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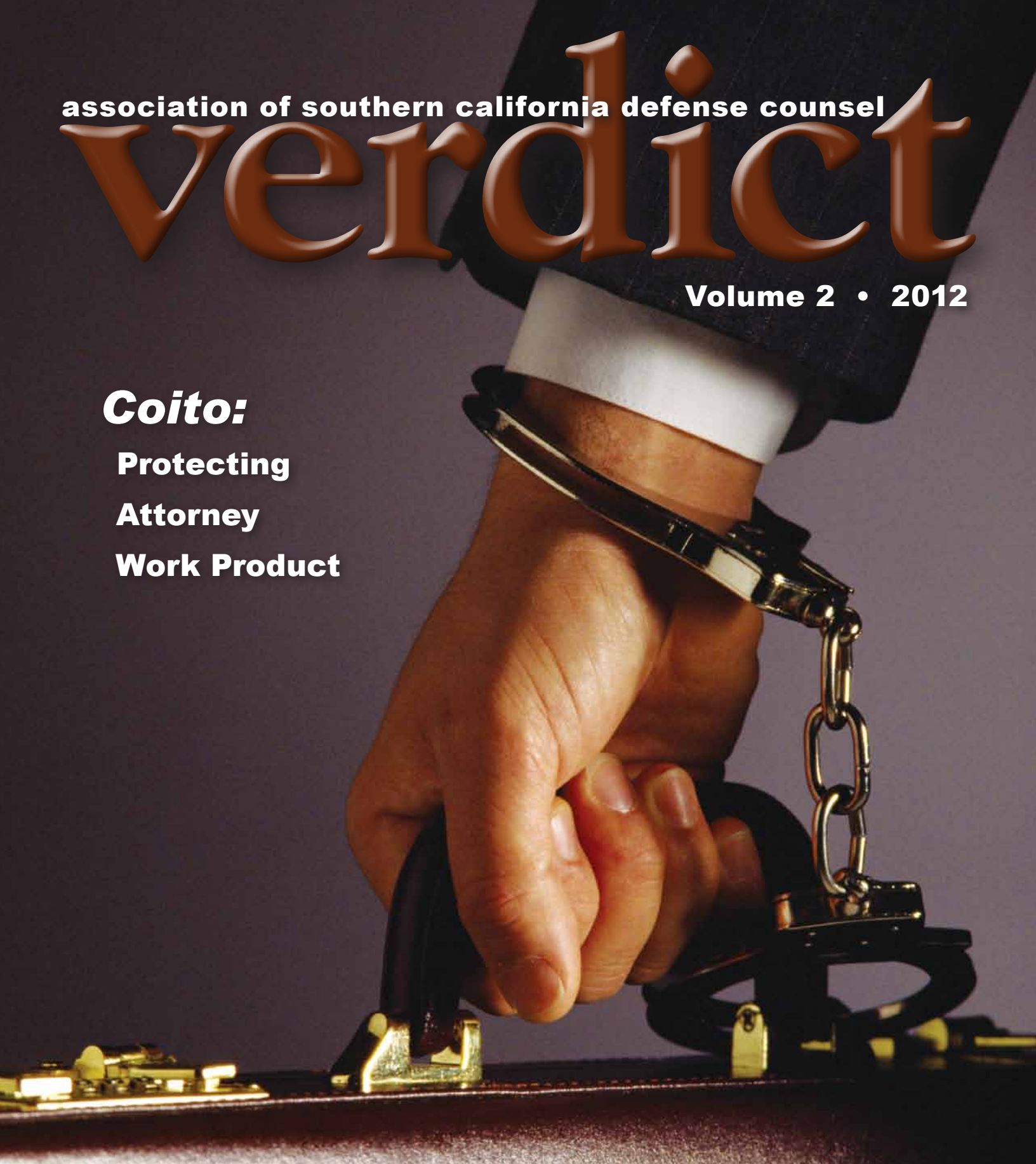

Coito:

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president's message

"Play Ball"

Some of you may recall that I am a baseball fan (not a fanatic, life's too short). One of my goals is to visit all of our Major League ballparks. I recently had a chance to go to Chicago, so I grabbed an old law school buddy who practices in Illinois, and we headed out to US Cellular Field to see the White Sox take on the Toronto Blue Jays. The Sox won, and it was a treat to see their home field. It was also great to reconnect with an old friend.

During all the reminiscing, we wondered where some of our other law school classmates were. With a few taps on my smart phone, we found them through their state bar websites, and called them up. The next thing I knew, I was receiving a photo of us in law school when we had big hair, no wrinkles and fewer pounds. Another reunion is in the works. All this just goes to show that you can never underestimate the power of connecting – on so many levels.

ASCDC is continuing its theme to "Connect" this year as well. Since our last issue, Los Angeles County announced it would shutter some courtrooms and suspend the availability of court reporters for most civil trials. The far-reaching effect of such changes and how to work through them resulted in a well-attended ASCDC Seminar with Judge Buckley from the LASC. We were able to get the word out on how to navigate the change and preserve your trial record for appeal. Our thanks to the Hon. Daniel Buckley, Steve Pasarow, Jeff Koller, Bob Olson and our sponsors Aiken & Welch, Sullivan Court Reporters and Hutchings Court Reporters for their contributions. A podcast of the seminar is available for download via the ASCDC website.

In response to the recent revision of Code of Civil Procedure section 631, which dictates a new procedure for posting non-refundable jury fees, ASCDC gathered information and recently sent its members notice of the change by e-mail. Of course, that is not the only change that the current economic mess has wrought to our courts. For more on that, please see the piece on the Budget Crisis in this issue, contributed by Colin Cronin of Bowman and Brooke.

In the midst of weathering the impact of court budget reductions, we have kept our collective eye on substantive legal developments affecting our practice. In this issue you will see a discussion of *Coito v. Superior Court of Stanislaus County,* which came out just weeks ago. Thanks to Graves and King for the article. We also gathered on July 19 in Orange County to talk about proposed legislative changes to the *Howell v. Hamilton Meats* case, what's going on in the Orange County Superior Courts with the Hon. Thomas Borris, and then we "connected" at an OC Judicial Reception and Young Lawyers Mixer. Thanks to Watson Court Reporters for their sponsorship.

The ASCDC Golf Tournament at Oak Quarry Golf Club was held on June 15, with about 100 golfers. The weather was perfect, the grass was pristine and the camaraderie was in "full swing." Congratulations to the winners, and my profound thanks to our attendees from the Inland Empire courts for coming out: San Bernardino County Judges Mike Welch, Keith Davis and Marsha Slough; and Riverside County Judges Mac Fisher and Roger Luebs. We were encouraged to hear in their remarks that our IE courts are working hard, and that they will do their steady best in these hard times to keep courtrooms open to civil trials.

Diane Mar Wiesmann
ASCDC 2012 President

Finally, my thanks go out to Tournament Chair Gary Montgomery of Thompson & Colegate; and our sponsors, MEA Forensic Engineers and Scientists, Janney & Janney Attorney Service, and Peterson Reporting.

See the back page of this magazine for upcoming ASCDC events. In the meantime, we will continue to reach out with Webinars and e-mail alerts, because it just goes to show that you can never underestimate the power of connecting – on so many levels.

A New Day for Sacramento

Michael D. Belote
Legislative Advocate
California Defense Counsel

As this column is written, eighteen business days remain in the 2011-2012 legislative session. As citizens, ASCDC members will be interested in the outcome of debates on public pensions, workers compensation reform, and potentially water issues. As lawyers, though, big issues remain relating to *Howell*, *Concepcion*, and depositions. Resolution of the issues may not occur, if at all, until the wee hours of August 31, the state constitutionally-mandated adjournment of session. A lot tends to happen in Sacramento in the closing days and hours of the legislative session.

Pundits are suggesting that the *Howell* bill will be one of the biggest remaining issues of the year, legal or otherwise. At the present time, SB 1528 is intended as the vehicle to address the issue, although after nearly eight months of the legislative year, the actual language has still not been put in the bill. The Consumer Attorneys contend that *Howell* created ambiguities in a number of areas, including Medi-Cal, while CDC and a host of organizations in opposition argue that *Howell* reached the right result and is consistent with a century of tort law in California. Rumors are rampant in Sacramento about the possibility of some "deal" on this issue between the plaintiff's bar and an insurance association, and we may not know until just before the end of session whether this eventuality occurs.

AT&T v. Concepcion, of course, is the US Supreme Court case dealing with arbitration and class action waivers. The Chair of the Senate Judiciary Committee in California introduced SB 491 to provide that in contracts of adhesion entered into on and after January 1, 2013, waivers of class rights are void. The bill did not specifically mention arbitration or *Concepcion*, but the intent was clear. In a very surprising development, SB 491 failed to receive the necessary votes in the Assembly Judiciary Committee, but the author has indicated an intent to revive the issue in the final days of the session if possible.

On depositions, AB 1875 proposes to conform the California Code of Civil Procedure to the federal standard of one day of seven hours, subject to the ability to petition the court for more time, and subject to various exemptions from the seven hour standard. Exemptions include employment cases, cases designated as complex, depositions of experts, and more. CDC has engaged in productive discussions with the Consumer Attorneys on this issue, but we continue to seek amendments to make sure that adequate time is available.

Following the midnight, August 31 adjournment, and the session will most assuredly go right up to midnight, Governor Brown will have 30 days to sign or veto the bills sent to him. These decisions will be especially interesting given the forces lining up for and against the Governor's tax initiative on the November ballot.

Beyond the resolution of 2012 bills, there is a strong sense that a new era will begin in Sacramento after the November elections. The combination of redistricting, the "top two" primary, and the recent change in term limits will create huge changes in the legislature. Incredibly, 38 of the 80 Assembly seats will be occupied by first-time legislators after November, and they will now be allowed to serve twice as long in the Assembly, twelve years instead of six. The hope and expectation is that this change alone will allow legislators to develop expertise that is not possible in only six years, while reducing the constant drive to look for the next seat when six years are up.

The idea of a more thoughtful and experienced legislature should significantly upgrade the public policy process in California, and permit CDC to develop and nurture relationships with legislators interested in tort issues.

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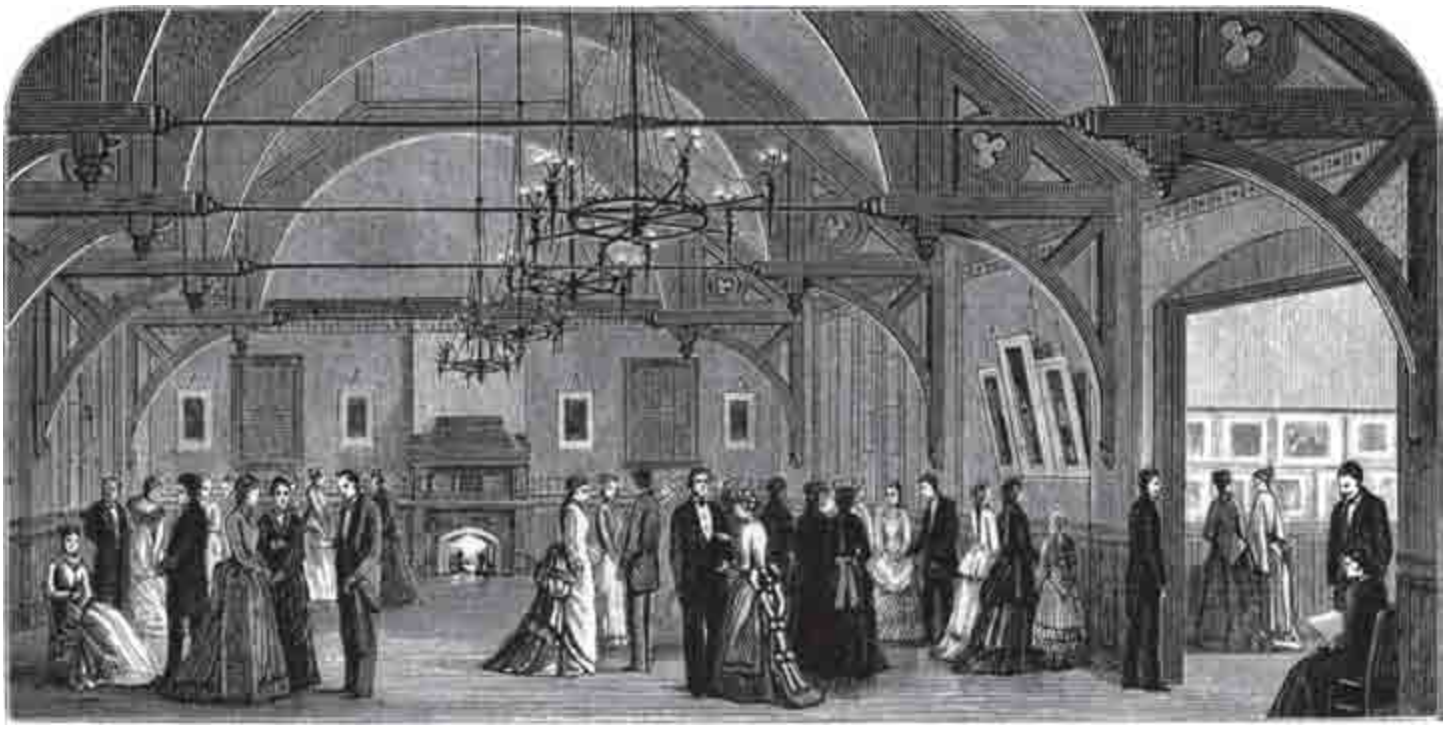

I Know What You Did Last Summer

Patrick A. Long

This column talks at length about what "we" do. We do darn near everything, i.e. read books, listen to music, travel, ride horses, watch movies, surf, ride motorcycles, fly planes, and all of the other things that have been discussed in these columns. But what about our judicial colleagues who sit on Courts of Appeal and Supreme Courts. Do they ever get to do anything besides read our briefs, listen to our arguments, then rule against us? (Okay, okay, many times they do in fact rule in our favor.)

I'll tell you what many of them do. Every July more than 10% of all sitting judges on all of the State Courts of Appeal and Supreme Courts from across the country travel to Chicago to attend a symposium put together by the *National Foundation For Judicial Excellence*. The program consists of discussions over a day and a half of major issues likely to come before our appellate courts. This year the discussions involved many of the issues surrounding class actions, including the role of Attorneys General in bringing class actions, due process limitations on class actions under State procedural law, balancing fairness and efficiency under the due process clause, and a number of other equally important issues. On each topic speakers from differing aspects of the legal spectrum presented opposing ideas. The symposium presents positions most defense attorneys would agree with, and also presents the opposite side of those positions. To borrow a phrase from Fox News, the NFJE Symposium is fair and balanced, except in the case of the Symposium, it truly is fair and balanced.

It is occasionally compared to a program put on each summer by The Roscoe Pound Institute, but there truly is no comparison. The Pound Forum was founded by a group of plaintiff's counsel. It is pretty one-sided in the sense that almost all the speakers are pro-plaintiff on issues that are divisive between plaintiff and defendant. I know because for two years I was the token defense attorney speaker at the Pound Forum.

The National Foundation for Judicial Excellence arose from the brain of Richard Boyette, a past president of DRI, and a personal friend of mine. There have now been eight Symposia with different topics of conversation each year. The NFJE approach of providing arguments and thoughts on both or all sides of every issue discussed was evident during the event. For example, at the Class Action Symposium in July not only did defense counsel speak but also law school professors from around the country, a state Attorney General (in favor of Attorneys General entering into contingency fee deals with plaintiff's counsel), and plaintiff's attorneys including a partner at the California firm of Robinson Calcagnie Robinson Shapiro & Davis. NFJE has always prided itself on not being one-sided, and on providing a balanced discussion of important legal issues for the appellate judges from all over the country.

The only attendees at NFJE Symposia are the judges, the speakers, and NFJE's board of directors who organize the programs. I've been present because I sit on NFJE's board. Every sitting judge on every State Court of Appeal and Supreme Court in the country is invited, and the current limit for participants is 150. It is first come, first served. California has been well-represented every year since the program began, with justices from our Courts of Appeal and Supreme Court in attendance.

I'm absolutely certain that our justices here in California also read books, fly airplanes, ride horses, listen to music, surf, travel, watch movies and do all the other things that we practicing attorneys do, but by gosh they also take time from their demanding schedules to become better justices, to be more informed, and to render opinions that carry out the intent and purpose of our system of law.

Thanks to all our justices on our Courts of Appeal and Supreme Court. You serve us well.

Pat Long – *palong@ldlawyers.com*

Civil Courts Crisis:

Cuts in Services Due to Budget Shortfall Impact Public

Colin Patrick Cronin
Bowman and Brooke LLP

Signs are everywhere that the fiscal health of our State government is in decline. Looming debt and increased yearly deficits have become a dangerous reality, and the task of putting our State's fiscal house back in order is daunting. Due to the need for a balanced budget coupled with reduced tax revenues, spending cuts have become an inevitability. The drastic cuts are adversely affecting innumerable programs that serve broad and diverse segments of the State's population.

In the case of the California Judicial System, the budget cuts projected this year pose a serious threat to citizens' access to justice – and access to justice is essential to stability and trust in our government. As San Francisco City Attorney Dennis Herrera has explained, "Our court system isn't just another beleaguered public agency. It is a fully co-equal branch of government without which a just democracy can't exist." It is important for everyone in the State – not just judges and lawyers – to have an understanding of the impact that budget cuts have on the fabric of our society. We hope that readers of this article will share their knowledge widely with others who may not be as attuned to the operation of our legal and judicial systems, to enhance the ability of all California citizens to participate in their role of evaluating fiscal priorities and solutions to the current fiscal crisis.

THE CURRENT SITUATION

Budget cuts within our government are not new phenomena. Amidst the State's long history of disaster and recovery one must wonder, what makes the current situation unique? To quote the administration of the Superior Court of California, County of Fresno; "Simply stated, this is the most severe fiscal crisis that the Court has ever faced and well beyond anything that could have been anticipated." All levels of all branches of our government are being

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impacted. For instance, the city of Stockton (population 291,707) officially declared bankruptcy on June 28, 2012. According to Reuters, "Stockton, California, became the largest city to file for bankruptcy in U.S. History." The City of San Bernardino recently followed suit.

The legislature has handed down new budget targets to deal with the State's deficit. As the judicial branch cannot, by design, create legislation, the court system is bound by the budgets of the State legislature. The State's judicial branch budget has been cut by approximately $606 million, and an additional $125 million reduction is slated for the coming year alone. This figure is impossible to ignore. Judge Trentacosta of San Diego County explained that the severity of the current reductions will fundamentally alter the way in which the courts do business. "No court can reduce its current operating budget by 21% on top of reductions incurred during the preceding four fiscal years, without radically altering the structure, composition and capability of the court."

In years past, budget reductions have led to the re-appropriation or reassignment of funds from other sources. The government is once again shifting monies earmarked for separate purposes to close funding gaps. In April, the California Judicial Council voted to reconsider $1.1 billion worth of courthouse construction projects. The judicial branch will look into scaling down the projects, renovating existing courthouses, leasing space and using lower-cost construction methods to achieve savings. Those measures alone, however, do not fill the gap left by the cuts. Personnel are being laid off, and hours for court services are being reduced. On the other side of the ledger, numerous fees are being raised and new fees imposed. As noted in a news release by the San Diego Superior Court, "The cuts envisioned by our budget reduction plan will affect every judge, court employee and ultimately the litigants, court users and citizens."

