association of southern california defense counsel

verdict

Volume 3 • 2015

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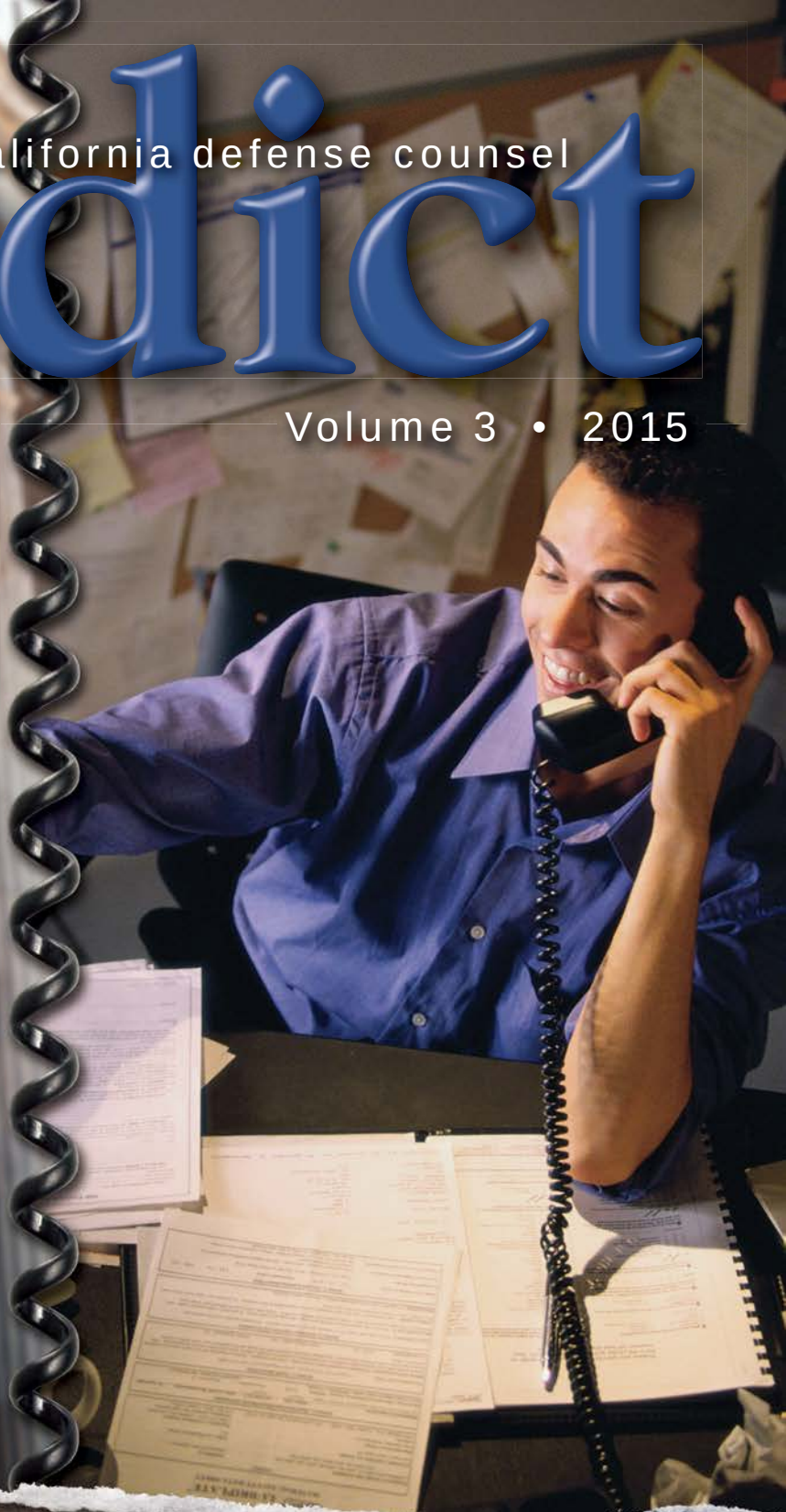

Be Media Savvy (p.9)

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2015 Is In the Can. And Oh, What a Year it Was.

Michael Schonbuch
ASCDC 2015 President

The Eurasian Economic Union comes into effect. Lithuania officially adopts the Euro. Massacres in Nigeria by Boko Haram kill more than 2000 people. The Swiss National Bank abandons the cap on the Franc's value causing turmoil in International financial markets. Leaders from Russia, Ukraine, Germany and France reach an agreement on the conflict in Ukraine that includes a ceasefire and withdrawal of heavy weapons. Charlie Hebdo office is attacked in Paris. Leftist leader wins Greece Prime Minister election. The Egyptian military begins conducting airstrikes against a branch of the Islamic militant group ISIL in Libya in retaliation for the group's beheading of over a dozen Egyptian Christians. The Islamic State of Iraq and the Levant allies with fellow jihadist group Boko Haram, effectively annexing the group. Saudi Arabia leads attack on Houthi rebels in Yemen. 148 people are killed in a mass shooting at the Garissa University College in Kenya perpetrated by the militant terrorist organization Al-Shabaab. A 7.9 magnitude earthquake hits Nepal, causing 8857 deaths. ISIL claims responsibility for four attacks around the world during Ramadan. A Lockheed C-130 Hercules operated by the Indonesian Air Force crashes into a residential neighborhood in Medan shortly after take off, killing 143 people on board and another 22 on the ground. Greece becomes the first advanced economy to miss a payment to the International Monetary Fund in the 71-year history of the IMF. An Airbus 320 operated by Germanwings crashes in the French Alps, killing all 150 on board. Greece votes NO to bailout. Iran nuclear deal reached. Microsoft introduces Windows 10. Cuba and the United States reestablish full diplomatic relations, ending a 54-year stretch of hostility between the nations. Debris found on Reunion Island is confirmed to be that of Malaysian Airlines Flight 370, missing since March 2014. The migrant crisis of Europe stretches on. Volkswagen is embroiled in an emissions scandal. Flowing water is found on Mars. A stampede during the Hajj pilgrimage in Mecca, Saudi Arabia kills at least 2,200 people and injures more than 900 others, with more than 650 missing. Turkey downs a Russian jet. Russia begins air strikes against ISIL and anti-government forces in Syria in support of the Syrian government. A suicide bomb kills at least 100 people at a peace rally in Ankara, Turkey and injures more than 400 more. Paris terrorist attack kills hundreds. Climate change deal reached by about 200 countries. The Fed initiates the first Unites States interest rate hike since 2008. The United Nations Security Council passes a resolution on a peace process for war-torn Syria. The country reels from the San Bernardino terrorist attack.

As defense attorneys battling the plaintiffs' bar in litigation and jury trials we really need to put our issues in perspective.

I don't know about you but I'm looking forward to a New Year. Here's to 2016.

Better Living Through Legislating

Michael D. Belote
Legislative Advocate
California Defense Counsel

Every year the California Legislature introduces around 2500 new pieces of legislation, to make all of our lives better. Where General Motors makes cars and Apple makes phones (and maybe cars as well), the legislature makes laws. There is virtually no subject in the California experience too small to be the subject of some proposal or another.

This year nearly 1000 of the 2500 proposals reached Governor Brown's desk for signature. Although the Governor has been heard to say, repeatedly, that California has too much law, he still signed 808 new bills into law. The remainder, about 14% of the total, were vetoed.

As discussed in the summer issue of *Verdict*, 2015 will go down as one of the busiest in memory relating to civil procedure. In addition to a number of bills affecting defense practitioners generally, there were a number of bills signed in discrete practice areas, particularly employment. All of the bills followed by the California Defense Counsel are available through the ASCDC website; bills on the CDC status report which show as "chaptered" are bills passed by the legislature and signed by the Governor.

