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Volume 1 • 2011

California's Chief Justice Tani Cantil-Sakauye addresses ASCDC's 50th Anniversary Seminar Luncheon

inside this issue:

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features

departments

Annual Seminar, 9

Cross-Examination, 15

Professional Judgment, 23

James Robie, 35

index to advertisers

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president's message

The Beginning of the Next 50 Years

I think the most stressful part of this job as President of the ASCDC is giving the speech at the annual seminar and writing the President's Message. This time the President's Message has a natural lead-in because of the sudden passing of our prior President Jim Robie. Jim was a beloved friend, a hardworking member of the Board and an outstanding colleague and President. He worked very hard for this organization. His presence will be greatly missed among the defense bar and among the legal profession in general, but he will be long remembered because of the caliber of person he was. While we miss Jim, it's really because he was such a special part of our lives. Please take a few minutes and read the obituary in this issue about him. Goodbye, my friend.

In taking over as ASCDC President, I am honored to be listed among the extraordinary defense lawyers who have previously led this organization. I am a little intimidated also, because I cannot do this job alone. I cannot do it without the assistance of your Board of Directors and committee chairs, and without the assistance of you, each and every one of our members.

We have lots of exciting activities planned for 2011. We will have our Hall of Fame dinner on June 9, 2011 at the Biltmore Hotel. That has always been an entertaining event and an opportunity to salute greatness from the plaintiff's bar, the judiciary and the defense bar. Please mark your calendars.

Last year our annual Judges Night was a terrific success, even though it was pouring rain and the week before Christmas. Many of the judges attended the event even though they were on vacation that week. This year that event will be December 13, 2011. Plan on not missing this opportunity to celebrate the holidays and meet our hard working judges.

I hope to initiate a series of meet-and-greet mixers with the assistance of some of the vendors in the legal community, so that members and non members with specific common interests have an opportunity to introduce themselves to one another, get to know other practice areas and each other, and so we can be resources for one another in the defense bar. We will continue our Brown Bag lunches with the courts and we will try to expand them into more counties and more branch courts in Los Angeles County. We are going to be working on putting together a program on the Expedited Jury Trial Act so that our members are well versed on how it works. When the right cases come up that fit this model, our members will be equipped to advise their clients and to recommend this model if it proves best for the case. It should also provide opportunities for young lawyers to get jury trial experience that they otherwise would not have.

This year our courts are again facing a major crisis in terms of financing and ASCDC plans to be there to help in whatever way we can. One early plan is a Crash Settlement Program for employment cases that our members will participate in to help reduce the backlog in the courts.

Chief Justice Tani Cantil-Sakauye was an eloquent and dynamic speaker at our 50th Annual Seminar. The problems she faces are incredible. But as she so dramatically pointed out, these problems are not "hard," they are challenges. We will keep you apprised of opportunities for our members to help with these challenges.

The California Defense Counsel ("CDC") is an important part of our function. Many of our members don't fully appreciate the benefit CDC provides us and our clients. It serves a lobbying effort for both the Northern California Defense Counsel and ASCDC in Sacramento and is led by our lobbyist, Mike Belote. Because of this organization, ASCDC and the Association of Defense Counsel of Northern California and Nevada are able to provide defense input into issues facing defendants, defense lawyers and our clients. Because of our involvement

Linda Miller Savitt
ASCDC 2011 President

with CDC, we have a voice at the table in Sacramento to balance that of the plaintiffs' bar on issues in the State Capitol that can affect how we and our clients do business.

As always, membership in ASCDC is necessary to keep alive these programs. The question I am always asked when encouraging people to join ASCDC is: what is the "value added" that your organization brings that is different than others? Well, let me give you a few points to tell potential new members. We have an incredibly strong amicus committee. Our amicus committee, along with the Board, reviews and acts on requests for amicus letters, amicus briefs, requests for publication or decertification. We have had tremendous positive response from the Courts of Appeal in adopting our recommended positions. Members have the ability to request our input on their appellate matters. In Southern California, we are the only defense organization that can advocate a cohesive and strong defense position. Our members have also been contributing to the CACI Committee in revising and proposing changes to the CACI jury instructions, not just from the perspective of one defendant or one case, but from the collective wisdom of the defense bar who practice in these areas. Most recently, we have provided comment on the products liability jury instructions.

continued on page 38

No Money, But Lots of Bills

Micahel D. Belote
CDC Representative

With California staring into the abyss of a $15 billion state budget deficit, one might rationally expect legislative activity to decrease. After all, to the extent that legislation proposes expensive new programs, those bills are dead on arrival for the foreseeable future. Shouldn't the situation in Sacramento be "all budget, all the time," given the gravity of the fiscal crisis?

Surprisingly, the sheer number of new bills introduced in Sacramento has not declined amidst the budget concerns. For 2011, over 2500 new bills have been introduced, an average of over 20 per legislator. The scary thing is that every bill, and every amendment to every bill, must be read for identification of potential impacts on defense practice. After reviewing all of the newly-introduced legislation, nearly 85 bills have been identified of interest to CDC, covering essentially every major area of defense practice. From construction defect to class actions, with a very healthy smattering of employment law and public entity issues, it is difficult to conceive of an ASCDC member without an interest in one or more of the new bills. All the new bills can be viewed through the ASCDC website.

The following are but a sample of the seven dozen proposed bills identified by CDC:

AB 20 *(Halderman):* **Construction Defect Actions.** Requires plaintiff's lawyers to make certain disclosures to potential clients, including the duty of sellers to advise buyers of pending actions.

AB 158 *(Halderman):* **Products Liability.** Prohibits punitive damages in products cases if the product complies with federal standards regulating the product.

AB 238 *(Huber):* Discovery Objections. Amends the Civil Discovery Act to expressly reference the obligation to produce privilege logs in certain instances.

AB 271 *(Nestande):* **Class Actions.** Permits appeals of class certification as well as denial of certification.

AB 328 *(Smyth):* **Inverse Condemnation.** Applies the doctrine of comparative fault to inverse condemnation actions.

AB 556 *(Wagner):* **Punitive Damages.** Requires determinations of punitive damages to be made by the trier of fact, but the amount of the damages to be determined by the court.

AB 803 *(Wagner):* **Electronic Reporting.** Requires the implementation of electronic court reporting in all superior court actions, over a five-year period.

AB 990 *(Allen):* **Court Transcripts.** Prohibits parties or their counsel from lending or providing copies of transcripts without paying a fee to the court reporter.

AB 1208 *(Calderon):* **Trial Court Bill of Rights.** Sets forth various rights and programs reserved to local courts, including administration, accounting, information technology and more.

AB 1286 *(Fuentes):* **Waivers of Employment Claims.** Provides that waivers or settlement of certain employment claims are not valid unless approved by a court or the Division of Labor Standards Enforcement.

AB 1403 *(Judiciary Committee):* **Voir Dire.** Makes mandatory the language in current law which states that courts "should" permit liberal and probing examinations of potential jurors.

SB 221 *(Simitian):* **Small Claims Jurisdiction.** Raises the small claims jurisdictional limit to $10,000.

SB 326 *(Yee):* **Access to Court Filings.** Requires courts to provide same-day access to documents filed with courts.

SB 474 *(Evans):* **Commercial Construction Indemnities.** Extends the current limitations on "Type 1" indemnities applicable to residential construction to commercial.

SB 848 *(Emmerson):* **Courts of Appeal.** Creates a new court of appeal district in the Inland Empire, by removing the counties of San Bernardino, Inyo and Riverside from the 4th Appellate District.

Even as these bills, and many more, are debated in Sacramento, the budget drama continues to unfold daily. The potential impacts on California courts are enormous, and will be described in future issues of this column. CDC is working actively with legislators and the Judicial Council on critical court funding issues.

Jan Roughan, RN

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I'll Be Seeing You In All the Old Familiar Places

Patrick A. Long
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We don't get to see each other enough. Seriously, you and I have hundreds, perhaps thousands, of friends we rarely see. For those in court regularly we do run into each other walking in opposite directions in the hallways, but those contacts are sporadic, limited, and almost always brief.

Certain events in the last several weeks have brought this home with a vengeance. As you know, ASCDC – and many of us personally – lost two giants of our profession when Jim Robie and Mike Packer left us. It was my privilege to attend memorial services, celebrations of life, or whatever name we choose to use, for both of these great men. And as you might expect, both events were very crowded with Jim's and Mike's hundreds of friends, colleagues and former opponents.

I should mention two other events, ASCDC's Annual Seminar and a pre-St. Patrick's Day party given by one of Southern California's best plaintiff's attorneys. As with the celebrations of life, there were hundreds of lawyers, judges, mediators and forensic types at both of these events.

At all four of these meetings I saw a number of colleagues with whom I have regular and continuing contact. But part of what made attendance special, in addition to paying tribute to Jim and Mike, was the pleasant enjoyment of greeting other friends I see perhaps only once a yearl or less. Meeting these long-ago friends added a certain poignancy to memorial celebrations, but I sense that both Jim and Mike enjoyed seeing us meet to smile and reminisce about our time with each of them and with each other. Meeting our rarely seen colleagues at the Annual Seminar and the St. Pat's get-together brought handshakes, hugs, and a great deal of laughter. Two past presidents mentioned to me that one of the joys of hanging at such meetings was the opportunity to run into a colleague with a lower bar number.

Some of you may feel differently about this, but I'm not much of an enthusiast for cocktail receptions. It's not that I'm against the drink, as God and some of you know. It's just that often not much real conversation takes place, and after an hour or so, it's harder to smile all the time when you'd rather not. These problems seem to fall by the wayside when we encounter good friends we haven't seen for a long time. Then the smiles come without effort, and the conversation is spontaneous and joyful. Of course the last statement of such conversations is always the same, "We'll have to get together sometime soon," or "I'll call you and we can get together for lunch or dinner." Of course we know the get-togethers or lunches or dinners probably won't happen, but the happiness of catching up with a law school classmate, former partner or associate, co-counsel in a case from ten years ago, or a colleague who now sits on the bench, indeed brightens a day, or evening.

Obviously none of us would choose the occasion of a memorial service or funeral to make contact with friends, but our friends will continue to leave us when God elects to call them, so what we experienced at Jim's and Mike's gatherings will most certainly come to us again and again.

I submit these thoughts about our infrequent meetings with friends of long-standing because following the four events outlined above I received a number of phone calls and e-mails from our membership expressing surprise, joy and a smattering of sadness at their contacts with voices and personalities from over the years. I know that when we lose a friend, as we lost Jim and Mike, we'll always want to join with their families at memorial services or celebrations, but the opportunities to encounter people we don't see much anymore is reason enough to take a chance on another boring cocktail reception, and certainly to add to our list of reasons to attend our Annual Seminar, and other bar-related activities. Think back to when you were a baby lawyer, at your fourth deposition of your career, and the older co-counsel there was kind enough to ask the crucially important question that you had forgotten to ask during your examination, the one that resulted in a successful motion for summary judgment. You haven't seen him in fifteen years. Now's the time to say, again, "Thanks for the help when I needed it, and I hope I see you at next year's Seminar."

With appreciation to Bob Hope,

Pat

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50th Annual Seminar Highlights

by Carol A. Sherman

ASCDC celebrated its historic 50th Annual Seminar at the beautiful Millennium Biltmore Hotel in downtown Los Angeles, March 10-11, 2011. The two-day program featured outstanding speakers and panelists who spoke on important issues and topics facing all attorneys who defend civil lawsuits. Members and their guests toasted the Association's 50th anniversary at a fun-filled Thursday evening party.

The 50th Annual Seminar's Friday luncheon had all of the traditional themes of recent years – acknowledgement of past Association presidents and members of the judiciary, presentations honoring the hard work and efforts of the out-going President, and a rousing keynote speaker. However, the customary passing of the Association leadership from out-going President James R. Robie to President-elect Linda Miller Savitt was different this year.

President-elect Miller Savitt fittingly summed up the feelings in the room when she paid tribute to James Robie, who recently passed away. "Today was the culmination of Jim's year as our president. It may sound corny, but I feel his presence with me."

Keeping with tradition, Pat Long, past president of both ASCDC and DRI, recognized Robie's achievements on behalf of DRI. "It was an honor and privilege to be a friend of Jim Robie." Pat recalled spending time with Jim this past year while both were waiting to catch a flight out of LAX. "Jim had a very trying year as ASCDC President which meant he was in trial more this past year than most lawyers will ever be. He was a world-class husband, father and law partner."

Edith R. Matthai, James Robie's partner both in marriage and law, graciously accepted the honors on his behalf, telling everyone, "He loved this organization." Matthai thanked members of the Board of Directors and the Association committees for making Robie's year a success. She also thanked Executive Directors, Carolyn Webb, recently retired, and Jennifer Blevins, for their support.

Matthai, who is also a past president, introduced Miller Savitt to the membership. "Linda is intelligent, witty and a delight to be with. She's the real thing. She's an incredibly good lawyer. You are in very good hands."

As her first act, Miller Savitt asked everyone to take a moment of silence in remembrance of Jim. "Today, we raise our glasses to our dear friend James Robie."

When introducing members of her family, Miller Savitt praised her 89-year-old mother for instilling in her a strong work ethic.

In her comments to the audience, Miller Savitt cited the continuing efforts by the Amicus Committee and its value to all members. She encouraged members to use the Amicus Committee as a resource. She also announced up-coming events, including the return of the Hall of Fame awards dinner on June 9, 2011, a spring seminar on expedited jury trials, the always well-received construction defect seminar in the fall, and the annual popular evening with the judges in December. She also plans to host mixers throughout the year where members can meet and network. She encouraged new attorneys to submit articles to *Verdict* magazine as a way to market their skills.

She urged members to contribute financially to ensure that California Defense Counsel (CDC) continues to have the resources necessary to be heard on issues important to all civil defense attorneys. "CDC is the real benefit of this organization. Through CDC, we have credibility in Sacramento. As defense lawyers, we make a difference. We remind the other side about the rule of law. I look forward to being your president."

photos from the 50th annual seminar

"This Is Why We Became Lawyers"

Tani Cantil-Sakauye, Chief Justice of California, Addresses the 50th Annual Seminar

by Carol A. Sherman

Tani Cantil-Sakauye's rise to the highest position in the California courts began in 1990 with her appointment to the Municipal Court in Sacramento. In 1997, she was elevated to the Superior Court, and in 2005, she was nominated to the Court of Appeal, Third Appellate District. In November 2010, voters elected Cantil-Sakauye as Chief Justice of the California Supreme Court. While serving as Chief Justice, she also heads the Judicial Council and the Judicial Branch.

Chief Justice Cantil-Sakauye addressed the 50th Annual Seminar luncheon on Friday, March 11, 2011, at the Millennium Biltmore Hotel in Los Angeles. She expressed her appreciation for the support she receives from attorney organizations like ASCDC, whose leadership is working to bring new ideas to the court system.

She also spoke candidly about the budget crisis facing from the courts. "We are working tirelessly to make sure that the $200 million budget cuts land where they will do the least amount of harm, with buy-in and collaborative work from what I call an 'ad hoc budget group' that consists of multiple judges and lawyers from across the state, including court executive officers that come up with ways and places where we can cut that $200 million from the Judicial Branch budget without closing courts."

And if the financial crisis wasn't challenging enough, the Chief Justice is confronted with the policy issue that has arisen in the Assembly threatening the governance of the Judicial Branch. Cantil-Sakauye nonetheless remains steadfastly optimistic, describing this time as "an incredible moment" in the history of the Judicial Branch.

"This is the arena where I want to be. And I know that for defense attorneys, this is where you want to be. This is where we belong. This is why we became lawyers – to be at the heart of it, to be in the midst of it, and to bring solutions. Is it challenging? Absolutely. Is it hard? You have to know a little bit about me to know what's hard."

Of Filipino ancestry, Cantil-Sakauye did not hold back when sharing from her personal history.

"Hard is not the challenge facing the Judicial Branch. Hard is picking fruit and cutting asparagus. Hard is growing up with signs that say, 'No Filipinos. No dogs'. Hard is not being able to own land in California. Hard is being told, like my in-laws, that you have 48 hours to pack your bags and go to a relocation camp, and then spend four years in a relocation camp. Hard is coming out of that camp and having no personal possessions and living in a barn or on the floor of your church gym.

"Those are the same people that I know that many of you have represented and would represent in a heartbeat. That's *hard*. What's facing California, what's facing the Branch, those are *challenges."*

She talked about what she called the "trilogy of game changers" that have defined the present-day courts, starting in 1997, when the State took over funding of the courts. "People from those days now joke with me that the Branch budget was a line item under sanitation in the county budget." The following year saw the unification of the more than 227 municipal and superior courts, resulting in more cases being heard. The final game changing initiative came in 2002, when the Judicial Branch took over

continued on page 12

Chief Justice Tani Cantil-Sakauye – continued from page 11

ownership, maintenance and operation of the courthouses "to make sure the courts are places of safety and refuge, not only for the public but for jurors, attorneys and judges to hear cases in places of dignity, efficiencies and respect."

