association of southern california defense counsel

verdict

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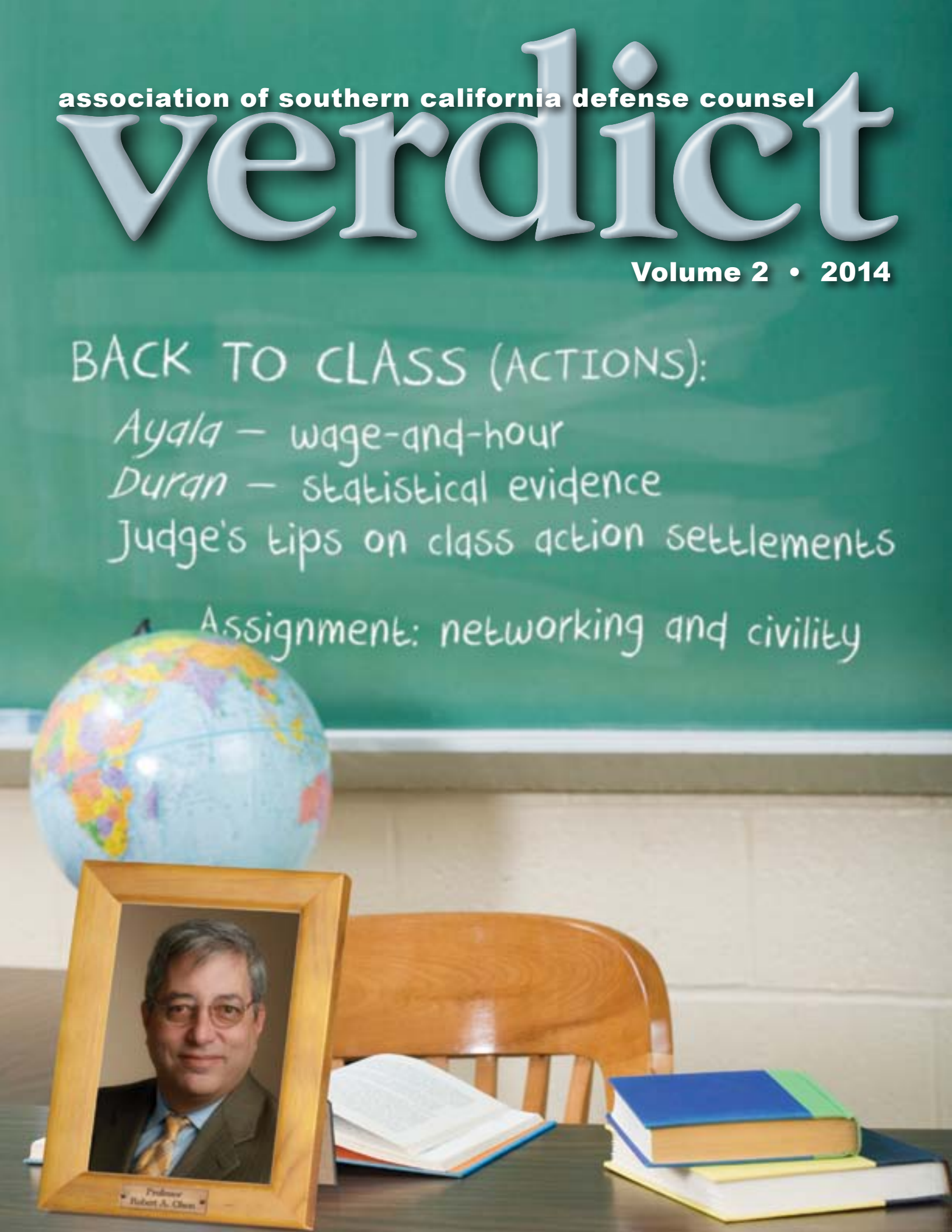

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— staff —

editor
Lisa Perrochet

executive director
Jennifer Blevins

art director
John Berkowitz

contributors
Michael D. Belote
Patrick A. Long
Carol A. Sherman

printing
Sig-1 Printing

— executive office —

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

The End In Mind

Robert A. Olson
ASCDC 2014 President

People have asked me "What's the purpose of the ASCDC?" The answer is simple: To help and promote the interests of its members, practicing civil defense lawyers. That is and should be the object of everything we do. How does it help the defense bar? That is the question we repeatedly must and do ask.

To that end, we have started the ASCDC listserv. Yes, there were some initial bumps in the road, but it is working well now. Almost every day I see members seeking to share information. I have taken an unscientific survey, and I've heard things like, "I had about a dozen very helpful responses within a couple of hours." If you are not on the listserv, consider opting back in. The listerv works because of you – our members. It is, as they say, "crowd sourced," it depends on others responding – offline – to the inquiries posted. Thank you for being so helpful to your colleagues. We are starting an opt-in listserv for employment law and will start others as interest arises.

Our educational programs also seek to target what is most needed from a defense lawyer's perspective. To that end, we've presented programs on recoverable economic medical damages in light of *Howell* and its progeny, and winning summary judgment motions. The upcoming September 19-22 seminar at Torrey Pines is going to address trying damages from a defense perspective, and responding to plaintiffs' "Reptile" tactics. That is education that defense lawyers just are not going to receive through other educational sources. If there is an issue that you would like explored in a seminar, please let us know.

We also provide amicus support on issues that matter to civil defense lawyers. Some of those issues are matters of substantive law – what damages measure may be recovered? Does a particular jury instruction correctly state the law or is it overly favorable to the plaintiff? Other issues go the essence of our practice as defense lawyers – should a trial be continued when defense counsel is engaged in another trial? Are defense counsel's bills discoverable notwithstanding work product and attorney-client privileges?

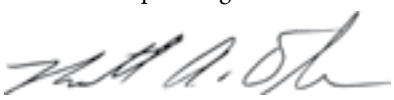
> **If you know a defense lawyer who is not a member – a colleague, a co-counsel, an in-house counsel, a young lawyer or law student interested in defense work – invite them to join us.**

I'm happy to report that we've made a small step towards more rational post-trial procedures. The briefing deadlines for new trial and JNOV motions for years have been inconsistent, causing confusion, and unnecessary multiple deadlines and ex parte appearances. To remedy the situation, the ASCDC proposed legislation to make the new trial and JNOV deadlines the same (as well as to explicitly provide for replies in new trial motions). The plaintifff's bar and the judiciary agreed. The ASCDC-sponsored bill has passed the Legislature and the Governor has now signed it, to be effective January 1. It's a small step, but small steps add up in making the process more rational, and in helping defense lawyers be better at what they do best – tackling the factual and legal merits of claims.

More good news: although they did not get as much funding as they sought or deserve, our courts received enough funding to stay afloat. This is a critical issue for the defense bar. Without functioning civil courtrooms, the system will seize up. We have worked with other bar organizations in supporting the courts' funding requests. The fact that the bar, across the board, has supported court funding has been critical in the halls of the Legislature. If there is one end and interest that the defense bar has, it is keeping a functioning civil bench where motions can be heard and trials go out. With continuing tight budget times, comes change in the local courts. We will try to keep you informed of many of the most important of those changes. To that end, take a look at the Around the Counties feature on page 34.

Whether through listserv exchanges, amicus advocacy, or legislative impact, there is strength in numbers. The more members we have, the more impact we can have, the more education we can present. If you know a defense lawyer who is not a member – a colleague, a co-counsel, an in-house counsel, a young lawyer or law student interested in defense work – invite them to join us. You will be doing them a favor and, by strengthening your membership, doing yourself a favor.

If there are additional ways we can promote the defense bar, please let me know. If nothing else, please come see me and introduce yourself at an upcoming event.



CDC Bill Signed by Governor

Michael D. Belote
Legislative Advocate
California Defense Counsel

On July 8, Governor Brown signed into law AB 1659, effecting changes in three sections of the Code of Civil Procedure. The bill was co-sponsored by the California Defense Counsel and the Consumer Attorneys of California, as part of ongoing dialogue to identify issues of common ground. The issue was first raised by ASCDC President Bob Olson, who also crafted the language for the bill.

AB 1659 aligns the filing and briefing deadlines for motions to vacate and motions for judgment notwithstanding the verdict with current deadlines applicable for motions for new trial. Along with CAOC, the California Defense Counsel argued that current law contains confusing and inconsistent deadlines, increasing the need for ex parte appearances. To the extent that deadlines are made consistent and streamlined, AB 1659 incrementally improves judicial efficiency, a goal of the courts and Governor Brown. The changes are effective on January 1, 2015.

The bill was entered into the California Codes as "Chapter 93, Statutes of 2014." Chapter numbers are assigned sequentially by the Secretary of State as the governor signs bills, meaning that AB 1659 is the ninety-third bill signed by Governor Brown this year. For reasons explained below, there is sure to be much lawmaking to come.

Under the state constitution, the legislature must adjourn the 2013-2014 two-year session by midnight, August 31. After that, the governor is given 30 days to sign or veto all of the bills sent to him. In a typical year, there are 800-900 new chapters added to the California Codes, so if the past is any indication, we can reasonably expect another 700-800 enactments by the end of September.

Further, since 2014 is the second year of the two-year session, no bills can carry over to 2015, when a new legislature is sworn in. Why is this important? The answer is that the legislature's final four weeks of session provide the only opportunity to make new laws without starting from scratch with a whole host of new legislators in January. August of the second year, then, is a particularly provocative time for last-minute changes to bills. Sometimes referred to as "mushroom bills," because they germinate and sprout in the dark, bills can be "gutted and amended" to address entirely different subjects than the original legislation. Some groups basically *begin* their legislative programs at the end of session.

While the existence and outcome of "mushroom bills" obviously will not be known until later, there are many bills relevant to defense practice still alive as the session rounds to a close. Particularly noteworthy are bills relating to employment law and those relating to residential care facilities. Bills worth watching in the final weeks of the session include the following:

AB 1522 *(Gonzalez):* Provides for mandatory sick leave for all full-time, part-time, and seasonal employees.

AB 1523 *(Atkins):* Imposes minimum liability insurance coverage requirements for residential care facilities.

AB 1657 *(Gomez):* Provides for interpreters in civil cases, and prioritizes the case types to be provided service.

AB 2059 *(Muratsuchi):* Amends Evidence Code Section 1158 regarding copying of medical records.

AB 2171 *(Wieckowski):* Establishes a bill of rights of patients in residential care facilities, with a private right of action for violations.

AB 2416 *(Stone):* Authorizes recordation of "wage liens" for unproven allegations of unpaid wages.

AB 2617 *(Weber):* Limits waivers of rights in allegations of FEHA violations, potentially limiting arbitration clauses.

The bills referenced above constitute only a handful of the nearly 120 bills monitored by CDC. Virtually every area of defense practice is implicated by these bills, including medical malpractice, products, public entities, and much more. More information will be available after the governor's "signing period" ends on September 30.

new members may – august

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Stop the Presses; Let's Get It Right

Patrick A. Long

"As you may recall I often conduct informal "surveys" of our membership to determine what books we read, music we listen to, our hobbies, and all the things we do away from our practice of law. That is primarily what this column is about. Those surveys are most assuredly unscientific, consisting mostly of phone calls, conversations at the courthouse and meetings at mediations. But our leadership at ASCDC has added a new tool for me, for all of us, to gather new information helpful to our practices. It's our listserv, and boy does it work.

For those who opt in to using the listserv, we receive periodic requests from colleagues looking for information on experts, judges, plaintiff's counsel, and anything else having to do with our practices. As a recipient of these requests we can ignore them, or respond if we have possibly helpful information. This listserv thing really works.

A week or so ago I sent out a listserv request asking for our members' thoughts as to whether they had been treated fairly and accurately by members of the media. Wowzer, I received more than thirty responses, most within a few hours of sending my request. The responses came from a true cross-section of our membership including several past presidents. To promote candid responses, I promised that I would not use names or other identifying information.

To detail every comment and opinion from my respondents would fill this entire magazine, so let me see if I can summarize the various schools of thought on our relationship with the media. It would be accurate to say that our relationship is, for many, problematic. Sometimes the media accurately quotes us, and doesn't delete portions of what we say, and uses the quotes in context, but perhaps more often than not, they make mistakes, intentional or not. Our colleagues reminded me that good news, for most reporters, is not news. Bad stuff, outrageous activity, huge plaintiff verdicts, corporate embarrassments – that's news. Let's take a look at the primary observations our colleagues voiced.

Commonly folks complained that unless the parties to a case are in the news every day for other reasons, defense verdicts rarely result in a story, but a plaintiff's verdict involving a known company will almost always inspire media coverage. Perhaps the most common complaint was that our members were rarely misquoted in the sense of an inaccurate representation of what they said, but rather that only certain portions of their comments were used, which selective quoting resulted in a misrepresentation of what they were trying to say. For example, I say to a reporter, "This is going to be a very difficult case. However, it is clear that my client's product was in no way responsible for the plaintiff's accident. There will be very well-known experts testifying on both sides. I believe ours will be more persuasive to the jury."

Here's what the reporter prints, "This is going to be a very difficult case. There will be very well-known experts testifying on both sides." While this is a somewhat silly example of inaccurate representations, it truly is not far from specific examples given me by our colleagues.

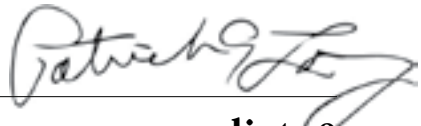
Perhaps what might serve you best is to set forth our colleagues' suggestions for thoughts to keep in mind when dealing with the press. First and foremost, if there's any possibility that you will be contacted by the press, discuss ahead of time with the client and obtain permission to speak, otherwise a "no comment" is the only thing you can say. Try to follow the rules you give your clients when preparing them for depositions, i.e. don't exaggerate, don't answer a question you don't understand, it's okay to say "I don't know." You may also want to speak "off the record." Make sure you and the reporter are on the same page as to what "off the record" means. Unless the reporter went to law school, he or she may not have a correct understanding of the legal principles under discussion.

It would be fair to state that our colleagues who responded to my inquiry were of the general opinion that the press accurately reported their comments somewhere between 50% and 70% of the time, which means of course that our colleagues felt misquoted somewhere between 30% and 50% of the time.

Let me conclude with some good news. Help is on the way. Loyola Law School sponsors the Journalist Law School. Every summer journalists from across the country, from print, TV, magazines, and newspapers, convene at the law school for an intensive program designed to make these "students" better reporters on legal matters. We hope to provide an article about Loyola's Journalist Law School in the next issue of *Verdict.*

Don't quote me on that.

Patrick A. Long
palong@ldlawyers.com



BUILDING A NET THAT WORKS

By
Lauren Solomon,
MBA, AICI, CIP

Anyone who tells you that they reached their greatest level of success alone is lying.

From our earliest days, we are born with a network of those who by association want to see us succeed and are willing to jump on board to help make that happen. Initially, Uncle Joe always got the best deals on a new bicycle. Auntie Rosa knew just what to get Mom for her birthday and where to find it within your budget. Your neighbor Sam was a baseball coach and made sure your pitch was up to par for season try-outs. These were the people who shared your early years and, usually, your holiday meal tables, as well.

