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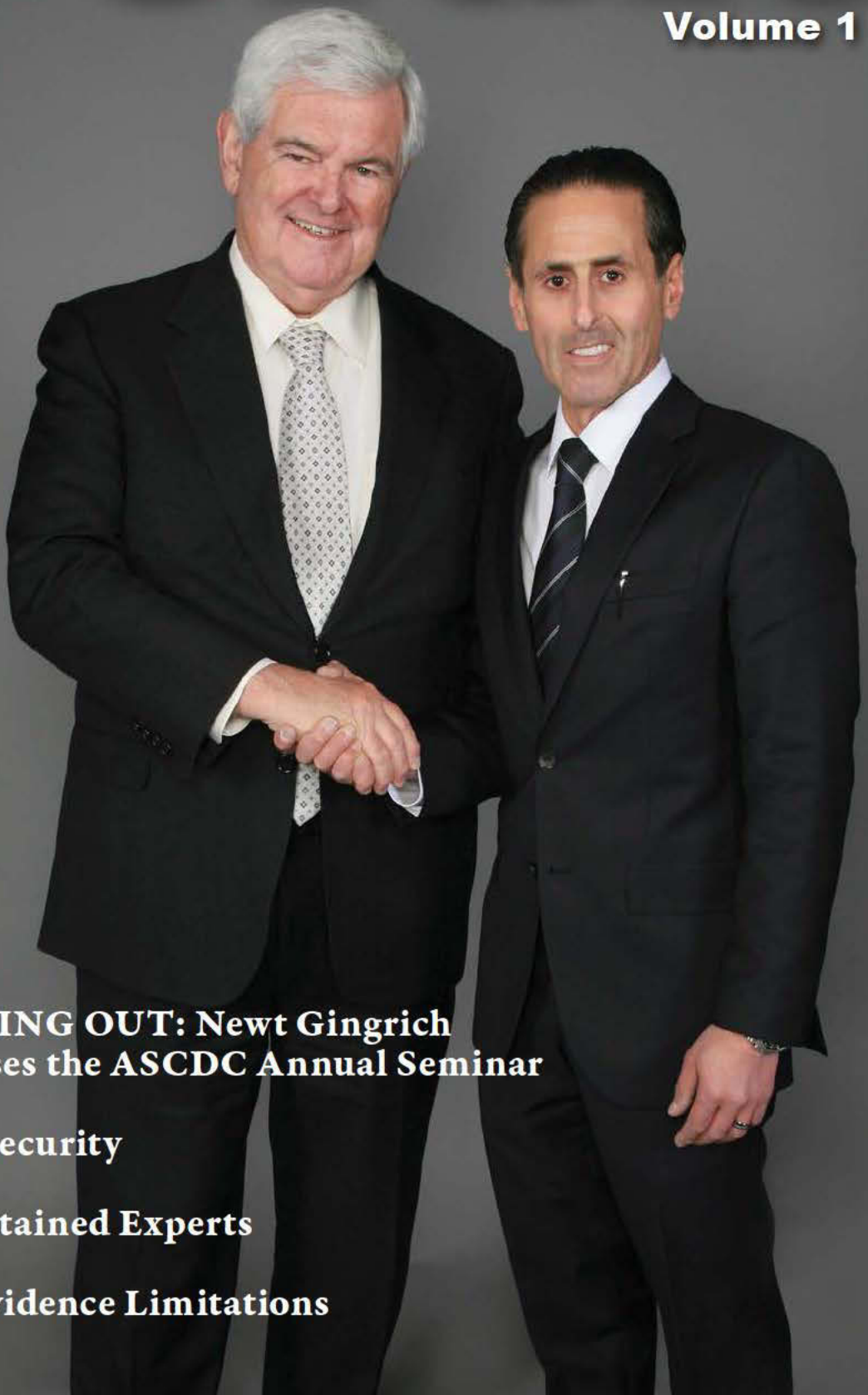

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- Cyber Security
- Non-Retained Experts
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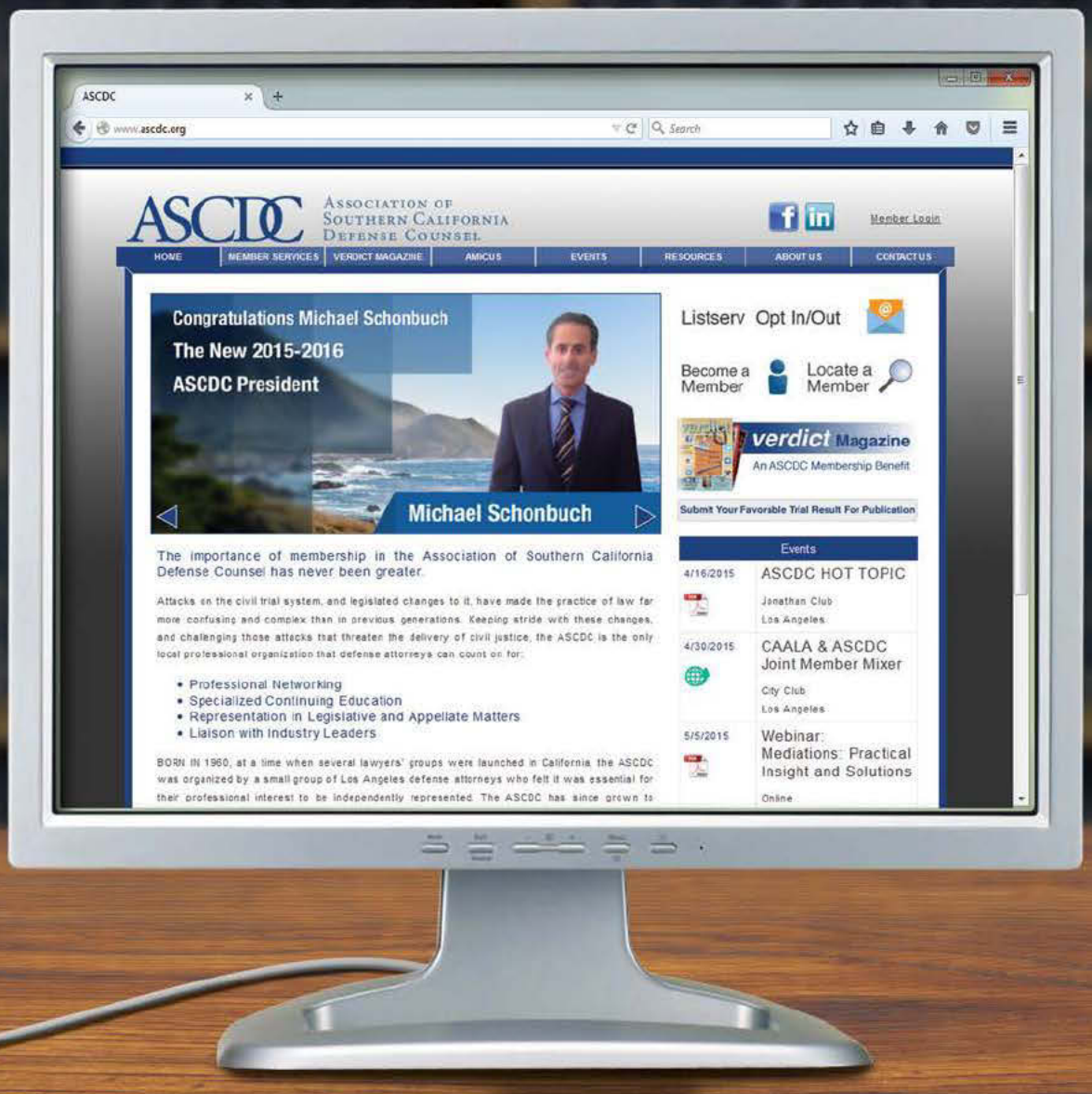

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president's message

Michael Schonbuch
ASCDC 2015 President

We All Work Together

If you attended the 2015 ASCDC Annual Seminar then you already know my story: I am all about defending business and protecting the economy. Many of us go about our daily routine without really paying attention to the actual service we are providing to the community. We focus on getting the case ready for trial, preparing a client for a deposition, making sure the court sets appropriate dates for future hearings and drafting motions to advance the case towards conclusion. What many of us fail to focus upon is the actual importance of our work and these otherwise daily assignments that we complete. With every single day and every single task we are defending business and protecting the economy. Don't ever lose sight of how valuable our services are to the State of California and the United States of America.

> **The ASCDC is the organization that keeps us all together.**

We always hear from the plaintiffs' bar that they are providing access to the justice system for those who may not have been able to obtain such access based upon economics, lack of sophistication and fear of taking on the "giant, faceless, corporate world." While the plaintiffs' bar deserves recognition for providing such service a simple exercise will demonstrate the value of our service. For just one moment imagine that we did not exist and the legal world consisted of just the consumers and their skilled plaintiffs' attorneys. How long would business stay "in business?" The answer is about 5 minutes. In the real world count how many times we are able to stave off a multi-million dollar demand or a request that a jury award 10 Million Dollars against one of our clients. Without us these sums would be readily awarded and readily paid on a daily basis crushing business and stifling our economy. Instead we are saving our clients millions upon millions of dollars on a daily basis thereby protecting these businesses and the countless employees who work for these businesses. These employees depend upon their paychecks to pay rent, mortgages, educational expenses and provide food and school supplies and clothing for their families. Without us there is no business, there is no economy and there are no jobs. So don't ever forget who we are and the value of the service we provide.

The ASCDC is the organization that keeps us all together. The ASCDC is the club where we all belong. The ASCDC provides us the educational opportunities to keep us informed on the rapidly changing tactics used by our opponents in their daily attempts to take out business. Our opponents are constantly studying ways to present cases and obtain higher verdicts and settlements. They stay on the cutting edge of technology and psychology teaching their members about jury persuasion, exhibit presentation and the world of reptiles. The ASCDC provides our members with the ammunition to be prepared for such strategies and attacks. We study the tactics being advanced and teach how to defend in this ever-changing landscape. We follow all new published cases and keep everyone informed of these tools to use in our daily duels. We educate our members and provide the necessary MCLE required by the State Bar. We share information with each other through our listserv. We represent all defense lawyers in Sacramento on issues of upcoming legislation, meetings with the California Supreme Court and defending attempts by our opposition to make their jobs easier and ours more difficult. But most of all we are a group. We are strength in numbers. We are your voice. We all have a common interest. We all work together. We are all friends. We are The Association of Southern California Defense Counsel and I am honored to lead us through 2015.

Of Bills and Initiatives

Michael D. Belote
Legislative Advocate
California Defense Counsel

By training and education, most lawyers focus primarily on law made by courts, under the time-honored principle of *stare decisis*. As a lawyer and lobbyist, however, I see first-hand how suddenly and dramatically the law can be changed by legislators. Or more worryingly, by voters.

Legislator-made law sometimes surprises practitioners. I recall being told one time by a lawyer that a bill could not possibly have done what he had been told, because "that isn't the law." Well guess what, it is now!

For 2015, the California Defense Counsel will focus on issues relating both to potential legislator and voter-made law. No initiatives will go before voters this year, but as described below, November 2016 could be a major ballot for initiatives, including one issue of enormous interest to defense practitioners.

In terms of legislation, the California legislature recently concluded the process of introducing new bills for 2015. In all, over 2300 pieces of legislation were introduced, including almost 1000 on the final deadline day, February 27. Each must be read for potential impacts on defense practice. Following that review, a total of 135 bills were placed in the CDC electronic folder for possible interest or impact to defense lawyers. Subjects covered include medical provider liability, public entities, products, toxics and more.

Issues of general application for defense lawyers include the following:

DEMURRERS:

SB 383 (Wieckowski) has been introduced to install a meet and confer requirement before filing demurrers. CDC has indicated a willingness to consider a meet and confer obligation, which already exists in some jurisdictions now. Some lawyers, though, have made suggestions which would effectively end demurrers, and that notion will be opposed vehemently. Fortunately, Senator Wieckowski is a lawyer-legislator skilled at finding consensus on issues such as this; CDC is in discussions with judges and the plaintiff's bar on the demurrer issue, and ASCDC leadership is being kept apprised of developments on this critical practice issue.

EXPEDITED JURY TRIALS:

Legislation establishing the expedited jury trial option is scheduled to "sunset" at the end of this year, and the experience is that "EJTs" have been far less utilized than hoped. CDC is at the table in discussions over extending or repealing the sunset date, and considering how the law might provide more incentive to use EJTs, which can both provide efficiencies for our over-burdened court system and valuable trial experience for young lawyers. Results of these discussions will be incorporated in AB 555 (Alejo).

SUMMARY JUDGMENT/SUMMARY ADJUDICATION:

SB 470 (Jackson) clarifies that judges need not rule on non-material evidentiary objections in summary judgment motions, building upon *Reid v. Google*. ASCDC Past President Bob Olson has been working on the language of the bill to avoid unintended consequences to hard-won summary judgment victories. AB 1141 (Chau) addresses Section 998 issues and also the limited ability to bring summary adjudication motions on issues which do not completely dispose of causes of action.

This is obviously just a tiny fraction of the issues raised in the 135 bills of interest to CDC. The biggest news, however, might relate to SB 8 (Hertzberg), which proposes to extend the sales tax to all services, with the exception of health care, education, or services performed by microenterprises with annual revenue of under $100,000. Legal services *are* covered.

This very, very far-reaching proposal, which is intended to raise new revenue of $10 *billion* annually, will be exceedingly difficult to enact in the legislature, since tax increases require 2/3 votes in each house. But this is where the initiative possibility comes in. Ballot measures will be easier to qualify than perhaps ever before in California history, because signature requirements are based on the historically-low gubernatorial votes cast in the November general election ballot, and there is a distinct possibility that a sales tax on services proposal could be placed before voters in November 2016 or a subsequent ballot.

You will be hearing much more from ASCDC as the sales tax issue unfolds. But it is a perfect example of how far-reaching changes in the law can come from legislators, or voters, rather than the courts.