The following highlights some of the key bills relevant to ASCDC members which were signed by Governor Brown:

- AB 87: Peremptory Challenges. Broadens CCP Section 231.5 prohibitions on peremptory challenges based upon race, color, religion, sex and national origin to also include ethnic group identification, age, genetic information, and disability.
- AB 304: Sick Leave. Enacts a series of largely technical clean-up provisions to the paid sick leave law which took effect on July 1, 2015. Perhaps the most significant is providing an alternative to the "90-day lookback" provision for the calculation of sick pay wages.
- AB 555: Expedited Jury Trials. Co-sponsored by CDC and the Consumer Attorneys of California, AB 555 repeals the sunset provision on the current voluntary expedited jury trial law, but broadens the "EJT" law to make the procedure mandatory for limited jurisdiction cases, with specified "opt-outs" for cases with certain characteristics. Mandatory EJT cases would be subject to appeal to appellate divisions of superior courts.
- AB 560: Immigration Status. Provides that immigration status of a minor in a civil action is irrelevant to issues of "liability and remedy" and generally prohibits discovery into immigration status.
- AB 856: Invasion of Privacy. Expands liability for physical invasions of privacy to include intentionally entering into the airspace above the land of another person without permission.
- AB 970: Labor Commissioner. Permits the state Labor Commissioner to enforce local overtime and minimum wage ordinances, with the permission of the local entity.
- AB 1141: Summary Adjudication. Co-sponsored by CDC and the Consumer Attorneys, re-enacts provisions of the CCP which inadvertently sunsetted permitting summary adjudication of issues which do not completely dispose of causes of action, if both sides stipulate that adjudication of the issue contributes to judicial economy. Also amends CCP Section 998 to clarify that both sides are liable for *post-offer* costs.
- AB 1197: Deposition Notices. Requires persons noticing depositions to include a disclosure if the noticing party is aware of a contract between the entity noticing the deposition or financing all or part of the action and the party performing deposition services, or if the noticing party has been "directed" to use a certain deposition services entity.
- SB 358: Gender Wage Differentials. Broadens existing law to require equal pay for *equal* work, to require equal pay for *substantially similar* work, "when viewed as a composite for skill, effort and responsibility."
- SB 383: Demurrers and Amended Complaints. Co-sponsored by CDC, the California Judges Association and the Consumer Attorneys of California, makes a number of changes relating to demurrers and amended complaints, subject to a five-year sunset provision ending in 2021. Requires meet and confer prior to filing demurrers, but also limits amended complaints to three without a specific showing to the court, and also requires complaints to be amended by the date oppositions to demurrers would otherwise be due.

new members september – december

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Listen Up, Folks

Patrick A. Long

President Ronald Reagan, President Jimmy Carter, President George H.W. Bush, President William Clinton, President Gerald Ford, Secretary of State Colin Powell, General Norman Schwartzkoph, Senator and Presidential Candidate Robert Dole, Prime Minister Margaret Thatcher, Prime Minister John Major, Mayor Rudy Giuliani. Okay, okay, I'll stop here, but there are a number of other names I could have set forth.

Why mention them here, and now? Well gosh, some of you with lower bar numbers will remember that in March, 1991 President Reagan appeared as our luncheon speaker at ASCDC's Annual Meeting. In the years that have followed, all of the above-named persons have also appeared as luncheon speakers at our Annual Meetings, along with many other stupendous speakers not named. There is no other bar organization in the country with a record of speakers more impressive than ours, and for that I thank our board members and officers who have achieved such wonderful results through the years. I know our membership is grateful for their efforts.

In a moment I'll talk a little bit about the speakers at this year's Annual Meeting in February at the J.W. Marriott in downtown L.A. but I'd like to reminisce briefly about some of our past luncheon speakers. I conducted my typical survey of our membership to discern which speaker or speakers were most popular. The results were thought-provoking. The speakers most often named by those who responded to my survey were President Reagan and General Schwarzkopf. This is interesting because they both appeared more than twenty years ago. Among others named were President Clinton, Vice-President Al Gore, and Prime Minister Thatcher.

What was rather remarkable was that the responders had recollections of specific comments made by various speakers. For example Larry Ramsey recalled General Schwarzkopf's comment, "When in command, lead." Randy Dean remembered Prime Minister Thatcher exhibiting the qualities of a true leader: morality, vision, and fortitude. Mary Pendleton expressed her surprise that Vice President Al Gore had such a great sense of humor. She recalled that when he began his talk he introduced himself by saying that he was "the guy who used to be our next president."

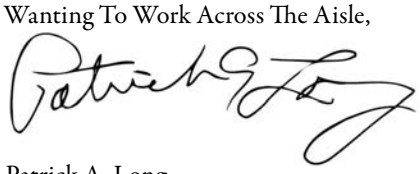
My thoughts here are focused on the Friday luncheon speakers, but I believe Mike Colton's comments about another speaker who did not appear as the Friday luncheon speaker bear repeating. Mike recalled an appearance a number of years ago by Morris Dees, the founder and Chief Trial Counsel of the Southern Poverty Law Center. Mike stated that Mr. Dees exhibited "humanity, compassion, humility, and steely resolve," which reminded Mike of what he believes to be *our profession's true calling* "if we listen to the better angels of our nature." Well said, Mike.

Before moving from past speakers to the present, let me express my personal appreciation for the work of our officers and board in their continuing efforts to bring in renowned speakers of every political persuasion and background, speakers who have inspired, informed, entertained and educated our members. Our membership owes all of you a great deal.

Our next Annual Meeting on February 25 and 26 sounds very exciting for a number of reasons. Glen Barger, Clark Hudson, and their crew have put together a terrific program. It will be our first program at the Marriott at L.A. Live. For many of our members who live and work outside of Los Angeles, a visit to the L.A. Live area will be a fascinating experience.

But let's talk about this year's Friday luncheon speakers (that's plural, as there will be two). Perhaps you've heard, we have a little trouble in Washington, D.C. of late. It seems our elected representatives can't seem to get along. I know, I know, some of you are shocked to hear this, but apparently it's true. Well, perhaps our speakers this year will have some answers, or at least suggestions. Our speakers are Trent Lott, former Senator from Mississippi and Senate Majority Leader, and Tom Daschle, former Senator from South Dakota and Senate Majority Leader. Both are now involved with the Bipartisan Policy Center and can, I hope, make some suggestions as to how to extricate ourselves from governmental gridlock. This is going to be a timely and informative program, and another in the long line of outstanding Annual Meetings of ASCDC. I'll look forward to seeing you there.

Wanting To Work Across The Aisle,



Patrick A. Long
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Smart Ways to Deal with the Press

by Eden Gillott Bowe

Whether they're print, TV or online, all journalists want the same thing: Recognition for being first with a breaking news story or writing the most insightful analysis. That is their metric. It is how they judge themselves, and it's how their peers and editors judge them. To the extent you can help them, they're grateful – and that makes them malleable. Once you grasp this concept, it's much easier to work with the media. But understanding motivation is only the first step.

The relationship between you and the media can be adversarial. But when developed well, it's also based on a sense of trust and *quid pro quo*. That doesn't mean you should blindly trust journalists. But it does mean that journalists *must believe* three things: you understand their needs, you want to help them, and you'll be honest (or at least fair). In addition, journalists *must believe* you offer something of value that will give them an edge over their peers.

Just as you develop a litigation strategy for the case, you should also devise a proactive media strategy. "No comment" is generally no good. Preparing in advance for dealing with the media saves headaches and cost, and provides your clients the best chance to protect their reputations – not to mention yours.

The Intersection of Reputation and Truth

To defend your client's reputation in the media, you must know where all the skeletons are buried. Only then can you build an effective defense. For this reason, experienced crisis public relations professionals are sometimes engaged as part of the legal team in high profile or high stakes cases. This brings them inside the tent of attorney-client privilege, so clients are reassured that they can share their darkest secrets – and they will stay secret.

Getting and Telling the Truth

Clients aren't always forthcoming. Some hope if they don't admit the truth even to

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themselves, it won't be real. Others think if they don't tell their lawyer or Crisis PR counsel the truth, it's easier to sell a believable story to the media and the public. Life doesn't work that way.

If the story doesn't sounds true, it probably isn't. Keep pressing from different angles to unearth nuggets of truth until you've guided the client to recognize the value of 'fessing up to you. The fastest way for a small issue to become a big problem is to step in front of the media or other stakeholders armed with half-truths and lies. You will lose credibility in an instant.

You'll never get away with flat denials if the facts against your client are obvious or will soon become public. False denials will not only destroy the reputations of you and your client but also whatever goodwill you've both earned.

Some explanations may take you close to the line, but not over it. They can soften the glare, shift the spotlight, or redefine the tone of the story. The problem may not go away, but it can become less painful at the moment and less damaging down the road.

Selective truth-telling is acceptable. But what you say must be plausible, and it must withstand scrutiny. Otherwise, you feed the frenzy, cause more speculation, and invite the media to keep investigating until they uncover what they believe you aren't telling them.

