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1. Provide an update on current black box technology and simulations in your State and the legal issues surrounding these advancements.

California distinguishes between computer "animations" and computer "simulations." (People v. Duenas (2019) 55 Cal.4th 1, 21). A computer animation is merely used to illustrate an expert's testimony, while simulations contain scientific or physical principles requiring validation. (Id.)

Animations do not draw conclusions; they attempt to recreate a scene or process, thus they are treated like demonstrative aids. (Id.) In other words, an animation is demonstrative evidence offered to help a jury understand expert testimony or other substantive evidence (People v. Hood (1997) 53 Cal.App.4th 965, 969.) Courts have compared computer animations to classic forms of demonstrative evidence such as charts or diagrams that illustrate expert testimony. (Id.) A computer animation is admissible if it is a fair and accurate representation of the evidence to which it

relates...." (Id.) A trial court's decision to admit such demonstrative evidence is reviewed for abuse of discretion. (See People v. Mills (2010) 48 Cal.4th 158, 207 [106 Cal.Rptr.3d 153, 226 P.3d 276]; People v. Williams (1997) 16 Cal.4th 153, 213–214 [66 Cal.Rptr.2d 123, 940 P.2d 710].)

Simulations are created by entering data into computer models which analyze the data and reach a conclusion." (Id. citing Harris v. State (Okla.Crim.App.2000) [13 P.3d 489, 494, fn. 6], citing Clark v. Cantrell (2000) 339 S.C. 369 [529 S.E.2d 528, 537].) A simulation is itself substantive evidence. (Duenas, 55 Cal. 4th at 21, citing Commonwealth v. Serge (2006) 586 Pa. 671, [896 A.2d 1170, 1176–1177 & fn. 3]; State v. Stewart (Minn.2002) 643 N.W.2d 281, 292–293.) A simulation is admissible only after a preliminary showing that any "new scientific technique" used to develop the simulation has gained "general acceptance ... in the relevant scientific community." (People v. Kelly (1976) 17 Cal.3d 24, 30); see also Hood, supra, 53 Cal.App.4th at pp. 969–970.)

When it comes to using black box technology as a basis for an animation or a simulation, the critical issues are foundation and authentication. Following a collision, simply pulling the data from an ECM or engine and then saving it on a computer somewhere is critical, but not sufficient. Rather, whomever pulls the data must be prepared to testify to his or her familiarity with the black box technology, his or her competence to identify and download the data, and to testify as to the method by which it was obtained, confirm it was preserved such that the data is not corrupted, and to maintain a chain of custody. After confirming the authenticity of the data, the expert and counsel must be prepared to lay the proper foundation at trial for both the data itself, and for the computer program used to create the animation or simulation (i.e., general acceptance of the program in the community, and that the expert is competent to validate that the program's results are consistent with other forensic evidence, if applicable).

In California, parties almost always stipulate to the foundation and authenticity of black box data, and the issue at trial becomes a "battle of the experts" concerning the validity of their respective animations or simulations.

2. Besides black box data, what other sources of technological evidence can be used in evaluating accidents and describe the legal issues in your State involving the use of such evidence.

As a preliminary note, under Section 9951(c) of the California Vehicle Code, most vehicle data cannot be downloaded or otherwise retrieved by anyone other than the registered owner of the motor vehicle unless the owner consents, by way of court order, or by way of other limited exceptions inapplicable in a tort setting. Thus, most California-based accident reconstruction engineers require a written authorization before performing a download of any kind.

Focusing on sources outside of "black box" data, California maintains a database of historical crashes, SWITRS, that is available for public access through the Transportation Injury Mapping System (TIMS) maintained by the University of California at Berkley. This is a critical tool for developing indemnity cases against public entities in California, as it can be used to show that prior accidents put the public entity on notice of a safety issue at the location of the accident. The data collected by TIMS identify the authority that investigated the incident, as well as a report number, and description of physical injuries.

3. Describe the legal issues in your State involving the handling of post-accident claims with an emphasis on preservation / spoliation of evidence, claims documents, dealing with law enforcement early and social media?

Claims Documents

Under California Law, a party may obtain discovery of the existence and contents of any agreement under which any insurance carrier may be liable to satisfy in whole or in part a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. (Cal. Code Civ. Proc. § 2017.210.). This discovery may include the identity of the carrier and the nature and limits of the coverage. A party may also obtain discovery concerning whether that insurance carrier is disputing the agreement's coverage of the claim involved in the action, but not the nature and substance of the dispute. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. (Id.)