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Where's Perry When We Need Him?

Patrick A. Long

Apparently what we do, as attorneys, as judges, as law clerks, provides tremendous and never-ending entertainment for millions of our fellow citizens. Of course I'm talking about television and movies concerning the law biz. This is not a recent phenomenon but rather stretches back to the beginning of time – movie and television time, that is. Today I shall not discuss movies, which causes me a little grief as I am something of a movie freak, but rather television programs dealing with the legal biz.

This discussion is limited to shows specifically involved with the practice of law, civil and criminal, but does not include shows that some might describe as "police procedurals." Google defines police procedurals as "a subgenre of detective fiction which attempts to depict activities of police investigations of crime." This would include all the various "CSI" shows, and their ilk. Police procedurals are not the subject of these ramblings.

There are of course many recent legal shows (well let's just call them legalities) like *Suits, Damages, Boston Legal, Law And Order,* etc. but folks have been watching legalities as far back as *Perry Mason* and beyond. Why? Do many judges and lawyers watch them?

First, why? Clearly whatever reasons impel our citizenry to watch legalities have been around forever, and apparently aren't going away. I'm no psychologist, and haven't taken any kind of poll about this, but I would suggest that, fortunately, most of our citizenry have little or no contact with our court system. Therefore legalities involve a lot of emotional issues in a very unknown and unfamiliar arena for most folks. Bad things happen in courtrooms, at least to one side of a lawsuit. Keep in mind, the only happy court is the adoption court. There are no legalities that involve transactional work dealing with mergers and acquisitions, unless of course someone doesn't want the merger to occur and attempts to short-circuit it by killing the chairman of the acquirer's board, leading to a criminal trial.

You can legitimately compare legalities to news programs in that there's always a focus in both on finding people involved in bad and despicable activities. As they say, good news isn't news. I'm suggesting that folks who watch legalities on a regular basis do so to enjoy "exciting" stories that take place in pretty much an unknown domain while viewers relax secure in the comfortable environment of their homes. Because of their unfamiliarity with how both civil and criminal legal matters work, they can accept what goes on in a legality as an accurate description of what could have happened in real life. I have absolutely no criticism of our citizens who watch these programs. But I rarely watch them, and to answer the second question above, I strongly suspect that relatively few judges or lawyers watch them either.

Most legalities involve an eventual trial, civil or criminal. In real life trials are complicated, complex, and outcomes depend on exquisitely thorough preparation. Such preparation doesn't fit within the confines of an hour, or even two hour television show. Many issues, while essential in real trials and real life, are left out of television programming. Thus when I, and some of you, watch these legalities we become frustrated and irritated that the story bears no resemblance to what we know happens in real life situations. For us, it's not real; it's a fantasy. In a real trial we don't get to scream at the judge or witnesses like they do on T.V. For us lawyers and judges, realistic television is more like *Honey BooBoo* or *The Real Housewives of Banning.*

But let's face it, a very sizable portion of our citizenry loves to watch these legalities, and we can assume the trend will continue forever. If any of you actually enjoy watching the occasional legality I'm interested to hear from you, and to learn from you whether you watch it because it appears true to what happens in the real world, or whether you watch it despite its unreality. I am most particularly interested in legalities that you feel accurately reflect what happens in the real legal world. I'd like to watch one, and I'd be grateful for your input.

Longing for a return to rabbit ears,

Patrick A. Long
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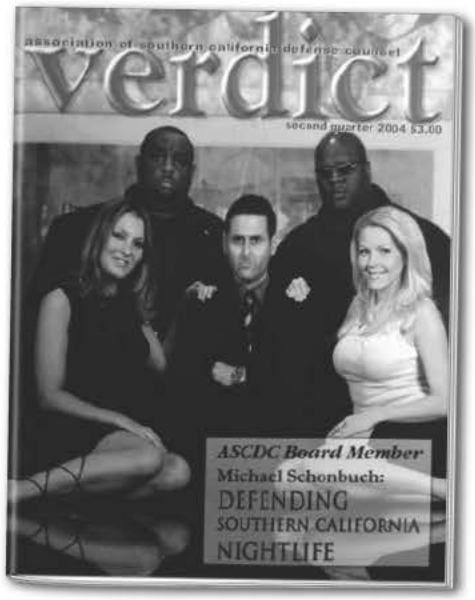
54th Seminar Luncheon Highlights – *by Carol Sherman*

2014 ASCDC President Robert A. Olson promised that the 54th Annual Seminar would deliver something "old" and something "new." While the "new" was the family-friendly Sheraton Universal venue, the always popular Friday luncheon celebrated the "old," those traditions that have made ASCDC among the nation's most prestigious civil defense attorney organizations – high profile keynote speaker, awards and recognition, and the passing of leadership duties to the incoming President.

Opening the 54th luncheon before a packed ballroom, Taylor Schonbuch, daughter of incoming ASCDC President Michael Schonbuch, beautifully sang the National Anthem. Keynote speaker Newt Gingrich later praised Taylor for her incredible poise and talent. Promising to "work my tail off as your President," incoming President Schonbuch welcomed everyone and acknowledged the special guests in attendance – the judges, members of the judiciary, past ASCDC presidents, members of the Board and ASCDC committees, and representatives from the Association of Defense Counsel of Northern California and Nevada. He thanked ASCDC Executive Director Jennifer Blevins and the CAMS staff for their hard work and dedication on behalf of the Association, and thanked members of his firm, his family, and his wife Laurie, for their support and encouragement as he takes over the Association's leadership role. As a side note, the current issue of *Verdict* magazine is not the first time Schonbuch has been on the



cover. Some will remember Schonbuch from when he was featured on the cover of *Verdict* in 2004.

Outgoing President, Bob Olson, presented the ASCDC President's Award to Steven Fleischman of Horvitz & Levy for his work on behalf of all members while serving as Chair of the Amicus Committee. Under Fleischman's helm for the last several years, that Committee has become more active than ever in advancing members' interests in the appellate courts, successfully supporting review in the California Supreme Court, submitting merits briefs in that court, and successfully seeking publication and depublication of favorable and unfavorable opinions, respectively.

Turning the focus to out-going President Olson of Greines, Martin, Stein & Richland, Schonbuch presented him with the ASCDC President's plaque in recognition of outstanding service to the Association. Pat Long, past president of both ASCDC and Defense Research Institute (DRI) honored Olson with DRI's national award for outstanding service. The awards reflect Bob's tireless leadership,

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overseeing and inspiring the work of the many board members and committee chairs who have organized superb MCLE programs, contributed to lobbying efforts in Sacramento, expanded membership outreach to enhance diversity and involvement by young lawyers and law students, and so much more.

In closing out his term as ASCDC President, Olson shared lessons learned from the past year, drawing a rousing laughter from those who have participated in ASCDC's new listserve when he began with, "Do not reply to all," and "Be patient when others reply to all," with respect to listserve posts. "I've also learned that you can rarely accomplish all that you hope to." He went on to note, "I've learned that this organization is the strongest when all of you participate. That's something that we want to strive for." He encouraged members to be both patient and persistent with the leadership. "They are here to help you." He added, "I've also learned that together we have a tremendous voice, far greater than I ever realized."

Olson gave special recognition to legislative advocate Michael Belote for his work with the judiciary on behalf of the Association. "We are the voice of the defense bar in California. When the judiciary wants to know what the defense perspective on an issue is, they call us."

In introducing incoming President Schonbuch, Olson said, "He's a great trial lawyer. He's all about civility, and he's all about winning. He is a force of nature. This Association is in great hands." As Schonbuch began to speak, the tremendous energy he brings to everything he does was evident, confirming Olson's "force of nature" description.

Schonbuch laser-focused his remarks to remind members of their importance within society as a whole. "We are defending and protecting those who create income and pay taxes and keep our economy and our state and our country in business." He said, "We're representing those who create and those who heal and those who design and those who build." Highlighting some of the types of clients many of our members count as clients, he added, "We're defending and protecting the restaurants, the waiters and the chefs who cook and serve our meals; the artists and promoters and venues where we go to hear our favorite music played. We're defending and protecting the manufacturers of the fantastic cars we all drive. We're defending and protecting the hotels we visit and malls where we shop, the markets where we get our food; the trucking companies, the transportation companies, the shipping companies and don't forget all the employers who provide millions of jobs in the state of California."

Evoking justifiable pride, Schonbuch concluded, "We are the Association of Southern California Defense Counsel. We want you to stay with us and be a very important part of our mission to protect and defend and keep the city, the state of California and the United States of America in business. So when you go to court next week or are sitting in your deposition, don't forget exactly how important we are in keeping this place in business."



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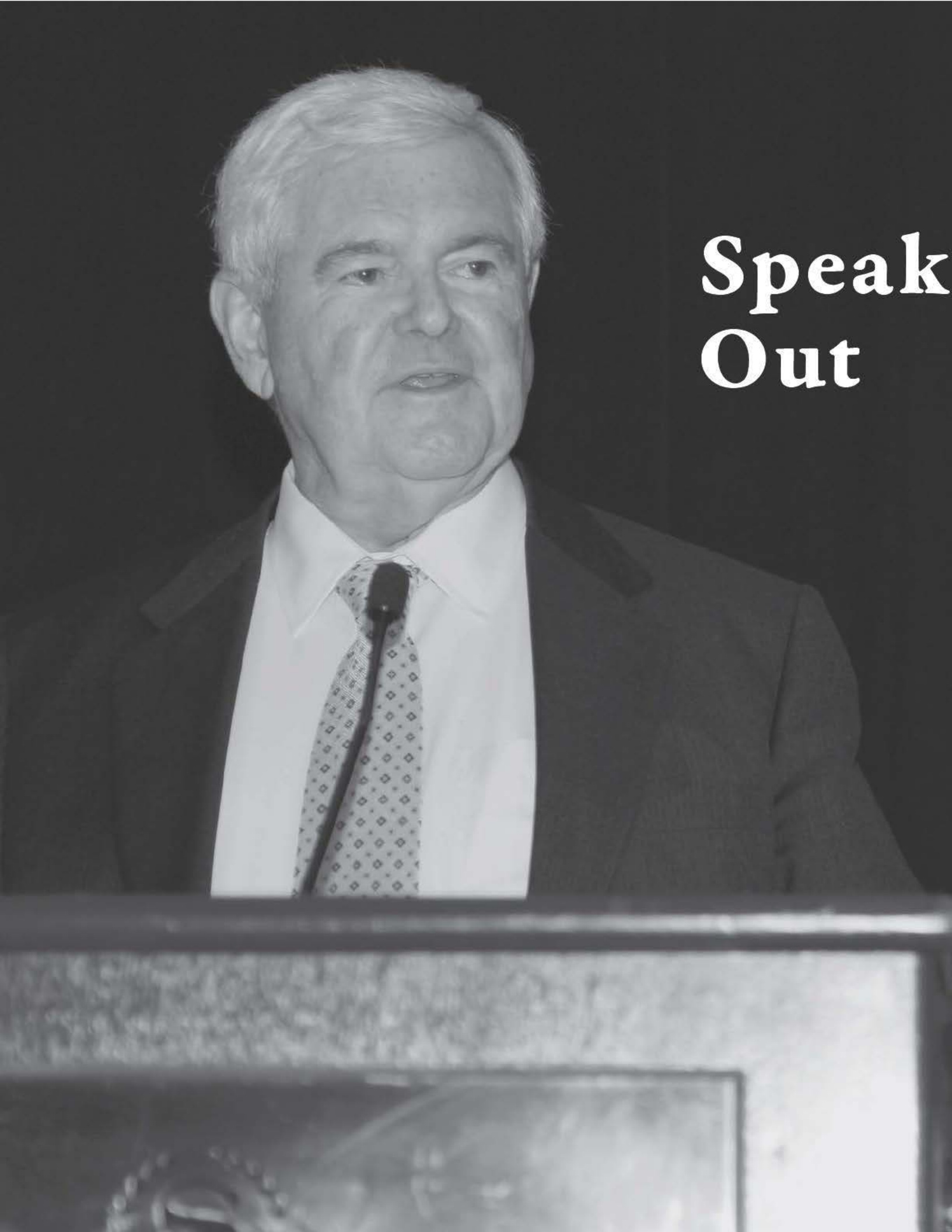

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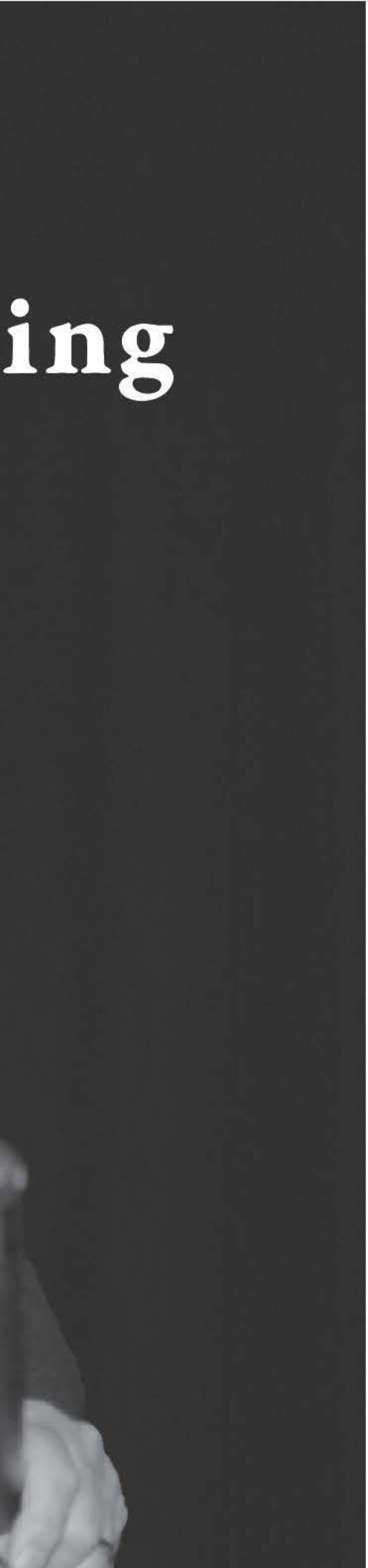

Newt Gingrich, 58th Speaker of the U.S. House of Representatives, Addresses the 54th ASCDC Annual Seminar

by Carol Sherman

Newt Gingrich didn't pull any punches when addressing the 54th ASCDC Annual Seminar, held at the Sheraton Universal, March 6, 2015, before a packed ballroom of ASCDC members and guests.

