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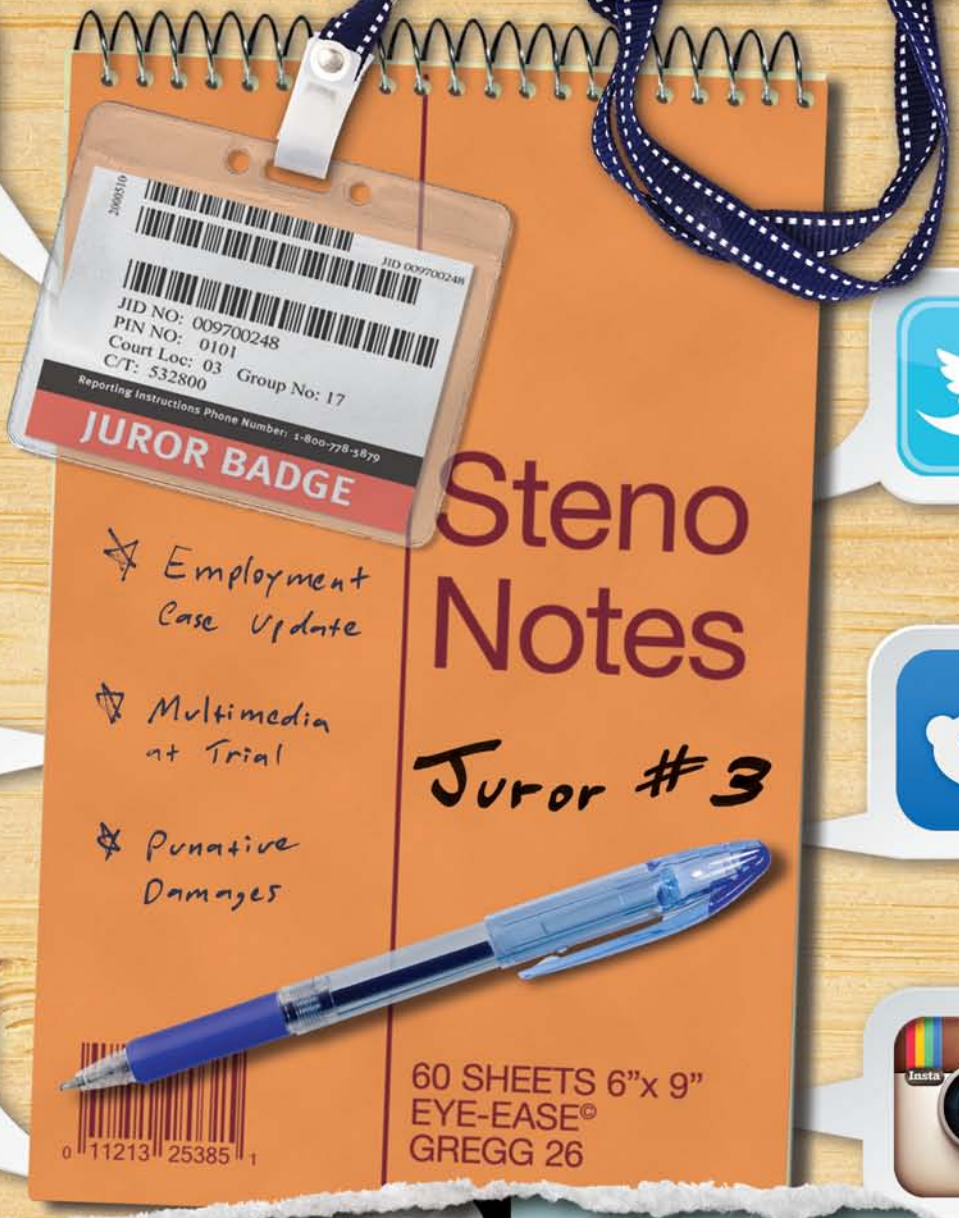
What Can Go Wrong and What to Do About It



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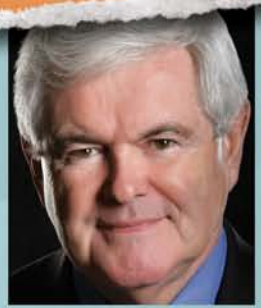

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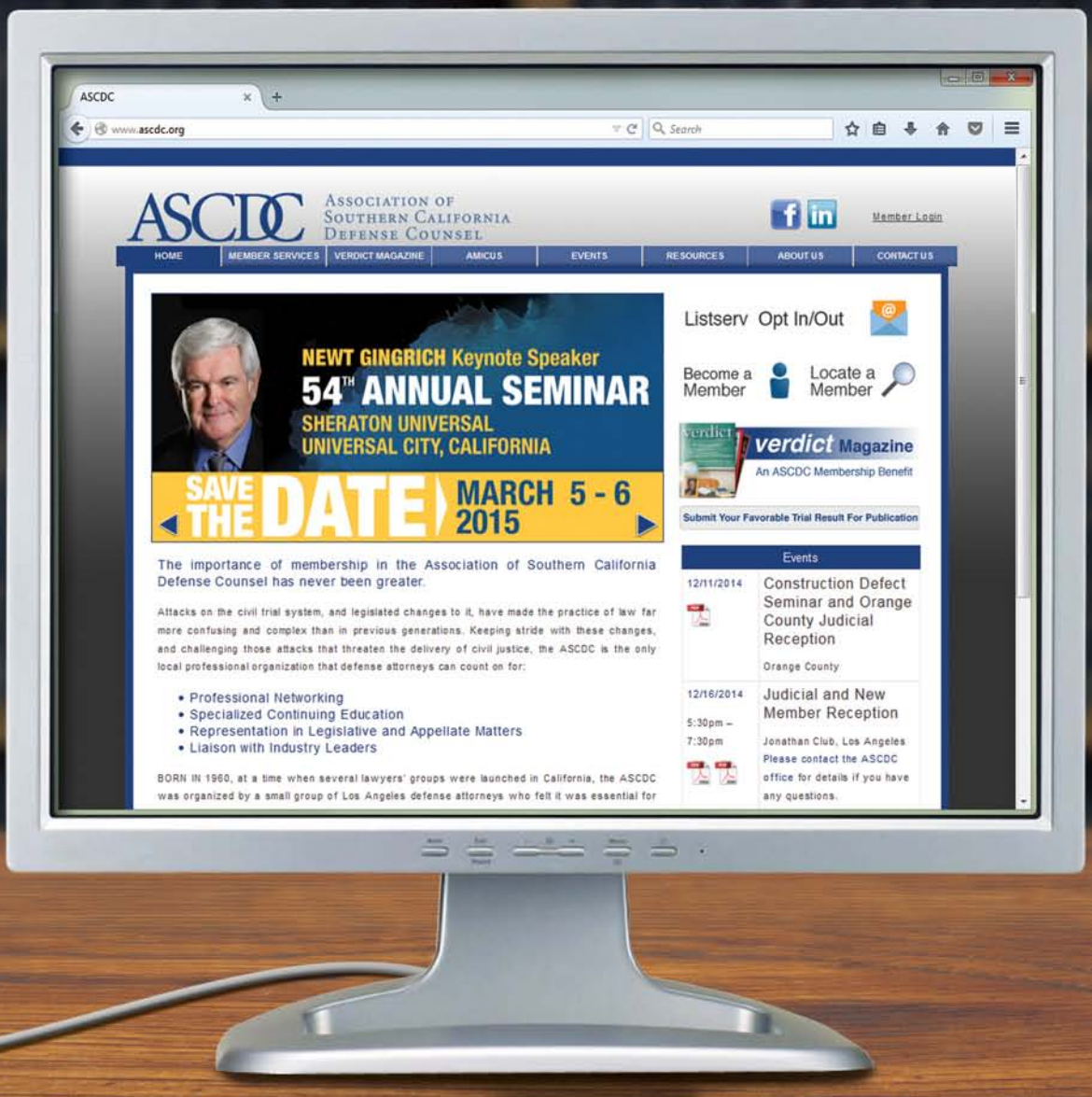

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10 Character Traits for Lawyers

Robert A. Olson
ASCDC 2014 President

My son was a Boy Scout (more precisely, he is an Eagle Scout, it's something that stays with you, says the proud father). The scouts have a 12-point "Scout Law": Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, and Reverent. His scoutmaster sometimes thought-provokingly asked if there were a thirteenth Scout Law point what should it be (Tolerant, Generous, etc.) It's an interesting exercise for lawyers. What principles should a lawyer strive for?

The first two I think can be plagiarized (lawyers call plagiarism adhering to precedent) from the scouts: Trustworthy and Loyal. The practice of law all starts with trustworthiness. The jury has to trust the lawyer, it has to trust the evidence, it has to trust the witnesses. It is the lawyer's job to build that trust. And, the court has to trust that the lawyer's legal and factual representations to be accurate and that the result advocated is both legally correct and fair. Of course, the client has to trust the lawyer. But the really good lawyers know that they need to build trust also with third parties, opposing witnesses and opposing counsel.

The lawyer also has to be loyal. That means loyalty not only to the client, but also to the judicial system as a whole. One can't allow loyalty to a client to outweigh loyalty to seeking the truth in a fair process.

Obedient and Courteous can also be cribbed from the scouts. Obedient is self-evident. The lawyer who deliberately disobeys a court order or client wishes for no good reason is inviting trouble. And, courtesy applies not only to the courts and those in power, but also to opposing counsel, witnesses, the public (no matter what their background) and court staff. Observe the well-seasoned veterans in any courtroom. They are on good terms with their opposing counsel. And they are on good terms with the court staff. They recognize that courtesy to the court staff both reflects well on them and makes the whole process work better. (The cognate is that court staff's attitudes often emanate from the judicial officer or officers in charge. A courteous and accommodating staff reflects a judicial officer who believes such courtesy is important; a staff that is curt and difficult to work with is often that way because the judicial officer creates that expectation, no matter how friendly the judge may seem on the bench).

Brave also needs to be in the lexicon of lawyer principles. It is the lawyer's job to tell the client (and sometimes the court) not what he/she/it wants to hear but what he/she/it needs to hear. A wise lawyer once advised that "your clients subconsciously make you the guardian of their morals." (Boyd, How To Succeed As A Lawyer: 21 Steps (Nov. 1962) Texas Bar Journal 941, 992 *www.texasbar.com/Content/NavigationMenu/ForLawyers/ResourceGuides/ForNewLawyers/RolandBoydArticle.pdf.*)

To these five, I would add Creative, Efficient, Alive, Neurotic and Humble. Creative doesn't mean making it up as you go along, it means recognizing problems and finding an alternative solution. At heart lawyers are problem solvers. Creative and Brave together are daring and intrepid. Sometimes you have to put the case on the line based on a theory that in your heart you know is right. That is how the law is made and developed. Efficient is not just a billing goal, it is an attribute of good lawyers. The efficient lawyer gets to the heart of the problem, addresses it and is done. The best lawyers don't require or want needless reams of discovery or endless testimony on tangents. They get to the nub of the issue. Abraham Lincoln as a lawyer was famous for conceding 90 percent of the other side's case but then focusing on and disposing of the 10 percent that won the case for him.

What do I mean by Alive? I mean being part of the rest of the world. Real lawyers have real lives. They don't spend every moment in the office or thinking about the law or a case. Law is about how people in the real world relate to each other and the world around them. To be able to understand, let alone to help resolve, such issues, the lawyer needs to be a part of the world around him or her and to connect to it and to other people. The really good trial lawyers are the ones with big personalities who are alive in the moment and yet have interesting lives outside the law too.

Neurotic? Yes, neurotic. Every successful lawyer I know has a streak of obsessive/compulsive behavior. Will that brief really get filed on time? Have I completely dotted all of the I's and crossed all of the T's to prove the fact that I need? A little fear is necessary to keep the sharp edge.

And last, but not least, Humble. It seems that it is always when we think that we are on the top of the world that we slip up. It is well worth remembering the old Roman adage that all glory is but fleeting.

Well, that's my 10 character traits for a lawyer. I'd be interested in yours.

The Niagara Falls of Legislation

Michael D. Belote
Legislative Advocate
California Defense Counsel

In a state as codified as California, a person might reasonably ask what subjects could possibly be left which require legislation. After all, the Code of Civil Procedure alone covers *twenty-four volumes*. Each year, however, the California Legislature once again earns the reputation as a bill factory. When the dust cleared at end of the 2014 legislative year, more than 900 new laws were enacted and signed into law to, ahem, improve our lives.

Given this volume, the month of September is no time to be Governor of California. At the end of the legislative session on August 30, 769 bills were forwarded to Governor Brown for signature or veto. Under the state constitution, he had until September 30 to act on these bills. This is no easy feat: the Governor receives an individualized presentation on each of the 769 bills in a one-month period. He vetoed approximately 150, signing the approximately 620 remaining bills. When added to the bills signed throughout the year, the total for 2014 is the 900 figure mentioned above.

The California Defense Counsel monitored 120 bills for the 2014 year. Of these, 58 were signed and six were vetoed. The bills covered virtually every substantive area of law within defense practice. As in recent years, employment law was clearly one of the most active areas of legislation. Over varying degrees of business opposition, Governor Brown signed three particularly significant bills relating to employment: AB 1522 (Gonzalez), which requires every public and private employer in California to provide a minimum number of paid sick days, within a very prescriptive set of requirements; AB 1897 (Hernandez), which could make employers liable for unpaid wages of employees of independent contractors working on the employer's premises; and AB 2617 (Weber), which employers fear could invalidate arbitration clauses when FEHA claims are included in employment disputes.

Privacy was another area of law attracting major interest. Signed into law were AB 1256 (Bloom), expanding the definitions of actual and constructive invasions of privacy where premises are entered for the purposes of recording sounds and pictures; AB 1356 (Bloom), expanding the definition of stalking and causing emotional distress; AB 2306 (Chau), also dealing with the use of devices to commit constructive invasions of privacy, and in recognition of our modern world, AB 2643 (Wieckowski), relating to sexting.

The medical area, broadly defined, was busy in 2014 as well. Although obviously no MICRA changes were enacted by the legislature or by voters, the liability, regulation and insurance relating to residential care facilities were addressed by AB 1523, AB 2171, and AB 2236; pharmacists were covered by AB 1535 and SB 960, and end of life notifications were the subject of AB 2139.

These bills are merely illustrative of the sheer range of issues relevant to defense practice addressed by the legislature in 2014. Other bills related to premises, public entities including schools, real property, contracting for services, and much more. Each of the bills, including content, analyses, votes and more is available to ASCDC members through the website.

When the new legislature is sworn in for the 2015-2016 session, the waterfall of legislation will begin again. New bills for next year will be subject to an end of February deadline, but it is a virtual certainty that bills will be introduced on disability access, liability under *Howell v. Hamilton Meats*, demurrers, toxic torts, Section 909 offers, partial summary adjudication, discovery, SLAPP, use of electronic recording.