Telling the Truth in a Way that Gets Reported

You may have a good angle to share that truthfully presents your side of the story, but it won't help your client if it never finds its way into the reporter's story. Be quick. Be memorable. Be smart. Why? The public's attention span is short, and the media's is even shorter. Use this to your advantage by giving them only the most necessary information. End of story. Tailor your comments to the journalist's beat and expertise – reporters in the legal press may be better able to appreciate nuances that will be lost or mangled in the mainstream media. But whether or not you are speaking to a sophisticated reporter who has experience covering the area, don't add details that bury your theme in minutiae. Even worse are details that increase their appetite for more or raise questions you don't want to answer.

Buying Yourself Time

Initial media statements can serve as pause buttons, and they are an integral part of your long-term strategy. They briefly satisfy the media and public while you gather facts, polish your message, and get the tone just right. Keep them short and simple. Too much information isn't your friend. It creates confusion and leaves room for error (either on your end or theirs). Also, the media may focus on what's least important to you and undermine your message.

Next, explain your priorities, what you're doing, and what you'll be doing in the near future. Make it obvious that you're engaged. Reassure them that taking care of this matter is your top priority. This is an excellent time to show compassion, especially if there's a loss of life (human or animal) or a threat to safety.

As more information becomes known and you make further statements, keep them simple and stick to the facts.

Managing Your Client's Employees

The media will grab anyone they can for a statement. Make sure all your client's employees know who's authorized to speak. No one else should. This is a major pitfall. The danger is that people love to talk. When a microphone is put in front of them, a star is born. They become overwhelmed and tend to ramble. To make matters worse, they're

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often the least informed and make erroneous and damaging statements.

Using Social Media to Your Benefit

Your client's most loyal fans (and critics) will automatically look to social media for the latest information. It's crucial that you don't ignore this. Post official statements directly onto all of your client's social media platforms. This is your opportunity to tell your client's story on your terms. Reach out to your client's stakeholders in whatever form they use. If you don't keep them informed, they will speculate. Know where their eyes are. There's no point in getting your message out if no one is around to read it.

The Internet is a treasure trove of information. Use this to your advantage. Monitor the public's opinion of your client. Correct inaccuracies. Learn what the other side is up to.

Working Directly With the Media

First things, first. Breathe. Stay calm. Your speed, accuracy, and credibility are essential to effectively represent your client in the media. The media will learn about an incident, like a major adverse verdict, within minutes, assuming it's big enough news. Sometimes they're in such a rush to publish that they report the future. Remember Michael Jackson's death? TMZ reported he was dead while emergency room doctors were still working and nearly half an hour before they declared him dead.

Media: Friend or foe? Neither. The media isn't out to get you. They're out to get the story. Understanding the mind-set of a reporter means you know what they need and when they need it. Sadly, this often means they prefer a juicy, negative story. Your client just happens to be in the wrong place at the wrong time.

Killing a story. If the media has sunk their teeth into a story, you might be out of luck. But you do have options. Is no one else chasing the story? If so, it's not competitive. Let the reporter know this, and assure them that if any other media *does* come snooping, they'll get the first call-back. This will deflate the sense of urgency because the reporter doesn't feel compelled to file a story immediately to protect their "scoop." This buys time to develop a more thorough strategy to defuse the issue.

Shifting the spotlight. If killing a story isn't an option, shift the spotlight. Refocus the reporter's attention by providing them a new angle and fresher material. For a reporter, that's preferable to regurgitating the same day-old story.

Best thing you can say (in almost every circumstance): "Let me check on that, and I'll get right back to you." This buys you time. Not a lot, but even a little goes a long way. Gather all the facts. Know what you want to achieve before you start talking. Don't stray off message. Changing your story mid-stream corrodes your credibility and reputation.

Worst thing you can say (in almost every circumstance): "No comment." Unless you're restricted by legal constraints, saying this means you've missed an opportunity. Use the time to say something that can shift the spotlight, make the story more favorable, or at least soften the damage to your client. If a client is nonetheless too worried about mistakes to allow you to speak extemporaneously, at least seek permission to send publicly filed documents (briefs, motions) that reflect the client's position, so that you don't sound cagey and obstructive.

Never lie. If you do, you'll get caught. The cover-up (or lie) is worse than the original sin.

Key Points: Pick two or three (and stick to them!) Know what questions you want to answer, which may be very different than what the media asks. You see this all the time in political debates. If you rattle off too many points or topics, chances are the reporter will focus on exactly what you *don't* want. Don't leave things to chance.

Sound bites. Anticipate what will capture the media's attention and tailor your words ahead of time. Comments that are overly detailed and riddled with jargon cause the media to lose interest. Ask yourself: Will this fit into a few seconds of air time or a paragraph in a newspaper?

You needn't fill the silence. Don't fall for this old journalistic trap! People naturally feel awkward when there's silence. Resist the urge to ramble. If you say nothing, reporters will realize they've been outfoxed and will move on.

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Quick Tips for Working with the Media

DO

- Select one to two people who are trained to talk to the media.
- Let the public know what you're doing to resolve the situation. Show empathy and compassion.
- Select two to three talking points. Don't stray from them.
- Monitor all media coverage. This includes social media.
- Correct errors immediately. Otherwise they're presumed true by whoever sees them in the future.

DON'T

- Allow untrained or uninformed individuals to talk to the media.
- Go into too much detail.
- Say, "No comment."
- Speculate. Make sure you stick to the facts.
- Use industry jargon. It's off-putting and makes you less likely to be quoted.

Presume you're always "on the record." Only if you've built a long relationship with a reporter should you even begin to consider speaking on background or "off the record." The lower you go down the journalistic food chain, the less likely reporters are to understand, let alone abide by, the rules of "on background," "off the record," and "not for attribution."

Get back to the reporter promptly. When you tell a reporter "I'll get back to you," make sure you do. Usually, reporters will say their deadline's earlier than it actually is. Regardless, respect their clock and deliver on your promise.

Monitor the media for factual errors – and correct them. If you don't, errors will take on a life of their own and eventually become accepted as facts.

Repairing a Reputation After a Crisis

Whenever accusations are made in the media, you always face an uphill fight. The world is more cynical than ever. It's easier to believe the bad than it is to hope for the good. It's also satisfying (in a voyeuristic sort of way) to watch the powerful fall.

In the public's mind, your client is presumed guilty until proven innocent. Even if the accusations are ultimately found false, the stench of perceived impropriety will linger.

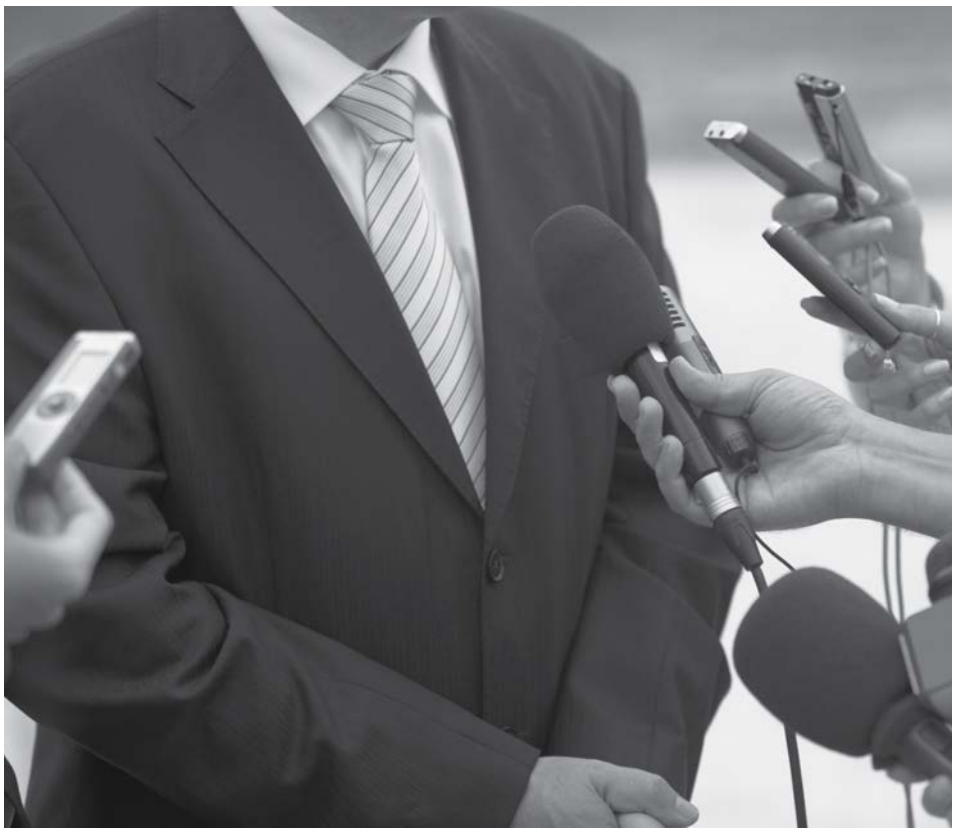
The media is at least partly responsible because bad news is big news, while good news is buried.