She credited her predecessor, Chief Justice Ronald George, for guiding these initiatives through multiple governors, Legislatures and Judicial Councils to finally create today's Judicial Bench. "The Bench, as you know it, is really only 14 years young even though in reality, it is as old as statehood. We are 14 years young and the ability to realize our potential can't happen in 14 years. It's going to take awhile, and it's going to continue to take the good work of people like you and your Association that bring in good ideas that moves the Branch forward."

Looking ahead, she announced that the much-anticipated California Case Management System is in the testing phase. "It will be up and running in every county which means that you could be in Buenos Aires and go online and pull up the pleading of your opponent."

Describing her leadership style as "getting to 'yes,'" she stressed the importance of the Judicial Branch having the authority to address its own issues. "We do not want to be a Judicial Branch in name only. We want to be a Branch that takes care of itself."

"operation mend" at the annual seminar

Dr. Tim Miller

Dr. Tim Miller spoke at our 2011 Annual Seminar regarding his incredible treatment of wounded soldiers through "Operation Mend." At the conclusion of his remarks, many of you asked for more information about the history of the project and opportunities to donate.

Founded in October 2007, Operation Mend is a collaborative project that provides reconstructive plastic surgery for U.S. military personnel wounded in Iraq and Afghanistan. UCLA Medical Center advisory board member and philanthropist Ronald A. Katz helped forge this unique pilot program between UCLA Medical Center and Brooke Army Medical Center in San Antonio, Texas. Dr. Miller, chief of plastic and reconstructive surgery at UCLA, leads the surgeries. Patients and their families stay at UCLA's Tiverton House during treatment. Patients are identified for surgery by Brooke Army Medical Center and travel to UCLA when they are medically ready. For more details, including information about donating to this worthy cause, please visit *http://operationmend.ucla.edu/default.cfm.*

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— 50TH ANNUAL SEMINAR —

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Executive Presentations

Remembering a Few Cross-Examination Techniques Learned from a Great Mentor

by James R. Robie (posthumously) and Michael J. O'Neill

The ASCDC has within its ranks a significant number of extraordinary lawyers. One of those lawyers was my partner, James R. Robie. Jim and I tried numerous jury trials in which he proved to me (and scores of witnesses) that he was truly a master of cross-examination. Several years ago, we interviewed a jury after Jim and I tried the case to a defense verdict. The jurors had this uniform response to questioning by Jim: "Mr. Robie, when you stood up to ask questions, we all perked up because we knew when you stood up something was going to happen." This reaction of the jury – knowing something was going to happen is one of the most important things a trial lawyer can accomplish. If you master the skill, every time you stand up a jury will listen and understand the points you will make in support of your client.

Cross-examination is more akin to an art form than it is to a skill set that can be communicated in some quantifiable measure. The purpose of this article is to provide some ideas on cross-examination as I learned them from Jim. This list is not exhaustive and is certainly not meant to suggest these ideas that necessarily are better than others. What is presented is information that the trial lawyer can use to determine whether these ideas fit with their personality and can assist in refining their skills of cross-examination.

1. Make Sure the Jury Understands Your Points.

Jim's success as a trial lawyer is based, in part, upon his view that the defense does not merely respond to what the plaintiffs present in the way of theories or issues. Instead, the defense tells its own story, explaining why the jury should see things from the defendant's viewpoint and vote for the defense. As part of this theme, Jim believed in repetition. It was his view that jurors, unlike lawyers, do not hang on every word: instead they need positions explained to them and then repeated so that at the end of the cross-examination the jury appreciates what points have been made by the defense.

In a recent trial involving an alleged bad faith adjustment of property loss, plaintiff contended he had not been paid enough money to repair the damage to his large home, an extensive koi pond and landscaping. During the claim, our client, State Farm, paid plaintiff $30,398 based on a landscaping estimate prepared by a consulting landscape contractor. Plaintiff did not submit, during the claim process, an estimate to replace the landscaping. Instead, plaintiff's retained contractor, during the claim process, submitted plans from a landscape architect named Sullivan. Here is Jim's cross-examination of plaintiff on this issue:

Q. [State Farm] paid you $30,398 for landscaping, correct?

A. I guess so.

Q. Did you ever submit a landscaping bid to State Farm?

A. No.

Q. Did you ever ask anybody to prepare a landscaping bid to State Farm?

A. No.

Q. Did you ever dispute the landscaping bid that State Farm did?

A. Which one?

continued on page 16

Q. The one on which they paid you $30,398.78.

A. This one, I didn't. The previous one by Sullivan, yes, that was disputed.

Q. Did you ever submit it?

A. No.

Q. Because it wasn't an accurate replacement estimate, was it?

A. No.

Q. In fact, it didn't even remotely begin to duplicate what you lost?

A. Correct.

Q. It was a whole new landscape scheme?

A. I agree.

Q. With substantially more exotic botanical plants, right?

A. Agreed.

Q. It didn't have any relation – that Sullivan Landscaping scheme didn't have any relationship to what you actually lost, right?

A. I agree.

Q. As you sit here today, don't you, [plaintiff], know that was not an accurate estimate, and because of that, you never gave it to anybody at State Farm?

A. I know that it was not an accurate estimate.

Q. So the company paid you $30,398.78 for landscaping, which included your irrigation system, your drainage system, exterior lighting, and landscape work. Isn't that a fact?

A. As I read that, yes.

Q. And you have spent how much of that $30,000 doing landscape work?

A. At this point, none.

2. No "Free Rides."

Another rule of cross-examination that Jim lived by was that no plaintiff got a "free ride." It was their claim to present and their claim to justify. A plaintiff cannot be a passive participant that is sitting in the proverbial "back seat." Consider the following cross-examination of plaintiff by Jim in the same action:

Q. You can't be critical of the company for paying exactly the amount that your expert says it should cost to do those repairs, can you?

A. No.

Q. You are not critical of them for paying you this kind of money are you?

A. I was critical of the process of what we had to go through to come up with–

Q. I want to talk about the dollars put in your pocket. They paid you a fair and reasonable amount of money for the damage to your koi pond, your waterfall, and that retaining wall, didn't they?

A. Yes.

Q. Just as they paid you a fair and reasonable amount of money for replacement of the deck and repairs to the underground section, the basement section – lower section of your house; isn't that right?

A. I presumed it was fair and reasonable.

Q. You don't have any basis for criticizing it, do you?

A. The basis for criticizing it would be in attempting to find somebody to do it for that price.

Q. That's isn't my question. The calculated number and the payment was a fair and reasonable payment for the repair of your house, wasn't it?

A. I believe it was.

Q. And if we go back again to Exhibit 68, the $30,000 – $30,398 paid for landscaping, which included repair of the irrigation system, the drainage system, lighting, and hard scape, that was a fair number as well, wasn't it?

A. You are asking me my opinion as to fairness?

Q. I'm asking you if that payment of $30,398 for replacement of those items – repair and replacement of those items was a fair payment by my client?

A. Presumably it's fair.

Q. You know it to be fair, don't you?

A. Presumably it's fair.

Q. As you sit here today, that's a fair number? That payment to you was a fair number, wasn't it?

A. Presumably.

Q. Most assuredly, wasn't it?

A. Presumably, most assuredly.

Q. And in addition to these items that we've gone through, we've now talked about the damage to the house and the deck, the koi pond and waterfall and the landscaping.

You don't have any criticisms of State Farm's payment for your septic system, do you?

A. No.

Q. You don't have any criticism of State Farm's payment for boarding your koi for two years, do you?

A. No.

continued on page 17

Cross-Examination Techniques – continued from page 16

3. Get an Answer to Your Question.

Effective cross-examination requires an answer to the question that was asked. Witnesses, especially expert witnesses, are capable of attempting to deflect a question. Consider the following questions and answers in a bad faith action based upon a multimillion dollar excess judgment:

Q. Mr. [plaintiffs' bad faith expert], if there is a potential loss of consortium claim, that claim is derivative of [plaintiff's] personal injury claim, isn't it?

A. That's correct.

Q. It does not change the $100,000 limit, does it?

A. That's not the point.

Q. No, that is not my question. My question is: You can't set a separate reserve for a claim that is included in her personal injury claim, can you?

A. That's correct.

* * *

Q. And do you [plaintiffs' bad faith expert] agree or disagree that the main concern in the case is one of liability?

A. Well, it's always the case. Liability is always a main concern.

Q. Is your answer "yes"?

A. Yes.

4. Make Sure You Establish the Bright Lines at Deposition.

An effective cross-examination depends on an effective deposition. The deposition should not be a passive exercise of letting the witness define the scope of his or her testimony. Merely asking the witness what they did, saw, or what opinions they have, does not provide an effective barrier at trial. Jim always preached that the lawyer taking the deposition establish this barrier by being proactive in asking questions (and getting answers) that put the proverbial "bookend" on an issue. In an action that resulted in an underlying $16,000,000 excess judgment against an insured after a binding arbitration, the following questions and answers were given by plaintiffs' bad faith expert seeking to support coverage for the excess judgment:

Q. And, in fact, you are not critical of [the carrier] for hiring [defense lawyer] to defend this case, are you?

A. Yes, I am.

Q. And when did you develop that criticism?

A. I thought about it a long time. I didn't express it at my deposition, but you asked me here at trial. So I am critical of hiring that particular firm because they did defense bad faith work for [carrier]; and I think in an excess exposure case, it would not be proper to send the defense of a case like this to a firm who does bad faith defense for the insurance company.

Q. Mr. [plaintiff's expert], when did you arrive at this conclusion?

A. A long time ago.

Q. Sometime after your deposition?

A. I am not sure if I formed it before then or after then, to be honest with you.

Q. Well, I would like to read from your deposition at page 71. It is your deposition of April 16, 2001, starting at line 2 through line 7.

continued on page 18

"Question: Are you critical of [carrier] in hiring [defense lawyer] to represent [insured] in this matter?

"Answer: No.

"Question: Do you think he was a well-qualified, experienced lawyer for this case?

"Answer: Yes."

5. Always Know What You Are Asking and Why.

Jim would observe the parallel between a lawyer asking a question and an actor playing a role in theater. The actor must always know why the character is saying what is being said. The lawyer must also know why the question is being asked and what the answer should be. This requires that the lawyer know more about the client's file or facts than the witness knows. You must know what the client did, when it did it, and why. If the witness makes a mistake, you will need to be able to promptly impeach the witness. Here is an example of Jim impeaching plaintiffs' expert witness in a bad faith excess case:

Q. You [plaintiffs' bad faith expert] testified that [claim representative] or that the insurance company did no investigation whatsoever of comparative fault.

Is it your testimony, [plaintiffs' bad faith expert], that they never evaluated that issue?

A. I don't think so, I think in the November report of [claim representative], he talks about comparative fault on a 50/50 basis.

Q. In fact, if you look at Exhibit 121, the IMS DOCS at page 008, in the last portion of the entry dated March 18, 1994, [claim representative] says – the very last portion of that entry, please. Do you see the word "if" in quotes"

A. Yes.

Mr. Robie: (reading)

"If the claimant's injuries are as significant as her attorney has described, even if comparative negligence is found to be 50/50, a good faith settlement offer would still be at the member's policy limits. This will be my recommendation."

Q. Did you see anything in the file to suggest to you that that recommendation ever changed for [claim representative]; namely, that the damages were far in excess of the policy limits?

A. No.

Q. Did you see anything in the file that suggested [claim representative] ever changed his viewpoint that even if comparative negligence was 50/50, the limits would be gone?

A. No.

6. "Take your time in a hurry." – Wyatt Earp.

Jim used to quote this statement by Wyatt Earp about gun fighting. Mr. Earp further explained his rule of being a gunfighter who lived to an old age: "Perhaps I can best describe such time-taking as going into action with the greatest speed at which a man's muscles are capable, but mentally unflustered by an urge to hurry or the need for complicated nervous and muscular actions which trick-shooting involves." This analogy translates well into maintaining a flow in the questions and, more importantly, the answers. Stated otherwise, simple questions fit within this time frame; complex questions do not. Questions should be designed to solicit a specific but succinct response. A question that results in a long answer means the question was not specific enough. Consider the following cross-examination by Jim in the trial on the multimillion dollar excess verdict:

Q: Do you agree, [plaintiff's bad faith expert], the defense attorney and claims personnel have to share a common goal of prompt and proper disposition of all contested claims?

A. Yes.

Q. The team concept implies that the necessary activities to reach that goal will be accomplished by the person who can perform the task most efficiently. That is an admirable goal, isn't it?

A. I think so.

Q. And it is a well-respected principle in defense of casualty liability cases that the adjuster and the lawyer have to work together to get the tasks performed, right?

continued on page 19

Cross-Examination Techniques – continued from page 18

A. Yes.

Q. And, in fact, it is impossible for a claims adjuster to take depositions, isn't it?

A. Yes.

Q. It is impossible for a claims adjuster to issue a subpoena, right?

A. Right.

Q. It is impossible for a claims adjuster to send out interrogatories or request for production of documents, right?

A. Yes.

Q. All of those things have to be done by the defense lawyer retained to defend the insured in the litigation, correct?

A. Correct.

Q. The adjuster and the defense counsel have to work as a team to gather the information utilized in the defense of the case, right?

A. Right.

Q. And, in fact, in this case, from the first day that the adjuster was aware of this claim, [plaintiff] was represented by counsel, wasn't she?

A. Yes.

Q. And [claim representative] had no ability to just talk to [plaintiff,] he had to go through her attorney, didn't he?

A. He had to go through her attorney, but that doesn't mean that he couldn't talk to her.

Q. He asked to talk to her, didn't he?

A. I believe – I am not sure.

Q. Didn't he ask [plaintiff's counsel] to give him a recorded statement of [plaintiff]?

A. I think so.

Q. And [plaintiff's counsel] refused, correct?

A. Correct.

Q. And [claim representative] has no way to compel that lawyer to make his client available for a statement, does he?

A. That's correct.

Q. He simply has to do the best he can in convincing [plaintiff's counsel] to give him whatever information he will make available, right?

A. Yes.

Q. And, in fact, [claim representative], as a claims adjuster, cannot just go to a hospital and say, "Give me the medical records of [plaintiff]," can he?

A. He could if he had a medical authorization form, which he did have.

Q. Right. And which was rescinded by [plaintiff's counsel] very shortly after he gave it to him, wasn't it?

A. I think so.

Q. Well, your investigation shows that, doesn't it?

A. I think when I reviewed the file, that that was in there; but right now sitting here, I am not sure. I am not saying it wasn't.

Q. But once [plaintiff's counsel] revokes the authorization, [claim representative] cannot go to hospitals and get medical records, can he?

A. In most cases, no.

7. Don't Tell the Jury – Show Them.

Jim was one of the first lawyers to fully appreciate that jurors respond to the visual. We are now part of a "television culture" that responds to the visual image more quickly than to something we hear. There is also a certain amount of impatience the jurors will exhibit if a document is being referred to and there is no opportunity to see that document for themselves. Jim was adept at using exhibits projected onto a screen as a basis to move cross-examination at an engaging pace, not too fast and not too slow.

8. Watch the Clock.

A jury is very sensitive to when a break is scheduled. Jim was very adept at structuring his cross-examination so that he made an emphatic point just prior to any break, whether it be the mid-morning break, or a break for lunch, for the evening, or for the weekend. "Working the clock" so that you finish an aspect of cross-examination just before a break on a positive note will allow the jury to take with them that established point when they leave the courtroom. Here is an example of Jim's cross-examination of the plaintiff from the case involving damage to the home and landscape including a koi pond:

continued on page 20

Cross-Examination Techniques – continued from page 19

Q. You were comfortable that [koi pond expert] could do an accurate as-built plan?

A. Yes.

Q. And that it would be readable, legible, and perfect?

A. And itemized.

Q. And itemized. And he did that?

A. Yes.

Q. And then he priced it out, right?

A. It's all part of the same process as far as I know.

Q. Right. But you didn't ask him to actually sign a contract to re-build it, did you?

A. No.

Q. You have never asked him to do that, have you?

A. No.

Q. But you went to him because you were comfortable that whatever number he gave you, you could replace what you lost if you were paid that figure. Is that a fact?

A. The fact is that his name was given as a person who could provide the information of what was there and blueprints to rebuild it.

Q. That wasn't exactly my question.

A. That's right. Your question – if you care to have it repeated.

Q. I will rephrase it. My question was, based on all the information you had, he was the guy that you were most comfortable with in giving a number that you believed you could replace your pond for?

A. He only gave one number. At that point, that's all we had.

Q. That's, again, not my question.

Mr. Robie: Move to strike, Your Honor?

The Court: Stricken.

By Mr. Robie:

Q. You went to him because you believed that whatever number he arrived at would be a fair and accurate number that would allow you to replace your koi pond.

