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A Field Guide to Snakes: Identifying and Catching Plaintiffs' Reptile Theory in the Wild

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— staff —

editor
Lisa Perrochet

executive director
Jennifer Blevins

art director
John Berkowitz

contributors
Michael D. Belote
Peter Doody
Ben Howard
Linda B. Hurevitz
Christine T. Le
Patrick A. Long
Holiday D. Powell
Alana Rotter
Benjamin G. Shatz
Carol A. Sherman
N. Denise Taylor

printing
Sig-1 Printing

— executive offices —

2520 Venture Oaks Way, Suite 150
Sacramento, CA 95833
800-564-6791 • *ascdc@camgmt.com* • *www.ascdc.org*

president's message

N. Denise Taylor
ASCDC 2013 President

The New Normal

"*The new normal.*" That is what I recently heard someone call our "new" experience as civil attorneys practicing in Los Angeles Superior PI courts as of this year. In my first President's message 9 months ago, I wrote, "At this point, no one knows how this is really going to work." I am happy to report that as 2013 comes to a close, things appear to be working surprisingly well in the courts, particularly given the devastating budget cutbacks and court restructuring. In Los Angeles, for every case that has been ready for trial, a courtroom has been found. A challenge remains with delays in securing a timely date for dispositive motions, but , effective January 6, 2014 there will be four PI courts instead of three, to handle the load. In the meantime the courts have been cooperative in continuing trial dates as necessary to get our motions heard, and in returning complex cases to an Independent Calendar court when appropriate. ASCDC will continue to work closely with the courts to improve these systems.

To those of you in counties other than Los Angeles: we have heard and responded to the message that you would like more programs in your locale. In September we held our Board meeting in Santa Barbara, followed by a two-day conference on professional liability and medical malpractice. The educational program was stellar. The wine tour that followed was one of a kind, thanks to Tom and Peter Stolpman of Stolpman Vineyards, who hosted a lunch and wine tasting on the loggia of their new home in Ballard Canyon, overlooking the vineyards.

Our Young Lawyers Committee put on two successful mixers this year, at Perch in downtown Los Angeles, and at the University Club in San Diego. It is so energizing to come together with these folks to mingle in a collegial social atmosphere. We have another Young Lawyers event scheduled in Santa Monica on January 30. We know that our young defense lawyers are the future of this organization and you can count on more of these networking opportunities next year.

In Orange County, we held our yearly signature event, the Construction Defect Seminar and Holiday Judicial reception, on December 5. It was a spectacular event and great turn out. In addition, we held a well-attended "brown bag" seminar at the Orange County courthouse in November. The judges and members in attendance heard President-elect Bob Olson and plaintiff attorney Eric Traut discuss what is new on the *Howell v. Hamilton Meats* front.

Next year, our September professional liability seminar will be in San Diego County, and we are bringing back our popular golf tournament to Riverside County, to provide worthwhile educational as well as social events to members throughout Southern California. In that vein, we have had several webinars this year, with more to come for members in outlying counties who want to participate in the important programs that ASCDC provides.

Our calendar year ended on a high note on December 17 at the Jonathan Club in Los Angeles, where we celebrated with our judges, and members both old and new, at our annual Judicial and New Member Holiday Reception. I overheard many attendees say it is the best holiday party of the year.

I have thoroughly enjoyed leading ASCDC as your President this year, and am looking forward to turning the reins over to Bob Olson at our 53rd Annual Seminar. Bob is not only a highly respected appellate lawyer, but he is a fabulous person who is very dedicated to ASCDC. As for the Annual Seminar, we have a wonderful program planned; at our Friday luncheon we look forward to hearing from Dana Perino, former Press Secretary in the George W. Bush White House and panel member of the popular Fox program The Five. Please be there!

I extend a heartfelt thank you to our ASCDC Board members, Committee chairs, our Executive Director Jennifer Blevins and her staff, and to Mike Belote, our Legislative Advocate, for an amazing year. And most of all, thank you to all of the ASCDC members and friends who have sponsored, spoken at or attended our variety of programs this year. Membership has never been so valuable; in the appellate decisions we influence, the legislative work we do for the benefits of our members and clients, the MCLE programs and social networking through LinkedIn that we provide and most of all, the personal networking opportunities and friendships that develop through membership.

Improving System

Michael D. Belote
Legislative Advocate
California Defense Counsel

As popular as it may be to bemoan the state of our political institutions, and Congress seems particularly subject to derision, on many levels our state governmental structures are on a decidedly upward trajectory. The factors contributing to the improved environment include the following:

- Changes in term limits: Voters approved a very meaningful improvement in California term limits law by permitting state Assembly members and Senators to serve up to twelve years in either house, instead of the prior limits of six years in the Assembly and eight years in the Senate. Although in a few cases this may reduce a members total time in the legislature from fourteen years to twelve, the ability to serve up to twice as long in the Assembly and fifty percent more in the Senate is an enormous improvement. Where formerly Assembly members faced a ticking time clock of six years as soon as they were sworn in, causing a frenetic desire to get things done quickly upon election, the longer limits allow members to begin more slowly and thoughtfully, and mitigate the pressure of looking for the next job;

- "Top Two" Primary: Voters also approved an electoral change permitting Democrats to vote for Republicans in primary elections, and vice versa. While the system is not popular with party leaders, already the change seems to be having the desired effect of advantaging moderate candidates. If a Republican can appeal to Democrats in a predominantly Republican district, and Democrats appeal to Republicans, the net effect is to push the system towards the political middle, where most Californians are. This should reduce the extreme polarization which has gripped Sacramento, and to a greater extent, Washington D.C.

- Improving budget picture: While legislators now termed out under the old law knew nothing but budget privation in their six year tenures, new legislators are not faced with the immediate need to make substantial cuts. Tax revenues are running hundreds of millions per month ahead of projections, and experts predict years of budget surpluses, assuming no new recession. A certain "budget envy," and "term limits envy" are noticeable in departing legislators.

For his part, Governor Brown is striking a very cautious tone, indicating an intent to resist the temptation to spend the surpluses. This may be important on the court funding issue discussed below, but at least the system is moving into the black, from years of red.

As defense practitioners, ASCDC members are well aware of the impact of persistent budget cuts on the courts. While trials may be going out timely in various counties, the ability to have a demurrer or summary judgment motion heard can be frustratingly delayed. California Defense Counsel representatives (made up of lawyers from the ADC north and south) met recently with Chief Justice Cantil-Sakauye to discuss advocacy efforts in 2014 to reinvest in the court system. For a variety of budget reasons, the system will need over $400 million in increased funding just to keep even. Court funding will remain a key objective for CDC when the legislature returns in January.

Beyond the fiscal issues, CDC is developing a legislative package for the new year, including proposals relating to expert depositions and sharing of expert opinions. We also understand that bills may be introduced on such diverse issues as Section 998 motions, limited jurisdiction monetary limits, SLAPP suits, electronic recording of unlimited civil proceedings, and more.

Finally, November 2014 may see a general election battle over MICRA limits. If the initiative presently in circulation qualifies for the ballot, many tens of millions will be expended, probably on each side. It is too early to make a prediction as 2013 comes to a close, but this column will report on the looming fight over MICRA as the new year unfolds.

new members august – december

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Our Benchwarmers are the Best

Patrick A. Long

Do you believe our trial bench here in California is, to use terminology previously preempted by a certain television network, fair and balanced? Are certain judges "plaintiff-oriented," or are some inclined to rule for the defense on difficult issues? Do we have any stupid judges? Where do the best judges come from?

My sense was that asking twenty or so of our members these questions would produce perhaps fifty different variations of answers. Surprise, surprise, I got about a hundred and fifty different answers.

Now I understand and appreciate, actually really appreciate, that a large number of judges read these humble scribblings, and in fact some take the time to drop me a note indicating that while I'm not yet being held in contempt of court, I am treading perilously close. I'm most grateful for their feedback, and always come away wiser after hearing from them.

Let me reach back to times long ago when men named Traynor and Tobriner sat on our Supreme Court. In the early 1970s there was a list of judges to avoid when possible, as they were "plaintiffs' judges," whatever the heck that was.

Suffice it to say that a large percentage of the folks who responded to my questions concluded that our current judiciary is sufficiently neutral, and that few members of the bench are blatantly one-sided. Oh, there were negative comments about a few judges, but these negative comments were more in the nature of personality issues, e.g., a sense of arrogance, aka the black robe disease, or perhaps a certain lack of civility concerning scheduling issues. On the whole, our membership is pleased with the vast majority of our bench, most particularly when compared with stories we hear from other states where judges run on a party platform for election. Regarding most of our judges, it would be extremely difficult to hazard a guess at what political party they belonged to based on their rulings. Apparently a number of other states where judicial elections are party-based are not so blessed.

Of the twenty interviewees, perhaps three or four suggested that a couple of judges were "plaintiff-oriented" but upon further discussion with them it appeared that this opinion was more based on a single instance where our colleagues received a ruling they didn't want rather than a steady stream of rulings favoring plaintiffs.

Next question, do we have any stupid judges? Of course we do, just as we have stupid attorneys, stupid clients, stupid politicians, etc., etc., etc. It's just common sense, but stupid is a relative term, and what may be stupid in a judge may equal great brilliance to the man or woman on the street. Law school is no walk in the park, passing the California bar exam doesn't happen for everyone, and excelling sufficiently at a practice so as to be recommended for appointment by the governor to the bench requires a certain level of intelligence and hard work. Intelligence didn't seem to be an issue our colleagues were concerned about.

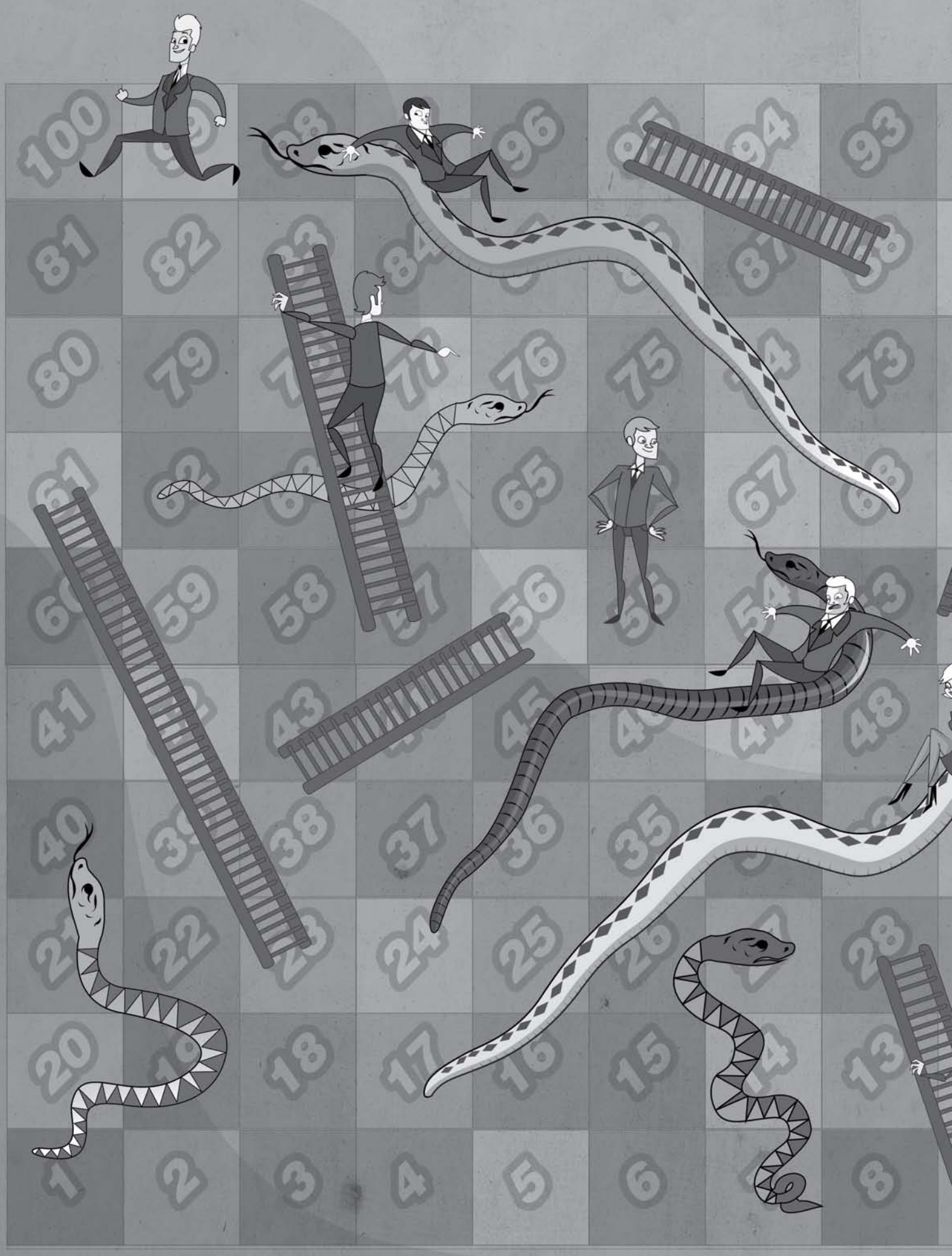
Last question, where do the best judges come from? Here there was almost unanimity of opinion. From the perspective of our colleagues the best judges come from the ranks of former civil trial attorneys, from both sides of the bar, plaintiff's and defendant's. Again, no great surprise here. There are a number of members of this organization, and outfits like CAALA, who have become outstanding trial judges.

But I'm sure all of you can appreciate that some really great judges also come from the ranks of a criminal practice, the D.A.'s office, or public defenders. I can personally testify that a former District Attorney from Orange County has become an outstanding judge. He was a great trial attorney. I know this because I sat as a juror through a four month trial in a first degree murder case which he prosecuted. He was one of the finest trial attorneys I've ever seen, and has become a truly exceptional judge. What is also interesting, his father was a past president of this organization.

To summarize my survey of our colleagues, we here in California are fortunate to have an outstanding bench, fair, hardworking, creative, and civil. As we all know, they are under tremendous financial pressure at present, and we must do everything we can to support them, and work with them to preserve perhaps the best trial bench in the country.

Respectfully submitted your honors,

Patrick A. Long
palong@ldlawyers.com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A Field Guide to Southern California Snakes:

Identifying and Catching Plaintiffs' Reptile Theory in the Wild

By Ben Howard, Neill Dymott

In 2009, Don Keenan and David Ball released a how-to manual for the plaintiff's bar entitled, "REPTILE: The 2009 Manual of the Plaintiff's Revolution." Don Keenan is a successful Atlanta-based plaintiff's attorney, a pioneer in the field of focus groups, and the president of ABOTA in 1992. David Ball is a North Carolina based trial consultant and the author of the bestselling "David Ball on Damages." At the close of 2013, Reptile advocates have self-reported over $4.8 billion in verdicts and settlement attributed to the Reptile Theory.