Thus, in third party actions, this code section governs what is discoverable. Otherwise, insurance claim files are subject to privacy and relevancy protections under California Law. (Cal. Ins. Code § 791.13.)

In regard to first party and bad faith claims, claims files are discoverable. However, Courts have held that insureds are not entitled to portions of the claims filed created after a claim for bad faith is made. (*Cal. Physicians' Serv. v. Superior Court* (1992) 9 Cal. 4th 1321.)

Preservation Issues

Under California Law, every party has a general duty to preserve relevant evidence if litigation is reasonably anticipated. This duty ensures that potentially relevant evidence is not lost or destroyed. (Cal. Code Civ. Proc. § 2023.010; *Cedars-Sinai Med. Ctr. v. Sup. Ct*. (1998) 18 Cal. 4th 1, 12.) However, the precise point at which the duty to preserve documents comes into existence is not yet clear short of a demand. The California Supreme Court, in discussing spoliation of evidence, stated that "[d]estroying evidence in response to a discovery request after litigation has commenced would surely be a misuse of discovery within the meaning of [CCP §] 2023" and therefore sanctionable. (*Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal. 4th 1, 12.) However, the decision did not deal with the question of the earliest point at which the duty to preserve evidence could initially arise.

Generally, a party, or anyone who anticipates being a party, to a lawsuit has a duty to not destroy evidence. (*Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal. 4th 1.) This is particularly true if a party to a potential lawsuit sends a litigation hold letter instructing the other party that a lawsuit is imminent and that party should not destroy documents.

However, in California, there is case law that suggests that the duty to preserve evidence does not arise until a lawsuit is filed and discovery demands for information and/or documents is served. In *New Albertsons Inc. v. Sup. Ct*. (2008) 168 Cal.App.4th 1403, 1430-1431, the Court rejected sanctions for the destruction of video recordings where there was no failure to obey an order compelling discovery. The Court relied on California Code of Civil Procedure sections 2031.310 (e)

and 2031.320(c), which authorizes sanctions only where a party "fails to obey an order compelling a further response or an order compelling an inspection." The Court found no such order in this case. Furthermore, the Court looked at the California Civil Discovery Act as authorizing sanctions only "to the extent authorized by the chapter governing any particular discovery method." There are no discovery methods authorized by the Civil Discovery Act which address destruction of evidence prior to service of a discovery demand.

However, the best course of action is to instruct retention of any potentially relevant documents and information. Under California law there are safe harbor provisions for well managed document retention policies.

Spoliation Issues

"The spoliation of evidence is the intentional or negligent withholding, hiding, altering, or destroying evidence that is relevant to a legal proceeding. Spoliation has two possible consequences: in jurisdictions where the (intentional) act is criminal by statute, it may result in fines and incarceration for the parties who engaged in the spoliation; in jurisdictions where relevant case law precedent has been established, proceedings possibly altered by spoliation may be interpreted under a spoliation inference."

California used to view spoliation as an independent tort. However, in *Cedars-Sinai Med. Ctr. v Superior Court* (1988) 18 Cal. 4th 1, 17, the tort was eliminated and is no longer a viable cause of action.

As presently set forth in Evidence Code section 413, an inference arises is as follows: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's willful suppression of evidence relating thereto." In addition to the evidentiary inference, California discovery laws provide a broad range of sanctions for conduct that amounts to a "misuse of the discovery process." (Cal. Code Civ. Proc. § 2023, subd. (b).) Section 2023 of the Code of Civil Procedure gives examples of misuses of discovery, including "[f]ailing to respond or to submit to an authorized method of discovery." (id., subd. (a)(4)) or "[m]aking an evasive response to discovery." (Id., subd. (a)(6).) Destroying evidence in response to a discovery request after litigation has commenced would surely be a misuse of discovery within the meaning of section 2023, as would such destruction in anticipation of a discovery request.

The sanctions under Code of Civil Procedure section 2023 are potent. They include monetary sanctions, contempt sanctions, issue sanctions ordering that designated facts be taken as established or precluding the offending party from supporting or opposing designated claims or defenses, evidence sanctions prohibiting the offending party from introducing designated matters into evidence, and terminating sanctions that include striking part or all of the pleadings, dismissing part or all of the action, or granting a default judgment against the offending party.

