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president's message

"EOY"

Diane Mar Wiesmann
ASCDC 2012 President

If you Google "EOY," you will find a number of definitions for the acronym. One is "End Of Year." As I reflect on my year as your ASCDC President, I am happy to say that with one exception (and I will talk about that in a minute), we accomplished the goals we set for ourselves this year.

Consistent with our goal to "Connect," we confabbed at the Annual Seminar in March with James Carville (wow). We took our educational programs on the road, traveling to Orange County, the Inland Empire, Santa Barbara, Ventura County and then back to Los Angeles. We connected with young lawyers, judges, our counterparts from northern California, and experts in their fields — on the golf course, while kayaking in Monterey Bay, sampling wine in Santa Barbara, and at other seminars, receptions and free "Brown Bag" meetings.

We presented an update seminar on *Howell v. Hamilton Meats*, new court reporter rules, medical malpractice, anti-SLAPP motions, on-line legal research, and construction defect litigation. We participated in Mediation Day, recognizing its importance in resolving disputes efficiently and economically. As part of the California Defense Counsel (CDC), we met with the Chief Justice and talked about what was important to us, and how we could work together moving forward. We advocated as part of the Open Courts Coalition to retain as much access to justice as possible.

But that's not all: Through our lobbyist, Mike Belote and as part of CDC, we vigilantly advocated against proposed legislation that would adversely impact our practices and our clients. Among those was the successful and focused effort to defeat SB 1528, which would have overturned *Howell*, and SB 491, which would have would have outlawed class-action waivers in "adhesion" contracts making it easier to bring class actions and to circumvent the Unites States Supreme Court's *AT&T v. Concepcion* ruling on the enforceability of arbitration agreements.

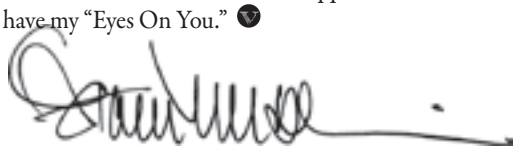
Our Amicus Committee diligently scanned the appellate track of important cases on a near-daily basis, and guarded our positions in the Courts of Appeal and beyond, filing Amicus Briefs and letters supporting review, seeking publication or de-publication, and supporting defense counsel's position on the merits in a variety of cases.

EOY indeed. It has been my pleasure to serve you during such a significant year for the civil defense bar. None of this would have happened without your ASCDC board members who supported our goals so fully; the able assistance of our Executive Director Jennifer Blevins and her staff, the guidance of our legislative advocate Mike Belote; each of our seminar speakers who gave so unselfishly in the name of education; or the support of my partners and family. To those who reached back when we reached out, THANK YOU. My hat is off to each of you. I may be small, but you have made me mighty. You will always have my gratitude, loyalty and friendship.

So, what's left for us to do this year? Please "Save the Dates" of February 28-March 1, 2013 to attend the ASCDC's 52nd Annual Seminar at the Millennium Biltmore Hotel in Los Angeles. Among other great speakers and programs, we will hear from Karl Rove, our Keynote Speaker. Since James Carville got a platform this last time, it seemed like a good idea to get the scoop from Rove in 2013. Love him or hate him, you will want to hear him. At that time, I will also hand our collective mission over to N. Denise Taylor, whom I consider to be not only one of the smartest, most talented trial lawyers I know, but also one of the finest of human beings. Of her leadership I can only predict, "Oh, the Places You'll Go."

EOY also stands for "Eyes On You." (Google said so.) The acroynm aptly applies to the only unmet goal this year — we have not increased our membership. *If you are reading this message and you are not a member, become one.* An application is at the back of this issue and online at *www.ascdc.org.* For those of you with QR code apps, scan this code to the right and it will take you to our website. *If you are already a member, step up and do something.* Sponsor a new member. Help with a seminar presentation. Write an article for *Verdict*. Bring a client to the Annual Seminar. Network with other civil defense lawyers at one of our many meet-and-greet opportunities.

Membership is not just about what you get for your dollars (which is A LOT), but also about what you can do to preserve your practice. ASCDC provides a way for you to do so. There are committees within ASCDC that comprise the entire cause: Amicus, Young Lawyers, Education, Membership, ADR, Court Liaison/ Bench Bar, Brown Bags, Verdict/Website, Construction Defect and more. Tell us what you can do and we will make room for you. As I step into that exclusive club of Past Presidents, I know the officers coming behind me will make this better than it already is. But will you come behind them? You can. So make it happen. I will have my "Eyes On You."



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Michael D. Belote
Legislative Advocate
California Defense Counsel

Much has been written about the new era in California politics, with the election of supermajorities in the Assembly and Senate. Actually, two-thirds supermajorities, with the governor from the same party, have happened before. But the date was 1933, "Sunny Jim" Rolph was governor, and Republicans were in control. What a difference 80 years make!

The state thus commences a political environment unfamiliar to essentially any working Californian. Two-thirds supermajorities mean, at least in theory, the ability to raise taxes consistent with the requirements of the state constitution without any Republican votes; the ability to place constitutional amendments on the ballot without Republican votes, and the numbers necessary to override gubernatorial vetoes. Of course, getting two-thirds of the Assembly and Senate to line up behind any given policy, or agreeing to the exceedingly rare step of overriding a veto, is far from a simple task.

The basic tension will be between those progressives who say, "We achieved our two-thirds majorities fair and square, this chance may not come around for 80 more years, so we should be bold and not squander the opportunity" and those counseling moderation who say, "If we overreach and propose a whole series of new and increased taxes, frightened voters will push back and punish us as early as 2014."

Very shortly after the election, Senate President pro Tem Darrell Steinberg was asked about his priorities in light of the supermajorities. He mentioned "initiative reform" and "tax reform." As to initiative reform, there are certainly broad numbers of people who believe that something should be done. But the details are complicated, and perhaps even more so on the issue of tax reform. Senator Steinberg mentioned the ability to *lower rates*, while *broadening the base*. These phrases quite clearly relate to the possibility of extending sales taxes to services.

Lobbyists in Sacramento immediately began meeting in preparation over the possibility of a bill on sales tax on services. Obviously the issue potentially affects an enormous array of service providers, who presumably would be required not only to add sales tax to their fees, but also to collect and remit the taxes to the State Board of Equalization.

But do you "go big" and propose sales taxes on *all* services? Do you cover medical care, with patients already experiencing annual double-digit insurance premium increases? Do you cover criminal defense, only when provided by private counsel? Is there a threat of further "off-shoring" services, particularly in the high-tech arena where services can be performed almost anywhere? Do you extend taxes to services performed at home, including lawn care, in-home supportive services, day care or even babysitting?

Alternatively, do you proceed incrementally, extend sales taxes only to limited services, to establish the precedent and see how it goes? If so, is there certain "low-hanging fruit" which you might start with? Services which cannot leave the state? Politically unpopular services? Services consumed by the wealthy? Services performed by businesses which already collect sales taxes for retail transactions?

In a recent address to the ASCDC Construction Defect Seminar, Insurance Commissioner Dave Jones suggested that a comprehensive sales tax proposal would face serious political difficulties, igniting a situation of "all against all." But with supermajorities which may be transitory, and with both Senator Steinberg and Speaker John Perez termed out of office in 2014, many expect the issue to be raised this year.

Beyond sales tax on services, suggestions have been made that discussion of tax reform should also involve the "third rail of California politics": Proposition 13. In this regard, discussion normally focuses on the concept of a "split roll," wherein residential property is treated differently from commercial property.

Finally, supermajorities may well encourage discussion of concepts directly relevant to the *practice* of law, as opposed to the *taxation* of it, including another attempt to modify the *Howell* decision, limit class action waivers in the post-*Concepcion* era, and modify MICRA limits.

Let the party begin!

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Coffee Klatch Conversation

Patrick A. Long

A good friend of mine, Elbert, became a Superior Court judge a number of years back. Elbert is not his real name. I feel compelled to use a pseudonym for reasons which will soon be apparent. Elbert loves his work, and from what I hear tell (I've never appeared before him) is quite good at it. Our friendship extends far back over the years. We don't see each other socially except for the occasional bar group event, ABOTA and the like, except that we do irregularly meet for coffee at a local coffee house. I say irregularly because one of us is often drawn away by family matters or travel or other events.

We just show up at our coffee house and join each other if we are both there. We have a third member of our klatch, Kevin, a fellow who is not an attorney but rather an investment advisor for an outfit you know well. For many reasons we almost never talk business. Of course Elbert, as a sitting judge, would certainly not consider talking business with me at some coffee house (or anywhere else).

Among the relatively mundane things we regularly discuss are cigars, travel, health issues, great espresso, good scotch, Rush Limbaugh, the Chicago Bears, etc., you know, the usual stuff that guys are wont to blabber on about. But then in recent times along came budget worries, cuts to our court system, court closings, staff layoffs, potential trial delays and the like. But know that it was not Elbert that brought these topics to our most recent conversation but rather Kevin. Kevin had apparently been looking into what he calls "court issues" in some depth, perhaps because he has clients who are lawyers, or judges. He didn't say, and we didn't ask.

Not having a legal background, Kevin asked a lot of questions about our court system, and how it fits into our system of government, and about the rights and responsibilities of our three branches of government. Elbert was mostly quiet. I tried to answer those questions for which I had an answer, but for many questions I had no adequate answers. Kevin was particularly curious about the concept of the separation of powers between the Executive, Legislative and Judicial branches of government. He understood that our Governor submits a proposed budget to the legislature which then enacts what it feels is appropriate. But he had many questions about the control one branch might have on the ability of another branch to carry out the second branch's duties. He posed specific questions. What if the Legislature enacted (or modified) a budget which resulted in the Executive branch not having *sufficient* funds to hire staff, to have office space, to fund telecommunication and computer needs, would that be "legal"? Wouldn't it be up to the courts to decide? Is it up to the courts to decide what constitutes *sufficient* funds to operate at a *minimally acceptable funding?* Which branch decides what is *minimally acceptable funding* for each of the branches?

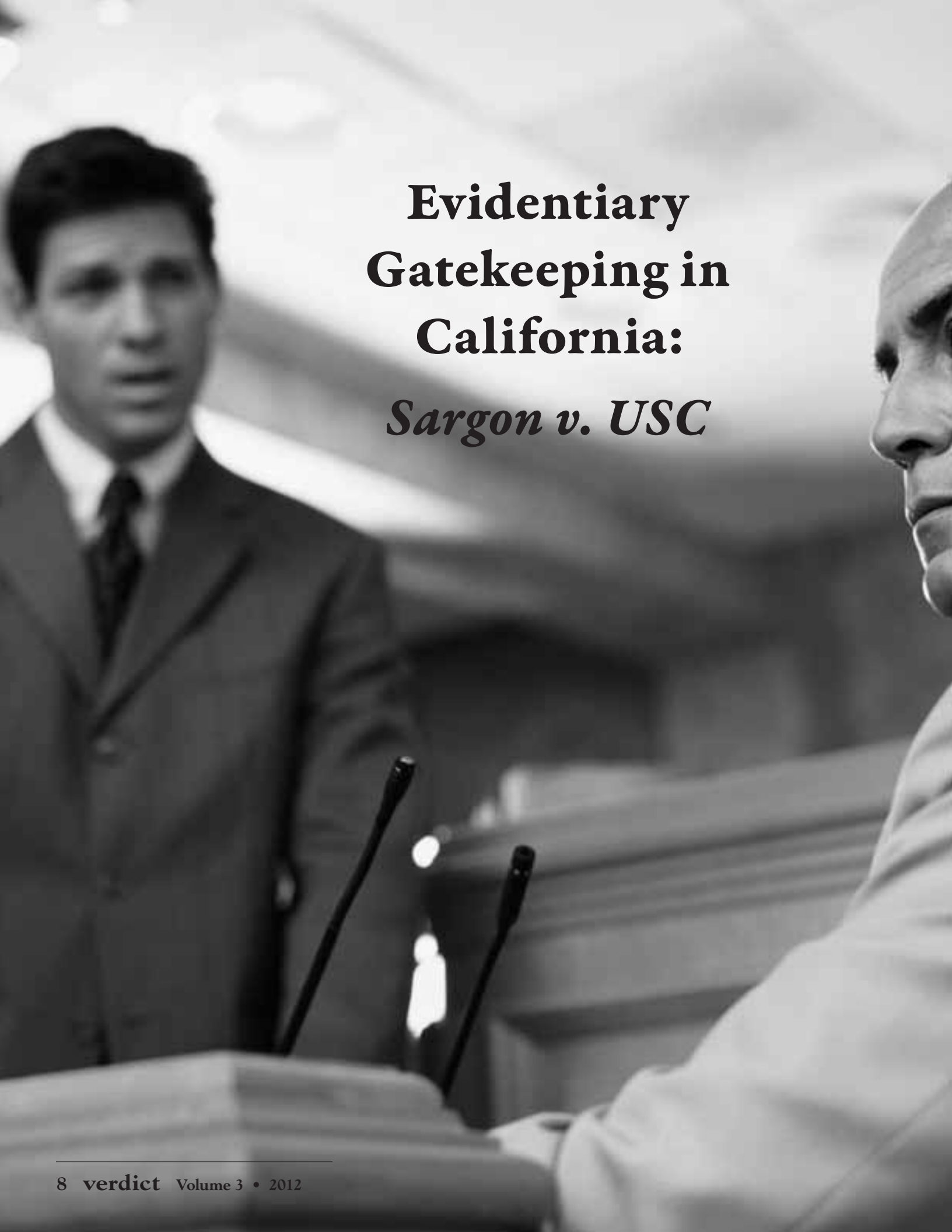
I made a half-hearted attempt to switch the conversation back to questions about whether a freshman should be allowed to win the Heisman trophy, but Kevin wanted answers. I didn't have any, and Elbert just observed that such questions were, at least to his knowledge, questions of first impression, and he then went on to explain the concept of questions of first impression. He was quite careful not to express any opinions as to what the answers might be, even though I suspect Elbert may have had opinions about these questions, and had perhaps done some research into applicable case law, if there is any.

I frankly haven't given thought to whether or not the First Amendment permits a sitting Superior Court judge to express opinions on these kinds of questions outside of court, but I'll bet our colleagues on the bench, God bless them, sure have. There would seem to be arguments both ways.

This conversation had turned a little deeper than I was prepared for on an early Saturday morning. Fortunately I had a grandson's ice hockey game to get to, and Kevin needed repair to his office for some weekend work, so our klatch adjourned. Who knows where we're headed concerning the State budget in general, and the budget for our court system in particular, but I hope to gosh that our legislators, executives and jurists can come to agreements that will allow the greatest system of justice ever devised to continue to serve the needs of all Californians. Lift your cup of half-caf dark roast to our judiciary, and let's provide what support we can to their budgetary needs.

Jump-starting my heart with caffeine,
I am.

Patrick A. Long – *palong@ldlawyers.com*



Evidentiary Gatekeeping in California:

Sargon v. USC

Marion V. Mauch
Bowman & Brooke LLP

I. Introduction

On November 26, 2012, the California Supreme Court took a major step toward moving California in line with federal law on the role of trial courts and admissibility of expert testimony. In *Sargon Enterprises, Inc. v. University of Southern California* (Nov. 26, 2012, S191550) __ Cal.4th __ [2012 WL 5897314], the Court ruled that trial courts have a "gatekeeping responsibility" to exclude speculative expert testimony. This article discusses the Court's ruling and provides a historical context for this new standard as well as a look at the practical consequences of the decision.

II. Historical Context: *Kelly/Frye* and *Daubert*

In 1976, the California Supreme Court in *People v. Kelly* (1976) 17 Cal. 3d 24, 32 unanimously adopted the test for admissibility of scientific evidence set forth in *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013. *Frye* required the proponent of scientific expert testimony to show the expert opinion proceeded from a scientific principle that is "sufficiently established to have gained general acceptance in the particular field in which it belongs." The Court in *Kelly* created from this holding a three-part test to determine the foundational reliability of scientific evidence: first, "the reliability of the *method* must be established, usually by expert testimony"; second, "the witness furnishing such testimony must be properly *qualified as an expert* to give an opinion on the subject"; and third, "the proponent of the evidence must demonstrate that *correct scientific procedures* were used in the particular case." *Id.* at 30. (citations omitted).