As time moved on, you made new and important connections. Your network evolved and grew. These people, ultimately, have impacted your life in ways you would hardly imagine. Mr. Nakash made a phone call and suddenly your college application appeared on the top of the pile. Ms. Chenn introduced you to Mr. Raja and you were invited to interview for the summer internship of your dreams. These folks might not have appeared at your family holiday meals, however, they might be counted among your Top 12 MVCs (Most Valuable Connections) today.

Let's explore this concept a little further ... Who Is Sitting at Your Table?

Who has earned the right to one of the coveted 12 MVC seats around your table today? Let's see....

To your right is Britt. You met Britt at a conference four years ago. (Not ASCDC sponsored.) You bonded over the total waste of time and money spent to be there. Nevertheless, you became best of friends

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and she has your back, your front and all your sides.

Next to Britt is Micah, her husband. Micah is a legal marketing expert who received a request to write an article for *Verdict* magazine and passed it along to you. What a kind gesture and a super opportunity from a friend!

Micah is chatting with Lorenzo, your office mate from two years of undergrad summer internships. Lorenzo now works at a firm across town and has become your go-to person for all things social. He just knows how to get you out of your head and your office. Everyone needs a Lorenzo – at least one.

Next to Lorenzo is Ethan, your hair stylist. Britt introduced you to Ethan. Ethan is better than a bartender. He listens to you and refers a continuous string of well-qualified clients for the firm and you. He also happens to style the hair of most of the folks around the table. You've become a terrific referral source for him, as well.

Ethan is sitting next to Yasmin whom you met at an ASCDC mixer a year ago. She invited you to be on the program committee and, wisely, you agreed. That's where you met Philipe, Yasmin's husband. Philipe is a judge in a neighboring district and has become the best kind of friend, one who genuinely likes you and is willing to make key introductions over time.

Continuing around the table are Nicolas, Caelan and Emma whom you met in a LinkedIn chat room. When you met face-to-face at the MCLE seminar you knew they looked familiar, you just weren't sure from where ... until you all figured it out. And, they are also ASCDC members. They totally "get" you and seem to know exactly when to ping you with a question or an event you need to attend.

Wrapping up this esteemed group of 12 are Jeremiah, Hitomi and Ava who read a series of articles you published online through ASCDC and reached out to you on multiple occasions for opinions. They have now become your posse, your people, your tribe.

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I interviewed Diane Mar Weismann, Past President ASCDC 2012, Partner/ Owner at Thompson and Colegate in Riverside, CA, to further understand the true value and real benefit of a long time ASCDC member and as someone who stays connected ... for all the right reasons. Here's what she had to say:

Q: How has your affiliation in ASCDC influenced your professional opportunities? Is there one occasion that stands out for you?

I would write articles and my President's message for *Verdict* magazine and wonder if people actually read them. Then, I would start receiving feedback and comments from appellate court justices from all over, people I did not know. One day, a judge from Riverside Superior Court stopped me to tell me that he had read my President's message and liked it. It gave me exposure both statewide and at higher levels, far beyond the reach of my local practice. Those connections have resulted in situations whereby someone I needed to know already knew my name. It opened a door that would otherwise have been closed to me. It has always helped me to get things done just a little bit easier than being an unknown entity.

Q: How do you see participation in ASCDC events as effective ways to connect with people you need to know?

I believe active involvement means getting busy stepping up to assist in putting on the events – mediating, leading. That's where membership can create opportunities for each of us to do something we wouldn't otherwise have the opportunity to do. It also provides a safe place to learn a new skill, or test a new approach. Involvement can give you a spotlight or a showcase among your fellow members – rookie and veteran alike. We can each offer to present a program and get recognized as an authority on any topic within our own community. The truth is that this community is a legitimate, ethical vehicle to self-promote – show up, stand out, be noticed and rewarded. I don't know many places that offer the same – given the nature of our profession.

Q: What one key piece of wisdom would you offer to new members regarding getting the most value from their membership?

Use the opportunities provided through ASCDC to learn in a safe environment, to meet others of like-mind and shared interests, let your voice be heard in Sacramento and become more of yourself. Use the benefits of membership to your advantage. That's why they exist.

Networking – continued from page 12

In talking with Dan Kramer, ASCDC Young Lawyers Committee Chair and a partner at Kramer Holcomb Sheik *(khslaw.com),* he recounted his initial connection with ASCDC. A nervous first year associate, Dan was sent, alone, to network at an LA City BAR event on behalf of his then firm. He was seated at the table with ASCDC board members, even more intimidating. It was his good fortune to sit next to Linda Miller Savitt, a partner at Ballard Rosenberg Golper & Savitt, then ASCDC President (2011). They talked about life, not law, and a connection was sparked. Weeks later, wisely, Linda tapped Dan to chair a committee for young lawyers, a group for which he had a passion and represented well. Dan was hooked (in a good way).

Since that day, the ASCDC has created numerous opportunities for new attorneys to connect informally and formally with more senior counsel where meeting, greeting and learning from each other happens in a safe space. By fostering initiatives that focus on mentorship, access, and opportunities to connect, the ASCDC has developed into "a big group of friends who learn from each other." By sharing stories, experiences and expertise, everyone wins ... becomes better ... and raises the bar (so to speak) together.

For Dan, one event and one meaningful connection have changed his life and the lives of many. Looking out at this current Table of 12, you bet Dan can see many ASCDC pals. He may need more than 12 seats to accommodate everyone!

It is said that your network is your most valuable asset in business and in life. Around this table sit the core of your network – your MVCs. These people share one critical thing in common – YOU.

Let's look at what you're doing to attract and develop your MVC community....

1. Make a list of your Table of 12. Who are they?
2. Where did you meet?
3. What qualifies them to be at your table?
4. What are you doing to add value to them?

By joining in, showing up, and standing out, you are not only helping yourself, you are differentiating yourself from those around you. You have built a net that truly works. This table of 12 is the core of a circle that will continue to grow and provide you with friendship, support, counsel, collaboration, resources and more. Connecting through your professional organization provides far more than the tangible cost of membership can ever represent. The benefits you receive over time always outweigh what you give. It is the law.

Lauren Solomon, MBA, AICI, CIP is the trusted image advisor to CEOs, corporations and individuals worldwide. She is the former Vice President of Professional Image Development at Chase Manhattan Bank; creator of the professional skills workshop, *The Brand Called Me,* at NYU's Stern School of Business, Past President of the Association of Image Consultants International (AICI), author of *Image Matters!* and co-author of #1 Best Seller, *The Law of Business Attraction* and *Executive Image Power.* Her clients cross every continent and industry. For more information you can connect with Lauren at *www.LaurenSolomon.com.*

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Want to Get a Cup of Coffee?
Civility requires communication

By Hon. Daniel J. Buckley
Superior Court of Los Angeles County

Over the last year, when I speak to attorney groups, I comment that if I could enact only one rule to deal with the challenges faced by the civil courts, it would be a very simple one:

All attorneys must have a cup of coffee with their adversaries at the outset of the case.

Of course, if the attorneys want to wait until the appropriate time, the drink of choice could be a beer or glass of wine.

This is not a formal meeting in which the attorneys exchange evaluations of the lawsuit. Instead, the attorneys *must* talk about some personal stuff: mutual friends from law school; the schools where their children go; the Clippers or Kings; favorite gym; etc, etc.

Why? We need to break open the lines of communication between attorneys in a civil lawsuit and insist that communication start at the beginning of the case. Attorneys need to develop a personal relationship with each other – a personal relationship which makes it much more difficult to say no or ignore the other attorney or send a nasty e-mail. If we are successful with this rule, we need to advance a critical ancillary rule: two attorneys cannot communicate by e-mail on any issue which may require a meet and confer conference. Instead, they must meet face-to-face or, only upon a showing of good cause, they talk by telephone. This rule would put an end to attorneys cloaking themselves in the impersonal means of an e-mail which all too easily leads to strident and inflexible positions and personal attacks. It would also put an end to requiring judges to read through pages of e-mails that rarely cast an attorney in a good light and often seem sophomoric and gratuitous.

What do we accomplish by enacting these requirements? Attorneys actually know each other and, as a result, treat each other in a professional manner and with respect. Ideally, attorneys would naturally stop in the hallways of the courthouse to talk about something other than their current lawsuit. The "kick-off" cup of coffee would result in forming a foundation for a relationship and bonding before the pressures of the lawsuit kick in. As a result, it would become much more difficult to snub the other attorney. In addition, the attorneys would find it tougher to play hardball during the lawsuit; to say no to another month to respond to the interrogatories; to ignore telephone messages. This closer relationship would lead to the attorneys being better able to discuss settlement and resolve cases because they have a greater trust in their adversary.

Contrary to the old adage, familiarity does *not* breed contempt. Rather, in civil lawsuits familiarity facilitates open communication and cooperation. We constantly read articles which bemoan the fact that too many in our legislative branch no longer reach across party lines to communicate; many opine this lack of communication has led to an inability to compromise. We in the judicial branch must work hard to avoid succumbing to a belief that it is antithetical to compromise. We must reach across case lines so the plaintiff's attorney talks with the defense attorney and vice versa.

Civility is a hot topic for many bar organizations which work hard at pointing out the need for civility. CAALA is one of a number of organizations which emphasizes civility at all events and in all publications. Unfortunately, civil judges will tell you that they do not feel that the message and lessons of civility are always finding their way into the courtroom. Judges continue to see too many examples of disrespect and lack of cooperation which are invariably the result of a lack of meaningful and productive communication. For example:

Attorneys file far too many motions to compel and other discovery motions where it is obvious that the attorneys are not communicating with each other and the meet and confer process is reflected in an exchange of lengthy letters or e-mails which become progressively vitriolic.

Attorneys are indifferent to opposing counsel's personal issues (e.g., sick spouse, expert unexpectedly engaged in another trial).

A party files an amended complaint the day before the hearing on a demurrer or

continued on page 16

Coffee – continued from page 15

withdraws the motion the morning of the hearing, *after* the research attorney and judge have spent hours of work on the matter.

An attorney notices an ex parte hearing but does not appear for the hearing, without any attempt to tell opposing counsel.

Two attorneys snipe, sometimes yell, at each other during oral argument making it evident that when they appeared for the hearing they clearly did not know each other.

In discussing the cause of the overabundance of demurrers, it is often the case that plaintiff's attorneys point the proverbial finger at defense counsel. Yes, we have too many demurrers which are the result of an automatic response by defense counsel to file a demurrer with regard to certain causes of action or allegations and the ruling is most often to sustain the demurrer with leave to amend or to overrule entirely. It is also true that often the demurrer is the result of over-reaching by the plaintiff's attorney: 13 causes of action are not often appropriate in every lawsuit and punitive damages are not warranted in all cases. If lawyers had started the lawsuit by sitting down to enjoy a libation of their choosing, it follows that with open lines of communication, both sides can work toward a compromise which may allow for an easy way to amend later in the case or recognition that the dispute cannot be resolved with the demurrer and a motion for summary judgment or a trial is necessary. The lesson is that achieving these agreements and efficiencies cannot occur without meaningful communication.

A practice that is not uncommon in the medical malpractice arena is a plaintiff naming a defendant in a medical malpractice lawsuit and when the defendant files a motion for summary judgment, not only does the plaintiff not oppose the motion, but he does not give advance notice of the non-opposition to opposing counsel or the court. This failure to communicate causes a valuable slot for a complicated motion in the Personal Injury hub courts' Computer Reservation System to be taken which could have gone to another disputed motion. As a result, that other hearing must be heard later – again, the result of no communication.

Attorneys did not go to law school, and judges definitely did not seek to become judges, to deal with disputes created, or exacerbated by, personal differences or failures to communicate. Judges should be dealing with a complicated anti-SLAPP motion or a novel legal issue on a motion for summary judgment, not whether 117 of the 155 interrogatories are vague; whether the judge needs to rule on the same eight objections to each and every statement of undisputed fact – all 143 of them; or how to decide which attorney is telling the truth when both insist they called but the other attorney did not return the call. (These examples are true; the names have been withheld to protect the guilty. The substance of the dispute – and too many times the dialogue between the attorneys – makes the judge feel like she is on a car trip with her children and listening to them complain "he is looking at me!")

The majority of attorneys are extremely professional, trustworthy and reliable. But the reason that this article is necessary is because the number of attorneys, who refuse to communicate with the other side and display a fundamental disrespect for others, including the Court, is too high. We do not have the time to devote to their squabbles.

Think back to a case that you enjoyed litigating and that caused you little to no unneeded stress. It was most likely because you had a good relationship with opposing counsel that was defined by open communication. There is no doubt that a positive result of open communication and cooperation among attorneys is that everyone will experience less stress. Another positive result should be obvious. We are in the midst of an unprecedented financial attack on the courts resulting in a severe reduction of staff and courtrooms. This, in turn, has led to similarly unprecedented court congestion. In all the civil courts (Independent Calendar, Personal Injury, Limited Civil Jurisdiction, Unlawful Detainer, and Collections) we face delays of months for hearings on all types of motions. A simple solution is to significantly reduce the number of discovery motions, demurrers and other motions filed without any real communication between the attorneys. Judges uniformly believe that they would be able to schedule hearings much sooner if they were not forced to hear and decide so many motions which result primarily from no communication or cooperation among the attorneys. Of course, the Court can find other ways to reduce congestion, including ways to increase the number of courtrooms. However, that is the topic of another article.

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It is telling that judges who have sat in criminal courts are shocked by the difference in civility in the civil courts. Attorneys in a serious felony case, in which a defendant could lose his or her freedom for decades, invariably display the utmost cooperation, professionalism, and, yes, civility. Yet some attorneys in a limited jurisdiction civil case, with a potential award of $10,000 and $20,000 at most, cannot agree on whether the lights in the hallway were on or off before entering the courtroom.

One can consider a number of reasons for this difference between the criminal and civil attorneys but the best explanation is most criminal attorneys (prosecutors, public defenders, and private defense attorneys) work in the same courthouse every day, often in the same courtroom, where personal relationships are developed. As a result of this closer relationship, the attorneys have an expectation that others will be cordial and cooperative. The judges and staff members also expect everyone to be more cordial and cooperative.

This same level of cooperation can be found in the probate courts, in which the same situation exists – the attorneys appear in the same courtroom for many of their cases, which forces them to develop relationships with the attorneys on the other side of the case. To put it bluntly, it is far more difficult to be an ass when you have talked with the other attorney about his child's college applications or the two of you have discussed your vacation plans or you will see her every day for the next year. Do not be misled into thinking that more civility means an attorney is failing to fully and aggressively represent her clients. Absolutely not! An attorney can at the same time advocate on behalf of one's client based on applicable rules and laws, aggressively fight to advance the best interests of one's client, *and* have a cooperative and professional relationship with opposing counsel. In other words, having a cup of coffee with opposing counsel takes nothing away from one's ability to zealously represent one's client. In fact, it is quite the opposite – conducting oneself in a professional and reasonable manner will most definitely result in cost savings to one's client because the attorneys will not find themselves in court arguing about issues that could have been easily resolved without court intervention. And, as noted above, a cooperative relationship with opposing counsel will foster settlement.

