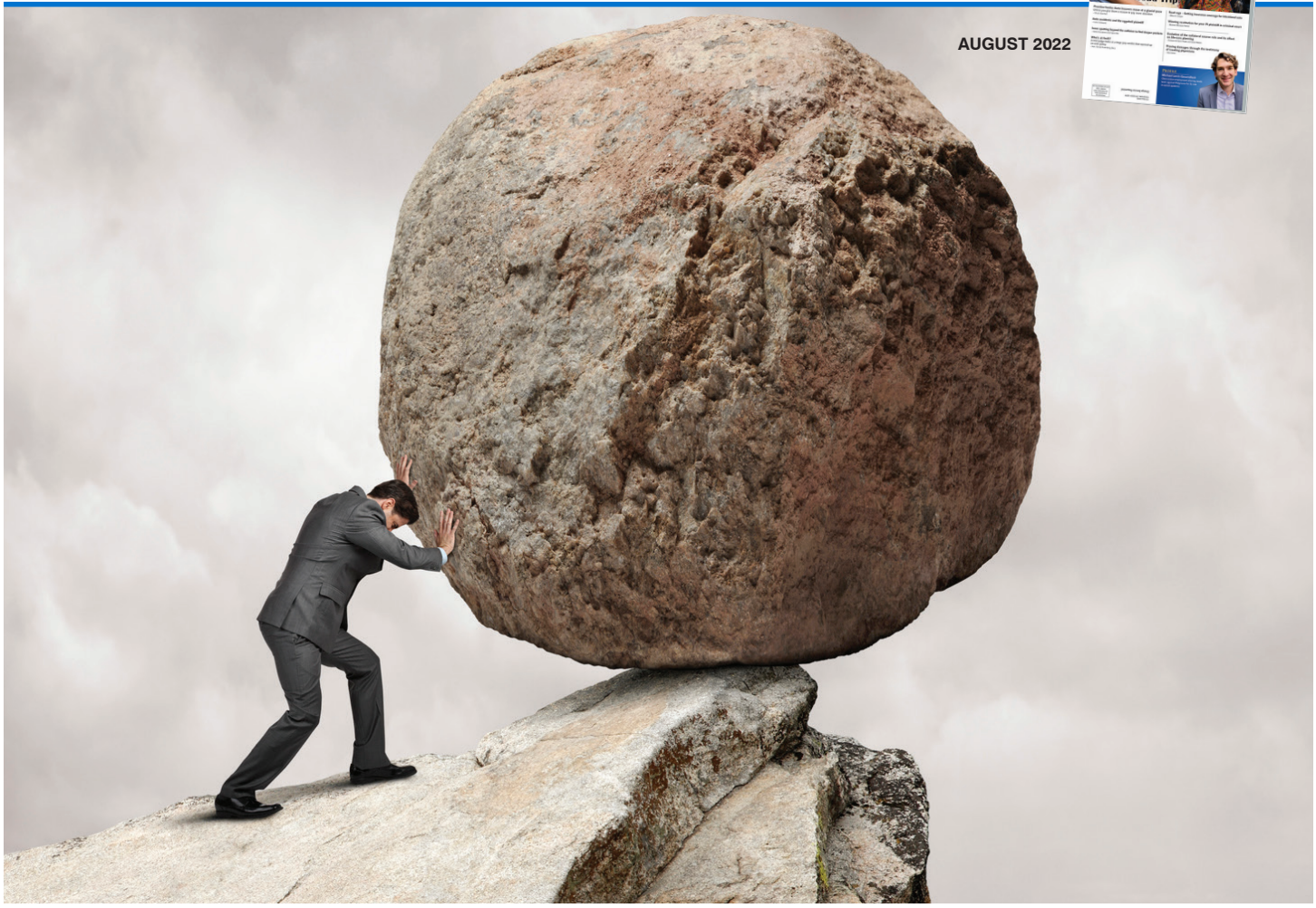

Practice hacks in the COVID age

Insurance companies move at a glacial pace unless you give them a little push forward

By Chuck Geerhart

The problem: It can take forever to get a claim or case resolved due to Covid, court crowding (or lack of funding), and defense delays. I have one case that was set for trial in March 2021 – it's still waiting for a courtroom. How do we plaintiff lawyers move our cases along so our clients can get the justice they deserve? I offer some suggestions here. I'm speaking primarily about injury cases, but these tips could apply to almost any case. I'll be using the words claim or case interchangeably, as some claims can be settled before even becoming cases.

Ways to work around carrier inertia

A first principle: Carriers don't willingly agree to resolve cases, certainly not at full value. They exist to slow you down and conserve their money. If you take the time to do a checklist of everything you will need to make your claim, and then execute on it, it will shave months off the timeline.

By the way, why the emphasis on time? Because clients don't want to be stuck in litigation forever. That doesn't mean we rush it. I believe that before attempting to resolve a claim, lawyers have an obligation to ensure that our client has reached maximum medical improvement, that we have a firm handle on what the residual injuries are, what types of future treatment the client will need and, if indicated, a life care plan.