In general, professionals within the legal community are attuned to most of the changes that are being made to the judicial system. The common citizen however, is largely unaware of the impact that they will feel personally when a matter calls for adjudication. Let's attempt to examine the consequences of the current crisis from the litigant's perspective.

COURT CLOSURES

Prior to 2012 the State of California provided hundreds of courtrooms to its 58 counties. At present, several courthouses have been closed temporarily or permanently. In addition to full closures, numerous court departments have been shut down or relocated. As an example; an April 4, 2012 notice to attorneys from the Los Angeles County Superior Court stated, "Effective Tuesday, May 1, 2012, all new limited civil cases within the jurisdiction of the Pomona Courthouse North shall be filed at the West Covina Courthouse."

Similarly, pursuant to California Rule of Court, Rule 10.620(e) & (f), the Fresno County Superior Court gave "urgent notice that the courts in Coalinga, Firebaugh, Reedley, Sanger, and Selma will close on July 30, 2012. Clovis and Kingsburg will close effective August 6, 2012." "Effective September 3, 2012, the Ramona court facility located at 1428 Montecito Road, Ramona CA, 92065 (including its courtroom and clerk's office) will close, and all case matters will be relocated to the East County Division Courthouse."

"The San Diego Superior Court has estimated that it faces as much as a $14 million cut for fiscal year 2012-2013. The court is predicting the total cuts for fiscal year 2013-14 could rise to $40 million or more. If implemented as proposed, these planned cuts will eventually lead to the elimination of more than 250 court employee positions and the closure or restructuring of more than 40 courtrooms during the next two fiscal years."

These occurrences are but a microcosm of the larger reality. In less urban counties, the closest courtroom may be upwards of 100 miles away for some. As availability of facilities lessens, caseloads at remaining facilities increase. According to the 2011 California Judicial Council Report, the California Superior Courts field over 10,000 filings per year. The court system, apart from the financial crisis, already struggles with limited resources to handle case loads. The State budget cuts serve only to exacerbate the problem.

DARK DAYS, REDUCED HOURS, AND HIGHER FEES

In addition to closures, courthouses have to struggle with reduced operating days. Furloughs have become ubiquitous within the public sector nowadays, and the judicial branch is no exception. The State has determined that keeping the doors of government facilities closed on certain days leads to an immediate savings. The loss of pay to court employees is, however, accompanied by losses of access to the courts by litigants. Jeff Adachi, San Francisco Public Defender, finds the current situation brings to mind the adage. "Justice delayed is justice denied." For example, the Court in Big Bear has been reduced to operating only 1 or 2 days per month.

Many citizens do not have the luxury of being able to choose their time away from work. Scheduling conflicts, coupled with loss of pay due to absence from work make litigation arduously difficult for many. The direct effect of dark days is that less can be accomplished in a given week. A trial that might have taken one month may stretch on for two because dark day gaps limit active trial hours. Without exception, the longer a trial takes, the more expensive it becomes.

Furthermore, reductions of operating hours within the day also limit access. Pursuant to Government Code section 68106, the Orange County Superior Court has provided notice of the reduced hours of operation for each of the branches of the court. Time is precious in a litigation setting. When fewer witnesses can be examined in a given day, the length of a trial will increase. As trial times lengthen, costs increase.

Additionally, court fees in the trial and appellate courts have risen sharply recently. The increased user fees have been deemed necessary as a stop-gap for the resource drought. Filing services are being reduced.

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Civil Court Crisis – continued from page 10

"Due to ongoing budget reductions, the Court is reducing public services at the Civil front filing counter."

Increased filing fees, accompanied by fewer rather than more services, discourage the citizen from seeking justice. And, at a certain point, a poll tax principle comes into play. Court users with limited financial resources may be excluded from the system entirely.

A PLAINTIFF'S PERSPECTIVE

For proper perspective, we explore a hypothetical example of a common legal dispute. A small retail shop owner takes delivery of a shipment of goods from a wholesale supplier. Upon unpacking the pallets the business owner discovers that the goods are defective. A countersigned contract contains a return policy clause. The businessman requests a new shipment and the supplier refuses, instead sending an invoice demanding payment.

The proper legal option would be for the retail shop to bring a civil suit. But the owner of the shop has to make some difficult decisions. Before the court closures, his home in Coalinga used to be just 5 miles from the nearest courthouse. Now, however, he must travel almost 70 miles to attend any hearing. According to IRS figures, he will incur travel costs of about $0.55 per mile. As if this were not discouraging enough, he receives a phone call from the Court explaining that his Motion to Compel hearing must be continued nearly a month because there is insufficient staff to work up or research the issues. He nonetheless perseveres but, after an extensive and expensive discovery period, the parties cannot come to a settlement resolution. The trial is scheduled for the second week of January.

The shop owner regularly keeps his shop open 9-5 on weekdays to make ends meet. He puts out word to his customer base that he will be closed for the second week of January. He budgets a loss of about $2000 – an average winter week's profit. Following an unexpected influx of civil cases from surrounding localities, however, the Court is forced to kick the trial to the fourth week of March. The shop owner changes his planned January closure, but the news doesn't reach the majority of the shop's customer base, and the profit margins suffer a significant loss for January. When March finally rolls around, the Court has scheduled several furlough days which divide the operational week. The Court hears the shop owner's case from 9:00 am to 2:00 pm with an hour lunch break due to hour reductions. Needless to say, the shop owner has zero hope of conducting any business during his litigation. The loss of revenue is once again significant.

Plaintiff's counsel advises him to serve several motions that end up costing $370.00 per filing. Due to expert and percipient witness scheduling conflicts, the defense's case ends up taking two days longer than expected. The dark days force the trial into another week. The plaintiff's trial budget is regrettably exceeded and the owner is forced to begin operation of his establishment on weekends to recoup the losses and attempt to stay in business.

A DEFENDANT'S PERSPECTIVE

A musical instrument shop owner finds that a water main has burst within one of his walls. He calls a plumber who spends a day fixing the problem. The plumber is paid and the businessman continues to operate his shop without issue. Twenty-seven years later the plumber is diagnosed with mesothelioma. The plumber decides to sue every employer he has a record of working for – including the musical instrument shop owner – asserting liability for asbestos exposure.

Upon being served, the defendant owner is surprised and confused. He barely recalls the plumber and he is certain that his shop did not contain asbestos. But just to file an answer to the complaint, the shop owner is required to pay the increased fee of $435 per GC 70612. The case is designated as complex because so many defendants are named, and each is required to pay the court an additional $1000.00 per GC 70616(b). It is incredible to think that a defendant must pay $1435.00 simply because they are named in a lawsuit. The $1435.00 figure is multiplied by the number of defendants which can lead to fees exceeding $25,000.00 for a mere 18 defendants. Thereafter the musical instrument shop owner files a motion for summary judgment in an attempt to get out of the case. He is shocked to learn that the filing fee for this motion has increased to $500.00. As he reflects back upon the broken water main he is frustrated by the fact that the original plumbing job cost him just under $500.00. The exorbitant fee schedule of the court system paired with the time demands of litigation harm the shop owner, who simply wishes to conduct his business unmolested.

Feeling confident he has no liability exposure, he nonetheless heeds his attorney's advice that vindication will not come for many months, and possibly many years given the reductions in court staff and hours. He will in the meantime incur not only the ordinary costs of discovery, but also significant new costs related to court reporter fees, among others. Truly dispirited, he pays $20,000 to settle out of the case rather than put his business on hold during litigation. He tells his tale to a number of

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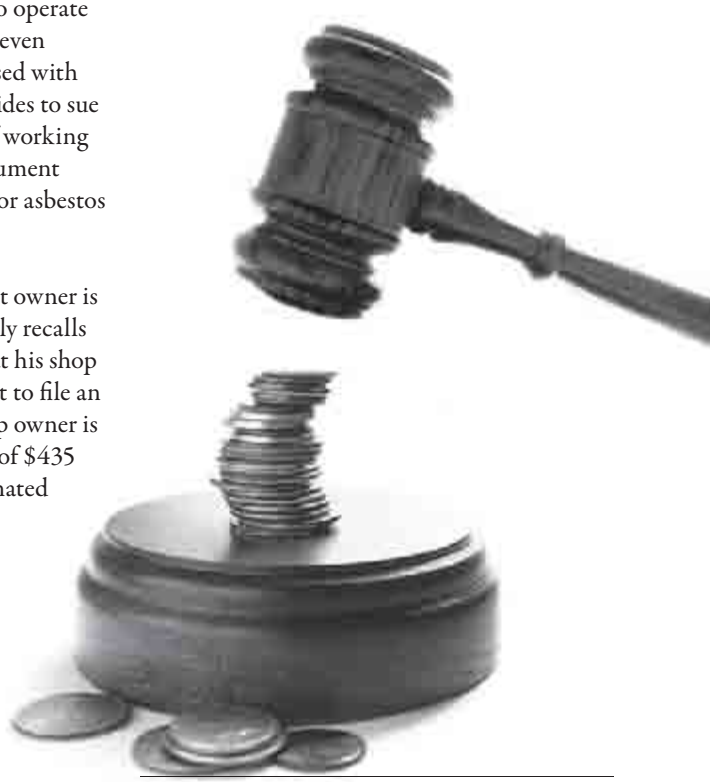

acquaintances, who register disgust with "the system."

THINKING AHEAD

Trial budgets have become increasingly bloated which leads potential litigants to conduct more scrutinizing cost/benefit analyses of methods for seeking justice. Most people do not possess a large cache of resources to devote to litigation. A person with a legal problem may resolve to seek illegal means of justice outside of the system. Conversely, his spirit may become so thoroughly trounced as to give up on justice completely. To lend a moment to hyperbole, the worst case scenario would be an increase in vigilante justice which only adds further strain to the system.

In this time of financial uncertainty, the legal community must be vigilant. We must work together to make certain that justice is not forsaken. Spending reductions are a necessary measure; however we cannot allow insufficient funding to dismantle a system that is constitutionally guaranteed to all citizens. We cannot allow certain citizens to be priced out of the judicial market. Apportionment of the State's budget cuts must fall within an operable range and the State legislature must come to understand the gravity of the need for judicial funding. As a recent San Diego Superior Court news release put it, "These cuts will significantly reduce or eliminate access to our court system and are devastating to those of us who have worked so hard to convince the Governor and Legislature that such cuts threaten the stability of our third branch of government."

Looking forward, both the plaintiff and defense bar associations need to continue to press lawmakers in Sacramento to allocate adequate funds to our judicial branch. The courts need to continue to serve the public with uninterrupted success. California Attorney General Kamala Harris stated that the courts are vital to ensure that "every voice is heard and has equal weight." A strategy needs to be developed to expose the severity of the financial crisis and enlist the support of common citizens to protect their rights.

A handful of organizations are working to stem the damage of the budget cuts, including the California Defense Counsel (CDC). In addition to representation of civil defense attorneys in California, the CDC has a voice in the State legislature. The involvement of the California legal community is encouraging, however it is not sufficient. It is the position of such legal organizations that citizen awareness and involvement is indispensable. The fiscal woes of California will hopefully subside soon. In the interim, we must all come to a consensus on how to ensure the continued success and accessibility of the State court system.

Colin Patrick Cronin is employed as a Case Assistant at Bowman and Brooke LLP's Los Angeles Office and plans on attending law school.

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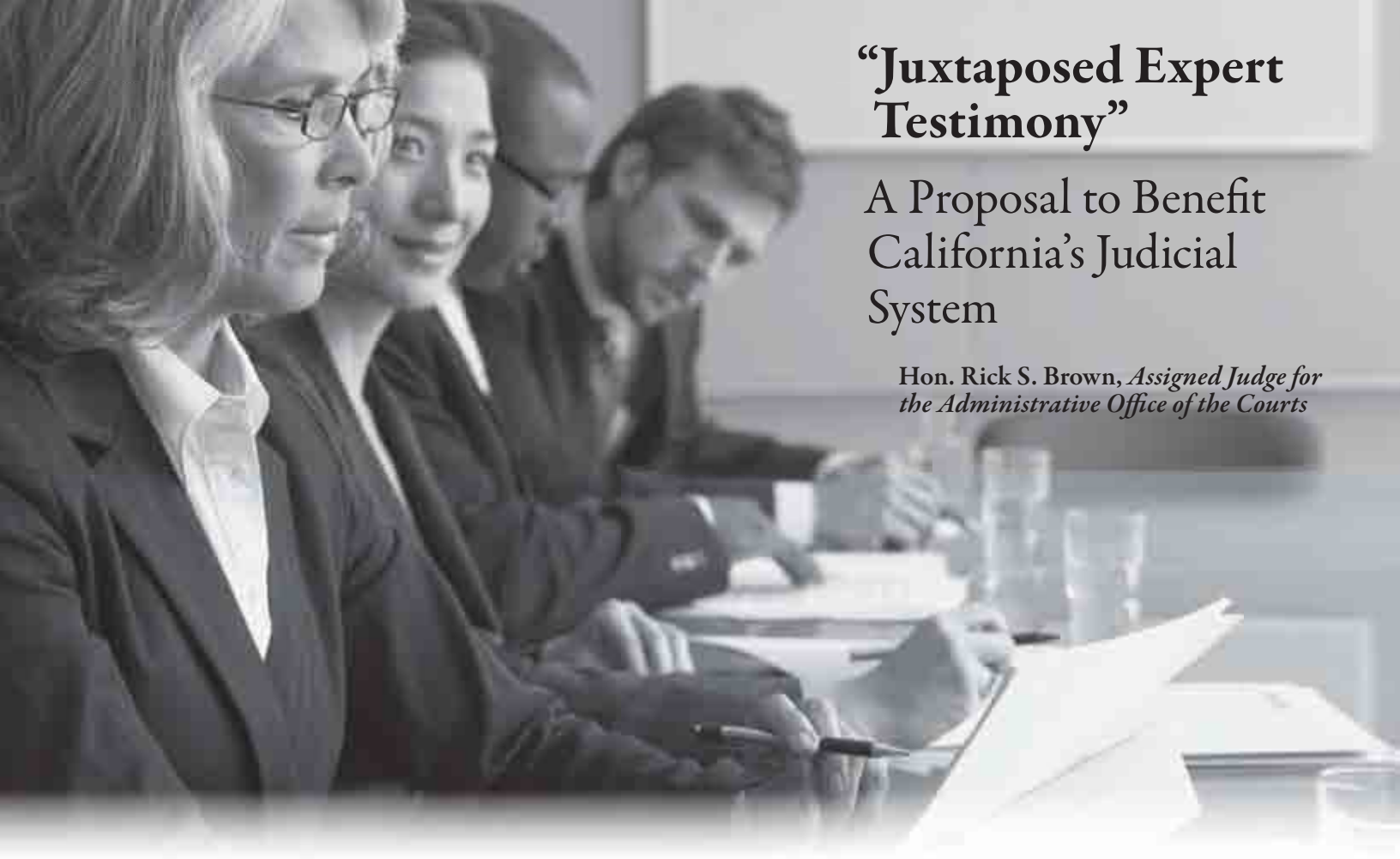

"Juxtaposed Expert Testimony"

A Proposal to Benefit California's Judicial System

Hon. Rick S. Brown, ***Assigned Judge for the Administrative Office of the Courts***

Juxtaposed Expert Testimony ("JET") is an alternative method of eliciting expert testimony. In a case with several expert witnesses, rather than having each expert testify at a different time, experts from all sides on an issue are examined together. The goal is to streamline the process of taking expert testimony and make it more efficient and straightforward for the fact-finder (judge or jury) to compare and evaluate expert testimony.

This article is a proposal that advances a *Code of Civil Procedure* statute and associated *Rules of Court* to establish JET. The statute would provide that *by stipulation of the parties, and court approval*, JET could be used at any *non-criminal* jury trial, court trial, court hearing or other court proceeding, or at any pretrial proceedings such as *Evidence Code § 402 or 801(b) hearings, or at depositions.*

This article will describe the JET procedure and its potential benefits to our judicial system. There will be an analysis of the types of cases where attorneys are more likely to stipulate to JET. Finally, required steps to make effective and efficient use of JET will be discussed.

THE GENESIS OF JET

In all U.S. trials witnesses are called to testify in succession. Such has been the procedure throughout the history of the Anglo-American legal system. This approach can be described as *vertical;* the expert answers all questions on all issues within that witness' expertise before being excused. An expert's testimony need not be directly followed by another expert's testimony. Indeed, lay witness testimony is often interspersed between the testimony of the experts, resulting in a time lapse of hours, days or months between the experts' testimony. It can be difficult for the court or finder of fact to compare the experts' testimony on complex matters when testimony is taken at different times.

The genesis of JET occurred in Santa Barbara County Superior Court in November 1996. Judge Rick S. Brown was assigned a civil court trial involving two issues: (1) Whether grading caused a landslide which destroyed a shed and created an unstable hill, the instability of which continued to threaten the home at the bottom of the hill; and (2) If so, what remedial measures were necessary? A total of five expert geologists from both sides of the dispute were to be called to testify and were seated in the courtroom. In a desire to address the two issues immediately with the input of all of the experts, instead of hearing a succession of experts over several days, Judge Brown suggested that the geologists be seated in the jury box and questioned together on each issue. The parties stipulated to this procedure. After testifying and listening to each other for two hours, one of the geologists requested a recess. He told the court that he believed that if the experts were permitted to discuss the matter, they could devise a mutually acceptable solution to remedy the unstable hill. During the recess, the geologists agreed upon a solution to resolve the instability; the parties entered into a stipulation and the case settled.

The JET process described, above, can be described as *horizontal;* experts on all sides of an issue testify on each issue before proceeding to the next issue.

THE BENEFITS OF USING JET

It is essential for juxtaposed examination that the experts be placed together in a jury box

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or similar seating arrangement so that their testimony and discussion can be observed and heard by the finder of fact. (In a court trial the jury box would be a convenient location for the juxtaposed experts. In a jury trial chairs for the experts to sit and respond to questions would have to be arranged in view of the court, attorneys and jury.) The benefits of this process are potentially profound.

First, the judge or jury can easily compare the experts' answers during and immediately after testimony. In a recent JET jury trial, a juror responded in a questionnaire: "[The JET procedure] made it very easy to compare the opinions of the two experts." Another juror wrote: "I like having them both [the two experts] there to go back and forth so you didn't have a lot of time in between to have to recall what the other said."

Second, the experts' presence as a panel highlights their individual qualifications, responses and conclusions; the distinctions between each are in direct and open contrast.

Third, JET creates a dynamic interactive process among the experts as they respond "side by side" to the questions posed and answered by other experts. This exchange obviates the need to recall experts to rebut testimony of other experts. (Also, in the traditional trial, the experts testify in a certain order. This can have an impact on the weight the jurors or judge give to the experts' testimony. For example, the finder of fact might forget earlier expert testimony and be more influenced by the testimony of the last expert who testifies, simply because of the order of testimony. With the experts testifying "side by side" in a JET trial, this problem does not exist.)

Fourth, there are procedural benefits to using JET as it simplifies and makes more efficient the process of taking testimony:

1. All witnesses are sworn at once;
2. A question can be posed to all the experts, and answered by the witnesses in an agreed upon order;
3. Referencing previous answers can shorten some answers. i.e. Expert D: "My answer would be the same as Expert B, except I would add....";
4. Cross-examination would similarly efficient.

