ASCDC
VERDICT
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- Legal Malpractice: Now What?
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PRESIDENT'S MESSAGE

DIANA P. LYTEL
2021 President

The Road Ahead

As we leave 2021 behind and look toward 2022, I would venture to say that many of us are looking forward to a new year. It has been a challenging time, and while we were hoping to return to live, in-person events, circumstances necessitated continuing with a virtual platform. Despite COVID, it has remained our goal throughout the pandemic and moving forward, to provide useful and innovative content to our members. This year, even though we have been forced to scale down, we are still providing the same invaluable content you have come to expect from ASCDC.

The legal landscape in California continues to be challenging due to COVID and new coronavirus variants, which has not only disrupted the court system, but also in-person meeting formats for the Board, Committees, and members at large. Still, ASCDC continues to adapt by delivering invaluable information through the Listserv, *Verdict* Magazine and monthly webinars. In particular, the webinar series has garnered a great deal of attendance and yielded critical new Continuing Legal Education (CLE) content for our membership (look on page 30 to see an overview of all the seminars we've hosted this year and a link where you can download any you may have missed).

My goal as President has always been to use my leadership role to keep ASCDC unified and engaged while also providing access to resources, addressing issues germane to the defense bar and improving the civil justice system. While 2021 has presented many obstacles, ASCDC has risen to the occasion. Case in point, our Webinar Committee led by Lindy Bradley, Bron D'Angelo and Alice Chen Smith, quickly and sharply adapted to a rapidly changing landscape to put together meaningful and relevant content which has been hugely successful. Due to the member engagement with our webinar series, once the pandemic is over, if and when that ever happens, we will continue to provide this programming as an added benefit to our membership.

As we continue to navigate the disruptions and obstacles caused by the COVID-19 pandemic, I would like to take a moment to express my gratitude for how our defense community has responded during this uncertain time. COVID-19 has certainly presented many challenges to Bar Association leaders across the country, but it has also created the opportunity to "virtually" bring many of us together. Insofar as many of the same disruptive themes of last year continue in 2021, ASCDC's Board has not only acclimated to the virus restrictions, but also collaborated with our justice partners including the plaintiff's Bar and court leadership to help mitigate the backlog in our courts. In a more recent development, and in collaboration with CAALA, LA-ABOTA, the Beverly Hills Bar Foundation, and Los Angeles County Superior Court leadership, we have been incredibly proud to implement Resolve Law Los Angeles (RLLA), which is the virtual version of the volunteer-staffed Mandatory Settlement Conference (MSC) program in place pre-pandemic. The program has been such a monumental success that as of September 28, 2021, the RLLA MSC program officially expanded to allow parties in qualifying PI Hub cases to stipulate to a RLLA MSC at any point in the case. This is an enormous achievement and a testament to the hard work and dedication of Bar leaders collaborating together to create innovative solutions to complex issues.

ASCDC has always been a strong advocate for this program and I personally participated as a settlement officer recently in a highly contentious case. We mediated the case on a Thursday and it was set to go to trial on Monday. I worked diligently with the plaintiff settlement officer and as a team, we vigorously hashed out the issues with plaintiff and defense counsel. The experience was phenomenal and one in which I will never forget. We collaboratively

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CAPITOL COMMENT

MICHAEL D. BELOTE
Legislative Advocate, California Defense Counsel

A Defining Moment in Litigation?

There is always a risk of overstatement when announcing that permanent change has arrived at a given point in time. "Things will never be the same again" sometimes just is not true. Lots of these broad pronouncements are being made about the effects of the COVID pandemic. But as to litigation, it is just possible that the virus has forced a permanent paradigm shift, and that we will never fully return to pre-existing court processes.

The subject of remote civil proceedings was easily the most consequential debate concerning the courts in the 2021 legislative year in Sacramento. Dozens of organizations weighed in on SB 241 (Umberg) which basically came down to three fundamental questions: should the existing telephonic appearance statute in the Code of Civil Procedure be broadened to other forms of remote appearances; should trials be included; and what protections should be included to insure due process for all participants?

The author of SB 241 is Senator Tom Umberg, a retired and decorated Army colonel, veteran civil litigator from Orange County, and Chair of the Senate Judiciary Committee. He obviously brought major gravitas to the debate, but given the fundamental differences between the parties, passage of the bill was in doubt until the final days of the legislative year in September. And in an odd way, even the gubernatorial recall played a role.

A brief recap may help set the stage for the SB 241 debate. Telephonic appearances have been conducted in California since approximately 1995 with the advent of CourtCall, and are authorized in Code of Civil Procedure Section 367.5. This section references only telephones, however, and includes a non-exclusive list of civil hearings which presumptively may be conducted by telephone. When the pandemic struck, it was obvious that broader authority for remote appearances was necessary to address the growing backlog of civil cases.

The California Supreme Court issued Emergency Rule of Court 3, which contains a very expansive grant of authority for courts to employ technology for remote proceedings. Grounded in the pandemic, however, the emergency rule by its terms lasts only as long as the Governor's declaration of emergency, plus 90 days. This raised the recall angle: had Governor Newsom been recalled, his successor could have ended the declaration of emergency, which would have put Emergency Rule 3 on a 90-day clock. Obviously the pandemic backlog in the courts will last far longer than 90 days.

The participants in the SB 241 debate fell into two basic camps: judges and lawyers arguing that remote appearances are essential to assure access to justice, and that, while imperfect and not favored by all lawyers, telephone and video appearances are working, and on the other side, organized labor, chiefly representing court reporters and interpreters, arguing that remote appearances have not been sufficiently evaluated, have resulted in audibility issues, and have therefore created due process risks.

Representatives of the Governor, Assembly Speaker, Senate President pro Tem and Judicial Council took the lead in convening stakeholder meetings. CDC, along with the Consumer Attorneys of California and representatives from legal aid, dependency counsel and others, were front and center on the lawyer side. The California Judges Association joined in communications from the legal groups.

The final compromise embodied in SB 241 allows civil hearings and both bench and jury trials to be conducted in whole or in part by remote means. The bill includes criteria for the court to consider in ordering or permitting remote proceedings, and provisions for opposing parties to object to remote appearances. Courts will not be permitted to require a party to appear remotely, and there must be a way for parties, witnesses, court reporters and

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"Open and Obvious" Hazards Are Not Actionable in Trip-and-Fall Cases Against Public Entities

Paul J. Lipman

For ordinary trip/slip and falls on *private* property, proving that an allegedly harm-inducing hazard on premises was "open and obvious" is generally not a complete defense but goes only to plaintiff's comparative negligence. (*Osborn v. Ready Mix* (1990) 224 Cal.App.3d. 104; *Williams v. Carl Karcher Ent's, Inc.* (1986) 182 Cal.App.3d 479, 488.) An obvious danger negates the duty to warn, but still leaves the duty to remedy a danger the premises owner or possessor knew or should have known about. For instance, in *Martinez v. Chippewa* (2004) 121 Cal.App.4th 1179 a private landowner on a hill who let his sprinklers flood the driveway and sidewalk created an open and obvious danger to sidewalk pedestrians.

The landowner owed no duty to *warn* pedestrians, but continuing to allow the daily flooding to exist (failure to remedy) created a triable issue of negligence.

However, in a *public entity* case, open and obvious is a complete defense to the whole case. Public entity case law does not use the common law phrase "open and obvious" but instead uses terms like "in plain sight," and "readily apparent," in holding that readily apparent features of public property are not actionable altogether.

Ironically, that is because open and obvious is included within the trivial risk, aka "trivial defect" statutes and case law, which most practitioners think of as only addressing sidewalk cracks and the like that are too *small* to burden cities with repairing. However, Gov't Code §830(a) does not speak in terms of trivial "defect" but rather trivial "risk." It limits an actionable "dangerous condition" to one that creates a "substantial (as distinguished from a minor, trivial or insignificant) *risk* of injury when such property is used with due care." Case law holds that "risk ... when used with due care" is trivial either when the defect is too small to burden cities with repairing, or if the alleged defect is so large as to be open and obvious, i.e., avoidable if using due care. See:

Dobbs v. City of Los Angeles (2019) 41 Cal.App.5th 159, 161 [knee-high 17 inch high cement pillars in front of government building to keep terrorists from driving into building are easily seen and avoided in broad daylight, and thus pose a trivial risk rather than an actionable "dangerous condition" of public property; "The rule deciding this case is *look where you are going*"; trivial

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risk rule applied in finding no dangerous condition when used with due care, and summary judgment affirmed];

Huckey v. City of Temecula (2019) 37 Cal. App. 5th 1092, 1109-1110 [half-inch to one-inch sidewalk crack "*in plain sight*" was not only so small as to be a trivial risk, but as a matter of law, also created only a trivial risk because it was *large and visible* enough in broad daylight as shown in a single photo, so as to be clearly avoidable if using due care; trivial risk rule applied in finding no dangerous condition when used with due care, summary judgment affirmed];

Biscotti v. Yuba City Unified Sch. Dist. (2007) 158 Cal.App.4th 554, 560 [fall risk of propping up bike against school fence to get oranges on other side "*readily apparent*" even to a minor, and therefore fence was a trivial risk when used with due care; summary judgment affirmed];

Davis v. City of Pasadena (1996) 42 Cal. App.4th 701 [stair trip; photo showed that the way the Pasadena Convention Center seating sections and concrete steps came together at right angles converging on handrail was a large, clearly visible feature that "*[a]nyone can see,*" rather than deceptive and confusing, and thus could be used safely if using due care to see what is there to be seen; summary judgment affirmed];

Thimon v. City of Newark (2020) 44 Cal. App.5th 745, 761[marked crosswalk allegedly "lured" 14-year-old out; morning sun glare in driver's eyes, and no pedestrian warnings or signals; held, these did not create a dangerous condition when used with due care because drivers and pedestrians have to control speed and pay attention to see what is there: "The manifest intent of the Tort Claims Act is to impose liability only when there is a substantial danger which is *not apparent* to those using the property in a reasonably foreseeable manner with due care"];

Fredette v. City of Long Beach (1986) 187 Cal.App.3d 122 [diving accident; held, "the absence of the gangplank and the shallowness of the water between the pier and the float *were apparent to all users.* The physical characteristics of the facility gave immediate notice to those persons exercising due care that diving from the pier was, in and of itself, a hazardous activity that should be avoided. We think it clear that no member of the public may ignore the notice which the condition itself provides."];

Summary judgment motions on trivial risks based on open and obvious are not disfavored. On the contrary, "The rule which permits a court to determine 'triviality' as a matter of law rather than always submitting the issue to a jury provides a check valve for the elimination from the court system of unwarranted litigation which attempts to impose upon a property owner what amounts to absolute liability for injury to persons who come upon the property." (*Huckey*, supra, at 37 Cal. App. 5th 1092, 1105) [trip over open and obvious concrete pillar, summary judgment affirmed]; see also *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542 [summary judgment is not a disfavored remedy; it is a "particularly suitable means to test the sufficiency of the plaintiff's or defendant's case"].)

Not A Catch-22 — Plenty of *Non*-Obvious Defects Are Actionable

By definition, the open and obvious ("too big") aspect of the trivial risk rule does not apply to *non-obvious* dangers, where conditions obscure the defect. For example, in *Kasparian v. Avalon Bay Communities, Inc.* (2007) 156 Cal.App.4th 11, 24 plaintiff tripped over a good-sized drain that would normally be open and obvious in daylight, but summary judgment was overturned because photos of the condition showed that shadows over the drain could make it difficult for a pedestrian using due care to see it, making "open and obvious" at least a question of fact in *that* case, where the photos were blurry and showed that the condition was hard to see.

Reason For the Rule

Open and obvious is a complete defense for public entities but often is not for private landowners because Govt. Code §830(a) and §830.2 restrict liability to conditions that cannot be used safely "when used with due care." Government liability is narrower than common law negligence. Unlike private landowner liability, government liability is limited to that allowed and defined by the Gov't Code itself (Govt. Code §815). These statutory exceptions to sovereign immunity are narrow and rigidly applied: " '[T]he intent of the [Tort Claims Act] is not to expand the rights of plaintiffs in suits against governmental entities, but to confine potential governmental liability to rigidly delineated circumstances.... ' " *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 829. And two of those rigid statutes state that government liability attaches only to conditions that are "dangerous *when used with due care*" (Gov't. Code §830(a); §830.2). This doesn't refer to the plaintiff's own comparative negligence on a specific occasion, it means, objectively and in general, whether the property at issue *could* be used safely, if due care is exercised (*Fredette v. City of Long Beach* (1986) 187 Cal. App. 3d 122, 132).

This is a major difference between public entity liability, which is statutory only, and private property owner liability, which can be based on common law negligence. Government entity liability for dangerous conditions is not to be viewed through the lens of common law negligence. (See *Torres v. Department of Corrections and Rehabilitation* (2013) 217 Cal.App.4th 844, 850 ["Although the complaint sounds in negligence, there is no common law tort liability for public entities in California"]; *Van Kempen v. Hayward Area Park District* (1972) 23 Cal.App.3d 822, 825 ["the liability of the public ... could not rest on a theory of common law negligence"].).

Under the public entity liability standard, "dangerous when used with due care" (as opposed to "reasonable precautions under the circumstances" or other common law negligence concepts) is determined by

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the court only after *assuming* that people adequately look to see what is there to be seen, regardless of whether they are actually careful or not. The court then looks at photos or other evidence to determine whether the feature *could* be seen by people using the property with due care. Whether people are *in fact* often careless, i.e., the foreseeablity of carelessness, is not the test – in contrast to common law. The "dangerous when used with due care" standard thus bars liability where a feature *could* be seen by attentive users, under two corollary principles:

1 **Open and obvious defeats "dangerous when used with due care"**: "[P]remises liability may not be imposed on a public entity when the danger of its property is readily apparent." (*Biscotti v. Yuba City Unified Sch. Dist.* (2007) 158 Cal.App.4th 554, 560.)

2 **Foreseeable or even common negligence or misuse by the public does not create a triable issue of public entity liability if the feature is obvious**, as it might at common law against a private landowner: "[P]roperty is not "dangerous" within the definition of section 830(a) if the property is safe when used with due care and a risk of harm is created *only when foreseeable users fail to exercise due care*." (*Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131.)

For example, if traffic signals at a busy intersection go out for all four directions, it is highly *foreseeable* that traffic will tangle and accidents will occur. Indeed, that is common. But cities are not liable as a matter of law for that common scenario, even if the signals went down or stayed down for an unreasonable amount of time due to carelessness. That is because "use with due care" means following the Vehicle Code, which states that when cars come upon inoperative signals, they are to treat the intersection as a four-way stop and yield to the right. (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th at p. 1195.) If people follow the Vehicle Code at downed signals, there are no accidents. The fact that it is foreseeable that people will get confused, fail to notice, and have accidents is irrelevant. If the intersection is "used with due care," by motorists treating it as a four-way stop per the Vehicle Code, accidents will only occur if and when motorists fail to follow that rule. It is therefore not an actionable "dangerous condition when used with due care," as a matter of law.

(See *City of S. Lake Tahoe v. Superior Ct.* (1998) 62 Cal. App. 4th 971, 978–79 [following Chowdhury: A city "cannot be charged with foreseeing that a motorist will recklessly disobey traffic laws.... At some point, citizens must take responsibility for their conduct when there is an obvious roadway hazard.... The government cannot provide round-the-clock staffing to respond to every eventuality, particularly when the need to take precautions is self-evident and the law is clear on how motorists must behave under the circumstances."].)

Caveat, some cases do hold that foreseeable misuse *combined with other problems* can sometimes yield potential liability. (See generally, *Gray v. Am. W. Airlines, Inc.* (1989) 209 Cal. App. 3d 76, 87 [discussing such cases].) But as noted there, these are exceptions.

Thus, open and obvious as a complete defense is not defeated by the mere foreseeability of public negligence or misuse, or even the proven frequency of it, because the public entity liability trigger of "dangerous *when used with due care*" is not activated by proof of frequent use without due care.

Industry Standards Such As ASTM And Unadopted Building Codes Do Not Overcome Open And Obvious

Caloroso v. Hathaway (2004) 122 Cal. App.4th 922 affirmed summary judgment in a sidewalk crack case based on photos that plainly showed that the crack was trivial in the sense of being too small, and also posed a trivial risk because it was *visible* to a pedestrian using the sidewalk with due care. As for being too small to be actionable, "It was undisputed that the difference in elevation created by the crack in Hathaway's walkway was less than half an inch at the highest point." However,

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plaintiff's expert Brad Avrit declared that the crack was camouflaged by dappled light and shadows, and jagged edges. Further, Mr. Avrit opined that the crack was dangerous because "the 1994 Uniform Building Code and 1996 ASTM Standard Practice for Safe Walking Surfaces prohibit height differentials greater than one-quarter of one inch absent a ramp or slope." (Id. at p. 925).

The court of appeal rejected this, noting that the trial court "properly found no foundation for Avrit's opinion that noncompliance with certain building codes and standards made the crack dangerous. Avrit failed to indicate that these codes and standards have been accepted as the proper standard in California for safe sidewalks." (Id. at p. 928.)

This suggests two attacks on an industry-standards declaration in a public entity case. (1) Plaintiff will have to show that the standard was *adopted as law*. Public entity liability is statutory only, and public entities are not bound by common-law standards like industry standards, unless statutorily adopted. (2) Even if adopted, violation of a standard still *might or might not* make a condition dangerous when used with due care.

Where Photos Show The Condition Is Plainly Apparent, Courts Resist "Expert" Declarations On Whether The Defect Is Obvious Or Trivial

Davis, supra, rejected plaintiff's "expert" declaration about how confusing the design was, because the court could see for itself from a single photo the way the steps and handrail came together. What any lay juror can see for him or herself in a photo (such as whether a feature is plainly visible or whether anything is camouflaging it), is not an "expert" opinion. An expert opinion is not simply any opinion that comes from the mouth of an expert in that field. It must be an opinion that *goes beyond the jury's common abilities and experience.* (*Davis, supra*.) Neither a juror nor a court needs any "expert" help looking at a photo of how steps and a handrail converge, to decide whether those features are plainly apparent, or camouflaged in some way.

Judicial resistance in sidewalk cases to "expert" declarations regarding whether a photo shows a dangerous versus small or obvious crack, goes at least as far back as the venerable opinion in *Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719. "In *Fielder*, the court disregarded the testimony of plaintiff's expert that the defect was dangerous, reasoning that 'there is no need for expert opinion. It is well within the common knowledge of lay judges and jurors just what type of a defect in a sidewalk is dangerous.' " (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922.)

Caloroso likewise disregarded expert Avrit's opinion, where a photo was sufficient to show the minor nature of the sidewalk crack, for purposes of granting and affirming summary judgment. Mr. Avrit's "expert" opinion was that "other factors besides the size of the crack made the walkway dangerous, including the location and irregular shape of the crack, the interplay between bright sunlight and shadows, and the shadow of an adjacent tree that fell across the crack and made the area dark." (Id.). However, "No expert was needed to decide whether the size or irregular shape of the crack rendered it dangerous. The photographs of the crack submitted by both sides demonstrate that the crack is minor and any irregularity in shape is minimal." (Id. at p. 928; see also, *Ursino v. Bob's Big Boy* (1987) 192 Cal. App.3d 394 [private property case – photo sufficient to show ¾ inch high cement mis-leveling was trivial, i.e. no obscuring factors, affirming summary judgment.].)