From the difficulty in predicting future world events, the troubles in the Middle East, the race for the White House, and fixing gross inefficiencies within the government, Gingrich shared his perspectives as someone who never shied away from his conservative Republican views.

The former Speaker of the House of Representatives (1995-1999), Gingrich rose to the national political forefront as the architect of the Republican Contract With America, a bold promise to scale down government, lower taxes and reform welfare. In 1995, he graced the cover of *Time* magazine as its Man of the Year, noted for ending 40 years of Democratic House majority. More recently, he made an unsuccessful bid to be the Republican nominee for the 2012 presidency.

Gingrich began his remarks by focusing on global issues and the unpredictability of future threats. "In 1981, our primary concern was the Soviet Union and our primary campaign objective was protecting Germany against the huge Soviet military." Regarding military planning, he offered the perspective that, in the last century, it would have seemed far-fetched "if you had said to people, you don't understand, 20 years from today, a group of people hiding in Afghanistan are going to figure out to steal some commercial airlines to knock down two of our most famous buildings, killing almost more Americans than were killed in Pearl Harbor and attack the Pentagon and attempt to attack either the White House or the Capitol. You couldn't have said that in a staff meeting trying to discuss the Army of the future."

continued on page 14

Newt Gingrich – continued from page 13

Gingrich had harsh words for the recent handling by the White House over Israeli Prime Minister Benjamin Netanyahu's invitation from Speaker John Boehner to address the U.S. Congress. Gingrich blamed the White House for the resulting media frenzy, and drew laughter when he said, "I don't quite know how Netanyahu hired the White House staff for the purpose of building interest in his speech. Had the President said, 'Bibi's coming to town, why don't you drop by the White House and we'll have coffee before your speech,' it would have been a non-event."

According to Gingrich, who attended Netanyahu's speech, the speech helped consolidate the anti-Iranian nuclear agreement faction in the U.S. "I think there's a very large block of people who are now committed to voting against an Iranian agreement." Regardless of the final vote, Gingrich had no doubt that Israel would "not risk another holocaust" and would, if necessary, take on Iran alone.

"It's important to understand how serious this is," he said, adding that Israel has not wavered from its anti-Iranian position for decades. He recalled that in December 1994, a month before his term began as Speaker of the House, Israeli Prime Minister Yitzhak Rabin asked to meet with Gingrich. "His primary fear for the survival of Israel was Iran. He said they could handle the Palestinians, but Iran was too big a country." He added, "I think there's a very real possibility that the Israelis will attack the Iranians if they have to. Under no circumstances will they accept an Iranian nuclear weapon. How Israel attacks Iran I don't think we know yet, but I would not underestimate Israel's ingenuity, and the fact that they've been working this problem for 20 years."

Gingrich went on to touch on Iran's growing involvement in Iraq by aiding the Shiites in attacks against Sunnis. "The Iranians are deeper today in Iraq than at any time in modern history. And this is all going to be a mess, and it's going to get much worse."

Turning to domestic politics, Gingrich honed in on Hillary Clinton's yet-to-be-announced bid for the White House amid the growing controversies surrounding her use of personal emails while Secretary of State, and foreign money donations to the Clinton Foundation. "If I were a Democrat right now, I'd be very worried because this is beginning to be a 'what's the next shoe' or 'what's the next closest' kind of problem. There are more things that are coming and it's almost inevitable. So everyone thinks she is the inevitable nominee, but I'm here to tell you that nothing in American politics is inevitable."

He moved to the Republicans, and their current field of "somewhere between eight and 20 serious candidates." He didn't hold back when sharing his observations of the Republican loss in the last election, and drew laughter when talking about the debates. "Our chairman last time thought we had too many debates, but since I kept winning them, I disagree vehemently. I tried pointing out to him, Hillary and Barack Obama had 22 debates in 2008, and we had 23. So if the number of debates made a difference, Obama wouldn't have been elected." He offered the advice that thinking that "the best way to get ready for the Super Bowl is to avoid playing football is not very clever. If you've nominated somebody who you've protected from debates, because you think they're too stupid to debate well, and you think that they look pretty and with enough money you can buy enough ads that they'll look good enough that they won't have to answer anything, that's very dangerous. What I really believe in is forcing candidates out in the open where they have to function in real time."

Gingrich expressed his belief that after eight years of Barak Obama's presidency, the country will elect a Republican governor who brings experience running a state government. "The last six years have proven that having a really articulate person with no experience is really a dangerous experiment in how you run the country."

Gingrich did, however, give kudos to President Obama's campaign strategy, calling it "brilliant." He said, "The Obama campaign actually set out to beat Romney before Labor Day, spending most of their advertising money by the end of the summer." He explained, "They spent October pursuing women who were not certain they were going to vote for Romney. They literally had a design that said, 'We're going to come after him so hard, and so early, and spend so much money, by the time you get to the actual discussion, it'll be over and we'll have already sealed off most of the country. And they came pretty close to that." He added, "The Obama campaign figured out early on that they could not convince people that the economy was good, but they could convince them that it was George W. Bush's fault."

In closing, he said, "You are on the edge of an extraordinary revolution that will make us, within a decade, the most

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dynamic country in the world again by huge margins – assuming we don't screw it up." He asked the audience, "How many of you have a smart phone, how many of you use GPS to find places you have to go, how many of you no longer carry maps in your cars? Take that one single piece of data and apply it across the board" to imagine how far technology has changed and will continue to change our lives. He cited the 93,000 health apps that already exist as an example of the revolution in health care. On the flip side, he described inefficiencies in government that need to be fixed. "A report came out that last year that the U.S. government lost $125 billion to payments that shouldn't have been made." He added, "Take the accuracy of you using your ATM card, yet the U.S. government can't transfer veterans' records from DOD to the Veterans Administration in less than 150 days." He concluded, "We are at the edge of revolution from stunning obsolete incompetent bureaucracies built around manual typewriters to a model that will be the largest breakthrough in government since the time of your fathers. It's going to happen at every level, and it's going to be extraordinary."

Carol Sherman

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2015 Annual Seminar Photos

Cyber Security in the Age of the Hack

by Doug Hafford

Almost daily, another cyber-attack is in the news cycle. Whether it's from hearing about the Sony Pictures debacle, Target's compromised customer data, or the troubling rise of ransomware, most people are aware that information of any kind can be at risk. While law firms and lawyers are usually appropriately sensitive to exposure, bad information can mean they often make misguided decisions on implementing the security needed to avoid that exposure.

Law firms by nature have significant confidential information about clients, whether they be businesses or individuals. Lawyers carefully guard against disclosure of this information to opponents in discovery, but may not always be as careful about malicious access or even inadvertent disclosure outside the context of a litigated or transactional matter. Moreover, law firms may overlook other confidential information they possess having nothing to do with clients, such as firm personnel's medical or financial information. Any unauthorized disclosure of information in the firm's custody can give rise to liability, and can be disruptive even if no one asserts a claim against the firm

Vigorously protecting against disclosures of confidences in a firm's possession can be seen as adversely affecting the day-to-day operation of the law firm. Unfortunately, the primary source of security breaches is an individual in the firm who has access to the data and who, perhaps inadvertently, sets the stage for a release of information. Increasingly, however, malicious activity from outside the firm plays a role in security breaches as well. More on this, and ways to protect against breaches, as we go on. But first let's look at what must be protected.

Personal Information

Have you ever had your credit card number compromised or received a new card in the mail unexpectedly?

Data like social security numbers, tax IDs and credit card numbers are by far the biggest target for hackers. They don't care whether the personal information belongs to a client (in discovery responses, for example) or belongs to a firm employee (in personnel records). They just know that law firms have personal data, and that data is valuable on the open market.

- Fishing expeditions for personal information are generally broad brush rather than targeting an individual. Generally speaking, some simple steps can protect this information adequately, as described below. Improving user habits – more than any type of hardware or software security mechanism – is the key to protecting this information
- Firms working with banking, healthcare or insurance company clients have (or will have) additional security requirements, often imposed by the client, that specifically address this area

Client Confidences – Including Litigation or Transaction Work Product and Strategy

Has your firm had an attorney or group leave the firm and later found out about massive amounts of documents e-mailed out of the firm?

Though protecting this type of information is difficult, it's also the least likely data to be compromised.

- This type of information is very difficult for a hacker to obtain with even a modicum of security.
- Almost all breaches of this type involve firm personnel.
  - Personnel know where information is located
  - Personnel may know the tools used to create and store the information
  - Personnel can be careless about security in the interest of "getting things done"
- Developing trust is particularly important in dealing with the IT staff.

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- They generally have full access to the system.
- IT staff know how to cover their tracks.
- The expedient of getting a user back to work can mean shortcuts on security that are never corrected.
- Ideally, a firm will have more than one person, on staff or outside the firm, who is generally familiar with the system and what is being done on it, so that red flags are spotted.

- Highly targeted attacks do occur, although most include some inside help. This you can do something about.

Firm System Information

Have you ever seen an e-mail from a friend or colleague that was clearly spam sent using their e-mail and name?

- All day, every day, virus programs troll the web for weak points in e-mail systems and servers.

- The worst attacks can shut down an e-mail system or cause a firm to lose the ability to e-mail one or more clients.

- This can have an immediate and detrimental effect on the firm's reputation.

These types of attacks can easily be prevented with normal and inexpensive measures.

Mobile & Traveling Devices

Have you ever left your phone at a hotel or restaurant?

The most commonly lost and stolen items of concern are laptops, tablets and phones. These devices often have firm data, or quick links that dive into firm information.

- More often these are lost items, rather than stolen items. Prompt notification protocols and response by the firm are crucial.

- Stolen items are rarely taken for the purpose of data mining. However, protections must still be put into place.

Break-ins

Have you ever lost something within your own office and been unable to locate it?

Computer device theft is rampant. Computer goods are an attractive target for thieves because of their value and portability. A thief may have no interest in the data on the device, but the firm will still have to react as though the data is being disclosed and exploited, just to be safe.

- Most of these attacks are specifically for hardware and most are confined to new hardware in boxes.

- Servers and data storage devices are rarely stolen (but it is not unheard of) because they are generally in use and more often in locked areas that are more difficult to enter.

Protection for the firm – what do we do?

With the above threats and the as yet undiscovered modes of attack, how can a firm reasonably deal with security while maintaining functionality? Driving a Sherman Tank might make you safe from most common auto accidents but can you drive it in the car pool lane and park it at the store? The answer does not lie in locking everything down so hard that users cannot work. Rather the answer lies in good quality security practices combined with high value security solutions.

Perimeter Protection

Step one in a quality security solution is to protect your perimeter. Smart firms are already doing a fair bit of perimeter protection..

- Pre-filtering of e-mail.
  - The primary vector for malicious attacks is e-mail, particularly e-mail that invites the recipient to send confidences, or unwittingly click on a link that downloads destructive software ("malware").
  - More clever ways of invading your system are invented every day.
  - Having your e-mail filtered before it reaches the firm's perimeter is essential, to protect users from unwisely opening and responding to messages that are not legitimate.
  - This also has the valuable effect of removing common SPAM that

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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 or ***ECuatto@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.

ANTI-SLAPP

Asserting an attorney fee lien does not arise out of protected activity.

Drell v. Cohen (2014) __ Cal.App.4th __

A client hired attorney Cohen to represent him in a personal injury action on a contingent fee basis. Cohen later withdrew from the representation, and the client hired attorney Drell instead. Cohen sent a letter to Drell asserting an attorney fee lien against any future recovery. After Drell negotiated a settlement of the case, Drell filed a declaratory relief action seeking a determination as to what amounts, if any, were owed to Cohen to satisfy the lien. Cohen filed an anti-SLAPP motion, contending that his assertion of a lien in a demand letter was protected activity because it flowed from the underlying personal injury suit and was an assertion of potential claims. The trial court denied the anti-SLAPP motion.

Affirming, the Court of Appeal (Second Dist., Div. Eight) held that Drell's declaratory relief complaint did not arise out of protected activity. The gravamen of Drell's declaratory relief complaint was a dispute over the right to attorney fees, not a claim that Cohen engaged in wrongdoing by asserting the lien in the demand letter.

ARBITRATION

Arbitrator bias does not justify court interference mid-arbitration.

In re Sussex (9th Cir. 2015) __ F.3d __

While an arbitration between a condominium developer and condominium purchasers was pending, the arbitrator began a litigation financing business. Arguing that this business created an apparent conflict of interest, the developer moved the district court for an order disqualifying the arbitrator. The district court granted the motion on the ground any award would ultimately have to be vacated due to arbitrator bias. The plaintiffs sought a writ of mandate to prevent the district court from interfering mid-arbitration to disqualify the arbitrator.

The Ninth Circuit issued the writ, noting that no case has yet recognized extreme enough circumstances to justify court intervention in the middle of an arbitration. The court held that even if the arbitrator's activities created a reasonable impression of partiality, the district court's equitable concern that delays and expenses would result if an arbitration award were ultimately vacated was not a sufficient reason to warrant the extraordinary step of intervening mid-arbitration.

Plaintiff's filing a lawsuit is typically sufficient to establish the plaintiff's refusal to arbitrate under CCP 1281.2.