PROCEDURES FOR JET EXAMINATION OF EXPERTS

JET is designed to be a dynamic process, malleable to the type of case. Therefore, the proposal to establish a voluntary JET procedure in California recommends that a new *Rule of Court* provide that in a JET trial or other proceeding the parties may stipulate to any order of examination, subject to court approval. This rule would provide the following template for the parties' consideration regarding JET examination of expert witnesses:

1. Experts who have performed primary research, such as experiments, tests, physical or mental examinations, will be called to testify *alone*, and questioned in the traditional direct, cross-examination, re-direct format regarding their primary research. The other experts will be allowed to be present during this testimony.

   Once the examination regarding primary research is completed and the primary expert then intends to offer *opinions* regarding the significance of the primary research, his or her testimony can be *juxtaposed* with testimony of the experts who intend to offer their *opinions* solely on their review of the reports of other experts, lay witness testimony and other evidence presented at the trial or hearing.

2. When expert testimony is juxtaposed, each party may introduce his or her expert by direct examination regarding the expert's qualifications and the essential points of the expert's opinion. This introduction will commence with the expert for the party having the burden of proof on the issue being examined.

3. Following introduction of all the experts, the attorney for the party having the burden of proof on the issue being examined may ask questions of any of the experts.

4. After examination by the attorney for the party having the burden of proof, the attorney for the defending party may ask questions of any of the experts who have been introduced.

5. The attorneys for the parties will continue to take turns in the questioning of all the experts until the examination by all parties is completed.

6. If a defendant moves for a judgment of nonsuit pursuant to CCP § 581c, in ruling on the motion the court can consider all evidence presented before the conclusion of plaintiff's evidence. This includes testimony by defense experts given as juxtaposed testimony with plaintiff's experts. (It would be rare that the defendant's expert testimony would save the plaintiff from nonsuit. However, before a JET trial the parties should stipulate how a motion for nonsuit will be handled in a trial where defense witnesses will be testifying with plaintiff's witnesses before the conclusion of plaintiff's case.)

CASES WHERE ATTORNEYS ARE MORE LIKELY TO STIPULATE TO JET

In response to questionnaires, the fact-finders (judge or jury) in the JET trials held thus far, have expressed a preference for hearing the experts testify as a panel, and being able to compare and contrast their opinions and qualifications. It is expected that the fact-finder will like JET in most, if not all cases. However, there will be cases where the attorney will reject JET. If the attorney has an expert whose qualifications are weak, compared to the other side's expert, or if his or her case is not as strong on the expert issue(s), the attorney may not stipulate to the JET procedure. If the attorney has an impressive, charismatic expert, the attorney might prefer to have the expert testify alone, and not in a JET proceeding. Finally, the attorney may simply prefer to present his case in the traditional manner.

The cases where both the plaintiff and defense attorneys will want a JET trial are likely to be cases with one or more of the following:

1. The expert issues are close or difficult for the fact-finder to decide.
2. The expert issues are complex.
3. The experts are "evenly matched," with good qualifications, curriculum vitas.
4. The attorneys want a good record for appeal.

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The JET trials held so far have clearly displayed for the record the differences in the experts' positions on the issues. In a recent JET trial, the attorney wrote in response to a questionnaire re the effectiveness of JET procedure: "I thought it was effective and streamlined the presentation. The medical issues in this case were relatively simple. It all boiled down to the issue of excessive treatment/ medical charges. Plaintiff's doctor summed it up when he testified that the only difference between his testimony and that of the Defense doctor was the length of physical therapy and the amount of the associated charges."

5. The attorneys anticipate that JET will shorten the time required for the total amount of expert testimony, saving *litigation* costs. (JET was used recently in a one-day expedited jury trial. [CCP 630.01 *et seq.*] Using JET, the testimony of two experts was heard, and the trial completed in one day.)

A JET trial necessitates that the juxtaposed testimony of the expert witnesses take place during the same time period. Some attorneys have expressed concern that scheduling experts for a JET trial might be too difficult because of the experts' respective schedules. However, experience thus far with JET trials indicates that if a "time certain" is blocked out for the expert's testimony several weeks in advance of the trial, all of the experts will be able to appear. In a complex case with many experts testifying on an issue, arranging for all of the experts to be in the courtroom or hearing room at the same time may be difficult. Technology will play an important role in making JET trials possible in such cases, allowing witnesses from around the world to appear together by videoconferencing.

Another concern is that with a JET trial it would cost the parties too much for all experts on an issue to be in court until all of the expert testimony is completed. However, the cost of all the experts being present is mitigated by the reduction of the time required for all of the expert testimony.

USE OF JET TO PROMOTE SETTLEMENT, OR AS A TRIAL PREPARATION TOOL

The JET proposal before the California Judicial Council's Civil and Small Claims Advisory Committee recommends a statute that provides:

> In a case where it is anticipated that the experts for opposing parties will testify at trial, the parties may stipulate to the experts testifying concurrently at a deposition.

It is anticipated that the JET deposition, as well as other pre-trial events in a JET case, including discovery re experts, case management conferences and settlement conferences where the deposition JET testimony or anticipated JET trial testimony of the experts is considered, will reveal the similarities, differences, strengths and weaknesses of the experts' positions and promote settlement. On the other hand, the JET deposition and other pre-trial events can serve as a trial preparation tool. The attorney with an expert revealed as "weak" from the JET deposition and other pre-trial proceedings, may chose to strengthen his or her case for trial by replacing that expert with another expert. (However, to add a new expert, the attorney would have to comply with *Cal Code Civ Proc § 2034.610(a)*(1) and the discovery time limits of *Cal Code Civ Proc §* 2024.010 *et seq.*)

WHY IS NEW LEGISLATION NECESSARY?

JET trial procedure has the potential to streamline the trial and reduce litigation costs. JET pre-trial events will promote settlement, or serve as a tool for an attorney to evaluate and strengthen his or her case. However, there are legal barriers to the use of JET at trial. Existing statutes provide in civil and criminal cases that the plaintiff must present his evidence first, then the defendant *Cal Code Civ Proc* § 607; Cal *Pen Code* § 1093. Therefore, the statutes require that witnesses testify in succession.

Without new legislation JET can be implemented by stipulation with court approval. However, legislation specifically authorizing JET would educate judges, attorneys and the public about JET as an alternative to the traditional method of examining experts, and thus would enhance both the actual procedures of the judicial system and the public perception of them.

Rick S. Brown is an Assigned Judge for the Administrative Office of the Courts and in this role has handled Civil, Criminal, and Juvenile cases in state courts throughout California for the past nine years. In 2003, he retired from the Superior Court after 26 years as a judge in Santa Barbara County. He served four years as a member of the state Judicial Council.

Judge Brown has a new website **jet-trials.org** *dedicated to introducing, developing and establishing the use of Juxtaposed Expert Testimony. He invites attorneys and judges participate in the development of JET by completing the attorney or judge questionnaire on the website and by taking part in future forums. Plans for this website include guest commentary from attorneys and judges.*
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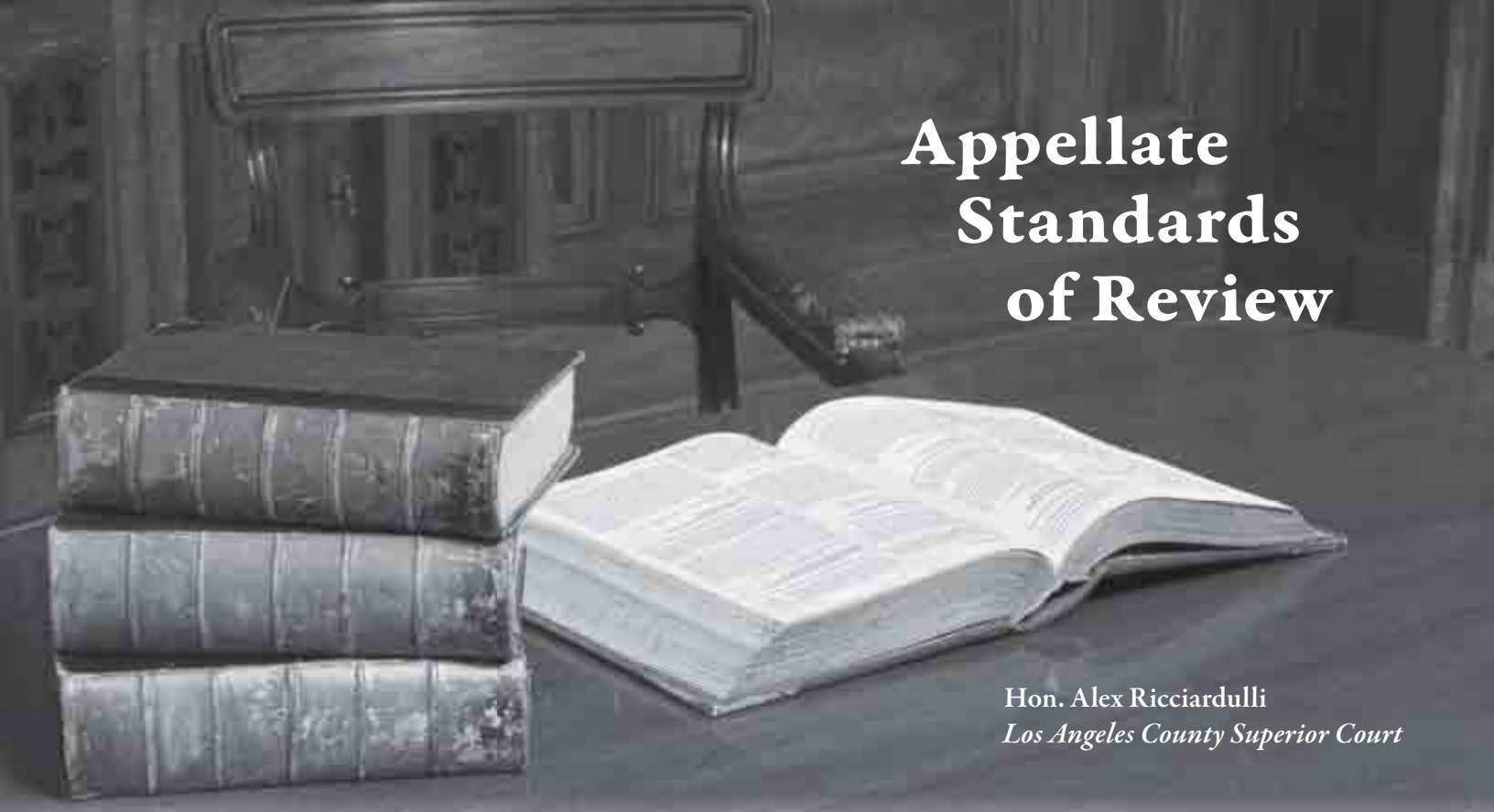

Appellate Standards of Review

Hon. Alex Ricciardulli
Los Angeles County Superior Court

Knowing the fundamental standards of appellate review is essential to successful practice of law. This is true for both appellate and trial lawyers.

Appellate attorneys must be fully cognizant of the standards of review employed by the courts of appeal where they perform their work. The principles of review used by appellate courts limit the relief that can be granted. Those principles can act as a shield, warding off appeals and preserving valuable judgments, and they can also be used as a sword, permitting appellate tribunals to correct erroneous decisions.

Astute trial lawyers benefit from knowing basic appellate standards because they are aware that prevailing in a trial court can be a hollow victory if the trial court's judgment is vulnerable to being eviscerated on appeal. Effective trial lawyers plan ahead, securing victories that endure on appeal, or, losing in ways that leaves open avenues of attack in higher tribunals.

Although far from an exhaustive compilation, this article reviews selected standards used by appellate courts in various common contexts, including motions to continue, sufficiency of the evidence, summary judgment, and review over arbitrations. The standards are all based on state law, but their federal counterparts are largely the same.

ABUSE OF DISCRETION

Whenever a trial court has discretion to make a determination, from granting or denying a continuance, to staying or not staying a case based on a choice of law clause, appellate courts use well-known standards regarding what constitutes abuse of discretion.

The "abuse-of-discretion" standard is a variable one that depends on the nature of the underlying ruling. The California Supreme Court has explained that abuse of discretion should be analyzed in three steps: "[1] [t]he trial court's findings of fact are reviewed for substantial evidence, [2] its conclusions of law are reviewed de novo, and [3] its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fns. omitted.)

The greatest amount of deference is in the analysis in step three, where it has been held that "[a]n exercise of discretion will be disturbed on appeal only if the court exercised it in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice." (*Baltayan v. Estate of Getemyan* (2001) 90 Cal. App.4th 1427, 1434; *Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1420.) Nonetheless, even in that situation, a trial court's exercise of discretion is not unfettered, but "is subject to the limitations of legal principles governing the subject of its action." (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355; see also *Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 275 [a trial court's discretion is not "unfettered" but must be "exercised in conformity of the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice"].)

In addition to showing an abuse of discretion by demonstrating that a ruling was "whimsical, arbitrary, or capricious" and thus "exceeded the bounds of reason," a party may establish an abuse of discretion by showing that "the trial court erred in acting on a mistaken view about the scope of its discretion." (*Olsen v. Harbison* (2005) 134 Cal.App.4th 278, 285.) "'The discretion of a trial judge is not a whimsical, uncontrolled

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power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.' [Citations.] The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action....' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion. [Citation.] If the trial court is mistaken about the scope of its discretion, the mistaken position may be 'reasonable', i.e., one as to which reasonable judges could differ. [Citation.] But if the trial court acts in accord with its mistaken view the action is nonetheless error; it is wrong on the law." (*City of Sacramento v. Drew* (1989) 207 Cal. App.3d 1287, 1297–1298.)

Yet another way a court may abuse its discretion is when, either deliberately or in ignorance of the law, the court decides not to exercise discretion at all. Failure to exercise discretion can itself constitute an abuse of discretion. (See, e.g., *Richards, Watson & Gershon v. King* (1995) 39 Cal. App.4th 1176, 1180; *Gardner v. Superior Court* (1986) 182 Cal.App.3d 335, 340.) In such instances, an appellate court will not review deferentially for abuse of discretion, since no discretion was exercised. (*Garcia v. Mejmadi* (1997) 58 Cal.App. 4th 674, 686.) For example, in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 526, 535, the California Supreme Court held that where a trial court fails to rule on objections, the Court of Appeal reviews the objections de novo rather than for abuse of discretion "because there was no exercise of trial court discretion" and the Court of Appeal therefore "ha[s] no occasion to determine whether the trial court abused it."

Below are some examples of specific rulings as to which appellate courts will apply an abuse of discretion standard, followed by contrasting situations in which courts will apply an independent "de novo" standard, or a deferential "substantial evidence" standard of review. The final example discussed below addresses the special standard of review when a judgment confirming an arbitration ruling is challenged.

MOTIONS TO CONTINUE

It is often said that a motion to continue is the most important one that can be made in any case. Because having sufficient time to prepare a case is essential, courts will often grant motions to continue. On the other hand, motions are also sometimes rejected because courts know that justice delayed can often mean justice denied.

Appellate courts realize that trial courts have broad discretion in deciding whether to grant or deny a request for a continuance. (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395.) A court's ruling on a motion to continue will be reversed on appeal "only if it was capricious, arbitrary or partial or exceeded the bounds of reason or would prevent a fair trial from being held." (*Ohmer v. Superior Court* (1983) 148 Cal. App.3d 661, 666; *In re Marriage of Johnson* (1982) 134 Cal.App.3d 148, 155.)

ATTORNEY FEES

On appeal, a trial court's exercise of discretion regarding an award of attorney fees is reviewed deferentially. "The experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his [or her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong." (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.)

"The trial court's decision will only be disturbed when there is no substantial evidence to support the trial court's findings or when there has been a miscarriage of justice. If the trial court has made no findings, the reviewing court will infer all findings necessary to support the judgment and then examine the record to see if the findings are based on substantial evidence." (*Frei v. Davey* (2004) 124 Cal. App. 4th

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Appellate Standards of Review – continued from page 20

1506 , 1512.) "The burden of showing abuse of discretion rests upon the appellant." (*Bailey v. Safeway, Inc.* (2011) 199 Cal. App.4th 206, 217.)

CHOICE OF FORUM AND CHOICE OF LAW DETERMINATIONS

A trial court's decision whether to stay or dismiss a case due to a choice of forum clause is reviewed on appeal for abuse of discretion. (*Trident Labs, Inc. v. Merrill Lynch Commercial Finance Corp.* (2011) 200 Cal. App.4th 147, 154; *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 9.)

The decision whether to grant or deny a stay based on a forum selection clause requires the court to consider whether enforcement of the clause violates California public policy (*America Online, Inc. v. Superior Court, supra,* 90 Cal.App.4th 1, 12) and whether the circumstances of the case before it make enforcement of a clause unreasonable (*Trident Labs, Inc. v. Merrill Lynch Commercial Finance Corp., supra,* 200 Cal.App.4th 147, 154 [reversing trial court's order enforcing forum selection clause where defendant relying on clause had litigated extensively in forum chosen by plaintiff before asserting right to change forum).

SUMMARY JUDGMENT MOTIONS

The standard of review of a summary judgment ruling by a trial court is clear: because summary judgment "involves pure matters of law, [appellate courts] review a summary judgment ruling de novo to determine whether the moving and opposing papers show a triable issue of material fact." (*Addy v. Bliss & Glennon* (1996) 44 Cal. App.4th 205, 214.)

An appellate court reviews a summary judgment decision de novo, "considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

JUDGMENT ON THE PLEADINGS AND LEAVE TO AMEND

Code of Civil Procedure section 438, subdivision (c)(1)(A), requires a court to grant judgment on the pleadings when "the complaint states facts sufficient to constitute a cause ... of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint."

As with summary judgment rulings, an appellate court reviews a trial court's determination regarding judgment on the pleadings employing de novo review to decide whether, as a matter of law, the complaint stated a sufficient cause of action, or the answer stated a sufficient defense. (*Ludgate Ins. Co., Ltd. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 602.)

A different standard applies, however, with regard to whether an order granting judgment on the pleadings is accompanied by leave to amend. Code of Civil Procedure section 438, subdivision (h)(1), provides that judgment on the pleadings "may be granted with or without leave to file an amended complaint or answer, as the case may be." "Denial of leave to amend after granting a motion for judgment on the pleadings is reviewed for abuse of discretion." (*Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal. App. 4th 1439, 1448.) In a motion for judgment on the pleadings, "denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment." (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal. App.4th 1848, 1852.) The party seeking leave to amend bears the burden of showing that there is a reasonable possibility that the moving party can cure the defect. (*Foundation for Taxpayer and Consumer Rights v. Nextel Communications, Inc.* (2006) 143 Cal.App.4th 131,135.)

SUFFICIENCY OF EVIDENCE

Whether reviewing a verdict in a trial, or in any other context where the trier of

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fact makes a determination on contested factual issues, an appellate court uses well-established standards:

"'When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.' [Citation.]." (*Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 683-684.)

A jury's factual findings are similarly reviewed to determine if they are supported by substantial evidence: "Under the substantial evidence standard of review, 'we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.] [¶] It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment. Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences in the absence of a rule of law specifying the inference to be drawn.... [Citations.]' [Citation]." (*ASP Properties Group v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266.)