Judges will also tell you that the most successful civil attorneys usually do not resort to the gamesmanship connected to a lack of civility. One reason is prominent lawyers often oppose the same attorneys. As a result, accountability is key. Conversely, many civil attorneys can appear in a number of cases, over several years, and not see the same attorney or judge. Because of this lack of accountability, it is easy to disregard civility. There are little to no consequences of bad behavior in this scenario.

Judges and attorneys fully recognize the pressure on attorneys to deal with workload, billings, the need to keep the current client, and the importance of winning the case not only for the current client but also in order to develop future business. There is no question, however, that an attorney will realize more and consistent success by conducting oneself in a civil and honest manner. After all, we all know that you attract more flies with honey than with vinegar.

Think about what adjectives you use when you describe a judge that you like – reasonable, she listens and gives you time to make your argument, she lets you know what she is thinking. Invariably, she is cordial, meaning that she did not yell or lose her cool. There is no reason that the same attributes cannot define an effective attorney who represents the interests of the client and gets good results.

Next time you are in the courthouse, take a couple of minutes to observe a good trial attorney. No doubt, you will see an attorney who is respectful to court staff, the judge, opposing counsel, and the jury, listens to the witness, and is attentive to the jury. There is no reason that attorneys should wait until a jury is present to conduct themselves in this manner. Attorneys should endeavor to be on their best behavior all the time.

Judges recognize the pressures of practicing law and are trying to facilitate cooperation and candor among attorneys. The court worked with several leading bar associations to develop the Voluntary Efficient Litigation Stipulations ("VELS") which provide formal means to work out differences on demurrers, discovery disputes, motions in limine and other common disputes in civil litigation. The VELS are available on the Court's website under "Tools for Litigators."

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Also, a growing number of judges are willing to participate in an informal discovery conference. (These "IDCs" are required in the PI courts when the dispute has to do with a motion to compel further discovery responses.) The judges who conduct these conferences will tell you that they seldom have to hear a motion after an IDC because the attorneys almost always resolve the dispute when they sit down in a room face-to-face and discuss the discovery issues. (One unfortunate observation by the judges is that usually these conferences are the first time the attorneys are speaking to each other.)

When the VELS were first promulgated and judges began to discuss them with attorneys at law firms or bar groups, judges were told that attorneys were hesitant to suggest using them because it would be viewed as a sign of weakness to be the first to raise the issue. This was very disturbing to hear. The fact that an attorney is afraid she will compromise her client's position by agreeing on issues shows that we have sunk to a very low point. We must endeavor to have the courage to do what is right and that is to conduct ourselves in such a way as to foster communication, cooperation, and professionalism.

The Supreme Court of California recently recognized the epidemic of lack of civility. The oath that we took had us swear to support both the United States and California constitutions and that we would faithfully discharge the duties of an attorney to the best of our knowledge and ability. Based on a recommendation by the State Bar of California, the Supreme Court recently approved the addition of language regarding civility. As of May 23, 2014, new admittees will also have to promise to "conduct [themselves] at all times with dignity, courtesy, and integrity." One can only hope that new attorneys adhere to this oath. The fact that the Supreme Court saw fit to amend the oath certainly speaks volumes regarding the demise of civility in the profession of law.

Judges fully recognize the talents of our civil bar. Most attorneys are professional and courteous toward the Court and their adversaries. We all are honored to work in the finest profession in the land. But quite simply, we all will benefit from more civility. The courts will run more smoothly, clients will be more satisfied because they will not be paying for needless litigation, attorneys will be less stressed, young attorneys will learn from positive role models, and we can look in the mirror and know that we are facilitating justice. The next time you attend a bar meeting, listen to the message of civility that is conveyed. And, instead of discarding the message as soon as the valet brings your car around, be bold and take the first step toward practicing the message of civility – after you know the name of the defense attorney, pick up the phone (note that I do not suggest sending an e-mail) and schedule a time to go get a cup of coffee with opposing counsel. If you opt for a beer instead, enjoy the talk.

Hon. Dan Buckley sits on the Los Angeles County Superior Court and serves as the Supervising Judge of Civil. Before the move to the Mosk Courthouse, Judge Buckley sat in Pomona, where he served as the Supervising Judge of the East District, and over the years handled misdemeanor, general civil, felony trial, felony master calendar and probate courts. Judge Buckley teaches trial advocacy at Loyola Law School and both California Civil Procedure and Remedies at USC, and has taught a number of classes to judges. Before taking the bench in 2002, Judge Buckley was a shareholder at the Los Angeles firm of Breidenbach, Buckley, Huchting & Hamblet. He had a general civil defense practice with a concentration of trials in the areas of toxic torts, professional negligence, personal injury and insurance coverage; and served as managing partner for a number of years. Judge Buckley attended the University of Notre Dame for his undergraduate and law degrees.

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green sheets

NOTES ON RECENT DECISIONS

Lisa Perrochet

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

LPerrochet@horvitzlevy.com

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

Civil Procedure

A defendant's awareness that his conduct will have a "significant connection" to forum residents is not sufficient to create personal jurisdiction over the defendant.

Walden v. Fiore (2014) 134 S.Ct. 1115

Two professional gamblers, who were Nevada residents, were carrying $97,000 in cash through a Georgia airport. A Georgia police officer undertaking drug enforcement efforts seized the money and helped draft a probable cause affidavit for forfeiture of the money. The Nevada residents sued the officer in Nevada federal district court on civil rights claims alleging the officer falsely suggested the money was related to illegal activity, without including relevant exculpatory information. The trial court dismissed the complaint for lack of personal jurisdiction in Nevada over the Georgia police officer, but the Ninth Circuit reversed, holding that the officer knew the affidavit would affect people with a "significant connection" to Nevada and it was therefore reasonable for him to be required to submit to jurisdiction there.

The United States Supreme Court reversed the Ninth Circuit's finding of personal jurisdiction. The officer's knowledge that his allegedly tortious conduct would delay the return of property to Nevada residents was insufficient to connect the officer to Nevada. For purposes of establishing specific personal jurisdiction, courts must look to "minimum contacts" the defendant himself created with the forum state, not the plaintiff's contacts with the forum state: "the plaintiff cannot be the only link between the defendant and the forum."

See also *Rouse v. Wachovia Mortgage, FSB* (9th Cir. 2014) 747 F.3d 707 [For diversity jurisdiction purposes under 29 U.S.C. § 1348, a national bank is a citizen only of the state where its main office is located and not where its principal place of business is (if different than the location of its main office), notwithstanding 28 U.S.C. § 1332];

But see *Gilmore Bank v. AsiaTrust New Zealand Ltd.* (2014) 223 Cal.App.4th 1558 [in California fraudulent transfer action, requirements for specific personal jurisdiction over New Zealand company that received the fraudulent-transferred funds were satisfied because the company transacted business with California residents, including the co-defendant fraudulent transferor, through modern telecommunications methods]

Trial courts may enforce reasonable trial-day limits even if a party is not finished presenting its case.

California Crane School, Inc. v. National Com. for Certification of Crane Operators (2014) 226 Cal.App.4th 12

In this business dispute, the trial court limited the parties to 10 trial days after dismissing all but two of the claims pretrial. Although plaintiffs' counsel expressed skepticism that the trial could be accomplished in only 10 days, he did not expressly object or explain why that time would be inadequate. Plaintiffs' case-in-chief proceeded slowly, using nearly three days for one witness. Plaintiffs were unable to call all of their witnesses before the eighth day, when

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the case was to be handed over to the defense. The court granted a nonsuit as to one of plaintiffs' claims, but denied it as to the other claim. Defendants proceeded with their case, during which plaintiffs used significant amounts of time for cross-examination of defendant's witnesses, leaving no time for rebuttal. The jury returned a defense verdict, and plaintiffs appealed on the ground the trial court abused its discretion in limiting the time for trial.

The Court of Appeal (Fifth Dist.) held that the trial court did not abuse its discretion in limiting the trial to 10 days given the plaintiffs' failure to object when the time limit was set and failure to proceed expeditiously during trial. The court admonished that attorneys should not presume trial courts will give them whatever time they want; rather, the trial court has the right and responsibility to manage the proceedings efficiently for the benefit of the court, jurors, and all litigants. The Court of Appeal encouraged the use of time limits based on court hours rather than court days.

Discovery

Trial court must evaluate whether responses to requests for admission are substantially compliant with the Code of Civil Procedure as a whole, not response-by-response.

St. Mary v. Superior Court (Schellenberg)
(2014) 223 Cal.App.4th 762

Defendants served 114 requests for admission (RFAs). Plaintiff requested a two-week extension of time to respond, but defendants denied the request—a day after the requests were due. Plaintiff provided her responses the next day. Because the responses were late, defendants moved for an order deeming the RFAs admitted. The trial court reviewed the RFA responses piecemeal and granted defendants' motion as to 41 of the RFAs.

The Court of Appeal (Sixth Dist.) issued a peremptory writ of mandate directing the trial court to vacate its order. The court explained that, while Code of Civil Procedure § 2033.280, subdivision (b), provides that a responding party's failure to serve any RFA responses in a timely fashion requires the trial court to grant a motion to deem them admitted, the trial court must deny the motion as to a party who serves responses before the motion is heard and substantially complies with Code of Civil Procedure § 2033.220 (governing RFAs). In this case, the trial court erred by examining each RFA individually, rather than the responses as whole, to determine if the responses substantially complied with the statute. The trial court also erred by deciding that responses not solely and unequivocally admitting or denying the RFAs were not in substantial compliance with the Code: where responses are "verified by the party," "unquestionably Code-compliant" as to the majority of the RFAs, and contain "meaningful, substantive responses" as to the remainder, that is sufficient to constitute substantial compliance.

Doctors may be ordered to produce other patient records where relevant so long as the records are appropriately redacted to protect patient privacy.

Snibbe v. Superior Court (Gilbert)
(2014) 224 Cal.App.4th 184

In this medical malpractice case involving a patient who died from an opiate overdose following a hip replacement surgery, plaintiffs sought to discover 160 post-operative orders prepared by the defendant doctor and his assistant. Plaintiffs argued this discovery was relevant to liability theories about the doctor's interactions with other medical staff. The doctor objected to the discovery request on the grounds of relevance, privilege, and his patients' rights to privacy. The trial court ordered the doctor to produce the post-operative orders, and the doctor sought a writ of mandate.

The Court of Appeal (Second Dist., Div. Four) held that the trial court's order was overbroad, but that plaintiffs were entitled to discover orders reflecting the doctor's custom and practice regarding the administration of opioids. The court further held that production of the orders would not violate the physician-patient privilege or the patients' right to privacy where redactions could easily be made. The court rejected the doctor's claim that he would face liability for disclosing patient information, even in redacted form, because the relevant statues permit such disclosure under court order.

Trial courts have inherent authority to exclude expert witnesses disclosed after the discovery cut-off date even if the opposing party's pre-cutoff date disclosures were also technically untimely.

Cottini v. Enloe Medical Center (2014) 226 Cal.App.4th 401

The plaintiff sued the defendant hospital for negligent treatment of a shoulder injury. As trial approached, the hospital served a demand to exchange expert information. The plaintiff responded by claiming that he did not need to exchange information with the hospital's counsel because counsel had a conflict of interest, and filing a motion to disqualify. Neither side exchanged expert information per the original disclosure cut-off date. After the trial court denied the plaintiff's motion to disqualify, the hospital offered a date for simultaneous expert disclosure, but the plaintiff again refused. Before the discovery cutoff date, the hospital unilaterally disclosed its expert information. The plaintiff appealed the disqualification motion, and the Court of Appeal affirmed the denial. Immediately after the remittitur issued, the plaintiff submitted his expert disclosures. The hospital moved to exclude plaintiff's expert witnesses based on the untimely disclosure, the trial court granted the motion upon an exercise of its inherent authority, and the plaintiff appealed.

The Court of Appeal (Third Dist.) affirmed. The trial court did not abuse its discretion in excluding the plaintiff's experts. Although Code of Civil Procedure § 2034.300 did not *require* exclusion of the experts because the hospital's disclosures also were not timely, it did not limit the trial court's inherent authority to exclude them.

Evidence

A differential diagnosis concluding the defendant's medication was a substantial factor in causing a medical condition is relevant and reliable expert testimony.

Messick v. Novartis Pharmaceuticals Corp. (9th Cir. 2014) 747 F.3d 1193

The plaintiff sued the manufacturer of a medication she alleged contributed to necrosis in her jaw, an ailment for which the plaintiff had several different medical risk factors. The plaintiff planned to prove the necrosis was caused by the defendant's product through presentation of a differential diagnoses by her medical expert that the defendant's medication was a substantial factor in the development of the necrosis. The district court excluded the expert's testimony as irrelevant and unreliable since the expert could not identify which of the plaintiff's multiple risk factors caused the necrosis. Without the expert testimony, the plaintiff had no causation evidence, so the district court granted summary judgment for the defense.

The Ninth Circuit reversed the grant of summary judgment. Explaining that the "relevancy bar is low," the court held that the expert's testimony was relevant to the standard for medical causation under California law. The court then held that the testimony was sufficiently reliable because the law does "not require that an expert be able to identify the sole cause of a medical condition in order for his or her testimony to be reliable. It is enough that a medical condition be a substantial causative factor."

See also *City of Pomona v. SQM North America Corp.* (9th Cir. 2014) 59 F.3d 1036 [reversing district court's decision to exclude expert testimony on causation in a suit over groundwater contamination on the ground that the expert's method for testing the origin of the contaminants was unreliable; whether the expert was credible and his methods were superior to a competing expert's methods were matters for the trier of fact]

Class Actions

Class action waivers are enforceable, but PAGA action waivers are not.

Iskanian v. CLS Transportation Los Angeles, LLC (2014) 59 Cal.4th 1036

The plaintiff sought to bring a class action alleging violations of state wage and hour laws, but had signed an arbitration agreement that waived the right to class proceedings. In *Gentry v. Superior Court* (2007) 42 Cal.4th 443, the California Supreme Court concluded that class action waivers in employment agreements to arbitrate state statutory wage and hour claims could be invalidated as a matter of California public policy if individual arbitration would not as effectively vindicate the employee's substantive state rights, and that the Federal Arbitration Act (FAA) did not preempt this prohibition of class action waivers. In this case, the California Supreme Court reconsidered that ruling in light of the U.S. Supreme Court's intervening decision in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740.

The California Supreme Court ruled that *Gentry's* rule against class action waivers was abrogated by *Concepcion*, thus rendering such waivers enforceable, and additionally ruled that federal labor law does not foreclose enforcement of a class action waiver in an employment arbitration agreement. However, where an arbitration agreement compels the waiver of a representative claim under the Private Attorneys General Act (PAGA) – which permits employees to bring representative civil actions against their employers on behalf of the state to recover civil penalties for certain violations of the Labor Code – the waiver is contrary to California's public policy and therefore unenforceable. According to the Court, the FAA does not preempt this prohibition because the FAA focuses on the resolution of private disputes whereas a PAGA action is a dispute between an employer and the state.

See also *Imburgia v. DIRECTV, Inc.* (2014) 225 Cal.App.4th 338 [affirming trial court ruling that a class action waiver was unenforceable under California law, even though the preemptive provision of the FAA would have rendered the agreement enforceable, because the arbitration agreement expressly provided that the class action waiver provision was subject to "the law of [the consumer's] state"].

