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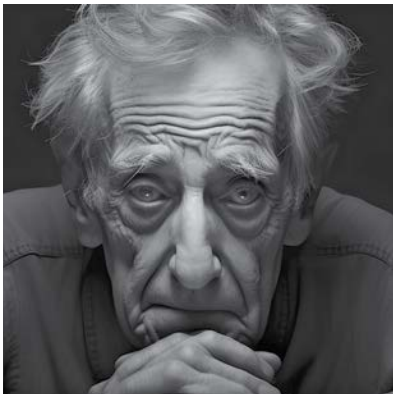

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PRESIDENT'S MESSAGE

NINOS P. SAROUKHANIOFF
2023 President

It is an honor to address you once again as we gather for the second time during my term as the President of this esteemed organization. I am truly grateful for the trust and confidence you have placed in me, and I am committed to serving you to the best of my abilities.

Throughout this term, our focus remains on advancing the mission of the Association of Southern California Defense Counsel – to promote excellence in civil defense litigation and support the professional development of our members.

On Thursday, June 15, I experienced one of the most thrilling moments in my legal career when I was part of a group of representatives from the California Defense Counsel (CDC), the Association of Defense Counsel of Northern California and Nevada (ADCNCN) and the ASCDC, and Mike Belote that had the privilege of meeting with California Chief Justice Patricia Guerrero and her staff at her office in San Francisco. The purpose of the meeting was to address several important issues concerning our associations and the legal profession. Some of the highlights of our discussion were as follows:

Court Reporter Shortage: We raised concerns about the shortage of court reporters and the potential impact on the timely administration of justice. The Chief Justice and her staff attentively listened to our concerns and engaged in a constructive dialogue.

Remote Appearances: The topic of remote appearances was discussed, focusing on the benefits, challenges, and potential reforms in this area. We emphasized the importance of striking a balance between accessibility and preserving due process rights.

Case Thresholds: We had the opportunity to address the issue of case thresholds and their impact on litigation. The Chief Justice and her staff showed genuine interest in understanding the perspectives of our associations and the potential implications of any changes to existing thresholds.

Discovery Reforms: We discussed the need for meaningful discovery reforms to streamline the process, reduce costs, and ensure fairness. Our representatives articulated our members' concerns, and the Chief Justice expressed her willingness to explore potential improvements.

Informal Discovery Conferences: We highlighted the benefits of informal discovery conferences and their potential to promote efficient and effective case management. The Chief Justice and her staff demonstrated a keen interest in this matter and expressed openness to exploring the feasibility of implementing such conferences.

State Bar Paraprofessional and Sandbox Working Groups: We had the opportunity to discuss the State Bar Paraprofessional and Sandbox Working Groups and their role in advancing the legal profession. The Chief Justice and her staff acknowledged the significance of these initiatives and encouraged further collaboration between our associations and the working groups.

We consider the meeting with Chief Justice Guerrero and her staff to be of immense value, as it provided an opportunity for open dialogue and mutual understanding. We are grateful for the ongoing tradition of this meeting, and we extend our appreciation to Mike Belote for his efforts in facilitating and preserving this important connection. This meeting is an example of the significance of the ASCDC and our sister associations, CDC and ADCNCN providing you and your clients a voice at the highest levels of our government and court system. So, the next time someone who is not a member of the ASCDC asks you why they should become members, feel free to let them know about this meeting.

In the remainder of this year, I have outlined three key pillars that will guide our efforts:

Advocacy: As defense counsel, we play a vital role in upholding the principles of justice and ensuring fair and balanced

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CAPITOL COMMENT

MICHAEL D. BELOTE
Legislative Advocate, California Defense Counsel

A Measley $30 Billion?

2023 was a momentous year on legal issues in the California legislature, with new law on early discovery, arbitration stays, defense experts on medical causation issues, remote appearances in civil cases, and much more. Virtually every area of defense practice was implicated in one or more bills signed into law by Governor Newsom, with most of the bills effective on the first of this year. One bill alone, SB 235 (Umberg), moved California discovery law closer to the Federal Rules of Civil Procedure and was arguably biggest change in the California law of civil procedure in decades.

As we begin 2024, the second year of the current 2023-2024 two-year session in Sacramento, the one issue overarching everything is the condition of the state budget. It seems like yesterday that elected officials were blessed with a budget *surplus* approaching $100 billion, larger than the total budgets of many other states combined. In the blink of an eye, the Governor is now confronting a budget deficit which he puts at $38 billion, while the state's Legislative Analyst pegs it at $68 billion. They are only $30 billion apart!

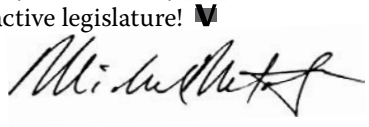
Regardless of who's number is correct, the psychology has flipped in Sacramento, and groups are now bracing for new fiscal challenges. Questions also are being asked, how did the situation change so quickly? Was it incompetence, fraud, or what? The answer is far less incendiary: the state budget is dangerously dependent upon capital gains realized by wealthy residents, and when the stock market corrects, capital gains go down, as do taxes paid by investors. The math is as simple as it is shocking. Nearly 50% of all income taxes are paid by the top 1% of state taxpayers (roughly $1 million on joint returns) and approximately 70% of state revenue comes from income taxes. 50% times 70% means that wealthy Californians are responsible for 35% of state revenue, so changes in the stock market can have very sudden impacts on the state budget.

No California governor has yet figured out how to smooth out this revenue "volatility." The reason that this merits discussion in this column, besides the fear of budget cuts for the courts, is that one of the "solutions" which is discussed every time the state budget turns red is to broaden the sales tax base, by taxing services which are not presently taxed. To be clear, *there is no sales tax on services proposal pending in the California legislature at this time;* but a prolonged downturn resulting from a national recession which may or may not occur carries with it the risk of the sales tax issue again being raised.

The problem is compounded by the fact that most current state legislators have only served in times of plenty. To put it mildly, parceling out pain is far less pleasant than distributing largesse. Over one-quarter of the California legislature was newly elected in November 2022, and approximately one-third of all seats in the Assembly and Senate will change this November. By January 2025, well over half of the legislature will be brand-new or nearly-new, and completely new to state budget challenges.

The new year also brings with it important changes in key positions for the defense bar in the Capitol. The Assembly has a new Speaker, Robert Rivas from Hollister, and a new Senate President pro Tem will be installed in early February. The new Senate leader is Mike McGuire from Sonoma County. New leaders bring new committee chairs, and the Assembly now has a new Chair of the all-important Judiciary Committee, Assembly Member Ash Kalra of San Jose. Mr. Kalra has served on the Assembly Judiciary Committee for several years, but his professional background is as a public defender rather than civil practice. Possible changes have not been revealed in the Senate, but our hope is that the current Chair of the Judiciary Committee, Tom Umberg from Santa Ana, will continue.

New bills will be introduced prior to a deadline established in mid-February. Watch this space to learn how defense practice may be affected by proposals from our ever-active legislature!



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Ninos Saroukhanioff

Proust Questionnaire

Get to know your ASCDC President, Ninos Saroukhanioff, as he answers a few of French philosopher, Marcel Proust's questions:

What is your idea of perfect happiness?

Waking up early on a Saturday morning in the Fall. Cleaning up around the house. Grabbing a cup of coffee and watching ESPN College Football Pregame Show from 6 am to 9 am.

What is your greatest fear?

Fear? I know not this word. Seriously, swimming in a lake.

What is the trait you most deplore in yourself?

Being pessimistic.

What is the trait you most deplore in others?

Arrogance.

Which living person do you most admire?

Bob Morgenstern. The epitome of class.

What is your greatest extravagance?

Bourbon.

What is your current state of mind?

Anxious and a bit sad. As I write this, I am dreading the fact that later tonight I will be taking my oldest son, Nicolas, to LAX where he will be flying out to China to spend the next two months studying at Tsinghua University in Beijing.

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What do you consider the most overrated virtue?

Perfectionism.

On what occasion do you lie?

Never. Tee hee.

What do you most dislike about your appearance?

Where do I start?

What is the quality you most like in a man?

Empathy.

Marcel Proust

What is the quality you most like in a woman?

Confidence.

Which words or phrases do you most overuse?

"That's bitchin."

When and where were you happiest?

Coaching my boys' flag football teams.

According to author Joe Bunting, in the late nineteenth century, 14-year-old Marcel Proust completed a list of questions in a journal titled "An Album to Record Thoughts, Feelings, etc." These types of journals were a somewhat popular parlor game amongst the French elite, designed to get to know your friends better. Enjoying the activity, Proust recorded his answers to the same list of questions six years later at the age of 20. Proust went on to become a famous novelist, critic, and essayist. After his death, the journal in which Proust recorded his answers was discovered, and in 2003, it was sold for approximately $115,000. The Proust Questionnaire, as it is now known, reached pop culture status when re-printed in Vanity Fair magazine (beginning in 1993), and several notable celebrities, including Johnny Cash, David Bowie, Carrie Fisher, Ray Charles, Joan Didion, and Sidney Poitier recorded their responses, revealing thoughts on life, love, and regret.

Which talent would you most like to have?

Playing the accordion.

What do you consider your greatest achievement?

Being the father of two amazing young men, Nicolas and Gabriel.

If you were to die and come back as a person or a thing, what would it be?

Ashurbanipal II, the last great king of the Neo-Assyrian Empire. I know, not a nice man.

Where would you most like to live?

The San Fernando Valley. But, a house on the beach wouldn't be bad.

What is your most treasured possession?

My dad's Winged Bull gold pinky ring.

Who are your heroes in real life?

My dad, Victor, and mom, Valla.

What are your favorite names?

Nicolas, Gabriel, and Lori.

How would you like to die?

In my sleep after a fun night out drinking and having fun with family and friends.

What is your motto?

Try hard and have fun.

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for their unwavering friendship and support
and to the members of ASCDC for placing their
trust and confidence in me these past 15 years

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Play Ball!

The Genesis – and Evolution – of Baseball Mediation™

Floyd J. Siegal, Judicate West

(Previously appeared in the September 2023 issue of *Plaintiff* Magazine)

Imagine a voluntary/optional mediation process that *always* results in resolution, *always* manages risk effectively and *always* assures a mutually acceptable outcome.

Seven years ago, I accidentally stumbled into designing just such a process.

I had received a call from plaintiff's counsel asking me to conduct what he referred to as a "binding mediation." Confused, I asked him to explain exactly what he meant because "binding mediation" seemed like an oxymoron to me.

He told me the parties wanted me to serve as mediator, but also wanted me to determine the final outcome if settlement negotiations ended in an impasse.

I declined, because I felt that would turn the mediation process into a de facto arbitration. To me, the guiding principle of mediation is self-determination. The parties decide the outcome, not the mediator. Any process that delegates final decision-making responsibility to the mediator is literally the antithesis of self-determination.

He persisted, telling me both sides preferred that I serve as mediator but that both sides were insistent on a process that would guarantee resolution and closure.

I didn't know it at the time, but I was about to create "Baseball Mediation™."

The Wheels Start to Turn....

Tasked with designing a process that would guarantee resolution and closure, it struck me that the only impediment to reaching a resolution in *every* mediation was the absence of a mechanism – agreed to by the parties in advance – for resolving a final impasse.

As a lawyer and former litigator, I'd been trained to accept the notion that jury trials are society's "default" mechanism for resolving disputes if settlement negotiations between the parties are unsuccessful.

But why? Was there some way to fully and finally resolve an impasse between the parties *without* resorting to trial? A process that would be both cost-effective and easy to implement? A process that could simultaneously manage risk and assure a mutually acceptable outcome?

To satisfy the parties' objective while remaining true to my own convictions, I knew I would have to design a *different* type of mediation process – one that integrated a fail-safe mechanism for resolving an impasse, while still respecting, to the greatest extent possible, the principle of self-determination.

As I pondered how I might accomplish those dual goals, "baseball arbitration" suddenly popped into my head.

Baseball Arbitration Explained

For those who may not be familiar with the term, "baseball arbitration" – also referred to as "final offer arbitration" – derives its name from its use resolving salary disputes in Major League Baseball between a team and one of its players when: (1) the team wants to retain the player, (2) the team and player are not able to reach an agreement upon the player's salary for the upcoming season; (3) the player doesn't yet qualify for free agency; and (4) the player otherwise meets the eligibility requirements for salary arbitration.

In "baseball arbitration," the team and player submit their final proposal to the arbitrator and one another. After considering the evidence and arguments presented by the parties, the arbitrator must choose one proposal or the other. In other words, the arbitrator may not issue an award that differs from the proposals submitted by the parties. Consequently, there are only two possible outcomes – both of which have been generated by the parties themselves.

However, the arbitrator is still the one responsible for making the final decision and must ultimately decide which party wins and which party loses by choosing one of the two proposals. If I was to serve as mediator, that notion was unacceptable to me.

Continued on page 16

Another form of "baseball arbitration" – often referred to as "night baseball arbitration" – differs in the following way: the parties do *not* reveal their proposals to the arbitrator. Instead, the arbitrator considers the evidence and arguments and then issues a merits-based award without knowing which side the award will ultimately favor. In that sense, the arbitrator's award is neutral in its application without being random (as opposed to – for example – flipping a coin, which is also neutral in its application but entirely random). The party whose proposal is closest to the arbitrator's merits-based award is deemed the prevailing party and that party's proposal becomes the actual arbitration award.

Again, there are only two possible outcomes – both generated by the parties.

The brilliance of both "baseball arbitration" and "night baseball arbitration" is threefold:

(1) the parties are incentivized to present their most reasonable proposals, because an unreasonable proposal increases the likelihood the arbitrator's decision will favor the other side; (2) the process enables the parties to effectively manage risk, because each side knows their precise risk once the proposals are exchanged; and (3) the process often results in a negotiated resolution, because the parties usually continue to negotiate after exchanging proposals.

In what I've come to think of as my "Reese's Peanut Butter Cup" moment, I wondered whether I could blend ingredients from "baseball arbitration" and "night baseball arbitration" with ingredients from traditional mediation. I decided to give it a try. And to honor its DNA, I decided to dub the process "Baseball Mediation™."

How Does Baseball Mediation™ Work?

In most respects, Baseball Mediation™ is a conventional mediation process in which the mediator facilitates settlement negotiations following discussions about the facts, liability, damages and risk. The goal, of course, is to reach a negotiated resolution.

If the parties are not able to reach a negotiated resolution, however, Baseball Mediation™ also incorporates a thoughtfully and carefully conceived impasse-breaking mechanism – described in the next section – which is triggered *only* if the parties mutually agree they have reached a final impasse.

Until the parties mutually agree they have reached a *final* impasse, they may elect to resume settlement negotiations by "bidding against themselves." In the immortal words of Yogi Berra, Baseball Mediation™ "ain't over 'til it's over."

If the parties mutually agree they have reached a *final* impasse, the impasse-breaking mechanism is triggered, automatically and immediately resolving the dispute for either plaintiff's final demand or defendant's final offer.

Continued on page 17

By design, Baseball Mediation™ – like its conceptual cousins, "baseball arbitration" and "night baseball arbitration" – limits the possible outcomes to those that have been generated by the parties themselves. Consequently, the parties retain complete and total control over the process *and* the final outcome, instead of outsourcing determination of the final outcome to a jury or an arbitrator. As a result, Baseball Mediation™ eliminates the risk of an unexpected, unreasonable or unacceptable final outcome.

The "Impasse-Breaking" Mechanism

At the outset of the mediation, the mediator engages in private discussions about the case with counsel and the parties. Based upon those discussions, plus review of the mediation briefs and any pre-mediation conferences conducted with counsel, the mediator then takes a few moments to privately and confidentially formulate the following three "projections" and record them on the Baseball Mediation™ Worksheet:

- The minimum amount projected to be within a realistic settlement range ("Projected Minimum");
- The maximum amount projected to be within a realistic settlement range ("Projected Maximum"); and
- The mathematical midpoint between the two ("Projected Midpoint").

Another way to think of the Projected Minimum is the lowest amount a reasonable plaintiff would feel compelled to seriously consider (or the amount a reasonable defendant would be hard-pressed to reject) if received in the form of a Statutory Offer to Compromise pursuant to CCP Section 998 ("998 Offer"). Similarly, another way to think of the Projected Maximum is the *highest* amount a reasonable defendant would feel compelled to seriously consider (or the amount a reasonable plaintiff would be hard-pressed to reject) if received in the form of a 998 Offer.

The mediator's objective is to identify a realistic settlement range and calculate the resulting midpoint, not to substitute his or her subjective value of the claim.

Once completed, the Baseball Mediation™ Worksheet is e-mailed to all counsel, "password-protected" so it cannot yet be opened and reviewed. Thereafter, the Baseball Mediation Worksheet remains in the inbox of counsel – unable to be opened (or, for that matter, altered) – unless and until the parties agree they have reached a final impasse.

If the parties are unable to reach a negotiated resolution and agree they have reached a final impasse, the password is then shared with counsel so they are able to access and review the Baseball Mediation™ Worksheet, with the understanding and agreement by all parties – pursuant to a Stipulation the parties and counsel must execute in advance – that the dispute will automatically and immediately be resolved for either plaintiff's final settlement demand *or* defendant's final settlement offer, whichever is closer to the Projected Midpoint.

In the unlikely event that plaintiff's final settlement demand and defendant's final settlement offer are equidistant from the Projected Midpoint, the dispute is automatically resolved for the Projected Midpoint.

As mentioned above, the process has been carefully designed to insure that the *parties* determine the final outcome of their own dispute. The parties make their own negotiating decisions based upon their own risk analysis and their own risk tolerance – including whether and when to declare a final impasse.

Given that the parties know the possible outcomes before they declare a final impasse, they will only declare a final impasse if they are willing to accept the risk that the other side's final demand or offer is closer to the Projected Midpoint.

Most importantly, the "impasse-breaking" mechanism preserves self-determination – the central tenet of mediation – because the possible outcomes are generated by the parties themselves and, as in "night baseball arbitration," the impasse-breaking mechanism is neutral in its application without being random.

By design, therefore, Baseball Mediation™ simultaneously manages risk, preserves self-determination, guarantees closure and assures a mutually acceptable outcome.

The Evolution of Baseball Mediation™

As originally conceived, the parties were expected to either commit to Baseball Mediation™ before meaningful settlement negotiations took place at mediation or forever forego the process, because the way the parties approach negotiations is likely to change once the parties stipulate to the process.

Many parties, especially insurance carriers, balked – pun intended – at the requirement that they commit to the process before settlement negotiations began because they considered the concept untested and too risky.