A court on appeal will presume that sufficient evidence existed to support a judgment. "All intendments and presumptions are made to support the judgment on matters as to which the record is silent." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal. App. 4th 939, 956.) Therefore an appellate court will infer that the trier of fact made all of the factual findings needed to support its decision. (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58.)

Whether the judgment is supported by substantial evidence is a question of law for the appellate court to determine. (*Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1515; *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580-1581.)

REVIEW OF ARBITRATION DECISIONS

A neutral arbiter's determination is reviewed in two steps: the trial court first examines the arbiter's award, and then an appellate tribunal reviews the court's determination.

"The scope of judicial review of arbitration awards is extremely narrow. Courts may not review the merits of the controversy, the sufficiency of the evidence supporting the award, or the validity of the arbitrator's reasoning. [Citations.] Indeed, with limited exceptions, 'an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties.' [Citations.]" (*Cal. Statewide Law Enforcement Assn. v. Cal. Dept. of Personnel Admin.* (2011) 192 Cal. App.4th 1, 12-13 (*Cal. Statewide*).)

"An arbitrator exceeds her powers if (among other things) she issues an award that violates a well-defined public policy, or that violates a statutory right, or that provides a remedy not authorized by law, or that imposes a remedy that is not rationally related to the contract. [Citation.]" (*Shahinian v. Cedars-Sinai Medical Center* (2011) 194 Cal.App.4th 987, 1000.) "In determining whether arbitrators have exceeded their powers, a court must give 'substantial deference to the arbitrators' own assessments of their contractual authority....' [Citation.]" (*Glaser, Weil, Fink, Jacobs & Shapiro, LLP v. Goff* (2011) 194 Cal. App.4th 423, 448.)

An appellate court reviews "de novo the superior court's decision confirming or vacating an arbitration award, while the arbitrator's award is entitled to deferential review. [Citations.]" (*Cal. Statewide, supra,* 192 Cal.App.4th at p. 13.)

Alex Ricciardulli is a judge in the Appellate Division of the Los Angeles County Superior Court where he works on civil and criminal appeals and writs.

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.

Civil Procedure

Malicious prosecution and abuse of process claims arise from protected activity protected by anti-SLAPP statute, and should be dismissed where underlying action was not favorably terminated on the merits, and litigation privilege barred abuse of process claim.

JSJ Limited Partnership v. Mehrban (2012) 205 Cal.App.4th 1512.

After a lawyer (Mehrban) lost a case in 2008, he sued his former adversary (JSJ) again in 2009. That case was dismissed because it was barred by res judicata. JSJ then sued Mehrban in this action for malicious prosecution and abuse of process. The trial court denied Mehrban's anti-SLAPP motion to dismiss the case. Mehrban appealed the denial of that motion.

The Second District, Division Five, reversed, holding the anti-SLAPP motion should have been granted. First, regardless of JSJ's assertion that Mehrban had an improper for filing the 2009 law suit, the complaint alleging ADA violations was protected activity. "The subjective intent of a party in filing a complaint is irrelevant in determining whether it falls within the ambit of section 425.16." JSJ then failed to meet its burden under the second prong of the anti-SLAPP analysis, proffering no admissible evidence to make out a prima facie case on its claims. As a matter of law, the abuse of process claim was barred by the litigation privilege, and the malicious prosecution claim was barred because the prior dismissal of the 2009 case on res judicata grounds was not a dismissal "on the merits," thus negating an essential element of a malicious prosecution action.

See also *Nesson v. Northern Inyo County Hospital Dist.* (2012) 204 Cal.App.4th 65 [Fourth Dist., Div. Two: in action by doctor against hospital that suspended doctor's staff privileges, trial court properly granted hospital's anti-SLAPP motion dismissing claims for breach of contract, retaliation and discrimination; all claims were "inextricably intertwined" with the hospital's peer-review process and thus arose from a "public proceeding" within the meaning of the anti-SLAPP statute, and the doctor's failure to exhaust administrative and judicial remedies before filing suit was one of many reasons that his claims "lacked even minimal merit," so he was unable to show a reasonable probability he would prevail];

And see *Johnson v. Ralphs Grocery Company* (2012) 204 Cal. App.4th 1097 [Fourth Dist., Div. One: in action by a store patron against a supermarket allegedly responsible for an unsuccessful shoplifting prosecution against the plaintiff, the trial court properly granted defendant's anti-SLAPP motion dismissing the malicious prosecution claim; the complaint arose from protected activity and plaintiff failed to proffer admissible evidence that the defendants lacked probable cause to suspect her of shoplifting; trial court also properly sustained demurrer to a claim for intentional infliction of emotional distress due to the lack of any "extreme and outrageous" conduct, and the claim of negligence based on actions of an independent contractor security agency failed because that conduct could not be imputed to the defendant];

And see *City of Colton v. Singletary* (2012) 206 Cal.Ap.4th 751 [Fourth Dist., Div. Two: in action with cross-claims between

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by developer and city with claims including breach of contract and unfair business practices, the cases raised "mixed causes of action," only some of which were subject to being stricken under the anti-SLAPP statute, and court found proper remedy was to excise narrow portions of the parties' complaints that fell within the statute; dissent disagreed with this "slice and dice" approach; majority opinion also addressed limitations on the "public enforcement" and "public interest" exceptions to the anti-SLAPP statute];

Compare *Donovan v. Dan Murphy Foundation* (2012) 204 Cal. App.4th 1500) [Second Dist., Div. Four [trial court erred in granting anti-SLAPP motion in action against defendant board members of a nonprofit organization failed to show that their removal of plaintiff as a director was protected activity: "A board may have a statutory right to remove a director, but the exercise of that right is not necessarily an exercise of a free speech or petitioning right"; moreover, "a board of directors meeting by a nonprofit charitable organization is not an 'official proceeding authorized by law' protected by the anti-SLAPP law, and the challenged conduct was not in furtherance of a public interest];

And compare *Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.Ap,4th 182 [Second Dist., Div. Four: trial court properly denied defendant lawyers' anti-SLAPP motion in collection action by court reporters because defendants' alleged nonpayment was not protected activity: "notwithstanding plaintiff's allegations regarding arguably protected activity (protesting that certain court reporting fees in underlying cases were illegal, excessive, and unnecessary), those allegations are only incidental to the causes of action for breach of contract and common counts, which are based essentially on nonprotected activity – the nonpayment of overdue invoices"; defendants' appeal from trial court's order was frivolous].

Trial court cannot compel class arbitration where an arbitration agreement is governed by the Federal Arbitration Act and there is no evidence the parties agreed to such arbitration.

Kinecta Alternative Financial Solutions, Inc. v. Superior Court (2012)
205 Cal.App.4th 506.

Plaintiff signed an agreement that required her to arbitrate all disputes arising out of her employment. The arbitration provision neither authorized nor prohibited class arbitration, and was governed by the Federal Arbitration Act (FAA). After plaintiff filed a wage and hour class action, her employer moved to compel arbitration of plaintiff's individual claims and to dismiss her class claims. The trial court granted the motion to compel arbitration but denied the motion to dismiss the class action allegations.

The Second District, Division Three, ordered the trial court to dismiss the class action allegations. The Court of Appeal concluded that by granting the motion to compel arbitration but denying the motion to dismiss the class allegations, the trial court erroneously imposed class arbitration, contrary to the requirements of the U.S. Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 130 S.Ct. 1758 (holding that, where an arbitration agreement is governed by the FAA, a party may not be compelled to submit to class arbitration unless the agreement provides a basis for concluding that the parties agreed to class arbitration). The Court of Appeal decided that because the arbitration provision expressly limited arbitration to disputes between plaintiff and her employer, the provision did not authorize class arbitration.

See also *Iskanian v. CLS Transportation* (2012) 206 Cal. App.4th 949 [petition for review pending] [Second Dist., Div. Two: holding United States Supreme Court implicitly overruled California Supreme Court decision regarding test for enforceability of arbitration agreements: "the Concepcion decision conclusively invalidates the Gentry test"; "A rule like the one in Gentry – requiring courts to determine whether to impose class arbitration on parties who contractually rejected it – cannot be considered consistent with the objective of enforcing arbitration agreements according to their terms"; disagreeing with *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489 regarding nonarbitrability of PAGA claims; disagreeing with D.R. Horton (2012) 357 NLRB No. 184 which held a mandatory agreement requiring arbitration of all employment-related disputes violated the National Labor Relations Act];

And see *Nelsen v. Legacy Partners* (2012) 207 Cal.App.4th 115 [opinion not final] [First Dist., Div. One: compelling arbitration of wage and hour claims; following *Kinecta* and *Iskanian];*

Compare *Samaniego v. Empire Today* (2012) 205 Cal.App.4th 1138 [First Dist., Div. Three: invalidating arbitration clause in employment agreement under California's common law restrictions on enforceability of arbitration agreements; narrowly construing *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740].

A defendant who delays in making a demand for arbitration may be found to have waived arbitration, despite defendant's argument that moving earlier to compel arbitration would have been futile in light of existing case law.

Lewis v. Fletcher Jones Motor Cars, Inc. (2012)
205 Cal.App.4th 436.

In an action by a consumer who leased a car from defendant car dealer, the trial court denied defendant's motion to compel arbitration, finding the providion to be unconscionable and finding the dealer waived it right to arbitrate.

The Fourth District, Division Three, affirmed. The court found substantial evidence supported the trial court's finding that defendant waived the right to arbitrate by (1) delaying its arbitration demand for an unreasonable time period; (2) engaging in litigation on the merits of plaintiff's claims and taking other steps inconsistent with the right to arbitration; and (3) prejudicing plaintiff through the delays and litigation on her claims. The court rejected defendant's argument that it had believed the California Supreme Court's decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 would preclude any attempt to compel arbitration by declaring agreements with class action waivers to be unenforceable, and that defendant promptly moved to compel arbitration after the

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United States Supreme Court overruled *Discover Bank* in *AT&T Mobility v. Concepcion*. The Court of Appeal concluded *Discover Bank* had not categorically barred enforcement of agreements containing class action waivers, especially where the plaintiff was pursuing an individual claim, and the value of that claim was not "so small that individuals would . . . be [un]willing to spend the time and effort to pursue an individual claim for the amount, particularly when the prospect of an award of statutory attorney fees is also possible."

Counsel's exhortations to jury to "send a message" and other references to issues beyond the scope of the jury's task may be misconduct, but will not require a new trial if **found to be insufficiently prejudicial.**

Garcia v. ConMed Corporation (2012) 204 Cal.App.4th 144.

In a personal injury action against the manufacturer of a device used in a medical procedure, counsel for one of the defendants referred in closing argument to "consequences" from the results of the verdict, accused plaintiff of suing defendant because of "deep pockets," and suggested jurors should "send a message" with their verdict that would encourage plaintiff's family to help plaintiff. The jury found for the defendant, but found in favor of plaintiff on his claim against another defendant (a doctor). Plaintiff appealed, asserting prejudicial misconduct by counsel.

The Sixth District affirmed the judgment, finding counsel's offending arguments were fleeting (15 lines in a closing argument that spanned 40 transcript pages); the defense verdict was supported by a "logical path" from the evidence, and the trial court specifically instructed the jury that the statements of counsel were not evidence, instructed the jury that the remarks were improper, admonished the jury to ignore the remarks, and instructed the jury to make its decision only on the evidence and the law.

CCP section 998 offers may be made jointly to spouses in a personal injury action.

Farag v. ArvinMeritor, Inc. (2012) 205 Cal.App.4th 372.

In this action arising out alleged asbestos exposure, the defendant made a pretrial offer jointly to the plaintiffs, offering to settle for $.01 in return for a dismissal with prejudice and mutual waiver of costs. The offer did not specific that it was capable of being accepted by either plaintiff without the consent of the other. The jury found for the defendant, which submitted a memorandum of costs for some $13,000 based on the rejected section 998 offer.

The Second District, Division Three, held the trial court properly rejcted plaintiffs' motion to tax the defendant's cost memorandum. Addressing conflicting lines of authority on this issue, the court held the plaintiffs' causes of action for personal injury and for loss of consortium arose during the marriage and constituted community property. Therefore, the section 998 offer, made to the plaintiffs jointly, was valid.

CCP section 998 offer is invalid if it lacks the statutorily required "provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted."

Perez v. Torres (2012) 206 Cal.App.4th 418.

In this personal injury action arising out of a car crash, the jury returned a verdict in plaintiff's favor. The defendant filed a memorandum of costs claiming that he had made a valid offer pursuant to Code of Civil Procedure section 998 for more than plaintiff recovered at trial. The trial court found the offer was invalid and granted plaintiff's motion to tax all of the costs sought by defendant.

The Fifth District affirmed. The court followed an earlier decision *(Puerta v. Torres)* finding that, where a section 998 offer made to a pro per plaintiff did not strictly comply with the statutory requirement that it allow the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted," the offer was invalid to trigger cost shifting. The court rejected the defendant's argument that the rule should not apply where the party to whom the offer was made is represented counsel. The court further rejected the defendant's argument that no cost shifting should occur where the party to whom the offer was made offers no evidence that the offer would have been accepted if the statutory provision had been included.

A prevailing defendant may recover costs under CCP section 998 even in an action in which statutory fees are recoverable only by the plaintiff, and not the defendant.

Bates v. Presbyterian Intercommunity Hospital, Inc. (2012) 204 Cal.App.4th 210.

In an action under the Elder Abuse and Dependent Adult Civil Protection Act, plaintiff rejected a settlement offer under Code of Civil Procedure section 998, but then voluntarily dismissed her law suit. Defendant submitted a cost memorandum that included almost $65,000 in expert witness fees. The trial court denied plaintiff's motion to tax costs.

The Second District, Division Four, affirmed. The court noted, "Some courts have ... concluded that where all of a plaintiff's claims are closely related to claims falling under a statutory scheme with a one-way attorney fee provision, a successful defendant may not recover fees even where another relevant statutory or contractual provision would arguably permit the court to award them." However, where a one-way attorney fee provision does not mention prevailing defendants and does not expressly disallow costs to them, such a statute precludes only an award of attorney fees to prevailing defendants. Costs awardable under sections 1032 and 998 cannot be precluded by implication from such a statute.

In addition, the trial court did not abuse its discretion in finding the settlement offer was reasonable. The plaintiff's voluntary dismissal of her claim "resulted in zero liability for respondent and established the prima facie reasonableness of the section 998 offer. The burden was on appellant to establish unreasonableness or lack of good faith. Appellant failed to meet her burden. Preliminarily, we note that in

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contesting the reasonableness of the offer, appellant focused on the evidence she had gathered to support her claims as of the February 2011 date on which she voluntarily dismissed respondent. Appellant presented no evidence concerning the parties' understanding of the relative strengths and weaknesses of the claims as of February 2010, the date respondent served the offer." The offer was not a mere "token" because it included a waiver of costs. "[C]osts were expected to be substantial due to the necessity of retaining multiple medical experts. Moreover, respondent offered not only to waive costs but to forego any future litigation over the propriety of the claim. Thus, the offer had substantial value when weighed against appellant's prospects of success."

Finally, the court reaffirmed the rule that section 998 costs may be awarded based on the services of an expert even where that expert did not testify, so long as the expert was qualified and aided in the preparation of the defense case.

Under Civil Code section 1717, only one party may be deemed the prevailing party entitled to attorney fees on a given contract.

Frog Creek Partners, LLC v. Vance Brown, Inc. (2012) 206 Cal.App.4th 515.

Two parties entered into a contract with an arbitration clause and a separate attorney fee provision. A dispute arose, a lawsuit was filed, and the defendant petitioned to compel arbitration. The trial court found that, under Civil Code section 1717, the plaintiff could collect a fee award for defeating the first motion to compel arbitration, while the defendant could collect a fee award for prevailing on the second motion to compel and on the substantive contractual dispute.

First District, Division Five, reversed, holding, "under Civil Code section 1717, there may only be one prevailing party entitled to attorney fees on a given contract in a given lawsuit." The court examined the legislative history at length, and concluded, "the legislative history suggests that the Legislature intended to provide guidance to the courts on the determination of the identity of the prevailing party where there are multiple contract claims or contract and noncontract claims. Section 1717 as amended in 1987, makes it clear that the party who obtains greater relief on the contract action is the prevailing party entitled to attorney fees under section 1717, regardless of whether another party also obtained lesser relief on the contract or greater relief on noncontractual claims." On the other hand, "Where multiple, independent contracts are involved in one lawsuit, and each contract provides an independent entitlement to fees, it is necessary to determine the prevailing party under each contract."

Prejudgment interest under Civil Code section 3287 may run while a judgment or award is temporarily in abeyance during the pendency of an appeal.

Tenzera, Inc. v. Osterman (2012) 205 Cal.App.4th 16.

In a prior opinion (Tenzera I), the court reversed a trial court order vacating an arbitration award in plaintiffs. After the award was reinstated by virtue of the appellate opinion, the trial court found that interest on the award had not accured while the matter was on appeal.

The Second District, Division Three reversed. Finding that plaintiffs were entitled to interest under Civil Code Sec. 3287, the court rejected the defendant's contention that no prejudgment interest may be awarded during the period after the trial court vacated the arbitration award because during that period the arbitration award was "void," and not a fixed liability. "Throughout the appeal in Tenzera I, damages were certain and there was no dispute between the parties concerning the basis of computing those damages. ... Rather than void, we view the vacated arbitration award as procedurally analogous to a judgment notwithstanding the verdict (JNOV). (Code Civ. Proc., § 629.) The vacatur order rendered the arbitration award unenforceable, but liability had been determined, review was limited, and on remand the trial court was directed to confirm the arbitration award."

See also *Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140 [Second Dist., Div. Three: in class action, where amounts awarded to individual class members were certain or capable of being made certain by calculation on the date of each payment, prejudgment interest pursuant to Civil Code section 3287 began to accrue on each payment date rather than from the earlier date of the parties' stipulation regarding calculation of the payments].

A trial court may not reduce a contractual fee award based on equitable consideration of the **losing party's financial status.**

Walker v. Ticor Title Company of California (2012) 204 Cal.App.4th 363.

Plaintiffs sued defendant title company on allegations they participated in a conspiracy to fraudulently induce plaintiffs to take out real estate refinancing loans. With respect to the claims involved in this appeal against the title company, the trial court granted summary adjudication on a claim of aiding and abetting the fraud, and the case proceeded to trial on claims of breach of contract and fiduciary duty. The defendant company substantially prevailed on all claims. The trial court awarded contractual attorney fees, but took into account plaintiffs' financial circumstances when setting its contractual attorney fees award.

The First District, Division One, reversed. " If Ticor's entitlement to attorney fees were judged solely by the standards applicable to an award of damages under a contract, we would have little difficulty rejecting the consideration of such equitable matters as its financial impact. Contract damages are the classic legal remedy, consistently distinguished from equitable remedies.... The unconventional nature of contractual attorney fees, however, makes such a straightforward resolution difficult.... [C]ontractual attorney fees awards are judged not as damages but by the rules applicable to statutory attorney fees, including the consideration of equitable factors. While recognizing this general principle, we conclude it is inappropriate to consider the losing party's financial status as an equitable factor in assessing contractual attorney fees."

Evidence

Disclosing privileged materials in response to a government request waives the privilege.

In re Pacific Pictures Corporation (9th Cir. 2012) 679 F.3d 1121

While a civil action was pending, one party voluntarily disclosed otherwise privileged documents in response to a subpoena by the United States Government. The trial court found this act waived the attorney client privilege.

