were issues which were apparent to me. For one, I was representing joint clients, so I had to be careful that there were no conflicts among them, or if there were potential conflicts, the clients understood what those were and what would happen if they became "real" conflicts at some point. I also needed to explain how this was all going to work.

What I did not realize was that my clients were totally unsophisticated as to what had to be done. As in the case of many

professionals, they were naive about the potential for dishonesty in the arena of financial services, tax deferred programs and investments. As busy professionals they worked long hours, spent much of their business day involved in their respective practices, and relied on others, whom they trusted, to carry out a financial plan. They had little experience with lawyers, and frankly, some of their experiences were not positive. They feared that a lawyer would eat up their funds, recommend filing a lawsuit and ask for more money, resulting in a "black hole" for them to deposit more. Since I did not know any of them other than original client, I had not realized this was a concern.

Initially, I had a couple of meetings to discuss their problems. I later found out that the clients still did not quite understand the nature and extent of the issues regarding the challenged investments. They were either too embarrassed to ask more questions or did not understand the problems well enough. We were miscommunicating, and neither they nor I realized it! Not a good situation for a lawyer trying his best to provide legal services.

I had met with these clients in the initial phases without charge. They had agreed to reimburse me for my time once we agreed that I would quarterback the inquiry into the status of their investments. There were questions about the safety of their funds, how they were handled by the broker and intermediaries, where the funds were deposited (an off-shore site emerged!), and a host of questions about taxability.

Finally, through a lead member of the client group, I discovered there were misperceptions of what I was proposing my firm do, how I was going to go about helping them get information and who and when the information would be evaluated. They were also still concerns about getting into more lawsuits. When this came to my attention, I knew we had to have another meeting, but this time I was going to listen more and search out the areas where they were uncertain,

confused or had misperceptions.

We had that meeting. It was a basic Q&A session, as I explored these areas. I explained the plan, the role of each professional who was on the "team" (whom they had met at a prior meeting), and that I was trying to reach a goal to minimize any adverse tax consequences for them and avoid litigation. I explained the further course would be influenced by what our outside professionals found out and recommended. The expert opinions were vital in making my recommendations, so the clients could make some important personal decisions for themselves and their families about their assets.

Granted, this was a unique situation, both for them and for me. Representing several professionals as clients in an investment and tax situation such as this was unusual. For them, it was a first-time venture. However, they were not bashful once we got into the intimate setting of a law office, and we sat down and communicated in a way that allowed each of them to ask the questions they had been reluctant to ask previously. I was able to question them regarding the goals in what we were doing.

It took time and patience on both sides to get to the point where we could have a high level of communication. But we got there. We are now an attorney-client team, with a common goal of preserving the assets of my clients, hopeful to avoid litigation. We were also hopeful that the favorable tax treatment would be preserved and if that was not the case, we would be ready to assess the potential for recouping any losses my clients suffered from any person or entity responsible for bad advice.

Without the eventual complete communication between lawyer and clients, this would not be possible. In the normal circumstances of client representation, in less complex situations, the problem I have described may not have arisen. It is a lot less complicated to

communicate with one or two clients or even a business representative as opposed to a group as we had here. It is critical to maintain full and complete communications with your lawyer to allow him or her to provide the legal representation that you need.

This is true in all phases of representation. Remember your conferences and communications with your lawyers are confidential. What you tell your lawyer and what he or she tells you is "privileged," i.e. you do not have to disclose it to others – and should not and your lawyer is duty bound to keep the contents of your communications confidential and protect them from disclosure to third parties. So be candid, tell your lawyer what he needs to know, ask questions, and do not hold back, no matter how simple the question. Your lawyers need your candid communication and you need to learn what it is you need to know to make informed decisions about your affairs.

CHAPTER 5

The Lawsuit Process:
How a Case Proceeds in the Courts

Clients discover that becoming involved in a lawsuit can be a confusing, frustrating and time-consuming process. The court system is often not viewed as user friendly. The terminology, forms and rules tend to be viewed as traps, rather than a means of getting to an end - the resolution of a dispute. It can be helpful when entering into a lawsuit to understand the basic process and terminology.

Lawsuits should only be filed when one has no other choice or when disputes cannot be resolved by compromise, informal negotiation or formal mediation (a form of negotiation supervised by a trained, neutral mediator). A client may have to sue when there is a devastating injury, or an insurance company refuses to pay what it owes under an insurance policy.

The Complaint - Stating the Case

A lawsuit begins by filing a complaint with the court. In the complaint, the plaintiff—the party bringing the suit—must set forth a "legal story" that meets the substantive requirements for the claim being brought. This may be a claim of negligence (i.e. unreasonable conduct), breach of contract (i.e., the failure to pay what is owed under a policy) or violation of statutes. A complaint can be fairly simple or complex depending on the subject of the litigation.

