The 50th Anniversary of Bonne, Bridges, Mueller, O’Keefe & Nichols came and passed quickly. Maybe this is emblematic of life in general. It seems to start slowly but thereafter speeds up with each passing year. A little like the movie “The Life of Benjamin Button,” except for the fact that the movie’s main character aged in reverse.

So, as we review the past year, we can reflect upon and appreciate the collaborative effort of our administrative staff, secretaries, associate attorneys, and senior mentors, which allowed us to meet the ongoing challenges of our busy trial and administrative law practice. It definitely requires a coordinated effort to comply with not only current court and client guidelines, but to also exercise the judgment and creativity necessary to accomplish an analysis of the pertinent legal and factual issues of each client’s case in our efforts to achieve the best possible client outcome.

Indeed, we must be doing this job reasonably well. Our trial performance this past year resulted in 100 percent defense verdicts. We were equally successful in our administrative law department and appellate department. These accomplishments are in keeping with our 50 years of experience representing the medical profession, health care institutions, and numerous other entities and individuals.

It has become apparent with the passage of time that litigation is experiencing a period of significant change. Technology has become a major part of this change. From computer-generated animation to help explain complex medical issues or to recreate the mechanics of accidents or events, digital presentations to depict a day in the life of a severely injured individual, all of which is designed to provide the trier of fact with a better understanding, or at least a more empathetic understanding, of the impact that their decision will have upon a particular party. This is an aspect of litigation in which the plaintiff’s bar is likely a step ahead of the defense bar, particularly as it relates to the presentation of catastrophic injury cases. Nonetheless, much can still be said for the old-fashioned use of an effective cross-examination and a persuasive oral argument that plants seeds in the minds of rational jurors to help them arrive at a proper and unbiased result. This has been the foundation of Bonne, Bridges’ trial excellence for many years.

What a trial practice should offer lawyers of all ages and levels of experience is the opportunity to be challenged and yet have fun at what they do. There are few endeavors that allow one to interrogate witnesses, whether expert or percipient witnesses, about the details of their lives, experiences, and opinions, in a professional and dignified manner, in an effort to unveil the truth—at least as we perceive the truth. No one should fail to appreciate this very unique and always challenging and entertaining profession. I certainly do not. And at this stage of my own career, I have decided to emulate Benjamin Button and charge forward in reverse.

David J. O’Keefe
President and Managing Shareholder
A Closer Look: Medical Boards, HIPAA and What’s Next for Health Care Providers in 2012

The administrative law practice at Bonne Bridges experienced a tremendously successful year filled with defending clients involved in disciplinary actions, peer reviews, and privacy and security breaches and achieving major medical board victories, among its many representations.

ANY BIG CHANGES THIS YEAR IN ADMINISTRATIVE LAW?
McMahon: We saw a dramatic increase in HIPAA violations and privacy right issues, especially in conjunction with the HITECH Act. Physicians and health care providers face a tremendous amount of exposure in these evolving areas. From stolen computers, lost flash drives and even employees posting patient information on Facebook and other social networking sites, the legal issues connected to medical privacy breaches continue to spread.

Osinoff: I noticed an uptick in peer review and medical staff actions this year, with more reporting by hospitals to the Medical Board. There were also more cases before the nursing board, many of which involved pharmaceutical and dosage issues.

WHAT ADVICE DO YOU HAVE ON HIPPA AND SECURITY BREACHES?
McMahon: We’re wrestling with the downside of the information revolution. As privacy issues become more widely known to patients, there will be more complaints, governmental investigations and law suits. Providers must take security breaches seriously because they face liability for statutory damages even in the absence of actual damages. Clients should contact us at the first sign of a breach so we can aid in conducting a thorough investigation and formulating a plan of action.

Osinoff: I urge clients to take extreme care with electronic medical records. The medical legal context is challenging and the privacy and standards-of-care issues connected to EMR are expanding.

WHAT IS THE EFFECT ON HEALTH CARE PROVIDERS?
Osinoff: In criminal misdemeanor cases, and depending on circumstances, we argue before the board that in a first-offense situation, a single conviction should not be actionable. But all providers must be aware that misdemeanors, like a DUI, can potentially jeopardize their careers.

