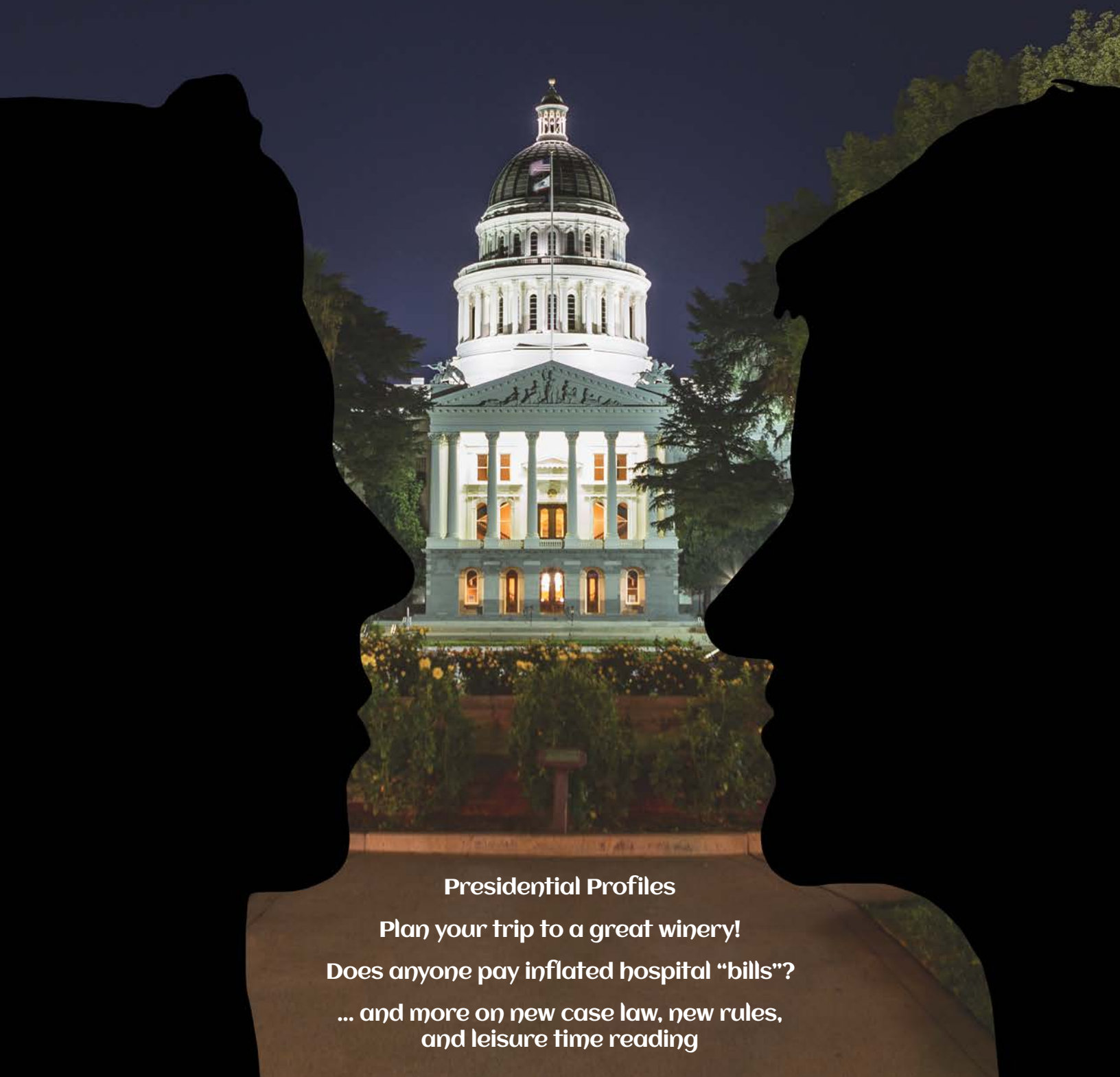
ASCDC

VERDICT

Volume 1 • 2022

A Publication of the Association of Southern California Defense Counsel



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PRESIDENT'S MESSAGE

DIANA P. LYTEL
2021 President

Onward & Upward

The New Year heralds the final months of my tenure as President of ASCDC, a position that has not only been a great honor but has enabled closer relationships, a good deal of ASCDC accomplishments and a multitude of resources for our membership. Indeed, it is a profound privilege to lead this organization where I have met, worked with, and collaborated with some of the most outstanding legal minds in California. Although we did not see each other in person this past year at the traditional events, and my year as President was anything but traditional, it was nonetheless a remarkable leadership opportunity that marks a highpoint in my legal career.

The COVID-19 pandemic has changed all of us by redefining how we work, how we live and at times, how we interact with one another. We all adapted to a new way of living and slowly, are returning to a new normal. Though it has brought its share of challenges, one positive trend has emerged: a distinct shift towards prioritizing what is most important to us. Insofar as the shared experiences of new virus protocols have impacted us all differently, in many cases, we have turned challenges into opportunity. I am hopeful ASCDC has provided tools, resources and educational content to help maintain some normalcy in an otherwise abnormal work environment.

Case in point, this year we are back hosting our Annual Seminar in person where we can all meet again "live" with exciting events, motivating speakers, sponsor "swag," cocktail gatherings and an overall phenomenal seminar setup. With the long pause on in person events, we are coming back strong to the JW Marriott in downtown Los Angeles where we will take advantage of this location with a Kings hockey game in the VIP Hyde Lounge. Of course, the seminar will maintain its focus of trial tactics and effective defense strategies for the courtroom while also providing unique experiences to network and mingle with our colleagues and clients.

In the year ahead, I look forward with a sense of optimism that we are finally emerging from the pandemic and re-entering the land of the living. What I have learned over the last year is that ASCDC has never been more relevant and important for those of us practicing law in California. All of the changes around us – whether social, political, scientific, economic or otherwise – require that we help our clients navigate through new and increasingly complex legal landscapes. However, during our daily advocacy and defense of our clients, we also need a sense of community and comradery in which ASCDC is uniquely equipped to provide with the upcoming Annual Seminar, continued webinars, Hall of Fame and the unparalleled content you have come to expect from ASCDC.

I am so proud of ASCDC's successes over the past year, particularly in providing opportunities for meaningful engagement, introducing original programming, and providing professional development and outreach opportunities. In many instances, we are responsible for shaping the new legal landscape and leading the charge in spearheading ethical practices, professionalism, and innovative defense strategies.

Over the last 61 years, ASCDC has grown into one of the nation's preeminent and largest regional defense organizations which continues to represent the defense bar's interests with judges, the legislature and our Southern California communities through our bench and bar committees, amicus efforts and continuing legal education. We accomplish all of these things because of our strong membership and engagement. I want to personally thank all of our members for your continued support, participation and enthusiasm.

Wishing you all a successful 2022 and I look forward to seeing you soon.

Diana P. Lytel
2021 ASCDC President

CAPITOL COMMENT

MICHAEL D. BELOTE
Legislative Advocate, California Defense Counsel

The Great Resignation Comes to Sacramento

As proof that no segment of society is immune from the unpredictable effects of the pandemic, a wave of resignations has roiled the California legislature in Sacramento. From a time when legislators would serve until they were forced out by term limits, we are now seeing Assembly and Senate members resign, or announce that they will not seek reelection, even when they are eligible to serve another term. Just as with the great resignation in other elements of the workforce, the reasons for this phenomenon are not entirely clear.

The highest-profile resignation thus far is Assembly Member Lorena Gonzalez from San Diego. Ms. Gonzalez was unquestionably one of the most powerful legislators in the Capitol; her eight years in office generated a raft of landmark bills, none more consequential than AB 5 dealing with independent contractor status. Her clout will change, but not necessarily diminish, when she next becomes head of the powerful California Labor Federation.

Other resignations include Ed Chau, who resigned after he was appointed to the Los Angeles Superior Court, and David Chiu, who left to become San Francisco City Attorney. The fact that all three members are lawyers also raises the distinct possibility that the number of attorneys in the legislature will continue to decline when they are replaced.

There are many more legislators simply choosing not to run again, or in some cases run for seats in Congress. The reason Congressional seats are attractive may be as simple as higher pay, with pensions legislators do not receive in Sacramento, and no term limits. Members of the public generally feel little sympathy for lawmakers, but a brain drain from Sacramento is, as one lobbyist drily noted, "suboptimal."

Again, while there may be a number of reasons for the departures, pandemic burnout is certainly one. Politics and lawmaking are very much founded on human interaction, and flying weekly to Sacramento only to sit in an apartment and participate on Zoom calls is not what legislators signed up for. Presumably as the pandemic recedes and the legislative process reopens to in-person meetings, the benefits of give and take will return as well.

February 18 was the deadline for new bills to be introduced for the 2022 legislative year in Sacramento, the second year of the 2021-2022 two-year session. Over 2000 new bills were introduced, about normal for the second year of a session. Of the nearly 100 bills identified of interest to the California Defense Counsel, some are reintroductions of bills which have failed passage in the past. Included among these are:

- **AB 2182 *(Wicks)*: Employment Discrimination: Family Responsibilities.** Creates a new protected class of employees by prohibiting employment discrimination against those applicants or employees who must provide care to a minor child or care recipient, defined to include family members or those whose close relationship with an applicant or employee is equivalent to a family relationship.

- **AB 2188 *(Quirk)*: Employment Discrimination: Cannabis.** Prohibits discrimination in hiring or employment based upon off-work use of cannabis.

- **AB 2777 *(Wicks)*: Statute of Limitations: Sexual Assault or Other Activity of a Sexual Nature.** Amends Code of Civil Procedure Section 340.16 to revive sexual abuse claims otherwise time-barred, if filed between January 1, 2023 and December 31, 2023, if the plaintiff alleges, among other factors, that the person or entity responsible engaged in a cover up.

- **SB 975 *(Min)*: Coerced Debt.** Establishes a cause of action permitting an alleged debtor to bring an action against an alleged creditor contending that the debt is invalid because it was procured through duress, intimidation, threat, force, fraud or exploitation.

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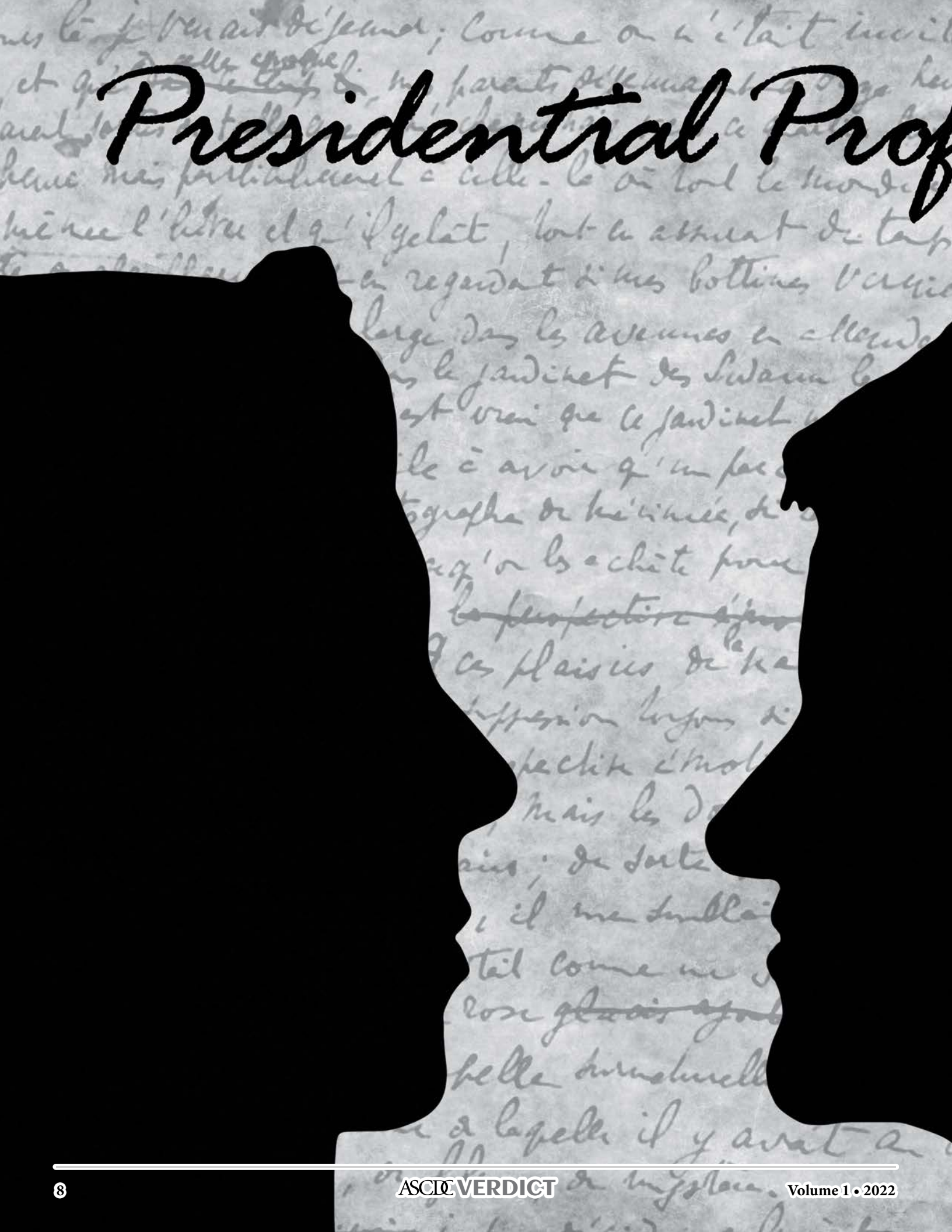

Diana P. Lytel

Marta A. Alcumbrac

Get to know your ASCDC Presidents, Diana Lytel (current) and Marta Alcumbrac (soon to be), as they answer a few of French philosopher, Marcel Proust's questions:

What is your idea of perfect happiness?

Diana: Having absolutely nothing to do – no deadlines, no obligations on a tropical island with my family.

Marta: Coffee, the newspaper, a fire in the fireplace, and a very quiet morning.

What is your greatest fear?

Diana: Having regrets.

Marta: Heights and dental work of any kind.

What is the trait you most deplore in yourself?

Diana: The ability to immediately jump to worst case scenario – 0 to 60 in no time flat.

Marta: Giving advice without being asked for it first. Occupational hazard, perhaps.

What is the trait you most deplore in others?

Diana: Dishonesty, selfishness, insincerity.

Marta: Condescension, lack of empathy, and believing being a bully is talent.

Which living person do you most admire?

Diana: U.S. Supreme Court Justice Sonia Sotomayor.

Marta: Leaders seeking to protect our democracy and its history.

What is your greatest extravagance?

Diana: Travel.

Marta: Good food, drinks, and presents for my kids.

Continued on page 10

What is your current state of mind?

Diana: Determined and forward thinking.

Marta: Grateful.

What do you consider the most overrated virtue?

Diana: Righteousness.

Marta: Righteousness.

On what occasion do you lie?

Diana: I tend to be a pretty honest person.

Marta: Playing B.S. (a card game) with my kids.

What do you most dislike about your appearance?

Diana: Posture – I am always trying to stand up straight.

Marta: My frown.

Which living person do you most despise?

Diana: I wouldn't say I despise anyone – perhaps just disagree.

Marta: No. 45.

What is the quality you most like in a man?

Diana: Integrity.

Marta: Accountability and a sense of humor.

What is the quality you most like in a woman?

Diana: Integrity.

Marta: Women who support women.

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

Which words or phrases do you most overuse?

Diana: "Touch base" – I annoy myself by using this all the time.

Marta: Curse words, which are not fit for print here.

What or who is the greatest love of your life?

Diana: My husband and two kids.

Marta: Ella, Tessa, and Lilah.

When and where were you happiest?

Diana: At home with my family.

Marta: With my kids, laughing.

Which talent would you most like to have?

Diana: The ability to speak multiple languages. I have always wanted to learn another language and never have. It's on my list of things to do.

Marta: Musical talent of any kind.

If you could change one thing about yourself, what would it be?

Diana: I would love to be a morning person – never have been and I don't think I ever will be. I am a total night owl.

Marta: I would like to be as funny as I think I am.

What do you consider your greatest achievement?

Diana: Tie between my two children.

Marta: Helping my daughters to become strong and confident women. Co-founding a school.

Continued on page 11

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

Diana: A philanthropist – to be able to effectuate profound change in the world would be an amazing thing.

Marta: A piano owned by a world-class pianist.

Where would you most like to live?

Diana: Lake district of Italy.

Marta: Sedona, Arizona or next to any body of water.