These bills will be considered by a legislature that is at once very new to the system (a huge percentage have served for two years or less), more moderate (some estimates are that as much as half of the Assembly Democratic caucus could be identified as "moderate" rather than "progressive"), and less trained in the law (the number of lawyers in the legislature continues to decline).

More in the spring when the onslaught of legislation has been introduced....

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Let's Get Away For the Weekend

Patrick A. Long

Let me suggest something that may perhaps drive a large percentage of our membership totally bonkers. Most certainly you have heard this suggestion before, probably many times. I'm suggesting that each of us find a desert island with a high class resort where the most expensive room is $100 a night, where the cuisine is spectacular, the natives are all beautiful, clothing optional, and Taylor Swift, Tony Bennett, U2 and Katy Perry provide the free nightly entertainment. Would you be interested in hanging there for a week? Oh yes, let me add a last proviso, there is no Internet/e-mail access, no Wi-Fi, no cell phone use, nada, nothing. You'll be in paradise, and cut off from the rest of the world, from clients, friends, family (well, your spouse or best friend gets to accompany you), the media, everything. Could you do it? Would it be enjoyable? Probably not.

My suggestion specifies a week, but I've discussed the concept with a few of our members who have conducted a kind of similar experiment for just a weekend, of course minus the desert island, the resort, the spectacular cuisine and the entertainment. What they did was to unplug their computers and stow the tablets, cell phones and assorted electronic gear from Friday night through Monday morning. Six folks I spoke to tried this, and while the results ranged from a near nervous breakdown to a sense of truly total relaxation, the greater number, four, were not comfortable, were on edge, and worried about what was going on that they didn't know about.

Let's parse this out a little bit. Thirty years ago many of us didn't know what a byte was, and a mouse was nothing more than a rodent. Today our lives are, to a certain extent, ruled by electronics of one sort or another. It's truly a two-edged sword, which of course means that electronics bring a great deal that is good and pleasurable to our lives, but incorporates bad things as well. I know, I know, life is indeed a compromise. I accept that, but what we're trying to do here is to weigh the good stuff with the bad, and see which side outweighs the other.

I won't waste your time by listing all the wonderful ways in which electronics benefit our lives, how they increase productivity, keep us in touch, eliminate the need for paper, supply never-ending blocks of information, etc. The problem seems to be that after years of availing ourselves of these benefits most of us seem to have lost the ability to disconnect from receiving these benefits when appropriate, like maybe on the weekend, or just for an evening.

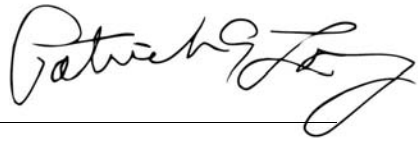
Additionally, the rise of the electronic colossus has, to a certain extent, eliminated other forms of communication, specifically for one, the letter. Oh of course we still send typed business letters from our offices, although not as often as we used to, given the modern usage of e-mails to communicate business matters. But some of us are old enough to recall actually putting a pen to paper to communicate personal, family and social matters. Such cursive letters have gone the way of the soda fountain and the five and dime store.

Before you start to label me Long the Luddite let me assure you that although I still use a fountain pen at my desk I am truly devoted to keeping up with all the continuing progress of our electronic media, and I am closely attuned to many web sites devoted to literature, history, things Irish, movies, music, political matters and the law. But as with my colleagues mentioned above who became nervous when disconnected from their sources of information, I sometimes worry that I'm too connected, that I'm never unconnected. From the time I dress in the morning I'm never without my cell phone, which as we all know, is much more than a cell phone. It receives and sends e-mails, logs onto the Internet, texts, and does many other tasks. Am I doing something wrong? Do we all need some separation? Should we make ourselves disconnect periodically? Is it the correct thing to do to wear a phone all the time, or always have our tablets turned on?

I'll be darned if I know what the answers to these questions may be. I can only say that the electronic revolution has, in my opinion, made all our lives mostly better, not worse. And I'm happy to be, at the touch of a button, connected with family, friends, clients, colleagues, the courts, and the world of information. I just don't know how much connection is too much connection. I appreciate that psychologists, business consultants, and the like are studying these issues, but hey, I'd rather hear your thoughts on these questions than theirs.

Electronically yours,

Patrick A. Long
palong@ldlawyers.com



Tracking Trends in California Employment Law:

Alexander v. FedEx Ground Package Sys., Inc. and *Patterson v. Domino's Pizza*

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By David D. Cardone, Esq.

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On August 27, 2014, a three judge panel of the United States Court of Appeals for the Ninth Circuit published its ruling in *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 984 (9th Cir. 2014), finding that FedEx was the employer of the named plaintiffs and approximately 2300 similarly situated delivery route drivers who claimed violations of certain rights that could be asserted only by employees. The court agreed with the plaintiffs on the question of their employment status, even though the drivers had signed independent contractor agreements with FedEx. The *Alexander* opinion continues the trend in the Ninth Circuit as it interprets California's law to create an employment relationship where a right to control the workers is shown. Meanwhile, the California Supreme Court's recent decision in *Patterson v. Domino's Pizza, LLC,* 60 Cal. 4th 474 (2014), found *no* employment relationship, despite indicia of general control over employees' work. Both cases offer insights into how California employment law questions regarding a company's status as an employer are decided, especially in the context of franchise relationships.

The *Alexander v. FedEx* lawsuit was filed and certified as a class action for purposes of resolving certain claims, and was consolidated with other similar cases for multidistrict litigation (MDL). One of two companion cases arising in California and Oregon, the case has a complicated procedural history. After certification, the trial court denied the plaintiffs' motion for summary judgment while granting FedEx's motion. Because of unique aspects of California employment law, the case resulted in cross-appeals by both parties on the question whether FedEx had misclassified the workers as independent contractors rather than employees. The Ninth Circuit reversed the trial court rulings in favor of FedEx, using language that provides a cautionary tale to companies who believe they are entitled to rely on express agreements with workers to provide services on an independent contractor basis.

Each of the drivers who were class members in this case had signed a version of an independent contractor agreement with FedEx. These agreements, termed "Operating Agreements" by FedEx, provided that the drivers were not employees and that "no officer or employee of FedEx shall have the authority

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to impose any term or condition [on the driver] which is contrary to this understanding." The Agreement also set forth that drivers retained authority to determine the means and methods of doing the work and that FedEx could not "prescribe the hours of work, whether or when the [driver] is to take breaks, what route the [driver] is to follow," and so on. The Court found that despite the relative freedom guaranteed to the workers by this language, day-to-day life as a FedEx driver was just the opposite.

The *Alexander* Court pointed out that FedEx did not merely dictate the desired end of the workers' performance (timely delivery of packages), but also precisely dictated the manner and means by which the end was to be accomplished. FedEx assigned drivers to specific geographic service areas and insisted that work be done each day that FedEx was open. Drivers were required to supply their own truck, which normally would be an indicator of independent contractor rather than employee status. But the trucks had to display FedEx colors and logos, had to be outfitted to FedEx's prescribed criteria for shelving, and drivers had to use that vehicle to deliver all assigned packages each day. Drivers were required to register and maintain their vehicles to FedEx's standards. Despite owning their trucks, drivers were not permitted to use the trucks for their own purposes without first removing all FedEx logos or identifying marks. Drivers were encouraged to leave their trucks at the FedEx facilities in order to have them loaded by FedEx. Drivers were required to use scanners that were unavailable from any source other than FedEx. Also, drivers were required to wear FedEx uniforms. FedEx even regulated drivers' appearance and grooming.

As for the job itself, the Court noted that FedEx carefully and stringently insisted on when and how packages were delivered and that regulation extended to the drivers' work days. FedEx required the drivers, who typically worked 9.5-11 hours each day, to work heavily regulated schedules, and FedEx limited the ability of drivers to alter their schedule or get help from other drivers. Drivers received training by FedEx, and were subjected to a code of conduct reflective of FedEx's image as a high quality service. FedEx managers regularly rode with drivers along their routes to ensure compliance with such regulations. Managers observed driver conduct down to minutiae including whether drivers worked "with a sense of urgency" and observed whether drivers held their truck keys properly. Drivers were also subjected to detailed "safe driving standards." All this despite insisting that the drivers were independent contractors.

Applying California's long-standing common law "right to control" analysis that is typically associated with the California Supreme Court's 1989 decision in *S.G. Borello & Sons v. Department of Industrial Relations*, 48 Cal.3d 341, the Ninth Circuit panel focused on whether the record demonstrated that FedEx retained all necessary control over the work done by the drivers. However, in explaining its analysis, the Court relied not only *Borello* but also on the California Supreme Court's 1970 decision in *Tieberg v. Unemployment Ins. App. Bd.*, 2 Cal. 3d 943 (1970). Interestingly, in the recent *Ayala v. Antelope Valley Newspapers* decision, 59 Cal. 4th 522 (2014), the California Supreme Court also relied upon *Tieberg* in explaining why demonstrating a right to control is critical to demonstrating an employment relationship but that other "secondary" factors may also be considered. These "secondary" factors allow consideration of a variety of individualized aspects such as whether there is an entrepreneurial upside to the relationship and whether the work requires supervision or specialized skill. The *Alexander* Court ultimately concluded that FedEx retained such "a broad right to control the manner in which its drivers perform their work" that the drivers were FedEx's employees *as a matter of law*.

In *Alexander*, the parties agreed that the *Borello* analysis was the correct means to resolve their dispute. They also largely agreed on the relevant facts, but disagreed on whether those facts analyzed under *Borello* demonstrated that the drivers were FedEx's employees. Thus, while marking a bad day for FedEx, the *Alexander* opinion should not be said to have expanded California's common law rule for defining an employment relationship under *Borello*. Employers may, in fact, be able to contrast *Alexander* in other cases to show that arrangements lacking such a

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high degree of control should not give rise to employer status.

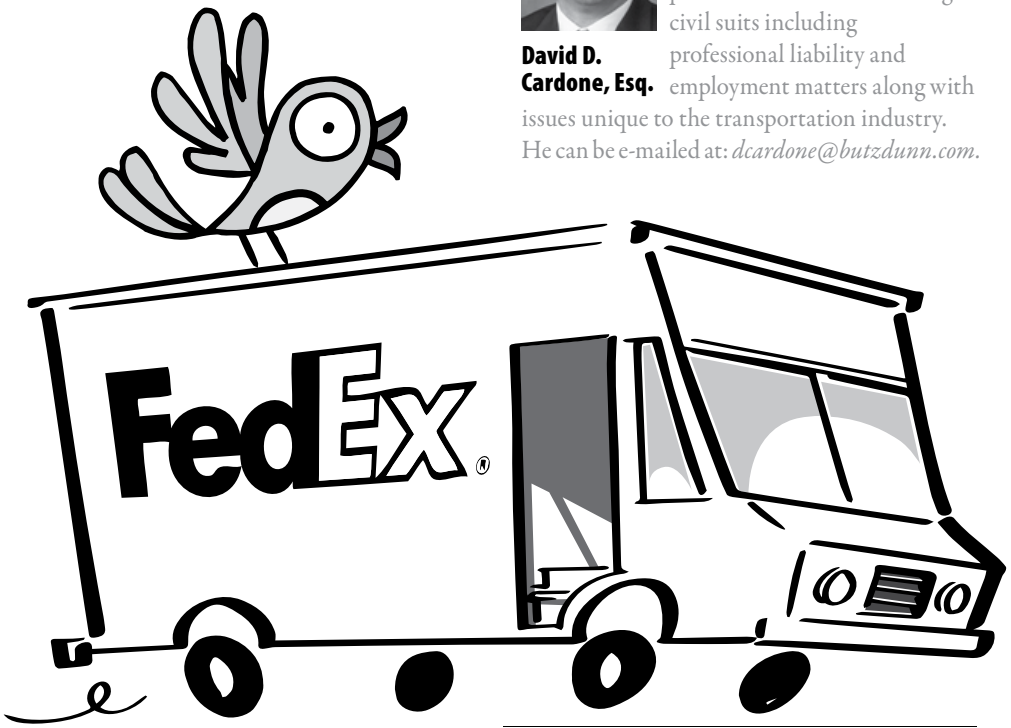
Questions will undoubtedly arise about the extent to which an employment relationship exists when the plaintiff proves *some but not all* of the features of employment described in *Alexander*. Defendants should be leery of any jury instruction or legally improper argument to the jury that suggests *each* one of those features is sufficient to support a finding that the plaintiff is not an independent contractor. On that question, counsel may find guidance in *Bowman v. Wyatt*, 186 Cal.App.4th 286 (2010), in which the Court of Appeal reversed a verdict of over $15 million in a personal injury action because of instructional error on the question of employment status. The plaintiff in *Bowman* sued the driver of the dump truck that caused his injury, as well as the city for whom the driver was working at the time of the accident, alleging negligence and vicarious liability. The plaintiff prevailed and, on appeal, the appellate court held the judgment against the city could not stand because the standard CACI form jury instruction on employment status was erroneous: "CACI No. 3704, given in the present case, did not correctly instruct the jury that it must weigh [multiple] factors to determine whether [plaintiff] was an employee or an independent contractor. Instead, it told the jury that if it decided that the City had the right to control how [plaintiff] performed his work, then it must conclude that [plaintiff] was a City employee. In other words, it told the jury that the right of control, by itself, gave rise to an employer-employee relationship." In other words, the instruction did not capture existing precedent on the issue, which requires a more nuanced analysis. Given that explanation, *Bowman* may provide a useful counterpoint to arguments that rely upon the outcome of *Alexander*.

In something of a coincidence, a day after *Alexander* was decided, the California Supreme Court published its opinion in *Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474 (2014), reh'g denied (Sept. 24, 2014). The *Patterson* majority focused on questions about whether and how franchisors might be vicariously liable in tort to an employee of a franchisee who alleged sexual harassment claims and violations of California's Fair Employment and Housing Act. The majority opinion in *Patterson* turned on application of traditional agency principles and found the notion of vicarious liability by the franchisor to be fundamentally inconsistent with the franchise relationship. That was true even though the plaintiff demonstrated the "imposition and enforcement of a uniform marketing and operational plan" by the defendant company. The franchisor instituted a computer training program covering "pizza making, store operations, safety and security, and driving instructions." The franchisor required use of a computer system that the franchisor could access "in order to track certain sales, such as those involving product promotions and repeat customers." The computer system "also contained employee information that franchisees could use to prepare work schedules and payroll documents" The franchisor provided a franchise handbook, and a Manager's Reference Guide requiring franchisee employees: (1) to be trained under programs provided or approved by the franchisor; (2) to submit time cards and reports; (3) to satisfy minimum wage and experience standards to serve as delivery drivers; (4) to wear the franchisor's uniforms; (5) to adhere to detailed clothing and accessory guidelines; (6) to meet certain grooming and hygiene standards; and (7) to refrain from consuming alcohol or illicit drugs, and to limit tobacco use, while working or on store premises. The franchisor's area managers undertook visits and inspections through which they would "coach franchisees and employees on problems" they observed with "pizza making, food safety, product packaging, store cleanliness, employee hygiene, customer orders, consumer complaints, and delivery procedures." They also offered "advice" that franchisees fire employees whose substandard performance endangered the franchisor's brand or the franchise.

