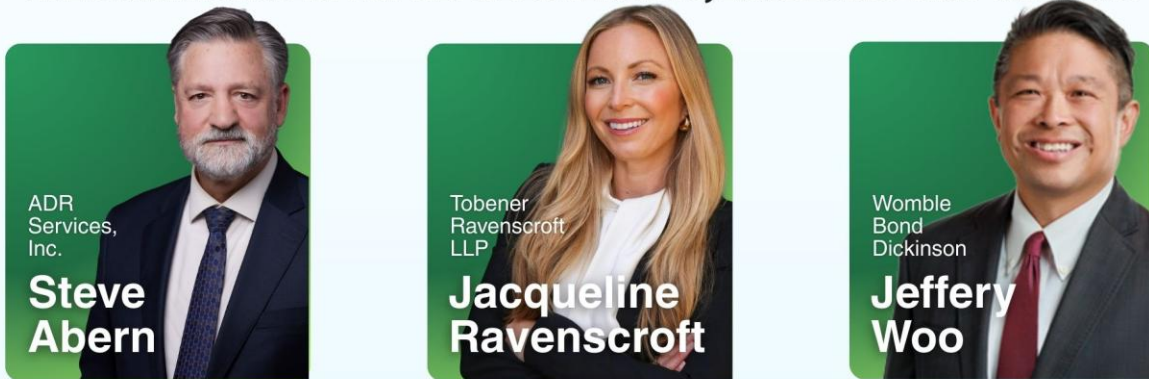




MEDIATING WRONGFUL EVICTION & HABITABILITY CLAIMS

THE DYNAMIC INTERPLAY BETWEEN TENANTS, LANDLORDS AND CARRIERS



MARCH 19, 2026
12 PM - 1PM

1 HOUR CLE CREDIT
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Glossary of Roles & Terms:

Roles in Wrongful Eviction & Habitability Claims

Panel Counsel: Panel counsel is the attorney hired by the defendant's insurance carrier to defend its insured where a covered claim has been sufficiently pled to trigger a defense. That attorney is normally on a preapproved panel of attorneys selected by the carrier to defend its insureds.

Note that the carrier's duty to defend is broader than the duty to indemnify and thus the carrier's offer of a defense does not guarantee that the carrier will indemnify for the claim. Panel counsel's client is the insured, not the carrier. This arrangement is a *tripartite relationship*, where panel counsel owes a duty of confidentiality and of zealous advocacy to the insured, but also has a duty to report to the carrier and evaluate the claim. Panel counsel is precluded from advocating for or against coverage for either the insurer or the insured.

Panel counsel defends both covered and uncovered claims.

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Panel counsel must understand the insurance coverage landscape, although she or he is precluded from being an advocate for either side of a coverage dispute. Ignorance of the coverage landscape creates a risk that a dispositive motion might eliminate covered claims while preserving uncovered claims. It also creates a risk of malpractice in the drafting of CCP §998 offers where an award of attorney's fees is implicated.

Cumis Counsel: Where a defense has been triggered but panel counsel is in a position, through selective discovery and/or in reporting to the carrier, to steer the defense away from indemnity coverage, the insured is entitled to retain counsel of his or her own choosing to defend the lawsuit at the expense of the carrier at the rates normally paid to panel counsel. The relationship between the carrier, the insured and *Cumis* counsel is controlled by Civil Code §2860. The designation "*Cumis* Counsel" derives from the case *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*, (1984) 162 Cal. App. 3d 358. There, the defendant was sued for a battery which was potentially subject to an exclusion in the insurance policy for intentional torts. Due to its ongoing relationship with the carrier, panel counsel was seen to have a conflict of interest, tempting it to steer the claim out of coverage for the benefit of the carrier in order to preserve counsel's lucrative relationship with the carrier. Like panel counsel, *Cumis* Counsel has a duty to report to the carrier and is precluded from advocating for or against coverage for either the insurer or the insured.

Personal Counsel: Where there is a dispute regarding coverage for indemnity but where *Cumis* has not been triggered, the insured is well advised to obtain personal counsel at his or her own expense to oversee the defense. That attorney may take either a passive role or an active role, though panel counsel will remain the attorney of record. Panel counsel should treat personal counsel as speaking for the client, and should run all reporting and case evaluation by personal counsel before publishing it to the carrier. Personal counsel is not limited from advocating for or against coverage and can be instrumental in getting a case settled. Personal counsel can also operate as a back channel between the insured, the carrier and plaintiff's counsel. Importantly, whenever the insured is offered a defense by the carrier subject to a reservation of rights but where *Cumis* counsel has not been offered, panel counsel should recommend that the client retain personal counsel.