Just because improper "expert" opinion on what's obvious or not in a photo is often disregarded where the condition is *in fact* obvious, does not mean there is *never* a question of fact about obviousness whenever there's a photo. The photo might show the defect is obscured or camouflaged or invisible from the pedestrian's perspective. If so, a court might find a human factors expert could shed light on what is or isn't obvious to most people exercising due care, i.e., a triable issue of fact. (See, *Kasparian v. Avalon Bay Communities, Inc.* (2007) 156 Cal.App.4th 11, 24 [blurry photos showed shadows over drain, and difficulty seeing drain from a pedestrian's position, making "open and obvious" a question of fact in that case].)

Conclusion

The statutory defense to government entity liability is "trivial risk," which includes "trivial defect," but which also includes alleged defects that are *large* enough to be open and obvious. Being open and obvious defeats the narrow statutory trigger of liability, which requires that the property can't be used safely even when used with due care. Cases like *Huckey, Dobbs, Davis* and *Coloroso* together indicate that a broad daylight trip over an obvious condition is not actionable against a government entity. An open and obvious risk, that can be avoided by trivial means ("look where you are going," per *Dobbs*) creates only a trivial risk of an accident occurring – even if harm may be severe when an accident does occur – when the property is used with due care. This open and obvious aka "too large" prong of the trivial risk rule supplements the more commonly known "trivial defect" prong protecting government entities from liability for features that are too small to burden cities with repairing. This is not a Catch-22 and a dangerous condition that is *not* obvious to users with due care is often actionable, as the many cases upholding liability attest. But if the action involves a broad daylight fall, with no obscuring factors, and especially in the absence of prior accidents (indicating that people using due care can see and avoid the alleged defect), the rule from modern case law is that such accidents are not actionable as a matter of law under the "open and obvious" aspect of the trivial risk rule.

Paul J. Lipman

Paul J. Lipman is a partner with Wesierski & Zurek LLP since 1999. He represents national hotel and transportation clients, and also handles municipality and retail defense, including class actions.

Your Firm is Facing a Legal Malpractice Claim: Now What?

Douglas R. Richmond

Introduction

As your firm's general counsel, this day has been no different than any other day since Covid-19 turned the world upside down until you get a call from one of your real estate partners. She tells you that she just received an e-mail message attaching an ominous letter from a lawyer for a developer that the firm represented in connection with the development of Manor Centre, a mixed-use development (upscale apartments, office space, boutique hotel, and shops) near the intersection of two major thoroughfares and a quaint shopping district in a popular suburb. Unfortunately, cost overruns, multiple changes in plans, construction delays, and problems obtaining additional financing caused the project to crater. All work on the project has stopped. The large unfinished construction site is an open wound on the municipal landscape. Your partner knew that Manor Centre had proved to be a disaster and always recognized the developer as a difficult client who notoriously held the firm's bills, but she never anticipated this letter, which accuses her of negligently advising the developer regarding the project and of charging unreasonable fees. The letter makes no monetary demand but invites your partner or another firm representative to contact the developer's lawyer to discuss settling the matter confidentially to avoid "the expense and embarrassment" of litigation. The letter warns that the developer "intends to fully enforce its rights" against the firm.

Your partner promises to forward you the lawyer's e-mail message with the letter as a PDF attachment. She also promises to send you a copy of the engagement letter for the matter as soon as she can. Apart from reassuring your partner, what should you do next?

Next Steps

A. Protect the Firm's Attorney-Client Privilege

First, instruct your partner not to discuss the letter and its contents, or the firm's representation of the developer in connection with Manor Centre, with anyone other than you until notified otherwise. Promptly identify the associates and staff members who participated in the representation and give them the same instruction. Further instruct everyone involved in the representation to send no instant messages or text messages and prepare no e-mails, memos, notes, chronologies, etc., about the matter. The time may come when you want them to commit information to writing to aid the firm in its defense, or to pool their collective thoughts in the same cause, but now is not the time. Now, you simply want to do what you reasonably can to cement the firm's ability to claim the attorney-client privilege with respect to internal communications regarding the developer's allegations.

It is possible that some of the lawyers or staff members who worked on the matter have left the firm. You need not get in touch with them immediately; they should not have any documents or e-mail messages that you need to preserve that are not available on the firm's systems. Before you do communicate with any departed lawyers or staffers, you'll want to investigate the circumstances of their departures to try to get a handle on whether any testimony they might give will likely be favorable or unfavorable to the firm.

Fortunately, California courts generally recognize the intra-firm attorney-client privilege. *Edwards Wildman Palmer LLP v. Super. Ct.*, 180 Cal. Rptr. 3d 620, 632–35 (Ct. App. 2014). Courts in other states that have most recently considered a law firm's ability to claim an intra-firm attorney-client privilege have also correctly sided with the firm. *See, e.g., JJ Holand Ltd. v. Fredrikson & Byron, P.A.*, 2014 WL 5307606, at *11 (D. Minn. Oct. 16, 2014) (affirming a magistrate judge's order); *TattleTale Alarm Sys., Inc., v. Calfee, Halter & Griswold, LLP*, 2011 WL 382627, at *8–10 (S.D. Ohio Feb. 3, 2011) (applying Ohio law); *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, PC*, 746 S.E.2d 98, 105–06 (Ga. 2013); *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 536 (Ill. App. Ct. 2012); *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1076 (Mass. 2013); *Moore v. Grau*, 2014 N.H. Super. LEXIS 20, at *15–26 (N.H. Super. Ct. Dec. 15, 2014); *Stock v. Schnader Harrison Segal & Lewis LLP*, 35 N.Y.S.3d 31, 44–52 (App. Div. 2016); *Crimson Trace Corp. v.*

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Davis Wright Tremaine LLP, 326 P.3d 1181, 1192–95 (Or. 2014).

Furthermore, with any luck, your engagement letter with the developer includes language granting you an intra-firm attorney-client privilege. For example:

> Although unlikely, it may be necessary during your representation for our lawyers to analyze or address their professional duties or responsibilities or those of the firm, and to consult with the firm's general counsel or other lawyers in doing so. To the extent we are addressing our duties, obligations or responsibilities to you in those consultations, it is possible that a conflict of interest might be deemed to exist as between our lawyers or firm and you. As a condition of this engagement, you consent to any conflict of interest that might be deemed to arise out of any such consultations. You further agree that these consultations are protected from disclosure by the firm's attorney-client privilege and that you will not seek to discover or inquire into them. Of course, nothing in the foregoing shall diminish or otherwise affect our obligation to keep you informed of material developments in your representation, including any conclusions arising out of such consultations to the extent that they affect your interests.

Although the language speaks only to the privilege during a representation, it ought to apply with even greater force after a representation concludes and there is no longer a reasonable basis to allege a related conflict of interest. Plus, as we'll see in a minute, it is possible that the developer may be a current client of the firm even though the firm's work with respect to Manor Centre at least superficially appears to be concluded.

In considering whether the firm enjoys an intra-firm attorney-client privilege, be sure to check any outside counsel guidelines the developer may have issued to the firm. Some clients' guidelines require firms to waive any applicable intra-firm attorney-client privilege. If you have not refused such terms, they are trouble.

If, for any reason, you are not confident that you enjoy an intra-firm attorney-client privilege, you may wish to retain defense counsel now to secure a confidential chain or line of communication. Although various courts have refused to recognize an intra-firm attorney-client privilege where a current client is concerned, there is no reason to believe that a court would require a firm to disclose its lawyers' communications with outside counsel. *See In re SonicBlue Inc.*, 2008 WL 170562, at *11 (N.D. Cal. Jan. 18, 2008) (noting that the court's "research has not uncovered any decision where a court denied the application of the privilege between a law firm and its outside counsel due to the law firm's breach of a fiduciary duty owed to its own client").

Regardless of whether you decide to hire outside counsel immediately, open a new client matter for the developer's claim against the firm. Perhaps you already have general counsel client matter numbers in place. Either way, you will need a dedicated client matter number for filing documents and recording time spent dealing with the claim. At some point, either you or outside counsel will need to interview everyone at the firm involved in the Manor Centre matter and may make other related demands on their time, and any timekeepers will want to be able to record their time even though it is non-billable. Recording their time under the Manor Centre client matter number (even if the developer is never billed for that time) or storing communications relating to the claim under that number potentially compromises the firm's attorney-client privilege. It also creates the possibility of the inadvertent disclosure of otherwise privileged information or information that would otherwise qualify for work product protection. Creating a new client matter number alleviates these problems.

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Creating a separate matter number for tracking time will also be necessary if the firm intends to self-defend the matter for at least for some time and then request credit from its insurers toward exhaustion of its retention.

B. Preserve Relevant Documents

Second, promptly institute a litigation hold. You can, in your initial conversations with the lawyers involved in the developer's representation, advise them to retain all documents, e-mail messages, etc., related to the representation. That is not enough, however; other lawyers and staff members may have relevant documents and, of course, your firm has a records department responsible for maintaining the files (both electronic and paper). You also want to be able to demonstrate that you took reasonable steps to preserve relevant documents (including e-mail and text messages) should your conduct ever be challenged. Under the circumstances, the firm is obligated to preserve potentially relevant information or materials even if the developer's letter does not demand that it do so. *See Bistrian v. Levi*, 448 F. Supp. 3d 454, 468 (E.D. Pa. 2020) (explaining that a firm has a common law duty to preserve information it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation); *Borum v. Brentwood Village, LLC*, 332 F.R.D. 38, 45 (D.D.C. 2019) ("Once a party anticipates litigation, it must preserve potentially relevant evidence that might be useful to an adversary."); *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 888 F. Supp. 2d 976, 990 (N.D. Cal. 2012) ("As a general matter, there is no question that the duty to preserve relevant evidence may arise even before litigation is formally commenced."); *Martin v. Keeley & Sons., Inc.*, 979 N.E.2d 22, 28 (Ill. 2012) (stating that while there generally is no duty to preserve evidence, such a duty arises if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action); *MDB Trucking, LLC v. Versa Prods. Co.*, 475 P.3d 397, 407 (Nev. 2020) ("A party has a duty to preserve evidence 'which it knows or reasonably should know is relevant,' ... to litigation that is pending or reasonably foreseeable[.]" (citations omitted)); *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 939 N.Y.S.2d 321, 324, 328–30 (App. Div. 2012) (explaining that once a party reasonably anticipates litigation, it must take steps necessary to preserve potentially relevant documents, including instituting a litigation hold, and suspending routine document destruction policies and automatic deletion features that periodically purge e-mail or other electronic documents).

As part of your document preservation efforts, you may wish to consider whether to copy potentially relevant hard copies of documents that may be stored in various locations; electronic files that may be similarly dispersed (including, say, housed on lawyers' smartphones, laptop hard drives, or thumb drives); and e-mail and text messages for storage in a central repository. If you decide to go that route, you may want to make a single person responsible for accomplishing the task. In choosing that person, there are two key requirements: (1) the knowledge and skills to perform the task capably, perhaps summarized as "competence"; and (2) the perceived ability to testify effectively should the developer as the eventual plaintiff want to depose the person responsible for the firm's document collection and preservation efforts. On the other hand, you may conclude that it is preferable to delay document collection until the firm retains defense counsel who can then either direct the efforts, or, alternatively, decide that document collection is at least temporarily an unnecessary exercise.

C. Ascertain Whether the Developer Is a Current Client

Early in the process – indeed, in your initial conversation with your real estate

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partner if possible – ascertain whether the developer is a current client. Initially, it appears that the developer is a former client. This may more clearly be the case if your engagement letter states (1) that your representation of a client will terminate when you send your final statement for fees and expenses in a matter, and you have sent your final invoice; or (2) that your representation will be deemed to have ended after X period of time passes with no billable activity in the matter and that time has passed. Obviously, if your real estate partner sent the developer a disengagement letter (wishful thinking, perhaps) the developer can likely be considered a former client. But maybe your colleagues consider the developer a current client and are simply waiting for new financing to materialize so that the Manor Centre project can proceed. Alternatively, even if the Manor Centre matter is concluded, the developer will be considered a current client if your firm represents it in other matters. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 481, at 6 (2018) [hereinafter ABA Formal Op. 481].

Whether the developer is a current client is important for three reasons. First, depending on the jurisdiction, the developer's status as a current client may affect a court's decision as to whether the firm can claim an intra-firm attorney-client privilege. *See, e.g., Bella Monte Owners Ass'n, Inc. v. Vial Fotheringham, LLP*, 2020 WL 3489647, at *3–4 (D. Utah June 26, 2020); *Asset Funding Grp., LLC v. Adams & Reese, LLP*, 2008 WL 4948835, at *4 (E.D. La. Nov. 17, 2008); *Koen Book Distribs., Inc. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 286 (E.D. Pa. 2002); *VersusLaw, Inc. v. Stoel Rives, LLP*, 111 P.3d 866, 878–89 (Wash. Ct. App. 2005). These courts typically reason that lawyers create an impermissible conflict of interest when they consult with in-house counsel for purposes of advancing their own interests at the same time they represent a client. In the face of this concurrent conflict of interest, the firm's interest in self-representation must surrender to the client's interest. Again, several courts have rightly rejected this reasoning in recent years, but if you remain concerned about protecting the confidentiality of your lawyers' internal communications about the developer's claims, you can alleviate that concern by hiring outside counsel to manage any preparations for litigation.

Second, if the developer is a current client, in some jurisdictions that could toll the statute of limitations for claims it may have against the firm. *See, e.g., McCoy v. Feinman*, 785 N.E.2d 714, 722 (N.Y. 2002) (explaining that the continuous representation doctrine tolls the statute of limitations for a malpractice claim if there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim); Cal. Civ. Proc. Code § 340.6(2) (tolling the statute of limitations where an "attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred"). There is nothing in the facts set forth above to indicate that the statute of limitations is a concern here, but it may be in another matter.

Third, if the developer is a current client, the lawsuit against the firm creates a conflict of interest for the firm. The question then becomes whether the firm wishes to continue to represent the developer with the developer's informed consent to the conflict, or whether it prefers to withdraw from the developer's representation.

1. Conflict of Interest and Withdrawal

A lawyer has a concurrent conflict of interest when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or *by a personal interest of the lawyer*." Model Rules of Prof'l Conduct R. 1.7(a)(2) (2021) [Model Rules] (emphasis added). An actual or threatened malpractice claim against a lawyer obviously implicates the lawyer's personal interests. And, while it is a personal interest conflict, it is nonetheless imputed to all other lawyers in the firm because it presents a significant risk of materially limiting the client's representation by those lawyers. See id. R. 1.10(a)(1). For that matter, and regardless of any technical imputation issues, the firm's leaders are sure to consider the conflict to be an issue for the firm as a whole.

If the developer is a current client with respect to the Manor Centre matter, withdrawing from the representation is the clear choice. But what if the firm currently represents the developer in other matters? If that is the case and (1) the developer wants the firm to continue to represent it in all or some of those matters and (2) the responsible lawyers want to continue to represent the developer notwithstanding the developer's malpractice threat, the firm's leaders will have to make a choice: withdraw from the developer's matters altogether or obtain the developer's consent to the conflict of interest. We generally favor withdrawal across the board – after all, if the developer is willing to sue the firm in connection with one matter it is surely willing to sue the firm in connection with others – but this is a business decision for individual firms to make based on their unique situations. A client may be so important to a firm – and a firm may have so many current matters for the client – that blanket withdrawal is considered imprudent or impractical.

a. Withdrawal

If the other matters in which the firm currently represents the developer are counseling or transactional matters, withdrawal is straightforward; absent a "material adverse effect" on the developer's interests, the firm can simply advise the developer that it is withdrawing from any given matter. See Model Rules R. 1.16(b)(1). The chance that withdrawal might materially and adversely affect the developer's interests in a matter outside of litigation is highly unlikely; certainly, inconvenience or increased cost to the developer attributable to a change in counsel is insufficient. Now, if the firm is representing the developer in a matter in which, say, a closing is imminent, the firm might have to continue to represent

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the developer through the closing with the developer's informed consent to the conflict of interest. But, again, such circumstances should be rare.

If any of the open matters are in litigation, withdrawal is more complicated. Although there certainly is good cause for the firm's withdrawal, the court's (or courts') permission will be required by procedural rules that the lawyers involved must respect. *See id.* R. 1.16(b)(7) (permitting withdrawal where "other good cause" exists); *id.* R. 1.16(c) ("A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.").

In moving to withdraw from any litigation matters, the firm's lawyers must be careful about the reasons they offer for withdrawing. Rule 1.16 does not relieve lawyers from their Rule 1.6 duty of confidentiality. Sup. Ct. of Ariz., Att'y Ethics Advisory Comm., Op. File No. EO-20-0001, at 4 (2020). Revealing too much about the fracture in the attorney-client relationship when moving to withdraw may expose a lawyer to discipline. *See, e.g., People v. Waters*, 438 P.3d 753, 761 (Colo. 2019) (disclosing client confidences unnecessarily and without consent; the lawyer was disbarred for unrelated infractions); *In re Gonzalez*, 773 A.2d 1026, 1029–32 (D.C. 2001) (admonishing a lawyer who revealed that his clients had stopped paying, didn't cooperate in trial preparation, missed appointments, and misrepresented facts); *Att'y Grievance Comm'n of Md. v. Smith-Scott*, 230 A.3d 30, 69 (Md. 2020) (concluding that a lawyer breached her duty of confidentiality when she attached e-mail exchanges with the client to support withdrawal); *Cleveland Metro. Bar Ass'n v. Heben*, 81 N.E.3d 469, 470–72 (Ohio 2017) (suspending the lawyer for one year for disclosing attorney-client communications regarding the scope of the representation and his compensation but staying the suspension on the condition that the lawyer commit no further misconduct).

"An attorney may disclose to the court only as much as is reasonably necessary to demonstrate her need to withdraw,

and ordinarily it will be sufficient to say only words to the effect that ethical considerations require withdrawal or that there has been an irreconcilable breakdown in the attorney-client relationship." State Bar of Cal., Comm. on Prof'l Responsibility & Conduct, Formal Op. 2015-192, at 1 (2015). Or, as the ABA's Standing Committee on Ethics and Professional Responsibility has advised, a lawyer should initially submit a motion "providing no confidential information apart from a reference to 'professional considerations' or the like." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 476, at 9 (2016). If the court insists on more information before ruling, the lawyer should (1) try to persuade the court to decide the issue based on the information presented, asserting all legitimate claims of confidentiality or privilege; and (2) failing that, submit no more information than is reasonably necessary and preferably do so for in camera review or under seal. *Id.* If the court stubbornly orders further disclosure, the lawyer will have to comply to the extent necessary to satisfy the court and trust that Rule 1.6(b)(6) (the "court order" exception to confidentiality) protects her. Fortunately, most courts will be satisfied with the initial reference to a breakdown in the professional relationship, ethical considerations, or the like.

b. Consent to the Conflict

If the firm wishes to continue to represent the developer in any matters, the decision-makers will first have to be satisfied that the lawyers involved "will be able to provide competent and diligent representation" to the developer. Model Rules R. 1.7(b)(1). Rule 1.7(b)(1) imposes an objective standard. *People v. Mason*, 938 P.2d 133, 136 (Colo. 1997); *In re Stein*, 177 P.3d 513, 519 (N.M. 2008); *Ferolito v. Vultaggio*, 949 N.Y.S.2d 356, 363 (App. Div. 2012); Ill. Adv. Op. 09-02, 2009 WL 8559340, at *3 (Ill. State Bar Ass'n 2009). The test here is that of a reasonably competent and prudent lawyer; the subjective, good faith belief of the lawyers in the firm that they can fulfill their professional obligations to the client despite any competing interests or obligations is immaterial. Moreover, this is a decision that will potentially be judged in the bright light of hindsight. It needs to be made carefully and it requires the participation of lawyers beyond those involved in the matter at hand.