What is your most treasured possession?

Diana: My family.

Marta: My health, and in particular, my eyes.

What do you regard as the lowest depth of misery?

Diana: Waking up very early in the morning. See above.

Marta: Losing people I love.

What is your favorite occupation?

Diana: Relaxing – it is very hard to come by.

Marta: Artists.

What is your most marked characteristic?

Diana: My ability to worry about everything possible – even things that would never happen. See #3.

Marta: The ability to laugh at myself.

What do you most value in your friends?

Diana: Honesty, laughter, realness, kindness, support, trust.

Marta: Their honesty, loyalty, and ability to make me laugh.

Who are your favorite writers?

Diana: John Steinbeck, F. Scott Fitzgerald, Ralph Waldo Emerson, Robert Frost, Henry David Thoreau, JD Salinger, Jane Austen.

Marta: Amanda Gorman, Jane Austen, and from the LA Times, Steve Lopez, and Chris Erskine (ret.).

Marcel Proust

Who is your hero of fiction?

Diana: Elizabeth Bennet – Pride & Prejudice.

Marta: All of Charlie's Angels.

Which historical figure do you most identify with?

Diana: I don't think I have a historical figure that I most identify with.

Marta: Civil Rights leaders – I don't necessarily identify with them, but I admire them greatly.

Who are your heroes in real life?

Diana: My mom, teachers, healthcare workers, social workers.

Marta: Elementary, middle, and high school teachers.

What are your favorite names?

Diana: Carys, Lochlan, Thomas, Henry, Griffin.

Marta: Ella Roze, Tessa Valentina, Lilah Kristina.

What is it that you most dislike?

Diana: Insincerity.

Marta: Dishonesty.

What is your greatest regret?

Diana: I don't have regrets as I believe every experience shapes who we are.

Marta: Sweating the small stuff.

How would you like to die?

Diana: In my sleep – peacefully with no regrets.

Marta: Laughing.

What is your motto?

Diana: You never know what someone else is going through, so be kind.

Marta: Take the next right step.

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ASCDC 61ST ANNUAL SEMINAR

3/17-18/22 JW Marriott LA Live

President's Message

Welcome to the 61st Annual Seminar! We are thrilled to be back in person in the center of Los Angeles at our favorite LA Live venue. This year's seminar is focused on trial tactics where we will sharpen our skills as we begin to get back into the courtroom and do what we do best, try cases.

We will begin with our Annual Business Meeting on Thursday, followed by the crowd favorite, "A Year in Review" featuring California and Federal appellate decisions of importance to the civil defense bar. Presented by Past President Robert "Bob" Olson and Ellie Ruth, you will get up to speed on the critical cases that are relevant to your practice.

We are honored to have with us some of the preeminent trial lawyers in California who will demonstrate their skills and give us practice pointers in developing our own strategies for voir dire, openings, closings and more. Following "Year in Review," the trial track will begin with a panel focusing on voir dire including a mock session with a jury consultant and jurors. If jury selection doesn't interest you, an alternative offering is an ethics session presented by Lisa Perrochet.

Following lunch, our trial track will pick up with opening statements. This all-star panel from the bench and both sides of the bar will dialogue and debate on important topics. Concurrent with this panel, join the Honorable Rupert Byrdsong of the Los Angeles County Superior Court, Stacy Douglas of Everett Dorey LLP, and J. Bernard Alexander, III of Alexander Morrison + Fehr LLP for a discussion on the impact of implicit bias in employment law.

The last sessions of the day will focus on closing statements in a medical malpractice case and a hot topic panel covering third-party relationships, coverage and cumis counsel. Thursday will end with an update on the status of civil in LASC by Supervising Judge, Civil Division, Honorable David Cowan.

Following a full day, we will adjourn to a cocktail reception followed by a special optional event at Crypto.com Arena which will include tickets to the LA Kings vs. San Jose Sharks hockey game. Join friends and colleagues in the private Hyde Lounge to enjoy food, beverages, camaraderie, and the game.

Friday morning will begin with an update from legislative advocate, Michael Belote, who will apprise us on current events and legislation in Sacramento. Steven Fleischman will present a session on discovery issues to consider in light of *Howell* and *Pebley*. Our last panel on Friday morning will feature the Honorable Eric C. Taylor, Presiding Judge of the Los Angeles Superior Court, and the Honorable Erick L. Larsh, Presiding Judge of the Orange County Superior Court for a discussion about diversity and inclusion and why it matters.

For Friday's luncheon, our keynote speaker will be CNN host, political commentator, Emmy Award-winning producer, and author, Van Jones. Van has found success as a social entrepreneur, having founded and led many thriving enterprises. A Yale-educated attorney, in July 2021, Jones was awarded $100 million from Amazon founder Jeff Bezos with his inaugural Courage and Civility Award, to give away as he sees fit.

I would like to close with a special thank you to our Annual Seminar Committee, chaired by Marta Alcumbrac, for adeptly putting together this phenomenal event. Marta will be taking over as President, and we are honored and privileged to have her.

Thank you for your support of ASCDC. I look forward to seeing you all in person at the seminar.

Diana P. Lytel
2021-2022 President

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Thursday, March 17, 2022

7:30 am – 6:30 pm *Diamond Foyer*	**Registration Open**
7:30 am – 9:00 am *Diamond Foyer*	**Continental Breakfast in the Vendor Faire Area**
7:30 am – 4:30 pm *Diamond Foyer*	**Vendor Faire**
8:30 am – 8:45 am *Diamond 5*	**Annual Business Meeting**
8:45 am – 10:15 am *Diamond 5*	**"A Year in Review" – Case Highlights of 2021** ***(MCLE – 1.5 hour of general credit)***

The ASCDC Annual Review features the 2021 California and Federal appellate decisions of importance to the civil defense bar and insurance claims personnel.

Robert A. Olson
Greines, Martin, Stein & Richland

Ellie Ruth
Greines, Martin, Stein & Richland

10:15 am – 10:30 am *Diamond Foyer*	**Vendor Break**

MCLE Credit

This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of **8.5 hours**, including **1.25 hours** of **Recognition and Elimination of Bias in the Legal Profession and Society** credit and **1.5 hours** of **Legal Ethics** credit.

The Association of Southern California Defense Counsel certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

Please make sure to include your State Bar I.D. number on the registration form in order to receive your MCLE credits.

Additionally, please make sure you sign the attendance sheet located in the Diamond Foyer and retain the Certificate of Attendance for your records.

Register Online at *www.ascdc.org*

ASCDC 61ST ANNUAL SEMINAR

3/17-18/22 JW Marriott LA Live

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Thursday, March 17, 2022 – *continued*

TRIAL SCHOOL TRACK

10:30 am – 12:00 noon *Diamond 5*

Picking a Wrongful Termination Jury In the Pandemic Era

(MCLE – 1.5 hour of general credit)

Picking a jury in Los Angeles County in employment cases remains as challenging as ever, particularly during the pandemic. The seasoned trial attorneys, jury consultant, and judge on this interactive panel will demonstrate the art of jury selection using audience members as potential jurors.

MODERATOR:
Eric C. Schwettmann
Ballard Rosenberg Golper & Savitt

Gary A. Dordick
Dordick Law Corporation

Dan Gallipeau
Dispute Dynamics

Linda Miller Savitt
Ballard Rosenberg Golper & Savitt, LLP

Hon. Patricia Schnegg
(Ret.)

HOT TOPIC PRACTICE TRACK

10:30 am – 12:00 noon *Diamond 1-3*

Don't Waver From Risk Management: Learn to Spot Conflicts and Other Red Flags at Intake

(MCLE – 1.5 hour of Legal Ethics credit)

It's so great when your business development efforts pay off and a new client contacts you for representation. It's also rewarding to get that vote of confidence when an existing client calls with a new matter. But does the rush make you ignore that little voice in the back of your head that says to slow down and check up on who exactly you will and will not be representing, what exactly the representation will entail, and what you need to document along the way? Attend this panel for tips on safe practices for defense lawyers entering into an attorney-client relationship.

Frances M. O'Meara
Freeman Mathis & Gary, LLP

Lisa Perrochet
Horvitz & Levy, LLP

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Thursday, March 17, 2022 – *continued*

12:00 noon – 1:30 pm **Lunch On Your Own**
Visit *www.ascdc.org* for dining options.

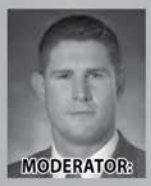
TRIAL SCHOOL TRACK

1:30 pm – 2:45 pm *Diamond 5*

No Second Chances for First Impressions: Outstanding Opening Statements

(MCLE – 1.25 hours of general credit)

Opening statements can be a powerful tool in presenting your trial theme and providing the jury with an overview supporting your client's fact pattern. This all-star panel from the bench and both sides of the bar will dialogue and debate on topics such as mini-openings, anchoring damages, trial themes, bad facts, storytelling, and more.



MODERATOR:
Benjamin J. Howard
Neil, Dymott, Frank, McCabe & Hudson APLC

Christopher E. Faenza
Yoka & Smith LLP

Amy Rose Martel
Chihak & Martel

Hon. Kenneth J. Medel
Superior Court of San Diego County

HOT TOPIC PRACTICE TRACK

1:30 pm – 2:45 pm *Diamond 1-3*

The Impact of Implicit Bias in Employment Law

(MCLE – 1.25 hours of Recognition and Elimination of Bias credit)

Workplaces can be fraught with unconscious biases related to race, gender, and disability resulting in implicit bias claims by employees. This experienced and all-star panel will discuss the growing trend of these types of claims including approaches and strategies with perspectives from the bench and both sides of the bar.

MODERATOR:
David A. Napper
Chapman, Glucksman, Dean & Roeb

J. Bernard Alexander, III
Alexander Morrison + Fehr LLP

Hon. Rupert Byrdsong
Los Angeles County Superior Court

Stacy Douglas
Everett Dorey LLP

2:45 pm – 3:00 pm *Diamond Foyer*

Vendor Break

ASCDC 61ST ANNUAL SEMINAR

3/17-18/22 JW Marriott LA Live

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Thursday, March 17, 2022 – *continued*

TRIAL SCHOOL TRACK

3:00 pm – 4:15 pm
Diamond 5

How to Cure the Common Closing Argument

(MCLE – 1.25 hours of general credit)

Closing argument is the trial attorney's chance to persuade the jury to accept his or her version of the facts. It is not a summary of the case – it's argument. Our panel of seasoned trial lawyers will demonstrate a closing argument involving a medical malpractice fact pattern and they will discuss topics such as, how to handle bad facts, avoiding nuclear verdicts and strategies on connecting with the jury.

Angela S. Haskins
Haight, Brown & Bonesteel, LLP

Jennifer R. Johnson
Law Office of Jennifer R. Johnson

Linda Star
Collinson, Daehnke, Inlow & Greco

Hon. Wendy Wilcox
Los Angeles County Superior Court

HOT TOPIC PRACTICE TRACK

3:00 pm – 4:15 pm
Diamond 1-3

2022 Primer on Malpractice Trends and Common Pitfalls

(MCLE – 1.25 hours of general credit)

In 2022 the landscape of how to be a lawyer has changed and It's easier to make mistakes now, more than ever. The remote work environment has led to less associate oversight, poorer work product and increased demands from clients. The standard of care remains the same, yet how attorneys are viewed in the community is changing. This panel will provide an in depth discussion with perspectives from both the plaintiff and defense side in relation to hot topics, current trends and updates with respect to the relevant case law.

Marshall R. Cole
Nemecek & Cole

Kenny C. Brooks
Nemecek & Cole

James R. Rosen
*Rosen * Saba, LLP*

4:15 pm – 4:30 pm
Diamond Foyer

Vendor Break

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Thursday, March 17, 2022 – *continued*

4:30 pm – 5:00 pm
Diamond 5

LASC Court Update

(MCLE – 0.5 hours of general credit)

Hon. David J. Cowan
Los Angeles County Superior Court

Supervising Judge of the Civil Division of the Los Angeles County Superior Court, Hon. David J. Cowan, will discuss recent developments and changes in the Civil Division and the current status of bringing cases to trial.

5:00 pm – 6:30 pm
Diamond 4

Cocktail Reception

Join your fellow members and colleagues for appetizers and cocktails at the Annual Seminar Reception – an opportunity to wrap up your day and enjoy the camaraderie amongst seminar attendees.

7:00 pm
Hyde Lounge

LA Kings vs. San Jose Sharks Special Event at Crypto.com Arena

Join your friends and colleagues for a special offsite event in the private Hyde Lounge at the Crypto.com Arena and enjoy food, beverages, friends, and a hockey game! **Separate advance ticket purchase required; space is limited.**

Register Online at *www.ascdc.org*

ASCDC 61ST ANNUAL SEMINAR

3/17-18/22 JW Marriott LA Live

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Friday, March 18, 2022

7:30 am – 12:00 noon *Diamond Foyer*
Registration Open

7:30 am – 9:00 am *Diamond Foyer*
Continental Breakfast in the Vendor Faire Area

7:30 am – 11:00 am *Diamond Foyer*
Vendor Faire

8:45 am – 9:30 am *Diamond 5*
California Defense Counsel Legislative Update

(MCLE – 0.75 hours of general credit)

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

Michael D. Belote
California Advocates, Inc.

9:30 am – 9:45 am *Diamond Foyer*
Vendor Break

9:45 am – 11:00 am *Diamond 5*
Discovery Strategies for Lien Providers

(MCLE – 1.25 hours of general credit)

Many of us hoped the California Supreme Court's seminal decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 would put to rest the notion that personal injury plaintiffs can recover for the grossly-inflated amounts billed by medical providers that, in real life, are never paid. However, the last eleven years have taught us that *Howell* marked only the beginning of the battle.

Notwithstanding *Howell*, decisions like *Pebley* and *Qaadir* have permitted plaintiffs to treat on a lien basis and try to recover the full amount billed. Hear from the defense firm who handled *Howell* from the trial court to the California Supreme Court, an appellate attorney and from a Los Angeles Superior Court judge regarding discovery issues related to lien treatment and how to obtain the discovery needed to prepare your case for trial.

Steven Fleischman
Horvitz & Levy

Hon. Daniel Crowley
Los Angeles County Superior Court

Codie Dukes
Tyson & Mendes

Mina Miserlis
Tyson & Mendes

11:00 am – 11:15 am *Diamond Foyer*
Final Vendor Break and Prize Drawings

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Friday, March 18, 2022 – *continued*

11:15 am – 12:00 noon *Diamond 5*
Diversity and Inclusivity – Why It Matters

(MCLE – .5 hours of general credit)

Please join Presiding Judges of Los Angeles and Orange County Superior Courts, two of the largest trial courts in the country, for an in-depth discussion about diversity, inclusion and why it is important. Presiding Judges Eric C. Taylor and Erick L. Larsh will discuss why it is imperative that we all play a role in promoting diversity which works to ensure fairness and equity under the law. Our courtrooms should reflect California's rich and varied demographics and this panel will focus on court initiatives that work toward achieving this goal.

Diana P. Lytel
Lytel & Lytel, LLP

Hon. Eric C. Taylor
Los Angeles County Superior Court

Hon. Erick Larsh
Superior Court of Orange County

12:00 noon – 2:00 pm *Diamond 1-4*
Annual Seminar Luncheon with Keynote Speaker

Keynote Speaker:
VAN JONES
CNN Host and Dream Corps Founder

Van Jones is a CNN host, political commentator, Emmy Award-winning producer, and author of three New York Times best-selling books: *The Green Collar Economy* (2008), *Rebuild the Dream* (2012) and *Beyond the Messy Truth: How We Came Apart, How we Come Together* (2017).

Van has also found success as a social entrepreneur, having founded and led many thriving enterprises including the REFORM Alliance, Color of Change, the Ella Baker Center for Human Rights and the Dream Corps, which works to close prison doors and open doors of opportunity in the green and tech economies.

Jones was the main advocate for the Green Jobs Act. Signed into law by George W. Bush in 2007, the Green Jobs Act was the first piece of federal legislation to codify the term "green jobs." During the Obama Administration, the legislation resulted in $500 million in national funding for green jobs training. In 2009, as the Green Jobs Advisor to the Obama White House, Jones oversaw an $80 billion dollar investment in clean energy jobs.

A Yale-educated attorney, Jones has won numerous awards, including the World Economic Forum's "Young Global Leader" designation, *Rolling Stone's* 2012 "12 Leaders Who Get Things Done," *TIME's* 2009 "100 Most Influential People in The World," the 2010 NAACP Image Award, a 2017 WEBBY Special Achievement Award, a 2019 Lumiere Award and a 2020 Primetime Emmy Award for Outstanding Original Interactive Program.