Protecting your client's reputation has two parts: First, fix the immediate problem. Second, provide a narrative for long-term redemption. If you don't do what's necessary to repair your client's reputation for the future, the immediate fix might not hold – and the tarnish will return.

Handling the media is more art than science. You need to be inside their brain – to know intimately what they need, when they need it, and what is enough to keep them satisfied.

Eden Gillott Bowe

Eden Gillott Bowe, President of Gillott Communications, is a Crisis PR expert who resolves issues both inside and outside the media's glare — from celebrity scandals to corporate fraud to civil litigation. She's the co-author of *A Lawyer's Guide to Crisis PR* (2014) and *A Board Member's Guide to Crisis PR* (2016).



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– Matthew B.F. Biren, Biren Law Group

"I have known Andy Shapiro for over 30 years. I had cases against him when I was practicing and have mediated and arbitrated cases with him in my more recent capacity as a Neutral Hearing Officer. Based on my experience with him, Andy has the skills and more importantly, the temperament, to be extremely effective in this endeavor. His many years of experience will serve him well, and I enthusiastically endorse and support his entry into the field."

– Darrell Forgey, Judicate West

Effective Advocacy Outside the Courtroom

How Far *Can* You Go? How Far *Should* You Go?

by Roger Goff

As attorneys, we are first and foremost communicators. That is our primary skill, our primary job function, and for many of us, a genuine passion. We love to write, talk, argue and convince. It's what we do.

However, while our job is to communicate, we are actually more restricted in that regard than most other citizens. The U.S. Supreme Court has noted that attorneys do not enjoy the same First Amendment freedoms as people engaged in most other professions. *Gentile v. State Bar of Nevada (1991) 501 U.S. 1030, 1073, 111 S.Ct. 2720.* Our ability to communicate is certainly restricted by rules of attorney-client privilege. And judges routinely impose restrictions on what lawyers may say or do both inside and outside the courtroom. So while our role in society is to communicate on behalf of our clients and their causes, we understand that significant restrictions exist in that regard.

On the other side of the coin is our passion and obligation to protect our clients and to assert their positions as aggressively as we can in order to get the best possible result in a transaction or controversy. When our clients are publicly attacked or placed in a negative light, we must work with crisis control experts and other professionals to assure that the public discourse is as fair as possible. It is often the attorney who is called upon to be the public spokesperson for a client who has drawn negative attention. Our communication in that role is not only often critical to the outcome of the matter at hand, but also essential for the long-term success and well-being of the client. As we know, attorneys tend to be summoned at the most perilous times in their clients' lives, and it is those moments and events that can determine the ultimate results of a lifetime of effort.

So when we are called upon to be a public advocate and spokesperson, how can we be most effective without crossing any ethical or legal boundaries? In California, Rule 5-120 of the Rules of Professional Conduct gives substantial guidance in that regard. On the one hand, section (A) of that rule prohibits us from making statements outside the courtroom with the intent of creating a prejudicial result in the proceeding at hand. However, section (B) grants us the ability to assure that the public is receiving accurate information regarding the proceedings.

In other words, it's not appropriate to "try your case in the press" if you cross the line with misleading statements, or statements that are true but may in some way sway the potential jury pool or a sitting jury. But we *are* permitted to share information that is already a part of the public record, and we can provide names, dates and places, as well as informing the public of ongoing investigations and certain concerns where we fear harm to individuals or the public interest.

Further, section (C) of Rule 5-120 allows us to "make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client." Therefore, when our clients are attacked in the press or other public forums, we have the right to set the record straight.

As natural communicators and aggressive defenders of our clients' rights, most of us are probably prone to pushing the envelope. Our instinct is to strive for the cutting edge of what we can proclaim in the press without going past our ethical limitations. However, we should also remember that sometimes silence is not only golden, but can speak volumes. The public interest is often stirred more by what is omitted than what is stated. When the public knows that there is information that is being withheld, imaginations often fill in the blanks in a manner that the truth cannot match.

Social psychologist Jack Brehm spent much of his career demonstrating the effect of reactance, which makes us more focused on and desirous of the things that are withheld from us. Therefore, the *implication* of the existence of a key piece of information can often bring more attention than lengthy proclamations of facts and assertions that are likely to be viewed as self-serving, incomplete or outright distortions of the truth.

Our skills and years of training in communication are therefore not wasted in an environment where we are restricted. In fact, those restrictions and protections are essential to promoting fair outcomes in our legal system, and our ability to work effectively within those boundaries is what makes us most valuable, both to our clients and to the system of justice to which we have devoted our professional lives.

Roger Goff

Roger Goff is an attorney and business advisor for privately held companies, primarily in the entertainment industry, and a partner at Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP. Much of Roger's practice is in the film industry where he regularly represents producers, writers, financiers and others. He is consistently involved in the development and production of dozens of feature films, as well as a wide variety of financing and distribution transactions.

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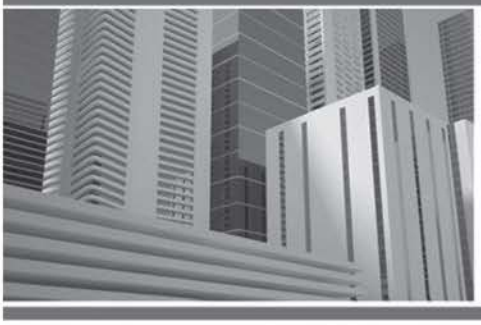
EDITOR'S NOTE:

Authorities bearing on lawyers' public statements about cases, and judges' authority to restrict such statements, include:

- Code Civ. Proc. Section 128 [general authority to control conduct of persons in any manner connected with a judicial proceeding];
- Cal. Rules of Court, rule 1.150(a) ["The judiciary is responsible for ensuring the fair and equal administration of justice. The judiciary adjudicates controversies, both civil and criminal, in accordance with established legal procedures in the calmness and solemnity of the courtroom. Photographing, recording, and broadcasting of courtroom proceedings may be permitted as circumscribed in this rule *if executed in a manner that ensures that the fairness and dignity of the proceedings are not adversely affected.* This rule does not create a presumption for or against granting permission to photograph, record, or broadcast court proceedings."];
- Cal. Rules of Court, rule 1.150(e) [media coverage is permitted "only on written order of the judge as provided in this subdivision. The judge in his or her discretion may permit, refuse, limit, or terminate media coverage"; rule lists factors to be considered];
- Cal. Rules of Court, rule 1.150(f) ["Any violation of this rule or an order made under this rule is an unlawful interference with the proceedings of the court and *may be the basis for an order terminating media coverage, a citation for contempt of court, or an order imposing monetary or other sanctions as provided by law"*];
- Cal. Rules of Prof. Conduct, rule 5-120, and rule 5-120(A) [Trial Publicity];
- Always check local rules/codes of conduct;
- Rutter, Cal. Practice Guide: Prof. Responsibility Ch. 8D, D. [Restrictions on Speech and Behavior Outside Courtroom];
- *Hollywood v. Superior Court* (2008) 43 Cal. 4th 721, 43 Cal. 4th 721 [notwithstanding counsel's general freedom to discuss cases outside the courtroom, "a case might arise in which a trial court could order recusal [of prosecuting counsel] based on the prosecution's attempt to manipulate the prospective jury pool by disseminating inflammatory portrayals of the defendant"];
- *Canatella v. Stovitz* (ND CA 2005) 365 F.Supp.2d 1064, 1071 [discussing scope of permissible restrictions on attorney speech, and noting, "the Supreme Court has observed that lawyers are not 'protected by the First Amendment to the same extent as those engaged in other businesses,'", citing *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1073, 111 S.Ct. 2720].
- Bus. & Prof. Code Section 6068 ["It is the duty of an attorney to, among other things: (a) To support the Constitution and laws of the United States and of this state; (b) To maintain the respect due to the courts of justice and judicial officers; ***(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth,*** and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law; ***(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged."];***
- California Attorney Guidelines of Civility and Professionalism, Section 4 [Communications, subsection g: "An attorney should not create a false or misleading record of events or attribute to an opposing counsel a position not taken"];
- *Fasuyi v. Permatex, Inc.* (2008) 167 Cal. App. 4th 681 [The California Attorney Guidelines of Civility and Professionalism "reflect that "attorneys have an obligation to be professional with ... other parties and counsel, [and] the courts ...," which obligation "includes civility, professional integrity, ... candor ... and cooperation, all of which are essential to the fair administration of justice and conflict resolution"];
- *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 607 [discussing disqualification upon a showing of continuing effect on judicial proceedings]
- If an opposing counsel is stepping over the line, these authorities help document the prejudicial effect of such behavior, discussing the adverse effects of pretrial publicity, and the potential for jury nullification:
  - Ruva, Christine and Guenther, Christine, (December 15, 2014), *From the Shadows Into the Light: How Pretrial Publicity and Deliberation Affect Mock Jurors' Decisions, Impression, and Memory,* Law and Human Behavior, Advance online publication, *http://dx.doi.org/10.1037/ihb000017;*
  - Ruva, Christine and McEvoy, Cathy, *Negative and Positive Publicity Affect Juror Memory and Decision Making,* Journal of Experimental Psychology: Applied, 2008, Vol. 14, No. 3, 226-235;
  - Daftary-Kapur, Tarika and Penrod, Steven and Wallace, Brian, (2014) *Examining Pretrial Publicity in a Shadow of Jury Paradigm: Issues of Slant, Quantity, Persistence and Generalizability,* Law and Human Behavior, 2014, Vol. 38, No. 5, 462-477 [includes discussion of persistent "anchor" from pretrial publicity];
  - Sommers, S. R. and Kassin, S. M. (2001), *On the many impacts of inadmissible testimony: Selective compliance, need for cognition, and the overcorrection bias,* Personality and Social Psychology Bulletin, 27, 1368–1377;
  - Brehm, J. W. (1966), *A theory of psychological reactance,* New York, NY, Academic Press, 10.1037/1076-8971.6.3.677 [discussing negative impact of admonishing juries to ignore extrajudicial information, which can unfavorably attract the jurors' attention];
  - Brehm, S. S., & Brehm, J. W. (1981), *Psychological reactance: A theory of freedom and control,* New York, NY, Academic Press;
  - Lieberman, J. D., & Arndt, J. (2000), *Understanding the limits of limiting instructions: Social psychological explanations for the failures of instructions to disregard pretrial publicity and other inadmissible evidence.* Psychology, Public Policy, and Law, 6, 677–711.



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Revisiting Practical Application of the *Privette* Doctrine

by Cynthia E. Tobisman and David J. Byassee

"Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work." (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594.)

This rule has been known as the "*Privette* doctrine" since 1993 when the Supreme Court decided *Privette v. Superior Court* (1993) 5 Cal.4th 689, holding that when an independent contractor's employee is injured on the job and thus subject to workers' compensation coverage, he cannot seek recovery of tort damages from someone who hired the contractor, but did not cause the injury. Thus, a roofing employee injured carrying buckets of hot tar up a ladder could not sue the property owner for injuries compensable under the workers' compensation system.

The *Privette* doctrine runs contrary to a natural inclination to characterize the general contractor as the captain of the ship, and the one with whom the buck stops on a construction site. But there is good reason for the doctrine. General contractors hire subcontractors expressly because those subcontractors are experts in what they do, and act independently of the general contractor in performing their work, such that it is fair to put the onus on subcontractors to look out for their own safety – and that of their employees – on the jobsite.

Because *Privette's* rule may be somewhat counterintuitive, defendants have faced an uphill battle in the trial courts convincing judges of the breadth of *Privette*'s application. And plaintiffs routinely seek to go after someone higher in the contracting chain, whether to avoid the workers' compensation exclusivity defense asserted by their employers, or to seek a deep pocket. With predictable regularity, plaintiffs have sought to introduce expert testimony or to point to regulations as a basis for imposing general-negligence duties of care on general contractors and property owners – notwithstanding the fact that such testimony or regulations are irrelevant in the face of *Privette*.

Those efforts by the plaintiffs' bar have yielded a series of Supreme Court and Court of Appeal decisions illuminating and extending the reach of the *Privette* doctrine by making clear that it precludes hirer liability in many instances where an independent contractor's employee (or the contractor himself) is injured on the job. As explained in more detail below, the major exceptions are where (i) the hirer retains control over the work of the independent contractor and exercises that retained control in a manner that affirmatively contributes to injury; (ii) the hirer fails to disclose a preexisting dangerous condition on the property that the contractor could not discover in the exercise of reasonable care; and (iii) the hirer provides defective equipment to the contractor and the contractor's employees are injured while using the equipment.

Privette and its progeny provide ammunition to defense counsel seeking to shut the door on claims against property owners, general contractors and other hirers of independent contractors. For example:

- **Failure to specify precautions**. *Toland v. Sunland Housing Group, Inc*. (1998) 18 Cal.4th 253: The Supreme Court rejected hirer liability where the hirer failed to specify in its contract that the contractor should take special precautions to avert a peculiar risk: A hirer "has no obligation to specify the precautions an independent hired contractor should take for the safety of the contractor's employees." (*Id*. at p. 267.) Although a person hiring an independent contractor to do inherently dangerous work can be liable under the peculiar risk doctrine for failing to see to it that the hired contractor takes special precautions to protect neighboring property owners or innocent bystanders, there is no obligation to specify the precautions that the contractor must take for the safety of *the contractor's own employees*. (*Ibid*.)

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Privette **–** continued from page 17

- **Failure to exercise retained control**. *Hooker v. Dept. of Transp*. (2002) 27 Cal.4th 198: The Supreme Court held that even where a hirer retained general control over safety, its failure to exercise that control did not subject the hirer to liability. "We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at the worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control affirmatively contributed to the employee's injuries." (*Id*. at p. 202.) "The mere failure to exercise a power to compel the subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff." (*Id*. at p. 209.)

- **Other subcontractors' negligence**. *Sheeler v. Greystone Homes, Inc.* (2003) 113 Cal.App.4th 908: The Court of Appeal held that a general contractor was not liable when a subcontractor injured another subcontractor's employee: "[T]he limitations on hirer liability in *Privette* and its progeny apply even when injuries to a subcontractor's employee are not the result of the subcontractor's own negligence, but arise from the activities of neighboring subcontractors." (*Id*. at p. 922, fn. 8.)

- **When no workers' compensation benefits are available to injured contactor**. *Tverberg v. Fillner Construction, Inc*. (2010) 49 Cal.4th 518: The Supreme Court held that a hirer is not liable where an independent contractor (rather than the contractor's employee) is injured and the contractor was not entitled to workers' compensation benefits. Relying on the hirer's presumed delegation to the contractor of responsibility for workplace safety, the Supreme Court held that the contractor "has authority to determine the manner in which inherently dangerous ... work is to be performed, and thus assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions." (*Id*. at p. 522.)

- **Enforcing statutory safety regulations**. *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590. The Supreme Court held that Cal-OSHA could not be used to impose general-negligence duties of care in cases governed by *Privette*. There, a maintenance worker who was injured while performing work on a baggage conveyor belt sought to rely on Cal-OSHA safety requirements to show that the hirer owed a duty of care. The Supreme Court rejected this argument, holding that Cal-OSHA could not be used to expand hirer liability beyond *Privette's* mandates. (*Id*. at p. 601.) Rather, all safety duties were implicitly delegated as a matter of law to the contractor.

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- **General contractor's scheduling of subcontractors**. *Brannan v. Lathrop Constr. Assn., Inc.* (2012) 206 Cal. App.4th 1170: The Court of Appeal held that a general contractor's act of scheduling of the work of various subcontractors on a project does not suffice to bring the claim outside of *Privette's* rule of non-liability.