Second, the developer's consent to the conflict must be informed. Informed consent requires a client's agreement "to a proposed course of conduct after the lawyer has communicated adequate information

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and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Model Rules R. 1.0(e). Here, the firm should insist that the developer consult independent counsel before consenting to the conflict. If the developer has an in-house law department, consultation with those lawyers will suffice. If the developer declines to consult independent counsel, the firm must document that it urged the developer to seek objective advice and the developer declined to do so. In this situation, "documentation" requires a letter, e-mail message, or both to the developer; an internal memorandum regarding a conversation with the developer is not sufficient.

Third, while a client's consent to a conflict normally needs to be merely confirmed in writing under Model Rule 1.7(b)(4), here the firm should have the developer sign a waiver letter or form prepared by the firm rather than the firm confirming the developer's consent in a letter or e-mail message. If push ever comes to shove, a waiver letter or form signed by the developer arguably has greater evidentiary value than a confirming communication from the firm. It is also important to know the rules in the jurisdiction. California, for example, requires clients' informed written consent to conflicts of interest. See Cal. Rules of Prof'l Conduct R. 1.7 (2020).

c. Consent Plus Security

Finally, for now, the firm may want to insist on a security retainer in any matter in which it plans to continue to represent the developer. History unfortunately teaches that some clients who believe they have the upper hand over their lawyers will string firms along before they simply refuse to pay their bills on the theory that law firms generally will not sue to collect unpaid fees. That risk is especially acute in our hypothetical situation where the quality of the firm's representation is in question and the developer was notoriously slow in paying its bills before raising the specter of malpractice. The firm should require the client to pay the retainer before the firm does any more work on the matter. In charging the retainer, the firm will want to comply with Model Rule 1.5(b). See Model Rules R. 1.5(b) ("The ... basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.... Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.").

If you seek a standard security retainer, make sure that any amount you demand is adequate for the remaining representation. You may wish to request a so-called "evergreen retainer," which provides the best protection against non-payment of your fees. By way of explanation, evergreen retainers differ from standard security retainers in the timing of their application to the lawyer's fees. With a standard security retainer, the lawyer begins billing against the retainer at the outset of the representation. An evergreen retainer, on the other hand, contemplates that the client will pay regularly and that the lawyer will not tap the retainer for payment until the final bill is due. Because the retainer is intact and the funds are unused until the representation concludes, the retainer is said to be "evergreen." Alternatively, a lawyer may bill time against a security retainer and require that the client continually replenish the retainer, so that the lawyer always has the full retainer as a hedge against non-payment. In this way the retainer is also "evergreen." The second form of evergreen retainer is generally preferable.

2. An Alternative "What If"

Let's pause for a moment and consider an alternative scenario. What if instead of the developer claiming that your real estate partner erred in the representation, your partner or another lawyer working on the Manor Centre matter forms the opinion that the firm committed malpractice? This is a delicate issue. To start, there may not be agreement among the members of the team on whether the questioned decision, advice, or action was erroneous.

As a matter of professional responsibility, if the developer is a current client of the firm when the issue arises, the firm is duty-bound to inform it of any material error in the representation. ABA Formal Op. 481, at 4. A lawyer's error is material in this context if a disinterested lawyer would conclude that the error is reasonably likely to harm or prejudice the client. *Id.* An error is also material if it is "of such a nature that it would reasonably cause a client to consider terminating [the] representation even in the absence of harm or prejudice." *Id.* With respect to informing the developer, the lawyers involved may first consult among themselves, with knowledgeable colleagues, or with you to decide whether there has been a material error and, if so, how to respond. *Id.* at 5. If it is reasonable to do so, your lawyers may attempt to correct the error before informing the client. *Id.*

The firm need not admit malpractice to the developer and, indeed, it should not do so to preserve its ability to defend any subsequent claim by the developer. These can be difficult communications to craft and a firm may wish to consider involving our loss prevention team or the firm's underwriters' representatives in the process.

If, on the other hand, the firm somehow discovers a material error in the developer's representation *after* the representation has concluded and the developer is thus a *former* client, there is no duty to inform the developer of the error. *Id.* at 8. Model Rule 1.4, which generally governs lawyers' duty to communicate with clients, speaks only to current clients – not former clients. *Id.* at 7. Although some fiduciary duties survive the termination of the attorney-client relationship, there is no basis to claim that there is a fiduciary duty to inform the developer of the error. *See generally Access Point Med., LLC v. Mandell*, 963 N.Y.S.2d 44, 47 (App. Div. 2013) ("[W]here one party's fiduciary obligations to another arose out of their attorney-client relationship, and would not have existed without that relationship ... the attorney's fiduciary duty to the client necessarily ends when the representation ends."). The firm may, however, wish to inform the developer of the material error if the firm can do so in time to avoid or mitigate any harm or

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prejudice to the developer. ABA Formal Op. 481, at 2.

D. Respond to the Developer's Lawyer's Letter

It is necessary to respond to the developer's lawyer's letter within a reasonable time even if it is only to acknowledge receipt and indicate that you will respond further when you are able. If your engagement letter includes a provision requiring the arbitration of professional liability claims, it may be advisable to remind the developer's lawyer of that mandate. If the developer has set a deadline for a response, meet that deadline. Beyond such basics, your response will probably depend on how serious you consider the threat of litigation, the developer's lawyer's reputation, and other case-specific factors. Obviously, do not even impliedly confess error. Not responding is a poor option because the developer may feel that your silence leaves it no choice but to sue. To be sure, you may decide that you are willing to litigate, but you also might be able to negotiate a favorable settlement, agree to arbitration even if your engagement letter does not include an arbitration clause, negotiate a tolling agreement if that seems appropriate, or perhaps even persuade the developer's lawyer that she has her facts wrong. You simply do not know at this point what your best course of action may prove to be. The firm's response should not impede or preclude any of these future courses.

E. Retain Defense Counsel

When you retain defense counsel may depend on several factors. As noted earlier, if you are concerned about protecting the confidentiality of your lawyers' internal communications about the developer's threat, you might do so right after your real estate partner advises you of the threat or after instituting a litigation hold. Depending on the identity of the developer's lawyer, you might wait until after you have responded to her letter to hire defense counsel, or you might first hire defense counsel and have him respond to the developer's lawyer. In other cases, you may wait until you have been served with a complaint or petition, or a demand for arbitration. Long story short, while you do not always need to rush to retain defense counsel, you don't want to unreasonably delay in retaining defense counsel, either. In many cases you will benefit from the objective assessment of the firm's potential liability that an experienced defense lawyer will be able to provide.

You will also want to consider the need for separate counsel for any of the lawyers involved in the Manor Centre representation. Based on the facts outlined here, there is no reason to believe that the firm and any of the individual lawyers need separate counsel. If the developer files suit, a single lawyer should be able to defend the firm and any lawyers individually named as defendants. In other cases, however, separate lawyers may be warranted. Common examples include cases where a claimant alleges a lawyer's intentional wrongdoing, improper receipt of some personal benefit or some type of personal interest conflict, or arguably criminal conduct.

F. Notify the Firm's Insurers

Under a typical lawyers' professional liability (LPL) insurance policy, you are obligated to report claims in writing as soon as practicable. Some LPL policies additionally require firms to report "circumstances," that is, facts that may subsequently give rise to a claim. In any event, the letter from the developer's lawyer warrants prompt reporting. The developer's threat "to fully enforce its rights" against the firm, combined with the invitation to discuss settlement to avoid the expense and embarrassment of litigation, reasonably suggests the developer's intent to hold your real estate partner responsible for her alleged negligence.

Do not delay in reporting the matter; LPL policies are either claims-made or claims-made-and-reported policies, with the first form requiring only that the claim be made during the policy period to trigger coverage and the second requiring both that the claim be made against the insured during the policy period and be reported to the insurer during the policy period. (Both types of policies are generally described as "claims-made" for ease of reference.)

In reporting this matter to your insurers, it should suffice for descriptive purposes to simply attach or enclose a copy of the letter from the developer's lawyer. If you have retained defense counsel, identify or confirm the lawyer you have retained and provide her contact information.

Generally, when reporting a matter to your firm's insurers, say no more than is reasonably necessary to fairly describe the matter for them. Again, do not even impliedly admit liability. You may wish to simply recite the claimant's allegations and describe them as such. Your report to your insurers should be protected from discovery by work product immunity and in all likelihood by the attorney-client privilege, but some initial caution is still a good idea.

Conclusion

A threatened legal malpractice claim presents numerous legal, personal, practical, and strategic issues for a firm. Some cases may be especially complex or difficult; all cases are unique in one way or another. As a result, it is impossible to capture all the issues a law firm general counsel may have to consider. Careful consideration of the baseline issues outlined in this article, however, should help the firm best manage a difficult situation and ultimately position the firm to successfully defend any lawsuit that follows. V

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Jan Roughan, RN

LIFE CARE PLANS

- Comprehensive (Trial)
- Mini (Mediation/Settlement Conference)
- Critique

EXPERT TESTIMONY

- Trial
- Arbitration
- Mediation/Settlement Conference

VIDEO SERVICE

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- Mediation/Settlement Documentary

MEDICAL RECORDS

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- Chronology

IME

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LIFE CARE PLANNING

Metadata: A Legal Ethics Minefield for California Attorneys

Michelle Korol

Attorneys have a well-established duty not to knowingly reveal information relating to the representation of a client. Cal. Rules of Prof'l Conduct r. 1.6 (2021); Model Rules of Prof'l Conduct r. 1.6 (Am. Bar Ass'n 2018). When client information is stored electronically, this obligation necessarily overlaps with an attorney's duty to "keep abreast of changes" in the relevant technology. Cal. Rules of Prof'l Conduct r. 1.1 cmt. 1 (2021); Model Rules of Prof'l Conduct r. 1.1 cmt. 8 (Am. Bar Ass'n 2018). So, what happens when – in the course of routine, electronic communications with opposing counsel – an attorney inadvertently transmits metadata containing information related to a client matter? There is no one-size-fits-all approach to this cutting-edge issue. In fact, while some nineteen state bars have produced a wide spectrum of conflicting ethics opinions, the State Bar of California has yet to address the nature of its members' obligations concerning metadata transmissions. Absent express guidance, attorneys must instead rely on existing principles of professionalism governing legal practice in California. This article seeks to fill the gap by identifying good practices for handling metadata, based on the applicable California Rules of Professional Conduct and related case law. These authorities suggest that California attorneys should consider (1) scrubbing documents of metadata prior to electronic transmission unless the metadata, itself, makes up part of the intended transmission; and (2) refraining from seeking out, reviewing, and using metadata transmitted by opposing counsel unless otherwise authorized.

What is "Metadata," and Why Should I Care?

Metadata, or embedded data, is "data about data," meaning the invisible data that accompanies the visible text in digital files and emails. David Hricik & Chase Edward Scott, *Metadata: The Ghosts Haunting E-Documents*, 82 Florida Bar J. 32 (2008). Specifically, electronic documents contain two forms of metadata. The first type includes data automatically generated by the computer software, which contains information about when and by whom the text was created and changed. Hans P. Sinha, *The Ethics of Metadata: A Critical Analysis and a Practical Solution*, 63 Maine L. Rev. 175, 176 (2010). A second form of author-generated metadata is populated when drafters use document-editing features, such as the Microsoft Word's "track changes" or "insert comment" tools, to produce data that is visible on the surface of the document. *Id.*

Metadata "mining" refers to the process of seeking out such information, either by using features within the program that produced the data or by deploying another software to scan for such information. Robert Brownstone, *Metadata: To Scrub Or*, State Bar of Cal.: MCLE Self Study (Feb. 2008), *https://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testid=27*. For example, to view a document's automatically generated metadata in any Microsoft Office suite program, one can simply open the file's "Properties" and discover information about when and where it was created, modified, printed, and accessed; the author's name; and the size and title of the file. Viewers can access information about the amount of time spent editing the document, the name of the person who last saved it, the number of revisions, the date it was printed, and word count information. *See* Carole Levitt and Mark Rosch, *Making Metadata Control Part of A Firm's Risk Management*, L.A. Law., Mar. 2005, at 40. The properties will also reveal information the author chooses to include, such as the drafter's name, the client's name, and anyone the document was forwarded to.

Moreover, unless the drafter turns off the "track changes" function before transmitting a Word document to opposing counsel, the recipient can view comments and edits made by the drafter by simply turning on the document's "markup" view. Depending on the sender's settings when saving the document, the recipient might also be able to use the "undo" feature to work backwards through recent edits. The recipient may also uncover prior versions of the Word document, and even other documents that the drafter used as a template for the current file. *See* Stephen Shankland, *Hidden Text Shows SCO Prepped Lawsuit Against BofA*, CNET News.com, (Mar. 4, 2004, 9:18 a.m.), *https://www.cnet.com/news/hidden-text-shows-sco-prepped-lawsuit-against-bofa/*. Further, while an author can erase the visible properties of her edits from a document's face by turning off "track changes," author-generated information may nonetheless remain embedded within the document's metadata. Sinha, *supra*, at 17677. This information can still be transmitted and retrieved.

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Accidental transmissions of metadata can place a wealth of information in the hands of opposing counsel. Most concerningly, the metadata can reveal confidential or privileged information or information protected by the work product doctrine. For example, in 2004, the SCO Group, a software company, filed lawsuits against DaimlerChrysler and AutoZone. Shankland, *supra* (referencing *SCO Group Inc. v. AutoZone Inc.*, No. CV-S-04-0237-DWH-LRL, 2004 WL 524751, *complaint filed* (D. Nev. Mar. 3, 2004) and *SCO Group Inc. v. DaimlerChrysler Corp.*, docket number unavailable, 2004 WL 524757 (Mich. Cir. Ct., Oakland County Mar. 3, 2004)). Data embedded within one of the documents in the filing read like a playbook of plaintiff's strategy, revealing that Bank of America had originally been listed as a defendant until exactly 11:10 a.m. on February 18, 2004. *Id.* Shortly thereafter, DaimlerChrysler was inserted as the defendant, and a comment that read, "Are there any special jurisdiction or venue requirements for a NA bank?" was deleted. *Id.* The document's metadata also revealed plaintiff's intended claims, avenues for relief, and the amount in damages sought against Bank of America. *Id.*

Likewise, in May 2008, attorneys representing plaintiffs and defendants in a sex discrimination class action against General Electric discovered that redacted information in the electronic filings remained embedded as metadata. Douglas S. Malan, *GE Suffers a Redaction Disaster; General Electric's Sensitive Information Easy to Access Behind Black Veil*, LegalTech News (May 28, 2008), *https://www.law.com/legaltechnews/almID/1202421717785/?id=1202421717785/* (describing *Schaefer v. General Elec. Co.*, No. 3:07-CV-0858 (PCD), 2008 WL 2001244 (D. Conn. Jan. 22, 2008)). When the documents were downloaded from PACER's federal court filing system and copied and pasted into Word, the previously redacted, sealed information repopulated. *Id.*

Inadvertent metadata transmissions may also carry grave implications for criminal law practitioners. For example, New York's Ethics Committee envisioned a hypothetical scenario, in which a prosecutor in a criminal case uses a cooperation agreement signed by a confidential witness as a template for another confidential witness's agreement. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 782 (2004). The second document's metadata could contain identifying information about the first witness and expose that witness to significant risks. *Id.*

What are the Sender's Obligations as to Metadata?

Ethical issues involving metadata most often arise in two related scenarios: (1) an attorney's electronic transmission – to opposing counsel, journalists, or others outside the umbrella of the attorney client privilege – of a file that contains confidential or privileged information within its metadata; and (2) a receiving attorney's conscious act of seeking out, or "mining" the metadata. Sinha, *supra,* at 179.

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RECENT CASES

Lisa Perrochet

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***

To make the Green Sheets a useful tool to defense counsel, they are printed in green and inserted in the middle of *Verdict* magazine each issue. They can be easily removed and filed for further reference. Of course, the Green Sheets are always one attorney's interpretation of the case, and each attorney should thoroughly read the cases before citing them or relying on this digest. Careful counsel will also check subsequent history before citing.

PROFESSIONAL RESPONSIBILITY

Retainer agreement purporting to give attorney authority to settle without the client's consent violates the Rules of Professional Conduct and is voidable.

Amjadi v. Brown (2021) 68 Cal.App.5th 383

In this personal injury suit, plaintiff and her attorneys disagreed whether plaintiff should accept the defense's settlement offer. On the day of trial, plaintiff's attorneys approached defense counsel and agreed to a settlement on plaintiff's behalf over plaintiff's objection, and then successfully moved to voluntarily dismiss the case. Plaintiff's attorneys contended that they had authority to resolve the case over their client's objection based on a provision in their retainer agreement that purportedly provided them with authority to accept settlements at their "sole discretion," as long as they believed the amount reasonable and in the plaintiff's best interest. Plaintiff hired new counsel who moved to vacate the judgment. The motion was denied.

The Court of Appeal (Fourth Dist., Div. Three) reversed. A provision in an attorney's retainer agreement that purports to grant the attorney the right to accept settlement offers on the client's behalf and in the attorney's sole discretion violates the Rules of Professional Conduct and is void to the extent it grants an attorney the right to accept a settlement over the client's objection. Thus, plaintiff's attorneys entered the settlement without authority and the settlement was voidable by plaintiff.

ATTORNEY FEES AND COSTS

A CCP Section 998 offer is invalid if it requires plaintiffs to indemnify defendants against possible future claims of nonparties.

Khosravan v. Chevron (2021) 66 Cal.App.5th 288.

In this asbestos action, defendant served a Code of Civil Procedure section 998 offer on the plaintiffs offering payment in return for a waiver of costs plus "a release of all future claims based on the allegations in the complaint, including, but not limited to, claims for wrongful death, *and indemnity in the event such claims are filed by non-parties to this case.*" Plaintiffs rejected the offer. After prevailing on summary judgment, the defendant sought costs including payment of expert witness fees under section 998. The trial court granted the expert witness fees, and plaintiffs appealed.

