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president's message

2011: the Budget and Beyond

Linda Miller Savitt
ASCDC 2011 President

We have had a very eventful second quarter of 2011. As many of you know, we had a well attended seminar on the new expedited jury trial statute and a great post-seminar cocktail party with your Board of Directors and the attendees. In light of the upcoming budget problems through the courts, utilization of the expedited trial procedure may be more and more advantageous. Therefore, I urge each of you to look at this new trial format if you have cases that might fall within its parameters.

On June 9, 2011, we held our Hall of Fame night at which we honored Larry Grassini as plaintiffs' civil advocate bar, the Honorable Judge Margaret Morrow, and our own Jim Robie. It was a great evening with laughter, tears and a tremendous sense of community among the defense bar, the judiciary and the plaintiffs' bar. This will be an ongoing event every other year and one that you should all look forward to.

We are well into setting up the Crash Settlement Program for employment law cases and have been working hard with the court to provide assistance for the week of September 19 to try and settle those cases.

The new Medicare set aside law is creating problems for both the plaintiff's bar and the defense bar in terms of getting cases resolved. We have set up an ad hoc committee that is working together on possible ways to streamline the process or at least cut through some of the difficulties. If any of you have suggestions or are interested in participating, please feel free to contact me directly.

Some of our members are also working on an ad hoc committee with the consumer attorneys on possible reforms to voir dire procedures.

In May 2011, your Secretary-Treasurer Bob Olson and I, along with representatives of the North and CDC, met with California's new Chief Justice to discuss various ongoing issues and what we can do to help the courts, as well as what the courts can do to help us in our practices. This, of course, was before the Governor signed the budget cuts, but I believe we are developing a good relationship with the Chief Justice and the Administrative Office of the Courts to have a voice in how these budget cuts are going to be implemented. That being said, I want to remind you about our lobbying efforts in Sacramento and again urge you to contribute to CDC. *(Go to www.califdefense.org.)*

We will be having more Brown Bag Seminars. We are going to also have a meet-and-greet for young lawyers in the fall, and we are always looking for new ideas for an afternoon seminar followed by a cocktail reception.

The big news that will likely dominate the rest of 2011 and beyond is the court funding challenge in view of the fact that the Governor has signed the budget with an additional $150 million cut from the court system. We plan on working with each of the county Superior Courts to see what can be done to minimize furlough days and other adverse impacts on the courts, our cases and our clients.

Again, I urge you to contact me directly if you have any proposals that would affect the defense bar as a whole, and I look forward to seeing you at our annual Judges Night on December 13 at the Jonathan Club. My e-mail address is *lsavitt@brgslaw.com.*

Linda Miller Savitt

Budget Blues

Michael D. Belote
CDC Representative

Like some sort of closed-loop, Groundhog Day phenomenon, the state budget mess seems to replay over and over. Was there ever a time that the state budget was *not* upside-down? Unfortunately, with much of the state budget constitutionally protected, and with powerful interest groups defending their programs, the judicial branch is vulnerable. And 2011 has not been a good year for the branch.

To understand where the branch finds itself, recall that the state budget was essentially created in two phases. The first portion of the budget was enacted in March, when the trial courts received a $200 million reduction. Then, facing the prospect of no new tax revenues, the Legislature enacted the final budget recently with a mixture of cuts, deferrals, and borrowing. In the most recent phase, the judicial branch suffered an additional $150 million cut. On top of that, the budget transferred (*not* borrowed) $310 million in court construction funds directly into the state general fund. Thus, the total loss to the judicial branch was $350 million, plus $310 million in construction money. And, a deficit of $120 million was carried over from last year.

Not surprisingly, the Judicial Council has been evaluating how to cover the cuts where possible, and how to allocate the cuts which could not be covered. A working group was appointed to make recommendations. Clearly, the loss of the construction money would cause a major delay in the 41 court construction projects already in the pipeline. As to the budget cuts, intense discussions have occurred about fund transfers which might mitigate the impact to trial courts. Various parties have suggested delay or elimination of the statewide computer project (CCMS), cuts to the Administrative Office of the Courts, further diversions of those construction funds which have not already been taken, and more.

The recommendations of the working group are now being considered by the Judicial Council, and if approved as presented, the bottom line appears to be this: various fund transfers will occur, including $56 million from CCMS, which will cause a 12-month delay in further deployment of the system. The AOC will take a reduction in excess of 12%, appellate and Supreme Courts roughly 10%, and the trial courts between 6 and 7%. The statewide "hit" to the trial courts will be approximately $135 million.

The allocation of the $135 million trial court reduction is likely to be pro rata according to a specific court's percentage of the statewide budget. Los Angeles, for example, represents approximately 29% of the statewide total, equating to a staggering cut of over $38 million.

The allocation of the cuts might be pro rata, but the operational impact to the trial courts will vary greatly, because some courts have deeper reserves than others. San Francisco, for example, almost entirely bereft of reserves, has announced plans to lay off a remarkable 200 staff members (40%), terminate virtually all commissioners, and close 25 courtrooms. Changes of that magnitude would absolutely decimate the ability to get a civil case to trial in San Francisco, but even in counties with greater reserves, service reductions will fall disproportionately on civil, since criminal and family law cases will get priority.

Judicial Council and other branch leaders fully understand that on behalf of defense and plaintiff's lawyers, CDC and the Consumer Attorneys of California have repeatedly stepped forward to help address the budget problem with first paper and motion filing fee increases. To put it bluntly, there is recognition that the civil system is finding itself paying more to potentially receive less. But right now the system is scrambling to address repeated budget reductions from the executive and legislative branches. CDC will remain at the table to help look for solutions to this seemingly never-ending problem.

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Happy 50th Birthday

Patrick A. Long
palong@ldlawyers.com

It's been my joy, and a labor of love, to write this column for some years now, but it's a particular honor with this issue because we're celebrating the 50th anniversary of our association, the Association of Southern California Defense Counsel, ASCDC. Our founders came together 50 years ago, a half-century, and God bless them for their intelligence and foresight. We salute, honor and thank our founders for creating this association so long ago. They have given us the opportunity, through ASCDC, to work with our judicial colleagues, the plaintiffs' bar, the legislature, our brothers and sisters in Northern California, and our clients to preserve and maintain our system of civil justice, which, although imperfect, is the finest in the world. There are a few among our members, even today, who were in fact there at the beginning. You know who you are, and we are grateful to you. Our earliest presidents are gone, but their names are still well known to many of us, Forrest Betts, Joe Jarrett, Clarence Hunt, et. al.

As you will note, a number of our past presidents have favored us in this issue of *Verdict* with comments about events and issues which occured during their terms. Their thoughts make for fascinating reading. Thanks to each of them for sharing their memories with us herein.

I strongly urge you to read their comments carefully. For some of you who fit the description "baby lawyers," the events and issues set forth in the comments of our past presidents may seem like ancient history, or perhaps even unknown history. But if you spend a few moments with some of the more senior partners in your firms they will share with you the fact that, almost without fail, every year in the history of this association brought new problems, issues, threats, options and opportunities to be dealt with. We must all be grateful for the hard work, leadership and organizational skills provided by the men and women who have brought us to where we are today. Take a look at their informed comments and you will recognize how well they have served us.

I'm having some difficulty remembering specifically what year I joined this association. I believe it was 1973, and while that makes me pretty darned old, it also provides me with the benefit of having known some of our leaders who were in fact there at the beginning, and a phenomenal group they were. It was my privilege to know Bob Todd, Bill Haight and Don Ruston personally, and to have practiced with Bob Carlson. In fact, since initially becoming a member it's been my honor to have been on a first name basis with essentially all of our past presidents because they were all approachable, and they reached out to our entire membership, even a newbie like me, as I was in those days.

Each year, the night before our Annual Seminar, all our past presidents gather for dinner. The turnout would astound you, and it is indeed a joyous occasion. I love those gatherings. Last March I looked across the room at Gary Ottoson (1980) and Fred Kosmo (1981), John Collins (multi-year) and all the other past presidents between them and our current officers, and I thought to myself, this is one hell of an organization. Something someone once said about a dinner at the Kennedy White House might apply to our past presidents' dinners; the collective wisdom in the room was unsurpassed, except perhaps when Thomas Jefferson dined alone.

So I raise my glass to all our past presidents, to our current officers and board, to our entire membership, to our retired Executive Director Carolyn Webb, to our new Executive Director, Jennifer Blevins and her staff, and to all you who read this. ASCDC now moves into its second half-century. We are strong because of the work of those who created us, and have come before us. We thank them. We celebrate them. We hope we can equal their strength and devotion to justice.

Pat Long *palong@ldlawyers.com.*

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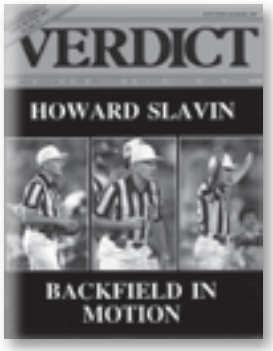
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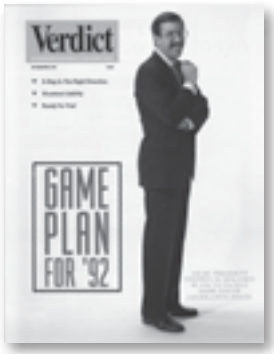
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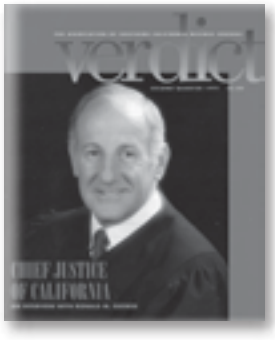
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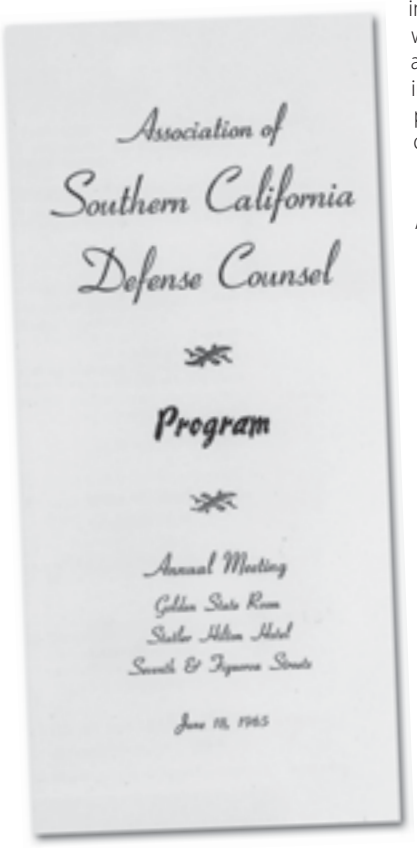
THE 1960's

The ASCDC was founded in 1960 through the single-minded efforts of Forrest A. "Red" Betts, a partner in Betts, Ely & Loomis, and one of Los Angeles' leading defense lawyers from the 1930's until 1961 when he passed away. Betts was named as ASCDC's one and only Chancellor. "In those days, the so-called defense bar in Los Angeles was a very informal network consisting of the top lawyers in the 10 or so leading firms that represented insurance companies. There was no formal organization. Yet, they were all trial lawyers and friends," recalls Theodore P. Shield, formerly the principal partner of Shield & Smith and a former partner and friend of Red Betts.

In the late 1950's, Red Betts had gained national attention for his efforts in the International Association of Insurance Counsel (IAIC), an international group of lawyers who practiced insurance litigation. Betts served as IAIC's President in 1957 and helped form the Defense Research Institute (DRI) in 1960. Ted Shield served as President of IAIC in 1975. DRI was an arm of IAIC designed to further the knowledge and skills of defense lawyers across the country by publishing position papers and research articles on important topics.

With the formation of DRI underway in 1960, IAIC felt it would be advantageous for states to have their individual local defense counsel organizations, not formally a part of DRI, but with a similar purpose on the local level. Red Betts assumed the assignment of forming such a group in the Los Angeles area. This new organization would provide a communication network among attorneys who worked in the defense of personal injury and property damage claims and whose practices included a substantial representation of insurance companies.


Association of
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Defense Counsel

Program

Annual Meeting
Golden State Room
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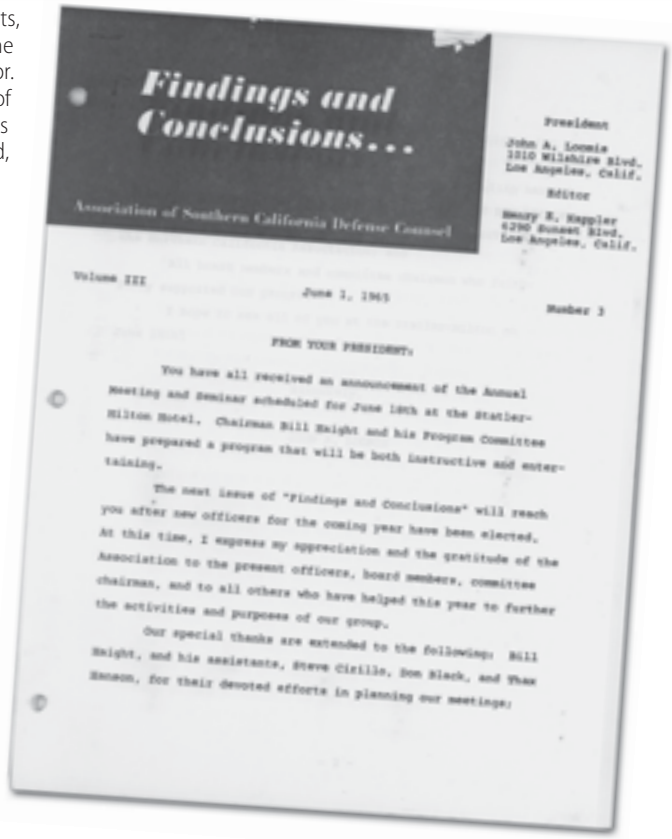
June 18, 1965

In 1960, Betts organized the leaders of Los Angeles' leading civil defense firms, most of whom were his friends and colleagues. "Red explained how the DRI worked," recalls Ted Shield, who was present at ASCDC's first meeting. "Then, he proposed the formation of the Association of Southern California Defense Counsel." He explained how membership would be solicited from all lawyers who represented insurance companies or who otherwise practiced the defense of civil litigation from Bakersfield to San Diego.

"Red took the bull by the horns and got everybody organized and came up with the bylaws," Shield adds. "The Association was formed to exchange information about recent cases and developments in the practice of the civil defense law."


Theodore P. Shield


Findings and Conclusions...

Association of Southern California Defense Counsel

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Volume III — June 1, 1965 — Number 3

FROM YOUR PRESIDENT:

You have all received an announcement of the Annual Meeting and Seminar scheduled for June 18th at the Statler-Hilton Hotel. Chairman Bill Knight and his Program Committee have prepared a program that will be both instructive and entertaining.

The next issue of "Findings and Conclusions" will reach you after new officers for the coming year have been elected. At this time, I express my appreciation and the gratitude of the Association to the present officers, board members, committee chairmen, and to all others who have helped this year to further the activities and purposes of our group.

Our special thanks are extended to the following: Bill Knight, and his assistants, Steve Cirillo, Don Black, and Thos Hanson, for their devoted efforts in planning our meetings;


Association of
Southern California Defense Counsel

STATEMENT

TO:

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ASCDC Past Presidents 1960's

1960	Forrest Betts (dec.)	1965	Donald E. Ruppe (dec.)
1961	Joseph W. Jarrett (dec.)	1966	George Maslach (dec.)
1962	Clarence S. Hunt (dec.)	1967	William D. Still
1963	Hon. Gerold C. Dunn (dec.)	1968	Hon. Robert C. Todd(dec.)
1964	Hon. John A. Loomis (dec.)	1969	Robert C. Carlson (dec.)

The 1970's

For the first decade, most of the ASCDC Presidents were the leaders of Los Angeles' top defense law firms. In the 1970's, an effort was made to change the perception that the association was almost exclusively identified with Los Angeles and not with the rest of Southern California. The Board of Directors decided that, on a regular basis, the presidency must go to an attorney outside of Los Angeles. "We worked very hard in the 1970's to change that image, which was one reason I was president," said Caywood Borror, whose firm was located in San Bernardino and who served as President in 1974-75.