Compare *Davis v. Nordstrom, Inc.* (9th Cir. 2014) __ F.3d __ [following *Conception*, Nordstrom changed its arbitration agreement to require arbitration of most claims; Nordstrom satisfied the minimal requirements under California law for providing employees with reasonable notice of the change to its employee handbook by sending a letter to the employees informing them of the modification, and not seeking to enforce the arbitration provision during the 30-day notice period.]

See also *Baumann v. Chase Investment Services Corp.* (9th Cir. 2014) 747 F.3d 1117 [PAGA suits are not "class actions" eligible for removal under CAFA because it is "at heart a civil enforcement action filed on behalf of an for the benefit of the state, not a claim for class relief."]

Plaintiff's claim that drug store must provide reasonable seating to cashiers and clerks is amenable to class treatment.

Hall v. Rite Aid Corp. (2014) 226 Cal.App.4th 278

Plaintiff filed this class action on behalf of Rite Aid cashiers and clerks for failure to provide seating at cash registers. The trial court granted plaintiff's motion to certify the class, but on the eve of trial, Rite Aid moved to de-certify, arguing that the claims were not amenable to class treatment because of differences in the amount of time employees spent at the register. The trial court granted the motion, concluding that individual issues would predominate with respect to whether the nature of the cashiers' and clerks' work "as a whole" would reasonably permit use of seating.

The Court of Appeal (Fourth Dist., Div. One) reversed the decertification order. The court concluded that "under the analytic framework promulgated by *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*), the trial court erred when it decertified the class action because its decertification order was based on an assessment of the merits of [plaintiff's] theory rather than on whether the theory was amenable to class treatment." Here,

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the plaintiff's theory was that Rite Aid had a uniform policy of failing to provide suitable seats for cashiers and clerks while at the register, and the amount of time particular employees spent at the register was not relevant to whether cash register work generally can be performed while seated. Thus, plaintiff's theory was amenable to class treatment.

Torts

Major retailer does not have a duty to provide AEDs.

Verdugo v. Target Corp. (2014) 59 Cal.4th 312

Mary Ann Verdugo suffered a sudden cardiac arrest, collapsed, and died while shopping at a Target store. Her relatives sued Target, alleging that Target breached the duty of care it owed its patrons by failing to have in its store an automated external defibrillator (AED) for use in a medical emergency. A federal district court dismissed the complaint, concluding that Target owed no duty to acquire and make available an AED for the use of its customers. On appeal, the Ninth Circuit requested that the California Supreme Court address whether a commercial property owner owes its patrons a common law duty to acquire and make available an AED for cases of sudden cardiac arrest.

The California Supreme Court granted the Ninth Circuit's request and found for the defendant on the duty issue. After evaluating the burdens that a duty would impose on business establishments, and finding a lack of "heightened foreseeability" that Target patrons will suffer sudden cardiac arrests on its premises, the Court concluded that Target owes its customers no common law duty to acquire and make available an AED for use in a medical emergency. The policy decision whether a business entity should be required to acquire an AED for the protection of its patrons is better left to the Legislature.

Landlords who rent property with a "maintained pool" have a duty to prevent children from drowning even if the children are not tenants.

Johnson v. Prasad (2014) 224 Cal.App.4th 74

Defendant homeowners purchased a home in 2000 with a pool that had been built in the 1970s, and that complied with ordinances of the time. The only access to the pool was through the kitchen, through a sliding glass door with a security gate that did not have a self-closing mechanism. In 2009, the homeowners rented their property to the Johnsons. Four-year-old Allen attended a get-together at the house with his grandmother. At some point the grandmother went inside with Allen but did not close the door. Allen wandered off and was later found drowned in the pool. His mother sued the homeowners. The trial court granted summary judgment for the homeowners, reasoning, in part, that the homeowners had no duty to prevent the drowning because they had no reason to expect children to be playing in the pool and that there was no causation because the door and gate were intentionally left open.

The Court of Appeal (Third Dist.) reversed, holding "as a matter of law that the homeowners here, who knowingly rented a home with a maintained pool, owed a duty of reasonable care to the four-year-old boy to protect him from drowning in the pool." Under the *Rowland* factors, it was foreseeable that the pool would be used, and that children would be invited to the property use it. The homeowners were not negligent *per se* in failing to fence the pool, because no ordinances required fencing, but the existence of such regulations was informative in determining whether public policy supported imposing a duty under the circumstances of the case. As for causation, the court held that whether other precautions were required and would have prevented the drowning was a fact issue that could not be resolved on summary judgment.

A plaintiff bears the risk of noneconomic damages caused by defendants she does not sue.

Vollaro v. Lispi (2014) 224 Cal.App.4th 93

Defendant rear-ended the car in which plaintiff was a passenger. In plaintiff's personal injury suit, defendant argued that the driver of the car in which plaintiff was riding had been negligent in stopping short. Defendant requested the verdict form permit an allocation of fault to the driver, who plaintiff had not sued, but the trial court denied the request. The jury returned a plaintiff's verdict including $86,000 in economic damages and $575,000 in noneconomic damages. Defendant appealed the trial court's failure to permit the jury to allocate fault to the driver.

On appeal, the Court of Appeal (Second Dist., Div. Four) reversed. Under Proposition 51, the driver had no liability to plaintiff for noneconomic damages attributable to the driver. Because she did not sue the driver, plaintiff bore the entire risk of loss of noneconomic damages that might be attributable to the driver after remand for a retrial on apportionment of fault.

See also *Chaudhry v. City of Los Angeles* (9th Cir. 2014) __ F.3d __ [Code of Civil Procedure § 377.34, which prohibits pre-death pain and suffering damages in survival actions, limits recovery too severely to be consistent with the deterrence policy underlying 42 U.S.C. § 1983 and so does not apply to § 1983 claims where the decedent's death was caused by a violation of federal law.]

Two-year statute of limitations under Code of Civil Procedure § 335.1 may apply to malicious prosecution claims against lawyers.

Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC (2014) 225 Cal.App.4th 660

In this malicious prosecution action, trial court dismissed the plaintiff's lawsuit against its former attorneys under the anti-SLAPP statute. The trial court found that the plaintiff's complaint was untimely because the one-year statute of limitations in Code of Civil Procedure § 340.6, subdivision (a), applied to the malicious prosecution claim and the limitations period continued to run during the time the underlying action was on appeal. Plaintiff appealed.

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The Court of Appeal (Second Dist., Div. Three) heldthat section 340.6, subdivision (a), which provides a four-year statute of limitations for malpractice actions that is not tolled during the pendency of an appeal, does not apply to malicious prosecution claims against lawyers. Declining to follow earlier cases on the subject, the Court held that the applicable statute of limitations is supplied by Code of Civil Procedure § 335.1, which provides for a two-year statute of limitations that is tolled during the pendency of an appeal. The Court of Appeal nonetheless affirmed the dismissal on the ground that the plaintiff had failed to make a minimal showing that the attorneys acted with malice.

The consumer expectations test applies to failure of an automobile driver's seat in a high-speed collision.

Romine v. Johnson Controls, Inc. (2014) 224 Cal.App.4th 990

The plaintiff suffered severe injuries when her seat broke free of its floor mountings and collapsed backward in a rear-end collision. She sued the seat manufacturer for strict products liability on a design defect theory. The trial court instructed the jury using the "consumer expectations" test: "whether the product performed as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner." The defendant argued that instruction was improper, and the court should have used the "risk/benefit" test for strict liability – i.e., "whether the benefits of the challenged design outweigh the risk of danger inherent in the design." The defendant also argued that it was entitled to an instruction (if not judgment) on its component parts supplier defense, which applies when a component part has been incorporated into a finished product. Finally, the defendant argued it was entitled to an apportionment of fault for other component part manufacturers whose products also contributed to plaintiff's injuries. The trial court denied these requests, and the jury returned a substantial plaintiff's verdict.

The Court of Appeal (Second Dist., Div. Five) affirmed in part and reversed in part. The court held that use of the consumer expectations test was appropriate because "[c]onsumers have expectations about whether a vehicle's driver seat will collapse rearward in a rear-end collision, regardless of the speed of the collision." (This holding deepens the confusion among appellate courts concerning proper application of the consumer expectations test.) The court also rejected the defendant's component part supplier defense on the ground the seat was not a component part because it was not a "generic, fungible, multi-use, or off-the-shelf" component part and "[i[nstead ... was a separate product with a specific purpose and use" in the completed vehicle. The court did agree, however, that the defendant was entitled to seek an apportionment of fault to other component parts manufacturers, and remanded for a limited retrial on that issue.

Sophisticated user doctrine is a complete defense to asbestos claims only where the plaintiff knew of the dangers of asbestos when he first started working with it.

Scott v. Ford Motor Company (2014) 224 Cal.App.4th 1492

The plaintiff, who worked as an automobile mechanic starting in the 1960s, sued over 30 defendants for asbestos-related injuries. By the time of trial, Ford Motor Co. was the last defendant standing. The plaintiff claimed Ford failed to warn about the risks of asbestos exposure from performing brake work and sought compensatory and punitive damages. The trial court granted Ford's motion to strike the punitive damages claim on the ground that Michigan law applied and under Michigan law, punitive damages are not available. The case went to trial on the compensatory damages claim, and the jury returned a verdict in plaintiff's favor, finding Ford 22% at fault, plaintiff 19% at fault, and various other parties at fault for the remainder. Ford appealed on various grounds, including that plaintiff should have been deemed a "sophisticated user," and plaintiff appealed the elimination of his punitive damages claim.

The Court of Appeal (First Dist., Div. One) held that the trial court properly refused to enter judgment for Ford on its sophisticated user defense. "[I]n order for the sophisticated user doctrine to provide a complete defense to plaintiffs' claims, Ford was required to show that service station owners knew or should have known of the risks of vehicle repair exposure to asbestos from the mid-1960's on," and there was no evidence of plaintiff's knowledge until at least the 1970s. The jury's finding that the plaintiff was 19% at fault merely meant that the jury must have concluded at some point the plaintiff gained sufficient knowledge to protect himself, and not that Ford was entitled to a complete defense. With respect to plaintiff's cross-appeal, the Court of Appeal reversed. Applying California's governmental interests analysis to choice-of-law, the court held that Michigan did not have an interest in having its law applied in California courts to injuries occurring from exposures in California.

Medical care provider's "full bills" do not necessarily represent the reasonable value of medical services.

Children's Hospital Central California v. Blue Cross of California (2014) 226 Cal.App.4th 1260 *[petition for review pending]*

Blue Cross paid the plaintiff hospital about $4.2 million for medical services the hospital rendered to Blue Cross enrollees before the hospital had a contract with Blue Cross. The hospital sought to recover additional amounts by filing suit for the "reasonable and customary" value of its services (as authorized by regulation). At trial, the court admitted evidence of the hospital's "full billed charges" of $10.8 million but excluded evidence of the lesser amounts it had historically accepted as payment.

The Court of Appeal reversed (Fifth Dist.), reversed. Under *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, a "medical care provider's billed price for particular services is not necessarily representative of either the cost of providing those services or their market value." The trial court erred by excluding evidence of the historical *paid* amounts because the reasonable value of the hospital's medical services must be determined after considering all factors, including the amounts the hospital accepts as payment for its services.

Attorney Fees and Costs

Trial courts may not award attorney fees based on an in camera review of the attorney's bills that deprives the opposing party of the opportunity to review and challenge the claimed fees.

Concepcion v. Amscan Holdings, Inc. (2014) 223 Cal.App.4th 1309

Plaintiffs filed several class actions, later consolidated, under the Song-Beverly Credit Card Act to challenge defendant Party City's collection of customer zip codes to complete credit card transactions. The parties settled, and class counsel sought a fee award of $350,000. The trial court reviewed class counsel's billing records in camera, and granted the fee award. Party City appealed, arguing that the trial court's reliance on an in camera review of records that Party City had no opportunity to review or challenge was unfair and a denial of due process.

The Court of Appeal (Second. Dist., Div. Seven) reversed and remanded for reconsideration of the fee award. Awarding fees based on an in camera review that afforded the defendant no chance to examine the bills and challenge whether they supported the requested amount of fees was improper.

Labor and Employment

Undocumented workers may bring employment discrimination claims.

Salas v. Sierra Chemical Co. (2014) 59 Cal.4th 407

Plaintiff, a seasonal worker who injured his back while lifting crates at defendants' warehouse, was not rehired for a new season because he did not obtain clearance from his doctor to resume work. Plaintiff sued his employer for failure to provide reasonable accommodations and retaliation. After discovering evidence that plaintiff had obtain his job through provision of a false social security number, the employer moved for summary judgment in light of after-acquired evidence and plaintiff's unclean hands. The trial court granted the motion and the Court of Appeal affirmed.

The California Supreme Court reversed. As a threshold matter, Senate Bill No. 1818, which extends state employment law protections to employees "regardless of immigration status," was not preempted by federal immigration law, except to the extent it would authorize an award of damages for lost pay after the employer discovers an employee's ineligibility to work in the United States. A contrary result would encourage employers to "look the other way" and thereby gain an ability to exploit employees like plaintiff and evade the state's wage, hour, and anti-discrimination laws, thereby undermining federal immigration policy and state employment policy. The Court next held that the doctrines of after-acquired evidence and unclean hands were not complete defenses to the employee's claims where there were triable issues that the employer was on notice of the invalidity of the employee's social security number and did not terminate plaintiff. The Court did hold, however, that the trial court could consider unclean hands in fashioning any equitable remedy.

Contractual provisions seeking to limit the time for employees to bring FEHA claims are void as against public policy.

Ellis v. U.S. Security Associates (2014) 224 Cal.App.4th 1213

The plaintiff, a female security guard, was sexually harassed by her supervisor. She complained to the California Department of Fair Employment and Housing and received a right-to-sue letter, and timely brought suit under the Fair Employment and Housing Act (FEHA). Telying on a provision in the employment application purporting to limit the employee to bringing suit within six months of the date of the adverse employment action, the employer moved for judgment on the pleadings. The trial court granted the motion.

The Court of Appeal (First Dist., Div. Two) reversed, holding the contractual suit limit unreasonable and against public policy. FEHA has particular provisions governing the timing for employees to report misconduct, exhaust their administrative remedies, and then bring claims. That the statutory scheme and the public policy behind it would be undermined if employers could shorten the time in which aggrieved employees could sue.

Insurer's failure to notify builder of water damage caused by construction defect relieves the builder of liability for repair costs.

KB Home Greater Los Angeles, Inc. v. Superior Court (Allstate Insurance Company) (2014) 223 Cal.App.4th 1471

An insurer repaired water damage to its insured's home caused by a construction defect. The insurer then brought a subrogation action to recover the costs of repair from the homebuilder. The builder moved for summary judgment, citing the Right to Repair Act (Civil Code § 895 et seq.), which requires that a builder receive notice of damage caused by a construction defect *before* repairs are made. The trial court denied the motion.