The 9th Circuit denied the party's petition for mandamus. noted that, generally, "the attorney-client privilege will protect communications between clients and their attorneys from compelled disclosure in a court of law" because, even though "this in some way impedes the truth-finding process, we have long recognized that 'the advocate and counselor [needs] to know all that relates to the client's reasons for seeking representation' if he is to provide effective legal advice." However, "this rule 'contravene[s] the fundamental principle that the public has a right to every man's evidence,'" so the rule is construed narrowly to serve its purposes, and courts recognize several ways by which parties may waive the privilege. "Most pertinent here is that voluntarily disclosing privileged documents to third parties will generally destroy the privilege." The court concluded that, even though public policy favors cooperation with the government, the party's disclosure of information to the government effected a complete waiver of the privilege, rather than merely a "selective" waiver as to the government. This was true notwithstanding a confidentiality agreement with the government. It was also true notwithstanding that the government's request was in the form of a subpoena, because the party solicited the subpoena and did not assert a privilege when it could have done so.

Labor and Employment Law

Party who prevails on claim for denial of required rest breaks is not entitled to statutory fees under overtime law.

Kirby v. Immoos Fire Protection, Inc. (2012) 53 Cal.4th 1244.

Plaintiffs sued defendants for violating various labor laws as well as the unfair competition law (UCL). Once claim alleged the failure to provide rest breaks as required by Labor Code section 226.7. The remedy for such a violation is "one additional hour of pay ... for each work day that the ... rest period is not provided." Plaintiffs ultimately dismissed this claim with prejudice, and one defendant subsequently moved for attorney's fees under section 218.5, which requires the awarding of attorney fees to the prevailing party "[i]n any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions." This provision awards fees to the prevailing party whether it is the employee or the employer; it is a two-way fee-shifting provision. However, Labor Code section 218.5 "does not apply to any action for which attorney's fees are recoverable under [Labor Code] Section 1194." (Lab. Code, § 218.5.) Labor Code section 1194 provides that *employees* who prevail in an action for any unpaid "legal minimum wage or ... legal overtime compensation" are entitled to recover attorney fees. The trial court awarded fees, and the Court of Appeal affirmed.

The Supreme Court reversed, holding that neither section 1194 nor section 218.5 authorizes an award of attorney fees to a party that prevails on a section 226.7 claim. First, section 1194 permits fees to be recovered by a plaintiff who prevails on claims for *unpaid minimum wages and overtime compensation,* but claims for missed meal and rest breaks are not fundamentally claims for minimum wages or overtime compensation, even if the remedy for the missed breaks is measured in terms of wages. Second, section 218.5 authorizes any party who prevails in an action for *non-payment of wages* to recover fees, but again, claims for missed meal and rest breaks are *not* claims for the nonpayment of wages.

This ruling may support an argument by defendants that (1) section 226.7 does not authorize a private right of action for missed meal and rest breaks and (2) plaintiffs could not pursue such actions under Labor Code sections 218 and 1194, which afford private rights of action to recover wages, because section 226.7 payments are not based on non-payment of wages. While in *Murphy v. Kenneth Cole* (2007) 40 Cal.4th 1094 the Supreme Court held that section 226.7 payments are premium wages rather than penalties, under *Kirby's* reasoning, a lawsuit under section 226.7 based on missed breaks is not a claim for the nonpayment of wages, minimum wages, or overtime compensation. ["[A] section 226.7 claim is not an action brought for nonpayment of wages; it is an action brought for non-provision of meal or rest breaks. [¶] ... *To say a section 226.7 remedy is a wage . . . is not to say that the legal violation triggering the remedy is a nonpayment of wages.* As explained above, the legal violation is nonprovision of meal or rest breaks ..."]. Notably, section 226.7 itself does not provide a private right of action and, while sections 218 and 1194 afford a private right of action for nonpayment of wages or for the recovery of unpaid minimum wages and overtime, they do not provide rights of action to recover section 226.7 payments for missed breaks, even if those payments take the form of premium wages.

Prevailing defendant may recover expert witness costs in FEHA case only if plaintiff's action was frivolous.

Baker v. Mulholland Security and Patrol, Inc. (2012) 204 Cal.App.4th 786.

Plaintiff brought employment related claims for retaliation, failure to pay overtime compensation, and failure to maintain records, claiming he was terminated after just 13 days of employment when he complained about discriminatory remarks made at his workplace. The trial court granted summary adjudication as to the retaliation claim, The trial court concluded plaintiff was terminated for poor performance and failed to demonstrate there were triable issues whether defendant's justification for its termination decision was pretextual. The remainder of the claims were dismissed after the parties reached a settlement. The trial court also awarded expert witness fees to the defendant under the rule that FEHA permits recovery of expert witness fees, within a court's discretion. (Gov. Code, § 12965, subd. (b).)

The Second District affirmed the summary adjudication ruling but held the trial court applied an erroneous legal standard in awarding expert witness fees. The court held that, just as with awards for attorney fees, expert fees which could not be awarded where plaintiff make a prima facie showing of retaliation. The court noted a split about whether this standard applies to an award of ordinary litigation costs to a prevailing FEHA defendant.

Statutory fees awarded to "employee" must be made to employee's attorney absent fee agreement to the contrary.

Henry M. Lee Law Corporation v. Superior Court (Chang) (2012) 204 Cal.App.4th 1375.

An attorney represented a client in employment litigation and obtained for his client a $62,246.74 judgment after a jury trial, as well as an award of $300,000 in attorney fees under Labor Code sections 1194, subdivision (a) and 226, subdivision (e). The plaintiff later substituted herself in propria persona for her former attorney, who moved to intervene in and to amend the postjudgment order awarding attorney fees to make the fee award payable to the attorney. The trial court denied the motion.

The Second District, Division Three, reversed: "We hold that an attorney fee award under Labor Code sections 1194, subdivision (a) and 226, subdivision (e) should be made payable to the attorney who provided the legal services rather than the client, unless their fee agreement otherwise provides." While the statutes authorize a fee award to an "employee," the court found that term is ambiguous in the context of wage and hour statutes providing for a fee award to an employee who is entitled to damages or a penalty under the statutes." Applying public policy to resolve the ambiguity, the court concluded that the attorney fee provisions are designed to help parties vindicate the right to payment of earned wages, and that "requiring the payment of a statutory attorney fee award to the litigant rather than to the attorney, absent a contract providing for a different disposition of an attorney fee award, would diminish the certainty that attorneys who undertake such litigation will be fully compensated, contrary to the legislative intent of encouraging counsel to prosecute such litigation."

PAGA does not create a private right of action to enforce an Industrial Welfare Commission wage order. Penalties awarded under PAGA to enforce Labor Code meal and rest period requirements may be reduced based on mitigating evidence of defendant's conduct.

Thurman v. Bayshore Transit Management, Inc. (2012) 203 Cal.App.4th 1112.

In an action by a bus driver alleging that defendant employers had violated provisions of the Labor Code that require employers to provide meal and rest periods for their employees, a bench trial was held and the trial court entered a judgment imposing civil penalties, including unpaid wages, in the amount of over $350,000 under the Private Attorneys General Act of 2004. Both sides appealed, with the plaintiff contending the trial court erred both in rejecting his claim that he may recover PAGA penalties under Wage Order No. 9 in addition to penalties available under Labor Code section 558, and erred in reducing the penalty under section 2699, subdivision (e) based on evidence of the defendants' conduct in that they "took their obligations under Wage Order No. 9 seriously and attempted to comply with the law.

The Fourth District, Division One, affirmed on these issues. The court first approved the trial court's reasoning that that section 2699, subdivision (a) of the PAGA allows the recovery of civil penalties only for violations of "this code," meaning the California Labor Code, and that allowing plaintiff to recover PAGA penalties under both section 558 and Wage Order No. 9 would "allow an impermissible double recovery for the same act." The court further held that the trial court properly exercised its discretion to reduce the maximum PAGA civil penalty under Labor Code Sec. 2699(e)(2) by 30 percent where the trial court believed that "[t]o do otherwise under the particular facts and circumstances of this case would be unjust, arbitrary, oppressive and confiscatory." Trial courts may properly take into account defendants' efforts to comply with their Labor Code obligations as well as their ability to pay.

Products and Premises Liability

Defendant owed no duty of care to plaintiff in action based on alleged "take-home" exposure to asbestos on plaintiff's husband's clothing.

Campbell v. Ford Motor Company (2012) 206 Cal.App.4th 15.

The plaintiff alleged that she contracted mesothelioma as a result of washing her husband's and brother's work clothes, which collected asbestos fibers while the husband and brother worked at the defendant's business premises. The plaintiff herself did not work at the plant, but alleged "direct and indirect contact with her father and brother as well as their clothing and other belongings." The trial court allowed this theory of liability to go to the jury, which returned a verdict fiding defendant five percent at fault for plaintiff's injury.

The Second District, Division Seven, reversed. noting that even if the plaintiff's alleged take home exposure were foreseeable, the public policy considerations showed defendant had no duty to prevent such exposures: "strong public policy considerations counsel against imposing a duty of care on property owners for such secondary exposure." The factors in analyzing the legal question of duty weighed heavily against finding a duty because, in contrast to the risk of injury to those on the defendant's premises, the risk of injury to the family members of those individuals was remote. "[T]he 'closeness of the connection' between [the property owner]'s conduct in having the work performed and the injury suffered by a worker's family member off of the premises is far more attenuated." In addition, the court considered "the extent of the burden to the defendant and the consequences to the community." Recognizing a duty to prevent the secondary exposure of family members would "'saddle[ ] the defendant ... with a burden of uncertain but potentially very large scope.'" Indeed, the duty would be almost limitless: "the claim is that the laundering of the worker's clothing is the primary source of asbestos exposure, the class of secondarily exposed potential plaintiffs is far greater, including fellow commuters, those performing laundry services and more." Such a duty would also entail the high "cost of insuring against liability of unknown but potentially massive dimension" – a cost that would be passed on to the consumer.

Tort Liability and Damages

School district may be vicariously liable for negligent hiring and supervision of counselor who molests student.

C. A. v. William S. Hart Union High School District (2012) 53 Cal.4th 861.

A minor sued his public high school guidance counselor and the school district for damages arising out of sexual harassment and abuse by the counselor. The trial court sustained the school district's demurrer, and a divided Court of Appeal affirmed. The majority rejected the viability of a vicarious liability theory under Government Code section 815.2, on the ground that the alleged sexual misconduct of the guidance counselor cannot be considered within the scope of her employment. The majority further held no theory of direct liability for negligent hiring, supervision or retention could lie because plaintiff had adduced no statutory authority for it: "'[A] direct claim against a governmental entity asserting negligent hiring and supervision, when not grounded in the breach of a statutorily imposed duty owed by the entity to the injured party, may not be maintained.'"

The California Supreme Court reversed. Although the district could not be vicariously liable for the acts of the counselor, which were outside the scope of her employment, a plaintiff may seek to hold a school district vicariously liable for the negligence of supervisory or administrative personnel who hired, retained, and inadequately supervised the counselor, despite their alleged knowledge or notice of her propensities. The court noted that "a school district and its employees have a special relationship with the district's pupils, a relationship arising from the mandatory character of school attendance and the comprehensive control over students exercised by school personnel, 'analogous in many ways to the relationship between parents and their children.' ... Because of this special relationship, imposing obligations beyond what each person generally owes others under Civil Code section 1714, the duty of care owed by school personnel includes the duty to use reasonable measures to protect students from foreseeable injury at the hands of third parties acting negligently or intentionally."

Compare *Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521 [First Dist., Div. Four: where a woman involuntarily committed to a county mental institution was assaulted by a fellow patient and sued the institution and several of its employees for negligence, trial court properly granted summary judgment based on immunity under a statute providing that a public entity is not liable for injuries caused by, or suffered by, a patient of a mental institution (Gov. Code, § 854.8, subd. (a)); the patient who assaulted plaintiff gained access to the victim's room due to an improperly functioning door lock, but there was no evidence that any employee of defendant knew of any problem with the latching mechanism, and no statute or regulation required that the door be locked].

Fault may not be allocated to a non-party treating physician absent proof of all elements of a medical malpractice claim.

Chakalis v. Elevator Solutions, Inc. (2012) 205 Cal.App.4th 1557.

Plaintiff was injured when an elevator malfunctioned and fell six floors. Plaintiff sued the elevator maintenance company, the homeowners association that controlled the building where the elevator was located, the property manager, and the property manager's agent. A jury absolved the elevator maintenance company and found the homeowners association 25 percent at fault, the property manager and its agent 15 percent at fault, plaintiff 8 percent at fault, and a non-party physician 52 percent at fault. On appeal, plaintiff challenged the apportionment of fault to the non-party physician.

The Second District, Division Three, reversed the judgment for a new trial, holding that "[i]n order to prevail on a defense of comparative negligence by a non-party physician ... the defendant [must] prove[ ] all of the elements of medical malpractice." In addition, the court concluded that "a jury cannot find a non-party medical doctor comparatively at fault for the plaintiff's injuries unless the jury is instructed on the requirements of a medical malpractice claim." Because the defendants failed to prove all elements of the malpractice claim against the non-party treating physician, the trial court erred by denying the plaintiff's motion for new trial.

Plaintiff asserting insurance bad faith claim based on duty to settle must establish insurer owed a duty to indemnify.

DeWitt v. Monterey Insurance Company (2012) 204 Cal.App.4th 233.

In an action for bad faith against a liability insurer, arising out of an adverse judgment against the plaintiff in an underlying third party action for injuries sustained in an auto accident, the trial court refused to instruct the jury regarding bad faith for breach of the implied duty on the part of an insurer to accept reasonable settlement demands on within policy limits. The jury returned a defense verdict, and plaintiff unsuccessfully moved for a new trial.

The Fourth District, Division One, affirmed the defense judgment based on the rule that an insurer has a duty to accept a reasonable settlement offer only with respect to a *covered* claim. The trial court did not err in denying plaintiff's request to instruct the jury pursuant to the standard jury instruction that sets forth the elements of a bad faith claim based on a refusal to settle (CACI No. 2334), because plaintiff "neither established as a matter of law, nor requested that the jury in this case determine, that defendants [respondents] owed [plaintiff/appellant] a duty of indemnity with respect to claims brought against him in a prior action." Moreover, while an insurer who undertakes to defend its insured without a reservation of its rights to challenge coverage may waive coverage defenses and thus owe a duty with respect to reasonably settling within policy limits, the defendant insurers in this case never "effectively undertook" the insured's defense in the underlying action; rather, they did no more than file a motion to set aside the underlying default judgment against the insured to *protect the insurers' interests,* and concurrently filed a proposed complaint-in-intervention that expressly reserved their rights to contest coverage.

Insurers have an affirmative duty to make, not just to accept, a reasonable settlement offer within policy limits when the insured's liability is reasonably clear.
Du v. Allstate Insurance Co. (9th Cir. 2012) 681 F.3d 1118.

Plaintiff was injured in an accident caused by defendant's insured. After the insurer attempted unsuccessfully to get medical documentation from plaintiff, his lawyer made a global settlement demand on his behalf and on behalf of three other accident victims, documenting plaintiff's medical costs at $108,742.92. The insurer then tendered the $100,000 policy limits for plaintiffs' claim, which plaintiff rejected the offer as "too little too late." Plaintiff then filed suit against the insured and obtained a verdict in excess of $4 million, and the insured in turn assigned his bad faith claim to plaintiff in exchange for a covenant not to execute. During trial on the bad faith claim, the district court instructed the jury that breach of the covenant of good faith and fair dealing could be found only if the insurer had failed to accept a reasonable settlement demand, and not for failing affirmatively to effectuate a settlement in the absence of a settlement demand from the third-party claimant. The jury found in favor of the insurer, and plaintiff appealed.

The Ninth Circuit Court of Appeals reversed, holding that "under California law, an insurer has a duty to effectuate settlement where liability is reasonably clear, *even in the absence of a settlement demand."* (Emphasis added.) The Ninth Circuit also held the "genuine dispute" doctrine is not available as a defense to a bad faith claim in the third-party context. Rather, the doctrine is limited to coverage disputes "in first-party insurance cases, where the court must determine whether the insurer's refusal to pay policy benefits was unreasonable or without cause." While the Ninth Circuit cited cases holding that an insurer may not rely on a dispute over coverage to refuse a reasonable settlement offer within policy limits, whether these cases were pertinent in the absence of any settlement offer may be questionable, because the dispute concerned the requirements of California law, and California cases have allowed a "genuine dispute" defense when the insurer's obligations were unclear because of "uncertainties in controlling case law." *(Dalrymple v. United Services Auto. Assn.* (1995) 40 Cal.App.4th 497, 523.)

CASES PENDING BEFORE THE CALIFORNIA SUPREME COURT

Addressing finality of trial court judgments for purposes of appealability.
Kurwa v. Kislinger, case no. S201619
(formerly published at 204 Cal.App.4th 21).

In an action involving claims for breach of fiduciary duty, defamation and an accounting, the trial court dismissed the fiduciary duty and accounting claims. The parties then voluntarily dismissed their cross-claims for defamation without prejudice. After judgment was entered for defendant, plaintiff appealed.

The Second District, Division Five, analyzed the appealability of the judgment. The court concluded that the judgment was final even though the some claims were dismissed without prejudice. The court acknowledged a line of appellate opinions holding that a cause of action dismissed without prejudice remains "pending" and thus prevents a judgment from becoming final while the dismissed causes of action exist "in a kind of appellate netherworld." Such cases hold that orders of the trial court subsumed in an interlocutory judgment are not appealable unless and until the dismissed causes of action are subsequently revived and adjudicated on the merits. The court of appeal here, however, said, "We interpret the term 'pending' more narrowly. In our view, a cause of action is pending when it is filed but not yet adjudicated," and the trial court retains jurisdiction over the adjudication. "While a cause of action which has been dismissed may be pending 'in the appellate netherworld,' it is not pending in the trial court, or in any other court, and thus cannot fairly be described as 'legally alive.'" A final, appealable judgment may therefore be entered.

The California Supreme Court granted review on April 12, 2012, to address the following question: "Was the judgment in this case, which dismissed most of the causes of action with prejudice and the remainder, pursuant to the parties' stipulation, without prejudice and with a waiver of the applicable statute of limitations, an appealable judgment?"

Addressing admissibility of computer generated photographic evidence.
People v. Goldsmith, case no. S201443
(formerly published at 203 Cal.App.4th 1515).

In a criminal case that potentially will affect evidentiary standards applied in civil cases, the California Supreme Court granted review on April 6, 2012, to address the following question: "(1) What testimony, if any, regarding the accuracy and reliability of the automated traffic enforcement system (ATES) is required as a prerequisite to admission of the ATES-generated evidence? (2) Is the ATES evidence hearsay and, if so, do any exceptions apply?