Finally, California Penal Code section 135 creates criminal penalties for spoliation. The code section provides, "Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation

whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor."

Social Media Issues

Evidence relating to social media evidence are subject to the same preservation and spoliation issues as set forth above. Social media can provide a great source for evidence for impeachment purposes as online posts can directly contradict what a witness has said in the past or disprove where a witness was on a given day. Who "friends" or "follows" a party or witness can assist in proving bias, affiliation or notice of a particular act. Social Media has the potential to provide an endless source of evidence that can be used in Court.

As with any piece of evidence at trial, social media evidence must be relevant to be admissible. (Cal. Evid. Code § 350.) "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Cal. Evid. Code § 210.)

Failure to properly authenticate social media evidence could lead to the evidence being found irrelevant. For example, if counsel wants to introduce a blog post but does not provide proper authentication showing that a party was the author of the blog post, the proffered evidence will be considered irrelevant because it does not prove or disprove any disputed fact in the determination of that particular action. (*People v. Beckley* (2010) 185 Cal. App. 4th 509.)

Further, social media evidence is considered to be a writing as defined by California Evidence Code section 250. As such, to be used at trial, it must be properly authenticated. (*People v. Beckley* (2010) 185 Cal. App. 4th 509) California Evidence Code section 1400 provides that "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it to be or (b) the establishment of such facts by any other means provided by law." California Evidence Code section 1401 provides that "(a) Authentication of a writing is required before it may be received into evidence. (b) Authentication of a writing is required before secondary evidence of its contents may be received into evidence." Further, California Evidence Code section 1421 provides that "A writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing."

There are ethical considerations to consider when dealing with social media evidence. California Rule of Professional Conduct 5-200 relating to trial conduct provides that "In presenting a matter to a tribunal, a member: (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth." This is known as the Duty of Candor.

In regard to social media evidence, attorneys must be careful with how they compile the evidence. While simply doing a Google search and printing out what is publicly available complies with ethical rules, there are many ways that social media can run afoul of ethical standards. This would include impersonation to become a "friend" or a "follower" of a party or witness in order to obtain access to online posts. There is also a fine line that must be considered should "contact" be made on social media with a party or a witness. While the California State Bar has not yet made a rule

specific to social media, given the increasing popularity of the medium and the increasing use of social media evidence, these ethical questions must be considered.

Dealing with Law Enforcement Issues

Generally, members of law enforcement are dealt with the same as any other third-party witness under California Law, with the exception of a higher witness fee to secure the testimony of a law enforcement office. However, please note, traffic collision reports are not admissible as evidence in California Courts. (Cal. Veh. Code § 20013.)

4. Describe the legal considerations in your State when defending an action involving truck drivers who may be considered Independent Contractors, Borrowed Servants or Additional Insureds?

California law makes it exceedingly difficult for a motor carrier to distance itself from a driver involved in a traffic collision. Recent decisional (Dynamex Operations W. v. Superior Court (2018) 4 Cal.5th 903) and legislative (Assembly Bill 5 or "AB 5") authority essentially sought to force all motor carriers to treat their drivers as employees as opposed to independent contractors. Currently, AB5 does not apply to California's truckers due to an injunction handed down by a U.S. District Court Judge (see section 7, below). However, even in the absence of AB5, California law heavily favors a finding of "vicarious liability" on the motor carrier in tort settings, even when dealing with independent contractors.

A. To Establish Vicarious Liability of an Employer in Tort Action, the Plaintiff Must Only Prove the Driver was Within the Course and Scope of Employment/Agency at the Time of the Tort.

Even outside of AB5, motor carriers operating in or through California will almost always be vicariously liable for the actions of their negligent driver (employee or independent contractor) in a tort setting.

Under Judicial Council of California Civil Jury Instructions (CACI) 3704, "Existence of Employee Status Disputed," the jury is instructed:

> "In deciding whether [driver] was [motor carrier's] employee, the most important factor is whether [motor carrier] had the right to control how [driver] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker [without cause]. It does not matter whether [motor carrier] exercised the right to control."

There are other relevant factors, but the "right to control" test is powerful, and most motor carriers' have driver handbooks or other such documents which impose company standards or drivers which make it nearly impossible to argue the motor carrier lack the "right to control" the driver.