Justice Werdegar, writing in dissent, concluded that the existence or non-existence of a right to control by the franchisor should have been the primary focus. Justice Werdegar explained that the plaintiff in *Patterson* appeared to have raised a triable issue of fact on that question. Her opinion may provide a roadmap for future plaintiffs to frame arguments of franchisor liability in such cases by focusing on joint employment analyses. Defendants should be on the alert for such theories, and might point out that having been espoused in a dissenting opinion, they were not accepted by the Supreme Court majority, and thus should not be adopted in lower courts.

David D. Cardone, Esq.

The author is a shareholder of Butz, Dunn & DeSantis, APC, a San Diego-based civil litigation boutique. His practice focuses on defending civil suits including professional liability and employment matters along with issues unique to the transportation industry. He can be e-mailed at: *dcardone@butzdunn.com*.



Social Media and Juries:

What Can Go Wrong and What to Do About It

By Justice (Ret.) J. Gary Hastings and John G. McCabe, Ph.D

You have just won a major victory by obtaining a defense verdict by a vote of 9-3 for your corporate client, avoiding a claim in excess of $50 million. Within a couple weeks you are served with the other side's motion for new trial based on juror misconduct. The supporting declarations establish that one of the jurors failed to disclose during voir dire that recently she and her company, of which she was a part owner, had successfully been sued on a claim similar to the one on which you just prevailed. Shortly afterward she established a blog on which she criticized the justice system and attorneys who bring frivolous claims. Another juror, during deliberations, used his iPhone to look up the definition of "prudent," a term that was central to the liability issue in your case. Another juror, who was excused during the trial due to a hardship, texted one of the remaining jurors during trial that she had formed a belief early on during the plaintiff's case-in-chief that the plaintiff's main witness was a liar and that defendant should prevail. The other juror texted back; "I think you are right. I'll bring this up with the other jurors." She then did so before the case concluded. Assuming these facts are true, what are the chances you will be able to hold on to the defense verdict?

These are not fanciful scenarios. Go online and search Google for "jurors & Internet & mistrials," and you will discover a number of articles written about juror misconduct involving use of the Internet that resulted in either mistrials or reversals on appeal after the trial court denied a motion for mistrial. This article does not rehash the various cases addressed in other articles. Rather, our aim is to address how you can use social media and the Internet to gain a strategic advantage without running afoul of your professional duties, and help you detect juror misconduct.

The Duty of Competence

First, you must recognize that to be a competent attorney you must understand and use technology, when appropriate. Comment No. 8 of Rule 1.1 of The American Bar Association Model Rules of Professional Conduct states: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." California has not yet adopted similar language in its own Rules. But in an article in the Los Angeles County Bar Association County Bar *Update*, October 2013, Andrew M. Vogel opines that California will recognize such a duty. (See *www.lacba.org/showpage.cfm?pageid=15158.)* And Proposed Ethics Opinion No. 11-0004 recognizes that "[a]n attorney's obligations under the ethical duty of competence evolve as new technologies develop and then become integrated with the practice of law." (*www.calbar.ca.gov/Portals/0/documents/publicComment/2014/2014_11-0004ESI03-21-14.pdf.)* This Proposed Opinion addresses an attorney's competence in connection with e-discovery. It's only a short step to conclude an attorney's duty of competence will require use of the Internet and social media in connection with litigation, when appropriate.

Jury Misconduct

Jury misconduct is any conduct by a juror that interferes with a party's Constitutional right to unbiased and unprejudiced jurors. (*Weathers v. Kaiser Foundation Hosps.* (1971) 5 C3d 98, 103.)

If you learn of misconduct during the trial you must immediately bring it to the attention of the court. You cannot wait and see whether the outcome will be favorable to your side. (*Lindemann v. San Joaquin Cotton Oil Co.* (1936) 5 Cal.2d 480, 496.) A motion to dismiss the violating juror and install an alternate or for a mistrial are appropriate under the circumstances. (See *Weathers v. Kaiser Foundation Hosps*., *supra*, 5 Cal.3d at 103; *People v. Goff* (1981) 127 Cal.App.3d 1039, 1046.)

Jury Selection

Missouri recognizes an affirmative duty for a lawyer to research potential jurors.

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In *Johnson v. McCullough* (Mo. 2010) 306 S.W.3d 551, following a defense verdict, plaintiff's counsel discovered from an online database maintained by the courts ("Case.net": *https://www.courts.mo.gov/casenet/base/welcome.do),* that a juror had lied during voir dire about not being previously involved in litigation. A motion for new trial was granted by the trial court but reversed on appeal. The Court concluded that litigants cannot wait until after a verdict to do basic research on potential jurors when it could have been done during jury selection. Shortly after that the Missouri Supreme Court adopted Rule 69.025 which mandates background Internet searches on potential jurors, specifically their litigation history using Case.net.

Researching potential jurors is fraught with potential ethical and legal violations. California Rules of Professional Conduct, Rule 5-320, subsection (E) provides: "A member shall not directly or indirectly conduct an out of court investigation of a person who is either a member of the venire or a juror *in a manner likely to influence the state of mind of such person in connection with the present or future jury service*." (Emphasis added.) ABA Model Rules of Professional Conduct, Model Rule 3.5, also prohibits contact with jurors or potential jurors except as authorized by law or court order. (See *In re Holman* (S.C. 1982) 286 S.E.2d 148.) These rules do not prohibit an investigation of jurors or potential jurors, only the "manner" in which it is done. What does this mean?

New York Bar Association Formal Opinion 2012-2 directly addresses this issue. The Digest provides:

> Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney *unknowingly or inadvertently* causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney may not use deception to gain access to a juror's website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. *Should the lawyer learn of juror misconduct through otherwise permissible research of a juror's social media activities, the lawyer must reveal the improper conduct to the court.* (Emphasis added.)

This Formal Opinion was cited with approval by the San Diego County Bar Association in its Ethics Opinion 2011-2, which did not address juror contact, but addressed contact with an employee of an opposing party. *(See www.sdcba.org/index.cfm?pg=LEC2011-2.)* But the gist of the opinions are similar: it is deceptive and a violation of the Rules of Professional Conduct if an attorney, or someone at the behest of the attorney, seeks to "friend" or otherwise get behind the public portions of a website to gain information about

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a person. The San Diego Opinion goes further and states, "A friend request nominally generated by Facebook and not the attorney is at least an indirect ex parte communication with a represented party for purposes of Rule 2-100(A)." It's not much of leap to conclude that such an attempt to obtain information about a juror is also a deceptive practice which may violate California's Rule 5-320, subsection (E). The New York Bar Association Opinion states: "The Committee concludes that an attorney may research potential or sitting jurors using social media services or websites, provided that *a communication* with a juror does not occur. 'Communication,' in this context, should be understood broadly, and includes not only sending a specific message, but *also any notification to the person being researched that they have been the subject of any attorney's research efforts*." (Emphasis added.) But the American Bar Association, in its Formal Opinion 466, issued on April 24, 2014, does not agree with the New York Bar Association that notice by the network to the potential juror is a violation of ethics. The summary of the opinion states, "The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b)."

So, how does an attorney research jurors or potential jurors without a "communication" that is "likely to influence the state of mind of such person in connection with the present or future jury service?" The attorney may try to hide his identity by using someone not connected with him or his firm, but that raises the issue of deception addressed in the New York and San Diego Bar Opinions. Still, conducting online research can potentially create problems because of the "footprints" which may be left behind.

"Footprints" are any indication to the potential juror that they have been the target of online research by a party in the suit. While online research can offer substantial benefits in terms of providing additional information to that garnered through voir dire, all forms of online juror research have inherent risks of leaving "footprints." The key is to minimize these risks through an understanding of how Internet and social media sites work.

Social media sites often allow users to access information on other users who have viewed their page. In addition, social media sites collect information on the pages that their users visit within the site. These records are used in creating the "people you may know" portion of the user's homepage. Thus, if you visit someone's page within Facebook, LinkedIn, etc., it is likely that you will show up on their "people you may know" list. This falls well within the San Diego and New York Bar Association's definition of "communication." Even if the researching attorneys adjust their own privacy settings in an attempt to view others' pages anonymously, the potential juror may receive notice that "a legal professional from XYZ law firm" viewed their page – again, a "communication." Thus, attorneys and their agents should never access a potential juror's pages from within the social media site.

However, many social media users will allow some or all of their information to be accessed by the public, depending on the user's privacy settings. This is the case with Twitter, where tweets can be public, but in order for users to see who specifically is reading their tweets the reader must be a follower. This public information is accessible through search engines like Google, and the records of these searches, though accessible to the social media site, are typically not available to potential jurors. As a result, online research of jurors' social media should be conducted through search engines like Google, and limited to publicly available information, with one very important condition.

Attorneys and their researchers should never use their own personalized computer to conduct the searches. Here's why.

Many web browsers save information about the user's social media accounts, e.g., user

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name and password. This information makes accessing social media accounts easier. However, when a user accesses a potential juror's public information on a social media site through a search engine, the user's browser may automatically log into the site. Thus, the search will create a record of the attorney's search that is available to the juror. As a result, attorneys and their agents should use only "sanitized" computers, free of add-ons, plug-ins, and personalized information.

Occasionally, a potential juror will have a website or personal blog. Depending on the juror's level of sophistication, the juror might be able to trace any search of the website or blog back to the attorney through a log of the site visitors' IP addresses. This is particularly true if the personal website or blog gets very little traffic. It is possible to avoid this problem by using proxy servers which route the search through other servers, masking the original server's IP address. The use of proxy servers takes some expertise on the part of the attorneys or their agent and also has the effect of slowing the search, sometimes considerably – a problem during jury selection when time is of the essence. Although this will prohibit the juror from identifying the attorney's search, the costs can outweigh the benefits during jury selection.

In sum, best practices call for the use of a "sanitized" computer and a search only of publicly available information on potential jurors through search engines like Google.

Issues Arising During Trial

In *U.S. v. Juror No. 1* (E. Dist. Pa, 2011) 866 F.Supp 842, a juror was dismissed from jury duty due to work conflicts. After being dismissed, she sent an email to jurors 8 and 9: "It was great meeting you and working with you these past three days. If I was so fortunate as to have finished the jury assignment, I would have found [Defendant] guilty on all four counts based on the facts as I hear them...." Juror 8 responded, "Thank you for sharing your thoughts. I am of the same mind and have great doubt that the defense can produce anything new today that will change my thinking. It disturbs me greatly that people lie.... Anyway, I will share your message with the gang." Juror 1 was hit with a $1,000 fine for contempt of court – violating an order of court not to discuss the case with anyone until the case had been completed.

We all know this occurs, and that jurors will also seek to obtain outside information in aid of deciding the case if they believe they haven't heard all of the evidence. In many cases a juror who has heard and understood the admonition of the judge will report the misconduct and it can be remedied during the trial. In other cases, counsel may learn of the misconduct in interviews with jurors after the trial is over, which will trigger a motion for new trial. (In *U.S. v. Juror No. 1, supra*, the misconduct was discovered during voir dire of juror No. 8 in a totally unrelated matter.) But in some cases, jurors may not come forward with any helpful information. What do you do?

First, you must anticipate that juror misconduct will occur. Address the possibility with the court at the outset and include questions on voir dire regarding juror use of social media to determine which jurors use the technology. Make sure the court instructs the jurors regarding discussion of the case with others or among themselves prior to deliberations and that they are not to obtain information from any outside sources. And these instructions should include communications through social media and information sought through use of the Internet. (See CACI No. 100) You may also request that the judge issue the admonitions as an order that can be enforced by contempt.

We all know that despite these admonitions, jurors are tempted to and do violate the instructions, especially given the ubiquitous nature of social media and the Internet. So what more can you do? If the case is worth it you may want to monitor the Internet to see if there is any activity involving your trial. How you do so may be problematic.

If during voir dire, a juror identifies herself as an active user of social media, the attorney should consider monitoring the juror's online activities during the trial. The same precautions described above should be taken. But during trial, when there may be more time to collect juror information, the use of proxy servers, despite their drawbacks, may be appropriate. Of course, any relevant information gleaned from this monitoring should be immediately brought to the court's attention.

Issues Arising After Trial

After the trial has been concluded, if an issue of jury misconduct arises a motion for new trial pursuant to California Code of Civil Procedure section 657(2) is the appropriate remedy. But evidence is limited in this regard.

California Evidence Code section 1150(a) provides, "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such character as is likely to have influenced the verdict improperly. *No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to*

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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.

Attorney Fees and Costs

Courts may not order a party's counsel to pay opponent's defense costs under CCP 1038.
Settle v. State of California (2014) 228 Cal.App.4th 215.

The plaintiff sued the state and a city for personal injuries she suffered on the beach. The public entities were immune from suit, and warned the plaintiff's counsel that they would seek defense costs under Code of Civil Procedure section 1038 should he not dismiss the lawsuit. Plaintiff's counsel did not dismiss the suit, and the public entities successfully moved for summary judgment and obtained an order against opposing counsel to pay their defense costs. Plaintiff's counsel appealed.

The Court of Appeal (Second Dist. Div. Two) reversed. Section 1038 provides for mandatory defense costs where the trial court determines that "a plaintiff, petitioner, cross-complainant, or intervenor" did not bring "the proceeding with reasonable cause and in the good faith belief that there was a justiciable controversy under the facts and law which warranted the filing of the complaint." No reference to sanctioning "counsel" appears, and the court declined to read any such language into the statute.

A memorandum of costs is not required to recover fees sought by motion under CCP 1717.
Kaufman v. Diskeeper Corporation (2014) 229 Cal.App.4th 1.

After the defendant prevailed in a contractual arbitration, it sought an award of attorney fees pursuant to a prevailing party fee clause in the parties' contract. The defendant moved under Code of Civil Procedure section 1717, which requires the court to fix the reasonable amount of fees upon notice and motion. The trial court denied the motion because the defendant had not filed a memorandum of costs pursuant to California Rules of Court, rule 3.1700.

The Court of Appeal (Second Dist., Div. Four) reversed. A party seeking fees pursuant to section 1717 need not file a memorandum of costs in addition to filing a noticed motion.

Postjudgment interest on attorney fee awards belongs to the attorneys, not the clients.
Hernandez v. Siegel (2014) 230 Cal.App.4th 165.

After the plaintiff prevailed at trial on employment discrimination claims, the trial court awarded attorney fees in her favor pursuant to Government Code section 12965. The defendant sent the plaintiff's attorneys a check for an amount equaling the fee award plus postjudgment interest on that award. Plaintiff's attorneys cashed the check, including the interest. The plaintiff then sued her attorneys for breaching their fiduciary duty by not giving her the interest. The trial rejected the plaintiff's claim, holding that the attorneys were entitled to the interest on the fee award.