Although "the Reptile" is approaching five years of age, it has only been spotted in Southern California in the past two years. Despite the Reptile's youth, its habitat has been expanding rapidly. Along with this identification guide, sightings of the Reptile are only expected to increase. Although this author disagrees with the Reptile's methods, common ground can always be found. In this case, "Defense attorneys will be doing everything in their power to keep you from using these methods." (p. 15) This article will explain the where the Reptile came from, how to identify it, and how we can eradicate its presence in Southern California.

Where did the Reptile Come From?

The Reptile Theory was conceptualized in the 1960s by Paul McLean, M.D.'s classification of the "Triune Brain." Dr. McLean believed human brains consist of three areas: the neomammalian complex (the "ape brain"), the paleomammalian complex ("dog brain"), and the reptilian complex ("reptile brain"). The ape brain is used for high cognitive functions such as spatial reasoning, conscious thought, and language. The dog brain is associated with emotions and memory formation. Last, the reptile brain is responsible for our basest functions: survival and reproduction. Of note, reproduction concerns the survival of *our individual* genes, rather than our species' genes.

Despite the recent popularity of the Reptile theory, the plaintiff's bar believes the Reptile has been lurking in our courtrooms for years. However, instead of being used by

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the plaintiff, Keenan and Ball believe the defense bar has utilized tort "deform" to manipulate the Reptile for its own use. By leading the public to believe torts undermine the quality and availability of healthcare, threaten the local economy by endangering jobs, make products more expensive, and weaken research and development expenditures, the Reptile has long viewed the plaintiff's case, rather than the defense, as a threat to its survival. With their book Keenan and Ball attempt to turn the Reptile onto the defense, where our purported mantra is always, "Give danger a pass." (p. 27)

The Reptile's Major Axiom is, "When the reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community." (*Id*.) Keenan and Ball posit, "[W]hen something we do or don't do can affect – even a little – our safety or the propagation of our genes, the Reptile takes over," and "The greater the perceived danger to you or your offspring, the more firmly the Reptile controls you." (p. 17) The Reptile believes community safety is personal safety's cousin, and asks the juror to project the defendant's act or omission onto a larger community canvas. In a perversion of The Golden Rule ("[W]here counsel asks the jury to place itself in the victim's shoes and award such damages as they would charge to undergo equivalent pain and suffering," *Collins v. Union Pacific Railroad Co.* (2012) 207 Cal. App. 4th 867, 861), the Reptile wants to punish the Defendant so he cannot endanger the community the Reptile is part of.

Why this Reptile is Different from Native Species

The Reptile is not content using only the evidence available from her case. In order to apply her facts to the community's sense of well being, the plaintiff "awakens" the reptile in each juror by asking, and answering, three questions. Notably, these questions all involve presenting information to the jury outside the facts of the case. First, the Reptile asks how likely was it that the act or omission would hurt someone, or more importantly, *anyone*. After addressing the injury in the present case, the Reptile does not stop. Rather, it continues on to address the frequency with which the act or omission occurs, and the resulting harm, on a broader scale. Keenan and Ball use an automobile negligence case to illustrate this point. Rather than telling the jury, "If you follow a vehicle too closely...you may hit it," the Reptile states, "4,295 injury wrecks were caused last year by people following too closely." (p. 32)

Second, the plaintiff will ask the jury to envision how much harm the act or omission could have caused. Again, the Reptile is not content with stopping with the plaintiff's actual injury. Instead, the Reptile tells the jury, "The valid measure is the *maximum* harm the act *could* have caused" (emphasis in original. p. 33). So if an auto accident involving speeds in excess of 100 mph only resulted in a split lip, the Reptile will not ask the jury to address the plaintiff's facial injury. Rather, the Reptile will ask whether the accident could have caused brain damage or a fatality.

Third and last, the Reptile will ask the jury how much harm the act or omission could have caused in other situations. (p. 34) Using the auto accident example from above, assume the accident occurred on a highway. The Reptile takes the car that caused the accident, has the driver take an off ramp into the juror's community, and only stop the car after it has threatened a few local schools and the community's retirement home.

By asking and answering these three questions, the plaintiff wants the Reptile to plant three seeds in the jurors' minds: the defendant's conduct threatens everyone's safety; a proper verdict will reduce the danger; and, if a proper verdict for the plaintiff is not given, the danger in the community will be increased. (p. 39)

Identifying the Reptile in the Wild, and "Rules" for Identification

The Reptile attempts to circumvent the applicable legal standard by presenting an alternative "rule" to the jury. If the defendant violated this rule, the implication

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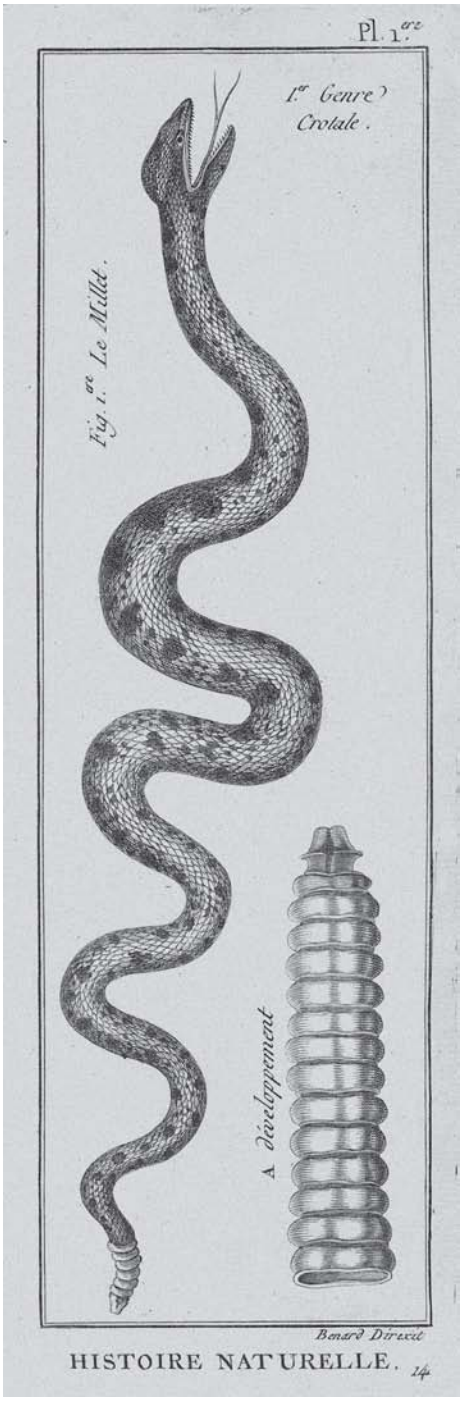
Reptile Theory – continued from page 12

is the defendant did not meet the legal standard. In each of the three questions above, the Reptile explicitly refers to an "act or omission" by the defendant. Keenan and Ball admonish the plaintiffs bar never to refer to the underlying incident as an accident or a mistake, (p. 53) as accidents do not endanger the community. Instead, these incidents should be characterized as follows: "Every wrongful defendant act derives from a choice
to violate a safety rule." (*Id.*) Not only was this safety rule important to the plaintiff in the case, but is important to the community going forward.

The Reptile's rule must be a simple one for it to work, and must meet six criteria: the rule must prevent danger, it must protect people in a wide variety of situations, it must be clear and concise, it must explicitly state what a person must do or not do; it must be practical; and the rule must be one the defendant agrees with (or looks foolish for disagreeing with). Examples include "physicians should do no harm," "a company must not needlessly endanger their employees," or even "an accountant should not needlessly endanger his client's financial well being." The word "needlessly" is always used, because "If you omit 'needlessly,' the defendant can escape, because there are almost always unavoidable risks." (p. 56)

Once the Reptile has established its rule, the plaintiff's attorney will ask your client or expert to agree to the rule, ask them to agree violating the rule can hurt *anyone* (this is important, because anyone includes the jury and their community), and ask them to agree the plaintiff was acting like *everybody* else when the incident occurred. By doing so, and without explicitly violating The Golden Rule, the Reptile will have placed the jury/community into the plaintiff's shoes.

Often, the first sign the Reptile is present occurs during written discovery. When our clients are asked to produce Policies or Procedures, it may be the Reptile. If our clients are asked to agree to rules in Requests for Admission, the Reptile is already coiled around your case. Frequently, the first time the Reptile rears its head is at your client's deposition when he or she is asked to agree with the attorney's "rules." If your client is asked to agree with rules at their deposition, the topic will be revisited with your experts, but it is possible you experts will be asked about it independent of your client.



Eradicating the Reptile

If the Reptile is present in your case, it needs to be eradicated. Most of the time it can be identified during the discovery phase, but from time to time advocates of the Reptile theory are brought into the case to only try the case and the Reptile's themes are not introduced until the mini-opening or *voir dire*. Regardless of whether or not the Reptile is present, preparation of the case should include a defense to the Reptile.

Prior to their depositions, clients and experts should be made aware they may be asked to agree to a rule, and then asked to extend this specific rule to a general rule encompassing the case. If the deponent is savvy enough to avoid this, they should still be prepared to answer questions explaining how a violation of the specific rule can cause harm in *other* contexts. Depending on how well the witness handles themselves under questioning, they should also be prepared to differentiate the facts of the present case with the rule the plaintiff is promoting. If applicable, the deponent should also be able to explain why the plaintiff's conduct and/or condition is different from the general public. For the expert, they may be able to create a rule of their own, such as "Patients should always follow post operative instructions to prevent needlessly endangering themselves," or "Employees should be honest when applying for a job to prevent needlessly endangering of their co-workers and customers."

The Court should be educated on the plaintiff's Reptile theory, and should be asked to instruct the plaintiff's counsel not to apply it. If the Reptile appeared during discovery, explain it in your trial brief. If the Reptile shows up at trial, submit a pocket brief. In either case, follow up with specific motions *in limine*. Asking the Court to exclude "the Reptile theory" does not give the Judge enough information to base a ruling on. Asking the Judge to exclude references to the attorney's made-up rule, to exclude facts not relevant to the case, and to prevent plaintiff from referring to the jury "as the conscience of the community" are unambiguous and more likely to end in a favorable ruling.

If the Reptile is present, opposing counsel will fight to let it remain. Keen and Ball devote a full 19% of the book, 63 of 330 pages, to countering defense arguments regarding violations of the Golden Rule. Of

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those 63 pages, five are devoted to California, more than any other state. Keenan and Ball specifically claim, "Our method is to get jurors to decide on the entirely logical basis of what is just and safe, not what is emotionally moving. Jurors are often emotionally moved, and we always want jurors to 'feel' strongly that we should win. But the Reptile gets jurors to that point not on the basis of sentiment, but what is safe." (p. 39) Pointedly, in defending their theory, Keenan and Ball refer to a subjective "what is safe" standard rather than the law.

In order to separate the Reptile's theory from the law, jury instruction should include Ev. Code § 210 ("Relevant Evidence"), Ev. Code § 350 ("Only Relevant Evidence Admissible"), CACI 200 ("Evidence," regarding the burden of proof), CACI 400 ("Substantial Factor"), CACI 1602 and 1620 ("Intentional/Negligent Infliction of Emotional Distress," even if not claimed by the plaintiff), CACI 3924 ("No punitive Damages"), and CACI 5000 ("Duties of the Judge and Jury"). Where relevant, CACI 505 ("Success not Required") and CACI 506 ("Alternative Methods of Care") are appropriate.

Keenan and Ball are acutely aware the Reptile does not belong on the *terra firma* of the law. They admit, "We are often asked, 'How does this negligence stuff relate to causation and damages?' It relates in the most important way: It give jurors a personal reason to want to see causation and dollar amount come out justly, because a defense verdict will further imperil them. Only a verdict your way can make them safer." (p. 39) With this quote, the Reptile's own creators shed their skin and reveal the Reptile for what it is: a subversion of the law. The Reptile wants the juror to make a decision based on a "personal reason," (in violation of Ev. Code §§210, 350 and contrary to CACI 400 and 5000). Likewise, the Reptile wants to "imperil" the jury and "make them safer" (violating the Golden Rule).

Using these snake handling tools to better prepare yourself, our clients, and your case, and using the Reptile own words to educate the Courts, we can drive the Reptile back to the swamp.

Music to the Defense's Ear

By Linda B. Hurevitz

I should have realized there was something missing in my life. I was in trial defending a sexual harassment, wrongful termination case for a client who required a daily trial report. As I wrote that report each day, I found myself introducing the day's events with a song title as the theme.

It took several more years until the right opportunity came along to fill the void. In 2009, Gary S. Greene, Esq. formed the LA Lawyers Philharmonic *(www.lalawyersphil.org)* which is made up of judges, lawyers, and other legal professionals. The Lawyers Phil has been recognized by Mayor Antonio Villaraigosa as L.A.'s only "legal" orchestra. With the success of the Lawyers Phil under his belt, Greene then formed Legal Voices, a choir of legal professionals. I jumped at the opportunity to audition and have been singing with them ever since.

We have weekly rehearsals at The United Methodist Church in the mid-Wilshire area using both its chapel and choir room. In exchange, we perform two concerts each year at the church with all proceeds donated back to the church for their generosity. The big event is our annual summer concert at Disney Hall. With a full house each year, the experience of performing in one of the finest concert halls in the world is exhilarating. In addition, we perform for other charitable and bar related events including the ASCDC Annual Seminar; the Metropolitan News "Persons of the Year" Award Dinner; the California, Los Angeles County Bar, Santa Monica, Beverly Hills and San Fernando Bar Associations; the Italian American Lawyers Association; the American Diabetes Association; Greystone Mansion, the Los Angeles Law Library and many others.

What has made the experience so special is the discovery that there are so many like-minded professionals who are skilled performers. They are all passionate about the music and many of them have degrees in music. But, they found their way into law for the intellectual stimulation and the steady paycheck. (If you think trying a case takes fortitude, try earning a living as a musician!)

Among the members of the LA Lawyers Philharmonic and Legal Voices are numerous ASCDC members.

Christine T. Hoeffner is a certified appellate specialist and Senior Counsel with Ballard Rosenberg Golper & Savitt. Christine began playing French horn in 4th grade and continued through her college years. At University of Connecticut she took many classes in music and performed with the University of Connecticut Orchestra, the Concert Winds and in theatre productions. Christine has been performing with the Lawyers Phil since its first year.

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Derrick S. Lowe, Esq. is an Associate at Baker, Keener & Nahra. Derrick is an irreplaceable fixture with Legal Voices. He is the choir accompanist and an extraordinary pianist who sight reads just about anything and can move facilely from classical to jazz to Broadway show tunes. Derrick was a feature soloist at the 4th Annual Disney Hall concert in July 2013 performing Beethoven's Choral Fantasy. He earned his undergraduate degree in music, and then studied at Berklee College of Music for two years before returning to the Santa Barbara area where he performed with local jazz groups, cover bands, and as accompanist to several choirs.