With the talk of no-fault automobile insurance in the early 1970's, the Association retained the services of a professional legislative advocate. ASCDC's early lobbying efforts were limited with little, if any, funding for important political causes. Although its early efforts in Sacramento were considered by many to be moderately successful, it was an important learning experience and a recognition that defense counsel would need to take a greater role in legislative matters.

In spite of its early lack of influence with the Legislature, ASCDC was making inroads in other areas including attorneys' fees. Based upon the recommendations of ASCDC to the insurance industry and the defense bar, both groups were overwhelmingly in favor of hourly billings vs. per diem compensation. This was a big step – it radically changed the economy of the defense practice on the west coast and served as a benchmark for the effectiveness of the ASCDC.

Also of significance in the early 1970's was a plan which was formulated to use arbitrators to help unclog the overcrowded courts. The arbitration program developed by ASCDC in cooperation with the plaintiff's bar continued to expand. In 1977, Governor Edmund G. (Jerry) Brown, Jr. signed a law making arbitration a statewide program.

As ASCDC began to take a more active role in issues directly affecting its members, the Board of Directors recognized the need for a full-time Executive Director to oversee its day-to-day activities and planning of educational meetings. "The decision to hire a full-time Executive Director was widely debated," recalled former President, Gary Ottoson (1980-81). "At the time, it required a substantial financial commitment and the recognition that ASCDC had evolved to the point where it required a more formal structure." In March, 1977, Carolyn Webb was hired as Executive Director of the then 500-member ASCDC and solely managed the association at their leased office in the Travelers Building on Wilshire Boulevard in Los Angeles.

In 1977, the Association moved and shared office space with the law firm of Lynberg and Watkins whose founding partner, Charles A. Lynberg served as ASCDC President in 1978-79. "When Charlie moved his firm, he knew we needed more space," Carolyn Webb explained, "So when he realized he had additional space, he offered it to the Association."

During Lynberg's presidency and under the direction of Webb, the Association expanded its seminars. The first out-of-town seminar was held in Bakersfield and the first evening seminars were offered in the auditorium of the Union Oil Building in downtown Los Angeles.

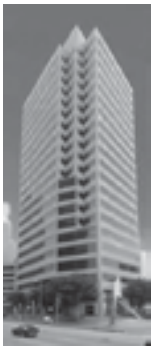
Francis Breidenbach – 1976

I was honored to have been chosen as president of ASCDC in 1976, actually, completing the term of my predecessor before serving a full term of my own. During my tenure, we welcomed the appointment of a woman to office and to membership on our board of directors, which I believe was a first. I also am proud of the fact that we developed a formal amicus curiae committee, which remains active to this day. In the twenty years before I became president, tort law was undergoing some radical changes wrought by the judiciary, including the groundbreaking California Supreme Court decision in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804. I noticed that many of the new decisions showed active participation by a plaintiffs' amicus curiae committee. I suggested to our directors that ASCDC needed such a committee. They agreed, and I was appointed to chair it. Several well known and respected leaders of the defense bar were appointed to the newly formed amicus committee, and a few of us younger members rolled up our sleeves to write the briefs that presented the defense side of the story. I think the courts were happy to have us participate. We contributed to a number of decisions, including *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, which first permitted indemnity on a comparative fault basis, and *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, which first applied comparative fault to strict product liability cases. In reviewing those opinions, you will see the names of our committee members and recognize them as stalwarts of the defense bar and ASCDC.

ASCDC Past Presidents
1970's

1970	Fulton Haight (dec.)
1971	Donald A. Ruston
1972	Donald B. Black
1973	James O. White (dec.)
1974	Caywood J. Borror (dec.)
1975	Robert L. Dickson (dec.)
1976	Francis Breidenbach
1977	Hon. Harrison R. Hollywood (dec.)
1978	Charles A. Lynberg (dec.)
1979	Richard B. Goethals (dec.)

The 1980's



The 80's were a turning point for ASCDC with the formation of the California Defense Counsel and the launch of the *Verdict* magazine. Membership reached 1,000 lawyers and, in 1988, along with Lynberg and Watkins, ASCDC moved to its long-time location of 888 South Figueroa Street, Los Angeles.

The ASCDC worked closely with the Northern California association and began holding joint Board of Directors meetings instead of meeting in emergency sessions when the need arose. In the early 1980's, in order to more effectively take action on legislative issues affecting all defense attorneys, the two organizations jointly formed a legislative component, the California Defense Counsel (CDC). The CDC Board of Directors would include the officers of both the ASCDC and the ADC.

ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL ASCDC + A·D·C VERITAS =

CALIFORNIA DEFENSE COUNSEL

In order to become more consistent with the northern group, ASCDC changed its president's one-year term from starting in May to begin in January. To facilitate this transition, John J. Collins who was elected president in May, 1982, served an additional seven months until January of 1984. Since that time, presidents have served on a calendar-year basis.

The insurance industry was a key financial supporter of CDC until 1989 when the insurance carriers officially resigned from CDC largely over opposing viewpoints on a series of auto insurance initiatives. CDC then officially became an all-attorney organization, comprised of the members of the ASCDC and the Association of Defense Counsel of Northern California and was represented by legislative advocate, Jon Smock.

The CDC today continues its vibrant and important lobbying presence in Sacramento. Through the efforts of today's legislative advocate, Mike Belote, the defense bar is actively involved in key legislation and Judicial Council efforts.

It was important to keep members updated on the legislative activities taking place in Sacramento and the new *Verdict* magazine, launched in 1984, was the perfect vehicle for this purpose.

John J. Collins
1982-1983

My presidency lasted longer than the usual one-year term, covering the period from 1982-84. This was not because of any exercise of brilliant leadership but rather the need to align terms (fiscal vs. calendar years) with the Northern Defense organization, ADC. We were exploring the formation of the California Defense Counsel (CDC) and this created a need to coordinate terms of office as the leaders of the two organizations would become the officers and directors of the new Political Action Committee. We recognized that, by combining forces, we could better serve the interests of defense counsel throughout the state. I would be remiss if I did not mention some of the leaders from ADC who led the effort to form a strong alliance that became CDC: Archie Robinson, Don Walter , Paul Cyril, Tony Barrett and Lowell Carruth and many others.

This was also a time of growing tension between defense lawyers and some insurers; established relationships frayed as short term economic goals seemed to rise in importance compared to the long term trust and competence that defense counsel had developed. In a 1983 speech, I commented that the day would come when insurance companies would have neither the unfettered right to select counsel nor to set compensation. In late 1984 we were given the Cumis decision *(San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358.)

Also in my term, *Verdict* magazine was born through the efforts of George Martin. There is so much more to chronicle but space does not permit. My membership and involvement in ASCDC is one of the great memories I have of my many years of trial practice.

Proposition 51 (Civ. Code section 1431.2) enacted. Under section 1431.2, in personal injury, property damage and wrongful death actions, a defendant's responsibility for the plaintiff's non-economic damages is no longer joint and several. It is several only. Thus, section 1431.2 first eliminates joint and several liability for noneconomic damages and then focuses on what each defendant will pay, i.e. focuses on his percentage of fault.

Chief Justice Rose Bird becomes first Chief Justice to be removed from office by a majority of voters.

The 1980's

Verdict magazine, the official publication of the Association of Southern California Defense Counsel (ASCDC) is one of the most professionally designed and informative defense law trade publications in the country.

The cover of this special 50th Anniversary issue features a collage of past *Verdict* covers. The *Verdict* covers have captured the ASCDC in action by featuring many noteworthy individuals and many members of the association.

First published as a magazine in 1984, *Verdict's* roots date back to 1975 when then-ASCDC President Robert Dickson (1975-76) felt a newsletter would generate more interest and involvement in the Association and would help increase membership. With approval by the Board of Directors, Dickson solicited the help of Jack Daniels. "Daniels seemed a natural for the newsletter," said Dickson. "He was an energetic, articulate, and imaginary individual with a great sense of humor. He responded very enthusiastically." Daniels recalled that Dickson wanted a newsletter that was informative yet humorous and fun for members to read. "As lawyers, we receive so much serious material," said Daniels. "Dickson wanted our publication to be different, yet have informative articles."

With the help of law firm associates Jim Baratta and Paul Fine, Daniels developed *Defense Dialogue*, a four-page black and white newsletter. Daniels served as editor with Baratta and Fine as associate editors. Together they made an effort to produce the newsletter each month, although publication was often sporadic because of their caseloads. Daniels published the newsletter for five years until 1980. During the late 1970's and early 1980's, ASCDC had grown from a relatively small, informal network of defense lawyers to a well-respected organization whose membership topped 1,000. With an increased emphasis on education and awareness, ASCDC realized the added value created by a first-rate, professionally produced publication.

George Martin first recommended to ASCDC that it publish a professional magazine. "At the time, I felt it was very important for our organization to communicate to members through a professional publication," said Martin, who became *Verdict's* first editor in 1983. The following year, he became ASCDC President. "I recommended to the Board of Directors that we produce a magazine that was less stuffy than a law review, communicate what the Association was doing, and include articles helpful in the practice of law. I felt that, with a professional looking publication, people would be more likely to read and save it for future reference. *Verdict* is certainly a publication members can be proud to display."

Martin shared how he came up with the name *Verdict*. "A good friend of mine had written a book which he named *Verdict,* which means 'to speak the truth'" said Martin. "When it came time to name the new magazine, *Verdict* seemed appropriate."

Since its inception, *Verdict* has had numerous, hardworking, volunteer editors who have made it their passion to continue to publish the magazine as one of the premier defense publications in the United States.

With a distribution of over 4,500 today, *Verdict* reaches every ASCDC member as well as our colleagues in the Association of Defense Counsel of Northern California and Nevada and numerous judges in the Superior, Appellate and Federal courts, as well as many insurance professionals.

Michael I. Neil – 1988

Probably what stands out most for me about my time as president of ASCDC is how the organization in 1988 stood up against the No Fault Initiative that was on the ballot in 1988 during my presidency. We joined with the North in opposing this flawed initiative. A meeting was called by the tort reform group sponsoring the initiative. In attendance were representatives of many auto insurers along with a Mr. Bailey (brother to F. Lee) who headed up the Tort Reform Coalition. We invited our Northern Calif. Defense Attorney brethren to the meeting. Incoming president Bob Baker was seated to my right as I recall. Mr. Bailey gave a long impassioned plea to us defense lawyers in attendance as to why we should support the Initiative. When he was through, he looked down the long table at me and said: "Mike, what do you think?" My reply: "You are full of #!&@ if you think we are going to support you." I then listed all the reasons why the initiative was inequitable. The meeting ended in disharmony and the Initiative was eventually defeated by a wide margin. As a post note, a Vice President of one of the auto insurers in attendance followed me out of the meeting and said he wanted me to do their auto work.

Bob Baker – 1989

In 1989 we were struggling with the conflict between ASCDC attorneys and insurance companies who were demanding audits of defense firm bills, and imposing guidelines on the provision of legal services (in effect, insurance companies practicing law without a license). We decided that the Association should first and foremost be an organization that supported and assisted our attorney members, even if on occasion we alienated or were not on exactly the same wave length as some of our insurance company clients. It made for great debate.

ASCDC Past Presidents 1980's

1980	Gary C. Ottoson	1985	Donald A. Way
1981	Frederick W. Kosmo	1986	Timothy L. Walker
1982	John J. Collins	1987	Phillip R. Marrone
1983	John J. Collins	1988	Michael I. Neil
1984	George F. Martin	1989	Robert C. Baker

The 1990's

Wayne J. Boehle – 1990

I was President of our organization in 1990 which I like to refer to as the beginning of the "Great Gatsby Years." We had over 2000 members and enjoyed a close-knit camaraderie amongst the defense bar. We scheduled tennis, softball and golf tournaments along with educational seminars.

Our membership stepped up big time in providing financial support for the CDC, our lobbying organization. Together we battled continuing efforts to introduce "No Fault" initiatives and the seemingly always present problem of court congestion. Those of us old enough can remember the long delays in getting a case to trial, and one attempted procedure for dealing with this problem – the Jury pre-selection process. The good news was that it gave you something to do while waiting for a courtroom. The bad news was the case was tried before you made your opening statement.

I have many friends as a result of the years I spent with our great organization. I am proud to say that they are friends for life.

Annual Seminar Keynote Speakers:

Tommy Lasorda *(1990)* • **Ronald Reagan** *(1991)*

Norman Schwarzkopf *(1992)* • **Jimmy Carter** *(1993)*

Colin Powell *(1994)* • **Margaret Thatcher** *(1995)*

Mario Cuomo *(1996)* • **George Bush** *(1997)*

John Major *(1998)* • **Bob Dole** *(1999)*

John (Jack) W. Marshall 1996

In 1996, there were three initiatives on the ballot which were referred to as the "Terrible Two Hundreds." These initiatives, which championed "no fault" laws, "loser pays" provisions for securities litigation, and restrictions on any contingency fees above 15%, threatened the practice of both the plaintiff and defense bar as we knew it. The ability of ASCDC to work with the plaintiff's bar and the California Defense Counsel (CDC) to defeat these initiatives showed what could be accomplished by maintaining a strong political presence.

I encourage all current and future members to reflect that both ASCDC and CDC need support to remain relevant, and to ensure that the common interests of all defense attorneys are represented in our political process.

Darrell A. Forgey 1995

I was President in 1995 and honored to be selected. We honed our tradition of continuing legal education; at that time, the annual Hawaii Seminar was still going strong. Children were included and it was one of the absolute best events offered by any of the organizations. During my year as president, we were honored to have Margaret Thatcher as our seminar speaker. In addition, in the face of mounting hostility between the defense and plaintiffs' bars, we recognized the need to foster cooperation. As a result, we developed a "civility code," true to ASCDC's longstanding values of integrity and professionalism.

The 1990's

circa 1998


Mike Belote, *cir. 1998*

In 1998, the CDC retained Mike Belote as its lobbyist, replacing Jon Smock. At the time, defense attorneys were troubled by language in State Farm Automobile Insurance Co. v. Federal Insurance Co. (1999), which brought into question whether an attorney had a conflict of interest when representing a client insured by one insurance company, such that the attorney was prevented from filing a cross-complaint against the same insurance company in another lawsuit.

Tom Keating (Past President, 1995) reports that Mike Belote was instrumental in introducing legislation, ultimately enacted by the Legislature, which directed the California State Bar to construe Rule 3-320 of the Rules of Professional Conduct to avoid this possible application of the State Farm case. Thanks to the work of Mike Belote, the Comments to Rule 3-320 now read, in part:

"In State Farm Mutual Automobile Company v. Federal Insurance Company (1999) 72 Cal.App. 1422, the court held that paragraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action."

Karl A. Keener – 1998

In 1998 the ASCDC, on behalf of its members, remained deeply enmeshed in an ongoing battle to preserve the independence of our private practices and the civil justice system. This fight began to our surprise in the late 1980's with the introduction of two ballot propositions: one to enact no-fault auto insurance and the other to severely restrict contingency fees. While both propositions were soundly defeated, their sponsors remained undeterred, and reintroduced similar propositions again in 1996 against which defense counsel throughout the state effectively and successfully rallied in open opposition. On the national level, "trial attorneys" had become public enemy number one in the minds of some administrations – and their corporate sponsors made no apparent distinction as to which side of the counsel table the attorneys were on.

We also saw a number of insurance companies demanding immediate major fee cuts on already substandard rates, under the threat of pulling all of the business in-house. At the same time a former claims executive was traveling the nation slandering defense counsel with wild assertions that we were all stealing from the carriers – while he lined his pockets with their gold. In the midst of this turmoil, the ASCDC was confronting on behalf of our members a new breed of predator in the form of fee auditors, who were guaranteeing they could cut a pre-determined percentage or more from each bill; the more the cut the more they were paid. Through the efforts of California Defense Counsel that type of fee audit arrangement was made illegal.