Similarly, under CACI 3705, "Existence of Agency Relationship Disputed," California juries are instructed:

> The Plaintiff claims that [driver] was [motor carrier's] agent and that [motor carrier] is therefore responsible for [driver's] conduct.
>
> If Plaintiff proves that [motor carrier] gave [driver] authority to act on its behalf, then [driver] was [motor carrier's] agent. This can be shown by words or may be implied by the parties' conduct. This authority cannot be shown by the words of [driver] alone."

Thus, even if a motor carrier is successful in arguing they did not have the "right to control" a driver and that he or she was not an employee, most motor carriers would be vicariously liable on the theory that the independent contractor was acting as an agent at the time of a collision.

b. Vicarious Liability has Narrow Exceptions.

Although California law holds employers liable for negligent acts of employees performed in the course and scope of their employment. There are – arguably – activities a driver can engage in which could take the driver outside the course and scope, even in his or truck.

For example, in Perccolo v. City of Los Angeles (1937) 8 Cal.2d 532, 539, two employees of the Department of Water and Power took a company vehicle to check power lines. They stopped work just before noon and drove the same vehicle to lunch. After eating, they parked the car to read for a short time, and then started to drive back to the place where they could resume their work. They were about a mile from that location when they were involved in an accident. The Court held that in driving to lunch, they were serving their own interests. The Court stated:

> "It is well settled by the authorities that an employee, while taking time away from his work for meals, is not in the service of his employer and that the latter therefore is not responsible for negligence during such periods of absence from work."

The "lunch rule" was essentially unchallenged for 60 years, but was examined and re-affirmed by the Court of Appeal in Baily v. Filco, Inc. (1996) 48 Cal.App.4th 1552, 1566-1567. In that case, an employee was involved in an auto accident when she took an unscheduled 10-15 minute break to go buy cookies to eat at work. The court held the employee was acting outside the scope of her employment since the trip lacked the necessary connection to the employer's enterprise and the employee's duties at work.

Similar results were reached in Martinelli v. Stabnau (1935) 11 Cal.App.2d 38, 39-41 [respondeat superior liability did not apply where the employee was apparently in the field conducting his employer's business until a few minutes before the accident, but the accident happened while he was driving home for lunch]; Adams v. Tuxedo Land Company (1928) 92 Cal.App.266, 268-270 [employer not liable where accident occurred while employee was traveling from his work site to the company owned pumping plant to eat lunch]; Tryer v. Ojai Valley School (1992) 9 Cal.App.4th 1476, 1481-1483 [employer was not vicariously liable for an accident which occurred while the

employee was on a lunch break between work shifts, even though she was driving to her second shift at the time of the accident]; and Helm v. Bagley (1931) 113 Cal. App. 602, 603-605 [no respondeat superior liability where the accident occurred while the employee was proceeding home from one of the branch stores in his district to eat dinner, even though he planned to visit another branch store after dinner].

The lunch rule was affirmed as recently as 2013 in Haliburton Energy Services, Inc. v. Department of Transportation (2013) 220 Cal.App.4th 87, when the Court of Appeal held:

> "For example, the general rule is that, when an employee is traveling to or from lunch, even in the employer's vehicle, and performing no services for the employer, he is not acting within the scope of his employment."

And the result is not somehow different in the trucking industry. In the unreported decision of Reed v. Covenant Transport, Inc. (2002) 2002 WL 31412736, a driver for Covenant Transport struck and killed a pedestrian on a freeway on-ramp in Fontana, California. The driver had arrived in Fontana at around 3:00 p.m. and been told by Covenant not to deliver his load until the following morning. The driver drove his truck to Fontana Truck Town – where food and fuel were available – and there was no evidence he was required to leave Truck Town for any purpose related to his employment. Prior to the incident, the driver was seen arguing with the pedestrian at Truck Town. Later, police found the pedestrian's body on the on-ramp, and later located the driver and his truck about a quarter-mile down the I-10 freeway with blood and hair matching the pedestrian on the underside of his truck.

The Court of Appeal observed that "if the employee substantially deviates from his duties for personal purposes, the employer is not vicariously liable, notwithstanding that the employee is using the employer's property at the time of his tortious act. (citing Lisa M. v. Henry Mayo Newhall Memorial Hospital (1995) 12 Cal.4th 291, 297-299). The Court of Appeal concluded that the evidence established that Covenant's driver was pursuing a personal matter at the time he caused the pedestrian's death, and there was nothing to suggest that the driver's contact with the pedestrian or their argument had something to do with the driver's employment.

c. Drivers using Company Vehicles Are Likely "Permissive Users" and Therefore "Insureds" on the Policy.