Hyundai Amco America, Inc. v. S3H, Inc.
(2014) __ Cal.App.4th __

In this breach of contract action, the defendant moved to compel arbitration under Code of Civil Procedure § 1281.2 (requiring a party requesting arbitration to show the existence of an agreement to arbitrate and the other party's refusal to arbitrate). The trial court denied the motion, reasoning that under *Mansouri v. Superior Court* (2010) 181 Cal. App.4th 633, the defendant had to show it had made a formal demand for arbitration and such demand was refused.

The Court of Appeal (Fourth Dist,, Div. Three) reversed. The court read *Mansouri* as limited to its facts, which involved a petitioning party's attempt to compel arbitration on different terms than stated in its demand letter. In this case, the plaintiff's act of filing a lawsuit was effectively a refusal to arbitrate under the terms of the agreement, rendering any formal demand unnecessary.

CIVIL PROCEDURE

A postjudgment motion for costs must be filed before delivery of a cashier's check for the full judgment amount.

Gray1 CPB, LLC v. SCC Acquisitions, Inc.
(2015) __ Cal.App.4th __

After avoiding enforcement of a judgment for nearly two years, a judgment debtor tendered a cashier's check to the judgment creditor's attorney for nearly $13 million in full satisfaction of the judgment and accrued interest. The judgment creditor held on to the check without cashing it, delaying so as to first file a motion for post-judgment costs, including attorney fees amounting to over $3 million incurred in attempting to enforce the judgment. The judgment debtor claimed the motion for costs and fees was untimely because delivery of the cashier's check satisfied the judgment in full, and Code of Civil Procedure § 685.080, subdivision (a), requires such a motion be filed *before* the judgment is fully satisfied. The judgment creditor argued that mere acceptance of the cashier's check was not sufficient to satisfy the judgment, and that its motion was timely because it was made before the check was cashed. The trial court denied the judgment creditor's costs motion.

The Court of Appeal (Fourth Dist., Div. Three) affirmed. Upon directions from the California Supreme Court to consider the effect of *Conservatorship of McQueen* (2014) 59 Cal.4th 602, 605; the Court of Appeal held that under California Uniform Commercial Code § 3310, subdivision (a), certified, cashier's, and teller's checks discharge obligations in the same manner as cash payments. Thus, the judgment was fully satisfied when the cashier's check was delivered. Judgment creditors can protect their interests by rejecting delivery of the check and filing a motion for costs. The court recognized that the judgment creditor's position was sympathetic, but believed another result would undermine the statutory purpose for requiring costs motions be filed before satisfaction of judgment: preventing a party who pays a judgment from later being confronted with additional claims.

Court of Appeal warns trial courts against making findings based on reasons stated "in open court" when no court reporter is present.

Maxwell v. Dolezal (2014) 231 Cal.App.4th 93

Plaintiff sued defendant for breach of contract and violation of publicity rights. The trial court sustained the defendant's demurrer to the plaintiff's Second Amended Complaint "[f]or the reasons stated in open court" and denied leave to amend since "neither in his briefs nor in open court" had plaintiff provided a reasonable basis for being able to fix the defect in his pleadings. No court reporter had been present at the hearing.

On appeal, the Court of Appeal (Second Dist., Div. Seven) affirmed the demurrer as to the publicity claim but reversed the demurrer as to the breach of contract claim. In so holding, the court cautioned: "because the correctness of the court's ruling with respect to the first cause of action and its error with respect to the second were both readily apparent from a review of the operative complaint and the demurrer, neither a transcript of the hearing nor the court's statement of specific grounds for its ruling (Code Civ. Proc., § 472d) was essential to permit effective appellate review. However, we view this case as an exception. We remain profoundly concerned about the due process implications of a proceeding in which the court, aware that no record will be made, incorporates within its ruling reasons that are not documented for the litigants or the reviewing court."

Although an email signature may suffice to create a binding agreement, it does not suffice to create a binding settlement enforceable under CCP 664.5 if the parties had not expressly agreed to conduct negotiations electronically.

J.B.B. Investment Partners, Ltd. v. Fair (2014) __ Cal.App.4th __ (publication ordered December 31, 2014)

The defendant responded to an email outlining plaintiff's settlement terms with the phrase "I agree" and typed his name. The defendant later refused to execute the formal settlement agreement plaintiff prepared. Plaintiff sought to enforce the settlement under Code of Civil Procedure § 664.6, but the defendant opposed on the ground that his email response was insufficient to create a binding agreement. The trial court held that the defendant's printing his name at the bottom of his email sufficed as an electronic signature for purposes of California's Uniform Electronic Transactions Act (UETA), and enforced the settlement.

The Court of Appeal (First Dist., Div. Two) held that the trial court's ruling was manifestly erroneous. Under the UETA, an electronic signature suffices only if the parties agree to conduct their business via electronic means. The circumstances here did not reveal any evidence that the defendant assented to conducting the settlement by electronic means, and the email from plaintiff outlining the settlement terms clearly contemplated a formal agreement being prepared at a later time. Thus, although it is possible a party's printed name at the bottom of an email could constitute an electronic signature for UETA purposes, the email here could not be used as a basis for enforcing a settlement under § 664.6.

See also *Ruiz v. Moss Bros. Auto Group, Inc.* (2014) __ Cal.App.4th __ [trial court properly denied petition to compel arbitration where defendant did not present sufficient evidence that an electronic

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signature on its proffered arbitration agreement was "the act of" plaintiff because defendant did not explain how she verified that plaintiff signed the document]

EVIDENCE

In Federal Court, juror affidavits indicating juror dishonesty during voir dire are not admissible to impeach a verdict under FRE 606(b).

Warger v. Shauers (2014) 135 S.Ct. 521

In this personal injury action arising out of a motor vehicle accident, the jury found for the defendant. The plaintiff moved for a new trial, armed with a juror affidavit saying that the jury foreperson had lied during voir dire about her potential bias—specifically, that her daughter had been sued for personal injuries arising out of a motor vehicle accident and that a plaintiff's verdict would have "ruined her life." The district court excluded the declaration under Federal Rule of Evidence 606(b), which bars evidence "about any statement made...during the jury's deliberations" to invalidate a verdict. The Eighth Circuit affirmed.

The U.S. Supreme Court affirmed. FRE 606(b)'s plain language applies to bar use of a juror affidavit to invalidate a verdict based on juror dishonesty during voir dire The Court rejected the argument that FRE 606(b)(2)(A)'s exception for evidence of "extraneous prejudicial information" would permit admission of the affidavit, holding that the juror's statement about her daughter was not extraneous because it related to internal jury matters. California law differs.

Evidence Code 1552 and 1553 are presumptions affecting the burden of production, not the burden of proof, so unrebutted expert testimony that digital evidence is unreliable means the evidence cannot be relied on by the trier of fact.

People v. Rekte (2015) __ Cal.App.4th __

The defendant was accused of running a red light. The prosecution's principal evidence consisted of photographs from a red light camera, which were presumptively authentic and accurate under Evidence Code §§ 1552 (providing that "[a] printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent") and 1553 (providing that "[a] printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent"). The defendant offered expert testimony that the red light camera photographs were unreliable and inaccurate, and the prosecution failed to offer further evidence to authenticate the photographs and prove their reliability. The defendant was convicted.

The Court of Appeal (Fourth Dist., Div. Two) reversed. The court held, per the plain language of the statutes, that the presumptions embodied in § 1552 and § 1553 affect the burden of producing evidence, not the burden of proof. Accordingly, undisputed expert testimony that the video and digital images were inaccurate and unreliable shifted the burden to the prosecution to produce evidence that the images were accurate and reliable or to produce other evidence of the alleged violation. The prosecution's failure to do so meant the prosecution had no evidence and defendant's conviction had to be reversed.

The first of two joint clients cannot block the second client from discovering the first client's communications with the attorney made during the course of the joint representation.

Anten v. Superior Court (Weintraub Tobin Chediak Coleman Grodin, Law Corporation)
(2015) __ Cal.App.4th __

Two clients, Anten and Ruben, hired Weintraub to jointly represent them in legal proceedings against their former tax lawyers. When the two clients disagreed on how to proceed against the former tax lawyers, Weintraub fired Anten as a client and proceeded to represent Ruben only. Anten then sued Weintraub for malpractice, and sought to discover communications between Ruben and Weintraub during the course of the joint representation. Ruben refused to waive the attorney-client privilege, and on that basis the trial court refused to compel Weintraub to produce the requested discovery. Anten sought a petition for writ of mandate.

The Court of Appeal (Second Dist., Div. One) granted the writ, holding that communications between an attorney and his joint clients are not privileged as between the attorney and each of the joint clients, so Ruben could not block Anten from obtaining and using Ruben's communications with Weibtraub made while Wientraub was representing both of them.

CLASS ACTIONS

A defendant may remove a CAFA case based on allegations that the amount in controversy requirement is satisfied; it need not submit evidence until the plaintiff challenges the defendant's jurisdictional allegations.

Dart Cherokee Basin Operating Co., LLC v. Owens
(2014) 135 S.Ct. 547

Plaintiff brought a class action in state court. Defendants filed a notice of removal, invoking diversity jurisdiction under the Class Action Fairness Act (CAFA). Plaintiff moved to remand based on defendants' failure to present evidence of the amount in controversy. In response, defendants submitted evidence that the amount in controversy exceeded the jurisdictional threshold, but the district court nonetheless ordered the case be remanded because the defendants had not presented their evidence of the amount in controversy with their notice of removal. Defendants filed a petition for permission to appeal, which the Tenth Circuit summarily denied.

The Supreme Court reversed. The Tenth Circuit abused its discretion in denying permission to appeal because under 28 U.S.C. § 1446(a), "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. *Evidence* establishing the amount is required ... only when the plaintiff contests, or the court questions, the defendant's allegation."

See also *Ibarra v. Manheim Investments, Inc.* (9th Cir. 2015) __ F.3d __ [when the complaint does not include a facially apparent amount in controversy or the plaintiff may have understated the true amount in controversy, the defendant may nonetheless remove the case to federal court based on CAFA jurisdiction if it can establish the amount in controversy requirement is satisfied by a preponderance of the evidence, including reasonable assumptions and inferences]

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See also *LaCross v. Knight Transportation, Inc.* (2015) __ F.3d __ [where defendants established by competent evidence and a reasonable chain of logic that treating plaintiff class members as employees would cause defendant to incur costs far in excess of the CAFA jurisdictional threshold, defendants met their burden of proof to show removal was proper]

ATTORNEY FEES AND COSTS

Where a plaintiff pursues claims in both arbitration and court and loses in the arbitration, the plaintiff may not avoid liability for the defendant's prevailing party attorney fees by dismissing the court proceedings.

Mesa Shopping Center-East, LLC v. O Hill (2014) __ Cal.App.4th __

In this breach of contract action, the plaintiffs simultaneously sought damages in arbitration as well as "ancillary" declaratory and injunctive relief in court based on the same claims. The "ancillary" court proceedings were stayed pending arbitration. In arbitration, the plaintiff lost, meaning the defendants were the prevailing parties on the arbitrated claims. The plaintiffs then dismissed the "ancillary" court proceedings "without prejudice" to avoid having to pay the defendants' attorney fees under Civil Code § 1717. The defendants sought to vacate the dismissal, but the trial court denied the motion.

The Court of Appeal (Fourth Dist., Div. Three) reversed. The court held that once the hearing on the merits of the parties' dispute commenced in arbitration, it was too late for plaintiffs to dismiss without prejudice the civil action, which was based entirely on the same claims, just to avoid defendants' attempt to recover prevailing party attorney fees.

See also *David S. Karton, A Law Corporation v. Dougherty* (2014) 231 Cal.App.4th 600 [where arbitrators ruled that defendant breached his contract with plaintiff but owed plaintiff nothing because plaintiff had already collected more than he was owed under the contract, defendant was the prevailing party and was entitled to costs under Code of Civil Procedure § 1032 and attorney fees under Civil Code § 1717]

TORTS

The Highway Patrol is not a "special employer" of tow truck drivers simply because it administers the Freeway Service Patrol program, but may be the drivers' special employer if common law factors are satisfied.

State of California ex rel. Department of the California Highway Patrol v. Superior Court (Alvarado) (2015) __ Cal. __

The plaintiffs were injured in a collision with a tow truck operating under contract with the California Highway Patrol (CHP) pursuant to the Freeway Service Patrol (FSP) program. Plaintiffs sued CHP, and CHP moved for summary judgment on the ground that it was not the tow truck driver's special employer and could not be liable for the tow truck driver's negligence. The trial court granted summary judgment for CHP. The Court of Appeal (Fourth Dist., Div. Three) affirmed, the relevant Streets and Highways Code and Vehicle Codes provisions suggest that the Legislature intended to distinguish between the people and companies employing tow truck drivers in the FSP program, on the one hand, and the CHP on the other.

The California Supreme Court reversed. Although CHP cannot be considered the "special employer" of a tow truck driver solely because it administers the FSP, the FSP statutes do not necessarily *preclude* a special-employer finding if CHP takes on responsibilities beyond those described in the FSP statutes, and those additional responsibilities bring it within the scope of the common law special employment doctrine.

In medical negligence cases governed by MICRA, defendants must (1) prove their codefendants' comparative fault in order to reduce their liability for noneconomic damages, and (2) may not offset noneconomic damages awarded by a jury with amounts paid by settling codefendants.

Rashidi v. Moser (2014) __ Cal. __

Rashidi sued his surgeon, Dr. Moser, a hospital, and a medical device manufacturer. Prior to trial, the hospital settled for $350,000 and the manufacturer settled for $2 million. At trial, Dr. Moser failed to prove the hospital's or manufacturer's liability, so no fault was apportioned to them. The jury awarded Rashidi $125,000 in economic damages and $1,325,000 in noneconomic damages. The court reduced the noneconomic award to the $250,000 MICRA cap per Code of Civil Procedure § 3333.2. The Court of Appeal (Second Dist., Div. Four) held that Dr. Moser was entitled to an offset against the $250,000 noneconomic damage award based on his codefendant's pretrial settlements.