John J. Manier, Esq. is a principal at Nassiri & Jung. During his undergraduate days at Notre Dame John sang with the Notre Dame Chorale and the Glee Club. At UCLA Law School he had lead roles each year in musicals written by Professor Kenneth W. Graham, Jr. including "My Fair Lawyer," "The Exam-a Game," and "Cole's Law." He is one of those rare musicians who not only has perfect pitch, but also sings in every vocal range from tenor to bass. John's ability to read music is matched by his legal writing ability. John is a very fine writer and has many appellate decisions under his belt.

Shannon Wainwright, Esq. is an associate with Taylor Blessey where she specializes in medical malpractice defense. Shannon grew up in a home filled with music. Her mother performed in musical theatre and Shannon followed in her footsteps. Throughout high school, Shannon performed in musicals as well as with her school choir.

As for me, **Linda B. Hurevitz, Esq.,** I sang professionally, touring internationally for nine years and recording two albums with a ten piece swing show band called "The New Deal Rhythm Band" *(www.cdbaby.com/cd/NewDealRhythmBand)* under the stage name "Linda Asher." The group was described by "Radio and Records" as "Manhattan Transfer meets Tower of Power." When I finally settled down in Los Angeles and began my second career, practicing law, I first found a home with Thomas & Price. When Mike Thomas offered me a job, he told me that he thought my entertainment background would make me a good trial lawyer. I knew immediately I was "home," and he had me trying a wrongful death case within my first year in practice. For the past six years I have been a Senior Counsel at Ballard Rosenberg Golper & Savitt where I am a trial attorney defending employment cases exclusively. I am one of the founding members of Legal Voices. Keeping in the lawyers-in-music mode, I also sing with Gary S. Greene's "Big Band of Barristers" (named the #1 lawyers band in the country by the American Bar Association) and the vocal jazz quartet "The Singers in Law" *(www.singersinlaw.com).*

For each of us, the opportunity to be in the moment with the music is not only a source of pleasure, but engages the creative side of our brains which gives each of us an enhanced ability to focus on the legal issues we address each day. I truly believe we are better lawyers because of it!

Now that you know about us, why don't you experience one of our performances!

February 5, 2014 –
The Singers in Law with Justice Gilbert, Jerry Levine and Eric Schaefer for The Shakespeare Club in Pasadena

Protecting Attorney Disqualification Orders From Reversal

Alana Rotter,
Greines, Martin, Stein & Richland LLP

Attorney disqualification can be a powerful tool for protecting client confidences and preserving attorney loyalty. But winning an attorney disqualification order in the trial court is only half of the battle. The other half is defending the order on appeal.

A disqualification order is immediately reviewable, through a regular appeal or a writ petition. *State Water Resources Control Bd. v. Superior Court*, 97 Cal. App.4th 907, 913 (2002). And this review is rigorous: Recognizing the heavy burden that disqualification imposes on a client, appellate courts scrutinize disqualification rulings closely.

Because of the close scrutiny that a disqualification order receives, it's critical that any disqualification motion accurately identify the relevant law and include evidence that will support disqualification under that law. Where an attorney is disqualified for having acquired information about the other party from a prior representation, that means showing not only that the attorney has the information, but also that it is both *confidential* and *material*. Two recent cases illustrate what it takes to make this showing.

DeLuca v. State Fish Co., Inc., 2013 DJDAR 8519 (Cal.App. 2d Dist. June 27, 2013) stemmed from a dispute over who owned a fish storage, packing, and processing plant. The two parties who claimed ownership, DeLuca and State Fish, sued each other. The trial court granted a mistrial on DeLuca's claim and entered judgment for State Fish on its claims. The Court of Appeal reversed, finding that DeLuca was entitled to judgment as a matter of law on State Fish's claims and remanding for a retrial on DeLuca's mistried complaint.

On remand, DeLuca indicated that he would be using a real estate expert who had testified for State Fish in the original trial—not entirely surprising, given that the expert's testimony had bolstered DeLuca's own position regarding the value of the property at issue. State Fish moved to disqualify DeLuca's counsel on the ground that the expert had confidential information about State Fish and, by implication, had given that information to DeLuca's counsel. The trial court granted the motion, but the Court of Appeal reversed.

DeLuca explained that to disqualify DeLuca's counsel for contact with State Fish's expert, State Fish would have to establish that the expert "possesses confidential information materially related to the proceedings before the court." State Fish's evidence did not meet that standard.

State Fish had presented some evidence: Its attorney declared that he had disclosed to the expert "some of [his] own impressions, conclusions, opinions and theories about certain issues" in the case, and that the expert possessed "confidential, proprietary information of State Fish, regarding how State Fish conducts its business, and what its real estate needs are in connection with conducting its business." But the Court of Appeal held that this was not enough. It concluded that whatever "impressions, conclusions, opinions and theories" State Fish's attorney had conveyed to the expert "were very likely revealed during the course of the initial trial," and so were not confidential by the time that DeLuca's counsel retained the expert on remand. State Fish's declarations apparently did not show otherwise.

The court found similarly lacking State Fish's attorney's declaration that the expert knew his views on "certain issues" in the case. The

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declaration did not specify *which* issues he had discussed with the expert. Only one issue (unlawful detainer) was in play on remand. Any confidential information that the expert had relating to other, now-resolved issues therefore was not "materially related" to the case that was pending by the time of the disqualification motion. Because the attorney declaration did not state that the confidential information related to the single remaining issue, it was not evidence that the information was *material*—the standard for disqualification. It therefore was error for the trial court to disqualify DeLuca's counsel based on contact with the expert.

Khani v. Ford Motor Co., 215 Cal.App.4th 916 (2013) offers another example of what it takes to create a record that will withstand appeal.

A car buyer sued Ford, alleging that his car was a "lemon." Ford moved to disqualify the plaintiff's attorney on the ground that he had previously defended lemon law cases for Ford and knew Ford's strategies when it came to such cases. The trial court granted the motion, disqualifying the attorney on the ground that he knew Ford=s litigation "playbook"—that is, how Ford handles lemon law cases. As in *DeLuca,* the Court of Appeal reversed.

Khani explained that a party seeking to disqualify its former attorney must show that the former representation is substantially related to the current case. If there is such a relationship, the court will presume that the attorney possesses confidential information requiring disqualification. But establishing a "substantial relationship" may not be easy. It is not enough, for example, that the two representations involve the same legal issue. The trial court must closely analyze the connection between the two cases, considering "'precisely'" whether they are factually and legally similar. That means comparing *both* the legal issues involved *and* how confidential information learned during the first representation would be material to the second representation.

In the *Khani* Court of Appeal's view, the facts that both representations involved lemon law claims and that the attorney may have known Ford's general "playbook" for lemon law cases did not themselves warrant disqualification. To be entitled to relief, Ford would also have to present evidence that the same confidential information was relevant to both cases. Such evidence might include, for example, that the cases involved the same car; that the "policies, practices, or procedures" Ford used to evaluate, settle, or litigate lemon law cases when the attorney represented it were the same as Ford's current practices; or that the same decision makers who called the shots in the prior case were also the decision makers in the current case. Absent such evidence, *Khani* held, disqualification was an abuse of discretion.

Although *Khani* and *DeLuca* arose out of different factual scenarios, they share a common theme: A party seeking to disqualify opposing counsel based on a claim that the attorney has been privy to confidential information faces a high bar. Even if the trial court grants the motion, the appellate court will scrutinize the record for evidence that the attorney has confidential information, *and* that the information is material to the issues being tried. It therefore is crucial not only to draft a motion that explains the relevant law and why disqualification is warranted, but also to create a detailed factual record that shows, as specifically as possible, that the attorney has information that is both confidential and material.

Alana Rotter is certified as an appellate specialist by the State Bar of California Board of Legal Specialization. She is a partner at Greines, Martin, Stein & Richland LLP, which the National Law Journal recently featured on its "2013 Appellate Hot List." She can be reached at arotter@gmsr.com.

green sheets

NOTES ON RECENT DECISIONS

Lisa Perrochet

The Green Sheets, although published later than most current advance sheets because of copy deadlines, should serve as a useful review of recent important decisions. Readers are invited to suggest significant decisions for inclusion in the next Green Sheets edition. Please contact:

LPerrochet@horvitzlevy.com

To make the Green Sheets a useful tool to defense counsel, they are printed in green and inserted in the middle of *Verdict* magazine each issue. They can be easily removed and filed for further reference. Of course, the Green Sheets are always one attorney's interpretation of the case, and each attorney should thoroughly read the cases before citing them or relying on this digest. Careful counsel will also check subsequent history before citing.

ARBITRATION

Arbitration agreement waiving assertion of claims in a class action is not unconscionable even where the cost of proving a claim on an individual basis makes it uneconomical to litigate the claim.

American Express Co. v. Italian Colors Restaurant (2013) 133 S.Ct. 2304.

In *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, the U.S. Supreme Court held that a California state law policy declaring class arbitration waivers to be unconscionable and unenforceable was preempted by the Federal Arbitration Act (FAA). In the *American Express* case, the U.S. Supreme Court addressed the related question of the extent to which courts could refuse to enforce an arbitration agreement based on a concern that the agreement failed to "vindicate" *federal* statutory rights. The Court said no, decisively limiting the scope of the so-called "vindication principle" as a defense against efforts to enforce arbitration agreements as written. The court held that, to the extent it exists at all, the principle precludes at most prospective waivers of the right to pursue federal statutory remedies, and perhaps also prohibits filing and administrative fees that are so high they make access to the arbitral forum impracticable in cases involving federal statutory rights. The Court concluded that this principle is not violated by a class action waiver requiring individual arbitration, even where the cost of proving a claim makes it uneconomical for a party to litigate on an individual basis.

See also *Oxford Health Plans LLC v. Sutter* (2013) 133 S.Ct. 2064 [arbitrator's decision is valid where the parties agreed the arbitrator could determine whether the arbitration agreement permitted class arbitration; if parties bargain for the arbitrator's construction of their agreement, the FAA permits federal courts "to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly"; see 2013 *Verdict*, vol. 1 Greensheets (available at http://www.ASCDC.org/Publications.asp) for more details about the supersededCourt of Appeals decision in this case].

See also *Ferguson v. Corinthian Colleges, Inc.* (9th Cir. 2013) 733 F.3d 928 [California Supreme Court precedent (*Broughton* and *Cruz* cases) prohibiting arbitration of claims for public injunctive relief brought under the Unfair Competition Law or the Consumers Legal Remedies Act is preempted by the FAA after *Concepcion*; the vindication principle does not save this state rule from FAA preemption because the principle is inapplicable to state statutory claims];.

See also *Richards v. Ernst & Young, LLP* (9th Cir. 2013) 734 F.3d 871 [indicating that federal labor law did not override FAA's mandate requiring enforcement of arbitration agreements according to their terms, including their class action waivers];

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See also *Mortensen v. Bresnan Communications, LLC* (9th Cir. 2013) 722 F.3d 1151 [applying *Concepcion* and *American Express* to hold that FAA preempts a state rule invalidating adhesive arbitration agreements unless they are explained to and initialed by consumers; while the principles underlying this rule are ones of general applicability, they disproportionately affect arbitration agreements where they arose from "state court consideration of adhesive arbitration agreements" and "most of the rule's applications have been to those provisions," thereby "invalidating them at a higher rate than other contract provisions"];

Compare *Chavarria v. Ralphs Grocery Co.* (9th Cir. 2013) 733 F.3d 916 [affirming order denying motion to compel arbitration under California law where the agreement unconscionably permitted employer to "pick the pool of potential arbitrators every time employee brings a claim," required the arbitrator to impose significant arbitrator fees "up front, regardless of the merits of the employee's claims," and severely limited the arbitrator's authority to allocate those arbitrator fees in the award; the FAA did not preempt result because it did "not disfavor arbitration" and instead provided "that the arbitration process must be fair"];

California courts' approach to FAA preemption of state laws hostile to arbitration agreements continues to contrast with the U.S. Supreme Court and 9th Circuit Federal Court of Appeals after *Concepcion* and *American Express*:

See, e.g., *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 [holding that the FAA, as interpreted by *Concepcion*, preempts the California Supreme Court's prior public policy standard categorically prohibiting an arbitration agreement from waiving an employee's informal administrative hearing for wage-related claims before the Labor Commissioner and mandating arbitration of the wage dispute; but leaving open the possibility that this waiver may be found to be unconscionable on a case-by-case basis where, as one factor in the unconscionability analysis, a court considers a variant of the "vindication principle," i.e., whether the agreements fails to provide the employee with an "accessible and affordable" forum for resolving wage disputes];

See also *Vargas v. SAI Monrovia B.*, review granted case no. S212033, formerly published at 21b Cal.App.4th 1269 [trial court held arbitration agreement was enforceable in action by car buyer who brought a putative class action against a dealer, alleging violations of the Consumers Legal Remedies Act (CLRA), the Automobile Sales Finance Act, the Unfair Competition Law (UCL), the Song–Beverly Consumer Warranty Act, and the California Tire Recycling Act; the Court of Appeal reversed with directions to deny defendant's motion to compel arbitration and motion to strike the class allegations; Supreme Court granted review on August 21, 2013, but ordered briefing deferred pending the Court's decision in *Sanchez v. Valencia Holding Co., LLC*, S199119. For further discussion of *Sanchez*, see 2012 Greensheets, vol. 1];

See also *Brown v. Superior Court*, review granted case no. S211962, formerly published at 216 Cal.App.4th 1302 [trial court held arbitration agreement was enforceable in employees' putative class action against their employer for violations of California's wage and hour laws, seeking restitution, damages, and civil penalties on behalf of themselves and all other aggrieved employees, as allowed by the Private Attorneys General Act (PAGA); the Court of Appeal reversed, directing that a new order be entered (1) granting the employer's petition to compel arbitration with respect to all of plaintiffs' claims except the claim for civil penalties under PAGA, and (2) staying the action as to all of plaintiffs' claims, including the claim under PAGA, pending resolution of the arbitration; Supreme Court granted review on September 11, 2013, but ordered briefing deferred pending its decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, S204032. For further discussion of *Iskanian,* see 2012 Greensheets, vol. 3].

CIVIL PROCEDURE

Order compelling judgment debtor discovery responses from a third party after entry of judgment is immediately appealable.

Macaluso v. Superior Court (Lennar Land Partners II, LLC) (2013) 219 Cal.App.4th 1042.

The judgment creditor who sought to enforce its judgment issued a subpoena to a third party (Macaluso) to obtain information about the judgment Macaluso appeared at a judgment debtor's exam but largely refused to answer questions, and subsequently refused to provide financial documents ordered by the trial court to be produced. After Macaluso timely appealed the production order, the trial court concluded the order was not appealable, and scheduled a contempt hearing. Macaluso filed a writ petition.

The Court of Appeal (Fourth Dist., Div. One) held the order to produce documents at a judgment debtor examination held pursuant to CCP section.110 was appealable under CCP section 904.1(a)(2), which provides that "[a]n appeal ... may be taken from ... [¶] ... [¶] ... an order made after a judgment...." The order "represented a final determination that overruled the subpoenaed party's objections to the document request and mandated that the materials described in the subpoena be produced,: and "left no issue for future consideration except the subpoenaed party's compliance or noncompliance with the terms of the order."