The Court of Appeal (Second Dist., Div. Four) issued a writ of mandate directing the trial court to enter summary judgment for the builder. Under the Right to Repair Act's prelitigation procedures, which are designed to resolve construction defect claims in a non-adversarial manner, reasonable notice must be given to a builder before repairs are made to a house subject to the act before a claim may be made against the builder. The insurer's failure to provide such notice deprived the builder of its right to inspect and repair the defects, thus relieving the builder of liability. The court rejected the insurer's argument that the notice provisions did not apply when the defects caused property damage. The court declined to explain what would constitute reasonable notice when emergency repairs are needed – the court was satisfied that builders have an incentive to act quickly in such cases because a failure to do so would increase the builder's exposure to consequential damages.

But see *Burch v. Superior Court (Premier Homes, LLC)* (2014) 223 Cal.App.4th 1411 [Right to Repair Act, Civil Code §. 895, does not provide the exclusive remedy for damages for construction defects that causes property damage, so plaintiff could sue builder for negligence and breach of implied warranty]

Insurance

Advertisements that do not specifically name another's product in a disparaging manner do not trigger a duty to defend under coverage for advertising injury.

Hartford Casualty Ins. Co. v. Swift Distribution, Inc. (2014) 59 Cal.4th 277

The plaintiff and defendant both made carts for moving musical equipment. The plaintiff sued the defendant for infringing on his patents and trademarks, alleging unfair competition, misleading advertising, breach of contract, and violation of certain nondisclosure agreements. Plaintiff's complaint attached advertisements of the defendant's product, calling it "superior" and "unique." The advertisements did not mention the plaintiff's product. The defendant tendered defense of the lawsuit to its commercial general liability insurer under the coverage for "personal and advertising injury," defined to include the offense of "[o]ral, written, or electronic publication of material that ... disparages a person's or organization's goods, products or services." The insurer sought declaratory relief that it had no duty to defend.

The California Supreme Court unanimously found for the insurer. "[A] claim of disparagement requires a plaintiff to show a false or misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication." The advertisements generally touting that defendant's product was "superior" did not meet this test. The Supreme Court disapproved the controversial decision in *Travelers Property Casualty Company of America v. Charlotte Russe Holding, Inc.* (2012) 207 Cal. App.4th 969, which held that, under an identical disparagement clause, the insurer had a duty to defend a clothing retailer against allegations that the retailer disparaged a manufacturer's premium apparel by selling it at steeply discounted prices.

Insurance adjustors may be sued individually for unlawful claims handling practices.

Bock v. Hansen (2014) 225 Cal.App.4th 215

A tree limb fell on the plaintiffs' house causing significant damage. According to the plaintiffs, their homeowners' insurance adjuster performed only a cursory examination of the scene, altered the scene, misrepresented the coverage provided for the claim, and engaged in other misconduct. The plaintiffs sued the insurer for various claims, and sued the adjustor personally for negligent misrepresentation and intentional infliction of emotional distress. The trial court granted the adjustor's demurrer without leave to amend, holding that an insured cannot sue an adjustor directly.

The Court of Appeal (First Dist., Div. Two) reversed, holding that an adjustor can be personally subject to suit for conduct occurring in the course of adjusting a claim. The court determined that the negligent misrepresentation claim was adequately pleaded, and that while the IIED claim was not, plaintiffs should have been given leave to amend to state such a claim.

Cases Pending in the California Supreme Court

Addressing whether a supplier of raw materials is liable to workers who are injured on the job while using the raw materials during manufacturing.

Ramos v. Brenntag Specialties, Inc., case no. S218176

The plaintiff contracted pulmonary fibrosis from exposure to the defendants' metal and mineral products during work at a metal foundry. The trial court granted defendants' demurrer to plaintiff's claims relying on *Maxton v. Western States Metals* (2012) 203 Cal. App.4th 81, in which the Court of Appeal held that the "component parts doctrine" generally immunized a supplier of raw materials (other than asbestos or other inherently dangerous substances) from both negligence and strict liability causes of action by workers who are injured while using the raw materials during the manufacturing process. The Court of Appeal disagreed with *Maxton,* and held that "the component parts doctrine does not shield a product supplier from liability when a party alleges that he suffered direct injury from using the supplier's product as the supplier specifically intended."

The Supreme Court granted review on July 9, 2014, to resolve the split in authority.

See also *Uriarte v. Scott Sales Co.* (2014) 226 Cal.App.4th 1396 (Case No. B244257) [petition for review pending: Following *Ramos* and rejecting *Maxton* to conclude plaintiff could sue the companies who supplied silica sand to his employer for claims related to a pulmonary illness]

Addressing the scope of any duty owed to plaintiffs in "take-home" toxic exposure cases.

Kesner v. Superior Court (Pneumo Abex LLC), case no. S219534

Haver v. BNSF Railway, case no. S219919

In these companion take-home toxic exposure cases, plaintiffs claim injury from substances carried home from relatives' worksites. In *Kesner,* the Court of Appeal found the worker's employer owed a duty of care to the plaintiff. In *Haver,* the Court of Appeal found no duty was owed.

The Supreme Court granted review in both cases on August 20, 2014, to answer the following question: If an employer's business involves either the use or the manufacture of asbestos-containing products, does the employer owe a duty of care to members of an employee's household who could be affected by asbestos brought home on the employee's clothing?

Answering the Ninth Circuit's question whether web sites are "places of public accommodation."

Greater Los Angeles Agency on Deafness v. Cable News Network, case no. S216351

The Greater Los Angeles Agency on Deafness, Inc. (GLAD) asked that Time Warner Inc., which wholly owns Cable News Network, Inc. (CNN), caption videos on its news web sites (such as CNN.com) so that hearing-impaired visitors could have full access to the online videos. When an agreement could not be reached, GLAD sued, alleging violations of the California Unruh Civil Rights Act and the California Disabled Persons Act. CNN removed the action to federal court and moved to strike under California's anti-SLAPP statute. The Ninth Circuit concluded that the action arose from conduct in furtherance of CNN's free speech rights and that GLAD could not prove a probability of prevailing on its Unruh Act claims. The court certified to the California Supreme Court the question whether the California Disabled Persons Act claims were viable.

The Supreme Court granted review on March 26, 2014, to answer the following question: "Does the California Disabled Persons Act's reference to "places of public accommodation" [Civ. Code, § 54.1, subd. (a)(1)] include web sites, which are non-physical places?"

Addressing whether electronic communications in public employees' personal accounts on their personal devices are "public records."

City of San Jose v. Superior Court (Smith), case no. S218066

The plaintiff submitted a request to the City seeking specific public records, including conversations between public officials on their private cell phones or e-mail accounts. The City denied the request, arguing they are not "public records" under the California Public Records Act (CPRA) (Government Code § 6250 et seq.). The plaintiff obtained summary judgment declaring his right to access the records. The Court of Appeal (Sixth Dist.) reversed, holding CPRA does not require public access to communications between public officials who exclusively used their private cell phones or e-mail.

The Supreme Court granted review on June 25, 2014 to answer the following question: Are written communications pertaining to city business, including email and text messages, which (a) are sent or received by public officials and employees on their private electronic devices using their private accounts, (b) are not stored on city servers, and (c) are not directly accessible by the city, 'public records' within the meaning of the California Public Records Act?

Addressing the extent of federal preemption of state laws governing labeling of organic foods.

Quesada v. Herb Thyme Farms, case no. S216305

This class-action lawsuit alleged that the defendant mislabeled packages that contained both organic and conventionally grown herbs as "USDA Organic," thus violating the Consumer Legal Remedies Act, Unfair Competition Law, and false advertising laws of California. The trial court dismissed the claims, finding preemption under the federal Organic Foods Production Act (OFPA), 7 U.S.C. § 6501 et seq., which sets national standards for the sale and labeling of organic agricultural products and does not authorize private enforcement actions. On appeal, the plaintiff class asserted a new theory of liability and alleged that their claims were solely grounded on the defendant's violation of the California Organic Products Act (COPA), Food & Agriculture Code § 46000 et seq.; Health & Safety Code § 110810 et seq., which codified California's federally approved state organic program. The Court of Appeal held the plaintiffs' claims were preempted, reasoning that enacting OFPA and in approving state organic programs like COPA, Congress intended to achieve a national standard of the use of "organic" in food labels enforceable through administrative rather than private legal action.

The Supreme Court granted review on April 30, 2014, limited to the following issue: Whether OFPA preempts state consumer lawsuits alleging that a food product was falsely labeled "100% Organic" when it contained ingredients that were not certified organic under COPA.

Addressing whether a settlement entered orally on the record constitutes a net monetary recovery to the plaintiff for costs purposes.

DeSaulles v. Community Hospital of the Monterey Peninsula, case no. S219236

In this employment case, some of the plaintiff's claims were settled by a $23,500 payment agreed to orally on the record pursuant to Code of Civil Procedure § 664.6, while others were voluntary dismissed or summarily adjudicated. Plaintiff did not abandon the causes of action that were resolved by summary adjudication and appealed those rulings, but ultimately lost on appeal. The trial court awarded the defendant mandatory prevailing party costs under Code of Civil Procedure § 1032.

The Court of Appeal (Sixth Dist.) reversed the cost award to the defendant, and ordered mandatory prevailing party costs be awarded to the plaintiff instead. The court reasoned that the settlement entered orally before the court constituted a settlement accomplished through "legal process" and therefore constituted a "net monetary recovery" for purposes of determining who was the prevailing party entitled to recover costs.

The Supreme Court granted review on July 23 to answer the following question: When plaintiff dismissed her action in exchange for the defendant's payment of a monetary settlement, was she the prevailing party for purposes of an award of costs under Code of Civil Procedure section 1032, subdivision (a)(4), because she was "the party with a net monetary recovery," or was defendant the prevailing party because it was "a defendant in whose favor a dismissal is entered"?

The New Normal

ASCDC President Robert A. Olson talks about the year's new initiatives while changes in the courts continue to impact how defense lawyers practice.

By Carol Sherman

When Robert Olson, the new President of the Association of Southern California Defense Counsel (ASCDC), wants to relax and escape from the pressures of the day, he reads history. What he likes is the flow of change and the potential for changing outcomes. He sees that reflected in the ASCDC. It has a great history and traditions, but it needs to change with the times as well.

One of his first goals when his term began at the 53rd Annual Seminar in February was to launch a members-only listserv. Listservs have been used by the plaintiff's bar and in other groups, including the Northern California defense counsel organization, for years. "It was time for us to join the 21st Century," Olson said. "Although there were a few bumps at first, the listserv is running smoothly with about 50 percent of members using the service." Posts range from inquiries for expert referrals to advice on how to handle a particular argument. When inquiring about an individual, such as a judge or opposing counsel, members should respond by e-mail or phone and not a post accessible to all users.

He counts it as one of his accomplishments to date. There is also a recently started opt-in listserv group for members who practice employment. "If this is successful, we may offer listserv groups for other practice areas."

Olson also remains focused on keeping members better informed especially about the ongoing changes in the courts. "It's a challenging time for civil defense lawyers as court restructuring continues in the wake of the state's budget crisis. Because our members do not practice in just one county, we provide a conduit for information from the local courts to our members and vise versa. We really are the voice of the defense bar in Southern California."

Olson added, "There's still a lot ASCDC is doing to help shape what the new normal is going to be for how defense lawyers practice." For example, Olson meets regularly with Judge Dan Buckley, former ASCDC member and supervising judge of the Los Angeles civil courts. "For the most part, the system in Los Angeles County has been working well. But preliminary motions are not being heard in a timely manner. Demurrers and motions for summary

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judgment are heard six to nine months out. We're working with the courts to address the problem." In efforts to better communicate with members, Olson proposed a new *Around The Counties* column in *Verdict* magazine that began in the last issue.

Helping to keep the courts running is critical to Olson. "It's one of the foundations of our freedom." One of the recent books he read – "In The Garden Of Beasts: Love, Terror and an American Family in Hitler's Berlin" by Erik Larson – details life in the new Nazi Germany in the early 1930s. It provides "a vision of what happens when fundamental legal norms break down."

Some might find it unusual that Olson, an appellate lawyer at Greines, Martin, Stein & Richland LLP in Los Angeles, is leading a mostly trial lawyer organization. "I have a tremendous admiration for trial lawyers. They do a tremendous job under great pressure. And, I've learned that successful trial lawyers are all interesting people with big personalities."

He attributes his involvement with ASCDC to serendipity. Years ago, then-Board member Jean Lawler invited him to co-present the *Year in Review: Summary of Recent Cases* at the Annual Seminar with Lawler's Murchison firm partner Chip Farrell. Olson and Farrell have presented that session now for the past 18 consecutive years. He credits close friend and past ASCDC President Linda Miller Savitt with his involvement on the Board of Directors and at the Committee level. "I started out working with Pam Dunn on the Amicus Committee, a committee that I am happy to say is now quite active." What has kept him so involved are the interesting lawyers he has met though the organization.

Olson was quick to point out that leading one of the country's largest civil defense bar organizations is not a one-person job. "We have a very good team of officers, members of the Board of Directors and committee chairs who are proactively reaching out to educate and involve our members." He especially wants to find expanded ways to involve members in the ASCDC.

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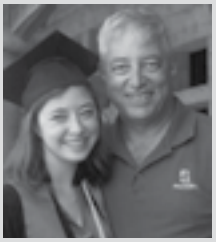
Happy Accident

By Carol A. Sherman

Bob Olson attributes much in his life to happy accident. Not originally from Southern California, he came to Los Angeles after law school and a clerkship not knowing if he was going to stay. As Bob tells it, it was a "classic story of boy comes to Los Angeles and meets a really cute and nice girl." He recalls that he met his future wife Gail on "September 14, 1985, at a day-long legal seminar called 'Getting Results in Law and Motion in Los Angeles County.'" "Gail was seated next to me." (Practice pointer: Talk to others at seminars.) Bob went on to develop a thriving practice in civil appeals, and Gail serves as Deputy General Counsel for City of Hope Comprehensive Cancer Center in Duarte.



Bob and his family live in Toluca Lake in the San Fernando Valley. Bob and Gail have two adult children, now living on the East Coast. Kaitlin Olson, 23, sang the National Anthem at the 53rd Annual Seminar luncheon, to her father's great admiration and pride. Bob confesses: "Kaitlin did not inherit her singing ability from me. I can't sing at all." The musical talent comes from her mother's side. "Gail's father was a saxophone player in the Big Bands during the 1940's, a composer and an arranger of music for various artists, and the music producer for composer Henry Mancini." A recent graduate of Stanford, Kaitlin is an editorial assistant with Simon & Schuster in New York City.

Their son Morgen, 20, is a senior at Wake Forest in North Carolina, studying politics, international affairs and communications. "He aspires to be Mike Belote once he graduates," Olson said, referring to the Association's legislative advocate. "Morgen certainly has the smarts and the people skills." With the kids out of the house, Bob and Gail feel fortunate to spend time with their immediate neighbors – their nearly 90-year old mothers, who live adjacent to Bob and Gail.

The son of a U.S. Marine Colonel and a mother with a sharp eye for art and design, Bob grew up just outside Washington, DC. He describes his father, a combat veteran who passed away two decades ago, as easygoing and low-key. "Growing up with him taught me that stereotypes don't necessarily ring true." Bob has two older sisters and a younger brother and spent most of his childhood in McLean, Virginia. "We did spend a year in Hawaii. In talking with [San Diego Board Member] Pete Doody, it is likely that his family moved into our house when we left Hawaii which is quite a coincidence."