ANY MAJOR DEVELOPMENTS IN MEDICARE AND MEDI-CAL?
McMahon: I am noticing significant governmental scrutiny of providers with Medicare and Medi-Cal practices. There has been a general increase in prepayment reviews, warning and citation notices, temporary suspensions, and audits for recoveries. As government budgets have tightened, there has been greater vigilance over safeguarding the programs’ integrity.

HOW CAN MEDICARE AND MEDI-CAL PROVIDERS PROTECT THEMSELVES?
McMahon: As always, I seek to minimize clients’ exposure. In some cases, such as in actions brought by U.S. attorneys, there’s the risk of criminal charges, and in many non-criminal actions, the threat of license revocation looms. Clients must balance protecting their Constitutional rights with providing accurate, responsive information to regulators. Having counsel guide them through this process, as early as the audit stage, can improve the outcome.

WHAT OTHER DEVELOPMENTS ARE ON YOUR RADAR?
Osinoff: Since the Medical Board’s diversion program was eliminated, substance abuse by physicians has been handled through the disciplinary process. There has also been an increase in criminal misdemeanor cases reported to the board, such as DUI cases, and that has increased risks for clients, depending on the particular circumstances of the DUI and any other adverse events.
DID YOU WORK ON ANY MEMORABLE CASES THIS YEAR?
Osinoff: Recently, we have obtained several favorable rulings from the Medical Board involving physicians charged with sexual relations with patients, allowing them to keep their licenses without any suspension. We also recently helped two dentists overturn license revocations connected to billing issues with Denti-Cal. That preserved the viability of several professional practices, staff, and families.

McMahon: We had tremendous successes in Medicare appeals this year, including for several freestanding, large radiation oncology centers. I obtained reversals of several major claim denials, which led to an unambiguous reinterpretation of covered services. I was also proud of the many physicians I was able to help become reactivated from suspended status, as well as my effective challenges to the scope of overpayment audits of practitioners by private insurers. Representing physicians in Medical Board matters, I achieved several noteworthy victories, including an argument to the Medical Board itself which resulted in a dismissal of the accusation against the client.

WHAT EVENTS DO YOU FORESEE IN 2012?
McMahon: On the federal front, I am anxious to see the Supreme Court’s review of President Obama’s health care plan and the ramifications of the Court’s decision. On the state level, recently the California Department of Health Care Services has been more aggressive in its review/sanction process. I expect that to continue.

Osinoff: The use of electronic medical records is bourgeoning. Physicians must take great care to update their templates and be meticulous in how they transfer previous notes. There have been recent cases where cumulative notes have created complicated scenarios during physicians’ interviews with the Medical Board. I anticipate more such issues as the adoption of EMR grows. I am also underscoring the importance of physicians diligently running CURES reports on patients to whom they prescribe controlled substances. Alleged violations in this area are arising with greater frequency.

WHAT ARE YOU LOOKING FORWARD TO IN 2012?
McMahon: It has become harder to practice medicine and I really feel for our clients. I’d like to see more education for the Legislature and Congress about the multitude of effects and expenses caused by changes in the law. The more expensive it is for doctors to practice, the more expensive health care will be. I’d like to increase efforts to highlight the practical and financial consequences of the changes in health care law.

Osinoff: Legislators respond to pressure from the press and certain consumer groups that have become the public’s voice, all of which make it more difficult for physicians and other licensees. There is little sympathy for physicians and nurses in the press, which is always clamoring for greater and swifter disciplinary measures. Documentation requirements for physicians are also ever-increasing. The depth of our practice reflects our clients’ demands for experienced, effective counsel. We stand between the State and the licensees, in order to argue for fair treatment for our clients. Toward this end, we are working directly with the enforcement and probation arms of the Medical Board, and we have cases pending in federal and state courts to attempt to reduce the adverse impact of disciplinary actions upon physicians and licensees.