In 1993, the United States Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.* (1993) 509 U.S. 579, rejected the "austere" or "rigid" *Frye* standard in federal cases and left the admission of expert scientific evidence to the discretion of the trial court under the "liberal thrust" of the Federal Rules of Evidence. According to *Daubert*, federal courts have a gatekeeping function which "entails a preliminary assessment of whether the reasoning or methodology underlying

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the testimony is scientifically valid" and grounded "in the methods and procedures of science." *Id.* at 592-93. The *Daubert* Court held that Federal Rule of Evidence 702 abrogated *Frye*. *Id.* at 588-589.

In 1994, the California Supreme Court in *People v. Leahy* (1994) 8 Cal.4th 587, reaffirmed the *Kelly/Frye* test for admissibility of scientific evidence in California. Specifically, the Court stated that since *Daubert* applied only to federal law, that case was "at most only persuasive authority" in California. *Id.* at 597.

Since that time, the *Kelly/Frye* test has generally been more permissive in allowing admission of what some might call "junk science," because California courts have concluded that, so long as an expert can describe a scientific method used in arriving at a conclusion, the court's job in screening for reliability is done. Jurisdictions following *Daubert,* by contrast, have tended to require a more searching examination by trial courts before admitting expert evidence.

With *Sargon*, the California Supreme Court embraced *Daubert*'s reasoning and the trial courts' gatekeeping responsibility, thus making it more than just persuasive authority.

III. *Sargon v. USC*: Case Background

Sargon Enterprises, Inc., a small dental implant company, sued the University of Southern California for breach of a contract to clinically test a newly patented implant. Sargon claimed the implant would have cut down on surgery, healing time, and overall cost. The contract between Sargon and USC provided that USC's School of Dentistry would conduct a five-year clinical study. When USC failed to present proper reports, Sargon filed suit.

Sargon admittedly had only $101,000 in net profits in 1998, yet it claimed future lost profits ranging from $200 million to over $2 billion. Sargon asserted that but for USC's breach, it would have become a world-wide leader in the dental implant market. To support their lost profits claim, Sargon proffered the testimony of their expert James Skorheim, a certified public accountant of 25 years and an attorney. USC moved to exclude Skorheim's testimony as speculative.

Over an eight-day evidentiary hearing, Skorheim set out the bases for his opinions. Skorheim utilized a market share method to determine the share of the worldwide dental implant market that Sargon would have gained. Skorheim compared Sargon to six large, multinational dental implant companies that were dominant market leaders in the industry (referred to as the "Big Six"). He opined that innovation was the determining factor in the Big Six's success and believed Sargon possessed the same innovative spirit. Accordingly, he concluded that Sargon was less like other smaller dental implant companies which he described as "copycats," and more like the Big Six.

The trial court excluded Skorheim's opinions as speculative. *Sargon*, *supra*, at *12. The Court of Appeals reversed and remanded for a new trial on lost profits. *Id.* The Court of Appeals concluded that it was error to exclude Skorheim's testimony, stating that at the very least, the jury was entitled to hear about comparing Sargon to one of the Big Six companies. *Id.* The California Supreme Court granted review. In a twenty-four page opinion, the California Supreme Court unanimously reversed the Court of Appeal's ruling and held that the trial court properly excluded Skorheim's speculative expert testimony. *Id.* at *24.

IV. *Sargon v. USC*: "Gatekeeping Responsibility"

The California Supreme Court's message in *Sargon* is loud and clear: "the trial court has the duty to act as a 'gatekeeper' to exclude speculative expert testimony." *Id.* at *1. The term "gatekeeper" or "gatekeeping" appears fifteen times throughout the opinion and the role of trial courts is thoroughly analyzed.

The root of this "gatekeeping responsibility" is California Evidence Code Sections 801 and 802. *Id.* at *14-15. These code sections enable courts to "inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert's reasoning." *Id.* at *15. More specifically, "Evidence Code section 801 governs judicial review of the *type of matter*; Evidence Code section 802 governs judicial review of the *reasons for the opinion*." *Id.* (emphasis added). The California Supreme Court concluded that the trial court acts as "a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." *Id.*; *see also* Evidence Code § 803 (trial court shall exclude opinion testimony that is based in whole or in significant part on a matter that is not a proper basis for such an opinion)

In other words, after *Sargon,* a trial court's inquiry is not limited to simply confirming that the *type* of material upon which the expert relies provides a proper foundation for the expert's opinion. The court must dig further and determine whether the opinion is actually supported by the *substance* of the material upon which the expert relies. *Id.* at *14-15. And the court must exclude expert testimony that is contrary to decisional law or is speculative. *Ibid.* The court held a trial judge properly excluded the plaintiff's expert opinions where it was unreasonable for that expert "or any such expert, to rely on much of the data which forms the basis of his opinions, because no data bears any resemblance to" the plaintiff's particular circumstances. *Id.* at *7, 19-24. The California Supreme Court cited with approval to *Lockheed Litigation Cases*, 115 Cal.App.4th 558, 565-66 (2004), which affirmed a trial court's decision to exclude expert causation testimony that was not supported by the studies on which the expert relied. *Sargon*, at *14.

Citing *Daubert*, the California Supreme Court tempered trial courts' "gatekeeping responsibility," indicating that the focus "must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at *16. Further, the California Supreme Court stated:

> The court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather,

continued on page 11

> the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. *Id.*

Ultimately, the California Supreme Court concluded that "[t]he goal of trial court gatekeeping is simply to exclude 'clearly invalid and unreliable' expert opinion." *Id.* Further, "the gatekeeper's role 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id*. at *16, *citing Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 152.

V. *Sargon v. USC*: Application of the Court's "Gatekeeping Responsibility"

Through recognition of this newly-articulated gatekeeping authority, the California Supreme Court affirmed the trial court's exclusion of Skorheim's expert opinions as speculative and lacking in any reliable basis. In doing so, the Court discussed the substantive law of lost profits and analyzed the basis for Skorheim's opinions in great detail.

First, the Court looked to the substantive law of lost profits "to help define the type of matter on which an expert may reasonably reply." *Id*. at *19. The Court explained:

> While lost profits can be established with the aid of expert testimony, economic and financial data, market surveys and analysis, business records of similar enterprises and the like, the underlying requirement for each is a substantial similarity between the facts forming the basis of the profit projections and the business opportunity that was destroyed.
>
> *Id.* (citations omitted.) Although lost profits in the case of an unestablished business are generally objectionable, "anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." *Id.* at *18.

Second, the Court thoroughly examined Skorheim's opinions. The Court agreed that a market theory approach can be a proper method in appropriate cases, but stated this was not such a case. *Id.* at *19. Skorheim did not base his lost profit estimates on a market share ever actually achieved by Sargon. *Id.* Instead, he opined that Sargon's market share would have "increased spectacularly over time to levels far above anything it had ever reached." *Id.* But that opinion was entirely speculative. For example, it required the assumption that Sargon was similar to the Big Six rather than other smaller companies which it more closely resembled, and Skorheim failed to cite to any objective data for such an assumption. *Id.* at 20.

The Court classified Skorheim's opinions as akin to historical "what-ifs":

> World history is replete with fascinating what ifs. What if Alexander the Great had been killed early in his career at the Battle of the Granicus River, as he nearly was? What if the Saxon King Harold had prevailed at Hastings, and William, later called the Conqueror, had died in that battle rather than Harold...?
>
> Many serious, and not-so-serious, historians have enjoyed speculating about these what ifs. But few, if any, claim they are considering what *would* have happened rather than what *might* have happened.

Id. at *23. The Court concluded that trial courts must "vigilantly exercise their gatekeeping function when deciding whether to admit testimony that purports to prove such claims." *Id.*

VI. Public Policy Considerations Are Supported by the *Sargon* Decision

The movement of California law closer to *Daubert* demonstrated in *Sargon* is favorable due to public policy considerations. In this economic climate, it is important to look at the practical effect court rulings have on commerce and business.

First, *Sargon* is an encouraging ruling for both large and small businesses in California. As was argued in the *amicus* brief filed by the Washington Legal Foundation, *Sargon* provides greater security for larger, more established businesses because it decreases the risk of a huge lost profit award without the benefit of reliable, non-speculative expert opinion. Brief of Wash. Legal Found. & Allied Educ. Found. As *Amici Curiae* Supporting Appellants at 24-27, *Sargon v. Univ. S. Cal.*, No. S191550 (Cal. Sup. Ct. 2012). For smaller startup companies, such as Sargon, the Court's ruling will also prove beneficial in the long run. If the Court had allowed Skorheim's opinions, a large business may be hesitant to work with startup companies for fear of exposing itself to potential billion dollar lost profit claims. Thus, smaller companies could lose out on a large segment of these important business opportunities and their growth would by stymied.

Second, *Sargon*'s ruling increases efficiency and fairness in civil litigation. If speculative expert opinions are allowed as the sole support of factually devoid damages claims such as the lost profit claim espoused by Sargon, the risk to defendants in standing their ground and taking their cases to trial would be too onerous due to exposure to "what if" damage scenarios, whether they be cloaked as lost profits, loss of earnings for a plaintiff injured in a personal injury claim, or other such speculative damages claims

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where there is no foundational basis for expert opinion. As noted in the Washington Legal Foundation's *amicus* brief:

Rules that lead to settlement of lawsuits without any relation to the underlying merits of the suits undermine the aims of common law. Contract law is designed to encourage individuals to abide by their promises to others, or else to provide compensation for the damages flowing from their breach of promise. Its purposes are undermined by rules of procedure that force breach-of-contract defendants to pay substantial settlements not justified by any reliable opinions regarding damages incurred as a result of a breach of contract.

Brief of Wash. Legal Found. & Allied Educ. Found. As *Amici Curiae* Supporting Appellants, *supra*, at 28-29.

Third, the application of the gatekeeper role of the trial court as reflected in *Sargon* will also provide significant benefit to product manufacturers, business owners, and professionals who may face potentially speculative claims of product defect or negligence. Trial courts will have greater latitude in assessing and excluding liability "opinions" regarding product design that are wholly speculative.

VII. What *Sargon* Means for Defense Counsel

Sargon gives defense counsel in California another tool to ward off a plaintiff's excessive demands. Pointed pre-trial motion practice will open up opportunities to exclude adverse expert opinions when their bases and reliability are questionable. There will be opportunities to gain an advantage before trial through motions *in limine* that are based upon testimony elicited during thorough and detailed depositions of adverse experts.

Sargon also provides defense counsel with a greater ability to predict a client's possible exposure at trial. This may lead to more settlement opportunities, or otherwise help the client feel more comfortable in deciding to go to trial, and consequently relieve some pressure on trial counsel. Defense counsel may also have an increased role at mediation by convincing mediators that plaintiff's demand is based on speculative expert opinion which would not be allowed at trial.

VIII. Conclusion

Sargon is a positive step for California as it moves closer in line with federal law and helps reduce the risk of jury awards based on unreliable testimony that are later subject to post-trial remittitur or reversal on appeal. Trial courts are likely to use their role as gatekeepers to provide further focus to jury trials by virtue of their ability to preclude speculative expert opinion. This will promote efficiency in trial, to the benefit of the litigants and the judicial system.

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Beyond the Basics of Stare Decisis

Benjamin G. Shatz
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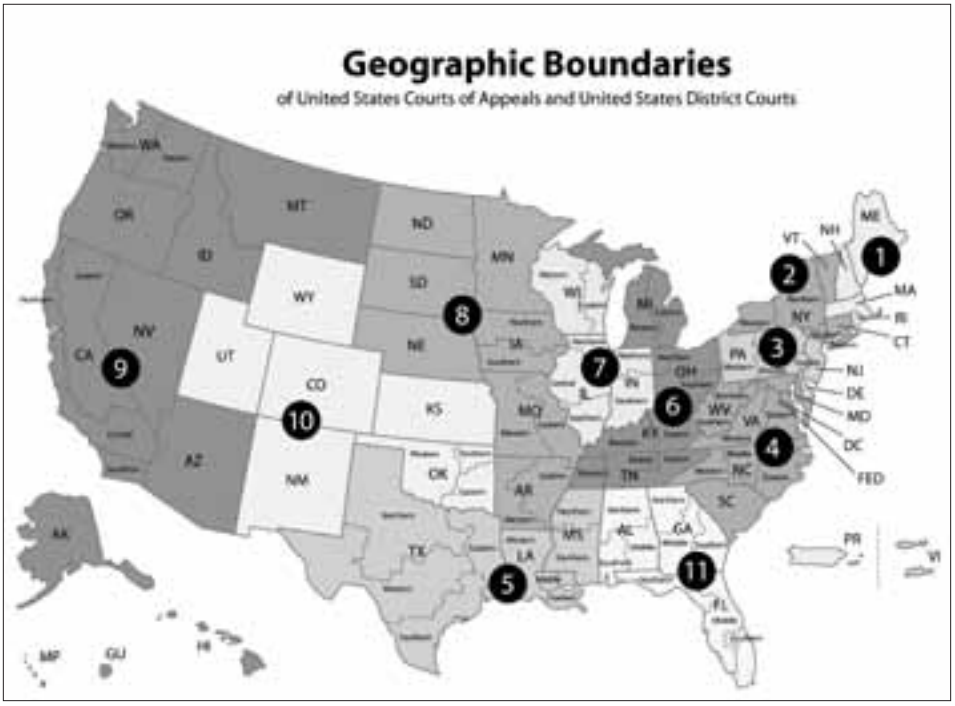
One of the first concepts taught in law school is the doctrine of stare decisis. This doctrine draws its name from the Latin phrase *stare decisis et non quieta movere*, meaning to adhere to precedent and not unsettle what is established. (*In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996).) The core of the doctrine is often simply stated that the higher courts decision are binding precedent on lower courts. Law schools focus on federal practice, and the basics of stare decisis for that court system are easily understood: Decisions of the United States Supreme Court bind all other federal courts, and decisions of the various circuit Courts of Appeals bind the federal district courts located within the circuits. Thus, a federal district court judge in California need not follow precedent from any circuit court except that of the United States Supreme Court and the Ninth Circuit Court of Appeals, which has appellate jurisdiction over that district court's rulings.



For law school purposes, discussion of stare decisis typically ends here. Unfortunately, many lawyers in practice never advance beyond this rudimentary understanding. But there is more to know. Much more.

A fundamental point to understand is that stare decisis operates differently in different court systems. California's court system may look like the federal court system – with both having a three-tiered layering of trial courts, then intermediate appellate courts (called "circuits" in the federal system, and "districts" in the state system) with decisions issued by three-judge panels (called "judges" in federal lingo, but "justices" in California), and a supreme court at the top (comprised of 9 justices in federal court versus 7 in California) – but these outward similarities belie rather different internal mechanisms. In short, assuming that the functioning of the federal doctrine applies equally in state court is a mistake.

The two biggest differences between federal and California stare decisis concern the roles of geography and equality within the intermediate level. Starting with geography, as noted already, geography matters in federal practice. Decisions of the various Circuit Courts of Appeals bind only the federal district courts located within each circuit. A district court judge in California

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Stare Decisis – continued from page 14

may therefore disregard a Second Circuit decision, but not a published Ninth Circuit decision, because the Ninth Circuit has appellate jurisdiction over California's federal courts. In other words, geography – specifically whether a given district court sits within a given circuit – has substantive meaning in federal practice.

In contrast, although the California court system outwardly seems to mirror the structure of the federal courts, there is no geographical component to stare decisis under California law. Where the binding effect of a federal circuit court of appeals exists only within the circuit's borders, the scope of a California district court of appeal decision extends statewide, even beyond the geographic limits of the district.

The California Court of Appeal is divided into six geographic districts.