These cases teach that in order to fasten liability on a property owner or hirer of an independent contractor, an injured contractor or employee of a contractor must establish that the hirer retained control over the specific instrumentality that caused the injury, and negligently exercised that control in a manner that affirmatively contributed to the injury. The mere fact that a hirer has retained control over safety or scheduling will not suffice. Nor is it enough that a dangerous condition existed on the work site; if that dangerous condition was evident to the subcontractor, who was free to take steps to safeguard his or her own safety, the hirer is not liable. The fundamental premise here is that the hirer can and is presumed to have delegated safety to the independent contractor.

Even in cases where the facts suggest that the hirer retained control and affirmatively contributed to the injury, if the injured worker was under the hirer's control and direction, the hirer may be able to argue that the special employment doctrine serves as a defense to liability. The special employment doctrine serves to bring the employee of an independent contractor within workers' compensation exclusivity for the hirer as a "borrowed" employee in the same way that workers' compensation exclusivity would apply to the hirer's own employee. (See, e.g., *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174-175.) Contract language identifying the worker as an independent contractor and not an employee is not determinative. (*Id.* at 176.)

Despite the breadth of *Privette* and its progeny, plaintiffs are likely to rely on a handful of cases that apply to special circumstances to seek to fasten liability on hirers. For example:

- **Contractual safety preclusion**. *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120, held that a general contractor may be liable for injury to the employee of a subcontractor when the general contractor *contractually precluded* the subcontractor from implementing the precise safety precaution that the plaintiff contended was necessary to protect the public, including the subcontractor's employee. (*Id.* at p. 1134; but cf. *Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 66 [distinguishing circumstance of contractual retention of exclusive control].)

- **Hidden property defects**. *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, held a landowner liable to an employee of an independent contractor to the extent that the landowner knew or should have known of a latent or concealed preexisting hazardous condition that the contractor did not know of and could not have reasonably discovered, and the landowner failed to warn the contractor of the condition. (*Id.* at p. 664.)

- **Providing unsafe equipment**. *McKown v. Wal-Mart Stores, Inc.* (2004) 27 Cal.4th 219 held that a hirer was liable to an employee of an independent contractor on the basis that the hirer's provision of unsafe equipment affirmatively contributed to the employee's injury. (*Id.* at p. 222.)

In addition to these cases, *Elsner v. Uveges* (2005) 34 Cal.4th 915 contains language suggesting that Cal-OSHA may be used to establish standards and duties of care. However, *Elsner* involved the hirer's *direct negligence* in providing unsafe scaffolding. (*Id.* at p. 924.) *SeaBright* subsequently and unambiguously repudiated the argument that Cal-OSHA duties are nondelegable and thus made clear that Cal-OSHA does not provide an avenue to end-run *Privette*.

A recent case — *Vargas v. FMI, Inc.* (2015) 233 Cal.App.4th 638 — opens the door to the possibility of hirer liability resulting from certain other statutory and regulatory duties, or work under a franchise. (See *id.* at p. 654 [hirers held liable for injury to independent contractor truck driver when his co-driver crashed the truck they were driving; distinguishing *Privette* on the basis that *Vargas* involved duties "to protect the public" owed pursuant to the federal Motor Carrier Act and a "franchise granted by public authority" (*i.e.*, a federal motor carrier permit)].) According to *Vargas,* the court's task is "to review the pertinent statutes and regulations to determine whether they preclude the applicability of the *Privette* doctrine and prohibit delegation of the hirer's tort law duty in the particular case." (*Id.* at p. 654.) But *Vargas* cannot countermand *SeaBright.* And *Vargas*'s citation to *Evard v. Southern California Edison* (2007) 153 Cal. App.4th 137 as holding that certain safety duties under California's General Industry Safety Orders were nondelegable, is arguably infirm as *Evard* was effectively overruled by *SeaBright*. Thus, properly viewed, *Vargas* was an instance of federal law preemption and supremacy. Nonetheless, *Vargas* is likely to foster further challenges to the *Privette* doctrine.

In sum, *Privette*'s general rule of non-liability remains a potent weapon for defense counsel representing property owners and other hirers of independent contractors. While a handful of outlier cases may test the breadth of *Privette*, the Supreme Court's recent jurisprudence, as well as a raft of decisions from the Courts of Appeal provides a vanguard for defeating those efforts.

Cynthia E. Tobisman

Cynthia E. Tobisman is a partner in the appellate firm, Greines, Martin, Stein & Richland LLP. She's been named a Rising Star by Super Lawyers five times. She chairs the Beverly Hills Bar Association's amicus briefs committee.

David J. Byassee

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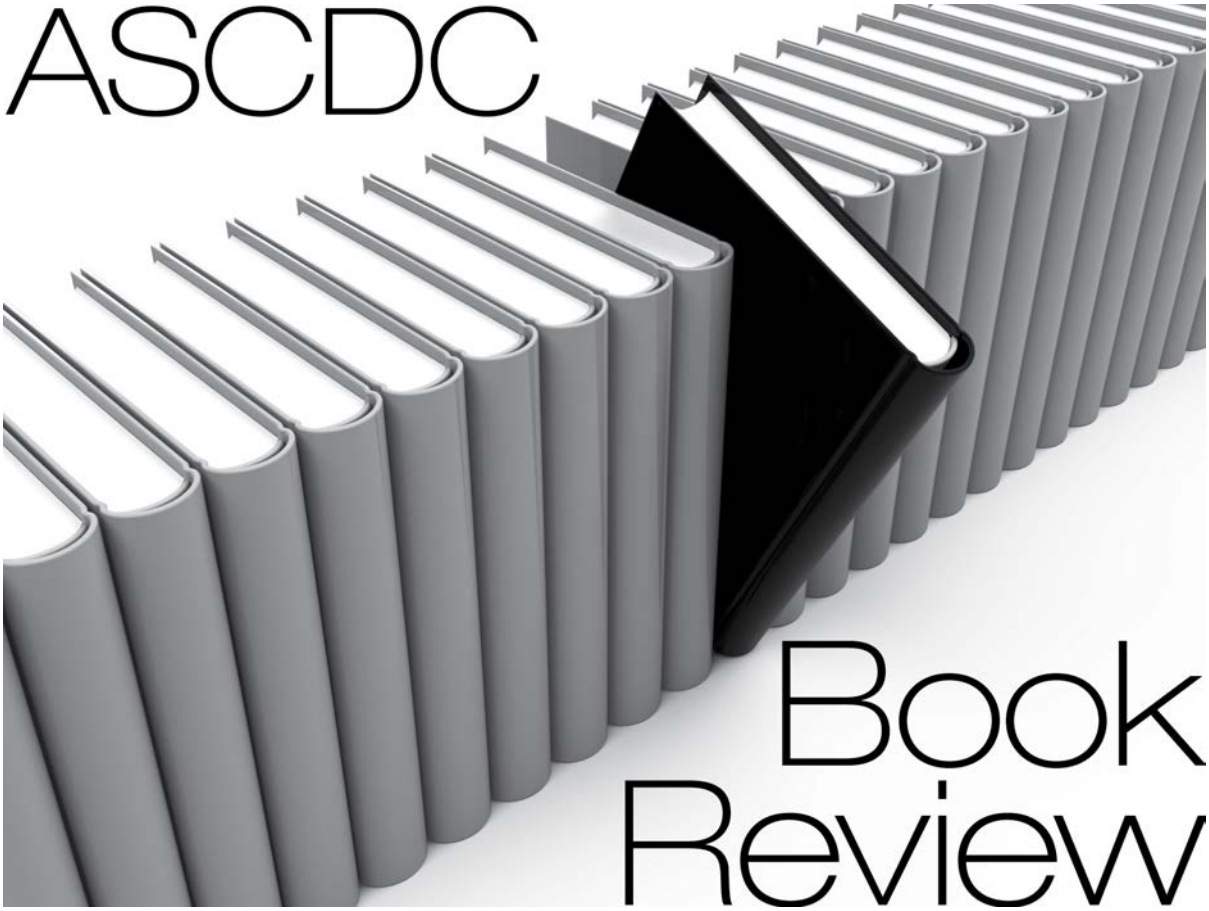

California Premises Liability Law 2015

by Danny Gonzalez

Coming in at just 195 pages, plus an appendix of pertinent CACI instructions and verdict forms, Jayme C. Long's *California Premises Liability Law 2015* is an outstanding summary of the law concerning the legal exposures of persons owning, possessing or controlling land. Written by Long and her colleagues at McKenna Long & Aldridge and Polsinelli LLP, the book recognizes that premises liability is no longer a general topic in tort law. It is, instead, a specialty area with developments concerning which practitioner should be informed.