The Court of Appeal (Second Dist., Div. Seven) reversed the award of expert fees on the ground the section 998 offer was invalid for purposes of cost shifting. While "[a] valid section 998 offer may include terms requiring the release of all claims (by parties or nonparties) arising from the injury at issue in the lawsuit," the requirement that the plaintiffs indemnify the defendant against claims by nonparties rendered the offer "difficult to value" and possibly costly enough to the plaintiffs that it was less favorable

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than the judgment under which they were liable only for costs. The court observed, "[w]e recognize the desire by defendants to reach a settlement that protects them from all liability for the conduct alleged in the complaint, whether as to the plaintiffs or their heirs in a wrongful death action. But if defendants seek that protection through indemnification, they may well need to give up the benefit of section 998."

See also *Mostafavi Law Group v. Larry Rabineau APC* (2021) 61 Cal.App.5th 614 [Court of Appeal affirmed trial court order granting defendant's motion to vacate a judgment based on defendant's own Code of Civil Procedure section 998 offer where the offer did not contain a valid acceptance provision and so plaintiff's attempted acceptance (a hand written note on the offer) was thus also invalid].

See also *Arriagarazo v. BMW of North America* (2021) 64 Cal.App.5th 742 [A section 998 offer specifying only that the plaintiff will execute a release cannot avoid entry of judgment; "where a section 998 offer sets out certain settlement terms but fails to specify whether acceptance would result in judgment, an award, or dismissal, "the offer, by virtue of default to the statutory language, is simply intended as one to 'allow judgment to be taken' in exchange for the specified amount of funds.""]. ■

Trial courts may properly consider an attorney's civility in determining a reasonable attorney fee.

Karton v. Ari Design & Construction (2021) 61 Cal.App.5th 734

A homeowner hired a contractor to do work on his home. When the homeowner became suspicious of the contractor's licensing status, he demanded the contractor stop work and refund all amounts not yet spent on labor and materials. When the parties failed to agree on the amount of the refund, the homeowner sued the contractor as well as the contractor's surety. Because the contractor was indeed unlicensed, pursuant to Business and Professions Code section 7031, subdivision (b), the trial court ordered it to disgorge the full amount the homeowner had paid (about $92,000), even for work that had already been done. The homeowner – a lawyer who largely represented himself in the proceedings – then sought nearly $300,000 in attorney fees under Code of Civil Procedure 1029.8. The trial court awarded only $90,000, reasoning that the plaintiff had over-litigated the case and acted in an uncivil manner in its filings, and that a $300,000 fee request on a $90,000 judgment was unreasonable.

The Court of Appeal (Second Dist., Div. Eight) affirmed the fee award, and further ordered that the surety was responsible for paying it. The trial court acted within its discretion to reduce the fee claimed for various reasons, including consideration of the judgment amount and the attorney's incivility towards opposing counsel during the litigation. "The size of a judgment is pertinent to rational evaluation of a requested fee. Rational decisionmaking weighs benefits and costs ... The trial court properly connected the fee to the judgment." Further, an attorney's skill is an appropriate consideration in determining a reasonable fee, and "[c]ivility is an aspect of skill."

See also *Pech v. Morgan* (2021) 61 Cal.App.5th 841 [When an attorney sues a client for breach of a valid and not unconscionable fee agreement, the attorney may recover fees per the terms of the agreement even if that exceeds what would be a "reasonable fee" under the lodestar method, although the attorney must still demonstrate that he or she performed the services to be compensated consistent with the implied covenant of good faith and fair dealing (i.e., with reasonable care, skill, and diligence)].

And see *Reck v. FCA US* (2021) 64 Cal.App.5th 682 [Although trial courts may consider the relationship between the results achieved and the amount of fees in a lodestar analysis, courts may not rely on Code of Civil Procedure section 998 to categorically deny all fees after the date of a statutory offer for an amount less than the plaintiff received at trial; the court did not address whether the trial court could alternatively denial all fees for other reasons, such as presentation of an unduly inflated fee claim]. ■

Postjudgment interest on costs and attorney fees runs from the date entitlement to them is established, even if the amount is fixed later.

Felczer v. Apple (2021) 63 Cal.App.5th 406.

In a wage and hour class action suit, the trial court issued separate posttrial orders awarding prejudgment costs and attorney fees to plaintiffs. The parties disputed when postjudgment interest on the awards accrued. Plaintiffs argued that interest accrued from the date the judgment was entered – even if the amount of the awards is not determined at that time. Defendant argued that interest accrued only once the amount of the awards were determined. The trial court agreed with defendant.

The Court of Appeal (Fourth Dist., Div. One) reversed, straddling the parties' positions. Postjudgment interest on prevailing party costs and attorney fees begins to run when entitlement to those costs is established, either in the judgment or a posttrial order, even if the precise amounts are not determined until a later date. The court reasoned that any order that establishes one party owes the other payment is a money judgment for purposes of Code of Civil Procedure section 685.020, and that under Code of Civil Procedure 685.010, interest accrues on unsatisfied "money judgment[s]." The opinion is contrary to other authority such

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as *Stockton Theaters, Inc. v. Palermo* (1961) 55 Cal.2d 439, 443 explaining that cost awards "are, in fact, separate and complete judgments in themselves"; they cannot properly be entered as such until the amount is determined. The court did not address how a defendant can satisfy such a "judgment" before the amount is ascertained.

CIVIL PROCEDURE

Qualified work product protection may apply to the identity of a witness.

Curtis v. Superior Court (2021) 62 Cal.App.5th 453

To assist in the defense of an employment suit, attorney Robert Curtis consulted with a plaintiffs-side employment lawyer as a nontestifying expert. Curtis's client lost the employment suit, and the plaintiffs' attorney posted about the case on a plaintiffs'-side employment law listserv. The expert forwarded the posting to Curtis, who then included it as an exhibit in a posttrial filing. The plaintiff moved to strike the exhibit on the ground it contained attorney work product and/or was attorney-client privileged, but the court denied the motion, reasoning that any privilege was waived by the posting of the material on a widely distributed listserv. The organization that ran the listserv then filed a breach of contract lawsuit, seeking to uncover the identity of the expert who had forwarded the posting in violation of the listserv's confidentiality policy. The organization sought to depose Curtis to learn the expert's identity, but Curtis objected that it was protected attorney work product. The trial court disagreed and ordered Curtis to disclose the name. Curtis appealed.

The Court of Appeal (Second Dist., Div. Seven) treated the appeal as a petition for writ of mandate, and denied the petition. Assuming absolute work product protection could even apply to nonwritten material like the name of a witness, Curtis had not shown the expert's name reflected his impressions, conclusions, opinions or legal research or theories, as would be required for absolute production under Code of Civil Procedure section 2018.030, subdivision (a). Even so, given the risk that disclosing the expert's name could impact Curtis's ongoing efforts to consult with plaintiffs'-side attorneys to develop legal strategy, as disclosing the expert's identity could chill other experts from consulting with him on legal strategy, potentially triggering qualified work product protection under section 2018.030, subdivision (b). And yet, the organization had met its burden under that statute to show it would be unfairly prejudiced by not being able to discover the defendant's identity, and the organization's interest outweighed Curtis's. Accordingly, Curtis could properly be compelled to disclose the name in this case.

To obtain a continuance of discovery to oppose a summary judgment motion, the nonmoving party must demonstrate reasonable diligence.

Braganza v. Albertson's LLC (2021) 67 Cal.App.5th 144

Plaintiff claimed to have slipped on water on the floor at an Albertson's grocery story. Albertson's moved for summary judgment on the grounds that there was no evidence Albertson's had actual or constructive notice the floor was wet, and that even if it was wet, according to its expert, the floor had sufficient friction to prevent falls. Plaintiff did not oppose the motion, and instead, the day before the opposition was due, filed a request to continue the hearing pursuant to Code of Civil Procedure section 437c, subdivision (h). Plaintiff claimed the continuance was necessary to permit an inspection of the site and conduct further expert discovery. The trial court denied the motion to continue, reasoning that plaintiff had not shown reasonable diligence in conducting the needed discovery during the 75-day notice period. The trial court then granted summary judgment for Albertson's.

The Court of Appeal (Fourth Dist., Div. Two) affirmed. Recognizing the split of authority among the appellate courts over whether a party must show diligence in order to obtain a continuance under section 437c, subdivision (h), the court followed *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246 and held that "a party who seeks a continuance under section 437c, subdivision (h), must show why the discovery necessary to oppose the motion for summary judgment or summary adjudication could not have been completed sooner, and accordingly requires the court to grant the continuance."

When notice is waived, the time for filing a petition for writ of mandate runs from the hearing.

Austin v. City of Burbank (2021) 67 Cal.App.5th 654

Plaintiff filed a request for records under the Public Records Act, Government Code section 6250 et seq. The trial court denied the request at a hearing on July 14, 2020 and issued a minute order adopting its tentative to deny the request and directing the defendant to prepare a proposed judgment. Plaintiff waived notice. The trial court signed the proposed judgment on July 24. Plaintiff filed a notice of appeal on August 4.

The Court of Appeal (Second Dist., Div. Eight) dismissed the appeal. An order denying a Public Records Act request is reviewable only by writ filed within 20 days of the order. (Gov. Code, § 6259, subd. (c).) Even if the plaintiff had shown extraordinary circumstances justifying treating the appeal as a writ, because plaintiff waived notice, the petition was due 20 days after the July 14 hearing – i.e., August 3, the day before he filed his notice of appeal.

EVIDENCE

Expert testimony concerning particular events and participants alleged to have been involved in predicate gang offenses constitute case-specific facts that, under *Sanchez*, must be proven by independently admissible evidence.

People v. Valencia (2021) 11 Cal.5th 818

Defendants were charged with various crimes arising out of alleged gang activity. At trial, a police officer testified as a gang expert. In addition to testifying about certain general background facts about the gang (e.g., monikers, tattoos), the expert also testified that the gang had engaged in three predicate offenses for purposes of California's "STEP Act," including assaults and an attempted robbery. The expert also testified as to the particular circumstances of the three predicate offenses. However, the expert's only knowledge of these predicate offenses came from hearsay conversations with other officers and a review of hearsay police reports involving the gang. Defendants were convicted on certain charges. The Court of Appeal reversed, concluding that some of the expert's testimony about the predicate offenses constituted inadmissible hearsay under *People v. Sanchez* (2016) 63 Cal.4th 665.

The California Supreme Court affirmed. Under *Sanchez*, general knowledge about background facts accepted in the expert's field may be supported by hearsay, but case-specific facts about which the expert has no independent knowledge cannot be supported by hearsay and must instead be proven by independently admissible evidence. The commission of predicate offenses to show that a gang's members have engaged in a pattern of criminal gang activity under the STEP Act is a case-specific fact—not a general background fact—and thus must be proven by independently admissible evidence. The Court explained that (1) "[t]he proper role of expert testimony is to help the jury understand the significant of case-specific facts proven by competent evidence, not to place before the jury otherwise unsubstantiated assertions of fact"; and that (2) "[w]ithout independent admissible evidence of the particulars of the predicate offenses, the expert's hearsay testimony cannot be used to supply them. In the absence of any additional foundation, the facts of an individual case are not the kind of general information on which experts can be said to agree." V

TORTS

A duty of care to protect against injuries caused by a third party requires a special relationship.

Brown v. USA Taekwondo (2021) 11 Cal.5th 204

A group of taekwondo athletes filed suit against their coach, Marc Gitelman, the United States Olympic Committee (Olympic Committee), USA Taekwondo (US Taekwondo), and others for the sexual abuse committed by Gitelman. Against the Olympic Committee and US Taekwondo specifically, the plaintiffs alleged several causes of actions rooted in negligence. The Olympic Committee and US Taekwondo filed demurrers, claiming they had "no duty of care to plaintiffs to prevent Gitelman's sexual abuse." The trial court sustained the demurrers and dismissed both defendants. Court of Appeal (Second Dist., Div. Seven) reversed as to US Taekwondo, holding that under the *Rowland* factors, USA Taekwondo owed a duty to protect their youth athletes from abuse by their coaches. However, the Court of Appeal affirmed as to the Olympic Committee, reasoning that even though it had the ability to control USA Taekwondo, the Olympic Committee did not have a special relationship with the athletes or the coach involved.

The California Supreme Court affirmed, clarifying that the existence of a duty to protect depends upon a two-step inquiry. First, the court must determine whether there exists a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to protect. Second, if the court finds a duty exists, the court must consult the factors described in" *Rowland v. Christian* (1968) 69 Cal.2d 108 "to determine whether relevant policy considerations counsel limiting that duty." The Court rejected plaintiffs' argument that the policy factors set out in" *Rowland* can be applied to create a duty in the absence of a special relationship.

See also *City of Los Angeles v. Superior Court* (Wong) (2021) 62 Cal.App.5th 129 [City owed no duty to protect police officer's wife from contracting typhus from her husband, who contracted the illness on city property from a homeless encampment, because, by statute, public entities owe a duty of care only to people whose injuries arise from their own use of a public property (i.e., *Kesner* duty analysis does not apply to public entities); further, public entities are immune from liability for decisions affecting public health]. V

The hirer of an independent contractor owes no duty to protect the contractor against known hazards even where the hazards cannot be avoided.

Gonzalez v. Mathis (2021) 12 Cal.5th 29

A contractor hired to work on the home of singer Johnny Mathis slipped and fell while rushing to assist several co-workers stop a leak that developed as they washed the home's skylights. The contractor had worked for Mathis on a regular basis and claimed that he told Mathis's housekeeper several months prior to the accident that the roof was in a dangerous condition and needed to be repaired. Mathis moved for summary judgment under the *Privette* doctrine and the trial court granted the motion. The Court of Appeal (Second Dist., Div. Seven) reversed, holding that a landowner may be liable to an independent contractor for injuries arising from a known hazard that could not be remedied through reasonable safety precautions.

The California Supreme Court reversed the Court of Appeal. The court declined to create a new exception to the *Privette* doctrine for circumstances where no steps could have avoided or minimized the hazard. "When a landowner hires an independent contractor to perform a task on the landowner's property, the landowner presumptively delegates to the contractor a duty to ensure the safety of its workers. This encompasses a duty to determine whether the work can be performed safely despite a known hazard on the worksite. As between a landowner and an independent contractor, the law assumes that the independent contractor is typically better positioned to determine whether and how open and obvious safety hazards on the worksite might be addressed in performing the work." The Court rejected plaintiffs' retained control theory of liability, holding that under *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, Mathis was not liable because he did not prevent the contractor from undertaking any needed safety measures and did not otherwise exercise control over the contractor's work in a manner that affirmatively contributed to the injury.

See also *Sandoval v. Qualcomm, Inc.* (2021) 12 Cal.5th 256 [The affirmative-contribution exception to the general *Privette* rule is "satisfied only if the hirer in some respect induced – not just failed to prevent – the contractor's injury-causing conduct" and that "[i]t is not enough for the hirer's exercise of control to incidentally give the hirer the opportunity to prevent the contractor's injury-causing conduct."].

But see *Zuniga v. Cherry Avenue Auction* (2021) 61 Cal.App.5th [the *Privette* doctrine does not extend to the landlord-tenant context; lessors have duty to warn commercial tenants about danger of overhead power lines].

Condo complex had no duty to provide guest parking or protect against jaywalking.

Issakhani v. Shadow Glen Homeowners Assn., Inc. (2021) 63 Cal. App.5th 917

The plaintiff was struck by a car while jaywalking across a five-lane highway to get to a condo complex. She sued the condo complex homeowners' association, claiming it was responsible for her injuries because it did not have enough onsite parking spaces for guests, as allegedly required both by the common law and a local ordinance. The trial court granted summary judgment for the association.

The Court of Appeal (Second Dist., Div. Two) affirmed. The association had no duty to guests to provide onsite parking because (a) binding precedent "forecloses imposing a duty upon a landowner to provide invitees with onsite parking in order to protect them from the obvious dangers of crossing nearby streets to get to the property,", (b) the connection between the landowner's conduct and the injury suffered was too attenuated, especially "where it was the visitor's decision – rather than the landowner's – to select an offsite parking space on the far side of a busy street," (c) "[i]mposing a duty to provide sufficient onsite parking to accommodate all invitees would not be especially effective in preventing future harm," (d) imposing such a duty "would also impose an unacceptably heavy burden [on the landowner]," and (e) no duty of care could be grounded on a zoning ordinance that imposed a condition for additional "guest parking" applicable to only a single parcel and embodied no "general public policy."

But see *Hernandez v. Jensen* (2021) 61 Cal.App.5th 1056 [family members owe a duty to in-home healthcare aids to secure known firearms in the house; homeowner thus was potentially liable to worker injured when a loaded rifle in a closet accidentally discharged; the holding does not address a duty to protect against third party intentional acts].

Trial court did not err in refusing to consider similar verdicts in evaluating excessiveness of noneconomic damages award.

Phipps v. Copeland Corp. (2021) 64 Cal.App.5th 319

In this asbestos personal injury action, the jury found plaintiffs suffered $25 million in damages, and assessed the last remaining defendant, Copeland, 60 percent of the fault. Copeland moved for a new trial, arguing that substantial evidence did not support the jury's allocation of fault and that the noneconomic damages were excessive. The trial court denied a new trial. Copeland appealed the fault allocation and the trial court's refusal to consider a survey of verdicts in other cases to determine if the noneconomic damages award was excessive.

The Court of Appeal (Second Dist., Div. Seven) affirmed. Copeland, as the party with the burden to establish the percentage of comparative fault attributable to others, "must demonstrate its percentage of comparative fault could not, as a matter of law, be as large as 60." Copeland did not meet that burden. Further, the trial court did not abuse its discretion by refusing to consider a spreadsheet survey of verdicts in other mesothelioma cases) that Copeland introduced at the new trial motion hearing because sufficiency of the evidence must be determined "on the minutes of the court" (Code Civ. Proc., § 658), and the survey was not part of the minutes.

See also *Pilliod v. Monsanto* (2021) 67 Cal.App.5th 591 [affirming punitive damages award that trial court reduced to a 4:1 ratio as compared against compensatory damages, where defendant deliberately disregarded and sought to downplay risk its product contained a carcinogen].

See also *Hardeman v. Monsanto* (2021) [upholding $5 million compensatory award and $20 million punitive damages award in bellwether trial alleging Round Up causes lymphoma; rejecting arguments that the plaintiffs' claims were preempted, that plaintiffs' evidence of causation was flawed, and that the punitive damages were unconstitutionally excessive]. V

"Loss of life" damages are available in 238 U.S.C. § 1983 actions even though they are barred under California law.

Valenzuela v. City of Anaheim (9th Cir. 2021) 6 F.4th 1098

In this civil rights action against the City of Anaheim and two police officers, the jury awarded the plaintiffs a total of $13.2 million in damages, including $3.6 million in "loss of life" damages for the decedent. Relying on the general rule that in civil rights actions under 42 U.S.C. § 1983, damages are governed by state law unless the state law is inconsistent with the federal statute's goals, the defendant argued that the $3.6 million in "loss of life" damages for the decedent were not recoverable because noneconomic damages for "pain, suffering or disfigurement" are not recoverable for a decedent under California law. (Cal. Code Civ. Proc., § 377.34.)