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Living close to CIA headquarters (in Langley, Virginia), Bob recalls that most of the parents of his childhood friends worked for the government. Following graduation from the local public high school, Bob attended Rice University for two years before transferring to Stanford, where he studied political science. "If I could do it over, I would major in history," he said, admitting that to be his true academic love.

After a year working in Boston, Bob returned to California to attend Stanford Law School, and graduated in 1983. He spent the following year clerking for then-Ninth Circuit United States Court of Appeals Judge Anthony Kennedy in Sacramento, describing this experience as "the best job, working with a true legal scholar with a brilliant mind." Over the next several years, Bob practiced civil litigation in the Los Angeles area, but he did not find that to be a real fit for his career interests.

Bob quit his job in 1987, shortly after he and Gail returned from their honeymoon. (Gail was very understanding.) While between jobs, Bob represented an actor friend being sued in Federal Court: "I did everything in that case, from typing the briefs to serving and filing them personally." When Judge Kennedy was nominated as Associate Justice of the United States Supreme Court in 1988, he asked Bob and a few other former law clerks to assist with position papers in support of the nomination. (A warm, celebratory thank you letter from Justice Kennedy is framed in his office.) Bob was contemplating leaving law for another career path when he stumbled upon the possibility of an appellate practice. He was offered a position with Greines Martin Stein & Richland in Fall 1987 and realized that appellate law was what he wanted to do. It was a turning point in his career.

Bob has been with his firm for nearly 27 years and loves what he does. He is Immediate Past President of the California Academy of Appellate Lawyers. Bob has argued numerous cases before the California Supreme Court, including *Howell* on behalf of ASCDC, in addition to cases in the Ninth Circuit and the California Courts of Appeal. He says that his favorite part of appellate practice is oral argument but confides that his least favorite part is "the hour before [argument]."

Outside of work, Bob reads (history, of course), gardens, hikes, and bicycles, including a 35-mile loop from his home to the Rose Bowl and back. A bicycle accident on Colorado Boulevard in Eagle Rock resulted in a fractured wrist and a near-miss head injury. "The bike helmet saved me, and I wouldn't ride without it." During recovery, Bob learned to use dictation software and his own personal experience dealing with medical bills helped him to prepare for his Supreme Court argument in *Howell.*

"So, maybe it was a happy accident after all."

Expanding upon ASCDC's already strong education schedule is one of his goals. Several new seminars have been added this year to reach members in a variety of locations. "Seminars are a great way to receive valuable information from the defense perspective that is useful in the member's practice." ASCDC is a unique education provider in Southern California because it focuses on helping defense lawyers win civil cases, not just a neutral presentation of principles.

A new general litigation seminar will be held at Torrey Pines Resort in La Jolla in September. This seminar will be held every other year, alternating with the long-standing Santa Barbara medical liability seminar, also held in September. Its topics will include defending damages claims and parrying plaintiff's "reptile" tactics. Another first was the well-attended seminar held at the Jonathan Club in Santa Monica, where members were updated on trying medical damages issues in the wake of *Howell*, a case Olson successfully argued before the California Supreme Court on behalf of ASCDC.

This year's seminar schedule also includes the popular brown bag lunches with the judges, and December's always well-attended construction defect seminar in Orange County and the judges' reception in Los Angeles.

He pointed to the efforts of ASCDC's very active Amicus Committee and the good work it does on behalf of all members. "Our Amicus Committee has had extraordinary success. They file briefs in important cases and regularly look at cases that come down and request publication or de-publication, or support or oppose the California Supreme Court's review of a case."

Olson also noted the Association's presence in Sacramento with the Legislature through the efforts of advocate Mike Belote. "Mike is not only a voice in Sacramento for members, but he's also our ears. We know when an issue may develop that would affect our members in their everyday lives. It's often times the small details that impact

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lawyers the most," he said, citing a recent proposed procedural change in the statutes, spearheaded by ASCDC, that relates to scheduling post-trial motions. "This rationalization of a small procedure will result in significant time savings for civil defense lawyers. In my view, most lawyers don't like the administrative hassle of the law, they want to focus on the substance and merits."

Olson was especially encouraged by the involvement of younger lawyers in the Association who come together at mixers several times during the year. "I'd like to come up with a different name for the young lawyer group because it suggests that the rest of us are old," joked Olson.

At the same time, attracting new members continues to be a challenge, but Olson remained optimistic. "There's a new reality many bar associations are facing that impacts membership. Attorneys want to understand the value to their practices by joining. My philosophy is that if we make ourselves useful, members will come. As lawyers realize that more and more they are responsible for creating their own professional lives, they will realize how valuable ASCDC is to them in doing so." He particularly emphasizes the value of being able to network, talk, socialize and communicate with other defense lawyers. "It brings benefits to the individual's practice and it makes practicing law more fun."

Olson mentioned several new member pricing initiatives in effect this year, including discounted membership fees for pre-existing newer lawyers, public entity lawyers, and in-house counsel.

"We have to be more relevant to individuals and demonstrate how becoming involved in our Association will foster and enhance their personal careers. What our Association provides is educational opportunities so you're up on the law, and opportunities to network with peers and more experienced lawyers. You come away with so much information about specific issues that you may be facing now or in the future, as well as how the world in which you are practicing works."

As challenging as it may be at times for civil defense lawyers, Olson concluded, "It's always a good time to be in this profession if it's what you love to do. It's never a good time if it's not your calling."

Duran v. U.S. Bank:

Developing a Trial Management Plan that Highlights Individual Defenses in Class Actions and the Problems Associated with Statistical Sampling in Class Certification and Trial

By
Jennifer Weidinger
Pettit Kohn Ingrassia & Lutz

On May 29, 2014, the California Supreme Court issued its long-awaited decision in *Duran v. U.S. Bank*. In a unanimous decision, the Supreme Court affirmed the appellate court's reversal of a near $15 million class action judgment, and set forth substantive standards for trial courts to follow to determine whether class certification is appropriate in the face of significant individual questions, especially those involved in an employee misclassification claim. The trial court's refusal to admit defense evidence relating to class members outside the sample group had inappropriately impaired the defendant's ability to present a defense, as a class action trial management plan "must permit the litigation of relevant affirmative defenses, even when these defenses turn on individual questions." Further, while statistical sampling can be an appropriate way to assess liability and damages in some wage and hour class actions, the trial court's acceptance of the plaintiff's approach to sampling was "profoundly flawed" because, among other things, the sample size (1) was too small; (2) was not random; and (3) involved an "intolerably large" margin of error of 43.3%.

A trial plan that relies on statistical sampling must be developed with expert input and must afford the defendant an opportunity to impeach the model or otherwise show its liability is reduced. *Duran* is the first case to consider the now prevalent use of statistical evidence by class action parties at the class certification stage and at trial, and represents a significant victory for California employers in defending wage and hour class actions.

I. Background.

A. The trial court certified a class based on plaintiffs allegations of unpaid overtime, attributed to misclassification as exempt employees under the outside salesperson exception.

Defendant U.S. Bank National Association (USB) USB was a nationwide financial services provider who operated over 130 branches in California. Plaintiffs were USB employees who worked as business banking officers (BBOs). BBOs sold bank products, including loans and lines of credit, to small business customers, and their primary job was to cultivate new business. USB had classified the BBO position as exempt from overtime compensation, primarily based on the outside salesperson exemption in Labor Code §1171.2. This exemption applies to employees who spend more than 50 percent of the workday engaged in sales activities outside the office. (*Ramirez v. Yosemite Water Co*. (1999) 20 Cal.4th 785 (Ramirez).) Plaintiffs alleged the BBOs at US Bank were misclassified.

At support of class certification, Plaintiffs provided declarations for 34 current and former BBOs. In turn, USB provided declarations from 83 putative class members, 75 of which stated they typically spent 50% or more of their workday engaged in outside sales. Despite opposition by USB, the trial court certified the class, relying on *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319 (Sav-On). The trial court found common questions of law and fact predominated over individual issues based on evidence that: (1) the BBO position was standardized; (2) USB classified all BBOs as exempt without examining each employee's duties or work habits; and (3) USB failed to train or monitor BBOs to ensure that exemption requirements were satisfied. The class was ultimately defined as all California-based BBOs who worked overtime for USB at any time during the period from December 26, 1997 until

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September 26, 2005. The total class was 260 employees. USB's writ of mandate related to the certification was denied.

B. The trial court crafted a trial management plan based on a small sample of random class members' experiences, which would then be extrapolated to the whole class, and entered judgment for close to $15 million based on the fiction that every class member had been misclassified.

Approximately one year post-certification, the parties presented competing trial management plans. Plaintiffs' initial plan was to divide the class into 20-30 groups and have special masters conduct individualized evidentiary hearings on liability and damages. As an alternative, Plaintiffs proposed a random sampling, as set forth by their expert Richard Drogin, in which the entire class would be surveyed (notably no such survey was ever done). USB objected, submitting a declaration from its expert, Philip Gorman, who opined that reliance on such a small sample size presented a high risk of error, and that the survey would still likely be biased due to the probability that any properly classified employees would not participate in the survey. USB proposed the parties each select an equal number of class members for the trial sample.

The trial court rejected USB's proposal, and enacted an alternative plan of its own devising, that the trial court (literally the clerk of the trial court) would select a random sample of 20 class members, known as the representative witness group, to testify at trial. The trial would be broken down into two phases: (1) liability; and (2) restitution. Any findings on liability would then be extrapolated to the remainder of the class. USB again objected that an attempt to extrapolate liability from representative testimony would violate due process, noting that there was "no precedent for using random sampling to establish liability in a class action involving the outside sales exemption." The trial court proceeded with its own trial plan and the RWG.

Shortly after, USB moved to decertify the class, citing new case law and deposition testimony of several class members, arguing individual issues predominated. USB's statistician, Andrew Hildreth, identified several problems with the representative witness group, including the small size of the sample, the selection bias, and the multiple "non-response" errors. Importantly, Hildreth found that there was no basis for the court to conclude the *entire* class had been misclassified. Despite this, the trial court proceeded on, further denying USB's motion in limine that sought to include testimony by employees outside of the representative witness group, and USB was officially barred from presenting evidence of work habits/ hours of any such employees. Phase 1 of the trial lasted 40 days.

In Phase Two of the trial, USB again sought to include deposition testimony and declarations of employees outside the representative witness group. The court denied the request, as inconsistent with the Phase 1 of the trial. Plaintiffs moved in limine to prevent USB from introducing any evidence pertaining to liability because that question had been resolved in the court's statement of decision for phase one. Plaintiffs' statistics expert, Richard Drogin opined that the Phase One findings of liability and average weekly hours of unpaid overtime could be reliably projected to the whole class because they were based on a random sample. Taking the court's indicated findings for Phase One, with adjustments for vacation time and other breaks in service, Drogin calculated a weighted average of overtime for the representative witness group at 11.87 hours per week, 12 with a margin of error of plus or minus 5.14 hours at a 95 percent confidence interval. *The relative margin of error for the overtime estimate was plus or minus 43.3 percent.*

The trial court granted the motion, noting that the purpose of Phase One had been to resolve USB's class-wide liability for misclassification. The trial court effectively barred any challenge to its Phase One decision that all class members were misclassified as exempt and all were entitled to overtime compensation, in the face of due process argument proffered by USB. The court ultimately entered a judgment against USB for nearly $15 million. This was only the second misclassification case in California certified as a class action and tried to verdict.

II. The Supreme Court's Decision.

USB appealed the judgment and the appellate court reversed. The appellate court distinguished an earlier case approving the use of representative testimony in an overtime class action, *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, in that *Bell* utilized sampling at the trial of damages only, not liability.

In affirming the appellate court's decision, the Supreme Court found that the appeal highlighted difficult questions about how individual issues can be successfully managed in a complex class action, and that the trial court had an obligation to consider the manageability of individual issues in certifying a class action. The *Duran* court found the trial court ignored individual issues, effectively "hamstringing USB's ability to defend itself." There were fatal flaws in the trial plan's implementation of statistical sampling as proof of USB's liability to the class.

Trial courts have the obligation to decertify a class action if individual issues prove unmanageable, (*Sav-On* 34 Cal.App. at 335) and the trial court should have considered these at the certification stage, including any statistical proof a party anticipates will weigh in favor of granting class certification. Notably, the Supreme Court rejected plaintiffs' characterization of class actions as creating a requirement that the trial court fashion a way to resolve the parties' dispute through common evidence: "plaintiffs assert, '[i]t would be inconsistent with the requirement of common evidence' for the employer to be permitted to litigate its exemption defense against individual class members," but, the Court held, "plaintiffs' argument rests on a false assumption. Class actions do not create a 'requirement of common evidence.' Instead, class litigation may be appropriate if the circumstances of a particular case demonstrate that there *is* common evidence." (Emphasis in original."

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III. Lessons Learned from the Duran decision Relevant to Opposing Class Certification.

A. Prepare a strong trial plan early on in the litigation.

The Supreme Court's emphasis on the need for a workable trial plan prior to class certification is particularly significant, given the trend of class action claims in California. The court noted that according to the Administrative Office of the Courts, 89% of class actions that are certified settle prior to trial, compared with 15% of cases where class certification was denied, creating a clear disadvantage to defendants after the certification stage.

Plaintiffs have urged trial courts to certify based on a (mis)reading of the Supreme Court's decision in Brinker Restaurant Corp. v. Superior Court, 53 Cal.4th 1004 (2012). Many trial courts, accepting plaintiffs' arguments, have concluded that almost any claim can be certified if any essential element of plaintiff's theory of relief appears to be susceptible of common proof; regardless of whether the aspect of the case that may be subject to common proof will really *predominate* in resolving the case as a whole, in light of the material issues to be tried that are, in fact, subject to individualized differences. *Duran,* however, indicates that class treatment is inappropriate where individualized differences make proceeding as a class all the way to judgment unfair or unmanageable—even if one central liability question might manageably be proved on a class-wide basis.

Duran therefore will aid defendants who craft a well prepared trial plan at the certification stage to show a preliminary assessment of variability, and to demonstrate that individual issues swamp common issues to render a class action unmanageable.

B. Present individualized defenses to class claims.

Defendants should be prepared to vehemently counter any purported representative showing by the plaintiff, using concrete examples backed by affirmative evidence. For example, in disputing allegations of misclassification, defendants should present direct evidence demonstrating individualized differences among putative class members in what job duties they perform and how much time they spend on those duties. This evidence can include putative class member declarations, employer self-audits, surveys, studies, and even video evidence.

Moreover, employers who rely on the outside sales exception can take a preventative approach *before* the onset of litigation by performing self-audits or interviews, which ensures that employees are meeting the 50%-plus test on a consistent basis; if they are not, the employer will be able to help the employees amend his or her workload or to reclassify the employee as non-exempt if necessary. These self-audits can be used both to oppose class certification and to support the employer's defense at trial.

Duran plainly supports the standard that if the trial court cannot conduct a fair trial on the class claims, while allowing employers the ability to assert affirmative defenses (and evidence) as to the class, certification should be denied. This standard applies not only to misclassification allegations, but all wage and hour claims.