California Premises Liability Law 2015 is arranged in nine chapters that cover the essential aspects of premises liability litigation, including the duties owed by landowners, hazards and theories of liability, potential claimants, public policy concerns, defenses, and damages. The discussion's format will be familiar. It uses numbered paragraphs with short headings to introduce concise summaries of the law on important legal principles that give the reader an easily accessible overview of the relevant law.

At the same time, supported by loads of footnotes with legal citations, the discussion lets the reader delve more deeply into the subject matter and provides a quick source for points and authorities. Among other things, there is a helpful chart that explains the development of California's law over the past two decades with respect to an owner's liability to hired independent contractors (the "Privette" doctrine). And while the book focuses on California law, it also includes charts with informative state-by-state comparisons on important topics like "take-home" liability in toxic exposure cases, assumption of risk, and damages.

Published by The Recorder and available in printed and digital versions from ALM Media, Inc., *California Premises Liability Law 2015* is a fine publication. It will take its place alongside other useful resources to which time-conscious California lawyers can turn in their practice.

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Daniel J. Gonzalez

Message Received: In *Sanchez v. Valencia Holding Company, LLC*, the California Supreme Court Implicitly Yields to Recent United States Supreme Court Decisions Protecting the Enforceability of Arbitration Agreements

by David D. Cardone

On August 3, 2015, the California Supreme Court issued a decision, *Sanchez v. Valencia Holding Company, LLC* (2015) 61 Cal.4th 899, that – in other parts of the country – may have seemed like a very straightforward, practical, and unsurprising application of contemporary legal principles favoring the enforceability of arbitration agreements and recognizing the preemptive effect of the Federal Arbitration Act (FAA). However, California's historic hostility to the enforceability of arbitration agreements has marked it as different from most of the rest of the country. Given (1) that the plaintiff in *Sanchez* was a consumer who bought a used car, (2) that the arbitration clause in question was in a contract of adhesion, and (3) the ongoing struggle between the California Supreme Court and the United States Supreme Court on the questions of the reach of the FAA and its effect on state law contract interpretation principles, the result in *Sanchez* was something of a surprise. How the *Sanchez* case came before the Court is also of interest.

In 2008 – some three years before the United States Supreme Court issued its landmark decision in *AT&T Mobility v. Concepcion*, plaintiff Gil Sanchez bought himself a two-year old Mercedes Benz from Valencia Holding Company, LLC. The Mercedes wasn't cheap: Sanchez negotiated a sales price of over $50,000 for his used car. The sales documents put in front of him were of the form type – that this was a contract of adhesion was not in dispute. The sales documents included several provisions that became central to the Supreme Court's ultimate decision. These included an arbitration agreement that allowed limited appellate rights, required an appealing party to front all costs of the appellate process for both sides, allowed either party to resort to small claims court and to pursue self-help remedies, and a class action waiver. The agreement also required that if the class action waiver were held unenforceable, the entire arbitration agreement would be unenforceable.

Sanchez filed a class action against Valencia in 2010. His claims centered on theories that Valencia's sales documentation practices ran afoul of California's Consumer Legal Remedies Act (CLRA), and that Valencia made false representations to him about the Mercedes. He also claimed that Valencia hid or failed to accurately disclose various charges on the sales contract, such as for titling, registration, and warranty fees and costs. He raised claims under the Automobile Sales Finance Act, the Song-Beverly Consumer Warranty Act, and the Public Resources Code.

Valencia moved to compel arbitration. The trial court denied the motion on the basis that the class action waiver was unenforceable and, thus, the entire arbitration agreement was unenforceable. Valencia appealed, arguing that the recently decided *Concepcion* case required reversal. However, the Court of Appeal affirmed without addressing the class action waiver, holding that the arbitration agreement as a whole was unconscionable and unenforceable under California contract law principles. The California Supreme Court then granted review.

The California Supreme Court reversed, holding that *Concepcion* requires enforcement of the class action waiver – not a controversial determination – but also concluding that none of the terms of this particular consumer arbitration clause were unconscionable despite being in a contract of adhesion. Explaining why each of the provisions at issue was logical, reasonable, and even useful to both parties, the Court painstakingly set aside each of Sanchez's arguments that this agreement was unfair or too one-sided. Explaining and then applying the two-part, sliding-scale unconscionabilty analysis – and clarifying that "a simple old-fashioned bad bargain" is not itself unconscionable – the Court emphasized that unconscionability analysis is "highly dependent on context." In the context of Mr. Sanchez's purchase of an expensive Mercedes, the Court noted that the "dispute in this case concerns a high-end luxury item," and that cost considerations that might bear on the unconscionability analysis in another context were less relevant in this particular case because Mr. Sanchez did not demonstrate he was unable to avail himself of the arbitration process due to its inherent costs.

The Court also held that the various terms used throughout the case law to describe what is an unconscionable agreement –

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such as "overly harsh," "unduly oppressive," "unreasonably unfavorable" and "shocks the conscience" – are terms that "all mean the same thing."

While the *Sanchez* opinion analyzed and rejected each of the plaintiff's arguments – including interesting analyses explaining why the CLRA's non-waiver provision necessarily yields to the FAA and why non-judicial self-help statutory remedies are logically excepted from the arbitration agreement and thus are not unconscionable – what is perhaps *most* interesting about *Sanchez* is not any particular component of the analysis but instead the sum of all of its parts. Had the opinion concluded that the appealability provisions or the limited rights to injunctive relief were enough to make the arbitration clause substantively unconscionable, it would probably not have shocked anyone familiar with this area of California jurisprudence. But it would also have potentially resulted in another reversal by the United States Supreme Court on the basis that California courts cannot, in the wake of *Concepcion*, continue making decisions that, in effect, interfere with the fundamental attributes of arbitration. So does *Sanchez* herald a sea change in how California courts will rule on petitions to compel arbitration? Probably not. The bits and pieces of *Sanchez* that will be tools for trial court litigators making day-to-day arguments are nothing new. But it is certainly possible that *Sanchez* will one day be recognized as the turning point when the California judiciary finally raised the white flag and ceased attempts to resist the will of the United States Supreme Court in this important area of the law.

Editor's Note: a recent unpublished California appellate decision demonstrates how the *Sanchez* opinion has reshaped California law. In *Gillespie v. Svale Del Grande, Inc.,* the Sixth District Court of Appeal originally found portions of an arbitration clause in an auto sales finance contract to be unconscionable. That decision was vacated while the *Sanchez* case was pending in the California Supreme Court and, on remand after *Sanchez* was decided, the Court of Appeal in *Gillespie* followed *Sanchez,* and reversed the trial court's order denying the defendants' petition to compel arbitration. (*Gillespie v. Svale De. Grande, Inc.* (Nov. 19, 2015), case no. H039428.)

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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

An attorney's breach of ethical duties owed to a client is not protected by the anti-SLAPP statute even where protected litigation activity underlies the breach.

Sprengel v. Zbylut (2015) ___ Cal.App.4th ___ [193 Cal. Rptr.3d 626; petition for review pending, case no. S230384].

The half-owner of a corporation filed a malpractice action against attorneys who represented the other half-owner in a dispute between them concerning alleged copyright infringement. Plaintiff alleged that she had an implied attorney-client relationship with the attorneys by virtue of her half ownership of the corporation, and the attorneys violated their duty of loyalty to her. The attorneys moved to strike under the anti-SLAPP statute, but the trial court denied the motion, concluding that plaintiff's claim did not arise from the attorneys' protected litigation activities, but rather from their alleged breach of professional and ethical duties owed by attorneys to their clients.

The Court of Appeal (Second Dist., Div. Seven) affirmed. Actions based on a breach of professional duties owed to a client are not subject to the anti-SLAPP statute even though litigation activity underlies the breach. Here, the conduct giving rise to the attorneys' alleged liability involved undertaking representation in which they had an irreconcilable conflict of interest.

Anti-SLAPP statute does not protect defendants accused of deceptive commercial speech in the form of internet advertising, and defendants' argument to the contrary was frivolous.