The California Supreme Court reversed the Court of Appeal. The court held that § 3333.2 "does not include settlement recoveries in the cap on noneconomic damages." Because the MICRA cap applies only to noneconomic damages awarded in a judgment, and not to the amount of money paid by a defendant to settle a personal injury claim prior to trial, the court concluded that a settling plaintiff in an action governed by MICRA is entitled to both the noneconomic portion of a settlement with co-defendants and the capped award of noneconomic damages at trial. The court further held that a defendant seeking to limit his liability for noneconomic damages must prove the liability of the settling codefendants and secure the jury's apportionment of fault among all parties liable for the injury. If the defendant secures such an apportionment of fault, "he would [be] ... entitled to a proportionate reduction in the capped award of noneconomic damages" pursuant to Proposition 51. (See Civ. Code, § 1431.2.)

Insurance Code § 11583 applies to medical malpractice actions.

Coastal Surgical Institute v. Blevins (2015) __ Cal.App.4th __

The defendant paid the plaintiff about $4,000 for medical expenses the plaintiff had incurred in treating his knee, which had become infected after surgery at the defendant's surgical facility. When making the payment, the defendant did not notify the plaintiff about the one year statute of limitations for medical malpractice actions. The plaintiff brought suit 15 months later. The trial court ruled that Insurance Code § 11583 (providing that failure to notify a person of the applicable statute of limitations when making an advance or partial payment tolls the statute of limitations) tolled the statute of limitations, rendering plaintiff's case timely. The defendant appealed, arguing that § 11583 does not apply to medical malpractice actions because Code of Civil Procedure §§ 340.5 and 364 provide the relevant statute of limitations and tolling rules for such actions.

The Court of Appeal (Second Dist., Div. Six) affirmed. The court held that § 11583 does apply to medical malpractice actions and permits tolling up to three years, after which time no medical malpractice action can be filed under § 340.5.

State law claims against medical device manufacturer based on failure-to-warn are not preempted by the Food, Drug & Cosmetics Act.

McClellan v. I-Flow Corporation (2015) __ F.3d __

Plaintiff sued the manufacturer and distributor of a pain pump device claiming the device was unreasonably dangerous due to inadequate warnings. The district court refused to give plaintiff's proposed jury instructions, which were based on various aspects of state tort law, on the ground that the 1976 Medical Device Amendments to the Food, Drug & Cosmetics Act (FDCA) preempted state law under *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001). The jury returned a defense verdict.

The Ninth Circuit reversed and ordered a new trial. The court acknowledged that state law claims of "fraud on the FDA," as well as claims that exist solely by virtue of FDCA disclosure requirements, are preempted. But state law claims outside those categories – such as failure-to-warn theories concerning the labeling and regulation of medical devices – are not preempted. The Ninth Circuit rejected defendants' argument that any use of federal law to establish a standard of care amounts to an attempt to enforce underlying federal provisions, requiring preemption.

Beverage manufacturers are not protected by California's dram shop laws.

Fiorini v. City Brewing Company, LLC (2014) 231 Cal.App.4th 306

The father of a 23-year-old college student shot by police after drinking two cans of Four Loko (a drink with a high alcohol and high caffeine content) sued the beverage manufacturer for products liability, arguing Four Loko is unreasonably dangerous because it combines alcohol and stimulants in a single beverage, thereby increasing the risk of violent behavior. The trial court granted the manufacture's motion for judgment on the pleadings, holding that California's dram shop laws protected the manufacturer from liability.

The Court of Appeal (Fifth Dist.) reversed. The dram shop laws do not apply to a manufacturer because the laws apply to those who "furnish" alcoholic beverages, and "furnishing" requires taking the affirmative step of directly providing the drink to the consumer. A manufacturer who is up the chain of distribution does not "furnish" it for purposes of the dram shop laws. The court further held that Four Loko did not qualify as a "common consumer product" within the meaning of Civil Code § 1714.45(a)(2) (no manufacturer may be liable for a common consumer product intended for consumption, including alcohol) because the stimulants allegedly masked the intoxicating effects of the alcohol, thereby rendering the product unreasonably dangerous compared to regular alcoholic products.

Restaurant may have a duty to warn patrons about dangers of turning from the restaurant's parking lot onto a major roadway.

Annocki v. Peterson Enterprises, LLC (2014) 232 Cal.App.4th 32

In this case, a restaurant patron encountered the center divider when he attempted to turn left from the restaurant's parking lot onto Pacific Coast Highway. When the patron attempted to return to the restaurant by backing into the parking lot, a motorcyclist hit the patron and was killed. The trial court dismissed a wrongful death complaint against the restaurant, finding that PCH is inherently dangerous and therefore a business along the roadway had no duty to warn about it.

The Court of Appeal (Second Dist., Div. One) reversed, holding that the restaurant may have a duty to warn exiting patrons not to turn left because it was foreseeable that patrons might not be aware of the center divider at night, and because prominent signage and driveway paint would have done much to avoid the accident.

Kickboxing student's negligence action against instructor barred by primary assumption of risk doctrine.

Honeycutt v. Meridian Sports Club, LLC (2014) 231 Cal. App.4th 251

The plaintiff, who was a novice kickboxer, suffered a knee injury while her kickboxing instructor was physically manipulating her body in order to teach her a roundhouse kick technique. She sued the instructor. The instructor moved for summary judgment on the grounds of primary assumption of risk and written release. The trial court granted the motion.

The Court of Appeal (Second Dist., Div. Five) affirmed. The court held that knee injuries are an inherent risk of kickboxing, and there was no evidence the instructor increased the inherent risk in the sport by physically manipulating her rather than using verbal instruction and demonstration, even though the plaintiff's expert opined verbal instruction and demonstration would have been the proper instructional method. As for the release, the court rejected the plaintiff's argument that the instructor's gross negligence negated the release because there was no evidence of gross negligence; rather, the evidence was that the instructor was trying to teach the plaintiff the proper technique to prevent her from injuring herself, and any difference of opinion about what would have been the proper instructional method did not give rise to a triable issue on the issue of gross negligence.

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See also *Eriksson v. Nunnink* (2015) __ Cal.Appp.4th __ [written release signed by minor and her mother eliminated equestrian coach's duty of care, thus barring parents' claims for wrongful death and negligent infliction of emotional distress arising out of minor's death during equestrian competition].

But see *Fazio v. Fairbanks Ranch Country Club* (2015) __ Cal.App.4th __ [trial court correctly held that a professional music performance was an activity to which the doctrine of primary assumption of the risk might apply, but erred in granting summary judgment to property owner in premises liability action for injuries resulting from plaintiff musician's fall from stage where triable issue existed as to whether defendant constructed and placed stage in a way that unreasonably increased the risk of falling].

INSURANCE

Insured is entitled to a conditional judgment requiring insurer to pay anticipated cost of repairing damaged property, with the amount to be determined if and when repairs are actually made.

Stephens & Stephens XII, LLC v. Fireman's Fund Insurance Co. (2014) 231 Cal.App.4th 1437

An insured sued its commercial property insurer for breach of contract and bad faith arising out of the insurer's failure to pay for property damage burglars caused to a rental warehouse. At trial, the jury awarded the insured damages for repair costs and lost business income, but not lost rent. The insurer filed posttrial motions arguing the awards were improper under the policy. The trial court granted the motion, findingthat the policy covered replacement cost only where such costs were already incurred (otherwise, the policy provided coverage only for depreciation), and the building had not yet been repaired. It further held that the jury's award of lost business income – which happened to be the amount of the lost rental value of the warehouse – was improper because the insured conducted no business at the property (as was required by the policy's coverage for lost business income) and the jury specifically rejected an award of lost rent.

The Court of Appeal (First Dist., Div. One) reversed the trial court's posttrial rulings. The insured did not have to complete the repairs to recover repair costs, especially given that the insurer's failure to provide timely coverage hindered the insured's ability to conduct the repairs. But the insured would be entitled to recover only the amount it actually incurs to pay for the repairs if and when they are actually made – which may not be the same amount as the "likely" amount of repair costs awarded by the jury. Thus, the insured was entitled to a conditional judgment for the amount of any future repair costs actually incurred. The court also held that the jury clearly intended to award the insured the lost value of renting the warehouse – a covered loss – so the jury's award for "lost business income" should be construed as an award of lost rent and upheld.

The denial of an insurer's motion for summary adjudication on the duty to defend based on the insurer's failure to meet its initial burden of production does not establish the duty to defend as a matter of law.

McMillin Companies, LLC v. American Safety Indemnity Company (2015) __ Cal.App.4th __

A general contractor sued its subcontractor's insurer for failing to defend against construction defect claims. Prior to trial, the trial court ruled that the insurer was precluded from presenting evidence or argument disputing its duty to defend because a different judge had earlier denied the insurer's motion for summary adjudication on that issue. . But the trial court also ruled that the general contractor could not introduce evidence of damages in light of the fact that its settlements with other insurers more than offset its costs of defending against the construction defect claims. That ruling effectively required entry of judgment for the insurer. Both parties appealed.

The Court of Appeal (Fourth Dist., Div. One) reversed the trial court's rulings. The court held that the first trial judge's ruling that the insurer failed to meet its initial burden of production to show it had no duty to defend was not equivalent to a ruling that there was, for purposes of the duty to defend, necessary a potential for coverage. Thus, the denial of the insurer's summary adjudication motion merely meant the duty to defend issue had to be tried; it did not mean the duty to defend was established as a matter of law. The court further held that the trial court erred in limiting the evidence the general contractor could introduce to prove its damages. Any offsets from other settlements went to the amount the insured could ultimately recover, but not to the threshold question of whether it was damaged at all by the insurer's failure to defend.

LABOR AND EMPLOYMENT

California Supreme Court holds that security guards are entitled to payment for "on-call" hours.

Mendiola v. CPS Security Solutions, Inc. (2015) __ Cal. __

This case was a wage and hour class action brought by security guards at construction sites who were required to spend part of each workday on patrol and some of their evenings "on call." Security guards were compensated for "on call" hours either on an hourly basis, or for a full eight hours if more than three hours were spent investigating disturbances. The trial court held that the policy violated Wage Order 4, which governs those employed in professional, technical, clerical, mechanical, and similar occupations, and requires employers to compensate non-exempt employees for all hours worked—which includes time sleeping or resting but "on call."

The California Supreme Court held, consistently with the trial court, that Wage Order 4 requires those employing security guards to compensate the guards for all "on call" hours spent at assigned worksites under the employer's control because these "on call" hours constitute compensable hours worked. The court also held that under Wage Order 4, employers cannot exclude "sleep time" from the compensable hours worked by the guards in 24-hour shifts.

The Ninth Circuit defines the standard for pleading a Fair Labor Standards Act claim.

Landers v. Quality Communications, Inc.
(2014) 771 F.3d 638

This was a wage and hour class action under the Fair Labor Standards Act (FLSA) in which the plaintiff alleged in conclusory fashion that his employer failed to pay minimum and overtime wages. The district court dismissed the plaintiff's complaint on the ground it failed to plausibly allege that class members were not paid for overtime hours worked.

The Ninth Circuit affirmed. The court explained that under Federal Rule of Civil Procedure 8, as interpreted in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, a FLSA plaintiff need not plead in detail the numbers of hours worked, his wages, or the amount of overtime owed, but he must allege more than merely that the employer failed to pay the employee minimum wages or overtime wages. To survive a motion to dismiss, the plaintiff must allege that he worked more than forty hours in a given workweek without being compensated for the overtime hours worked during that workweek.

PROFESSIONAL RESPONSIBILITY AND CONDUCT

Internal firm communications seeking legal advice about a current client are protected by the attorney-client privilege. *Edwards Wildman Palmer LLP v. Superior Court (Mireskandari)* (2014) 231 Cal.App.4th

The plaintiff hired the defendant law firm to represent him in an invasion of privacy lawsuit. After the firm filed a complaint on the plaintiff's behalf, the plaintiff became dissatisfied with the representation and amount of the firm's billings. The lead attorney sought advice internally from the firm about the plaintiff's complaints. The plaintiff later sued the defendant law firm for malpractice, and demanded the law firm produce the lead attorney's internal communications with the other attorneys in her firm. The defendant invoked the attorney-client privilege, but the trial court granted the plaintiff's motion to compel production. The defendant sought a writ of mandate.

The Court of Appeal (Second Dist., Div. Three) granted the writ. When an attorney representing a current client seeks legal advice from an in-house attorney concerning a dispute with the client, the attorney-client privilege may apply to their confidential communications. The court declined to adopt "fiduciary" and "current client" exceptions to the attorney-client privilege as contrary to California law, under which courts may not imply exceptions to the attorney-client privilege.

CASES PENDING IN THE CALIFORNIA SUPREME COURT

Addressing personal jurisdiction after *Daimler AG v. Bauman.*

Bristol-Myers Squibb Co. v. Superior Court
case no. S221038, review granted November 19, 2014

Residents of several states brought several products liability actions against Bristol-Myers Squibb (BMS) alleging defects in Plavix, a prescription drug BMS manufactures and sells in California and throughout the country. BMS filed a motion to quash service of summons, asserting that its California contacts were insufficient to support *general* personal jurisdiction because BMS was neither headquartered nor incorporated in California. The trial court found that California had general jurisdiction because, among other things, BMS conducted business in the state, operated five offices and employed about 160 people in the state, and operated multiple research facilities and laboratories in several cities throughout the state. The Court of Appeal (First Dist., Div. Two) reversed, holding that although BMS had extensive sales and research activities in California, BMS was not headquartered in California, did not maintain its principal place of business in California, and thus was not "essentially at home" in California. However, the court concluded that California had *specific* jurisdiction because BMS sold nearly $1 billion worth of Plavix in California, had five offices and facilities in California, employed California-based employees and sales representatives, caused both resident and non-resident plaintiffs the same alleged harm, and failed to establish that the exercise of jurisdiction would be unreasonable and in violation of Due Process under the Fourteenth amendment.