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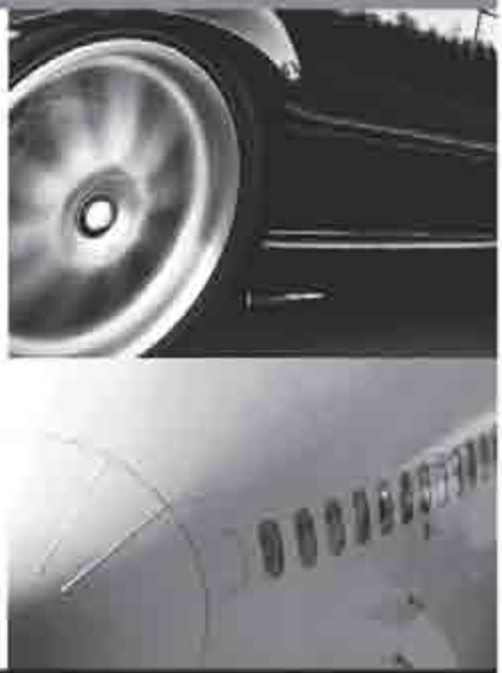

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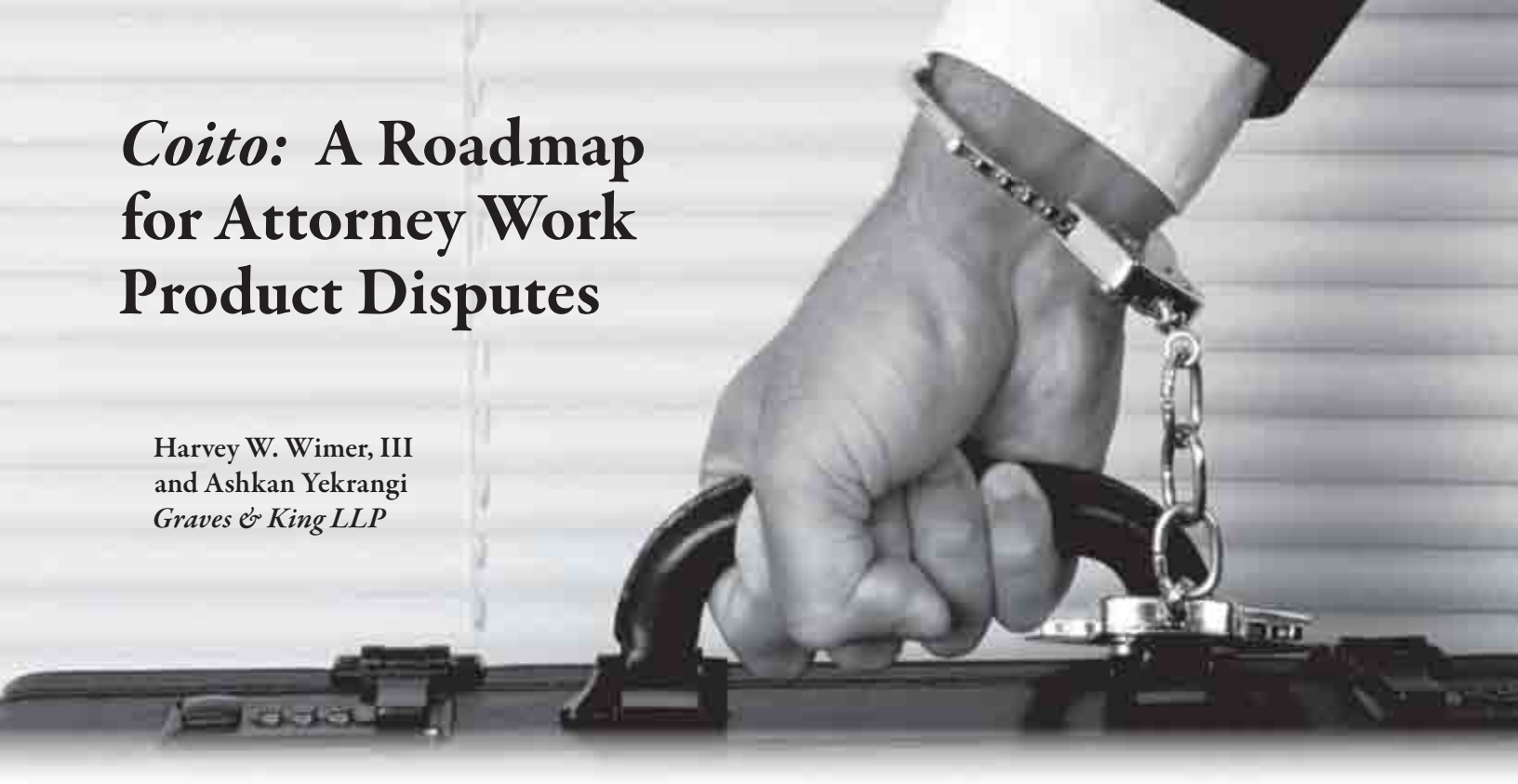

Coito: A Roadmap for Attorney Work Product Disputes

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I. INTRODUCTION

For over fifteen years, California attorneys have relied on *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214 for direction in discovery disputes regarding the names of witnesses who provided statements as well as the statements themselves. In *Nacht,* the Third District Court of Appeal created an easily applied "bright line" rule regarding the disclosure of such witness information. Specifically, the court ruled that a party cannot be compelled to respond to Judicial Council Form Interrogatory No. 12.3 (requesting the identity of witnesses that provided a statement) because the disclosure of such witnesses "would tend to reveal counsel's evaluation of the case by identifying persons who claim knowledge of the incident from whom counsel deemed it important to obtain statements." (*Nacht*, *supra*, 47 Cal. App.4th at 217.) The *Nacht* court, however, recognized an exception to the rule in those rare instances where a witness took it upon himself or herself to prepare a statement, which was later sent to an attorney. (*Id.* at p. 218.)

In its recent decision in *Coito v. Superior Court of Stanislaus County* (2012) __ Cal.4th __ 12 C.D.O.S. 7149, the California Supreme Court has kept much of *Nacht* intact, but created well-reasoned qualifications to *Nacht's* "bright line" which will need to be addressed by practitioners.

In this article, we discuss an overview of *Coito*, how the decision altered the *Nacht* rule as well as how the decision will impact future discovery disputes concerning witnesses and their recorded statements.

It should be noted that the ASCDC submitted an amicus curiae brief authored by Paul Salvaty of Glaser Weil and Michael Reynolds of O'Melveny & Myers. The Supreme Court's decision ultimately incorporated many of the positions asserted by the ASCDC.

II. BACKGROUND

Coito arises from a wrongful death action wherein a 13-year-old boy drowned in the Tuolumne River. Six individuals witnessed the drowning and there were allegations that the decedent was engaged in criminal activity immediately before his drowning. Defense counsel for the defendant State of California sent two investigators to interview four of the six witnesses, providing the investigators with pre-prepared questions. Each interview was audio recorded.

In discovery, the plaintiff served the State with Form Interrogatory 12.3, which sought the names, addresses, and telephone numbers of individuals from whom written or recorded statements were obtained. The plaintiff also sought production of the audio recordings of those statements. The State objected based on the work product privilege. In response, the plaintiff moved to compel an answer to Form Interrogatory No. 12.3 and for the production of the audio recordings. The trial court denied the plaintiff's motion, relying on *Nacht*. The plaintiff then petitioned for a writ of mandate, which the Fifth District Court of Appeal granted. The Fifth District declined to follow *Nacht* and ordered the State to provide the discovery responses. The Supreme Court of California then granted review.

III. THE SUPREME COURT'S RULING

The Court began by noting that Code of Civil Procedure section 2018.030 does not define or describe "work product," and that courts have generally decided whether certain materials constitute work product on a case-by-case basis. The Court went on to chronicle 65 years of policies and cases

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affecting the scope of the work product rule. Recognizing the importance of an attorney work product privilege, Justice Liu, writing for a unanimous court, relied heavily on the United State Supreme Court's opinion in *Hickman v. Taylor* (1947) 329 U.S. 495, stating that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." (*Hickman*, *supra*, 329 U.S. at 510.) Justice Liu added that, "[w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." (*Coito*, slip opinion p. 7.) The Court also stated that in enacting C.C.P. section 2018.020, the Legislature intended "to encourage attorneys to prepare their own cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases." (*Coito*, slip opinion p. 12.) Justice Liu expressed the concern that "[i]f attorneys must worry about discovery whenever they take a statement from a witness, it is reasonably foreseeable that fewer witness statements will be recorded and that adverse information will not be memorialized." (*Coito*, slip opinion, p. 16) Against this backdrop, the Supreme Court addressed the issues presented.

A. Production of Recorded Witness Statements

The Court held that statements obtained as a result of an interview conducted by an attorney, or by an attorney's agent, are subject to the privilege protecting work product. (*Coito*, slip opinion p. 12.) The Court noted, however, that the privilege analysis is actually two-fold: that is, the privilege may either be absolute or qualified, depending on how the statements were obtained and the contents of the statement. On this topic, the *Coito* decision differs significantly from the *Nacht* decision in that *Nacht* held that an absolute privilege *always* applied unless the statement was independently prepared by the witness.

The Supreme Court held that in order for the absolute work product privilege to apply, the recorded witness statement must reveal the impressions, conclusions or legal research, and/or theories of the attorney. Examples include "when a witness's statements are 'inextricably interwined' with explicit comments or notes by the attorney stating his or her impressions of the witness." (*Coito*, slip opinion p. 14.) It can also occur in lines of questioning, as they can be "especially revealing." (*Id.*) The Court noted, however, that sometimes "redaction of the attorney's question may sometimes be appropriate and sufficient to protect privileged material." (*Id.*) Because of the various ways in which witness statements can be collected, the Court found that the applicability of the absolute protection must be determined on a case-by-case basis.

The Court further held that all other witness statements fall under the qualified privilege: "We hold that a witness statement obtained through an attorney-directed interview is, as a matter of law, entitled to at least qualified work product protection." (*Coito*, slip opinion p. 16.) In reaching this conclusion, the Court recognized the efforts an attorney undergoes in obtaining witness statements. For example, "[e]ven when an attorney exercises no selectivity in determining which witnesses to interview ... the attorney has expended time and effort in identifying and locating each witness." (*Coito*, slip opinion p. 15.)

Finally, the Supreme Court held that in those instances where a witness statement is protected by a qualified privilege, the burden shifts to the party seeking to obtain the statement to "establish adequate reasons to justify production such as unavailability or inaccessibility of the witness." (*Coito*, slip opinion p. 17.)

B. Form Interrogatory 12.3 – Identity of Witnesses Providing Statements

Form Interrogatory Number 12.3 asks "Have YOU OR ANYONE ACTING ON YOUR BEHALF obtained a written or recorded statement from any individual concerning the INCIDENT?" The interrogatory goes on to ask for the names and addresses of the witnesses.

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On this topic, the court made a serious departure from *Nacht*. In *Nacht*, it was held that a list of witnesses that provided statements were automatically covered by a qualified privilege. In *Coito*, the Supreme Court rejected that rationale and stated: "information responsive to form interrogatory No. 12.3 is not automatically entitled as a matter of law to work product privilege. Instead, the interrogatory usually must be answered." (*Coito*, slip opinion p. 24.)The Court stated, however, that an objecting party may be entitled to protection if that party can establish that answering the interrogatory would reveal the attorney's tactics and strategies, or his or her impressions about the case, or would result in opposing counsel taking undue advantage of the attorney's industry or efforts. (*Id.*) This may be the case where an attorney selected only a few of a large pool of potential witnesses to interview and obtain statements. If the attorney can establish that there were tactical reasons involved in the selection of those interviewed, the list may be protected by an absolute immunity because the disclosure of the identities of those interviewed would tend to reflect the attorney's thought processes and strategies.

If, on the other hand, the witnesses were interviewed merely because they were witnesses, the argument would likely fail. "Where it appears that an attorney has sought to take recorded statements from all or almost all of the known witnesses to the incident, compelling a response to Form Interrogatory No. 12.3 is unlikely to violate the work product doctrine." (*Coito*, slip opinion p. 23.)

C. Is *Nacht* still good law?

The short answer is that *Nacht* is still good law and that *Coito* kept intact most of what *Nacht* stood for. However, the Court expressly rejected *Nacht's* bright-line rule that "recorded statements taken by defendants' counsel would be protected by the absolute work product privilege because they would reveal counsel's 'impressions, conclusions, opinions, or legal research or theories'...." (*Coito*, slip opinion p. 20) (internal citations omitted.) Instead, the Court held that a witness statement obtained through an attorney-directed interview is entitled as a matter of law to at least qualified work product protection.

Significantly, *Coito* did not address under what circumstances a party must respond to Judicial Council Form Interrogatory No. 12.2 regarding the identity of witnesses. Form Interrogatories 12.2 and 12.3 differ only to the extent that 12.3 inquires about *recorded* statements. Each interrogatory requests the identification of all interviewed witnesses. By analogy, however, it seems that *Coito's* reasoning may apply equally to Form Interrogatory 12.2.

IV. APPLYING THE *COITO* DECISION

A. Written or Recorded Witness Statements

In many instances, a litigant may seek to compel the production of witness statements obtained by an opposing party. In some instances, the party in possession of the statement may consider the production of the statements of no significance to the case and the document can be produced without incident. In other situations, and for a myriad of reasons, practitioners may want to assert the work production privilege on behalf of his or her client. In those situations, *Coito* provides some important guidance.

First, a witness statement receives no protection if it was not prepared by an attorney or at an attorney's direction as "there is no dispute that a statement independently prepared by a witness does not become protected work product simply upon transmission to an attorney." (*Coito*, slip opinion, p. 13.)

A witness statement may easily fall within the absolute privilege category where the attorney was actively involved in the selection of the questions asked of the

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witnesses. Under *Coito,* what is most important in determining whether a recorded statement should be afforded an absolute privilege is whether an attorney's questions (or lack of specific questions) "provide[s] a window into the attorney's theory of the case." (*Coito*, slip opinion p. 14.) This rationale would hold true regardless of whether the questions were asked by the attorney or by an investigator acting at the direction of the attorney.

A third scenario discussed by *Coito*, which is not uncommon, is one in which an attorney sends an investigator to interview all witnesses listed in a police report and the interviewer asks a few vague questions such as, "what happened?" In such a scenario, it is hard to imagine that any of the attorney's impressions or conclusions would be revealed if disclosed to opposing counsel. As pointed out by the Court, redaction of an attorney's limited questioning may be an easy solution to removing any possible work product, thus allowing the production of the witness statements.

It is important to note that a determination that a statement is subject to a qualified (and not absolute) privilege, does not necessarily mean the statement must be produced in discovery. *Coito* recognized that all witness statements are afforded at least a qualified privilege. In cases where a practitioner's mental impressions and strategy are not ascertainable from the recorded statement, opposing counsel may obtain these statements only if "the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (California Code of Civil Procedure § 2018.030, subd. (b).) Usually, this arises when the witness is unavailable or inaccessible to opposing counsel. If a witness statement is deemed to fall under a qualified privilege, the court must be reminded that "[d]iscovery was hardly intended to enable a learned profession to perform its function either without wits or on wits *borrowed* from the adversary." (*Coito*, slip opinion p. 16, citing *Hickman*) (emphasis added.)

B. Form Interrogatory 12.3 – Identity of Witnesses Providing Statements

Judicial Council Form Interrogatory No. 12.1 requires a party to list all known witnesses of an incident. Form Interrogatory 12.2 requires a party to list those witnesses that have been interviewed. Form Interrogatory No. 12.3 requires a party to divulge those witnesses that have provided recorded statements. Unlike *Nacht*, the *Coito* decision offers no bright-line privilege when it comes to whether a litigant can be compelled to respond to Judicial Council Form Interrogatory No. 12.3. Indeed, *Coito* specifically held that Interrogatory No. 12.3 "usually must be answered." Despite this broad statement, it is interesting to note that the Court in *Coito* recognized that indeed, absolute and qualified work product privileges may very well apply. If arguing that a witness list deserves application of an absolute privilege, it is important to establish that the witnesses chosen to be interviewed reflect the attorney's thought processes regarding the case. Where an attorney chooses to interview a small selection of witnesses from a large pool of potential witnesses, a judge may infer that revealing the identity of the few witnesses will reveal the attorney's thought process and tactics. In other words, there must be a reason that the attorney selected those witnesses, and the reason must be related to the attorney's strategy about the case. Conversely, if a practitioner interviews each and every potential witness known to exist, it is easy to see that the disclosure of the entire list of potential witnesses does not disclose any of the attorney's strategies or thought processes.

Even where a list of witnesses that have provided statements does not reflect an attorney's thought process, the list may still be covered by a qualified privilege. In many instances, a party may expend significant time, money and effort to locate and obtain statements from witnesses. Even in our information age, locating witnesses may be a difficult and time consuming. Under Code of Civil Procedure § 2018.030(b), the opposing party is not entitled to the witness list unless the court "determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or will result in an injustice."

Although there is no bright-line rule concerning whether a party must disclose witnesses' identities, many arguments can be fashioned that disclosure of such information is protected from discovery by the absolute and/or qualified privileges contained within the attorney work product doctrine.

V. CONCLUSION

The *Coito* decision is important in several ways. First, it acknowledges the importance of privacy to the legal profession; proper preparation of a case requires that attorneys investigate both the favorable and unfavorable facts of their case. Fear of having the unfavorable facts discovered may hinder attorneys in their investigation. Second, the *Coito* decision recognizes that attorneys expend vast efforts in identifying witnesses and interviewing them. No attorney should be able to "take undue advantage of their adversary's industry and efforts" without substantial justification. (*Coito*, slip opinion p. 15.) Third, the *Coito* decision is instructive by providing attorneys a roadmap as to how to safeguard potentially discoverable information.

The *Coito* decision is replete with examples of how witness lists or witness interviews can remain privileged. Examples include weaving your mental impressions and strategies into questions asked from witnesses.

The *Coito* decision however, invites more court scrutiny into the discovery process, as many discovery disputes over work product will require a case-by-case determination.

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Social Media, Discrimination, and Privacy Rights in an Employment Context

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and Andrew Brown
Wesierski & Zurek LLP

SOCIAL MEDIA AND EMPLOYERS

Employers are using Facebook, Myspace, and other social media websites to both investigate prospective employees and to monitor the activities and behaviors of current employees. While this irks privacy watch-dogs and employees, California employers face a vast amount of potential liability for the acts of their employees. In California, employers can be held liable for damages caused as a result of their hiring or retaining an employee who is incompetent or unfit. (*Federico v. Superior Court* (*Jenry G.*) (1997) 59 Cal.App.4th 1207; *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal. App.4th 1133.) Thus, California incentivizes employers to screen applicants thoroughly for general safety concerns.

At the same time, many people choose to make their Facebook page available only to close friends or family in efforts to protect personal information. The California Constitution affords individuals the right of privacy, and much of the information available on Facebook is precluded from being used as a basis for employment decisions under California and Federal anti-discrimination laws, discussed below. These competing interests and laws are sure to collide and result in litigation.

The most recent outrage has been caused by news reports of employers asking prospective employees for their Facebook password. Kimberly Hester, a grade school teacher's assistant in Michigan, was recently put on leave for refusing to provide her Facebook password to her supervisors after a parent who she was "friends" with reported seeing an inappropriate picture on her Facebook page. Ms. Hester currently plans to sue the school district for demanding her password. (Mariella Moon, Grade school teacher's aide fired for refusing to hand over Facebook password, *News.yahoo.com*, April 2, 2012.)