In California, every owner of a motor vehicle is liable and responsible for injuries to persons or property resulting from the negligent or wrongful acts or omissions in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner. (California Vehicle Code § 17150). However, California limits liability under this section to $15,000 for the death or injury to one person, or $30,000 for the death or injury to more than one person. (Id.)

Moreover, most insurance policies list "permissive users" as "insureds" on the companies insurance policy, and most insurance policies do not limit liability for acts of the permissive user to $15,000/$30,000 (although such language is permissible if conspicuous in the policy). Thus, even if a driver commits a tort "outside the scope" of employment/agency (e.g., while driving to lunch), he

is still likely an insured on the policy and the self-insured company cannot "wash their hands" of the employee/agent. (Note, there are exceptions to this analysis that would far exceed the scope of this guide.)

5. What is the legal standard in your state for allowing expert testimony on mild traumatic brain injury (mTBI) claims and in what instances have you had success striking experts or claims?

Generally, under California Law, expert testimony on mild traumatic brain injury is subject to the same standards as any medical expert testimony. A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact. (Cal. Evid. Code § 801, subd. (a).) Even so, the expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact. (Bushling v. Fremont Med. Ctr. (2004) 117 Cal. App. 4th 493, 510.) Moreover, an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based. (Kelley v. Trunk (1998) 66 Cal. App. 4th 519.)

In 2015, a San Diego County jury awarded at 24-year-old filmmaker involved in a multi-car accident $17,393,480 in damages. Those damages included a mild/moderate traumatic brain injury and a broken jaw. The plaintiff continued his filmmaking career and finished his Ph.D. during the pendency of the case. The parties settled for an undisclosed amount post-trial.

6. Is a positive post-accident toxicology result admissible in a civil action in your State?

A positive post-accident toxicology report is more likely than not to be admissible. An intermediate appeals court decision, Shannon v. Gourley, (2002) 103 Cal.App.4th 60, 64-65 held that "the foundational showing necessary for the admission of blood-alcohol test results consists of evidence demonstrating the testing device was working properly and a qualified operator correctly administered the test. (*Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133, 140.) One way to meet these requirements is to show the test results were obtained by following the standards prescribed for forensic alcohol analysis in Title 17. 'Compliance with the regulations establishes both a foundation for admission of test results into evidence in any proceeding and a basis for finding such results to be legally sufficient evidence to support the requisite findings in such proceeding.' (*Id.* at p. 142.)"

7. What are some considerations for federally-mandated testing when drivers are Independent Contractors, Borrowed Servants, or Additional Insureds?

Currently, California's "Assembly Bill 5" does not apply to California's truckers due to an injunction handed down by a U.S. District Court Judge. This federal judge ruled "Assembly Bill 5" is preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAA"). The fate of "Assembly Bill 5" and whether it applies to California truckers is currently on appeal before the Ninth Circuit. If the injunction is overturned, then essentially all independent truckers will be

considered employees of the trucking company who retained their transportation services and all federally mandated drug testing rules will apply and be overseen by the hiring trucking company.

On the other hand, if the injunction stays in place then a California trucking company utilizing independent contractors should have a policy to ensure the independent trucker is self-enrolled in a drug testing consortium company such as Consortium Pool. A consortium company provides DOT-required random drug testing of owner operators and independent truckers. Enrollment in a drug testing consortium company guarantees that drivers are randomly selected and tested and the company maintains the results and records.

8. Is there a mandatory ADR requirement in your State and are any local jurisdictions mandating cases to binding or non-binding arbitration?

Yes. California has a mandatory ADR requirement. Upon the filing of the complaint, all plaintiffs are required to serve the particular county's ADR package when the complaint is served on defendants. (California Rules of Court, Rule 3.221(c).) The ADR information packet has information related the mandatory settlement conference, local ADR programs, and other information for ADR within the county where the case will be heard.

California courts also employ what are called mandatory settlement conferences in civil cases. (California Rules of Court, Rule 3.1380.) These are settlement conferences ordered by the court prior to a matter be heard for trial. They are conducted, usually, by sitting judges. Each county has their own rules and procedures as to when and how settlement conferences are conducted.