The Court of Appeal (First Dist. Div. Five) affirmed, holding the attorneys were entitled to the interest on the award in their favor.

Civil Procedure

28 USC 1367(d) does not suspend state statutes of limitation on claims dismissed without prejudice in federal court. *City of Los Angeles v. County of Kern* (2014) 59 Cal.4th 618.

In a dispute between the City of Los Angeles and Kern County over certain waste management laws, the federal court declined jurisdiction over the matter, and dismissed the suit without prejudice to Los Angeles's right to re-file in state court. The city filed suit in state court 68 days later. Whether the suit was timely depended on the correct interpretation of 28 U.S.C. section 1367(d), which provides that where a federal district court declines to exercise supplemental jurisdiction over state law claims, and instead dismisses without prejudice to the plaintiffs' right to bring them in state court, the limitations period under state law is "tolled while the claim is pending and for a period of 30 days after it is dismissed." The Court of Appeal held that Los Angeles's suit was timely based on its view that the statute of limitations was suspended at the moment the federal suit was filed, leaving the city with the remainder of the limitations period that had not run when Los Angeles filed its federal suit, *plus* 30 more days.

The California Supreme Court reversed. Section 1367(d) allows claims that would otherwise have become barred while pending in federal court to be pursued in state court if refiled no later than 30 days after federal court dismissal; it does not suspend the limitations clock so as to add time that was left in the original limitations period at the time of the federal filing to the 30 days.

Trial court erred by excluding one party's experts where opponent's demand misstated deadline for disclosure, and party's tardy disclosure was not unreasonable. *Staub v. Kiley* (2014) 226 Cal.App.4th 1437.

Per Code of Civil Procedure section 2034.210, defendants served by mail a demand for exchange of witness information by December 27, 2011 –50 days before trial. Defendants complied with the December 27 date, but plaintiffs did not serve their expert information until January 9, 2012. The delay was due to difficulty in contacting the experts. Plaintiffs notified defendants that they would make their experts available for deposition within a couple of weeks, but defendants refused to depose the experts. On the day set for trial, defendants successfully moved in limine for an order precluding plaintiffs from presenting the belatedly disclosed experts' testimony. This effectively prevented plaintiffs from proving their case.

On appeal, the Court of Appeal (Third Dist.) reversed. First, defendants lacked standing to object to plaintiffs' untimely disclosures because the December 27 date in defendants' demand was improperly calculated. Under Code of Civil Procedure section 1013, the disclosure date is extended by five days if service is by mail – even if adding those five extra days means the disclosure date is fewer than 50 days before trial. Second, plaintiff's tardy disclosure was not unreasonable because they were only a week late, they had offered the opportunity to depose their experts (so any prejudice to defendants was their own fault for failing to depose the experts), and otherwise did not show any signs of gamesmanship. Such circumstances did not warrant what was, in effect, a terminating sanction.

Treating doctors may testify to the reasonable value of their services without being designated as experts. *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120.

In an action for personal injuries, the trial court precluded plaintiffs' treating physician from testifying on the reasonable value of his services to the plaintiffs on the ground he was not disclosed as a retained expert. The jury found for the plaintiffs. When ruling on posttrial motions, the trial court held that the plaintiffs had presented no evidence of the reasonable value of their past and future medical care because they presented only evidence of amounts billed, which is not competent evidence under *Corenbaum v. Lampkin* (2013) 215 Cal. App.4th 1308.

The Court of Appeal (Second Dist., Div. Three) dismissed the appeal for lack of a final judgment, but addressed the medical expenses issues to guide the trial court going forward. The court held that a treating physician who became familiar with the reasonable value of his medical services in the course of treating the plaintiffs and not for purposes of the litigation may testify as to the reasonable value of his services without complying with the retained expert disclosure rules.

General in personam jurisdiction over corporations exist only where corporations are "at home." *Martinez v. Aero Caribbean* (9th Cir. 2014) 764 F.3d 1062.

California resident plaintiffs sued a French airline over a crash that occurred in Cuba. To obtain personal jurisdiction over the French airline in California, the plaintiffs served one of its officers while he was at a business conference in California. The district court dismissed the suit for lack of personal jurisdiction in California.

The Ninth Circuit affirmed. The "tag" service of process on a corporation's officer within the forum state does not create *general* personal jurisdiction over the corporation. General personal jurisdiction over a corporation exists only when the corporation is incorporated in the state, has its principal place of business there, or its contacts are otherwise so constant and pervasive as to render it essentially "at home" in the forum state. Absent general jurisdiction, plaintiffs must establish specific jurisdiction, i.e., that the case arises out of out of or relates to the defendant's contacts with the forum.

Parties may not appoint temporary judge to approve class action settlement prior to class certification. *Luckey v. Superior Court (Cotton On USA, Inc.)* (2014) 228 Cal.App.4th 81.

The named plaintiff brought suit for violations of the federal Fair and Accurate Credit Transactions Act. The parties reached a mediated settlement prior to class certification, and stipulated that a temporary judge would be appointed to approve the settlement. The Superior Court refused to appoint a temporary judge because counsel for the named plaintiff lacked authority to stipulate to a temporary judge on behalf of absent potential class members. The named plaintiff sought writ relief, requesting an order directing the Superior Court to appoint a temporary judge.

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The Court of Appeal (Second. Dist, Div. Three) denied writ relief. "The California Constitution, the California Rules of Court, and public policy concerns all preclude the appointment of a temporary judge for purposes of approving the settlement of a pre-certification class action."

Official enforcement actions under California's UCL are not barred by a class action settlement involving private citizens' claims for the same conduct, so long as the relief sought is not duplicative. *People v. IntelliGender, LLC* (9th Cir. 2014) 771 F.3d 1169.

The defendant settled a class action suit brought under California's unfair competition law against the marketer of a test that purportedly predicted the gender of a fetus. Notice of the settlement was given to the relevant state officials, who did not object to the settlement. Subsequently, the State of California filed an enforcement action against the defendant test marketer, and the defendant sought to enjoin the enforcement action as seeking duplicative recovery and interfering with the class action settlement. The district court denied the defendant's motion to enjoin the official enforcement action, and the defendant appealed.

The Ninth Circuit affirmed the district court's denial of the defendant's motion to enjoin the entire enforcement action, but reversed the denial of the part of the defendant's motion seeking to enjoin the claims for restitution. The state was not entitled to obtain a recover restitution on behalf of the state's citizens because that remedy would duplicate the restitutionary relief provided by the class action settlement. But the public enforcement action aimed at vindicating broader governmental interests than were at issue in the class action, so those claims could proceed to that extent.

Evidence

Workers' Compensation Appeal Board cannot order in camera review of privileged documents. *Regents of the University of California v. Workers' Compensation Appeals Board* (2014) 226 Cal.App.4th 1530.

The Workers' Compensation Appeal Board ordered the defendant employer to produce documents the employer claimed were privileged for in camera review by a special master. The employer sought writ review of whether the Evidence Code statutes governing privilege apply in workers' compensation proceedings.

The Court of Appeal (Fourth Dist., Div. Three) held that Evidence Code section 915 does apply in workers' compensation proceedings. And because it expressly prohibits a tribunal from ordering a party to produce documents for review as a means of determining the validity of a claimed privilege, the court determined that the Board's order was erroneous and granted the writ, thereby relieving the employer of the obligation to submit the privileged documents for in camera review.

Court of Appeal reaffirms rule that subsequent remedial measures are inadmissible. *McIntyre v. The Colonies-Pacific, LLC* (2014) 228 Cal.App.4th 664.

The plaintiff tenant whose business experienced a robbery sued the defendant owner of a shopping center for failing to provide adequate security. The trial court excluded under Evidence Code section 1151 evidence that after the robbery, the shopping center hired security. The plaintiff appealed, arguing that the evidence was relevant to causation – i.e., that having security would have prevented the robbery.

The Court of Appeal (Fourth Dist., Div. Two) affirmed. The court rejected the plaintiff's argument that the evidence was relevant to causation and so not within the scope of Evidence Code section 1151. In this case, there was no question of whether there was security at the center at the time of the robbery. The court rejected the plaintiff's argument that evidence of subsequent remedial measures is admissible under the guise of showing the causation rather than breach of the duty of care. That would ignore the public policy behind section 1151, which is to encourage remedial measures.

Healthcare

Court of Appeal applies Howell to value hospital services rendered without a contract. *Children's Hospital Central California v. Blue Cross of California* (2014) 226 Cal.App.4th 1260.

A hospital sought to recover from Blue Cross the "reasonable and customary" value (as authorized by regulation) for medical services rendered without a contract to Blue Cross members. At trial, the court admitted evidence of the hospital's full billed charges, but excluded evidence of the lesser amounts it had historically accepted as payment.

The Court of Appeal (Fifth Dist.) reversed, relying on *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 for the proposition that 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. Blue Cross should have been allowed to conduct discovery into the amounts paid by other parties for the hospital's medical services. The hospital argued that the discovery would disclose proprietary financial information and trade secrets, but the court held that any such interests could be protected through the use of protective orders.

The release of merely demographic information does not trigger statutory damages under the **Confidentiality of Medical Information Act.** *Eisenhower Medical Center v. Superior Court (Malanche)* (2014) 226 Cal.App.4th 430.

Plaintiffs' class action complaint alleged that "medical information" was released when someone stole a password protected computer from a medical center's waiting room area. The computer contained names, birth dates, partial social security numbers, and an index of numbers

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assigned to paper files elsewhere in the building. Plaintiffs sought $1,000 in statutory damages for each of the 500,000-plus alleged class members for a purported violation of the Confidentiality of Medical Information Act (CMIA) (Civil Code § 56 et seq.). The medical center argued that the computer theft did not result in the disclosure of "medical information" within the meaning of the CMIA. The trial court denied summary judgment and the medical center sought a writ of mandate.

The Court of Appeal (Fourth Dist., Div. Two) issued the writ, holding that the demographic information that by itself revealed nothing substantive about the listed persons' medical condition was not protected under the CMIA.

Mere possession of stolen medical records is insufficient to establish violation of Confidential of Medical Information Act. *Sutter Health v. Superior Court (Atkins)* (2014) 227 Cal.App.4th 1546.

A thief stole a health care provider's computer containing medical records of approximately 4 million patients. The plaintiffs filed a class action under the Confidentiality of Medical Information Act seeking $1,000 per patient whose records were on the computer. The health care provider successfully demurred on the ground there was no allegation that the records were ever accessed by the thief, and thus were never "released." The trial court sustained the provider's demurrer.

The Court of Appeal ((Third Dist.) affirmed. The plaintiffs did not allege that the stolen medical information was actually viewed by an unauthorized person. Mere possession of the medical records was insufficient to establish breach of confidentiality under the Act. Moreover, the court plaintiffs had not demonstrated they could allege that private medical information was actually viewed, so plaintiffs were not entitled to leave to amend.

Insurance

Conspiracy to abduct child is not an "occurrence" under homeowners' policy. *Upasani v. State Farm General Insurance Company* (2014) 227 Cal. App.4th 509.

A father accused several individuals, including the insureds, of conspiring to help the mother abduct their child to India. The insureds sought a defense from their homeowner's insurer, but the insurer disclaimed coverage. The trial court ruled that there was no duty to defend, and granted summary judgment in the insurer's favor.

The Court of Appeal (Fourth Dist., Div. Three) affirmed. All of the conduct alleged was nonaccidental, intentional, and purposeful. The court rejected the insureds' argument that the mother's unexpectedly long stay in India was unexpected from the standpoint of the insureds and thus an accident, because the extended stay may have exacerbated the father's damages but did not negate the intentional tort that triggered the claim.

Sexual misconduct by massage therapist was not covered by therapist's employer's general liability policy. *Baek v. Continental Casualty Company* (2014) 230 Cal.App.4th 356.

A massage therapist employed by the insured sexually assaulted a client while performing a massage. The insured's policy covered the insured "with respect to the conduct of [the insured's] business" and covered its employees "while performing duties related to the conduct of [the insured's] business." Defendant insurer, sued by the insureds after denying coverage, successfully demurred.

The Court of Appeal (Second Dist., Div. Four), agreeing with several out-of-state decisions, affirmed. Sexual misconduct at work cannot be said to occur "while performing duties related to the conduct of" an insured's business even if the assault occurs at the place of work and during the work day.

Home exercise regimen was within the course **and scope of correctional officer's employment.** *Young v. Workers' Compensation Appeals Board* (2014) 227 Cal.App.4th 472.

A correctional officer was injured while performing jumping jacks at home as part of his regular warm-up exercise regimen. He sought workers' compensation benefits, but the Workers' Compensation Appeals Board concluded that the exercises did not arise in the course and scope of the officer's employment, and denied benefits.

The Court of Appeal (Third Dist.) reversed. Where a departmental order required correctional officers to "maintain themselves in good physical condition so that they can handle the strenuous physical contacts often required of a law enforcement officer," and where the employer required the officers to undergo periodic training exercises, many of which involved physical activity, such training exercises at home were within the course and scope of the officers' employment.

Labor & Employment

Employers may not attribute commissions paid on one pay period to previous pay periods to achieve compliance with minimum wage laws. *Peabody v. Time Warner Cable, Inc.* (2014) 56 Cal.4th 662.

The plaintiff, an account executive who sold cable advertising, brought a wage and hour class action suit against Time Warner, alleging that Time Warner failed to pay the minimum wage and for overtime. Time Warner acknowledged that the plaintiff regularly worked 45 hours per week and was paid no overtime, and that the plaintiff's paychecks were for less than one-and-a-half times the minimum wage as required to qualify her for the "commissioned employee" exemption to the wage and hour laws. Time Warner argued, however, that periodic commissions it paid the plaintiff should be reassigned to earlier pay periods, thus resulting in a total salary higher than the minimum wage. The district court agreed with Time Warner and granted summary judgment in its favor. On appeal, the Ninth Circuit asked the California Supreme Court whether California's compensation requirements could be satisfies by reassigning commission wages paid in one pay period to other pay periods.

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The California Supreme Court held that employers may not attribute commission wages paid in one pay period to other pay periods. Whether "the minimum earnings prong is satisfied depends on the amount of wages *actually paid* in a pay period. An employer may not attribute wages paid in one pay period to a prior pay period to cure a shortfall."

Exhaustion of DFEH administrative remedies is not a jurisdictional requirement. *Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336.

The plaintiff brought sexual harassment claims against her employer. After the case was submitted to the trier of fact for decision, the employer contended the plaintiff had failed to prove she had exhausted her administrative remedies (i.e., presenting her claims to the Department of Fair Employment and Housing), so subject matter jurisdiction was lacking. The trial court entered judgment for the plaintiff and the employer appealed.