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No Tort Liability for Insurer's Alleged Underpayment of Hospital Bills

Kristi Blackwell

On November 4, 2021, the Second District Court of Appeal, Division 2, issued its decision in *Long Beach Memorial Medical Center v. Kaiser Foundation Health Plan, Inc.* The court ruled against establishing tort liability for insurers who paid less than what the hospital asserted was the "reasonable and customary value" of treatment rendered. *Long Beach Memorial Medical Center v. Kaiser Foundation Health Plan, Inc.* (Cal. Ct. App., Nov. 4, 2021, No. B304183) 2021 WL 5118888. This partially published opinion is based on the suit filed by plaintiffs Long Beach Memorial Medical Center and Orange Coast Memorial Medical Center (collectively "the hospitals") against defendant Kaiser Foundation Health Plan, Inc. ("Kaiser") stemming from alleged underpayment by Kaiser for emergency medical services rendered at the hospitals to a Kaiser member patient.

Even though this is not a case against a third party tortfeasor, it is relevant to defendants in those cases. The Court discusses many principles integral to the holding in the landmark California Supreme Court case of *Howell v. Hamilton Meats* that a personal injury plaintiff may recover only the lesser of the amount paid or the reasonable value of medical services rendered. *Howell v. Hamilton Meats*, (2011) 52 Cal.4th 541. Here, the Court notes, hospitals collect their full, billed rate only 1% to 10% of the time. Furthermore, the average rate the hospitals agreed to accept as payment for emergency medical services was just 27% of the hospitals' full, billed rates.

The Court of Appeal reviewed the following issues:

1. whether a hospital may sue [a health care insurer] for the tort of intentionally paying an amount that is less than what a jury might later determine is the "reasonable and customary value" of the emergency medical services, and thereby obtain punitive damages;

2. whether the hospital may sue for injunctive relief under California's unfair competition law to enjoin the plan from paying too little reimbursement for possible future claims not covered by a contract;

3. whether in a quantum meruit claim [against the insurer], a trial court errs in instructing the jury that the "reasonable value" of emergency medical services is defined as "the price that a hypothetical willing buyer would pay a hypothetical willing seller for the services, when neither is under compulsion to buy or sell, and both have full knowledge of all pertinent facts ... *Id.* at 335.

Generally, California's Knox-Keene Health Care Service Plan Act of 1975 (the Knox-Keene Act) (§ 1340 et seq) requires an insurance plan to reimburse hospitals for providing emergency services and care to insured patients. *Long Beach*, citing (§ 1371.4, subd. (b).). The plan must reimburse either a previously decided value if the hospital and plan have an existing contract, or, if there is no such contract, the "reasonable and customary value" of the services provided. *Long Beach*, citing Cal. Code Regs., tit. 28, § 1300.71, subd. (a)(3)(B).

Here, Kaiser and the hospitals had no current contract as they let the existing contracts expire. Kaiser calculated payment of medical bills accrued by its enrollees at the hospitals from 2015 to 2017 based on its own "internal methodology." Ultimately, Kaiser reimbursed the hospitals $16,524,537 – or 53.2 percent of the full, billed charges." *Id.* at 332.

Tort Claim

The court held a hospital could not sue in tort for underpayment, finding that the costs of establishing such a tort outweighed the benefits. Among other concerns, the court opined that establishment of such a tort would inevitably lead to an outcome fundamentally at odds with one of the avowed purposes of the Knox-Keene Act, which is to "help ensure the best possible health care for the public *at the lowest possible cost* by transferring the financial risk of health care from patients to providers." *Long Beach* at 338, citing § 1342, subd. (d), italics added; *Pacific Bay Recovery, Inc. v. California Physicians' Services, Inc.* (2017) 12 Cal.App.5th 200, 207, 218 Cal.Rptr.3d 562.

Unfair Competition

The court held the restitution available under the unfair competition law would

Continued on page 20

be entirely duplicative of what was already afforded to the hospital based on its quantum meruit suit. Additionally, the court opined the injunctive relief the hospitals sought – that is, an order enjoining Kaiser from violating the Knox-Keene Act by underpaying for emergency medical services in the future, is legally unavailable.

While the trial court erred dismissing the claim to the extent it sought restitution, the court here found the error harmless because of this duplicative relief already provided through the quantum meruit suit.

Jury Instruction

At trial, the jury was instructed as follows on the definition of "reasonable value":

> The measure of recovery in quantum meruit is the reasonable value of the services. Reasonable value is the price that a *hypothetical* willing buyer would pay a *hypothetical* willing seller for the services, neither being under compulsion to buy or sell, and both having full knowledge of all pertinent facts. Reasonable value can be described as the "going rate" for those services in the market.
>
> In determining reasonable value, you should consider the full range of transactions presented to you, but you are not bound by them. You may choose to use the transactions you believe reflect the price that a *hypothetical* willing buyer would pay a *hypothetical* willing seller for the services. On the other hand, you may reject transactions you believe do not reflect the price that a hypothetical willing buyer would pay a hypothetical willing seller for the services. *Id.* (Italics added by court).

The hospitals challenged these instructions, particularly the use of the word "hypothetical," while amici supporting the hospitals took issue with the court not instructing jurors to give greater weight to prior agreements. The court was not persuaded by either of these arguments. In particular, the court held the use of the word "hypothetical" was entirely appropriate as "fair market value" is defined similarly in other situations as the amount that "hypothetical buyers and sellers" would pay in a "hypothetical transaction." *Id.* at 346.

Further, the court stated, it is also affirmatively helpful to phrase the instruction as the trial court had done "because it emphasizes another pertinent legal principle – namely, that the parties' prior *actual* transactions are not dispositive. *Id.* at 346. In fact, the discretion accorded by the jury to reject some transactions does no more than reflect the reality that some market transactions will more closely resemble the transactions at issue in the case before the jury, and some will bear less resemblance, giving the jury the ability to give greater weight to the former and less weight to the latter in fixing what a hypothetical buyer and seller would pay for the specific services at issue in that case.

In particular, the court clarified, "The quantum meruit remedy by definition looks to the reasonable, ***market-based value*** of the services provided: That value is calculated by looking at the 'full range of fees' charged and accepted in the market (e.g., *Sanjiv Goel, M.D., Inc. v. Regal Medical Group, Inc.* (2017) 11 Cal. App.5th 1054, 1060, 1062 (Goel)), ***and thus encompasses the lower rates grounded in contracts*** as well as the higher rates charged and accepted where no contract exists." *Id.* at 341 (Emphasis added.).

Also noteworthy, although not certified for publication and thus not citable to or by California state courts, is the court's discussion of Kaiser's successful Sargon challenged to opinions from the hospital's expert, and the court's analysis of other rulings relating to evidence of Kaiser's pricing methodology. The full text of the opinion can be found at *https://www.courts.ca.gov/opinions/documents/B304183M.PDF.*

Takeaway

The inquiry into factors affecting market rates may also fairly include examining the treating doctor's intake process for accepting new patients on referral, and the doctor's practice in discussing cases with plaintiffs' lawyers before agreeing to accept payment for treatment on a lien basis rather than from available insurance.

Kristi Blackwell

Kristi Blackwell is the Managing Partner of Tyson & Mendes' San Diego office and leads the firm's Retail, Restaurant, and Hospitality practice group. Her practice focuses primarily on general liability, professional liability, personal injury, premises liability, coverage, and complex litigation. Ms. Blackwell has wide-ranging litigation experience representing a diverse group of individuals and businesses in California state and federal district courts.

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

Judge's ownership of stock in parent company disqualified him from presiding over case involving wholly-owned subsidiary.

Chaganti v. Superior Court of Santa Clara County (2021) 73 Cal.App.5th 237

Trial judge granted summary adjudication for the defendant, Cricket Communications, on certain issues in this breach of contract case, which then proceeded to a jury trial before a different judge on the remaining claims against Cricket. During trial, it became apparent that there was some relationship between Cricket an non-party AT&T. The jury found for Cricket. After the trial was over, the first judge filed an annual disclosure form indicating that he owed stock in AT&T valued at over $10,000. Plaintiff appealed the adverse judgment, and serendipitously discovered the AT&T disclosure. Plaintiff filed a writ of corum vobis, arguing that the appellate court should take new evidence concerning the summary adjudication judge's financial interests disclosed after the judgment had been rendered and, based on that evidence, vacate the judgment as void because the judge should have been disqualified under Code of Civil Procedure section 170.1,

The Court of Appeal (Sixth District) granted the writ and directed the superior court to vacate the judgment. Under Code of Civil Procedure section 170.1, a judge is disqualified if she or she has a "financial interest" in "a party to the proceeding." And under Code of Civil Procedure section 170.5, a "financial interest" includes a legal or equitable interest in a party exceeding $1,500 in value. The judge's $10,000+ financial interest in a party's parent corporation constituted a legal or equitable interest in the parent's wholly owned subsidiary, mandating disqualification. The judge's summary adjudication order was therefore void.

ATTORNEY FEES AND COSTS

A Code of Civil Procedure section 998 offer that omits acceptance instructions is invalid.

Finlan v. Chase (2021) 68 Cal.App.5th 934

In this personal injury action, plaintiff served Code of Civil Procedure section 998 offers that referenced the statute and proposed that defendant "'allow judgment to be entered in [her] favor,'" but did not include any instructions about how defendant could accept the offers. Defendant did not respond to the offers. After obtaining more at trial than the amount of the pretrial demand, plaintiff sought interests and costs pursuant to section 998. Over defendant's objections that the offers were invalid for lack of a proper acceptance provision, the trial court awarded the heightened costs, concluding that the offers "'w[ere] not silent as to how [they were] to be accepted because they explicitly referr[ed] to [§ 998]' and thus" incorporated by reference "'the provisions of that statute,' " including an acceptance provision.

Continued on page ii

continued from page i

The Court of Appeal (Fourth Dist., Div. One) reversed. Section 998 specifically states that offers must provide the offeree with some indication on how to accept in order to satisfy the acceptance provision requirement in section 998, subdivision (b). "A mere reference to the code section cannot supply an acceptance provision that would otherwise be entirely missing."

Code of Civil Procedure section 998 offers are valid even if not every performance term is set forth, and such offers apply to cut off statutory fee and cost recovery in lemon law cases.

Covert v. FCA USA, LLC (2022)
73 Cal.App.5th 821 [petition for review pending]

In this lemon law action under the Song-Beverly Act, the defendant served a Code of Civil Procedure section 998 offer for $51,000 to repurchase the plaintiff's vehicle. Plaintiff did not accept the offer, nor did plaintiff accept defendant's second section 998 offer for triple the amount of the first offer. At trial, the jury awarded plaintiff $48,000 – less than either offer. Defendant asserted that this barred plaintiff's recovery of post-offer statutory attorney fees and costs, but the trial court sustained plaintiff's objections to the offers as invalid, and awarded about $250,000 in fees and costs.

The Court of Appeal (Second Dist., Div Seven) reversed the attorney fees and costs award. The Song-Beverly Act does not override section 998. "[A] valid and reasonable section 998 offer by the seller, where the buyer recovers less than the offer, precludes recovery by the buyer of post-offer attorneys' fees and costs under Civil Code section 1794, subdivision (d)." The appellate court rejected plaintiffs' arguments that the offer was invalid because it omitted detailed information that the statute did not specify must be included, such as the date when the settlement payment would be tendered or when the vehicle would be returned.

See also *Duff v. Jaguar Land Rover North America, LLC* (2022) __ Cal.App.5th __ [2022 WL 246853] [award of attorney fees under Song-Beverly Act depends on the extent to which the plaintiff achieved his or her litigation objectives].

See also *Oakes v. Progressive Transportation Services, Inc.* (2021) 71 Cal.App.5th 486 [Code of Civil Procedure section 998 must be applied before Labor Code § 3856's scheme for establishing the priority of payments out of a judgment in a case with a workers' compensation lien].

Trial court did not abuse its discretion in shifting over $100,000 of nonparty's cost of responding to subpoena onto the requesting party.

Park v. Law Offices of Tracey Buck-Walsh (2021) 73 Cal.App.5th 179

Plaintiff filed this lawsuit against his former attorneys whom he had hired to help him purchase a casino. He served a subpoena duces tecum on the California Department of Justice seeking 19 categories of electronically stored documents from the Bureau of Gambling Control. Extensive discovery law and motion practice followed, and a referee ultimately ordered production of some of the documents. It also ordered over $130,000 of the costs of production be shifted to plaintiff. Plaintiff appealed.

The Court of Appeal (First Dist., Div. Three) affirmed. Under Code of Civil Procedure §1985.8(l), courts must protect nonparties from "undue burden or expense" when ordering them to comply with a subpoena to produce electronically stored information. Trial courts have discretion to consider whether the burden of production is "undue" under the particular circumstances of the case. And even if a court determines that production is not unduly burdensome (and so orders it), the court still has discretion to shift the costs to avoid undue expense to the responding party. In making the determination of whether expense is undue, the court should consider how significant the cost is, as well as the nonparty's relationship to the case and the parties' respective resources.

See also *Wertheim, LLC v. Currency Corp.* (2021) 70 Cal.App.5th 327 [trial court properly denied statutory fee-shifting as to fees unreasonably incurred to enforce judgment: "fee awards are fundamentally governed by equitable principles" and "[e]quity countenances against awarding attorney fees to parties who litigate unnecessarily or in expensive battles eclipsing the dispute that initially brought them into court."].)

The prevailing party may, at the trial court's discretion, recover costs for photocopies made but not used at trial.

Segal v. Asics America Corporation (2022)
__ Cal.5th __ [2022 WL 120960]

After the defendant prevailed in this complex fraud action, it filed a memorandum of costs that included preparing photocopies of exhibits, exhibit binders, and demonstratives; travel expenses; and interpreter fees. The plaintiff moved to tax those costs, arguing that many of the exhibit copies and demonstratives were not even used at trial. The trial court declined to tax those costs.

The Court of Appeal (Second Dist., Div. Four) affirmed, reasoning that Code of Civil Procedure section 1033.5(a)(13)

Continued on page iii

continued from page ii

[allowing recovery of "[m]odels, the enlargements of exhibits and photocopies of exhibits, and the electronic presentation of exhibits, including costs of rental equipment and electronic formatting, may be allowed if they were reasonably helpful to aid the trier of fact"] and 1033.5(c)(4) [allowing other costs to be recovered at the court's discretion] had to be interpreted to reflect the "reality of how complicated cases are tried" in which prudent counsel prepare exhibits and demonstratives in advance.

The California Supreme Court affirmed on narrower grounds. The plain language of section 1033.5(a)(13) does not authorize recovery of exhibits and demonstratives not used a trial, because such materials were not "reasonably helpful to aid the trier of fact." Thus, the costs are not recoverable as a matter of right under that subsection. However, nothing in the statute expressly forbids recovery of such costs, so such costs may still be awarded in the trial court's discretion pursuant to section 1033.5(c)(4). V

CIVIL PROCEDURE

In ruling on a summary judgment motion, trial courts should look to all the evidence in the record to evaluate whether a declaration has adequate foundation for statements purporting to create triable issues.

Forest Lawn Memorial-Park Association v. Superior Court of Riverside County (2021) 70 Cal.App.5th 1

A temporary staffer was on his way to work at defendant's funeral business when he caused a vehicle collision that injured plaintiff. Plaintiff sought to hold the defendant vicariously liable for the accident despite the "going and coming rule" on the theory that the staffer was driving a "required vehicle." Defendant moved for summary judgment, making a prima facie showing that the staffer's job did not require a vehicle. In opposition, plaintiff submitted a declaration from a florist saying that the staffer came to pick up flowers many times. In deposition, the declarant recanted, explaining that she was not a florist and was merely a customer service manager at a grocery store with a floral department; did not know the defendant's staffer or if he had picked up flowers; and had signed the declaration only because plaintiff's counsel harassed her at work and pressured her to do so. The trial court denied summary judgment, reasoning that the discrepancy between the declaration and the deposition merely created a credibility issue that had to be resolved at trial.

The Court of Appeal (Fourth District, Div. Two) granted a writ of mandate directing entry of summary judgment for defendant. A "declaration should not be considered in isolation in determining whether there is foundation in personal knowledge for its contents, but rather any evidence in the record can and should be considered." Where, as here, the declarant's deposition testimony unequivocally disclaimed having foundation for the statements in her declaration about the staffer's work, the trial court erred in concluding that the declaration created a genuine issue of material fact. In so holding, the court expressly noted that it was not relying on the rule of *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, however, because that case applies only to admissions in deposition by a party, not third party witnesses. V

Courts presiding over coordinated proceedings have discretion to depart from rules governing trial preference.