A divided panel of the Ninth Circuit disagreed. In *Chaudhry v. City of Los Angeles* (9th Cir. 2014) 751 F.3d 1096, the court had permitted a civil rights plaintiff to recover for the decedent's pre-death pain and suffering damages notwithstanding state law to the contrary, reasoning that the state limitation on damages was inconsistent with the remedial purpose of § 1983. The majority held that *Chaudhry* controlled and permitted the plaintiffs to recover for an additional category of noneconomic damages: the decedent's "loss of life" damages. V

INSURANCE

To establish an insurer's liability for an excess judgment, CACI No. 2334 notwithstanding, the plaintiff must prove the insurer's failure to accept a reasonable settlement demand was unreasonable.

Pinto v. Farmers Insurance Exchange (2021) 61 Cal.App.5th 676

This case arose out of a single-vehicle accident. One of the injured passengers made a policy limits demand to Farmers under a policy covering both the owner and the permissive driver. The demand included a requirement that Farmers deliver declarations from both the owner and permissive driver that they did not have other insurance. Farmers did everything within its control to accept the demand, including delivering a policy limits check before the demand expired, but Farmers was unable to procure the demanded declaration from the permissive driver because she refused to cooperate. The claimant deemed Farmers' failure to provide the declaration as a rejection of his demand. He then secured an excess judgment against the owner and permissive driver, obtained an assignment of their claims against Farmers, and sued Farmers for bad faith. Over Farmers' objection, the trial court modeled the verdict form upon CACI No. 2334, which as currently drafted does not include any requirement that the

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jury determine whether the insurer acted unreasonably when it failed to accept a settlement demand. The jury found the two existing elements of CACI No. 2334 satisfied – namely that the demand was reasonable and Farmers failed to accept it. Even though the jury also found that Farmers had acted reasonably in attempting to secure the permissive driver's cooperation, the trial court entered judgment for the claimant.

The Court of Appeal (Second Dist., Div. One) reversed with directions to enter judgment for Farmers. All bad faith claims require a finding that the insurer acted unreasonably. An insurer's mere failure to accept a reasonable demand is not unreasonable per se, and as currently drafted, CACI No. 2334 is erroneous because it omits the element of unreasonable conduct by the insurer. Because the claimant could have, but declined to, seek a jury verdict on that "crucial" element, judgment for the insurer was required.

But see *Hedayati v. Interinsurance Exchange of the Auto Club* (2021) 67 Cal.App.5th 833 [In action alleging bad faith failure to settle, insurer not entitled to summary judgment where there were triable issues whether the insurer failed to provide claimant's counsel with sufficient information to evaluate initial policy limits offer and then failed to accept later short-fuse policy limits demand despite already knowing the claim's value exceeded policy limits]. V

ANTI-SLAPP

Lien doctor's alleged fraudulent billing was not a protected litigation activity.

People ex rel. Allstate Insurance v. Rubin (2021) 66 Cal.App.5th 493

Allstate brought a qui tam action against Dr. Sonny Rubin, a lien doctor. Allstate alleged that Dr. Rubin prepared false or inflated billing records for medical services that his patients then used to support claims for insurance benefits. Dr. Rubin filed an anti-SLAPP motion, arguing that his patients were prospective personal injury plaintiffs and that his billings were therefore created in anticipation of litigation and constituted protected litigation activities. The trial court denied the motion.

The Court of Appeal (Fourth Dist., Div. Three) affirmed. Mere preparation of bills for purposes of submitting an insurance claim is not protected activity unless litigation "is under serious consideration and is more than theoretical." Where, as here, the doctor's billing practices were done in the ordinary course of business for the purpose of obtaining payment, and litigation was only a possibility, the practices were not protected activity for anti-SLAPP purposes. V

Decisions and actions arising out of peer review proceedings are not protected under the anti-SLAPP statute

Bonni v. St. Joseph Health System (2021) 11 Cal.5th 995

A physician lost his staff privileges following peer review proceedings allegedly begun in retaliation for his protest against hospital practices. He sued the defendant hospitals. The defendants moved to strike the retaliation claim under the anti-SLAPP statute, arguing that the claim arose out of speech and conduct related to the peer review process. The trial court granted the motion. The Court of Appeal (Fourth Dist., Div. Three) reversed on grounds that the anti-SLAPP statute does not protect actions based on a retaliatory motive.

The California Supreme Court reversed in part. The Court clarified that its prior application of the anti-SLAPP statute to hospital peer review proceedings in *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192 extended anti-SLAPP protection only to speech and petition in peer review proceedings and not to decisions or actions arising out of such proceedings. Accordingly, the Supreme Court struck plaintiff's allegations related to speech and petition but remanded for the Court of Appeal to consider whether the remaining allegations were otherwise barred by the anti-SLAPP statute. V

ARBITRATION

A collective bargaining agreement must clearly and unmistakably require arbitration of wage-and-hour claims for the arbitration agreement to be enforceable.

Wilson Davis v. SSP America (2021) 62 Cal.App.5th 1080

In this putative wage-and-hour class action, the defendant sought to arbitrate the plaintiffs' claims pursuant to a collective bargaining agreement. The trial court denied the defendants' motion to compel arbitration, reasoning that the collective bargaining agreement did not clearly and unmistakably require arbitration of the wage-and-hour claims alleged in the plaintiff's complaint. The employer appealed, arguing that the clear-and-unmistakable standard applies solely to agreements to arbitrate statutory discrimination claims and does not apply wage-and-hour claims.

The Court of Appeal (Second Dist., Div. Three) rejected the employer's argument, thus affirming the denial of the employer's motion to compel arbitration. The clear-and-unmistakable standard applies to agreements to arbitrate a variety of statutory claims, including those brought under California's wage-and-hour laws. V

CLASS ACTIONS

Habitability claims based on the conditions of building common areas may be amenable to class treatment.

Peviani v. Arbors at California Oaks Property Owner, LLC (2021) 62 Cal.App.5th 874

Plaintiffs, current and former residents of an apartment complex with over 400 units, brought a lawsuit alleging that the complex was dilapidated and unsanitary. Plaintiffs sought to certify the case for class action treatment with respect to their claims that (1) the building falsely advertised that the units and building amenities were luxurious; (2) the building lacked appropriate trash receptacles, causing the common areas to become unsanitary, which breached the implied warranty of habitability and was a nuisance; (3) that the building owner retained security deposits in bad faith; and (4) that the building owners engaged in unfair competition based on the same allegations. The trial court denied class certification, reasoning that common issues would not predominate.

The Court of Appeal (Fourth Dist., Div. Two) reversed and remanded for reconsideration of class certification. A false advertising claim depends on what a reasonable person would understand from the advertisement, not subjective reliance. The trial court therefore erred in believing it would require individualized proof. The habitability and nuisance claims related to the conditions of the building's common areas. The trial court therefore also erred in concluding that those claims would depend on the conditions experienced by individual renters. The claim for bad faith withholding of security deposits involved the common question of whether the defendant acted reasonably in making deductions form deposits. Liability for that claim could be dealt with on a class wide basis even if damages would be individualized. And the unfair competition claims could be subject to class treatment to the same extent as the other claims which provided the factual predicates for the unfair competition claims. V

Misclassification claims should not be certified for class treatment where establishing the employer's liability will still require individualized proof.

Wilson v. The La Jolla Group (2021) 61 Cal.App.5th 897

In this wage and hour class action, the plaintiffs, who worked gathering signatures for political causes, alleged they were misclassified as independent contractors rather than employees. When ruling on the plaintiffs' class certification motion, the trial court found that individual issues would predominate over any common misclassification issues because the "[s]ignature gatherers worked all over the state, at different wage rates, there were no time records, and 'everybody's got a different story." The trial court denied the motion.

The Court of Appeal (Fourth Dist., Div. One) mostly affirmed. While the plaintiffs' argument for misclassification was common to all class members, that was only a threshold issue in the case. The trial court could reasonably conclude that individualized proof was still going to be required to show liability, and that as a result, class treatment was improper. The only claim that depended solely on the common misclassification question was the claim for inaccurate wages statements. As to that claim, common issues would predominate, but the case still had to be remanded for further consideration of whether that claim would the raise problems implicating the manageability and superiority requirements for class certification. V

Federal courts should deny certification of a damages class where the class would include in more than a de minimis number of uninjured class members.

Olea Wholesale Grocery Cooperative v. Bumble Bee Foods (2021) 993 F.3d 774

Plaintiffs brought this class action seeking monetary damages for defendants' admitted price-fixing scheme related to canned seafood products. To satisfy their burden under Federal Rule of Civil Procedure 23(b)(3) to show common issues would predominate, plaintiffs presented expert testimony to establish a methodology for determining damages on a class wide basis. Plaintiffs also presented expert testimony estimating that, under their damages methodology, only about 6% of the class members would be uninjured. Defendants responded with their own expert who estimated that plaintiffs' methodology would result in up to 28% of the class being uninjured. The district court granted class certification, reasoning that the plaintiffs' methodology was reliable enough to support class treatment.

The Ninth Circuit reversed. The district court should have resolved the competing claims about the number of uninjured class

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members, applying a preponderance of the evidence standard to the issue. Were that dispute resolved in the defendants' favor, "the inclusion of 28% uninjured class members would 'unquestionably' defeat [the] predominance [requirement]." The court declined to set a definitive "threshold for how great a percentage of uninjured class members would be enough to defeat predominance," but held the percentage of uninjured members "must be *de minimis*," and suggested that "'5% to 6% constitutes the outer limits of a *de minimis* number.'" V

HEALTHCARE

Having a third party redact private patient information does not overcome privacy concerns.

County of Los Angeles v. Superior Court (Johnson & Johnson) (2021) 65 Cal.App.5th 621

In this litigation alleging that pharmaceutical companies made false and misleading statements when marketing opioids, the plaintiffs moved to compel production of the medical records of over 5,000 patients treated for substance abuse in third-party, county-run treatment programs. The trial court granted the motion but ordered that the personally identifying information would first have to be removed by a third-party vendor. The counties filed petitions for writ of mandate seeking to vacate the order as a violation of the patients' right to privacy.

The Court of Appeal (Fourth Dist., Div. One) granted the writ petitions. Under the framework of *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, the transfer to a third party of the health care provider's duty to protect privacy interests threatened "serious intrusion" into the patients' privacy rights. The requirement that a third party remove personally identifying information did not remedy the threatened privacy intrusion, since disclosing that information to any third party implicated the patients' privacy rights. Plaintiffs had not established an interest in obtaining this information sufficient to justify the proposed privacy invasion. V

The prospect that a peer review hearing officer could be hired by the hospital in the future does not require disqualification of the officer.

Natarajan v. Dignity Health (2021) 11 Cal.5th 1095

A physician whose hospital staff privileges were revoked petitioned the superior court for a writ of administrative mandate, arguing he was denied due process because the hearing officer appointed by the hospital to hear his case was potentially biased by his past and likely future appointment by the hospital. The trial court denied the petition because there was no evidence of actual bias. The Court of Appeal affirmed, disagreeing with *Yaqub v. Salinas Valley Mem. Healthcare Sys.* (2004) 122 Cal.App.4th 474 regarding the "potential for bias" disqualification standard.

The California Supreme Court affirmed, disapproving *Yaqub*. A peer review hearing officer may be disqualified based on a direct financial benefit that creates an intolerable risk of actual bias under the circumstances, but that is a context-sensitive inquiry. Such a risk does not arise from the mere fact that the officer has been hired by a hospital on an ad hoc basis and may one day be hired again by the same hospital. In determining whether a hearing officer is disqualified, courts must consider two factors: (1) which entity exercises control over the hearing officer selection process, and (2) the extent and likelihood of future financial opportunities the hearing officer may receive from the same entity. V

LABOR & EMPLOYMENT

Plaintiff could state Unruh Act claim, but not a FEHA "aiding and abetting claim," against third party who made racist comments while giving a presentation to plaintiff's employer.

Smith v. BP Lubricants USA (2021) 64 Cal.App.5th 138

Plaintiff attended a workplace seminar hosted by her employer but presented by another company. The presenter allegedly made racist comments and her colleagues and supervisors allegedly laughed at the comments. Plaintiff brought claims against the presented for aiding and abetting her employer's violation of the Fair Employment and Housing Act; intentional infliction of emotional distress, and violation of the Unruh Act (which prohibits businesses open to the public from engaging in discrimination). The presented moved to dismiss on the grounds it was not the plaintiffs' employer so could not be liable for a FEHA violation; that its conduct was not extreme and outrageous enough to support an IIED claim; and that the Unruh Act did not apply to alleged racial harassment at a private business meeting. The trial court agreed and dismissed all of plaintiff's claims without leave to amend.

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The Court of Appeal (Fourth Dist., Div. Two) affirmed in part and reversed in part. The crux of an aiding abetting claim under FEHA is concerted activity between parties; here, there were no facts supporting concerted activity between the plaintiff's employer and the seminar presenter, so the aiding and abetting claim was properly dismissed. However, an intentional infliction of emotional distress claim can stem from the use of racial epithets if coupled with aggravating circumstances. Here, the plaintiff had alleged sufficient facts to support a jury question on whether the conduct was sufficiently extreme and outrageous to result in liability. Finally, the plaintiffs allegations were sufficient to show that the presenter was acting as a "business establishment" that discriminated against the plaintiff.

An employee may pursue a Private Attorney General Act claim even where her individual claims are time-barred.

Johnson v. Maxim Healthcare Services (2021) 66 Cal.App.5th 924

Plaintiff filed a representative Private Attorney General Act (PAGA) action against her employer alleging that the employer required its employees to sign unlawful noncompetition agreements. The defendant moved to dismiss on the ground that plaintiffs' claim was time-barred, and she therefore lacked standing to bring a PAGA action. The trial court sustained defendant's demurrer without leave to amend.

The Court of Appeal (Fourth Dist., Div. One) reversed. Even though plaintiff's individual claim may be time-barred, she continues to be an "aggrieved employee" with standing to pursue a PAGA claim so long as she is employed by defendant and personally suffered at least one Labor Code violation on which the PAGA claim is based. The court analogized to *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, in which the California Supreme Court held that a plaintiff who settled her individual claims could still proceed with a PAGA claim: "the fact that [plaintiff's] claim is time-barred places her in a similar situation as a plaintiff who settles her individual claims or dismisses her individual claims [and is nonetheless able] to pursue a stand-alone PAGA claim."

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.)

Addressing when government entities can be liable for failure to warn of a dangerous condition.

Tansavatdi v. City of Rancho Palos Verdes (2021) 60 Cal.App.5th 423, review granted April 21, 2021, case no. S267453

The plaintiff's son died in a bicycle accident. She sued the city for removing a bike lane, thus creating an allegedly dangerous condition, and for failing to warn about the dangerous condition. The city moved for summary judgment on the ground of Government Code section 839.8 (design immunity). The trial court granted the motion without addressing the failure to warn claim separately. 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 Supreme Court granted review to address the following issue: Can a public entity be held liable under Government Code section 830.8 for failure to warn of an allegedly dangerous design of public property if the design itself is entitled to immunity under Government Code section 830.6?

Addressing whether the federal Holder Rule bars a Song-Beverly plaintiff from recovering attorney fees in addition to the vehicle purchase price.

Pulliam v. HNL Automotive (2021) 60 Cal.App.5th 396, review granted and depublication denied April 28, 2021, case no. S267576

When plaintiff purchased a car from a the dealership, she entered a retail installment sales contract that included consumer protection language mandated by federal law – 16 Code of Federal Regulations part 433.2. That federal regulation, known as the Holder Rule, provides that consumers who buy goods on credit may stop making payments on a loan and sometimes may obtain a refund of payments already made in certain circumstances involving the sale of defective goods. TD Auto Finance accepted assignment of the loan contract and became the "holder" subject to plaintiff's rights under the Holder Rule. Plaintiff then sued on lemon law claims, reoverying $22,000, and successfully asserted a statory fee claim for $170,000. The defendants appealed the fee award, arguing that they are not liable for attorney fees under the Holder Rule, which provides that a "recovery" against a holder in due course of an installment contract cannot be more than the purchase price of the contract. The Court of Appeal (Second Dist., Div. Five) affirmed the award, holding that "recovery" does not include fees: "the Holder Rule does not limit the attorney's fees that a plaintiff may recover from a creditor-assignee." The court expressly disagreed with two other decisions and disregarded FTC guidance on the issue.

The California Supreme Court granted review on the following issue: Does the word "recovery" as used in the Holder Rule (16 C.F.R. § 433.2) include attorney fees?

Addressing whether a commercial trucker's lapsed insurance policy continues in effect until the insurer cancels a DVM certificate of insurance.

Allied Premier Insurance v. United Financial Casualty Company (2021) 991 F.3d 1070, Certification Granted to Answer Question of State Law presented in Pending Ninth Circuit Case – May 12, 2021, case no. S267746

This case involves a dispute between two insurers that issued successive liability policies to a commercial truck driver. The trucker allowed the first policy to lapse and purchased the second policy from a different insurer, but the first insurer failed to formally cancel a *certificate* attesting to coverage that was on file with the DMV. The driver caused a fatal accident while the second policy was in force, and the second insurer paid to settle the claim, subsequently filing a contribution action in federal district court against the first insurer. The plaintiff insurer argued that the defendant insurer's policy remained in effect due to the uncancelled certificate and that the defendant therefore had to contribute to the settlement. The district court granted summary judgment to the plaintiff.

The Ninth Circuit certified the following question to the California Supreme Court: "Under California's Motor Carriers of Property Permit Act (Veh. Code § 34600 et seq.), does a commercial automobile insurance policy continue in full force and effect until the insurer cancels the corresponding Certificate of Insurance on file with the California Department of Motor Vehicles, regardless of the insurance policy's stated expiration date?"

Addressing the requirements for organizational standing under the Unfair Competition Law.

California Medical Association v. Aetna Health of California (2021) 63 Cal.App.5th 660, review granted and depublication denied July 28, 2021, case no. S269212

The California Medical Association (CMA) sued Aetna under the Unfair Competition Law (UCL), arguing that Aetna improperly prevented its in-network providers from referring patients to out-of-network providers. Aetna moved to dismiss, arguing that CMA lacked standing to sue for the injuries to its individual members and that CMA's argument that it diverted its money and resources to investigating Aetna's practices was sufficient to establish injury in fact for UCL purposes. The trial court granted Aetna's motion to dismiss, and the Court of Appeal (Second Dist., Div. Eight), affirmed.

The California Supreme Court granted review on the following issues: (1) Does an organization that expends resources and diverts them from other activities in order to counteract a defendant's allegedly unfair competition practices satisfy the requirement of injury in fact or lost money or property in order to have standing to bring an action under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.)? (2) Does organizational standing depend on whether the organization has members who are also injured by the practices and who would also benefit from the requested relief?