To address those concerns, Baseball Mediation™ was tweaked. Instead of

Continued on page 18

having to commit to the process before settlement negotiations begin, the parties are now welcome to agree to the process at any time – whether during the mediation session itself or at any time subsequent to the mediation session if the parties were unable to reach a resolution.

In other words, the use of Baseball Mediation™ was expanded to include use as a *post*-mediation tool to reach a resolution – more or less as a substitute for a Mediator's Proposal.

Today, therefore, the parties are able to agree to Baseball Mediation™ at any point during the natural life cycle of a claim – from pre-litigation thru appeal.

Impasse Reimagined

Perhaps the most noteworthy feature of Baseball Mediation™ is the way in which the concept of *impasse* has been completely reimagined. In Baseball Mediation™, the term no longer denotes a "deadlock" or "stalemate." Rather than meaning "we can't reach an agreement and we refuse to negotiate any further," *impasse* has been redefined to mean "we've negotiated to our respective final positions but are willing to compromise by accepting either outcome." Rather than a declaration that the parties have not been able to reach a resolution, *impasse* has been repurposed so as to trigger the mechanism that establishes the final settlement terms. In other words, *impasse* has literally been transformed from "a *roadblock* to resolution" into "the *pathway* to resolution."

Why is Baseball Mediation™ Effective?

Baseball Mediation™ is effective because it requires the parties to view settlement negotiations through an entirely different prism. While the parties' ultimate objective – as in any mediation – is to reach a *negotiated* resolution, Baseball Mediation™ requires the parties to simultaneously focus on ending negotiations closer to the Projected Midpoint in the event negotiations do *not* result in a settlement. This leads the parties to negotiate more realistically, eliminating unreasonable demands and offers. Put another way, having stipulated they will resolve a final impasse by the agreed-upon protocol, each party is incentivized to present more reasonable demands and offers to the opposing party because an unreasonable demand or offer increases the likelihood that the impasse-breaking mechanism will favor the other side.

Baseball Mediation™ prods the parties to continuously move in the direction of whatever they believe to be the Projected Midpoint. Given that the Projected Midpoint is unknown, it operates as a hidden magnet, drawing the parties toward one another. Consequently, the gap is continually closing, increasing the likelihood the parties will reach a settlement on their own.

Finally, Baseball Mediation™ assures that the outcome will be acceptable to both sides because neither side will declare a final impasse unless they are prepared to accept the possibility that the opposing party's pending demand or offer is closer to the Projected Midpoint. Any party not willing to accept that risk will continue to negotiate, even if it requires "bidding against oneself."

How effective is Baseball Mediation™?

Thus far, Baseball Mediation – which has been used in five, six and seven-figure cases – has been essentially foolproof. In every case in which the process has been used (i.e., *100%* of the time), the parties have either reached a negotiated resolution or closed the gap to less than $50,000 before mutually agreeing they had reached a final impasse, thereby triggering the impasse-breaking mechanism.

Conclusion

In short, Baseball Mediation offers the parties a unique way to simultaneously manage risk, guarantee resolution and assure a mutually acceptable outcome because the parties themselves determine and control the possible outcomes through their settlement negotiations.

Yogi Berra is reported to have also said "It's tough to make predictions, especially about the future." For anyone who also finds that it's tough to predict the future or anyone who simply prefers certainty and closure to uncertainty and risk, it might be time to play ball!

Summary:

Baseball Mediation™ – so-named because it fuses elements derived from baseball arbitration/night baseball arbitration with elements derived from traditional mediation – is a unique dispute-resolution process that incorporates an impasse-breaking mechanism directly into the mediation process.

Floyd J. Siegal

Floyd J. Siegal has been a mediator since 2008 and is celebrating his 10th Anniversary with Judicate West this month. In 2016, he served as president of the Southern California Mediation Association (SCMA). He is also a Distinguished Fellow in the International Academy of Mediators (IAM), and in 2017 served on its Board of Governors/Executive Committee as Membership Chair. His son, Justin, plays drums for *The Scarlet Opera*. Floyd can be reached at *fjs@fjsmediation.com.*

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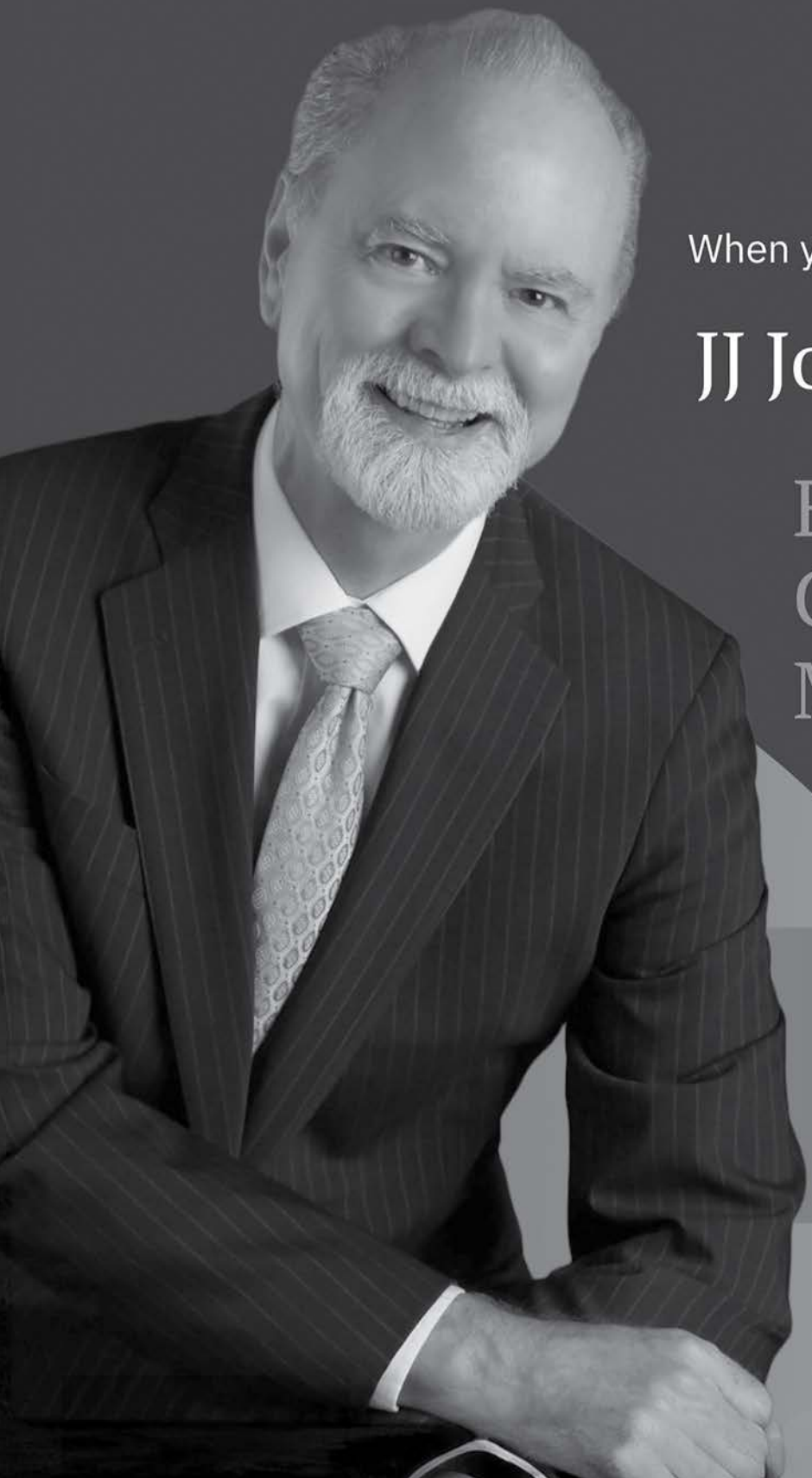

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The Case of the Vanishing Client

Matthew K. Corbin, Aon

Introduction

Good client communication is a bedrock ethics and risk management principle. Failing to communicate with a client is often cited as the number one reason for disciplinary complaints against lawyers. Communication breakdowns are also a significant contributor to malpractice claims, particularly where a client expects one result and gets another. At the same time, communication is a two-way street.

Ideally, a client will promptly respond to communications, cooperate with requests for information, and provide notice about any relevant changes in circumstances. It is hardly unprecedented, though, for a lawyer to represent a difficult client who falls short of this standard. Perhaps the client does not return phone calls or e-mails for an extended period, struggles to keep up with an opponent's increasing demands for documentation, or fails to timely inform the lawyer about a key personal or business development. On the extreme end of this spectrum, the client stops communicating with the lawyer and, despite the lawyer's efforts, the client's whereabouts remain unknown. The client suddenly disappears.

While this dilemma is thankfully uncommon, it still raises difficult questions for the unfortunate lawyer faced with the aftermath. How much time, money, and effort must the lawyer expend to locate the client? What steps must the lawyer take to protect the client's interests when the adversary makes a favorable but time-sensitive settlement offer, client funds remain in the lawyer's trust account, or a third party subpoenas the client's file? What can the lawyer disclose to opposing counsel or a court? When is it appropriate for the lawyer to withdraw from the client's representation?

This Article focuses on lawyers' ethical responsibilities when they are unable to contact or locate their clients.

Reasonable Efforts to Locate a Missing Client

It is settled that a lawyer must make reasonable efforts to locate and contact a missing client. This responsibility is grounded in a lawyer's fiduciary duties to a client and is consistent with a lawyer's ethical obligations under Model Rules 1.3, 1.4, and 1.16(d). (See Model Rules of Prof'l Conduct R. 1.3, 1.4, & 1.16(d) (2022) Cal. Eth. Op. 1989-111, 1989 WL 253259, at *3 (Cal. State Bar, Comm. on Prof'l Responsibility 1989); Colo. Eth. Op. 128, at 3 (Colo. Bar Ass'n 2015).)

A lawyer is required to conduct a reasonably diligent search for the client, not an exhaustive one. What constitutes reasonable efforts will turn on the facts of each case, but relevant factors considered by courts around the country include the stage of the client's representation, the value of the client's case, and the amount of any client funds held by the lawyer. California, however, takes a relatively strict view of lawyers' obligations. (See Cal. Eth. Op. 1989-111, 1989 WL 253259, at *3 ["an attorney should not weigh the value of the client's case or the attorney's desire to withdraw from employment against the costs" because "[i]n all cases the attorney must expend a reasonable amount of time and funds so as to insure that the attorney makes a diligent effort to locate the client"].)

Conducting basic internet searches of public information and attempting to contact the client at known addresses, telephone numbers, and e-mail addresses will normally suffice. Beyond these measures, a lawyer might go a step further and visit the client's last known address; send a letter by both regular mail and certified mail, return receipt requested, to the client's last known address; contact known family, friends, neighbors, work colleagues, medical providers, or other acquaintances who might provide leads to the client's whereabouts; monitor the client's social media accounts and related networking sites; publish a notice in newspapers where the client is likely located; or search available voter registration lists, motor vehicle records, social security records, and forwarding information left with the U.S. postal service. If the client's representation is by nature sensitive or highly private, a lawyer should exercise care in selecting a contact method so as not to embarrass the client. (See Mich. Eth. Op. RI-38, at 1.)

Some authorities suggest that it may be necessary to hire a private investigator or skip-tracing service to locate the client. (See *In re Valsartan*, 2020 U.S. Dist. LEXIS 33373, at *42; Cal. Eth. Op. 1989-111, 1989

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WL 253259, at *2; cf N.M. Adv. Op. 1983-3, at 1 [finding it unnecessary to hire an investigator in a matter involving a minimal amount of client trust funds].)

No matter what amount of time, money, and effort is reasonably required, a lawyer should document in writing her attempts to reach the missing client. A complete and contemporaneously recorded chronology of the lawyer's efforts to contact and locate the client will go a long way if the client ever resurfaces and challenges the lawyer's actions taken in the client's absence.

Reasonable Steps to Protect a Missing Client's Interests

Where a lawyer's efforts to locate a client are unsuccessful, the lawyer must still take reasonable measures to protect the missing client's interests and minimize foreseeable prejudice. (See Model Rules R. 1.2(a), 1.3, & 1.16(d); Cal. Eth. Op. 1989-111, 1989 WL 253259, at *3.) Complicating matters, the lawyer's continued ability to act is constrained by the authority previously granted by the client and duties of candor and truthfulness to opposing counsel and the court. To illustrate these principles, five missing client scenarios frequently tackled by state ethics committees are discussed below.

Meeting Important Litigation Deadlines

It may be impossible for a lawyer to participate in discovery, prepare for a deposition, hearing, or trial, or make critical strategic decisions when a client disappears during litigation. (See, e.g., Cal. Eth. Op. 1989-111, 1989 WL 253259, at *2 [emphasizing that an "attorney is severely limited in the substantive acts the attorney may take on behalf of a client when the client cannot be located"].)

To protect a client's interests when confronted with looming deadlines, a lawyer should seek an extension or continuance whenever possible and continue her efforts to reach the client. Otherwise, a lawyer may ordinarily act on the client's behalf if the lawyer reasonably believes the client has authorized the lawyer to proceed and is relying on the lawyer to do so. (See Model Rules R. 1.2(a); Cal. Eth. Op. 1989-111, 1989 WL 253259, at *2 [a lawyer may file an answer to a complaint to avoid foreseeable prejudice]; see also Alaska Eth. Op. 2011-4, 2011 WL 2410520, at *2 (explaining that a lawyer should file a notice of appeal and may file briefs when the client previously directed the filing of the appeal notice in a criminal matter); Mo. Informal Adv. Op. 20010038, at 1 (Mo. Bar Off. of Chief Disciplinary Couns. 2001) [where a lawyer is representing X, Y, and Z as plaintiffs in a lawsuit, but has been unable to locate or speak with Y and Z about a trial setting despite reasonable efforts to contact them, the lawyer "may need to dismiss without prejudice as to the two 'missing' plaintiffs and proceed with the representation" of X].)

Adding to an already challenging situation, what can the lawyer say to opposing counsel or the court? Is there a duty to inform them about the lawyer's difficulties in locating the client? A lawyer has no affirmative obligation to volunteer to opposing counsel that she cannot locate her client, because the disclosure could be detrimental to the client's interests. (See Model Rules R. 1.6(a); Cal. Eth. Op. 1989-111, 1989 WL 253259, at *2.) A lawyer, however, cannot *conceal* the information if asked directly by the court. (Model Rules R. 3.3; Cal. Eth. Op. 1989-111, 1989 WL 253259, at *2.)

Accepting Settlement Offers

Lawyers are significantly restricted in their ability to settle a lawsuit or other dispute on a missing client's behalf. The consensus among authorities is that a lawyer cannot accept a settlement offer on behalf of a missing client, even if the lawyer believes that the settlement terms are favorable. (Cal. Eth. Op. 2002-160, 2002 WL 31161693, at *2 (Cal. State Bar, Comm. on Prof'l Responsibility 2002); Cal. Eth. Op. 1989-111, 1989 WL 253259, at *2.)

Requiring the missing client's express consent to settle is based on Model Rule 1.2(a), which obligates lawyers to "abide

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by a client's decision whether to settle a matter." (Model Rules R. 1.2(a).) Unless the missing client previously authorized the lawyer to settle on the specific terms proposed by the client's adversary, a lawyer generally cannot accept the settlement offer. (E.g., Cal. Eth. Op. 2002-160, 2002 WL 31161693, at *2; cf. Utah Eth. Op. 78, at 1 ["the lawyer whose client is absent, but who obtained from that client an express power of attorney, may ethically settle the client's claim within the bounds established in the power of attorney"].)

In exceptional cases, such as where a client's potential incapacity is anticipated, a lawyer and client may foresee the need to draft an agreement authorizing a lawyer to accept a settlement offer within specific parameters due to circumstances where it might be impossible for the lawyer to consult with a client about the settlement. The agreement "would most likely need to be phrased in terms of specific, foreseeable circumstances, and not based on the mere occurrence of an unavailable party." (Md. Eth. Op. 2013-08, at 1.)

Preserving Client Trust Account Funds

When a client disappears, a lawyer is ethically obligated to safeguard any client trust account funds in the lawyer's possession. This duty is established under Model Rule 1.15, which governs the safekeeping of property, and requires lawyers to hold client property with the care expected of a professional fiduciary. (Model Rules R. 1.15 & cmt. 1.)

Rule 1.15 is silent as to a lawyer's specific duties concerning the disposition of client trust account funds when the client's whereabouts are unknown. D.C. Eth. Op. 359, at 3. Numerous states ethics committees, however, have filled this void. (E.g., Cal. Eth. Op. 1989-111, 1989 WL 253259, at *3.)

The clear majority of states direct lawyers to hold missing clients' funds in their trust accounts for the length of time required under their state's abandoned or unclaimed property statute. Assuming a lawyer makes reasonable efforts to locate the missing client during this period and maintains complete records of the client's funds, the lawyer may then dispose of the funds as directed by statute.

A few more points on this issue. First, what sort of conduct constitutes "reasonable efforts" to locate a client will pivot on the *amount* of the unclaimed trust account funds. (E.g., Cal. Eth. Op. 1989-111, 1989 WL 253259, at *3 [using client funds to locate client is more likely to be found reasonable if it will not exhust the trust account]; see S.D. Eth. Op. 2019-05, at 3-4 (assessing attorneys' fees for a client search is unreasonable under Rules 1.5 and 1.15 where there is less than $100 in funds].)

Second, a lawyer's report of unclaimed client trust account funds pursuant to a state's abandoned property statute likely falls under the implied authorization exception to client confidentiality because "uniting a client with her funds or property serves the client's interests." (Conn. Eth. Op. 98-18, 1998 WL 988208, at *1-2.) Providing a client's name and related information to the state should also satisfy the confidentiality exception for compliance with the law, although the disclosure should be no greater than necessary to accomplish the intended purpose. (D.C. Eth. Op. 359, at 3; Ky. Eth. Op. E-433, at 3 & fn.7.)

Lastly, a forfeiture clause in an engagement agreement that awards a client's unclaimed trust account funds to the lawyer is unenforceable, regardless of the amount involved. Lawyer are not advised to charge an annual dormancy fee against the client's remaining trust account funds, although some states allow it if the fee approximates a lawyer's actual administrative costs, the fee does not violate any state laws that might preclude such an assessment, and the client consents to the fee in writing. (E.g., 2006 N.C. Eth. Op. 15, 2007 WL

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5768448, at *1 (N.C. State Bar 2007); S.D. Eth. Op. 2019-05, at 5.)