Once filed with the court, a summons is issued. The summons commands the party or parties named as defendants (the persons being sued) to appear. The summons must be "served," that is, delivered to each defendant in accordance with the statutes for service of the summons and complaint (personal delivery, by registered mail or publication in a newspaper). Once served, a defendant has at least 30 days to "appear" by filing a response to the complaint. This response is usually an answer, which denies the important parts of the claim being made, or it may be a procedural device to challenge the sufficiency of the story to state a legal claim, the jurisdiction of the court or the venue where the case is filed.

Investigation - The 'Discovery' Process

Once the initial papers are filed, the parties begin what is called "discovery," which is the pre-trial process for finding out what the other side and third parties know about the facts of the case. Depositions, which are recorded, formal statements made under oath, may be taken of the witnesses. A party may submit written questions to the other party called interrogatories. There are other discovery tools that are used: written requests for admission of facts, requests for production of records and subpoenas requiring third parties to produce documents, such as medical records, financial statements or employment records.

When third-party records are subpoenaed, there are certain protections against disclosure of confidential personal and financial information. While private records are normally not available, in a personal-injury case, the plaintiff who is suing "waives," or gives up the right to claim privacy regarding health issues that are specific to the case. Once this occurs, the defendants have a right to obtain relevant information on these subjects. However, this does not necessarily mean this information, once disclosed, is available to the public. There are ways to limit disclosure or to protect private information.

As noted, *depositions* are nearly always required during the discovery process. The attorneys involved with the lawsuit conduct the process of questioning the subpoenaed parties about the facts of the case. A deposition is held before a court reporter, who is responsible for recording all questions and answers in full. The lawyers for the parties

are entitled to ask the deposed person questions. These questions are subject to limited objections that can be stated on the record, or, in cases in which protected information is requested, a "privilege" may be asserted and the witness may be instructed by the lawyer not to answer (unless later compelled by the court). Lawyers representing all parties to the case have a right and opportunity to ask questions during the deposition, again, subject to appropriate objections. This is designed to be an orderly process in which all parties may ask questions. The deposition's transcript is then available to the parties for further use in the proceedings.

Today, lawyers spend more time in depositions than trial. The deposition is a key tool in the trial lawyer's kit for developing evidence, assessing witness impression and evaluating a case. Unfortunately, in some instances, depositions have become unruly and prolonged proceedings. This unnecessarily distracts from, rather than advances the cause of bringing a case to resolution.

Depositions have rules. Depositions should proceed as if the testimony was being taken in open court. That is, in trial, a lawyer is not permitted to do the following:

- Interrupt the examination with objections designed to help the witness testify.
- Make speeches at will.
- Speak directly to opposing counsel in an effort to intimidate or distract the examining lawyer from the line of questioning being pursued.
- Have conferences at will with a client or witness to discuss the "proper" answers to questions.

As a case develops, there are motions that can be made by either side if one party refuses to respond to the discovery requests or a party believes that a judge may resolve an issue as opposed to a jury (this

is known as a Motion for Summary Judgment Adjudication or, if it disposes of the entire case, a Motion for Summary Judgment). There are also periodic status conferences in front of the assigned Judge in order to facilitate management of the case and to determine that all parties are being treated fairly.

There will be dates for the end of discovery, the disclosure of expert witnesses by both sides, a pre-trial conference and trial. Earnest trial preparation should begin between 60-100 days before the trial date. Also, the court will direct the parties to attend a mandatory settlement conference, at which point a judicial officer—usually not the trial judge—will oversee negotiations, requiring the parties to submit briefs, called "settlement conference statements," in support of their respective positions.

The Trial

Once the trial is called, the judge and the lawyers meet and discuss how it will proceed. There may be pre-trial motions that need to be heard and resolved by the trial judge.

If trial is to take place before a jury, the prospective jurors will be brought to the courtroom in large groups to allow the parties to "select" a jury of the appropriate number. This can be six, eight or twelve jurors, with alternates in a lengthier case of two to four jurors. During the selection process, the judge and attorneys ask the jurors' questions in an effort to choose the jurors the parties believe to be fair decision makers. This process is called "voir dire," which means "to speak the truth" in French.

Once the jury is selected and sworn, the lawyers make their opening statements.

Testimony begins when witnesses testify, and documents are introduced. This constitutes the "evidence" in the case, the official

record of "facts" from which a court or jury makes a decision.

The plaintiff, who has the burden of initially proving the case, begins first. The defendant follows.

Each side puts on a "case-in-chief," then they can rebut the other side's case.

They then "rest," the judge gives "instructions" on the law to the jury and the jury deliberates until it reaches a "verdict."

Once this part is concluded, the parties review the verdict and can make various post-trial motions. Following these, a "judgment" is entered by the court from which appeals may be taken.

Trial lawyers have a professional responsibility to act ethically. If done properly, a skilled trial lawyer performs under the trial judge as a conductor. The trial lawyer knows the rules and knows when to ask permission to move about the courtroom so that the evidence, both testimonial and documentary, is developed in a logical, understandable fashion. When selecting a lawyer, make sure you engage one who has the correct approach to representing you in your lawsuit and subscribes to this professional approach of representation.