C. Attack inadequate and unqualified statistical methods.

Defendants will benefit from early (and often) opposition to biased or incomplete sampling, both at the certification stage and pre-trial, or statistical evidence that lacks expert approval. The *Duran* court made a point to reference USB's repeated objections to Plaintiffs' proposed samplings and expert's opinions. Utilizing expert analysis, defendants can impeach plaintiff's statistical model of proof and focus the trial court on affirmative defenses, especially if it includes individualized evidence. Statistical methods may not be compatible with the nature of plaintiff's claims, and defendants should not hesitate to question plaintiff's sample size and expert's analysis. Samples must be supported by a party's liability expert, must be statistically appropriate and capable of producing valid results with a reasonable margin of error, and must be random.

Duran illustrates the misuse of statistical evidence in class litigation, where the margin of error was unreasonably high, 43%, and incompatible given the individualized claims.

Plaintiffs will no doubt claim the Supreme Court did not wholly preclude the use of sampling and surveys in class litigation; but *Duran* imposes restrictions on this practice. If statistical evidence is to be used as part of a trial plan for managing a complex class action, methods to be employed by class counsel must be presented, evaluated, and scrutinized early in the life of the case, and in any event no later than the hearing on class certification. Trial courts are not permitted to assume that the use of statistical methods will serve as a solution to unmanageability issues that would arise if each class member's differing circumstances were explored at trial.

As wage and hour class actions continue to arise in California, *Duran* presents a clear message from the judiciary that class litigants must acknowledge, and adhere to, due process in class certification proceedings and trial. The guidelines provided in *Duran* provide substantial support for defendants who can present individualized evidence when faced with class claims, and will reward defendants who can present this evidence early on in litigation.

Jennifer Weidinger is an Associate at Pettit Kohn Ingrassia & Lutz's Los Angeles office. Ms. Weidinger's practice focuses primarily on employment and retail litigation.

Employee or Independent Contractor Under California Law?

In *Ayala v. Antelope Valley Newspapers, Inc.* the California Supreme Court Reaffirms a Long-Standing Test But Leaves Open Questions Unanswered

By James A. McFaul, Esq.
Butz Dunn & DeSantis

By David D. Cardone, Esq.
Butz Dunn & DeSantis

On June 30, 2014, the California Supreme Court published its much-anticipated opinion in *Ayala v. Antelope Valley Newspapers, Inc.*, (June 30, 2014, S206874) __Cal.4th__. The Court examined the criteria for deciding whether, for purposes of wage-and-hour rules, a worker is an independent contractor or an employee, and reaffirmed application of the "right to control" test last addressed by the Court a quarter century ago in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 357. The Court then explored related questions concerning whether classwide litigation of that issue was appropriate.

The *Ayala* court restated that whether the hirer has the right to control the worker is the critical inquiry in deciding whether the worker is an employee or an independent contractor and that, for purposes of whether class litigation is appropriate, trial courts must analyze whether the question of the existence of a right to control can be decided on common proof.

In *Ayala*, the plaintiffs were newspaper carriers hired under form independent contractor agreements written by Antelope Valley Newspapers, Inc., the publisher of the Antelope Valley Press. Despite the terms of the agreements, the Plaintiffs claimed – on behalf of themselves and all similarly situated carriers of the Antelope Valley Press – that they were in fact *employees* deprived of various wage-and-hour protections.

The trial court denied the plaintiffs' motion for class certification on the basis that litigating all of the class members' status would entail "heavily individualized inquiries" about how each newspaper carrier was or was not controlled. In other words, the trial court focused on common evidence of whether control was *exercised* over the carriers and concluded that common issues would not predominate in resolving that question. The Court of Appeal reversed, finding that carrier-by-carrier variations in how the work was performed did *not* preclude class certification. The Supreme Court granted review on January 30, 2013.

In *Ayala*, the Court explained that the essential question to resolve the plaintiffs' class certification motion was: "[I]s there a common way to show Antelope Valley possessed essentially the same legal *right* to control with respect to each of its carriers?" (*Ayala* Slip op. at 10, emphasis added.) Put another way, the Court queried: Did Antelope Valley's rights vary substantially, "such that it might subject some carriers to extensive control as to how they delivered [the newspaper], subject to firing at will, while as to others it had few rights and could not have affected their manner of delivery even had it wanted, with no common proof able to capture these differences?" *Id.* According to the Supreme Court, "the trial court lost sight of this question" and focused improperly on variations in *how* Antelope Valley went about exercising its control over carriers and why the class was not subject to pervasive control by Antelope Valley relative to the means and methods of delivering the newspapers. *Id.* The Court explained,

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"Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved." *Id.* at 2. And the existence of a standardized hiring contract that appears to grant a uniform right of control goes a long way toward finding, upon common proof, that the right does or does not rise to the level of an employer/employee relationship.

Ultimately, the plaintiff class in *Ayala* prevailed, at least to the extent the Supreme Court ordered a remand to the trial court to consider the certification anew under the principles laid out in the Court's opinion. But the court made clear that, on remand, the trial court might again find that certification was not appropriate: "That some other analytical path might, on this record, support the same disposition matters not; because the reasons given are unsound, the ruling must be reversed." The *Ayala* Court explained why, under certain circumstances, focusing on the right to control will not yield a determination of the employee or independent contractor analysis through examination of common, rather than individualized, proof. This aspect of *Ayala* also draws directly from *Borello*.

The *Borello* Court explained: "[C]ourts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements" and that "[w]hile describing the right to control work details as the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." *Borello, supra*, 48 Cal. 3d at 350. That practical reality drove the *Borello* Court to prescribe consideration of the secondary factors, derived from the laws of agency, including: "(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." *Id.* at 351.

Ayala's restatement of the ongoing usefulness of the *Borello* test includes a restatement of the usefulness of the secondary factors. While form contracts were at issue in *Ayala* and the terms of those contracts dictated, critically, "the extent of Antelope Valley's control over what is to be delivered, when, and how, as well as Antelope Valley's right to terminate the contract without cause on 30 days' notice," *Ayala* recognizes (as *Borello* did) that not *all* contracts establish uniform rights of control, much less a right of control such as would be exercised as to an employee rather than an independent contractor. Thus, the Court explained that the parties' *course of conduct* – details revealed by consideration of the secondary factors – remains relevant. "While any written contract is a necessary starting point" in assessing whether there is a right to control, the practical reality is that "the rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." (Ayala Slip op. at 12)

Where such other evidence is present, or where the contract is devoid of any allocation of a right to control, then it remains appropriate for the court to consider "whether evidence of the parties' course of conduct will be required to evaluate whether such control was retained, and whether that course of conduct is susceptible to common proof – i.e., whether evidence of the parties' conduct indicates similar retained rights vis-à-vis each hiree, or suggests variable rights, such that individual proof would need to be managed." *Id.* In the wake of *Ayala*, then, it is clear that the parties' course of conduct remains entirely relevant when answering questions about whether a hirer had a significant right of control and, in the context of class actions, whether such a right was uniform among the proposed class.

While the *Ayala* Court restated the ongoing appropriateness of the *Borello* analysis to draw the distinctions between employees and independent contractors, the Court stopped short of answering open questions about that test's relationship with other analyses used to reach similar questions raised in the context of alleged violations of wage orders issued by California's Industrial Welfare Commission: "We solicited supplemental briefing concerning the possible relevance of the additional tests for employee status in IWC wage order No. 1-2001, subdivision 2(D) – (F). [Citations.] In light of the supplemental briefing, and because plaintiffs proceeded below on the sole basis that they are employees under the common law, we now conclude we may resolve the case by applying the common law test for employment, without considering these other tests. [Citation.] Accordingly, we leave for another day the question what application, if any, the wage order tests for employee status might have to wage and hour claims such as these, and confine ourselves to considering whether plaintiffs' theory that they are employees under the common law definition is susceptible to proof on a classwide basis." Such questions were raised by, but not answered in, the Court's prior decision in *Martinez v. Combs* (2010) 49 Cal.4th 35. Observers anticipated that *Ayala* might provide clarification of the relationship of these tests or announce new law in this area, but instead, *Ayala* merely amounts to an endorsement of the continued vitality and usefulness of the *Borello* test.

By James A. McFaul, Esq. and David D. Cardone, Esq. are partners of the San Diego based firm Butz Dunn & DeSantis, practice in the area of employment law and routinely defend class actions involving misclassification and wage and hour claims. They can be reached at: *jmcfaul@butzdunn.com* and *dcardone@butzdunn.com*.

Class(ic) Settlement Problems

By
Hon. Curtis E.A. Karnow
Superior Court of California, San Francisco

Last year I participated on a panel of state and federal judges discussing class actions. Not one of us had approved a class action settlement on the first effort. This suggests that it might be helpful to provide a list of issues which often seem to pose problems when counsel file motions for preliminary approval of such settlements. (I assume here that the class has not been certified as of the time of settlement.)

Generally, counsel should review the papers with great attention to detail. Problems often slip in because old forms are used, or conflicts are created as among various papers filed, such as variations in the definition of the class.

What follows is not a checklist of the important areas to cover in a motion for approval. Some potentially useful checklists are cited at the end of this note.

Finally, I must note that each case is unique. Problems listed below may or may not in a given case inhibit preliminary approval; many are matters of degree; and many judges will view things very differently than suggested here.

Generally

Counsel often use different language in different documents, such as in the notice, settlement agreement, claim forms, proposed orders, and so on, on the same issue. For example, I have seen conflicting measurements of time and deadlines. The papers might tell potential members that their claims or objections must be submitted by a certain date but that is described variously as "postmarked by" "mailed by" "served by" "sent in by" or "received by" the date. Sometimes there are conflicting requirements concerning the same issue, such as what must be done with claims or objections; e.g., mailed to all counsel (or the claims administrator), or filed, or *also* filed; or mailed to the court, or filed with the court, etc. Frequently there are differences, and sometimes major differences (such as the class period), among the class definitions in the proposed order, the proposed settlement, and the notice.

Settlement

Settlement agreements on occasion fail to cover potentially important issues. For example, if it provides for equitable relief (such as an injunction), how is this valued and how was that value arrived at? Are the parties merely endowing great value on just a promise to obey the law in the future? The agreement (or other explanation) should usually note how many "cents on the dollar" the settlement represents. This usually involves a description of the sums plaintiffs might obtain with an outright victory, and the fraction represented by the settlement. The court needs to know the size of the class and average or likely recovery for a class member; and the estimated range of high and low amounts.

Does the settlement create a true common fund? Or will defendant only agree to make a certain amount available, pay up to that amount, and have the rest revert back to the defendant? Although this would be unusual and perhaps a red flag, the papers should note if the employer share of taxes comes out of the settlement fund. The court will need to know how uncashed checks are handled. These might escheat to the state, or provide an additional payment to identified class members, or be treated otherwise.

Class notice & claims

Commonly, the class notice is not comprehensible to a lay person. It contains legalese such as "consideration," and Latin phrases such as "pro rata." Drafters should assume the notice will be read quickly, sometimes suspiciously (does it look like a bill or invoice?), by readers with an 8th grade education[1] (unless the class definition suggests otherwise). Lawyers often use undefined, difficult and vague terms such as 'proof of purchase' or 'proof of membership in the class' or 'Net Settlement Distribution.'

Readers may not be able to tell from the notice if they are included in the class, or the range of a possible distribution, how to send in claims, or exactly what information they must provide. Sometimes the notice fails to report the range of attorney's fees which might be awarded, or fails to note a potential impact on other class actions and on recipients' rights in those other cases (dueling class actions).

Some notices have bizarre and unnecessary obstacles to filing objections or making claims, such as asking for unnecessary information

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and then deeming any incomplete objection or claim as 'not filed.' Counsel should consider whether a claims procedure is needed at all: administrative costs may be lower and more class members may receive sums without it; so the papers should note for example why the administrator cannot simply mail out checks.

Often proposed procedures provide too little time to make a claim, or objection, or to opt out, or before money goes to *cy pres* recipient. (Generally 30 days is not enough.) The parties should discuss the various proposed methods of notice, making a record why publications or other fora are best suited to reach class members, and not others. Judges want to reach as many members as possible.

Memoranda

The papers must include a good presentation of the basis for the court to make the merits evaluation required by *Kullar v. Foot Locker Retail, Inc.,* 168 Cal.App.4th 116, 129 (2008). Frequently counsel state that *they* have carefully considered this, and I am sure that's true, but the trial judge *herself* is obligated to do so on the basis of the discovery and other investigations made by the parties. The discussions should show the strength and weakness of cases, such as an explanation of the parties' damages model or damages estimates under optimistic and pessimist views of evidence or law, discussing evidence on both liability and damages.

Release

Trial judges carefully scrutinize the release language. This may be too broad, using language that covers all claims in any way related to the subject matter of the suit or the relationship of the parties. Usually, releases should just be within the scope of the claims at issue in the case, i.e., within the scope of what res judicata would implicate were judgment for one of the parties to be entered. Sometimes releases are too broad or vague when they describe claims which "relate to" or "arose in connection with" or "that could have been brought" in the case. Problems may arise when the release can be read to extend to claims entirely unrelated to the lawsuit. Consider whether it is sufficient to have a release covering "claims stated in the complaint and those based on the facts alleged in the complaint." In short, releases should generally be tethered to the complaint's alleged facts.

In this connection judges look at the language waiving CC § 1542, if present. Often, at least read in isolation, the scope of that release is far broader than the parties actually intend or that a judge would usually adopt. Sometimes, the interplay of language from various sections has the (sometimes unintended) consequences of limiting or greatly expanding the scope of a release. For example, one might find the definition of "Released Claims" in ¶ X; then in ¶ Y we might read that class members "will release any claims related to the Released Claims...." This last "related to" clause may greatly, but to some unascertainable extent, broaden the scope of the release.

The PAGA (Private Attorney General Act) is a sometime difficult and emerging area of the law, and parties may have legitimate concerns on whether such claims are subject to release. A red flag may be raised when the complaint does not plead PAGA but the defense wants a PAGA release.

Payment to class representatives

The fact that a class representative might personally provide broader release than the rest of the class can't usually be a basis to justify any additional payments *out of the class fund*. At least prior to final approval, non-hearsay declarations will be needed on the hours spent, or other contribution made by class representatives, in order to justify a separate payment. Regardless of these contributions, a judge may pause when there are vast differences between the sums to be distributed to absent class members and the payments to the class representatives.

Objections

Counsel may suggest objectors file their objections directly with the court. At least in San Francisco's complex departments, this usually does not work: there is confusion as to what filing fees might have to be paid, and it is difficult for unrepresented class members to know what to do. Objections are usually handled by plaintiffs' counsel, who bundles them up and files them as a group in advance of the final fairness hearing. Perhaps the administrator might handle the task.

Class definition

Some definitions are so complex no one can figure them out; in particular, putative class members might never understand it. Sometimes the class period is badly defined: is it (i) through entry of judgment rather than (ii) tied to date no later than date of notice with opt-out opportunity? Care should be exercised in ensuring that the time period in the class definition is such that claims not extant as of the time of the preliminary approval (and thus not then known) will be released. If the geographic scope of the class extends beyond this state, the papers should explain how the court has jurisdiction.

Administrator

The court usually approves the administrator to accomplish a variety of work on behalf of the court. Is there a declaration explaining why the proposed administrator is competent, suitable and trustworthy?