Responding to a Subpoena for the Client File

Lawyers regularly receive subpoenas or other compulsory process for documents and information relating to a client's representation. Upon receiving a subpoena requesting a client's file, a lawyer must promptly notify – or attempt to notify – the client concerning the initial demand. (ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 473, at 1 (2016) [hereinafter ABA Formal Op. 473].) This directive applies with equal force to both current and former clients. (*Id.* at 3.)

A lawyer cannot simply turn over the client's file when the lawyer cannot locate the client after reasonable due diligence. The lawyer's duty of confidentiality to the client still compels her, in the first instance, to try to limit the subpoena on any non-frivolous ground – such as the attorney-client privilege, work product immunity, relevance, or undue burden. In response to a court order requiring production of the client's documents and records, a lawyer should seek appropriate protective orders to limit access to the client's information. (ABA Formal Op. 473, at 7-8.) There is no ethical duty, however, to appeal an adverse court decision on behalf of the missing client. (*Id.*)

Representing Insurance Defense Clients

Special considerations may apply to missing clients in the insurance defense context. Take, for example, an insurance company that retains a lawyer to defend an insured pursuant to an insurance policy providing the insurer the right and duty to defend the insured. In California, the lawyer generally has a tripartite relationship, standing in a dual client role. (Cite.) The lawyer, may be, is unable to communicate with the insured client either initially or at some point during the representation. May the lawyer continue to represent the insured and, if so, to what extent? A trio of state ethics committees have considered this general scenario and reached varying conclusions.

A North Carolina opinion advises that, where an insurance carrier retains a lawyer to represent an insured whose whereabouts are unknown, the lawyer may not appear in court to defend the insured unless authorized by statute, case law, or court order. 2010 N.C. Eth. Op. 1, 2010 WL 2020508, at *1-2 (N.C. State Bar 2010). The opinion states that this is the proper outcome even if the insurance policy grants the insurer authority to choose the insured's legal counsel and to decide whether to settle the case. *Id.*

In contrast, a South Carolina opinion states that where a lawyer is retained by the insurance carrier to defend an insured in litigation and can't locate the insured, the lawyer may appear for and defend the missing insured at the request of the insurance carrier if the insurance policy gives the insurer the right to retain counsel to defend claims made against the insured. S.C. Adv. Op. 19-04, 2019 WL 5853809, at *1 (S.C. Bar, Ethics Advisory Comm. 2019). The opinion reasons that the lawyer may rely on the insurer's instructions to appear and conduct the defense in the absence of any direction from the missing insured, and perhaps even settle the matter within the coverage limits of the policy. *Id.* at *1-2.

On the settlement front, a Colorado opinion addresses whether a lawyer hired by an insurer to defend an insured can settle claims covered under the insurance policy where the insured client cannot be located. Acknowledging the general rule that a lawyer cannot settle a matter without the client's express authorization, the opinion sets forth five conditions that, if present, could warrant the lawyer's settlement of a covered claim against the missing insured:

> (1) the insurance contract clearly gives the insurer the right to settle claims without the consent of the insured, (2) the lawyer has made reasonable efforts to contact the client regarding the settlement proposal, (3) the proposal does not impose obligations on the client to the claimant beyond what the insurer is paying under the settlement, (4) the lawyer determines in the exercise of independent professional judgment that the settlement is appropriate for the client, and (5) the lawyer has not received express instructions to the contrary from the insured client[.]

Colo. Eth. Op. 128, at 9–10.

Collectively, these ethics opinions offer baseline guidance and issue spotting to insurance defense lawyers asked to represent a missing insured. A lawyer in this position should think twice about

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entering an appearance for a missing client (even at the insurer's request) if doing so would be prejudicial or otherwise detrimental to the missing client's interests.

Setting aside any ethical considerations, each jurisdiction's insurance statutes and case law, not to mention the specific terms of the insured's insurance policy, will likely control the lawyer's ability to enter an appearance, prepare a defense, and even settle a matter on behalf of the insured. For example, courts commonly reason that an insured consents to representation by the defense lawyer retained by the insurer when it purchases a policy that grants the insurance company a duty and right to defend. (See, e.g., *Mora v. Lancet Indem. Risk Retention Grp., Inc.*, 773 F. App'x 113, 117-18 (4th Cir. 2019); *Maple Wood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 601 (S.D. Fla. 2013); *Kruger-Willis v. Hoffenburg*, 393 P.3d 844, 849 (Wash. Ct. App. 2017).)

Withdrawal from the Missing Client's Representation

A lawyer's inability to locate or contact a client is a permissible basis to withdraw from a representation. Typically, withdrawal is available under one or more of the following grounds: (1) "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled"; (2) the representation "has been rendered unreasonably difficult by the client"; or (3) "other good cause for withdrawal exists." (Model Rules R. 1.16(b); see *First Franklin Fin. Corp. v. Rainbow Mortg. Corp.*, 2008 WL 11381896, at *2 (D.N.J. Oct. 24, 2008) [good cause to withdraw exists where a lawyer is unable to contact clients and the clients fail to fulfill the obligation to cooperate and assist in their defense]; N.C. Eth. Op. 223, at 1 [when a lawyer's reasonable attempts to locate a client are unsuccessful, the client's disappearance constitutes a constructive discharge requiring the lawyer's withdrawal from the representation].)

Even when a valid reason for withdrawal exists, litigators who have made an appearance as counsel of record must still obtain the court's permission to do so. This prompts a delicate balancing act between a lawyer's responsibility to provide the court an adequate explanation for withdrawal and the lawyer's obligation to maintain the missing client's confidences. Indeed, a lawyer's request to withdraw from a missing client's representation under Rule 1.16 does not relieve her from the duty to protect client confidentiality under Model Rule 1.6. (ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 476, at 2 (2016) [hereinafter ABA Formal Op. 476].)

For purposes of the motion to withdraw, it will ordinarily be sufficient to (1) cite the governing rule that warrants the lawyer's withdrawal; and (2) state that professional or ethical considerations require withdrawal, or that there has been an irreconcilable breakdown in the attorney-client relationship that prevents the lawyer's continued representation. (See ABA Formal Op. 476, at 3; Restatement (Third) of the Law Governing Lawyers § 32 cmt. d (2000).)

A lawyer moving to withdraw from a missing client's representation should first attempt to persuade the court to rule on the motion without requiring the disclosure of client information, and then offer to submit additional materials for an in camera review. Some courts may balk at this tactic and require the lawyer to submit facts supporting withdrawal. A prime example is *In re Valsartan*, where a New Jersey federal district court denied a lawyer's motion to withdraw because she failed to provide factual support for her "'bare-bones'" claim that she was unable to communicate with her clients after making reasonable efforts to do so. (2020 U.S. Dist. LEXIS 33373, at *35-40.) The court directed the lawyer to detail the specific steps that she had taken to locate and contact her clients to determine whether they had "abandoned the case or if there is an innocent or good cause reason for their failure to communicate." (*Id.* at *39, *44 & n.5.)

When a court orders a lawyer to make further disclosures, the lawyer can fall back on rules of professional conduct creating an exception to client confidentiality in the fact of a court order. Again, the guiding principle for the lawyer is to say no more than is necessary. (Cal. Eth. Op. 1989-111, 1989 WL 253259, at *3; Colo. Eth. Op. 128, at 14.)

Concluding Remarks and Recommendations

The case of the vanishing client can raise potential ethical pitfalls for lawyers who find themselves in this regrettable position. Lawyers should consider instituting intake procedures that collect robust contact information to protect against this eventuality. Withdrawal is generally permissible when the lines of communication are broken, but lawyers must still make reasonable attempts to locate clients and take reasonable steps to protect clients' interests. Proper documentation of lawyers' efforts to meet these obligations is a worthwhile risk management strategy.

In some circumstances, a lawyer may need to consult with a client about the importance of maintaining contact with the lawyer throughout the representation and notifying the lawyer if the client's contact information changes. The engagement letter is a useful tool to not only memorialize these expectations, but also to chart a path should the client become unavailable, including authorization for the lawyer to take specific action(s) on the client's behalf.

Lawyers who anticipate the possibility of the disappearing client – however slight that chance might be – will be better positioned to avoid the situation or at least minimize any impediments to withdrawal from the representation.

Matthew K. Corbin

Matt is a Senior Vice President on the loss prevention team of the Professional Services Practice at Aon in North America, which consults with Aon's law firm clients on a wide range of professional responsibility and liability issues.

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Notes on Recent Decisions

Emily Cuatto

The Green Sheets, although published later than most current advance sheets because of copy deadlines, should serve as a useful review of recent important decisions. Readers are invited to suggest significant decisions for inclusion in the next Green Sheets edition. Please contact: ***LPerrochet@horvitzlevy.com*** or ***ECuatto@horvitzlevy.com***

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ATTORNEY FEES AND COSTS

Party seeking cost-of-proof sanctions may recover fees for obtaining *pretrial* ruling confirming evidence admissibility that opponent had no good faith basis to challenge.

Vargas v. Gallizzi (2023) 96 Cal.App.5th 362

In this personal injury lawsuit, plaintiffs requested the defendant admit that the business records exception to the hearsay rule applied to certain medical records. Defendant did not admit they qualified as business records. Plaintiffs then obtained a pretrial ruling from the trial court that the records qualified as business records. Plaintiffs prevailed at trial and sought cost of proof sanctions under Code of Civil Procedure section 2033.420 for having had to prove "the truth of specified matters of fact, opinion relating to fact, or application of law to fact," i.e., the admissibility of the medical records. The trial court denied cost of proof sanctions on the ground that plaintiffs had not proven the denied matter (admissibility of the records) at trial because the court had resolved the issues pretrial.

The Court of Appeal (Second Dist., Div. Seven) reversed. "Code of Civil Procedure section 2033.420, subdivision (a), provides expenses shall be awarded if the party requesting the admission 'thereafter proves the *genuineness of that document or the truth of that matter.*' The statute contains no requirement the proof be made 'at trial.' " (Emphasis added.) By providing proof that the documents qualified as business records sufficient for the court to make admissibility findings pretrial, the plaintiffs had proved the matter. Importantly, defendants had no good faith belief that they would prevail on any hearsay objections. Accordingly, the trial court abused its discretion in denying sanctions.

A court may consider an attorney's pervasive incivility in determining the reasonableness of that attorney's claim for statutory attorney fees.

Snoeck v. Exaktime Innovations (2023) 96 Cal.App.5th 908, petition for review pending

In this Fair Employment and Housing Act lawsuit, the plaintiffs prevailed at trial and plaintiffs' counsel then sought over $2 million in attorney fees. The trial court cut the award by applying a .4 negative multiplier to the lodestar amount, noting the inefficiency occasioned by the attorneys' incivility to opposing counsel and the court over the course of the litigation.

The Court of Appeal (Second Dist., Div. Three) affirmed. "A court may apply, in its discretion, a positive or negative multiplier to adjust the lodestar calculation – a reasonable rate times a reasonable number of hours – to account for various factors, including attorney skill." An attorney's pervasive incivility can

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be taken into account when evaluating skill. Substantial evidence supported the trial court's conclusion that plaintiffs' counsel was uncivil by, among other things, accusing defense counsel of lying and fraud, and that that incivility impeded progress of the litigation in a manner that inflated the claimed fees thus warranting a reduction. V

CIVIL PROCEDURE

Federal rule allowing remote testimony did not nullify geographic limitations on a court's subpoena power to compel trial testimony

In re Kirkland (2023) 75 F.4th 1030

In connection with an adversary proceeding pending in bankruptcy court located in California, the court ordered two residents of the U.S. Virgin Islands (one a party and one a nonparty) to testify by Zoom at an upcoming trial. The witnesses moved to quash the trial subpoenas, arguing that the subpoenas violated the geographic limitations set forth in Federal Rule of Civil Procedure 45(c)(1). The bankruptcy court denied the motion on the grounds that, under Federal Rule of Civil Procedure 43(a), good cause and compelling circumstances warranted remote testimony. After the bankruptcy court denied appellate certification, the witnesses petitioned the Ninth Circuit for a writ of mandamus directing the bankruptcy court to quash the trial subpoenas.

The Ninth Circuit issued the writ. Under Rule 45(c), a person can be compelled to testify (1) if the person resides, works, or regularly does in-person business in the state where the court sits, so long as giving the testimony would not impose substantial expense, or (2) if the location for the testimony is within 100 miles of where the person lives, works, or regularly does in-person business. Because the witnesses did not live, work, or conduct in-person business in California or within 100 miles of the court where the trial proceedings were taking place, Rule 45 required the subpoenas be quashed. Changes in technology and professional norms had not changed the subpoena power of federal courts so as to make remote appearances exempt from the geographical limitations on the power to compel a witness to appear and testify at trial. V

A private university's disciplinary procedures do not need to provide the accused student with all attributes of a trial, including an opportunity for live cross-examination, to meet the common law requirements for a fair proceeding.

Boermeester v. Carry (2023) 15 Cal.5th 72

After a drunken late night party, a USC student violently assaulted his ex-girlfriend. Multiple witnesses observed the incident, which was also caught on a security camera. The ex-girlfriend described the assault to a university Title IX investigator, who initiated an investigation. The ex-girlfriend later recanted her accusations, but the investigation continued based on the witness testimony and security footage. At the investigation's conclusion, the student was expelled. He sued in superior court, claiming USC's proceedings violated his common law right to fair procedure because, among other things, he was denied the ability to attend a live hearing at which he or his attorney could directly question and cross-examine his accuser in real time. The Court of Appeal (Second Dist., Div. Two) found for the student.

The California Supreme Court reversed the Court of Appeal. Private universities' disciplinary proceedings are governed by California's common law fair procedure doctrine, a flexible doctrine that requires the university to provide only notice of the charges and a meaningful opportunity to be heard. Fair procedure does not require providing a live hearing with cross-examination. V

A statement of compliance with requests for the production of documents need not identify the specific request to which each document will pertain.

Pollock v. Superior Court of Los Angeles County (Schuster) (2023) 93 Cal.App.5th 1348

In this dependent adult abuse case, the plaintiff preemptively produced to defendant all documents in his possession relevant to the matter. Defendant later served requests for the production of documents. Plaintiff responded by making a statement that all responsive documents will be and had been produced (or a representation that plaintiff could not comply). Plaintiff later provided a table correlating the documents already produced with the request for production to which it was responsive. Defendant maintained that plaintiff had misused the discovery process by not identifying in the statement of compliance provided in response to the document production requests which documents were responsive to each request. The trial court agreed and sanctioned plaintiff.

The Court of Appeal (Second Dist., Div. One) issued a writ of mandate directing the trial court to vacate its sanctions order.

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Plaintiff complied with his obligation to respond to the requests for production by serving a verified response to each request with a statement of compliance or statement of inability to comply. The requirement that a party identify which documents are responsive to which requests applies only when the documents are actually produced; such identification does not have to be included in the statement of compliance itself. Here, by providing a table to categorize the already-produced documents, plaintiff substantially complied with that requirement as well.

The unavailability of courtrooms for trial does not automatically lead to a finding of an impossible or impractical circumstance for purposes of the 5-year rule.

Oswald v. Landmark Builders, Inc. (2023) 97 Cal.App.5th 240

Plaintiffs filed this construction defect action on June 28, 2016. In June 2018, the court held a case management conference and set the trial for July 2019. There were then eight trial continuances caused by plaintiffs' own requests and lack of compliance with discovery orders. The final trial date was set for April 2022, well beyond the 5-year mark. Once the five-year period expired, defendants moved to dismiss the action and the trial court granted the motion.

The Court of Appeal (First Dist., Div. Three) affirmed the dismissal. While courtrooms were closed due to COVID-19, that did not make it impossible or impracticable for plaintiffs to bring their case to trial within five years, since they were not ready for trial during the closure period anyway. At a minimum, plaintiffs could have conducted discovery to ready the case for trial during that period. Yet they requested continuances to complete discovery even after courtrooms reopened. After courtrooms reopened, plaintiffs could have requested a trial date within the five year period but failed to do so.

EVIDENCE

In a toxic torts case, a trial court properly exercised its discretion to exclude an expert general causation opinion that was based on a single study.

Onglyza Product Cases (2023) 90 Cal.App.5th 776

In this products liability action, plaintiffs alleged that defendants' medication caused them to suffer heart failure. To establish general/medical causation (i.e., whether defendants' medication was capable of causing the harm plaintiffs alleged), plaintiffs called a medical expert who concluded, based on a single epidemiological study, that defendants' medication was capable of causing heart failure. Defendants moved to exclude plaintiffs' medical expert testimony and the trial court granted the motion. Defendants then successfully moved for summary judgment on the ground plaintiffs had no evidence of causation.

The Court of Appeal (First Dis., Div. Four) affirmed. The trial court did not abuse its discretion in excluding expert testimony on general causation when the expert's opinion is based on a single study that provides no reasonable basis for the opinion offered. "A single study rarely, if ever, persuasively demonstrates a cause-effect relationship." "Epidemiological studies demonstrate only association, not causation" and before a causal relationship is accepted by epidemiologists and other scientists, it is "important that a study be replicated in different populations and by different investigators."

An expert cannot be cross-examined with contrary opinions contained in hearsay sources simply because he or she has read the source.

Jensen v. EXC, Inc. (2023) 82 F.4th 835

In this personal injury action arising out of a traffic accident involving a bus, plaintiffs moved in limine to exclude sections of a police report prepared at the scene to the extent the report contained not just personal observations of the officers (which qualified as public records under FRE 803(8)(A)) but opinions of the officers about the cause of the accident, which were hearsay. The district court granted the motion. But during cross-examination of plaintiffs' experts, defense counsel elicited testimony that the experts had reviewed the police report in preparing their opinions. Defense counsel was then allowed to ask the experts about the police reports' conclusion that there was no improper driving by the bus and one of the other drivers had improperly passed and was speeding. The jury found for the defense.

On appeal, the Ninth Circuit ordered a new trial. Under FRE 803(8)(A)(iii), in civil cases, factual findings from a legally authorized investigation by a public office (as well as conclusions and opinions based on such investigations) are admissible if they are trustworthy. But defendant did not invoke this rule. Rather, defendant asserted that under FRE 705, it was allowed to cross-examine the opposing experts with otherwise inadmissible facts or data upon which their opinions were based. The 9th Circuit held FRE 705 does not permit cross-examination about an out-of-court opinion simply because the expert read the report in which the opinion is contained, or relied on other data in the report. "An opinion rendered by a person of unknown qualifications and contained in a report that, without any other explanation, relies uncritically on the hearsay statements of only selected witnesses and that does not expressly take account of, or address, any other relevant considerations, does not bear sufficient indicia of reliability and trustworthiness to be admitted as a competing expert 'opinion' that a testifying expert may be required to address on cross-examination."