But attorneys were not the only members of the judicial system under attack. Many of the same folks who were attacking "trial attorneys" were also attacking the civil jury system and certain members of the judiciary. Because of a 1997 abortion-related opinion written by Chief Justice Ronald George and joined by Justice Ming Chin, a fringe pro-life group was organizing an effort to defeat them in the upcoming statewide November 1998 election when they would be up for reconfirmation. In early 1998, a representative of the Chief Justice and Associate Justice Chin contacted me asking for ASCDC's assistance and support, which we gladly and wholeheartedly provided. We devoted one of ASCDC's quarterly publications to the topic of judicial independence, featuring pictures of the two Justices on the cover. I became a member of their campaign fundraising committee and many of our members donated both time and money to help educate the general public about the importance of maintaining a well-qualified and independent judiciary – a lesson we must never forget.

ASCDC Past Presidents
1990's

1990	Wayne J. Boehle
1991	Patrick A. Long
1992	Hon. Stephen M. Moloney
1993	Lori R. Behar
1994	Michael B. Lawler
1995	Darrell A. Forgey
1996	John W. Marshall
1997	James P. Collins, Jr.
1998	Karl A. Keener
1999	Robert A. Davidson

The 2000's

Now and the Future ....

ASCDC

Association of Southern California Defense Counsel

ASCDC entered this current decade under the leadership of Jeffrey Behar (2000) and Edith Matthai (2001), both of whom were dedicated to lead the association through a period of transition, "One of the keys to positive change is through a unified Association that speaks for defense lawyers," quoted Edith Matthai in her "New Directions" column in the 4th Quarter *Verdict*.

In the years since Red Betts' vision, the ASCDC has certainly become unified to continue to be the premier civil defense organization. The membership of 1200 lawyers benefits from myriad of programs through their membership in the ASCDC.

Over the last 50 years, the ASCDC has attracted internationally known speakers at its Annual Seminars, including former Presidents Bill Clinton; Gerald R. Ford; George H.W. Bush; Jimmy Carter; and Ronald W. Reagan and other prestigious, inspirational individuals including: Chief Justice of California Tani Cantil-Sakauye; General H. Norman Schwarzkopf (Ret.); Secretary Thomas Ridge; General Colin L. Powell (Ret.); General Tommy Franks (ret.); Former Secretary of State, Madeleine Albright; former Mayor of New York City, Rudy Giuliani; former Vice President, Al Gore; former Senator Bill Bradley; former Senator Robert Dole; former Governor of New York Mario Cuomo; former Prime Minister of Great Britain, Margaret Thatcher; plus many others.

ASCDC is also very proud of its active and successful Amicus Committee; Legislative Program; Annual Meetings with the Chief Justice; Substantive Law Committees; Brown Bag Seminars; Meet and Greets; Young Lawyers Programs; Specialty Education Seminars; Expert Witness Bank; Hall of Fame Event, the Annual Judicial and New Member Reception, and a new website. Hard working, loyal volunteers and staff have worked countless of hours to insure the success of the organization, and this significant 50th Anniversary is truly a time to celebrate its accomplishments. Congratulations ASCDC!

Jeffrey S. Behar – 2000

It was a great privilege and honor to serve as the ASCDC President for the year 2000. We ushered in the new millennium with the introduction of the ASCDC substantive law committees, with specific focus groups in the areas of products liability, professional liability, employment law, insurance bad faith, and construction defect litigation. In the last 10 years these committees have flourished with significant attendance from the bench, bar and insurance industry at the annual events.

In the year 2000, at the ASCDC Annual Seminar our keynote speaker was former President Gerald Ford. It was particularly poignant in that, just before the event, President Ford had received the Congressional Gold Medal, the highest civilian honor in our country.

The event was also significant to me personally. In addressing the 1,200 in attendance, I had the opportunity to publicly acknowledge and thank my mentor Ted Shield, the "Babe Ruth" of all defense trial lawyers, and Lori Behar, the first woman president of the ASCDC and, more importantly, my wife.

Walter M. Yoka – 2002

First and foremost, it was just great fun being President. I truly enjoyed every minute of it. That said, I think all of the past presidents would agree that they felt a great responsibility to live up to the leadership and work of the presidents that preceded them. I will always feel very lucky to be part of this group of lawyers.

If I had to pick one thing that stood out during my year as President, it would be celebrating Carolyn Webb's 25th Anniversary as Executive Director. Her work always represented the strength, longevity and reputation of our organization. Candidly, I was proud to serve under her.

Paul R. Fine – 2004

My year as President of our association began with Former Secretary of State Madeleine Albright's keynote speech and ended with President William Jefferson Clinton's keynote speech. Meeting these world leaders was an experience that I will always remember. Having the opportunity to meet with Chief Justice George and the leadership of the judiciary to address the financial crisis that faced our courts and to discuss issues of concern to our membership; to work with Mike Belote and to attend meetings in Sacramento with our State legislators to address key legislative issues; were all memorable and gratifying experiences. In the end, however, it is the friendship and respect of the great people that I had the opportunity to work with as President that I treasure the most.

The 2000's

After 34 years at the helm, Carolyn Webb retires in 2010

ASCDC retains an association management company in 2011 and welcomes new Executive Director, Jennifer Blevins.

ASCDC loses friend and 2010 President, Jim Robie, pictured with wife, Edith Matthai and Secretary Thomas Ridge

ASCDC Past Presidents 2000's

2000	Jeffrey S. Behar
2001	Edith R. Matthai
2002	Walter M. Yoka
2003	Robert W. Harrison
2004	Paul R. Fine
2005	Dennis R. Thelen
2006	Harry W. R. Chamberlain II
2007	Phillip A. Baker
2008	Randall J. Dean
2009	Robert A. Morgenstern
2010	James R. Robie (dec.)
2011	Linda Miller Savitt

THANK YOU CONTRIBUTORS – The ASCDC wishes to thank our past presidents and those of you who offered a few words of reflection about your tenure with the ASCDC. As the remarks demonstrate, we have all benefited from the creativity and dedication of so many fine defense lawyers who contributed their time and energy over the years. The remarkable result has been an organization that evolves in response to the changing world of litigation and the changing needs of our members, while remaining true to the core values that have infused the Association from the beginning – expecting and nurturing the highest levels of professional ability, collegiality and integrity. Thanks to all of our past leaders for ensuring ASCDC's continuing relevance both in enhancing defense lawyers' day-to-day practice, and in helping guide California law and policy down a path to equity and justice. Many thanks also to Carol Sherman, Pat Long, Lisa Perrochet and the ASCDC Office for their contributions to this anniversary section.

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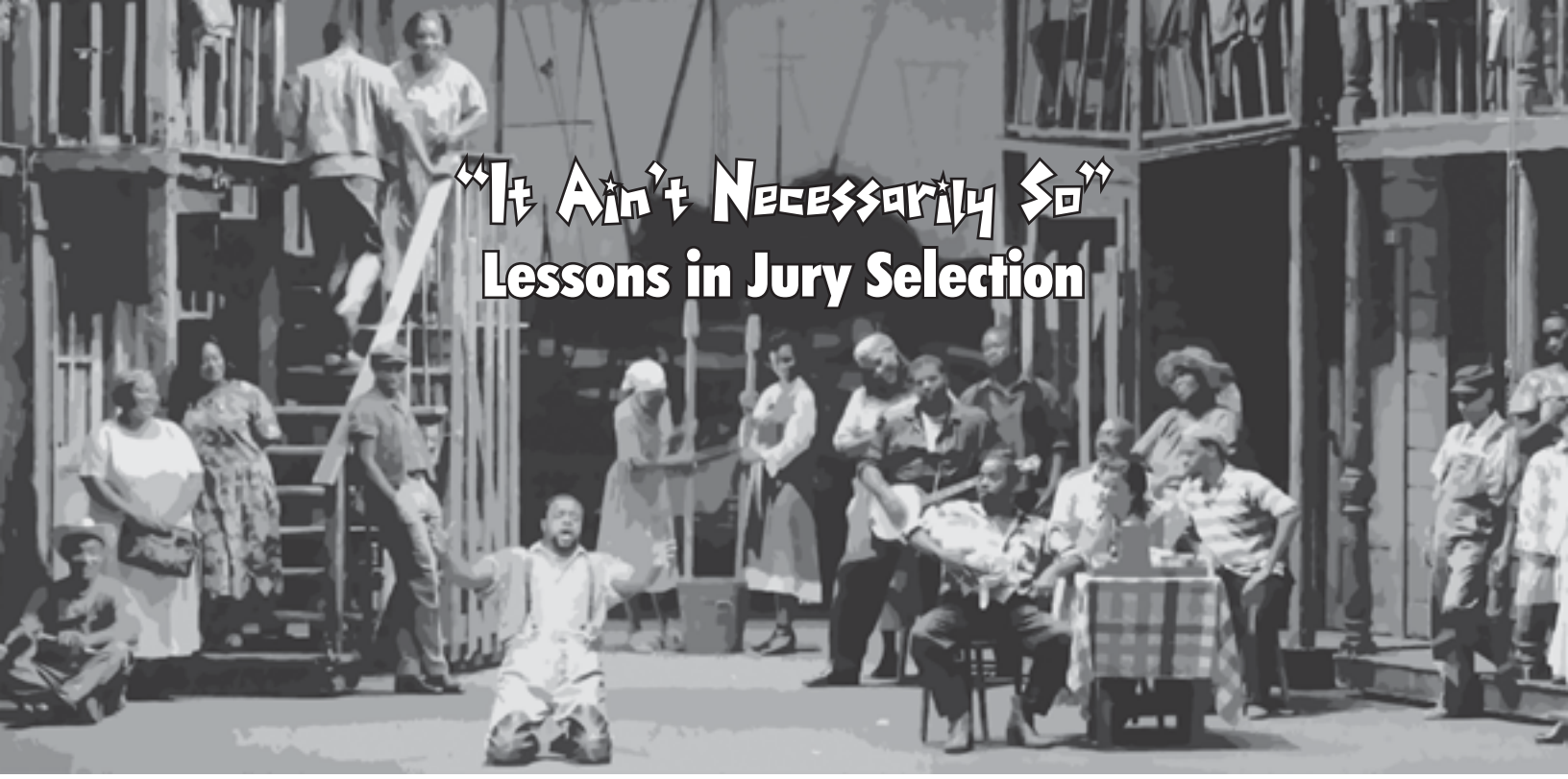

"It Ain't Necessarily So" Lessons in Jury Selection

by Richard Willis, *Bowman & Brooke, LLP*

You don't have to be a musical theater fan to appreciate George and Ira Gershwin's famous song "It Ain't Necessarily So," from *Porgy and Bess*.

The song title has become a cliché for contrarian wisdom, of which it takes a heap (not to mention some luck) to select a good jury.

Jury selection, or rather, de-selection, has been called "an exercise in prejudice." (Swift, "The Unconventional Equal Protection Jurisprudence of Jury Selection" (Spring 1996) 16 N.Ill. U. L. Rev. 295.)

Get a few cocktails into any trial lawyer and ask about their least favorite jury. They almost invariably will tell you a story about a personal prejudice that did not pan out – a juror that should have been a "fer ye" or a "don't care," that turned out to be an "agin' ye" (more on this in a bit.)

How can that be? Aren't our personal prejudices, the ones we keep buried under platitudes about all men being created equal, always right?

Sadly, "It ain't necessarily so." Are all female jurors sympathetic? Are all male jurors hard-hearted? Are all African-American jurors anti corporate defendant? Are all under 30 jurors emotional decision makers? Not necessarily....

The truth is, some are and some aren't. As such, exercising your precious peremptory strikes based on your personal prejudices is bound to mislead.

Besides, outright reliance on personal prejudice can get you in trouble. (See *Batson v. Kentucky* (1986) 106 S.Ct. 1712 and *J.E.B. v. Alabama* (1994) 114 S.Ct. 1419 [disallowing racially motivated and gender based peremptory strikes].)

Of course, trial lawyers aren't supposed to admit this. Jury selection is all about finding an impartial panel, right? Rubbish! It is all about compiling a jury that is as predisposed to your position as humanly possible. The idea is that if both sides are after the same objective, somehow the tug of war produces an fair jury. "It ain't necessarily so."

OK, Willis, if I can't rely on my personal prejudices, what can help me separate the "agin' ye" jurors from the "fer ye's" and the "don't cares?"

Well, careful voir dire questions of course, and accurate jury information developed pre-trial, but those subjects are for another day. What "gut feel" can be reasonably relied upon in the heat of the courtroom?

Each veteran trial lawyer has his or her secret list – Clarence Darrow shared his in 1936. Female jurors were "puffed up with importance." Presbyterians were "as cold as the grave." Was Darrow always right? Ask John Scopes. (He was convicted.)

Like all my techniques, what follows is admittedly stolen from a great trial lawyer – this time, my senior partner, Dick Bowman – the man who tried (and won – then lost – then won) *Larsen v. General Motors* (8th Cir. 1968) 391 F.2d 495, the first crashworthiness case in judicial history, not to mention a few hundred others since then.

What I stole from Bowman is the concept of the "happy status quo" juror, versus the juror who is an "agent of change." Status quo jurors are reasonably satisfied with their lot in life. The world has treated them kindly. They have a steady job, a stable family. They are content with the way things are. In a typical civil case, these tend to be defense jurors. It takes powerful evidence to persuade them to change the status quo, to

continued on page 20

take hard earned dollars from one party and give them to another.

On the other hand, jurors who are unhappy with their world, who have perhaps been victims themselves, of an unfair boss, of bias, of circumstances undeserved – maybe they have lost a job or a loved one, maybe they are dealing with a family crisis, financial hardship – these tend to be agents of change – if not in their own lives, then in the lives of people they think need help. It takes a powerful appeal to higher emotion to persuade these folks to set aside their natural affinity for the wronged, the hurt. Unhappy jurors can easily become punitive jurors, if given the right reason.

Put another way, "it ain't necessarily so" that more highly educated jurors can be counted on to vote for the corporation or the professional defendant, while mere high school graduates will sympathize with the "little guy." You might have a PhD on your panel – but if he or she is overqualified for that job managing a retail outlet or selling cars, that juror may feel the "system" doesn't work, and the defendants who are part of the "system" are to blame. Meanwhile, the more humbly educated prospective juror who has worked up to a position that commands respect and a relatively good living may be the one who believes most thoroughly in personal responsibility, and who may listen

carefully to the evidence rather than letting sympathy be the single deciding factor.

One of the advantages of this approach is that it is "Batson-proof." But beware; even this advice "ain't necessarily so." How do you know? Truth is, you don't. It is always an educated guess. The operative word is "educated." Do your homework. Ask the hard questions in voir dire. If you are in a court that allows lawyers to conduct the voir dire, be sure to talk about the weaknesses in your case before the other side gets a chance. Use open ended questions – what, when, where, why and how – to get prospective jurors talking. HDYFAT – "How do you feel about that?" It's the best question you can ask in voir dire.

Now, about the "fer ye's," the "agin ye's" and the "don't cares." This is also stolen, from my former partner and lifetime mentor, Steve Morrison, a veteran of over two hundred and fifty jury trials. According to Steve, there are only three types of jurors. Identify the "agin ye's" and strike as many as you can. Don't concern yourself too much with the "don't cares." Then pitch your case to the "fer ye's" that are left – for they are the ones that make the most important argument in the case – the one that takes place where you can't go – inside the jury room. Your job as an advocate is to arm the "fer ye's" with the evidence and arguments they need to win your case for you, while you are nervously pacing the halls, wishing you still smoked cigarettes.

And that's the only part of this article that is "necessarily so."

Richard Willis – Mr. Willis is a partner in the Columbia, S.C. office of Bowman and Brooke, LLP, and primarily represents corporate defendants in commercial, product liability and environmental disputes. He is an Adjunct Professor of Trial Advocacy at the University of South Carolina School of Law and is a frequent writer and speaker on Trial Advocacy issues.

Attribution: Adapted from an April 2011 article originally published in South Carolina Lawyers Weekly.

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.

attorney fees

Contingency fee agreements requiring clients to proceed to "settlement or trial" are void as against public policy, and interfering with such a contract cannot form the basis for a claim of intentional interference with prospective advantage.

Lemmer v. Charney (2011)
195 Cal.App.4th 99.