The first scenario implicates the sending attorney's duty to provide competent representation and to preserve the confidentiality of information pertaining to the representation of a client. *Id.* The second involves the receiving attorney's duty to respect the rights of third parties and to abstain from engaging in dishonest conduct, balanced against the duty to diligently and zealously represent one's client. *Id.*

Bar authorities in states that have tackled the metadata issue generally agree that the sending attorney has a duty to take *reasonable* steps to preserve confidential information contained in the metadata. See Brownstone, *supra*. It is likely impossible to *guarantee* protection of confidences, and inadvertent disclosure does not give rise to automatic discipline or malpractice liability. Some sliding scale factors that ethics committees consider in evaluating whether an attorney took reasonable steps to prevent disclosure include:

a) the subject matter of the document;
b) the sensitivity of the information being transmitted;
c) whether the document is a template;
d) whether there have been multiple drafts of the document;
e) whether the client has commented in the document;
f) the identity of the recipients;
g) steps taken by the attorney to prevent disclosure;
h) the nature of the metadata revealed;
i) the potential consequences of inadvertent disclosure; and
j) whether the client gave any special instructions regarding the metadata or electronic transmission.

See Elizabeth W. King, *The Ethics for Mining for Metadata Outside of Formal Discovery,* 113 Penn. St. L. Rev. 801, 817.

Recognizing their ethical obligations as outlined above, law firms have increasingly turned to the use of software tools to "scrub" metadata from electronic documents. Notably, ethics committees have diverged as to whether a sending attorney's duty to preserve confidential information imposes a *requirement* that attorneys scrub documents of their metadata prior to transmission. Some jurisdictions, however, have gone so far as to suggest that attorneys avoid creating metadata at the outset by refraining from inserting comments and tracking changes, or by drafting client documents from scratch, rather than using older documents as a template. *Id.* at 818.

While the precise contours of reasonable behavior are not clear, the common thread among all authorities is that the sending attorney has an ethical duty to reasonably prevent the inadvertent disclosure of confidential client matters via transmissions of metadata. See *id.* However, inevitably, accidents happen. That raises another pressing inquiry: the nature of the receiving attorney's ethical

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obligations as to opposing counsel's inadvertently transmitted metadata.

Is Metadata Mining Ethically Permissible in California?

Like many other states, California's state bar has not expressly addressed attorneys' ethical obligations regarding metadata mining, loosely defined as affirmatively taking steps to look beyond the surface of documents received to uncover the metadata hidden within. Thus, taking a page from the ABA and the states that have addressed the issue, the following analysis of the receiving attorney's obligations focuses on California's Rule 4.4 counterpart, governing inadvertent disclosure. Cal. Rules of Prof'l Conduct r. 4.4 (2021) [CRPC 4.4].

California's Rule 4.4 requires an attorney who suspects that she has received an inadvertently transmitted writing to "promptly notify the sender." CRPC 4.4. Going a step further than most other states and the ABA, California additionally prohibits the receiving attorney from reviewing the material "any more than is necessary to determine that it is privileged or subject to the work product doctrine." *Id.* Moreover, Comment 1 to CRPC 4.4 adds suggested steps a receiving attorney *should* take upon receipt of inadvertently transmitted writings, including returning the writing to the sender, seeking to reach agreement with the sender regarding the disposition of the writing, or seeking guidance from a tribunal. In sum, CRPC 4.4 broadly stands for the proposition that where an attorney would reasonably suspect that an electronically submitted writing was inadvertently transmitted, the attorney is not free to review and use the information contained within.

Various California decisions concerning inadvertent disclosure of privileged material reinforce this hardline stance. In fact, before CRPC 4.4 was codified in 2018, its wording first appeared in *State Compensation Ins. Fund v. WPS*, 82 Cal. Rptr. 2d 799, 807 (Ct. App. 1999) [*State Fund*], which held that a lawyer must refrain from reviewing materials and notify the sender when it is "reasonably apparent" that confidential or privileged materials were provided through inadvertence. See Alexander J. Pinto, *Mind Your Ds & Qs: A Summary Guide to Complying with the State Fund Rule*, 62 Orange County Law. 51, 52 (Oct. 2020) (discussing the evolution and application of the "*State Fund* rule").

Building on *State Fund*, the California Supreme Court in *Rico v. Mitsubishi Motors Corp.* established an objective standard for determining the scope of the receiving attorney's duties. 171 P.3d 1092, 1099 (Cal. 2007) (applying the *State Fund* rule to attorney work-product notes acquired by plaintiff's attorney through means other than having been intentionally produced by defendant or his counsel). The court held, "courts must consider whether reasonably competent counsel ... would have concluded the materials were privileged, how much review was reasonably necessary to draw that conclusion, and when counsel's examination should have ended." *Id.* Subsequent decisions reinforced that an "attorney has an ethical obligation to protect an opponent's privileged and confidential information." *DP Pham, LLC v. Cheadle*, 200 Cal. Rptr. 3d 937, 954 (Ct. App. 2016) (*State Fund* and *Rico* standards applied because there was "no showing [defendants] intended to disclose these communications to [plaintiff] or anyone else"); *see O'Gara Coach Co., LLC v. Ra*, 242 Cal. Rptr. 3d 239, 249 (Ct. App. 2019) (collecting cases).

Taken together, the most natural reading of CRPC 4.4 and related decisions suggests that the same requirements pertaining to inadvertent disclosure extend to metadata. Absent some overt expression by the sender or advance agreement among the parties, it is safe to assume that *no one* affirmatively intends that metadata be explored, any more than one might expect a printed page with redactions to be held up to the light to discern what lies beneath. Forgoing any attempt to ascertain metadata is consistent with the expectation that California attorneys will exercise caution and consider whether they are faced with an inadvertent or unauthorized disclosure situation. State Bar of Cal. Standing Comm. on Prof'l Resp. and Conduct, Formal Opinion 2013-188, at 5. In making this assessment, the attorney's subjective belief as to whether the information is privileged or confidential is irrelevant because the *Rico* "reasonably competent counsel" objective standard governs. 171 P.3d at 1099; Pinto, *supra*, at 51–52. Where receiving counsel does happen across metadata, that likely triggers an attorney's CRPC 4.4 obligations to refrain from reviewing such information and to notify opposing counsel of the transmission.

Recommendations for California Attorneys

Prevention is Key: Scrub Your Documents

Fortunately, attorneys can take steps to erase metadata from documents before electronically transmitting them. Computer word-processing programs, like Word, often contain mechanisms for scrubbing metadata. For example, Microsoft Office 2003 users can install a free feature called "remove hidden data," and newer Office suite programs automatically come equipped with an "inspect document" tool for PC users. Marilyn Cavicchia, *How clean is your document? What you need to know about metadata*, Bar Leader (2008) *https://www.americanbar.org/groups/bar_services/publications/bar_leader/2007_08/3203/metadata/.* Mac users can navigate to the "protect your document" tool and select the "remove personal information from this file on save" option. Additionally, attorneys can supplement these tools with commercial metadata removal software that scrubs the metadata from various programs and file formats. *Id.* Counsel should consider these scrubbing mechanisms carefully; a court might expect such tools to be used *by default* whenever a document is sent out of an attorney's office unless affirmative steps are taken to skip cleaning – such as to enable a client to see track changes.

Another means of removing or limiting the transmission of metadata is to

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convert documents into PDFs. However, this technique may have drawbacks due to editing and formatting constraints. Moreover, attorneys should nonetheless scrub documents in their native format before exporting to PDF, as metadata from the original software can carry over. For example, the resulting PDF might include, on its face, comments and changes left over from the original Word version of the document. Converted PDFs also contain information about the author, when the file was created and modified, and a summary of the document. Philip J. Favro, *A New Frontier in Electronic Discovery: Preserving and Obtaining Metadata,* 13 B.U. J. Sci. & Tech. L. 1, 9 (2007). Short of printing a document and mailing it, attorneys should assume that some metadata exists, and that a court may be called to examine whether reasonable steps were taken not to disclose it.

Abstain from Metadata Mining Unless Authorized

When it comes to metadata transmitted by opposing counsel, California attorneys should adopt a "better safe than sorry" approach and consider abstaining from mining. California's existing framework for inadvertent disclosure lends itself to a metadata-mining-prohibited approach. As evidenced by CRPC 4.4, in situations where the sending attorney's duties clash with the receiving attorney's obligation to zealously represent her own client, California provides procedural safeguards aimed at preserving the sender's privileged attorney-client relationship.

Similarly, New Hampshire, one of the only other states to expressly prohibit a receiving attorney from examining inadvertently sent hard-copy information in its Rule 4.4 counterpart, adopted a parallel mining-prohibited approach to electronic data on that basis. N.H. Rules of Prof'l Conduct R. 4.4(b) (2021); N.H. Ethics Op. 2008-09/04 (May 15, 2009) [N.H. Op. 2008-09/04]. California already prohibits an attorney who *passively* receives an inadvertent transmission from reviewing the writing's contents once it becomes apparent that the transmission could have been in error. It follows that this structure supports a rule that further prohibits *affirmative* interference with the attorney-client relationship by seeking out information that was not intended for opposing counsel, like metadata.

Moreover, while not all metadata is confidential or privileged, when metadata does reveal confidential or privileged information, it can lead to significant intrusions into the attorney-client relationship. Further, mining is a "take advantage of the mistake" act meant to gain an unfair upper hand over opposing counsel. Thus, mining might additionally constitute impermissible conduct "involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation." *See* Cal. Rules of Prof'l Conduct r. 8.4(c) (2021). Indeed, this conduct is similar to other prohibited acts, such as peeking at opposing counsel's notes during a hearing or deposition, or eavesdropping on a conversation between an attorney and her client. *See* e.g., N.H. Op. 2008-09/04, at 6.

As such, California attorneys should consider starting with a presumption that the sending attorney intends to provide the receiving attorney with only the visible content in the body of the transmitted writing, not the invisible information embedded within the file. Additionally, with respect to metadata that remains immediately visible to the recipient, such as comments left behind by the tracked changes function or similar features that commonly arise as part of redlining practices, the "reasonably competent counsel" standard still applies. Thus, where the sending attorney does not indicate an intent to share a redlined document – for example, in the body of an email accompanying the attached document, or otherwise – this can constitute an inadvertent transmission, triggering the receiving attorney's CRPC 4.4 obligations. *See e.g.*, N.H. Op. 2008-09/04, at 6.

In closing, since all signs point to California adopting a metadata-mining-prohibited approach, attorneys should consider acting accordingly. The takeaway: scrub your documents and avoid unauthorized metadata mining.

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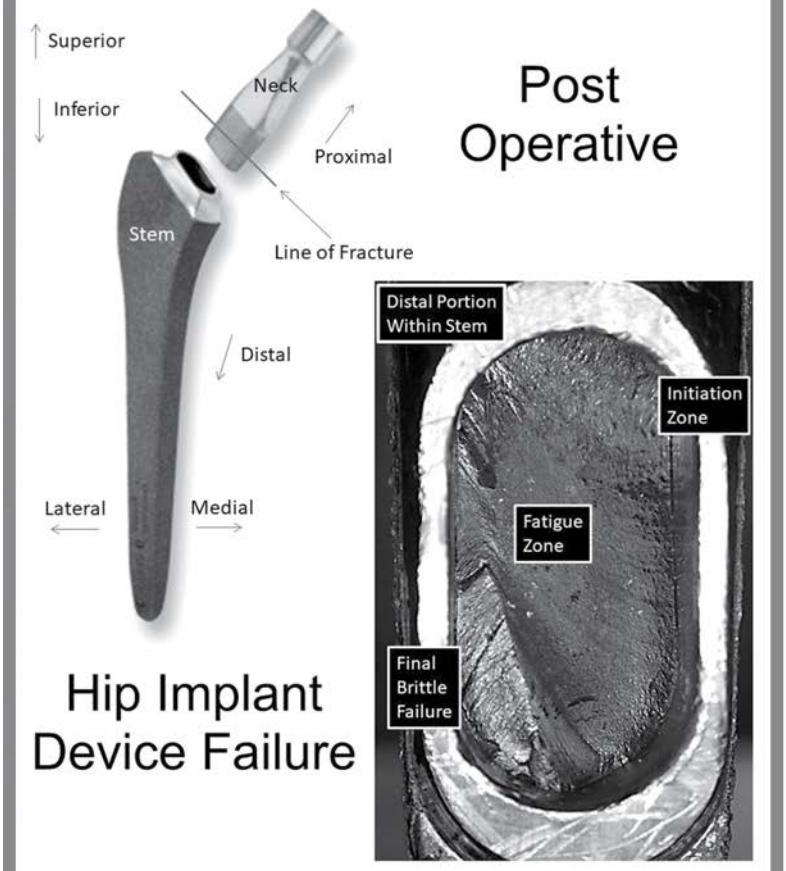

When the Appeal Party is Over: Paying the Judgment

Mark Kressel

When a defendant appeals from a money judgment and loses, the defendant must confront payment of the judgment, absent a settlement agreement. In this situation, there are steps defense counsel can take to ensure that payment of the judgment fully concludes the matter, stops the accrual of further interest, and protects the defendant from claims by others who may assert an interest in the judgment.

Establishing the Payoff Amount and Logistics

The first step should be to get opposing counsel to provide the figures that counsel believes is the amount necessary to satisfy the judgment. The payoff amount, should include the judgment, any trial court costs, any attorney fees, appellate costs (if the court of appeal ordered the defendant to bear them), and interest. (See Code Civ. Proc., §§ 685.090, 695.220; *Lucky United Property Investments, Inc. v. Lee* (2013) 213 Cal.App.4th 635, 642–643.)

To stop accrual of post-judgment interest as soon as possible, the defense should pin opposing counsel down on their position right away when the opinion issues (in appropriate cases, this can even be discussed while the appeal is pending), and defense counsel should prepare the client to issue a wire or check on the earliest date the client is confident it can tender payment. Picking a date in advance and agreeing with the other side on the payoff amount due as of that date will prevent the plaintiff from taking the position, after the money has been transferred, that the defendant failed to fully satisfy the judgment.

Often, the parties have minor disagreements about the payoff amount that work out to one or two days' interest. If the defendant cannot quickly persuade the plaintiff to adopt the defense calculation, it may be more cost effective (in consultation with the client) to simply pay an extra day's interest rather than to continue the dispute, potentially triggering expensive motion practice. Advancing the payoff date can make up for the payment of additional disputed interest.

The defense should also develop a clear plan for payment logistics, including whether payment will be by check or by wire and who will oversee delivery, and communicate this plan to the plaintiff. Particularly where payment comes from multiple sources via different financial instruments, communicating the plan in advance will avoid misunderstandings.

Figuring Out the Name(s) On the Check

Defense counsel also needs to coordinate with plaintiff's counsel about whose names appear on the checks.

It is permissible to write the check to both plaintiff's counsel and the plaintiff. (See Code Civ. Proc., § 283; *Navrides v. Zurich Ins. Co.* (1971) 5 Cal.3d 698, 705–706.) If multiple plaintiffs are jointly represented by the same counsel, it is permissible to prepare a check for one lump sum made out to their counsel. (See *Bank of America Nat. Trust and Sav. Ass'n v. Allstate Ins. Co.* (C.D.Cal. 1998) 29 F.Supp.2d 1129, 1141; U. Com. Code com., 23A pt. 2 West's Ann. Cal. U. Com. Code (2002 ed.) foll. § 3420.) It is not necessary that the check be made out to the attorney's client trust fund, as opposed to the attorney's firm, and some attorneys will not accept a check written directly to the trust account. Again, as with other payment details, it is best to consult and reach an agreement with plaintiff's counsel in advance.

It is important to identify anyone who may have a lien on the plaintiff's recovery. In a typical personal injury action, for example, lienholders may include prior counsel, healthcare providers, a workers compensation carrier, or a third-party litigation funder (judgment purchase company). (See Code Civ. Proc., § 708.410; Cal. Rules of Court, rule 3.1360.) The defendant has a duty not to interfere with the rights of judgment lienholders of which the defendant has notice. (See *Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280, 291; *Siciliano v. Fireman's Fund Ins. Co.* (1976) 62 Cal.App.3d 745, 752–753.) If the defendant has notice of a judgment lien (such as through a lien recorded in the court record) and pays the judgment to the plaintiff without protecting the lienholder's rights, the defendant may be required to compensate the lienholder – double paying on at least part of the judgment. (Code Civ. Proc., § 708.470, subd. (c); see *Pangborn Plumbing Corp. v. Carruthers & Skiffington* (2002) 97 CalApp.4th 1039, 1056–1057; *In re Marriage of Katz* (1991) 234 Cal.App.3d 1711, 1720–1722.) Similarly, a defendant who pays a personal injury plaintiff without paying the treating hospital's properly noticed lien is liable to the hospital for the amount of the lien. (Civ. Code, §§ 3045.4, 3045.5.)

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When the parties have a settlement agreement, it is possible to include a term requiring the plaintiff to warrant that there are no other lienholders besides the ones already known to the defendant (and named in the settlement agreement), and to require that the plaintiff indemnify the defendant from future lienholder claims. When there is no settlement, the defendant can reduce the risk of postpayoff lienholder claims by getting a written statement from the plaintiff as to how the parties will account for known lienholders and written confirmation that there are no other lienholders.

As a last resort, the defendant can interplead the funds and let the court sort out competing claims, such as where a medical provider or prior counsel claims a right to a lien, and the plaintiff disagrees. (Code Civ. Proc., § 386.) The attorney fees for interpleading funds may be recoverable under certain circumstances. (*Id.*, § 386.6.)

Finally, in wrongful death actions, defense counsel should take steps to protect the defendant from claims by new heirs who do not appear in the judgment and may surface only after the judgment has been satisfied. The general rule, called the "one action rule," is that a defendant cannot be sued after paying a wrongful death judgment by an heir who was not included in the wrongful death action. (*Gonzales v. Southern California Edison Co.* (1999) 77 Cal.App.4th 485, 489.) There is an exception, however, when the defendant "voluntarily elects to settle the case with less than all of the heirs, *having knowledge* of the omitted heir's existence and status as an heir." (*Romero v. Pacific Gas & Electric Co.* (2007) 156 Cal.App.4th 211, 216–217.) It is unclear whether this exception would apply in a case where there is no settlement, but to avoid risk, the best practice would be to review the court file and the discovery and identify and account for any heirs disclosed who do not appear in the judgment.

Tendering the Judgment and Obtaining Acknowledgment of Satisfaction

Tendering the full judgment amount stops the running of postjudgment interest, regardless of whether the plaintiff accepts the tendered funds or cashes the check. (Code Civ. Proc., §§ 685.010, subd. (a), 685.030, subds. (c) & (d)(2); *San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn.* (1990) 222 Cal.App.3d 146, 150; *General Ins. Co. v. Mammoth Vista Owners' Assn.* (1985) 174 Cal.App.3d 810, 829 810; see also See Code Civ. Proc., § 283 [attorney has authority "to receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment"]; *Navrides v. Zurich Ins. Co.* (1971) 5 Cal.3d 698 [tender to counsel is effective even if counsel absconds with the funds].)