CHAPTER 6

Uninsured and Underinsured Motorist Coverage is Most Important in Your Auto Policy

A most important insurance protection for you, your family and passengers in your automobile is that which covers you or them in the event you are hit by a wrongdoing *uninsured* or *underinsured* motorist.

In California, it has been estimated that 1 in 4 motorists are driving on the highways uninsured or underinsured, that is without adequate liability insurance protection. What this means is that they either have no insurance or not enough to cover any responsibility they have as a negligent driver who injures others.

So, if this is the case, how do you protect yourself and passengers in your automobile if anyone is injured in an accident with someone driving without adequate insurance protection? There are two ways.

First, in your auto policy there is special coverage for "medical payments." This coverage pays for medical bills for anyone in your automobile, who is injured while driving with you. It has nothing to do with fault. If the bills are incurred for medical expenses resulting from an injury in an auto accident, those bills are paid for under this coverage. So, you should get a high limit for this coverage. I recommend at least $10,000 or higher if you can purchase such. While this coverage may duplicate coverage you may have under a health insurance policy, either individual or through your employment, it is additional insurance coverage for the high medical expenses that can result from a serious injury. The $25,000 limit is per person, so it can really help in serious cases.

In addition, you should purchase *uninsured* AND *underinsured* motorist coverage in the highest amounts you can. I recommend

at least $300,000 per person and $500,000 per accident. I also recommend that you purchase even higher limits if you have an excess policy, because you can add that to what is available under the policy in the event of a catastrophic injury.

Now, here is how all this works.

First of all, your insurance company must offer you both coverages (which are separately stated in your policy) in the same amounts as your liability coverage (the protection that applies if you are the negligent driver and have responsibility to others for their injuries). In order to eliminate or lower the limits of this insurance protection, you must sign a written waiver form confirming the change. I highly recommend you NOT do this.

If you are hit by a negligent motorist without any insurance protection – either because none was purchased, or the insurance company has a valid defense against coverage – then your uninsured motorist coverage kicks in. Your insurance company then stands in the shoes of the uninsured driver and becomes, in a sense, that uninsured driver's insurance company. So, if you have $300,000/$500,000 limits, each of the persons in your car can seek as much as $300,000 from your insurance company, subject to the maximum collective limits of $500,000. Each of them would also have the medical payments coverage for medical bills.

Underinsured motorist protection works similarly. However, what triggers the coverage is a bit different from uninsured motorist protection. Here is how it works. Your vehicle is hit by a wrongdoing motorist with minimum limits of $15,000 per person and $30,000 per accident. However, your injuries are much worse. You have coverage of $300,000 per person and $500,000 per accident. You claim injuries that exceed $300,000 including past and future medical expenses, wage loss, and pain and suffering. The insurer for the wrongdoing motorist accepts liability and pays the $15,000. You then have $285,000 left on your underinsured motorist coverage to collect against your own insurer, plus you would have any medical payments coverage for medical bills incurred for injuries suffered in the accident.

One major aspect of uninsured motorist and underinsured motorist coverage is how disputes are resolved. Under California law, any disputes with your insurance company as to whether and how much you are entitled to recover must be resolved by binding (no appeal) arbitration. A single neutral arbitrator, usually a retired judge or experienced attorney, will hold a full hearing with you and your insurance company, each party has the right to present evidence just as if you were in court. Rather than a sitting judge or jury deciding the factual issues and the amount of any damages, the arbitrator makes the decision. The parties have full rights to conduct pre-trial discovery, including taking depositions, submitting written requests for information, and even obtaining a medical exam. The insurance company of the claimant (insured) and the claimant have a right to have counsel represent them, which is the normal circumstance.

The important point is that you have this protection in the first place. It is a critical part of the full picture if you want to make sure that you and your family have the insurance you need to cover significant financial loss. Serious injuries occur on the streets and highways every day with those who irresponsibly fail to adequately cover themselves for negligent driving which can result in injury to others.

CHAPTER 7

Don't Let Your Insurance Company
Treat You Unfairly!

Most of you have insurance. You insure your automobiles, your homes, your health (medical insurance), your income (disability insurance) and your lives. You may also insure your businesses against damage to property used for commercial purposes and loss of income. Your insurance policy includes protection against lawsuits filed by a third party against you. As such, you expect your insurance company to defend you in that lawsuit and protect you against a judgment for money damages.

We buy insurance not because we want it but because we need it. **Fear of the future** motivates us to protect ourselves against injury to ourselves, our families and our property. The prudent person buys as much insurance as he or she can afford, sometimes even more. We seek from our insurance company **peace of mind and security** against the **risk of financial injury** caused by the unexpected.