Plaintiff was an attorney who had represented a client in an employment dispute with the client's employer. The client sought – but never intended to honor – a contingency fee agreement in which the client agreed to pursue the case to settlement or trial. As trial approached, the client instructed the lawyer to resolve the matter, eventually agreeing upon a "walk away" settlement despite likely recovery. The attorney, who never received any fees, sued the client for conspiracy to defraud, and sued the client's wife for intentional interference with the fee agreement. The trial court sustained the client's demurrer without leave to amend.

The Court of Appeal (Second District, Division Eight) affirmed, emphasizing prior case law reflecting that a restriction on settlement that requires attorney consent is against public policy: "the law does not recognize a tort cause of action for damages for the client's decision to abandon it, because that would ... constrain defendant to keep his lawsuit alive just for his attorney's profit, despite his own fears and desire to abandon the case." The Court also held that since the client's instructions requiring the attorney to settle despite an agreement to the contrary was not independently wrongful, the client's wife could not be accountable for intentional interference with prospective advantage.

A trial court may not use a government entity defendant's need for funds as a basis for applying a negative multiplier in awarding attorneys' fees against the entity.

Rogel v. Lynwood Redevelopment Agency (2011)
194 Cal.App.4th 1319.

Plaintiff mobile home park sued to require a city development agency for failing to meet its affordable housing obligations, and the parties entered into a settlement that the trial court incorporated into an order. The settlement agreement allowed for recovery of attorney fees, but it noted that the development agency's financial obligations could be considered in calculating the amount of fees to be awarded. In making the calculation, the trial court relied on that provision, and said at the hearing that "the money should be spent in Lynwood and not on the lawyers." Accordingly, the trial court applied a 0.2 negative multiplier to the lodestar requested by plaintiffs, reducing the amount awarded from $2.7 million to $540,000. Plaintiffs appealed.

The Court of Appeal (Second District, Division Eight) reversed. It held that while negative multipliers have been affirmed in other distinguishable cases, they did not rely on the rationale that it would simply be "better" for a governmental entity to keep money it would otherwise have to pay. Thus, the court refused to employ "a rule which awards less than the fair market value of attorneys' fees merely because the case was filed against a government agency." Noting that there is a "strong public policy against such a rule," the court described the problem that negative multipliers create: a perverse incentive for governmental entities to "negligently or deliberately run up a claimant's attorneys' fees, without any concern for consequences."

A plaintiff who obtains a default judgment can collect attorney fees only if they were sought as party of the request for default, not through postjudgment motions.

Garcia v. Politis (2011)
192 Cal.App.4th 1474.

A plaintiff sought damages and injunctive relief for defendant's failure to provide a designated handicap parking spot. A default judgment was entered based upon plaintiff's written declaration – the record did not reflect the request for entry of default or for default judgment. Two months after the default judgment was entered, plaintiff moved for attorney fees. The trial court denied the motion in accordance with California Rules of Court, rule 3.1800.

The Court of Appeal (Second District, Division Four) affirmed. It held that plaintiff could not avail himself of the statute concerning attorney fees as costs (Code of Civ. Proc. § 1033.5), as he had failed to comply with the statute and rule for default judgments. Those strictures require that "*all*" the relief sought must be stated in the initial application for entry of default. This is because "a default judgment is intended to include all relief sought in the complaint and established by the plaintiff."

civil procedure

California common law rules invalidating class arbitration waivers in certain consumer contracts are preempted by the Federal Arbitration Act.

AT&T Mobility LLC v. Concepcion (2011)
__ U.S. __ [131 S.Ct. 1740, 179 L.Ed.2d 742]

California courts have long been hostile to consumer contracts that included arbitration agreements under which consumers agreed that they would waive the right to pursue their claims on a class-wide basis. In particular, such class action waivers were deemed to be unconscionable and unenforceable when applied to bar claims alleging that the defendant carried out a scheme to cheat large numbers of consumers out of individually small sums of money. (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 162-163.) In this action, cell phone purchasers who had entered into contracts containing arbitration clauses with class action waivers sought class treatment of claims that they should not have been charged sales tax when buying phones that were advertised as free. The District Court denied AT&T's motion to compel arbitration under the *Concepcions*' contract, relying on the *Discover Bank* decision to find the arbitration provision unconscionable insofar as it disallowed classwide proceedings. The Ninth Circuit agreed.

By a 5-4 vote, the United States Supreme Court held that California's *Discover Bank* rule is preempted by the Federal Arbitration Act (FAA). The Court therefore held defendant AT&T was entitled to an order compelling arbitration of the claims against it. The FAA generally requires courts to enforce arbitration agreements as written, and the *Discover Bank* rule impaired the objectives of Congress in enacting the FAA – namely, "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." The Court noted that class-wide arbitration sacrifices the speed and informality that is the principal purpose of arbitration under the FAA, and substitutes in its place a procedure that is slower, more costly, requires more procedural formality, and carries significantly greater risks for defendants than arbitration of individual consumer claims.

Compare ***Sonic-Calabasas A, Inc. v. Moreno*** (2011) 51 Cal.4th 659 [California Supreme Court: in a 4-3 decision issued *before* the *AT&T Mobility v. Concepcion* opinion, the court ruled that, where an employee entered into an arbitration agreement as a condition of employment, and the agreement required waiver of the right to an informal administrative hearing, the agreement was unenforceable as being contrary to public policy and unconscionable, notwithstanding the Federal Arbitration Act. The court noted that, once an employee has availed himself of the statutorily authorized administrative procedure, the employer could validly require arbitration of further proceedings to challenge the administrative ruling, so long as certain statutory protections were followed, including allowing the Labor Commissioner to represent the employee in the arbitration and requiring the employer to post a bond to appeal the Commissioner's decision]

And see ***Wherry v. Award, Inc.*** (2011) 192 Cal.App.4th 1242 [Fourth District, Division Three: arbitration agreements between real estate brokerage and independent contractors were both procedurally and substantively unconscionable. The arbitration provision was procedurally unconscionable because plaintiffs were only given a few minutes to review after being told to sign it if they wanted to work for the company. Plaintiffs also were not afforded an opportunity to ask questions, and were not given a copy of the document. Moreover, the provision authorizing an arbitrator to impose costs on the losing party was substantively unconscionable]

See also ***JSM Tuscany, LLC v. Superior Court*** (***NMS Properties, Inc.***) (2011) 193 Cal.App.4th 1222 [Second District, Division Three: non-signatory plaintiffs may be compelled to arbitrate based on equitable estoppel – including by defendants who are themselves non-signatories to the contracts containing the arbitration clauses – where plaintiffs have joined the action based on contracts containing an arbitration provision and seek to rely affirmatively on the underlying contractual terms. This is true particularly for related entities and where the relevant claims are "inextricably intertwined with the obligations imposed by the contract containing the arbitration clause."

Note that the California Supreme Court has granted review in another case involving the enforceability of arbitration agreements against nonsignatories. In ***Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*** (case no. S186149), issues to be addressed by the court include the following: "Is a homeowners association bound by an arbitration provision contained in the covenants, conditions and restrictions for a common interest development that were executed and recorded prior to the time the association came into existence?" And, in ***Diaz v. Bukey*** (case no. S194150), review has been granted and the matter held pending the disposition in *Pinnacle Museum Tower Assn.,* with the issue being whether the beneficiary of a family trust is bound by an arbitration provision contained in the trust where the beneficiary is not a party to any agreement that disputes be resolved by arbitration.

A class action discovery order that violates consumer privacy rights in the course of seeking information to identify appropriate class representatives is improper.

Starbucks Corporation v. Superior Court (Lords) (2011) 194 Cal.App.4th 820

In this class action challenging Starbucks' employment applications process, the trial court was called on to address the effect of legislation in the 1970s requiring the "destruction" by "permanent obliteration" of all records of minor marijuana convictions that were more than two years old. Employers were prohibited from even asking about such convictions on their job applications, with statutory penalties of the greater of actual damages, or $200 per aggrieved applicant. Plaintiffs here sought some $26 million in statutory penalties on behalf of an estimated 135,000 job applicants, alleging that Starbucks's preprinted job application violated this legislation. In *Starbucks Corp. v. Superior Court (2008) 168 Cal.App.4th 1436 (Starbucks I)*, the court of appeal held the class representatives lacked standing to represent the proposed class because none had any marijuana convictions to reveal. The court declined to turn the legislation into a "veritable financial bonanza for litigants like plaintiffs who had no fear of stigmatizing marijuana convictions." On remand, however, the trial court permitted plaintiffs to file an amended complaint to include only job applicants with marijuana convictions, and further allowed further discovery to find a "suitable" class representative. To achieve this, Starbucks was been ordered to randomly review job applications to find applicants with prior marijuana convictions. Such applicants' names were to be disclosed to class counsel unless they affirmatively opt out. Starbucks challenged this discovery order on appeal.

The Court of Appeal (Fourth District, Division Three) held the trial court abused its discretion in making this discovery order. As the court explained, "By providing for the disclosure of job applicants with minor marijuana convictions, the discovery order ironically violates the very marijuana reform legislation the class action purports to enforce. We fail to understand how destroying applicants' statutory privacy rights can serve to protect them." The court acknowledged, "With no readily apparent means by which class members may be identified without also violating their statutory privacy rights, there may well be no ascertainable class, let alone a class representative plaintiff. But these matters are not currently before us on this challenge to the discovery order."

Note that the California Supreme Court has granted review in another case involving privacy rights. In ***County of Los Angeles v. Los Angeles County Employee Relations Commission*** (case no. S191944), the court will address issues it has framed as follows: "1) Under the state Constitution (Cal. Const., art. I, § 1), do the interests of non-union-member public employees in the privacy of their personal contact information outweigh the interests of the union representing their bargaining unit in obtaining that information in furtherance of its duties as a matter of labor law to provide fair and equal representation of union-member and non-union-member employees within the bargaining unit? (2) Did the Court of Appeal err in remanding to the trial court with directions to apply a specific notice procedure to protect such employees' privacy rights instead of permitting the parties to determine the proper procedure for doing so?" The court's decision will directly affect the privacy rights of thousands of government workers and the ongoing efforts of public-sector labor unions to obtain the names, home addresses and phone numbers to recruit new members.

Plaintiffs attempting to defeat anti-SLAPP motions in malicious prosecution actions bear the burden of establishing the defendant lacked probable cause in pursuing the underlying action.

Mendoza v. Wichmann (2011) 194 Cal.App.4th 1430.

An attorney brought a malicious prosecution action against parties who had previously sued her for defamation. The attorney claimed the former plaintiffs lacked a reasonable basis to bring the defamation claim. The former plaintiffs in turn filed an anti-SLAPP motion to dismiss the malicious prosecution action, arguing that their defamation claim was meritorious and thus, the malicious prosecution action lacked merit, and was subject to dismissal as a "SLAPP" (Strategic Lawsuit Against Public Participation) suit. The trial court denied the anti-SLAPP motion, finding that the challenged defamation action was not supported by probable cause, resulting in the malicious prosecution action having sufficient merit to survive the anti-SLAPP motion.

The Court of Appeal (Third Appellate District) reversed with directions to grant the anti-SLAPP motion. Because the subject of the anti-SLAPP motion was a lawsuit for malicious prosecution and the standard for probable cause to bring a malicious prosecution action is an objective one, the fact that some evidence supported a potential defamation claim (it showed the attorney said one of the defamation-defendants was threatening and unstable) demonstrated merit. This in turn established that the malicious prosecution action *lacked* merit as a matter of law, and the anti-SLAPP motion should have been granted.

See also ***Gerbosi v. Gaims, Weil, West & Epstein, LLP*** (2011) 193 Cal.App.4th 435 [Second District, Division Eight: defendant attorney's alleged eavesdropping on plaintiff's telephone conversations was not protected activity for purposes of anti-SLAPP motion to dismiss plaintiff's claim, where plaintiff was not a party to any litigation involving the attorney; moreover, alleged eavesdropping on a second plaintiff who *was* a party to litigation involving the attorney was unprotected under the anti-SLAPP statute to extent that the eavesdropping constituted criminal activity; trial court did not abuse its discretion in awarding attorney fees to first plaintiff where court found that no reasonable attorney would have believed that eavesdropping on a party not involved in litigation with the attorney constituted protected activity.]

And see ***Coretronic Corporation v. O'Connor*** (2011) 192 Cal. App.4th 1381 [Second District, Division Eight: client's complaint against a former attorney alleging fraud, negligence and other claims was not based on protected activity and thus was not subject to dismissal anti-SLAPP statute where theory was that attorney undertook representation of the client while simultaneously representing another party who, in unrelated litigation, was adverse to the client; as a result, the client argued it unwittingly disclosed confidences that could be helpful in the former attorney's client in the unrelated litigation; Court of Appeal explained, "Defendants contend that all of plaintiffs' claims arise from protected petitioning activity, reasoning that the allegations concern attorneys' breaches of duty in the context of two lawsuits.... Plaintiffs assert their claims arise from [the firm's] dual representation ... [and] negligent or intentional failure to disclose its representation of E&S while at the

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same time obtaining plaintiffs' confidential information of strategic value to plaintiffs' adversary, E&S. Plaintiffs contend that it is the *fact* of this conflicting representation, and not any litigation-related statements or conduct, which forms the basis of their claims. We agree with plaintiffs and conclude that the complaint does not target litigation-related activity"].

A previously filed writ petition challenging a good faith settlement determination does not preclude a later appeal raising the same challenge.

Cahill v. San Diego Gas & Electric (2011)
194 Cal.App.4th 939.

In this personal injury action, a window washer suffered electrical burns and sued the electric utility (SDG&E), which in turn filed a cross-complaint against the private property owners on whose premises the injury occurred. The owners, who had previously settled with the window washer for $25,000, moved for a determination by the trial court that the settlement had been made in good faith, since Code of Civil procedure section 877.6 bars indemnity claims against those who have entered into a good faith settlement. The trial court granted the good faith determination, and dismissed the indemnity claim. SDG&E timely exercised its statutory right to challenge the good faith determination by writ petition, but the petition was summarily denied by the Court of Appeal. While the litigation between the window washer and SDG&E remained pending in the trial court, SDG&E appealed the indemnity action dismissal order, raising both a challenge to the good faith determination that formed the basis for the dismissal, as well as a challenge to a prior ruling by the trial court denying summary judgment vis-à-vis the window washer's action.

The Court of Appeal (Fourth District, Division One) held SDG&E's challenge to the nonappealable summary judgment denial order was premature, as that order was not encompassed within the scope of issues reviewable on appeal from the indemnity action dismissal. On the other hand, SDG&E's good faith determination underlying dismissal of its indemnity claim *was* permissible, even though the same challenge had been made in the earlier unsuccessful writ proceeding. The Court of Appeal acknowledged a split in authority on this issue, and chose to follow the line of cases holding that Code of Civil Procedure section 877.6(e), which states a writ petition "may" be filed to challenge a good faith finding, reflects a permissive, not mandatory, means of challenging a good faith settlement determination. The availability of writ review, or fact of such review having been sought, does not bar a later appeal on the issue after a final judgment. Finally, with respect to the merits of the good faith settlement challenge, the Court of Appeal held the trial court did not abuse its discretion in finding the $25,000 settlement was in good faith, notwithstanding plaintiff's claim for $5 million in damages, given that information *available at the time of settlement* did not reveal a strong causation theory against the settling owners.

consumer law

California overtime law and the UCL apply to work performed by non-resident employees in California for a California-based employer.

Sullivan v. Oracle Corp (2011)
51 Cal.4th 1191.

In this wage-and-hour action, the plaintiffs were out-of-state employees sued their California-based employers on claims for withheld overtime wages under the Unfair Competition Law (UCL). Their action was filed in the federal district court, which granted the defendant's motion for summary judgment on stipulated facts. The 9th Circuit Court of Appeals initially held the California Labor Code and UCL claims did apply to plaintiffs' claims for work performed in California, but not to work in other states. The court then withdrew its opinion, however, and certified the questions of state law to the California Supreme Court to decide.

The California Supreme Court held that California law applies to claims for overtime compensation by out-of-state employees for work *performed in California* for a California-based employer. And, under California law, such overtime claims can serve as the basis for claims alleging UCL violations. In contrast, overtime claims under federal law *for work done in other states* by non-resident employees of a California-based employer cannot serve as the predicate for a UCL claim. The Court concluded that an employer's decision in California to classify its employees as exempt from overtime compensation does not, standing alone, justify applying the UCL to non-resident employees' federal claims for overtime worked elsewhere.