Claims Representative: The claims representative is an employee of the company assigned to manage the carrier's response to the claim. The claims rep decides (often in consultation with the carrier's coverage counsel) whether to offer a defense to the claim, hires defense counsel, evaluates the claim and sets reserves, and negotiates the settlement. The claims rep is usually the most significant player on the defense side of a mediation.

The claims rep is almost always far more experienced and sophisticated than a casualty adjuster. They are seasoned professionals, often with specific training regarding insurance coverage. They are usually the least emotional and most pragmatic player at mediation. They typically know the value of claims because they see far more of them than the attorneys do.

It used to be that carriers would have regional CPL (comprehensive personal liability) units in which the claims reps were familiar with the law, the attorneys, the judges and the verdicts. More recently, the carriers have moved to a more national model where a claims rep may be located anywhere in the country. Because landlord-tenant law in California is unique, panel counsel and the mediator often play an important role in educating an out-of-state claims rep regarding the law and case values.

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Reservation of Rights: Where the carrier has offered a defense to a claim but disputes indemnity coverage, it must set forth the specific rationale for that dispute in a letter to the insured. That letter is commonly referred to as a reservation of rights. It functions as a notice to the insured. Any coverage concern not set forth in the letter may be deemed waived for lack of notice. The letter should be considered a *confidential* communication and should not be disclosed to opposing counsel absent permission from both the carrier and the insured. That said, it is frequently desirable for the defense to share the Reservation of Rights with plaintiff's counsel, as limitations on coverage are important to plaintiff's calculus as to the settlement value of his or her claim.

Declaratory Relief Action: If a matter in which coverage is disputed goes to verdict for the plaintiff, the defendant will present the judgment to the carrier and demand that it be paid. The carrier then has the option of either paying it despite its coverage reservations, or filing an action (typically in federal court) asking the court to declare which claims and damages reflected in the judgment are covered. Both the insured and the plaintiff in the underlying action will be named as defendants in that action. Note that a declaratory relief action involves significant uncertainty, delay and expense for all involved. Consequently, the potential for a declaratory relief action can be used as a potent inflection point in settlement negotiations.

Statutory Penalties: Many local rent control ordinances provide for statutory penalties in the event of an unlawful eviction or tenant harassment. Those provisions are typically for a mandatory award of treble damages to be imposed by the court after the matter has gone to verdict. Typically, the jury is not to be told about the potential for a treble damages award. Several state statutes - such as Civil Code Sections 1942.4 and 1942.5 - also provide for mandatory penalties.

Many insurance policies do not contain specific exclusions for statutory penalties. Insurance carriers nevertheless typically deny coverage for statutory penalties on the ground that they are not damages, relying on *Bullock v. Maryland Casualty Co.* (2001) 85 Cal.App.4th 1435, 1448–1449.

Note that punitive damages are distinct from statutory penalties and are never covered as a matter of law.

Attorney's Fees Awards: Many leases provide for an award of attorney's fees to the prevailing party in any action arising from the lease. Counsel should always be aware whether the lease in the matter they are litigating contains such a provision.

Many newer leases either omit the fees provision, or limit the fees to a specific dollar amount, or make the award contingent upon whether the plaintiff has requested or the defendant has declined pre-litigation mediation. Fees provisions in leases are reciprocal as a matter of law whether or not they are drafted as being unilateral.

Many local rent control ordinances and state statutes relating to landlord-tenant matters also provide for an award of attorney's fees, either to the prevailing party or to a prevailing plaintiff. While those provisions are typically mandatory, such provisions are not generally considered statutory penalties, but are instead classified as a form of costs awarded to the prevailing party or plaintiff. Note that lease limitations on attorney fees awards apply only to contractual damages, not to fees awards provided for in statutes and ordinances.

Whether an insurance policy covers an award of attorney's fees depends on its supplementary payments provision. Typically, those provisions provide that "we pay costs taxed against the

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insured in any suit we defend.” An award of attorney’s fees against the insured qualifies as such costs. More recently, policies will specifically exclude an award of the opposing party’s attorney’s fees from the supplementary payments provision.

Because the attorney’s fees are a potent value driver, often eclipsing the damages, it behooves all counsel and the mediator to understand whether there is coverage for such an award.

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