A section 998 offer that greatly exceeds the defendant's insurance limits and ability to pay may nonetheless be reasonable if the defendant's insurer is potentially liable for any future judgment in excess of policy limits.

Aguilar v. Gostischef (2013) 220 Cal.App.4th 475.

In this personal injury action, the plaintiff attempted to learn the defendant's policy limits in order to make a settlement demand within policy limits. The defendant's liability insurer not respond. When the insurer later offered its $100,000 limits, the plaintiff rejected the offer, and countered with a CCP section 998 settlement demand for $700,000, telling the insurer that, notwithstanding

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the defendant/insured's lack of assets, the insurer's earlier failure to negotiate in response to attempts to settle within policy limits subjected the insurer to liability on its policy for amounts in excess of the limits.

The Court of Appeal (Second Dist., Div. Eight) held the trial court properly found the section 998 offer to be reasonable and therefore valid, taking into account the potential that the insurer might be liable for an excess judgment when evaluating whether a Code of Civil Procedure Sec. 998 offer was reasonable.

Defendants may properly seek removal based on allegations in plaintiffs' complaint that their claims share common issues, but subsequently argue that plaintiffs do not actually demonstrate the commonality of issues required to join plaintiffs under the federal rules.

Visendi v. Bank of America, N.A., (9th Cir. 2013) 733 F.3d 863.

A group of 137 plaintiffs filed a single state-court complaint stating, "Plaintiffs, and each of them, demand a jury trial." Defendants removed the case to federal court under the Class Action Fairness Act (CAFA), and then moved to dismiss the action on the ground that plaintiffs' claims were misjoined under Federal Rules of Civil Procedure 20(a) because they lack commonality. The trial court accused defendants of "gamesmanship and bad faith" for taking what it considered inconsistent positions: defendants obtained CAFA removal by showing that "claims of 100 or more persons are proposed to be tried jointly on the ground that plaintiffs' claims involve common questions of law or fact," (28 U.S.C. § 1332(d)(11)(B)(i)), and then defendants subsequently argued that plaintiffs' claims were misjoined because they did not raise common issues of law or fact (Fed. R. Civ. P. 20(a)).

The Ninth Circuit reversed, holding defendants acted properly. The court held that CAFA removability is determined at the time removal is sought, and once plaintiffs filed a single complaint with over 100 plaintiffs alleging their claims share common issues of law or fact and proposing a joint trial, removability was proper at that time, regardless of whether the claims ultimately proceeded to a joint trial. Once in federal court, however, defendants are free to argue that, notwithstanding plaintiffs' allegations, plaintiffs' claims lack sufficiently common issues of law or fact to merit joinder, in which case the court may sever the misjoined plaintiffs by dismissing the claims of all but the first named plaintiff without prejudice to the filing of individual actions. Thus, defendants may properly seek removal based on the allegations in plaintiffs' complaint that their claims share common issues, but subsequently argue that plaintiffs do not actually demonstrate the commonality of issues required to join plaintiffs under the federal rules.

INSURANCE

Bad faith claim for failure to settle may be rejected as a matter of law where plaintiff never made a settlement demand, and defendant insurer did not unreasonably delay in offering policy limits when liability was clear.

Reid v. Mercury Insurance Company (2013) 220 Cal.App.4th 262, petition for review pending.

This insurance coverage and bad faith action arose out of an auto accident in which the insured's liability was clear to the insurer shortly after the accident. The third party did not make any settlement demand before filing suit. The insurer did not immediately offer its policy limits while waiting for medical records, but did so within three months after receiving those records. The trial court granted summary judgment for the insurer.

The Court of Appeal (Second Dist., Div. Eight) affirmed, holding that insurers have no duty to initiate settlement efforts, even where it appears that there is a substantial likelihood the claimant will recover damages in excess of policy limits. An insurer cannot be liable for bad faith failure to settle absent an "indication from the injured party that he or she is inclined to settle within policy limits." "An insurer's duty to settle is not precipitated solely by the likelihood of an excess judgment against the insured. In the absence of a settlement demand or any other manifestation the injured party is interested in settlement, when the insurer has done nothing to foreclose the possibility of settlement, we find there is no liability for bad faith failure to settle."

Liability insurer's reservation of rights does not trigger duty to appoint Cumis counsel.

Federal Insurance Co. et al. v. MBL Inc. (2013) 219 Cal.App.4th 29.

To determine their contractual obligations with respect an underlying CERCLA action asserting pollution contamination claims, the defendants' liability insurers filed a declaratory relief action to be freed from the obligation under Insurance Code section 2860 to pay for independent counsel (known as "*Cumis* counsel," following a 1984 decision establishing that obligation) to represent the insured, a dry cleaning chemical supplier. The supplier argued that, in the dispute over the remediation of a California Superfund site, the insurers' decision to provide a defense only under a reservation of rights created a conflict of interest such that defense counsel could not properly jointly represent the insured and insurers in a tripartite relationship. The trial court granted summary judgment in favor of the insurers.

The Court of Appeal (Sixth Dist.) affirmed, holding that no conflict triggering a duty to retain *Cumis* counsel was created by the existence of potentially applicable coverage limitations in a policy (such as the requirement that a pollution discharge be "sudden and accidental") where the insurer did not specifically raise those provisions when reserving their rights to deny coverage for any judgment that might be returned against the insured. Moreover, even if insurers have pointed to specific policy language while reserving their rights, there can be no conflict of interest based on issues that defense counsel appointed by the insurer cannot control. For example, the

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court explained, the insured "has not shown how [the insurer's] reservation of rights to deny coverage for losses arising out of a government demand to monitor and clean up such pollution gives rise to a conflict of interest, since counsel could not control the outcome of that inquiry." Additionally, the fact that the insurer had issued policies to more than one defendant in the case (and provided separate counsel to the co-defendants) did not automatically create any conflict requiring independent counsel. Finally, the appointed defense counsel could not control the timing of underlying losses, which could be relevant to ascertaining whether the losses fell within a particular insurer's policy period.

See also *Swanson v. State Farm General Insurance Co.* (2013) 219 Cal.App.4th 1153 [Second Dist., Div. Seven: a material conflict of interest triggering insurer's duty to appoint *Cumis* counsel exists only when the basis for insurer's reservation of rights could cause appointed defense counsel to assert factual or legal theories affecting coverage that would be contrary to positions the insured would assert to defend against the third-party claim; the insurer's duty to provide *Cumis* counsel ceased to exist when the insurer withdrew its reservation of rights, which restored the insurer's right to take control of the defense with an attorney of its choosing; the insurer did not waive that right by failing expressly to reserve it].

See also *Carter v. Entercom Sacramento, LLC* (2013) 219 Cal. App.4th 337 [Third Dist: employee asked his employer to pay for defense counsel in an action arising out of the employee's work, but the employee refused the counsel appointed by the employee's insurer, wishing instead to have counsel of his choice; the trial court declined to award recovery for fees the defendant paid to his attorney, finding they were not "necessary" once the insurer appointed counsel; and the Court of Appeal affirmed, holding Labor Code Sec. 2802 duty to indemnify employee for defense costs did not give employee an absolute right to be represented by counsel of his own choosing, even when claims against employee sought punitive damages; there was no reservation of rights and no conflict given lack of motive on employer's part to expose employee to punitive damages].

Liability insurer does not have a duty under standard policy terms to defend its policyholder against a third-party lawsuit seeking injunctive relief but no compensatory damages.

San Miguel Community Assn. v. State Farm General Insurance Co. (2013) 220 Cal.App.4th 798.

Insureds in this breach of contract and bad faith action sued their liability insurer for refusing to reimburse them for the cost of defending the early stages of a lawsuit in which the plaintiffs had initially sought only injunctive relief to enforce parking restrictions within the community, plus an award of punitive damages. When the third party plaintiffs later amended their pleading to include a claim for recovery of compensatory damages, the insurer agreed to assume appellants' defense, but refused to reimburse it for any defense costs incurred prior to the amendment. The trial court entered summary judgment in favor of the insurer. The insureds appealed, arguing that the insurer had an obligation to provide them with a defense even in absence of any express claim for damages in the earlier versions of the third party complaint, because those earlier versions *implied* the third parties had suffered compensable damages as a result of insureds' wrongdoing and thus demonstrated a potential liability for damages covered under the policy.

The Court of Appeal (Fourth Dist., Div. Three) affirmed. Under the policy, the duty to defend applied only to claims or suits "seeking damages payable under th[e] policy." The possibility that the third-party plaintiffs might later seek recovery of compensatory damages was irrelevant. "What matters is whether the third party has sought to recover damages from the insured. It is only when the third party does that, that it has it made a claim which triggers even potential coverage under a liability policy. That did not occur here until the third party plaintiffs amended their pleading to include a claim for compensatory damages." Moreover, the insured's claim based on the insurer's "alleged bad faith in manufacturing evidence fails for the most basic reason of all: ... a claim for liability based on an insurer's alleged breach of the implied covenant of good faith and fair dealing cannot be maintained unless the insured was entitled to coverage under the insurer's policy."

An insurer must provide a defense even if the insured has not paid the policy's self-insured retention, absent clear language to that effect in the policy.

American Safety Indemnity Co. v. Admiral Insurance Co. (2013) 220 Cal.App.4th 1.

One insurer who paid defense costs sued another insurer for equitable subrogation because the defendant insurer declined to defend the insured against underlying soil subsidence claims, noting that the insured had not yet paid the $250,000 self-insured retention in defense costs. The trial court ruled that the defendant insurer owed a duty to reimburse the plaintiff for defense costs it paid.

The Court of Appeal (Fourth Dist., Div. One) affirmed. "[T]he subject commercial general liability policy has a provision labeled "Self-insured Retention (SIR)" that clearly makes the insured liable for the first $250,000 in damages payable to any third party claimant. The policy also makes it clear the insured's payment of defense costs count toward meeting the insured's SIR obligations. However, the SIR clause we are asked to consider does not expressly make payment of the SIR a condition of the insurer's broader obligation to provide a defense when an arguably covered claim is tendered. Rather, the SIR clause expressly applies only as a limitation on the insurer's duty to indemnify the insured for covered damages for which the insured is found liable. Given the language of the policy, an insured could quite reasonably interpret it as providing a defense to arguably covered claims as soon as such claims are tendered and before any SIR has been paid." The distinguished primary insurance policies from excess policies, in which the insurer generally has no duty to defend until the underlying primary coverage is exhausted.

TORTS

UNFAIR COMPETITION / CONSUMER LAW

UCL action against insurer may proceed so long as it is based on alleged conduct that is wrongful under principles independent of the Unfair Insurance Practices Act.

Zhang v. Superior Court (2013) 57 Cal.4th 364.

The plaintiff insured claimed that his insurer violated the Unfair Competition Law (UCL), Business and Professions Code section 17200 et seq., by promising to provide timely coverage in the event of a compensable loss, when it allegedly did not intend to pay the true value of its insureds' covered claims. The insurer contended plaintiff's claim was an impermissible attempt to plead around the holding in *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287 that a private right of action could not be based on violation of the Unfair Insurance Practices Act (UIPA), Insurance Code section 790 et seq.

The California Supreme Court held that while *Moradi-Shalal* bars private actions for violation of the UIPA, including UCL claims directly based on the UIPA, it does not preclude first party UCL actions based on grounds independent of the UIPA, even when the insurer's conduct may also violate the UIPA.

Fraud and Unfair Competition Law claims against lender may properly be dismissed if **fraud is pleaded with insufficient specificity,** and no independent ground for UCL liability is shown.

Aspiras v. Wells Fargo Bank, N.A. (2013) 219 Cal.App.4th 948, petition for review pending.

In this action for fraud, negligent misrepresentation and unlawful business practices under the UCL, plaintiffs-alleged that defendant lender defrauded them by claiming it would hold off on foreclosure while the parties discussed loan modification. The trial court sustained defendant's demurrer on the ground plaintiffs had not pleaded any actionable representation with adequate specificity (in part because the only apparent misrepresentation was by an unidentified employee without confirmed authority to make any representation), and plaintiffs appealed the resulting defense judgment.

The Court of Appeal (Fourth Dist., Div. One) held the practice of negotiating a loan modification while also pursuing foreclosure does not violate any common law duty, and also does not violate the UCL, as that practice will not be barred by law until new legislation takes effect on January 1, 2018. "Where a plaintiff predicates a claim of an unfair act or practice on public policy, it is not sufficient to merely allege the act violates public policy or is immoral, unethical, oppressive or unscrupulous. [Citation.] Rather, this court on numerous occasions has held that to establish a practice is "unfair," a plaintiff must prove the defendant's "conduct is tethered to an[] underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law." Finally, the trial court properly found plaintiffs failed to sufficiently allege fraud where their claims were based on a call with an unnamed person whose authority was in question.

See also *Schlegel v. Wells Fargo Bank, NA* (9th Cir. 2013) 720 F.3d 1204 [borrowers unsuccessfully sued a bank under the Fair Debt Collection Practices Act for sending mortgage default notices despite the existence of a loan modification agreement; the bank' principal business was not debt collection, so it did not qualify as a debt collector under the Act. However, the borrowers could pursue a claim under the Equal Credit Opportunity Act's notice requirement, because with respect to the bank's alleged acceleration of the borrowers' debt, the borrowers' complaint "plausibly alleges that [the bank] annulled, repealed, rescinded, or canceled their right to defer repayment of their loan," constituting a revocation of credit within the statutory definition of adverse action, triggering the duty to provide a statement of reasons for the action; in contrast, "sending a mistaken default notice would not necessarily constitute an adverse action"];

Compare *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217 [Second Dist., Div. Three: trial court erred in sustaining demurrer in UCL and CLRA action based on allegations that defendant advertised a calling plan as "unlimited," when, in fact, the plans were limited as to the number of minutes per day and month, and the number of calls per day A trier of fact could find that "that consumers are likely to believe that Skype's '*Unlimited* US & Canada' (italics added) calling plan offers *unlimited* calling within the United States and Canada for a fixed monthly fee, and that they will fail to notice the disclosure to the contrary in the fair usage policy" that was referenced in a footnote on a web page. Moreover, a trier of fact could infer UCL causation (actual reliance) based on allegations that the representation was material to the decision to purchase the plan];

See also *Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390 [California Supreme Court: a private action alleging an unlawful business practice under California's Unfair Competition Law may be based on alleged violations of a federal statute, even where Congress has repealed a provision of that statute authorizing civil actions for damages, so long as Congress made it plain that state laws consistent with the federal statute are not superseded];

See also *Angelica Textile Services, Inc. v. Park* (2013) 220 Cal.App.4th 495 [petition for review pending] [Fourth Dist., Div. One: trial court erred in summarily rejecting plaintiff employer's claims that its former employee breached his employment agreement and his duty of loyalty where the employee allegedly disparaged the employer to a local business and took actions that resulted in customers taking their business to employee's new employer; these claims, as well as employer's claim that employee wrongly retained documents belonging to employer, were not displaced by the Uniform Trade Secrets Act, on which the employer lost at trial, as the allegations supported theories independent of any trade secret];

See also *People v. Persolve, LLC* (2013) 218 Cal.App.4th 1267 [Fifth Dist.: trial court erroneously sustained a demurrer in this public enforcement action under the UCL, alleging defendants

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repeatedly violated fair debt collection statutes. The complaint was not barred by the litigation privilege even though the parties did not dispute that the complaint was based solely on communications and communicative acts related to judicial proceedings; the unfair competition law cause of action was predicated on conduct specifically prohibited by federal and state debt collection laws, and an exception to the litigation privilege must be recognized in such circumstances because the California Act and the Federal Act are more specific than the privilege and would be significantly or wholly inoperable if the privilege applied].