Your insurance company seems like a friend when you agree to purchase the insurance. However, often that same insurance company becomes your enemy when you make a claim. The claims process is often a hostile and difficult one with burdensome paperwork and frequent requests for more information, usually with the goal of finding a way to turn down your claim or limit payments. Some insurance companies *reward* their claims handlers for keeping claim costs down by basing their compensation on how little they pay on legitimate claims.

Insurance companies are powerful financial corporate structures. They have large treasuries. While the purchase of a policy may take

place at your home, business or local office, things are different when a claim is made. Nearly all of the time, you are dealing with someone who is hundreds if not thousands of miles away. There are no face to face meetings (except when an investigator shows up at your door unexpectedly). Indeed, your insurance company has the power and control over you in your relationship with it. Consider these points:

- Your insurance company *fixes the price*; there is *no bargaining*. You can lower your cost only by accepting *less* insurance;
- It chooses the language for your policy; *you are stuck with the policy* terms your insurance company selects;
- Your claim is paid when your insurance company decides to pay; *it determines when and how much you receive*;
- Dealing with your insurance company is on a take it or leave it basis.

What can you do when you believe your insurance company acts unfairly? How do you combat "low-balling" or wrongful refusals to pay you what the insurance company promised to pay you for the **protection** that you purchased?

One answer is to go to your state's Department of Insurance. However, these state executive departments are generally ineffective. More than one-half of states under-fund their Departments of Insurance, so they have inadequate staffs and resources to handle complaints from the public. In some states, the Department of Insurance has been graded as low as an "F" by an independent agency. Not surprisingly, when a claim is denied, your insurance company will usually refer you to the state's Department of Insurance if you disagree with the claims decision, knowing that you will receive little help.

What your insurance company does not tell you is that there are ways to combat its wrongful denials. For example, in nearly all states, there is an **Unfair Claims Practices Act** which lists 16 unfair claim

practices which insurance companies cannot engage in. You are never told about this when your insurance company denies a claim. In addition, all insurance companies must abide by a **duty of "good faith and fair dealing"** in their investigation, administration and decisions regarding your claim. If your insurance company violates these duties to you, you can sue and obtain money damages for what is owed you under your policy, plus damages for your worry and anxiety, and in some instances attorney fees. In the cases of malicious and fraudulent claims handling, your insurance company may be liable to you for **punitive damages** based on a civil fine, which you receive to punish the company for its wrongful conduct.

Don't put up with insurance company abuse and unfair treatment. Attorneys can help you evaluate your claim and determine if you need to sue to get what is rightly yours under your insurance policy. You paid for protection; your insurance company should provide it!

CHAPTER 8

Liens and Workers Compensation Rights

In most cases, the medical bills in personal injury matters are paid by third parties; a medical insurance company, a workers' compensation carrier, Medicare, Medicaid/Medi-Cal, or others who are responsible for the direct medical costs to someone who is injured. That is the good news. However, once a third party pays these medical costs, the third party may have a right to reimbursement for what has been paid. To protect its right to reimbursement, the third party will assert what is known as "lien" or a claim for that reimbursement.

Medical liens, whether based on the health insurer's contract or a government claim for reimbursement can be very complicated, and if not handled properly can hold up the payment of settlement funds. The question is always: "How much do we have to pay back?" That is a good question and does not always have a finite answer. There may be ways to negotiate with the holders of these liens so that full payment is not necessary. Indeed, in some cases, the lien recovery is a modest percentage of the settlement.

There are various approaches to negotiating these liens, and in some cases, there are statutes passed by the state legislature or Congress that govern the recovery to which a lien claimant is entitled. Often, we can persuade the lien claimant that it should pay its fair share of the attorneys' fees that have been incurred, so the lien is reduced by the percentage of the recovery that is due the lawyers representing the injured victim.

In addition, if the injury is work-related but the injured employee has rights against a non-employer third party, the workers compensation

carrier or insurer will assert a statutory right of reimbursement against any recovery by the injured employee against that third party. That recovery is also negotiable.

Under new statutes and regulations, we are required in government benefit cases, such as those involving Medicare or Medicaid/Medi-Cal to contact the administrative agency overseeing these benefits to alert them to the fact that a third-party claim is being asserted. If we do not do this, our law firm and you can be the subject of an action to recover any lien amounts that were not addressed and paid back. So it is better to get started early on these potential claims and negotiate them along with any settlement or after any recovery in court.

There are some benefits you may receive which are not subject to lien claims or claims of reimbursement. For example, if you are covered by an employee sponsored or private disability policy, your monthly benefits do not have to be reimbursed. This is the same with Social Security disability payments resulting from a total disability. Therefore, you do not have to pay those back.

Attorneys can help you evaluate any lien claims in your case. We work hard to negotiate those and obtain the best settlement for you by any lien claimant. The lien claimants' rights must be assessed, and your rights protected so that the least amount is paid back to any lien claimant who asserts rights.

CHAPTER 9

What Happens When Your Medical Care Provider Commits Malpractice?