TORTS

Company that rented scooters had duty to remove them from locations where they posed an unreasonable risk of danger to people on the sidewalk.

Hacala v. Bird Rides, Inc. (2023) 90 Cal.App.5th 292

The defendant operated an electric scooter rental business that allowed customers to pick up and leave scooters at any public location. While walking on a crowded sidewalk, plaintiff tripped on a scooter. She sued the scooter company for negligence. The trial court found the scooter company owed no duty of care to the pedestrian and sustained defendants' demurrer.

A majority of the Court of Appeal (Second Dist., Div. Three) reversed. The scooter company owed plaintiff a duty (1) to remove a scooter located in a place where it could cause harm, (2) not to entrust its scooters to individuals who the scooter company "knows or should know are likely to leave scooters in hazardous locations where they will pose an unreasonable risk of harm to others," and (3) to ensure its scooters are conspicuous so they will not become unreasonable tripping hazards on public sidewalks. Imposition of a duty was consistent with public policy under *Rowland* factors because (1) the scooter company conceded foreseeability of harm, likely because the permit issued from the City of Los Angeles implicitly recognized the risk from an improperly parked scooter, (2) the permit reflected local authorities' policy judgment that dock-less scooter companies should take responsibility for management of their property, (3) relevant laws warned against recognizing an exception for dock-less scooter companies, (4) the scooter company had insurance to cover costs of future harm, and (5) the scooter company would not face "extreme burdens" because it would only be obligated to use ordinary care to monitor and remove its property when it posed an unreasonable risk of harm to others. ■

Design immunity does not categorically preclude failure to warn claims that involve a discretionarily approved element of a roadway, where the public entity defendant had notice of a "concealed trap" hazard.

Tansavatdi v. City of Rancho Palos Verdes (2023) 14 Cal.5th 639

Plaintiff's son died after being struck by a tractor-trailer while riding his bike. Plaintiff sued the city for removing a bike lane, which allegedly created a dangerous condition, and failing to warn the son of that dangerous condition. The trial court granted summary judgment for the city on the ground of design immunity under Government Code section 830.6, which generally protects California public entities and employees from liability for injuries "caused by the plan or design of a construction of, or an improvement to, public property." The Court of Appeal (Second Dist., Div. Four) reversed, holding that "even where design immunity covers a dangerous condition, it does not categorically preclude liability for failure to warn about that dangerous condition."

The California Supreme Court affirmed the Court of Appeal. Addressing the issue "whether design immunity is limited to claims alleging that a public entity *created* a dangerous roadway condition through a defective design, or whether the statutory immunity also extends to claims alleging that a public entity failed to warn of a design element that resulted in a dangerous roadway condition," the court concluded that "design immunity does not categorically preclude failure to warn claims that involve a discretionarily approved element of a roadway." Public entities "retain a duty to warn of known dangers that the roadway presents to the public." However, "a plaintiff seeking to impose liability for failure to warn of an immunized design element must prove the public entity had notice that its design resulted in a dangerous condition" and must also overcome a separate immunity "by establishing the accident-causing condition was a concealed trap."

See also *Brinsmead v. Elk Grove Unified School District* (2023) 95 Cal.App.5th 583 [Because school had undertaken to provide transportation to students, school district was not immune under Education Code section 44808 in lawsuit brought by parents of a child killed in a car accident after she accepted a ride from a friend when the school bus failed to timely pick her up].

But see *Carr v. City of Newport Beach* (2023) 94 Cal.App.5th 1199 [The hazardous recreational activity immunity in Government Code section 831.7 protected city from liability to plaintiff who dove head first into shallow harbor: "the Legislature chose to generally shield public entities from liability claims arising from hazardous recreational activities in order to deter those entities from severely restricting access to and use of public lands"]. ■

Teacher's failure to report bullying by one student was not proximate cause of bullying by a different student; primary assumption of the risk doctrine does not apply to a sports activity that is part of a mandatory physical education class.

Nigel B. v. Burbank Unified School District (2023) 93 Cal.App.5th 64

Plaintiff was bullied by a couple of larger students. The physical education teacher observed some of this bullying behavior and reprimanded the bully but did not otherwise intervene. During one physical education class, one of the bullies targeted plaintiff and pushed him down, causing plaintiff to suffer injuries. Plaintiff sued the school district, physical education teacher, and bully that hurt him. At trial, defendants requested the court instruct the jury on primary assumption of risk doctrine, but the trial court

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refused the request on the ground it did not apply to a mandatory class. A jury found for the plaintiff and defendants appealed.

The Court of Appeal (Second Dist., Div. Three) reversed the judgment as to the district on the ground there was insufficient evidence it was aware of the bullying towards plaintiff. While the physical education teacher was aware of *another* student's bullying behavior towards the plaintiff, that knowledge and any failure to report it was not the proximate cause of the injury here inflicted by a different student. The court also reversed as to the physical education teacher, reasoning that he was entitled to seek an apportionment of fault to the bully. While an intentional tortfeasor like the bully is not entitled to allocate fault to other negligent tortfeasors, a negligent tortfeasor may seek to reduce his fault by the share of fault borne by the intentional actor. On retrial, however, the teacher was not entitled to an instruction on primary assumption of risk, as that doctrine does not extend to activities a student must engage in as part of a mandatory curriculum.

But see *Wellsfry v. Ocean Colony Partners* (2023) 90 Cal.App.5th 1075 [Primary assumption of risk doctrine barred plaintiff from suing owner of a golf course for injuries sustained while stepping on a tree root in an area used to access tee boxes; encountering topographical features of the course is an inherent risk of golf].

Condominium lessee owed no duty to guest to remedy dangerous condition of common area walkway.

Moses v. Roger-McKeever (2023) 91 Cal.App.5th 172

Plaintiff fell on a walkway after visiting defendant in a condominium she leased from the owners. Plaintiff sued defendant, asserting defendant owed him a duty of care to ensure his safe ingress and egress from the property she invited him to. Defendant moved for summary judgment on the ground she did not own, possess, or have the right to control the common areas of the premises. The trial court granted summary judgment.

The Court of Appeal (First Dist., Div. One) affirmed. "[A] a residential tenant having no ownership or control over common areas leading to the tenant's dwelling place generally has no duty of care to protect invitees against the dangerous condition of those areas." Defendant did not "impliedly adopt" control of the premises, and responsibility for its safety, simply by inviting plaintiff over.

See also *Nicoletti v. Kest* (2023) 97 Cal.App.5th 140 [Apartment complex owner owed no duty to protect plaintiff against open and obvious danger of rainwater current on property's driveway].

A bare claim that more security personnel could have prevented a criminal assault was insufficient to defeat summary judgment.

Romero v. Los Angeles Rams (2023) 91 Cal.App.5th 562

Plaintiffs were assaulted at a football game by other attendees and sued the premises manager, the football team, and the University of Southern California. The premises manager and the football team obtained summary judgment on grounds that plaintiffs could not show that defendants' failure to take additional security steps was a substantial factor in causing the assault.

The Court of Appeal (Second Dist., Div. Eight) affirmed. Causation in a non-medical context requires plaintiff to introduce evidence showing it is more likely than not that the defendant's conduct was a cause in fact of the result. Therefore, the plaintiff must prove it was more probable than not that additional security precautions would have prevented the attack. Here, plaintiffs' allegations consisted of abstract negligence—a "bare claim that more security personnel could have prevented a criminal attack." Causation, the court held, requires "direct or circumstantial evidence showing that the assailant took advantage of the defendant's lapse or omission 'in the course of committing his attack, and that the omission was a substantial factor in causing the injury.' "

City did not create a dangerous condition of public property by failing to provide security at a public park.

Summerfield v. City of Inglewood (2023) 96 Cal.App.5th 983

Plaintiffs' son was shot and killed at a public park in Inglewood. Plaintiffs filed a wrongful death action against the city, alleging that the city created a dangerous condition because it failed to provide adequate security precautions in the park. They also claimed that two other shootings in the park between 1997 and 2021 showed that the park's lack of security attracted criminal activity, making the area inherently dangerous. The city demurred to the complaint, and the trial court sustained the demurrer.

The Court of Appeal (Second Dist., Div. Eight) affirmed. The lack of park security was not a physical characteristic of the public property and thus was not actionable as a dangerous condition. The fact there were two prior crimes over a 23-year period did not support plaintiffs' claims that the city's failure to provide security cameras created inherent or ongoing danger at the park, particularly in the absence of any statutory provision establishing the city's liability.

Bar not liable for death of patron who encountered his assailants after leaving the bar.

Glynn v. Orange Circle Lounge (2023) 95 Cal.App.5th 1289

A customer at defendants' bar became involved in an altercation with several of the bar's other patrons. Security broke up the fight, and the customer and his assailants went their separate ways. One hour later, the customer encountered his assailants again in the parking lot of another business. Another fight ensued and the customer was stabbed to death. The customer's parents sued the bar for wrongful death. The trial court granted defendants' motion for summary judgment, concluding that defendants' duty to the customer did not extend to the subsequent fight at another business location.

The Court of Appeal (Fourth Dist., Div. Three) affirmed. While there is a special relationship between bar proprietors and their customers, the tenuous nature of the connection between the bar's conduct and the customer's death, the absence of moral blame attached to the bar's conduct, and the substantial burden that imposing a duty would place upon defendants and the community outweighed other factors favoring imposition of a duty. V

***Privette* doctrine shielded landowner from liability to technician injured in crawl space.**

Blaylock v. DMP 250 Newport Center, LLC (2023) 92 Cal.App.5th 863

Plaintiff, an HVAC technician, fell through an access panel in the floor of a crawl space when, contrary to instructions from his employer, he rested his body weight on the panel rather than the joists framing the panel. Plaintiff sued the property owner. The trial court granted summary judgment for the defendant and plaintiff appealed, arguing the owner was liable for not warning him of the hazard posed by the access panel.

The Court of Appeal (Fourth Dist., Div. Three) affirmed, following *Kinsman v. Unocal, Inc.* (2005) 37 Cal.4th 659. A property owner is not liable to its contractors or their employees for work-related injuries that could have been avoided had the contractor conducted a reasonable inspection of a worksite for preexisting hazardous conditions. In this case, (a) no evidence suggested that the building owner knew there was a risk that plaintiff might fall through the access panel; (b) plaintiff had a duty to inspect the crawl space for potential safety hazards; (c) a reasonable inspection would have revealed to plaintiff that the access panel was a potential hazard; and (d) plaintiff in any event could have avoided injury by following his employer's instructions pertaining to job site safety. Inadequate lighting in a crawl space is the kind of known hazard that can be addressed through reasonable safety precautions on the part of an independent contractor. Knowledge that a condition exists is not the same as knowing or suspecting it could create a hazard for a contractor's employees.

See also *Acosta v. MAS Realty* (2023) 96 Cal.App.5th 635 (Case Number B316420) [Privette doctrine protected landowner from liability to electrician who was injured when a broken hatch providing access to the roof of the building he was servicing shut on him in a manner that gave him notice something was amiss with the hatch]. V

Employers are not liable to employees' family members for take-home COVID

Kuciemba v. Victory Woodworks (2023) 14 Cal.5th 993

Robert Kuciemba began working for a furniture and construction company during the COVID-19 pandemic. The company allegedly failed to follow relevant COVID-19 safety protocols and he developed COVID-19. He also gave COVID-19 to his wife, who was hospitalized for over a month and kept alive on a respirator. The Kuciembas sued the company alleging negligence and other claims. The company removed to federal court and sought dismissal under the derivative injury doctrine as well as on the ground that the company owed no duty to the wife. The district court agreed. The Ninth Circuit ordered certification of the case to the California Supreme Court.

The Supreme Court held that employers cannot be sued for failing to prevent the spread of COVID-19 to employees' household members. While the exclusivity of workers' compensation benefits did not prevent the claim because the wife's illness was not " 'collateral to or derivative of' the employee's workplace injury, and while there is a special relationship between an employer and its employees, neither conclusion allowed the claim to proceed. Allowing liability "would impose an intolerable burden on employers and society in contravention of public policy." V

Evidence that an available alternative design would have prevented a plaintiff's injuries is sufficient to establish a prima facie case of products liability.

Camacho v. JLG Industries (2023) 93 Cal.App.5th 809

Plaintiff fell off a scissor lift after failing to secure a safety chain. He sued the manufacturer alleging that the lift was designed defectively because the safety chain invited human error and that there was an available alternative design (including a self-closing gate) that would have prevented the plaintiff's fall. Defendant moved for a directed verdict on the ground that plaintiff failed to present substantial evidence that the alternative design would have prevented his fall. The trial court granted the motion.

A majority of Court of Appeal (Fourth Dist., Div. Three) reversed. The plaintiff made a prima facie showing of causation because,

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based on photographs of the alternative self-closing gate design, "the jury could have reasonably inferred that had a self-closing gate been in place, [plaintiff's] fall would have been prevented." To survive directed verdict, the plaintiff needed only show that product's design was a substantial factor in causing his injury. It did not matter that the chain itself was not defective; the alleged design flaw was in using a chain rather than a safer alternative. ▼

HEALTHCARE

Emergency medical service providers may maintain reimbursement actions against publicly operated health care service plans.

Quishenberry v. UnitedHealthcare (2023) 14 Cal.5th 1057

As required by state and federal law, two Hospitals provided emergency medical services to three patients enrolled in a health care service plan operated by the County of Santa Clara. The Hospitals had no contract with the County governing rates payable for emergency services rendered to plan members. The Hospitals billed the County for the emergency services rendered, but the County paid only a portion of the billed amounts. The Hospitals then sued the County for the balance under the Knox-Keene Act and related regulations requiring a health care service plan to reimburse emergency medical service providers for the "reasonable and customary value" of the emergency care. The County demurred, arguing it was immune from liability under Government Code § 815, which provides that a public entity is not liable for an injury except as otherwise provided by statute. The trial court overruled the demurrer, but the Court of Appeal (Second Dist., Div. Seven) granted the County's petition for a writ of mandate and held the County was immune from the Hospitals' suit.

The California Supreme Court reversed the Court of Appeal. "The immunity provisions of the Government Claims Act are directed toward tort claims; they do not foreclose liability based on contract or the right to obtain relief other than money or damages. [Citation.] The Hospitals have not alleged a conventional common law tort claim seeking money damages. Instead, they have alleged an implied-in-law contract claim based on the reimbursement provision of the Knox-Keene Act, and seek only to compel the County to comply with its statutory duty. Accordingly, the County is not immune from suit under the circumstances and the Hospitals' claim may proceed." ▼

ANTI-SLAPP

Statements made when an employer terminates an employee and seeks to settle claims are not protected by California's anti-SLAPP law where the employee had not yet threatened litigation.

Nirschl v. Schiller (2023) 91 Cal.App.5th 386

After a family fired their nanny, they offered to pay severance in exchange for a release of claims. The family asked the owner of the nanny placement agency to "strongarm" the nanny into signing the release, and levied various accusations against the nanny to convince the owner to assist. When the nanny later filed a formal suit, she included defamation claims. The defendants moved to strike the nanny's entire complaint on the ground that the defamation allegations arose out of their efforts to settle contemplated litigation. The trial court denied the motion and awarded the nanny attorney fees.

The Court of Appeal (Second Dist., Div. Four) affirmed. "[W]hen parties negotiate to resolve a dispute that might ultimately result in litigation – but might also be resolved without litigation – statements made in a pre-litigation negotiation are not automatically protected under the anti-SLAPP law just because they relate to 'settlement.'" In this case, there was no allegation or evidence that the family's statements to the agency owner were made after litigation had been threatened, so the defamatory statements were not made in the course of protected activity. Further, the suggestion that the wage and hour claims arose out of protected activity was frivolous, warranting an award of attorney fees to the nanny.

See also *Park v. Nazari* (2023) 93 Cal.App.5th 1099 [trial court properly denied anti-SLAPP motion where defendants did not identify the individual claims or allegations that should be stricken even if the entire complaint were not]. ▼

ARBITRATION

The 100-day deadline provided by Code of Civil Procedure §1288.2 in which to vacate an arbitration award in response to a motion to confirm such an award is not jurisdictional and may be subject to equitable tolling or estoppel.

Law Finance Group v. Key (2023) 14 Cal.5th 932

In this dispute over the terms of a litigation financing arrangement, an arbitration panel entered an award in favor of the financing company. The parties agreed that they would "work backward" from the date the trial court set for hearing on the financing company's motion to confirm the award. The borrower thus filed

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her motion to vacate the award 130 days after it was served, and her response to the financing company's motion to confirm the award 139 says after service of the award. The trial court vacated the award, holding that the borrower's motion to vacate filed more than 100 days after service of the final award was untimely, but that her response to the financing company's motion was timely under Code of Civil Procedure section 1290.6 [providing that a response to an arbitration-related filing is due 10 days, subject to extension by agreement between the parties]. The Court of Appeal (Second Dist., Div. Two) reversed, holding that the 100-day timeframe for moving to vacate was jurisdictional.

The California Supreme Court reversed the Court of Appeal. The 100-day period provided for by Code of Civil Procedure sections 1288 and 1288.2 are mandatory and the period cannot be extended by application of the more general rule of section 1290.6 governing responses in arbitration matters. However, section 1288.2 is not "jurisdictional" in the sense that it deprives a court of the power to act. Nor is there any indication in the statute that the legislature intended equitable doctrines not to apply. Accordingly, the Court directed the Court of Appeal to consider whether the borrower was entitled to equitable relief from the failure to file timely.

See also *Doe v. Superior Court (Na Hoku)* (2023) 95 Cal.App.5th 346 [The 30-day period in Code of Civil Procedure §1281.98(a)(1) for the payment of arbitration fees is strictly enforced].

An arbitrator in a nonconsumer case need not disclose subsequent retentions when he has indicated no such disclosures would be forthcoming.