S P O T L I G H T

Meeting Hospital Medical Staff Challenges in 2012

Peer review and Medical staff actions are often the first formal arena for incidents involving adverse patient outcomes or addressing disruptive physicians (and other practitioners or staff) in hospital settings. Effective legal guidance at this stage can help prevent disciplinary action and decrease or avoid future litigation.

Veteran Bonne Bridges attorney Sara Hersh has been defending physicians, dentists, nurses, therapists and other health care professionals in malpractice cases, at hearings, arbitrations, jury trials and before licensing boards for the past 22 years. In her practice, Sara has focused on advising the medical staffs of numerous hospitals and clinics. She provides us with a glimpse into the current legal challenges that medical staffs face.

How do you work with medical staffs?
The medical staff is a self-governing legal entity, which is responsible for the safe and competent medical treatment rendered by its staff physicians. It is accountable to the hospital’s governing body. I guide medical staffs in their peer review process and formal hearing process. This can entail helping them make recommendations for changes or modifications to a physician’s hospital practice. Medical staffs may also consider when indicated, whether protctoring or discipline is the course to follow.

Any new developments for medical staffs in the past year?
I have noticed an increase in the number of complaints brought before medical staffs and reported to the Medical Board. Also, there is an increase in negative publicity that some physicians and practices have received, which in turn has spurred more people to come forward with complaints to the medical staff, hospital administration, and the Medical Board.

What has been keeping you and your clients busy?
Compliance with changes in statutes and requirements by accreditation bodies, continue to be significant issues for clients. Hospital programs interface with the Medical Staff. For example, I am working with one major hospital’s medical staff in its launch of a residency program to ensure the training program is fully compliant and the extensive documentation to the approving entity is complete. I work with medical staffs to help them balance the numerous concerns of patients, hospital administration, hospital personnel, individual physicians, and accreditation bodies.
With the close of 2011, some notable cases to remember include the following:

**SECTION 998 OFFERS**

In *Martinez v. Los Angeles County Metropolitan Transportation Authority* (2011) 195 Cal.App.4th 1038, 1041, the California Court of Appeal, Second Appellate District, Division One held that where a *Code of Civil Procedure* § 998 Offer to Compromise provides that each party is to bear its own costs, the use of the language “costs” refers to all costs included in *Code of Civil Procedure* § 1033.5, including attorneys fees. The defendant served a Section 998 Offer, which included that each party was to bear its own costs. After acceptance of the Section 998 Offer, the plaintiff filed a Motion for Attorneys Fees, seeking to collect attorneys fees under the Americans with Disabilities Act and other California statutes. The trial court denied the motion, and the Court of Appeal affirmed. The *Martinez* Court noted that its reasoning is consistent with the holding in *Engle v. Copenbarger v. Copenbarger, LLP* (2007) 157 Cal.App.4th 165, 169 — “a party who secures a recovery by accepting a section 998 offer is entitled to costs and [attorneys] fees unless they are excluded by the offer.” **TIP: To be crystal clear, if the intent is to waive attorneys fees and costs, say it.**

In *Puerta v. Torres* (2011) 195 Cal.App.4th 1267, 1273, the California Court of Appeal, Fourth Appellate District, Division Three held that to be valid, a *Code of Civil Procedure* § 998 Offer to Compromise must contain “a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted.” For example, the court referenced the Judicial Council Section 998 Offer (CIV-090), which includes a signature line to indicate acceptance. The court also noted that a “sentence in the offer stating that acceptance could be indicated by return letter might be equally acceptable.” After a bench trial, the trial court found in favor of the defendant, and ordered the plaintiff to pay costs under Section 998. The plaintiff appealed, arguing that the defendant’s Section 998 Offer was invalid, for failing to include language regarding a provision for acceptance. The Court of Appeal reversed the portion of the judgment requiring the plaintiff to pay the defendant’s expert witness fees, as mandatory language was missing. **TIP: Add a signature line for acceptance to your Section 998 Offers.**