Some districts are further sub-divided into divisions, some of which have geographic boundaries (e.g., the Fourth District, Division 3, covers only Orange County; the Second District, Division 6, covers Ventura, Santa Barbara, and San Luis Obispo Counties, whereas the other seven divisions within the Second District all cover only Los Angeles County). And yet every superior court must follow any published decision from any District (and any division) of any court of appeal. (*Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347, 353-354 [stare decisis requires a superior court to follow a published court of appeal decision, even if the trial judge believes the appellate decision was wrongly decided].) Thus, a court of appeal decision from the Fourth District, Division 2 (covering Riverside and San Bernardino Counties), is just as binding on a superior court in Sacramento as a decision from the Third District, which is the district having appellate jurisdiction over a Sacramento judge's rulings. The key authority on this point is the Supreme Court's opinion in *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.

Therefore, the geography plays different roles in the federal and state court systems with respect to *vertical* stare decisis – with vertical referring to the binding precedential power of decisions up and down the court systems. But what about *horizontal* stare decisis – i.e., the effect of decisions on "sister" courts at the same level of the court system?

At the highest level, this poses no problem because there is only one United States Supreme Court and only one California Supreme Court. (Note that some states, however, have two supreme courts. Texas, for instance, has separate supreme courts for civil and criminal matters.)

At the intermediate appellate level in both systems, however, there are multiple courts. In the federal system, there are 13 circuit Courts of Appeals, and in California there are six district Courts of Appeal. (Note the difference in nomenclature here: The word "district" indicates a trial court in federal parlance, but an intermediate appellate court in California. Also, the federal systems has circuit Courts of Appeals, with an "s," whereas California has Courts of Appeal, without an "s.")

In federal practice, decisions of one circuit court has no binding effect outside that circuit. Thus, the Second Circuit is free to disagree with the Ninth Circuit, and thereby set up a circuit-split suitable for review via a petition for certiorari by the United States Supreme Court. (Again, a vocabulary diversion exists: a "cert petition" is the vehicle to ask the U.S. Supreme Court for review, but in California practice that document is titled a "petition for review.")

Thus, there is no horizontal stare decisis across circuit lines. (*Hart v. Massanari* (9th

Cir. 2001) 266 F.3d 1155, 1172–1173.) But there is horizontal stare decisions within a given circuit. (*Id.*) Circuits must convene en banc panels of all their judges (or limited en banc panels, e.g., the Ninth Circuit convenes 11-judge en banc panels) to overrule existing circuit precedent. In other words, three-judge panels of the courts of appeals are bound by prior three-judge panels from that same circuit, and by en banc decisions of the court. (*In re Amy & Vicky* (9th Cir., Oct. 24 2012) ___ F.3d ___ [9th Cir. panel bound by prior panel decisions, absent "intervening higher authority" that is "clearly irreconcilable" with circuit precedent, and sister circuit opinions are not such "higher authority"]; *Miranda B. v. Kitzhaber* (9th Cir. 2003) 328 F.3d 1181, 1195 [panel must follow prior panel decisions unless a Supreme Court decision, an en banc decision, or subsequent legislation undermines its precedential value].)

In contrast to the horizontal stare decisis that exists for Ninth Circuit panels, panels of the California court of appeal are not

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bound by prior appellate decisions, even within the same district. (*Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409.) So if Division 5 of the Second District Court of Appeal issues a decision on a certain issue, it is binding on all superior courts, but is not binding on any other court of appeal anywhere in the state, *and is not even binding on Division 5 itself*, which is free to change its mind if the issue arises again. Thus, while the U.S. Supreme Court must regulate circuit-splits from the 13 federal circuits, the California Supreme Court oversees potential splits from 19 separate and independent intermediary appellate courts (i.e., each of the six districts, plus the divisions within some of those districts).

Combining the fact that there is no horizontal stare decisis in the California Court of Appeal with the fact that geography plays no role in the authority of California's intermediate appellate courts to bind lower courts, a problem exists in California that does not exist in the federal system: There may simultaneously exist two conflicting opinions that are both binding on a superior court. For instance, assume a published opinion from the Fifth District (based in Fresno) goes one way, but another published opinion from the Fourth District Division 1 (covering San Diego and Imperial Counties) goes another way. How is a trial court bound by these conflicting appellate decisions, supposed to rule?

As explained, geography does not govern the analysis. Thus, it does not matter if that the superior court is in Fresno or in San Diego, or San Francisco. Instead, the superior court is free to choose one or the other of the decisions to follow, based on whatever factors the trial judge believes are most compelling. Once again, the Supreme Court's *Auto Equity Sales* opinion provides the precedent for this rule. (*Auto Equity Sales*, 57 Cal.2d at p. 456 ["where there is more than one appellate court decision, and such appellate decisions are conflict," the superior court "can and must make a choice between the conflicting decisions"].)

Some superior court judges may view this freedom as more theoretical than real, however. In practice, "a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so." (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315.) Thus, geography may creep into a particular judge's analysis. But it needn't, as Supreme Court precedent makes clear. *Auto Equity Sales* is one Supreme Court decision every California litigator should know by name.

EDITOR'S NOTE: I solicited this article for Verdict magazine after hearing of a recent exchange during oral argument in the Court of Appeal. One of the lawyers presenting argument believed a published California appellate decision compelled a ruling in his favor, and he urged that the court was "bound" by that decision. One member of the panel corrected the lawyer on this point, but the lawyer continued to insist that the decision was "precedent" and therefore must be followed – at which point the state court appellate justice remarked, "We are not the 9th Circuit!"

And speaking of California Supreme Court decisions, note that they are, of course, binding on the Courts of Appeal and all superior courts, and that this is true no matter how old the Supreme Court opinion might be. (*Lawrence Tractor Co. v. Carlisle Ins. Co.* (1988) 202 Cal.App.3d 949, 954; *Mehr v. Superior Court* (1983) 139 Cal. App.3d 1044, 1049, fn. 3.) Note also that both supreme courts are free to overrule their own precedents. (*State Oil Co. v. Khan* (1997) 522 U.S. 3, 20; *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 93.) Under what circumstances a high court should exercise its discretion to reverse itself, however, is topic of much scholarly debate. (E.g., Michael Sinclar, Precedent, Super-Precedent, 14 Geo. Mason L. Rev. 363 (2007); Lawrence B. Solum, The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 U. Pa. J. Const. L. 155 (Oct. 2006) [discussing the notion of "super" stare decisis based on the number of justices adopting a particular view].)

A final topic to consider is the effect of stare decisis across court systems. Federal courts applying state law are bound by the highest state authority to have reviewed the issue. Thus, the Ninth Circuit may be bound by a decision of the California Supreme Court, or the California Court of Appeal, or possibly even a superior court Appellate Division if that is the highest court to have addressed the issue. (*Johnson v. Frankell* (1997) 520 U.S. 911, 916 [federal courts must follow state's highest court on question of state law].) On an unsettled state law issue, the 9th Circuit will do its best to determine how the California Supreme Court would rule if presented with the issue. (See *Cal. Pro-Life Council, Inc. v. Getman* (9th Cir. 2003) 328 F.3d 1088, 1099 [federal courts must follow state's intermediate appellate courts absent convincing evidence that the state's highest court would rule differently].)

State courts applying federal law are bound by decisions of the U.S. Supreme Court. (*Elliott v. Albright* (1989) 209 Cal.App.3d 1028, 1034.) But they are not bound by district or circuit court decisions construing federal law – although such rulings are entitled to "substantial deference." (*Rohr Aircarft Corp. v. San Diego County* (1996) 42 Cal. App. 4th 177, 191.) Lastly, federal court decisions on state law are not binding on state courts. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 764; *Bodell v. Walbrook* (9th Cir. 1997) 119 F.3d 1411, 1422 (Kozinski, J., dissenting) ["The good thing when a federal court misapplies state law is that its opinion can be ignored by the state courts."].)

The foregoing points expound upon the cursory explanation of stare decisis encountered in law school. But even these few points do not address many interesting complications that lurk beneath the surface of the seemingly simple doctrine of stare decisis. The elementary principles discussed above identify just some of the quirks that practicing lawyers need to know to move beyond the basics of stare decisis.

Benjamin G. Shatz, a certified appellate specialist, co-chairs the Appellate Practice Group of Manatt, Phelps & Phillips, LLP.

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Schedule of Events

8:00 am - Registration
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8:30 am - Welcoming Remarks
Hon. Thierry P. Colaw, OC Chapter President
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8:45 am - Voir Dire Demonstration I
Wylie Aitken for the Plaintiff
Denise Taylor for the Defendant

10:00 am - Refreshment Break

10:15 am - Voir Dire Demonstration II
Mark Robinson for the Plaintiff
Doug Degrave for the Defendant

11:30 am - Panel Discussion: Strategy & Technique

Noon - Break and pick up Box Lunches

12:15 pm - Luncheon Speaker: Ethics Presentation
Lewis Sifford, Past National President of ABOTA

1:15 pm - Break

1:30 pm - Symposium: View From the Orange County Bench
Hon. Gail A. Andler
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Hon. Luis A. Rodriguez

2:30 pm - Afternoon Break

2:45 pm - Judges' Symposium Continues

4:00 pm - Questions From the Audience

5:00 pm - Adjourn

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Getting Appellate Review of a Good Faith Settlement Determination

By Alana H. Rotter, *Greines, Martin, Stein & Richland LLP*

A settlement among fewer than all of the parties in a case can have many consequences for the parties who are left to litigate.

A settlement's consequences become particularly dramatic when the trial court certifies that it was made in good faith: Under California Code of Civil Procedure section 877.6, a good faith determination bars *non*-settling defendants from later suing the settling joint tortfeasors or co-obligors for contribution or equitable indemnity. In other words, no matter how large the eventual verdict, the non-settling defendants who are jointly liable for the judgment cannot pass along any part of their obligation to their former co-defendants.

Given the significance of a good faith determination, non-settling defendants should closely examine any settlement before it receives the court's stamp of approval. Relevant factors include whether the settlement amount reasonably relates to the settlor's proportionate share of liability (the "ball park" test), the total settlement amount, the idea that a settling defendant should generally pay less than one found liable at trial, the financial conditions and insurance policy limits of settling defendants, and whether the settling parties colluded to hurt the non-settling defendants' interests. *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.* (1985) 38 Cal.3d 488, 499-500.

If there is a basis for arguing under these standards that a settlement was not made in good faith, non-settling parties can and should oppose court approval of the settlement. Section 877.6 lays out the procedure for doing this, including applicable deadlines.

But what is a non-settling party to do if the trial court finds, over its opposition, that the settlement was made in good faith?

File a writ petition in the Court of Appeal – right away.

Section 877.6, subdivision (c) provides that "any party aggrieved" by a good faith determination can seek appellate review by a petition for writ of mandate. There isn't much time to do this: The petition must be filed in the Court of Appeal within 20 days of service of written notice of the good faith determination (extended to 25 days if service is by mail). (*L. C. Rudd & Son, Inc. v. Superior Court* (1997) 52 Cal.App.4th 742, 746.)

Fortunately, there is a short reprieve available: Section 877.6, subdivision (c) also authorizes the trial court to extend the writ petition deadline by up to 20 days. Trial courts often do not know that they have this authority. But once they know, they are generally willing to exercise it.

In light of the tight timeline and busy court calendars, it's prudent to ask for the extension at the earliest opportunity – for example, by requesting in your moving papers or during the hearing that, if the trial court determines that the settlement is in good faith, it also enter an order extending the time to petition for writ review.

Whatever the deadline, filing a timely writ petition is critical. As the recent decision in *Oak Springs Villas Homeowners Ass'n v. Advanced Truss Systems, Inc.* (2012) 206 Cal.App.4th 1304, demonstrates, parties who miss the writ petition deadline may forfeit their opportunity to challenge the trial court's determination that a settlement was made in good faith – and with it, their opportunity to seek indemnification or contribution from the settling defendant.

Oak Springs Villas arose out of a dispute about who should pay damages for construction defects in a condominium development. The homeowners' association sued the developers and various parties involved in the construction; the defendants cross-complained against each other for indemnity.

The homeowners' association eventually settled with the developers. The developers then sought a good faith determination. Over the opposition of a non-settling subcontractor, the trial court agreed that the homeowners' association and developer had settled in good faith. Under Code of Civil Procedure section 877.6, subdivision (c), that determination barred the remaining defendants from claiming that the developers were liable for any contribution or indemnity.

The subcontractor did not petition for writ review of the good faith determination, as allowed under section 877.6. Instead, it *appealed* from the good faith order. That procedural choice turned out to be dispositive: The Second Appellate District, Division Eight held that a good faith

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Good Faith Settlement – continued from page 19

settlement determination is not appealable and dismissed the subcontractor's appeal without reaching the merits.

The Court of Appeal rejected the subcontractor's argument that the good faith settlement determination was an appealable final judgment under Code of Civil Procedure section 904.1. The court reasoned that in order to be appealable as a final judgment, an order must be final *as to the party appealing*. An order determining that a settlement was made in good faith is not final as to the non-settling parties, because they remain in the lawsuit. The non-settling parties therefore cannot appeal from the order.

The court in *Oak Springs Villas* expressly disagreed with a contrary rule set forth in *Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939. There, the Fourth Appellate District, Division One summarily concluded that a non-settling defendant *can* appeal from a good faith settlement order. *Cahill* apparently assumed that so long as an order is final as to *some* party, *any* party may appeal from it.

Oak Springs Villas dismissed *Cahill*'s analysis as "bare" and as providing "no legal support for its conclusion." In particular, *Oak Springs Villas* pointed out that the general rule is that *the party as to whom a judgment is final* may immediately appeal that judgment. But that rule does not "stand for the proposition that a party remaining in the action may seek review by appeal."

Based on its conclusion that the good faith determination was not appealable and that the subcontractor should not "get a second bite of the apple before its final judgment," *Oak Springs Villas* dismissed the subcontractor's appeal.

After *Oak Springs Villas,* a question remains as to whether the subcontractor could challenge the good faith determination later, as part of its eventual appeal from a final judgment in the case. The case law on that issue is mixed.

Some decisions have held that a good faith settlement determination *is* reviewable on appeal from the final judgment in the case. These decisions' rationale is that section 877.6 says that a party *may* petition for writ review of a good faith determination, not that writ review is the *only* avenue for appellate review. *Maryland Cas. Co. v. Andreini & Co. of Southern California* (2000) 81 Cal.App.4th 1413. That rationale would seem to give the non-settling subcontractor in *Oak Springs Villas* some prospect for appellate review at the end of the tunnel.

But other authority points to a different conclusion. In *Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency* (1999) 73 Cal. App.4th 1130, the Court of Appeal refused to review a good faith determination on appeal from the final judgment. The court reasoned that allowing post-judgment review of settlements entered months or years earlier would undermine the settling parties' interest in finality, discouraging settlement. To avoid that result, the court held that a non-settling party may not skip the statutory writ petition and instead challenge the good faith determination on appeal at the end of the case. In other words, according to *Main Fiber*, a non-settling defendant must seek immediate writ review of a good faith settlement determination in order to preserve that issue for appeal.

The bottom line is that a good faith settlement determination is not immediately appealable, and that a court might refuse to review the determination on appeal from the final judgment unless the appellant has already challenged the determination via a timely writ petition. Accordingly, there is only one prudent course of action: If you are aggrieved by a good faith settlement determination and there is a meritorious basis for challenging it, file a writ petition right away.

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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:

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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.

ARBITRATION

Gentry opinion invalidating class arbitration waivers may survive U.S. Supreme Court's holding in AT&T Mobility LLC v. Concepcion, but plaintiff seeking to avoid waiver must present case-specific showing to invoke Gentry factors.

Truly Nolen of America v. Superior Court (Miranda) (2012) 208 Cal.App.4th 487

In this action alleging various hour and wage violations, defendant moved to compel arbitration and requested that plaintiffs be ordered to arbitrate on an individual basis. The trial court granted defendant's motion to compel arbitration, but denied the request to order plaintiffs to arbitrate individually because *Gentry v. Superior Court* (2007) 42 Cal. 4th 443 held arbitration agreements under which plaintiffs waive any right to pursue class claims in arbitration cannot be enforced. By writ petition, defendants challenged the court's order, arguing that the arbitration agreements did not provide a contractual basis for ordering class arbitration and that *Gentry* was no longer good law after U.S. Supreme Court's holding in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ____ [131 S. Ct. 1740, 179 L.Ed.2d 742].