A. I had no prior knowledge how fair or accurate he would be. All I did was supply his name to Integrity, who then made contractual arrangements of what he was required to do for State Farm.

* * *

Mr. Robie: I move to strike as nonresponsive.

The Court: Sustained. Stricken.

By Mr. Robie:

Q. You contracted [koi pond expert] with the expectation that if he prepared a replacement bid for you, whatever number he calculated, you would be comfortable that would be adequate for you to replace your koi pond if you were paid that sum; isn't that a fact?

A. Correct.

Q And you were paid this figure, weren't you?

A. Correct.

Mr. Robie: Is this a good time to break, Your Honor?

The Court: It is. Thank you, Counsel. We're going to take our recess, Ladies and Gentlemen, for the weekend.

This article, again, was not designed to provide a primer on cross-examination. What we have hopefully accomplished (through my efforts to share with you some examples of Jim's techniques) is to provide a few ideas to help the trial lawyer on cross-examination.

green sheets

Notes on Recent Decisions

Lisa Perrochet

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

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.

class actions

Death knell doctrine allows for immediate appeal of an order denying class certification only where the order terminates class claims but allows individual claims to continue.

In re Baycol Cases I and II (2011)
__ Cal.4th __ (WL682378).

A plaintiff bringing class claims alleged the defendant drug maker engaged in false and misleading advertising regarding Baycol, a cholesterol reducing drug. Plaintiff sued for violation of the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.) and for unjust enrichment. Defendant successfully demurred to both the class allegations and each substantive claim. The trial court subsequently denied Plaintiff's motion for reconsideration on both class and individual claims and entered a judgment of dismissal. Defendant served a notice of entry of judgment, and Plaintiff filed his notice of appeal 60 days later. The Court of Appeal reversed dismissal of Plaintiff's individual UCL claim, concluding he should have been granted leave to amend. In doing so, it declined to consider on the merits the appeal of the class claims dismissal and instead dismissed that portion of the appeal as untimely. The Court of Appeal reasoned that, upon entry of the initial order sustaining defendant's demurrer, the class claims dismissal was appealable and the time to file on appeal expired before the notice of appeal was filed.

The Supreme Court reversed, holding that "the preservation of individual claims is an essential prerequisite to application of the death knell doctrine: the doctrine renders appealable only those orders that effectively terminate class claims but permit individual claims to continue." The court continued: "When instead an order terminates *both* class and individual claims, there is no need to apply any special exception to the usual one final judgment rule to ensure appellate review of class claims."

A business's recording of a patron's zip code, violates the Song-Beverly Credit Card Act rule against collecting "personal identification information."

Pineda v. Williams-Sonoma Stores, Inc. (2011)
51 Cal.4th 524.

Plaintiff brought class action against defendant asserting causes of action for violation of the Song-Beverly Credit Card Act (Civ. Code, § 1747 *et seq.*) ("Credit Card Act"). Plaintiff alleged that defendant collected and recorded plaintiff's ZIP code at the time of purchase which, when combined with other pertinent information, was later used to find plaintiff's address for marketing purposes. Plaintiff divulged the information believing that it was necessary to complete the transaction and was unaware that her ZIP code would be used for marketing. Defendant demurred arguing that a ZIP code is not "personal identification information" as that phrase is used in section Civil Code section 1747.08. The trial court sustained the demurrer and the Court of Appeal affirmed.

The Supreme Court reversed holding that requesting and recording a cardholder's ZIP code, without more, violates the Credit Card Act. The court reasoned that the statute's plain language, protective purpose, and legislative history, renders a consumer's zip code as "personal identification information" for purposes of 1747.08.

See also *Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688. The Court of Appeal (Second District, Division Five) dismissed cross-complainant's appeal as to attorney's fees as untimely where cross-complainant filed his notice of appeal from the judgment after an adverse ruling at trial but before the statement of intended decision on fees. The

continued on page ii

continued from page i

court stated: "Notice of appeal from judgment does not encompass a separately appealable post-judgment order awarding attorney fees where trial court had not adjudicated entitlement to attorney fees at the time the judgment was entered."

UCL plaintiffs have standing under Proposition 64 (but not necessarily a right to monetary relief) so long as they allege that they would not have bought the product but for a misrepresentation on its label.

Kwikset Corporation v. Superior Court (Benson) (2011) 51 Cal.4th 310.

Plaintiff sued defendant under the Unfair Competition Law (UCL), claiming that locksets sold as "Made in U.S.A." were falsely labeled because they contained some screws or other component parts made elsewhere. To satisfy the standing requirements of the UCL, plaintiff alleged that he purchased several Kwikset locksets in reliance on their "Made in U.S.A." label and would not have done so absent that false designation of origin. The trial court concluded these allegations were sufficient but the Court of Appeal reversed.

The Supreme Court reversed, interpreting Proposition 64's standing requirements to impose a minimal burden on UCL plaintiffs, who now have standing so long as they allege that they would not have bought the product but for a misrepresentation on its label, even if the product performs precisely as advertised. The Supreme Court explained that such allegations show that "because of the misrepresentation the consumer ... was made to part with more money than he or she otherwise would have been willing to expend, i.e., that the consumer paid more than he or she actually valued the product. That increment, the extra money paid, is economic injury and affords the consumer standing to sue." The court did not disagree with the defendant that no restitution remedy would be available on the facts alleged, but rejected the defendant's argument that no injury in fact resulting from the alleged UCL violation can be shown where no right to restitution is available.

To certify a class, the class members must be ascertainable, and a UCL class action claiming members relied on false advertising may fail the ascertainability test absent objective criteria to identify consumers who were exposed to the advertising.

Sevidal v. Target Corporation (2010) 189 Cal.App.4th 905.

Plaintiffs alleged defendant Target Corporation's web site misidentified certain items he purchased as made in the United States. Plaintiff alleged fraud and violation of unfair competition and false advertising laws and sought an injunction and restitution. Plaintiff moved to certify a class of California consumers who bought imported items from Target's Web site that were similarly misidentified arguing that under the California Supreme Court's recent decision in *In re Tobacco II Cases* (2009) 46 Cal.4th 298, the class could be certified on his unfair competition claim even if most of the proposed class members never relied on the "Made in USA" designation in deciding to make their online purchases. The trial court agreed with Plaintiff's interpretation of Tobacco II but did not certify the class because Plaintiff did not meet his burden to establish other necessary elements of a class action, including the requirement that a class be ascertainable.

The Court of Appeal (Fourth Appellate District, Division One) affirmed, holding that substantial evidence showed the absent class members could not be reasonably identified by reference to records or by common characteristics that would allow the class members to identify themselves by any objective criteria defining and limiting the class. Moreover, the court determined the trial court properly found the class as alleged was overbroad because the evidence showed the vast majority of absent class members never saw the Web page containing the alleged misrepresentation and thus were never exposed to the alleged wrongful conduct.

civil procedure

CCP 998 Settlement offer served with summons and complaint cannot form the basis of subsequent recovery of fees and interest, as such a premature offer is made in bad faith.

Najera v. Huerta (2011) 191 Cal.App.4th 872.

Plaintiff sued defendant for injuries incurred in a traffic collision. After winning at trial, plaintiff claimed entitlement to expert witness fees and prejudgment interest because defendant had failed to accept plaintiff's Code of Civil Procedure section 998 offer of settlement. In response, defendant moved to tax costs, arguing that plaintiff's offer—which was served at the time of the original summons and complaint—was not made in good faith. The trial court granted defendant's denying recovery of the challenged costs.

The Court of Appeal (Fifth District) affirmed holding that the trial court did not abuse its discretion in granting defendant's motion to tax costs where plaintiff's pretrial settlement offer was served concurrently with the summons and complaint. Plaintiff established no special circumstances demonstrating that counsel for defendant had access to information or a reasonable opportunity to evaluate plaintiff's offer at such an early date in the proceedings before the 30-day period for acceptance expired.

Anti-SLAPP motion to strike should be granted as to claims for emotional distress when a defendant shows that plaintiff's cause of action is based on constitutionally protected conduct and the plaintiff fails to show the conduct was such as would ordinarily cause severe and serious distress.

Wong v. Jing (2010) 189 Cal.App.4th 1354.

Plaintiff, a pediatric dentist, sued defendants alleging causes of action for libel per se and intentional and negligent infliction of emotional distress. Plaintiff's allegations were based on allegedly false assertions in a posted review on a popular website that criticized the dental services provided by plaintiff. The defendants filed an anti-SLAPP motion to strike plaintiff's claims. The trial court denied the motion finding that while defendants had shown that their actions arose from protected speech – i.e., "a writing made in a place open to the public or a public

continued on page iii

continued from page ii

forum in connection with an issue of public interest" – plaintiff also had established a probability of success on the merits by making a prima facie showing of facts that could support a finding of libel and infliction of emotional distress against defendants.

Court of Appeal (Sixth Appellate District) affirmed in part and reversed in part. The court affirmed the denial of defendant's motion as to plaintiff's libel claim because plaintiff satisfied her burden by showing that the reviews falsely implied that plaintiff failed to warn and advise, and defendants did not conclusively negate that implication. As to defendant's motion relating to plaintiff's emotional distress claims, the court reversed finding that plaintiff's alleged emotional reaction to being professionally criticized in an online review "did not constitute the sort of severe emotional distress of such lasting and enduring quality that no reasonable person should be expected to endure." Accordingly, plaintiff was not likely to prevail on these claims.

Anti-SLAPP motion is properly denied where "principal thrust" of plaintiff's complaint pertains to business dispute and alleged protected activity is incidental to such dispute.

Baharian-Mehr v. Smith (2010)
189 Cal.App.4th 265.

Plaintiff sued defendants based upon disputes arising from a business partnership, alleging causes of action for breach of fiduciary duty and constructive fraud in the misuse of business funds. After the complaint was filed, one defendant filed a special motion to strike under the anti-SLAPP statute. The trial court denied the motion holding that the complaint did not arise from any protected activity on defendant's part, but from a business dispute between the parties, and that the mention of any protected activity was merely incidental to the business dispute.

The Court of Appeal (Fourth District, Division Three) affirmed: "Resolution of an anti-SLAPP motion requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue." In assessing whether the defendant has met the burden, the court analyzes "the principal thrust by identifying the allegedly wrongful and injury-producing conduct ... that provides the foundation for the claim." "If the mention of protected activity is only incidental to a cause of action based essentially on non-protected activity, then the anti-SLAPP statute does not apply."

Order granting defendants' motion to strike plaintiffs' complaint under California's anti-SLAPP statute with leave to amend is not immediately appealable under federal court collateral order doctrine.

Greensprings Baptist Christian Fellowship Trust v. Cilley (9th Cir. 2010)
629 F.3d 1064.

Plaintiffs brought suit for malicious prosecution against defendants and attorneys who represented defendants in prior action. The federal district court granted defendants motion to dismiss under California's Anti-SLAPP statute but granted plaintiffs leave to amend their complaint. California Code of Civil Procedure section 425.16 provides for the pre-trial dismissal of a strategic lawsuit against public participation (SLAPP). Under California law, a state court order granting or denying such an anti-SLAPP motion is immediately appealable to the California Court of Appeal. Ninth Circuit authority had established that a federal district court order *denying* an anti-SLAPP motion is immediately appealable as a collateral order. The question on appeal in this case was whether an order granting a motion to strike with leave to amend is similarly appealable.

The Ninth Circuit held that a federal district court order that grants an anti-SLAPP motion but permits a plaintiff leave to amend its complaint is not immediately appealable as a collateral order. Unlike an order *denying* an anti-SLAPP motion, such an order is not the final word on whether the requirements of California's anti-SLAPP statute are met, and instead permits the district court to later reassess the propriety of granting the anti-SLAPP motion.

Use of lodestar method to calculate attorney fees appropriate except where statute expressly provides otherwise.

Santa Rosa v. Patel (2010)
191 Cal.App.4th 65.

Plaintiff successfully sued defendant under the red light abatement law (Pen. Code, § 11225 et seq.) and the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). Plaintiff subsequently moved for attorney fees under Civil Code section 3496, subdivision (b) using calculations under the lodestar method. Defendants opposed the motion, contending that the fees requested by plaintiff were unreasonable and that only the actual fees incurred should be awarded. The trial court awarded fees to plaintiff utilizing a cost-plus approach rather than the lodestar method.

The Court of Appeal (First District, Division Four) reversed, holding that since Civil Code section 3496 did not provide for a specific method to be used for fee calculations, the lodestar method applied. That approach affords predictability to the process and avoids protracted litigation concerning the question of salaries, costs, and the internal economics of a law office. The court contrasted the lodestar method's ease of use with the cost-plus method, under which plaintiff was required to undertake an analysis of the cost of its attorney, including salary and benefits, service and supplies, and overhead.

Appellate court, and not trial court, is best equipped to assess CCP 1021.5 request for fees based entirely upon success on appeal.

Environmental Protection Information Center v. California Department of Forestry and Fire Protection (2010)
__ Cal.App.4th __.

Plaintiff sued seeking to halt the logging of timberland owned by Pacific Lumber Company in Humboldt County. Plaintiffs had successfully challenged various approvals issued by defendant administrative agency and the trial court awarded plaintiffs their attorney fees under Code of Civil Procedure section 1021.5. Defendants were ultimately successful in substantially reversing the judgment on the merits in the California Supreme Court.

continued on page iv

continued from page iii

The Court of Appeal (First Appellate District, Division Five) addressed the fee award on remand from the Supreme Court, and reversed the trial court's attorney's fees award: "Where a successful party has been awarded attorney fees under section 1021.5, and a reviewing court later reverses the judgment on which the fee award was based, the reviewing court must also reverse the fee order."

For purposes of 180-day window for appeal, presumption that a judgment or an appealable order is filed on the file-stamped date may be rebutted by evidence that the order was not accessible to the public until some time after that date.

Marriage of Mosley (2010)
190 Cal.App.4th 1096.

In this in divorce case, an appealable order was signed and filed-stamped but neither served on the parties nor made part of the public record. Appellant, who repeatedly (and physically) checked the court files to determine whether any order had been entered, came away empty-handed. Not until after the 180-day time for appeal had elapsed was the order located by the court clerk, served, and placed in the public record. Appellant then immediately filed her notice of appeal.

The Court of Appeal (4th District, Division 3) considered but declined to dismiss the appeal under California Rules of Court, rule 8.104, subdivision(d)(3), which mandates an appeal be filed within 180 days after the entry of the appealable order. The court framed the issue as follows: "A judgment or an appealable order is presumptively filed on the file-stamped date. But what happens when a file-stamped appealable order disappears into the juridical equivalent of a sock drawer?" The court held that under the circumstances described above, appellant adequately rebutted the presumption of filing on the file-stamped date, so her appeal was timely.

Where settlement agreement encompasses both civil action and commensurate workers' compensation claim, Workers' Compensation Appeals Board must approve workers' compensation claim before settlement of such claim is effective; extrinsic evidence is admissible to construe an ambiguous agreement.

Steller v. Sears, Roebuck and Co. (2010)
189 Cal.App.4th 175.

Plaintiff sued defendant in a civil tribunal and filed a complaint with the Workers' Compensation Appeals Board stemming from injuries incurred while working for defendant. Plaintiff and defendant subsequently reached an agreement to settle both during a superior court settlement conference. The lower court interpreted the settlement agreement as encompassing both of her actions against respondent. On appeal, however, plaintiff argued that the settlement agreement encompassed only her civil action because Labor Code section 5001 requires WCAB approval before a worker's compensation claim can be settled. Neither the settlement agreement nor the judgment expressly required that settlement of the workers' compensation claim be approved by the WCAB.

The Court of Appeal (Second Appellate District, Division Six) affirmed holding that where the parties seek to settle both a civil action and a related workers' compensation action at a superior court settlement conference, the entire settlement must be conditioned upon Workers' Compensation Appeals Board approval. The court explained the "significant difference in legal effect between a release of tort liability and a release of workmen's compensation liability.... A tort release is effective upon execution, but a compromise and release of workmen's compensation liability is invalid until approved by the Workmen's Compensation Appeals Board. [Citations.].... These safeguards against improvident releases place a workmen's compensation release upon a higher plane than a private contractual release...."

Furthermore, because the language of the settlement agreement was ambiguous, the trial court was required to consider extrinsic evidence of the parties' intent: "The court should not limit the 'determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous' when the language is reasonably subject to multiple interpretations."

evidence

In attorney malpractice action, attorney-client privilege applies to communications during mediation unless expressly waived by all parties or unless respecting the privilege would violate due process.

Cassel v. Superior Court (Wasserman, Comden, Casselman & Pearson, L.L.P.) (2011)
51 Cal.4th 113.