Sitrick Group v. Vivera Pharmaceuticals (2023) 89 Cal.App.5th 1059

The parties arbitrated their contract dispute before a JAMS arbitrator. The arbitrator disclosed that he would entertain requests to arbitrate future matters involving the same parties and would not inform the parties of any such subsequent matters. Neither side objected to this disclosure. The arbitrator was later engaged to arbitrate a separate matter involving one of the same parties (Sitrick). When the other party (Vivera) learned of the subsequent engagement, it moved to disqualify the arbitrator. The JAMS National Arbitration Committee denied the motion on the ground the disclosure of the second matter was merely a courtesy and Vivera had not objected to the arbitrator's disclosures. The arbitrator found for Sitrick and the trial court confirmed the award.

The Court of Appeal (Second Dist., Div. Two) affirmed. The Ethics Standards for Neutral Arbitrators in Contractual Arbitration do not impose a continuing duty to disclose relationships with the parties in noncommercial cases where the arbitrator previously informed the parties that he would not disclosure future engagements and the parties do not object to. The arbitrator's disclosures here were legally adequate.

See also *Perez v. Kaiser Foundation Health Plan* (2023) 91 Cal. App.5th 645 [arbitrator did not have a continuing duty to disclose the post appointment results of arbitration cases that were pending at the time of his appointment].

An appeal from an order denying a motion to compel arbitration automatically stays district court proceedings pending appeal.

Coinbase v. Bielski (2023) 599 U.S. 736

In a putative class action by users of a cryptocurrency platform, the defendant moved to compel arbitration based on the arbitration provision in its user agreement. The district court refused to compel arbitration, and defendant filed an interlocutory appeal under 9 U.S.C. § 16(a), which permits such an appeal from the denial of a motion to compel arbitration. Defendant moved to stay district court proceedings while the appeal was pending, but both the district court and the Ninth Circuit Court of Appeals denied a stay.

The United States Supreme Court granted certiorari and held that when a party files an interlocutory appeal under § 16(a) challenging the denial of a motion to compel arbitration, the district court must stay its proceedings pending appeal. An interlocutory appeal divests the district court of its authority over the aspects of the case on appeal. When the question on appeal is whether the case belongs in arbitration, the entire case is "involved in the appeal," requiring a stay. Imposing as stay also protects the benefits of arbitration, including efficiency and cost-savings, by preventing proceedings that might be unnecessary if the case belongs in arbitration; prevents "forced" settlements that can arise from defendants' desire to avoid costly district court proceedings, especially in putative class actions; and conserves judicial resources.

CONSUMER PROTECTION

The Song-Beverly Consumer Warranty Act's antiwaiver provision does not categorically prohibit all settlement agreements, but a settlement that contravenes a consumer's substantive rights under the act is void and unenforceable as against public policy.

Rheinhart v. Nissan North America (2023) 92 Cal.App.5th 1016 (Case Number D079940)

RECENT CASES

LABOR AND EMPLOYMENT

An employer's business entity agents can be liable for violations of the California Fair Employment and Housing Act.

Raines v. U.S. Healthworks Medical Group (2023) 15 Cal.5th 268

The plaintiff brought Fair Employment and Housing Act claims against a medical screening company, which was acting as the agent of her future employer for purposes of administering a health screening. Plaintiff alleged the company improperly required her to answer an extensive medical history questionnaire and that her employment offer was improperly revoked when she refused to answer one of the questions. The district court dismissed the action on the ground that the company, acting merely as the employer's agent, could not be liable under FEHA. The Ninth Circuit certified the case to the California Supreme Court.

The California Supreme Court held that the provider of the pre-employment medical screening could be liable to the plaintiff. FEHA defines an "employer" prohibited from engaging in various unlawful employment practices as including "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly." The "the agent-inclusive language ... permits a business-entity agent of an employer to be held directly liable for violation of the FEHA when it carries out FEHA-regulated activities on behalf of an employer" and has at least five employees. V

Direct evidence of discriminatory motive for a FEHA claim requires something more than just plaintiff's claim of discriminatory motive

Hodges v. Cedar-Sinai Medical Center (2023) 91 Cal.App.5th 894

Plaintiff was fired for refusing to get a flu vaccine despite not having a medically recognized excuse from the vaccination requirement. Plaintiff sued her employer, alleging disability discrimination and related claims under the Fair Employment and Housing Act (FEHA). The trial court granted defendant's motion for summary judgment on the ground that a plaintiff failed to offer direct evidence that defendant acted with a "prohibited motive."

The Court of Appeal (Second Dist., Div. Eight) affirmed. Direct evidence must prove a fact "without inference or presumption" and a plaintiff's bare claim of a discriminatory motive, without more, is not direct evidence. Further, a disability under the FEHA requires evidence "that the symptoms are sufficiently severe to make a major life activity, such as working, difficult." Plaintiff failed to rebut defendant's claim that she was neither disabled nor able to prove that getting vaccinated posed a risk of her developing a disability.

See also *People ex rel. Garcia-Brower v. Kolla's* (2023) 14 Cal.5th 719 [A report of unlawful activities made to an employer or agency that already knew about the violation is a protected whistleblower "disclosure" within the meaning of Labor Code §1102.5(b)]. V

Employees have standing under California law to litigate representative PAGA claims in court regardless whether their individual claims must proceed in arbitration.

Adolph v. Uber Technologies, Inc. (2023) 14 Cal.5th 1104

An aggrieved employee sought to litigate wage and hours claims under California's Private Attorneys General Act (PAGA). The employer moved to compel arbitration, but the trial court denied the motion on the ground that under California law, the individual claims could not be severed from the representative claims and the representative claims were not subject to arbitration. While the case was pending, the United States Supreme Court decided *Viking River Cruises v. Moriana* (2023) 596 U.S. 639 [holding that the Federal Arbitration Act (FAA) preempted the state law rule prohibiting the severability of individual and representative PAGA claims, and that once the individual claim was severed and sent to arbitration, the individual lacked standing to pursue the representative claim in court].

The California Supreme Court granted review to provide guidance on standing under PAGA after *Viking River Cruises.* The Court held that a plaintiff is not stripped of standing to pursue non-individual PAGA claims simply because his or her individual PAGA claim is compelled to arbitration. PAGA standing does not require the individual to have redressable claims; only that the individual is an aggrieved employee. V

CALIFORNIA SUPREME COURT PENDING CASES

Published decisions as to which review has been granted may be cited in California cases only for their persuasive value, not as precedential/binding authority, while review is pending. (See Cal. Rules of Court, rule 8.1115.)

Considering whether the right to seek disqualification of a judge for bias can be impliedly waived and the standard for such disqualification.

North American Title v. Superior Court (Cortina) (2023) 91 Cal.App.5th 948, review granted Aug. 30, 2023, S280752

In this class action brought against a title company, the defendant went through a restructuring after its liability in the case became clear but proceedings were still ongoing. The judge made critical

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comments about the defendant, such as that it appeared to be engaged in a "shell game." Due to a codefendant's attempted exercise of a peremptory challenge to the judge under Code of Civil Procedure section 170.6 and an appeal related to that challenge, the defendant did not seek to exercise its own challenge to the judge's impartiality under section 170.3 until a year after the comments were made. The judge held that the 170.3 challenge was untimely and insufficient. The Court of Appeal (Fifth Dist.) issued a writ of mandate reversing that ruling, concluding that "a statement of disqualification for bias, prejudice, or appearance of impartiality cannot be found to be impliedly waived as untimely under [Code of Civil Procedure] section 170.3, subdivision (b)(2). (§ 170.3, subd. (b)(2) ['There shall be no waiver of disqualification if ... [t]he judge has a personal bias or prejudice concerning a party.'].)" The Court of Appeal also concluded that the statement of disqualification was facially sufficient because it detailed the offending statements that indicated the court was biased against the defendant.

The Supreme Court granted review of the following issues: (1) Is the requirement that a party seeking to disqualify a trial judge for alleged lack of impartiality file a verified statement of disqualification "at the earliest practicable opportunity" subject to waiver or forfeiture? (2) Did the Court of Appeal err in concluding that the trial judge's challenged statements did not qualify as expressions of the court's views on issues pending before it in the proceeding?

Addressing the scope of liability for bystander emotional distress.

Downey v. City of Riverside (2023) 90 Cal.App.5th 1033, review granted July 19, 2023, S280322

Plaintiff's daughter was in an auto accident while on a phone call with plaintiff. During the call, sounds of the auto crash and its aftermath were audible. Plaintiff sued defendants, alleging the accident was caused by defendants' negligent maintenance of a dangerous condition of the intersection where the accident occurred and that plaintiff suffered emotional distress as a contemporaneous observer to her daughter's injury. Defendants demurred on the grounds that plaintiff's complaint was insufficient to show her contemporaneous awareness of both the harm that the daughter suffered and the causal connection between the defendants' tortious conduct and the daughter's injuries. The trial court sustained the demurrers without leave to amend. The Court of Appeal (Fourth Dist., Div. One) agreed that plaintiff's complaint failed to allege that she was "aware" at the time of the phone call that defendants' deficient traffic signals and markings and insufficient landscaping caused the accident or injured her daughter, as required to show a " 'contemporaneous sensory awareness of the causal connection between the negligent conduct and the resulting injury,' " but ordered the trial court give her leave to amend based on her representations at oral argument that she had prior knowledge about the dangers at the intersection.

The Supreme Court granted review of the following issue: In order to recover damages for negligent infliction of emotional distress as a bystander to an automobile accident allegedly caused by dangerous conditions on nearby properties, must the plaintiff allege that she was contemporaneously aware of the connection between the conditions of the properties and the victim's injuries?

Addressing whether a contractual time limit in an insurance policy governing the time to bring claims on the policy applies to bar UCL claims against the insurer that are brought within the 4-year limitations period for UCL claims.

Rosenberg-Wohl v. State Farm Fire and Casualty Co. (2023) 93 Cal. App.5th 436, review granted Oct. 18, 2023, S281510

Plaintiff submitted a claim under her homeowners' policy seeking reimbursement of expenses she incurred to fix a staircase that had "settled" and was no longer safe. The insurer denied the claim with no investigation, observing that there appeared to be no covered cause of loss and the policy specifically excluded damage caused by "settling." The insurer further noted that the staircase issues appeared more than a year before plaintiff submitted her claim and therefore, any claim was barred by the policy's one-year limitations provision. Plaintiff's husband later asked the insurer to reconsider, and it "reopened" the claim and again denied it. Plaintiff then filed two lawsuits, one for breach of contract and bad faith and another "class action" for violation of the UCL. The insurer demurred arguing that the claims were time-barred under the policy. The trial court sustained the demurrers, reasoning that the UCL claim was an action on the policy grounded in plaintiff's complaints about denial of her claim. A majority of a Court of Appeal panel (First Dist., Div. Two) affirmed.

The Supreme Court granted review, limited to the following issue: When a plaintiff files an action against the plaintiff's insurer for injunctive relief under the Unfair Competition Law, which limitations period applies, the one-year limitations period authorized by Insurance Code section 2071 or the four-year statute of limitations in Business and Professions Code section 17208?

RECENT CASES

Addressing whether Code of Civil Procedure § 998's cost-shifting provisions apply when the case ends in a settlement for an amount less favorable than a previously rejected offer.

Madrigal v. Hyundai Motor America (2023) 90 Cal.App.5th 385, review granted Aug. 30, 2023, S280598

A manufacturer offered to repurchase a customer's vehicle in response to a claim under the Song-Beverly Act (lemon law). The plaintiff twice rejected such offers, and litigation (which is subject to one-way statutory fee shifting) continued. After a jury was sworn, however, the plaintiff had second thoughts and settled for less than could have been obtained under the manufacturer's earlier offer. As is common, the agreement called for resolution of any attorney fee claim by the court. The manufacturer argued that the fees incurred *after* the rejected settlement offer were barred under Code of Civil Procedure section 998 because plaintiff failed to obtain a more favorable judgment or award. The trial court disagreed with that analysis, but the Court of Appeal reversed the resulting fee award, finding that section 998 does not require that parties proceed all the way through trial to a judgment to invoke the "carrot and stick" provisions of section 998.

The Supreme Court granted review to decide the following issue: Do Code of Civil Procedure section 998's cost-shifting provisions apply if the parties ultimately negotiate a pre-trial settlement?

Addressing when public entities are exempt from Labor Code requirements.

Stone v. Alameda Health System (2023) 8 Cal.App.5th 84, review granted May 17, 2023, S279137

Two former employees of the Alameda Health System – a county-created hospital authority – sued the agency, alleging seven hour and wage class action claims and six individual race and sex discrimination claims. The trial court sustained AHS's demurrer as to all seven class action Labor Code claims, leaving intact only certain individual claims, agreeing with AHS that the Labor Code claims were not authorized against public entities and that it was not a "person" capable of being sued under PAGA. The Court of Appeal (First Dist. Div. Five) reversed on several of the claims, holding that (1) AHS could be liable for failure to provide off-duty meal periods, provide off-duty rest breaks, and keep accurate payroll records because it lacked many of the "hallmarks of sovereignty" that would permit it to claim sovereign immunity; (2) AHS could be liable for unlawful failure to pay wages because it was not an exempt municipal corporation for purposes of Labor Code section 204; and (3) while AHS is a public entity of some sort and thus is not a "person" for purposes of PAGA, that requirement is limited to statutory violations subject to default penalties, not to those for which a civil penalty is specifically provided, and PAGA penalties are not punitive damages, so plaintiffs' PAGA claim could stand.

The Supreme Court granted review of the following issues: (1) Are all public entities exempt from the obligations in the Labor Code regarding meal and rest breaks, overtime, and payroll records, or only those public entities that satisfy the "hallmarks of sovereignty" standard adopted by the Court of Appeal in this case? (2) Does the exemption from the prompt payment statutes in Labor Code section 220, subdivision (b), for "employees directly employed by any county, incorporated city, or town or other municipal corporation" include all public entities that exercise governmental functions? (3) Do the civil penalties available under the Private Attorneys General Act of 2004, codified at Labor Code section 2698 et seq., apply to public entities?

Addressing whether Proposition 22 regarding the employment status of ride-share drivers conflicts with the California Constitution.

Castellanos v. State of California (Protect App-Based Drivers and Services) (2023) 89 Cal.App.5th 131, review granted June 28, 2023, S279622

In November 2020, voters approved the Protect App-Based Drivers and Services Act, Proposition 22, which allowed rideshare companies to treat app-based drivers as independent contractors rather than employees and detailed certain benefits to which drivers are entitled. The proposition also stated that the Legislature could amend its provisions with a statute passed by a seven-eighths majority in both houses, so long as the statute is consistent with and furthers the purpose of the initiative, and included a severability provision. Plaintiffs – several app-based drivers and the Service Employees International Union and California State Council – sued to challenge Proposition 22's constitutionality. The Court of Appeal (First. Dist., Div. Four) upheld the provision against the petitioners' challenges that the Proposition invaded the Legislature's authority over workers' compensation issues and/or violated the rule that initiatives must have a single subject. The court agreed with the petitioners that the initiative's definition of what constituted an amendment violated separation of powers principles, but concluded the offending provisions were severable.

The Supreme Court granted review of the following issue: Is Proposition 22 (the "Protect App-Based Drivers and Services Act") invalid because it conflicts with article XIV, section 4 of the California Constitution?

Addressing hospital duties to disclose fees to patients.

Capito v. San Jose Healthcare System (Apr. 6, 2023, H049022, H049646) [nonpub. opn.], review granted July 26, 2023, S279862, S280018

Plaintiff sought emergency medical treatment at San Jose Healthcare System's Regional Medical Center (Regional) on two occasions. She was charged an Evaluation and Management Services (EMS) fee in addition to treatment cost for each visit. Both times, plaintiff signed Regional's Condition of Admission and Consent for Outpatient Care form, where she promised to pay the rates stated in the chargemaster, the hospital's price list. The consent form did not explicitly mention the EMS fees, but they were listed in the published chargemaster. Plaintiff sued Regional, alleging that it failed to disclose its intention to charge an EMS fee, violating the Consumer Legal Remedies Act (CLRA) and the Unfair Competition Law (UCL). The trial court dismissed on demurrer plaintiff's action with prejudice, finding that Regional did not have a duty to disclose the EMS fee beyond publishing it in the chargemaster. The Court of Appeal (Sixth Dist.) affirmed, concluding that Regional's published chargemaster was compliant with the applicable statutes and regulations regarding pricing transparency, which also had no requirement for pretreatment disclosure of the EMS fee.

The Supreme Court granted review to address the following issue: Does a hospital have a duty to disclose emergency room fees to patients beyond its statutory duty to make its chargemaster publicly available?

See also *Naranjo v. Doctors Medical Center of Modesto* (2023) 90 Cal.App.5th 1193, review granted July 26, 2023, S280374 [addressing application of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) and the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.) to evaluation and management services fees charged by hospitals]. V

Addressing when the form of an arbitration provision renders it unconscionable.

Fuentes v. Empire Nissan (2023) 90 Cal.App.5th 919, review granted Aug. 9, 2023, S280256

Plaintiff signed an arbitration agreement when hired to work for Nissan. The agreement required any claim to be determined exclusively by binding arbitration. It was written in small blurry font. Plaintiff was terminated and sued Nissan for discrimination and wrongful termination. Nissan moved to compel arbitration, but the trial court found the arbitration agreement unconscionable and denied the motion. Nissan appealed. The Court of Appeal (Second Dist. Div. Eight), reversed. While the document's illegibility was procedurally unconscionable, the contract was not substantive unconscionability and thus had to be enforced.

The Supreme Court granted review of the following issue: Is the form arbitration agreement that the employer here required prospective employees to sign as a condition of employment unenforceable against an employee due to unconscionability

See also *Basith v. Lithia Motors* (2023) 90 Cal.App.5th 951, review granted Aug. 9, 2023, S28025 [addressing whether incomprehensibility of arbitration agreement renders it unconscionable even if the terms are fair and so the agreement is not substantively unconscionable]. V

Addressing nonsignatory rights to compel arbitration.

Ford Motor Warranty Cases (2023) 89 Cal.App.5th 1324, review granted July 19, 2023, S279969

Respondents bought vehicles manufactured by Ford and signed a sale contract with a dealer. The contracts stated that either party could choose to settle any disputes by arbitration. In 2015 and 2016, respondents sued Ford (but not the dealers) after experiencing problems with the transmissions in their vehicles. Ford moved to compel arbitration based on the arbitration provision in the sale contracts. Ford argued that, while not a signatory to the sales contract, Ford was entitled to enforce the provision because (1) agency allegations in respondent's complaints made Ford an undisclosed party in the provision (2) Ford was an intended third-party beneficiary of the provision and (3) the plaintiff who claimed obligations owed by Ford as a result of the contract was equitably estopped from avoiding the provision. The trial court denied Fords motion on its merits. The Court of Appeal (Second Dist. Div. Eight) affirmed, disagreeing with a prior appellate decision that held to the contrary. There was insufficient evidence the dealers were Ford's agent; Ford did not meet the standards for being a third-party beneficiary; and (3) equitable estoppel did not apply because the respondent's claims against Ford were based on Ford's statutory obligations, not the sales contracts.