The Court of Appeal (Fourth Dist., Div. Three) affirmed. Exhaustion of Fair Employment and Housing Act remedies is not a "jurisdictional prerequisite" that a plaintiff must prove at trial, and so lack of proof of exhaustion did not require reversal of the judgment where the employer did not raise the issue prior to or at trial (not to mention there was evidence of exhaustion in the record that plaintiff could have presented at trial had the employer raised the issue prior to submission of the case for decision). Moreover, the plaintiff was not required to prove that the employer had at least five employees to prevail on her claim that she was forced to resign her employment due to sexual harassment because neither harassment claims under FEHA nor common law wrongful termination claims are subject to the five-employee minimum.

Employers must reimburse employees for a reasonable percentage of their cell phone bills. *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal. App.4th 1137.

In this class action brought by employees who used their personal cell phones, the employees sought reimbursement for a reasonable percentage of their cell phone bills. The trial court declined to certify the class because of a lack of commonality: individualized inquiries into each class members' cell phone plan would be required.

The Court of Appeal (Second Dist., Div. Two) reversed the trial court's denial of class certification. The court held that when employees must use their personal cell phones for work-related calls, Labor Code section 2802 requires the employer to reimburse them. The individual circumstances of each employee's plan may be relevant to damages, but is irrelevant to commonality because the failure to reimburse alone is what gives rise to the employer's liability. Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills.

Franchisors are not the employers of franchisee's supervisor, and thus not vicariously liable for supervisor's sexual harassment of another employee. *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, case no. S204543.

Plaintiff, who worked for a Domino's Pizza franchise, sued her employer (the franchisee) for sexual harassment, and also sought to hold the franchisor vicariously liable. The trial court granted summary judgment for the franchisor on the ground the requisite agency relationship did not exist between the franchisee and the franchisor. The Court of Appeal reversed.

The California Supreme Court reversed the Court of Appeal and reinstated the summary judgment. Despite a great deal of control by the franchisor over franchisee's business operations, the franchisor does not stand in an employment or agency relationship with the franchisee and its employees for purposes of holding it vicariously liable for the alleged workplace injuries here.

> But see *Alexander v. FedEx Ground Package System, Inc.* (9th Cir. 2014) 765 F.3d 981 [Fed Ex drivers who had been classified as independent contractors were in fact employees *as a matter of law* where the drivers' contract gives FedEx a broad right to control the manner in which its drivers perform their work, with numerous specific day-to-day work activities within the control of Fed Ex rather than at the discretion of the drivers];
>
> And see *Castaneda v. The Ensign Group, Inc.* (2014) 229 Cal. App.4th 1015 [where defendant, a holding company with no employees, was the indirect owner of another corporation – a nursing home with employees – the plaintiff nursing home employee presented a triable issue of fact on the question whether the holding company could be deemed an additional employer for purposes of alleged Labor Code violations, given the corporate ownership status, partial overlap of corporate officers, and ambiguous evidence of some control over or input into nursing home operations].

Torts

Architects owe a duty of care to future owners of a home to design a safe home. *Beacon Residential Community Association v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568.

A homeowners association sued, among others, two architectural firms for design defects that allegedly made homes unsafe and uninhabitable. The trial court dismissed the architects because they had made only recommendations, not the final decisions on construction, and therefore owed no duty of care to future homeowners with whom they have no contractual relationship.

The California Supreme Court reversed. "[A]n architect owes a duty of care to future homeowners in the design of a residential building where ... the architect is a principal architect on the project–that is, the architect, in providing professional design services, is not subordinate to other design professionals. The duty of care extends to such architects even when they do not actually build the project or exercise ultimate control over construction."

In-home care givers assume the risk of injury from Alzheimer's patients they are hired to care for. *Gregory v. Cott* (2014) 59 Cal.4th 996.

When an Alzheimer's patient injured her in-home caregiver, the caregiver sued for personal injuries. The trial court granted summary judgment in favor of the patient on primary assumption of risk grounds, and the Court of Appeal affirmed.

The California Supreme Court affirmed. The primary assumption of risk doctrine – which is most often applied in cases involving recreational activity, but also governs claims arising from inherent occupational hazards – applied. Application of the doctrine in the occupational context first developed as the "firefighter's rule," which precludes firefighters and police officers from suing members of the public for the conduct that makes their employment necessary. The rationale for this rule is that such workers, as a matter of fairness, should not be heard to complain of the negligence that is the cause of their employment. The doctrine likewise applied to the relationship between hired caregivers and Alzheimer's patients, because violent behavior is a common symptom of the disease, and no duty should be owed to protect caregivers from the very dangers they are hired to confront. However, the Supreme Court limited its rule to professional health care workers who are trained and employed by an agency, without addressing claims by other caregivers.

Stairway width and railing defects were patent as a matter of law. *Delon Hampton & Associates, Chtd. v. Superior Court (Los Angeles County Metropolitan Transportation Authority)* (2014) 227 Cal.App.4th 250.

The plaintiff fell on a stairwell at a transit station and sued the Metropolitan Transportation Authority, alleging that the stairwell was too narrow and that the banister was too low. MTA cross-complained against the contractor that designed and built the stairwell. The contractor demurred to the cross-complaint on the ground the alleged defects were patent and, accordingly, claims based on them were barred by the 4-year statute of limitations applicable to patent defects. The trial court held that the defects were latent and refused to dismiss the cross-complaint. The cross-defendant contractor sought writ relief.

The Court of Appeal (Second Dist., Div. Three) issued the writ, directing the trial court to sustain the contractor's demurrer. The alleged stairwell defects were patent as a matter of law.

> **Compare** *Heskel v. City of San Diego* (2014) 227 Cal.App.4th 313 [trip-and-fall claim against city failed as a matter of law where plaintiff failed to present evidence that the condition that caused the fall was obvious such that the city, in the exercise of due care, should have become aware of it, notwithstanding evidence that the condition was present for over one year before his accident.]

MICRA statute of limitations applies to intentional tort claims against doctor based on conduct occurring while doctor treated patient. *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal. App.4th 336.

The plaintiff underwent a procedure for the treatment of a kidney stone. The plaintiff alleged that during a preoperative checkup and the administration of anesthesia, the anesthesiologist committed a battery and intentionally inflicted emotional distress by grabbing and twisting the plaintiff's arm, prying his mouth open, and lifting, pulling and pushing on his face and head. The trial court sustained the defendants' demurrers to the complaint, holding that the complaint was time-barred under the one-year MICRA statute of limitations contained in Code of Civil Procedure Section 340.5

The California Court of Appeal affirmed. The court held that, although the plaintiff labeled his claims as intentional torts, a review of the complaint shows that the plaintiff's claims were in fact "based on professional negligence within the meaning of section 340.5." Thus, the claims were time-barred.

Consumer Law

UCL claims based on workplace injuries are preempted by California's federally-approved workplace safety plan. *Solus Industrial Innovations, LLC v. Superior Court (People)* (2014) 224 Cal.App.4th 17.

Two factory workers were killed when a water heater exploded in the defendant's manufacturing facility. After the Division of Occupational Safety and Health assigned fault for the explosion to the defendant, the district attorney filed a civil action against the defendant that included a request for civil penalties under California's Unfair Competition Law (UCL) (Bus. & Prof. Code, §17200 et seq.). The defendant argued the claim was preempted by federal workplace safety regulations. The trial court disagreed, overruled the defendant's demurrer, and the defendant sought writ relief.

The Court of Appeal (Fourth Dist, Div. Three) reversed, finding preemption. The federal workplace safety law preempts any state law workplace safety enforcement mechanism—including the UCL—that was not specifically incorporated into the state workplace safety plan approved by the U.S. Secretary of Labor.

Magnusson-Moss Warranty Act is not supplanted by Song-Beverly Consumer Warranty Act. *Orichian v. BMW of North America, LLC* (2014) 226 Cal.App.4th 1322.

The plaintiff bought a BMW, but stopped driving it after it developed noises that several trips to the dealer did not cure, and that caused plaintiff to fear for her safety while driving. Plaintiff eventually sued, alleging claims for breach of express warranty under the state Song-Beverly Consumer Warranty Act and breach of written warranty under the federal Magnuson-Moss Warranty Act. The case went to trial. The trial court declined to instruct the jury on both the Song-Beverly and Magnuson-Moss acts, believing the Song-Beverly act supplanted the Magnuson-Moss claim and that an instruction

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on Song-Beverly was sufficient. The jury found for the defense after finding that a reasonable person would not have been concerned about the car's safety.

The Court of Appeal (Second Dist., Div. Three) affirmed, but only after holding that the Magnuson-Moss claim was not "supplanted" by Song-Beverly, because the Magnuson-Moss breach of written warranty claim can be established without showing a reasonable person would be concerned about the product' safety. Instructions on both claims were required. The court nonetheless determined that the instructional error was harmless: both of plaintiff's claims were based on plaintiff's assertion that engine noises indicated the engine was defective and required replacement, so the jury's finding that there was no defect a reasonable person in plaintiff's position would believe substantially impaired the vehicle's use, value, or safety necessarily implied a complete rejection of plaintiff's theory of liability.

But see *Brand v. Hyundai Motor America* (2014) 226 Cal.App.4th 1538 [trial court erred in concluding that "no reasonable jury could conclude a new vehicle sunroof that spontaneously opens and closes while driving constitutes a safety hazard in violation of the implied warranty"].

Potential Consumer Legal Remedies Act defendant may not seek declaratory relief that its conduct does not violate the Act. *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459.

The plaintiff in a putative class action alleging violations of the Consumer Legal Remedies Act for false and misleading marketing of a dietary supplement served the defendant with a demand to cease and desist the false advertising, and settlement correspondence followed. Before any settlement was reached, however, the defendant filed a declaratory relief action seeking a declaration that its advertising was not false or misleading. The class action plaintiff filed an anti-SLAPP motion, arguing that the notice and subsequent settlement communications were protected activity and that supplement maker had not shown a probability of success on the merits. The trial court granted the motion.

The Court of Appeal (Second Dist., Div. Five) affirmed. A party who expects to face a CLRA suit may not, after receiving statutory notice of intent to sue, maintain a declaratory relief action to establish that there was no violation of the CLRA. "It is inequitable for a consumer to be forced to defend a declaratory relief action, divorced of the incentives and rights under the CLRA, merely because the consumer sent a CLRA notice, and regardless of whether that consumer decided ultimately to file a lawsuit under the CLRA. Indeed, the consumer may review responses to the CLRA Notice and decide not to bring an action. A preemptive request for a declaration of rights would compel the parties to litigate the matter. Thus, consumers would be deterred from making claims under the CLRA."

CA Supreme Court Pending Cases

Addressing whether trial court or arbitrator decides scope of arbitration agreements as providing for classwide arbitration. *Sandquist v. Lebo Automotive, Inc.,* case no. S220812, review granted November 12, 2014.

An African-American car salesman brought individual and class claims against his employer-dealership (among others) for discrimination, a hostile work environment, and constructive discharge. Relying on three arbitration agreements signed by the salesman on his first day of work, defendants moved to compel individual arbitration and to stay or dismiss the proceedings with the trial court retaining jurisdiction to enforce any arbitration award. The trial court granted the motion, dismissing the class allegations because there was no contractual basis to compel class arbitration. "Since the plaintiff himself is now going to be subject to individual arbitration, there would no longer be any representative in the lawsuit that would be able to adequately represent a class action to pursue the claims that are asserted by plaintiff." The Court of Appeal reversed the dismissal of the class claims, holding that, absent an express provision in the parties' agreement, an arbitrator, not the trial judge, must decide whether the named plaintiff's claims sent to arbitration can include claims for relief on behalf of a class.

The California Supreme Court granted review to decide whether "the trial court or the arbitrator decide[s] whether an arbitration agreement provides for class arbitration if the agreement itself is silent on the issue."

See *Network Capital Funding Corporation v. Papke* (2014) 230 Cal.App.4th 503 [agreement to submit "any claim, dispute, and/or controversy" between employer and employee to binding arbitration "[i]nclud[ing]...all disputes, whether based on tort, contract, statute..., equitable law, or otherwise," with specified exceptions authorized court, not arbitrator, to determine whether class-wide arbitration was permissible under the agreement; agreement did not authorize class-wide arbitration];

See also *Knutsson v. KTLA, LLC* (2014) 228 Cal.App.4th 1118 [trial court correctly ruled on arbitrability, rather than referring the issue to arbitration, in the absence of an agreement unambiguously requiring that the issue be decided by an arbitrator];

And see *Malone v. Superior Court (California Bank & Trust)* (2014) 226 Cal.App.4th 1551[delegation clause permitting arbitrator to determine disputed issues regarding enforceability of the arbitration agreement itself was not unconscionable where the clause was applicable to both parties, did not provide for a biased decisionmaker, and was clearly and conspicuous].

Addressing whether HMOs who delegate payment responsibility to IPAs remain responsible for reimbursing physicians for their services if the IPA fails to pay. *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.,* case no. S218497, review granted July 16, 2014.

Under Health and Safety Code section 1371.4, subdivision (e), an HMO must reimburse physicians for emergency health care services

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provided to its enrollees even when the physicians are not under contracts to the HMO. In this case, the defendant HMO delegated its health care obligations to an independent physicians association (IPA), making the IPA liable for any payments to the physicians. When the IPA failed to make payments because of financial hardship, the physicians sought payment from the HMO. When the HMO failed to reimburse the physicians, they sued the HMO for negligent delegation of its responsibility to the IPA. The Court of Appeal (Second Dist., Div. Three) held the HMO liable to the physicians on the ground that an HMO has a duty not to delegate its obligation to reimburse emergency physicians to an IPA it knows or has reason to know will be unable to pay.

The Supreme Court granted review to address the following questions: (1) Does the delegation by an HMO to an IPA under Health and Safety Code section 1371.4, subdivision (e) of the HMO's responsibility to reimburse emergency medical service providers for emergency care provided to the HMO's enrollees relieve the HMO of the ultimate obligation to pay for emergency medical care provided to its enrollees by non-contracting emergency medical service providers, if the IPA becomes insolvent and is unable to pay? (2) Does an HMO have a duty to emergency medical service providers to protect them from financial harm resulting from the insolvency of an IPA which is otherwise financially responsible for the emergency medical care provided to its enrollees?

Addressing whether jointly and severally liable parties may be sued in separate actions. *DKN Holdings v. Faerber,* case no. S218597, review granted July 23, 2014.

The lessor of a commercial property brought an action against three co-lessees for past due rents. The lessor dismissed without prejudice two of the parties and received a $3 million judgment against the third party which remains unsatisfied. The lease specified all lessees were "jointly and severally responsible." The lessor then brought the present action against the other two lessees for the unpaid rent. The trial court sustained the two lessees' demurrers without leave to amend. The Court of Appeal (Fourth Dist., Division Two), affirmed. It held "the complaint does not and cannot state a cause of action against [the lessees] for monies due under the lease, because [the lessor's] claims against [the lessees] in the present action are barred by the claim preclusion aspect of the res judicata doctrine."