The Court of Appeal (Fourth Dist., Div. One) observed that *Concepcion*'s reasoning strongly suggests that *Gentry* is preempted by the Federal Arbitration Act, but that the US Supreme Court did not directly rule on that issue, and the CASCT has not yet revisited *Gentry*, so for purposes of this case the court assumed that *Gentry* remains binding on an intermediate appellate court. However, the court further held that plaintiffs failed to present evidence relevant to the *Gentry* analysis, stating that "the factual analysis as to whether the *Gentry* factors apply in any particular case must be specific, individualized, and precise." The appellate court ordered the trial court to vacate its ruling allowing class-wide arbitration, and to evaluate whether there was an implied agreement to permit class arbitration between the parties.

Under California law, at least as to matters not governed by the Federal Arbitration Act, parties cannot compel arbitration of statutory wage and hour claims unless the agreement clearly and unmistakably waives a judicial forum. Further, a party waives the right to seek arbitration if the party first engages in significant court litigation, causing prejudice to the other party.

Hoover v. American Income Life Insurance Company (2012) 206 Cal.App.4th 1193.

Plaintiff, an insurance agent, filed a class action against defendant, an insurance company, relating to her classification as an independent contractor rather than an employee. Defendant removed the case to federal district court, but the district court later remanded the case to state court. Defendant then filed a demurrer in state court. Defendant then requested production of several documents, answered discovery requests, and filed other motions. When defendant moved to compel arbitration, the trial court denied the motion because (1) the neither the Collective Bargaining Agreement (CBA) nor the agent's contract referred to arbitration of statutory rights, and (2) defendant waived its right to arbitrate by participating in the litigation process.

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The Court of Appeal (Fourth Dist., Div. Two) affirmed. First, defendant waived any right to arbitration claims by participating in the litigation process to such an extent that plaintiff had sustained prejudice through incurring serious court-related expenses. Moreover, relying on *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, the court indicated that plaintiffs' state statutory claims were not subject to arbitration agreements, whether contained in individual or collective bargaining agreements, because the relevant statutes stated that they could not be contravened by private agreement. Plaintiff did not waive the right to bring a court action to vindicate her statutory wage claims because neither the collective bargaining agreement nor the agent contract provided a "clear and unmistakable" waiver of a judicial forum for those claims. The court held the US Supreme Court's holding in *AT&T Mobility LLC v. Concepcion* did not require the court to respect the parties' agreement to arbitrate because the agreement was not subject to the Federal Arbitration Act, because there was no evidence that established that the relevant contracts had any impact on interstate commerce.

See also *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115) [First Dist., Div. 1: an arbitration agreement requiring individual, rather than class wide, arbitration of wage and hour claims was not unconscionable, nor would enforcing it violate California state law, federal law or public policy]

See also *Goodridge v. KDF Automotive Group* (2012) 209 Cal. App.4th 325 (petition for review pending) [Fourth Dist., Div. 1: *Concepcion* does not supplant California unconscionability case law in context of auto sales finance contracts].

When addressing a petition to compel arbitration between a school district and a union, if the collective bargaining provisions at issue conflict with Education Code provisions, the court should deny the petition.

United Teachers Los Angeles v. Los Angeles Unified School District (2012)
54 Cal.4th 504.

The United Teachers of Los Angeles (UTLA) filed several grievances alleging that the Los Angeles Unified School District failed to comply with the collective bargaining agreement relating to conversion of a public school into a charter school. After failed informal attempts to resolve the grievances, the UTLA, pursuant to the collective bargaining agreement, sought to compel arbitration pursuant to a collective bargaining agreement. However, the District contended that arbitration should not be compelled because the collective bargaining provisions regulating charter school conversion unlawfully conflicted with the statutory scheme for creation and conversion of charter schools. The trial court agreed with the District, but the Court of Appeal reversed, holding that the court's role in adjudicating a petition to compel arbitration was limited to determining whether a valid arbitration agreement existed and whether it had been waived, and that the arbitrator rather than the court should decide whether there was a conflict between the collective bargaining provisions and the charter school statutes.

The California Supreme Court granted review and held that, if the collective bargaining provisions at issue conflict with Education Code provisions, the court should deny the petition. The court further found that the UTLA had not sufficiently specified which collective bargaining provisions the District allegedly violated. Thus, the court remanded to the trial court, offering the UTLA an opportunity to identify specific provisions and to allow the parties to address whether those provisions conflict with the Education Code.

Arbitration clause was unconscionable and thus unenforceable because it was included in a lengthy handbook, was not brought to the employee's attention; the handbook stated that it was not intended to create a contract; and the arbitration agreement would require relinquishment of administrative and juridical statutory rights.

Sparks v. Vista Del Mar Child and Family Services (2012)
207 Cal.App.4th 1511

Plaintiff brought a wrongful termination claim against his former employer. The employer moved to compel arbitration, based on an arbitration clause in its employee handbook, which plaintiff received. The trial court denied the petition to compel.

The Court of Appeal (Second Dist., Div. Five) affirmed in a divided opinion, after evaluating the undisputed facts under a de novo standard of review. The court held that the plaintiff was not bound by the arbitration clause because the clause was included within a lengthy employee handbook, the clause was not called to the attention of the employee, and the employee did not specifically acknowledge or agree to arbitration. Moreover, the handbook stated that it was not intended to create a contract, and provided that it could be amended unilaterally by defendant. Accordingly, the agreement was illusory. Finally, the court said the arbitration clause was substantively unconscionable "in that it requires the employee to relinquish his or her administrative and judicial rights under federal and state statutes" and "makes no express provision for discovery rights," contrary to *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 104)

Labor Code Section 206.5 does not preclude an employer from requiring an employee to arbitrate wage claims as a condition of employment.

Pulli v. Pony International, LLC (2012)
206 Cal.App.4th 1507

Employer filed a motion to compel arbitration in which it argued that all of employee's claims against it were subject to an arbitration provision in his employment agreement. Employee contended the agreement was unenforceable pursuant to Labor Code Sec. 206.5, which prohibits an employer from requiring an employee to execute "a release of a claim or right on account of wages due...." The trial court denied the employer's motion to compel.

The Court of Appeal (Fourth Dist., Div. One) reversed, holding that section 206.5 does not preclude an employer from requiring an employee to agree to *arbitrate* wage claims as a condition of employment. The Court concluded that section 206.5 prohibits an employer only from obtaining a *release* of a claim for wages. The agreement in question did not require employees to release any claim for wages.

ATTORNEY FEES

Plaintiffs who dismissed their action with prejudice after accepting defendant's Code of Civil Procedure Sec. 998 offer to compromise were the prevailing parties for purposes of a statutory attorney fee motion.

Wohlgemuth v. Caterpillar Inc. (2012)
207 Cal.App.4th 1252.

Plaintiffs purchased a new motor home that had an engine manufactured and warranted by defendant Caterpillar Inc. Plaintiffs claimed the engine was defective and sued Caterpillar under the Song-Beverly Consumer Warranty Act (Civ. Code,1 § 1790 et seq.). Shortly before trial, defendant made a Code of Civil Procedure section 998 offer to compromise, which provided that plaintiffs would be paid $50,000, in exchange for which plaintiffs would dismiss the action with prejudice and sign a release of all claims. The offer was silent as to attorney fees and costs. Plaintiffs filed a notice of acceptance of the offer, dismissed the action with prejudice and then moved to recover statutory attorney fees and costs under section 1794, subdivision (d). Defendant opposed the motion, arguing that there was no formal judgment in plaintiffs' favor and that, in any event, defendant was the true prevailing party, not plaintiffs, since a dismissal had been entered. The trial court rejected defendant's arguments and awarded attorney fees and costs to plaintiffs. Defendant appealed.

The Court of Appeal (Fifth Dist.) affirmed. A "compromise agreement contemplating payment by defendant and dismissal of the action by plaintiff is the legal equivalent of a judgment in plaintiff's favor." The Court rejected defendant's argument that plaintiffs could not be the prevailing party as a matter of law because a dismissal with prejudice was entered.

CIVIL PROCEDURE

Where plaintiffs sued corporate entities for malicious prosecution on a successor-in-interest theory of liability, the entities could invoke the SLAPP Act to the same extent as the predecessor entities whose assets they acquired.

Daniell v. Riverside Partners I, LP (2012)
206 Cal.App.4th 1292.

Tenant sued for malicious prosecution based on an unlawful detainer allegedly filed against him by the previous owner of his apartment complex and by the previous property manager. The defendants included the alleged current owners and current property manager, who the tenant claims were liable as successors in interest. Those defendants brought an anti-SLAPP motion, which the trial court granted, reasoning that the tenant's action arose out of the moving parties' exercise of their First Amendment rights, even though they themselves did not prosecute the unlawful detainer. The trial court also ruled that the tenant failed to show a probability of prevailing against the current owners and manager because they did not prosecute the unlawful detainer. Tenant appealed.

The Court of Appeal (Fourth Dist., Div. Two) affirmed. The court held, "when an entity that has acquired the assets of another entity is sued [under a successor-in-interest theory], and when the predecessor entity could have invoked the SLAPP Act, the successor entity can invoke the SLAPP Act, too."

The SLAPP Act may be asserted as a defense by lawyers who are sued by third parties based on litigation conduct.

Thayer v. Kabateck Brown Kellner LLP (2012)
207 Cal.App.4th 141.

Plaintiff sued a law firm that handled a class action suit, based on the firm's conduct in managing settlement funds arising from that litigation. The firm had represented plaintiff's husband, but not plaintiff, in the class action suit. Defendant filed a motion to strike the complaint under Code of Civil Procedure, section 425.16, arguing that plaintiff's lawsuit arose from defendant's protected activities on behalf of their clients during the class action suit. The trial court denied defendant's motion to strike, holding that defendant's conduct was not "protected litigation speech and petitioning activity."

The Court of Appeal (First Dist., Div. Two) reversed, holding that defendant's motion to strike satisfied both two prongs of section 425.16. First, section 425.16 applies to claims made by third parties against lawyers for litigation related speech and activities undertaken on behalf of their actual clients. Next, plaintiff did not show a probability of prevailing on the merits because it was undisputed she was not defendant's client and thus was owed no duty by the defendant. The court rejected plaintiff's argument that she was a third party beneficiary to the contract between her spouse and the defendant, holding that an attorney's duty to their client does not extend to their client's spouse.

Under the SLAPP Act, defendant can strike causes of action for slander of title where plaintiff relies on allegedly false maps and reports created by defendant for use in a permitting process.

M.F. Farming, Co. v. Couch Distributing Company (2012)
207 Cal.App.4th 180.

Plaintiff, owner of a parcel over which defendant had an easement, filed suit against defendant for (1) quiet title, (2) slander of title, (3) cancellation of cloud on title, and (4) injunctive relief. Defendant moved, under Code of Civil Procedure, section 425.16, to strike the complaint as to the slander of title, cancellation of cloud on title, and injunctive relief causes of action, arguing that any statements allegedly caused to diminish the value of plaintiff's title were made during a permitting process, and were therefore protected petitioning activity. The trial court granted defendant's motion in its entirety.

The Court of Appeal (Sixth Dist.) affirmed with respect to the slander of title and cancellation of cloud on title causes of action, but reversed with directions to deny the motion as to the injunctive relief cause of action. First, the maps and reports prepared by defendant satisfied the first prong of the anti-SLAPP analysis for the slander of title and cancellation of cloud on title causes of action because defendant used the reports in an official proceeding – a permitting process with the city government – so they constituted

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protected speech. The speech would not be protected if "illegal as a matter of law," but the evidence did not establish this. Second, the cause of action for injunctive relief arose from both protected and unprotected activity. Any harm caused to the value of the property by the maps and reports used in the permitting process arose from protected activity, while any harm caused to the value of the property by overuse and physical interference arose from unprotected activity. Next, the court held that the plaintiff did not meet the second prong of the anti-SLAPP analysis as to the slander of title and cancellation of cloud on title causes of action, because (1) plaintiff offered no evidence that defendant falsely represented their ownership interest in the maps and reports, (2) plaintiff offered no evidence that the plans decreased the value of the property so as to show pecuniary loss, and (3) plaintiff offered no evidence that the maps, plans, or reports were void or voidable "instruments." However, plaintiff showed a probability of prevailing as to the injunctive relief cause of action, because this cause of action related to the unchallenged quiet title cause of action, and because plaintiffs made a showing that defendant may have misused the easement.

Plaintiff demonstrated a prima facie case to support her defamation complaint based on a potentially libelous statement in a homeowner's letter about homeowner association business, thus precluding dismissal of the complaint under the anti-SLAPP statute. Moreover, the litigation privilege did not bar the action because while the letter mentioned litigation, the challenged statement was not in furtherance of litigation.

Silk v. Feldman (2012)
208 Cal.App.4th 547.

Defendant's anti-SLAPP motion in defamation and libel action was denied when plaintiff's evidence demonstrated that defendant made a defamatory statement – that plaintiff used her position as an official of a homeowner's association to settle a lawsuit against the association so that she could obtain free parking spaces – and plaintiff demonstrated that the statement was false.

The Court of Appeal (Second Dist., Div. Six) affirmed. The court noted that statements made in a letter critical of the actions of a homeowners association director may qualify as free speech in connection with an issue of public interest. However, the court did not have to decide whether that was true here, as the court found that even if the defendant satisfied the protected speech prong of the anti-SLAPP statute, the plaintiff demonstrated a prima facie case for prevailing, because the letter, which accused plaintiff of a serious breach of fiduciary duty, it was libelous per se if the facts proffered by plaintiff in opposition to the anti-SLAPP motion were accepted by the trier of fact. Moreover, the litigation privilege did not bar the action even though the defamatory statement was made in a letter mentioning an ongoing lawsuit by some members against the association, as well as the possibility of an action for the involuntary dissolution of the association. The defendant failed to show how the defamatory statement was designed to achieve the objects of the referenced litigation.

Defendants could not strike a complaint under the SLAPP Act because plaintiffs' claims for breach of fiduciary duty, although made against the backdrop of litigation, did not rest on any protected activity by defendants.

Aguilar v. Goldstein (2012)
207 Cal.App.4th 1152.

Shareholders of a medical group filed a class action against the Chief Executive Officer, Chief Operating Officer, and Chief Financial Officer of the medical group and its management services organization, who provided staffing to a hospital. Defendants moved to strike the complaint under the SLAPP Act (Code of Civil Procedure, section 425.16), arguing that the lawsuit arose from conduct in furtherance of their right to petition or to free speech because the complaint was based on (1) defendants' conduct in a previous lawsuit, (2) defendants' statements made during negotiations between the medical group and the hospital leading up to the previous lawsuit, and (3) defendants' public statements about the illegality of the hospital's proposals during the negotiations. The trial court denied defendant's motion to strike, holding that this conduct was not protected activity because (1) the references to the original lawsuits in the complaint were "merely incidental" to plaintiff's allegations of breach of fiduciary duty, (2) the conduct set forth in the lawsuit was conduct in an attempt to reach a new contract rather than conduct in anticipation of litigation, and (3) the complaint sought to hold defendants liable for acts such as business decisions and contract negotiations rather than for their public statements. Defendants appealed.

The Court of Appeal (Second Dist., Div. Four) affirmed, holding that Code of Civil Procedure section 425.16 did not apply because defendants failed to show that plaintiffs' cause of action for breach of fiduciary duty arose from defendants' exercise of their right to petition or to free speech. First, the plaintiffs alleged that defendants put their own interests ahead of those of the shareholders when they refused to negotiate for the sale of the group and sued the hospital; those claims were not based on any public statements the defendants made regarding the illegality of the hospital's proposals. Second, defendants' statements made during negotiations with the hospital were not made in anticipation of litigation, but rather, for the purposes of negotiating a contract. Even if defendants made these statements in anticipation of litigation, those statements would not have been protected by section 425.16 because plaintiffs based their claim for breach of fiduciary duty on defendants' failure to disclose conflicts of interests and negotiate in good faith.

A party seeking to strike a complaint under the SLAPP Act is barred by collateral estoppel from relitigating the motion after an appellate court has ruled on the motion and remanded the matter to the trial court.

Direct Shopping Network, LLC v. James (2012)
206 Cal.App.4th 1551.