The Supreme Court granted review to address the following issues: (1) Did the plaintiffs in this action *who are not residents of California* establish specific personal jurisdiction so as to assert their claims against the nonresident pharmaceutical drug manufacturer? (2) Does general jurisdiction exist in light of *Daimler AG v. Bauman* (2014) 571 U.S. __ [134 S.Ct. 746, 187 L.Ed.2d 624]?

See also *Hollingsworth & Vose Company v. Superior Court*, case no. S221290, review granted &held November 19, 2014 [granting review of decision that defendant was subject to general jurisdiction in California because its California sales over the past five years (2009-2013) constituted approximately 6.5% of its total domestic sales, it maintained a registered agent in California, and is registered to do business in California; and until 2009 had a sales office in California where a single employee worked as a sales agent; briefing deferred pending *Bristol-Myers Squibb Co. v. Superior Court*]

Addressing whether federal law preempts a prosecutor's attempt to collect civil penalties under the Unfair Competition Law based on violations of workplace safety standards.

Solus Industrial Innovations v. Superior Court
case no. S222314, review granted January 14, 2015

The district attorney brought an action seeking civil penalties for Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.) violations. The defendant demurred, arguing an award of UCL penalties to a prosecutor is not part of California's federally-approved workplace safety plan. The trial court overruled the demurrer. The Court of Appeal (Fourth Dist., Div. Three) held that (1) state regulation of workplace safety standards is explicitly preempted by federal law under the Occupational Safety & Health Act and (2) California is entitled to exercise its regulatory power only in accordance with the terms of its federally-approved workplace safety plan.

The Supreme Court granted review. The question presented is whether federal law preempts a district attorney's attempt to recover civil penalties under the UCL based on an employer's violation of workplace safety standards.

Addressing whether the vexatious litigant rules apply to appealing defendants.

John v. Superior Court
case no. S222726, review granted February 11, 2015

Aleyamma John defended herself in an unlawful detainer action brought by her landlord, and lost. She appealed to the appellate division of the superior court. The appellate division then issued an order to show cause whether John should be decelerated a vexatious litigant in light of the fact that, in propria person, she had prosecuted at least five litigations in the past seven years that were determined adversely to her. The court entered an order precluding John from filing any new litigation without leave of court and ordering her to provide a $10,000 security as a condition to proceeding with her appeal. Her appeals were dismissed for failure to comply with the court's orders. The Court of Appeal (Second Dist., Div. Seven), ordered the appellate division to vacate the dismissal of John's appeals, reasoning that the appellate division's application of the vexatious litigant rules to a defendant disregarded the vexatious litigant statute's express reference to actions by a plaintiff and unduly impaired self-represented defendants' right of access to the appellate courts.

The Supreme Court granted review to determine whether a defendant who has been declared a vexatious litigant and is subject to a prefiling order must obtain leave of the presiding judge or justice before filing an appeal from an adverse judgment.

See also *Garcia v. Lacey* (2014) 231 Cal.App.4th 402 [complaints that were never filed do not constitute litigations "finally determined adversely" to plaintiff for purposes of California's vexatious litigant law].

Addressing whether a trial court may base a reasonable class action attorney fee award on a percentage of the common fund rather than the lodestar method.

Laffitte v. Robert Half International (Brennan)
case no. S222996, review granted February 25, 2015.

In this class action, the trial court approved a $19 million class action settlement in which the attorneys were awarded one third of the settlement ($6.3 million). A member of the plaintiff class appealed. The Court of Appeal (Second Dist., Div. Seven) affirmed. The court explained that, while the lodestar method is the primary method for calculating attorneys' fees as a general rule, the percentage approach may be proper where, as here, there is a common fund. The court also held that the trial court's one-third percentage was appropriate because it was consistent with, and in the range of, awards in other class actions.

The Supreme Court granted review. The question presented is whether *Serrano v. Priest* (1977) 20 Cal.3d 25, permits a trial court to anchor its calculation of a reasonable attorneys' fees award in a class action on a percentage of the common fund recovered.

Addressing whether inadvertent disclosure of privileged documents in response to a Public Records Request waives the privilege.

Ardon v. City of Los Angeles, case no. S223876
review granted March 11, 2015.

After obtaining documents from a Public Records Act (PRA) request, plaintiff's counsel informed the defendant City that she had obtained a document that appeared to have been prepared in response to two other documents listed in the privilege log and which disclosed the contents of those two other documents. The City responded that the documents had been inadvertently produced. It demanded that plaintiff's counsel return the documents and agree not to rely on them in any way. Plaintiff's counsel declined, contending the City had waived any claim of privilege. The City moved to compel the return of the three documents and to disqualify plaintiff's counsel. The trial court denied the City's motion, concluding that the production of the documents waived any privilege that previously attached to them, regardless of whether the production was due to mistake, inadvertence or excusable neglect. The Court of Appeal (Second Dist., Div. Six) held that disclosures pursuant to the PRA that are made inadvertently, by mistake or through excusable neglect, do not waive any privilege that would otherwise attach to the production. However, the court further held that plaintiff's counsel's exercise of her statutory and constitutional rights to petition the government regarding a matter of public importance was within the scope of permitted professional conduct, and there was thus no basis to disqualify her or any member of her law firm under Rule of Professional Conduct 2-100.

The Supreme Court granted review. This case presents the following questions: (1) Does inadvertent disclosure of attorney work product and privileged documents in response to a Public Records Act (PRA) request waive those privileges and protections? (2) Should the attorney who received the documents be disqualified because she examined them and refused to return them?

Addressing whether an affirmative defense qualifies as an "action" or "proceeding" for purposes of Civil Code § 1717.

Mountain Air Enterprises, LLC v. Sundowner Towers, LLC
case no. S223536, review granted March 18, 2015

Plaintiff Mountain Air Enterprises LLC sued defendants Sundowner Towers LLC and others for breach of a contract to purchase real estate. As affirmative defenses, defendants alleged that the contract was illegal and that it was extinguished by novation when the parties entered into a later option agreement. Following a bench trial, the court ruled in favor of defendants on both defenses but declined to award contractual attorney's fees. The Court of Appeal (First Dist., Div. Two) affirmed the judgment in favor of the defendants on their contract claims and reversed the portion of the judgment denying defendants' attorney's fees. First, the court concluded that the attorney fees clause applied to defendants' novation defense because it was raised in connection with an "alleged dispute, breach, default, or misrepresentation" concerning a provision of the parties' agreement. Second, the court held that defendants' assertion of an affirmative defense constituted an "action" or "proceeding" under Civil Code § 1717.

The Supreme Court granted review of the following issues: (1) Does the assertion of an agreement as an affirmative defense implicate the attorney fee provision in that agreement? (2) Does the term "action" or "proceeding" in Civil Code § 1717 and in attorney fee provisions encompass the assertion of an affirmative defense?

clutters users' inboxes and poses a threat different from malicious attacks: SPAM, like e-mail hoarding, can cause users to overlook "real" messages that require attention.

- Maintaining a quality business-class firewall.
  - Most of these are now called UTM (unified threat management) devices
  - This means they contain anti-malware protection, intrusion detection, and other types of protection.
  - The firewall allows you to close off ports that might be used to exploit your system.
    - Ports are access points that allow access to valuable traffic like e-mail or remote access.
  - Each year, the firewall's threat protection will need to be renewed. Every few years, it will have to be replaced with a more current device.
  - Special care must be taken to obtain a unit that allows sufficient bandwidth to accommodate your users' internet usage needs.
    - A hyper-fast 100mbps connection makes no difference if your firewall can't pass traffic at that speed.
  - If the technical terms used above don't mean much to you, sit down with the person in your firm charged with maintaining your computer system, and ask for an explanation. If you aren't comfortable with the explanation, it may be time to dig a little deeper into the firm's investment in information security.

Endpoint Protection

Some dangerous e-mail can get through the best firewall. A high quality anti-malware solution is the next layer in your security solution, to protect your system if destructive software tries to inject itself onto your system. This prevents normal virus infections and can include protection against spyware (which captures keystrokes and other activity on your system and conveys that information outside the firm to someone looking for passwords and other sensitive data) and protection against adware (which causes annoying popups and similar intrusion).

- Your business class anti-malware solution will include server protection and – if you have internal e-mail server – e-mail protection.
- Central management will insure that all endpoints are covered and that protection is up to date at all times.

Informed Users, and Firm Culture

- By far the best security steps you can take are in this area.
- Formal training in attorney meetings and staff meetings, to show threats are presented and how safe practices can be implemented, is relatively easy and of high value.
- Informed users, managed protection, and functional layers of security start with management; the message must come from the top that security must not be bypassed. Senior partners must abide by the same rules that everyone else is expected follow, without grumbling or otherwise undermining security policies set by firm administration.
- Most firms allow users to have whatever cell phones, tablets and laptops they want. This means the IT staff cannot reasonably be expected to ensure all devices are properly configured and are used safely.
- IT staff can and should periodically alert users to evolving threats, useful diagnostic sites, and cost-effective tools that should be downloaded for password protection, data encryption, lost device location, and so forth.
- Firm should consider implementing a policy under which no device may locally story firm data; users must access materials only through remote-access software (more about this below) so that a lost or stolen device never contains anything that should not be disclosed. Many firms require that portable devices used to communicate with the firm can be "wiped" remotely if the device is lost or stolen.
- The features built in to Microsoft's latest releases of their Exchange e-mail system and Office 365 products answer most needs. Two common management tools are Good Technology and Mobile Iron. Both offer a plethora of tools to keep

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your firm's information safe as users work in a mobile, connected world.

Remote Access

Though it's nominally a part of Perimeter Protection, the challenges offered are unique enough to merit its own section. Remote computing – through companies like Terminal and Citrix – is a must-have in today's legal world. But because of the nature of remote computing – access to the firm's files from outside the office – it represents a major area of concern.

Common solutions to this include devices that authenticate users beyond a simple username and password. While Citrix and Terminal services both offer excellent security features when properly implemented, most security-conscious firms desire more hardened measures.

- Secure Remote Access (SRA) devices are relatively inexpensive and offer both additional authentication and encryption of data as it moves between the remote user and the system.
- Multi-factor authentication can be added so that a user must meet two or more criteria:
  - Something they carry – such as a dongle that works with a random code generator.
  - Something they are – such as a thumbprint scanner.
  - Something they know – much like a bank where the user must enter some personal bit of information that only they would know.
- Geographic or IP restrictions can also be added so that users can connect only if the device (including a home desk computer) is in an expected location or using an expected network.

Personal Information Leak Prevention

A personal information ("PI") leak could be disastrous for a law firm. Credit card information is less likely but social security numbers can often be stored by a human resources department, or may be reflected in a legal transaction. This is of course the primary concern of banking clients, as this would be seen as a breach of their system.

The challenge is that we live in an electronic communication world. Most people have encountered a situation in which they sent or received critical personal information in an e-mail. And sometimes such e-mails are sent to the wrong person, perhaps because of auto-complete features that fill in a recipient's name, or because of sloppy file naming conventions that promote accidentally attaching the wrong file. These types of mistakes are relatively common. What can be done?

The most common way of addressing this is to add a service to your e-mail system that scans for and detects PI leaks. Commonly used products include Symantec Message Security and the built in features of Microsoft Office 365.

- Message Security covers significant numbers of possible breaches but is also highly restrictive.
- Office 365 has fewer features for PI leak prevention but does have other values for the firm.

Client Confidences

This is probably the hardest to address because it can come in so many different forms. It could be tax returns, research memoranda, scanned images, e-mails, and many more. There is no reasonable way to insure this information is kept private beyond the good practices mentioned above and some security measures within your IT solution.

- Computer systems in general should ask users to "give" permissions rather than grant access by default and invite users

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to "restrict" permissions. (For example, scrubbers on outgoing attachments can be set so that metadata is automatically "cleaned" unless the user checks a box otherwise.)

- Access to client information should be limited to those that need it.
  - While this is relatively easy to do from an IT perspective, it also means significant intervention. Firm administration must decide whether partners really need access to everything on the system, and whether those who only occasionally need to see billing or other administrative should be given unrestricted access.
  - But if security is too tight, users cannot easily accomplish their work.
  - Even with highly restricted access, a malicious user can cause problems for things they *can* access.
- A quality document management system is an excellent tool for cordoning off specific areas where firm files are stored so that access is tailored to those who need it.
  - Examples include iManage, Worldox or NetDocuments.
  - These products automatically enforce security on a matter-by-matter basis (which is also useful for ethical screens in conflicts situations).
  - Document Management can also prevent leaks by restricting what can be done (e.g., read only, edit, download, etc.) with any of these document types.
  - Document Management focuses on creating a secure, empowered user so you get both high value work tools and security.
- Rather than try to lock everything down, an informed, high-value staff member is your best bet.

Going Too Far

Though good security practices are important, it's sometimes easy for firms to go too far to protect their data. Notwithstanding client-enforced rules such as those mandated by healthcare, banking, or insurance clients, significant restrictions on user access often result in two negative outcomes.

- Unhappy, unproductive users. This is very common in overzealous secured environments. Users are asked to get work done, on time and efficiently, despite IT system rules and restrictions working directly against them. This is nothing if not frustrating.
- Users – especially attorneys – will find a way to work around a system like this. So now the firm is not only fighting its security concerns, but also its own staff.

What About the Cloud?

There are common misconceptions about the "cloud" that can cause concern. When we read about Target, Sony and others we think, "That can happen to my firm!" To some degree,

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that is true. However, if we look at the facts we quickly come to realize the cloud can be far more secure than a local network.

First, the IT industry is moving toward the cloud at a very rapid pace. So rapidly in fact that many IT firms offer a "cloud" that is really no more than an offsite data center. Having a firm's servers in a datacenter is not new and has been used for centralization, security, and other concerns for many years.