What happens when your doctor, hospital, dentist or other medical provider does not render the proper care and the results are not what you expected? Let's first clarify the question. I am not talking about a result that is not perfect or as expected. Sometimes the risks of care carry with them results that are not the best, but that result is within the accepted risks assuming you have been told about those risks ("informed consent") and have gone ahead with the procedure or treatment aware of them.

What I am talking about is care that falls below the accepted standards and is regarded as "negligent" or "malpractice." What can you do at that point? What can you be expected to recovery if successful in a lawsuit?

In 1975, the California Legislature, then responding to what was perceived as an "insurance crisis" for doctors and hospitals and their professional liability coverage, passed the Medical Injury Compensation Reform Act, which was a form of "tort reform", designed to lessen the potential for lawsuits to be brought against medical care givers who were negligent in their care. This statute, which has essentially remained the same since it was passed over 25 years ago, limited recovery for pain and suffering to $250,000 (essentially worth about $60,000 today); allowed offsets if the victim had private medical or disability insurance or had a government program, such as worker's compensation or Social Security benefits; and significantly limited a victim's lawyer's fees by capping the percentage which a lawyer could require from the usual 1/3 to a much less favorable structure overall (somewhere around 25%, and maybe even less for a large case).

The upshot of these reform measures is to make it more expensive and less financially beneficial to both the victim and his or her lawyer to pursue medical negligence claims. While some of these reforms may be applauded by the medical providers, they have resulted in VICTIM'S of medical negligence being treated differently from other injured tort VICTIM'S. The limitations and changes in medical negligence cases do not apply in ordinary tort cases, such as those involving automobile accidents or injury from defective products. In addition, the California Legislature made it more difficult for a victim of medical negligence to recover punitive damages in harsh cases.

Before any medical negligence case can be brought, the case must be evaluated as to a) whether the standard of care was, in fact, breached, b) if so, what damages were caused that would otherwise not have been caused, and c) what value or compensation is appropriate for that injury.

The first issue, "breach of the standard of care," requires that a medical expert qualified in the particular professional field be prepared to testify based on a complete review of the case, that the standard of care applicable was, in fact, violated by what the medical professional did or did not do, i.e., that malpractice occurred. This means that the expert must be willing to testify against a fellow professional. It has been suspected that there is a conspiracy of silence among medical professionals in any particular field. They belong to the same societies, go to the same conventions, work in closely connected medical facilities, and know each other personally. Therefore, it is sometimes very difficult even in large metropolitan areas, to find someone willing to testify against another professional in the same field. Often, the victim's lawyer must go elsewhere to find an expert who is familiar with the standards applicable in a similar community and who is qualified to testify. In addition, such experts, even if they are willing to testify, can be very expensive. They frequently charge several thousand dollars for the review and several thousand more for depositions given before trial

and testimony at trial. This, coupled with travel and other expenses and the usual expenses of trial, make medical negligence cases very expensive for the victim's lawyer who usually advances these costs.

Second, the "causation" issue is also of concern. Even if a breach of the standard of care is proven, the victim must still prove that there is a casual relationship between the standard of care violation and the injury. This also may require expert medical testimony to make that connection. Suppose a surgeon is negligent in performing a spinal fusion. The physician argues that it was not his or her fault that the injury occurred because; unknown to that physician, the medical device used in the surgery was defective. Examples of this are the recent cases where total hip replacements have involved "defective" hip prostheses made with a coating that prevented a "solid" new replacement joint, which could then dislocate.

Or, if death occurred, the physician might argue that the physical condition of the patient was not strong enough to withstand the procedure. There is one case in which after back surgery, a patient fell in a convalescent home and had to have a second surgery; the defendants argued that his condition after the second surgery is nearly the same as before. They are claiming that the client's condition is essentially no different now from his condition after the first surgery. Thus, no injury was caused by any wrongdoing, except for the fact that the client had to undergo a second procedure (which, of course, has some value but not the same as a permanent injury).

Third, damages must be evaluated. What losses, both economic and non-economic are the result of the malpractice committed. This is important as the case has to have economic and non-economic, are the result of the malpractice comitted. This is important as the case has to have "economic legs" to justify proceeding. Cases such as these can be made into intensely and aggressively defended lawsuits which take time and money and create more stress for the already injured victim.

CHAPTER 10

Alternative Dispute Resolution:
The Preferred Alternative to Litigation

"The odds of a plaintiff's lawyer winning in civil court are two to one against. Think about that for a second. Your odds of surviving a game of Russian roulette are better than winning a case at trial. Twelve times better. So why does anyone do it? They don't. They settle. Out of the 780,000, only 12,000 or 1.5 percent ever reach a verdict. The whole idea of lawsuits is to settle, to compel the other side to settle. And you do that by spending more money than you should, which forces them to spend more money than they should, and whoever comes to their senses first loses. Trials are a corruption of the entire process and only fools who have something to prove end up ensnared in them. Now when I say prove, I don't mean about the case. I mean about themselves."

