Katherine Gallo, Esq.
Discovery Referee, Special Master, and Mediator
1-650-571-1011

WHAT IS WRONG WITH THE CURRENT CMO PROCESS IN CONSTRUCTION LITIGATION? And yes, there is a better way!

By Katherine Gallo

At the 22nd Annual West Coast Casualty Seminar, Plaintiff counsel Michael Kennedy, General Contractor Counsel Matthew Hawk, Subcontractor Counsel Brian Sanders, Claims Manager James Rzpecki and I presented a new protocol for how to litigate construction defect cases. This new protocol is in compliance with the Code of Civil Procedure as well as the current case law. But, more importantly these new Case Management Orders address the concerns that the parties have with the current process and provides them with admissible evidence in order to adequately evaluate their case and be prepared to have a meaningful mediation within six months of the litigation.

In preparing for the seminar, the panel obtained comments from parties, judges and special masters regarding current Special Master Case Management Orders. This included:

> *"**We are overworking those special masters that are effective to the point they don't become effective**." Plaintiff Counsel*
>
> ***"It implies you are going to settle and you lose your threat and leverage that you can defense the case."** General Contractor Attorney*
>
> *"**We have a term for it – A.I. Extortion!"** Subcontractor Attorney*
>
> **"Insurance Companies are not manned to handle multiple mediations."** Claims Manager
>
> ***"I open discovery only when settlement doesn't happen. Then I let the parties bombard each other with discovery until they come back to the table."*** Special Master
>
> **"*I have to monitor them to make sure the case is moving along. If it is not moving along then I make them move it along*.** Superior Court Complex Judge

969G Edgewater Blvd., Suite 345 Foster City, CA 94404
phone: (650)571-1011 fax: (650)571-0793 klgallo@discoveryreferee.com
Discovery Blog www.resolvingdiscoverydisputes.com

Katherine Gallo, Esq.
Discovery Referee, Special Master, and Mediator
1-650-571-1011

The panel then identified problems with many of the Case Management Orders being used, as they are not in compliance with statutory authority and current case law. Some of these provisions included:

- Deeming all answers with affirmative defenses and cross-complaints filed contrary to C.C.P. § 431.30
- Requiring disclosure of information not permitted by the Discovery Act. (i.e., Statement of Claims and expert meetings)
- Allowing non-code compliant discovery requests and responses. See C.C.P. 2030.060, 2031.060 and 2031.220-240.
- Staying discovery. See my blog "*You Have the Right to Conduct Discovery*"
- Conducting settlement conferences while controlling case management and discovery. See California Rules of Court, Rule 3.900,Rule 3.920 and Rule 3.1380
- Applying the mediation privilege to settlement conferences. See Ev.C. §1117
- Requiring payment for conducting mandatory settlement conferences. See C.C.P. §645.1
- Cloaking all communications in the mediation privilege making nothing admissible. Ev.C. §1125
- Violating the mediation privilege by communicating with the court. See Ev.C. §1119, 1121
- The ability to rule on good faith settlements when only the court has the power. See *Aetna Life Insurance v. Superior Court* (1986) 182 CA3d 431
- The ability to issue sanctions for non-compliance of the CMO when only the court can do. See *Barrientos v. City of Los Angeles* (1994) 30 Cal App 4th 63
- Not requiring a report to the court within 20 days after a hearing as required by C.C.P. §643

969G Edgewater Blvd., Suite 345 Foster City, CA 94404
phone: (650)571-1011 fax: (650)571-0793 klgallo@discoveryreferee.com
Discovery Blog www.resolvingdiscoverydisputes.com

Katherine Gallo, Esq.
Discovery Referee, Special Master, and Mediator
1-650-571-1011

It is difficult to obtain credible, admissible evidence of liability and damages to more accurately evaluate case.

- Cases are incapable of being resolved early.
- Attorneys and claims adjusters attending multiple unproductive Mandatory Settlement Conferences.
- Not enough time to conduct meaningful discovery as discovery usually opens too close to trial and usually limited to depositions.
- Can't file dispositive motions.
- Trial dates not maintained.

The panel then presented **three new Case Management Orders:**

Construction CMO #1 outlines the battle plan for the first 180 days of litigation with the goal of having a meaningful and hopefully successful mediation.

Construction CMO #2 outlines how to precede with a discovery plan with discovery targeted managed and controlled.

Construction CMO # 3 outlines the discovery deadlines for the last year before trial. They have been specifically modified for a complex construction case that is expert intensive.

The **philosophy of these Case Management Orders** is that:

- Settlement is advanced simultaneously with trial preparation, instead of sequentially.
- The parties, not the Special Master or mediator, will control the settlement and evaluation process.
- The discovery referee/case manager's primary client is the court.

969G Edgewater Blvd., Suite 345 Foster City, CA 94404
phone: (650)571-1011 fax: (650)571-0793 e-mail: klgallo@discoveryreferee.com
Discovery Blog: www.resolvingdiscoverydisputes.com

Katherine Gallo, Esq.
Discovery Referee, Special Master, and Mediator
1-650-571-1011

- The mediator's primary client is the settlement.
- These Case Management Orders are compliant with the Code of Civil Procedures and current case law.
- The panel endorsed this new protocol for the following reasons:
- Plaintiffs' Perspective
- When providing admissible evidence to the defense our clients' claims carry more credibility than a Statement of Claims.
- Gives carriers the opportunity to sort out coverage before mediation.

Developer/General Contractors' Perspective

1. Assured that all necessary parties are in and participating early.
2. Verified discovery allows more meaningful mediation.

Subcontractors' Perspective

1. Discovery-only Referee can help subs get information sooner.
2. Claim information based on real, admissible evidence.

Insurance Carriers' Perspective

1. Identifying Insured's exposure early.
2. Claim files can be reserved for the most likely outcome.

You can find the Case Management Orders in Word format for this new protocol at www.discoveryreferee.com\forms.

You may find this blog and additional blogs on California Discovery by Katherine Gallo

969G Edgewater Blvd., Suite 345 Foster City, CA 94404
phone: (650)571-1011 fax: (650)571-0793 e-mail: klgallo@discoveryreferee.com
Discovery Blog: www.resolvingdiscoverydisputes.com

Katherine Gallo, Esq.
Discovery Referee, Special Master, and Mediator
1-650-571-1011

at www.resolvingdiscoverydisputes.com

969G Edgewater Blvd., Suite 345 Foster City, CA 94404
phone: (650)571-1011 fax: (650)571-0793 e-mail: klgallo@discoveryreferee.com
Discovery Blog: www.resolvingdiscoverydisputes.com