Plaintiff sued defendant attorneys in connection with settlement of a mediation where defendant law firm represented plaintiff alleging causes of action for malpractice, breach of fiduciary duty, fraud, and breach of contract. Prior to trial, the defendant attorneys moved, under the statutes governing mediation confidentiality, to exclude all evidence of private attorney-client discussions immediately preceding, and during, the mediation concerning mediation settlement strategies and defendants" efforts to persuade petitioner to reach a settlement in the mediation. The trial court granted the motion, but the Court of Appeal vacated, reasoning that the mediation confidentiality statutes (see, *inter alia*, Evidence Code section 1150) are intended only "to prevent the damaging use against a mediation disputant of tactics employed, positions taken, or confidences exchanged in the mediation, not to protect attorneys from the malpractice claims of their own clients."

The California Supreme Court reversed, holding all discussions conducted in preparation for a mediation as well as all mediation-related communications that take place during the mediation itself are protected from disclosure, even if these do not occur in the presence of the mediator or other disputants. The Court reasoned that "[i]n order to encourage the candor necessary to a successful mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding."

insurance

Insurance Code prohibits insurer from invoking "any insured" exclusion clause to coverage of innocent co-insureds where guilty co-insured admitted arson.

Century-National Insurance Co. v. Garcia (2011) 51 Cal.4th 564.

Plaintiff insurer sought a declaration that it had no duty to pay for insured defendants' loss under an exclusion for the intentional act or criminal conduct of "any insured." Insureds were a married couple and the couples' son who resided with them. The son set fire to his bedroom thus causing damage to the parents' property. The trial court agreed with the insurers interpretation of the exclusion and the Court of Appeals affirmed.

The California Supreme Court reversed, holding that a policy provision excluding coverage for fire losses caused by the intentional act of "any" insured cannot be enforced to deny coverage to a coinsured who neither directed nor participated in setting the fire. The Court explained that Insurance Code sections 2070 and 2071 prescribe a standard form of fire policy for use in California. Insurers may vary the form only if their policies provide fire coverage that is substantially equivalent to or more favorable to the insured than the fire coverage afforded by the form policy. The form policy incorporates a statutory exclusion for losses resulting from a willful act by "the" insured, but that exclusion is not triggered by the willful act of "any" insured.

Other exclusionary provisions in the form policy likewise are tied to "the" insured rather than "any" insured. The statutory form thus reflects "the Legislature's intent to ensure coverage on a several basis and protect the ability of innocent insureds to recover for their fire losses despite neglectful or intentional acts of a coinsured." The Supreme Court noted that because its decision involved a fire policy subject to sections 2070 and 2071, the decision "should not be read as necessarily affecting the validity of clauses that deny coverage for the intentional acts of 'any' insured in other contexts."

labor and employment

The anti-retaliation provision of the FLSA protects oral as well as written complaints of violation of the Act.

Kasten v. Saint-Gobain Performance Corp., (Mar. 22, 2011, No. 09-834.)

Plaintiff employee sued defendant employer alleging retaliation in violation of Fair Labor Standards Act (FLSA). In a separate suit, plaintiff alleged that defendant placed time clocks in a location that prevented workers from receiving credit for the time they spent donning and doffing work-related protective gear. Plaintiff here claimed that he was discharged because he orally and informally complained to company officials about the time clocks. The District Court granted summary judgment, concluding that the FLSA's anti-retaliation provision did not cover oral complaints. The Seventh Circuit affirmed.

The United States Supreme Court reversed, holding in a 6-2 decision that an employee may recover against his former employer for retaliation based on a verbal (as opposed to written) complaint about its employment practices. The Court reasoned that the FLSA protects an employee who has "filed any complaint" (29 U.S.C. section 315(a)(3)), which the Court construed as covering verbal complaints.

A city's duty to meet and confer with a collective bargaining unit does not extend to the decision to lay off employees but only to the implementation and effects of the layoff decision, including the number and identity of the employees to be laid off, and the timing of the layoffs; PERB decisions may be reviewed only under an "erroneous construction" standard.

International Association of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Board (City of Richmond) (2011) *51 Cal.4th 259.*

City issued lay-off notices to 30 firefighters in a cost-cutting measure. Plaintiff union filed an unfair labor practice charge with the Public Employment Relations Board ("PERB") alleging that the city had violated the Meyers-Milias-Brown Act by failing to meet and confer with it over the layoff decision. PERB declined to issue a complaint concluding that a decision to lay off employees, including firefighters, is not subject to collective bargaining. The PERB appeals board affirmed, and the Superior Court declined to issue a writ of mandate. The Court of Appeal affirmed and held that such decisions are not subject to judicial review by the superior court except in three narrow exceptions: (1) violates a constitutional right, (2) exceeds a specific grant of authority, or (3) is based on an erroneous statutory construction.

The California Supreme Court affirmed citing *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 622 (*Vallejo*). In *Vallejo*, the California Supreme Court held that a city had no duty to bargain with the union representing its firefighter employees over staffing decisions, including layoffs, unless its decision affected the "workload and safety of the remaining workers." *Vallejo* left unclear, however, whether this safety exception requires a public employer to bargain over the layoff decision itself or merely bargain over the effects of that decision on retained employees—e.g., the timing, number, or sequence of such layoffs. In the present case, the Court confirmed that, where the *Vallejo* exception applies, an employer must bargain only over the effects of a layoff decision. The Court further held that a public employer's duty to bargain under California's Meyers-Milias-Brown Act depends on which of the following three decision types is involved: (1) a pure business decision with only an attenuated link to employment, where no duty to bargain is required; (2) a pure employment decision, where a duty to bargain arises; or (3) a mixed decision that affects employment but chiefly concerns the entity's overall direction, where only a duty to negotiate effects is required. Because the City of Richmond's layoffs were based on a budget crisis, the decision fell into the third category and the city could thus conduct unilateral layoffs, and need only bargain with the union over the effects. The Court also held that judicial review of PERB decisions is available only if it is based on an alleged erroneous construction of an applicable statute.

E-mail communications between attorney and client using clients' work computer are not protected where employees using company computers to create or maintain personal information or messages have no right of privacy with respect to those.
Holmes v. Petrovich Development Company, LLC (2011) __ Cal.App.4th __.

Plaintiff employee sued defendant employer alleging causes of action for sexual harassment, retaliation, wrongful termination, violation of the right to privacy, and intentional infliction of emotional distress. Prior to commencing litigation, plaintiff sent e-mails to her attorney from defendant's computer at work regarding possible legal action. These e-mails were used by the defense at summary judgment and at trial, over objection by plaintiff, to defeat all of plaintiff's claims. Plaintiff appealed the judgment entered in favor of the defendant based on evidentiary and instructional errors stemming from the disclosure of the e-mails' contents.

The Court of Appeal (Third District) affirmed, finding that "the e-mails sent via company computer under the circumstances of this case were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him." Based on this, the Court held that the communications were not protected under Evidence Code section 952 which protects communications made "in confidence by means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted."

For purposes of the federal Fair Labor Standards Act (FLSA), only an "employer" has a duty to pay wages; wage order issued by the Industrial Welfare Commission (IWC) do not incorporate the federal definition of employment under the FLSA.
Futrell v. Payday California, Inc. (2010) 190 Cal.App.4th 1419.

Plaintiff brought a proposed class action against defendant payroll company Payday California, Inc. (Payday), among others, for unpaid wages. Payday argued it was not an "employer" under the FLSA and thus not liable for statutory damages. The trial court agreed and entered judgment in favor of defendant.

The Court of Appeal (Second District, Division Eight) affirmed, holding that under *Martinez v. Combs* (2010) 49 Cal.4th 35, (1) only an "employer" must pay wages; (2) a wage order adopted by the Industrial Welfare Commission (IWC) for a particular occupation, trade or industry, and not the common law, properly defines the employment relationship under Labor Code section 1194 [authorizing a private right of action]; and 3) wage orders issued by the IWC "do not incorporate the federal definition of employment." Applying the *Martinez* factors, the court concluded that Payroll was not an "employer" under the circumstances for purposes of the FLSA.

See *Parth v. Pomona Valley Hospital Medical Center* (9th Cir. 2010) 630 F.3d 794. Employees working different shifts may be paid different rates. Plaintiff failed to produce evidence suggesting that employer was attempting to set rates in a manner that would relieve it of the obligation to pay time-and-a-half whenever an employee worked more than eight hours in a day. Weighted average method of calculating employee's regular rate–multiplying the total number of hours employee works at each base rate, then dividing the total by the number of hours worked–is not prohibited by the FLSA.

For purposes of whistleblower protection under the Sarbanes-Oxley Act, statute of limitations begins to run when the employee learns of the injury, e.g. employee's termination. *Coppinger-Martin v. Solis* (9th Cir. 2010) 627 F.3d 745.

Plaintiff sued employer alleging that defendant violated the whistleblower-protection provision of the Sarbanes-Oxley Act of 2002 (SOX) by terminating her employment in retaliation for her reporting to supervisors conduct she believed violated Securities and Exchange Commission (SEC) rules. The United States Department of Labor's Administrative Review Board (ARB) dismissed her complaint as untimely. Plaintiff appealed.

The Ninth Circuit Court of Appeals affirmed, holding that the statute of limitations for purposes of whistleblower protection under SOX begins to run when the plaintiff learns of her injury, in this case at the time when the employer communicated the decision to terminate plaintiff. The court further held that defendant was not equitably estopped from asserting a statute of limitations defense despite plaintiff's claim that defendant had failed to reveal its retaliatory motive for terminating plaintiff – this was the conduct upon which plaintiff's claim was based.

Arbitration clause in employment contract is procedurally unconscionable where it incorporates employer's rules of procedure by reference only and is offered on a take it or leave it basis; clause is substantively unconscionable where it gives employer right to recover attorney fees in a FEHA claim without a showing that the claim was frivolous.
Trivedi v. Curexo Technology Corporation (2010) 189 Cal. App.4th 387.

Plaintiff sued defendant alleging wrongful termination as president and chief executive officer (CEO). An arbitration clause in the parties' employment agreement stated: "Any dispute arising out of or relating to this Agreement or any act which would violate any provision of this Agreement ... to arbitration ... before a sole arbitrator ... selected from the American Arbitration Association ("AAA") pursuant to the AAA's National Rules for the Resolution of Employment Disputes...." Defendant moved to compel arbitration pursuant to the employment agreement and to dismiss or stay the action. The trial court denied defendant's motion and defendant appealed.

The Court of Appeal (First District, Division Four) affirmed, holding that the arbitration agreement was both procedurally and substantively unconscionable. As to procedural unconscionability, the court found that the agreement was prepared by defendant, it was

continued on page vii

continued from page vi

made a mandatory part of the agreement, and that plaintiff was not given a copy of the governing AAA Rules, thus placing plaintiff at a distinct disadvantage at the time of entering into the agreement. As to substantive unconscionability, the court found that the broad attorney fee provision placed plaintiff at greater risk than if he retained the right to bring his FEHA claims in court. The court further found that the provision allowing a party to seek injunctive relief in court unfairly favored defendant, which would be much more likely to be the party to benefit from this provision. Finally, the court noted that enforcing the arbitration clause and compelling plaintiff to arbitrate his FEHA claims lessens his incentive to pursue claims deemed important to the public interest, and weakens the legal protection provided to plaintiffs who bring non-frivolous actions from being assessed fees and costs.

See *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659. Arbitration clause in employment agreement entered into by employee as a condition of employment requiring waiver of the option of employee's right to an informal administrative hearing under the Labor Code was contrary to public policy and unconscionable.

professional responsibility and conduct

An action for quantum meruit brought by prior counsel lies against former client and not against successor counsel; litigation privilege bars actions based on communications between client and attorney in virtually any tort action liability (including claims for fraud), with the sole exception of causes of action for malicious prosecution.

Olsen v. Harbison (2010)
191 Cal.App.4th 325.

Plaintiff attorney sued defendant attorney alleging causes of action for quantum meruit, breach of contract, fraud and deceit, intentional interference with contractual relationship, and the imposition of constructive trust based on defendant's purported scheme to steal plaintiff's client in order to obtain 100 percent of the attorney's fees from client's case. Client had hired plaintiff to represent her in a personal injury action based on a contingency fee. Plaintiff subsequently brought in associate counsel, defendant, with the signed written consent of client. The client soon fired plaintiff and retained defendant. Client's case settled for $775,000 and defendant collected the contingency fee. Plaintiff sued defendant for a share of the fee, but the trial court found such a quantum meruit claim would lie only against client, and not successor attorney. Moreover, plaintiff's claim that successor attorney committed fraud and deceit by inducing plaintiff to hire him as associate counsel, when his true intent was to persuade client to fire plaintiff and hire defendant, was barred by the litigation privilege, since the intent of the allegedly fraudulent communications was to secure the services of counsel. Similarly, litigation privilege barred plaintiff's claim against successor attorney for interference with contract since there is no requirement that plaintiff and defendant be adverse parties at time of the communications for litigation privilege to apply. Finally, plaintiff could not enforce fee-sharing contract with defendant, predicated upon contingency-fee contract between plaintiff and client, once client terminated plaintiff's services, plaintiff had no claim for constructive trust in the absence of a valid tort or quasi-contract claim.

The Court of Appeal (Fourth District) affirmed, holding that where a client agrees to the association of additional counsel and consents to the fee division, plaintiff's quantum meruit claim, if one existed, should have been brought against former client. As to plaintiff's fraud and intentional interference with contract claims, the court held that any communications that may tend to shed light on plaintiff's claims were within the litigation privilege of Civil Code section 47, subdivision (b) regardless of whether the contents are alleged or proven to be false, fraudulent or the product of malice. That result "promotes the public policy behind that protection by encouraging first and foremost co-counsels' duty of loyalty and complete candor to the client which in turn promotes the utmost freedom of access to the courts, and by curtailing the propagation of tangential derivative litigation arising from communications seemingly compelled by several ethical rules that guide co-counsel." As to plaintiff's breach of contract claim, the court noted that once the client fired plaintiff, the contract between them ceased to exist so that any fee-sharing between plaintiff and defendant, which was premised on the original agreement with the former client, also ceased to exist. As to plaintiff's cause of action for constructive trust, the court held that since none of the other of plaintiff's claims survived, no basis existed for this cause of action.

Business & Professions Code section 6147 applies to contingent fee arrangements regarding both litigation and transactional matters.

Arnall v. Superior Court (Liker) (2010)
190 Cal.App.4th 360.

Plaintiff sued former clients (Petitioners) for payment pursuant to a contingency fee agreement between them. Petitioners refused to pay contending that the agreements were void under Business & Professions Code section 6147 for want of a statutorily required statement, namely, that the success fees were "not set by law but [were] negotiable between attorney and client." Plaintiff argued that such clause did not apply to agreements covering non-litigation matters. The trial court agreed with plaintiff and Petitioners filed a writ petition.

The Court of Appeal (Second District, Division Four) reversed, holding that the Business and Professions Code Sec. 6147 requirement that contingent fee agreements contain a written disclosure that the fee is not set by law and is negotiable is not limited to pending and prospective litigation. The Legislature, in amending the statute on contingent-fee agreements to apply to "client[s]" and not merely "plaintiff[s]," intended to permit clients entering into such agreements for transactional services to void the agreements if the right to negotiate fee was not disclosed.

torts

Defendants' liability generally cannot be decided as a legal matter on lack of duty grounds, but must be assessed as a factual question as to whether defendant breached the duty of reasonable care for the safety of others.

Cabral v. Ralphs Grocery Company (2011)
51 Cal.4th 764

In this wrongful death action, a truck driver stopped his tractor-trailer rig alongside a freeway to eat. Plaintiff's husband veered off the freeway and collided with the parked trailer, causing his death. The jury found

continued on page viii

continued from page vii

both drivers negligent, assigning 90 percent fault to the decedent and 10 percent to the Ralphs driver. The trial court denied Ralphs' motion for judgment notwithstanding the verdict, but the Court of Appeal reversed, holding that the truck driver did not owe a duty to avoid being struck by a negligent driver who left the roadway.

The California Supreme Court granted review and reversed. The Court noted that everyone has a general duty to exercise reasonable care for the safety of others. Accordingly, the question whether a driver who stops alongside the road breaches a duty to exercise reasonable care is one for the jury to answer, considering such factors as whether the driver stopped due to an emergency, whether there were other places (such as a truck stop) the driver could have stopped, the precise location where the driver stopped, whether that location was designated for emergency purposes only, and how long the driver was there.

Sophisticated purchaser doctrine provides no defense to manufacturer of defective product in action by plaintiff who was not the purchaser of the product, was not aware of, and had no reason to be aware of its dangerous properties.

Stewart v. Union Carbide Corporation (2010)
190 Cal.App.4th 23.

Plaintiff Larry Stewart sued defendant alleging causes of action for fraud, negligence, and strict products liability on failure to warn and design defect theories stemming from the onset of mesothelioma purportedly caused by his exposure to asbestos manufactured by defendant. Plaintiff Janet Stewart sued for loss of consortium. Plaintiffs prevailed at trial and defendant appealed, citing trial court error in failing to instruct on the sophisticated purchaser doctrine.