Lawyer Jan Schlictman, Played by John Travolta, in the movie "A Civil Action."

Anyone who has been involved in a lawsuit as a dispute resolution mechanism knows what a laborious and often mysterious process it can be. However, the process is changing. The public is demanding a more user-friendly system that encourages litigants to enter into early discussions about resolution of their dispute to avoid the time, expense and emotional drain of protracted litigation.

A settlement is the best *economic* day for a client, considering the present value of money (i.e. the client has the use of funds now rather than the hope of some recovery later), and the cost of taking a case into the pre-trial and trial phases (and possibly through appeal). The costs of litigation often surprise clients, particularly if expert testimony from physicians or technical experts is needed. As I stated before, the fees for these experts are quite high, usually involving several hundred dollars

per hour. Considering the amount of time that experts need to prepare in order to testify at deposition and then appear in court, several thousands of dollars can be incurred quickly by just this aspect of the case.

The public has become intolerant of the notion of the trial lawyer as a "warrior" or "combatant," but looks to lawyers who work in litigation as problem solvers who can penetrate the process and assist in resolving a dispute, not perpetuating it.

In my view, settlement is the ultimate victory. It takes the decision making away from a third-party – a judge or jury – and puts it in the hands of the parties. Settlement results only from consent, so a case is settled when the parties have retained control over the outcome and have carved out a result for themselves. It does not happen unless there is concurrence.

Indeed, studies have shown that the parties to a dispute, risk more by going to trial if they walk away from a reasonable opportunity to settle. That is, studies of hundreds of cases in which negotiations have been conducted but the parties have not settled, have revealed that the odds are that a party rejecting an opportunity to settle often does worse at trial.

Settlement results in a number of different ways: the parties can directly negotiate, or they can use an intermediary. This latter process is called mediation. The intermediary, a mediator, can be a sitting judge, an attorney who acts for the courts as a settlement facilitator, or the parties can go outside the courthouse and engage a private mediator, a retired judge, attorney, or in some cases a person who has special expertise in the subject matter, to serve as a mediator.

Over the last several years, *mediation* has become the more popular means of resolving disputes. Mediation is a means available

to litigants to achieve settlement. Often, it is overlooked by lawyers in the beginning stages of litigation. However, this early time period mediation can lead to a very appropriate settlement. Overlooking this option is a big mistake in my view, as it is at this early stage of litigation that the "best deal" can be achieved given the expense of protracted litigation.

There is a great deal of confusion among lay persons as to the difference between arbitration and mediation. These are forms of *alternative* dispute resolution. They are alternatives to outright litigation. Court systems are now designed to make sure that parties are advised about these alternatives and how they can expedite the resolution of a dispute and avoid the risks and expense (not to mention the emotional drain) of full-blown litigation. Many court systems have programs for early resolution, including the federal court in San Francisco, which has been a pioneer in these alternatives for resolving disputes without a trial.

Mediation is basically a "supervised negotiation" away from the courthouse with a trained and experienced mediator who has the skills of getting parties to talk and exchange views in an attempt to resolve their differences. This is in contrast to an arbitration, in which the arbitrator actually decides the case and can issue an opinion, called an award, which resolves the matter.

Mediation is much different as the mediator guides the parties through the negotiation process so that any resolution comes because the parties agree. The mediator is not a decision maker, but a facilitator. The mediator is chosen by agreement only; a party cannot be forced to accept a mediator of a dispute. Mediators work in all aspects of litigation: complex civil cases, personal injury, professional negligence, complex insurance disputes and family law matters, particularly divorces and custody matters.

Mediation is voluntary and is not binding. A settlement is reached only if the parties agree. Mediation can last from a few hours to several days (not necessarily in succession). Often the parties exchange "briefs" on their position before the mediation.

Most important to note is that mediation is confidential. By law, what takes place during mediation cannot be used in the lawsuit as evidence. For example, during trial, what takes place during mediation is not a subject that can be addressed. A trial court or jury does not hear about anything that was discussed during the mediation, nor is the subject of the parties' respective positions at a mediation a proper subject of testimony at trial.

My experience is that the mediation process works well if certain conditions are met: First, the parties must be prepared to mediate. That is, they must know their case well and have discussed their position with their lawyer and set some realistic goals for settlement discussions. Second, the parties must go to the mediation with a *good faith* desire to resolve the case. Third, the right mediator must be chosen for the case, someone whose approach to mediation fits the type of case and the parties who are involved. If the case is volatile, then someone with a more low-key style using more diplomacy than persuasion may be the right choice. On the other hand, if the parties are at odds, it may take someone with stature (such as a retired judge of some preeminence) to bring the parties together. And lastly, the mediator must be willing to work. The mediator must be ready to roll up his or her sleeves and stay the course until all settlement alternatives are explored. The basic rule is to keep the parties talking. So long as the parties are willing to communicate, there is a chance for a negotiated resolution.