Plaintiff, a gemstone seller, sued defendants, an author and a publisher, for (1) trade libel, (2) interference with contract, and (3) intentional and negligent interference with trade advantage. Plaintiff alleged that defendants wrote and published articles questioning the quality of his goods. The two defendants filed separate anti-SLAPP

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motions. The trial court denied the publisher's motion, and the publisher appealed. The Court of Appeal reversed as to the publisher. On remand, the trial court allowed plaintiff to introduce new evidence, and based on this new evidence, the court again denied the publisher's motion.

The Court of Appeal (Second Dist., Div. Four) reversed, holding that collateral estoppel barred the plaintiff from relitigating the anti-SLAPP motion. Plaintiff argued that the additional evidence addressed issues different from the first anti-SLAPP motion and that he discovered new facts that were unavailable when he litigated the first motion. The court, however, held that "the issues were the same," because defendants had published the same articles and because in both motions, defendants argued that they made the statements "in a public forum on an issue of public interest," and plaintiff had not shown a probability of prevailing on the merits. The court disagreed with plaintiff's assertion that the new evidence could not have been obtained in connection with the first motion. Last, plaintiff could not relitigate the motion on equitable grounds, because he had a "full and fair" opportunity to oppose the defendants' motions, both at trial, twice, and on appeal.

Declining to follow contrary authority, Court of Appeal holds a good faith settlement determination that results in dismissal of cross-claims for indemnity is a non-appealable order.

Oak Springs Villas Homeowners Association v. Advanced Truss Systems, Inc. (2012)
206 Cal.App.4th 1304.

Plaintiff, a homeowners association, sued developers, roofing subcontractor, roofing materials supplier, and engineering firm. Developers cross-complained against the subcontractor and materials supplier for indemnity. The homeowners association then reached a settlement with the developers, roofing subcontractor, and engineering firm. The trial court approved the determination of a good faith settlement, and accordingly dismissed the cross-complaint against the settling parties. The material supplier challenged that order by appeal.

The Court of Appeal (Second Dist., Div. Eight) dismissed the appeal, because one cannot appeal from a good faith settlement determination. . (Code Civ. Proc., § 877.6, subd. (e).) The court declined to follow *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, where a court, relying on *Justus v. Atchison* (1977) 19 Cal.3d 564, allowed a defendant and cross-defendant to appeal a good faith settlement determination on the ground that approval of the settlement resulted in a final judgment after all the indemnity cross-claims had been dismissed. This court, however, disagreed with the *Cahill* court, and found that *Justus* held only that a party no longer in the proceedings may appeal immediately rather than seek adjudication of the other parties' rights. This court also found that *Justus* did not consider whether a nonsettling defendant can appeal a "good faith settlement upon the final adjudication of its rights, allowing it two appeals on the same issue." Last, this court declined to treat the appeal as a petition for writ of mandate, noting that they did not find any "unusual circumstance or peculiarity."

Contractual choice of law provisions may be voided on public policy grounds, but are generally enforceable where the party seeking to avoid the provision drafted the contract.

Maxim Crane Works v. Tilbury Constructors (2012)
208 Cal.App.4th 286.

Plaintiff, a construction worker, brought a personal injury action against a crane supplier. The crane supplier filed a cross-complaint against its employer, a contractor, for indemnity. The trial court ruled that under Pennsylvania law – the law that the contract between supplier and contractor specified – the indemnity agreement between supplier and contractor did not govern plaintiff's claim against supplier. The trial court also awarded attorney fees to contractor, but did not apportion the fees between defending against the indemnity contract and defending against the underlying claim. Supplier appealed.

The Court of Appeal (Third Dist.) affirmed. First, the choice of law provision applying Pennsylvania law to the contract was enforceable, because application Pennsylvania law is reasonable where enforced against supplier, a Pennsylvania company, particular since supplier drafted the contract. Second, the trial court did not err in awarding attorney fees to contractor without apportioning the fees between defending against the indemnity provision and defending against the underlying suit because preparation of defense on these two issues were "inextricably intertwined." The court explained that contractor's time spent investigating plaintiff's inflated injury claims could be used to defend against the underlying suit, as well as to argue that supplier's settlement with plaintiff was unreasonable.

CLASS ACTIONS

Class certification of wage and hour claims failed because the proposed class was not ascertainable and common issues of fact and law did not predominate; trial court's failure to consider an Industrial Welfare Commission wage order was harmless error.

Sotelo v. MediaNews Group, Inc. (2012)
207 Cal.App.4th 639

Plaintiffs brought a class action alleging fraud and various wage and hour violations against newspaper companies on the ground that plaintiffs were employees, not independent contractors. The trial court found the class was not ascertainable because there were no objective criteria to determine class membership, as there were "an unknown number of members who have no recorded relationship with [defendants]." The trial court also found common issues did not predominate on plaintiffs' overtime, meal break, rest break, fraud, and concealment causes of action. Additionally, utilizing the common law test to determine the employment relationship, the trial court found that some of the factors used to determine whether plaintiffs were employees or independent contractors were subject to significant variability, and therefore the issue was not amenable to resolution via class action.

The Court of Appeal (First Dist., Div. Two) upheld the trial court's findings, noting that plaintiffs failed to demonstrate that the trial court's findings were not supported by substantial evidence.

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Additionally, the trial court's failure to consider an Industrial Welfare Commission wage order in the employment relationship analysis was harmless error because, even if plaintiffs were employees, common issues did not predominate.

Class certification failed due to lack of commonality with respect meal and rest break claims, and conflicts existed among class members; trial court properly addressed a threshold legal issue when considering class certification.

Hernandez v. Chipotle Mexican Grill (2012)
formerly published at 208 Cal.App.4th 1487

Plaintiff brought a class action alleging that defendant failed to provide adequate rest and meal breaks. The trial court denied class certification, holding that individual issues predominated. The trial court recognized that, at the time, the California Supreme Court had granted review in another case, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, addressing whether employers were required to make meal breaks available, as opposed to requiring employers to ensure that employees take meal breaks. The trial court anticipated that the Supreme Court would likely find that employers would be required only to provide meal breaks. The Court of Appeal affirmed the trial court's denial of certification. The California Supreme Court remanded the matter to the Court of Appeal with instructions to vacate and reconsider in light of the Supreme Court's intervening holding in *Brinker*.

The Court of Appeal (Second Dist., Div. Eight) reaffirmed the trial court's holding. The trial court was not foreclosed from considering the threshold legal issue to be determined in *Brinker,* and having correctly anticipated the outcome of that case, the trial court did not abuse its discretion in denying class certification as there was substantial evidence supporting the trial court's conclusion that individual issues predominated. Time records did not demonstrate that plaintiff could prove on a classwide basis that defendant denied employees meal and rest breaks, evidence provided by plaintiff did not undermine the trial court's ruling, and there was evidence of substantial conflicts of evidence among potential class members.

Shortly before this issue of Green Sheets went to print, the California Supreme Court depublished this opinion, making it uncitable in California Courts.

EXPERT TESTIMONY

California Supreme Court reinforces trial courts' "gatekeeper" function in evaluating the admissibility of expert testimony.

Sargon Enterprises, Inc. v. University of Southern California (2012)
__ Cal.4th __. [2012 WL5897314]

The California Supreme Court has confirmed that under California Evidence Code sections 801 and 802, "the trial court acts as a gatekeeper to exclude speculative or irrelevant expert opinion." Trial courts must "determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies. Rather, it conducts a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.'" In addition, "the gatekeeper's role 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'"

See *Evidentiary Gatekeeping in California: Sargon v. USC,* published in this issue of *Verdict* magazine, for a full analysis of the *Sargon* opinion.

See also *Casey v. Perini Corporation* (2012) 206 Cal.App.4th 1222 [First Dist., Div. Four: in asbestos action, defendant properly relied on plaintiff's discovery responses to show lack of any evidence that dust and debris swept up by defendant's employees in plaintiff's presence contained asbestos, and trial court properly excluded speculative expert testimony supporting exposure that relied on a mere assumption that the premises at issue contained asbestos];

See also *Burton v. Sanner* (2012) 207 Cal.App.4th 12 [Fourth Dist., Div. One: in wrongful death action against homeowner who shot his estranged wife and another person after they came to his house late at night, trial court erroneously admitted opinions of retired police officer as plaintiffs' expert on the reasonableness of defendant's conduct – a jury would be as competent as the expert to evaluate the objective reasonableness of a civilian defendant's conduct under the circumstances. Additionally, in allowing the expert to describe the reasons for his opinion, trial court erroneously allowed him "to instruct the jury on his view of applicable legal principles and standards, even though he is unqualified to do so and the court has the exclusive duty to instruct the jury"].

When offering an opinion regarding the customs and practices in a particular industry, an expert may rely upon personal experiences as well other sources of information without detailing the specifics of such experiences.
Howard Entertainment, Inc. v. Kudrow (2012)
208 Cal.App.4th 1102.

In this breach of oral contract action, plaintiff sued actress Lisa Kudrow, for whom he had acted as personal manager for many years. After Kudrow terminated plaintiff's services, he claimed he should continue to receive a percentage of income from Kudrow's engagements entered into during the period of his retention. Plaintiff relied on custom and usage in the industry to support this claim. The trial court granted summary judgment in favor of Kudrow after excluding a declaration from plaintiff's expert on the ground that it lacked foundation, as it did not adequately reflect particularized knowledge from personal participation in contracts implementing the customs at issue during the time the parties entered into their agreement.

The Court of Appeal (Second Dist., Div. Five) reversed, holding that the expert demonstrated his qualifications and foundation for his opinion by outlining not only his personal experience, but also his observations of and discussions with others working in the entertainment industry, and his familiarity with customs and practices in circumstances closely analogous to those at issue in the present case. The trial court's concern that the expert did not "name names" when describing the basis for his opinions was misplaced: "An expert may rely upon experiences and conversations he or she has had and information he or she has obtained without the necessity of providing the specifics of such experiences and conversations" and "there is no requirement that an expert set forth specific persons, conversations, or dates of such conversation for the formation of the opinion, as apparently required by the trial court."

TORTS

California Supreme Court overturns common law rule regarding settling parties' release of joint tortfeasors.
Leung v. Verdugo Hills Hospital (2012)
55 Cal.4th 291.

A minor plaintiff sued his pediatrician and the hospital where he was born for medical negligence. The plaintiff and the pediatrician agreed to settle for $1 million policy limits in exchange for a release, but the trial court ruled the settlement amount was not in good faith because it was "'grossly disproportionate to the amount a reasonable person would estimate' the pediatrician's share of liability would be." Then, at trial, the jury found both the settling pediatrician and non-settling hospital were negligent, awarded approximately $15 million in damages, and apportioned 55 percent of the fault to the pediatrician, 40 percent to the hospital, and 2.5 percent to each of the plaintiff's parents. The judgment imposed liability against the hospital for 95 percent of the jury's economic damages award, subject to a setoff of $1 million. The Court of Appeal reluctantly reversed, holding that under the common law release rule, plaintiff's release of liability claims against the pediatrician also released the nonsettling hospital from liability for plaintiff's economic damages.

The California Supreme Court reversed, holding that California would no longer follow the common law release rule. Accordingly, the plaintiff could continue to litigate against non-settling defendants. The Court adopted a "set-off with contribution" approach to apportioning liability among joint tortfeasors in the absence of a good faith settlement determination. Under this approach, "the money paid by the settling tortfeasor is credited against any damages assessed against the nonsettling tortfeasors, who are allowed to seek contribution from the settling tortfeasor for damages they have paid in excess of their equitable shares of liability."

LABOR AND EMPLOYMENT

The ADA preempts section 1983 causes of action predicated on alleged violations of substantive rights provided by the ADA, and defendant rationally denied reinstatement based on conclusion that psychological disorders made plaintiff unable to perform her duties after returning from disability leave.
Okwu v. McKim (9th Cir. 2012)
682 F.3d 841.

Plaintiff, a Caltrans employee, filed a civil rights action against state officers, after defendants determined that plaintiff's psychological disorders made her unfit for reinstatement from disability retirement to active service. Plaintiff alleged that by denying reinstatement, defendants deprived her of (1) her right to reasonable accommodation, under the Americans with Disabilities Act (ADA), and (2) her equal protection rights under the Fourteenth Amendment. The district court granted defendants' motion to dismiss. Plaintiff appealed.

The Ninth Circuit Court of Appeals affirmed. First, Title I of the ADA is sufficiently detailed and comprehensive so as to preempt any causes of action under title 42 of the United States Code, section 1983, based on alleged violations of ADA Title I substantive rights. Further, plaintiff could not pursue a section 1983 cause of action even if an alternative cause of action would be barred by the Eleventh Amendment's sovereign immunity doctrine. Moreover, the trial court properly dismissed plaintiff's section 1983 cause of action because defendants did not deprive plaintiff of equal protection rights, as she did not plead that defendants had treated other employees in her situation differently. Even if plaintiff had pled disparate treatment, defendants' decision not to reinstate plaintiff was rationally based on their determination that plaintiff's psychological disorders made her unable to perform her duties.

Complaints filed through the Department of Fair Employment and Housing's online automated system are sufficient to satisfy the jurisdictional prerequisite for filing a lawsuit under the Fair Employment and Housing Act.
Rickards v. United Parcel Service, Inc. (2012) 206 Cal.App.4th 1523.

Plaintiff sued United Parcel Service, Inc. for violating the Fair Employment and Housing Act (FEHA). Defendant moved for summary judgment, arguing that plaintiff failed to file a verified complaint as required by Government Code, section 12960, subdivision (b). The trial courted granted defendant's motion. Plaintiff appealed.

The Court of Appeal (Second Dist., Div. Four) affirmed the grant of summary judgment on other grounds. First, the court held defendant was not entitled to summary judgment on the ground that plaintiff failed to meet the jurisdictional prerequisite to filing a FEHA lawsuit. The court explained that an attorney could verify an online complaint filed with the Department of Fair Employment and Housing on behalf of their client in order to satisfy Government Code, section 12960, subdivision (b). In the unpublished portion of the opinion, however, the court affirmed the summary judgment because plaintiff failed to raise a triable issue of material fact on his FEHA claims.

INSURANCE

Claim Against Insurer Properly Rejected on Summary Judgment Based on Insureds' False Statements.
Hodjat v. State Farm Mut. Auto. Ins. Co. (2012) __ Cal.App.4th __. [149 Cal.Rptr.3d 93]

Two insureds made a claim under their State Farm policy for the alleged theft of an insured BMW automobile. The insureds provided State Farm with three different purchase prices for the automobile and also provided various accounts of the amount of pre-existing damage to the automobile. State Farm denied the claim and the insureds sued for bad faith.

The Court of Appeal (Second Dist., Div. Eight) upheld summary judgment for State Farm because the insureds' misrepresentations and inconsistencies regarding their claim demonstrated that a genuine dispute existed regarding State Farm's denial of liability under the policy which provided there would be no coverage if the insured made any false representations with the intent to conceal or misrepresent any material facts or circumstances in connection with any claim under the policy.

CASES PENDING IN THE CALIFORNIA SUPREME COURT

Addressing enforceability of arbitration clauses that contain class action waivers.
Iskanian v. CLS Transportation Los Angeles, LLC, case no. S204032
(formerly published at 206 Cal.App.4th 949).

Plaintiff Iskanian worked as a driver for defendant CLS Transportation Los Angeles, LLC (CLS). During his employment, he signed an arbitration agreement that contained class and representative action waivers. Iskanian filed a class action complaint, alleging that CLS failed to provide meal and rest breaks, reimburse business expenses, provide accurate and complete wage statements, and pay final wages in a timely manner. CLS moved to compel arbitration, which the plaintiff opposed in reliance on *Gentry v. Superior Court* (2007) 42 Cal.4th 443, which requires that class waivers in arbitration agreements should not be enforced if "class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration."

The Court of Appeal (Second Dist., Div. Two) affirmed, finding that the test set out in *Gentry* was no longer good law, in light of the U.S. Supreme Court's decision in *Concepcion*. *Concepcion* rejected the concept that class arbitration procedures should be imposed on a party who never agreed to them, holding that "requiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with" the Federal Arbitration Act. "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." In so holding, the court disagreed with contrary reasoning in *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489 regarding nonarbitrability of PAGA claims, and disagreed 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.