The Supreme Court granted defendant's petition for review, ordering that the issue be limited to the following: "Do manufacturers' express or implied warranties that accompany a vehicle at the time of sale [by a dealer] constitute obligations arising from the sale contract [between the dealer and a buyer], permitting manufacturers to enforce an arbitration agreement in the contract pursuant to equitable estoppel?"

See also *In re Uber Technologies Wage and Hour Cases* (2023) 95 Cal.App.5th 1297, petition for review pending [ride-sharing companies could not compel Labor Commissioner and other public entities to arbitrate employment-related claims because they were not party to the agreement]. V

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Signature Resolution welcomes Hon. Mary H. Strobel (Ret.) to our esteemed panel of neutrals, specializing in a wide range of civil matters. For the past 8 years, Judge Strobel presided over the Writs and Receivers department at the Los Angeles Superior Court.

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Thursday, February 8, 2024

7:30 am - 8:00 pm *Diamond Foyer*
Registration Open

7:30 am - 4:30 pm *Diamond Foyer*
Exhibits Open

7:30 am - 8:30 am *Diamond Foyer*
Continental Breakfast with Exhibitors

8:30 am - 8:45 am *Diamond 4*
Annual Business Meeting

8:45 am - 10:15 am *Diamond 4*
Year in Review (MCLE 1.5 General Credit)
A review of some of 2023's most impactful decisions for the defense bar.
- David E. Hackett, *Partner, Greines, Martin, Stein & Richland, LLP*
- Stefan Caris Love, *Associate, Greines, Martin, Stein & Richland, LLP*

10:15 am - 10:30 am *Diamond Foyer*
Break

10:30 am - 12:00 noon *Diamond 4* (MCLE 1.5 General)
TRACK 1 – The Post-Pandemic Jury and Defense Verdicts in a Nuclear World
A panel of seasoned stakeholders in our civil justice system will discuss their experience with post-pandemic juries, including juror dynamics in a post-pandemic world. Has COVID-19 made it harder for jurors to agree? What role does our divisive political climate, social media and social distancing play on our juries? Does the divide extend to the jury box and if so, what can be done? Have citizens lost faith in the jury system? What factors have led to an increase in plaintiff's verdicts and what can be done by defense attorneys to recognize and combat plaintiff's verdicts in a post-pandemic world.
- MODERATOR: Patricia Egan Daehnke, *Founding Partner, Collinson, Daehnke, Inlow & Greco*
- Hon. Daniel M. Crowley, *Los Angeles Superior Court*
- Gina Harris, *Regional Claims Executive, Western Region, ProAssurance*
- Christina Marinakis, Psy.D., J.D., *CEO - Immersion Legal Jury*
- Deborah S. Tropp, *Founding Partner, McNeil, Tropp & Braun*

10:30 am - 12:00 noon *Diamond 2-3*
TRACK 2 – Law Practice Management Today and Tomorrow
The session will address issues related to recruiting, developing, retaining and transitioning attorneys to firm leadership and the business of law.
- MODERATOR: Thomas P. Feher, *Partner, LeBeau Thelen, LLP and Thomas P. Feher Mediations*
- John Childers, *Childers & Partners LLC*
- Anthony Kohrs, *Partner, Kohrs & Fiske*

12:00 noon - 1:30 pm
Lunch on Own

1:30 pm - 2:45 pm *Diamond 4* (MCLE 1.25 General)
TRACK 1 – How to Obtain a Favorable Verdict in Today's Atmosphere
The session will discuss how these two very successful plaintiff and defense attorneys obtain plaintiff and defense verdicts in today's jury atmosphere and what the judge saw on the bench from attorneys who obtained their successful verdicts.
- MODERATOR: Juan C. Delgado, *Partner, Ford, Walker Haggerty & Behar*
- Hon. Daniel Buckley (Ret.), *Los Angeles Superior Court, Signature Resolution*
- Dana Fox, *Partner, Lewis Brisbois Bisgaard & Smith*
- Rahul Ravipudi, *Partner, Panish | Shea | Boyle | Ravipudi*

1:30 pm - 2:45 pm *Diamond 2-3* (MCLE 1.25 General)
TRACK 2 – Artificial Intelligence and the Legal Landscape
Join us for a riveting panel discussion on the intersection of artificial intelligence and the legal landscape. As technology continues to advance at an unprecedented pace, the role of AI in the legal system becomes increasingly prominent. Our distinguished panel of experts will explore the impact of AI on legal processes from the perspectives of the plaintiff and defense bar.
- Marshall R. Cole, *Nemecek & Cole*
- Robert T. Simon, *The Simon Law Group*

2:45 pm - 3:00 pm *Diamond Foyer*
Break

3:00 pm - 4:15 pm *Diamond 4* (MCLE 1.25 General)
TRACK 1 – Lessons Learned from the Second Chair
We will have topics on how to be a good/valuable second chair; lessons learned from the second chair that you can bring with you in transitioning to a first chair; and how appellate counsel can be beneficial and effective.
- MODERATOR: Alexis Morgenstern, *Partner, Morgenstern Law Group*
- Mary R. Fersch, *Partner, Daniels Fine Israel Schonbuch & Lebovits, LLP*
- Steve Fleischman, *Partner, Horvitz & Levy, LLP*
- Robert S. Glassman, *Partner, Panish | Shea | Boyle | Ravipudi*
- Hon. Lauren Lofton, *Los Angeles Superior Court*

3:00 pm - 4:15 pm *Diamond 2-3* (MCLE 1.25 General)
TRACK 2 – Trial Technology: Leveraging Digital Tools to Multiply Your Effectiveness
This panel will educate and demonstrate digital technologies a small team can use to prepare a case, from Answer to Trial, rivalling the production values of a well-funded plaintiffs firm. Demonstrated technologies will include the necessary hardware and applications Notability, Essential Anatomy 5, LiquidText, TrialPad, and TranscriptPad.
- MODERATOR: Benjamin J. Howard, *Partner, Neil Dymott Hudson*
- Brett Burney (Host of the Podcast *Apps in Law*)
- Taryn Perez, *Associate, Peabody & Buccini*

4:15 pm - 4:30 pm *Diamond Foyer*
Break

Continued on page 29

Thursday, February 8, 2024 (continued)

4:30 pm - 5:00 pm
Diamond 4
(MCLE .5 General)

LASC Update with Judge Samantha Jessner

Hear the latest from the Los Angeles Superior Court

- Hon. Samantha Jessner, *Presiding Judge, Los Angeles Superior Court*

5:00 pm - 8:00 pm
Diamond 5-10

Cocktail Reception, Casino Night and Taylor Jules & Friends Live!

Join us for an enjoyable casino night packed with entertainment, prizes, and live music featuring the incredibly talented Taylor Jules, daughter of ASCDC Past President, Michael Schonbuch. This is an event you won't want to miss, so make sure to be there for a night filled with fun and excitement!

Friday, February 9, 2024

7:30 am - 12:00 noon
Diamond Foyer

Registration Open

7:30 am - 10:45 am
Diamond Foyer

Exhibits Open

7:30 am - 8:30 am
Diamond Foyer

Continental Breakfast with Exhibitors

7:30 am - 8:15 am
Diamond 1

Women in the Law Breakfast

- MODERATOR: Lindy Bradley, *Partner, Bradley, Gmelich + Wellerstein LLP*

8:30 am - 9:15 am
Diamond 4
(MCLE .75 General)

Legislative Update

Hear the latest from California Defense Counsel Legislative Advocate, Mike Belote, who will provide attendees with a review of new and pending legislation impacting the defense practice in California.

- Mike Belote, Esq., *Legislative Advocate, California Advocates, California Defense Counsel*

9:15 am - 9:30 am
Diamond Foyer

Break

9:30 am -10:30 am
Diamond 2-3
(MCLE 1.0 General)

TRACK 1 – Litigating a Product Defect Case from Beginning to End

- MODERATOR: Hannah Mohrman, *Partner, Bowman and Brooke, LLP*
- Chris Aumais, *Partner, Good Gustafson Aumais*
- Bryan Martin, *Partner, Yoka & Smith*
- Boris Treyzon, *Founding Partner, ACTS LAW*

9:30 am - 10:30 am
Diamond 4
(MCLE 1.0 General)

Track 2 – Premises Liability Basics: Tips from the Front Lines

From Ortega To Peralta the panel will discuss identifying the weaknesses and strengths of your case and leveraging premises specific facts to reach a desirable result for your client. Hear from seasoned Plaintiff and Defense attorneys on how they set up the premises case and address liability considerations.

- MODERATOR: Bron D'Angelo, *Partner, Burger Meyer & D'Angelo*
- Greyson M. Goody, *Goody Law Group*
- Vicki Greco, *Partner, Collinson, Daehnke, Inlow & Greco*
- Daniel Kramer, *Partner, Kramer Trial Lawyers*

10:30 am - 10:45 am
Diamond Foyer

Break

10:45 am - 12:00 noon
Diamond 4
(MCLE 1.25 General)

TRACK 1 – The Perils of Code of Civil Procedure § 2025.620 at Trial and other Advanced Trial Techniques

You can't win the war, if you're not prepared for the battle! Our distinguished panel of legal experts will explore the nuances and best practices of incorporating digital deposition clips effectively in the courtroom. This panel promises to not only equip you with actionable strategies to harness the potential of using digital deposition clips effectively, but also will equip attendees with the arsenal needed to adeptly counter the use of digital deposition clips by opposing counsel. Using digital clips and anticipating and effectively responding to the opposition's use of clips can significantly influence a trial's outcome. Join us for an illuminating discussion that will redefine the way you approach trial.

- MODERATOR: Lisa Collinson, *Managing Partner, Collinson, Daehnke, Inlow & Greco*
- Hon. Michelle Williams Court, *Los Angeles Superior Court*
- Christopher Faenza, *Partner, Yoka | Smith*
- Cindy Tobisman, *Partner, Greines, Martin, Stein & Richland, LLP*
- Deborah Chang, *Founder and Partner, Athea Trial Lawyers LLP*

10:45 am - 12:00 noon
Diamond 2-3
(MCLE 1.25 General)

TRACK 2 – Litigating, Mediating, and Trying Employment-Related Cases – What We've Seen and What We Expect to See

- MODERATOR: Katherine Hren, *Partner, Ballard Rosenberg Golper & Savitt, LLP*
- Hon. Rupert Byrdsong, *Los Angeles Superior Court*
- Hon. Michael D. Marcos (Ret.), *ADR Services*
- Jacquiline M. Wagner, *Los Angeles Unified School District*

12:00 noon - 2:00 pm
Diamond 5-10

Annual Seminar Luncheon with Keynote Speaker Bob Kendrick

- Bob Kendrick, *President of the Negro Leagues Baseball Museum*

National Anthem by The Singers In Law (Hon. Sheri Bluebond (U.S. Bankruptcy Court), Linda Hurevitz (Ballard Rosenberg Golper & Savitt, LLP), Ken Freundlich (Freundlich Law), and John Blumberg (Blumberg Law Offices)

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Pushing Back on Increasing Claims of Elder-Dependent Adult Abuse Based on Acts or Omissions During Inpatient Hospitalizations; A Call to Keep Up the Fight!

By David P. Pruett, Kelly, Trotter & Franzen

While plaintiffs' attorneys appear to increasingly assert a theory of elder-dependent adult abuse based on acts or omissions during inpatient hospitalizations, defense attorneys should steadfastly challenge the appropriateness of those claims, including by demurrer, in the defense of hospitals (and other health care providers) who provide acute care medical services. While maintaining such battlelines of defense may seem inconvenient, including for overloaded Superior Court judges, the assertion of substantive defenses by dispositive motions goes to the core of administration of justice.

The decisions of the California Supreme Court have consistently rejected formulaic assertions of elder abuse in complaints that blur the distinctions between elder-dependent abuse and medical negligence. The role of defense attorneys in holding the line, enforcing the distinctions between the theories, should not be underestimated. Without diligent enforcement of the difference, there is risk that the war of attrition will favor relaxation of standards and allow a broader scope of elder-dependent abuse theories based on acts or omissions during inpatient care than the known standards permit.

Plaintiffs have strong financial incentives to tack on a theory of elder abuse to a medical negligence case. The statutory scheme allows a prevailing plaintiff to recover attorney fees, it avoids the MICRA restrictions on allegations of punitive damages, and for living plaintiffs avoids the MICRA caps on noneconomic damages that apply in ordinary medical negligence actions. Defense counsel must take care to resist the idea that any hospital inpatient, elderly or asserted to be dependent, was necessarily under the hospital's or doctor's custodial care so as to trigger application the elder-dependent abuse statutes.

A Hospital Inpatient Should Not Be Presumed to Have Grounds for a Theory of Elder-Dependent Abuse for Alleged Failures to Provide for Safety, Comfort, Personal Hygiene, and Protection

A Common, Colloquial - but Legally Erroneous - Approach by Plaintiffs Attempts to Assert a Theory of Elder-Dependent Abuse

Colloquially, a person admitted to a hospital (elderly or not) is "dependent" upon doctors and hospital staff, especially nurses. Controlling precedent, however, rejects such a colloquial characterization of dependence relative to a custodial care relationship for a theory of elder-dependent abuse.

Increasingly, theories of elder-dependent abuse are asserted based on allegations that while admitted to a general acute care hospital for treatment, the medically compromised patient was deprived of adequate nutrition, hydration, repositioning, hygiene, bowel and bladder care, wound prevention and wound care by the health care providers charged with caring for the patient. Plaintiffs will allege that such failings were "deprivations of care" that went uncorrected. The plaintiff will contend that an adverse event suffered by the patient, such as skin breakdown-ulceration, a fall, or choking on food, were the result of such deprivations of care. Further, the plaintiff will contend that the outcome was predictable, and therefore recklessly malicious, because the health care providers knew or should have known of the risk that materialized into injury.

A plaintiff will typically contend that the defendant's status as a health care provider is irrelevant, with reference to a phrase within the Supreme Court's decision in *Delaney v. Baker* (1999) 20 Cal.4th 23, to argue that the plaintiff's theory of abuse is based on "the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, *regardless of their professional standing,* to carry out their custodial obligations." (*Id.* at 34; emphasis added.)

A plaintiff will often assert that because a plaintiff was admitted to a hospital (or other facility) the prerequisite of a custodial caretaker relationship has been met. A plaintiff may refer to *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, where the plaintiff raised issues regarding a medical clinic's outpatient services and was not allowed to proceed on a claim of elder-dependent abuse, with the Court stating that the elder-dependent abuse statutes contemplate "the existence of a robust caretaking or custodial relationship. By that, the court meant a relationship where a certain party has assumed a significant measure of responsibility for attending to one or more of an elder's basic needs that an able-bodied and fully competent adult

Continued on page 34

would ordinarily be capable of managing without assistance." (*Id.* at 157-158.) Plaintiffs will contend that inpatient status checks that box.

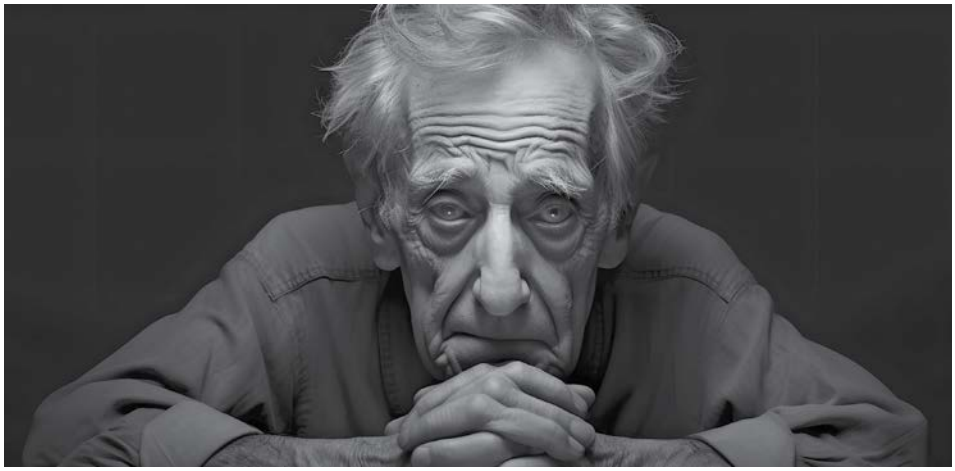
Moreover, a plaintiff may refer to the statutes defining elder-dependent abuse to try to piece together a theory of elder-dependent abuse. For instance, a plaintiff may contend that a defendant is a "care custodian" based on Welfare and Institutions Code section 15610.17, defining that term to mean "an administrator or an employee" of such facilities as hospitals and other 24-hour health facilities, clinics, and home health agencies. So, referring to that statute a plaintiff may contend that a physician with an administrative role at a hospital is an administrator at the hospital such that both that physician and the hospital are care custodians and thus targets, per se, of a theory of elder-dependent abuse.

Next, such a plaintiff may refer to section 15610.07 for the definition that "abuse of an elder or a dependent adult" includes neglect by "treatment with resulting physical harm or pain or mental suffering" or "deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering."

So, the plaintiff's argument would go, there was elder-dependent abuse because (1) actors involved were administrators or employees of a statutorily defined care custodian, including a physician with an administrative role at a hospital, and (2) their failures deprived the elder-dependent adult of goods or services needed to avoid physical harm or mental suffering. That formulation may be argued to mean hospitals are exposed to claims of elder-dependent abuse for any failures to provide needed care to a hospitalized patient.

Under that paradigm, all admitted patients would colloquially be in the custodial care of the hospital, and a theory of elder-dependent abuse could be asserted by any adult patient, regardless of age.

The greater the person's need for medical care, the greater the risk that the facilities and providers providing services in those



facilities will become targets of a theory of elder-dependent abuse. The worse that a patient's medical condition is, the more likely that patient will suffer from problems associated with malnutrition, dehydration, and skin breakdown, outcomes that plaintiffs will commonly assert as characteristic of elder-dependent abuse.

As explained below, the controlling appellate decisions have explained that the foregoing arguments are inconsistent with Welfare and Institutions Code section 15657.2, which provides that any cause of action for injury or damage against a health care provider "based on the health care provider's alleged professional negligence" shall be governed by the laws specifically applicable to professional negligence.