A warranty claim under the Song-Beverly Consumer Warranty Act can be maintained even if the consumer no longer has the product at the time of suit.

Martinez v. Kia Motors America (2011)
193 Cal.App.4th 187.

Plaintiff bought a Kia vehicle at a dealership and brought it in for repairs. The dealer refused to honor an express warranty and told plaintiff she would have to pay for the repairs herself. Unable to pay, she left the vehicle at the dealer, and it was eventually repossessed. Plaintiff then sued Kia Motors America under the Song-Beverly Warranty Act, which is a remedial statute designed to protect consumers who have purchased products covered by an express warranty. Kia sought summary judgment, arguing that because the plaintiff no longer owned the vehicle she could not maintain an action under the Act. The trial court agreed and entered judgment for Kia.

The Court of Appeal (Fourth Appellate District, Division Two) reversed, holding that the plain language of the statute – as well as undergirding policy considerations – does not require ownership or possession. To the contrary, all the Act requires of a plaintiff-buyer is that the buyer have "deliver[ed] [the] nonconforming goods to the manufacturer's service and repair facility" for the purpose of allowing the manufacturer a reasonable number of attempts to cure the problem." If the Legislature had intended to impose an ownership requirement, reasoned the Court of Appeal, it could have easily done so.

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See also ***Knapp v. AT & T Wireless Services, Inc.*** (2011) 195 Cal. App.4th 932 [Fourth Dist. Div. Three: affirming order denying class certification of UCL, CLRA and fraud claims based on a practice by a cell phone service to round up partially used minutes for a call to the next full minute; where service plans were marketed through a variety of means through a variety of means, including direct mailings, mall kiosks and non-uniform retailers' advertising, certification was properly denied because the proposed class "would include subscribers who solely spoke with a representative on the telephone, those who only considered certain advertisements, and those who only viewed [defendant's] Web site and began their service online; an individual inquiry would be required to determine whether the representations received by each proposed class member constituted misrepresentations, omissions, or nondisclosures. Thus, what business practices were allegedly unfair, unlawful, or fraudulent necessarily turns on an individualized assessment of which representations were made to each proposed class member"];

Starbucks Corp. v. Superior Court (Lords) (2011) 194 Cal.App.4th 820 [Fourth Dist., Div. Three: reversing order permitting discovery of class list by putative class representatives who lacked UCL standing, as disclosure of list to help identify representative with standing would violate proposed class members' statutory privacy rights];

Marlo v. United Parcel Service, Inc. (9th Cir. 2011) 639 F.3d 942 [affirming denial of class certification in wage-and-hour exemption status case based on district court's finding that plaintiff failed to meet burden of proving common issues of law and fact would not predominate over individual issues; defendant's "blanket exemption policy " 'does not eliminate the need to make a factual determination as to whether class members are actually performing similar duties'"];

Folgelstrom v. Lamps Plus, Inc. (2011) 195 Cal.App.4th 986 [Second Dist., Div. Five: affirming dismissal of UCL claim for lack of standing where plaintiff did not allege that he made a purchase or otherwise parted with money on account of defendant's allegedly unfair practice of collecting customers' zip codes for marketing purposes];

Bower v. AT&T Mobility, LLC (2011) ___ Cal.App.4th ___ [Second Dist., Div. One: affirming dismissal of UCL claim where plaintiff alleged she had improperly been charged $15.50 in sales tax as part of the purchase of a cellular telephone that had been advertised as free; court distinguished Kwikset Corp. v. Superior Court (Benson) (2011) 51 Cal.4th 310].

labor and employment law

U.S. Supreme Court limits plaintiffs' ability to certify class actions in discrimination and other cases under the Federal Rules of Civil Procedure.

Wal-Mart Stores, Inc. v. Dukes (2011) ___ U.S. ____ [131 S.Ct. 2541]

In this action by some 1.5 million women employees suing Wal-Mart, the plaintiffs alleged that Wal-Mart discriminated against female employees under Title VII in making pay and promotion decisions. The district court certified the class, and the Ninth Circuit affirmed. The United States Supreme Court reversed, holding that the class action could not be certified under Federal Rule of Civil Procedure 23(a) and (b)(2). The proposed class failed to raise common questions of law or fact, as required by Rule 23(a)(2). Specifically, plaintiffs' statistical and anecdotal evidence was insufficient to show that Wal-Mart operated under a general policy of discrimination that applied at every store, and as a result, the proposed class could not "generate common answers apt to drive the resolution of the litigation." The Court also held that claims for individualized monetary relief (such as the back pay plaintiffs sought) may not be certified under Rule 23(b)(2). The Court left open whether class claims for monetary relief can ever proceed under Rule 23(b)(2).

See also ***Mora v. Big Lots Stores, Inc.*** (2011) 194 Cal.App.4th 496 [Second District, Division Seven: trial court properly exercised its discretion in denying class certification of claims by store managers who alleged they had been misclassified as being exempt from overtime regulations; the court approved the court's approach to the issue, which was characterized as follows: "evaluating the persuasiveness of the declarations and deposition excerpts submitted by both sides, as well as the data and opinions from Big Lots' experts, the court found the activities performed by managers of Big Lots stores vary substantially based on the size of the store, the type of merchandise the store carries, the number of employees supervised, the time of year, the personality and judgment of the individual store manager and additional, periodic challenges at particular stores (for example remodeling). Accordingly, the court concluded common questions do not predominate because Big Lots does not operate its stores or supervise its managers in a uniform and standardized manner that would permit a determination of liability for misclassification of managers on a class-wide basis;" put another way, the trial court properly credited defendant's evidence "that there exists no uniform corporate policy requiring store managers to engage primarily in non-managerial duties, that wide store-to-store variation exists in the types of work performed and amounts of time per workweek spent by managers on different activities, and that misclassification, when it occurs, is the exception not the rule"]

U.S. Supreme Court reaffirms a relaxed causation standard in FELA cases.

CSX Transportation, Inc. v. McBride (2011) ___ U.S. ___ [131 S.Ct. 2630]

In this action arising out of a locomotive engineer's serous hand injury sustained while switching railroad cars, the federal courts were called upon to address the standard of causation in cases under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq., which holds railroads liable for employee injuries "resulting in whole or in part from [carrier]negligence." When instructing the jury on this theory, the federal district court declined a defense instruction that would have required plaintiff to "show that ... [defendant's] negligence was a *proximate cause* of the injury," and that would have "proximate cause" as "any cause which, in natural or probable sequence, produced the injury complained of." Instead, relying on *Rogers v. Missouri Pacific R. Co.* (1957) 352 U. S. 500, the court instructed that "Defendant 'caused or contributed to' Plaintiff's injury if Defendant's negligence played a part – no matter how small – in bringing about the injury." The jury returned a verdict for plaintiff and the Court of Apeal affirmed.

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In a 5-4 majority opinion by Justice Ginsburg, the Court upheld its prior interpretation of the FELA in *Rogers v. Missouri Pacific R. Co.,* reaffirming that the FELA does not incorporate common law "proximate cause" standards. After the *CSX* decision, it will continue to be proper to instruct juries that a defendant in a FELA case caused or contributed to a plaintiff's injury if the defendant's negligence played "'any part, even the slightest, in producing the injury.'" The Court's decision also determines the causation standard in cases under the Jones Act because the Jones Act extends to seamen the same rights given to railroad workers under the FELA.

Plaintiffs must prove an alter ego relationship to hold the owner of closely-held corporation liable for employment discrimination.

Leek v. Cooper (2011)
194 Cal.App.4th 399.

Employees of a car dealership sued the dealership and its sole shareholder for age discrimination. The plaintiffs argued that the level of control exercised by the sole shareholder over their employment made him personally liable. The trial court granted summary judgment for the defendant shareholder.

The Court of Appeal (Third District) affirmed, holding that an employee may recover against the sole shareholder of an employer corporation for discrimination in violation of state law only where the employee can demonstrate that the shareholder was an "alter ego" of the employer. The court explained that mere control is not enough to establish liability for breach of a duty owed only by an employer, and that the sole shareholder could be held liable only if plaintiffs proved all the traditional elements of "alter ego" liability, including a "unity of interest" between the shareholder and the corporation and the inequity of treating the alleged discrimination as an act of the corporation alone.

Employment relationship sufficient to support a plaintiff's claim for alleged Labor Code violations may be found even where defendant did not specifically control manner and means of plaintiffs' work.

Arzate v. Bridge Terminal Transport, Inc. (2011)
192 Cal.App.4th 419.

Plaintiffs (members of the Teamsters Union) brought this wage and hour class action on behalf of truck drivers who were paid by defendant to transport cargo. Plaintiffs alleged they were defendant's employees, and asserted causes of action under the Labor Code for failure to pay certain wages they claimed were due, and further alleged a cause of action for unfair business practices. The trial court granted defendant's motion for summary judgment on the ground that plaintiffs were independent contractors, not employees.

The Court of Appeal (Second Appellate District, Division Eight) reversed, holding the employer failed to establish that plaintiffs were, as a matter of law, independent contractors. Although defendant did not control the manner and means by which plaintiffs hauled their loads, the Court of Appeal noted that a trier of fact could find an employment relationship because "there are multiple other factors that must be considered and that do not weigh in favor of independent contractor status. Defendant executed the [contract] with plaintiffs' union, which represented the owner-operators of trucks in the role of 'employees' of the company. Defendant issued W-2 forms to plaintiffs, withheld taxes, and offered health plan benefits that included paying 70 percent of the cost. Defendant also paid hourly rates for some parts of plaintiffs' work day...."

See also ***Angelotti v. The Walt Disney Company*** (2011) 192 Cal. App.4th 1394 [Second District, Division Three: in personal injury action, summary judgment was properly granted to defendant film production company under the worker's compensation exclusivity rule where plaintiff, who was injured while rehearsing for a film stunt, was deemed to be a special employee; defendant hired him through a loan-out company, paid him a fixed weekly wage for seven months, had a right to control the manner and method of his work, and provided the work premises and all equipment necessary].

professional responsibility

Waiting two years to bring a disqualification motion is unreasonable and warrants denial of the motion where significant discovery had occurred and the first phase of trial was completed, such that disqualification would result in extreme prejudice to the client of the targeted counsel.

Liberty National Enterprises, L.P. v. Chicago Title Insurance Company (2011)
194 Cal.App.4th 839.

Plaintiff sued its insurer for wrongful denial of policy benefits. After presenting a defense in the first part of bifurcated proceedings, the insurer moved to disqualify plaintiff's counsel based on confidential information ostensibly learned by plaintiff's counsel from defendant years earlier. The trial counsel denied the motion to disqualify, finding that the two-year delay between initiation of the action and the filing of the motion was unjustified, and disqualification would severely prejudice plaintiff.

The Court of Appeal (Second District, Division Eight) affirmed, noting first that while some jurisdictions hold that disqualification cannot be waived, California is not such a jurisdiction. The delay, however, must be extreme or unreasonable before it can constitute a waiver. Here, the trial court did not abuse its discretion in finding the delay to have been unreasonable, particularly in light of the fact that defendant insurer never cited evidence in the record supporting its position that the delay was unavoidable. Accordingly, the trial court did not abuse its discretion. Interestingly, the Court of Appeal undertook a close examination of the appellate record and, while it ultimately agreed with the trial court's conclusions, the Court of Appeal appears to have evaluated the evidence for and against disqualification independently to ensure that a proper exercise of discretion was performed by the trial court.

torts

An employer that admits vicarious responsibility for employee conduct cannot be held liable on theories such as negligent entrustment, hiring, or retention.

Diaz v. Carcamo (2011)
51 Cal.4th 1148.

Plaintiff, who was injured in a car accident, sued two others who were involved in the accident and the employer of one of those drivers. The employer acknowledged that its employee was operating in the course and scope of his employment as a truck driver. The trial court rejected the employer's argument that this acknowledgment barred plaintiff from pursuing claims against it for negligent entrustment, hiring, and retention. The trial court allowed the plaintiff to introduce evidence of the employee's bad driving and employment history. The jury found the employee negligent and assigned him 20 percent fault. The jury allocated the employer a separate 35 percent fault, and allocated 45 percent to the other driver. The trial court entered judgment holding the employer and the other driver jointly and severally liable for plaintiff's economic damages, and holding the employer liable for 55 percent of plaintiff's noneconomic damages. The Court of Appeal affirmed

The California Supreme Court reversed, holding that where an employer admits vicarious liability for its employee's negligent driving, the employer can be held liable only to the extent of the employee's negligence. The Court explained that "the objective of comparative fault is to achieve an equitable allocation of loss" and that "objective is not served by subjecting the employer to a second share of fault in addition to that assigned to the employee and for which the employer has accepted liability." Accordingly, allowing a jury to assign "to the employer a share of fault greater than that assigned to the employee whose negligent driving was a cause of the accident would be an inequitable apportionment of loss." This is because "[n]o matter how negligent an employer was in entrusting a vehicle to an employee ... it is only if the employee then drove negligently that the employer can be liable for negligent entrustment, hiring, or retention.... If the employee did not drive negligently, and thus is zero percent at fault, then the employer's share of fault is zero percent."

cases pending in the california supreme court

Does the common law rule that a release of one tortfeasor releases all joint tortfeasors apply absent a judicial determination that the release was given in the context of a good faith settlement within the meaning of Code of Civil Procedure section 877.6?

Leung v. Verdugo Hills Hospital (case no. S192768)
formerly published at 168 Cal.App.4th 205.

Plaintiff in this action sought damages for a birth-related brain injury. Prior to trial, plaintiff settled with his pediatrician for $1 million in exchange for a release. The trial court ruled the settlement was not in good faith under Code of Civil Procedure sections 877 and 877.6, because it was grossly disproportionate to the pediatrician's potential liability and the total expected recovery. At trial, the jury found $15.5 million in damages and apportioned fault among the pediatrician, the hospital, and plaintiffs' parents. The trial court entered judgment awarding the full amount of economic damages against the hospital, as such damages are the joint and several responsibility of all joint tortfeasors.

The Court of Appeal (Second District, Division Four) reversed the economic damage award against the hospital, holding that under the common law—which the court found applies to any settlement not governed by the good faith settlement statutes—the plaintiff's release of the pediatrician also released the hospital from liability for all damages except its several liability for 40 percent of the $250,000 non-economic damages award. However, the Court of Appeal "urge[d] the California Supreme Court to grant review, conclusively abandon the release rule, and fashion a new common law rule concerning the effect of a non-good faith settlement on a non-settling tortfeasor's liability."

The California Supreme Court granted review, framing the issue as follows: "Should the common law rule that a release for consideration of one joint tortfeasor operates as a release of the joint and several liability of all joint tortfeasors be abandoned in light of statutory and case law modifications of the joint and several liability rule?"

What is the permissible scope of expert testimony regarding lost profits claimed by an unestablished business?

Sargon Enterprises, Inc. v. University of Southern California (case no. S191550)
___ Cal.4th ___.

When a defendant prevents the operation of an unestablished business, the plaintiff may recover an award of lost anticipated profits only by showing with reasonable certainty their nature and occurrence. Here, plaintiff alleged he invented a superior dental implant, but was unable to market that implant because of defendant's alleged breach of a clinical trial agreement. Plaintiff's damages expert would have testified that the anticipated lost profits depended principally on the implant's innovativeness. Thus, according to plaintiff's expert, if the jury found a high degree of innovation, plaintiff would have achieved a larger market share and larger profit than if the jury found a lower degree of innovation. The lost profits under this theory ranged from $1.18 billion to $220 million. The trial court excluded the expert's opinion as speculative.

In a split decision, the Court of Appeal (Second District, Division One) reversed. The majority held the trial court's ruling was "tantamount to a flat prohibition on lost profits in any case involving a revolutionary breakthrought in an industry," but also acknowledged the "factor of innovation ... is not easily converted into dollars and cents." The dissent concluded that the trial court acted within its discretion in ruling that a comparison of "degrees of innovation" was inherently speculative.