In granting review the Supreme Court limited the issues to the following: (1) Whether parties that are jointly and severally liable on an obligation can be sued in separate actions, and (2) whether the opinion of the Court of Appeal conflicts with the opinion of this court in Williams v. Reed (1957) 48 Cal.2d 57.

Addressing use of patient information obtained via the Controlled Substance Utilization Review and Evaluation System. *Lewis v. Superior Court,* case no. S219811, review granted September 17, 2014.

The Medical Board of California (the Board) received a complaint from a doctor's patient about the treatment she received. The Board launched an investigation of the doctor, which included a Controlled Substance Utilization Review and Evaluation System (CURES) report on his prescribing practices. Based on the report, the Board obtained records from six of the doctor's patients; two of those sets of records were obtained through an administrative subpoena. Ultimately, the doctor was placed on probation for three years. Challenging the probation in an action seeking a writ of administrative mandamus in the trial, the doctor argued the Board violated his patients' informational privacy rights by accessing CURES information during an investigation unrelated to improper prescription practices. The trial court denied the petition, concluding that "'[t]he public health and safety concern[s] served by the monitoring and regulation of the prescription of controlled substances serves a compelling public interest that justifies disclosure of prescription records without notification or consent.'" The Court of Appeal (Second Dist., Div. Three) affirmed.

The Supreme Court granted review of the following issues: (1) Do a physician's patients have a protected privacy interest in the controlled substance prescription data collected and submitted to the California Department of Justice under Health and Safety Code section 11165?; (2) If so, is disclosure of such data to the Medical Board of California justified by a compelling state interest?

Addressing whether there is a right to a jury trial in actions for violation of healthcare worker whistleblower statute. *Shaw v. Superior Court (THC–Orange County, Inc.),* case no. S221530, review granted Sept. 29, 2014.

Health and Safety Code section 1278.5 prohibits a health facility from retaliating against any of its employees for complaining about the quality of care or services provided by the facility, and provides for remedies including "reinstatement, reimbursement for lost wages and work benefits ... legal costs ... or ... any remedy deemed warranted by the court." When an ex-employee of a health facility brought suit under this provision for retaliation seeking monetary losses and damages for emotional distress, the trial court ruled that she was not entitled to a jury trial. The employee sought a writ of mandate. The Court of Appeal (Second. Dist., Div. Three) issued the writ. The court held that an employee seeking lost wages or benefits rather than reinstatement is entitled to a jury trial.

The Supreme Court granted review to address the following issues: (1) Did the Court of Appeal err by reviewing plaintiff's right to a jury by writ of mandate rather than appeal? (See ***Nesbitt v. Superior Court*** (1931) 214 Cal. 1.) (2) Is there a right to jury trial on a retaliation cause of action under Health and Safety Code section 1278.5?

> **Compare** *Bristol-Myers Squibb Company v. Superior Court (Anderson)* (2014) **228** Cal.App.4th **605** [where defendant engaged in substantial, continuous economic activity in California, including billions of dollars in sales of allegedly defective drug, *specific* personal jurisdiction over defendant drug manufacturer in case brought by nonresident plaintiffs was consistent with due process].

or dissent from the verdict or concerning the mental processes by which it was determined." (Emphasis added.)

In other words, evidence relating to the subjective reasoning processes of the jury or the jurors is inadmissible. "This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent. The only improper influences that may be proved under section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration. [Citation.] '[T]hese facts can be easily proved or disproved. There is invariably little disagreement as to their occurrence.' [Citation.]" (*People v. Hutchinson* (1969) 71 C2d 342, 350.)

One example of appropriately obtaining evidence from social media is *Juror Number One v. Superior Court of Sacramento County* (2012) 206 CA4th 854. After trial, the trial court was presented with information that one of the jurors had posted information on his Facebook page during trial about the trial. The court ordered the juror to provide consent to Facebook to turn over posts made during the applicable time period so the judge could determine if the juror had been guilty of misconduct and, if so, whether the misconduct was prejudicial. The Court of Appeal denied a petition for writ of prohibition sought by a juror who claimed the order violated his privacy.

But obtaining the necessary evidence may not be easy. California Rules of Professional Conduct, Rule 5-320, subdivision (D) provides, "After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury *that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.*" (Emphasis added.) As with subsection (E), there is no prohibition from contacting the jurors; it is the manner in which the jurors are contacted which may be the problem. (For an example of an improper communication see *Lind v. Medevac* (1990) 219 Cal.App.3d 516.) But, if a juror states he or she does not want to speak with counsel or an investigator it may be a violation of this Rule if counsel or the investigator continues to pressure the juror. That is so under ABA Model Rules, Rule 3.5(c)(2). In criminal cases, a refusal of a juror to discuss the case precludes any further contact. (Code Civ. Proc., § 206(b).) And if information about the jurors has been sealed, counsel must follow the proper procedure under Code of Civil Procedure section 237 to obtain the necessary information to contact the jurors.

Attorneys should supervise any third parties (e.g., trial consultants or investigators) conducting posttrial interviews with jurors, both in terms of the procedures for contacting jurors, as well as the questions to be asked. Generally, these interviews are conducted by telephone. Best practice is to develop a protocol. The protocol should include how the interview is introduced to the juror, how to handle common questions (e.g., which side is paying the interviewer?), and what to do when the juror refuses (i.e., thank them for their time and hang up). Surprisingly, many jurors are happy to be interviewed about their experiences and will talk, sometimes for several hours. This is particularly true if the interviewer is familiar with the case. Having been forbidden to talk about the case, the interview is often a cathartic experience for the juror. The attorney should also review with any third party interviewer what to do if the juror refers in the interview to events that may constitute juror misconduct.

Conclusion

Practicing law in the 21st century requires attorneys to be computer savvy and to use technology, when appropriate. The Internet offers a chance to learn more than ever before about potential jurors and their biases and to monitor their online behavior during the trial. This technology presents opportunities, but also imposes responsibilities. Attorneys must not deceive jurors, and also must inadvertently communicate with potential jurors by leaving "footprints" when they are investigating jurors online. In addition, attorneys should not leave jurors with the feeling that their privacy is threatened by their service, potentially souring their opinion of jury service and the justice system. If the proper precautions are taken, however, attorneys can make more informed decisions and eliminate jurors whose bias is not revealed during voir dire. In addition, jurors who flout judicial admonitions can be called to account for their transgressions. In all, modern technology can provide greater justice, if attorneys know how to use it.

Justice (Ret.) J. Gary Hastings

Justice J. Gary Hastings (Ret). served as a Judge at the Los Angeles Superior Court from 1985 to 1993, focusing on civil and criminal trials, family law matters, probate calendar, law and motion calendars, and civil master calendar. He was the Supervising Judge of the Southwest branch 1989-1990.

John G. McCabe, Ph.D

John G. McCabe, Ph.D., is a Los Angeles-based cognitive psychologist and trial strategy consultant with DOAR. Since beginning work as a consultant in 2005, Dr. McCabe has designed and participated in a wide variety of studies related to jury behavior including mock trial and focus group research. He also supports trial counsel by preparing witnesses, conducting internet searches of prospective jurors, composing voir dire questions, and assisting with jury selection. *jmccabe@doar.com.*

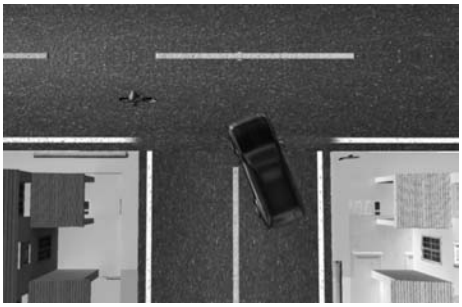
How Hollywood Can Help You Win

By Samir Lyons

Some of the greatest movie moments in history have taken place within a courtroom. In *To Kill A Mockingbird*, Atticus Finch (Gregory Peck) courageously took on racism as he defended an African-American who was wrongly accused of rape. Military lawyer, Kaffee (Tom Cruise) in *A Few Good Men* defended a group of Marines accused of murder who contend they were acting on orders. A has-been lawyer, played by Paul Newman in *The Verdict*, took a chance to salvage his career and self-respect by taking a malpractice case to trial rather than settling.

Although dramatic, these silver-screen moments epitomize a few basic storytelling principles that, when effectively incorporated into a real-life courtroom trial, can help an attorney win. With over 10 years of experience in animation and visual effects, I have used similar principles to tell entertaining stories for film and television. But these same approaches can also be a tremendous asset in the courtroom. Storytelling and animation techniques used in Hollywood can be a valuable resource for trial attorneys.

Animation has gained growing acceptance in the courtroom as an aid to help juries understand the evidence. For example, the California Supreme Court has specifically approved computer animations as demonstrative evidence at trial. In *People v. Duenas* (2012) 55 Cal.4th 1, the court rejected numerous attacks on an animation's use – including objections that the animation was speculative, that it created an improper air of scientific certainty, and that it was cumulative of testimony. (*Id*. at pp. 17-25.) The court concluded that "[a] computer animation is admissible if ' "it is a fair and accurate representation of the evidence to which it relates...." ' " (*Id*. at p. 20.)



As with an audience watching a movie in a theater, a jury will enter a trial with myriad biases. Audience members expect to be introduced to a protagonist and an antagonist. A juror also has preconceived notions about how the trial might unfold and who the bad actor is.

An attorney uses effective storytelling to overcome inherent bias in the same way that a director shapes an audience's perception about the characters and events in a movie. If the facts presented to the jury are not clear, jurors will make up their own stories and confabulate components of the scene as *they* see it. To avoid confusion and prevent the juror from "filling in the blanks" in a harmful way, introducing effective visuals and demonstrative evidence guarantees that the power of complete story creation will belong solely to the attorney.

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In court, an attorney has a finite amount of time to educate a jury on the volumes of facts that he or she has spent months researching. Similarly, Hollywood directors are challenged to tell a story in (traditionally) 120 minutes or less. When presented with a combination of both auditory and visual information, audiences and juries alike are able to process large amounts of information in relatively short periods of time. After all, as they say, a picture is worth a thousand words.

Many attorneys today have become adept at PowerPoints with static slides. But the audience in a courtroom – the jury – often includes younger folks who want a break in the verbal monotony of information thrown at them, and may expect more of a "show." More importantly, a simulation may be a much better way to demonstrate an accident reconstruction or the mechanics of a physical injury. Even boring material such as a dense timeline can be much easier to digest if the data marches sequentially onto the screen in a way that supplements the message.

With 3D animation, strategic design, and storytelling techniques such as sound effects, lighting, color, and basic cinematography, attorneys are empowered in their presentation of the facts in a way that is sure to have maximum impact. As an animator trained to convey a director's vision, I enjoy applying the same storytelling techniques to help attorneys win in the courtroom.

Samir Lyons

Samir Lyons moved to Los Angeles to pursue a career in 3D Computer Animation after graduating with a BFA from Savannah College of Art and Design in 2004. He has worked on feature films such as Iron Man, Terminator: Salvation, and Disney's Sorcerer's Apprentice, and has worked with a variety of high end brands to develop TV and online commercials for Porsche, Samsung, Nike, Bridgestone, Hershey's and more. He is now the founder of Animation For Law *(www.animationforlaw.com),* a company that provides legal animation and graphics for trial.

"Surviving" Claims for Punitive Damages In Wrongful Death Cases

By Mark V. Berry and Joyce M. Peim

By statute, punitive damages are recoverable in survival actions brought by a decedent's representative to collect certain damages that the decedent incurred before death, and would have received had he or she lived to prosecute the action personally. However, also by statute, punitive damages are *not* recoverable in wrongful death actions brought by the decedent's statutory heirs for their own pecuniary losses related to the decedent's companionship and, in appropriate cases, financial support. Yet creative plaintiffs' counsel pursuing both wrongful death and survival actions continue to advance arguments that effectively would award the wrongful death plaintiffs punitive damages. Careful analysis is needed to demonstrate why this should not be permitted, and why defense counsel must be vigilant in protecting their client from this type of outcome at trial.

The Statutory Basis for the Mutually Exclusive Damages In Survival and Wrongful Death Actions.

There is no doubt that the damages provided by the Legislature in the survival statute and in the wrongful death statute are discrete. Damages recoverable in a survival action are statutorily excluded from damages recoverable in a wrongful death action. (Code of Civil Procedure section 377.61.) Indeed, "[t]he two statutes operate exclusively to compensate distinct interests separately." (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 366.) The different recoveries available as between survival actions and wrongful death actions can be seen in contexts in addition to punitive damages. For example, although the decedent's lost wages may be recovered by the personal representative in the survival action, and the heirs' loss of financial support may be recovered in the wrongful death action, what is recoverable is distinctly different. In wrongful death cases, damages include the loss of financial benefits that the decedent contributed to the family by way of support at the time of death, which the family could reasonably expect in the future had the injury not occurred. (*Canavin v. Pac. Sw. Airlines* (1983) 148 Cal.App.3d 512, 520-21.) Wrongful death plaintiffs can recover the present value of the support the decedent would have contributed to the family during the life expectancy of decedent or plaintiff, whichever is shorter. (See 6 Witkin, Summary of California Law, Torts, section 1692, pp. 1223-1224 (5th Ed. 2005); *Overly v. Ingalls Shipbuilding, Inc*. (1999) 74 Cal.App.4th 164, 176. see also CACI No. 3921.) But the value attributed to decedent's personal consumption should be deducted from any award of loss of support to the heirs. (See *Overly v. Ingalls Shipbuilding, Inc*. (1999) 74 Cal.App.4th 164, 176.) But in survival actions the estate may recover only decedent's lost wages incurred *before* death. (See *County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 304.)

It cannot be disputed that the Legislature expressly provided for punitive damages only in the survival statute, based on any economic loss incurred by the decedent prior to death. (See Code of Civil Procedure sections 377.34 and 377.61.) This makes sense in view of the separate and distinct nature of the survival and wrongful death actions. First, the death of decedent creates a new statutory cause of action in the heirs, the purpose of which is to compensate the heirs for their personal injury in the form of decedent's lost support and companionship. (See Code of Civil Procedure section 377.60; *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1263-1264.) But the survival action is not a new cause of action. Rather, if a cause of action existed during the life of the decedent, a survival action prevents the abatement of that action and permits the cause of action to be brought by the representatives of decedent. *Id*. at 1264. The Ninth Circuit found that "it is important to note the contrast in remedies of the two enactments," and went on to explain, "The survival statute is best understood *as a matter of probate law*, not tort law. Its goal is to insure that the estate of a decedent loses no valuable rights possessed by him during his life by reason of his death, whether these rights arise from tort, contract, or other principles." (*In re Paris Air Crash* (9th Cir. 1980) 622 F.2d 1315, 1323 (emphasis added).)