The Seminal Decision of *Delaney* – Differentiating Elder-Dependent Abuse and Medical Negligence

Revisiting *Delaney v. Baker,* supra, 20 Cal.4th 23, the Court rejected the proposition that being licensed as a health care provider means that section 15657.2 entirely shields a defendant from claims of elder-dependent abuse. (*Id.* at 24.) Delaney explained that "neglect" as defined in elder-dependent statutes "does not refer to the performance of medical services in a manner inferior to '"the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing' [citation], but rather to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations." (*Id.*; citing *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 998.) *Delaney* found it "instructive" that the statutory definition "gives as an example of 'neglect' not negligence in the undertaking of medical services but the more fundamental '[f]ailure to provide medical care for physical and mental health needs.'" (*Id.*)

Delaney's instruction that "the term 'professional negligence'" is "mutually exclusive" of elder-dependent abuse (Delaney at 30) cannot be squared with an argument that a hospital simultaneously provides both "custodial functions" and "professional medical care." It thus cannot be the case that elder-dependent liability will turn on whether the acts or omissions were reckless, which is the minimal malice required for the enhanced remedies for elder-dependent abuse. (*Id.* at 34-35.)

Covenant Care Clarifies Delaney's Application and Rejects "Overlap" of Elder-Dependent Abuse and Medical Negligence

In *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, the Supreme Court emphasized Delaney's instruction that elder-dependent abuse "covers an area of misconduct distinct from 'professional negligence'" and that "the statutory definition of 'neglect' speaks not of the undertaking of medical services, but of the failure to provide medical care." (*Id.* at

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783; citing *Delaney* at 34.) *Covenant Care* emphasized that professional negligence is "mutually exclusive of the abuse and neglect." (*Id.* at 785.)

Building on the principles discussed in *Delaney, Covenant Care* observed that "in the medical malpractice context 'there may be considerable overlap of intentional and negligent causes of action,'" which in *Delaney* pertained to the statutory restrictions on allegations of punitive damages in actions "arising out of professional negligence" (i.e., Code Civ. Proc. § 425.13). (*Covenant Care* at 788-789.) *Covenant Care* broadly instructs, "no such overlap occurs in the Elder Abuse Act context, where the Legislature expressly has excluded ordinary negligence claims from treatment under the Act." (*Id.* at 788-789.)

In *Winn*, Supreme Court Explains that Being Statutorily Categorized as a "Care Custodian," Like a Clinic (or Hospital), Does Not Satisfy the Element of Being a Care Custodian for Asserting a Theory of Elder-Dependent Abuse

In *Winn v. Pioneer Medical Group, Inc.*, supra, 63 Cal.4th 148, the Supreme Court addressed the alleged failure of an outpatient medical clinic to provide medical services that an elder needed for her impaired peripheral vascular blood flow, with the failures allegedly resulting in below the knee leg amputation. The Court explained that elder-dependent abuse statutes pertain to circumstances involving a "a robust caretaking or custodial relationship – that is, a relationship where a certain party has assumed a significant measure of responsibility for attending to one or more of an elder's basic needs that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." (*Id.* at 157-158.) Significantly, *Winn* explained that a claim for elder-dependent abuse based on a caretaker-custodian's "'[f]ailure to provide medical care for physical and mental health needs'" pertains to "a determination made by one with control over an elder whether to initiate medical care at all." (*Id.* at 158, quoting Welf. & Inst. Code § 15610.57(b)(2); italics by Court.) *Winn* explained that the elder-dependent statutes were "not meant to encompass every course of behavior that fits either legal or colloquial definitions of neglect." (*Id.* at 159.)

Winn differentiated between elder-dependent abuse and medical negligence, stating that "the sort of conduct triggering more conventional tort liability," such as a "doctor's failure to prescribe the right medicine, or refer a patient to a specialist." (*Winn* at 159.) *Winn* explained: "What seems beyond doubt is that the Legislature enacted a scheme distinguishing between – and decidedly not lumping together – claims of professional negligence and neglect." (*Id.*; citing § 15657.2.) *Winn* cautioned against "[b]lurring the distinction between neglect under the Act and conduct actionable under ordinary tort remedies." (*Id.* at 160.)

While *Winn* addressed outpatient medical services, the partitioning from elder-dependent abuse was not limited to a distinction between outpatient and inpatient services. Rather, *Winn* more broadly concluded that because the alleged facts did not support an inference that the patient relied on "defendants in any way distinct from an able-bodied and fully competent adult's reliance on the advice and care of his or her medical providers," the "defendants lacked the needed caretaking or custodial relationship with the decedent." (*Id.*)

In reaching that conclusion, *Winn* observed that "clinics" were among the defined categories of care custodians listed in section 15610.17, but rejected that as a basis to jump to the conclusion that the care custodian element of a theory of elder-dependent abuse was satisfied. *Winn* rejected the argument that because section 15610.17's definition of a care custodian includes clinics that "Pioneer's outpatient facilities are clinics, and Pioneer is therefore

Continued on page 36

a care custodian." (*Id.* at 164.) *Winn* stated: "What plaintiffs erroneously assume is that the Act's definition of care custodian in section 15610.17 will, as a matter of law, always satisfy the particular caretaking or custodial relationship required to show neglect under section 15610.57." (*Id.*) "Neither the text of section 15610.17 nor anything else in the statute supports plaintiffs' argument that the presence of such a relationship may be assumed whenever the definition of 'care custodian' is met." (*Id.*)

Ultimately, *Winn* includes the rule that when a defendant acts in the role of a professional medical provider, the defendant is not subject to allegations of elder-dependent abuse. ***A plaintiff does not have a theory of elder-dependent abuse when the plaintiff's relationship with the defendant is consistent with "an able-bodied and fully competent adult's reliance on the advice and care of his or her medical providers."*** (*Winn* at 165; emphasis added.)

Winn's holding is not limited to outpatient clinics, it pertains to all the statutorily identified care custodians, including 24-hour health facilities (like hospitals). (§ 15610.17 (a).)

The Provision of Medical Services Is Not Custodial Care Because Such Services Are NOT Things Able-Bodied, Competent Persons Would Do for Themselves

That rule from *Winn* was applied in *Oroville Hospital v. Superior Court* (2022) 74 Cal. App.5th 382, where the Court acknowledged that a hospital's home health agency could be a care custodian under the statutory definition. (*Id.* at 388.) The Court observed that the elder's physician ordered "in-home nursing care for a pressure injury to her left ischium or buttock," which was provided by the hospital's home health agency. (*Id.* at 389.) The condition of the wound worsened leading to two hospitalizations, including for treatment of sepsis, and the elder died. (*Id.*) In concluding there was not a custodial caretaker relationship, the Court's decision did not hinge on any outpatient or inpatient distinction; *Oroville Hospital* explained that the "[w]ound care such as that at issue here is not a 'basic need' of the type an able-bodied and fully competent adult would ordinarily be capable of managing on his or her own." (*Id.* at 391.) The Court hammered the point home by observing that the patient's granddaughter who acted as a caretaker was presumably an able-bodied and fully competent adult, but "did not have the training to properly attend to decedent's wound care needs." (*Id.* at 391.) The provision of medical services is associated with providers acting in accordance with medical training and direction, which custodial care does not.

In accord, *Kruthanooch v. Glendale Adventist Medical Center* (2022) 83 Cal. App.5th 1109, stated: "We are not persuaded that a hospital necessarily assumes a robust caretaking or custodial relationship and ongoing responsibility for the basic needs of every person admitted," following the guidance of *Winn* and *Oroville.* (*Id.* 1131.) Further, *Kruthanooch* explained, "most, if not all, acts of professional negligence are susceptible to characterization as a failure to protect. For example, a surgeon who does not remove an instrument from the patient's body before closing the patient up has failed to protect the patient from infection and injury, and a doctor who prescribes the wrong medication or dosage fails to protect the patient from the medication's adverse effects. We doubt the Supreme Court would have repeatedly emphasized the distinction between the neglect of an elder under the Act and professional negligence if the two causes of action could so easily be 'lump[ed] together.'" (*Id.* at 1135; quoting *Winn* at 159.)

Moreover, *Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, affirmed a ruling on demurrer rejecting a theory of elder-dependent abuse against a hospital in a complaint "replete with references to the extensive medical care." (*Id.* at 223.) A theory of abuse was not stated on conclusory allegations of reckless failure "to protect her from health and safety hazards." (*Id.*)

The foregoing reasoning harmonizes with well-established precedent defining the scope of issues of medical negligence. *Mitchell v. Los Robles Regional Medical Center* (2021) 71 Cal.App.5th 291, stated: "A nurse's professional duties include providing '[d]irect and indirect patient care services that ensure the safety, comfort, personal hygiene, and protection of patients.'" (*Id.* at 297-298; quoting Bus. & Prof. Code, § 2725(b)(1); citing *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75.) "Appellant's allegation that she fell because the nurse did not assist her in using the toilet is an allegation that the nurse breached his professional duties." (*Id.*)

Conclusion – Continue to Challenge Plaintiffs' Approach of Blurring the Distinction Between Professional Negligence and Elder-Dependent Abuse

A theory of elder-dependent abuse should be deemed improper as to services that are not secured to provide for basic needs of the elder or dependent adult that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance. Providing some care services ancillary to providing medical services at a hospital is not the same as providing basic services that would ordinarily be managed by an able-bodied, competent person. Hospitals, and other health care providers, should maintain the stance that professional negligence and elder-dependent abuse are mutually exclusive and that the distinction "works like a toggle switch." (*Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1522-1523.). The switch will typically be appropriate on a theory of medical negligence, not elder-dependent adult abuse. V

David P. Pruett

Mr. Pruett is a certified appellate specialist and has extensive trial experience. In addition to the depth of experience in managed care issues, medical malpractice, and elder abuse, Mr. Pruett's experience includes insurance litigation, employment litigation, class action litigation, physician-hospital relationships, and various issues arising in business litigation.

Jan Roughan
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Recent Court of Appeal Opinion Helps to Mitigate Bad Faith "Set-Ups" and Policy "Lid-Off" Tactics

Min K. Kang, Coddington Hicks & Danforth

"It seems to me that attorneys who handle policy claims against insurance companies are no longer interested in collecting on those claims, but spend their wits and energies trying to maneuver the insurers into committing acts which the insureds can later trot out as evidence of bad faith." (*White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 900, fn. 2 [concurring and dissenting opn. of Kaus, J.].) Justice Kaus expressed his concerns nearly forty years ago. Yet this recurring theme of counsel focusing on "set-ups" of "open" policy limits rather than settlement in insurance matters prevails today, as in the recently published case of *CSAA Insurance Exchange v. Hodroj* (2021) 72 Cal.App.5th 272.

CSAA Insurance Exchange v. Hodroj, 72 Cal.App.5th 272 (2021)

The fact pattern in the *Hodroj* case is an unfortunately all too commonplace occurrence in insurance claims: a claimant extends a time-sensitive settlement demand to a tortfeasor's insurer for policy limits with various convoluted conditions (many unnecessary or near impossible to meet) in the hope the carrier will fail to timely accept or somehow err slightly in responding to each condition. Although the insurer evinces acceptance of the demand, the claimant nonetheless alleges that the carrier's conduct constitutes a rejection such that they proceed with filing suit against its policyholder. The claimant then alleges that the "lid is off" and that the insurer has "opened up" policy limits, with the intent to obtain an assignment of rights from the policyholder against their carrier for an amount awarded at trial in excess of the policy limit.

The declaratory relief action of *Hodroj* involved an underlying case that arose out of a single-car accident. *Hodroj* was a passenger in a vehicle operated by the defendant insured at the time of the accident, which resulted in personal injuries to the passenger. There is nothing in the record, nor was there any other indication, that the passenger claimant ever actually asserted or even suggested any potential property damage claims.

Before filing suit against the insured, who was also the passenger's driver, the passenger claimant's counsel had issued a time-sensitive policy limit demand to the driver's insurance carrier. The demand contained several conditions with various subparts. One of the "conditions" in the demand was actually an option for the carrier to have the passenger sign a settlement agreement and release regarding his bodily injuries. There was no mention of any potential property claim of the passenger.

The driver's carrier complied with all stated conditions of the demand seven days before its expiration. The insurer sent a letter stating in the first sentence that "We accept [the passenger's] demand for the settlement of this claim." It then timely provided the policy limit of $100,000, the demanded policy information and a signed declaration. The carrier also sent a proposed release to the passenger's attorney, which was a form release that the assigned adjuster had revised to comply with the demand, and which included property damage language.

Leaping upon the property damage language in the release, and despite the carrier's acceptance of the demand and satisfaction of the conditions, the passenger's counsel claimed the insurer had failed to *strictly* meet all of the conditions of the demand. He therefore claimed that the demand was rejected and the policy limits were now "open." In essence, after acceptance, the passenger's attorney seized upon the inclusion of an insignificant clause within the proposed release to declare a breach of the agreement or rejection of the offer.

The passenger then filed suit against his driver, after which the insured driver's carrier filed its declaratory relief action seeking a declaration that CSAA had in fact accepted the demand and that there was thus a binding settlement. The trial court granted summary judgment in favor of CSAA, and the passenger appealed.

Timely Acceptance of a Policy Limits Demand, Though Imperfect, May Result in Formation of a Binding Settlement Agreement

Ultimately, the Court of Appeal affirmed the judgment of the trial court, holding that the carrier's acceptance of a policy limits demand, though imperfect, was in fact an acceptance such that a binding contract was formed. The Court of Appeal concluded that the carrier's proposed release was not a rejection or some counteroffer, but merely an attempt to reduce the binding agreement into a formal writing and finalize the settlement. (*Hodroj, supra,* 72 Cal.App.5th at 276.) The *Hodroj* decision is important, because it is the first case in a context of an insured third party claim to address these types of demands that are, in actuality, not geared to settle

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the claim but to "set up" an allegation that the policy limits are opened.

Proffering Proposed Settlement Language that Varies From the Offer Does Not Constitute Rejection of the Demand

The Court of Appeal in *Hodroj* found it is well-established that the lack of a formal writing does not negate the existence of the prior contract, particularly when there is nothing to suggest that the contract or the parties specifically required a signed mutual agreement. (*Id.*, [citing *Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307 and *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358]; see also, *Smissaert v. Chiodo* (1958) 163 Cal.App.2d 827, 830-831; *Columbia Pictures Corp. v. DeToth* (1948) 87 Cal.App.2d 620, 629.)

The Court of Appeal further relied on authority to conclude that newly proposed terms that are ultimately rejected are simply considered a "nullity" rather than a purported counteroffer. (*Hodroj,* supra, 72 Cal.App.5th at 276 [citing *American Aeronautics Corp. v. Grand Central Aircraft Co.* (1957) 155 Cal.App.2d 69, 82]; *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 61.)

Public Policy Favoring of Resolution Supports a Finding of a Valid Settlement Agreement

The Court of Appeal also considered and upheld public policy issues to find the existence of a valid contract, reasoning that "'[a]ny other rule would always permit a party who has entered into a contract like this, through letters ... to violate it, whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where, by changes in the market, or other events occurring subsequent to the written negotiations, it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business.'" (*Id.* at 277-278, citing *Stephan v. Maloof* (1969) 274 Cal.App.2d 843, 848-849.)

After the Court of Appeal granted the carrier's request for the *Hodroj* decision to be published, the Supreme Court received multiple requests for depublication, including from the Consumer Attorneys of California. The American Property Casualty Insurance Association and other amici, filed briefs opposing the depublication requests. The Supreme Court declined to depublish.

Examples of Commonplace Conditions and Set-Up Tactics

These types of attempts to deter application of contract law to settling insured claims in effort to mindfully induce a "failed' settlement is to reap the potential rewards of threatening that an insurer has "rejected" a reasonable demand within the policy limits. This is based upon the proposition that the insured may be fully indemnified against the claim, regardless of the policy limits, depending upon whether there was an unreasonable rejection of a reasonable demand. (See *Critz v. Famers Ins. Group* (1964) 230 Cal. App. 2d 788.)

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The flood of such insurance claims involving allegations of excess exposure championed by parties and their counsel who seek to effectively manufacture the basis for a bad faith claim and "blow-up" smaller or minimal policy limits often include such conditions or requirements that:

- The insurer explain to the insured the legal meaning of certain phrases, such as "course and scope," although this requires the unauthorized practice of law;
- The release only release the insured and no one else, even if other potential tortfeasors could bring cross-complaints against the insured;
- The insurer provide proof that all statutory liens were perfected, even if that is impossible to do within the demand's time limit;
- The insurer ignore all non-statutory liens;
- The insurer accept a promise that the claimant will "handle" statutory liens, including Medicare liens, in contravention of federal statutes; and
- All settlement documents be received by the claimant attorney within an unreasonably short period of time, although an additional one or two days would not make the slightest difference to the claimant.

In addition, the demands are often accompanied by a recitation of the law regarding excess exposure (often incorrect) and a threat that the rejection of the demand will result in a finding of bad faith and excess exposure.

Conclusion

The *Hodroj* decision is significant in view of prevalent, ongoing attempts to orchestrate extracontractual claims. The strength of this decision is that it goes to the heart of the gamesmanship of plaintiff attorneys in making demands within the policy limit. If the insurer tries to accept the demand, agreeing to terms – it is accepted. That it does not completely meet every core element of the demand in execution is irrelevant.

While succinct, the published *Hodroj* opinion serves as a useful guide and precedent of the relevant analysis that must be undertaken in adjudicating these types of disputes and resultant insurance policy "lid-off" matters. It also helps to mitigate these bad faith set-up tactics by claimants' counsel, setting forth the clear standards for offer and acceptance and clarifying that these standards are no different in the negotiation of third-party insurance claims.

Min K. Kang

Min K. Kang is a Partner at the law firm of Hinshaw & Culbertson. Her practice encompasses contract analysis and disputes, regulatory/compliance, business litigation, insurance and coverage, appellate, transportation, e-commerce, privacy, aviation and administrative law matters.