The Court of Appeal (Second District, Division Five) affirmed, holding that the proposed defense was inapplicable since it does not impute an intermediary's knowledge to the plaintiff, or charge him with any knowledge except that which had been made available to him through his training and which, by reason of his profession and certification, he should have had.

For purpose of risk-benefit test, plaintiff bears the burden of establishing that an injury was more probably than not caused by a design defect at which point the burden shifts to defendant to show that the benefits of the challenged design outweighed its inherent risk of harm.

Pannu v. Land Rover North America, Inc. (2011)
191 Cal.App.4th 1298.

Plaintiff sued for strict liability based on design defect stemming from serious injuries sustained by plaintiff during a traffic accident where plaintiff's car, designed and manufactured by defendant, rolled over. Following a bench trial, the court entered a judgment for almost $22,000,000 against defendant, finding stability and roof defects in the vehicle had caused plaintiff's injuries. Defendant appealed contending that the trial court erred as a matter of law in applying the "risk-benefit" test.

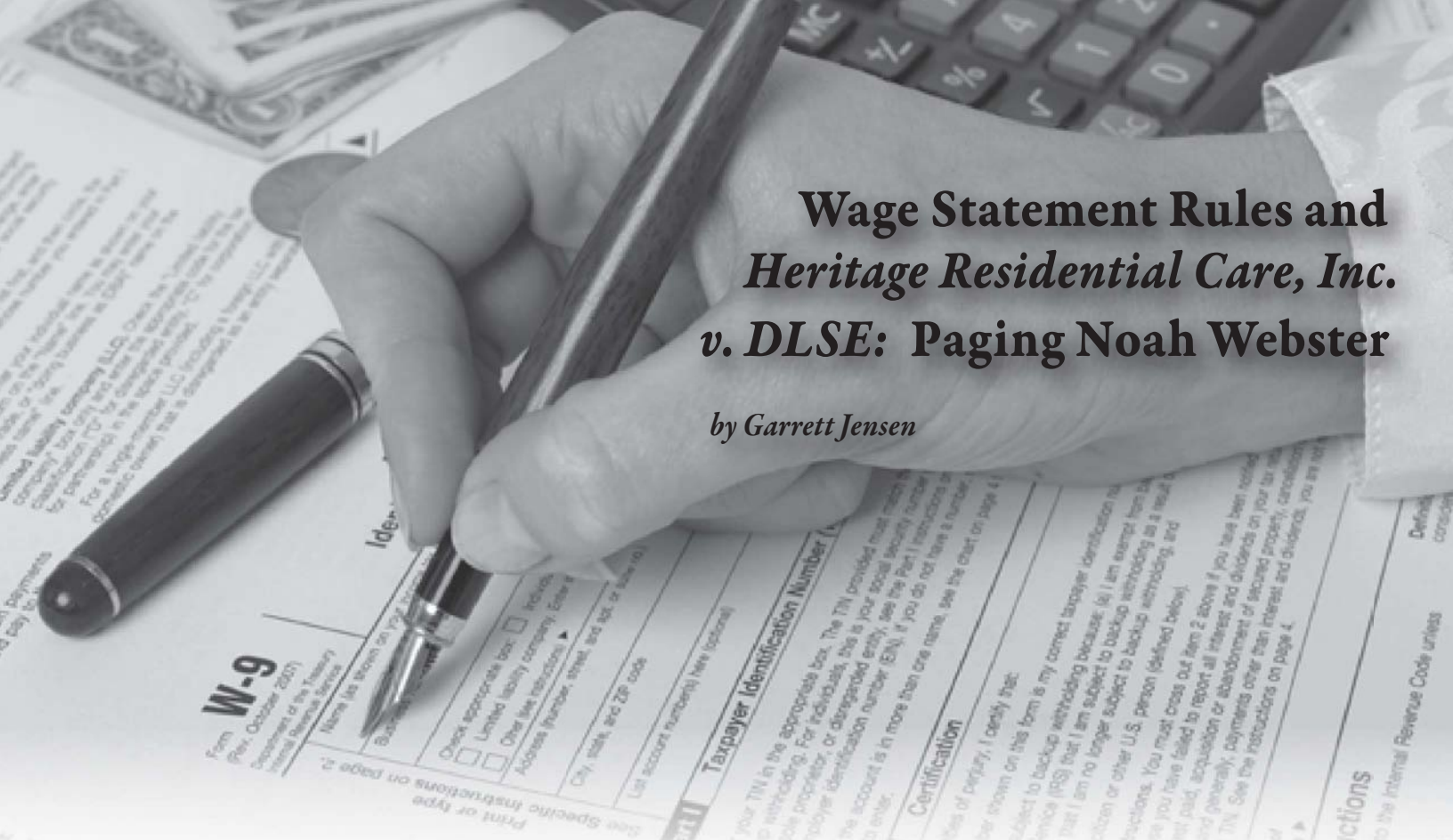
The Court of Appeal (Second District, Division Seven) affirmed. Plaintiff satisfied his burden under the risk-benefit test by showing that defendant's design proximately caused his injuries. The court further held that defendant failed to then satisfy its burden to establish that the benefits of the challenged design, when balanced against such factors as the feasibility and cost of alternative designs, outweighed its inherent risk of harm.

Under Article III of the U.S. Constitution, plaintiff employees sustain sufficient injury-in-fact for standing purposes where private information is stolen from defendant company and the threat of future misuse of such information exists.

Krottner v. Starbucks Corporation (9th Cir. 2010)
628 F.3d 1139.

Plaintiffs sued for negligence and breach of contract under Washington state law after defendant's loss of private employee data including names, addresses, and social security numbers. Defendant moved to dismiss based on the lack of evidence showing misuse of the data, or an injury-in-fact, so that plaintiff could not establish standing. Plaintiffs maintained that the loss of the data itself, independent of any effects from its misuse, constituted sufficient potential harm to support the action. The trial court granted defendant's motion as to plaintiffs' state causes of action but held they had established sufficient harm under Article III of the United States Constitution.

The Ninth Circuit Court of Appeals affirmed, holding that where plaintiff's data is lost by his or her employer, such plaintiff has established standing under Article III since such loss, even if the data is not misused, establishes "a credible threat of harm...." and that such harm is "both real and immediate, not conjectural or hypothetical." The court noted that were the plaintiffs to allege no data had been stolen or based upon the risk that it would be stolen in the future, the court would have found the threat far less credible.



Wage Statement Rules and *Heritage Residential Care, Inc. v. DLSE:* Paging Noah Webster

by Garrett Jensen

An employer's duty under the Labor Code to provide its employees with accurate itemized wage statements seems like an innocuous part of the Labor Code. However, as one employer recently found out (see *Heritage Residential Care, Inc. v. DLSE* (2011) 192 Cal.App.4th 75), a mistaken belief about whether it's necessary to issue them can be quite costly.

Itemized wage statements are required by statute

Labor Code section 226(a) provides that every employer must provide each employee, either semimonthly or at the time of each payment of wages, an accurate itemized statement in writing that contains the following: (1) gross wages earned, (2) total hours worked (not required for salaried exempt employees), (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece rate basis, (4) all deductions (all deductions made on written orders of the employee may be aggregated and shown as one item), (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and the last four digits of the employee's social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period, and the corresponding number of hours worked at each hourly rate by the employee.

Employers that fail to provide the required itemized wage statement are subject to a civil penalty of $250 per employee per violation in an initial citation and $1,000 per employee for each subsequent violation. In enforcing this penalty provision, Labor Code Section 226.3 provides that "the Labor Commissioner shall take into consideration whether the violation was *inadvertent*, and in his or her discretion, may decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake."

What about workers who lack social security numbers?

Heritage Residential Care, Inc. operated seven residential care facilities and employed 24 workers. Of those workers, however, 16 lacked social security numbers. In lieu of giving those 16 workers wage statements, Heritage treated them as independent contractors and issued them 1099s at the end of the year.

In October 2008, Margaret Flanders, an agent for the Department of Labor Standards Enforcement (DLSE), performed a workplace inspection of Heritage. Based on evidence that Heritage failed to provide all of its employees with itemized wage statements, Flanders issued a citation to it for violating Labor Code section 226(a). The citation included a civil penalty under section 226.3 in the amount of $72,000 for 288 violations at $250 per violation.

Heritage then requested an administrative hearing before the DLSE. At the hearing, Heritage argued that it knew about the requirements of section 226—the other 8 workers were provided itemized wage statements—but it issued 1099s because it could not withhold wages for tax purposes for workers who lacked social security numbers. The DLSE hearing officer explained that itemized wage statements have other purposes, apart from tax withholding, including providing clear notice to employees regarding their pay. Heritage's response was that their workers already knew how many days they worked and how much they were paid.

After the hearing, the DLSE affirmed the citation, concluding that there was no basis for exercising discretion to reduce

continued on page 22

or eliminate the penalty assessment for Heritage's failure to provide itemized wage statements to all of its employees. Heritage then brought the issue before the Santa Clara Superior Court, and lost. Undeterred, it appealed to the California Court of Appeal.

The Court of Appeal affirms a finding that an employer's failure to provide wage statements was not inadvertent (despite an honest but mistaken belief regarding employers' statutory obligations), leaving no option for avoiding civil penalties?

In examining the case, the Court of Appeal reviewed the two-step analysis for enforcing civil penalties under section 226.3. First, the court determined there is a mandatory consideration of whether the violation was inadvertent. Second, if inadvertence is found, there is a discretionary decision about whether to penalize a first violation. In determining the meaning of "inadvertent," the court held the term was not defined in the Labor Code, nor was its meaning discussed in any cases within the context of section 226.3.

Without any statutory or case law to guide it, the Court then turned to the Merriam-Webster dictionary to determine the definition of inadvertent--the ordinary meaning is "unintentional," "accidental," or "not deliberate" and antonyms include "intentional," "knowing," and "willful." Heritage argued that a state-of-mind component is present in the statute and its actions should be considered inadvertent since it was operating under a good faith but mistaken belief about California law when it misclassified employees as independent contractors.

The DLSE had previously determined that Heritage's failure to provide itemized wage statements was an intentional act, but ignorance of the law was not defense to the citations. The court agreed, finding that Heritage's behavior would need to be accidental and not deliberate in order to qualify as inadvertent.

In support of its position, the court pointed out that neither it nor the labor commissioner is tasked with determining the employer's subjective belief about the law. In addition, the court also found Heritage's argument unpersuasive as this was not a case where the legal requirements of the statute were unclear or unsettled. Since the Court did not find inadvertence on the part of Heritage, it did not review Heritage's argument that the civil penalty should be mitigated. *Heritage Residential Care v. Div. Lab. Standards Enforcement* (California Court of Appeal, Sixth Appellate District, 1/26/11).

Bottom Line

Unfortunately for this employer, ignorance of the law wasn't an excuse. Unless the failure to issue the required wage statement is due to a clerical error or inadvertent mistake, an employer can't escape the penalties under Section 226.3. Although the recovery in this case was relatively modest, potential liability for violating California's wage and hour laws is enormous, especially because such claims may be filed as a class action or a representative action under the Labor Code Private Attorneys General Act of 2004 (PAGA).

The PAGA authorizes an employee to file a civil action against his employer on behalf of himself and other current or former employees to recover any civil penalty that would otherwise be enforced by the California Labor and Workforce Development Agency. An employee who prevails on such an action is entitled to an award of reasonable attorneys' fees and costs.

The best way to avoid liability is to know and comply with California's wage and hour laws, including the requirement to provide accurate itemized wage statements under Labor Code Section 226(a).

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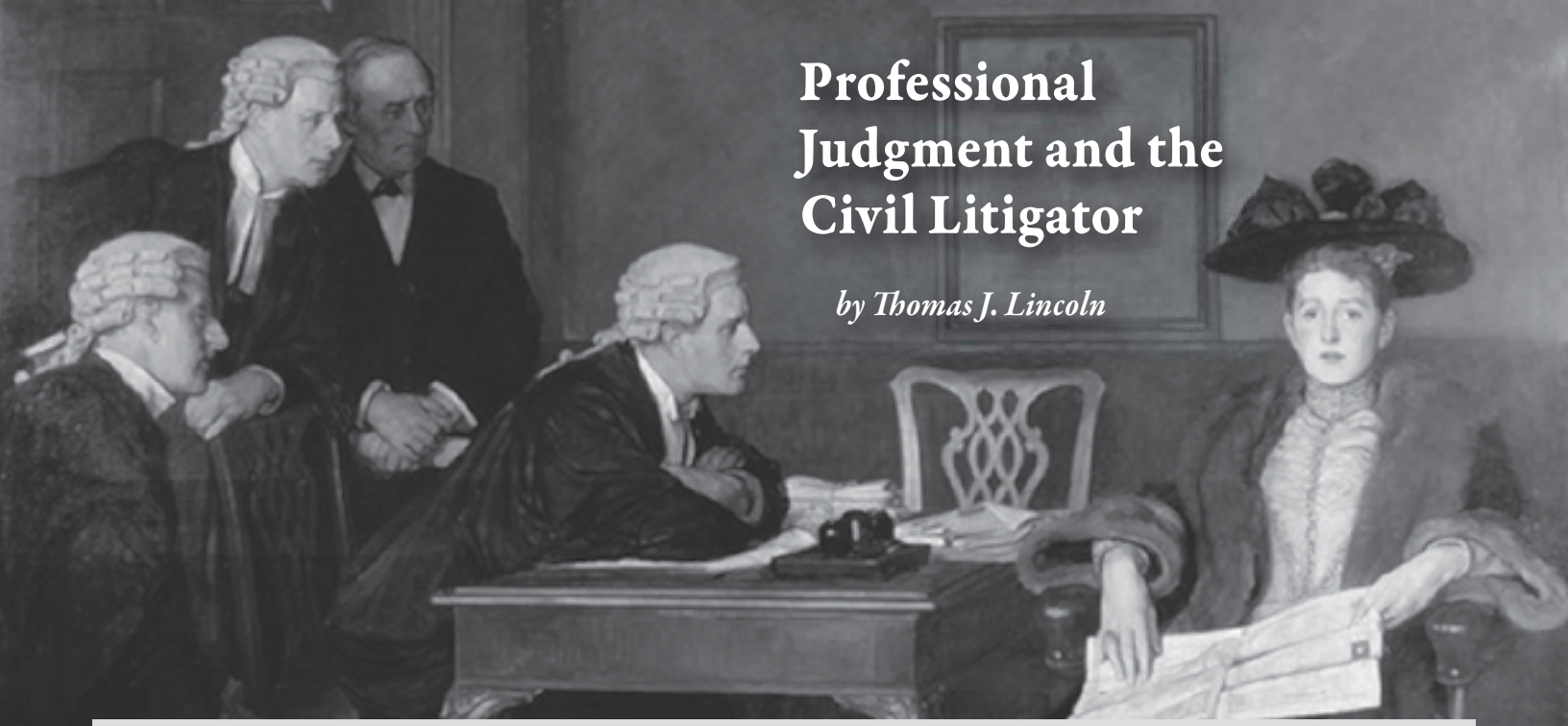


Professional Judgment and the Civil Litigator

by Thomas J. Lincoln

Good name in man and woman, dear lord, is the immediate jewel of their souls. Who steals my purse, steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands. But he that filches from me my good name robs me of that which not enriches him and makes me poor indeed.

— Iago, *Othello,* Shakespeare

One of the most difficult and complex things a lawyer does is to exercise his/her professional judgment. Professional judgment is the process by which a lawyer arrives at a decision. The focus here is on the process, not the decision. At a minimum, it requires knowledge of the law. But the process involves much more than a rote reading and application of the law. A recent, informal survey of successful and experienced lawyers shows how complex the process of exercising professional judgment is. The survey asked how the lawyer would respond if their opponent misses a deadline to designate experts and whether the client should be involved with the decision on how to respond. The answers reflected a depth and breadth of experience, a sense of fairness, and a strong recognition of the importance of one's reputation.

In order to understand the context of the survey, it is helpful to examine a situation in which these questions apply. There are occasions during the practice of law when difficult and complex decisions must be made by an attorney. These are the decisions which tug an attorney in different directions and test their "professionalism". One such decision may be when an opponent is a day or two late on a deadline and the lawyer is asked not to object. In that situation, relief for the late party will likely be granted by the court, even if there is an objection. However, there is a chance that the court will not grant relief and the client may want to take that chance. Moreover, there may have been some prior dealings between the opposing attorneys that factor into the decision. Such decisions require exercising sound professional judgment.