Defense counsel may suggest that delivery of funds occur simultaneously with plaintiff's counsel signing and filing acknowledgment of satisfaction of judgment. By statute, if a motion is required to force the plaintiff to enter acknowledgment of satisfaction of judgment after receiving payment, the defendant may be able to recover fees if the motion is successful, assuming appropriate advance notice is provided. (See Code Civ. Prod., § 724.050 [setting forth statutory notice language].) If a check is accepted as payment in full, but the plaintiff later claims some insufficiency, it may be helpful to cite Code of Civil Procedure section 2076: "The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it." (See also *Noyes v. Habitation Resources, Inc.*(1975) 49 Cal. App.3d 910 [the law "does not permit an offeree to remain silent regarding a tender

Continued on page 29

and later surprise the offeror with hidden objections."].)

Canceling the Appeal Bond

Once a judgment is satisfied (or reversed and no longer enforceable), defense counsel should discuss with the client steps for cancellation of any appeal bond that was posted to stay enforcement of the judgment pending appeal. Sureties should be satisfied by a copy of the appellate opinion and the acknowledgment of satisfaction of judgment, but many (arguably, improperly) demand that the bond be cancelled or released by court order to confirm that the sureties have no further liability. Sureties may continue to charge bond premiums until the bond is released. This is most customarily done by stipulation. (See Code Civ. Proc., § 995.430, subd. (b); Cal. Rules of Court, rule 3.1130(c).)

If the plaintiff's counsel unreasonably will not cooperate by stipulating to cancellation of the bond, defense counsel can submit a request to the court. (Code Civ. Proc., §§ 996.110, 996.120, 996.320, 996.330.)

Conclusion

There are many nuances to the basic principles above. However, in most situations, planning ahead to reach agreement on the amount owed, the payees to be paid, the date for payment, and procedures for acknowledgment of satisfaction and release of the bond will help the client avoid undue motion practice and unwelcome surprises. V

Mark Kressel

Mark joined Horvitz & Levy LLP as an associate and was invited to join the partnership in 2018. Before joining the firm, Mark was a litigation associate with Irell & Manella LLP. In addition to his bar admissions, he has practiced before the U.S. International Trade Commission.

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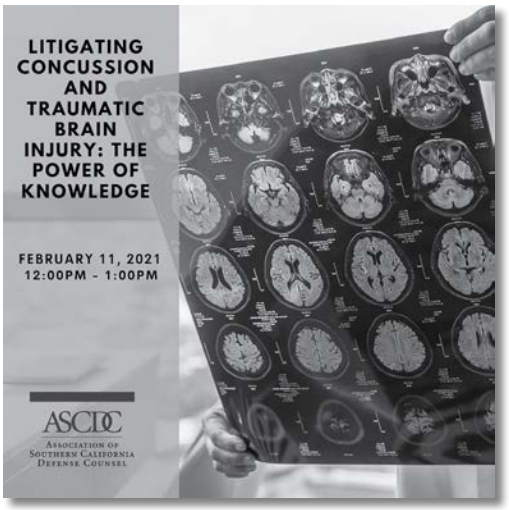
Updates from Eight Southern California County Courts Regarding Civil for 2021

On January 14, 2021, ASCDC organized a presentation from each of the eight Southern California Counties regarding projections for Civil in 2021. Attendees heard from Presiding Judges and their designated representatives regarding what is expected to occur for Civil, including trial scheduling and applicable procedures for pre-trial and trial, as impacted by COVID-19, from the following counties: Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara and Ventura.

Using Biomechanics to Assess Your Injury Claim

On January 20, 2021, MEA Forensics presented an informative webinar regarding how biomechanical analysis can be used to assess claimed injuries from a variety of events such as automobile accidents and slips, trips, and falls.

For more information contact:
John Gardiner, PhD PE | *John.Gardiner@meaforensic.com*
www.meaforensic.com



Litigating Concussion and Traumatic Brain Injury – The Power of Knowledge

On February 11, 2021, expert Jeff Victoroff. M.D., FAAN, an Associate Professor of Neurology and Psychiatry at the Keck School of Medicine, University of Southern California, discussed how to most effectively defend cases of alleged concussion or (mTBI), with proven ways to rebut implausible evidence of injury, exaggerated symptoms or purportedly "abnormal" imaging.

For more information contact:
Jeff Victoroff, M.D., FAAN | *victorof@usc.edu*
brainprofessor.com

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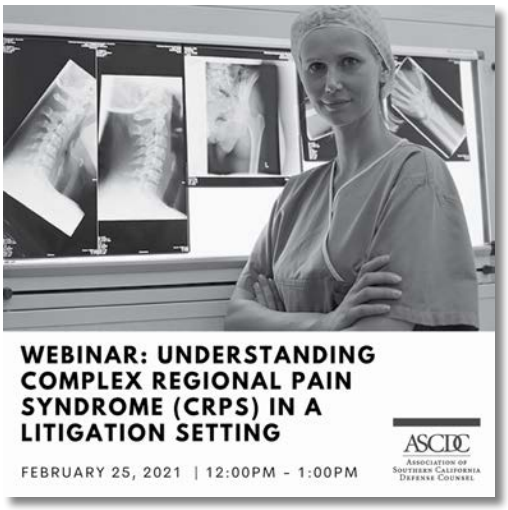

Understanding CRPS In a Litigation Setting

On February 25, 2021, pain management doctor and expert, Standiford Helm, M.D., M.B.A., of the Helm Center discussed how CRPS is diagnosed and how it may be differentiated from other pain related claims.

For more information contact:
Standiford Helm, M.D. M.B.A. | *drhelm@the helmcenter.com*
www.thehelmcenter.com

2021 Aligning Perspectives – Using Traffic Engineers to Prove Your Case

On March 11, 2021, Matthew Manjarrez, PE, the President and Principal Civil and Traffic Engineer at Verus Engineering and his colleague, Allen Bourgeois, PE presented a discussion regarding how attorneys can use a traffic engineering expert to help prove your case. The webinar focused on a traffic engineer's role in a typical case, and also covered common issues addressed by a traffic engineer, including evaluation of sight distance and accidents at signalized intersections. There was also a discussion regarding case studies as they relate to issues addressed by a traffic engineering expert in a litigated case.

For more information contact:
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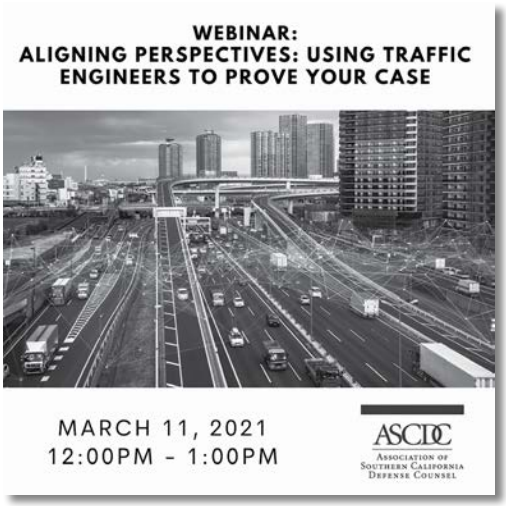
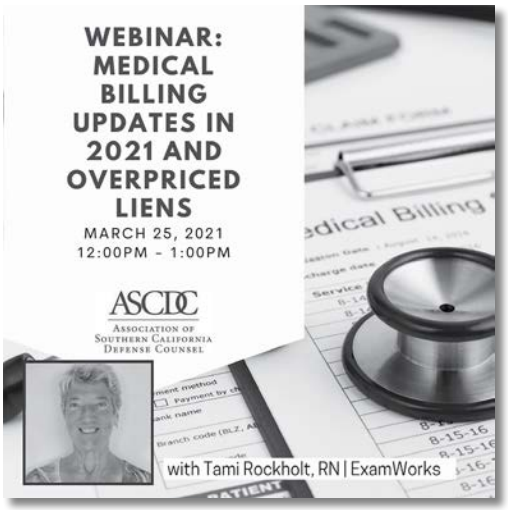
Allen Bourgeois, PE | *allen@verusforensic.com* | *verusforensic.com*





Medical Billing Updates in 2021 and Overpriced Liens

On March 25, 2021, Examworks medical billing expert, Tami Rockholt, RN presented a program which addressed 2021 updates to medical billing and overpriced liens. Ms. Rockholt went into detail with regard to numerous areas of interest, including, medical billing codes, new transparency rules in 2021, codes for Covid-19, recent "Howell" developments, Pebley updates, Medicare pricing and in-patient hospital stays.

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Examworks.com

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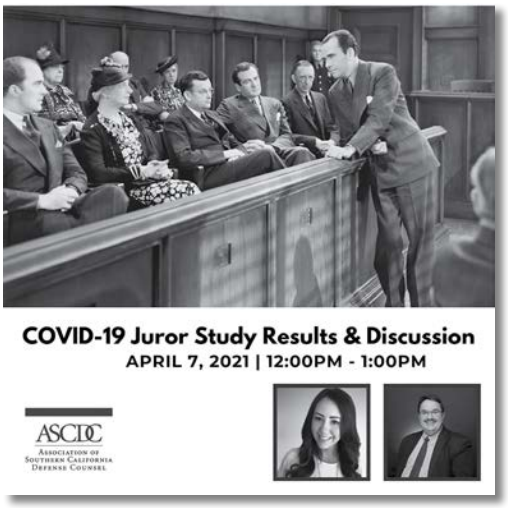

Nationwide COVID-19 Study

On April 7, 2021, Magna Legal Services jury consultants presented a nationwide study of data collected on a monthly basis from people in various venues around the country regarding experiences and attitudes related to Covid-19, feelings about having to appear for jury duty, how opinions of various types of businesses, industries and agencies have changed (or not) due to the pandemic, the "Halo Effect," whether to anchor or not to anchor and the impact on perceptions of verdicts in civil lawsuits, including damages and susceptibility to the Reptile Strategy.

For more information contact:
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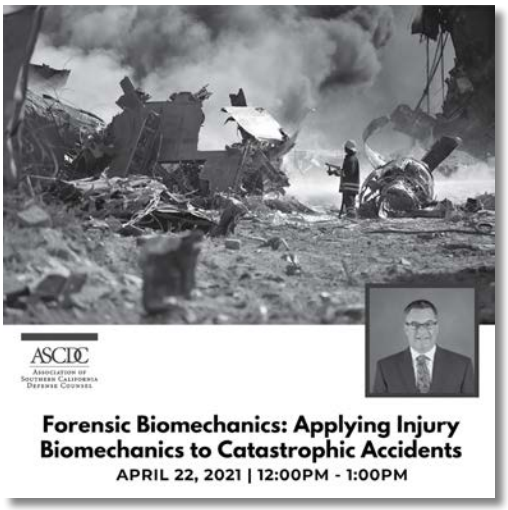
Magnals.com

2021 Court Updates for Los Angeles, Ventura, and Orange County

On April 15, 2021, ASCDC organized an update from Presiding Judges and their designated representatives from Los Angeles, Ventura and Orange County regarding the most recent developments for Civil in 2021, including the changing operations of the court as Covid-19 restrictions ease. The seminar included updates related to trial scheduling and applicable procedures for pre-trial and trial.



Applying Injury Biomechanics to Catastrophic Accidents

On April 22, 2021, Jeffrey B. Wheeler, MS., of Vector Scientific presented a biomechanics webinar which covered the definition of biomechanics, education and qualifications to look for in a biomechanical expert, when to hire a biomechanical expert, what material to provide the biomechanical expert, and numerous case study examples of injury biomechanics analyses in automobile, sport/recreation, and industrial/occupational accidents including head, spine, thoracic, and lower extremity trauma.

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2021 Court Updates for Kern, Riverside, San Bernardino and San Diego

On April 29, 2021, ASCDC organized an update from Presiding Judges and their designated representatives from Kern, Riverside, San Bernardino and San Diego regarding the most recent developments for Civil in 2021, including the changing operations of the court as Covid-19 restrictions ease. The seminar included updates related to trial scheduling and applicable procedures for pre-trial and trial.

Substance Abuse Goes to the Movies

On May 13, 2021, criminal defense attorney Anthony Salerno, Esq., of Salerno & Associates presented a unique webinar related to substance abuse and the movies. The webinar discussed the common theme of substance abuse in movies from the earliest days of Hollywood to today. The webinar reviewed examples from famous Hollywood movies to illustrate important issues in the detection and treatment of substance abuse.

For more information contact:
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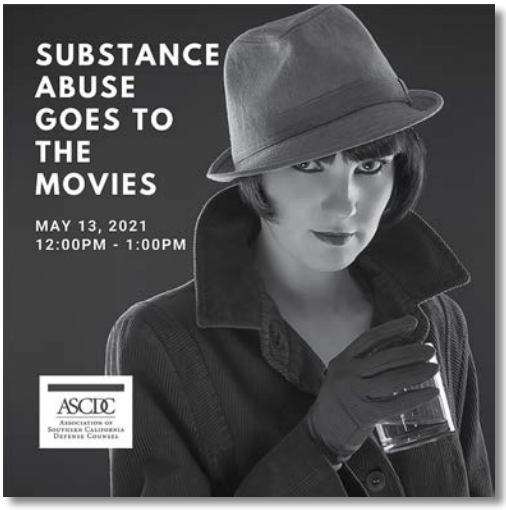

I Know What You Did Last Summer ... and Probably the Next Summer, too – Social Media Investigations – DIY vs. Outsourcing

On June 10, 2021 Social Detection presented an in-depth presentation to members about how effective social media and medical canvasses can help defense attorneys win cases and negotiate fair settlements. Presenters also provided some real case results along the way. The presentation also focused on the fact that there is more to a digital profile than Facebook, Twitter, and Instagram.

For more information contact:
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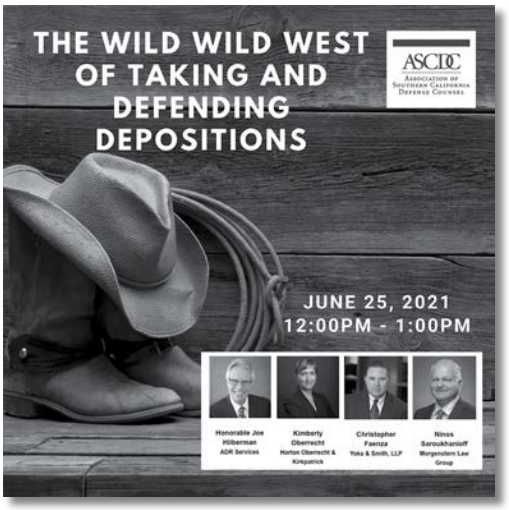

The Wild Wild West of Taking and Defending Depositions

This webinar on June 25, 2021 tackled numerous issues, including when attorneys should instruct witness not to answer and how to defend against the use of videotaped depositions for purposes of trial. Our panel of distinguished trial lawyers and retired Judge discussed everything an attorney would want to know about new remote deposition trends, use of discovery referee, and provide practice tips on defending, and taking video and/or remote depositions.

For more information contact:
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Kimberly Oberrecht | *koberrecht@hortonfirm.com*
Christopher Faenza | *cfaenza@yokasmith.com*
Ninos Saroukhanioff | *ninos@morgensternlawgroup.com*

CCP 998 Offers

On July 8, 2021 ASCDC's presentation discussed the most recent case law dealing with the issuance of CCP 998 offers. Presenters explored the benefits of fee shifting, and recovery of expert fees and costs, along with the potential pitfalls in the process and the dos and don'ts of issuing offers.

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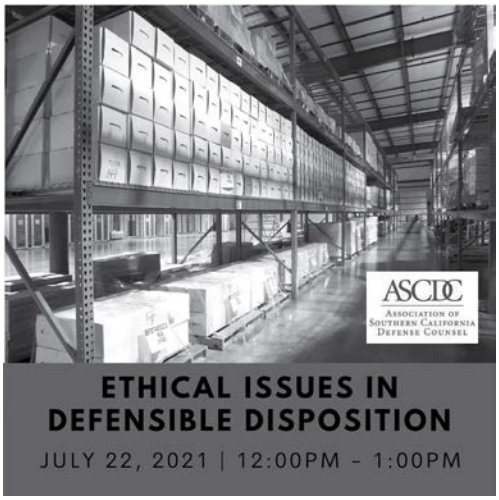
Bob Gonter | *bgonter@g3pmlaw.com*
Richard L. Stuhlbarg | *Richard.Stuhlbarg@bowmanandbrooke.com*



Ethical Issues In Defensible Disposition

On July 22, 2021, presenters from Ankura addressed many issues attorneys are now facing, including eDiscovery costs, privacy risk, and increasing cyber threats. The presentation addressed the financial and reputational impact of keeping legacy data and paper documents beyond their operational life. The discussion included the ethical obligations attorneys have to counsel their clients on effective data retention and disposition in order to comply with the ethical duties of competency, confidentiality, expedition, candor and fairness.

For more information contact:
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Brian Segobiano | *brian.segobiano@ankura.com*
Matt Krengel | *mkrengel@cooley.com*

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The Economic Impact of Ineffective Witness Testimony

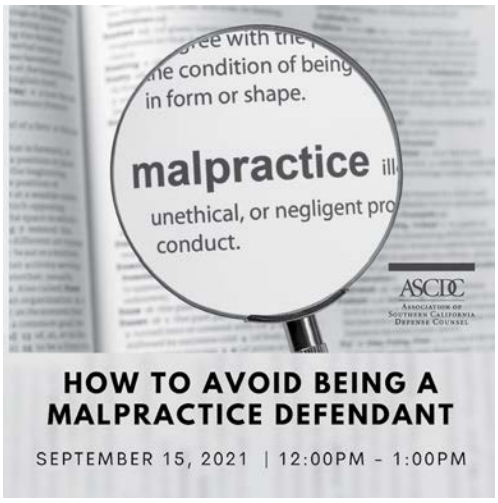
In this presentation on August 12, 2021, Dr. Bill Kanasky of Courtroom Sciences, discussed the criticality of deposition performance on case outcomes, particularly economically. The presentation emphasized that strong, effective depositions decrease a client's financial exposure and costs, while weak, ineffective depositions result in higher payouts on claims during settlement negotiations (i.e., a nuclear settlement). Specifically, when witnesses drop "bombs" at deposition, those "bombs" end up costing an extraordinary amount of money. Dr. Kanasky discussed the basis for the Reptile Theory and how to combat it during witness testimony.

For more information contact:
Dr. Bill Kanasky | *bkanasky@CourtroomSciences.com*

Legal Privilege and Outside Counsel: A Roundtable Discussion with General Counsel

On August 25, 2021 this comprehensive roundtable addressed hot topic issues including the limits of the attorney client privilege and the point at which a general counsel must determine that outside counsel needs to become involved in litigation, as well as best practices general counsel expects from outside counsel. ASCDC members heard from a four-person general counsel panel regarding their experiences with protecting their clients and seeking outside counsel when a matter calls for it. This roundtable discussion focused on privilege with an open session for questions at the end of the webinar.

For more information contact:
Daniel M. Flores | *DFlores@mgm.com* • Zarah Meyer | *zarah.b.meyer@gmail.com*
David Wasson | *dwasson@wassonlawyers.com* • Gary J. Bradley | *gbradley@stmoritzgroup.com*
Moderator: Bron D'Angelo | *bdangelo@petitkohn.com*



How to Avoid Being a Malpractice Defendant

The seminar on September 15, 2021 focused on the current hot topics pertaining to legal malpractice. Panelists discussed conflicts of interest, retainer agreements, breach of fiduciary duty claims and how to avoid finding oneself on the wrong side of a legal malpractice claim.