CASES PENDING IN THE CALIFORNIA SUPREME COURT

Addressing liability insurer's ability to seek reimbursement of excessive fees from ***Cumis*** counsel who was retained to defend insured in underlying action.

J.R. Marketing, L.L.C. v. Hartford Casualty Insurance Company, case no. S211645, formerly published at 216 Cal.App.4th 1444.

In this action by a liability insurer against counsel retained to defend an insured, the insurer argued that the legal fees charged were excessive, in violation of Civil Code Section 2860. That statute regulates the qualifications for *Cumis* counsel and the rates they may charge, and provides for binding arbitration of fee disputes. The trial court found that the provisions of section 2860, did not apply and the insurer's only remedy for unreasonable or excessive attorney fees was an action for reimbursement *following the close of the underlying litigation,* after the defense costs were paid. The insurer accordingly brought the reimbursement action authorized by the trial court, and argued it had a common-law, quasi-contractual right to bring the action directly against *Cumis* counsel as well as its insureds. However, both the trial court and the Court of Appeal (First District, Division Three) said that the insurer may seek reimbursement only from its own insureds, and not from the lawyers who had received the fee payments.

The California Supreme Court granted review on September 18, 2013, to decide the following issue: "Do the principles articulated in *Buss v. Superior Court* (1997) 16 Cal.4th 35 and the established common-law remedies for money wrongfully received give an insurer a common-law, quasi-contractual right to maintain a direct action against Cumis counsel for reimbursement of unreasonable and unnecessary defense fees and costs?"

Addressing elder abuse liability on the part of a physician who does not have custodial control over a patient, and who fails to refer the patient to a specialist.

Winn v. Pioneer Medical Group, Inc. case no. S211793, formerly published at 216 Cal.App.4th 875.

After the death of their 83-year-old mother, plaintiffs sued defendant physicians for elder abuse, based on defendants' repeated decisions not to refer their mother to a vascular specialist. Defendants contended they could not be liable for elder abuse because they treated decedent as an outpatient, and liability for elder abuse "requires assumption of custodial obligations." The trial court dismissed the elder abuse action, finding that plaintiffs failed to allege that petitioners denied their mother needed care in a reckless manner. Instead, relying on *Delaney v. Baker* (1999) 20 Cal.4th 23, the court ruled that the suit amounted to nothing more than professional negligence (which claim plaintiffs had asserted in a separately filed lawsuit). A divided Court of Appeal reversed, holding that a custodial relationship with the decedent was not required to state an elder abuse claim.

The California Supreme Court granted review on August 14, 2013, to address the following issues:

1. Whether a physician can be liable for elder abuse "neglect" where the patient was a competent, autonomous adult who voluntarily sought outpatient medical treatment from the physician on a periodic basis, or whether liability under the Elder Abuse and Dependent Adult Civil Protection Act depends upon that physician having "custodial obligations" for providing the basic needs and comforts of the elder patient.

2. Whether a physician can be liable for elder abuse "neglect" where the physician made a medical error in failing to recognize the need for specialized care, or whether the physician must have refused to provide for the elderly patient's basic needs and comforts.

Addressing the right of a prevailing defendant in a FEHA case to collect ordinary costs.

Williams v. Chino Valley Independent Fire District, case no. S213100, formerly published at 218 Cal.App.4th 73.

Plaintiff lost a FEHA (California Fair Employment and Housing Act, Gov. Code, § 12900 et seq.) case in which he had sued Chino Valley Independent Fire District for employment discrimination. When the District sought to recover its costs at the end of that case, the trial court granted plaintiff's motions to tax costs in part, granting the District costs of $5,368.88. Plaintiff appealed, contending that no costs should have been allowed. The Court of Appeal (Fourth Dist,. Div. Two) affirmed, holding that ordinary costs are recoverable by a prevailing defendant as a matter of right.

The California Supreme Court granted review on October 16, 2013, to decide the following issue: "Is a prevailing defendant in an action under the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) is required to show that the plaintiff's claim was frivolous, unreasonable, or groundless in order to recover ordinary litigation costs.

See also *Muniz v. United Parcel Service, Inc.* (9th Cir. 2013) ___ F.3d ___ [2013 WL 6284357] [a divided appellate panel held the federal district court in FEHA case did not abuse its discretion in awarding the prevailing plaintiff $697,971.80 in attorneys' fees where the jury awarded her only $27,280 in damages; California law did not require the district court to reduce the fee award despite such a the disparity to compensatory damages

Addressing overtime wage rules for private security guards.

Mendiola v. CPS Security Solutions, case no. S212704, formerly published at 217 Cal.App.4th 851.

In these wage and hour class actions brought against defendants who employed security guards for building construction sites, the Court of Appeal held that guards are entitled to compensation for nighttime on call hours when the shift worked consists of eight hours on patrol and eight hours on-call at the premises. However, the employer is permitted to deduct eight hours of sleep time for guards working 24-hour shifts.

The California Supreme Court granted review on October 16, 2013, to decide the following issue: "Are the guards that defendants provide for construction site security entitled to compensation for all nighttime 'on call' hours, or may defendants deduct sleep time depending on the structure of the guards' work shifts?"

Addressing competence of expert testimony to rebut Vehicle Code presumption of alcohol blood levels, and competence of contrary **circumstancial evidence to sustain finding** consistent with fact as to which statutory presumption had been rebutted.

Coffey v. Shiomoto, case no. S213545, formerly published at 218 Cal.App.4th 1288.

Plaintiff was arrested for driving under the influence. An hour after she was pulled over, she took a breathalyzer test. The test result was 0.08 percent blood-alcohol content (BAC). A few minutes later she took another test resulting in a 0.09 percent BAC. Twenty-five minutes later she took a blood test resulting in 0.095 percent BAC. The Department of Motor Vehicles (DMV) suspended her license after conducting an Administrative Per Se (APS) hearing. The trial court denied a petition for a writ of mandate challenging the DMV ruling. On appeal, plaintiff contends the uncontradicted expert testimony at the APS hearing demonstrated her BAC was rising throughout the three tests and thus below 0.08 percent at the time she was driving. The Court of Appeal (Fourth Dist., Div. Three) held (1) an expert's testimony that the motorist's BAC was rising as indicated by subsequent valid chemical tests was sufficient to rebut the three hour presumption of Vehicle Code section 213152, subdivision (b); however, (2) non-chemical test circumstantial evidence, in the presence of a valid BAC chemical test, constituted substantial evidence sufficient to sustain a finding that the motorist's BAC was at least 0.08 percent at the time of driving.

The California Supreme Court granted review on October 30, 2012, to address the following questions: "(1) Can circumstantial evidence other than the results of chemical tests be used to prove that a driver's blood-alcohol content at the time of driving was the same as, or greater than, the results of a blood-alcohol test taken approximately an hour after driving? (2) Is the decision of the Court of Appeal consistent with the requirements of Evidence Code section 604 for proof of an initially presumed fact after the presumption has been rebutted?"

Addressing scope of borrower protections **under anti-deficiency laws and the "security first" rule.**

Coker v. JP Morgan Chase Bank N.A., case no. S213137, formerly published at 218 Cal.App.4th 1.

A borrower was unable to make her mortgage payments, and agreed to sell her house to a third party to avoid foreclosure. However, the sale price was less than the amount the borrower owed on her loan. The mortgage lender agreed to the "short sale," but as a condition of approval, stated that the borrower would be responsible for any deficiency. The borrower filed a complaint for declaratory relief seeking a judicial determination that Code of Civil Procedure section 580b prohibits the lender from obtaining a deficiency judgment after the sale. The mortgage lender demurred to the complaint, and the superior court sustained the demurrer without leave to amend, finding section 580b applies only after a foreclosure. The Court of Appeal (Fourth Dist. Div. One) held that section 580b applies after a sale of property and there is no requirement in the statute that a foreclosure must occur to trigger its protections. Therefore, the Court of Appeal held that section 580b applied to the short sale that the mortgage lender approved.

The Supreme Court granted review on October 30 to address the following issues: (1) Do the anti-deficiency protections in Code of Civil Procedure section 580b apply to a borrower who engages in a "short sale" of real property when the lender approved the sale and reconveyed its deed of trust to facilitate the sale on the condition that the borrower remain liable for any outstanding balance on the loan following the sale? (2) Does a borrower's request that the creditor release its security interest in real property to facilitate a short sale result in a waiver of the protection of the "security first" rule set forth in Code of Civil Procedure section 726?

Addressing a challenge to a city ordinance placing conditions on building permits, relating to units for low income housing.

California Building Industry Association v. City of San Jose, case no. S212072, formerly published at 216 Cal.App.4th 1373.

The California Building Industry Association (CBIA) filed a facial challenge to a City of San Jose ordinance that requires developers of residential housing projects to either include "inclusionary" units for low-income individuals or pursue one of four enumerated alternatives, such as dedicating land for the units or paying an in-lieu fee. Applying *San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, 670, the trial court declared the ordinance invalid because the city had not shown that the ordinance was reasonably related to any "impacts caused by new residential development," and it granted CBIA's request for injunctive relief. The Court of Appeal (Sixth Dist.) reversed and remanded, finding *San Remo Hotel* inapplicable to the ordinance, on the ground that the ordinance needed only to be rationally related to the City's police power.

The Supreme Court granted review on September 11, 2013, to address the following issue: "What standard of judicial review applies to a facial constitutional challenge to "inclusionary" housing ordinances that require set asides or in-lieu fees as a condition of approving a development permit?"

Addressing propriety of city's approval of a development plan, in light of an allegedly inconsistent general plan.

Orange Citizens for Parks and Recreation v. Superior Court (Milan Rei IV), case no. S212800, formerly published at 217 Cal.App.4th 1005.

Plaintiffs (a group of City of Orange citizens) challenged a the city council's approval of a development project that, plaintiffs argued, was inconsistent with the city's general plan; an amendment to the general plan that would have allowed the project had been voted down by referendum. The trial court, however, ruled that the City's general plan was not inconsistent with the development, so the general plan amendment was unnecessary. The Court of Appeal (Fourth Dist., Div. Three) affirmed, holding that the City could reasonably find the development was consistent with the city's general plan.

The California Supreme Court granted review on October 30, 2013, to address the following question: "Is the proposed development project of low density housing at issue in this case consistent with the city's general plan?"

Addressing a government entity's liability for an alleged dangerous condition of public **property, and the entity's affirmative defense** of design immunity.

Hampton v. County of San Diego, case no. S213132, formerly published at 218 Cal.App.4th 286.

While driving his vehicle, the plaintiff collided with another vehicle at an intersection. He and his wife sued the driver of the other vehicle and also sued the County of San Diego, alleging a dangerous condition of public property. The County asserted that the claims were barred by the affirmative defense of design immunity and successfully moved for summary judgment. The Court of Appeal (Fourth Dist., Div. One) affirmed, holding that the County established the affirmative defense of design immunity as a matter of law, and that the accumulation of foliage on an embankment, which allegedly limited sight distance, was not evidence of a dangerous condition.

The California Supreme Court granted review on October 23, 2013, to address the following issue: "Does a public entity establish the second element of design immunity under Government Code section 830.6 – discretionary approval of design plans – as a matter of law by presenting evidence that its design plans were approved by an employee with the discretion to do so, even if the plaintiff presents evidence that the design at issue violated the public entity's own standards? "

Addressing scope of government entity's liability for alleged dangerous condition of property where harm to plaintiff was caused by acts of a third party that were not, in turn, caused by the condition of the property.

Curtis v. County of Los Angeles, case no. S213275, formerly published at 218 Cal.App.4th 366.

A motorist sued the County of Los Angeles for injuries sustained in a vehicle collision caused by another driver, alleging that the lack of a center median space or barrier on the highway constituted a dangerous condition. The Court of Appeal, (Second Dist., Div. Four) held (1) the lack of a median space or barrier was not the proximate cause of the collision; and (2) the County was immune from liability for not including a median space or barrier in the design of the highway.

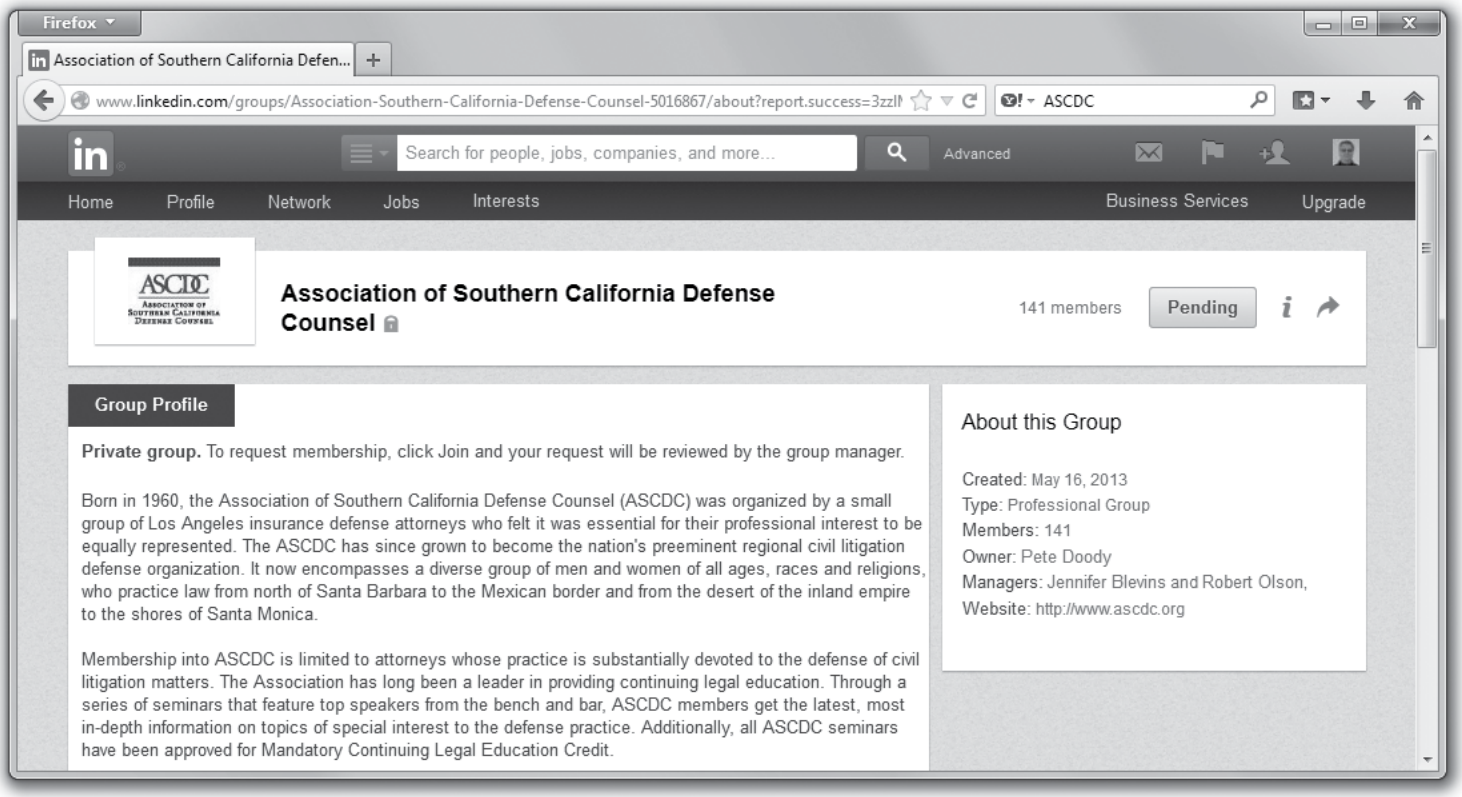
The Supreme Court granted review on October 23, 2013, but ordered further action deferred pending disposition of a related question in *Cordova v. City of Los Angeles*, case no. S208130, which presents the following issue: "May a government entity be held liable if a dangerous condition of public property existed and caused the injuries plaintiffs suffered in an accident, but did not cause the third party conduct that led to the accident?"