A Short History Of Punitive Damages In Wrongful Death And Survival Actions

The issue of whether punitive damages should be recoverable in wrongful death actions has a long history. Early in our state's jurisprudence, the California Legislature first permitted, and then expressly excluded, the recovery of punitive damages by the heirs in a wrongful death action. From 1862 until 1874 California's wrongful death statute permitted heirs to recover punitive damages. (*See Pease v. Beech Aircraft Corp*. (1974) 38 Cal.App.3d 450, 461.) However, in 1874 the Legislature struck

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the words "pecuniary and exemplary" from the wrongful death statute with the intent to take away the right of the heirs to recover punitive damages. (*See id*.; *see also Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 450; *Georgie Boy Manufacturing, Inc. v. Superior Court* (1981) 115 Cal.App.3d 217, 222; *In re Paris Air Crash*, *supra*, 622 F.2d at 1318, fn. 2 ["The correctness of *Tarasoff*'s statutory interpretation is supported by the legislature's failure to amend s 377 to include punitive damages despite attention having been drawn to their omission."].) Indeed, as established above, the wrongful death statute contains the exclusive remedies available to a wrongful death plaintiff, and the California courts and Legislature are reluctant to provide any relief not specifically authorized by statute. (*See Vander Lind*, *supra*, 146 Cal.App.3d at 364-365.)

Notably, prior to 1961, California's survival statute, then codified as Civil Code section 956, also did not permit recovery of punitive damages. (*Dunwoody v. Trapnell* (1975) 47 Cal.App.3d 367, 370.) Since that time, however, survival actions have provided the beneficiaries of a decedent's estate (who are often the same as the statutory heirs entitled to pursue wrongful death claims) a way to obtain punitive damages—at least to the extent that the decedent could have obtained such damages had he or she lived.

An important limitation on survival actions, however, is that they provide compensation only for damages that the decedent incurred "before death." For example, in *Stencel Aero Engineering Corp. v. Superior Court* (1976) 56 Cal.App.3d 978, the court permitted the claim for punitive damages to proceed past the pleadings stage, but cautioned that the "special administratrix bears the burden of proving that *an evidence-supported interval of time elapsed* between the property damage loss and the death of the decedent." (*Id*. at 988 (emphasis added).)

An interesting question arises as to how much time is sufficient to establish that the decedent survived long enough to have incurred economic loss "before death" in order to seek punitive damages within the meaning of the statute. Some intermediate appellate courts have suggested that economic damages such as ruined clothing may support punitive damages in a survival action, notwithstanding facts which indicate decedent's near-instantaneous death. (See *Pease v. Beech Aircraft Corp.* (1974) 38 Cal.App.3d 450 [finding no claim for punitive damages in a survival action lies where death was simultaneous with crash, but adding in dicta that some property damages, and thus some punitive damages, might yet be claimed by a personal representative with a right of control over the decedent's property]; *Stencel Aero Engineering Corp. v. Superior Court, supra,* 56 Cal.App.3d at p. 987-988 and fn. 6 [$200 in personal articles allegedly damaged by rocket blast of aircraft ejection mechanism when death occurred seconds later upon impact with ground]; *Grimshaw v. Ford Motor Co*. (1981) 119 Cal.App.3d 757, 829 [where decedent survived three days after accident, court said, "Punitive damages are, however, recoverable ... by the personal representative of the decedent's estate if the decedent survived the accident, however briefly]; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 582 [decedent stabbed to death: "Relatively minor compensatory damages, such as here the decedents' clothing and personal property damaged during the homicides, can be the springboard for substantial punitive damages"]; see also *In re Air Crash Disaster at Sioux City Iowa on July 19, 1989*, 760 F. Supp. 1283, 1287, (N.D. Ill. 1991) [federal district court disallowed punitive damages, but said, "*Grimshaw*, *Stencel* and *Pease* demonstrate that punitive damages are not available ... unless (1) the decedent survived the accident, if only for a moment"].)

However, in view of its intent to prevent wrongful death plaintiffs from recovering punitive damages, it is unlikely that the Legislature intended to create the right to recover punitive damages in situations where mere seconds or minutes elapsed between the alleged tortious act and death, as to do so would subvert the statutory distinction between damages recoverable in survival and wrongful death actions. Indeed, a recent unanimous California Supreme Court decision indicated that damages are not incurred before death if the victim died "more or less instantaneously." (*People v. Runyan* (2012) 54 Cal.4th 849, 861.)

But putting aside that question, we must ask what happens to the *punitive* damages award where it is undisputed that the death was not instantaneous? Punitive damages must be tied to the decedent's harm being compensated. (See *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 429, 123 S. Ct. 1513, 1526 [punitive damages must be reasonable and proportionate to the wrong committed]. But courts have not clearly established what that means in the context of a survival action, and they have not consistently evaluated the extent to which the bar on punitive damages in wrongful death actions should foreclose arguments that *survival* action damages may include those that punish the defendant for the *death*.

Survival Actions as an improper "Back-Door" to Recovery of Punitive Damages in Companion Wrongful Death Actions

To some extent, it is inevitable that a survival action will allow the beneficiaries of an estate to collect punitive damages where the same people could not collect punitive damages as statutory heirs in a wrongful death action. The Court of Appeal acknowledged as much in *Ford Motor Co. v. Superior Court* (1981) 120 Cal.App.3d 748, 751-752, when the court stated "where an injured person does not die immediately, *his heirs will be able to recover punitive damages indirectly*; a cause of action for exemplary damages will survive him, for all loss or damages *sustained by him* prior to death." (Italics added.)

However, in personal injury tort litigation we frequently see survival actions in the context of incidents causing death. Under these circumstances, unless the court carefully controls what the jury is allowed to consider as the basis for punitive damages, they may be based improperly on the wrongful death itself, rather than the decedent's own economic harm incurred prior to death. This is tantamount to permitting the heirs to recover punitive damages for the wrongful death of their decedent in contravention of the Legislative intent.

The key point is that the damages upon which the punitive damages are founded are not the damages sustained by the heirs (their "wrongful death" damages) but by the decedent before death. Those are distinctly different.

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The *Romo* Case Erroneously Approves "High Punitive Damages in Malicious-Conduct Wrongful Death Actions."

It is crystal clear that California does not permit recovery of punitive damages in wrongful death cases. As the Ninth Circuit stated in *In re Paris Air Crash*, *supra*, 622 F.2d at 1317 n.2, "California courts have uniformly held that the statute allowing punitive damage recoveries generally in tort actions is available for death recovering only in survival actions and not in wrongful death suits." (See also *Georgie Boy Manufacturing, Inc. v. Superior Court, supra,* 115 Cal.App.3d at p. 225 ["Apparently the Legislature sought to limit recovery of this volatile remedy to those causes of action personal to the decedent.... The Legislature's apparent concern for the danger of excessive recoveries in cases involving death is a sufficient discernible and legitimate purpose viewed in the perspective of rational analysis"].) And as noted in *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979* (7th Cir. 1981) 644 F.2d 594, 623-24, "Case law indicates that California seems to have a strong commitment to its policy of denying punitive damages in wrongful death cases."

Further, death as a "personal injury" to the decedent is not actionable in California. Nor is decedent's death itself a compensable component of damages in a wrongful death action. Rather, in the event of an alleged wrongful death, decedent's statutory heirs may recover only pecuniary damages caused by the death, such as loss of financial support and the pecuniary value of the loss of decedent's society. (See Code of Civil Procedure section 377.61; *Canavin*, *supra*, 148 Cal.App.3d at pp. 520-21; *Estate of D'india* (1976) 63 Cal.App.3d 942, 947 ["Under California law, an heir is entitled to recover wrongful death damages for *pecuniary* loss alone"; "p*ecuniary* loss may include the loss of such elements as personal companionship or society but only if—and to the extent that—it may reasonably be assessed in *pecuniary* terms under the evidence in the particular case"].)

However, one Court of Appeal decision ignored clear statutory and case law, impermissibly supported the subversion of the Legislature's express decision to disallow recovery of punitive damages in wrongful death suits, and thus has encouraged the strategy of basing punitive damages on the decedent's death itself. *Romo v. Ford, supra,* 113 Cal.App.4th 738 was an automotive product liability action that gave rise to wrongful death, survival, and personal injury claims. The jury awarded $5 million in compensatory damages, and $290 million in punitive damages. (*Id*. at 744.) After the punitive damages award was upheld in California, the United States Supreme Court granted *certiorari*, vacated the judgment and remanded the matter for reconsideration in view of *State Farm Mut. Automobile Ins. Co. v. Campbell*, *supra,*. (*Romo,* 113 Cal.App.4th at 744; *see also Ford Motor Co. v. Romo* (2003) 538 U.S. 1028, 123 S.Ct. 2072.)

On remand, however, the *Romo* Court reaffirmed a reduced punitive damages award. In so doing, the court relied on a highly debatable element of damages that is not generally recognized in California law: "hedonic" damages, or the loss of enjoyment of life:

> The deceased family members 'would have been entitled to recover [punitive damages] had [they] lived' (§ 377.34), just as the surviving family members were entitled to such damages. Although the *right* to such damages arises from the same statutory source for both deceased and surviving victims, the *amount* of such damages must, in order to serve the purposes articulated by section 3294, be measured somewhat differently and, in the case of the deceased victims, *take into account the impact of death upon the decedent and the loss of decedent's opportunity to live*.

Romo, 113 Cal.App.4th at 760, fn. 12. (Italics in original and added).

This analysis suggests that a decedent is entitled to punitive damages for their loss of the ability to enjoy life. But as noted in *Garcia v. Superior Court* (1996) 42 Cal.App.4th 177, 180, the "loss of enjoyment of life", or "hedonic damages"

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is "a concept foreign to our state survival statute."

Romo's further reasoning, however, is not just novel; it is flatly contrary to statute. Specifically, the court goes on to state:

> In this context of malicious conduct, as opposed to ordinary negligence actions, public policy and legitimate interests of the state in the protection of its people *require a mechanism to punish and deter conduct that kills people*. It would be unacceptable public policy to establish a system in which it is less expensive for a defendant's malicious conduct to kill rather than injure a victim. Thus, the state has an extremely strong interest in being able to *impose sufficiently high punitive damages in malicious-conduct wrongful death actions to deter a 'cheaper to kill them' mindset, while still maintaining limits on wrongful death compensation in cases of ordinary negligence*.

Id. at 761. (Italics added).

Romo is wrong for several reasons. First, *Romo* ignores the express language of the wrongful death and survival statutes. Second, *Romo* ignores well-settled and well-established decisional law confirming that the Legislature intended that punitive damages not be awarded in wrongful death cases. Third, by reasoning that, despite the statutory bar, wrongful death plaintiffs in strict products liability cases should be able to obtain punitive damages, *Romo* ignores the fact that 50 years ago California dramatically lessened the strict product liability plaintiff's burden to prove liability as to a product defect. (See *Greenman v. Yuba* (1963) 59 Cal.2d 57.) Finally, *Romo* ignores the California Penal Code, which fulfills California's interest in deterring conduct that "kills people."

In sum, and contrary to *Romo*, under California law there are no circumstances where the death of decedent should be used to support recovery of punitive damages in the survival action.

Uncompensated Potential Harm

Creative plaintiffs' counsel may argue that punitive damages should be recoverable for the death, on the argument that the punitive damage award can consider "uncompensated potential harm." However, a few years after *Rufo*, in a breach of contract/promissory fraud case, the California Supreme Court rejected the argument that uncompensated potential harm could support an excessive award of punitive damages. (*See Simon v. San Paolo U.S. Holding Co., Inc*. (2005) 35 Cal.4th 1159.) The jury in *Simon* concluded the contract in question was not enforceable, but found that the defendant engaged in promissory fraud. The plaintiff was awarded $5,000 in compensatory damages and $2.5 million in punitive damages. The case was re-tried only as to punitive damages which resulted in an award of $1.7 million. On appeal the plaintiff argued that uncompensated or potential harm in the form of lost profits of $400,000 – the alleged difference in the value of the property at the time of the contract and the current value – could be considered in support of the punitive damages award. The Supreme Court disagreed and, based on due process restrictions, reduced the punitive damages award to $50,000. (*Simon*, 35 Cal.4th at 1166.)

Unfortunately, the *Simon* Court did not completely close the door to the consideration of uncompensated or potential harm as a basis for punitive damages in other cases, although it did suggest that awards based on such harm will be strictly scrutinized for due process violations. (*Simon*, 35 Cal.4th at 1174.)

What Does This Mean?

It cannot be disputed that the Legislature intended to preclude heirs in wrongful death actions from recovering punitive damages. It is similarly clear that depending on the facts, wrongful death plaintiffs stand to recover *some* punitive damages for the death of their decedent under the guise of a survival action, at least in cases of non-instantaneous death. Be that as it may, under California law wrongful death/survival plaintiffs cannot "mix and match" the damages recoverable under the wrongful death and survival statutes, and cannot use their own wrongful death damages, or the fact of decedent's death, to support recovery of punitive damages in the survival action. To do so would fly in the face of the Legislature's express decision to disallow recovery of punitive damages in wrongful death suits and controlling case law supporting that decision.

Therefore, in a wrongful death/survival action the defendant must carefully craft a clear jury instruction regarding the *very limited* damages recoverable in the survival action *based on pre-death harm to decedent's property*. This means instructing the jury that punitive damages may not be used to punish the defendant for the impact of its alleged conduct except to the extent that conduct caused the decedent's pre-death economic harm, and *not* to the extent that conduct caused the decedent's death. . Further, the jury must be instructed that punitive damages may not be awarded for heirs' personal loss related to the decedent's death.

No appellate court has critically analyzed the comment in *Ford Motor Co. v. Superior Court* i.e., that the survival statute permits heirs to indirectly recover punitive damages. Similarly, the erroneous statements of law set forth in *Romo* remain available to creative wrongful death plaintiffs. Thus, where presented in a wrongful death/survival action, these issues may well be worth advancing in the trial court via motion to strike, motion for summary judgment, and/or motion *in limine*, and through the appellate system in the event of an adverse ruling.

Mark V. Berry

Mark V. Berry is a partner at Bowman and Brooke LLP's Los Angeles office where he defends motor vehicle and other manufacturers in product liability cases around the country. Mark has had more than 30 jury trials, and most recently was co-counsel in Uno v. Toyota, the first "bellwether" unintended acceleration trial in the California coordinated proceedings that resulted in a defense verdict in 2013.

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THE WIDOW WAVE

a book review of a maritime trial

Book Review
by Bernard Cotter

This article first appeared in the *ADC Defense Comment,* and is reprinted with permission of the Association of Defense Counsel of Northern California and Nevada

If you have ever appeared in court, for any reason, this book will grab and pull you between its covers. The author, Jay Jacobs, formerly a San Francisco defense attorney, reveals heart and soul, angst and turmoil in describing his defense of a wrongful death lawsuit resulting from the loss of a private fishing boat with captain and four men aboard in the waters outside San Francisco Bay.

The fishing boat, a 34-footer, was owned by Francis Dowd, a Raytheon vice-president. The passengers were Dowd's son, Dowd's brother-in-law, Dowd's friend and Dowd's business associate, Andy Ang. The suit was brought by Ang's widow and five children against the Estate of Francis Dowd. The trial was held in Santa Clara County where Dowd lived.