Isaak v. Superior Court of Contra Costa County (2022) 73 Cal.App.5th 792

In this coordinated proceeding involving claims that a pesticide causes cancer, one of the plaintiffs moved for trial preference under Code of Civil Procedure section 36 on the ground he was over 70 years old and his health was such that preference was required to avoid prejudicing his interests. The trial court denied preference, reasoning that its authority to manage the coordinated proceedings under Code of Civil Procedure section 404.7 and California Rule of Court 3.504 gave it discretion to depart from section 36 and establish different preference protocols, and following section 36 would interfere with its management of the proceedings in which discovery was not even completed. Plaintiff sought a writ of mandate, arguing that section 36 is mandatory.

The Court of Appeal (First Dist., Div. One) denied the writ. Section 404.7 provides that "[n]otwithstanding any other provision of law, the Judicial Council shall provide by rule the practice and procedure for coordination of civil actions." The introductory language "notwithstanding any other provision of law" means that the coordinating judge's authority to manage a coordinated proceeding takes precedence over other statutes, including section 36. The coordinating judge here did not abuse his discretion in concluding that the 120-day timeline imposed by section 36 was not compatible with coordinating the proceedings and thereby deciding to adopt his own preference protocols. V

A trial court reviewing an administrative agency's findings as to fundamental rights must engage in de novo review, applying the standard of proof required in the underlying proceeding.

Li v. Superior Court (2021) 69 Cal.App.5th 836

Pursuant to Code of Civil Procedure section 1094.5, plaintiff brought an action for administrative mandate seeking trial court review of the medical board's revocation of his medical license, and sought a stay of the revocation. In support of his stay request, he cited *Conservatorship of O.B.*(2020) 9 Cal.5th 989, in which the Supreme Court held that appellate courts should consider

Continued on page iv

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the standard of proof that applied at trial in deciding whether a judgment is supported by substantial evidence. Plaintiff argued that the trial court should conclude he was entitled to the stay because the medical board's decision was not supported by clear and convincing evidence, as required. The trial court denied a stay and plaintiff sought a writ of mandate.

The Court of Appeal (Third Dist.) denied the writ because plaintiff had not shown he could prevail under any standard of review. In so holding, however, the court concluded that the longstanding rule of *Chamberlain v. Ventura County Civil Service Com.*(1977) 69 Cal.App.3d 362 [holding that trial courts apply the preponderance of the evidence standard to proceedings under section 1094.5] was unsupported. Under section 1094.5, courts perform an independent review of agency action that affects fundamental rights, and substantial evidence review of agency action that affects nonfundamental rights. Because loss of a medical license implicates a fundamental right, trial courts apply independent rather than substantial evidence review to such a decision. Thus, this case did not raise the issue under *O.B.* whether the clear and convincing evidence standard must be taken into account in cases involving substantial evidence review. Nonetheless, it makes even less sense to disregard the applicable standard of proof when doing independent review. Contrary to the guidance in *Chamberlain*, trial courts should perform their independent review of agency action with an eye toward the standard of proof required in the underlying proceedings.

EVIDENCE

Declaration stating that it is based on personal knowledge, without facts establishing the basis for that knowledge, was inadequate.

Gamboa v. Northeast Community Clinic (2021) 72 Cal.App.5th 158

In this employment case, the employer moved to compel arbitration per an arbitration clause in the employment contract. In support of the motion, the employer filed a declaration from its human resources director attaching the arbitration agreement appearing to have been signed by the plaintiff. The plaintiff opposed the motion, declaring that she did not recall signing the agreement and objecting to the human resources director's foundation to say she had signed it. The employer's reply contained no new evidence, and merely argued that the plaintiff's failure to recall signing the agreement did not invalidate it. The trial court sustained the plaintiff's lack of foundation objections to the human resources' s directors declaration and denied the motion to compel on the ground the employer had failed to establish an agreement to arbitrate existed.

The Court of Appeal (Second District, Div. Seven) affirmed. The trial court did not abuse its discretion in sustaining the plaintiff's objections to the human resources directors' declaration. Boilerplate language that the facts asserted within the declaration are within the declarant's personal knowledge are insufficient; facts establishing how that knowledge was obtained are required. In any event, because the employer bore the burden of proof on the motion to compel, once the employee submitted evidence there was no agreement, the employer bore some burden to rebut that showing with further evidence. The employer was not entitled to reversal on appeal because it had not shown that the record compelled the trial court to grant the motion.

See also *Chambers v. Crown Asset Management, LLC* (2021) 71 Cal.App.5th 583 [Bank employee's declaration stating that she regularly reviewed the bank's records was inadequate to establish the bank mailed an arbitration agreement to the plaintiff customer; the declaration did not specify what records the employee reviewed or establish that the records were made in the usual course of business at the time of the event, as required for the business records exception to the hearsay rule to apply]

Kelley Blue Book information about market value of vehicle is admissible over hearsay objections as a published compilation.

People v. Jenkins (2021) 70 Cal.App.5th 175

The defendant was charged with and convicted of felony attempted car theft. At trial, a police detective testified that the car's value exceeded $950 (the threshold for a felony offense) based on online Kelley Blue Book values. The defendant appealed his conviction, arguing that the police detective's testimony about the car's value was based on inadmissible hearsay.

The Court of Appeal (Fourth Dist., Div. Three) affirmed. The trial court did not abuse its discretion in admitting the detective's testimony to establish the car's value. The online Blue Book is a published database used by consumers and retail personnel to locate a range of sales values from nationwide data after inputting a car's characteristics, including the type of car, its condition, amenities, location, and type of sale. It qualifies as a published compilation under Evidence Code section 1340 ["Evidence of a statement, other than an opinion, contained in a ... published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business"].

But see *Strobel v. Johnson & Johnson* (2021) 70 Cal.App.5th 796 [In case alleging asbestos exposure from talc, plaintiffs' causation experts could not testify to out-of-court expert's mineral testing results, which were case-specific hearsay under *Sanchez*].

RECENT CASES

TORTS

Officer's negligence in leaving loaded gun visible in his car, resulting in its theft and use by a third party to commit a homicide, was not the proximate cause of shooting four days later.

Steinle v. United States (9th Cir. 2021) 11 F.4th 744

A Bureau of Land Management ranger left his gun in his car, which was parked on a San Francisco street. Someone broke into the car and stole the gun. Four days later, a man found the gun and fired it aimlessly, striking plaintiffs' decedent. Plaintiffs brought claims under the Federal Tort Claims Act alleging that the ranger was negligent in leaving his gun loaded, visible, and unattended in a car parked on a city street. Defendants moved for summary judgment, arguing that plaintiffs could not establish duty or proximate causation. The district court granted the motion.

The Ninth Circuit affirmed. The ranger's conduct in leaving his gun in his car was a "but for" cause of the shooting, but it was not the proximate (legal) cause. The shooting occurred only after he gun was stolen, and then found days later, and then randomly fired, accidentally striking decedent. The connection between the ranger's alleged negligence and the harm was too remote and tenuous to give rise to liability as a matter of law. Given that holding, the court did not reach the question of duty. V

Workers' compensation exclusivity did not bar wrongful death claim based on take-home Covid-19 exposure.

See's Candies, Inc. v. Superior Court of California for County of Los Angeles (2021) 73 Cal.App.5th 66

Wife contracted COVID-19 at work and brought it home to her husband, who then contracted a fatal case of the disease. Decedent's heirs brought suit against wife's employer, asserting that it was negligent in failing to take adequate safety precautions. Defendant demurred to the complaint, arguing that the claims were derivative of injury to the wife, and were therefore barred by workers' compensation exclusivity. The trial court overruled defendant's demurrer and defendant sought a writ of mandate.

The Court of Appeal (Second Dist, Div. One) denied the petition. Defendant's harm did not derive from harm to his wife; he suffered a direct injury (death) that existed independently from whether his wife suffered harm from the virus. Simply because wife brought home the harmful agent from the workplace does not make husband's exposure to that harmful agent derivative of any injury to wife. That is not the type of spousal/take-home injury that is covered by workers' compensation. Because the issues were not raised in the petition, the appellate court expressed no opinion on whether plaintiffs could establish defendant owed a duty of care to decedent. V

Municipality did not have duty to maintain alley in as good a condition as it must keep sidewalks.

Martinez v. City of Beverly Hills (2021) 71 Cal.App.5th 508

Plaintiff tripped on a two-inch divot in the asphalt around a drain in a back alley. She sued the city for a dangerous condition of public property. The defendant moved for summary judgment. It explained that it hires contractors every two years to inspect alleyways to prioritize which need resurfacing, and it performs repairs in response to public complaints, but does not otherwise inspect and maintain alleyways. The defendant argued that such a program was sufficient given the purpose of alleys is for access, not walking, and that it had received no complaints about the particular divot at issue. Thus, defendant argued, it did not have constructive or actual notice of the divot and could not be liable a dangerous condition of public property. The trial court agreed and granted the motion.

The Court of Appeal (Second Dist., Div. Two) affirmed. "Because alleys, unlike sidewalks, are designed and primarily used for purposes other than walking, and because the cost to municipalities of inspecting alleys with the same vigilance as inspecting sidewalks would be astronomical relative to the benefit of doing so, we hold that what is an obvious defect in the condition of an alley is not the same as for a sidewalk." A two-inch divot in an alley is not an obvious danger that could give rise to municipal liability, even if such a divot might be a dangerous condition of a sidewalk. V

Primary assumption of risk doctrine does not apply to relieve sports venues of the need to take reasonable steps to protect spectators.

Mayes v. La Sierra University (2022) 73 Cal.App.5th 686

Plaintiff attended her college-age son's baseball game. She sat near the dugout in a place with no protective netting and no warning about the absence of such netting. She was struck in the face by a foul ball. She sued the college for her injuries. The college moved for summary judgment on primary assumption of risk grounds, arguing that getting hit by a foul ball is an inherent risk of being a baseball spectator and that the college did nothing to increase that inherent risk. The trial court granted the motion.

The Court of Appeal (Fourth Dist., Div. Two) reversed. Following *Summer J. v. United States Baseball Federation* (2020) 45 Cal. App.5th 261, and rejecting the "Baseball Rule" under which spectators assume the risk of injury from foul balls if they sit in unscreened seats, the court held that sports venues have a duty to take reasonable steps to protect spectator safety if they can do so without altering the nature of the sport.

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But see *Mubanda v. City of Santa Barbara* (2022) __ Cal.App.5th __ [2022 WL 202814][Because stand-up paddle boarding is a hazardous recreational activity and the risk of falling off and drowning is in inherent in the activity, public entity had no duty to protect decedent from that risk; expert declaration stating legal conclusion that public entity's conduct was an "extreme departure" from the ordinary standard of care was insufficient to create a triable issue on gross negligence].

School administrators have a common law duty to protect students from sexual abuse where they knew or should have known the teacher posed a risk, but actual knowledge of facts giving rise to a suspicion of abuse are required for a claim under the Child Abuse and Negligent Reporting Act.

Doe v. Lawndale Elementary School Dist. (2021) 72 Cal.App.5th 113

Plaintiff was sexually abused by a teacher. She sued the school district for negligence and breach of the mandatory duty to report suspected abuse under the Child Abuse and Neglect Reporting Act (CANRA). The district moved for summary judgment on the ground it had no duty to protect plaintiff from abuse where it had no advanced knowledge that the teacher had any propensity to commit abuse. The trial court granted the motion.

The Court of Appeal (Second Dist., Div. Seven) reversed as to the negligence claim, but affirmed as to the CANRA claim. Schools have a special relationship with their students that give rise to "a duty to protect students from sexual abuse by school employees, even if the school does not have actual knowledge of a particular employee's history of committing, or propensity to commit, such abuse." Whether the school's failure to discover the abuse fell below the standard of care was a jury question. However, "a plaintiff bringing a cause of action ... under CANRA must prove it was objectively reasonable for a mandated reporter to suspect abuse based on the facts the reporter actually knew, not based on facts the reporter reasonably should have discovered." Where, as here, there was no evidence any of the school administrators were aware of any of the facts about the plaintiff's interactions with the abusive teacher that the plaintiff claimed should have given rise to a reasonable suspicion of abuse, the administrators were entitled to summary judgment on the failure to report claim.

See also *Herrera v. Los Angeles Unified School District* (9th Cir. 2021) [2021 WL 5647960] [In 42 U.S.C. § 1983 action alleging school district failed to protect their son from drowning on a field trip, court would apply a subjective standard to determining if the school official acted with deliberate indifference; because there was no evidence the school official had any subjective knowledge the son was in immediate danger, district court properly granted summary judgment for district]

Providing brief in-home medical care did not create a custodial relationship for purposes of the Elder Abuse Act.

Oroville Hospital v. Superior Court of Butte County (2022) __ Cal.App.5th __ [2022 WL 224494]

The decedent in this case wase entirely dependent on her granddaughter for her basic care needs. Defendants were hired on 10 occasions to provide in-home nursing services, tending to a wound. Decedent was hospitalized for the wound, and later died from complications. Plaintiffs sued the in-home caretakers, alleging several claims including violation of the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA). Defendants moved for summary adjudication, arguing that they did not have a substantial caretaking or custodial relationship with the decedent, a prerequisite for recovery under EADACPA. The trial court denied the motion, and defendants sought a preemptory writ of mandate.

The Court of Appeal (Third Dist.) granted the writ. Providing medical care to an adult who is dependent as a general matter is not itself sufficient to create a caretaker relationship for purposes of EADACPA. Instead, the defendant must assume significant responsibility of one or more basic needs that a competent adult could manage without assistance. Here, medically supervised wound care did not constitute a "basic need" of the decedent. Thus, the specific responsibilities assumed by the defendants did not give rise to a substantial caretaking or custodial relationship, especially where decedent's granddaughter had been providing all basic care needs.

Physician's assistant was entitled to invoke MICRA noneconomic damages limitations even if assistant was not adequately supervised by physician as required by law.

Lopez v. Ledesma (2021) __ Cal.5th __.

Maria Lopez sued two physician assistants for wrongful death, alleging they had failed to diagnose her infant daughter's illness. The trial court found that physician assistants were treating patients without supervision in violation of physician supervision regulations, and negligently failed to diagnose her daughter's condition. An award of $4.25 million in noneconomic damages was reduced to $250,000 under the MICRA cap (Civ. Code., § 3333.2). Lopez appealed, contending the MICRA cap was inapplicable to the physician assistants because they were acting outside the scope their license restrictions. A Court of Appeal (Second Dist., Div. Two) majority affirmed the application of MICRA, holding the physician assistants acted within the scope of their licenses.

The Supreme Court affirmed the Court of Appeal. MICRA "applies to a physician assistant who has a legally enforceable agency

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relationship with a supervising physician and provides services within the scope of that agency relationship, even if the physician violates his or her obligation to provide adequate supervision." Requiring the supervision to be adequate " 'would threaten not only [MICRA's] goal [of controlling medical malpractice insurance costs] but also the broader purpose of MICRA.' "

See also *Mitchell v. Los Robles Regional Medical Center* (2021) 71 Cal.App.5th 291 [MICRA statute of limitations applied to claim that nurse failed to help plaintiff safely walk to the bathroom.]

A tort judgment based solely on a claimed breach of contract is invalid as a matter of law.

Drink Tank Ventures LLC v. Real Soda in Real Bottles, Ltd. (2021) 71 Cal.App.5th 528

The plaintiff business sued the defendant business for intentional interference with prospective economic advantage. By the time the case when to the jury, the plaintiff's case was based solely on a claim that the defendant had breached a nondisclosure agreement. The jury found for the plaintiff. Although the defendant had not objected to the validity of plaintiff's legal theory before the case went to the jury, the defendant appealed, arguing that the judgment had to be reversed because the alleged breach of contract, without more, was not "wrongful conduct" capable of supporting a tort claim.

The Court of Appeal (Second Dist., Div. Two) reversed the judgment with directions that judgment be entered for the defendant. Supreme Court precedent has long established that a breach of contract is not a tort, absent some independently tortious conduct. "[A] trial court ... lacks subject matter jurisdiction to enter judgment for allegedly tortious conduct, fashioned by common law, that our Supreme Court has determined is not tortious." Moreover, "[b]ecause a party's conduct cannot confer subject matter jurisdiction upon a court, the defendant's delay in objecting is irrelevant."

INSURANCE

COVID-19-related business losses are not covered by standard commercial property policies.