Datacenters are often highly secured both physically and via sophisticated systems far beyond the firewall that most firms can afford, so they generally do improve a firm's security. Other concerns, such as regional disasters and the like, can affect access in much the same way a local system is affected. Thus the distinction between Datacenter and Cloud.

Firms with dedicated datacenters (e.g., Sony, Target, etc.) may have geographic and centralized value but a single disgruntled IT staff member can do a lot of damage.

A true cloud solution like the ones offered by Amazon (Amazon Web Services), Google (Cloud Platform) and Microsoft (Azure) offers the finest security for which one can hope. They are massively redundant, geographically diverse, and elastic in the sense that it is simple to add servers, disk space, processing power, and the like.

These giants have unmatched physical and cyber security in all of their systems. and teams of professionals working around the clock to insure nothing goes wrong. When you consider that cloud hosted networks themselves have top-quality native encryption – it is easily the most secure solution you could have.

The common thread among all of these considerations and solutions is the user. A high value user prevents most exposures by being careful and aware. Security can be accomplished with good results by taking reasonable measures to prevent intrusion, data harvesting, and infection. With those threats solved, it comes down to good management, client requirements, and informed decisions.

Doug Hafford

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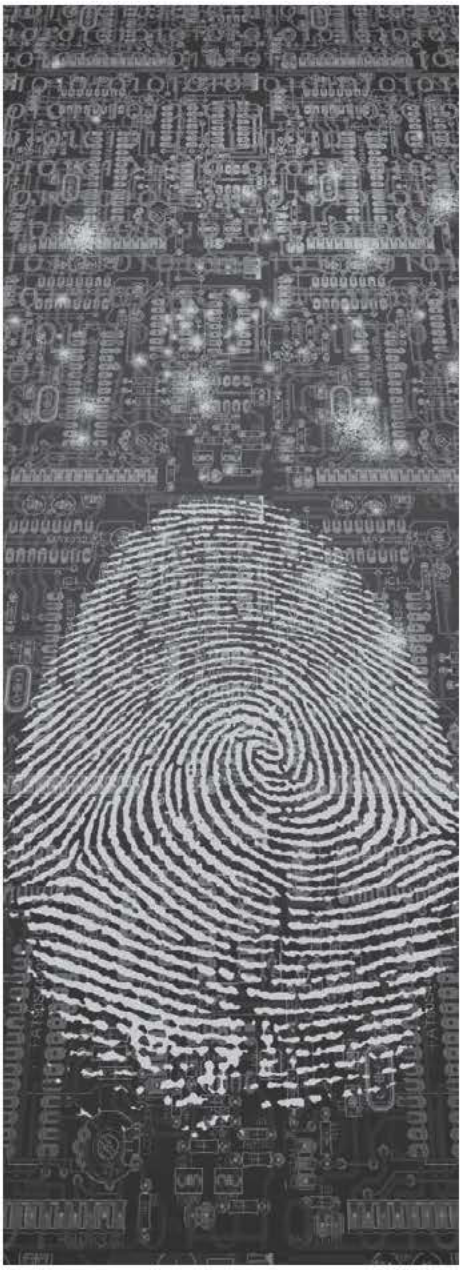

Defending Against Non-Retained Experts

by Blythe Golay and Angela S. Haskins

California is generally regarded as providing broad leeway for non-retained experts to testify on a range of matters. Several recent decisions, however, have narrowed the scope of permissible testimony for non-retained treating physician experts. Defense counsel, including those handling medical malpractice cases, should take advantage of these decisions in expert depositions, pre-trial motions, and Evidence Code 402 hearings, as the cases may be fatal to a plaintiff's claim.

Retained Versus Non-retained Experts

By statute in California, any party may demand a mutual and simultaneous exchange of information about all persons whose expert opinion the parties expect to offer at trial. Failure to timely exchange generally precludes the presentation of expert evidence at trial, which may result in crucial evidence being excluded. Each party must exchange a list setting forth the name and address of each person whose expert opinion the party expects to offer in evidence at trial. There are two types of physician experts, retained and non-retained. Non-retained experts, such as a plaintiff's treating physician, are percipient witnesses who can be called upon to give their expert opinions based on their observations. Thus, although a treating physician is a percipient expert, that does not mean that his or her testimony is limited only to personal observations. A treating physician can provide opinion testimony based on the facts independently acquired and informed by the physician's training, skill, and experience.

The California Supreme Court in *Schreiber v. Kiser* (1999) 22 Cal.4th 31 officially recognized the use of physicians as a classic example of non-retained experts. The Court noted, "A treating physician is a *percipient expert*, but that does not mean that his testimony is limited only to personal observations. Rather, like any other expert, he may provide both fact and opinion testimony.... [W]hat distinguishes the treating physician from a retained expert is not the content of the testimony, but the context in which he became familiar with the plaintiff's injuries ... which form the factual basis for the medical opinion." (*Id.* at pp. 35-36 (emphasis added).)

As noted by the *Schreiber* Court, the key to determining whether an expert has been retained is not just a question of whether the expert was paid, but rather, whether the expert's opinion is based entirely on his or her own personal observations or whether it is based on facts of the case with which he or she is not personally familiar.

Treating physicians are frequently used in medical malpractice cases for a number of reasons, but mainly because plaintiff's counsel can avoid costly expert fees and declaration requirements. A treating physician may also lend credibility as a percipient witness. Because plaintiffs frequently utilize treating physicians as non-retained experts, it is crucial for defense counsel to know the limits on their testimony.

Tools for the Defense

If a plaintiff fails to designate his or her treating physician as a non-retained expert, the defense can often preclude that treating physician from offering opinion testimony at trial. That is, the non-retained treating physician must be listed as an expert to give opinion testimony. An expert witness declaration, however, is not required because the physician is not retained for purposes of forming and expressing an opinion, as held by the California Supreme Court in *Schreiber*.

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Again, a treating physician is not consulted for litigation purposes, but learns of the plaintiff's injuries and medical history because of the underlying physician-patient relationship. Moreover, as held in *Kalaba v. Gray* (2002) 95 Cal.App.4th 1416, it is not enough to simply "designate" as experts "all past or present examining and/or treating physicians." The physician and his or her address must be specifically identified. Thus, the case law is clear that a party who intends to call a treating physician as an expert for opinion testimony must identify that physician in the designation of experts. But if the party fails to do so, may the physician still testify about nonexpert, percipient testimony (i.e., nonopinion testimony)? Probably yes. However, there is very little, if any, published California case law that addresses whether a treating physician can testify as a non-expert, percipient witness.

An unpublished opinion handed down last year by the California Fourth Appellate District, Division Two (Riverside) addressed this issue. In *Soto v. Knight Transportation* (E056536, 9/18/2014), the court held that the trial court did not abuse its discretion in excluding experts as to whom plaintiff failed to serve a timely designation of expert witnesses. However, the court further held a treating physician, who was not identified as an expert, should have been allowed to testify as a percipient, non-expert witness, but only as to the treating physician's observations within the physician's personal knowledge. Any opinion testimony derived from those observations or personally known facts is inadmissible. The *Soto* court based its decision on related California case law and persuasive federal decisions. Specifically, the court analyzed a California medical malpractice case where a physician was permitted to testify regarding a hospital's policy and personal knowledge of that policy. Thus, the *Soto* court permitted the treating physicians' non-expert, factual testimony (observations, treatment, diagnoses, prognoses, and billing) despite the failure to provide a timely expert designation.

Because the decision is not published, *Soto* is not citable as precedent in California trial or appellate courts, but it offers some insight into how an appellate court may approach this issue. One point of interest in the opinion is that, after finding error in excluding the physician's percipient, non-expert testimony, the court held that error was harmless and did not warrant reversal of the defense judgment on nonsuit. The lay witness testimony, if admitted, would have been insufficient to meet the plaintiff's burden of proving that his injuries were caused by the accident.

In short, *Schreiber*, *Kalaba*, and *Soto* make clear that if the injured party does not designate the individual's treating physician to testify at trial, by listing the physician by name and address, the physician cannot offer any opinions at trial. The physician may be able to testify as to observations within the physician's personal knowledge, however, the utility of that evidence is questionable, and any opinion testimony derived from those observations or personally known facts is inadmissible.

Another important decision limiting a treating physician's testimony is *Dozier v. Shapiro* (2011) 199 Cal.App.4th 1509. There, the court of appeal held that the trial court was justified in barring the plaintiff's treating physician from testifying on the issue of standard of care, and then dismissing the entire medical malpractice action. The treating physician had testified at his deposition that he was unable to determine whether the defendant surgeon's treatment fell below the standard of care. Further, the plaintiff's counsel never informed defense counsel about the treating physician's post-deposition change in testimony.

On appeal, the plaintiff argued that the treating physician was not *asked* whether he had an opinion as to whether defendant complied with applicable standard of care. The court was not persuaded, however, because at deposition, plaintiff's counsel objected to questioning on the grounds that the treating physician was not being deposed as an expert, and the questions went beyond the care and treatment of plaintiff and into expert opinion. The treating physician also testified that he had not been retained as an expert and all his opinions were based on his treatment of plaintiff, as well as experience and qualifications. Plaintiff's counsel further stated on the record that defendant could redepose the treating physician if he was later designated. One year after the deposition, the treating physician was asked to be an expert witness, and he then received the defendant surgeon's medical records and deposition transcript. Plaintiff argued that it was not until this time that the treating physician was able to formulate an opinion as to whether defendant's treatment met the standard of care. Plaintiff failed, however, to

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designate or identify the treating physician as a witness whose testimony would be offered as a retained expert on the standard of care issue. The court held that by failing to disclose the substance of the treating physician's anticipated opinion testimony, and that his opinions would be based on information received after his deposition and not wholly from his status as the plaintiff's treating physician, plaintiff did not substantially comply with Code of Civil Procedure requirements for expert witness designation.

The *Dozier* court spelled out what is *not* required of a witness testifying as a treating physician: an expert witness declaration under Code of Civil Procedure section 2034. This is true even if the testimony will include opinions with respect to subjects such as causation and standard of care. Thus, "the information required by the expert witness declaration 'is unnecessary for treating physicians who remain *in their traditional role*.'" (*Dozier*, *supra*, 199 Cal.App.4th at p. 1521 (emphasis added).) But when the treating physician receives, for example, additional materials to enable him or her to testify to opinions on a subject on which he or she had formed no opinions in connection with the physician-patient relationship, the role turns to that of a retained expert, which requires an expert witness declaration. The *Dozier* court concluded that the record showed that at the time of deposition, the treating physician had not formulated an opinion on the subject of the defendant's adherence to the standard of care, and his later-formulated opinions were based on information counsel provided to him after deposition for purposes of the lawsuit, rather than on the basis of the physician-patient relationship. The court found that the trial court therefore correctly determined that the trial testimony on standard of care would be that of retained expert, rather than merely treating physician, and as such, was properly excluded.

Dozier is a crucial case for defense counsel. The general takeaway is that a party's expert may not offer testimony at trial that exceeds the scope of deposition testimony if the opposing party has no notice or expectation that the expert will offer the new testimony.

ASCDC appeared as amicus curiae in the case to request publication of the opinion that was originally designated to be unpublished. Publication allows counsel to rely on *Dozier*'s sound and explicit statement of law, which has been effective in cutting back on the gamesmanship in expert disclosure that occurs with treating physicians in medical malpractice cases. *Dozier* is strong support for a motion in limine to limit a treating physician to testimony on opinions formulated at the time of deposition

Conclusion

The cases discussed above reflect the purpose of the expert witness discovery statute – "to give fair notice of what an expert will say at trial." (*Bonds v.* Roy (1999) 20 Cal.4th

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140, 146.) They also demonstrate the importance for defense counsel of having a clear record at deposition as to whether a plaintiff's treating physician is retained as an expert, whether the treating physician holds any opinions (particularly on standard of care and causation), the facts on which those opinions are based, and what observations and conclusions support the plaintiff's allegations. Note that questions on opinion may obligate deposing counsel to pay an expert witness fee to the treating physician. Note also that non-retained treating physicians must be subpoenaed for deposition because the designating party is not obligated to produce them for deposition. Even prior to expert depositions, however, defense counsel should closely examine a plaintiff's witness designation list to determine whether the statutory requirements have been met. Written discovery is another tool for counsel to elicit the plaintiff's contentions, as the identities and opinions of treating physicians are not subject to special discovery restrictions.

Blythe Golay

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Trial Evidence Limitations Imposed on Request for Admission Denials

by Craig A. Roeb, Esq. and Grace A. Nguyen, Esq.

In a matter of first impression in California, an appellate court has concluded that a party to litigation cannot use another party's denial of Request for Admissions as impeachment at trial. On January 13, 2015, in *Gonsalves v. Li*, 2015 WL164606, the First District Court of Appeal overturned a $1.2 million jury verdict after the plaintiff's attorney repeatedly examined the defendant over his denials of admission requests that had been propounded in the case.

In *Gonsalves*, plaintiff, Kenneth Gonsalves, worked as a sales consultant at a BMW dealership. He filed an action against Ran Li and Xiaoming Li after Ran Li lost control of a BMW that he was test-driving, with Gonsalves and Xiaoming Li as passengers. After Ran Li turned onto a freeway on-ramp, he lost control of the vehicle, causing it to spin into a guardrail. Gonsalves sued Ran Li for motor vehicle negligence, and sued Ran's father, Xiaoming Li, for negligent supervision. Xiaoming was later dismissed from the action.

Ran denied liability and claimed that he lost control of the vehicle when Gonsalves told him to hit the "M" button in the vehicle so that he could experience the vehicle's full potential. Gonsalves claimed significant injuries as a result of the accident.