The boat, the "Aloha," left Sausalito harbor on the morning of March 9, 1984. The boat was never seen or heard of again. Francis Dowd's body was found floating in San Francisco Bay about a month after the tragedy. Jay Jacobs was a young lawyer with ten years' experience selected by Dowd's insurer, Allstate, to defend the case. The plaintiffs were represented by highly successful lawyers, David Baum and Martin Blake of San Francisco. At stake was a $1.1 million liability policy and Dowd's estate.

Cold Air Meets Warm Air

The book begins on an obscure note describing a storm when icy cold air from Siberia met warm moist air from the South Pacific. The writing is poetic:

In this brutally cold environment, there is one unexpected element of beauty: at exceptionally low temperatures a deep breath expelled into the bone dry arctic air freezes instantly, forming miniature ice crystals that make a tinkling sound as they float downwards.

The storm may have produced a wave of unexpected height and power that slammed into the "Aloha" causing her to capsize and sink to the bottom of the Pacific.

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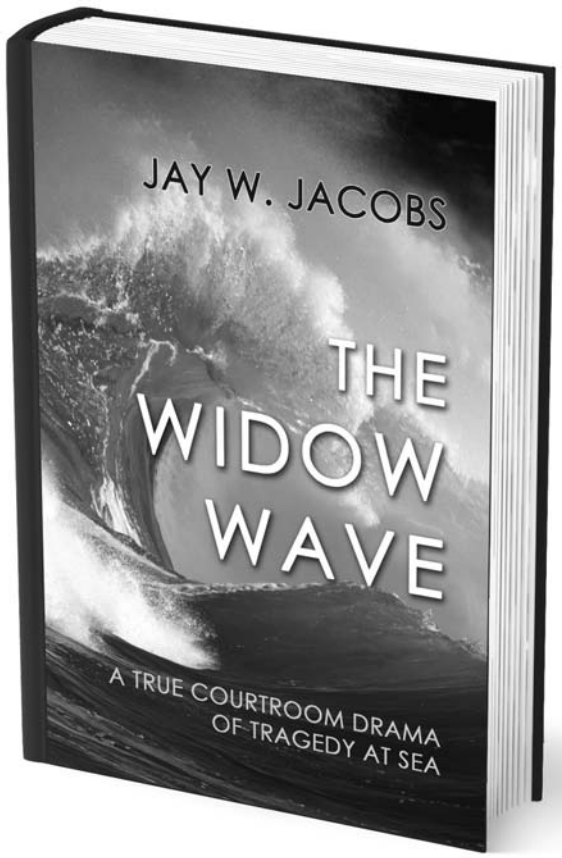

Keeping an Open Mind

It is well the jurors are told to keep an open mind and not come to any conclusions until the case is finally submitted to them. The trial of *Ang et al. v. Estate of Dowd* ran true to form for three weeks in Judge David Leahy's San Jose courtroom. Lay witnesses and experts appeared and testified. Conflicting facts and opinions clashed. Objections were sustained and broached topics left unexplored. The attorneys espoused their conflicting views of the evidence and implored the jury to come to directly opposite conclusions.

You Are the Juror

Author Jacobs puts the reader in the jurors' seats in recounting the trial. By defense reckoning, the "Aloha" left Sausalito Harbor at 6:00 am. Plaintiff counsel attempted to establish the "Aloha" lifted anchor at 7:30 am. This was a vital point in the trial.

The "Aloha's" destination was Duxbury Reef just west of Stinson Beach. To get to Duxbury, Captain Dowd would have passed under the Golden Gate Bridge. The opening to San Francisco Bay is actually 2.5 miles west of the bridge. The landmarks are Point Lobos on the San Francisco or south side, Point Bonita on the north or Marin side. After passing under the bridge, Captain Dowd had thechoice of continuing straight in the Main Shipping Channel for five or six miles into the open sea before turning right or north to Duxbury or taking a shorter route by turning right at Point Bonita into shallow Bonita Channel and then onto Duxbury. Per the experts, the shallower the passage, the more likely waves are to increase in size when the wind is blowing.

On the morning in question, 15 to 20 fishing boats heading for Duxbury took the Main Shipping Channel. No one on any of the boats saw the "Aloha." The conclusion was Captain Dowd, an experienced boater and fisherman, took Bonita Channel, the shorter route.

As to the storm that was brewing because of the collision of Siberian and South Pacific air, at precisely 8:00 am there was a small craft warning that waves had become dangerous in Bonita Channel. Attorneys Baum and Blake contended that the "Aloha," having left Sausalito Harbor at 7:30 am and not 6:00 am, as the defense claimed, negligently ventured into Bonita Channel after the 8:00 am warning had aired.

Trouble for the Defense

A month before the accident, while the "Aloha" was in its berth in Sausalito Harbor, someone snuck aboard and stole the radar equipment, the two-way radio and the ship-to-shore telephone. Replacement equipment had been purchased. However, there was a strong inference that the equipment had not been re-installed. This allowed Baum and Blake to argue Captain Dowd was operating an improperly outfitted boat and, not hearing the small craft warning, negligently blundered into shallow Bonita Channel after 8:00 am, where the "Aloha" was swamped by monster waves and sent to the bottom with all hands aboard.

The Loss of the "Aloha"

Jacobs, who served in the Merchant Marine as a sailor and an officer for three years before starting Golden Gate University School of Law, again turns poetic in describing the loss of the "Aloha:"

As it is with all living things, there comes a time for a vessel to die. At the moment the first hint of sunlight became visible over the Marin hills, erasing the last hint of stars from the fading night sky, the "Aloha" died.

Striking the bottom in a reverberating shudder, the boat gently rocked on the seabed, preparing a final resting place for herself. The men entombed inside were now in death's repose, their valiant struggle to live concluded. They appeared asleep, resting in silence. In a short time, the sea overhead would revert to gentler swells, leaving no trace of the men or the boat that had intruded into its realm.

Trial Begins on a Bad Note

The trial began on a bad note for the defense. Baum announced he was waiving the jury. At a previous Trial Setting Conference, Jacobs had waived a jury. He had no recollection of doing so, but had checked the jury waiver box on the court form bearing his signature. Somehow, he was able to convince Judge Leahy to permit him to have a jury.

Sunk by a "Coincidence" Wave

Jacobs called in two experts, Captain David Seymour, a boat safety expert, and Rae Strange, a meteorologist, in order to explain to the jury that the "Aloha" went down before the small craft warning was broadcast at 8:00 am. They relied on data from three buoys in the open waters outside the bay which suggested the "Aloha" went down in relatively calm waters when struck by a "coincidence" wave, a wave of unanticipated magnitude formed by two smaller waves, before 8:00 am. The coincidence wave could have reached a height of 20 feet, too much for a 34-foot fishing boat such as the "Aloha" to handle.

Three Books in One

In reading *The Widow Wave,* the reader will sense he or she is reading three books in one. First, there is the account of the sinking. Second, there is the jumble of the trial. Third and best is Jacobs' recitation of his deepest thoughts while the trial unfolded. Jacobs had profound respect for Baum's ability as a trial lawyer. "After I learned Baum was going to try the case, if a way had presented itself to get out of going to trial, I would have seized it." At one point: "This case was going to be my first or maybe my last big trial." At another: "I saw a man (in the mirror) overwhelmed with fear looking back at me." And then: "I leaned against the table to strengthen my legs which didn't seem to be cooperating." Later: "As the seconds ticked by my heart pounded faster than a sewing machine." Towards the end: "In the three weeks since the trial began, I had been in constant turmoil about not settling." Overall: "I blundered on."

Baum and Blake tried to ignore Jacobs during the trial, not responding to his good morning greetings, only disclosing next day's witnesses when asked. "I had been dismissed without even the courtesy of Baum looking in my

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direction." At one point, Jacobs heard Baum on the telephone: "It's all over with now, it's just a matter of how much." Jacobs felt "like the wind had been knocked out of me."

Fascinating to the End

In every trial something completely unexpected usually occurs. In this case, the leading side seemed to change day by day, witness by witness. What happened, including Judge Leahy's closing comment, will keep you fascinated to the end.

MCLE credits should be given for reading *The Widow Wave;* it's that good. The book can be ordered through Amazon Books or Barnes & Noble.

Bernard Cotter

This review of *The Widow Wave* was written by long-time ADC member Bernie Cotter who, after 50 years of trying cases, now devotes his time to mediating and arbitrating cases at McDowall Cotter, San Mateo – when he is not off fishing.

Around the Counties

Los Angeles County Report

The Los Angeles Superior Court system is updating their telephone systems and all courthouses will have new telephone numbers. Many of the courts have already converted to the new system but the changes will continue to take place on a rolling basis through April, 2015. A list of all new courthouse telephone numbers is available on the Court's website, *www.lacourt.org,* under the "General Information" tab. Judge Carolyn B. Kuhl has been elected as the new Presiding Judge for the Los Angeles Superior Court. Judge Daniel J. Buckley was elected to serve as the Assisting Presiding Judge.

The Antelope Valley Courthouse now requires all motions, etc., to be calendared through the Online Court Reservation System, available on the Los Angeles Superior Court's website.

Orange County Report

Effective February 2, 2015, all 24 civil courtrooms, including the civil complex courtrooms, will shift from one-to-one assignment of court reporters to civil courtrooms for all hearings to a system where court reporters are assigned to a courtroom as needed for trials and evidentiary hearings only. Official court reporters (i.e., court reporters employed by the Court) will only be provided for trials and matters in which oral evidence will be presented.

The expansion of this project follows a successful pilot which has been operating in 14 unlimited civil courtrooms since August 25, 2014. The pilot project has provided a significant cost savings for the Court. Also, pooled court reporter coverage has resulted in more efficient staffing assignments and the use of fewer "pro tempore" court reporters (i.e., reporters not employed by the Court).

Presiding Judge Glenda Sanders said, "Persistent pleas for adequate funding for the California Courts have failed. Our Court's current budget allocation for fiscal year 2014-2015 is insufficient, and the picture for 2015-2016 is even bleaker with an anticipated funding deficit of $5.7 million. Because of this, our Court must find ways to operate more efficiently."

Riverside County Report

Riverside County has enacted new filing deadlines for all filing types. As of December 1, 2014, the filing deadline is now **4:00 pm** for all filing types including in person filings, eFiling, drop box and fax filings. Any document left in the drop box after 4:00 pm will have been deemed filed on the next court day.

The Riverside Superior Court is also consolidating its filings. Only cases with zip codes from the cities of Murrieta, Menifee, Wildomar and Winchester will be filed and heard at the Southwest Justice Center. All cases currently assigned to the Southwest Justice Center will remain calendared there. All other zip codes (with the exception of those filed and heard at the Blythe and Palm Springs Courts, which remain unchanged) will be filed and heard in the Historic Courthouse.

San Diego County Report

Due to ongoing budget cuts, various San Diego Superior Court business offices are closing and being consolidated. All civil appeals, family law appeals, and both East and South County criminal appeals must now be filed in the Central Division effective January 5, 2015. Additionally, the Kearny Mesa Small Claims business office is closing; all Small Claims matters will now be filed in the Central Division.

Don't forget the San Diego Superior Court Local Rules have been revised and the new rules go into effect January 1, 2015. To see if the changes affect your practice, go to the Rules tab at *www.sdcourt.ca.gov.*

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Santa Barbara County Report

A few amendments to the Santa Barbara Superior Court local rules have been proposed for adoption on January 1, 2015. Keep an eye on the status of these changes at *www.sbcourts.org.*

Ventura County Report

The Ventura County Superior Court has enacted new Local Rules which go into effect on January 1, 2015. The new local rules can be downloaded for free at *www.ventura.courts.ca.gov/local-rules.html.*

The Judges of the Ventura Superior Court have elected Judge Donald D. Coleman as Presiding Judge and Judge Patricia M. Murphy as Assistant Presiding Judge for 2015 and 2016. The new term for both begins January 1, 2015.

defense successes **september –december**

Raymond Blessey
Taylor Blessey LLP
Grigorian v. Maissian

Constance A. Endelicato
Wood, Smith, Henning & Berman LLP
Waksberg v. St. John's Health Center

Richard Gower
Inglis, Ledbetter, Gower & Warriner, LLP
Hector v. Lewin

Kenneth N. Greenfield
Law Offices of Kenneth N. Greenfield
Zimmerman v. Wawanesa General Insurance Co.

Joseph Macha
Foley & Mansfield
Evans v. Hood Corporation

Jeff Walker
Walker & Mann LLP
Perry v. Buchan

Brian L. Williams
Sullivan, Ballog & Williams, LLP
Seay v. County of Orange

Michael A. Zuk
Herzfield & Rubin, LLP
Newsome v. J. Timothy Katzen

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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:

Larson v. UHI of Rancho Springs, Inc. (2014) 230 Cal.App.4th 336: Dave Pruett from Carroll, Kelly, Trotter, Franzen & McKenna drafted a **successful publication request**. The Court of Appeal affirmed an order sustaining a demurrer to claims of battery and intentional infliction of emotional distress against anesthesiologist, based on physical contact during pre-operative checkup. The Court of Appeal held that MICRA's one-year statute of limitation applies and rejected plaintiff's attempt to circumvent MICRA.

In re Walgreen Company Overtime Cases (B230191, Oct. 23, 2014) __ Cal.App.4th __ [2014 WL 5390402]. Brad Pauley and Steven Fleischman from Horvitz & Levy submitted a **successful publication request**. The Court of Appeal affirmed the denial of class certification in post*Brinker wage* and hour case. The court criticized plaintiff's submission of 44 form declaration, most of which were recanted by plaintiffs during depositions.

Matter of Yee (Cal. Bar Ct., May 21, 2014, 12-O-13204) [2014 WL 3748590]: **Successful publication request** to the Review Department of the State Bar Court written by Mark Schaeffer of Nemecek & Cole. This case involves attorney discipline for an attorney who erred in complying with her MCLE requirements and misreported compliance to the State Bar (which was found not to be intentional). The State Bar wanted a 30-day suspension. The trial court recommended a public reprimand instead of suspension. The State Bar appealed. The decision to reprimand rather than suspend was affirmed and the Review Department granted ASCDC's request for publication.

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:

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.

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.

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

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the plaintiffs' deceased mother, who died at the age of 82. The 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.

Hudson v. County of Fresno, docket No. F067460. Robert Wright, Lisa Perrochet and Steven Fleischman from Horvitz & Levy submitted an amicus brief on the merits in this appeal pending at Fifth Appellate District in Fresno. The defendant claims that the plaintiff improperly used "Reptile" arguments during closing argument. The Court of Appeal accepted ASCDC's amicus curiae brief and the appeal remains pending.

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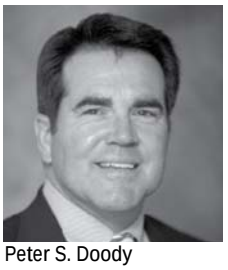
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