Addressing jurisdiction over foreign parent companies based on activities of subsidiaries with contacts in California.

Daimler AG v. Superior Court of Sacramento County (Pierson), case no. S210847; following summary denial of a writ petition.

This case raises a question about jurisdiction over defendant and petitioner Daimler AG, a German corporation. Daimler AG has an indirect U.S. subsidiary, Mercedes-Benz USA (MBUSA), which is domiciled in New Jersey. MBUSA performed services for Daimler AG in California pursuant to a Distributor Agreement between the companies. Daimler AG filed a motion to quash service of summons for lack of personal jurisdiction on the ground that it had no significant contacts with California. The Sacramento Superior Court denied the motion, imputing MBUSA's contacts to Daimler AG on a theory of agency (the "representative services doctrine"). The Court of Appeal (Third Dist.) summarily denied Daimler AG's petition for a peremptory writ of mandate.

The California Supreme Court granted review on July 31, 2013, but pending decision of the United States Supreme Court in *DaimlerChrysler AG v. Bauman,* No. 11-965, cert. granted Apr. 22, 2013, __ U.S. __ [133 S.Ct. 1995, 185 L.Ed.2d 865], which presents issues concerning a state court's exercise of personal jurisdiction over a foreign corporation based on services performed in the forum state by a wholly-owned subsidiary on behalf of the foreign corporation.



Note to Members – ASCDC is LinkedIn

Peter Doody, Higgs Fletcher & Mack

ASCDC has created a LinkedIn Group as a forum where our members, and only our members, can share information and ideas. ASCDC created the LinkedIn Group based on the adage "knowledge is power." The purpose of the site is to allow our members to trade valuable information and ideas concerning defense litigation. In order to foster candid discussion the ASCDC LinkedIn Group is a 'closed' group whereby only ASCDC members can be admitted and participate in the forum.

LinkedIn is the largest business networking site on the internet where professionals create their own profile page. Within the LinkedIn network, a professional group can create and manage a closed LinkedIn Group.

We launched the ASCDC LinkedIn Group a few months ago and already have over 140 members within our Group. We have had posts and discussions drawing on years of litigation experience amongst our members. The wide range of topics include how to combat the latest "Reptile" trial tactics employed by the plaintiffs' bar, how to efficiently obtain an out of state commission, and laying a proper foundation for sub-rosa videos. Our forum is also used to identify and find experts, and offers advice regarding *Howell v. Hamilton Meats* medical billing issues. Our ASCDC LinkedIn appellate lawyers have kept us abreast of cutting-edge published cases, and concisely explaining the key holdings of the case. The LinkedIn Group is an especially valuable resource for young lawyers, who can post any inquiry, and receive immediate feedback from experienced trial lawyers.

Some other groups on LinkedIn seem to have devolved into marketing venues for individuals or companies attempting to mine and market other members of the group. Our ASCDC LinkedIn Group is unique since we are closed, and do not allow any vendors or outside interests into the group. Our sole function is to exchange information and ideas pertaining to civil litigation defense.

To join our ASCDC LinkedIn Group, one has to first join LinkedIn. Most of our ASCDC members already have a LinkedIn profile. If not, it is easy to sign-in and create a profile page. Simply go to *www.LinkedIn.com* and provide your name and e-mail address, and create a password. The site will then direct you to information boxes to create your professional profile. Adding a profile photograph is optional but encouraged since it adds to the professional image of one's profile.

Once you have created your own personal profile page then joining our ASCDC LinkedIn Group is easy. On the top tool bar of your LinkedIn page locate and click "interests." On the page that appears you can select "Groups"; at the prompt, type in "Association of Southern California Defense Counsel." You will be immediately directed to our LinkedIn Group page. In the upper right hand corner locate and click the gold "join" bar. Since we are a closed group we will verify membership and then you will be a member of the ASCDC LinkedIn Group.

If, for whatever reason, you have trouble navigating access to the ASCDC LinkedIn Group, simply send an e-mail to me at *doody@higgslaw.com* and we will send you an instant invitation to join the Group.

We hope to see you soon as a member of our ASCDC LinkedIn forum.

Ninth Circuit Practice Guide

Benjamin G. Shatz, Manatt, Phelps & Phillips

Why is this book review different from all others? First, you needn't worry about whether to "buy" the book at issue – it is free and available on the internet. Second, there will be little discussion about the book's author – because there is no author.

The work presented here is *The Appellate Lawyer Representatives' Guide to Practice in the United States Court of Appeal* [sic] *For the Ninth Circuit*. This 112-page guide was posted on the Ninth Circuit's website last month. The website-page devoted to the guide explains:

> The *Appellate Lawyer Representatives' Ninth Circuit Practice Guide* provides an outline of the appellate process and detailed information about many court procedures. While not an official publication, the guide was developed in consultation with court staff and is freely available here: *www.ca9.uscourts.gov/AppellatePracticeGuide*. The guide was developed by the Ninth Circuit's Appellate Lawyer Representatives, a group of highly experienced and respected practitioners appointed by Ninth Circuit Chief Judge Alex Kozinski to advise the court on procedural and other matters. While intended for lawyers, the guide also would likely be of benefit to journalists, students and educators, pro se litigants and others interested in the workings of the court.

Thus, the guide has no single author, but – like the King James Bible and the U.S. Constitution – is the product of a dedicated and skilled committee. The guide's introduction notes that it is a "work in progress" and welcomes suggestions for improvement by e-mail to *ALRPracticeGuide@ca9.uscourts.gov*. ("ALR" here refers to Appellate Lawyers Representatives, not the more usual American Law Reports, but we'll leave any confusion about that to West publishing to address.) The "work in progress" designation is being taken seriously, because the version currently posted and dated October 22 already contains edits modifying the original version posted October 18. (An initial suggestion from the peanut gallery: Correct the title to accurately name the Ninth Circuit Court of Appeal***s***.)

The guide contains twenty "chapters" essentially in an outline format with short paragraphs and "practice tips" interspersed throughout. Many of the point headings take the form of a question, so the guide strongly resembles the hybrid offspring of a very exhaustive FAQ page and an annotated set of rules. The chapters introduce the court, how appeals are processed, and follows the appellate lifecycle (covering civil, criminal, immigration, and habeas matters) from filing a notice of appeal to post-

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decision matters. The last seven chapters consist of filing checklists and a list of other resources.

The very first practice tip (on page 13, in the chapter on "filing an appeal") is to another free guide on the court's website, the Ninth Circuit Appellate Jurisdiction Outline

(www.ca9.uscourts.gov/guides/appellate_jurisdiction.php). This highlights the fact that the guide is meant to be a quick introduction, review, and starting point. In no way will its present incarnation replace or even seriously challenge the existing practices guides, such as the *Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice* or Ulrich's *Federal Appellate Practice: Ninth Circuit* (West 2d ed.) – but it was never meant to do so.

Rather, the guide is just that: a quick guided tour of the governing rules and practices. Lawyers familiar with the basics of Ninth Circuit practice may not learn much, but they are not the intended audience. For lawyers and pro pers with little or no experience, the guide's outline, practice tidbits, and checklists should prove very helpful in understanding how to accomplish necessary tasks and clarifying the relevant rules, which can be difficult to follow when reading a vacuum.

The practice tips pick up steam in the chapter on "drafting the brief" and "oral argument," because they move beyond cross-referencing other guides or reiterating commentary on the rules, to provide sound advice for improved appellate practice. For instance, tips encourage the use of full sentences in headings, the use of an introduction (which isn't specially addressed in the rules), and supply advice about crafting an effective statement of facts. Similarly helpful tips on oral argument are also included. To be sure, these tips are concise and somewhat fundamental. But again, they should prove very useful to neophyte appellate practitioners. Lawyers may also find it valuable to share the guide with their paralegals, legal secretaries or other filing assistants, who may derive benefit from both the procedural and substantive discussion as well as the filing checklists. Finally, you just can't beat the price.

The bar and public owe congratulations and thanks to the ALRs for devoting many hours of time and attention to creating this new addition to the library of Ninth Circuit practice guides. No doubt future versions will become even more useful.

Benjamin G. Shatz co-chairs the Appellate Practice Group at Manatt, Phelps & Phillips in Los Angeles. A certified appellate specialist, Mr. Shatz is a past chair of the State Bar Committee on Appellate Courts and the L.A. County Bar's Appellate Courts Committee. He serves on ASCDC's amicus committee.

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Navigating Defenses to an Ostensible Agency Theory Under *Mejia*

Christine T. Le,
Carroll, Kelly, Trotter, Franzen & McKenna

Every physician vows to abide by the Hippocratic Oath. Inherent in the concept of "do no harm" is providing the best care possible to your patients. The physician swears to take measures to treat the ill and to avoid the corruption and temptation of others. I'm no Hippocrates, but I'm sure profit and outside influence perpetrated the need for such a solemn vow. This brings me to my point: the underlying principles of the Hippocratic Oath conflict with the principles of *Mejia v. Community Hospital of San Bernardino*, (1998) 99 Cal. App.4th 1448, which act to impose liability on hospitals on an ostensible agency theory. The Hippocratic Oath requires physicians to treat their patients to the best of their ability and ***with full autonomy***, while *Mejia* imposes liability on hospitals that have no control over a physician's care and treatment. So why should hospitals be ostensibly liable for the care and treatment provided by physicians they don't control?

It's a fact that hospitals, as entities, can't practice medicine or exert control over the physicians that choose to practice at their facilities. *Business & Professions* Code section 2032. Yet *Mejia* rattled the defense world 15 years ago by acting to impose liability on hospitals for the negligent acts of their independent contractor physicians via the theory of ostensible agency. Since then, *Mejia* has created a strange trichotomy between patient, physician and hospital, which hospitals just can't seem to shake. *Mejia* however, doesn't impose absolute, automatic liability on hospitals. This article will address and clarify some potential defenses to a *Mejia* argument at summary judgment and perhaps beyond.

The Law of the Land

Mejia stands for the proposition that hospitals are potentially liable for the negligent acts of independent contractor physicians through the theory of ostensible agency. *Mejia*, 99 Cal.App.4th 1448; California *Code of Civil Procedure* § 2300. To prove an ostensible agency relationship, plaintiff must satisfy both of the following elements: (1) **conduct** by the hospital that would cause a reasonable person to believe there was an agency relationship and (2) **reliance** on that apparent agency relationship by the plaintiff. *Ermoian v. Desert Hospital, et al*., (2007) 152 Cal. App.4th 475, 506; *Mejia*, 99 Cal.App.4th at 1457. A third pseudo element, as set forth in the ostensible agency jury instructions, requires that the plaintiff was harmed because he *reasonably* relied on his belief. *Jury Council of California Civil Jury Instructions* (2013), CACI No. 3709.

When a hospital holds itself out as a provider of care, it creates a presumption in the eyes of the law that the physicians inside are its agents. *Mejia,* 99 Cal.App.4th at 1454. This satisfies the first element of Mejia and places the burden on the hospital to demonstrate that contrary notice has been satisfactorily provided. *Ibid*.

As to the second element, courts traditionally required "detrimental" reliance. *N. Trust Co. v. St. Francis Hospital*, (1998) 522 N.E.2d 699, 704. However, the growing trend is to require only that plaintiff's reliance was "reasonable." *Mejia*, 99 Cal.App.4th at 1457. Additionally, a plaintiff is not required to prove (1) an actual belief that their physician was employed by the hospital, or (2) that she changed her position or otherwise relied to her detriment based upon her belief that the physician was an agent of the hospital. *Ermoian,* 152 Cal.App.4th at 505. Further, reliance is ***presumed*** absent evidence that plaintiff knew or should have known that the physician was not the hospital's agent. *Mejia,* 99 Cal.App.4th at 1454. As to the last element, harm can be easily proven by pointing to plaintiff's alleged injury which is the subject matter of the lawsuit. In sum, California law assumes that the physician appears to be an agent of the hospital, absent notice to the patient to the contrary. *Mejia*, 99 Cal.App.4th at 1459.

Even more disconcerting, is that the growing trend in the United States appears to align with *Mejia*; courts are increasingly holding hospitals liable for the negligent acts of their independent contractor physicians through the theory of ostensible agency. *See generally Burless v. West Virginia University Hospitals, Inc*., (2004) 215 W.Va.765, *Parker v. Freilich*, (2002) 803 A.2d 738. In light of *Mejia* and the cases that followed it, synthesized below

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are situations where hospital liability under a theory of ostensible agency appear either highly likely, likely or remote.

Most Likely Liable

There are two circumstances where liability routinely attaches to hospitals: (1) in emergencies and (2) when specific physician services are provided by "behind the scenes" health care professionals to patients at the hospital. In these two circumstances, the reliance element has been typically presumed regardless of notice.

Emergency. For a multitude of public policy reasons, including the lack of bargaining power on the part of a patient who needs emergency room services, notice of the lack of an agency relationship is typically insufficient to avoid hospital liability in an emergency room setting. (*Mejia* 99 Cal.App.4th at 1454; *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 101 ("insisting that a patient accept the provisions of waiver in the contract, the hospital certainly exercises a decisive advantage in bargaining [and] the would-be patient is in no position to reject the proffered agreement."). Courts note that the patient often arrives in excruciating pain, which makes digestion of boilerplate language near impossible to read, retain or understand. *Tadlock v. Mercy Healthcare Sacramento,* No. C044777, 2004 WL 1203138, at *10 (Cal. Ct. App. June 2, 2004).