As time goes by, our judicial system will rely more and more on courts and counsel directing litigants to a mediation alternative to litigation. The earlier the better.

CHAPTER 11

What is Tort Reform and is it Needed?

Anyone reading the papers these days will see the topic of "tort reform" frequently mentioned in both Sacramento and Washington, D.C., among politicians. What is "tort reform"? How should these so-called "reform" measures be viewed?

A "tort" is a civil wrong for which the law provides a remedy, usually in the form of monetary damages to compensate the victim for any injury caused. In addition, in the more egregious cases involving malice, fraud or oppression, punitive damages designed to punish and make an example of the wrongdoer are allowed. Compensatory damages are measured by actual losses. Punitive damages are a form of civil fine. Despite what you read in the papers, punitive damages are rare and require proof by "clear and convincing" evidence that a high degree of reprehensibility characterizes the wrongful conduct.

Over the years, certain business and professional interests have become "concerned" about what they perceive as the increasing size of jury awards in these cases of civil wrong. They argue that juries have been allowed to run wild, that the rules allow runaway verdicts, and that judges do not exercise their powers to prevent large, unwarranted verdicts in jury trials. Two of the primary complaints concern the size of awards for "non-economic" (i.e. pain and suffering and emotional injury) damages and the availability, as well as the amount, of punitive damages verdicts.

Normally, "tort reform," which is an effort to curb these so-called undesirable results, comes in the form of legislation either at the state or national level. The first California piece of "tort reform" legislation

was the Medical Injury Compensation Reform Act of 1975 ("MICRA"), which was designed to put the brakes on large medical malpractice verdicts against doctors and hospitals. That legislation primarily did three things: 1) it "capped" any award for "non-economic" damages at $250,000; 2) it made it more difficult to sue for punitive damages in medical malpractice cases; and 3) it provided for certain limits on attorneys' fees by reducing the contingency percentages in order to discourage lawyers from pursuing these cases. The "cap" of $250,000 has never been changed. There is MICRA-like legislation adopted in other states, but California has the lowest "cap" on "non-economic" damages. And, even though this "cap" was adopted 28 years ago, it has never been increased. I have been told that its "present value" in today's dollars is roughly $60,000, which is a modest and indeed inadequate amount to compensate a victim of death, disfigurement or serious life-altering injury from below standard conduct by doctors, hospitals and their staff members. Still, despite efforts to increase this "cap," the medical industry lobbyers have always managed to defeat them, and, in the process, "blamed" the "greedy" trial lawyers searching for new ways to increase recoveries and earn more fees. Of course, the trial lawyers are not interested in helping these VICTIM'S obtain adequate compensation for their injuries!

There have been other "tort reform" measures in California. For example, in 1988 legislation was passed which raised the bar for obtaining punitive damages by adopting a much stricter standard and also increasing the burden of proof from a "mere preponderance" of the evidence to "clear and convincing" evidence. And do you know what? Insurance companies have still been hit for large punitive damages when they act outrageously in denying benefits to their insureds who pay premiums for insurance coverage. Recently, UNUM/Provident, which is the largest writer of individual disability income policies in the U.S., suffered a significant punitive award of $30 Million in a jury trial in Marin County. While the judge subsequently reduced

the punitive award to $5 Million because she thought it was "excessive," she still allowed it to stand, serving as a warning to UNUM/Provident and other insurance companies that the citizens of California will not tolerate similar behavior by improperly denying an insured the coverage for which that insured, here a physician who was disabled from continuing his medical practice, had paid a substantial premium.

Now there are efforts in Congress to adopt similar reforms on a national level and to pass legislation putting "caps" on "non-economic" recoveries in medical malpractice, elder abuse, pharmaceutical and HMO cases, and to go so far as to just eliminate punitive damages altogether. There have been efforts at the national level to impose limitations on recoveries in product liability cases. Also, the U.S. Supreme Court has been slowly trying to change the law of punitive damages to make it more difficult to keep them when they are reviewed by an appellate court. The question is whether these reforms, at the state or national level or by legislation or judicial opinion, serve the best interests of the public.

Is it really the civil justice system, runaway juries and ineffective judges that are the "cause" of the perceived inequities that occur? This question was recently discussed in an entire issue of The Forum, the monthly publication of the Consumer Attorneys of California, the organization for trial and appellate lawyers who regularly represent injured parties and VICTIM'S of "torts." I am a member of that organization and regularly represent these injured parties and VICTIM'S of wrongs. I know how expensive it is to prosecute these civil cases, with all the litigation costs, and the time and money eaten up in working up these cases, carefully preparing them and pushing them through the trial court to resolution. Putting more barriers between lawsuits to right these wrongs and justice by artificially reducing – by blanket "caps" – the amounts that a victim can obtain is not advancing justice. Eliminating punitive damages in cases of reckless and intentional conduct will deprive the public of an important control over cases of serious corporate misdeeds. The referenced article cited 17 documented punitive cases where the punitive award influenced corporations to alter their practices or eliminate a dangerous product.