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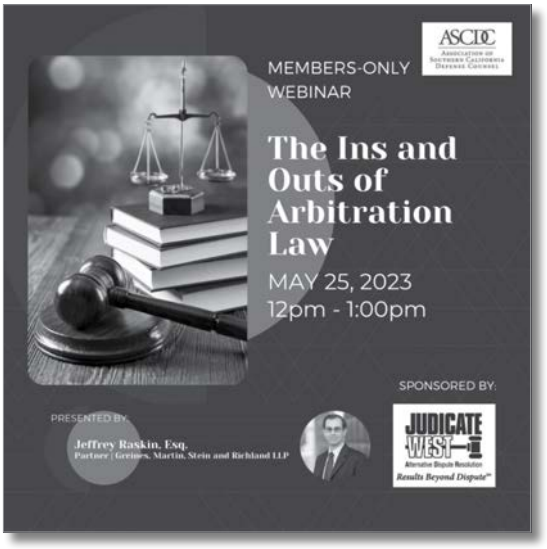

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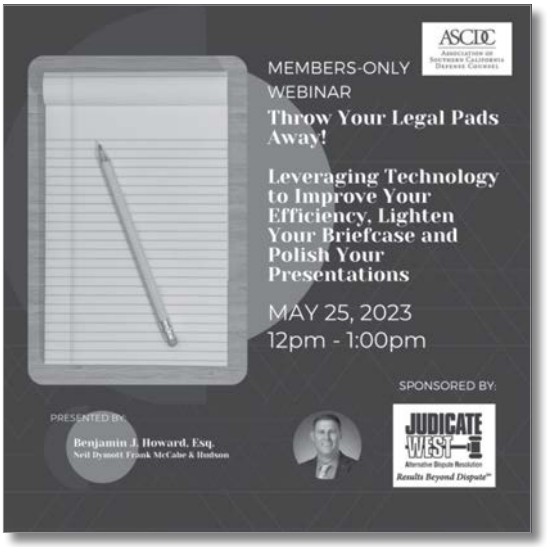

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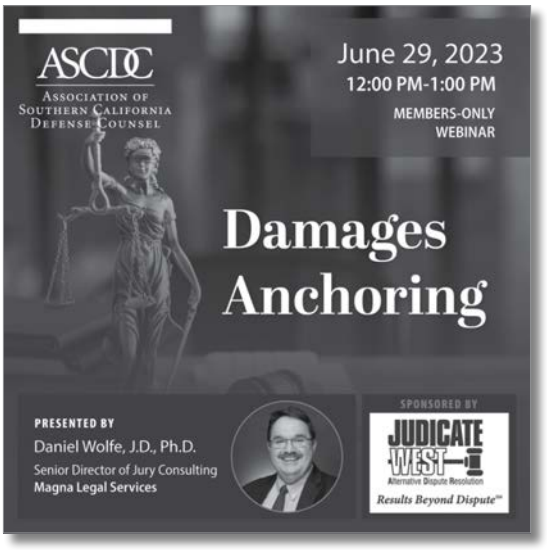

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This CLE presentation discusses the proliferation of nuclear verdicts around the country, some of the psychological reasons behind such verdicts, and provides practical advice for defendants as to how to avoid being on the receiving end of a nuclear verdict. Traditional versus new and recommended defense approaches to damages will be discussed – specifically, the concept of low anchoring – supported by academic research as well as jury research case studies.

For more information contact:
Daniel Wolfe, J.D., Ph.D. | *dwolfe@magnals.com*

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This women's mentoring panel is free to all, including non-ASCDC members. This webinar panel is an excellent opportunity in particular for women lawyers, younger lawyers, or any lawyers that have faced adversity in their practice, to hear from a panel of accomplished women litigators about some of the obstacles they faced in the profession and how they overcame those obstacles on the path to success.

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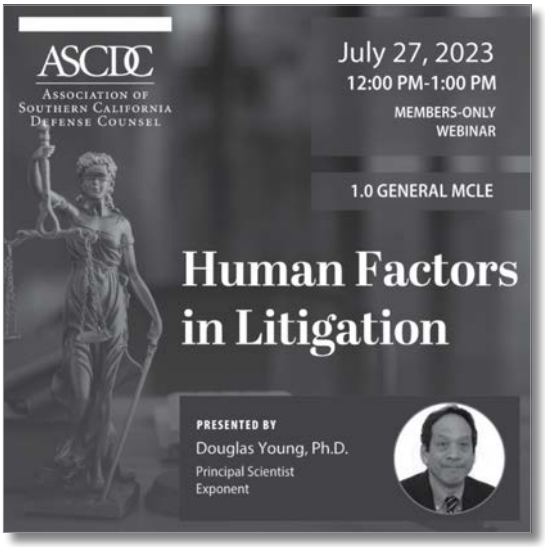

Human Factors in Litigation

Dr. Young will present information related to the role of a Human Factors expert in litigation. He will describe the array of topics and issues within the areas of human factors, human performance, ergonomics, and safety and how human factors experts can be used in the litigation process. In addition, he will provide examples of how human factors and the study of human behavior can contribute to the defense of court cases, including those involving product and premises liability.

For more information contact:
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Artificial Intelligence in the Legal Field

Artificial Intelligence (AI) offers immense potential to streamline processes, enhance efficiency, and drive better outcomes for legal professionals. However, legal departments and firms also face unique challenges when integrating AI into their operations. In this webinar we will be discussing the benefits, pitfalls and ethical considerations with respect using AI and Chat GPT in the legal field.

For more information contact:
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Uncover the art of achieving favorable resolutions in Wage & Hour Class Action and Private Attorneys General Act (PAGA) cases through the powerful tool of Early Mediation. In this comprehensive webinar, you will have the opportunity to hear from two seasoned defense counsels, one of whom also mediates cases, alongside a distinguished wage and hour damages economist expert. Together, they will equip you with essential strategies and insights to navigate early mediation with confidence.

For more information contact:
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David Napper, Esq. | *dnapper@cgdrlaw.com*
Nick Briscoe | *nick@briscoeeconomics.com*

The Role of an Economic Damages Expert

This presentation will discuss the most effective ways to use your economic damages expert. From the early parts of discovery, all the way through depositions and trial, your damages expert can be a trusted resource in cutting through the noise and understanding the financial aspects of your case. This presentation will cover the different elements of economic damages, as well as case examples of how economists are utilized in litigation.

For more information contact:
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Summary Judgment Procedure and its Application in Employment Cases

Appellate lawyers Steve Fleischman and Scott P. Dixler of Horvitz & Levy LLP will discuss recent developments in summary judgment procedure that all litigators should know. The presentation will also address trends in courts' treatment of summary judgment motions in employment cases.

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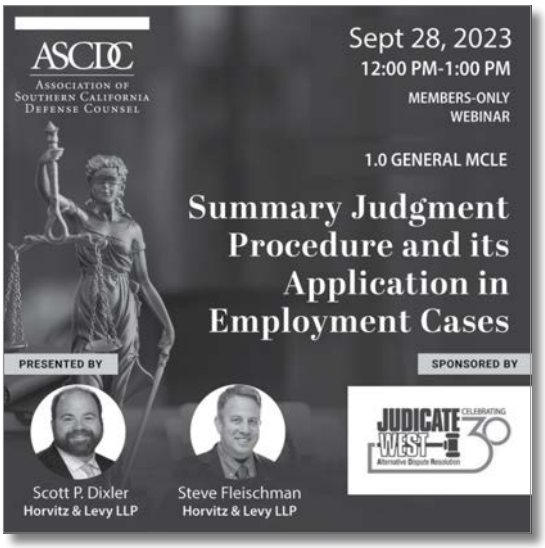

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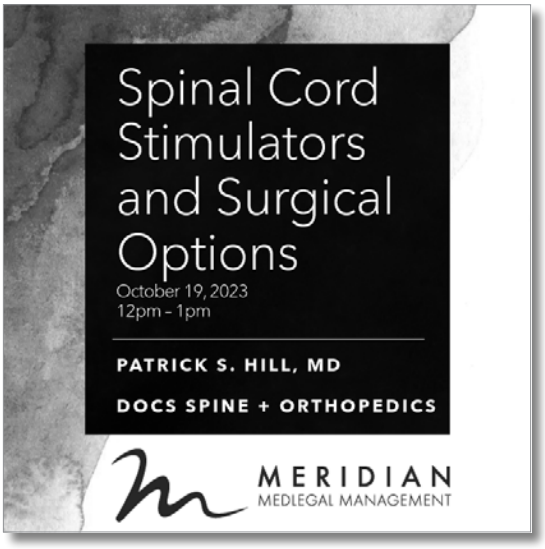

Social Media Ethical Evidence Collection and Use

Dr. Patrick S. Hill presented on the topic. Dr. Hill is part of DOCS Health and provides exemplary and highly attentive care for patients with all types of back and neck pain in his office in the Beverly Grove area in Los Angeles, California. He is also affiliated with Cedars Sinai Medical Center. He diagnoses and treats conditions including cervical stenosis, degenerative disc disease, lumbar spinal stenosis, and other types of spinal disease and trauma. In addition, Dr. Hill is a leading specialist in minimally invasive and robotic spine surgery, including disc replacements. Dr. Hill earned his undergraduate and medical degrees at the University of Kentucky in Lexington, Kentucky. Upon earning his MD with honors, Dr. Hill completed an orthopedic surgery internship and residency at the University of Southern California in Los Angeles, California.

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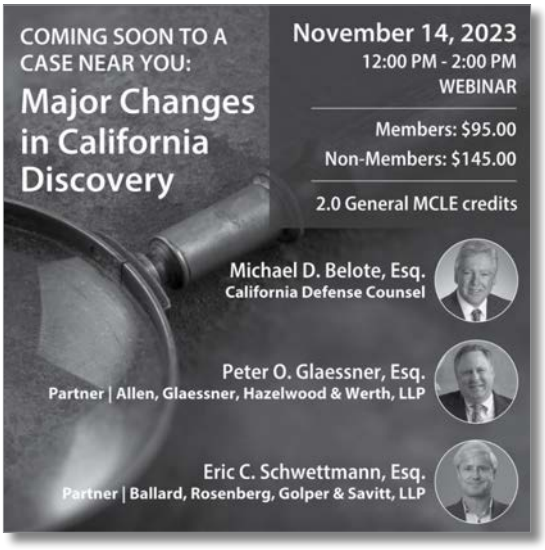

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Just prior to leaving for fall recess on September 14, the California Legislature passed SB 235 (Umberg), proposing major changes to the Code of Civil Procedure on discovery. Applicable to virtually every civil case in our state courts, the bill has been signed by Governor Newsom, and is effective on January 1, 2024.

This program outlined the changes to CCP Section 2016.090 on early discovery, and Section 2023.050 on sanctions. Presenters, who were directly involved in negotiations over the bill, will outline the changes and strategies for your cases going forward, as well as critical provisions of the discovery laws which were not changed.

For more information contact:
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This program is available to ASCDC members and can be purchased online by going to *www.ascdc.org.*

AMICUS COMMITTEE REPORT

ASCDC's Amicus Committee continues to work energetically on behalf of its membership. ASCDC's Amicus Committee has submitted *amicus curiae* briefs in several recent cases in the California Supreme Court and California Court of Appeal, and has helped secure some major victories for the defense bar.

Don't miss these recent amicus *VICTORIES*

The Amicus Committee successfully sought publication of the following case:

1) ***Acosta v. Mas Realty, LLC*** (2023) 96 Cal. App.5th 635: The Court of Appeal in Los Angeles reversed a $12.6 million verdict in a personal injury action under the *Privette* doctrine. Among other things, the court relied on *Blaylock v. DMP 250 Newport Center, LLC* (2023) 92 Cal.App.5th 863, a case ASCDC got published last year. Ted Xanders from Greines, Martin, Stein & Richland submitted a publication request that was granted.

2) ***Escamilla v. Vannucci*** (2023) 97 Cal. App.5th 17: The Court of Appeal in San Francisco held that the statute of limitations for legal malpractice claims (Code Civ. Proc., § 340.6) also applies to malicious prosecution claims brought against attorneys. There is an ongoing split of authority on this issue. Steven Fleischman and Nicolas Sonnenburg from Horvitz & Levy submitted a publication request that was granted.

3) ***Romero v. Los Angeles Rams*** (2023) 91 Cal. App.5th 562: The Court of Appeal in Los Angeles affirmed the granting of summary judgment in favor of a security company in a case involving a fight among fans at a Rams game at the Los Angeles Memorial Coliseum. Steven Fleischman and Nicole Hood from Horvitz & Levy submitted a publication request that was granted on May 15.

4) ***Blaylock v. DMP 250 Newport Center, LLC*** (2023) 92 Cal.App.5th 863: The Court of Appeal in Orange County affirmed the granting of summary judgment in a *Privette* case holding that the *Kinsman* exception (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 675) did not apply. Ted Xanders from Greines, Martin, Stein & Richland and Don Willenburg from Gordon Rees Scully Mansukhani, LLP submitted a publication request that was granted.

5) ***Snoeck v. Exaktime Innovations, Inc.*** (2023) 96 Cal.App.5th 908: In this employment case, the trial court reduced plaintiff's counsel request for attorney fees by 40 percent due to uncivil conduct by plaintiff's counsel. The Court of Appeal in Los Angeles affirmed that reduction. Ted Xanders from Greines, Martin, Stein & Richland and Don Willenburg from Gordon Rees Scully Mansukhani, LLP submitted a publication request that was granted.

6) ***Razoumovitch v. 726 Hudson Avenue*** (2023) 91 Cal.App.5th 547, ordered depublished: The Court of Appeal in Los Angeles reversed the granting of summary judgment in this premises liability case. After a night of drinking, the plaintiff came home to his apartment only to discover that he had forgotten his keys. Plaintiff decided to go to the roof of the building and try to drop onto the balcony of his top-floor unit to enter his apartment. That didn't work and plaintiff was injured. The Court of Appeal held that the apartment owner owed a duty to plaintiff to prevent the injury and that Brad Avrit's declaration created a triable issue of fact on causation. Lisa Perrochet from Horvitz & Levy submitted a request for depublication to the California Supreme Court that was granted.

7) ***Glynn v. Orange Circle Lounge*** (2023) 95 Cal.App.5th 1289: This is a bar fight case. Fight ended in the bar and then continued an hour later and a block away from the defendant's bar. The Court of Appeal in Orange County affirmed summary judgment for the bar owner, holding that that the physical and temporal distance between the defendant's bar and the defendant's death were too remote to justify liability. Steven Fleischman and Nicolas Sonnenburg from Horvitz & Levy submitted a publication request that was granted. ▼

Keep an eye on these PENDING CASES

ASCDC's Amicus Committee has also submitted amicus curiae letters or briefs on the merits in the following pending cases:

1) ***Bailey v. San Francisco District Attorney's Office*** (S265223): The Supreme Court has granted review in this employment case to address this issue: "Did the Court of Appeal properly affirm summary judgment in favor of defendants on plaintiff's claims of hostile work environment based on race, retaliation, and failure to prevent discrimination, harassment and retaliation?" The case involves the "stray remark" doctrine. The Amicus Committee recommended submitting a brief on the merits which the Executive Committee approved. Brad Pauley and Eric Boorstin from Horvitz & Levy submitted an amicus brief on the merits.

2) ***TriCoast Builders, Inc. v. Fonnegra*** (2022) The California Supreme Court has granted review to address these two issues: (1) When a trial court denies a request for relief from a jury waiver under Code of Civil Procedure section 631, and the losing

Continued on page 48

party does not seek writ review but instead appeals from an adverse judgment after a bench trial, must the appellant show "actual prejudice" when challenging the order on appeal?; and (2) Does a trial court abuse its discretion when it denies a request for relief from a jury trial waiver without a showing that granting the request will prejudice the opposing party or the trial court? Steven Fleischman and Andrea Russi from Horvitz & Levy submitted an amicus brief on the merits and oral argument was held on December 5, 2023. An opinion is expected in the first quarter of 2024.

3) ***Logan v. Country Oaks Partners*** (S276545): The California Supreme Court granted review to address this issue: "Does an agent operating under an advance health care directive and power of attorney for health care decisions have the authority to enter into an arbitration agreement with a nursing facility on behalf of the principal?" David Pruett from Kelly, Trotter & Franzen submitted an amicus brief on the merits and oral argument was held on January 4, 2023. An opinion is expected in the first quarter of 2024.

How the Amicus Committee Can Help Your Appeal or Writ Petition, and How to Contact Us:

Having the support of the Amicus Committee is one of the benefits of membership in ASCDC. The Amicus Committee can assist your firm and your client in several ways:

1. *Amicus curiae* briefs on the merits in cases pending in appellate courts.

2. Letters in support of petitions for review or requests for depublication to the California Supreme Court.

3. Letters requesting publication of favorable unpublished California Court of Appeal decisions.

In evaluating requests for *amicus* support, the Amicus Committee considers various factors, including whether the issue at hand is of interest to ASCDC's membership as a whole and would advance the goals of ASCDC.

If you have a pending appellate matter in which you believe ASCDC should participate as *amicus curiae*, feel free to contact the Amicus Committee:

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Pancy Lin, Esq.
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Elham R. Rabbini, Esq. & Mark E. Capell, Esq.
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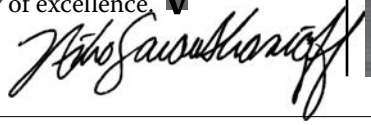
legal proceedings. We will continue to advocate for the rights of our clients, the integrity of the legal system, and the importance of a strong defense bar. We will actively engage with legislators, policymakers, and other stakeholders to shape laws and regulations that uphold the rights of defendants and maintain a just legal framework.

Education and Professional Development: Our commitment to excellence requires a dedication to continuous learning and growth. We will enhance our educational programs, offering opportunities for our members to expand their knowledge, sharpen their skills, and stay abreast of emerging trends and developments in our field. Through workshops, seminars, and webinars, we will provide a platform for meaningful exchange of ideas and best practices, empowering our members to deliver exceptional legal representation. Stay tuned for a members-only seminar regarding the "Mongoose Method."

Community and Networking: Our strength lies in our collective wisdom and support for one another. We will foster a sense of community and camaraderie among our members, promoting collaboration, mentorship, and networking opportunities. By facilitating meaningful connections within our profession, we can build a support system that not only strengthens our individual practices but elevates the entire defense counsel community in Southern and of course, Northern California.

I encourage each of you to actively participate in the various activities and initiatives planned for the upcoming year. Your engagement, ideas, and contributions are invaluable in shaping the future of our organization and the legal profession as a whole.

Thank you for your continued trust and support. I look forward to working with you all in the year ahead, as we continue our journey of excellence.



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- ☐ **DUAL MEMBER ($100)** – Limited to those members in good standing of the Association of Defense Counsel of Northern California and Nevada (ADC). Membership as a "Dual Member" shall allow for full membership privileges, except the right to vote or hold office.

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