The California Supreme Court granted review, framing the issue as follows: "Did the trial court err in excluding proffered expert opinion testimony regarding lost profits."

Is evidence of misrepresentations regarding the terms of a written contract admissible under the fraud exception to the parol evidence rule?

Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association (case. no. S190581)
formerly published at 191 Cal.App.4th 611

California's parol evidence rule generally prohibits the introduction of extrinsic evidence, including evidence of any prior or contemporaneous oral agreement, to vary, alter, or add to the terms of an integrated written instrument. This rule is subject to an exception "to establish illegality or fraud." (Code Civ. Proc., § 1856, subd. (g).) In 1935, the California Supreme Court limited this exception, holding that parol evidence could not be used to prove an oral promise made without intent to perform where the alleged promise directly contradicts the provisions of the written agreement. (See *Bank of America Assn. v. Pendergrass* (1935) 4 Cal.2d 258, 263.) Since then, however, other courts, including the Court of Appeal here, have held that the fraud exception authorizes admission of parol evidence of certain misrepresentations regarding the content of a written contract used to induce a party to sign the contract.

The Supreme Court granted review, framing the issue before it as follows: " Does the fraud exception to the parol evidence rule permit evidence of a contemporaneous factual misrepresentation as to the terms contained in a written agreement at the time of execution, or is such evidence inadmissible under *Bank of America National Trust & Savings Association v. Pendergrass* (1935) 4 Cal.2d 258, 263, as 'a promise directly at variance with the promise of the writing.'"

What is the scope of social hosts liability for injuries caused by intoxicated guests who pay admission to an event and are provided alcohol?

Ennabe v. Manosa (case no. S189577)
___ Cal.4th ___

In this case, the parents of a child killed by a minor driver who became intoxicated at a private party argued that the host of the party lost the "social host" immunity of Section 1714 because she charged admission and was therefore subject to Business & Professions Code section 25602.1, which imposes liability for "sell[ing an] alcoholic beverage to any obviously intoxicated minor." The Court of Appeal held that the immunity applied because (1) the partygoers served themselves, (2) the party was a social event, and (3) the host was not a commercially licensed liquor vendor.

The California Supreme Court has granted review and framed the issue as follows: "(1) Is a person who hosts a party at a residence, and who furnishes alcoholic beverages and charges an admission fee to uninvited guests, a "social host" within the meaning of Civil Code section 1714, subdivision (c), and hence immune from civil liability for furnishing alcoholic beverages? (2) Under the circumstances here, does such a person fall within an exception stated by Business and Professions Code section 25602.1 to the ordinary immunity from civil liability for furnishing alcoholic beverages provided by Business and Professions Code section 25602, subdivision (b)?"

Can an government employer be vicariously liable for alleged negligence of administrators who hired and supervised an employee charged with sexual assault and battery?

C.A. v. William S. Hart Union High School District
(case no. S188982)
formerly published at 189 Cal.App.4th 1166.

C.A., a minor, had sexual relations with his high school guidance counselor, and then sued the school district for negligence, sexual battery, assault, and sexual harassment. The trial court sustained the school district's demurrer, ruling that the school district could not be vicariously liable for the guidance counselor's misconduct. The Court of Appeal affirmed in a split decision. The majority opinion held " 'there is no statutory basis for declaring a governmental entity liable for negligence in its hiring and supervision practices.' " The dissenting justice concluded, "Although the school district cannot be liable for the intentional misconduct of the guidance counselor, it may be liable through respondeat superior for the negligence of other employees who were responsible for hiring, supervising, training or retaining her." (Emphasis omitted.)

The Supreme Court has granted review, framing the issue as follows: "May a school district be held liable for the negligent hiring, retention or supervision of a school guidance counselor who molests a student, when district employees who hired the counselor knew that the counselor had a history of child molestation?" Although the primary issue concerns the vicarious liability of a public entity, the Supreme Court's opinion regarding the scope of various statutory causes of action for sexual misconduct under Civil Code sections 51.9 and 52.4 could potentially apply broadly to all employers, in both the public and private sector.

When can government liability arise from tactical decisions by law enforcement officers preceding the use of deadly force?

Hayes v. County of San Diego (case no. S193997)
___ Cal.4th ___.

This is an action by the minor daughter of a suspect fatally shot by sheriff's deputies, alleging, inter alia, a state law negligence claim based in part on the deputies' preshooting conduct. Pursuant to California Rules of Court, rule 8.548, the Ninth Circuit requested that the California Supreme Court decide whether, under California negligence law, sheriff's deputies owe a duty of care to a suicidal person when preparing, approaching, and performing a welfare check on him.

Granting the Ninth Circuit's request, the California Supreme Court accepted the case, restating the issue presented as follows: "Whether under California negligence law, liability can arise from tactical conduct and decisions employed by law enforcement preceding the use of deadly force."

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TO BOLDLY GO WHERE NO COURT REPORTER HAS GONE BEFORE:

A NEW PRIME DIRECTIVE GOVERNING THE REPORTING OF ELECTRONIC EVIDENCE AT TRIAL

BY JOHN A. TAYLOR, JR.
HORVITZ & LEVY, LLP

Civil trials have increasingly become multimedia events. Courtrooms are packed with HDTV displays, computers, ELMO projectors, laser pointers, sound equipment, and the like. Like James T. Kirk on the bridge of the *Enterprise*, court reporters are surrounded by this array of technical wizardry, enabling them to be masters of all they survey and to fulfill their duty of transcribing every word the jurors hear, whether those words fall from the lips of live witnesses or from spectral images on a television screen.

As if. Judges are generally protective of their court reporters, and often see the playing of videotaped testimony as a chance to give them a "break" from their duties. And court reporters hate transcribing videotaped testimony, because videotaped witnesses cannot be asked to slow down or repeat anything, and because court reporters know that somewhere there is already a written transcript against which the accuracy of their reporting can later be checked. Consequently, when videotaped deposition testimony is played to the jury, the reporter's transcript usually reflects no more than exactly that, "Videotaped testimony played to the jury." Some court reporters don't even transcribe the snippets of deposition testimony played during the cross-examination of witnesses, so that cross-examinations in trial transcripts are interlaced with frustrating notations that testimony was played but not transcribed.

For years there has been a court rule – rule 2.1040 of the California Rules of Court – intended to ensure that a complete transcript of the trial, *including* electronically recorded evidence heard by the jury, is available in the event the judgment is appealed. Up until July 1 of this year, that rule provided that "[u]nless otherwise ordered by a trial judge, a party offering into evidence an electronic sound or sound-and-video recording must tender to the court and to opposing parties a typewritten transcript of the electronic recording." The transcript was supposed to be marked for identification, filed by the clerk, and included in the clerk's transcript in the event of any appeal. Furthermore, the rule provided that *unless specifically ordered by the trial judge* (not a likely event), a court reporter "need *not* take down or transcribe an electronic recording that is admitted into evidence."

The first part of this rule – that trial lawyers submit transcripts of electronic recordings played to the jury – was honored only in the breach. Most appellate lawyers have never seen an appellate record that includes such transcripts. And most trial lawyers are unaware they are required to submit such transcripts when they play the deposition testimony of an absent witness – much less a transcript for each line of deposition testimony played during an adverse witness's cross-examination.

The former rule was also problematic because it placed no time restriction on when attorneys had to submit the required transcript of electronic testimony to the court clerk. Therefore, the testimony typically would be played, the trial would come to a close, and the transcript would never be prepared or submitted to the clerk. Even if an attorney wanted to comply with the rule, in most instances it would be difficult or impossible to recreate a transcript of the deposition testimony excerpts played during cross-examination, or to provide any meaningful correlation between such excerpts and the reporter's transcript, which wouldn't even yet have been prepared.

For the past few years, the Appellate Advisory Committee of the California Judicial Council has been working to resolve these problems. After several rounds of revisions, an amended version of Rule 2.1040 was finally adopted and went into effect on July 1, 2011. The most significant change in the rule is to distinguish in subdivision (a) between electronic recordings of deposition or other prior testimony, and in subdivision (b) between *other* types of electronic recordings.

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Electronic Evidence – continued from page 23

Under subdivision (a)(1), *before* playing any videotaped deposition testimony to the jury, an attorney must lodge the deposition transcript with the court. Immediately before the testimony is played, the attorney must *state on the record* the page and line numbers where the testimony appears in the deposition transcript. This requirement applies *both* to deposition testimony played in lieu of having a live witness testimony, and to videotaped deposition excerpts played during the cross-examination of a witness. Subdivision (a)(2) then requires, either concurrently or within five days after the recorded testimony is played, that the attorney serve and file a copy of the deposition transcript cover and the relevant pages from the transcript, marked to show the testimony that was presented.

Subdivisions (a)(1) and (a)(2) thus function as "fail-safe" provisions – even if the deposition excerpts never get filed, the reporter's transcript should still reflect counsel's oral recitation of the page and line numbers where the video testimony appears in the deposition transcript, so that on appeal the testimony can be reconstructed and the record can be augmented to include it. And if the written excerpts actually do get filed, so much the better – they can then be included in the clerk's transcript (or an appendix filed by the parties) without the need for record augmentation. Attorney compliance with subdivision (a)(2) will be less burdensome than having to prepare a "typewritten transcript" of exactly what was played, as under the old rule. In fact, an Advisory Committee Comment to the revised rule clarifies that it is now sufficient to mark up the deposition transcript and that a new transcript need not be prepared.

Significantly, the revised rule *eliminates* the discretion trial court judges formerly had to relieve attorneys from submitting transcripts of electronic testimony played to the jury. But if the parties are blessed with a trial judge who requires the court reporter to take down the recorded testimony – the cleanest way of providing a complete transcript of trial proceedings to the appellate court, especially with regard to excerpts played during cross-examination – subdivision (a)(3) relieves the attorney of having to file the marked deposition pages after the testimony is played. An Advisory Committee Comment to the revised rule – which actually prompted objections from the California Court Reporter's Association during the "invitation to comment" period – states that "it may be helpful to have the court reporter take down the content of an electronic recording," for example "when short portions of a sound or sound-and-video recording of deposition or other testimony are played to impeach statements made by a witness on the stand." Because the deposition transcript will have been lodged with the court before the testimony is played, it will be available to the court reporter for use later in verifying the accuracy of her transcription.

Subdivision (b) of the revised rule governs "other" electronic recordings – basically any recording played to the jury (a recorded telephone conversation, a video with a soundtrack, etc.) – that is not a recording of prior *testimony*. A transcript of the recording must be provided to the court, and both a transcript and a copy of the recording must be provided to the opposing parties, before the recording can be played to the jury. The latter requirement gives opposing counsel the opportunity to verify the transcript is accurate before it is played, since such transcripts are often given to the court or the jury to follow along, especially when the recording is difficult to understand. To avoid undue burden, the transcript may be prepared by the party offering the recording, and need not be certified. For good cause, the trial judge may permit the transcript to be filed at the close of evidence, or within five days after the recording is presented, whichever is later.

In contrast to the playing of recorded prior testimony, subdivision (b) provides several escape valves from its requirements for other types of recordings. No transcript is required (1) in uncontested proceedings or the opposing party does not appear (e.g.,

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protective order proceedings which typically are not attended by the responding party), unless the trial judge orders otherwise; (2) where the parties stipulate that the sound portion of a sound-and-video recording does not contain any words that are relevant to the issues in the case; or (3) where for good cause, the trial judge orders that a transcript is not required. An Advisory Committee Comment to the "good cause" exception explains that it may apply in situations where the party offering the electronic recording "lacks the capacity to prepare a transcript" (e.g., a self-represented litigant) or the recording is of such poor quality that "preparing a useful transcript is not feasible."

The big question remaining after these revisions to rule 2.1040 is whether there will be any better compliance with the revised rule than there was with the old one. It would certainly help if the Center for Judicial Education and Research – which administers the "Judicial College of California" and provides orientation programs for new judges and continuing education for the judiciary – would provide state-wide training regarding the revised rule and its new requirements. But trial lawyers who hope to preserve their clients' rights on appeal should not assume that trial judges are aware of the revised rule's requirements. They should call attention to the rule before trial, and insist on the record that all parties comply with it when offering electronic evidence – especially recorded deposition testimony – into evidence.

To relieve much of the rule's burden, attorneys should specifically request that the court reporter take down recorded testimony that is played for impeachment purposes during cross-examination, which will eliminate the need to keep track of what excerpts have been played and which deposition transcript pages need to be filed with the clerk. And it should almost go without saying that an attorney should think carefully before stipulating that the requirements of rule 2.1040 may be waived. The testimony crucial to the enterprise of preserving a win on appeal or successfully challenging a loss may otherwise never make it into the trial court record.

John A. Taylor Jr. *is a certified appellate specialist and a partner with the law firm of Horvitz & Levy LLP in Encino. Since 2007 he has served on the Judicial Council Appellate Advisory Committee of California, which drafts revisions to the California Rules of Court governing appellate procedure.*

Rule 2.1040
Electronic Recordings Presented or Offered into Evidence

(a) Electronic recordings of deposition or other prior testimony

(1) Before a party may present or offer into evidence an electronic sound or sound-and-video recording of deposition or other prior testimony, the party must lodge a transcript of the deposition or prior testimony with the court. At the time the recording is played, the party must identify on the record the page and line numbers where the testimony presented or offered appears in the transcript.

(2) Except as provided in (3), at the time the presentation of evidence closes or within five days after the recording in (1) is presented or offered into evidence, whichever is later, the party presenting or offering the recording into evidence must serve and file a copy of the transcript cover showing the witness name and a copy of the pages of the transcript where the testimony presented or offered appears. The transcript pages must be marked to identify the testimony that was presented or offered into evidence.

(3) If the court reporter takes down the content of all portions of the recording in (1) that were presented or offered into evidence, the party offering or presenting the recording is not required to provide a transcript of that recording under (2).

(b) Other electronic recordings

(1) Except as provided in (2) and (3), before a party may present or offer into evidence any electronic sound or sound-and-video recording not covered under (a), the party must provide to the court and to opposing parties a transcript of the electronic recording and provide opposing parties with a duplicate of the electronic recording, as defined in Evidence Code section 260. The transcript may be prepared by the party presenting or offering the recording into evidence; a certified transcript is not required.

(2) For good cause, the trial judge may permit the party to provide the transcript or the duplicate recording at the time the presentation of evidence closes or within five days after the recording is presented or offered into evidence, whichever is later.

(3) No transcript is required to be provided under (1):

(A) In proceedings that are uncontested or in which the responding party does not appear, unless otherwise ordered by the trial judge;

(B) If the parties stipulate in writing or on the record that the sound portion of a sound-and-video recording does not contain any words that are relevant to the issues in the case; or

(C) If, for good cause, the trial judge orders that a transcript is not required.

(c) Clerk's duties

An electronic recording provided to the court under this rule must be marked for identification. A transcript provided under (a)(2) or (b)(1) must be filed by the clerk.

(d) Reporting by court reporter

Unless otherwise ordered by the trial judge, the court reporter need not take down the content of an electronic recording that is presented or offered into evidence.