**MOTIONS FOR SUMMARY JUDGMENT**

In *Shugart v. The Regents of the University of California* (2011) 199 Cal.App.4th 499, 506, the California Court of Appeal, Second Appellate District, Division Eight, addressed *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735. In *Garibay*, summary judgment entered in favor of the defendant doctor in a medical malpractice case was reversed, with a finding that the expert declaration submitted in support of the defendant doctor’s motion lacked foundation, as the motion did not include authenticated copies of the medical records on which the expert had relied. In *Shugart*, the defendant doctor’s Motion for Summary Judgment was granted, the trial court ruling that the plaintiff’s expert witness declaration in opposition to the motion had no evidentiary value because the medical records the plaintiff’s expert witness relied upon had not been submitted to the court. The Court of Appeal reversed and remanded, finding that the *Garibay* case does not require the party opposing a Motion for Summary Judgment to submit the medical records upon which the opposing expert witness relied, provided such medical records are already before the court. The *Shugart* Court reasoned that the medical records relied upon by the plaintiff’s expert witness had already been authenticated by the defendant doctor — “the party with the statutory initial burden of production on summary judgment.” Id. at 505. Thus, the plaintiff’s expert witness declaration had evidentiary value, triable issues of material fact existed, and the Motion for Summary Judgment should have been denied. **TIP: If you are the moving party, authenticate the records your expert witness relied upon; it is your burden, not the opposing party’s burden; don’t object where you have already authenticated the records.**

**PAST MEDICAL EXPENSES**

In *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 565-568, the California Supreme Court held that an injured plaintiff may recover past medical expenses which are “no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial.” The plaintiff was injured in an automobile accident caused by a driver for the defendant. At trial, the defendant conceded liability and the necessity of the medical treatment plaintiff had received. The defendant, however, contested the amounts of the plaintiff’s damages. With regard to past medical expenses, the jury returned a verdict awarding plaintiff the amount billed for her medical care. The defendant made a post-trial motion to reduce the past medical expenses by the amount “written-off” by the plaintiff’s medical providers. The trial court granted the defendant’s motion; the Court of Appeal reversed, finding that the trial court’s reduction violated the collateral source rule; and the California Supreme Court reversed the judgment of the Court of Appeal. In concluding that the trial court’s reduction was appropriate, the *Howell* Court reasoned that the discount medical providers offer their insurers “is not a benefit provided to the plaintiff in compensation for his or her injuries.” The Court noted that in so holding, the collateral source rule is not modified. For instance, in an action alleging professional negligence by a health care provider, evidence of indemnity payments to the plaintiff, and premiums paid by the plaintiff, remain admissible per *Civil Code* § 3333.1. **TIP: A plaintiff cannot recover for write-offs by his medical providers.**

Vangi Johnson is a Certified Appellate Specialist, State Bar of California, Board of Legal Specialization, and the Chair of the firm’s Appellate Department. For further information contact vjohnson@bonnebridges.com. Look forward to regular updates about notable cases in 2012.
giving back

At Bonne Bridges, we recognize that our obligations extend not only to our clients but to our communities as well. The firm and its lawyers and staff give generously of their time, financial support, expertise and leadership skills in order to give back to the communities in which we live and work. Areas of Bonne Bridges’ commitment to the community include, but are not limited to:

- Children’s Hospital of Orange County
- Children’s Hospital of Los Angeles
- Cystic Fibrosis Foundation
- Foundation of the American College of Trial Lawyers
- Los Angeles County Bar Foundation
- Marymount High School
- UCLA School of Law
- Venice Family Clinic
- Women’s Lawyer Association of Los Angeles

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All of the hard work and dedication from the employees at Bonne Bridges is very much appreciated. A special “Thank you” goes to the following outstanding employees celebrating anniversaries with Bonne Bridges.

50 years
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Mary Kern  Legal Assistant, LA
Shaunna Morales  Administration, LA
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15 years
Elizabeth Alanis  Reception, LA

10 years
Rosalba Castillo  Accounting Clerk, LA
Olive Del Rosario  Accounting Clerk, LA
Poppy Holguin  Director of Marketing, LA

5 years
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Sara Hersh  Attorney, LA

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