There are plenty of protections now available to any defendant against jury awards that are excessive. Our civil justice system does not need more artificial barriers to recoveries. As in the Marin County case, the trial judge, and later the appellate courts, have the power to reduce and even eliminate awards that are too high or not supported by the evidence. This is a time-tested means of insuring that justice is done and that all parties are protected. The plaintiff suing has rights, as does the defendant who is sued. Allowing the judges to oversee the process has been the civil justice system's long-standing means of seeing that the adversary system works properly on a case by case basis. That system should continue. Let the judges do their job as they have always done. In my experience, they do it.

CHAPTER 12

What is a Resolution Advocate at
Kornblum, Cochran, Erickson & Harbison

At our firm we describe ourselves as "Resolution Advocates" and our services as "Resolution Advocacy." Why? Because that is what our clients want. They want their disputes resolved in a timely manner. In fact, I stress *Litigation Management* and consider settlement efforts as a high priority in that process. Resolution by settlement is seldom anything but a positive result. If the case is meritorious, then the other side needs to know that. If there are disputed issues that create uncertainty in the outcome, then the parties should recognize that the end result is not guaranteed and that should drive them to discuss resolution by settlement, including mediation. If the case goes sour after it is worked up, then the client needs to know that, and a resolution short of trial must be considered to avoid a catastrophic result, by trial.

Resolution advocacy includes being prepared to try the case and pursue an appeal if that is the only alternative. But it also means that alternatives to trial must be considered, and the case managed so that it can reach a plateau at which direct settlement discussions or mediation are appropriate for all.

I teach our lawyers to actively manage their cases and to look for resolution alternatives in that process. I define *Litigation Management* as follows: *The effective planning, organization, delegation, and supervision of litigated matters so as to gain the advantage crucial to achieving an* ***acceptable and timely resolution*** *of the dispute*.

We are experienced and trained in managing our cases to gain the advantage and finding the best and most effective path to resolution, whether through mediated settlement, trial or arbitration.

We use our skills and experience as trial advocates to provide the vision to see how the case can best be managed for an early and effective evaluation and prepare it for settlement, most of the time this is done through mediation. Our goal is to persuade our adversaries that direct negotiation or mediation is preferable to challenging our client's cause at trial.

Of course, it is the client's choice whether a settlement is in his, hers or its best interest. Our task is to get to the point where the client has the choice after being fully informed of the potential outcome at trial and the cost and burdens of proceeding. And it is our job to get the case to that point in a timely manner, using all the tools available in managing the case to that end.

In doing this, we provide litigation expertise through consultants and experts who assist in that process, whether evaluating fault or damages, or determining the financial impact a settlement will have on the client personally, so that the client can plan for the future. This planning is not possible if the uncertainty of trial is hanging over the client's head. Planning requires certainty in regard to present circumstances. That certainty does not exist if a dispute significantly affects the client and the client's family or business.

Resolution advocacy is a process that allows us to use our litigation skills to assist the client in charting the future and bringing the client's life into focus and on a positive course.

This is what we do, and we strive to do.

REFERENCE

[1] - http://www.caoc.com/CA/

[2] - http://www.justice.org

[3] - "Recognizing QUALIFIED Trial Representation," published by the National Board of Trial Advocacy, 18 Tremont Street, Suite 403, Boston, Massachussetts 02108, tel. 617-720-2032"

[4] - California Code of Civil Procedure §377.60.

[5] - Judicial Council of California, Civil Jury Instruction No. 3921.

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Guy O. Kornblum has been the principal in his San Francisco based law firm specializing for over 40 years in all aspects of civil litigation, including trials, arbitrations, mediations and appeals. His firm has been involved in a wide variety of cases involving wrongful death, serious personal injury, insurance coverage and bad faith in all aspects of insurance (including broker and agent liability), professional malpractice (legal and medical), and business litigation.

He is Cerified in Civil Trial Law and a fellow, American College of Board Certified Attorneys, and the prestigious National Board of Trial Advocacy. He is also a Charter Fellow, Litigation Counsel of America, a Life Member of the Multi-Million Dollar and Million Dollar Advocates Forum, and a "Super Lawyer" since 2006. He has also achieved the highest rating (a.v.) by Martindale Hubbel, which he received in his first year of eligibility in 1971.

A former law professor and Assistant Dean at his alma mater, University of California, The Hasting College of Law, he is a frequent lecturer on various aspects of civil litigation to professional associations and on Continuing Legal Education programs.

Attorney Kornblum is available for professional mediation and regularly serves as an expert witness. He is also the auhor of *Negotiating and Settling Tort Cases: Reaching the Settlement* (Thomson West and AAJ Press, 4th Edition, 2018); and co-author of two other books on insurance law. He is also a contributing author to the California Continuing Education of the Bar's "Alternative Dispute Resolution in California" and has authored over 150 published articles on trial practice insurance law and related areas.

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