The California Supreme Court granted review on July 16, 2012, to address the following issues: (1) Did *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __ [131 S. Ct. 1740, 179 L.Ed.2d 742] impliedly overrule *Gentry v. Superior Court* (2007) 42 Cal.4th 443 with respect to contractual class action waivers in the context of non-waivable labor law rights? (2) Does the high court's decision permit arbitration agreements to override the statutory right to bring representative claims under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.)? (3) Did defendant waive its right to compel arbitration?

See also *Reyes v. Liberman Broadcasting, Inc.* (2012) formerly published at 208 Cal.App.4th 1537 [First Dist., Div. 1: an arbitration agreement silent on the issue of class arbitration may have the same effect as an express class waiver]. Review granted 12/12/12, no. S205907.

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Defeating "Settle and Sue" and "Lost Settlement Opportunity" Legal Malpractice Claims as a Matter of Law

By Steven S. Fleischman
Horvitz & Levy LLP

I. INTRODUCTION

A common claim in legal malpractice actions is the assertion that the underlying matter, if settled through the auspices of the attorney, should have been settled on better terms, or if litigated to a disappointing conclusion, that it should have been settled instead. By definition, these claims involve 20/20 hindsight and often rank speculation. One court has summarized the hindsight nature of these claims, noting that courts are "loathe to allow settling plaintiffs to later second-guess themselves by suing their attorneys." (*Blecher & Collins, P.C. v. Northwest Airlines, Inc*. (C.D.Cal. 1994) 858 F.Supp. 1442, 1458 (*Blecher & Collins*).) Recent case law confirms the importance of understanding the rules of causation in this area, and the strategies defense counsel can use to defeat these claims as a matter of law. The purpose of this article is to explain the legal basis for these claims and how defense counsel can defeat these claims as a matter of law on summary judgment.

II. RELEVANT CASE LAW

A. "Settle and sue" claims

The first (and more common) type of "buyers' remorse" claims discussed here arise when the underlying action was settled and the client then claims that the settlement would have been better absent the lawyer's malpractice. The law in California for these claims is clear: the legal malpractice plaintiff should not be able to obtain a better result from the attorney in the malpractice action than the plaintiff could have achieved in the underlying action.

The starting place is *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241 (*Viner I*), in which the California Supreme Court held that a legal malpractice plaintiff must always prove "but for" causation, regardless of the type of claim asserted. In other words, liability exists only if the plaintiffs shows that, but for the lawyer's malpractice, a different and better outcome would have been achieved. The "but for" causation requirement "is to safeguard against speculative and conjectural claims." (*Ibid*.) After the Supreme Court remanded the *Viner* case to the Court of Appeal to evaluate the facts in light of the clarified legal standard, the Court of Appeal held that the plaintiffs had failed to come forward with any evidence at trial proving that the other side would have agreed to a more favorable transaction than the one the parties eventually entered (a "better deal" scenario) or that the legal malpractice plaintiff would have been better off without entering into any transaction at all (a "no deal" scenario). (*Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1227-1229 (*Viner II*).)

The "better deal" scenario in *Viner II* is the proper analysis in any "settle and sue" claim. Legal malpractice plaintiffs must prove that "but for" the alleged malpractice leading up to settlement or malpractice in advising the client to agree to settlement, they could have obtained a "better deal" in the underlying action and that their attorney should be liable for the difference between what was received and what should have been received, taking into account the expense of going forward with a trial.

The California case with the most thorough analysis of these issues is *Barnard v. Langer* (2003) 109 Cal.App.4th 1453 (*Barnard*). During the underlying action, there were numerous offers and counteroffers between the parties and eventually a settlement was reached at a settlement conference. During the settlement conference, the client asked the law firm to reduce its fees by $100,000; the firm declined. The parties then negotiated and signed a settlement agreement. "Before the ink was dry," the client wrote the firm contesting the firm's fee due to its alleged negligence; the fee was placed in a trust account pending resolution of the dispute and the remaining sums were disbursed to the client. The client sued, claiming that the firm's malpractice caused him to settle for " 'substantially less than [he was] legally entitled to.' " (*Id.* at pp. 1457-1458.)

The trial court granted a nonsuit, which was affirmed. The court held that plaintiff had failed to come forward with evidence that "but for the [defendant's] negligence," the underlying action would have "had a better outcome, either by a higher settlement or at trial." (*Barnard*, *supra*, 109 Cal.App.4th at p. 1461.)

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"It is not enough for [plaintiff] to simply claim, as he did at the trial of this malpractice action, that it was possible to obtain a better settlement or a better result at trial. The mere probability that a certain event would have happened will not furnish the foundation for malpractice damages. 'Damages to be subject to a proper award must be such as follows the act complained of as a *legal certainty*.' " (*Ibid*.)

The plaintiff's evidence in *Barnard* showed nothing more than "speculative harm" because it did not demonstrate that but for the attorney's negligence, the underlying action would have "settled for more or gone to trial and resulted in a larger recovery." (*Barnard*, *supra*, 109 Cal. App.4th at p. 1461.) The plaintiff failed to introduce evidence that the defendant in the underlying action would have paid more than the settlement amount, leaving the alleged harm as " 'only a subject of surmise, given the myriad of variables' " that affect trials. (*Ibid*.) " ' "[T]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages." ' " (*Ibid*.) Plaintiff's offer of proof at trial was "little more than a wish list of damages, unsupported by evidence that the [defendant] would have settled for more, *or by expert testimony to show that [plaintiff's] amounts could have been recovered had the case been tried*." (*Id*. at p. 1463, emphasis added.) Accordingly, under *Barnard*, a legal malpractice plaintiff must prove either evidence that the case could have settled for more than it did or must submit expert testimony that the outcome would have been better had the matter gone to trial.

Barnard further noted the "hindsight vulnerability of lawyers is particularly acute when the challenge is to the attorney's competence in settling the underlying case." (*Barnard*, *supra*, 109 Cal.App. 4th at p. 1462, fn. 13.) The court stated that "the speculative nature of hindsight challenges to recommended settlements often are protected as judgment calls.' " (*Ibid*.)

" 'The standard should be whether the *settlement is within the realm of reasonable conclusions, not whether the client could have received more or paid less*. No lawyer has the ability to obtain for each client the best possible compromise but only a reasonable one.' " (*Ibid*., emphasis added.)

Barnard provides the correct analysis and shows that these claims can be resolved by motion short of trial. " ' "The law favors settlements." ' " (*Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913, 930.) Every client who settles a claim could sue their attorney for malpractice, asserting that the matter should have settled on better terms, even $1 better. If the possibility of an additional dollar could create a triable issue of material fact, requiring a trial, then the legal malpractice

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plaintiff would always be able to survive summary judgment. That is why the issue is not whether the settlement could have been higher or lower, but instead, whether the settlement was within the range of reasonableness. (*Barnard, supra*, 109 Cal. App.4th at p. 1462, fn. 13.)

Barnard was followed in *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518 (*Slovensky*). *Slovensky* involved a "settle and sue" claim brought by the underlying plaintiff. The client consulted the defendant attorneys *after* the statute of limitations had run on the client's claim. Nonetheless, the defendant attorneys filed suit on the client's behalf and settled the case for $340,000. (*Id.* at pp. 1521-1525.) The trial court granted defendant's a motion for summary judgment on the grounds that the plaintiff's underlying claim was barred by the statute of limitations. The Court of Appeal affirmed, following *Barnard* and reiterating that a plaintiff must prove damages "to a legal certainty, not to a mere probability." (*Id.* at p. 1528.) The court noted that "settle and sue" claims are "likely to be speculative" and followed *Barnard* in holding that attorneys are only subject to the "standard of whether the settlement was within the realm of reasonableness." (*Ibid.*) Undisputed facts showed that the plaintiff's underlying claim was time barred, and "to recover damages at trial, she would have had to defeat the statute of limitations defense. The undisputed facts reveal she could not have done so." (*Ibid.*) That is, the attorney defendants were entitled to summary judgment because they disproved the value of the plaintiff's underlying case.

Another case demonstrating these principles is *Jalali v. Root* (2003) 109 Cal. App.4th 1768. In this case, the gravamen of the plaintiff's claim was that the defendant negligently offered advice regarding the tax consequences of her settlement of the underlying action. (Because of the Alternative Minimum Tax, plaintiff was not able to deduct the defendant attorney's contingent fee for the underlying case.) Plaintiff did not claim that she would have received a better result at trial than she did in the settlement. Instead, she argued that had the negligent tax advice not been given, she would not have settled the case and would have insisted on going to trial even if it meant a lesser result. (*Id.* at p. 1774.) The Court of Appeal reversed a jury verdict rendered in plaintiff's favor. The court rejected plaintiff's contention that her claim was for the right to put the underlying defendant through a trial. The court held that implicit in that theory was that the underlying defendant would have paid some amount more in order to spare the exposure of a trial and that amount was, by definition, more than the settlement figure. (*Id.* at p. 1778.) However, because plaintiff "never put on evidence that a recovery larger than $2.75 million was even possible, her proof of damages fails." (*Ibid.*)

These principles were recently applied by the Court of Appeal in *Filbin v. Fitzgerald*

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(Nov. 20, 2012, A128544) __ Cal.App.4th __ [2012 WL 5857331]. In *Filbin*, the underlying action was an eminent domain proceeding where the plaintiff was represented by the defendant lawyer before hiring another lawyer. After the change of counsel, the plaintiff settled the underlying case. The plaintiff then brought a "settle and sue" malpractice claim against prior counsel. Following a bench trial, the trial court ruled that the defendant attorney's alleged failure to properly prepare for trial caused the plaintiff to settle the underlying case for $574,000 less than what the case was worth. The Court of Appeal reversed, holding that the plaintiff could not, as a matter of law, prove the causation necessary for a "settle and sue" claim. The court ruled that because the underlying settlement was reached without the assistance of the defendant attorney, the plaintiffs could not prove that anything the attorney did adversely affected them:

"Therefore, when replacement counsel took over the case on August 3, it was with no lingering impairment at Fitzgerald's hands. When it came time for the Filbins to consider whether to settle the case some two and a half months later, in mid-October, they were free agents. No past decision by Fitzgerald hobbled them. Nothing prevented their new counsel from giving them impartial advice. No one would stop them from going to trial. Their decision to settle was theirs and theirs alone, made with the assistance of new counsel, with no input from Fitzgerald. The consequences of that decision are likewise theirs alone." (*Id*. at *10.)

These and other cases show that, under California law, a defendant may be entitled to summary judgment in "settle and sue" cases. (*See Orrick Herrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052, 1057-1058 [following *Marshak* and *Thompson*]; *Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1518-1519 (*Marshak*) [same]; *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 661-663 (*Thompson*) [affirming the granting of summary judgment in "settle and sue" legal malpractice case]; *Blecher & Collins, supra,* 858 F.Supp. at pp. 1458-1459 [granting summary judgment in "settle and sue" case].)

Another issue that arises in these cases is the admissibility of settlement offers and demands made during a mediation. In *Cassel v. Superior Court* (2011) 51 Cal.4th 113, the California Supreme Court emphasized the absolute nature of the mediation confidentiality statutes (Evid. Code, § 1119 et seq.) and held that evidence of communications made during a mediation are inadmissible, even if it means that a legal malpractice plaintiff is unable to prove his or her claim. (*Cassel*, at pp. 132-134.) Therefore, neither the legal malpractice plaintiff, nor the defendant attorney, can introduce settlement offers made during a mediation in order to support their respective positions. In contrast, the mediation confidentiality statutes do *not* apply to mandatory settlement conferences. (Evid. Code, § 1117, subd. (b)(2); Advisory Com. com., 23 pt. 1B West's Ann. Codes, Rules (2012 supp.) foll. rule 3.1380, p. 43.) Thus, settlement offers and demands made during mandatory settlement conferences, unlike mediations, should be admissible in these cases.

B. "Lost settlement opportunity" claims. In the other "buyers' remorse" legal malpractice scenario, the client alleges that the attorney's negligence caused the client to miss an opportunity to settle for a result better than the ultimate outcome. Ronald Mallen refers to this as a "lost settlement opportunity" scenario. (4 Mallen & Smith, Legal Malpractice (2012) The Litigation Attorney – Legal Malpractice Claims, § 33:37, p. 895.) There are not as many reported "lost settlement opportunity" cases under California law. The leading case is *Campbell v. Magana* (1960) 184 Cal.App.2d 751 (*Campbell*). This involved a claim brought by the plaintiff in the underlying action. *Campbell* is usually

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cited for the proposition that a legal malpractice plaintiff who demonstrates malpractice leading to loss of a viable claim must also prove that, had a judgment in his or her favor been rendered, it would have been collectable. (*Id.* at p. 754.) The case also, however, stands for the proposition that a plaintiff may not rest a malpractice action on loss of a "nuisance value" claim regardless of the claim's merits. (*Id.* at p. 753.) The court rejected plaintiff's assertion:

This argument cannot prevail for at least two reasons; *first, it advances speculative values as a measure of recovery*; and second, it violates an established rule of this state (and most others) that one who establishes malpractice on the part of his attorney in prosecuting or defending a lawsuit must also prove that careful management of it *would have resulted in recovery of a favorable judgment and collection of same or, in case of a defense, that proper handling would have resulted in a judgment for the client*; that there is no damage in the absence of these latter elements, and the burden of proof rests upon the plaintiff to prove recoverability and collectibility of a plaintiff's claim or ability to establish a defense for a client who has been sued.

(*Id.* at p. 754, emphases added.) The court also rejected a "lost settlement opportunity" claim because the evidence showed that the best offer ever made to the plaintiff was $350, while the plaintiff demanded that she would settle " 'for nothing less than $100,000.' " (*Id.* at p. 758.) It is in this context that the court expressly rejected the contention, frequently raised by plaintiffs, that *every* claim has "settlement or nuisance value which cannot be disregarded." (*Id.* at p. 753.)

In *Charnay v. Cobert* (2006) 145 Cal. App.4th 170 (*Charnay*), the defendant in the underlying action brought a "lost settlement opportunity" claim, alleging that her attorneys should have advised her to settle the underlying action for $25,000, rather than trying the case. The underlying judgment against the client was $600,000. (*Id.* at pp. 175-177.) The trial court sustained the attorney's demurrer, holding that the plaintiff could not allege a more favorable outcome because such a claim was speculative under *Thompson* and *Marshak*. The Court of Appeal reversed. The court distinguished *Thompson* and *Marshak* because both of those cases were decided on summary judgment, rather than on the pleadings. Although the court was skeptical as to whether the plaintiff would be ultimately able to prove damages, the court held that the complaint sufficiently alleged causation to establish a cause of action for legal malpractice under *Viner I*. (*Id*. at pp. 179-182.)

III. CONCLUSION

Slovensky proves that by attacking the merits of the underlying case, the defendant attorney can prevail on summary judgment, and *Campbell* holds that a plaintiff cannot simply contend that every claim has *some* value. Even if the defendant attorney cannot prove that the plaintiff's underlying case was completely devoid of merit, *Barnard* and *Slovensky* hold that the attorney need only show that the former client's disappointing settlement is "within the range of reasonableness" in order to be entitled to summary judgment. By attacking the merits of the underlying action, attorney defendants can demonstrate that the settlement was "within the realm of reasonableness" and obtain summary judgment on legal malpractice claims. And, while *Charnay* cautions against trying to defeat such claims by demurrer, the question whether the settlement is within the "realm of reasonable conclusions" is an issue of law that can be decided on summary judgment. (*See Slovensky, supra*, 142 Cal.App.4th at p. 1533.)

Steven Fleischman is an appellate attorney with Horvitz & Levy LLP, and is Chair of ASCDC's amicus committee. This article is based on a prior article that Mr. Fleischman wrote with Edith Matthai, Robie & Matthai, which was presented to an ABA Seminar.