For more information contact:
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Amanda M. Moghaddam | *moghaddama@lawyersmutual.com*

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ASCDC "Mini" Annual Seminar

Year in Review: The ASCDC Annual Review features the 2020 California and Federal appellate decisions of importance to the civil defense bar and insurance claims personnel.

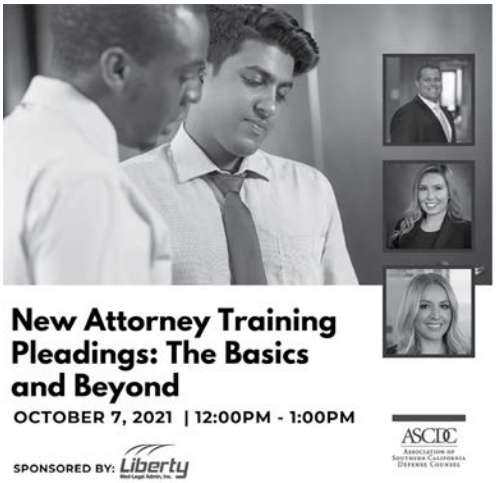
Juries Post-COVID and Beyond: Hear from our stellar panel of trial attorneys and jury consultants who have been in person in the pandemic trenches. Discussion on Jury Selection – What has changed? Tips on Voir Dire, Jury studies, science, masks vs. no mask, juror questionnaires, increased judicial participation. How to ask about the effect of COVID-19? Has "de-selection" changed in this post-COVID-19 world?

Going Virtual in 2021: Jury Trials and Arbitrations in the Age of Pandemic [Alice Chen Smith]. The panelists discuss their recent experiences conducting a fully remote jury trial, arbitration, and in-person hybrid jury trial, including lessons learned and what to expect in courtrooms moving forward.

New Attorney Training – Pleadings: The Basics and Beyond

Part one of ASCDC's New Attorney Training seminar on October 7, 2021 focused on new attorneys and those who wanted to brush up on their skills. This seminar covered the basics of evaluating the initial pleadings for issues such as venue and jurisdiction, responding appropriately, attacking the pleadings by demurrer and other motions, as well as complex and exceptional issues that arise during the pleadings stage.

For more information contact:
Bron D'Angelo | *bdangelo@pettitkohn.com*
Mary Fersch | *fersch@dfis-law.com*
Cynthia Arce | *cynthia.arce@wilsonelser.com*



New Attorney Training – Crafting, Responding to, and Completing Written Discovery for Resolution

Part two of ASCDC's New Attorney Training seminar focused on a high-level overview of the discovery phase, including strategic development of a written discovery plan, the basics of responding to written discovery and the inevitable meet and confer, demands for exchange of expert information, and discovery cut-off deadlines.

For more information contact:
Jennifer Persky | *jennifer.persky@bowmanandbrooke.com*
David Byassee | *dbyassee@linedinstlaw.com*
Zakiya Glass | *zglass@hfdclaw.com*

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New Attorney Training – Depositions: Preparation, Organization and Execution Basics

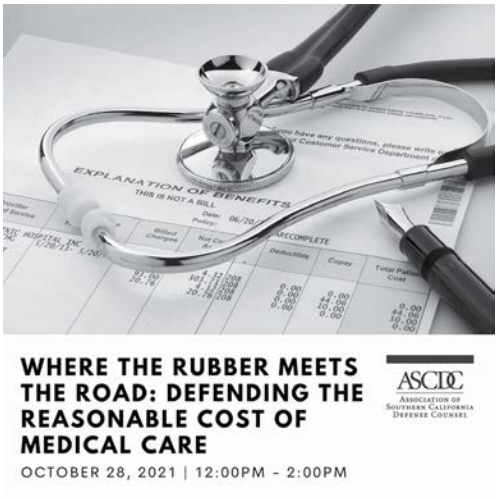
Part Three of ASCDC's New Attorney Training seminar focused on new attorneys and those that want to consider different approaches to preparing for, defending and taking depositions. This seminar covered basic procedural requirements for noticing depositions, and relatedly the process for bringing motions in the event that there are unresolved disputes regarding the appropriate length of time for a deposition, the scope of examination, and/or deponent's responsiveness. It also addressed how to generally prepare to take and defend depositions, use and organize exhibits, and effectively examine a deponent.

For more information contact:
Colin M. Harrison | *charrison@wilsongetty.com*
Natalia M. Greene | *ngreene@garrett-tully.com* • Lisa Collinson | *lisa.collinson@cdiglaw.com*

Where the Rubber Meets the Road: Defending the Reasonable Cost of Medical Care

Dr. Lubow, a well-known medical billing expert discussed what is and what is not the reasonable cost of medical care. He provided defense counsel with tools and methods for revealing the actual reasonable cost of medical care – regardless the plaintiff's position on the issue. Dr. Lubow also discussed: the relationship – if any – between the amounts charged for medical care and the reasonable value of that care; the meaning of customary charges; whether or not the so-called lien market actually exists; and critical elements to include in a deposition of plaintiff's billing expert. The seminar also included guided questions for use at defense expert depositions, strategic recommendations for how to set a case up for relevant motions in limine and/or orders to compel and strategies for how to portray plaintiff billing experts at the time of trial.

For more information contact:
Henry W. Lubow, M.D. | *Henry@InjuryReview.com* • Lindy F. Bradley | *lbradley@bglawyers.com*

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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 cases:

1) ***Choochagi v. Baracuda Networks*** (2020) 60 Cal.App.5th 444: The Court of Appeal in San Jose affirmed the granting of summary adjudication for the defendant and a defense verdict on the remaining claims after a jury trial, in an employment case alleging FEHA, CFRA and wrongful termination claims. Jennifer Lutz from Pettit, Kohn, Ingrassia, Lutz & Dolin submitted the publication request which was granted.

2) ***Morgan v. J-M Manufacturing Co., Inc.*** (2021) 60 Cal.App.5th 1078: ASCDC filed an amicus brief in this appeal where the defendant, J-M Manufacturing Co., Inc. was hit with a $22.4 million judgment that includes $15 million in punitive damages. Plaintiff claimed he developed mesothelioma from being exposed to J-M pipe as a bystander while he worked as a supervisor at unidentified construction work sites in California. ASCDC's amicus brief supported J-M's arguments contesting the punitive damages award on two grounds: (1) no substantial evidence that J-M's corporate decisionmakers engaged in culpable conduct; and (2) no substantial evidence of malice. Jennifer Persky from Bowman & Brooke submitted the amicus brief on the merits. The court reversed the judgment holding that the evidence was insufficient to support an award of punitive damages. Jennifer then submitted a publication request which was granted.

3) ***O'Shea v. Linderberg*** (2021) 64 Cal. App.5th 228: Originally an unpublished Court of Appeal opinion affirming the granting of a directed verdict in a legal malpractice action. The Court of Appeal held that the plaintiff failed to prove but for causation through expert testimony entitling the defense to a directed verdict. Curt Cutting and Sarah Hamill from Horvitz & Levy submitted the successful publication request.

4) ***McIsaac v. Foremost Insurance Company*** (2021) 64 Cal.App.5th 418: Court of Appeal in San Francisco held that plaintiff's underinsured motorist claim had to be submitted to arbitration before plaintiff could pursue a bad faith action. Don Willenburg from Gordon & Rees submitted a publication request which was granted.

5) ***Swanson v. The Marley-Wylain Company*** (2021) 65 Cal.App.5th 1007: The Court of Appeal in Los Angeles reversed a $5.5 million verdict in an asbestos case and ordered a new trial. The court held that the plaintiff failed to prove causation under Michigan law. David Schultz and J. Alan Warfield from Polsinelli submitted the successful publication request.

6) ***Braganza v. Albertson's LLC*** (2021) 67 Cal.App.5th 144: The Court of Appeal affirmed the granting of summary judgment in a slip and fall case. The court held that the trial court did not abuse its discretion in denying plaintiff's request for a continuance in order to conduct discovery because plaintiff's counsel did not show diligence in obtaining the discovery earlier. Steven Fleischman from Horvitz & Levy submitted the successful publication request on behalf of ASCDC.

The Amicus Committee recently participated as *amicus curiae* in the following cases:

1) ***Hoffmann v. Young*** (2020) 56 Cal. App.5th 1021, review granted (S266003): In a divided opinion, the Court of Appeal held that an invitation to use a motorcycle track abrogated the track owner's recreational immunity defense. Don Willenburg from Gordon Rees submitted a joint letter on behalf of ASCDC. The Supreme Court granted review on February 20, 2021.

2) ***Morgan v. J-M Manufacturing Co., Inc.*** (2021) 60 Cal.App.5th 1078: ASCDC filed an amicus brief in this appeal where the defendant, J-M Manufacturing Co., Inc. was hit with a $22.4 million judgment that includes $15 million in punitive damages. Plaintiff claimed he developed mesothelioma from being exposed to J-M pipe as a bystander while he worked as a supervisor at unidentified construction work sites in California. ASCDC's amicus brief supported J-M's arguments contesting the punitive damages award on two grounds: (1) no substantial evidence that J-M's corporate decisionmakers engaged in culpable conduct; and (2) no substantial evidence of malice. Jennifer Persky from Bowman & Brooke submitted the amicus brief on the merits. The court reversed the judgment holding that the evidence was insufficient to support an award of punitive damages. Jennifer then submitted a publication request which was granted.

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3) ***Shalabi v. City of Fontana*** (2021) 11 Cal.5th 842 [489 P.3d 714]: The California Supreme Court granted review to address this issue: "Code of Civil Procedure section 12 provides: 'The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded.' In cases where the statute of limitations is tolled, is the first day after tolling ends included or excluded in calculating whether an action is timely filed? (See *Ganahl v. Soher* (1884) 2 Cal.Unrep. 415.)" On March 24, 2021, the court requested supplemental briefing on this issue: "whether this court's decision in *Ganahl v. Soher* (1884) 2 Cal.Unrep. 415, retains precedential authority in light of this court's subsequent decision in *Ganahl v. Soher* (1885) 68 Cal. 95." Steven Fleischman and Scott Dixler from Horvitz & Levy submitted an amicus brief on the merits. The Court held that the first day tolling ends, in this case the plaintiff's 18th birthday, is excluded from the limitations period under Code of Civil Procedure section 12. The Court also held that the 1884 opinion in *Ganahl* was not valid precedent because rehearing in bank was granted. ASCDC's amicus brief was mentioned twice in the Court's opinion.

4) ***Ferra v. Loews Hotel Hollywood***, LLC (2021) 11 Cal.5th 858: The California Supreme Court held that the "regular rate of compensation" as used in a statute and wage order was the same as "regular rate of pay" used in overtime statute. Laura Reathaford of Lathrop Gage submitted an amicus brief on behalf of ASCDC before the Supreme Court and Court of Appeal.

5) ***Gonzalez v. Mathis*** (2021) 12 Cal.5th 29: The Supreme Court has granted review to address this issue in a *Privette* case: Can a homeowner who hires an independent contractor be held liable in tort for injury sustained by the contractor's employee when the homeowner does not retain control over the worksite and the hazard causing the injury was known to the contractor? When the Court of Appeal opinion was issued the Amicus Committee originally recommended taking no position on the defendant's petition for review because there was good and bad in the Court of Appeal opinion. The Supreme Court held that the defendant homeowner was not liable as a matter of law. Ted Xanders and Ellie Ruth from Greines, Martin, Stein & Richland submitted an amicus brief on the merits.

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) ***Berroteran v. Superior Court*** (2019) 41 Cal.App.5th 518, review granted: Request for amicus support in a Lemon Law case from Lisa Perrochet and Fred Cohen at Horvitz & Levy for ASCDC to support the defendant's petition for review. The Court of Appeal held that former deposition testimony of unavailable witnesses was admissible under the prior testimony hearsay exception. (Evid. Code, § 1291.) In doing so, the court created a conflict with *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543, which held that parties generally don't have a motive to examine friendly witnesses at deposition and, thus, deposition testimony was generally inadmissible in another case. J. Alan Warfield and David Schultz from Polsinelli LLP submitted a letter supporting the defendant's petition for review, which was granted. The case remains pending in the California Supreme Court.

2) ***Craig v. County of Orange/Valenzuela v. City of Anaheim***: These are two separate section 1983 wrongful death actions both pending at the Ninth Circuit. The issue presented is whether a plaintiff can recover damages for the decedent's "loss of life." There is a circuit split on this issue. Defense counsel in the first case (*Craig*) (member Shel Harrell at Lynberg & Watkins) requested amicus support, but past the deadline. Defense counsel in the second case (*Valenzuela*), Tim Coates at Greines, Martin, Stein & Richland, had the cases related so that they would be decided by the same merits panel. Steven Fleischman, Scott Dixler and Chris Hu from Horvitz & Levy submitted an amicus brief on the merits in *Valenzuela*. On August 3, 2021, the Ninth Circuit issued a published 2-1 opinion in *Valenzuela* affirming the award of loss of life damages; Judge Lee dissented. See 2021 WL 3355499. A petition for rehearing remains pending. *Craig* also remains pending.

3) ***Betancourt v. OS Restaurant Services, LLC*** (2020) 49 Cal.App.5th 240, review granted and held: Eric Schwettmann successfully sought publication of this opinion regarding the recovery of attorney's fees in a FEHA-related case. The California Labor Commissioner filed a request for depublication. The California Supreme Court issued a "grant and hold" order pending the outcome of *Naranjo v. Spectrum Security Services, Inc.*, S258966.

4) ***Qaadir v. Figueroa*** (2021) 67 Cal. App.5th 790 : Court of Appeal in Los Angeles followed *Pebley* and held that unpaid medical bills are admissible if there is testimony that the plaintiff incurred the amount of the bill and that there is no duty to mitigate damages. However, the court also held that the defense is entitled to inquire whether the plaintiff was referred to the lien doctor by their attorney. Steven Fleischman and Robert Wright from Horvitz & Levy submitted an amicus brief on the merits. A petition for review and depublication request will be filed.

5) ***Hoffmann v. Young*** (2020) 56 Cal. App.5th 1021, review granted (S266003): Request from Chris Hu at Horvitz & Levy for amicus support regarding defendant's petition for review. In a divided opinion, the Court of Appeal in Ventura held that an invitation to use a motorcycle track abrogated the

Continued on page 41

track owner's recreational immunity defense. Don Willenburg from Gordon Rees submitted a joint letter on behalf of ASCDC and the North. The Supreme Court granted review on February 20, 2021 and the case remains pending.

6) ***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.

7) ***Kaney v. Mazza*** (B302835): In a trip and fall case, the plaintiff is arguing, based on pre-Evidence Code case law, that she is entitled to a presumption that she acted with due care because she cannot remember how the accident happened. This presumption was eliminated with the Evidence Code was adopted in 1967. Rebecca Powell, Steven Fleischman and Fred Cohen from Horvitz & Levy submitted an amicus brief on the merits addressing this issue and several procedural issues related to the summary judgment statute. The appeal remains pending.

9) ***Harris v. Thomas Dee Engineering Co., Inc.*** (2021) __ Cal.App.5th __ [2021 WL 3398621]: The Court of Appeal reversed the grant of summary judgment in favor of a defendant in an asbestos case holding that the court had to consider the declaration of plaintiff's expert which offered new opinions not offered at his deposition and which were contradicted by deposition testimony, i.e., that *D'Amico* did not apply. A petition for rehearing was granted and the next day the court issued a new opinion reaching the same result. A petition for review and depublication request will be filed. ▼

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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Lopez v. Dominguez

Robert T. Bergsten
Hosp, Gilbert & Bergsten
Smith v. Empire
Faal v Boulderdash Indoor Rock Climbing

Christopher Hagan
Hagan Denison, LLP
Lala v. Kern Community College District

President – *continued from page 3*

were able to settle a challenging case by coming together. What this taught me is that while the pandemic has been disappointing, there are silver linings. The most noteworthy of which is the collaboration of plaintiff and defense Bars to create meaningful change.

Throughout the pandemic, I truly appreciate the hard work and ingenuity shown by the Board of Directors and our members. All have worked tirelessly to develop and implement ways to support our organization and sustain our progress.

In closing, as we maneuver the uncertain road ahead, I want to thank you all for your continued support of ASCDC. I am confident we can navigate these challenging times together.

Stay safe and be well.

Diana P. Lytel
2021 ASCDC President

Capitol Comment – *continued from page 5*

interpreters to advise the court of audibility problems. At the request of labor, for trials conducted with remote technology, the court reporter must physically be present in the courtroom, and interpreters may request to be physically present as well.

There are other detailed provisions not summarized here, contained in new Section 367.75 of the Code of Civil Procedure.

The biggest limitation in SB 241 is that the remote appearance section "sunsets", or expires by its own terms, on July 1, 2023. This extremely short window means that an evaluation of the law must be conducted quickly by the Judicial Council, to give the legislature time to extend or repeal the sunset provision.

Does this all mean that "things will never be the same again" in court hearings and trials? We'll see.

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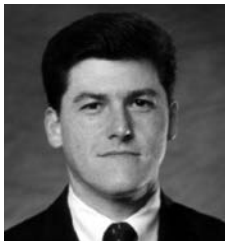

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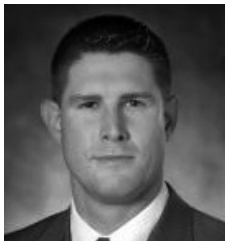

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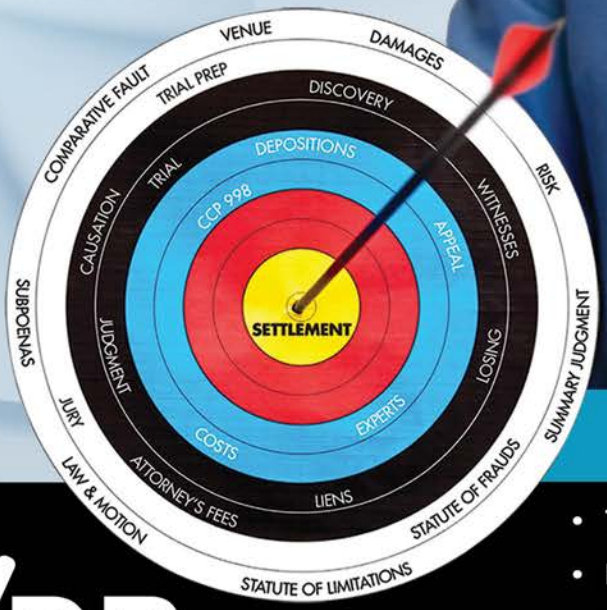

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December 2, 2021:	**Annual Construction Seminar**	*Hilton Costa Mesa, Orange County*
December 10, 2021:	**Association of Defense Counsel 62nd Annual Meeting**	*Virtual, via Zoom*
December 14, 2021:	**Judicial & New Member Reception**	*Jonathan Town Club, Los Angeles*
March 17-18, 2022:	**61st Annual Seminar**	*JW Marriott LA Live, Los Angeles*