As has been widely reported, Facebook's own terms of service prohibit users from turning over their login information and password for security reasons, and Facebook has threatened litigation against employers requesting users' login information. (Barbara Ortutay, Facebook Has Warning for Employers, *Los Angeles Daily Journal,* March 26, 2012, Vol. 125 No. 058, p3.) Additionally, two U.S. Senators recently requested that the U.S. Department of Justice probe employers' requests for Facebook passwords in hiring, signaling that Federal legislation may be in the works. (Manuel Valdes, Senators ask Holder to Probe Request for Passwords in Hiring, *Orange County Register,* March 25, 2012.) While it seems clear that the law will eventually protect a user's login information, this will not really address and resolve the core issue – employers gaining access to private or semi-private information that is posted on Facebook or other social media. This is because employers will most likely pivot and embrace a less intrusive policy, such as asking applicants or employees to "friend" someone in HR (allowing access to the user's social media content) or asking them to login and let the interviewer look around. Such requests will almost certainly have legal implications, but those implications are as of yet unknown.

DISCRIMINATION ASPECTS OF SOCIAL MEDIA IN EMPLOYMENT

Employers face a myriad of restrictions when it comes to hiring employees, and the process is fraught with the potential for subsequent litigation if the law is not obeyed. Under California Government Code § 12940(a), an employer is forbidden from making employment decisions, such as hiring, firing, or determining compensation, based upon "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation."

Further, under California Government Code § 12940(d), prospective employers are prohibited from asking potential employees any non-job-related inquiries that express, "directly or indirectly, any limitation, specification, or discrimination

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as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation." In addition, the mere *perception* that a person has one of the enumerated characteristics, or even the perception that they are *associated* with a person who has or is *perceived* to have the characteristic, can be the basis for liability. (Govt. Code § 12926(n).) While the statue allows job-related inquiries, they must be of a general nature. For example, employers may lawfully ask if applicants can perform job-related functions, but they cannot inquire as to the applicants' general health, mental condition, or physical disability. (California Department of Fair Employment and Housing Fact Sheet: Employment Inquiries, accessed April 4, 2012, at www.dfeh.ca.gov.)

Due to the wealth of information contained in even the most basic Facebook profile, the determination or perception that an applicant has one of the enumerated characteristics, or even that they are associated with someone who does, could easily be made or formed as a result of simply viewing the profile.

Standard Facebook profiles call for the user to provide information that would enable employers to determine a person's race, religion, color, marital status, sex, gender, and sexual orientation, as well as every other specifically enumerated class that is protected from discrimination. As such, the argument can be made that employers who access an applicant's Facebook page are indirectly asking for this information. Even if the specifically protected information is not used in making an employment decision, an employer would have a tough time proving so, especially in light of the fact that only a perception of the characteristic can lead to liability. If the inquiry is not specifically job-related, such as asking if the applicant has a specific handicap, the inquiry is most likely unlawful under California Government Code § 12940(d).

Viewing an applicant's Facebook page is more akin to asking general questions than asking questions that are tailored to job requirements. Simply put, employers are exposing themselves to liability for discrimination by requiring access to, or even reviewing, applicants' Facebook pages because of the content available therein. Employers can best shield themselves from discrimination claims (including unfounded ones) by forgoing any inquiry into applicants' Facebook pages or social media content, even though this means turning a blind eye to a valuable source of information about a job applicant's irresponsible or even unlawful behavior that can have a legitimate (and nondiscriminatory) bearing on anticipate work performance..

PRIVACY ASPECTS OF SOCIAL MEDIA IN EMPLOYMENT

The California Constitution affords individuals the right to privacy, as Article I, § 1 states:

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*.

While this right protects an individual against both private and state actors, it is not absolute. (*Chico Feminist Women's Health Ctr. v. Butte Glenn Med. Soc'y* (ED Cal 1983) 557 F. Supp 1190; *City of Santa Barbara v. Adamson* (1980) 27 C3d 123, 131.) To proceed with an invasion of privacy case, a plaintiff must first establish a legally protected privacy interest, an objectively reasonable expectation of privacy under the circumstances, and a serious invasion of the privacy interest. (*Hill*, supra.) Even if proven, the party invading can still prevail by either negating one of the elements, or by proving "that the invasion is justified because it substantively furthers one or more countervailing interests." (*Sheehan v. San Francisco 49ers, Ltd*. (2009) 45 Cal.4th 992, 998, citing *Hill*, supra, at p. 40.) This scheme for testing an individual's privacy rights is exemplified by California's drug testing laws.

EMPLOYER DRUG TESTING

Employer drug testing is permissible in California, despite the privacy protections afforded individuals by the California Constitution. Specifically, even though the California Constitution expressly provides individuals with the right to pursue and obtain privacy, employers may still require "suspicionless" drug testing of job applicants so long as the drug test is part of a general test required of all applicants. (*Loder v. City of Glendale* (1997) 14 Cal.4th 846.) The *Loder* court explained that the employer's interest supporting the drug testing of applicants and outweighing the privacy rights of applicants was the need to prevent the problems associated with substance abuse, including "absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more frequent turnover." (*Id*. at 882.) As these interests are present for nearly all normal businesses, drug testing prospective employees in this manner and for these reasons is generally acceptable, in spite of California's privacy protections.

Importantly, *Loder* held that current employees may not be tested on this basis, as the employer has the ability to observe the employee, their work product, and their behavior over a long period of time, thus diminishing the employer's need for drug testing. (*Id*.) Sufficient governmental interest to require drug testing of current employees was present concerning employees who were doing drug interdiction work, carrying firearms, or involved in public safety. (*Id*. at 878.) Accordingly, California employers can generally drug test job applicants based upon ordinary business concerns if all applicants are screened, and may test current employees if they are in some sort of sensitive position where the drug testing would truly be related to a business necessity.

The analysis for employees' privacy rights in terms of social media will most likely parallel the legal analysis required for drug testing, giving current employees greater protection than job applicants, and making the essential inquiry a balancing test between the rights of employees and applicants to protect their privacy, weighed against the employer's interest in obtaining the information for valid business purposes.

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BACKGROUND CHECKS

Employers need an applicant's written permission before conducting a background check under California's Investigative Consumer Reporting Agencies Act and under the Federal Fair Credit Reporting Act. (California Civil Code §§ 1786-1786.56; 15 United States Code §§ 1681-1681x.) Employers thus have no "right" to this information, even though much of it is culled from public databases. The privacy laws regarding background checks provide more protection to employees, and they may be used to bolster employees' privacy claims regarding social media content.

SOCIAL MEDIA CONTENT AND INVASION OF PRIVACY

When it comes to social media content, an individual's privacy rights will most likely be determined by the privacy settings of the user's account. This is because, as explained above, an individual cannot successfully litigate an invasion of privacy case in California unless they can show that they had an "objectively reasonable expectation of privacy under the circumstances." (*Hill*, *supra*.)

A California appellate court has already ruled that an individual has absolutely no expectation of privacy in content posted to a public Myspace profile that was available to everyone on the internet. (*Moreno v. Hanford Sentinel, Inc*. (2009) 172 Cal. App.4th 1125 (2009).) As a result, posting anything publicly to social media, or even anywhere on the internet, will defeat a claim of a violation of the right of privacy as to that information or content.

Based upon this, it appears that social media users who make things freely available to the public will not have any privacy interest in that content, and if employers are merely looking at this information it is permissible under privacy laws. Employers in this situation, however, must exercise caution because they can still face liability under discrimination laws, even if the individual has no expectation of privacy in regards to the social media content.

But what about a Facebook or Myspace page that is set to private? If your Facebook or social media account is shielded from public view, the user should have a reasonable expectation of privacy in that content. In order to determine if it is protected under California's privacy laws, the court will weigh the employer's interest in preventing absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, against the employee's privacy interest, as they did in the *Loder* court. As in *Loder*, current employees should expect to have a greater privacy interest.

At a minimum, employees who wish to protect themselves from employer intrusion should make their profile private and should avoiding making this information available to anyone else in the workplace, as this will diminish their privacy interest. Employers wishing to do some type of screening of social media content should access only public information, and should be aware that they may run into liability under discrimination laws for doing so. They will most likely not face liability, however, under privacy laws for accessing an applicant's public content.

NON-DISPARAGEMENT AGREEMENTS AND SOCIAL MEDIA

Many employers are starting to require employees to enter into non-disparagement agreements that prevent those employees from posting disapproving or critical comments about their employer on Facebook or other social media websites. The National Labor Relations Board, however, has determined that many of those disparaging remarks may actually be a "protected concerted activity" under the law, and they assert that terminating an employee for engaging in such behavior is unlawful.

The NLRB relies upon Section 7 and 8 of the National Labor Relations Act to assert this position. Those sections provide employees with the "right to self-organization ... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and make it illegal "for an employer...to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7...." (National Labor Relations Act §§ 7 and 8.) Thus, the NLRB takes the view that employers cannot punish employees for company-disparaging comments on social media if those comments are made for the purposes of mutual aid or protection of other employees. This perspective allows employees to easily argue that they were making such statements for the purposes of organizing other employees or trying to aid them by stopping illegal or oppressive employer conduct. Employers considering utilizing non-disparagements agreements should expressly state in the agreement that it does not restrict the employees' rights under the National Labor Relations Act.

CONCLUSION

Employers face a tremendous amount of potential liability, both for their hiring practices and for the acts of their employees. In efforts to limit their potential exposure, employers will undoubtedly gather information on potential and current employees, including through social media. While the legal consequences of using such information are not entirely clear, employers will face liability under discrimination laws if they use certain information contained on social media in employment decisions. It is also clear that employees will have no expectation of privacy in publicly available content. Beyond that, all interested parties should exercise caution in regards to social media and the workplace, paying special attention to discrimination and privacy laws.

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ASCDC

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"ASCDC New Attorney Mixer"

The ASCDC held two Young Attorney Mixers recently; one on April 12, 2012 in Los Angeles and one on July 19, 2012 in Orange County. The mixers offered young lawyers an opportunity to meet and network with fellow young lawyers, Judges, and members of the ASCDC. Dan Kramer of Gilbert Kelly Crowley & Jennett LLP has worked hard to organize these events and as Chairman of the Young Lawyer Committee, is planning many more mixers and events coming up in the near future.

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COURT REPORTERS

"Bring Your Own Court Reporter" Arrives in Los Angeles

Patricia M. Tazzara and Andrea Hilbert, ***Taylor Blessey LLP***

This summer, the Los Angeles Superior Court system effected new rules for all general civil courts, ending the availability of official Court reporters for all civil trials and significantly limiting the availability of official Court reporters for law and motion matters. The new rules were the subject of a panel discussion presented by the Association of Southern California Defense Counsel at the Jonathan Club in downtown Los Angeles, on June 19, 2012.

Panel members included the Honorable Daniel Buckley, Assistant Supervising Judge of Civil (Division), Stephen C. Pasarow, Esq. of Knapp, Peterson & Clarke, ASCDC Vice President Robert Olson, Esq., and Jeffrey P. Koller, Esq., General Counsel for Hutchings Court Reporters. This article attempts to outline the panel's pointers and suggestions to assist litigants as they transition to the new system and to ensure the continued existence of recorded proceedings. As Judge Buckley so aptly stated, "If it's not on the record, it doesn't exist."

CIVIL TRIALS

Effective May 15, 2012, the Los Angeles Superior Court ceased providing official Court reporters for all civil trials. Parties in civil cases do not have a constitutional right to have a Court reporter. Parties do, however, have statutory rights to notice and to arrange at their own expense for the presence of a certified shorthand reporter that the court may appoint to serve as an official Court reporter pro tempore for their hearing or trial. Such an arranged certified shorthand reporter must be appointed as an official Court reporter pro tempore by the judge presiding. If there is no timely request to arrange for a certified Court reporter, the Court is under no obligation to provide or permit the any transcription of the record of the trial or hearing.

Under the current scheme, the parties have two options. Parties may stipulate to use a privately retained certified shorthand Court reporter, or they may agree to use a reporter from a Court- approved pro tempore official reporters list.

With respect to selection and appointment of a Court reporter for trial, the panel provided the following considerations:

- By utilizing a reporter from the Court approved pro tempore official reporters list, rather than a private Court reporter, a party has the option to present an Order appointing that Court reporter at the time of hearing or trial. In this instance, the proposed Order must include a reporter agreement which has been signed by the certified short hand reporter. Additionally, no Stipulation or prior arrangement with other counsel is necessary.

- If using a private Court reporter (i.e., not on the court approved list), the parties must agree upon the Court reporter, and prepare a Stipulation to that effect on an approved Stipulation form (see Superior Court website for the form). The parties should arrive at this agreement and prepare the necessary Stipulation much sooner in this instance, and certainly prior to the date of any hearing. The signed Stipulation must be presented along with a proposed Order and the reporter's signed agreement at the hearing.

- If the parties cannot agree on a privately retained court reporter, the Court will select a Court reporter from the pre-approved list.

- Each court reporter who is to appear at trial must review and sign an agreement to be submitted to the Court as part of the appointment process. This agreement includes such terms as agreeing to comply with statutes and rules applicable to official court reporters pro tempore, to prepare timely transcripts, to leave reporting notes or an electronic copy with the Court, to follow directions from the court, to be available for reading of notes back to the jury if serving during a jury trial, among others.

- Particularly in the case of a long trial, it was recommended by the panel that more than one reporter be designated in the stipulation, so as to guarantee that coverage is always available and to prevent any delay or interruption in the recording of trial testimony due to unforeseen circumstances. A signed reporter's agreement is required for each reporter so designated.

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"Bring Your Own Court Reporter" – continued from page 33

- Court reporters should be notified well in advance of upcoming appearances, particularly trial dates, to ensure that the reporters selected are available and have the appearance on their schedules.

- The panel acknowledged that there may be parties who "waive" a court reporter at trial, in part because they do not wish to incur the cost of the court reporting fees, and/or as a cost shifting strategy to provoke settlement. In these instances, one party may be left to bear the entire cost of the court reporter's fees for a trial. The panel pointed out, however, that a good argument can be made by the prevailing party that court reporter's fees are recoverable costs. *See*, e.g. California *Code of Civil Procedure* §1033.5(a)(11).

- The panel also anticipated that a party who does not pay for a court reporter during the trial may later need a trial transcript on appeal. The general consensus on the issue was that each party should be required to pay the full cost of an original certified transcription.

- The panel reinforced the significance of protecting the record for appeal, stressing the importance of ensuring that entire trial be recorded, including motions in limine, voir dire, jury instructions, evidentiary rulings, and closing arguments.

LAW AND MOTION, AND OTHER NON-TRIAL PROCEEDINGS

On a limited basis, the court will provide official certified shorthand reporters for law and motion, for two half-day periods per week for each Department. The schedule showing each Department's Court reporter schedule is set forth in a Court Reporter Staff Assignment List (CRSAL) that is posted in the Clerk's office in each Courthouse, and it also appears on the Court's website: *www.lasuperiorcourt.org/courtreporter*.

As a result of this limited schedule, the Courts will not have reporters available five days per week for law and motions, including those which are brought *ex parte*. Therefore, some Departments are scheduling law and motions only on their designated two half days, while others are hearing law and motions five days a week, leaving attorneys the option of bringing in their own Court reporters for days on which Court reporters are not be provided. The latter practice will necessarily result in some law and motion proceedings going forward without Court reporters when not pre-arranged by counsel.

With respect to law and motion issues, the panel made the following observations:

- The limitations for law and motion dates do not affect Case Management Conferences or Order to Show Cause hearings, which will continue to be scheduled five days a week in all Departments.

- The same rules for use of private Court reporters (by stipulation and order) versus those on the official court approved list (requiring order only) apply to law and motions hearings.

- A party may wish to bring a Court reporter to an *ex parte* hearing, if an ex parte is being heard on a day other than the two half days for which Court reporters are available in the department. However, some Judges hear *ex parte* motions in chambers, thereby negating the need for a Court reporter.

- The decision to bring a Court reporter to a law and motion's hearing will involve strategy on the part of each attorney as to whether a record of a particular hearing will be useful or necessary.

- In those Departments in which law and motion hearings are held without official Court reporters, there may be more reliance upon minute orders. However, the parties should not expect that those orders will be prepared with anymore detail or that the clerk's entries will necessarily be reviewed by the Judges. It is likely that there will be more tentative rulings issues by Departments, though not necessarily on the day before the hearings.

- If the parties execute a Stipulation for a private Court reporter early in the case and get the Court's Order signed, that reporter can be scheduled for all hearings as well as the trial.

- The panel explained that there is presently no mechanism for facilitating the coordination of unrelated parties set to appear on a particular day of law and motion, in terms of court reporter appearances. According to the panel, it is unlikely that such a mechanism will become available through the Court, given the limited availability of administrative staff due to budget cuts. As a result, there will inevitably be delays and interruption during law and motion sessions, while multiple court reporters take down/set up their equipment in between cases.

- The new Court reporter rules apply to all the Los Angeles County courts, including Long Beach, Pomona, Glendale, Pasadena, Van Nuys, Burbank, Chatsworth, and Complex.

- As of June 25, 2012, Court reporters will also no longer be made available in Ventura County. See: *www.ventura.courts.ca.gov/court-reporting*.

A podcast of the June 19 seminar is available for download from the ASCDC website: *www.ascdc.org*.

defense verdicts

april – july

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Beatty & Myers, LLP

Alice Chen-Smith
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Patricia Egan Daehnke
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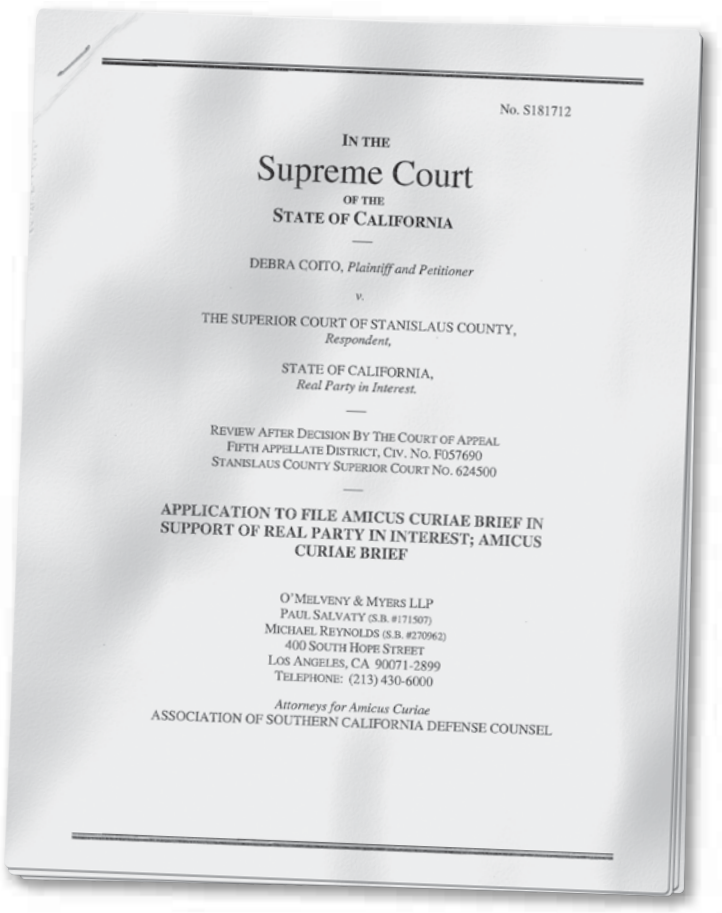
amicus committee report

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

Most recently, ASCDC's Amicus Committee has helped secure major victories for the defense bar.