During the litigation, Gonsalves propounded Requests for Admissions, including requests that Ran Li admit that he was driving too fast, and that his pressure on the accelerator was a substantial factor in causing the accident. Ran Li denied these requests on grounds that he lacked sufficient information to admit or deny these specific facts. At trial, on cross-examination, Gonsalves' counsel extensively questioned Li on his failure to admit the Requests for Admission. Objections by defense counsel that the questions were argumentative were overruled. During closing arguments, Gonsalves' counsel commented on Li's responses, and urged the jury to consider the fact that Li failed to admit these facts when considering liability. The jury awarded Gonsalves in excess of $1.2 million.

Requests for Admissions are an underutilized discovery tool that can assist a party in establishing admissible evidence that can be used both at trial and often in summary judgment motions. Requests for Admissions can be used to establish the truth of certain facts, the genuineness of documents, and a party's opinion on a particular matter. Under California *Code of Civil Procedure* Section 2033.410, a fact admitted in response to a Request for Admission "is conclusively established against the party making the admission." The primary purposes of Requests for Admissions are to expedite trial and eliminate the need to prove certain matters at trial. Thus the proverbial carrot and stick for parties to consider propounding carefully crafted admission requests, given risk of failing to admit that which inevitably must be conceded, especially given the attorney fees sanction available to the party forced to prove an unreasonably denied admission request. (See *Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 736-737 [the statute "authorizes only those expenses ... proving the matters denied by the opposing party"]).

Specifically, if a party unreasonably fails to admit the fact and the truth of that matter is later determined by the requesting party, the requesting party can seek an order requiring the non-admitting party to pay the reasonable expenses in proving that fact. (C.C.P. § 2033.420 [fee shifting not appropriate when "[t]he party failing to make the admission had reasonable ground to believe that that party would prevail on the matter"]; see *Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 511; accord *Hillman v. Stults* (1968) 263 Cal.App.2d 848, 886; *Chodos v. Superior Court* (1963) 215 Cal.App.2d 318, 324,) .

The trial court can award costs incurred in proving non-admitted matters not only if it finds the responding party did not have substantial justification in denying the particular request, but also if the responding party failed to make a reasonable investigation into the matter at issue. (*Smith v. Circle P. Ranch Co., Inc.* (1978) 87 Cal.App.3d 267.) While this does not mean

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that the responding party is required to go through great efforts to establish the other side's case, the responding party is required to conduct a reasonable investigation into the facts so that an adequate response can be provided.

Moreover, parties responding to Requests for Admissions must ensure that the responses are complete and accurate, as there are additional consequences for a party's unreasonable denial of a Request for Admission. If the responding party fails to timely respond to Requests for Admissions, all objections are waived. Furthermore, the propounding party can move for an order having the requests "deemed admitted." Such an order is mandatory unless a response is provided before the hearing on the motion. (C.C.P. § 2033.280.)

On appeal in the *Gonsalves* case, Li argued that the trial court erred by allowing his denials of Requests for Admissions to be entered into evidence and by allowing Gonsalves to cross-examine Li on the denials. While the statute governing Requests for Admissions allows for the recovery of *monetary sanctions* (in the form of cost-shifting) for a party's failure to admit a matter, the Court of Appeal in *Gonsalves* found that the statute does not provide for a party's failure to respond to be utilized against that party *at trial*.

Given the lack of authority on the issue in California, the Court of Appeal looked to other jurisdictions in support of its holding that denials of Requests for Admission are inadmissible at trial.

The court noted that at least three other states hold that denials of Requests for Admissions are inadmissible at trial. The court considered a decision from Massachusetts's highest court, which interpreted a statutory scheme similar to California's. In Massachusetts, as in California, the purpose of Requests for Admission is to narrow the issues before trial. The *Gonsalves* Court agreed with the Massachusetts Supreme Court that denials are not statements of fact, but rather, an indication that a party is not willing to concede an issue that must be determined at trial.

The Court of Appeal also analogized *Gonsalves* to *Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255, wherein the Court of Appeal condemned the practice of questioning a party at deposition to state facts in support of causes of action or affirmative defenses; to identify of each witness having knowledge of such facts; and identify documents relating to such facts or witnesses. (See also *Peck v. Clesi* (N.D. Ohio 1963) 37 F.R.D. 11, 12 [disapproving requests that "appear[ ] to be nothing more than an attempt by one party, in anticipation of a favorable verdict at trial, to lay a foundation for transferring to the other party a large part of the costs of the lawsuit.... Such an attempt will not be permitted."].)

In *Gonsalves,* the appellate court found plaintiff's counsel's conduct at trial similarly "unfair," as Li was asked to explain his responses without the ability to consult with his lawyer regarding why certain positions were taken in responding to the requests for admissions. Even more harmful, Li was asked to explain his responses in front of the jury.

It is therefore important that parties in civil litigation carefully respond to Requests for Admissions given the potential for monetary sanctions if the facts at issue are later proven to be true, and the denial was unreasonable. However, for now, it is settled that denials of Requests for Admissions cannot be utilized at trial as a method of impeachment. *Gonsalves* provides a party with protection against the potential for abuse of this discovery procedure by an opposing party.

Craig A. Roeb **Grace A. Hguyen**

Craig A. Roeb is a Partner and Grace A. Nguyen is a Senior Counsel at Chapman Glucksman Dean Roeb & Barger. Mr. Roeb and Ms. Nguyen specialize in business, employment, and product liability litigation.

Successful Media Awareness Week Has Events Throughout L.A.

by Daniel Ben-Zvi

Recently, the City of Los Angeles celebrated the 11th annual Mediation Awareness Week. Its Chair and Founder is Daniel Ben-Zvi, mediator with ADR Services, Inc. This year's Sponsor was Councilmember Paul Koretz. Ten events, as well as trainings, were held throughout the City, including a kick-off cocktail reception sponsored by the Southern California Mediation Association and the Beverly Hills Bar Association.

Chris Faenza, representing ASCDC, joined leaders of the legal, governmental and mediation communities at the Mediation Awareness Week proclamation in Los Angeles City Hall on March 18, 2015. The leaders spoke, in a televised session, about court delays due to budget cuts and how mediation is of greater value than ever, providing fast and fair dispute resolution. Similar presentations were also made by this group at the Los Angeles Board of Public Works.

RIGHT TO LEFT: Songhai Miguda-Armstead, Director of the City Attorney's Dispute Resolution Program; Chris Faenza, Secretary/Treasurer of the Association of Southern California Defense Counsel [ASCDC], partner at Yoka & Smith; Daniel Ben-Zvi, Chair/Founder of Mediation Awareness Week and Mediator with ADR Services, Inc.; Mike Feuer, City Attorney; Paul Koretz, Councilmember and Sponsor of Mediation Awareness Week; Michael Young, President of the International Academy of Mediators [IAM] and Mediator with Judicate West; Floyd Siegal, President-Elect of the Southern California Mediation Association [SCMA] and Mediator with Judicate West; Joseph Barrett, President of the Consumer Attorneys Association of Los Angeles [CAALA] and partner at Kabateck, Brown & Kellner; Mark Ameli, Chair of the Conflict Resolution Section Chair of the Beverly Hills Bar and Mediator with ADR Services, Inc.

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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.

Please visit *www.ascdc.org/amicus.asp*

RECENT AMICUS VICTORIES

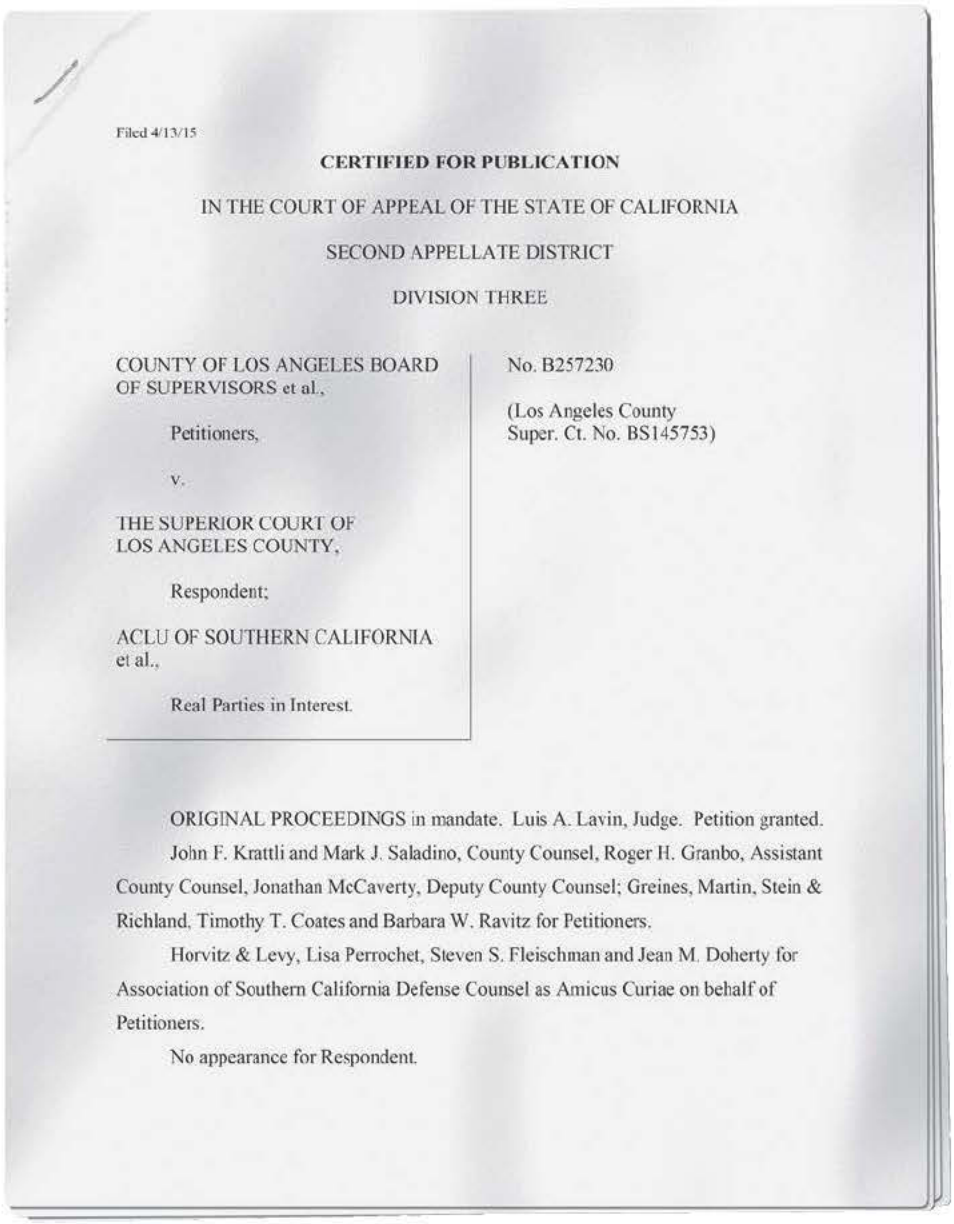
The Amicus Committee has recently participated as amicus curiae in the following case:

MacQuiddy v. Mercedes-Benz USA, LLC (2015) 233 Cal.App.4th 1036: The Court of Appeal held, among other things, that the trial court did not abuse its discretion in finding that plaintiff was not the "prevailing party" entitled to fees in a Lemon Law (Song-Beverly Consumer Warranty Act) case, where the defendant stipulated to repurchase the car, admitted liability in its answer, and the plaintiff was not awarded any civil penalties. The court held that simply because the plaintiff obtained a net monetary recovery, which made it the prevailing party for costs purposes, that does not mean that the plaintiff is also the prevailing party for statutory attorney's fees. Larry Ramsey from Bowman & Brooke wrote the successful 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 pending cases:

Sanchez v. Valencia, docket no. S199119, pending in the California Supreme Court.



Filed 4/13/15

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

COUNTY OF LOS ANGELES BOARD OF SUPERVISORS et al.,

Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

ACLU OF SOUTHERN CALIFORNIA et al.,

Real Parties in Interest.

No. B257230

(Los Angeles County Super. Ct. No. BS145753)

ORIGINAL PROCEEDINGS in mandate. Luis A. Lavin, Judge. Petition granted.

John F. Krattli and Mark J. Saladino, County Counsel, Roger H. Granbo, Assistant County Counsel, Jonathan McCaverty, Deputy County Counsel; Greines, Martin, Stein & Richland, Timothy T. Coates and Barbara W. Ravitz for Petitioners.

Horvitz & Levy, Lisa Perrochet, Steven S. Fleischman and Jean M. Doherty for Association of Southern California Defense Counsel as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

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.

Winn v. Pioneer Medical Group, Inc., docket no. S211793, pending in the California Supreme Court. Plaintiffs' claims are against defendant physicians for elder abuse arising out of the care provided to the plaintiffs' deceased mother, who died at the age of 82. The 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

continued on page 34

Amicus Committee Report – continued from page 33

Act allege that the defendant health care provider had a custodial relationship with the elder patient?" Harry Chamberlain, Buchalter Nemer, submitted an amicus brief on behalf of ASCDC.

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

Lee v. Haney, docket No. S220775 pending in the Supreme Court. The Supreme Court has granted review to determine if the one-year statute of limitations for legal malpractice actions (Code Civ. Proc., § 340.6) applies to a claim brought by a client against a lawyer for return of money allegedly held in the lawyer's trust account. Harry Chamberlain of Buchalter Nemer has submitted a brief on the merits supporting the defendant's position.

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

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

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

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

If you have a pending appellate matter in which you believe ASCDC should participate as *amicus curiae*, feel free to contact the Amicus Committee:

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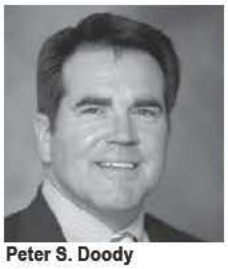

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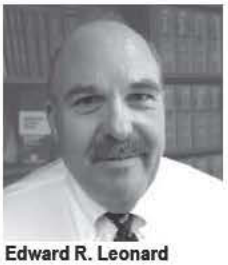

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