Inns-by-the-Sea v. California Mutual Insurance Co. (2021) 71 Cal.App.5th 688

Hotels that closed in response to COVID-19 stay-at-home orders filed this lawsuit seeking coverage under their first-party property policy seeking for their lost business income. The policy provided that the carrier would pay for (1) "the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration'. The 'suspension' must be caused by direct physical loss of or damage to property at [Inns'] premises;" and (2) "the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss." The carrier moved to dismiss the lawsuits, arguing that COVID-19-related closures did not involve "direct physical loss or damage to property." The trial court sustained the insurer's demurrer to the hotels' coverage lawsuit without leave to amend.

The Court of Appeal (Fourth Dist., Div. One) affirmed. The hotels' business losses were caused by the County-wide shut-down orders, not any physical damage to the property. Nor was the mere loss of use of the property equivalent to direct physical loss. The fact that the policies extend coverage for the time to repair, rebuild or replace the property reinforced that holding, since those activities occur only when there has been a physical loss. Further, the absence of a virus exclusion from the policy did not indicate that coverage was intended under the circumstances. The insured cannot "rely on the absence of an exclusion to create an ambiguity in an otherwise unambiguous insuring clause." Finally, the Civil Authority coverage also did not apply because the shut-down orders were issued to limit the spread of the virus, not because of any physical loss of or damage to property.

See also *Mudpie, Inc. v. Travelers Casualty Insurance Company of America* (9th Cir. 2021) 15 F.4th 885 [same].

Plaintiff could not renege on a policy limits settlement that had been timely accepted by the insurer, even though the insurer's post-acceptance proposed release language was broader than the plaintiff had agreed to.

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

Counsel for plaintiff in a vehicle accident case wrote to the defendant's insurer offering to settle for policy limits, on condition the insurer would provide a copy of the insurance policy face page, a sworn declaration confirming the policy limits, and a written acceptance and payment within 21 days. The offer stated that the insurer could require a release of all bodily injury claims as a condition of settlement. The insurer returned a written acceptance, declaration of policy limits, and a check for policy limits within the set time period, noting that the check should not be cashed until the release was signed. The release contained language covering both property damage and bodily injury claims. Plaintiff's counsel responded that because the

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release contained a new term (release of property claims), the insurer's acceptance was merely a counteroffer. Plaintiff then filed a personal injury suit. The insurer responded by filing its own lawsuit for breach of contract. The trial court granted summary judgment for insurer, holding that plaintiff had breached the parties' settlement by filing suit.

The Court of Appeal (Sixth Dist.) affirmed. A reasonable person looking at the parties' communications would conclude that an agreement had been reached, and the release was merely part of the effort to formalize the agreement in writing. Failure to complete a formal writing does not negate the existence of an agreement. While the plaintiff "was under no obligation to sign a release that was inconsistent [with] what he agreed to," *"a proposed writing that does not accurately reflect the terms of the agreement does not unwind the entire deal.* The contract formed by the parties' offer, acceptance, and consideration is still enforceable."

See also *Carachure v. Scott* (2021) 70 Cal.App.5th 16 [Trial court properly granted nonsuit after opening statements on defendant's affirmative defense that plaintiffs' claims had been settled pretrial in response to plaintiff's policy limits demand, despite plaintiffs' arguments that the settlement had not been accepted.]

ANTI-SLAPP

Private communications about the development of a creative work were not communications contributing to a public conversation about a matter of public interest sufficient to trigger protection under the anti-SLAPP law.

Musero v. Creative Artists Agency, LLC (2021) 72 Cal.App.5th 802

A writer sued his talent agents for stealing his script idea for a television show about the Justice Department and developing the show with a more established writer. The agents filed an anti-SLAPP motion, arguing that development of a television show is protected activity and is a matter of public interest, especially where the Justice Department is concerned. They further argued that the writer could not prove misappropriation because the evidence showed that the other writer developed his similar show independently. The trial court denied the motion, agreeing that development of a television show is protected activity concerning a matter of public interest (prong one of the anti-SLAPP analysis), but concluding that the writer had demonstrated minimal merit to his misappropriation claim given the agents' access to his script and the shows' substantial similarity (prong two of the anti-SLAPP analysis).

The Court of Appeal (Second Dist., Div. Seven) affirmed on different grounds. While it is well established that development of a television show is protected activity, whether the public interest requirement of the anti-SLAPP statute is satisfied requires examination of the context in which the statements were made. Here, although the subject matter of the show concerned a matter of public interest, the writer's claim was based on his agents' private communications with a different writer to develop the show; those conversations did not contribute to any public discourse. The agents had therefore failed to meet their burden under the first prong of the anti-SLAPP statute to show that the statute applied. Their motion was properly denied.

See also *Xu v. Huang* (2021) 73 Cal.App.5th 802 ["[A]lleged slander of a competitor in a private setting to solicit business is neither speech in furtherance of the exercise of the constitutional right of petition nor the constitutional right of free speech in connection with a public issue"].

When a plaintiff voluntarily dismisses a lawsuit in response to an anti-SLAPP motion that reserved the right to later seek fees, the trial court can defer consideration of the anti-SLAPP motion's merits until the defendant files its fee motion.

Catlin Insurance Company v. Dank Meredith Law Firm, Inc. (2022) 73 Cal.App.5th 764

In this dispute between an insurer and a third-party claimant's attorneys over an alleged duplicative insurance payment, the defendant attorneys filed an anti-SLAPP motion stating that they intended to seek fees by a separate motion. The insurer voluntarily dismissed the complaint, thus mooting the motion. The attorneys requested that the trial court nonetheless rule on the anti-SLAPP motion as a "predicate" to going to the trouble to bring a fee motion. The trial court refused, noting that the attorneys could have brought their request for fees with their anti-SLAPP motion, but they did not. The trial court explained that the court would not do the extra work required for ruling on the anti-SLAPP motion's merits until there was a reason to do so – namely, an actual, good-faith request for attorneys fees.

The Court of Appeal (First Dist., Div. Four) affirmed the trial court's decision not to address the merits of the moot anti-SLAPP motion prior to having to rule on any motion for fees. Whether the anti-SLAPP motion itself should have been granted was mooted by the dismissal of the complaint, and the question of entitlement to attorneys fees was not ripe in the absence of any pending motion for fees. The attorneys were effectively seeking an improper advisory opinion. Further, the attorneys' "proposed procedure of affording anti-SLAPP movants in a voluntarily dismissed case a free preview of their entitlement to fees before choosing to make any request for fees runs contrary to the countervailing policy favoring those targeted with frivolous anti-SLAPP motions. In the procedural circumstances we have here, the interests underlying the anti-SLAPP statute are optimally

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balanced by ensuring that an anti-SLAPP movant must decide whether to proceed with a standalone request for fees in the face of uncertainty about whether the court will award fees to it as the prevailing party, or rule against it because its anti-SLAPP motion was frivolous and taken in bad faith."

ARBITRATION

The Federal Arbitration Act does not preempt California Labor Code section 432.6, but it does preempt laws attempting to criminalize violation of that statute.

Chamber of Commerce of United States v. Bonta (9th Cir. 2021) 13 F.4th 766

The Chamber of Commerce and other business groups filed a lawsuit seeking to enjoin enforcement of California Labor Code section 432.6. That section declares any employer's attempt to force an employee to waive his or her rights to file a lawsuit raising California Fair Employment and Housing Act claims as a condition of employment to be an unfair labor practice. Further, under Labor Code section 433 and California Government Code section 12953, violation of Labor code section 432.6 constitutes a misdemeanor. The business groups claimed that these statutes were preempted by the Federal Arbitration Act. The district court agreed and granted the injunction.

The Ninth Circuit reversed in part. Labor Code section 432.6 does not discriminate against arbitration agreements or invalidate them after they have been executed; it is aimed at stopping unfair conduct that occurs prior to execution of the agreement to ensure that the agreements are consensual. Insofar as its regulates pre-agreement conduct, it does not conflict with the FAA. However, imposing criminal penalties for violating the statute would stand as an obstacle to the FAA's liberal favoring of arbitration agreements because it would punish employers for having entered into such an agreement.

The threshold question of whether an arbitration agreement was formed cannot be delegated to the arbitrator.

Ahlstrom v. DHI Mortgage Company, Ltd., L.P. (9th Cir. 2021) 21 F.4th 631

The plaintiff brought employment claims against his employer, and the employer moved to arbitrate per an agreement between the plaintiff and his employer's parent company. The plaintiff opposed the motion on the ground no valid arbitration agreement had been formed. The district court nonetheless granted the motion, reasoning that the plaintiff's argument had to be resolved by the arbitrator under the contract's provision that the arbitrator would have "exclusive authority to resolve any dispute relating to the formation, enforceability, applicability, or interpretation" of the agreement.

The Ninth Circuit reversed. Joining all other circuits to address this issue, the Ninth Circuit held that issues of formation cannot be delegated to an arbitrator no matter how clear and express the agreement. If an arbitration agreement was never formed, there would be no legal basis upon which to compel arbitration of any issue, including formation. Here, there was no valid agreement to arbitrate between the parties because the agreement was between the plaintiff and his employer's parent company, and the subsidiary – as a separate legal entity – lacked standing to enforce the agreement.

See also *Banc of California, National Assn. v. Superior Court* (2021) 69 Cal.App.5th 357 [Trial court, not arbitrator, must decide threshold question of whether an agreement to arbitrate a dispute over a loan existed where the parties' agreement to arbitrate was in a document separate from the loan documents]

See also *Najarro v. Superior Court* (2021) 70 Cal.App.5th 871 [Where an arbitration agreement purports to delegate issues of enforceability to the arbitrator, but contains a severability clause that refers to a court's ability to excise unconscionable provisions, the delegation clause is rendered ambiguous and a court may properly determine the enforceability issue]

CLASS ACTIONS

Trial courts have inherent authority to strike PAGA claims that it determines will be unmanageable at trial.

Wesson v. Staples The Office Superstore, LLC (2021) 68 Cal.App.5th 746

The plaintiff filed this action alleging that Staples had misclassified him and 345 other general managers as exempt employees. His claims included a representative Private Attorneys General Act (PAGA) claim for over $30 million in civil penalties. Staples moved to strike the PAGA claim on the ground its principal defense (that it properly classified the general managers as exempt) would require individualized proof and that proceeding with the claim as a representative action would be unmanageable. The plaintiff argued in response that trial courts lack authority to impose a manageability requirement on PAGA actions and refused to provide a trial plan despite the trial court's request for one. The trial court granted the motion to strike.

The Court of Appeal (Second District, Div. Four) affirmed. Drawing on authorities concerning a court's inherent authority to manage litigation, "including ensuring the manageable of representative claims" in the class action and Unfair Competition

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Law context, the court concluded that "courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike claims that cannot be rendered manageable." Further, "as a matter of due process, defendants are entitled to a fair opportunity to litigate available affirmative defenses, and a court's manageability assessment should account for them." Finally, given "plaintiff's lack of cooperation with the trial court's manageability inquiry, the court did not abuse its discretion in striking his PAGA claim as unmanageable."

See also *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56 [In approving PAGA settlement, trial court properly considered whether settlement was "fair, adequate, and reasonable" as well as meaningful and consistent with the purposes of PAGA, and trial court's approval of the settlement would be reviewed for abuse of discretion] V

Trial courts should scrutinize release language in class action settlements to ensure it is not overbroad.

Amaro v. Anaheim Arena Management, LLC (2021) 69 Cal.App.5th 521

The parties reached a settlement in this wage and hour class action based on claims that were also asserted in other pending lawsuits. A plaintiff from one of the other pending actions intervened and objected to the settlement. She argued that the settlement improperly sought to resolve and release Fair Labor Standards Act claims without obtaining the class members' written consent, and that the settlement improperly released PAGA claims outside the statute of limitations period for the named plaintiff's own claims. She further argued that the settlement was the product of a collusive "reverse auction" in which the defendant settled the weakest case to preclude the stronger ones. The trial court approved the settlement.

The Court of Appeal (Fourth Dist., Div. Three) reversed on the narrow ground that the release was overbroad as drafted and needed revision. Cautioning that "courts must remain vigilant and ensure that class releases do not extend to claims that are beyond the scope of the allegations in the complaint" and that "[r]eleases must be appropriately tethered to the complaint's factual allegations," the court held that here, the release's language covering "'potential claims ... in any way relating to the' facts [and theories] plead in the complaint'" was too broad. It both improperly "cause[d] the release to unreasonably extend to claims that may only be tangentially related to the allegations in [the settling plaintiff's] complaint," and improperly suggested that future claims based on the same legal theories but wholly different facts might be precluded. The court rejected the objector's other arguments against the settlement, however. The settlement term providing that any class members who cashed their settlement check would waive their FLSA claims was not improper; the FLSA requires plaintiffs to "opt-in" in writing to become plaintiffs in an FLSA action, but it does not require them to "opt in" in writing to release FLSA claims as part of a settlement. Next, it is not per se unlawful for a plaintiff to release PAGA claims outside the statute of limitations that would apply to the plaintiff's own claim, although courts may consider that in evaluating whether the settlement is fair. Finally, there is nothing per se wrong with a "reverse auction." The trial court's obligation to review class action settlements for fairness ensures any settlement is reasonable and free of collusion. V

HEALTHCARE

The reasonable and customary value of emergency medical services is properly measured by what a hypothetical willing buyer would pay a hypothetical willing seller.

Long Beach Memorial Medical Center v. Kaiser Foundation Health Plan, Inc. (2021) 71 Cal.App.5th 323

Under the Knox-Keen Act, hospitals must provide emergency services necessary for stabilizing any patient who presents at the hospital. The hospitals are then entitled to reimbursement for the emergency services from the patients' insurers either at a previously- agreed contractual rate, or, absent a contract, in an amount equal to the reasonable and customary value of the services. In this case, the plaintiff hospitals billed Kaiser for emergency services provided to Kaiser's enrollees. The parties had no prior contract. Kaiser paid about half of the billed amount after determining that amount was the reasonable value of those services. The hospitals brought a quantum meruit action seeking additional reimbursement, and an unfair competition law claim alleging that Kaiser intentionally underpaid and should be liable for punitive damages. The trial court granted summary adjudication for Kaiser on the UCL claim. At trial, after being instructed that the reasonable value was measured by the price that a "hypothetical willing buyer" would pay a "hypothetical willing seller." The jury found that Kaiser had paid the hospitals the reasonable value.

The Court of Appeal (Second Dist., Div. Two) affirmed. First, there is no tort duty requiring health plans to avoid paying less than the reasonable and customary value of medical services. There would be no substantial social benefit from recognizing such a duty since the traditional quantum meruit theory of recovery already provided adequate relief and in fact, recognizing a tort duty would create a strong incentive for health plans to overcompensate healthcare providers, thus undermining the Knox-Keene Act's purpose of ensuring low-cost health care. Second, the trial court properly instructed the jury that the reasonable and customary value was what a hypothetical willing buyer would pay a hypothetical willing seller. The reasonable value did not have to be determined with respect to any prior actual reimbursement rates. V

LABOR & EMPLOYMENT

Parent company was joint employer with subsidiary where the parent controlled the employee's wages and working conditions.

Medina v. Equilon Enterprises, LLC (2021) 68 Cal.App.5th 868

The plaintiff gas station worker brought this putative wage and hour class action against both the gas station operator and Equation Enterprises (a.k.a. Shell Oil), the gas station operator's parent company. He alleged that both Shell (parent company) and the gas station operator (subsidiary) were his joint employers. Relying on two prior cases holding Shell was not the joint employer with its subsidiaries (*Curry v. Equilon Enterprises, LLC*(2018) 23 Cal.App.5th 289 and *Henderson v. Equilon Enterprises*, LLC(2019) 40 Cal.App.5th1111), Shell moved for summary judgment. The trial court granted the motion.

The Court of Appeal (Fourth Dist., Div. Three) reversed. Applying the *Martinez v. Combs* (2010) 49 Cal.4th 35 test of joint employer status – which turns on whether the purported employer (1) exercised control over wages, hours, or working conditions, directly or indirectly, or through an agent or any other person, or suffered or permiited the person to work, or engaged the person to work – the court held that Shell could be a joint employer in this case. Unlike in the prior cases, the plaintiff here adduced evidence that Shell could hire or fire him. Further, contrary to the discussion in the prior opinions, an entity can be a joint employer even if it does not have direct control over the employee. Here, Shell was able to dictate the subsidiary's employees' wages and hours. That was sufficient indirect control of the plaintiff's working conditions to give rise to joint employer status. ▼

Putative class members who volunteered for a nonprofit without expecting compensation were not employees under California law.