ASCDC submitted an amicus brief on the merits to the California Supreme Court in *Coito v. Superior Court* (June 25, 2012, S181712) __ Cal.4th __ [278 P.3d 860]. The brief was authored by Paul Salvaty of Glaser Weil. The court largely adopted the position advocated by ASCDC, to wit, recorded witness statements should be absolutely or at least qualifiedly privileged under the work product privilege. In the opinion's words (unanimous, authored by Justice Liu):

> "In light of the legislatively declared policy and the legislative history of the work product privilege, we hold that the recorded witness statements are entitled as a matter of law to at least qualified work product protection. The witness statements may be entitled to absolute protection if defendant can show that disclosure would reveal its "attorney's impressions, conclusions, opinions, or legal research or theories." (§ 2018.030, subd. (a).) If not, then the items may be subject to discovery if plaintiff can show that "denial of discovery will unfairly prejudice [her] in preparing [her] claim ... or will result in an injustice." (§ 2018.030, subd. (b).)
>
> As to the identity of witnesses from whom defendant's counsel has obtained statements, we hold that such information is not automatically entitled as a matter of law to absolute or qualified work product protection. In order to invoke the privilege, defendant must persuade the trial court that disclosure would reveal the attorney's tactics, impressions, or evaluation of the case (absolute privilege) or would result in opposing counsel taking undue advantage of the attorney's industry or efforts (qualified privilege)."



No. S181712

IN THE

Supreme Court

OF THE

STATE OF CALIFORNIA

DEBRA COITO, *Plaintiff and Petitioner*

v.

THE SUPERIOR COURT OF STANISLAUS COUNTY,
Respondent,

STATE OF CALIFORNIA,
Real Party in Interest.

REVIEW AFTER DECISION BY THE COURT OF APPEAL
FIFTH APPELLATE DISTRICT, CIV. NO. F057690
STANISLAUS COUNTY SUPERIOR COURT NO. 624500

APPLICATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST; AMICUS CURIAE BRIEF

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Attorneys for Amicus Curiae
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

The Amicus Committee was also successful in having two requests for publication granted. First, *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal. App.4th 65 is a pro-defense ruling on an anti-SLAPP motion in a medical peer review setting that gives a very broad reading of *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192. *Kibler* established that peer review constitutes an official proceeding under the anti-SLAPP statute. Some courts have given *Kibler* a narrow gloss. Second, in *Thayer v. Kabateck* (May 30, 2012, A132580) __ Cal.App.4th __, the Court of Appeal reversed the trial court's denial of the defendant's anti-SLAPP motion. The court held that a non-client's claim against class counsel for matters arising from litigation (disbursement of settlement proceeds) was protected by the anti-SLAPP statute. The case weighs in on the continuing controversy of whether claims against lawyers based on litigation conduct are subject to the anti-SLAPP statute. Both publication requests were authored by Jeremy Rosen and Steven Fleischman of Horvitz & Levy.

The Amicus Committee was also successful in urging the California Supreme Court to take action on two matters. In *Sanchez v. Valencia*, docket No. S199119, the Supreme Court granted review to address whether an arbitration provision in a standard new car sales contract was unconscionable. J. Alan Warfield, at McKenna Long & Aldridge, wrote an amicus letter in support of the defendant's petition for review. The Amicus Committee was also successful in asking the Supreme Court to depublish the controversial decision in *Moody v. Bedford* (Jan. 9, 2012, B226074). In that case, the heir of the deceased contacted the defendant's insurance company and represented she was the sole surviving heir. The insurance company paid policy limits. Plaintiff then sued the defendant claiming she was the other surviving heir. The trial court granted summary judgment in favor of the defendant under the so-called "one action" rule for wrongful death cases (Code Civ. Proc., § 377.60). The Court of Appeal reversed, holding that the one-action rule is not triggered unless and until a wrongful death action is filed. Under that holding, the rule could not be triggered

continued on page 37

when a wrongful death claim is settled without litigation. Mitch Tilner and Steven Fleischman of Horvitz & Levy wrote an amicus letter on behalf of ASCDC. Instead of granting review, the Supreme Court ordered the case depublished.

Lastly, ASCDC participated an amicus curiae in the controversial decision in *Colony Bancorp of Malibu v. Patel* (2012) 204 Cal.App.4th 410. In that case, defense counsel was five minutes late returning from a lunch break during the first day of a bench trial. The trial court started trial without defense counsel being present. The Court of Appeal, unfortunately, affirmed the trial court's actions. Edith Matthai and Natalie Kouyoumdjian of Robie & Matthai submitted an amicus brief on the merits on behalf of ASCDC and also sought depublication from the Supreme Court. Although the Amicus Committee is disappointed with the result in this case, we feel that ASCDC properly "stuck up for the little guy" in this case.

PENDING CASES AT THE CALIFORNIA SUPREME COURT

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

1. *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.

2. *Nalwa v. Cedar Fair, L.P.*, docket No. S195031: This case involved the primary assumption of the risk doctrine in a case where the plaintiff was injured riding a bumper car at an amusement park. The Supreme Court has granted review on the following issues: (1) Does the existence of a state regulatory scheme for amusement parks preclude application of the doctrine of "primary assumption of risk" with respect to the park's operation of a bumper car ride? (2) Does the doctrine apply to bar recovery by a rider of a bumper car ride against the owner of an amusement park or is the doctrine limited to "active sports"? (3) Are owners of amusement parks subject to a special version of the doctrine that imposes upon them a duty to take steps to eliminate or decrease any risks inherent in their rides? Joshua Traver of Cole Pedroza, co-authored an amicus brief on the merits with Don Willenburg of Gordon & Rees, who represented the Association of Defense Counsel of Northern California and Nevada.

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
Horvitz & Levy
818-995-0800

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, *Glaser Weil*

Paul Salvaty, *Glaser Weil*

David Pruett, *Carroll, Kelly, Trotter, Franzen & McKenna*

The ASCDC Expert Witness Deposition Bank

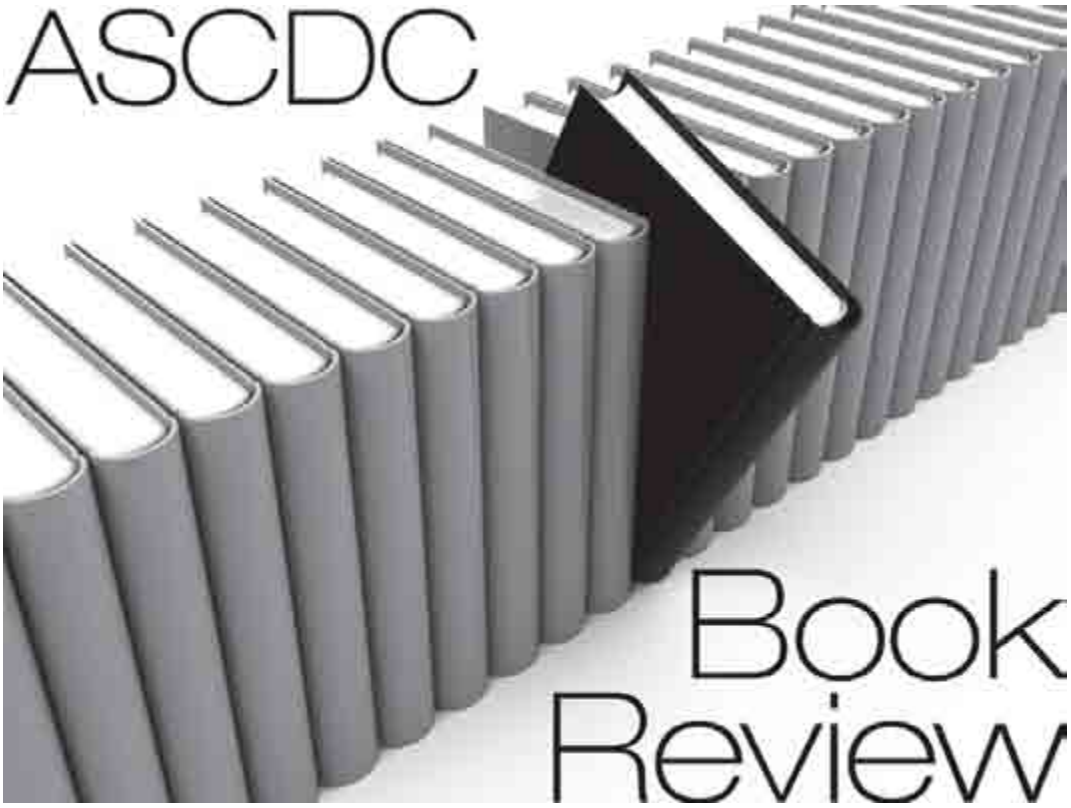
Michael Schonbuch, *schonbuch@dfis-law.com*

So ... your next jury trial starts in 30 days and it's time to get into "Trial Prep Mode." Haircut? Check. Suits Dry Cleaned? Check. Car washed? Check. Oh and let's not forget about preparing voir dire questions, writing out an opening statement, taking plaintiff's experts' depositions and preparing the cross for plaintiff's experts.

What better way to get ready than checking out ASCDC's brand new Expert Witness Deposition Bank? We have been collecting, organizing and downloading expert witness depositions from our Board members and their firms. We have been assembling a comprehensive expert witness deposition bank for exclusive use by our ASCDC members and now we all have access to this online expert witness deposition bank as part of ASCDC member benefits.

You can log in via the ASCDC website at *www.ascdc.org/Experts.asp,* search, click and get prior (and hopefully inconsistent) testimony under penalty of perjury from the opponent's expert witnesses you are about to face in trial. Or, if you're looking for a good expert to retain yourself, this is the place to check out how they hold up under questioning.

Some online expert witness deposition banks are charging hundreds of dollars per search and more fees for downloading the very same transcripts we are gathering. In order to keep our bank fresh and current we are asking all members to send in electronic versions of their expert witness depositions so we can all stay ahead of the opposition. There is strength in numbers so be proud of your ASCDC membership and take advantage of our latest weapon.



Sex in the City (D.C., that is)

Book review by John A. Taylor, Jr.

Discretion is the second legal thriller from author Allison Leotta, a former federal prosecutor in Washington D.C., who specialized in prosecuting sex crimes and domestic violence during her legal career.

The book's protagonist, Assistant U.S. Attorney Anna Curtis, is a federal prosecutor likewise specializing in prosecuting sex crimes and domestic violence. The action begins with the death of Carolyn McBride, one of the city's most beautiful and highest paid escorts, who plummets to her death from the balcony of the "hideaway" office of the sole Congressman for Washington D.C., a long-term holder of the office who is in a tough primary fight with a younger up-and-coming opponent.

Because of the victim's profession, Anna's boss in the sex crimes unit assigns her to assist Jack Bailey, the chief homicide prosecutor in a separate division of the U.S. Attorney's office. Unbeknownst to her boss, Anna is already romantically involved with Jack, which creates numerous complications. Jack's friendship with the suspect Congressman's political opponent creates yet more difficult ethical and strategic questions on which Anna and Jack disagree, affecting their personal relationship during the course of the investigation.

Using Internet research tools available to the sex crimes division, Anna quickly discovers a link between the victim and a secretive high-end escort service whose customers include some of the most powerful men in D.C. The suspense reaches a crescendo when Anna herself becomes a potential target of the unknown killer.

The author's personal experience as a federal prosecutor shines through in the novel. Though a criminal prosecutor might see points on which to nitpick, a civil practitioner would find none of the glaring

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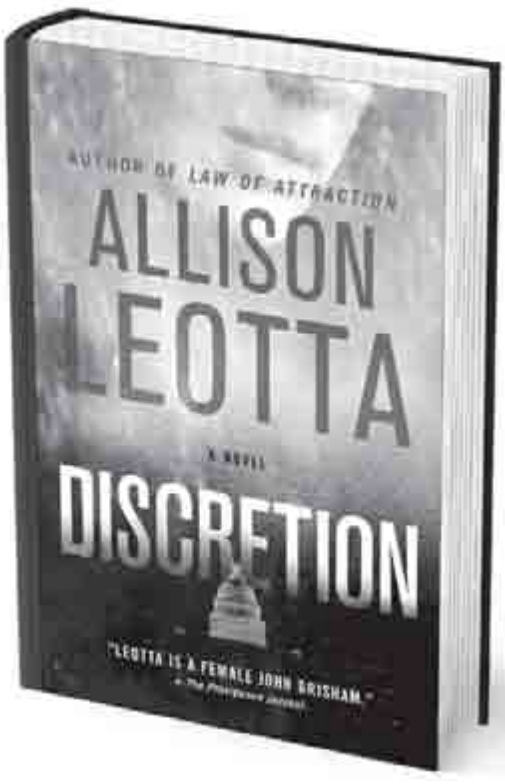

evidentiary and legal errors that seem to plague so many legal novels, movies, and television shows. Attorney readers may also appreciate that one of Anna's primary contributions to the legal team involves drafting federal court briefs under tight time constraints on complex legal issues. In this novel, as in real-life legal work, the laptop is more powerful than the Glock.

Leotta writes well, and has a knack for creating a sense of setting in D.C. and its judicial system rivaling that of Los Angeles and its superior courts in Michael Connelly's Mickey Haller novels. She also creates memorable characters, although the cast seems to contain just a few too many exceptionally good looking people. We are told, for example, that Caroline McBride was a "10" who could have been a Sports Illustrated Swimsuit model, and throughout the novel there are repeated references to Anna's looking "just like" her. Anna's supervisor/lover, Jack, is similarly described as looking (with his shirt off) like "the guy from the Old Spice commercial," and the FBI agent assigned to assist the prosecutors is described as "a beautiful dark-haired woman in a pantsuit" that she somehow makes look "so sexy." While it seems reasonable for the characters in the "trade" to be better looking than the average citizen, Leotta overdoes it with the prosecution team, heading into paperback romance territory, and detracting from the sense of authenticity she otherwise creates in describing her characters and physical settings.

In contrast with Connelly's Harry Bosch novels, which tend to be murder mysteries with a bit of dysfunctional romance mixed in, *Discretion* is more of a dysfunctional romance novel with a bit of murder mystery mixed in. Will Jack and Anna's relationship survive this investigation? Should Anna marry Jack or should she maintain her independence? Should they go public with their romance? These are the questions that seem to interest the author more than who murdered Carolyn McBride – a question whose answer jumps out a bit too early in the novel. And although there is an interesting plot twist near the end, as the groundwork hasn't really been laid to make the actions of the character at the heart of that twist seem completely believable.

Nonetheless, *Discretion* does not aspire to be literary fiction, but only a legal thriller, and in that genre it gets the job done competently. The book is a page turner, which is what really matters for a novel of its kind, and would be enjoyable beach or airplane reading for any lawyer looking for a few hours of distraction from the everyday stresses of the legal profession.

John A. Taylor, Jr. is a partner with the civil appellate law firm of Horvitz & Levy LLP in Encino.

2012 ASCDC Golf Tournament

June 15, 2102 • Oak Quarry Golf Club • Riverside

After a brief hiatus, the ASCDC Golf Tournament returned on June 15, 2012 with a shotgun tournament at the beautiful Oak Quarry Golf Club in Riverside, CA. Over one-hundred golfers, including several judicial officers from the Inland Empire, enjoyed the wonderful weather, great golfing and camaraderie; thank you to all of you for participating.

The ASCDC would like to thank the sponsors who supported the event:

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Finally, many thanks to **Gary Montgomery of Thompson & Colegate** who chaired this year's tournament.

Plans are underway for another golf tournament in the future – watch your ASCDC mail for details.

ASCDC
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(Updated 9/19/11)

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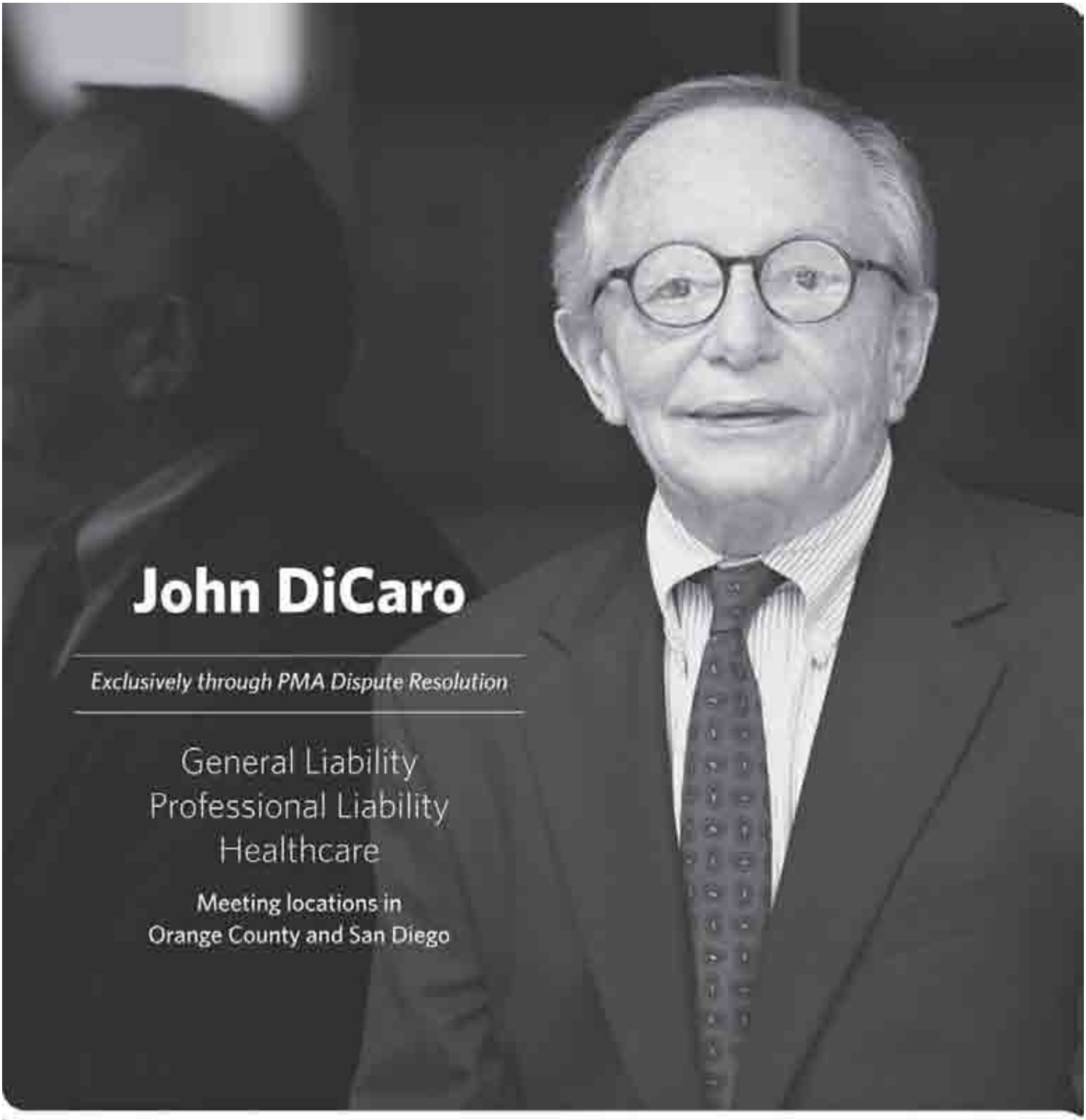

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