Let's say you are a lawyer who is representing the developer in a construction defect case and there is a case management order (CMO). A CMO is an agreement among the parties, which is approved by the court, and controls discovery, the resolution of discovery disputes, how documents are handled, the mediation process, and disclosure dates, among other things. The CMO in effect requires all parties to disclose their experts on a certain date. On the date set forth in the CMO, you email the list of experts but the plaintiffs' attorney fails to do so. After a couple of days, the plaintiffs' attorney calls and says she received your list of experts, that she would be sending hers over that day, that she hoped you wouldn't make a "big thing" about it being late and that she simply forgot. However, you know from one of your experts that she may not have forgotten, as demonstrated by the fact that she was calling to find experts on the date the designation was due.

You tell her that you need to think about it and ask her to send you an e-mail requesting that (1) you not object to the late designation and (2) the reason for it being late. That same day, you receive the plaintiffs' designation of experts and a notice of deposition for all your experts with the minimum days of notice possible so that plaintiffs can take your experts before you take theirs. While there is no code or case on point, typically plaintiffs and their experts are deposed before defendants and their experts, at least, as to the same fields of expertise. This seems to be the custom and practice in most locales. Obviously, she was not following this custom and practice. So, in addition to being a couple of days late, and in violation of the court order in that regard, the excuse used by the plaintiffs' attorney is suspect at the very least. By her delay in designating and then noticing your experts before you noticed hers, she may also have gained a tactical advantage by being able to take your experts before you take hers.

Unlike other states and what is required under the ABA Model Rules, California

continued on page 24

does not have an affirmative duty to report dishonesty of an attorney. So, there is really not much you can do about the attorney's apparent dishonesty. However, you are also now faced with a complex situation dealing with the plaintiffs, your clients, insurers and other parties in the case. As the developer's attorney, you are not only defending against the claims brought by the homeowners, you are also prosecuting those same claims, in one form or another, against the various trades and design professionals. In addition to your client, and perhaps its corporate counsel, watching your every move, there are often a host of claims professionals and coverage attorneys retained by insurance companies to which you report. Moreover, each of the sub-trades you are prosecuting is watching for any advantage you may give the plaintiffs so that, if you do, they can claim you prejudiced their rights. In analyzing how you should proceed, you begin to consider your options and client communication requirements.

The use of experts is vital in civil litigation generally, and especially so in construction defect litigation. Construction defect litigation is truly expert driven. Each party in litigation has the right to use an expert to explain matters that are beyond common experience and in situations in which the expert's opinion would assist the judge or jury. Dates to disclose those experts are either set by a code section, ordered by the court, or agreed to by the parties themselves and approved by the court. On the appropriate date, each party serves on the other parties a list of experts each may use in trial. The list includes not only the name of the expert but also a description of the expert's qualifications, what the expert is expected to testify to and the cost of the expert, among other things. The date to disclose experts is fairly close to the trial date, usually within 50 days of the trial date.

If a party fails to disclose its expert in a timely manner, the court, on objection of any party, shall exclude the expert. However, the late party may ask the court for relief for such failure and the court shall grant relief if a number of factors are met. Basically, unless there is some type of prejudice to the other party, as long as the late party acted promptly and has some reasonable excuse, the court will likely grant the relief. Of course, attorneys can always come up with some argument as to why an excuse is not reasonable or why a party has been prejudiced.

Practically, the attorney who fails to disclose experts in a timely manner has a couple of options. The attorney can simply serve the late list and wait to see if any of the other parties expressly object. However, this option can create problems because there is no requirement that any other party expressly object. So, unless one of the other parties take the depositions of the late disclosed experts, the attorney that disclosed late will not know for sure if the expert can be used during trial until the judge rules either during pretrial motions or during trial.

Another and safer option is to simply follow the code requirements. The code requires the attorney to meet and confer with the other attorney(s) and ask for an agreement to allow the late disclosure. If the other attorney refuses to agree to the late designation, the late party is required to file a motion seeking relief. If the late attorney acted diligently upon learning of the mistake and there is "no prejudice", the court will likely grant relief.

In addition to the procedural rules, there are other things the experienced attorney will likely consider. First, the attorney must consider what is appropriate to tell the client and whether the client is required to consent to the late designation. The law requires the attorney to keep the client reasonably informed of "significant developments" in the case. See California Business and Professions Code section 6068 (m) and California Rules of Professional Conduct, Rule 3-500. Typically, granting an extension of time is not considered significant unless there is some "material prejudice" to the client's interest. The State Bar has looked at revising Rule 3-500. A proposed change may include a Comment on the Rule 3-500 explaining what is and what is not significant:

continued on page 25

Professional Judgement – continued from page 24

"Whether a particular development is significant will generally depend upon the surrounding facts and circumstances. For example, a change in lawyer personnel might be a significant development depending on whether responsibility for overseeing the client's work is being changed, whether the new attorney will be performing a significant portion or aspect of the work, and whether staffing is being changed from what was promised to the client. Other examples of significant developments may include the receipt of a demand for further discovery or a threat of sanctions, a change in a criminal abstract of judgment or re-calculation of custody credits, and the loss or theft of information concerning the client's identity or information concerning the matter for which representation is being provided. Depending upon the circumstances, a lawyer may also be obligated pursuant to paragraphs (a)(2) or (a)(3) to communicate with the client concerning the opportunity to engage in, and the advantages and disadvantages of, alternative dispute resolution processes. **Conversely, examples of developments or circumstances that generally are not significant include the payment of a motion fee and the application for or granting of an extension of time for a time period that does not materially prejudice the client's interest.**" (Emphasis added). See California State Bar Commission for Revision of Professional Conduct, Proposed Rule 1.4 (RPC 3-500, 3-510) September 22, 2009.

It may be clear in some situations that a client would not be materially prejudiced; for example, granting a 30 day extension to answer a first set of interrogatories. Others, like the above scenario, are more complicated. In the above scenario, the plaintiffs' attorney may or may not have a valid excuse and the plaintiffs may or may not have gained a tactical advantage, which will be clear unless or until there is a hearing and ruling. Thus, the more complicated the scenario, the more the attorney is required to exercise his/her professional judgment.

As noted earlier, an informal, qualitative survey of lawyers dealing with the late designation of experts and whether the client should be consulted in making the decision as to how to deal with the situation was conducted. The lawyers, members of the San Diego Chapter of the American Board of Trial Advocates, were asked: 1. If your opponent misses a deadline to designate experts by a day or two and asks you to allow him/her to be able to designate without a motion, would you agree?; and, 2. Do you believe that you need to, or should, get permission from the client before you agree to the request?

Just under ½ of the members responded (66/175 approximate). Of those who responded, the vast majority answered "yes" to question one (48/2) and "no" to question two (30/18). The specific numbers of "yes" and "no" do not adequately reflect the views of the members, however. A

continued on page 26

qualitative evaluation of the survey demonstrates a deeper reflection and sense of professionalism of the members. Such an evaluation is recognized in many studies and, while this writer does not suggest his evaluation rises to a peer reviewed academic level, a qualitative evaluation is instructive. See Weiss, R. S. (1994) Learning from Strangers. New York: Free Press; Van Manen, M. (1990) Researching Lived Experience. New York SUNY.

While a large majority answered "yes" they would allow the late designation and "no" they would not inform nor seek the client's consent, virtually all qualified their responses in such a way that reflected a high level of experience and professionalism. In other words, their responses revealed the complex nature of the exercise of professional judgment.

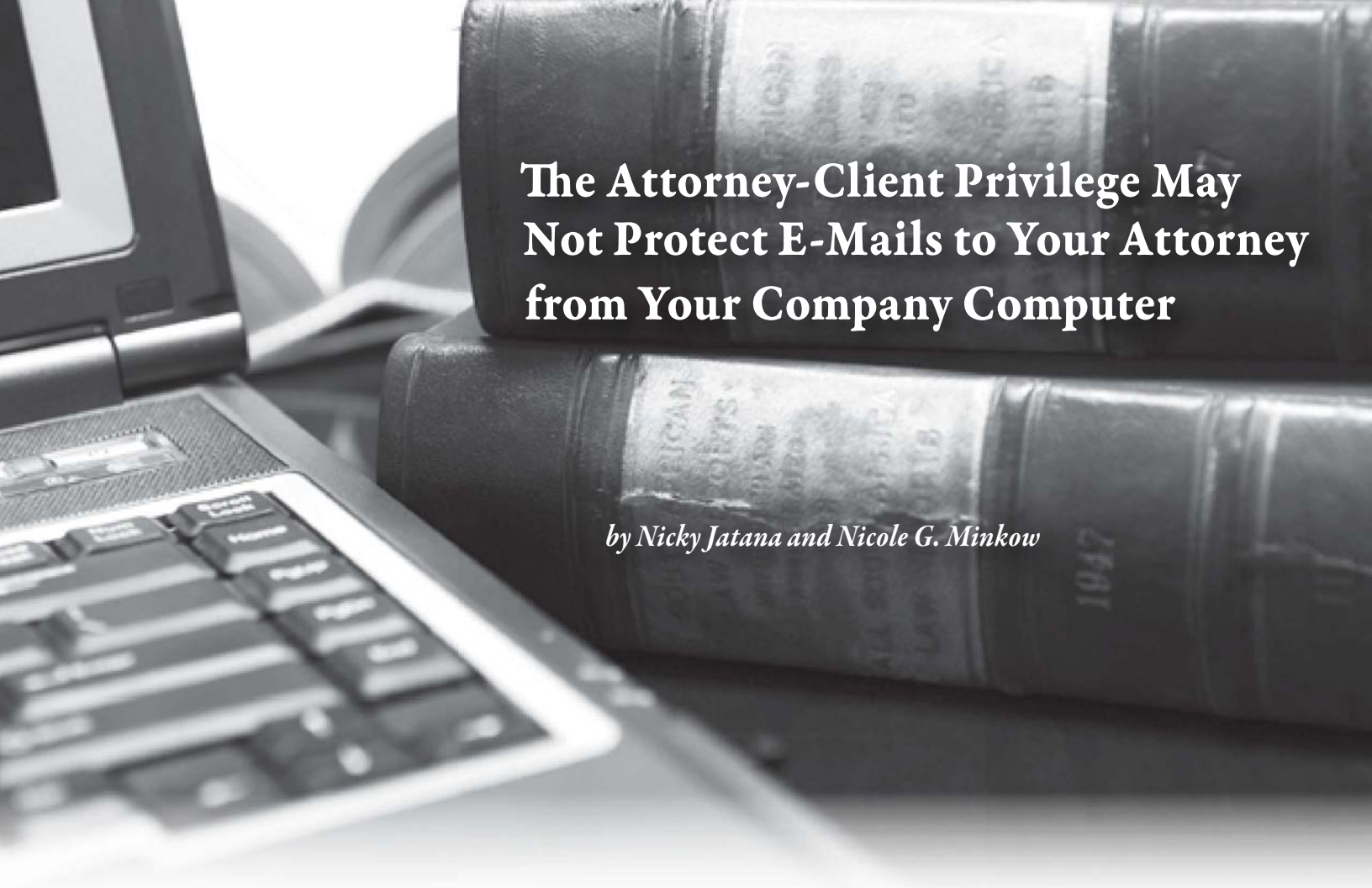
The lawyers in the survey examined the issues from a variety of perspectives. One of the most prevalent perspectives was based upon the prediction that the court would allow the late designation anyway so there was no value in objecting and the client did not need to be informed. It takes experience to be able to reasonably predict what a court will do. Based upon that assumption, the attorney believed he/she was not giving up any rights of the client so there was nothing of significance the client needed to be advised of. These attorneys felt that it was within their appropriate judgment to make such an assumption and base their decision on it. Others felt that it was fine to make that assumption, but the client should still be informed of the decision. Still others said that, not only should the client be informed but that the client should also be required to consent. While it can be argued that one can never be certain what a judge will do and, therefore, an attorney may in fact be prejudicing the right of a client (the court could sustain the objection and not allow the late designation), many of the lawyers surveyed felt that it was within their authority as a professional to exercise their judgment based upon their ability to predict. While no one can guarantee an outcome, professional judgment does require evaluating the likelihood of a result and factoring that into the decision making process, including the judgment as to whether the client should be consulted.

Another perspective reflected in the study focused on how the act of objecting would affect relations with the other attorney both in the current case and in future cases. While part of that perspective was based upon reputational considerations, it also dealt with the important benefit of being able to work together and cooperate. Working together and cooperating can inure to the benefit of the client and court system because the lawyers will be spending less time arguing and there will be less need for the court to intervene in disputes. To be sure, the California Bar recognizes cooperation and civility (along with honesty, dignity, candor, diligence, respect, and courtesy) as essential elements to the fair administration of justice and conflict. California Attorney Guidelines of Civility and Professionalism, California State Bar, July 20, 2007.

As to the reputational aspect, that could be viewed as merely a personal benefit to the attorney. But reputation can also enhance the ease with which a case is litigated. Thus, many in the survey made the point that one's reputation in the legal community for not putting others through meaningless work was valuable and in the client's interest because, in the long run, such a reputation would cause others to act toward you in the same manner.

It is this last perspective that appeared most prevalent: essentially, do unto others as you would have others do unto you. These attorneys felt strongly that there was an obligation for professionals to treat each other fairly and in a respectful, collegial manner, as you would want to be treated. The survey respondents reflected a strong sense of doing the "right thing" relating to the legal system as a whole even if, arguably, the client lost a potential immediate benefit. To be sure, the same person who was making the overall decision was also deciding that the immediate benefit to the client was not significant because of their prediction that the court would allow it anyway. While having the same person deciding the significance of the benefit and the likelihood of that benefit occurring is a theoretical conflict, these lawyers do not seem bothered by that conflict, viewing it as part of exercise of their professional judgment.

The survey results provide a glimpse of the complex process of professional judgment by successful and experienced lawyers. It shows the various perspectives a lawyer may use in coming to a decision. These perspectives include applying the appropriate law, ethics, short and long term consequences, predicting the outcome and the impact on one's reputation. The results demonstrate that the value of a lawyer's services does not simply come from winning or losing a specific case but rather the level at which the lawyer exercises their professional judgment. Finally, the results demonstrate that the lawyers surveyed are professionals in the truest sense of the word.



The Attorney-Client Privilege May Not Protect E-Mails to Your Attorney from Your Company Computer

by Nicky Jatana and Nicole G. Minkow

If an employee, using her employer's computer and e-mail account, sends an e-mail to her attorney about possible claims against her employer, is that e-mail protected by the attorney-client privilege so that it may not be used as evidence against her? The California Court of Appeal has answered, "No." *Holmes v. Petrovich Development Co., LLC*, No. C059133 (Cal. Ct. App. Jan. 13, 2011).

Affirming a judgment in favor of the employer on claims of invasion of privacy and intentional infliction of emotional distress, the Court held that, because the employee had no reasonable expectation of privacy in communications made using her employer's e-mail address and computer, the attorney-client privilege did not prevent the defendants from offering her e-mails into evidence.

A. The Facts

Gina Holmes was an executive assistant to Paul Petrovich, the owner of Petrovich Development Company. When hired, Holmes received a copy of the employee handbook, which included policies concerning the use of the Company's computers and e-mail systems. It stated:

- that those systems were for business purposes only,
- that employees were prohibited from sending or receiving personal e-mails, and
- employees had "no right of privacy" in any e-mail messages made using the Company's computers. The Company also reserved the right to "inspect all files or messages ... at any time for any reason."

Shortly after she began work, Holmes told Petrovich that she was pregnant and the two began a series of e-mail communications regarding maternity leave. Holmes initially stated she planned on working up to her due date of December 7, 2004 and would return after six weeks. Shortly thereafter, Holmes said she may take up to four months off and would begin her maternity leave earlier than Petrovich expected, on November 15th. Petrovich became concerned about coverage during Holmes' absence and stated in an e-mail "I need some honesty. How pregnant were you when you when you interviewed with me and what happened to six weeks? ... This is an extreme hardship on me, my business and everybody else in the company. You have rights for sure and I am not going to do anything to violate any laws, but I feel taken advantage of and deceived for sure."

Holmes replied by letting Petrovich know she found it "offensive" that he thought she was dishonest or deceitful. She explained her choice to wait until test results indicated there were no problems with the baby before letting co-workers know about her pregnancy. She also indicated the exchange had put a strain on their working relationship, stating, "At this point, I feel that your words have put us in a bad position where our working relationship is concerned, and I don't know if we can get past it. As long as we're being straightforward with each other, please just tell me if what you are wanting at this time, is for me to not be here anymore, because that is how it feels. I need to go home and gather my thoughts."