Fees

While details need not be presented at the preliminary hearing, it is very useful to have an estimate of the approximate lodestar, and of course the court (and notice recipients) usually need to know the upper limit on the fees to be sought, including as a percentage of the settlement fund created.

Proposed Order re: Preliminary Approval

The suggested finding should be that the settlement amount appears to be within the 'reasonable range' of the settling party's proportionate share of comparative liability for a plaintiffs' injuries or damages. *North County Contractor's Assn. v. Touchstone Ins. Services*, 27 Cal.App.4th 1085, 1089-90 (1994). But ideally, the showing at this preliminary stage should be good enough for ***final*** approval (absent e.g., a valid objection), so as to minimize the risk of wasted time and money on new notices. The proposed order should set forth a procedure to calendar a hearing to enable the court's ultimate approval of (i) the sums to be paid for claims administration, (ii) the identity of a cy pres recipient, and (iii) a report on the final distribution.

Judges may balk at secrecy provisions, e.g., that the settlement and related papers are deemed confidential if the final approval is not obtained. Such provisions may conflict with California Rules of Court on sealing (CRC 2.550). It is inappropriate to include

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proposed orders that a settlement be deemed in "good faith" under CCP § 877.6, without any showing required for such a finding. Some judges use a form that enjoins absent putative class members from filing additional actions--even though at that point they may not be subject to the court's authority. It is not clear this is useful.

Cy pres

The briefs should note all relationships between (i) the *cy pres* recipient and (ii) any class representative or counsel or others involved in the case; and why *cy pres* must be an option. The profit or nonprofit status of the recipient should be noted, and unless it is obvious from the description of the recipient how the money will be used, the use of the money should be stated. The parties should explain the congruence between (i) interests of recipient and (ii) the reasons for the suit and interests of the class. (In employment class actions, *cy pres* may be unnecessary as employees can usually be identified.)

Resources/checklists

- *www.fjc.gov/public/home.nsf/autoframe?openform&url_r=pages/376*
- *www.lasuperiorcourt.org/civil/UI/ToolsForLitigators2.aspx*
- *www.lasuperiorcourt.org/civil/UI/pdf/ChecklistPreliminaryApprovalofClassActionSettlement7.31.12.pdf*
- *www.17200blog.com/orders/Judge_Brick_Guidelines_for_Counsel_re_Class_Settlement_Applications_2-18-2009.pdf*

Endnotes

1 *http://en.wikipedia.org/wiki/Literacy_in_the_United_States.*

The Honorable Curtis E.A. Karnow is a Superior Court Judge in the County of San Francisco. He serves in a complex litigation department and is the author or editor of books on civil procedure, discovery, experts, as well as computer technology and the law, and has served on Judicial Council committees concerning civil procedure including discovery and rules reform. Judge Karnow has submitted this article for publication both in *Verdict* magazine and a publication issued by the plaintiff's bar for the mutual benefit of defense counsel and the plaintiffs' bar seeking to resolve class action cases through settlement.

Around the Counties

Los Angeles County Report

Currently, only 24 of the 31 Personal Injury trial courts are available. Cases are getting out on a timely basis but that may change. Those elected to fill judicial vacancies will not start until January 1, 2015. PI cases are moving to IC departments, but at a much smaller rate than anticipated (about 2% rather than the expected 15%). If you want your case in an IC department, be sure to seek that transfer early to avoid the appearance of judge shopping. It is currently running about 2 months to set up an informal discovery conference in the PI courts.

LASC is working on rolling out a new website and hopes to have it available by September; the new website should offer an easier system for retrieval of filed documents. Similarly, a new electronic case management system is in the works; financed by a legacy budget reserve that was required to be spent down by the end of the new system will likely be implemented in the next 12-15 months and will include an e-filing system.

Smile, you're on camera! The Stanley Mosk Courthouse has introduced Video Conference for CourtCall appearances in several courts, including 4 civil courtrooms and 3 PI departments. For an extra $10 (in addition to the standard CourtCall fee) you can appear "virtually" before the Court if you have a webcam and sufficient bandwidth. The court expects the CourtCall video service will expand to more departments in the future.

A personal injury crash settlement program will be held the second week in September. Attorneys will receive notice and cases will be scheduled on a first-to-respond, first-served basis.

New rules are being implemented for motions. All documents filed in the Los Angeles Superior Court which have Exhibits and/or Declarations must now be tabbed and all deposition excerpts referenced in briefs must be marked on the transcripts attached as exhibits. Motions that do not comply may be rejected upon filing, or may be accepted for filing but denied at the time of review for failure to comply with these rules.

Orange County Report

BYOR! (Bring Your Own Reporter) As of July 1, the Court is providing reporters only for evidentiary hearings in the civil and probate courts. For non-evidentiary hearings you will be required to notify the court prior to the hearing that you are bringing a court reporter and either choose from a pre-selected list, or go through some procedures (available online) to bring in an "outside" reporter. This includes motions for summary judgment.

The number of civil judges in the OC continues to decline and, for the first time in a while, trials are not getting out. Reports indicate that the civil panel is down to 20 Judges, from 26 previously. The Courts are also combating the practice of pre-reserving motion dates by mandating that papers be filed within 24 hours of reserving the date or it's lost. Motions for summary judgment are exempted.

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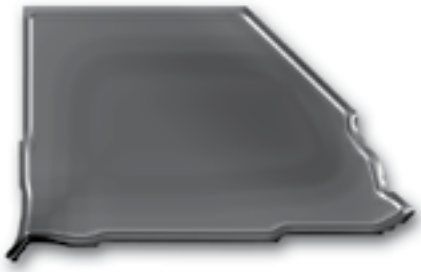
Riverside County Report

Riverside Superior Court is switching to an Independent Calendar ("IC") system. All unlimited civil cases filed in Riverside county will now be assigned for total case management, with all law and motion, trial and post trial matters assigned to a single department (Depts. 1, 3, 4,5, 6,7, and 10.). All limited civil matters are assigned to Department 11.

Senate Bill 1190, which would have provided funding for an additional 50 judges statewide, including 9 judges each to both Riverside and San Bernardino Counties, died in committee last month. This is unfortunate news for Riverside County which, according to Presiding Judge Mark A. Cope, has a "verified need" for 138 additional judges to join the 76 total judicial officers.

San Bernardino County Report



The brand-new San Bernardino Justice Center is now open for business. The new state-of-the-art Justice Center, located in Downtown San Bernardino across the street from the old annex, has 11 stories, 35 large courtrooms, two "hearing" rooms for mediations, beefed-up security, and a host of new technological additions. Each courtroom comes equipped with its own ELMOS, TVs and projectors; court calendars are on digital display both in the lobby and outside the courtrooms; and the lobby has five separate security lines to get you to your hearing on time.

San Diego County Report

San Diego Superior Court Judge Cynthia A. Bashant is now District Court Judge Bashant, for the United States District Court for the Southern District of California. Judge Bashant officially retired from the San Diego Superior Court bench in May, where she had served for 14 years. In September, 2013, President Obama nominated Judge Bashant to take the seat on the Southern District which had been vacated by former District Judge Irma Gonzalez. Judge Bashant's nomination was finally confirmed in late April by a vote of 90-4 and she received her judicial commission on May 8, 2014. Construction on the new San Diego County Courthouse is up and running. The new 22-story building has a long way to go however, with some reports suggesting it may not be open until 2017.

Check the local rules over the next few months. San Diego approved a set of revised local rules that go into effect on January 1, 2015. To see if the changes affect your practice, go to the Rules tab at *www.sdcourt.ca.gov*.

Santa Barbara County Report

Governor Brown recently announced the appointment of Michael Carrozzo to Judge of the Santa Barbara Superior Court. Judge Carrozzo, 48, of Santa Barbara, a former U.S. Army Captain and Judge Advocate, served as a special assistant U.S. Attorney before becoming a Santa Barbara County District Attorney, where he has served since 2007. Judge Carrozzo is a graduate of UCLA and Loyola law school. He fills the vacancy created by the retirement of Judge George Eskin.

Ventura County Report

Governor Brown has appointed Rocky J Baio to a judgeship in the Ventura County Superior Court. Judge Baio, 60, of Ojai, has served as a commissioner at the Ventura County Superior Court since 2010. He was a partner at Rosenmund Baio and Morrow from 1987 to 2010, where he was an associate from 1982 to 1987. Baio was an attorney in private practice from 1979 to 1982. He earned a Juris Doctor degree from the Western State College of Law and a Bachelor of Arts degree from the University of California, Los Angeles. He fills the vacancy created by the retirement of Judge Barbara A. Lane.

Ventura County Superior Court is also beefing up its electronic access to case materials. As of June 18, electronic copies of all unlimited civil cases will be scanned and available for viewing, at least for a short time.

defense successes april – august

Sean D. Beatty
Beatty & Myers, LLP
Pop v. Toyota Motor Sales, U.S.A., Inc.

Raymond L. Blessey
Taylor Blessey LLP
Brisco-Eamer v. Soldo
Juarez v. Machicado

Raymond Blessey
Patricia Tazzara
Taylor Blessey LLP
Starnes v. Moscos

Kurt Boyd
Law Offices of Kurt Boyd
Valdovinos, et al. v. Monge, et al.

Benjamin Coats
Melanie Ely
Engle, Carobini & Coats
Rizk v. Vera
Bello v. Hernandez

John A. Delis
Long & Delils
Wallerstein v. Williams Pipeline Contractors, City of Beverly Hills, et al.

Richard P. Dieffenbach
Clifford L. Schaffer
Schaffer, Lax, McNaughton & Chen
Kurtis Todd Suzuki v. Sport Chalet, Inc.

Mark V. Franzen
Carroll, Kelly, Trotter, Franzen & McKenna
Groves v. Davtyan, M.D.
Anderson v. Sutherland, M.D.

Michael G. Hogan
Michael G. Hogan & Associates
Crooks v. Salley

Margaret M. Holm
Bonne, Bridges, Mueller, O'Keefe & Nichols
Alldridge v. Behavioral Health Services, Inc.
Marquez v. Honzen Ou, M.D.

Brian Kahn
Chapman, Glucksman, Dean, Roeb & Barger
Gonzalez v. Coyle, et al.

Elizabeth L. Kolar
Kolar & Associates, Inc.
Nowparast v. The Auto Gallery

Marjorie E. Motooka
Fidone & Motooka, LLP
Moorcraft v. Diaz

Frank W. Nemecek
Nemecek & Cole
LAIBCO, LLC. v. Strapp & Strapp, et al.

David J. O'Keefe
Bonne, Bridges, Mueller, O'Keefe & Nichols
Grimes v. Delamarter, et al.

Daniel R. Sullivan
Sullivan Ballog & Williams, LLP
Eukovich v. The Catholic Diocese of Orange

N. Denise Taylor
Jennifer A. Scher
Taylor Blessey LLP
Ihly v. Regents of the University of California

Sheila S. Trexler
Neil, Dymott, Frank, McFall & Trexler APLC
Frost v. Boghosian, D.O.

Michael A. Zuk
Herzfeld & Rubin LLP
Labostrie v. Uzun, M.D.

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amicus committee report

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

RECENT AMICUS VICTORIES

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

Namikas v. Miller (2014) 225 Cal.App.4th 1574. Harry Chamberlain, Meyers Nave, Ben Shztz, Manatt, Phelps & Phillips, and Don Willenburg, Gordon & Rees, submitted a successful joint request on behalf of ASCDC and the Association of Defense Counsel to have this favorable legal malpractice decision published. The opinion addresses "settle and sue" legal malpractice actions where the client settles the underlying action and then sues their attorney claiming that the settlement could have been better, or that they would have received a better result at trial. The trial court granted the defendant's motion for summary judgment, which was affirmed on appeal.

Moua v. Pittullo, Howington, Barker, Abernathy, LLP (2014) __ Cal.App.4th __ [2014 WL 3591548]. Ken Feldman, Lewis Brisbois, submitted a successful request for publication in this legal malpractice action. In this case, the former client brought a malpractice action against a law firm arising out of an underlying family law action in which, after former client rejected a settlement offer, it was determined that former client was not a putative spouse and was entitled to nothing from alleged husband. The former client then sued her counsel for legal malpractice. The Court of Appeal affirmed holding that there was no causal connection between the alleged malpractice by the law firm and the client's loss.

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*, docket no. S199119, pending in the California Supreme Court. 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, Polsinelli LLP, submitted an amicus brief on behalf of ASCDC.
2. *Rashidi v. Moser*, docket no. S214430, pending in the California Supreme Court. This involves the interplay between MICRA and Prop 51. The issue as framed by the court on its website is: "If a jury awards the plaintiff in a medical malpractice action non-economic damages against a healthcare provider defendant, does Civil Code section 3333.2 entitle that defendant to a setoff based on the amount of a pretrial settlement entered into by another healthcare provider that is attributable to non-economic losses, or does the statutory rule that liability for non-economic damages is several only (not joint and several) bar such a setoff?" Harry Chamberlain, Meyers Nave, submitted an amicus brief on behalf of ASCDC.
3. *Winn v. Pioneer Medical Group, Inc.*, docket no. S211793, pending in the California Supreme Court. Plaintiffs' claims are against defendant physicians for elder abuse arising out of the care provided to the plaintiffs' deceased mother, who died at the age of 82. The

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Amicus Committee Report – continued from page 38

Court of Appeal had held that elder abuse claims are not limited to custodial situations. The Supreme Court has framed the issue presented as follows: "Does 'neglect' within the meaning of the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15657) include a health care provider's failure to refer an elder patient to a specialist if the care took place on an outpatient basis, or must an action for neglect under the Act allege that the defendant health care provider had a custodial relationship with the elder patient?" Harry Chamberlain, Meyers Nave, submitted an amicus brief on behalf of ASCDC.

HOW THE AMICUS COMMITTEE CAN HELP YOUR APPEAL OR WRIT PETITION AND HOW TO CONTACT US

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

1. *Amicus curiae* briefs on the merits in cases pending in appellate courts.
2. Letters in support of petitions for review or requests for depublication to the California Supreme Court.
3. Letters requesting publication of unpublished California Court of Appeal decisions.

In evaluating requests for *amicus* support, the Amicus Committee considers various issues, including whether the issue at hand is of interest to ASCDC's membership as a whole and would advance the goals of ASCDC.

If you have a pending appellate matter in which you believe ASCDC should participate as *amicus curiae*, please feel free to contact any committee or Board member. The amicus committee members are:

Steven S. Fleischman (Committee Chair)
Horvitz & Levy
818-995-0800

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

J. Alan Warfield
Polsinelli LLP
310-203-5341

Joshua Traver
Cole Pedroza
626-431-2787

Jeremy Rosen
Horvitz & Levy
818-995-0800

Harry Chamberlain
Meyers Nave
916-556-1531

Ben Shatz
Manatt, Phelps & Phillips
310-312-4000

Michael Colton
The Colton Law Firm
805-455-4546

David Pruett
Carroll Kelly Trotter Franzen & McKenna
562-432-5855

Sheila Wirkus Pendergast
Hennelly & Grossfeld
310-305-2100

Susan Brennecke
Thompson & Colegate
951-682-5550

Ted Xanders
Greines, Martin, Stein & Richland LLP
310-859-7811

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