Woods v. American Film Institute (2021) 72 Cal.App.5th 1022

Plaintiff brought this putative class action against the American Film Institute (AFI), a 501(c)(3) tax-exempt organization, claiming that she and other volunteers for AFI's annual film festival were legally employees who were denied employee benefits including minimum wage and meal and rest breaks. In connection with plaintiff's motion for class certification, the trial court found that AFI could lawfully use volunteer labor and that determining who might qualify as an "employee" would require individualized proof from each class member. The trial court therefore denied class certification on the ground that individual issues would predominate over common ones.

The Court of Appeal (Second Dist., Div. Two) affirmed. While a person who works for a nonprofit with the expectation of payment may legally be an "employee' for purposes of wage and hours laws, volunteers for nonprofit entities are generally not "employees." AFI was not prohibited from using volunteer labor as a matter of law, so the claims that AFI violated labor laws by not providing employment benefits to its volunteers were not subject to generalized proof – rather, those claims would have to adjudicated individually, based on whether the individual had expected to be paid or was instead a true volunteer. The trial court therefore correctly denied class treatment. ▼

For Labor Code section 1102.5 retaliation claims, the employer bears the burden to show it would have taken an adverse employment action against a whistleblower employee for legitimate, independent reasons.

Lawson v. PPG Architectural Finishes, Inc. (2022) __ Cal.5th __ [2022 WL 244731]

The plaintiff complained to his employer that his supervisor was directing him to engage in unlawful conduct. He began receiving low performance scores and was eventually terminated. He filed claims of (1) wrongful termination in violation of public policy and (2) retaliation in violation of California Labor Code section 1102.5 (whistleblower protection). Applying *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802 [93 S.Ct. 1817, 36 L.Ed.2d 668], which requires the employee to demonstrate that an employer's proffered legitimate reason is a pretext for discrimination or retaliation, the federal court granted summary judgment for the employer, reasoning that the employee had not shown that the employee's poor performance reviews were a pretext. On appeal, the plaintiff argued that the evidentiary standard set forth in Labor Code section 1102.6 should apply to his Labor Code section 1102.5 retaliation claim. Under section 1102.6, "once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons." The Ninth Circuit certified the question to the California Supreme Court.

The California Supreme Court answered the question. Labor Code section 1102.6's burden-shifting framework, not the U.S. Supreme Court's decision in *McDonnell*, provides the evidentiary standard for whistleblower retaliation claims under California law. ▼

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 whether common law negligence and elder abuse claims may be preempted by the Medicare Act.

Quishenberry v. UnitedHealthcare (2021) 2021 WL 4272048 [nonpub. opn.], review granted January 5, 2022, case no. S271501

Plaintiff brought negligence, elder abuse, and other claims against UnitedHealthcare entities, which provided a Medicare Advantage plan to plaintiff's father. Plaintiff alleged that his father was prematurely discharged from a nursing facility associated with UnitedHealthcare, resulting in his death, even though medical practice and Medicare rules required that his father remain at the facility. Defendants demurred to the complaint on the ground that the Medicare Act preempted plaintiff's claims because the allegations involved defendants' "failure to administer properly the health care plan." The Court of Appeal (Second Dist., Div. Seven) affirmed, holding that because plaintiff's allegations required a determination of the amount of allowable Medicare benefits for skilled nursing care, his claims were preempted by the Medicare Part C preemption clause.

The Supreme Court granted review to decide whether claims for negligence, elder abuse, and wrongful death may be preempted under the Medicare Part C preemption clause (42 U.S.C. § 1395w-26(b)(3). V

Addressing whether, in a PAGA settlement approval process, a nonparty who is a plaintiff pursuing other related PAGA actions has standing to intervene or challenge a judgment following settlement approval.

Turrieta v. Lyft, Inc. (2021) 69 Cal.App.5th 955, review granted January 5, 2022, case no. S271721

Lyft agreed to settle wage and hour claims asserted by one of several plaintiffs under the Private Attorneys General Act (PAGA). When the plaintiff moved for approval of the settlement, other plaintiffs pursuing their own PAGA actions against Lyft attempted to intervene and object to the settlement. The trial court implicitly denied intervention, and it approved the settlement as fair, adequate, and reasonable. In so doing, the trial court rejected the objectors' argument that that Lyft had engaged in an improper "reverse auction" of the PAGA claims. The objectors sought to appeal from the denial of intervention, as well as the later denial of their motions to vacate the resulting judgment. The Court of Appeal (Second Dist., Div. Four) affirmed the judgment on the ground the plaintiffs lacked standing. While PAGA plaintiffs are deputized to pursue the State's claims, the State remains the real party in interest. PAGA plaintiffs therefore lack a personal interest the PAGA claim that would confer standing on them to move to vacate a judgment or challenge a judgment on appeal of another, parallel PAGA claim. As a result, the trial court's approval of the settlement on the merits, in which the trial court had expressly rejected the objectors' reverse auction allegations as unfounded, remained intact.

The Supreme Court granted review, limited to the following issue: Does a plaintiff in a representative action filed under the Private Attorneys General Act (Lab. Code, § 2698, et seq.) (PAGA) have the right to intervene, or object to, or move to vacate, a judgment in a related action that purports to settle the claims that plaintiff has brought on behalf of the state? V

Addressing whether equitable tolling applies to requests to vacate arbitration awards.

Law Finance Group, LLC v. Key (2021) 67 Cal.App.5th 307, review granted November 10, 2021, case no. S270798

Defendant borrowed $2.4 million from litigation financing firm Law Finance Group (LFG) to finance a probate action. After prevailing in the action, defendant repaid the loan principal but refused to pay interest, claiming that the loan violated the California Financing Law. LFG initiated an arbitration in which the panel found some loan terms invalid but otherwise enforced the agreement and issued an award against defendant which LFG then filed a petition to confirm. After the parties communicated for several months about the timing of future actions, defendant filed (1) a petition to vacate the award, 130 days after service of the modified award, and (2) a response to LFG's petition to confirm in which she also requested the award be vacated, 139 days after service of the modified award. The Court of Appeal (Second Dist, Div. Two) held that defendant's requests to vacate were untimely under Code of Civil Procedure sections 1288 and 1288.2, which require a request to vacate be filed within 100 days of service of the award.

The Supreme Court granted review of the following issue: Does equitable tolling apply to the 100-day deadline in Code of Civil Procedure section 1288.2 to serve and file a request to vacate an arbitration award in response to a petition to confirm the award? V

Editor's note: Remember this one? Just one of the many useful tips circulating on ASCDC's listserv!

"Well, I Declare!"

Lessons on Declarations and Their Limits

Don Willenburg

Defense colleagues,

The recent decision, *Gamboa v. Northeast Community Clinic* (11/30/21 2d Dist. Div. 7) 72 Cal.App.5th 158, is a "twofer." It has a valuable general evidentiary lesson for all litigators regarding declarations. And it has guidance in the specific context of motions to compel arbitration.

The Clinic's HR director Lopez submitted a declaration supporting a motion to compel arbitration to the effect that "as part of Gamboa's employment agreement, Gamboa had signed an arbitration agreement." The declaration attached the agreement, which appeared to be signed by an employee.

The employee declared she did not recognize the onboarding documents and had she known about the arbitration provisions she would not have signed.

Despite the apparently signed agreement, the trial court ruled against arbitration, and the Court of Appeal affirmed. How did this happen?

The general lesson: standard declaration language is inadequate to establish foundation

"The Clinic presented no evidence that Gamboa saw or signed the arbitration agreement because the court sustained Gamboa's objections to the Clinic's proffered evidence." The trial court ruled that "Lopez did not provide the requisite preliminary facts to show she had personal knowledge about what she said" on those topics, even though the declaration contained a recitation common to many declarations you may have seen or even drafted.

"Lopez's boilerplate sentence, 'If called as a witness I could and would competently testify under oath to the above facts which are personally known to me,' is not sufficient to establish personal knowledge. (*Snider v. Snider* (1962) 200 Cal.App.2d 741, 754 ["'Where the facts stated do not themselves show it, such bare statement of the affiant has no redeeming value and should be ignored.'"].)" (Plus, isn't she already testifying under oath, and is anyone "competent" to testify as to their own competence?)

Lesson: give more details about the basis for the declarant's personal knowledge. "I was there when she signed the papers" would be optimal. Do you have the right declarant? Foundation is a matter of personal knowledge, not title.

If the other side challenges whether your declaration has sufficient foundational facts, consider filing a supplemental declaration including such facts. That may not work on a motion for summary judgment with its specific timing issues but may well be accepted in other motion practice.

Contrast the standard boilerplate with this approach for a mundane "attorney authenticating" declaration. "I am an attorney at ***, counsel of record for ***, and one of the attorneys chiefly responsible for this representation. In that capacity I am familiar with the discovery exchanged between the parties, including the demands and responses attached as exhibits, and all the other matters contained in this declaration." Similar attention to detail in a non-attorney declaration could prevent the Gamboa result from happening to you.

The specific lesson: tough to reverse a decision denying arbitration

Even worse for this employer, the Gamboa court would have affirmed anyway. "Even if the court had admitted Lopez's declaration and the arbitration agreement into evidence, those documents would not have compelled a finding in the Clinic's favor as a matter of law as required for a reversal."

This is because of a tough standard of review on appeal. Where the decision "is based on the court's finding that [the party seeking arbitration] failed to carry

Continued on page 22

its burden of proof, the question for the reviewing court is whether that finding is erroneous as a matter of law ... Specifically, the question becomes whether appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." In this case, the appellant employer had at most a "she said / she said" conflict in the evidence – very contradicted and impeached. (See also *Bannister v. Marinidence Opco, LLC* (2021 1st Dist. Div. 5) 64 Cal.App.5th 541 [whether employee e-signed arbitration agreement is a question of fact, and conflicting evidence will not justify reversal where trial court weighed testimony and evaluated credibility in denying arbitration]; *Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836 [denial of arbitration affirmed where plaintiff did not recall signing, and employer did not prove by a preponderance of the evidence that the electronic signature was authentic].) Ties go to the challenger.

"In sum, once Gamboa produced evidence challenging the authenticity of the purported arbitration agreement, the Clinic was required to rebut the challenge by establishing by a preponderance of the evidence that the agreement was valid. The Clinic did not have to authenticate Gamboa's signature on the arbitration agreement. The Clinic could have met its burden in other ways, including a declaration from the Clinic's custodian of records. But proferring no admissible evidence was insufficient."

Don is Chair of the Amicus Committee of ADCNCN, and chair of the appellate department at Gordon Rees Scully Mansukhani, LLP in Oakland.

Don Willenburg

Jan Roughan
BSN, RN, PHN, CRRN/ABSNC, CNLCP®, CCM

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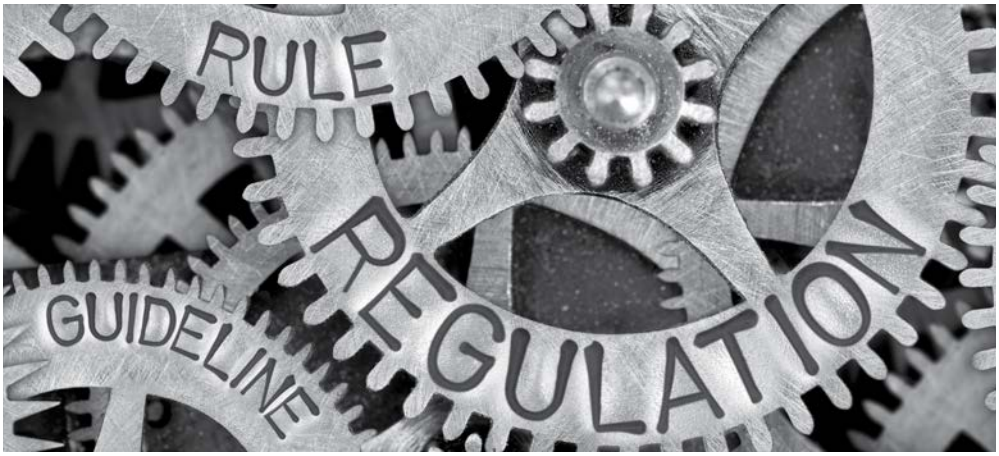

If You Want to Play, You've Got to Know the Rules!

Christopher F. Johnson

As many of you know, the Judicial Council has amended a number of California Rules of Court with an effective date of January 1, 2022. Here is a summary of some of the major changes which may affect you and your practice.

Depositions

Rule 3.1010 (a)(3) now allows any attorney of record to be physically present at the location of the deponent as long as written notice of such appearance is served by personal delivery, email, or fax, at least five court days before the deposition. This change certainly recognizes the fact that in order to fully evaluate a deponent's credibility and potential effect upon a jury, there is no substitute for in-person viewing. While not every deposition will require an attorney to be physically present at the deponent's location (a party's attorney should exercise their good judgment on a case by case basis), it would be a good idea to diary your calendar accordingly so that timely notice is given.

Rule 3.1010(a)(3) also allows an attorney for the deponent to be physically present with the deponent without notice. Personally, I believe it's a good idea for a deponent's attorney to *always* be physically present at the location of the deponent's deposition. Necessary conferences with the deponent when questions arise are best handled in person rather than through a computer screen. And first-time deponents will also feel much more comfortable if their attorney is physically present with them during the process.

Rule 3.1010(d), which previously allowed a nonparty deponent to appear by telephone, videoconference, or other electronic means with court approval, has been stricken. In addition, it is no longer required that the deponent be sworn in the presence of the deposition officer or by other means stipulated to by the parties or ordered by the court.

Remote Proceedings

The Rules of Court regarding Remote Proceedings are quite extensive. While it's not possible to set forth all of the details in this article, some important changes are summarized as follows:

Rule 3.672 was adopted to promote greater consistency on this topic. This Rule applies from January 1, 2022 to July 1, 2023. Under this Rule, a court may require a party to appear in person at a proceeding (that includes evidentiary hearings and trials) in any of the following circumstances: 1) If the court determines an in-person appearance would materially assist in the determination of the proceeding or effective management/resolution of the case; 2) If the court lacks the requisite technology to conduct the proceeding remotely; or 3) If the court determines that an in-person appearance is necessary based upon the factors listed in CCP Section 367.75(b). In addition to this Rule, Local Court Rules can also prescribe procedures for conducting remote proceedings.

Rule 3.672(h) concerns Remote Appearances for an evidentiary hearing or trial. If a court intends to conduct an evidentiary hearing or trial remotely, it must provide notice in one of two ways: 1) By providing notice to all parties at least ten court days before the hearing or trial date, or 2) By local rule providing that certain evidentiary hearings or trials are to be held remotely. Oppositions to a notice of a remote proceeding for an evidentiary hearing or trial may be filed, and filing must take place at least five court days prior to the proceeding. In ruling on the Opposition, the court must consider the factors in CCP Section 367.75(b) and (f).

Make sure you read Rule 3.672 and all Local Rules regarding this topic so you have a complete understanding of your rights and remedies.

Signatures on Documents

Rule 8.75(a) now states that when a document must be signed under penalty of perjury, the document is deemed to have been signed by the declarant if filed electronically, provided that the declarant has signed the document with an electronic signature under penalty of perjury, or the declarant has physically signed a printed form of the document and makes that physically signed document available for review.

Bias

Standard 10.20(a) and (b) change the court's duty regarding bias from that

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of prohibition to prevention. Each judicial officer and judicial employee must now take affirmative action to prevent all who interact with the court from engaging in conduct that exhibits bias based upon age, ancestry, color, ethnicity, gener, gender expression, gender identity, genetic information, marital status, medical condition, military or veteran status, national origin, physical or mental disability, political affiliation, race, religion, sex, sexual orientation, socioeconomic status, and any other classification protected by federal or state law. The Advisory Committee Comment to this Standard suggests that preventing bias may involve encouraging judicial officers, employees and court users to report bias. How that reporting should occur, and what is to be done following a report of bias, is not explained.

Christopher F. Johnson

Chris Johnson is a partner at Morgenstern Law Group in Sausalito, and former president of the Association of Defense Counsel of Northern California & Nevada. Chris loves to play golf with his wife Linda, for whom he is happy to prepare her favorite martini olives, stuffed with Maytag blue cheese.

EDITOR'S NOTE: Check out more rule changes online at *https://www.courts.ca.gov/3025.htm*

For example, new electronic filing rules for the Courts of Appeal and California Supreme Court, effective January 1, can be found starting on page 20 at the link for the October 1, 2021 report, at *https://www.courts.ca.gov/documents/2021-10-01-rules-effective-01-01-2022.pdf.* Among other things, the Advisory Committee Notes are worth a read, explaining changes such as those to electronic signatures:

Subdivision (c)(10). The definition of electronic signature is based on the definition in the Uniform Electronic Transactions Act, Civil Code section 1633.2.