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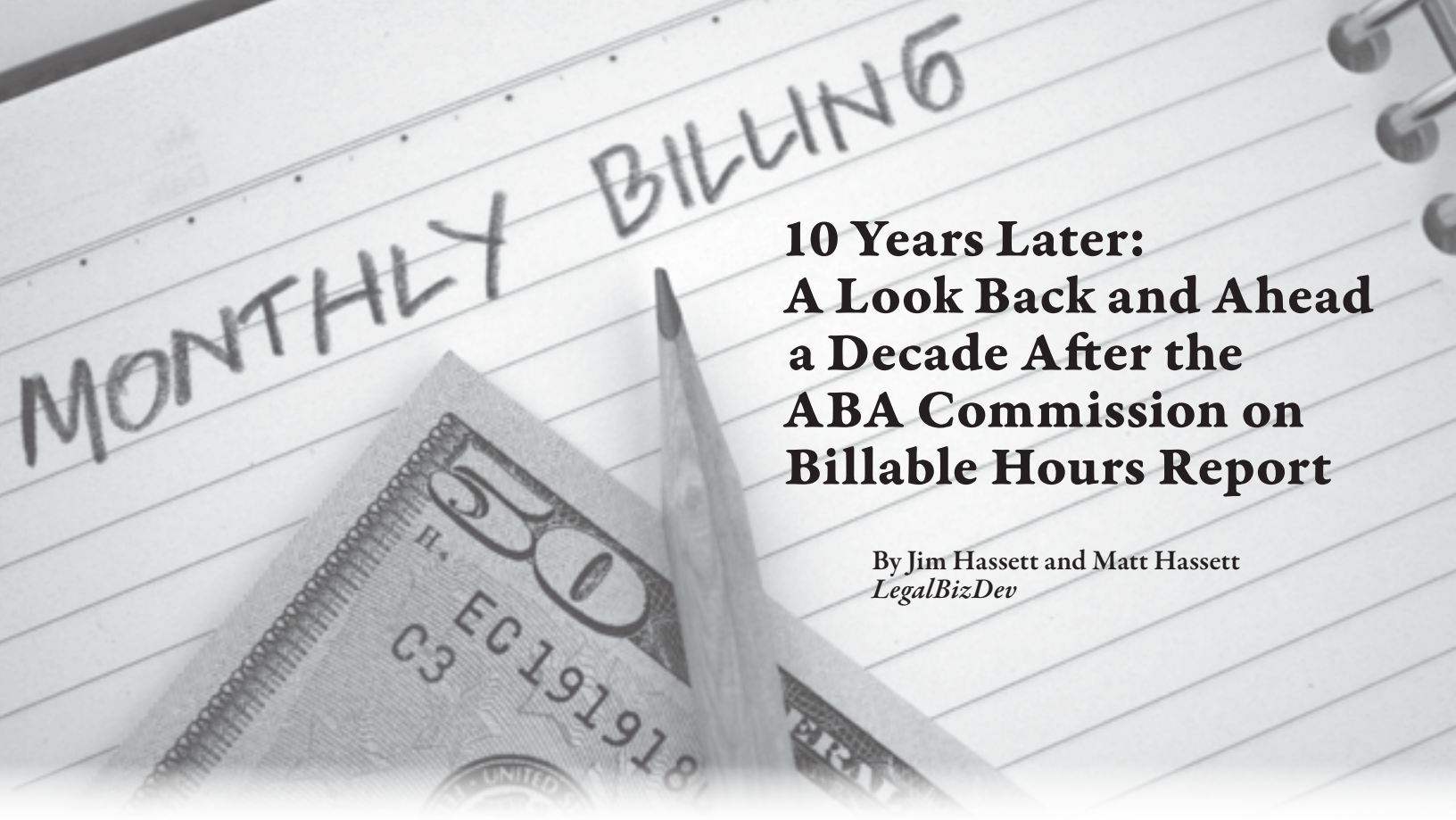

10 Years Later: A Look Back and Ahead a Decade After the ABA Commission on Billable Hours Report

By Jim Hassett and Matt Hassett
LegalBizDev

In August 2002, the **American Bar Association (ABA)** published its influential ***ABA Commission on Billable Hours Report*** summarizing the research of a distinguished panel of experts. The report highlighted many disadvantages of hourly billing and said that "the overreliance on billable hours by the legal profession:

- Results in a decline of the collegiality of law firm culture and an increase in associate departures
- Discourages taking on pro bono work
- Does not encourage project or case planning
- Provides no predictability of cost for client
- May not reflect value to the client
- Penalizes the efficient and productive lawyer
- Discourages communication between lawyer and client
- Encourages skipping steps
- Fails to discourage excessive layering and duplication of effort
- Fails to promote a risk/benefit analysis
- Does not reward the lawyer for productive use of technology
- Puts client's interests in conflict with lawyer's interests
- Client runs the risk of paying for:
  - The lawyer's incompetency or inefficiency
  - Associate training
  - Associate turnover
  - Padding of timesheets
- Results in itemized bills that tend to report mechanical functions, not value of progress
- Results in lawyers competing based on hourly rates"

OVER THE YEARS

Although the report generated a great deal of discussion, for several years it seemed to have little impact on behavior. A small percentage of clients and firms continued to use non-hourly billing (as they had for years before the report), and the talk gradually faded away. Then, in 2008, two things happened: The economy declined, and the Association of Corporate Counsel announced its Value Challenge, mobilizing action around its declaration that "Many traditional law firm business models ... are not aligned with what corporate clients want and need: value-driven, high-quality legal services that deliver solutions for a reasonable cost."

In 2009, when the alternative fee arrangement (AFA) buzz was still building, we interviewed chairmen, senior partners and C-level executives at 37 AmLaw 100 firms for our *LegalBizDev Survey of Alternative Fees*. Since we assured participants that all quotes would be anonymous, many of these law firm leaders spoke frankly and openly about the uncertainties that surrounded non-hourly work: • "In-house counsel are just as nervous and as scared about alternative fees as the law firms are."

- "General counsel really don't know exactly what they're trying to achieve. They just feel like everything has gotten very expensive [and that] the structure of the law firm promotes inefficiency. I don't think they've really thought through what would work well for them."

- "I think [clients] don't know yet how to evaluate [alternative fee] proposals. Our long-term clients are honest with us [and] say, "I have no way to measure this, no way to know which of these deals you are offering us is the best deal, and no way of comparing your

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alternative fee arrangement with the simple discount off of standard rates that the other firm has offered us."

- "When it comes to alternative billing arrangements, a number of clients are just not sure yet what it is they are looking for. They are feeling their way through this paradigm shift, just as we are."

In the words of another senior partner in our survey, the whole discussion was also "like a junior high dance. There's a lot more talking than dancing."

While that comment still rings true today, several recent surveys have found that about half of law firms and law departments report that they have increased the use of AFAs in the past 12 months. (In Altman Weil's 2012 Law Firms in Transition survey, 47 percent of firms reported that their AFA revenue had increased in the past year.

An ALM Legal Intelligence survey published in July showed that 50 percent of law departments and 62 percent of law firms reported an increase in the volume of AFAs between 2010 and 2011.)

AFA STRUCTURES

Lawyers have been very creative in coming up with a variety of AFA structures. In the LegalBizDev survey, we classified the most commonly used AFAs into nine types: risk collars, fee caps, fixed fees for a single engagement, fixed fee menus, portfolio fixed fees, retainers, success fees, holdbacks and full contingencies.

When the ALM Legal Intelligence Survey asked law departments which types they used from a slightly different list, the most common were flat fees (89 percent) and capped fees (57 percent), followed by blended rates, phased fees, contingent fees, success fees, flat fees with shared savings, defense contingency fees and holdbacks.

The most important difference between the two classification schemes is the fact that ALM included blended rates – a single hourly rate that applies to all lawyers on a matter – and we did not. This reflects a philosophical difference between two types of AFA definitions: narrow and broad. Our survey used the narrow definition which reserves the term AFAs for fees that are fully or partly non-hourly. The broad definition used by ALM and others also includes arrangements that are 100 percent hourly but include certain types of discounting.

The fact that two conflicting definitions of AFAs are in wide use adds considerable confusion to an area that was already confusing enough. If a firm claims that 50 percent of its work is performed on an alternative fee basis, that could mean that they are moving away from the billable hour (under the narrow definition), or it could mean that they are engaging in some creative hourly rate discounting (under the broad definition).

Some have a vested interest in maintaining this confusion. Announcing that a firm offers 50 percent of its work on an alternative fee basis sounds much more thoughtful and less desperate than saying, "Half the time, we have to slash our hourly rates because we need the business."

THE BOTTOM LINE

The best estimate of the revenue from alternative fees is about 15 percent. The most recent survey of law departments (Altman Weil's 2011 Chief Legal Officers survey) reported 14 percent of revenue. The most recent survey of law firms – ALM's 2010 Law Firm Leaders survey – put the figure at 16 percent. While in some ways 15 percent may not sound like much, it is important to emphasize that the AmLaw 100 performed over $10 billion worth of legal work last year on a non-hourly basis (based on total gross revenue of about $71 billion).

The ABA Commission predicted that the non-hourly approach would be a financial

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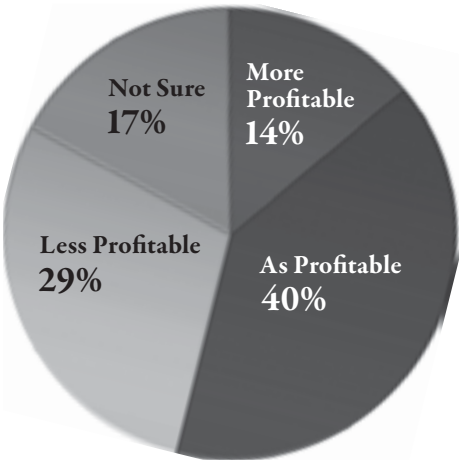
boon to law firms: "Alternatives that encourage efficiency and improve processes ... increase profits" (p. ix). But so far that has not been the case. Altman Weil asked managing partners, "Compared to projects billed at an hourly rate, are your firm's non-hourly projects more profitable or less profitable?" Here is what they found:



2012 Law Firms in Transition Survey

To many people, Altman Weil's most surprising finding was the 17 percent who were "not sure." Some financial systems were set up for a simpler world of hourly billing, and these firms simply did not know whether they were making money or losing money on AFAs. Legal software vendors have been scrambling to update their systems, and in the four years that Altman Weil has been asking this question, the percentage of firms who were unsure has been going down. But the fact that 17 percent of firms still don't know whether their multi-million dollar AFAs are making money or losing it shows how much work law firms still have to do to adapt to this new world.

AFA BENEFITS

Some law firms have actively promoted AFAs as a way to increase new business, and invested in training and systems to make them more profitable. For example, at Morgan Lewis, Richard Rosenblatt, the operations partner for the Labor and Employment Practice says that:

AFAs invite the client to engage with us and increase the ties that bind. We're now on the same team, and more likely to get the next engagement. This is an opportunity to get a bigger share of a shrinking pie.

Interestingly, the Altman Weil survey reported that about one-third of firms took this type of proactive approach because they believed non-hourly billing would help them win more work, while the other two-thirds said their use of AFAs was reactive, that they simply gave clients what they asked for. When Altman Weil compared AFA profitability for the two groups, they found that it pays to be proactive: "Firms that are proactive rather than reactive in their use of AFAs are more than three times as likely to enjoy higher profitability on their non-hourly work" (p. iv).

WHAT'S NEXT

Where are we headed? Clearly, the legal profession is changing, but there are differences of opinion how much it will change and how soon. In the ALM survey, about three-out-of-four participants predicted that AFAs will increase in the next five years (70 percent of law departments and 82 percent of law firms). Of all the firms that have moved in the direction of greater efficiency and non-hourly billing, none has generated more publicity than Seyfarth Shaw. In 2006, they started using Six Sigma and process improvement techniques to simplify and standardize certain types of legal work, and ultimately created a proprietary system called Seyfarth*Lean*. According to an April 2010 article in *The American Lawyer*, they spent over $3 million during the first few years on this initiative, and many articles have appeared describing its benefits. But if Seyfarth Shaw is at the head of this movement, it is interesting to note that six years into the effort, Seyfarth Chairman Steve Poor wrote in *The New York Times DealBook*:

Never underestimate the resistance to change from lawyers.... Much of what we've done is most effective when deployed in a collaborative change process with clients. What we overlooked at the outset

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Differences of Opinion about Shadow Billing

One of the most interesting findings in the *LegalBizDev Survey of Alternative Fees* was the split in firms' opinions about "shadow billing," in which law firms provide information about actual hourly costs for matters where they are paid a fixed price.

Many firms resist client pressures to provide this information, for fear that it will be used against them. A deal is a deal in this approach, and the client should not get to look behind the curtain to see whether the firm has won or lost. As one senior decision maker put it in our survey: In some cases, what's happening is that even when there's an agreement that the fixed fee is going to be allowed, the client wants to reconcile the time and see if they got a good deal or a bad deal. And as long as that's the kind of relationship it is, it really isn't an alternative billing arrangement. If general counsel really want to get rid of the billable hour system for billing, then you can't have all these post-audit questions about it. If you agree on something, there's value and we found a way to staff it differently. We should benefit from those efforts.

Other firms allow and even encourage this sort of comparison. As one put it: If we hide things like hours, it's not going to work. We're interested in this from a partnership perspective. There has to be mutual trust. If clients think we're just doing this and reaping in additional money, it's not going to work.

is that, by and large, our clients are lawyers, too ... The continuous move forward takes persistence and, perhaps, a bit of stubbornness (May 7, 2012).

When we asked one of the original members of the ABA Commission on Billable Hours – Mike Roster, who is now co-chair of the ACC Value Challenge Steering Committee – whether he was surprised by the slow rate of change in the 10 years since the report was issued, he said:

The ABA committee's report was all-encompassing but no one is going to change unless or until there is a need to do so. So I wasn't surprised that not much came of it. But the more recent pressures from clients, the economic meltdown, and now the growing evidence of major benefits being realized by companies and firms that take the plunge will all, I think, lead to long-lasting and highly beneficial changes.

Of course, it is impossible to predict just how quickly this move to alternative fees will proceed, or whether it will reach a tipping point any time soon. If the trend does pick up steam, alternative fees could completely transform the legal profession, from the way legal matters are handled to the way lawyers are paid. As Harry Trueheart, the Chairman Emeritus of Nixon Peabody, summed it up: A lot of education will go into this, and it's not cheap. Law firms will pay dearly as we as a profession learn to do this. There will be winners and losers.

Whether AFA growth proves to be fast or slow, it is important to note that this particular change is a one-way street, and there is no turning back.

In 2010, Tucker Ellis became one of the first firms with over 100 lawyers to generate more than half their revenue from non-hourly work. When we interviewed their Managing Partner Joe Morford about this trend, he noted that many clients were initially reluctant to make the switch, but that, "Once we started working for a client with alternative fees, not a single one has wanted to go back."

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The Name of the Game

By Christopher P. Wesierski,
Wesierski & Zurek LLP

On December 7, 2012, Christopher P. Wesierski and Andrew Brown, from Wesierski & Zurek, LLP obtained a defense verdict in a case where Plaintiff's counsel, Nicholas Rowley, from Carpenter, Zuckerman & Rowley, along with Dan Ambrose from Michigan and Tiffany Chung were claiming $27.6 million dollars for a traumatic brain injury case. What made this case interesting is that on a daily basis attorneys from across the country were monitoring the file and monitoring Mr. Rowley, since he has obtained large verdicts in a number of different cases over the last couple of years for brain damage cases. For example, earlier in 2002, in Orange County Nicholas Rowley obtained a $38.6 million dollar verdict for traumatic brain injury where the Plaintiff was alleged to be inebriated and under the influence. In addition, a number of different insurance carriers were monitoring the case as they have a number of cases set with Mr. Rowley, which are also traumatic brain injury cases. Finally, the closing arguments, by both attorneys, were argued in front of a packed house in front of numerous members of the bench and bar. Various individuals were turned away from the door as there was no room in the courtroom at the time of the closing arguments at 1:30 p.m. on Thursday, December 6, 2012.