So, for starters, to break through the inertia, the minute after the client is in the office, you need to do these things:

• Get all police and fire/EMS reports, and photos and video. This can be done via a Public Records Act request – most agencies let you request online. I have lately been amazed how fast some agencies respond, some within 10 days. If it's an auto accident case, the police report will have the insurance policy information you need, so you can open a claim promptly.

• Contact the carrier and open a claim, if one hasn't been opened already.
• Contact the witnesses listed in these reports to confirm they are locatable and will help. There is nothing wrong with the attorney (you) contacting witnesses (unless your goal is to obtain a recorded statement), but if you're jammed for time and it's not a tiny case, use an investigator.
• Very important: Try to get carrier to disclose the policy limits ASAP. If you have a $500K case but there is only a $250K policy, the case may be over very quickly. Some carriers (or their insureds) refuse to disclose policy limits pre-litigation out of some misguided notion that not disclosing will make the case settle more cheaply. In my view, that's asking for a lawsuit where the plaintiff can employ good old form interrogatory 4.1 (which ask for information concerning any policies which cover or may cover plaintiff's claims).

Here's another way — a hack I learned from an SFTLA colleague: If the carrier says the insured won't consent to disclose limits, send the carrier a letter asking it to "tender the policy limits now." You're not saying you will settle for those limits, but you are asking them to offer the policy. This makes some carriers nervous that they could be opening up the policy. For example, if you have a $500K value claim and a $25,000 policy, the carrier really should be tendering the policy limits to settle, and failure to do so is at its own risk.

In low or no insurance situations, look for other assets

If it is a policy limits situation, investigate whether the other party was working for someone, perhaps as a gig economy driver. That will implicate a large commercial policy. This investigation is essential as it can turn what looked like a loser case into a great outcome for your client. I believe it is the standard of care for the claimant's lawyer.

If I'm settling a case that is worth much more than the policy, I have a detailed sworn affidavit I insist the other party sign. It includes financial disclosures, but another key part of this form is a statement that the other party was not driving to or from work, because you can often argue there is an agency relationship not dictated by the going and coming rule. (See, e.g., *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301.) I am glad to provide a sample of the financial affidavit upon request to cgeerhart@gmail.com.

If there are low policy limits, investigate the other party's personal assets. A good investigator can tell you all about the person's real estate holdings, history of bankruptcy, etc. I am not sure an investigator can legally find out how much a person has in his/her bank or investments accounts, but I have seen list-serv postings suggesting they can get that information for a price.

This leads to the question: Even if the tortfeasor has assets, do you and your client really want to chase after those assets? Most tort judgments can be readily discharged

Get your damages numbers in order

Order all medical records and bills. Some providers take months to produce records, so it's essential to make your demand early.

Notify Medicare or Medi-Cal of the claim. For Medi-Cal liens, you can notify the California Department of Health Care Services (DHCS) online. It has been my experience that DHCS takes a month to even open a claim, and months more to give you a lien payoff number. Also, DHCS has the stated policy of not preparing a lien until your client is four months post-treatment. You can't really settle your case until you have those liens. It seems to be a variant of Murphy's Law that if you have a settlement and then try to get the lien from DHCS, it takes twice as long, so why not just do it at the beginning?

Retain the experts you will need to make your case, both liability and damages. If you have a major injury with residuals, it can take months to get the records, more months to have an expert physician see your client, and then even more time for the life care plan. The same goes for a vocational rehab expert or neuro-psych work up.

If my client has reached maximum medical improvement, I like to make a pre-litigation demand. Some carriers are willing to settle sizeable claims without litigation, especially commercial carriers.

My fellow SFTLA board member Sandy Ribera Speed says this: "I've been sending a pseudo-demand letter right off the bat. It's kind of a combo of a letter of representation but includes all the facts/basis for liability. I don't include a demand amount, but rather, I ask if they are interested in engaging in pre-litigation mediation. I usually give them a two-week deadline to get back to me. It's been a mixed bag in terms of responses. Since I do a lot of sex abuse cases, I've had a good portion reach out to say they are interested in pre-litigation mediation. Others, I think, call my bluff and don't think I'll litigate. But if I don't hear from them by the deadline, I file and serve ASAP and then I'll hear from them wanting to settle. I also usually throw a preservation of evidence letter in there somewhere."

What about filing suit to start the clock running?

There are some lawyers who prefer to simply file suit early on, without spending much or any time trying to resolve the case pre-litigation. Filing early does start the clock running toward jury trial and you get to do discovery against the responsible party.

If you are filing, think about the venue, not only for jury pool, but also for the question of whether they are getting trials out. Lately, Alameda County has been having a very difficult time getting cases out. I have been trailing in a non-preference case for a year and a half. I kid you not.

San Francisco has been getting some cases out, but there are currently rumors of more criminal cases being tried in civil court. So, if you have options, perhaps consider the other Bay Area counties for filing suit.