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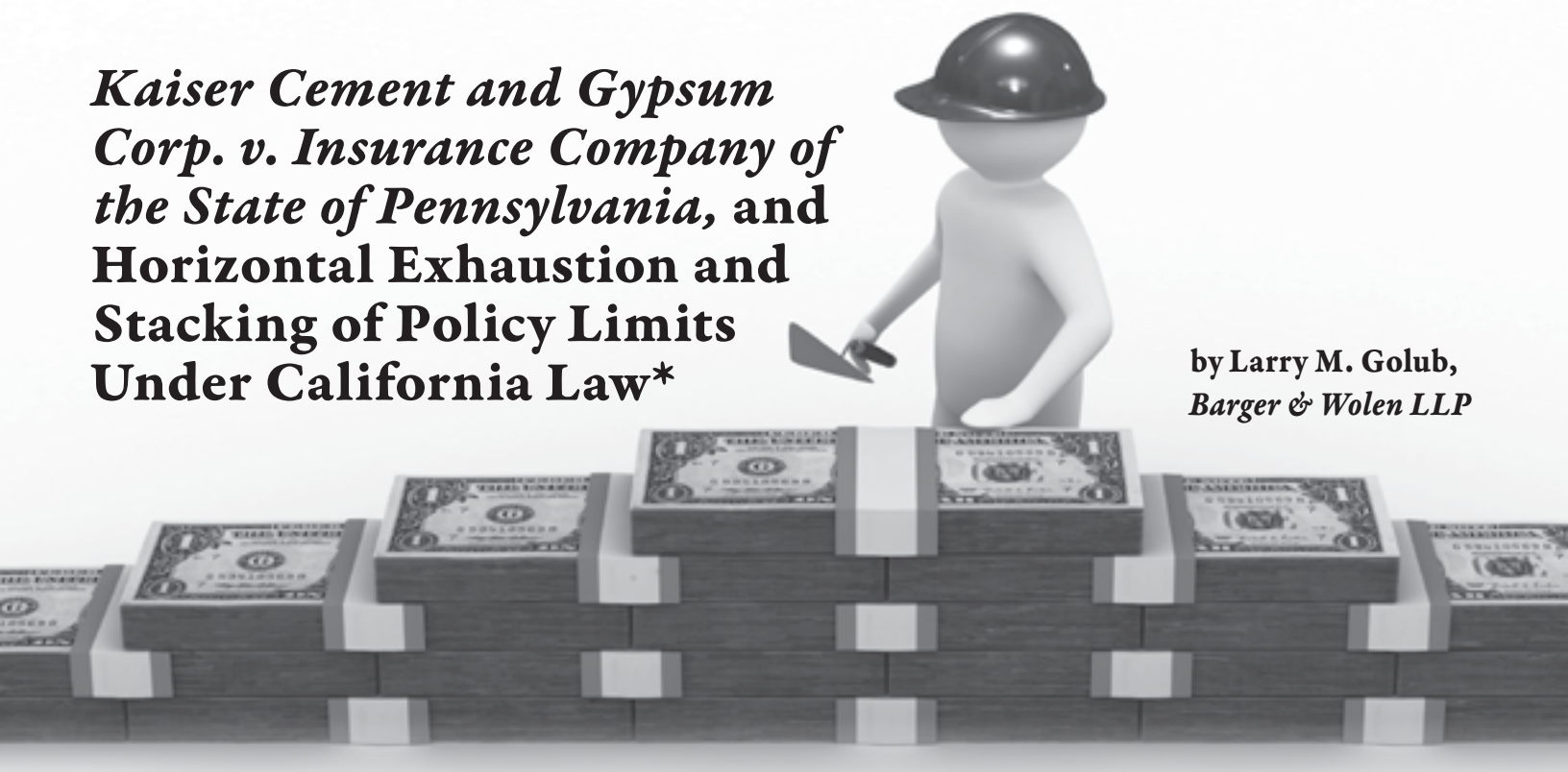
Kaiser Cement and Gypsum Corp. v. Insurance Company of the State of Pennsylvania, and Horizontal Exhaustion and Stacking of Policy Limits Under California Law*

by Larry M. Golub,
Barger & Wolen LLP



*Just as this issue was going to print, the California Supreme Court granted review in the *Kaiser Cement* case (case no. S194724) on August 24, rendering the intermediate appellate court's decision uncitable in California courts.

There is an issue in insurance coverage law that arises every so often in reported cases, though in practice arises much more frequently – how to apportion liability among policies providing liability coverage at the same level for continuing injury cases and when is excess coverage that lies above such policies triggered? This issue presents itself in cases that include continuous property damage such as land subsidence or construction defect claims as well as continuous bodily injury claims such as exposure to asbestos or other harmful substances. The California Supreme Court has not yet weighed in on the issue, which has been pending before the court for over two years in *State of California v. Continental Ins. Co.* (case no. S170560, formerly published at 170 Cal.App.4th 160). While awaiting the ruling in that case, California litigants may glean some guidance from a series of prior cases, culminating in a recent appellate decision – *Kaiser Cement and Gypsum Corp. v. Insurance Company of the State of Pennsylvania*.

In 1995, the Supreme Court issued *Montrose Chemical Corp. v. Admiral Ins. Co*. (1995) 10 Cal.4th 645, 654-55, 689, which adopted a "continuous injury trigger of coverage" approach for continuing injury claims, meaning that bodily injury and property damage that occur in multiple insurance policy periods are potentially covered by all such policies in effect during those periods. The Court, however, provided no direction as to how to apportion liability among insurers in these continuing injury cases, let alone did it address how any apportionment might impact excess insurers providing coverage above underlying primary policies. That task has been left to the lower courts.

One of the first cases to consider the issue was *Community Redevelopment Agency v. Aetna Casualty & Surety Co*. (1996) 50 Cal.App.4th 329, a construction defect case involving continuous subsidence and damage to residential housing developments in which the insured developer had primary insurance in effect from 1982 to 1986 and excess insurance for 1985 through 1986. Based on the language in the excess policy that provided that the excess insurer would only be liable for the "ultimate net loss" in excess of the policy's "underlying limit" plus "the applicable limits of any other underlying insurance collectible by the Insured," the excess insurer contended that its coverage was not triggered until all the primary policies for all years were exhausted. Relying on the language of the excess policy, the Court of Appeal agreed. (*Community Redevelopment, supra*, 50 Cal.App.4th 337-42.) It explained that the excess insurer's policy "could hardly be more clear." The court contrasted this principle of "horizontal exhaustion – that "*all* primary insurance must be exhausted before a secondary insurer will have exposure" – with that of "vertical exhaustion" – "where coverage attaches under an excess policy when the limits of a specifically scheduled underlying policy are exhausted" – and observed that, after *Montrose*, this interplay "will become an increasingly common one to be resolved." (Emphasis in original.)

That same year, another Court of Appeal decision, also involving a continuing loss property damage situation, adopted the "horizontal allocation of the risk" approach in that it "seems far more consistent with *Montrose's continuous* trigger approach. That is, if 'occurrences' are continuously occurring throughout a period of time, all of the primary policies in force during that period of time cover these occurrences, and all of them are primary to each of the excess policies; and if the limits of liability of each of these primary policies is adequate in the aggregate to cover the liability of the insured, there is no 'excess' loss for the excess policies to cover." (*Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1852-53 (emphasis in original).)

Shortly thereafter, the Court of Appeal decided *FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132, 1190, which held that if coverage for an occurrence is triggered in more than one policy period, the insured may select the policy period in which the policy limits are to be fixed. This case raised the issue as to whether underlying policies (in

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Stacking of Policy Limits – continued from page 27

this instance, first layer excess policies) could be "stacked," which means "that when more than one policy is triggered by an occurrence, each policy can be called upon to respond to the claim up to the full limits of the policy. Under the concept of stacking ... the limits of every policy triggered by an 'occurrence' are added together to determine the amount of coverage available for the particular claim." (*FMC Corp.*, 61 Cal.App.4th 1188 (citation omitted).) The answer in *FMC Corp.* was no stacking, since otherwise it would "afford[] the insured substantially more coverage, for liability attributable to any particular single occurrence, than the insured bargained or paid for." (*FMC Corp.*, 61 Cal.App.4th 1189; *but see Employers Ins. of Wausau v. Granite State Ins. Co.* (9th Cir. 2003) 330 F.3d 1214, 1221 (noting that some California courts had refused to "stack" primary policy limits, but observing that courts "have not broadly rejected 'stacking' in the primary insurer context," and thus Ninth Circuit distinguished *FMC* and permitted stacking since the primary policies contained "per occurrence per year" policy limits)).

On June 3, 2011, the Court of Appeal for the Second Appellate District issued *Kaiser Cement and Gypsum Corp. v. Insurance Company of the State of Pennsylvania*, 196 Cal.App.4th 140, addressing both the issue of horizontal exhaustion and stacking of policy limits, seeking to reconcile the above-discussed decisions. This dispute involved coverage obligations for asbestos bodily injury claims brought against Kaiser. In a previous decision, the appellate court held that asbestos bodily injury claims should be treated as multiple occurrences under the primary policies issued to Kaiser by Truck Insurance Exchange, rather than one single occurrence for multiple claimants. (*See London Market Insurers v. Superior Court* (2007) 146 Cal.App.4th 648, 652.) The primary policies all had non-aggregating per-occurrence limits, meaning the policies potentially could be on the hook for the total per-occurrence limit for each occurrence.

The present appeal addressed whether, when an asbestos bodily injury claim exceeded the coverage issued by the primary insurer (in this case, Truck) in a particular year, the excess coverage (as issued by Insurance Company of the State of Pennsylvania ("ICSOP")) was triggered to provide indemnification to the insured (Kaiser). Because asbestos bodily injury claims can continue to cause injury over time, even with a single claimant, a claim could trigger coverage in multiple policy years. The excess insurer argued that the insured had to exhaust all underlying primary policies for all years in which coverage was triggered. Both Kaiser and Truck argued that the ICSOP excess policy was triggered upon exhaustion of the single $500,000 per occurrence limit.

The Court of Appeal issued three discrete holdings. First, based on the language of the excess insurer's policy, it held that the excess insurer was entitled to horizontally exhaust all underlying primary insurance that was collectible and valid, and not just those policies directly underneath its excess policy. It advised that this ruling was consistent with prior California law addressing the issue of horizontal exhaustion. *(Kaiser Cement*, 196 Cal.App.4th 154-57, 160.) It also explained that its holding was consistent with the decisions in *Community Redevelopment* and *Stonewall*. (*Kaiser Cement*, 196 Cal.App.4th 157-160.) The second holding, however, concluded that the excess insurer was not able to "stack" the individual limits of the primary policies. The court did not base this holding on judicially imposed anti-stacking principles, but rather concluded that under the particular language of the primary Truck policies, Truck could only be liable as a company for one per-occurrence limit for each occurrence. Specifically, the court cited the language in the insuring agreement stating that "the Company's liability as respects any occurrence ... shall not exceed the per occurrence limit designated in the Declarations." It found this language "facially inconsistent with permitting Kaiser to recover more than the occurrence limit for a single occurrence." (*Kaiser Cement*, 196 Cal.App.4th 162.) Here, too, the court sought to reconcile prior decisions, explaining how its conclusion of no stacking was consistent with *FMC Corp* and consistent with, but distinguishable from, *Employers Ins. of Wausau*. (*Kaiser Cement*, 196 Cal.App.4th 162-64.) It also observed how this second holding was consistent with the principle of horizontal exhaustion in *Community Redevelopment*:

"*Community Redevelopment* held – and we agree – that in the case of a continuing loss, excess insurance is in excess of all collectible primary insurance, not merely the scheduled

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Stacking of Policy Limits – continued from page 28

primary policy or policies. That holding does not imply, however, that policy limits of primary policies may be (or must be) 'stacked,' such that an insured recovers multiple policy limits for a single occurrence."

Stacking was an issue that *Community Redevelopment* "did not reach." (*Kaiser Cement*, 196 Cal.App.4th 164-65.) Thus, the court in *Kaiser Cement* permitted horizontal exhaustion in principle but held that there was no valid and collectible insurance to horizontally exhaust in this case since Kaiser was only entitled to one per-occurrence limit for Truck as a whole for claims that exceeded the $500,000 per occurrence limit in the implicated Truck policy.

The third and final holding by the court was that the summary judgment issued in favor of Kaiser had to be reversed because, on the record presented, the appellate court could not determine if there was primary coverage issued to Kaiser by other insurers (outside of Truck) whose primary policies still needed to be exhausted under the court's horizontal exhaustion ruling. Contrary to Kaiser's contention, the court explained that its "conclusion that Truck's primary policy limits cannot be 'stacked' is based on the language of the Truck's 1974 primary policy, not on a generalized 'anti-stacking' rule." (*Kaiser Cement*, 196 Cal.App.4th 165-67.)

The last word on the dispute presented by *Kaiser Cement*, and the issues as to horizontal exhaustion and stacking, may soon be addressed by the Supreme Court. Both Kaiser and the excess insurer ICSOP filed petitions for review in mid-July. Moreover, in the pending Supreme Court case *State of California v. Continental Ins. Co.*, mentioned at the top of this article, the Court has framed the related issues before it as follows: "(1) When continuous property damage occurs during the periods of several successive liability policies, is each insurer liable for all damage both during and outside its period up to the amount of the insurer's policy limits? (2) If so, is the "stacking" of limits – i.e., obtaining the limits of successive policies – permitted?" Thus, we may shortly see whether the Supreme Court will close the loop on issues left unresolved by its *Montrose* decision. For the present, *Kaiser Cement* confirms that horizontal exhaustion of all primary insurance is still the general rule in the continuous occurrence context and that the anti-stacking rule should have a limited scope, applying only where there is a single insurer providing coverage under all triggered primary policies. And, above all, whether these rules apply requires a careful review of the specific policy language found in each primary and excess policy.

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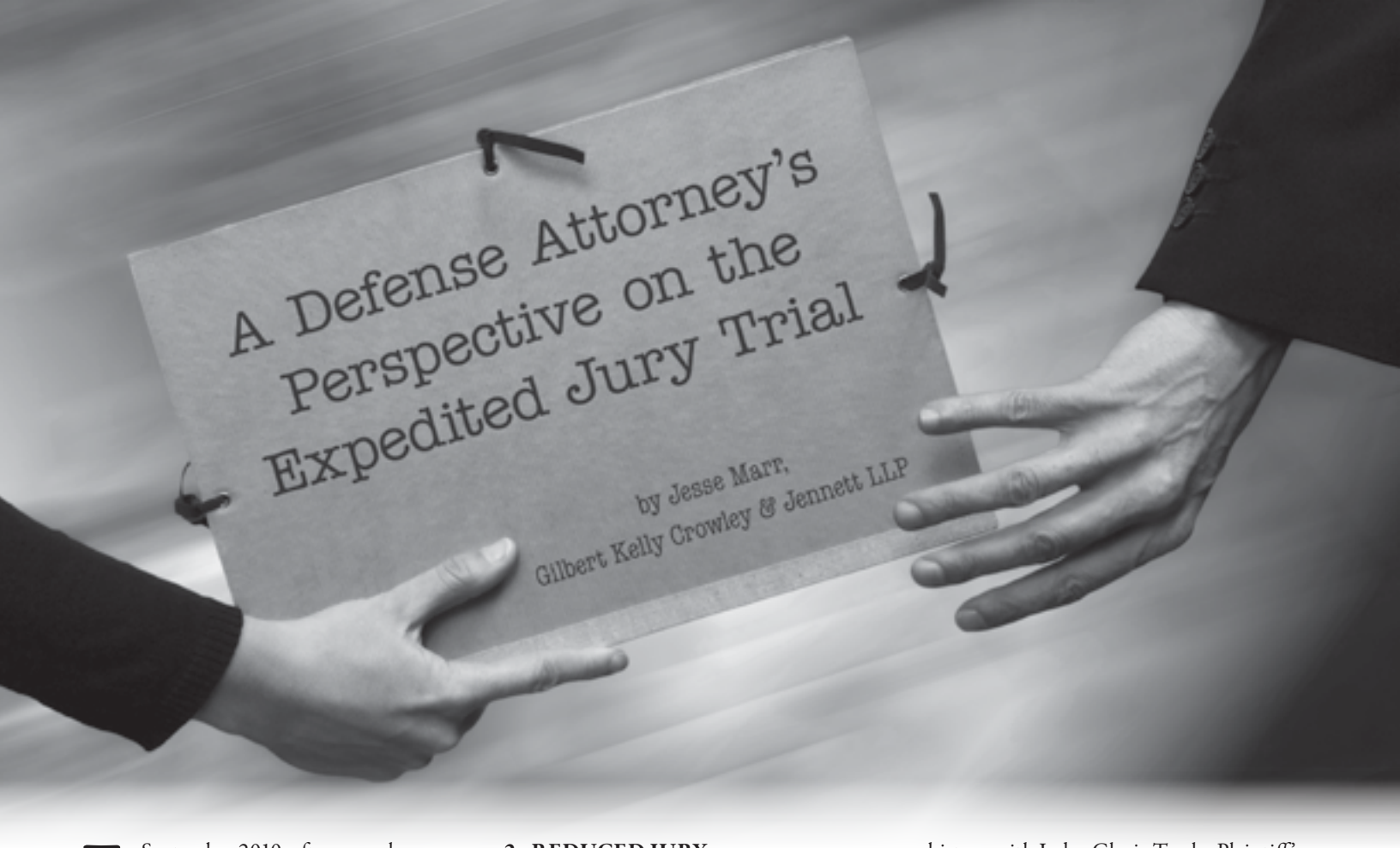

In September 2010, after several years of planning, drafting, and lobbying by the Judicial Council, the plaintiff's bar, and defense organizations such as the ASCDC, the legislature passed AB 2284, the Expedited Jury Trials Act. The intent of the law was to provide the option of a streamlined civil jury trial that is more efficient and affordable for the court system, the litigants, and their counsel.