By statute, the following cases are subject to mandatory non-binding arbitration through a judicial arbitration process: In each superior court with 18 or more authorized judges, all unlimited civil cases where the amount in controversy does not exceed $50,000 as to any plaintiff, in each superior court with fewer than 18 authorized judges that so provides by local rule, all unlimited civil cases where the amount in controversy does not exceed $50,000 as to any plaintiff; All limited civil cases in courts that so provide by local rule; Upon stipulation, any limited or unlimited civil case in any court, regardless of the amount in controversy; and Upon filing of an election by all plaintiffs, any limited or unlimited civil case in any court in which each plaintiff agrees that the arbitration award will not exceed $50,000 as to that plaintiff. (California Rules of Court, Rule 3.1380.)

9. Can corporate deposition testimony be used in support of a motion for summary judgment or other dispositive motion?

Yes. California Code of Civil Procedure section 2025.230 provides that upon a notice with "reasonably particularity" as to the matters upon which the examination will occur, a deponent "shall designate" and produce at deposition the officers, directors, managing agents, employees or agents who are "most qualified to testify on its behalf" as to the matters noticed. The PMQ is required to "make inquiry" of everyone who may possess responsive documents or information within the corporation. That deponent then speaks on behalf of the corporation.

Since PMQ testimony is considered to be the testimony of an entity defendant, the testimony may be read or submitted to the Court as evidence for any reason pursuant to Evidence Code section 1220.

10. What are the rules in your State for contribution claims and does the doctrine of joint and several liability apply?

California is what is known as a "Modified Joint and Several Liability" state. There is joint and several liability for economic damage on negligence claims and several liability for non-economic damages. (Cal. Civ. Code § 1431.)

California allows for contribution by statute. (Cal. Civ. Proc. Code § 875.) A contribution claim stands where there is a judgment rendered jointly against two or more defendants and one tortfeasor has discharged the judgment or paid more than that party's pro-rata share of the judgment. Contribution is not available for intentional acts.

If a tortfeasor settles with an injured party for less than the total amount of damages, and the Court finds that the settlement was made in "good faith" under California Code of Civil Procedure section 877.6, then a claim for equitable contribution is barred but provides offset in the amount of the settlement to subsequent liability of non-settlors. A settling defendant can recover equitable indemnity from a non-settling defendant to the extent the settling defendant has discharged a liability the non-settling defendant should be responsible to pay. The right of contribution can be enforced in a separate lawsuit or as a cross-complaint in lawsuit brought by an injured party. (Caterpillar Tractor Co. v. Teledyne Indus., Inc. (1975) 53 Cal. App. 3d 693.)

11. What are the most dangerous/plaintiff-friendly venues in your State?

The vast majority of California is composed of liberal jurisdictions, particularly counties that contain large metropolitan areas such as Los Angeles and the San Francisco Bay Area. There are pockets of conservative areas in the state, most of which are found in inland rural areas.

12. Is there a cap on punitive damages in your State?

Other than in medical-malpractice cases, California does not cap any type of damages that may be awarded.

13. Admissible evidence regarding medical damages – can the plaintiff seek to recover the amount charged or the amount paid?

All of the law in this area stems from the collateral source rule, which states that a tortfeasor may not benefit from the fact that a claimant has insurance. *Hanif v. Housing Authority*, (1988) 200 Cal.App.3d 635 stands for the proposition that an injured plaintiff is to be compensated for the loss or injury sustained as a result of the tortfeasor's action. However, for the injured plaintiff with medical insurance, she cannot recover more than the amount actually paid by her insurer on her behalf. (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.App.4th 541.) For the uninsured injured plaintiff, whom obtains medical treatment via a lien arrangement, the full billed amount is relevant and admissible as evidence in support of economic and noneconomic damage claims, with the caveat that the plaintiff must present an expert qualified to render an opinion as to the reasonable value of the medical treatment. (*Bermudez v. Ciolek* (2015) 237

Cal.App.4th 1311.) Once a Plaintiff has established the amount of treatment, it is incumbent on the defense to establish through expert testimony that the treatment or charges are unreasonable.

Mechanically, all reductions take place after the jury has awarded damages. The jury is presented with the full medical specials, which the judge subsequently reduces to what was actually paid by the plaintiff's insurance carrier.

To avoid reductions, plaintiffs have begun to seek treatment outside of their insurance plan so that they can present their medical specials at retail rates without subsequent reduction. *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App5th 1566, allows plaintiffs to go outside their insurance plan to seek treatment.

* Mr. Dubrawski would like to thank Austin Smith for his help in researching and compiling this compendium.