You've heard the adage "Trial dates settle cases!" In the current environment, the adage should be updated to "Selecting a jury settles cases." If your trial date means nothing, and everyone knows you won't really be getting out on the date set, then it will not have the effect of motivating the parties to settle.

Preference motions: The magic bullet

There is one magic bullet to get to trial. The single most valuable tool the trial lawyer has is the preference motion. (See Code Civ. Proc., § 36.) There are basically three ways to get preference. The easiest is where the plaintiff is under age 14. The Court must grant a preference motion based on age under Code of Civil Procedure section 36, subdivision (b). (*Peters v. County of Los Angeles*, (1989) 212 Cal.3d 218, 223-224.)

Under Code of Civil Procedure section 36, subdivision (a), the court "shall" give preference to a person 70 or older if "the health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation." Under the plain language of the statute, the court has some discretion to review the evidentiary showing regarding health.

The third road to preference is under Code of Civil Procedure section 36, subdivision (d), "In its discretion, the court may also grant a motion for preference that is accompanied by clear and convincing medical documentation that concludes that one of the parties suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months, and that satisfies the court that the interests of justice will be served by granting the preference."

If you win a preference motion, under Code of Civil Procedure section 36, subdivision (f), the court must set the case for trial to commence 120 days in the future. This means you are ahead of every non-preference civil case in the county, and you have an excellent chance of trying your case unless there is a Covid wave.

Don't file and forget – serve them promptly

Once you are in litigation, don't delay serving all parties and joining any new parties or DOE defendants you need. If a case isn't fully at issue, courts will kick the case over to a later status conference. This can cost you (and your client) months.

So, serve all defendants promptly. I don't waste time sending the party a Notice and Acknowledgment of receipt. They are rarely returned. If the case has sufficient value, using a process server makes sense. It's also a recoverable cost if the case has to be tried.

My brother trial lawyer, Richard Frischer, offers this hack: Send discovery 20 days after service of complaint (directly to the party, if s/he has appeared in action yet), including a deposition notice for the defendant for the day after written discovery is due.

Keep the pressure on the defense

You will know after getting discovery response what the policy limits are. Sandy Ribera Speed says, "Other 'hacks' I use are early 998s and policy limit demands. I try to have all my ducks in a row in terms of documentation, so opposing counsel has everything they need to evaluate the value of the case early on. Of course, this is a lot easier in sex abuse cases where you are dealing with predominantly emotional distress injuries. I typically have my clients undergo an early psych evaluation from our expert who can provide a report of the recommended care needed and cost of future treatment."

I am a firm believer of setting a deadline on all settlement demands, even those made without an accompanying 998 offer, which has a 30-day expiration under the code. Inevitably, the other side asks for more time, and I'll give it to them, but only about 30 to 60 days. It's good to keep the heat on them.

Have you ever had a case where the defendant is represented by a big civil defense firm? The partner assigns it to an associate, who you would think wants to bill lots of hours. Instead, the associate does nothing and the case languishes for months. Your job is to make this case a priority for that associate, and the partner. Among the ways to do this are to serve a 998 or a policy limits demand, with a deadline. Also, follow up on discovery responses. Make sure they've produced everything. If they have given you incomplete or evasive responses, write a meet and confer letter. If they don't produce a good response, file a discovery motion. That forces them to work, and bill. The client may notice the billing and tell its attorneys to try to settle the case. At the very least, the defense attorneys will have more to put in the standard evaluation reports they have to write to the client, thus educating the client and putting the case into position to resolve sooner.

Once you have the written discovery and if it's a disputed liability case, depose the defendant. If it's a company, depose the person most knowledgeable. Do this early in the case – you may be able to nail down liability in the eyes of the defense, which will prompt them to come to the table for resolution.

It was true before Covid, and now it's gospel: Video-record every deposition you take, especially of treating physicians and experts.

Richard Frischer offers this to keep opposing counsel focused: "Always try to challenge or limit overbroad subpoenas and discovery requests. This seems counterintuitive towards moving a case quickly since it takes more time, but the

carrier will use that overbroad info to support a low valuation of the case or to support further discovery and investigation into side issues, which drags out the litigation until you can convince them they're wrong. More issues equals more delay."

Mediation magic

After you've done all your work to get the case positioned to resolve, you may be able to get the case into mediation. Choose a mediator with a reputation for following up after the initial session in case you don't settle. Take mediation seriously. Prepare a great brief with all the necessary exhibits. If it's an injury case, consider getting high quality graphics of the injuries and surgeries prepared. That shows the defense you are ready for trial.

Again, Richard Frischer weighs in: "This one took me a long time to figure out: Send a mediation brief as early as possible, like a month before mediation, so that the carrier (hopefully) gets the right amount of authority and you don't waste a mediation. If it doesn't settle that day, send a 998 for a little less than your best demand to force the carrier to think about it. Similarly, if you have a high-value case, send some info about that with the complaint or first contact to the insurance company, or else you might get stuck with an adjuster with very little authority."

Richard adds: "Last, be very nice to opposing counsel and adjusters, because they can drag a case out to the day before trial if they don't like you."


Geerhart

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