Having participated in one of the first expedited jury trials (EJT) in Southern California, I would highly recommend this option if there is a low number of issues to be litigated and/or if the parties have pressing financial or time constraints. It is also a great opportunity for the newer attorneys in your firm to gain trial experience without the risk of an embarrassing verdict.

The key features of the EJT as follows:

1. ONE DAY JURY TRIAL

The expedited jury trial is just that – a jury trial that lasts one day. The litigants notify the court ahead of time so that trial will commence on a date certain. At trial, each party has a limited voir dire session and a maximum of 3 peremptory challenges. Then, each party has 3 hours to present its case.

2. REDUCED JURY

Voir Dire is limited in part because the jury in the in the expedited trial has only 8 members. The prevailing party must carry at least 6 of the 8 jurors.

3. HIGH-LOW

Before the trial, the parties will propose a consent order that may include, among other things, an agreement for a minimum recovery by the plaintiff and a maximum payout by the defendant. The high-low arrangement is not expressed to the jury.

4. NO APPEALS

In the EJT, for the most part, the case is concluded when the jury reads the verdict. The only post-trial motions that are available to the litigants is for costs and/or statutory attorney's fees.

5. RELAXED RULES OF EVIDENCE

In the consent order, the parties may stipulate to submit documentary evidence such as medical reports in lieu of live testimony.

MY EXPERIENCE

I was fortunate to participate in the first expedited jury trial in Riverside County history with Judge Gloria Trask. Plaintiff's counsel Eric Traut and I had litigated this matter for 2 1/2 years. The court had set several trial dates but because of our busy trial calendars – and our trial time estimate of 3-5 days – we were forced to request several continuances.

In late December, about a week before our scheduled trial date, Mr. Traut and I were having our pre-trial issues conference when we both noted that Orange County Presiding Judge Steven Perk had recently started encouraging litigants to consider the EJT, and had even handed out a proposed consent order.

Within a few minutes of conversation, we decided to take the plunge. There were several factors that made the expedited jury trial right for our case. For the plaintiff, his medical bills were fairly low but it would cost up to $5,000 to bring his expert to testify. To take care of that issue, we stipulated that he could simply submit his medical reports. Also, this was a case of a questionable mechanism for injury so that there was a chance that the plaintiff would get little to nothing from the jury. Toward that end, we stipulated to a floor of $2,000.

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Expedited Jury Trial – continued from page 31

The expedited trial was also beneficial to my client. Only 21 years old, my client worked 2 jobs and it was difficult for him to commit to more than one day of trial. Also, he had a small insurance policy. While I did not anticipate a high verdict, our stipulated cap of the policy limit guaranteed that my client was protected and there would be no issues with the carrier down the line.

We did not notify Judge Trask of our intent to use the expedited format until we answered ready for trial. However, when we provided her our proposed consent that carefully laid out how the trial would proceed, Judge Trask gave her full support.

Because of the court's busy calendar and the short notice, the trial did not commence until 9:30 a.m. The attorneys stuck to the rules on the limited voir dire and each side presented his case in the allotted 3 hours. We limited our closing arguments to 20 minutes per side. The case actually briefly carried into the next morning, but we had a verdict by 11 a.m. I believe that if we had given Judge Trask more notice, we would have completed trial and received a verdict in one day.

In the end, while the jury awarded the plaintiff a small very amount, because of the stipulated floor, he still received $2,000 and was not forced to spend money on an expert who may not have helped him. My client, though he was a bit groggy from working the previous night shift, was present for the entire trial and did not miss any work. And because of the stipulated maximum, the carrier had no concerns about an excess verdict.

For the attorneys, rather than spending a week away from our practice, we only missed about a day and a half.

For the court, I believe the trial was a great success, too. This case had been languishing for 2 1/2 years and we were able to resolve it quickly. Judge Trask and her staff were pleased that the case was closed.

And while I am sure the jurors were not thrilled that they had to take time from their busy lives for our trial, many expressed relief to me that their service was limited to just one day.

LOOKING AHEAD

Before trying a case in the expedited format, I would offer a few tips for the defense attorney:

1. GET YOUR CLIENTS ON BOARD.

This is a new concept and you might meet some resistance, particularly if the client does not want to guaranty a minimum recovery for the plaintiff. It is a good idea to educate your clients about the expedited jury trial now, rather than just springing it on them at the last minute. I have found that once they are learn about the benefits of this option, our institutional clients have been very supportive of it.

2. DRAFT A CLEAR, CONCISE CONSENT ORDER.

The form proposed by Judge Perk in Orange County is an excellent starting point. If there are any other issues that need to be addressed, such as documentary evidence submitted in lieu of procedure, make sure they are plainly addressed in the consent order.

3. DISCUSS THE APPLICATION OF CCP SECTION 998 WITH THE JUDGE AND OPPOSING COUNSEL BEFORE TRIAL.

While the EJT statute does provide for post-trial motions for costs, the opposing counsel may argue that the stipulated limits preclude any recovery of costs under CCP Section 998. It is best to resolve this issue before trial.

Jesse D. Marr is with the firm of Gilbert Kelly Crowley & Jennett LLP. Mr. Marr specializes in trial practice involving catastrophic personal injury claims, automotive liability, employment, products liability, construction defects, construction contracts, and professional liability. He frequently lectures on civil trial practice and defending fraudulent insurance claims. Mr. Marr can be reached at jdmarr@gilbertkelly.com.

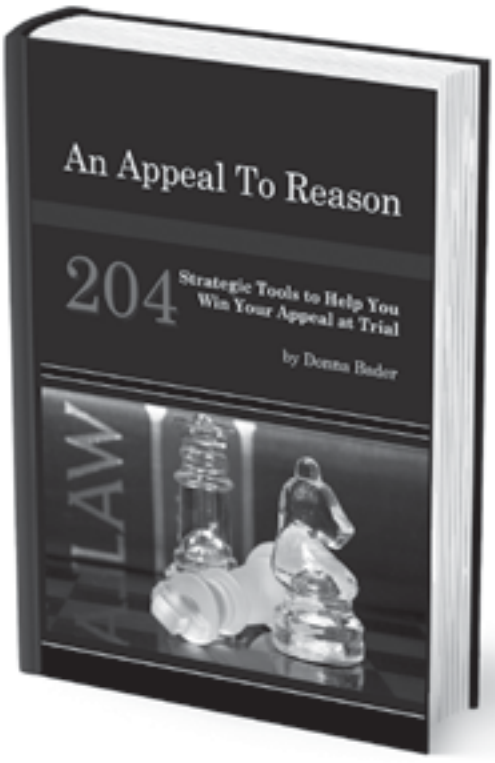
By Eric Kunkel

Bader, Donna. *An Appeal to Reason: 204 Strategic Tools to Help You Win Your Appeal at Trial.* Laguna Beach, California: Bench Press Publishing, Inc.

Far too often, trial counsel have a rather hazy grasp of the judicial horizon. They are well-versed in how to marshal the facts and tell a compelling story, but they have not taken the time to acquaint themselves with the rules and procedures which could ultimately vindicate their hard work or undo it – those pertaining to appeals. In her new book, *An Appeal to Reason: 204 Strategic Tools to Help You Win Your Appeal at Trial,* appellate specialist Donna Bader helps trial counsel remedy that shortcoming, explaining the essentials of the appellate process and the most common mistakes she has seen them make over the course of her career.

In undertaking that task, Ms. Bader employs a particularly effective device – grouping points relating to a given topic, such as those regarding the respective roles of trial and appellate counsel, and offering a clear explanation of them in no more than a page or two. In doing so, she accomplishes her goal of educating her readers and imparting to them practical information they can put to use immediately. By providing a discussion of each point which is neither so general the reader struggles to see its immediate relevance nor so involved it impedes his or her ability to grasp it, the author leaves the reader with a helpful, working knowledge of the appellate process and a better understanding of what he or she must do before it ever begins.

Especially useful is the discussion of the presumptions governing the appellate process, and the need to demonstrate prejudicial error. The latter point is so often missed, but essential to grasp. As she makes clear, the error complained of must have made a difference in the outcome. Also, although the importance of "protecting the record" is well known, the author provides helpful illustrations of when counsel must act, and what is likely to happen if he or she does not. Lastly, the discussion of motions for summary judgment and that relating to the statement of decision in bench trials will stand both the novice and seasoned trial counsel in good stead. The primer provided by the author in the latter regard should not only help counsel insure the trial court does its work, it may help him or her secure a reversal on appeal if it does not.



Congratulations 2011 ASCDC Hall of Fame Honorees

The ASCDC Hall of Fame Awards Dinner was held on June 9, 2011 at the Millennium Biltmore Hotel. Members of ASCDC, the plaintiff's bar, the judiciary and the media joined together to honor this year's outstanding recipients from the Southern California legal community.

The awards presentation included a short, entertaining and meaningful video, produced by Executive Presentations.

Congratulations To This Year's Honorees:

James R. Robie, Hall of Fame Award (in loving memory)
Accepted by Edith Matthai

The Honorable Margaret Morrow, Judge of the Year

Lawrence P. Grassini, Civil Advocate Award

Past Hall of Fame Inductees Include:

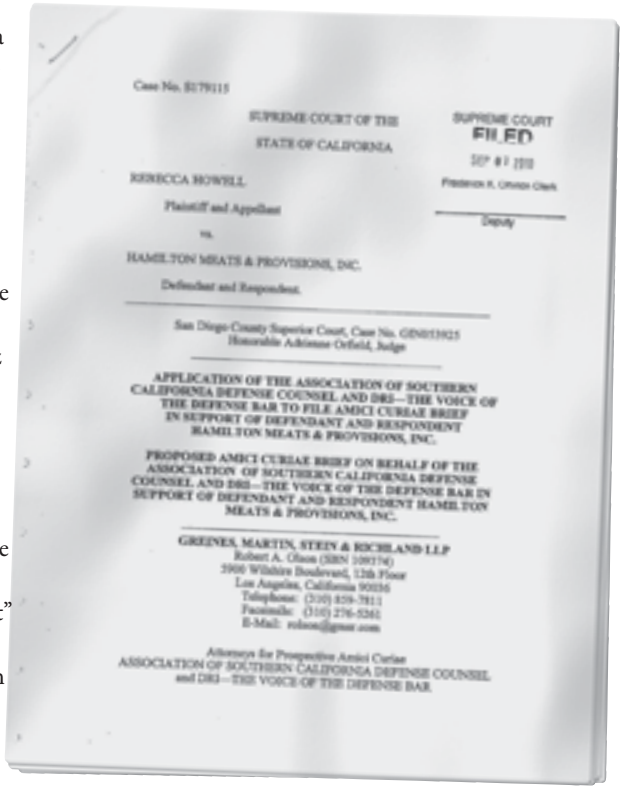
Judge of the Year	Hall of Fame Award	Civil Advocate Award
2009 – Hon. Lee Smalley Edmon	2009 – David O'Keefe	2009 – Bruce A. Broillet
2008 – Hon. Victoria G. Chaney	2008 – Walter M. Yoka	2008 – Michael J. Bidart

The ASCDC Hall of Fame Awards event is held every other year in the odd years – we look forward to honoring individuals in 2013.

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 has helped secure two major victories before the California Court of Appeal. In *Fireman's Fund v. Superior Court* (B229880, June 28, 2011) __ Cal.App.4th __, the Amicus Committee joined an amicus brief submitted by the Los Angeles and Beverly Hills bar associations, drafted by Robin Meadow, Robert Olson and Jeff Raskin of the Greines, Martin, Stein & Richland firm, seeking to vacate the trial court's discovery ruling permitting plaintiffs' counsel to take the depositions of defense counsel. The Court of Appeal agreed with ASCDC's position and issued a published decision holding (a) the attorney-client privilege applies to communications between lawyers in the same law firm and (b) work product protection applies to attorney's thoughts, not just their writings. Similarly in *State Farm Gen. Ins. Co. v. Frake* (B223865, June 22, 2011), *request for publication pending*, the Amicus Committee submitted a brief on the merits drafted by Lisa Perrochet and Mitch Tilner of Horvitz & Levy. In *Frake*, the trial court had held that the insured's conduct – the striking of a friend in the groin, which was part of a decades-long practice among friends – constituted an "accident," such that State Farm owed a duty to defend its insured. The Court of Appeal agreed with ASCDC that this conduct did not constitute an "accident" and ruled that there was no duty to defend. The Court of Appeal's unpublished decision reverses a $670,000 judgment in favor of the insured. The Amicus Committee also submitted a request for publication, which remains pending.


Case No. S179115

SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT FILED

REBECCA HOWELL,

Plaintiff and Appellant,

vs.

HAMILTON MEATS & PROVISIONS, INC.,

Defendant and Respondent.

San Diego County Superior Court, Case No. GIN053925
Honorable Adrienne Orfield, Judge

APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND DRI—THE VOICE OF THE DEFENSE BAR TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT HAMILTON MEATS & PROVISIONS, INC.

PROPOSED AMICI CURIAE BRIEF ON BEHALF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF DEFENDANT AND RESPONDENT HAMILTON MEATS & PROVISIONS, INC.

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson (SBN 109374)
5900 Wilshire Boulevard, 12th Floor
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Attorneys for Prospective Amici Curiae
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL and DRI—THE VOICE OF THE DEFENSE BAR

Cases at the California Supreme Court

ASCDC's Amicus Committee has submitted *amicus curiae* briefs in the following cases 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. Robert Olson of Greines, Martin, Stein & Richland drafted the amicus brief and presented oral argument to the California Supreme Court on behalf of

continued on page 36

Amicus Committee Report – continued from page 35

ASCDC on May 24, 2011. A decision is due shortly.

2. *Coito v. Superior Court,* No. S181712. ASCDC submitted an *amicus curiae* brief, drafted by Paul Salvaty of the Glaser Weil firm, 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 also urged the Supreme Court to grant review in this case.

3. *Aryeh v. Cannon Business Solutions*, No. S184929 This case addresses the following issues: (1) May the continuing violation doctrine, under which a defendant may be held liable for actions that take place outside the limitations period if those actions are sufficiently linked to unlawful conduct within the limitations period, be asserted in an action under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.)? (2) May the continuous accrual doctrine, under which each violation of a periodic obligation or duty is deemed to give rise to a separate cause of action that accrues at the time of the individual wrong, be asserted in such an action? (3) May the delayed discovery rule, under which a cause of action does not accrue until a reasonable person in the plaintiff's position has actual or constructive knowledge of facts giving rise to a claim, be asserted in such an action? The Amicus Committee has submitted an amicus brief on the merits drafted by Renee Konigsberg of Bowman & Brooke.

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.

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

J. Alan Warfield
McKenna Long & Aldridge
213-243-6105

You may also contact members of the Amicus Liaison Subcommittee who are:

Fred M. Plevin, *Paul, Plevin, Sullivan & Connaughton LLP*

Jeremy Rosen, *Horvitz & Levy*

Josh Traver, *Cole Pedroza*

Renee Koninsberg, *Bowman & Brooke*

Sheila Wirkus, *Greines, Martin, Stein & Richland*

Christian Nagy, *Collins Collins Muir & Stewart*

Michael Colton, *Hager & Dowling*

and **Paul Salvaty,** *Glaser Weil*

defense verdicts april – july

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Beatty & Myers, LLP

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Hosp, Gilbert, Bergsten & Hough

Raymond Blessey (2)
Taylor Blessey LLP

Kurt Boyd
Law Offices of Kurt Boyd

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ASCDC
Association of Southern California Defense Counsel

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December 13, 2011
Judicial and New Member Reception
Jonathan Club, Los Angeles