Because Petrovich was concerned that Holmes would resign, he forwarded their e-mails to the Company's in-house counsel and human resources managers. After several

continued on page 28

Attorney-Client Privilege – continued from page 27

additional e-mails, Petrovich and Holmes appeared to have resolved the maternity leave issue, and, in another e-mail, Holmes suggested that they "move forward in a positive direction." Later that day, during an obstetrics appointment, Holmes told her doctor that she felt that she was being harassed at work due to her pregnancy. He suggested that she discuss the matter with her boss, and if that did not remedy the situation, she should contact an attorney. When Holmes returned to work following her doctor's appointment, she used her Company issued e-mail account and computer to send an e-mail to her attorney, Joanna Mendoza, and asked for a referral to an attorney specializing in labor law. Holmes told Mendoza, "[N]ow that I am officially working in a hostile environment, I feel I need to find out what rights, if any, and what options I have." Holmes also explained that the comments from her boss were "upsetting and hurtful" and that she was upset he forwarded a personal e-mail about her pregnancy to others in the office.

The following day, after having lunch with Mendoza, Holmes sent Petrovich an e-mail stating she was very upset, and realized they could not "put this issue behind us." She went on to say "I think you will understand that your feelings about my pregnancy; which you have made more than clear, leave me no alternative but to end my employment here."

A lawsuit followed with Holmes bringing claims against Petrovich and the Company (collectively, "defendants") for harassment, retaliation, wrongful termination, invasion of privacy, and intentional infliction of emotional distress. The defendants filed a motion for summary adjudication, which the trial court granted as to Holmes' harassment, retaliation, and wrongful termination claims. The invasion of privacy and intentional infliction of emotional distress claims proceeded to trial.

B. Attorney E-mails as Evidence During Trial

Holmes filed a motion *in limine* to prevent Petrovich from introducing the e-mails to her attorney during the trial. Petrovich sought to demonstrate through the e-mails that Holmes did not suffer severe emotional distress but was only frustrated and annoyed, and only filed the lawsuit at the urging of her attorney.

Holmes sought to prevent the defendants from introducing into evidence the e-mails to her attorney, arguing they were privileged attorney-client communications. The trial court denied the motion, ruling the e-mails were not privileged because they were not private, permitting defendants to offer the e-mails into evidence at trial and thus, demonstrating Holmes did not suffer severe emotional distress. Judgment was entered in favor of the defendants.

Holmes appealed, arguing, among other things, that the trial court erred in allowing her e-mails to be introduced into evidence. The California Court of Appeal rejected her argument based on Sections 912 and 952 of the California Evidence Code. Under the law, "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons, other than those who are present to further the interest of the client" are privileged. Section 917 of the California Evidence Code further provides that a "communication ... does not lose its privileged character for the sole reason that it is communicated by electronic means."

The Court nonetheless recognized that it did not follow that the e-mails in the case before it were privileged, given that the computer and e-mail account Holmes used belonged to the defendants. She had been informed that e-mails were not private and could be monitored; and she was aware of these policies. According to the Court, the use of her employer's computer and e-mail account to communicate with her attorney was "akin to consulting her lawyer in her employer's conference room, in a loud voice,

continued on page 29

with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him."

The Court explained that, had Holmes used her home computer and personal e-mail account to send the e-mails, the result would likely have been different. But by using the Company computer, Holmes effectively disclosed the conversation with her attorney to a third party, thus destroying the attorney-client privilege. Accordingly, the Court concluded that the e-mails were not privileged and affirmed the trial court's ruling.

In reaching its decision, the Court rejected Holmes' urging to follow the Ninth Circuit Court of Appeals decision in *Quon v. Arch Wireless Operating Co., Inc.* (9th Cir. 2008) 529 F.3d 892, reversed by *City of Ontario v. Quon* (2010) 130 S. Ct. 2619. Holmes argued the "operational realities" of the workplace were that defendants did not monitor employees' use of company e-mail and as a result, Holmes did have a reasonable expectation of privacy in the use of her corporate e-mail account. In *Quon,* an employee of the City of Ontario Police Department sued the department claiming its review of his personal text messages on the City's issued text-pager constituted an unreasonable search and seizure violating his Fourth Amendment rights. The Ninth Circuit held that Quon had a reasonable expectation of privacy in his personal text messages because of the "operational realities" of the workplace specific to Quon, namely, an indication from his supervisor that personal use of the pagers would be private.

Distinguishing Ninth Circuit's reasoning in *Quon*, the Court here explained that Holmes' case does not present a Fourth Amendment issue, and the "operational realities" test was in any event not helpful because express policies existed confirming Holmes had no reasonable expectation of privacy in her company e-mail use. The Court reasoned that absent a company communication contradicting the express corporate policy of monitoring company computers, "it is immaterial that the 'operational reality' is the company does not actually do so." In other words, it is unreasonable for Holmes to assume her e-mails were private simply because she believed the company never enforced its computer monitoring policy.

C. The Summary Adjudication Motion

Holmes also appealed the trial court's granting of defendants' motion for summary adjudication with regard to Holmes' claims for harassment, retaliation and constructive discharge. The Court of Appeal upheld the lower court's ruling as to all three claims.

With regard to Holmes' harassment claim, the Court found that no evidence existed from which a reasonable jury could objectively find that Petrovich created a hostile work environment for a reasonable pregnant woman. The e-mails and alleged comments during Holmes' short two-month tenure failed to rise to the level of severe misconduct or pervasive pattern of harassment. The court explained that Petrovich's e-mails included nothing more than some critical comments due to the stress of being a small business owner facing the need to accommodate Holmes' right to maternity leave, notably recognizing Holmes' legal rights and agreeing to honor them. When Petrovich assured Holmes that he was pleased with her work and that this "will work" (referring to her maternity leave), Holmes quit instead of giving Petrovich a chance to honor his promise.

The trial court's grant of defendants' summary adjudication motion on the constructive discharge claim was also found to be appropriate because the conditions prompting Holmes to resign were not "sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job." (citing *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1246.) The Court explained

continued on page 30

"the resignation must be coerced, not merely a rational option chosen by the employee."

The trial court also properly adjudicated Holmes' retaliation claim in defendants' favor. The Court agreed Holmes suffered no adverse employment action, which requires a showing of a "substantial adverse change in the terms and conditions of the plaintiff's employment" (citing *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1454). The Court noted that the Company did not reduce Holmes' salary, benefits or work hours, nor did it terminate her employment. Indeed, Petrovich reassured Holmes that she still had a job and that things would work out. Holmes' failure to demonstrate that Petrovich harbored any retaliatory animus towards her was fatal to her retaliation claim.

D. Conclusion

This case confirms that a well written and disseminated employment policy regarding the permitted and restricted use of the employer's e-mail and computer systems is critical in obtaining information to assist in the defense of employment claims. By notifying its employees they have no reasonable expectation of privacy in e-mails sent on the Company's computer system, Petrovich Development was able to successfully defend against the claims raised by its former employee by using an e-mail to Holmes' attorney to demonstrate she did not suffer severe emotional distress.

In today's climate of boundless technology, communications are not limited to verbal conversations or the written word. More and more we see important communications being sent through electronic mail, a *Facebook* post or a "tweet." The sender's expectation of privacy in these communications is the focal point in any analysis concerning the privileged nature of the communication.

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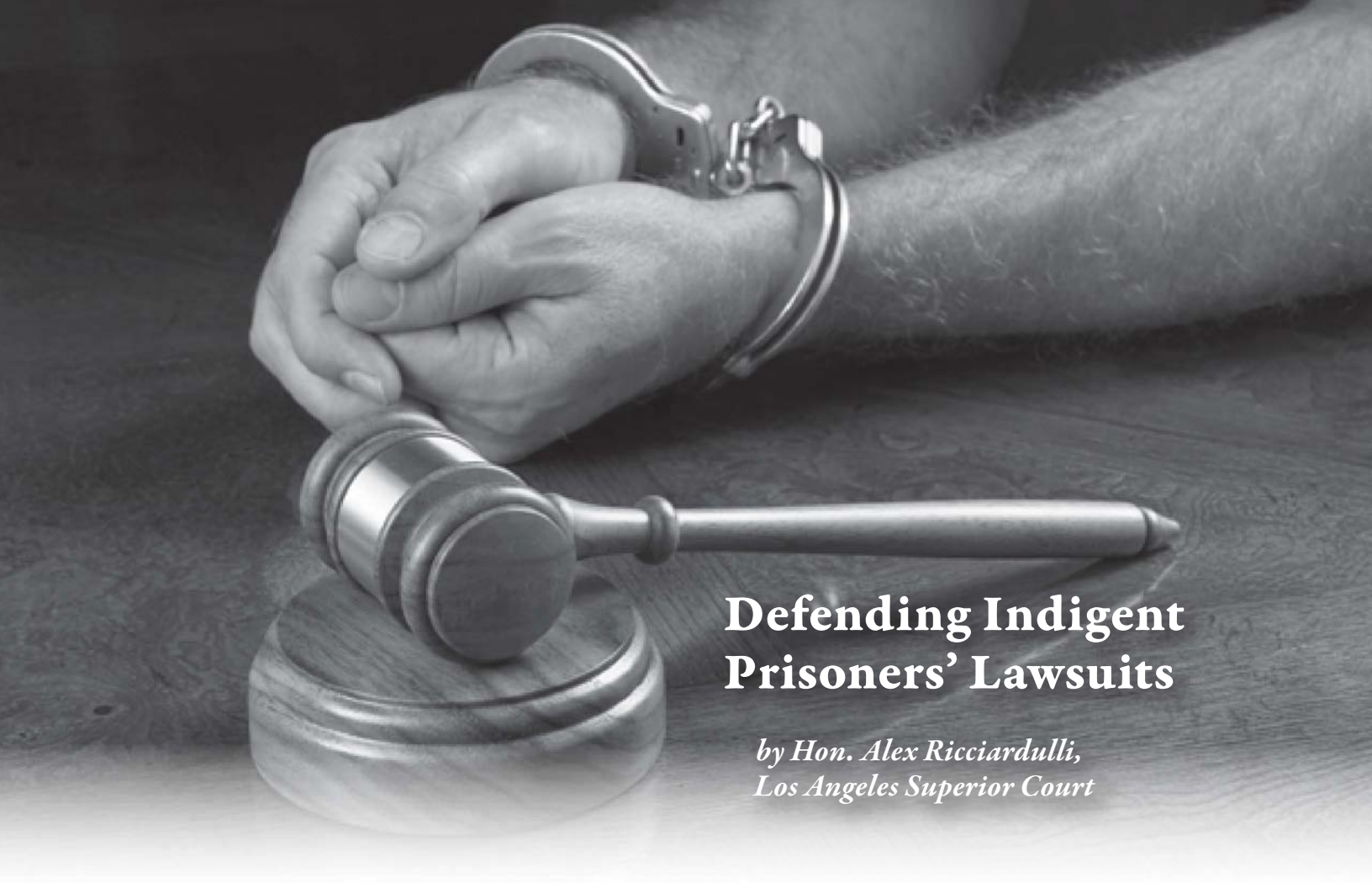

Defending Indigent Prisoners' Lawsuits

by Hon. Alex Ricciardulli, Los Angeles Superior Court

Getting sued is a tremendous nuisance from a defendant's perspective. In even the best of circumstances, a defendant is forced to spend time and money to litigate a case to a successful conclusion. When the plaintiff is indigent and prosecuting the action from behind bars, the nuisance can be more like a nightmare.

Despite the overwhelming advantages enjoyed by a defendant in an action brought by an indigent prisoner, including, first and foremost, that almost always only the defendant will be represented by counsel, a defendant must be alert of the numerous procedural protections put in place to ensure that the plaintiff is not taken advantage of. Knowing these rules and procedures will allow a defendant to successfully ward off a suit without running afoul of the prisoner's rights.

Overview

Access to courts and justice is a hot topic nowadays. For indigent non-incarcerated people, access means having a lawyer. For incarcerated persons, it includes both having a lawyer *and* being able to file and respond to pleadings to keep up with court proceedings from a distance.

The common denominator for free and locked-up poor persons alike is the need of an attorney. "The adage that 'a lawyer who represents himself has a fool for a client' is the product of years of experience by seasoned litigators." (*Kay v. Ehrler* (1991) 499 U.S. 432, 437-438.) The sheer complexity and arcane maze-like quality of civil litigation is a powerful detriment to indigent litigants.

Indigent persons' inability to afford attorneys to represent them in civil litigation has prompted repeated calls for establishment of the right to court-appointed counsel in civil lawsuits. This quest for a "Civil *Gideon*" has been largely rejected by the courts, although it has gained considerable traction in California's Legislature.

It is fundamental that the right to free legal representation does not apply in civil cases: the right to counsel generally only applies "where the litigant may lose his physical liberty if he loses the litigation." (*Walker v. State Bar* (1989) 49 Cal.3d 1107, 1117.) Only a few exceptions exist to this general rule, and none involve garden-variety civil suits. For example, *Salas v. Cortez* (1979) 24 Cal.3d 22, held that indigent defendants in paternity proceedings prosecuted by the government have the right to appointed counsel; *In re Jay R.* (1983) 150 Cal.App.3d 251, created a right to counsel in child dependency proceedings; and *County of Santa Clara v. Superior Court* (1992) 2 Cal. App.4th 1686, ruled that an indigent civil litigant has the right to counsel in defending court contempt.

In 2009, the California Legislature passed and Governor Arnold Schwarzenegger signed into law the Sargent Shriver Civil Counsel Act. (A.B. 590 (Feuer)). The Legislature believed that, "Expanding

continued on page 32

representation will not only improve access to the courts and the quality of justice obtained by [indigent] individuals, but will allow court calendars that currently include many self-represented litigants to be handled more effectively and efficiently." (Concurrence in Senate Amendments, Analysis of Assem. Bill No. 590 (2009-2010 Reg. Sess.) Sept. 10, 2009, p. 4.) The legislation created self-funded pilot projects due to begin operation in selected counties in October 2011. The projects will be run by legal services nonprofit corporations in collaboration with local superior courts, and will focus on areas where representation is most direly needed: Housing-related matters; Domestic violence and civil harassment restraining orders; Elder abuse; Guardianships; Probate conservatorships; and Child custody actions." (*See* Judicial Council Memorandum, *Request for Letters of Interest to Apply for Grant Funding to Operate a Pilot Project Under the Sargent Shriver Civil Counsel Act,* Sep. 10, 2010.)

Admittedly, the typical incarcerated felon who is suing his former lawyers or current medical personnel is definitely not the poster child for the right to legal representation free of charge. It remains to be seen whether any indigent prisoners will be represented by counsel in the pilot projects created by A.B. 590. Nonetheless, as discussed below, a court is allowed to provide a prisoner plaintiff in a civil case with a free attorney as a last resort.

No more "Civil Death"

Barely more than 35 years ago, lawsuits from persons in custody was not an issue: not only did prisoners have no right to court-appointed lawyers, they were wholly barred from bringing civil actions.

California used to ascribe to the concept of "civil death" for prison inmates. "Depending upon the convict's sentence, such statutes eliminated or restricted, during imprisonment and any parole, various rights and privileges enjoyed by other citizens, including the ability to contract, marry, inherit, and participate in judicial proceedings." (*People v. Ansell*) (2001) 25 Cal.4th 868, 872.)

"Civil death," as explained by the California Supreme Court, "the status of a prisoner deprived of all rights, originated in ancient Greece and flourished throughout the Dark Ages as a natural outgrowth of the primitive penal systems developed by the Germanic tribes of Europe. During the latter half of the nineteenth century, virtually every country in Europe rejected the doctrine; California, however, ... adopted civil death – as though bent on rescuing the concept from a well-earned oblivion – only four years before France and the Germanic countries abolished it." (*Delancie v. Superior Court* (1982) 31 Cal.3d 865, 871, fn. 3.)

When enacted in 1850, California's statute provided that "[a] sentence of imprisonment in the State Prison for a term less than life suspends all civil rights of the person so sentenced during the term of imprisonment, and forfeits all public offices and all private trusts, authority, and power; and the person sentenced to such imprisonment for life shall thereafter be deemed civilly dead." (Stats. 1850, ch. 99, § 145, p. 247.) Even after being amended in 1968, the statute used to provide that a "sentence of imprisonment in a state prison for any term suspends all the civil rights of the person."

In 1975, the statute was amended to delete its "civil death" provisions, and provide, substantially as it does now, that, "A person sentenced to imprisonment in a state prison may during that period of confinement be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests." Penal Code section 2601(d) is even more specific regarding prisoners' right to sue, providing that inmates have the right "To initiate civil actions, subject to a three dollar ($3) filing fee to be collected by the Department of Corrections, in addition to any other filing fee authorized by law...."

Although these provisions on their face apply only to inmates in state prison, it has been held that equal protection of the law requires they apply to all persons similarly situated, and this includes inmates in local jails (*Delancie v. Superior Court, supra,* 31 Cal.3d 865, 872), and wards of the California Youth Authority (*In re Arias* (1986) 42 Cal.3d 667, 687).

Scope of Prisoners' Rights

Though not "dead," prisoner's rights to sue are substantially inhibited by the very fact that they are in custody. As noted by the Court of Appeal, "Prison walls are a powerful restraint on a litigant wishing to appear in a civil proceeding." (*Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636, 640.)