Subdivision (c)(11). The definition of secure electronic signature is based on the first four requirements of a "digital signature" set forth in Government Code section 16.5(a), specifically the requirements stated in section 16.5(a)(1)-(4). The section 16.5(a)(5) requirement of conformance to regulations adopted by Secretary of State does not apply to secure electronic signatures.

Excerpts reprinted with permission from LawnStarter; see link at the end of this article

"Best of" Wine Tasting Outside California

When you think of wine counties, wine tours and even award-winning wines, do you think of regions of Oregon, Washington State, Texas, or Arizona?

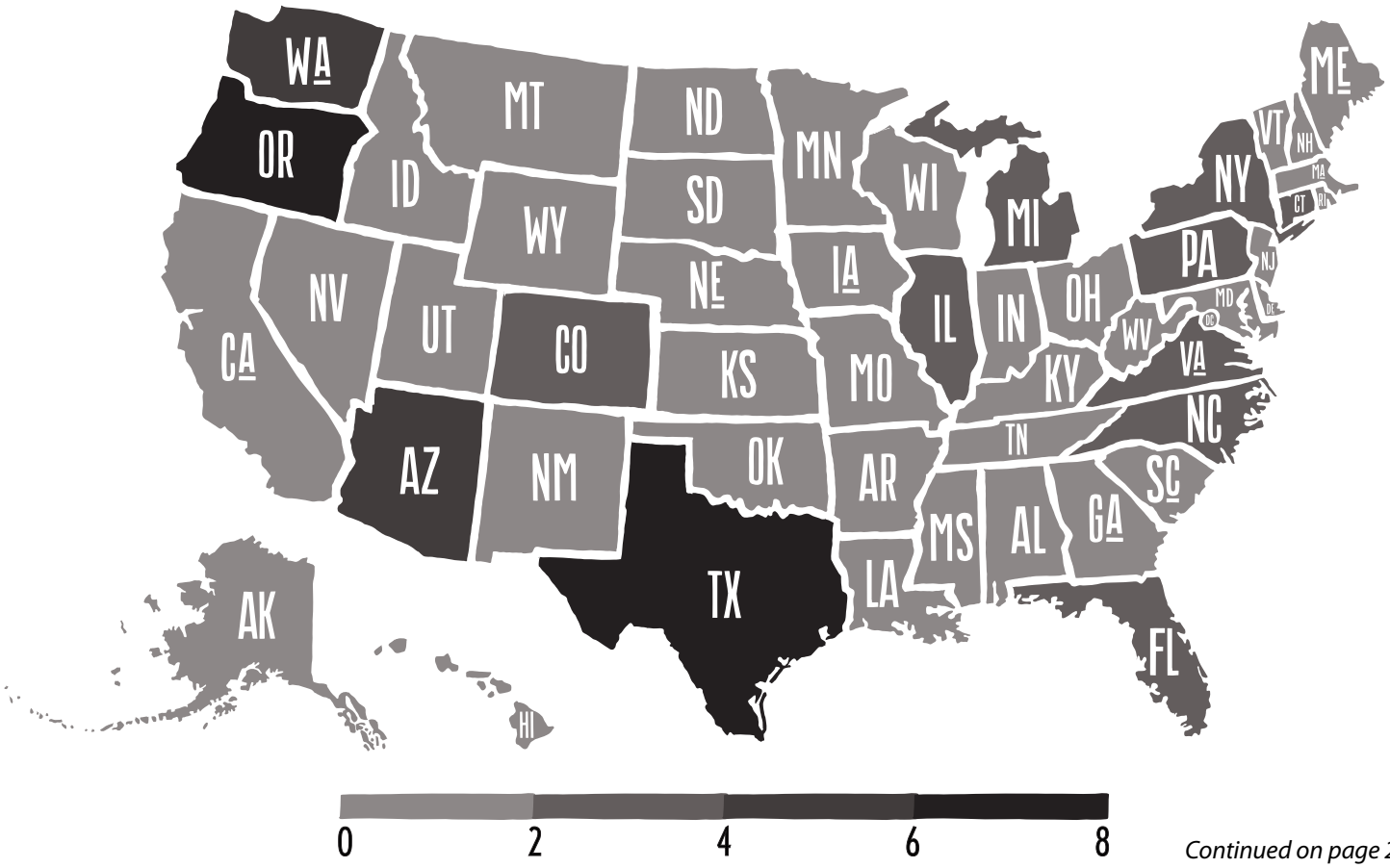
You should. LawnStarter analysis of the best wine counties outside California found wine counties dot the U.S. map.

To help rank the best wine counties across the United States, LawnStarter compared more than 1,048 counties across 18 key relevant metrics, including:

- Visitor accommodations (hotels, motels, and inn in the area)
- Number of winery tours
- Number of wine producers
- Tasting options
- Number of vineyards
- Number of award-winning wines
- Great reviews

Read on to discover the best wine counties outside California.

★ TOP 20 WINE COUNTIES OUTSIDE CALIFORNIA ★



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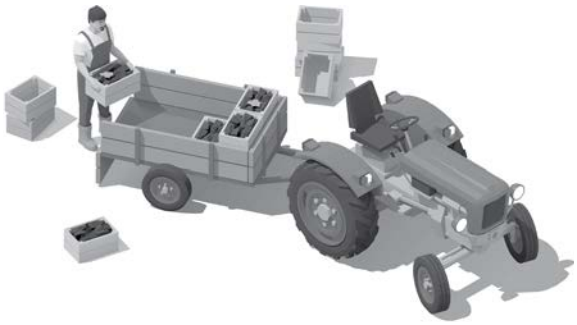
Best Wine Counties (Outside California)
by Awards, Wine Tours, Production

Number of Gold Medal Wines

1. Benton County, WA: 4
2. Yates County, NY: 2
3. Grays Harbor County, WA: 1
4. Pennington County, SD: 4
5. Douglas County, WA: 1



Counties with the Most Wine Producers

1. King County, WA
2. Yamhill County, OR
3. Walla Walla County, WA

Most Popular Wine Tours
(number of reviews / number of tours)

1. Kauai County, HI
2. Maui County, HI
3. Hawaii County, HI

Top 3 Counties with Over 20 Wine Tours
(best ratings for the wine tours)

1. Anderson County, SC
2. Clackamas County, OR
3. Storey County, NV

Top 5 Counties with the Most Accommodations

1. Miami-Dade County, FL
2. Cook County, IL
3. Broward County, FL
4. Maricopa County, AZ
5. King County, WA

Top 5 Counties with the Most Popular Accommodations

1. Clark County, NV
2. Cecil County, MD
3. New York County, NY
4. Honolulu County, HI
5. Washoe County, NV

Continued on page 29

Key Takeaways

Northwest is Best

Washington and Oregon dominate our top 10 Best Wine Counties Outside California list with two Washington counties and four Oregon counties in the top 10.

The South's Wine Belt Arizona

Arizona in the west has two counties in our top 20, Florida in the east has one county in those lofty ranks, and Texas is the buckle in this wine belt with three counties in the top 20.

Wine and Roses ... and Other Attractions

Some counties rank high because the attractions are as inviting as the wine. For example, you can sign up for at least 33 wine tours in Buncombe County, North County, including the author's favorite at the Biltmore Estate.

Methodology

California was excluded from our rankings because the Golden State is almost synonymous with wine-making. We wanted in this study to spotlight the best wine counties outside California.

To help you find the best counties outside California for wine lovers, LawnStarter compared 1,260 counties across the U.S. across four main dimensions: 1) Accommodations, 2) Wine tours, 3) Producers and Origin, 4) Award-winning wines.

LawnStarter evaluated these factors using 18 relevant metrics, which are listed, along with a great deal of additional information, at the more complete online version of this article at *https://www.lawnstarter.com/blog/studies/best-wine-counties-outside-california/*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The Defense Lawyer, by James Patterson and Benjamin Wallace

Reviewed by John A. Taylor, Jr.

Appellate lawyers are sometimes forged in the crucible of litigation, seeking an alternative to the stress of trials that stretch into weeks and months. Barry Slotnick started his career as an appellate lawyer – while in his 30s, Slotnick won an appeal for Mafia boss Joe Colombo in the United States Supreme Court. Slotnick descended from the lofty world of appeals into the trench warfare of trial litigation to become the most famous criminal defense lawyer of his day. At the height of his practice, he had an astounding twelve-year winning streak in seemingly unwinnable cases – culminating in the acquittal of Bernard Goetz, the so-called "Subway Vigilante" who had repeatedly confessed to shooting four young Black men in a New York subway car.

The highlights of Slotnick's storied criminal defense career are told in *The Defense Lawyer,* co-authored by James Patterson and Benjamin Wallace, and just published December 2021 by Little, Brown and Company. Patterson is purportedly the world's bestselling author of narrative fiction, and Wallace is a features writer for *New York Magazine* and a contributing editor at *Vanity Fair.* Combining their fiction and journalism talents, they've co-written a page-turning account about the actual cases handled by the greatest criminal defense lawyer of his age.

Slotnick graduated from NYU law school at age 20, and had to wait half a year before turning 21 and becoming eligible to take New York's bar exam. He started defending organized crime figures after becoming acquainted with the brother of Vincent "Chin" Gigante at a luncheonette near Greenwich Village where Slotnick lived. Chin approached Slotnick about defending his German Shepherd, who had bitten someone and was facing a hearing to determine whether the dog should be euthanized. Slotnick's defense strategy was brilliant in its simplicity. After the complaining witness and "arresting" officers testified, Slotnick took the dog out of the courtroom and then brought him back in with two other identical German shepherds. Slotnick asked the victim to identify the dog that had bitten her. When neither she nor the officers could do so, the judge dismissed the case.

Years later, Slotnick remembered that strategy when defending two Hasidic men who were charged with the assault and attempted murder of a young Black youth who had wandered into a Jewish section of Crown Heights at a time of great tension between Black residents and an Orthodox Jewish sect. Slotnick worried the case was going to end his winning streak, as the defendants were easily identifiable because of their red hair and beards. But just before the first eyewitness testified, Slotnick sought permission for his clients to sit in the gallery with other

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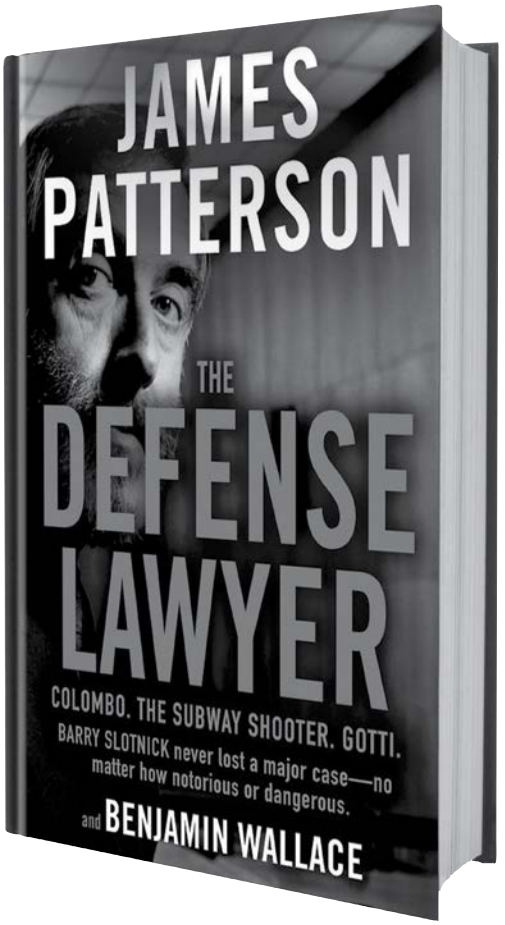


trial spectators. He then ushered in four dozen men – all with traditional Hasidic sidelocks, red hair, and red beards – to fill the pews around his clients. Once again, after none of the prosecution witnesses could pick his clients out of the group, Slotnick persuaded the jury to acquit both, arguing a mistaken identity defense bolstered by polygraph test results.

The Defense Lawyer is filled with similar stories, told in non-linear fashion between lengthy, yet fascinating, chapters detailing Slotnick's two most famous cases – the Bernard Goetz case, and that of John Carneglia, who was tried along with Mafia boss John Gotti for orchestrating the murder of his predecessor, Gambino boss Paul Castellano. Both trials are recounted from start to finish, with riveting details regarding pretrial investigation, jury selection, opening statements, witness testimony and cross-examination, closing arguments, and verdicts. The authors obviously had access to trial transcripts, and effectively used them in recounting the trials in spellbinding detail, supplemented by inside information (presumably from Slotnick and other participants) regarding what was happening behind the scenes.

Slotnick's defense of Bernard Goetz is the book's centerpiece, and is presented as a hopeless cause. Goetz had purchased a revolver after being attacked in a subway station, and was still carrying it several years later when four young men surrounded him in a subway car and demanded five dollars. Goetz responded by pulling out his revolver and shooting all four. Goetz not only later confessed to the shootings, but in one pre-trial statement claimed that he looked at one of the wounded men and said, "You don't look too bad, here's another," shooting him a second time. Slotnick tried the case on a self-defense theory, presenting evidence impeaching his own client's recollections of the shooting's details, and ultimately obtaining Goetz's acquittal on the primary charges of attempted murder and first-degree assault. The jury convicted Goetz only on a lesser charge of carrying a loaded, unlicensed weapon in a public place, for which he served only eight months.

Many litigators find it difficult to watch films or read books involving fictionalized trials. Novelists and screenwriters almost never get the details quite right, disrupting the willing suspension of disbelief that generally is necessary for entertainment. But *The Defense Lawyer* suffers from no such deficiencies, since the events and trials it describes are real. In addition, Slotnick is humanized with interesting details from his personal life – including the courtship and marriage of his wife, his relationship with his children (one of whom, Stuart, has himself become a well-known attorney), and the murder in Slotnick's presence of one of his clients (Joe Columbo) by an assassin.

The book opens with an attack on Slotnick by someone with a spiked club, which left him with a fractured wrist and puncture wounds, and suspense builds throughout the opening chapters until the culprit is finally revealed. One of Patterson's fictional gifts is the ability to sprinkle mini-cliffhangers throughout the chapters of his books, and that gift is liberally used here as the book relates the various stages of the Gotti/Carneglia and Goetz trials, with other interesting cases and incidents interspersed between them. Any criminal or civil defense lawyer, and any appellate attorney who reviews trial transcripts or consults with trial lawyers, will find *The Defense Lawyer* a compelling read.

John A. Taylor

John A. Taylor, Jr. is a partner at Horvitz & Levy, LLP, where he has been practicing appellate law since 1993. A California State Bar Certified Appellate Specialist, John has helped numerous clients prevail in high-stakes appeals concerning legal issues of industry-wide importance and from multimillion-dollar judgments.

Resolve Law LA – the Virtual Mandatory Settlement Program for PI Cases, Expands to Employment

Marta A. Alcumbrac

In 2017, ASCDC, CAALA and LA ABOTA partnered with leadership from the Los Angeles County Superior Court (LASC) and developed a successful Personal Injury (PI) Mandatory Settlement Conference (MSC) program. This program provided a free 3-hour MSC in which one defense attorney and one plaintiff's attorney partnered to act as settlement officers. Since July 2021, over 375 MSCs have been conducted within the Resolve Law LA program and approximately 56% of the cases either settled or the parties continued discussions outside the MSC.

Building on that success, in the summer 2021, the court's leadership and ASCDC, CAALA, and LA ABOTA, with strong support from the Beverly Hills Bar Foundation (BHBF), once again partnered to take this same program to a virtual platform, Resolve Law LA. Currently, LASC judges in the PI hub are ordering cases into the program Monday through Friday, excluding court holidays, at 9am-12pm and 1:30pm-4:30pm, and are conducted through the Resolve Law LA website in the integrated Zoom platform. Much like the original program, 50% of the cases ordered into the Resolve Law LA program settle or the parties continue to discuss resolution.

Most recently, Resolve Law LA has been expanded to include an early resolution program for employment cases in LASC. The Resolve Law LA Early Resolution Employment Case MSC Program is brought to you by Founding Justice Partners ASCDC, BHBF, CAALA, and LA-ABOTA, as well as Participating Members Beverly Hills Bar Association, California Employment Lawyers Association, and the Los Angeles County Bar Association's Labor & Employment Law Section.