This imagery was vividly illustrated in *Van Horn v. Hornbeak*, No. CVF 08-1622 LJO DLB, 2010 WL 599885, at *10 (E.D. Cal. February 18, 2010.). There, the patient complained that "she was shackled, in pain, and 'forced' to sign the forms." *Ibid*. In such circumstances, courts are more inclined to find ostensible agency exists because any notice of the independent relationship would be minimized by other competing factors such as pain or the lack of other alternative options at the emergent point in time.

Physician's services. Courts tend to favor ostensible agency in circumstances where a reasonable person in plaintiff's position would believe the physician services are "part and parcel" of services provided by the hospital. *Ermoian*, 152 Cal.App.4th at 505. Due to the nature of their specialties, radiologists, pathologists, anesthesiologists and the like have been deemed part of the services provided by the hospital. The reasoning lies with the fact that in those specialties, the physician rarely comes face to face with her patients. Rather, the patient's primary care physician and/or surgeon writes orders, submits specimens or determines the need for intubation for their patients, which are then disseminated to a pool of available physicians that practice behind the scenes and with very limited patient interaction. As such, in these situations, where a patient's choice of physician is lacking, courts are more likely to hold hospitals vicariously liable.

Accordingly, the remainder of this article provides factors whereby courts may recognize the distinction between physician liability alone and hospital liability relative to ostensible agency.

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Mejia – **continued from page 24**

Likely Liable

A combination of two or more of the following will likely strengthen a defense on a *Mejia* theory of liability.

Conditions of Admissions Forms. As discussed in depth below, Conditions of Admissions Forms are critical to a defense against a *Mejia* argument. Signature time and date are crucial in assessing the reasonable reliance factor. *Compare Tadlock v. Mercy Healthcare Sacramento,* C044777, 2004 WL 1203138, at *9, (Cal. Ct. App. June 2, 2004) (concluding that the "document could have been signed before he was admitted, after he was admitted or concurrently with his admission" and mere existence of the document is not sufficient to conclusively indicate the patient should have known the treating physician was not the hospital's agent), with *Decker v. Long Beach Memorial Medical Center*, No. B189265, 2007 WL 4346795, at *2 (Cal. Ct. App. Dec. 13, 2007) (plaintiff signed a pre-elective surgery condition of admissions form, but avoided summary judgment by submitting a declaration stating she had no reason to believe the defendant physicians were not hospital employees, she believed they were employees, and despite having signed the form, was never told otherwise). Use of a form can be particularly effective with elective procedures, for which paperwork can be provided in advance of treatment. If a hospital demonstrates it provided a form to a patient before the patient arrived for a procedure, that can bolster the argument that the patient had ample opportunity to consider the material, obtain others' assistance in understanding it, and could have backed out of the procedure if the conditions were unacceptable to the patient.

Billing for services separately from hospital. Defense attorneys should advise their hospital clients to avoid billing services on behalf of their independent contractors physicians. *Jacoves v. United Merchandising Corp*., (1992) 9 Cal.App.4th 88 (defendant billed for his services separately from the hospital, but found liable based on other factors), *Stanhope v. Los Angeles College of Chiropractic*, (1942) 54 Cal.App.2nd 141, 146 (college found liable despite the fact

defendants issued his own invoices separate and apart from the college).

Remote Likelihood of Liability

Existing Relationship. A physician who has an established relationship with the plaintiff-patient lends support to the hospital's defense against ostensible agency. *See Alemu v. Venn-Watson,* No. D055992, 2005 WL 2436473, at *5 (Cal. Ct. App. October 4, 2005). In *Alemu*, defendant physician had been treating patient-plaintiff for more than two months before plaintiff underwent her scheduled operation. *Ibid*. The Court reasoned that the patient's pre-existing relationship with her physician barred the surgical center from liability under a theory of ostensible agency because the physician was acting as the patient's "personal physician." *Ibid*.

What Do We Do About It?

Conditions of Admissions Forms. Hospital liability can be most efficiently avoided at the initial stage of the hospital-patient relationship. During that time, most hospitals provide a Conditions of Admissions Form ("Form") for patients to review, understand and execute. Defense attorneys can help their hospital clients by offering input into drafting and administration of the hospital's form, which apprises patients of the independent contractor relationship between physician and hospital:

Content of the Form. many hospital forms are quite outdated. They may contain clauses declaring that the "PHYSICIANS ARE NOT EMPLOYEES OR AGENTS OF THE HOSPITAL" but those paragraphs are often deep within the many provisions and multiple pages laid out in their Form. A more effective disclaimer would include presenting a patient with a *separate document* that describes only the nature of the physician and hospital relationship, in text printed in a larger than normal size font. This avoids an argument that your hospital client inundated a patient with too much undifferentiated information. Defense attorneys should also suggest that hospital forms require interactive reading rather than providing a placeholder for passive initialing. A plaintiff patient is less likely to deny that he misunderstood the nature of the physician's relationship with the hospital if it's clearly memorialized in his own hand. For example, patients may be asked fill in the name of the hospital in a paragraph reading: "ALL PHYSICIANS, DOCTORS AND SURGEONS TREATING YOU WHILE YOU ARE AT _____ [NAME OF HOSPITAL] ARE INDEPENDENT CONTRACTORS AND ARE *NOT EMPLOYEES OR AGENTS OF THE*

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Mejia – **continued from page 25**

HOSPITAL." By drafting this in clear and simple language, the Form will assist to minimize any ambiguity arguments a plaintiff may bring as a sword.

Languages. Patient demographics at hospitals are clear indicators of which languages, other than English, are primarily spoken among a hospitals' patients. Thus, hospitals could examine their own patient base to make forms available in languages that are most understood by their customers.

Hired Admissions Processor. Hiring an admissions processor with good communication skills and investing in an iron clad training program for this employee can be effective against a potential *Mejia* argument. A face to face explanation of a hospital's form at the time of admission to the hospital, conducted by an admissions processor trained for that purpose, can make a huge difference at summary judgment or trial, and thus could prove most cost efficient on the front end for any hospital. For example, at summary judgment, defense counsel could attach a declaration from an admissions processor testifying to the timing of the admissions process, the language spoken to the patient, the explanation given to the patient regarding the Form, including the nature of the physician and hospital relationship, and their witnessing of the patient's initials on each paragraph of the Form.

Discovery. For purposes of a motion for summary judgment, defense counsel should propound interrogatories and/or requests for admissions on both co-defendant physicians and patient-plaintiff to address a *Mejia* argument. The discovery should seek to inquire into the nature of the physician-patient relationship, including the length of physician-patient relationship, and the patient's experiences with other health care professionals. Likewise, defense counsel should confirm, via admission or deposition, that plaintiff had the ability to choose the doctor, met with an admissions processor, signed an advisory admissions form before elective surgery, or otherwise understood the independent contractor relationship between physician and hospital.

*Subpoenas***.** In the happenstance that patient-plaintiff has an extensive operative history, issuing a subpoena for plaintiff's hospital records, which invariably include other hospitals' Forms, should provide additional ammunition to add fuel to your hospital client's position that patient knew or should have known that physicians are independent contractors.

Causation Argument. In a dispositive motion or otherwise, an argument can often be made that the patient-plaintiff's lack of awareness of the independent contractor status of his physician *was of no moment*. The hospital may be able to point to the absence of evidence that the patient-plaintiff's choice to undergo elective surgery or continue treatment would have been different but for his ignorance of the independent contractor status. CACI 3709 and *Mejia* require "reliance." Demonstrating that even had patient-plaintiff known of the independent contractor status, he would have knowingly elected to proceed with treatment at the hospital anyway, will eliminate the possibility of plaintiff reliance. With well crafted deposition questions, defense counsel could effectively eliminate one compulsory element of ostensible agency.

Contract theory. In support of this causation argument, reference can be made to the Conditions of Admissions Form, a contract between patient and hospital, whereby patient-plaintiffs typically concede that physicians are independent contractors. That contractual reference creates a presumption which plaintiffs must then overcome. Where the document speaks for itself, the court should not look to the intent of the parties, but rather the four corners of the contract. *Machado v. Southern Pacific Transportation Co.* (1991) 233 Cal.App.3d 347, 352. Defense attorneys may defeat a *Mejia* argument on the premise that notice to the contrary was achieved and the reliance element is defeated under a contract theory of law. The federal district court opinion in *Romar v. Fresno Community Hosp. and Medical Center* (Mar. 23, 2007, CIV F 03-6668 AWI SMS) 2007 WL 911882 at pp. *15-*16 is instructive on this point: a form executed by plaintiff stating that physicians are independent contractors specifically put the plaintiff on notice that the physicians could not be ostensible agents, but because the form did not mention nurse practitioners, an issue of fact existed as to whether the plaintiff reasonably understood such health care workers to be agents or employees.

Conclusion

Hospitals have become prime targets in California for acts over which they exert zero control. Even stranger is the overall result; by holding hospitals liable on the theory of ostensible agency, *Mejia* did little to accomplish the twin objectives of tort law, deterrence and compensation. Rather, hospitals have become *de facto* insurance carriers for their independent contractor physicians, who by definition are not actual agents, but whose acts fall within the fiction of the ostensible agency theory. The truth is this, hospitals, as entities in California, can't practice medicine. And they certainly can't take the Hippocratic Oath. So why should hospitals be held liable for the acts of others that do?

Winning Shots

Rick Kraemer's photographs have won him friends and helped build Executive Presentations into a highly respected trial services company

By Carol A. Sherman

Flashing a friendly smile and wearing his signature bow tie, Rick Kraemer beams as he flips through the pages of one of the scores of photo albums that line a hallway in his top-floor mid-Wilshire office near downtown Los Angeles. The candid photos contained in these albums capture more than three decades of who's who of the Association of Southern California Defense Counsel (ASCDC).

Looking through the photos, no one seems to shy away from Rick's lens. He easily recalls every lawyer's name, the names of their children and the story behind the picture. "Through my pictures, I've become a part of many lawyers' lives. I've been to their parties, weddings and funerals. When someone needs a photo, be it a judge, lawyer or industry vendor, they call on me."

Rick admits that his photographs have opened doors for his trial services company. As founder and president of Executive Presentations, a full-service trial presentation company, much of Rick's business comes from the lawyers in his photographs. He says, "I built my business on personal relationships beyond the work my firm does for lawyers."

Rick formed Executive Presentations in 1986. At the time, he was selling computer graphics systems for business presentations. When the company folded, he saw the opportunity to create presentation boards for use in the courtroom. The idea caught on quickly, and today Executive Presentations uses the latest computer technology to help lawyers present their cases by producing convincing graphics, videos, animations, and other forms of digital presentations. The company employs a full-time team of 22, including graphic designers, videographers, editors, trial technicians, IT and administrative support, as well as a lawyer who reviews the work from the legal side. Over half of the staff has been with the firm for more than 10 years.

Susan Campbell, general manager at Executive Presentations, started as an office administrator in 1997 and has this to say about her boss, "I'm so proud to work with Rick. As an employer, he's very fair and very generous, and he's all about seeing the potential in others and fostering their growth and development. I'm a perfect example of that, and the career opportunities I've been provided have rewarded me both personally and professionally."

Rick oversees the day-to-day production of an average of 50 cases at any one time, including business, personal injury, medical malpractice, entertainment and labor related disputes, for both plaintiff and defense attorneys. Over the past 27 years, Executive Presentations has worked on more than 15,000 cases.

"In the legal community, cases often become complex and tough to explain. We make those difficult concepts easy for a jury to understand and remember," says Rick, "which takes a unique creative ability to do."

ASCDC's 2011 president, Linda Miller Savitt, is among his clients. "Everybody knows I work best under pressure and tend to get inspired at the last minute. I always go to Rick and know he is able to respond immediately. While I don't recommend doing things at the last minute, Rick is available 24/7 to supply the support with a can-do attitude."

Rick has attended every ASCDC Annual Seminar since 1991, the year Ronald Reagan delivered the keynote address at the Bonaventure Hotel and Pat Long was

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Rick Kraemer – continued from page 27

incoming ASCDC president. "That was the first year my company had a booth." He has had a booth every year since and has become friends with Pat, and the presidents who followed him.

Current ASCDC president, Denise Taylor, relies on Rick not only for trial services, but also for many of the photos and videos for ASCDC events. "For any Bar-related event, if asked, Rick will personally attend to photograph. At the ASCDC Hall of Fame Dinner this past year, we decided to forgo the usual video of the honorees and instead created giant posters with photo montages. Rick and I personally went through thousands of photos in his collection to select those that would capture the personality of the honoree. The result was fantastic. On a personal note, he is a great person and great friend. Rick's infectious smile, enjoyment of life, and compassion in times of grief is remarkable."

Although Rick has an M.B.A., he describes himself as a "right-brain creative visualist" and "creative problem solver," who places a high value on honesty, integrity and loyalty. Rick grew up farming in the Midwest and attributes his values to a disciplined, well-guided upbringing. "If a concept doesn't work the first time, we develop it and make it right. My clients know that. I don't look for shortcuts. Some growing seasons are longer than others."

ASCDC's 2007 president, Phil A. Baker, has used Executive Presentations and notes, "Any juror will be more compelled with graphic and video evidence. Using Executive Presentations makes this seamless." Phil's father, Robert C. Baker, also an ASCDC member says, "If you want to know what is going on in the legal community, ask Rick!"

Rick explains, "I understand how both plaintiff and defense lawyers think, and how judges and juries process information. My firm has an uncanny ability to transform complex legal concepts into digestible and understandable visual presentations."

Regularly attending trials, Rick befriends the lawyers' clients and the court staff. He can often be seen walking the halls of the courthouse. Impressed by what they see in trial, opposing counsel frequently hire Executive Presentations for trial services on future cases. Rick says, "The value of our work speaks for itself."

He likes to be involved in cases early on. "There's a methodology that we use in communicating. I like to evaluate the problems and work backwards. I'll ask the lawyer, 'How is your case going to end?' so we can start moving toward that conclusion." Rick attributes much of his success to being a good listener and learning what works from many of the best lawyers in California.

Andy Hollins, an Orange County ASCDC member, has been using Executive Presentations since 1995 and has worked with Rick on nearly every type of case imaginable. He says, "Frankly, I won't go to trial without Rick's insight and assistance. Having Rick's team help develop sellable issues to a jury, and then presenting them in a visual manner is a resource that is priceless."

Many ASCDC members are also members of the American Board of Trial Advocates (ABOTA). They have been the recipients of Rick's photos of their mutual travels across

the globe from Europe, Africa and South America, to Asia and New Zealand. Rick has served as the official photographer for ABOTA's national events since 1999.

Rick's long-time companion, Judy, a registered dietitian, keeps him fit and in good shape for his rigorous schedule whether at home or abroad. Judy says, "Rick always has others' best interests at heart, so I look after his. He is constantly on the go."

When he's not snapping photos or at the office, Rick and Judy enjoy entertaining at their home in Hancock Park. A problem solver at heart, Rick is fascinated with building design and has meticulously reworked their 1920's historic house. Also an admitted collector, Rick's home and office are filled with artwork and antiques. The little free time he has left is devoted to auto racing, fishing, and spending time outdoors.