The case involved an auto accident between Marilyn Hinman, DOB 07/07/53 and Kevin Chang, DOB 07/26/84. The date of the accident was 12/12/09. At the time of the accident, the weather was drizzly. Kevin Chang ran a red light and collided with Marilyn Hinman and was then forced into another vehicle driven by a separate driver who claimed injuries at the scene. The other driver settled before the case was filed.

Kevin Chang admitted liability at the scene of the accident, and at the scene of the accident Plaintiff indicated she was not hurt. However, within one hour after the accident, she gave a statement to Mercury Insurance Company, who was her insurance company and the insurance company for Kevin Chang. In that statement, she indicated that she had vomited twice and she had a severe headache. The adjustor who took the recorded statement then said "it does not sound like you are alright." Plaintiff then went to the emergency room. At the emergency room, a CAT Scan was ordered and they diagnosed her with a possible concussion.

Some months later, she then had a subsequent CAT Scan and eventually made a claim for soft tissue injury and posterior vitreous detachment in the right eye when she initially filed her lawsuit.

About 2 years later, the case then switched to the firm of Carpenter, Zuckerman & Rowley. They sent her to a well known expert they work with frequently, Hyman Gross, who is a Neurologist. He diagnosed her, based on his tests and interview with her, with traumatic brain injury. He requested an MRI scan with diffusion tensor imaging. The diffusion tensor imaging test came back as normal, but the MRI scan showed small focal points in the area where the Plaintiff hit her head. The Plaintiff claimed she hit her head on the steering wheel and the right front eyebrow area, and that she hit the left side of her head on the driver's side window. The focal points were found in both areas by Plaintiff's experts. Plaintiff's counsel also retained Dr. Barry Pressman, who is head of radiology at Cedar Sinai. He claimed that the focal points on the MRI scan matched with those areas of trauma, and therefore, there was definitive brain

continued on page 35

damage. Plaintiff also hired Dr. Arthur Kreitenberg, an Orthopedist, who surmised that she may need shoulder surgery and that she needed shoulder injections for problems with her shoulder. He also surmised that she had problems with her neck. In addition, Plaintiff hired Dr. Peter Francis as a biomechanic expert, who did not testify at trial based on illness. Plaintiff also hired Dr. Jeffrey Schaeffer, a Neuropsychologist, who tested Plaintiff and said she was brain damaged based on the tests she completed.

Defendant hired and had an IME with an Ophthalmologist. Dr. Hofbauer, who said that the posterior vitreous detachment of the right eye was not due to trauma, but was simply due to age. The Court would not let Defendant have any other IMEs even though the claim switched from an eye and soft tissue problem to a brain damage problem. Defendant hired Jeffrey Bounds, from Loma Linda, as a Neurologist. He said that the Plaintiff had been told that she had brain damage and therefore it was iatrogenic (psychological, in her mind and she did not really have brain damage). Defendant also hired Dr. Robert Sbordone, a Neuro-Psychologist. He said that her test results, contrary to what their experts said, did not show brain damage and showed she was normal. Dr. Kevin Triggs, an Orthopedist, said that Plaintiff had no more than soft tissue injury as far as orthopedist complaints, and definitely no need for surgery or future care. Dr. Richard Rhee, a Radiologist hired by the Defendants, said because there were focal points on both sides of the brain and in the same areas, (in the front area) that the focal points showed small vessel disease and aging process, and not trauma from the accident. He conceded that it could be trauma, but said it was most probably not trauma and more likely was small vessel disease. Finally, Defendant hired Dr. Nicholas Carpenter as biomechanic. He was not called at trial since Peter Francis was not called by the Plaintiff. In addition, Dr. Hofbauer, the defense Ophthalmologist, was also not called at since Plaintiff basically conceded that the posterior vitreous detachment was not due to the accident.

Kevin Triggs was not called at trial as well because Plaintiff's expert Arthur Kreitenberg, other than mentioning possible surgery or injections, conceded that he could not really tell at trial if the MRI scans that were done of the shoulders and neck showed degenerative disease or showed damage from the trauma.

Defendant kept hammering on the gap between the date of the accident and the date of the first diagnosis of brain damage, which was 788 days. Defendant also maintained that there was no proof that the accident caused the damages since Plaintiff could not remember any of what happened at the time of the accident when she testified at trial. Interestingly, in her statement, police report and deposition, she did have specific recall of the facts of the accident, but at trial she claimed no recall. While the police officer testified about her statement to him, that she was not injured, she never really told the police officer how she hit her head in the vehicle. None of that really came into trial since the deposition was not read nor was her statement read. Thus, there was no proof at time of trial of any causation or link between the accident trauma and the alleged brain damage.

The jury found for the Defendant, in a 9-3 verdict, showing no causation and zero damages. While plaintiff made a very convincing witness on the stand who said that her life was now ruined as she could no longer remember day to day tasks she was supposed to perform, but nonetheless, the jury was disappointed with Plaintiff's counsel when he called defense counsel a bully and a liar. They felt that was inappropriate and wrong and there was no conduct that justified that. Further, they felt the he tried to manipulate them by constantly trying to anchor them into a large amount of damages in voir dire, opening and closing.

Closing argument was done in front of a completely packed courtroom, with judges and counsel from both the plaintiff and defense bar coming to watch to ascertain what would happen in this case.

At the same moment, within a few minutes of that, there was a plaintiff verdict which was rendered upstairs. That plaintiff verdict was the largest plaintiff verdict for the wrongful death of a baby in Orange County.

The case was interesting because it was one of the first times diffusion tensor imaging had been allowed in at the time of trial as to testimony by experts, which the defendant argued showed no injury. Also, Plaintiff's counsel was allowed to ask the defense experts if Mercury Insurance Company had sent them the file and if Mercury Insurance Company was paying them despite defense objections.

The case was also interesting because during voir dire, Plaintiff's counsel was allowed to ask if the jury could award over $20 million. Multiple individuals said they would not and there were nine jurors excused from the jury for cause in the first round of the potential jurors. The voir dire took two full days. The voir dire took so long because Plaintiff's counsel continually focused on a large amount as a potential verdict. Defense counsel, Christopher Wesierski, constantly asked the jury if they could award zero in the face of that claim, for such a large amount, if the evidence showed there was no causation.

The case took eight days to try and there were multiple trial briefs filed during the entirety of the trial, as well as multiple motions in limine to try to limit some of the conduct of Plaintiff's counsel in regards to his demeanor and style at time of trial.

Defendant was extremely gratified to obtain a defense verdict as to all claims.

defense verdicts august – december

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Orange County Superior Court Announces a Pilot Project for Electronic Filing and Service of Documents for Civil Cases

By Lisa McMains, *Law Offices of Watten, Discoe, Bassett & McMains*

Recently, Governor Brown signed into law Assembly Bill 2073, which authorized the Orange County Superior Court to establish a pilot project that will require documents filed in all limited, unlimited, and complex civil actions on or after January 1, 2013 to be filed electronically. Since October 1, 2012, Orange County Superior Court has required that all papers filed in actions designated as Auto Tort or Other PI/PD/WDD (Personal Injury/Property Damage/Wrongful Death) be filed electronically. Now, effective January lst, all documents filed in limited, unlimited, and complex civil actions ***must be filed electronically*** unless the Court rules otherwise, pursuant to amendments to Code of Civil Procedure section 1010.6 and Orange County Superior Court Rule 352. (Small claims actions are not part of the Pilot Project)

After January 1, 2013, any document that is electronically filed with the court after the close of business shall be deemed to have been filed on the next court day. "Close of business" means the time at which the court no longer accepts filings at the court's filing counter (e.g., 4:00 P.M.). Although not ready for immediate implementation, the court is working towards extending the electronic 'filing window' to midnight, at which point all documents filed before midnight on a court day will deemed to have been filed on that court day, and documents electronically filed on or after midnight will be deemed filed on the next court day.

Information concerning electronic service providers is available on the court's website at *www.occourts.org/online-services/efiling.*

amicus committee report

ASCDC's Amicus Committee continues to work energetically on behalf of its membership. ASCDC's Amicus Committee has submitted amicus curiae briefs in several recent cases in the California Supreme Court and California Court of Appeal, and has helped secure some major victories for the defense bar.

Amicus Committee gathering on September 10, 2012. L to R: Joshua Traver of Cole Pedroza; David Pruett of Carroll Kelly Trotter Franzen and McKenna; Diane Mar Wiesmann of Thompson & Colegate; Bob Olson of Greines Martin Stein and Richland; Susan Brennecke of Thompson & Colegate; Steve Fleischman of Horvitz & Levy; and J. Alan Warfield of McKenna Long & Aldridge.

Have you read any good nonpubs lately?

ASCDC has been successful in having two recent requests for publication granted. ASCDC submitted a joint amicus letter with the Association of Defense Counsel for Northern California and Nevada successfully seeking publication of the Court of Appeal's opinion in *Batarse v. Service Employees International Union Local 1000* (2012) 209 Cal.App.4th 820. In *Batarse*, the Court of Appeal held that the trial court was not required to continue the hearing on the defendant's motion for summary judgment in order to allow the plaintiff to correct its procedurally defective opposing separate statement. The publication request was drafted by Harry Chamberlain of Manatt, Phelps & Phillips and Don Willenburg of Gordon & Rees.

ASCDC also successfully sought publication of the Court of Appeal's opinion in *Caron v. Mercedes-Benz Financial Services USA LLC* (2012) 208 Cal.App.4th 7, review granted Oct. 24, 2012. In *Caron*, the court held that an arbitration provision in the contract for the purchase of a pre-owned automobile was facially enforceable. Steven Fleischman and John Quiero of Horvitz & Levy submitted the publication request. On October 24, 2012, the California Supreme Court issued a "grant and hold" order in *Caron* and deferred briefing pending resolution of *Iskanian v. CLS Transportation Los Angeles, LLC*, S204032, which includes the following issue: Did *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __ [131 S. Ct. 1740, 179 L.Ed.2d 742] impliedly overrule *Gentry v. Superior Court* (2007) 42 Cal.4th 443 with respect to contractual class action waivers in the context of non-waivable labor law rights?

How about those unfortunate opinions that you wish would never make it to the bound volumes in the library?

The Amicus Committee was also successful in having the California Supreme Court depublish the Court of Appeal opinion in *Shifren v. Spiro* (B230631, May 24, 2012). In *Shifren*, the Court of Appeal reversed the granting of summary judgment to a defendant in a legal malpractice action based on the statute of limitations (Code Civ. Proc., § 340.6). The Court of Appeal had controversially held that the plaintiff/client did not sustain "actual injury" under section 340.6 by incurring attorney's fees in litigating the underlying matter handled by the defendant attorney. Edith R. Matthai and Natalie Kouyoumdjian of Robie & Matthai wrote the successful depublication request.

Also of note are the Amicus Committee's efforts in seeking to have *Bison Builders, Inc. v. ThyssenKrupp Elevator Corp.* (A131622, Sept. 5, 2012) remain unpublished. In that case, the Court of Appeal issued an unpublished opinion holding that, notwithstanding *Howell v. Hamilton Meats & Provisions, Inc.* (2012) 52 Cal.4th 541, the trial court did not err in allowing the plaintiff to introduce evidence of billed (but unpaid) amounts for medical services in a personal injury case. The Consumer Attorneys of California requested publication of the court's opinion. Don Willenburg, Gordon & Rees, and Robert Olson, Greines, Martin, Stein & Richland, submitted a joint letter on behalf of ASCDC and ADCNCN opposing publication. On October 1, 2012, the court denied CAOC's publication request.

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

continued on page 38

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 amicus brief on the merits was drafted by Renee Konigsberg of Bowman & Brooke.

2. *Nalwa v. Cedar Fair*, No. S195031. This case presents 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, Cole Pedroza, and Don Willenburg, Gordon & Rees, submitted a joint amicus brief on behalf of ASCDC and ADCNCN in this case, which was argued on October 3, 2012.

3. *Sanchez v. Valencia*, No. S199119: This case includes the following issue: Does the Federal Arbitration Act (9 U.S.C. ? 2), as interpreted in *AT&T Mobility LLC v. Concepcion* (2011) 563 U. S. __, 131 S.Ct. 1740, preempt state law rules invalidating mandatory arbitration provisions in a consumer contract as procedurally and substantively unconscionable? J. Alan Warfield, McKenna Long & Aldridge, submitted an amicus brief on behalf of ASCDC.

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:

Jeremy Rosen,
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Harry Chamberlain,
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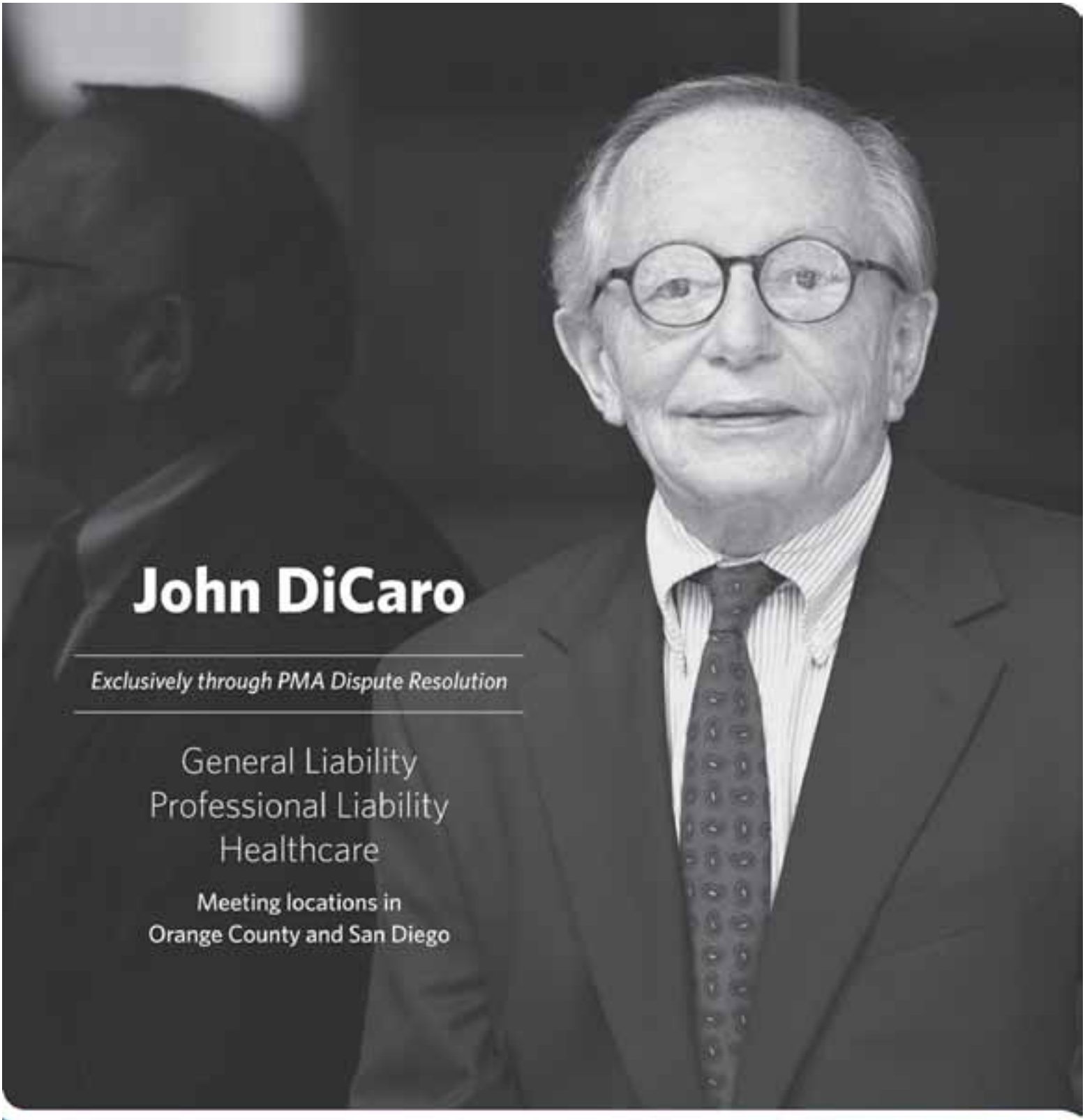

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