Resolve Law LA's Early Resolution Employment Case MSC Program offers a free 3-hour MSC in recently filed employment cases. Just like the PI program, Employment Case MSCs are staffed by one Plaintiff Settlement Officer and one Defense Settlement Officer. This Early Resolution Employment Case MSC Program will initially be offered as a pilot program through five LASC I/C courtrooms (Judges Bachner, Escalante, Seigle, Sotelo, and Traber). Judge Zaven Sinanian, Managing Judge of the MSC Unit at Spring Street Courthouse, will supervise the Early Resolution Employment Case MSC Program for LASC.

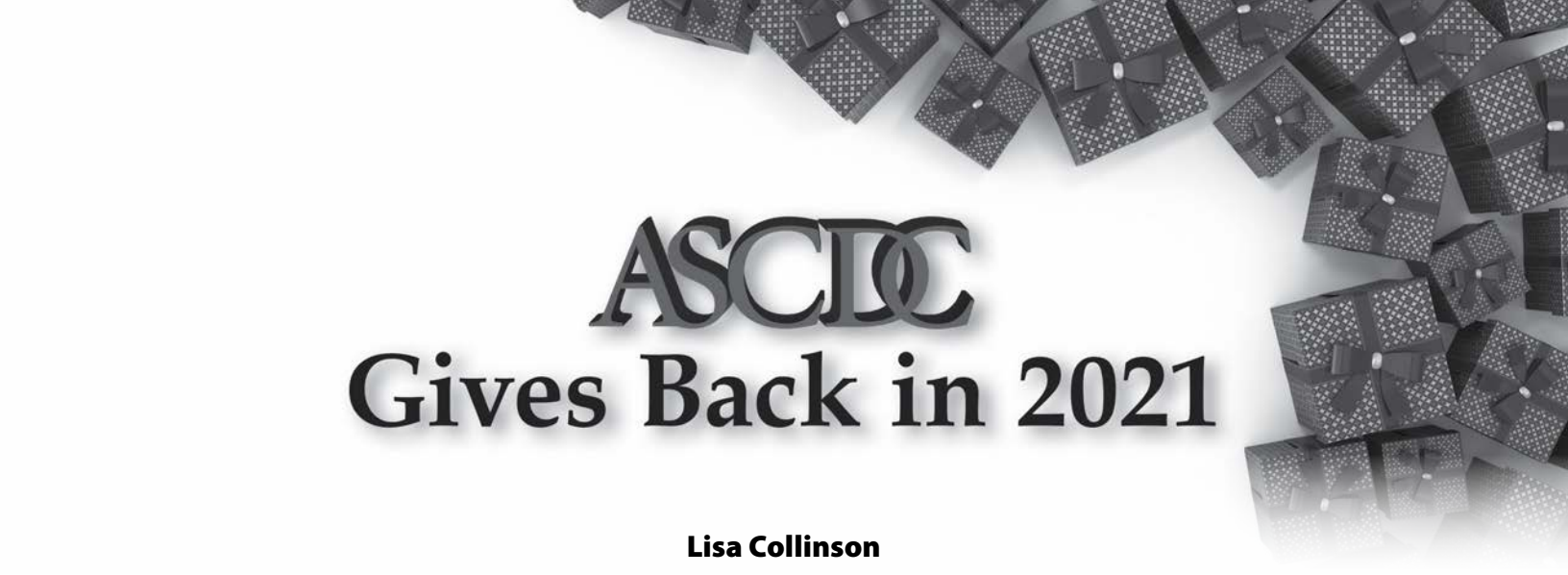
As with the Resolve Law LA MSC program in the PI Hub, employment cases must be ordered into the program. Participating Departments may order a case into the program at an early Case Management Conference or parties may stipulate and seek an order of the Court to be assigned to the program.

Resolve Law LA is now taking employment case settlement officer registrations and availability bookings for settlement officer volunteer dates and times at *www.resolvelawla.com.* To ensure the success of the program, volunteer settlement officers must have at least 10 years' litigation experience, preferably in employment cases. Employment law is a specialized area, so please ensure that you are well versed in employment law if you wish to volunteer as a Settlement Officer. Participating Departments began ordering cases into the program on February 14, 2022. If you are qualified and wish to act as a volunteer Settlement Officer for the Resolve Law LA's Early Resolution Employment Case MSC Program, please logon to your account or register at *www.resolvelawla.com.*

Please serve as a settlement officer in the PI and/or Employment Case programs; the settlement officers' hard work and dedication to resolve these cases make this program a success. Your support is greatly appreciated.

Marta A. Alcumbrac

Marta Alcumbrac of Robie & Matthai is certified as a specialist in legal malpractice law by the State Bar of California. She has successfully represented lawyers and law firms in numerous legal malpractice and breach of fiduciary duty cases. She regularly identifies strategy for early resolution by quickly obtaining and accurately analyzing the relevant facts and developing a litigation plan for bringing the case to conclusion.



ASCDC Gives Back in 2021

Lisa Collinson

Through the generosity of our members in 2021, we were able to make a difference in the lives of those less fortunate.

In February, the ASCDC made a difference in our community by joining the Los Angeles County Food Bank's #WeFeedLA campaign. Our membership helped raise funds for nutritious meals for our neighbors hit hardest by Covid 19. With millions out of work and kids home from school, the LA Regional Food Bank had a huge increase in demand. Our membership stepped up and donated funds to feed more than 120 families. Thank you to all the generous members of the ASCDC! In August, our membership partnered with the City of Hope in their Backpacks for Hope Campaign. The Back-to-School drive supported City of Hope's patients experiencing financial hardship. The ASCDC members' donations assisted in providing the necessary school supplies such as backpacks, notebooks, tablets. The donations also supported City of Hope's Pediatric patients in need of additional help while undergoing oncology treatment, maintaining their education and a sense of normalcy during treatment and recovery. Such a great cause supported by so many of our members!

During Breast Cancer Awareness month, in October, the ASCDC hosted its 3rd Annual Breast Cancer Awareness drive in conjunction with the City of Hope. Our members' donations raised funds for the research and treatment of breast cancer. These generous gifts to City of Hope do more than save lives, they transform the way we continue to fight for a cure. Breast cancer has touched so many of our members and so many feel strongly about this worthy cause. Thanks to all our members for their generosity,

If you have a cause and would like to start a charitable drive, please contact Lisa Collinson at *lisa.collinson@cdiglaw.com.*

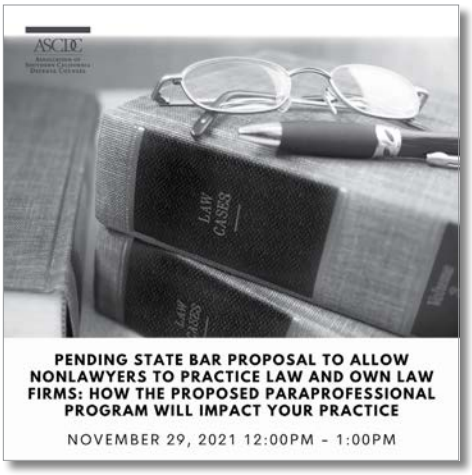
Lisa Collinson is the Managing Partner of Collinson, Daehnke, Inlow & Greco in Torrance, California.

Lisa Collinson

ASCDC 2021 Webinars

Visit the Webinar Store to purchase recordings of these outstanding and informative events: *https://ascdc-store.myshopify.com/*

In addition to the educational webinars summarized in the last issue of *Verdict* magazine, here's a summary of two more that closed out the year.



Pending State Bar Proposal to Allow Nonlawyers to Practice Law and Own Law Firms. (Webinar recording not available.)

On November 29, 2021, ASCDC hosted a discussion regarding the Paraprofessional proposal being advocated by the State Bar and how it might impact your practice if adopted. The proposal would allow nonlawyer "paraprofessionals" to practice law in certain areas and own up to 49 percent of law firms. The program also discussed another program designed to open a regulatory "sandbox," which would allow accounting firms, technology companies and others to practice law in California.

For more information contact:
Mike Belote | California Defense Counsel
Genie Harrison | Consumer Attorneys Association of Los Angeles
Steven Fleischman | Horvitz & Levy, LLP

How Workers Comp Effects Your Case

Presented on December 9, 2021: How does the worker's compensation system work, and how does it crossover and impact personal injury litigation? Our panel will provide an overview of the worker's compensation system and address litigating complaints-in-intervention and the workers compensation lien, and considerations and how to calculate the offset to apply to a verdict or judgment.

For more information contact:
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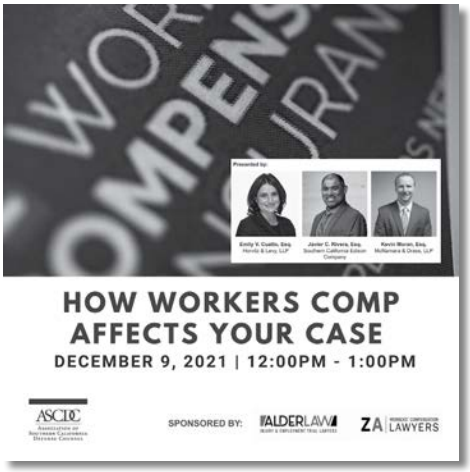
Javier C. Rivera, Esq. | *javier.rivera@sce.com*
Kevin Moran, Esq. | *kmoran@mcnamaradrass.com*



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.

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 (S259522): 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 to decide the following issue: "Does a party against whom former deposition testimony in a different case is sought to be admitted at trial under Evidence Code section 1291, subdivision (a)(2), have a similar interest and motive at both hearings to cross-examine a friendly witness?" The California Supreme Court is due to issue its opinion by March 7, 2022.

2) ***Valenzuela v. City of Anaheim*** (9th Cir. 2021) 6 F.4th 1098, rehearing petition pending (no. 20-55372): The opinion in this case arose out of a section 1983 wrongful death action. The issue presented was whether an heir can recover damages for the decedent's "loss of life." There is a circuit split on this issue. Defense counsel Tim Coates at Greines, Martin, Stein & Richland sought amicus support from ASCDC. Steven Fleischman, Scott Dixler and Chris Hu from Horvitz & Levy submitted an amicus brief on the merits. On August 3, 2021, the Ninth Circuit issued a published 2-1 opinion affirming the award of loss of life damages; Judge Lee dissented. A petition for rehearing remains pending. (In a related case raising the same issue – *Craig v. County of Orange* – the 9th Circuit issued a memorandum disposition on August 18, 2021.)

3) ***Betancourt v. OS Restaurant Services, LLC*** (2020) 49 Cal.App.5th 240, review granted and held (S262866): Eric Schwettmann successfully sought publication of the Court of Appeal opinion in this case regarding the recovery of attorney's fees in a FEHA-related case. The California Labor Commissioner filed a petition for review. The California Supreme Court issued a "grant and hold" order pending the outcome of *Naranjo v. Spectrum Security Services, Inc.* (S258966), which raises the following issues: (1) Does a violation of Labor Code section 226.7, which requires payment of premium wages for meal and rest period violations, give rise to claims under Labor Code sections 203 and 226 when the employer does not include the premium wages in the employee's wage statements but does include the wages earned for meal breaks? (2) What is the applicable prejudgment interest rate for unpaid premium wages owed under Labor Code section 226.7?.

4) ***Hoffmann v. Young*** (2020) 56 Cal. App.5th 1021, review granted (S266003): Request from Chris Hu at Horvitz & Levy to support 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 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 to decide the following issue: "Can an invitation to enter by a non-landowner – here, the landowner's child – that was made without the landowner's knowledge or express approval satisfy the requirements of Civil Code section 846, subdivision (d)(3), and abrogate the landowner's immunity from liability for damages suffered during permissive recreational use of the property?"

5) ***Bailey v. San Francisco District Attorney's Office*** (2020) unpublished opinion, review granted (S265223): The Amicus Committee recommended, and the Executive Committee approved,submitting a brief on the merits in this employment case involving the "stray remark" doctrine. The Supreme Court granted review 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?" Brad Pauley and Eric Boorstin from Horvitz & Levy submitted an amicus brief on the merits.

Continued on page 38

6) ***Kaney v. Mazza*** (B302835): Request from Ford, Walker, Haggerty & Behard for amicus support in this trip and fall case pending in the Second District Court of Appeal. Plaintiff appealed from a judgment following an order granting summary judgment. She 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 when the Evidence Code was adopted in 1967. Rebecca Powell, Steven Fleischman and Fred Cohen from Horvitz & Levy submitted an amicus brief on the merits. Oral argument was held on October 28, 2021 and the Court of Appeal is due to issue its decision 90 days later. V

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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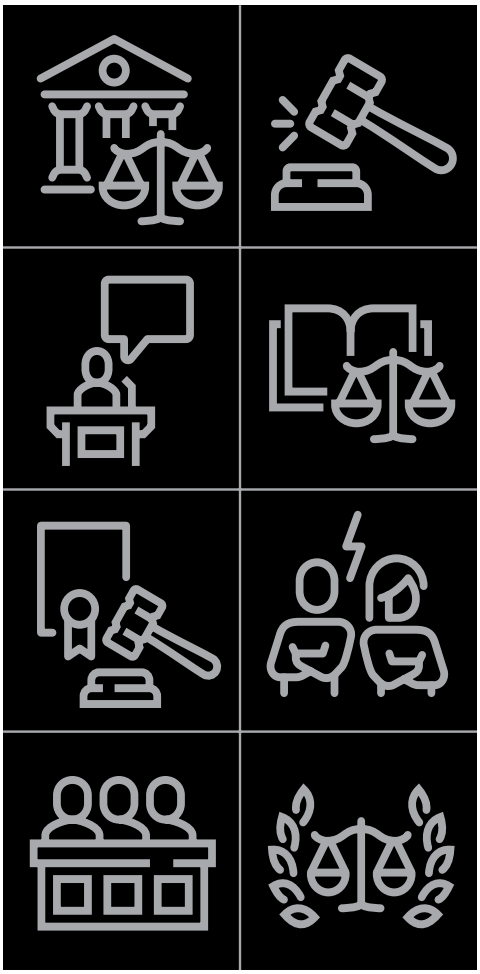

October - February

Sean D. Beatty
Beatty & Myers, LLP
Rodriguez v. Mazda Motor of America, Inc.
Castillo v. Mazda Motor of America, Inc.

Jeff Walker
Walker Law Group, LLP
Acquarelli v. Jackson

Michelle An
Yoka & Smith, LLP
Oglesby, III v. Fitness International, LLC

Richard Carroll
Carroll, Kelly, Trotter & Franzen
Derohanian v. Tahery

Capitol Comment

– continued from page 5

- **SB 1149 (Leyva):** Products Liability: Disclosure of Factual Information. Prohibits products liability settlements from preventing plaintiffs from disclosing factual information relating to actions, and creates a rebuttable presumption that court orders purporting to restrict such disclosure are invalid. Subjects lawyers to discipline for violations.

In addition to these and other bills of interest, there is a strong likelihood that the November general election ballot will contain issues of interest to CDC members. Already qualified for the November ballot is an initiative very substantially increasing medical malpractice limits under the Medical Injury Compensation Reform Act (MICRA). In circulation for signature gathering is a proposal which would essential repeal the Private Attorney General Act (PAGA) for Labor Code violations, returning California to the days of Labor Commissioner enforcement of employment claims.

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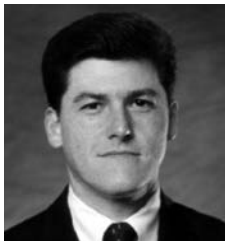

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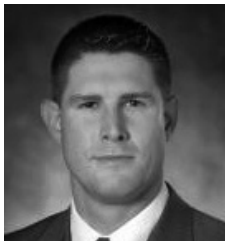

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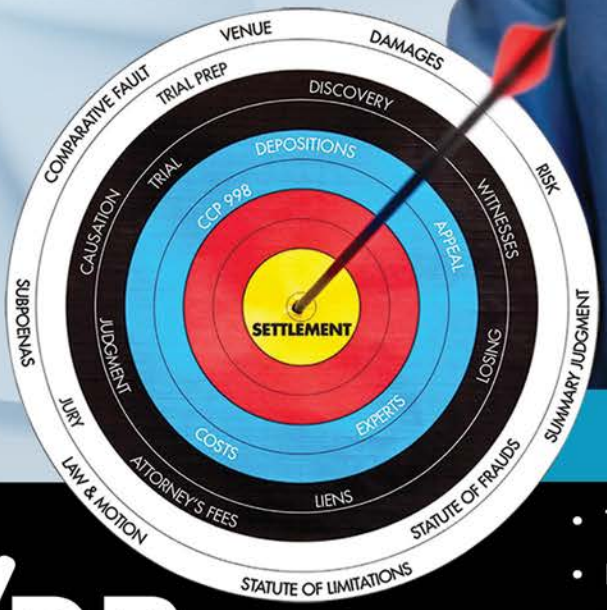

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