Imagine typical steps that can be involved in prosecuting a civil action: filing a complaint, serving defendants with summons, requesting an entry of default and court judgment, filing at-issue memoranda, moving to quash service of a cross-complaint, propounding interrogatories, moving to compel answers, participating in case management conferences, conducting a trial, etc. Now imagine doing all this without legal training, without a lawyer, in prison, and totally penniless.

Pro per litigants, including incarcerated persons, despite their custodial status, "are entitled to the same, but no greater, rights than represented litigants. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.) This includes being subject to delay-reduction rules that facilitate the expeditious processing of civil cases, such as those in California Rules of Court, rule 227, Superior Court of Los Angeles Rules, rules 7.7(c), 7.9, and 7.13.) It includes being subject to terminating sanctions including the striking of pleadings for failing to follow the rules, and propria persona litigatnt are presumed to know about the rules. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985; *Lawrence v. Superior Court* (1988) 206 Cal. App.3d 611, 619, fn. 4.)

A tension definitely exists between a prisoner's right to sue under Penal Code section 2601(d) and the fact that the legal system is not geared to be pro per-friendly. The most courts can do to reconcile these two concepts is to guarantee prisoners access to the courts, not to walk them through court proceedings, but to put them on similar footing to a out-of-custody pro per litigants. Access to the courts is the keystone of indigent prisoners' right to civil litigation.

continued on page 33

(*See Yarbrough v. Superior Court* (1985) 39 Cal.3d 197, 201.)

Remedies to Secure Access

Judges and litigants do not sail in uncharted waters in trying to ensure court access to inmates. Appellate cases have addressed situations where inmates have sued from behind bars, and set forth guidelines to make sure they get their day in court.

Wantuch v. Davis (1995) 32 Cal.App.4th 786 did an exemplary job of showing the way. The case dealt with an inmate serving a lengthy sentence who sued his criminal attorney for malpractice and fraud, among other things. Although the inmate participated in several steps in the case, the inmate failed to appear at a status conference and at a hearing on the defendant's motion to show cause for failure to prosecute, and the judge terminated his action and entered summary judgment on a cross-complaint by the attorney.

The Court of Appeal reversed, holding the trial court abused its discretion because the inmate's failure to appear was not willful. Rather than simply writing a one-line opinion saying, "Duh, how can failure to appear be willful when the litigant's serving six decades in prison?!" the appellate court spelled out in detail how the trial court should have handled the situation.

The Court of Appeal found that the trial judge must first determine if the inmate is in fact indigent. (*Wantuch v. Davis, supra,* 32 Cal.App.4th 786, 796.) The court could have the inmate complete a financial form for this purpose. Next, the court must determine if the suit is a bona fide action involving the inmate's property interests. (*Ibid.*) The actions in *Wantuch* alleging malpractice and defending against the attorney's cross-complaint, were found to be legitimate controversies. That does not mean that a court must allow access if the defendants in a case turn out to be far-flung entities with seeming little connection to the prisoner, like the President of the U.S. or the United Nations.

"If the trial court finds that [the inmate] is indigent and a party to a bona fide civil action threatening his property interests, [his] status as a prisoner may not deprive him of meaningful access to the courts." (*Ibid.*) Once these two determinations are made in the inmate's favor, *Wantuch* suggested that the court consider the following factors in determining what remedies to employ in securing access:

(1) "the potential effect on the prisoner's property";

(2) "the necessity for the prisoner's presence";

(3) "the prisoner's role in the action";

(4) "the prisoner's literacy, intelligence and competence to represent himself or herself, the stage of the proceedings";

(5) "the access of the prisoner to a law library and legal materials";

(6) "the length of the sentence";

(7) "the feasibility of transferring the prisoner to court and the cost and inconvenience to the prison and judicial systems." (*Wantuch v. Davis, supra,* 32 Cal.App.4th 786, 793.)

Relying on numerous statutory and case authority, *Wantuch* outlined the following potential remedies:

(1) "deferral of the action until the prisoner is released";

(2) "appointment of counsel for the prisoner";

(3) "transfer of the prisoner to court";

(4) "utilization of depositions in lieu of personal appearances";

(5) "holding of trial in prison";

(6) "conduct of status and settlement conferences, hearings on motions and other pretrial proceedings by telephone";

(7) "propounding of written discovery";

(8) "use of closed circuit television or other modern electronic media"; and,

(9) "implementation of other innovative, imaginative procedures." (*Wantuch v. Davis, supra,* 32 Cal. App.4th 786, 792-793.)

Wantuch emphasized that "A prisoner does not have the right to any particular remedy," and specifically may not "compel a trial court to appoint counsel.... The right of an indigent prisoner to appointed counsel in a civil action arises only when there is a bona fide threat to his or her personal property *and no other feasible alternative exists*." (*Id.,* at p. 793, emphasis added.) *Wantuch* also stated that, "Nor may a prisoner ordinarily compel his or her appearance in court." (*Id.,* at p. 794.)

As shown by cases subsequent to *Wantuch*, appellate courts will not tolerate courts' failure to take steps to grant prisoners access to proceedings. *Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468 reversed an order granting a defendant summary judgment at a hearing where the inmate was unable to appear through a telephonic conference. Likewise, *Jameson v. Desta* (2009) 179 Cal. App.4th 672 reversed an order dismissing the inmate's case when his presence could not be secured telephonically.

The Court of Appeal in *Jameson* specifically urged the trial court on remand to take steps to ensure that the inmate could be provided telephonic access to the proceedings, suggesting that the court communicate with prison personnel and the facility's litigation coordinator to make sure that the inmate can appear through the phone. (*Jameson v. Desta, supra,* 179 Cal.App.4th 672, 684.)

Conclusion

Dealing with pro per inmates' lawsuits can be quite a hassle, but unfairly taking advantage of an inmate's incarnation and lack of access to the court can make matters worse. To preserve dismissals and adjudications on the merits from reversals on appeal, courts and litigants must be cognizant of the simple steps that are required to preserve inmates' rights.

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James R. Robie

Dec. 10, 1949

Jan. 16, 2011

Jim was the consummate trial lawyer. Although he was a fierce adversary in the courtroom, Jim was ethical, gracious and fair to his opponents. He valued his profession and led by example. However, what we will most remember about Jim was his charisma, humor and deep love and loyalty to his family and friends. Jim's passion for living life to the fullest will forever be an inspiration to us all. His passing is a reminder about the fragile nature of the human condition, and the importance of living each day fully, as Jim did, and would want us to do.

To hear Jim Robie laugh was to understand instantly what life was all about.

His laughter carried appreciation, wisdom, irony, and compassion. This laughter, accompanied always with the twinkle in his eye, told you about the joy in the man.

James Raymond Robie was born on December 10, 1949, in his beloved Los Angeles. The son of Raymond J. Robie and Agnes P. Robie, he graduated from Bishop Amat High School in 1968 and Claremont McKenna College, cum laude, in 1972. In 1975 he earned his Juris doctorate from Loyola Law School of Los Angeles, where he later served on the board of directors.

Jim was wed to Edith Matthai in 1982, beginning a marriage in which Jim would cheerfully confess an ongoing 'crush' on his wife. Their daughter, Leigh, was born in 1986, their son, Raymond, in 1991. An unabashedly fond father, Jim never let the demands of his successful career get between him and his family. They spent many evenings together in the Dodger Dugout Club, from which Jim's voice could sometimes be heard in the background of televised games. They traveled together to Europe, Africa, China and the Galapagos Islands, and Jim brought to these adventures the same passion and enthusiasm that he brought to his work and to his everyday life.

In 1987, Jim and Edith founded the Robie & Matthai law firm in Los Angeles, where Jim pursued his specialty of insurance law and rose to national prominence, frequently designated a 'Super Lawyer' by his peers. The "go-to-guy" for several major insurance companies, Jim was lead counsel in complex litigation involving catastrophic losses: earthquake coverage issues, the California wildfires, Hurricane Katrina and other catastrophes. He tried many cases involving complex technical and scientific issues and handled numerous cases on the appellate level in the California courts and the Eighth and Ninth Circuits. In addition to his success in the courtroom, his clients frequently turned to him for his sage and down-to-earth advice on how to best run their businesses and avoid lawsuits.

As a masterful trial lawyer who earned a reputation for winning 'unwinnable' cases, Jim was dubbed 'the happy warrior' by his colleagues for his ever-positive attitude, his humor, his fierce intellect and his passion. Jim was a fearless advocate, not daunted by pressure, insurmountable odds or authority. He simply believed what he believed and knew what he knew. This confidence and incisive strength made him a formidable opponent: When a sitting state's attorney general participated in an effort to extort money from a client, Jim's cross examination of this public official caused an immediate settlement that vindicated his client and put

continued on page 36

a swift end to the attempted extortion. The transcript is now used to teach the art of cross-examination.

Jim sometimes referred to his firm as the 'parachute division of the insurance defense bar' for being dropped into difficult cases at the last moment, a challenge in which he reveled. He enjoyed taking the most complicated issues and making them understandable and persuasive for both judges and jurors. In his most recent case, a juror commented, "The defense was just phenomenal. I've only seen those kinds of attorneys on TV – he was great. He blew me away. I'm keeping his card." That's the kind of lawyer Jim Robie was – everyone wanted his card.

Jim gave back to his profession. He was the outgoing president of the Association of Southern California Defense Counsel, the outgoing chairperson of the Litigation Section of the Los Angeles County Bar Association and an Advocate of the American Board of Trial Advocates. He taught numerous seminars, especially on the topic of bad faith litigation, was an instructor at the National Arson Investigation Training Seminar, and was the author of many professional articles on a wide variety of subjects.

Jim's interests went beyond the law. He was a ferocious advocate for equal rights and opportunities, a stance that he and Edith put into action with their hiring practices, as well as their political and philanthropic activities.

As comfortable in a pair of jeans as he was on a private jet flying to a corporate headquarters, Jim was an accomplished landscaper, and loved to do work around his house. He was famous for conducting teleconferences with high-level executives while simultaneously making esoteric household purchases on the internet. He often conducted impromptu walking tours of downtown Los Angeles, describing architectural and design features in great detail.

Jim had a gift for friendship, and his laughter lit up not only the hallways of his law firm, but the hearts of his many friends, who loved him for his kindness, loyalty and intelligence. Jim was like a perfect California day – sunny, bright, warm and full of possibilities and life.

Jim Robie died on January 16, 2011, on Catalina Island. He is survived by his wife, Edith Matthai; his daughter, Leigh and his son, Raymond; as well as many other family members.

Of Jim Robie, we would say with the poet,

His life was gentle, and the elements

So mix'd in him that
Nature might stand up

And say to all the world,
'This was a man!'

amicus committee report

ASCDC's Amicus Committee continues to work hard on behalf of its membership. ASCDC's Amicus Committee has submitted *amicus curiae* briefs in several recent decisions from the California Supreme Court and California Court of Appeal.

Most recently, ASCDC's Amicus Committee helped secure a major victory for counsel before the California Supreme Court in *Cassel v. Superior Court* (2011) 51 Cal.4th 113. The California Supreme Court once again held that the mediation confidentiality statutes (Evid. Code § 1115, et seq.) are absolute and not subject to judicially-created exceptions, even if it means that a plaintiff's legal malpractice action must fail. The position ASCDC advanced prevailed. ASCDC's amicus brief is noted in a footnote in the opinion. This is an issue where ASCDC's Amicus Committee has been particularly active. We previously submitted amicus briefs on this issue in *Rojas v. Superior Court* (2004) 33 Cal.4th 407, *Foxgate Homeowners Ass'n v. Bramalea Cal*. (2001) 26 Cal.4th 1, and *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137.

The Amicus Committee also submitted an amicus brief on the merits in *Kwikset v. Superior Cour*t (2011) 51 Cal.4th 310. The issue presented was standing to sue under Business & Professions Code section 17200 in light of Proposition 64. The plaintiffs purchased locks with "Made in the USA." on the label. Plaintiffs allege that they would not have purchased the locks but for the label. The Supreme Court held that this was sufficient economic injury to constitute "lost money or property" to confer standing.

Pending Cases at the California Supreme Court

ASCDC's Amicus Committee has submitted, or will be submitting, *amicus curiae* briefs in the following cases pending at the California Supreme Court of interest to ASCDC's membership:

1. *Howell v. Hamilton Meats*, No. S179115: ASCDC has submitted an *amicus curiae* brief on the merits to the Supreme Court. The Court of Appeal held that a plaintiff in a personal injury case could seek to recover the full billed amount for their medical damages, even though the plaintiff's medical insurer had a contract with the providing doctor for discounted rates. At the urging of the ASCDC, which had participated as *amicus curiae* in the Court of Appeal, the Supreme Court unanimously granted review. ASCDC is arguing that a plaintiff's damages are limited to amounts actually paid and accepted as payment in full.

2. *Coito v. Superior Court,* No. S181712. ASCDC submitted an *amicus curiae* brief in support of protection for the fruits of attorney investigative efforts. This case addresses the work product doctrine and the extent to which parties have to answer form interrogatory No. 12.3 and produce witness statements that allow an opposing party to piggyback on counsel's investigation. Again, ASCDC had urged the Supreme Court to grant review in this case.

Other Recent Activity

The Amicus Committee has also submitted *amicus curiae* briefs, letters or requests for publications in the following matters:

Cabrera v. E. Rojas Properties, Inc. (2011) 192 Cal.App.4th 1319. ASCDC's Amicus Committee successfully requested publication in this case. This case addresses the same issue that is pending at the California Supreme Court in *Howell v. Hamilton Meat*: whether a plaintiff in a personal injury action can recover the full "retail" price of medical services, i.e., the amount billed by the hospital [$1,100 x-ray], or the amount actually paid by the plaintiff's insurance company [$100 for the same x-ray]. Division 8's opinion is the first decision from the Court of Appeal to agree with the defense position and it is unanimous. As of the time of this Amicus Committee Report, *Cabrera* remains citeable, although a petition for review is pending and it is likely that the Supreme Court will issue a "grant and hold" order pending the outcome of *Howell*.

State Farm Mut. Auto. Ins. Co. v. Lee (2011) 193 Cal.App.4th 34. At the request of ASCDC's Amicus Committee, the appellate court ordered published its opinion in this case. The court held that discovery into bona fides of medical services provider that provided services to a personal injury plaintiff was relevant. The court also held that an insurer and its retained defense counsel could not be held liable for abuse of process based upon questions asked during a deposition.

Fireman's Fund v. Superior Court, No. B229880. At the urging of ASCDC's Amicus Committee, among others, Division Three of the Second Appellate District OSC to address the merits of this original proceeding. The issue is whether an attorney can be deposed concerning internal firm communications on a case. ASCDC joined the Los Angeles County Bar Association and the Beverly Hills Bar Association in submitting an *amicus* brief on the merits and in appearing at oral argument. At oral argument, the Court specifically mentioned the amicus brief as helpful. The three Bar associations have urged a recognition of absolute privilege for an attorney's thoughts and strategies. This case remains pending.

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 unpublished California Court of Appeal decisions.

continued on page 38

Amicus Committee Report

– continued from page 37

In evaluating requests for *amicus* support, the Amicus Committee considers various issues, 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*, please feel free to contact any Board member or the chairs of the Amicus Committee who are:

Steven S. Fleischman
Robie & Matthai
213-706-8000

Robert Olson
Greines, Martin, Stein & Richland LLP
310-859-7811

Paul Salvaty
O'Melveny & Myers
213-430-6192

President's Message

– continued from page 3

The problems your defense clients are facing can be brought to ASCDC so we can help figure out a reasoned strategy to address not just litigation issues, but legislative and other legal solutions as well.

We also offer opportunities to attend our free Brown Bag seminars with the judges, opportunities to meet and strategize with other defense lawyers. Membership in ASCDC is the ability to be part of a bigger picture than just the individual cases that each of us is working on. It provides an opportunity to brainstorm with people who have different disciplines and creative ideas. Finally, it's an opportunity to just meet good, plain folk.

In these challenging economic times, everyone is scrutinizing the memberships they can be a part of, but I encourage you to promote ASCDC because we are the organization that advocates for the defense position in a climate where the plaintiffs bar is very strong and powerful. We need the cohesion of a group such as ours. There are many problems percolating that cannot be addressed by a single practitioner or even one firm. However, utilizing your membership in ASCDC can provide the strength of numbers and of respected defense leaders to help promote and support your issues.

I urge everybody to mark their calendars for our upcoming events, to make themselves available for our meet and greets, and to attend our Brown Bag lunches. It's an opportunity to network in person, face to face, and you can be a part of it.

I look forward to serving as your President and am proud to have this position. I will work diligently to preserve the influence and prestige this organization carries, but I ask you to join with me in doing that. My e-mail is available to you at *lsavitt@brgslaw.com,* and I look forward to hearing your ideas and seeing you at future events.

Linda Miller Savitt

defense verdicts november – march

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