At his recent 40th high school reunion, Rick recalls his classmate stating, "You've remained the big-smiled, smart, intuitive, wise-cracking jokester you were as a kid. You would flash that signature smile at the beginning of a wrestling match and then surprise your opponents with your fiercely competitive spirit." Not much has changed, except the wrestling has been replaced by the challenges of the legal system.

Rainmaking In a Competitive Environment:
What a Young Lawyer Can Do to Start Building a Book of Business

By Holiday D. Powell

Being a young lawyer can be challenging. You feel like you don't know anything, and in those unlikely times when you do know something, it took you three times too long to figure it out. You often define a good day based on the number of hours you billed and the number of redline comments you received. And just when you start to get a handle on all of this, you come to the realization that every attorney faces at some point in their career: How on earth do you do all of this and, at the same time, build your own client base? The short answer is that whether you know it or not, you are already doing it. The longer answer is that building a book can take practice and time. While not exhaustive, the following tips will hopefully help you along your way:

1. Do Good Work.

The first step to building a book of business is honing your legal skills and obtaining good results for your partners' current clients. As a young lawyer, you have the benefit of being able to focus on learning the basics, including the governing law in your practice area as well as persuasive legal writing and oral advocacy skills to convey the law to your targeted audience. Though perhaps obvious, developing a firm command of these skills will cause your partners and their clients to give you more opportunities, like handling mediations, expert depositions, trials and appeals. Once you obtain this experience, your partners and/or their clients may come directly to you to handle smaller matters in the future. I obtained my first piece of business this way.

The truth is that part of "doing good work" is becoming an expert on your practice area. You want to become an authority in your practice so that people think of you when looking for someone with your expertise. Look around within your office. Is there a knowledge gap; something that you could make an extra effort to explore, so that you are the "guru" within your office whom others go to because they know you've done the research, you follow the specialty blogs, you've been to seminars and written articles? Your own colleagues may be one of your best sources for dropping your name to a client when an issue within your skillset comes up. Whether it be existing clients or potential clients, if you are the first person they call when a new problem arises, you will also have the first opportunity to obtain that work.

2. Socialize with Your Peers

Depending on your personality, getting involved in industry and bar organizations can be key to developing business. However, don't mistake "joining" an organization for really becoming "involved" in one. Join, go to the events, meet the board and committee members, learn how to get involved and then do it!

Getting involved in bar organizations is a great way to develop business. By attending (and better yet, speaking at) seminars and

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other events, you can learn what others are doing in your field and simultaneously develop your own legal skills. Participating in bar association events is also a great way to meet attorneys from other regions. The relationships you build with these attorneys can ultimately lead to a bilateral referral network; creating opportunities to work with distant clients as well as allowing you to provide your local clients with strong referrals outside of your geographic location.

With regard to regional bar associations, you may say to yourself, why network with my competitors? The answer is multifold: First and foremost, it is a great venue for meeting other lawyers, mediators and judges, and building your reputation in your geographic area. You may develop great skills as defense counsel in labor law cases, for example, but if you don't show up where others in the field gather, you may be "out of sight, out of mind." Developing good relationships with the players in your area can make you more effective in court and mediation, and it can give you greater insight about the inner workings of your jurisdiction, which you can market to potential clients and referral sources. The more conversations you have outside the structured communications that occur while handling a particular case, the more you will learn about broader legal trends and tips that you can't learn from a practice guide or Westlaw search. Additionally, if the folks you meet practice in another area, they may end up sending you work one day.

Don't forget to look outside of bar organizations as well. While you can generate a lot of business through attorney referrals, one benefit of industry-oriented organizations is the chance to get to know potential clients directly. Even if they aren't in a position to offer you work now, they (like you) are going to continue to move up in their careers, and will one day have both the need, and the authority, to hire counsel. Another benefit of industry organizations is the ability to learn about and stay current with new industry trends, often from outside the legal perspective. The ability to talk to potential clients about such trends from multiple viewpoints can very often be the distinguishing factor between you and other attorneys.

3. Express Yourself

If you are like me, you may feel that you've lost the ability to write anything other than a legal brief. However, publishing articles is a great way to gain exposure in your community: it is a vessel to communicate your legal acumen to an audience beyond your partners, clients, judges and opposing counsel. Think about the subjects that interest you and a specific angle you want to master. Think also about writing in your own voice so that you can differentiate yourself from others. And please know that each issue of Verdict has a section dedicated to its Young Lawyers members, and the Young Lawyers' Committee encourages its members to submit articles!

4. Help Others and in Doing So, Help Yourself

Pro bono work offers a world of opportunity and fulfillment. The obvious benefits are the service you are doing for your community and the happiness you feel from helping others in need. However, it offers other "practical" benefits that may affect your book of business. It gives young lawyers the chance to gain practical skills that they may otherwise wait years to obtain, including depositions and trials. As detailed above, these skills result in greater litigation experience that young lawyers can tout to potential clients. Pro bono work also offers you the chance to interact with likeminded attorneys, which can always lead to great things down the line.

5. Be A Team Player

Following up on the last point, despite all the evidence to the contrary, being a good person really will take you far in this profession. For instance, you never know when your colleagues might go in house or otherwise end up in a position to give you business down the road. They will remember if you were a strong lawyer, but they will also remember if you blamed your fellow

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associates, assistant or other staff members for mistakes. Likewise, they will not forget your refusal to stay late to assist with that big project or when you refused to help cover a deposition when they were in need. In other words, don't burn bridges.

6. Don't Be Bashful with Family and Friends

While it may sometimes be wise not to mix business and pleasure, never underestimate the number of great business opportunities you have with your friends and family. Almost everyone will need a lawyer in their life, and while you hope that those occurrences are rare for your family and friends, it is never wrong to hope, or suggest, that they come to you with a problem. Even if you can't handle it, you can help them find someone who can. Which leads us to....

7. Don't Sell Yourself Short

Odds are you can handle something if you give it the time and the effort. While there will always be certain areas that are beyond your scope, at the same time, don't pass something up for the sole reason that it is new to you. The worst thing that can happen is you spend a night researching something before deciding that you need to refer the work elsewhere. More often, though, you will find that with a little effort, you are up to the task. There is an old adage that the correct response to "What type of law do you practice?" is "What type of problem do you have?" While I am not suggesting you should try or market yourself to be a jack of all trades (the full title of which concludes, "and master of none"), I do think that great rewards come from stepping outside of one's comfort zone.

8. Keep Commitments

A mentor of mine wisely pointed out the following: "many referral sources may not have the opportunity to observe your legal acumen, research skills, and ability to argue persuasively in court. They'll nonetheless form impressions about your lawyering prowess from the interactions they do have with you, even on seemingly insignificant things. So if, at a bar function, you promised to drop someone a line about that book you thought they might like, make sure to do that promptly, because a reputation as a flake can be easily earned but hard to dispel."

9. Be Yourself and Play to Your Strengths.

People have different strengths. Some people are great at working a banquet; some are great at writing; others enjoy setting up blogs and LinkedIn groups. Set goals for regular outreach, but try to make the activities ones you will enjoy. If you do, you will be more relaxed and likely to put your best foot forward.

Likewise, be yourself and have a distinct voice. A great way of setting yourself apart from others is by consistently delivering *your* "voice." Figure out what separates you from your colleagues. Aside from knowing the law, know your personality and the emotional benefits you can offer clients. This will help to define your value. After all, we work in a service industry and so the manner of service is equally important to the end product. Similar to the food industry, people will visit for the menu, but return for the service.

10. "From a small seed a mighty trunk may grow."

The most important advice I, or anyone else, can give you is to simply be patient. Chances are that you won't be able to predict from whom, where or when your best client relationships will be formed, but that doesn't mean they aren't forming around you all the time. You reap what you sow, so go out there and sow.

Holiday D. Powell is a senior associate at Morris Polich & Purdy LLP. Her practice focuses primarily on products liability, catastrophic injury / wrongful death, construction and real estate litigation. Holiday is the Chair of the Association of Southern California Defense Counsel's Young Lawyers Committee and a member of the Board of Directors.

defense verdicts august-december

Daniel S. Belsky
Belsky & Associates
Alvarez v. Nelson

Raymond L. Blessey
Taylor Blessey LLP
De Rogatis v. Shainsky

Richard D. Carroll and John S. Hinman
Carroll, Kelly, Trotter, Franzen & McKenna
Zameni v. Loudon and Aminian

Michael G. Hogan
Michael G. Hogan & Associates
Panameno v. Mori

Margaret H. Holm
Bonne, Bridges, Mueller, O'Keefe & Nichols
Zameni v. Loudon and Aminian
Adger v. Los Angeles Unified School District

Clark Hudson
Neil Dymott
Newvine v. Riley

James J. Kjar
Reback, McAndrews, Kjar, WArford, Stockalper & Moore, LLP
Horn v. Rand

Yuk K. Law
Law, Brandmeyer + Packer, LLP
Manley v. Richman

Jerry C. Popovich
Selman Breitman LLP
Hernandezcueva v. E.F. Brady Company, Inc.
Minton v. Pep Boys

Barry Reagan and Amanda Happle
Slaughter & Reagan LLP
Langworthy v. Wiltshire

Patrick G. Rogan
RoganLehrman
Gutcher v. Toyota

Daniel R. Sullivan
Sullivan, Ballog & Williams
Escudero and Martinez v. Virgen

Please submit your defense verdicts to *ascdc@camgmt.com*

~ In Memoriam ~

John J. Collins, past president, friend and colleague of the ASCDC, passed away on December 26, 2013 from complications from cancer.

Mr. Collins served as President of the ASCDC in 1982 and 1983. He will be deeply missed.

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.

Recent Amicus Wins

The Amicus Committee has recently participated as amicus curiae in the following cases:

Wise v. DLA Piper (2013) __ Cal.App.4th __: Don Willenburg, Gordon & Rees, and Michael Colton submitted a successful joint request on behalf of ASCDC and the Association of Defense Counsel to have this legal malpractice decision published. The opinion addresses the requirement that the underlying judgment must actually be collectable in order to form the basis for a legal malpractice claim. The opinion also has an extended discussion of the requirements for expert witnesses in light of the recent California Supreme Court opinion in *Sargon*.

Alamo v. Practice Management (2013) 219 Cal.App.4th 466: J. Alan Warfield, McKenna, Long & Aldridge, wrote a successful request for publication of this employment decision. The court held that former versions of CACI jury instructions 2430, 2500, 2505 were erroneous in light of *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, were prejudicial, and required a new trial.

Schaefer v. Elder (2013) 217 Cal.App.4th 1: Edith Matthai, Kyle Kveton and Natalie Kouyoumdjian of Robie & Matthai wrote a successful request for depublication on behalf of ASCDC. In this case, the Court of Appeal held that panel-appointed defense counsel owed a duty to the insurer to try to disprove that insurance coverage existed for the insured client.

Winn v. Pioneer Medical Group, Inc. (2013) 216 Cal.App.4th 875: Harry Chamberlain, Manatt Phelps & Phillips, submitted an amicus letter on behalf of ASCDC in support of the defendant's petition for review, which was granted on August 14, 2013. Plaintiffs' claims are against defendant physicians for elder abuse arising out of the care provided by the defendants to the plaintiffs' deceased mother, who died at the age of 82. The majority opinion authored by the Court of Appeal held that elder abuse claims are not limited to custodial situations. The practical effect of the opinion was to blur the distinction between true elder abuse cases, which are governed by the Elder Abuse Act, and professional negligence claims which are governed by MICRA.

Meddock v. Yolo County (2013) 220 Cal. App.4th 170: ASCDC joined a successful publication request submitted by the Association of Defense Counsel. The Third Appellate District interpreted the "natural condition" immunity found in Government Code section 831.2 and held that a public entity is not liable for a tree in a park that, due to natural causes, falls onto a publicly-maintained parking lot.

Pending Cases At The California Supreme Court and Court of Appeal

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

1. *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.

2. *Kesner v. Superior Court (Pneumo Abex, LLC)*. This case involves the issue of whether a plaintiff can maintain a "take home" asbestos claim, i.e., claiming that the plaintiff was exposed to asbestos through a family member bringing home asbestos fibers on clothing. The Court of Appeal held in *Campbell v. Ford Motor Co*. (2012) 206 Cal.App.4th 15 that no such claim can be asserted against a premises defendant, who owed no duty to family members of those visiting the premises. The trial court in this case followed *Campbell* and dismissed the plaintiff's claims. The issue is now pending before a different district of the Court of Appeal in a writ proceeding in the *Kesner* case; the court has issued an alternative writ indicating that it may disagree with *Campbell*. ASCDC joined the amicus brief submitted by Don Willenburg, Gordon & Rees, on behalf of the Association of Defense Counsel of Northern California and Nevada.

How The Amicus Committee Can Help Your Appeal or Writ Petition And How To Contact Us

Having the support of the Amicus Committee is one of the benefits of membership in ASCDC. The Amicus Committee can assist your firm and your client in several ways:

1. *Amicus curiae* briefs on the merits in cases pending in appellate courts.

2. Letters in support of petitions for review or requests for depublication to the California Supreme Court.

3. Letters requesting publication of unpublished California Court of Appeal decisions.

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Amicus Committee Report – continued from page 33

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

and **Joshua Traver**
Cole Pedroza
626-431-2787

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

Jeremy Rosen
Horvitz & Levy

Harry Chamberlain
Manatt, Phelps & Phillips

Renee Koninsberg
Bowman & Brooke

Michael Colton
Michael A. Colton, Lawyer & Counselor at Law

David Pruett
Carroll, Kelly, Trotter, Franzen & McKenna

John Manier
Nassiri & Jung LLP

Sheila Wirkus Pendergast
Greines, Martin, Stein & Richland

Susan Brennecke
Thompson & Colegate

Christian Nagy
Collins Collins Muir & Stewart

ASCDC
Association of Southern California Defense Counsel

Application for Membership

NAME: _____

FIRM: _____

ADDRESS: _____

CITY/STATE/ZIP: _____

TELEPHONE: _____ **FAX:** _____

E-MAIL: _____ **WEBSITE:** _____

BAR NUMBER: _____

MEMBERSHIP in the Association of Southern California Defense Counsel is open by application and approval of the Board of Directors to all members in good standing with the State Bar of California. A substantial portion of your practice must be devoted to the defense of civil litigation.

Are you now devoting a substantial portion of your professional time to the practice of the defense of civil and business matters, including the prosecution of eminent domain proceedings? ☐ Yes ☐ No

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February 27-28, 2014
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Millennium Biltmore Hotel, Los Angeles

June 20, 2014
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September 19-20, 2014
Education Seminar
Lodge at Torrey Pines

November 14, 2014
Law Firm Management Seminar
Jonathan Club, Los Angeles

December 11, 2014
Construction Defect Seminar and Orange County Judicial Reception
Orange County

December 16, 2014
Judicial and New Member Reception,
Jonathan Club, Los Angeles

Please visit *www.ascdc.org* for a complete list of upcoming events.