L.A. Taxi Cooperative, Inc. v. The Independent Taxi Owners Association of Los Angeles (2015) 239 Cal.App.4th 918

Cab companies sued competitors for false advertising in the form of Internet search result manipulation that, they said, resulted in consumers who viewed the defendants' advertisements were led to believe they were being directed to plaintiffs' phone numbers or websites when they were actually directed to phone numbers and websites wholly owned and operated by defendants. Defendants filed an anti-SLAPP motion, claiming that their advertising was protected communication on a matter of public interest made in a public forum. The trial court denied the motion, but declined to find it was frivolous, and thus denied plaintiffs' motion for fees and costs. Both sides appealed.

The Court of Appeal (Second Dist., Div. Four) affirmed denial of the anti-SLAPP motion, but reversed the denial of fees and cost, holding the motion was frivolous. The conduct alleged was purely commercial speech, and the commercial speech exemption of Code of Civil Procedure Sec. 425.17 applied. Moreover, defendants has no reasonable basis for asserting that the allegedly false advertisements constituted conduct in connection with an issue of public interest.

A professor's accusations that a student **committed plagiarism and falsified data is not** protected by the anti-SLAPP statute where it was published to a limited number of interested persons.
Bikkina v. Mahadevan (2015) 241 Cal.App.4th 70.

A former university student sued his former professor for libel and slander arising from the professor's accusations that the student falsified data and committed plagiarism. The professor moved to strike under the anti-SLAPP statute, but the trial court denied the motion on the ground that the professor's statements did not arise from protected activity.

The Court of Appeal (First Dist., Div. Four) affirmed. The statements did not arise from protected activity within the scope of the anti-SLAPP statute, in that they were published to a limited number of interested persons. Moreover, even if the statements were protected activity, the anti-SLAPP motion could not be granted because the student made a prima facie showing of libel and slander per se, given the professor's written and oral accusations and plaintiff's denial.

ARBITRATION

California Supreme Court clarifies standard for unconscionability defense to enforceability of arbitration agreements.
Sanchez v. Valencia Holding Co., LLC (2015) 61 Cal.4th 899.

The plaintiff, a car buyer, filed a putative class action alleging that the car he purchased from the defendant, a car dealer, was defective and that the sales contract violated various consumer protection statutes. The contract contained an arbitration clause that included a class arbitration waiver, a provision for appeals from arbitral damages awards of either zero or more than $100,000 and from injunctive relief awards, a provision requiring the appealing party to bear the costs of an arbitral appeal (subject to apportionment by the arbitrators), and a provision excluding self-help remedies, like repossession, from arbitration. The trial court rejected the dealer's attempt to compel arbitration, ruling that the class waiver was against public policy and that the entire arbitration clause was invalid. The Court of Appeal ruled the arbitration clause was unconscionable in various respects but did not address the class waiver.

The Supreme Court reversed the Court of Appeal. While it found that the contract bore some degree of procedural unconscionability, it held that none of the aforementioned provisions were substantively unconscionable. Significantly, the Court concluded that facially neutral arbitration provisions are not unconscionable unless they are "substantially more likely" to favor one side over the other in an unreasonable fashion. The Court also instructed that arbitration clauses may include a ""margin of safety" that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need.'"

Sanchez signals to lower courts in California that unconscionability is a rigorous standard and that courts should not simply rubber-stamp plaintiffs' complaints that a contract (whether an arbitration clause or not) tends to favor one side over the other. Unconscionability defenses to enforcement of arbitration clauses "must be as rigorous and demanding for arbitration clauses as for any contract clause" and unconscionability "requires a substantial degree of unfairness *beyond 'a simple old-fashioned bad bargain.'*

ASCDC submitted amicus curiae briefing in support of defendant in this case.

See *Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal. App.4th 619 [First Dist., Div. Four: relying on pre-*Sanchez* authorities, but citing *Sanchez* in a footnote, court affirms trial court denial of employer's motion to compel arbitration, concluding that the arbitration agreement was unconscionable because it was presented to the employee on a "take it or leave it" basis and was unreasonably one-sided]

ATTORNEY FEES AND COSTS

District court erred by using overly stringent criteria, including outdated and inapt hourly rate comparisons, in evaluating claim for attorney fees sought under the Civil Asset Forfeiture Reform Act.
United States (Moser) v. $28,000.00 in U.S. Currency (9th Cir. 2015) ___ F.3d ___

Following the granting of summary judgment in favor of the claimant in a civil forfeiture proceeding, the claimant moved for attorney fees totaling about $51,000 under the Civil Asset Forfeiture Reform Act. The district court awarded only $14,000, and the claimant appealed.

The Ninth Circuit vacated the fee award and remanded for recalculation. The court held that the district court erred by ignoring expert declarations concerning the reasonableness of counsel's hourly rate, analogizing to fees paid for indigent criminal representation, finding that counsel's hourly fee should be reduced because much of the work could have been delegated to associates with lower billing rates at a large law firm, relying on an award almost nine years old in determining the prevailing market hourly rate, and reducing the award because it exceeded the contingency fee that the claimant had agreed to pay.

See also *McKenzie v. Ford Motor Company* (2015) 238 Cal.App.4th 695 [Fourth Dist., Div. Three: trial court abused its discretion by reducing attorney fee award to prevailing plaintiff on the ground that plaintiff had delayed settlement, where the prior settlement offer included objectionable provisions that were dropped from the final agreement, and plaintiff reasonably chose to litigate over fees because the amount offered by the defense in its settlement proposal was around half of the fees plaintiff had already incurred].

California's reciprocal attorney fee statute applies in action involving Georgia contract, were Georgia did not have a superior interest in applying its laws.
First Intercontinental Bank v. Ahn (2015) 798 F.3d 1149.

A Georgia bank sued borrowers and guarantors for failure to make payments on a loan that stated it was to be construed under Georgia law, and that contained a unilateral attorney fee clause in favor of the bank. The bank obtained summary judgment against one borrower and the guarantors, but the remaining individual borrower obtained summary judgment in her favor on the ground that the bank had previously released her from any obligation under the loan. That individual borrower moved for attorney fees under the reciprocal fee provision in California Code of Civil Procedure section 1717,

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subdivision (a). The district court rejected the bank's argument that Georgia law governed the fee dispute, and awarded the borrower attorney fees.

The Ninth Circuit affirmed. The district court properly applied California's choice-of-law rules to determine that the borrower was entitled to fees, given that neither California nor Georgia had a superior interest in applying its laws, and California public policy would abhor the enforcement of a non-reciprocal attorney fee clause against a California resident.

Non-California attorney who has not been admitted pro hac vice may not recover attorney fees as plaintiff's class action counsel.

Golba v. Dick's Sporting Goods, Inc. (2015) 238 Cal.App.4th 1251.

Following the settlement of a class action, plaintiff's counsel sought $210,000 in attorney fees. The trial court awarded only $11,000 in fees after disallowing fees for work performed by non-California counsel who had not been admitted pro hac vice. Out-of-state-counsel appealed.

The Court of Appeal (Fourth Dist., Div. Three) affirmed, holding that counsel could not recover fees based upon the unlicensed practice of law in California and that co-representation by California counsel did not render non-California counsel's work compensable.

CIVIL PROCEDURE

The one-year statute of limitations in Code of Civil Procedure section 340.6(a) applies to a claim against an attorney when the merits of the claim will necessarily depend on proof that an attorney violated an obligation the attorney has *by virtue of* being an attorney.

Lee v. Hanley (2015) 61 S.Ct. 1225.

Plaintiff sued her former attorney, claiming she had advanced funds to cover litigation in litigation, but the attorney refused to return unearned attorney's fees after plaintiff terminated the representation. Defendant attorney demurred on the ground that the lawsuit was time-barred by the one-year statute of limitations in Code of Civil Procedure section 340.6(a), which applies to actions against attorneys arising in the performance of professional services. The trial court sustained the demurrer and plaintiff appealed the dismissal of her case. The Court of Appeal reversed.

The California Supreme Court affirmed the Court of Appeal ruling reversing the trial court. Plaintiff's allegations, if true, would show that the attorney had violated certain professional obligations in the course of providing professional services, and any claim *based on his violation of these obligations* is subject to section 340.6 and thus time-barred. But the complaint could also be construed to allege a claim for *conversion* whose ultimate proof at trial may not depend on the assertion that the attorney violated a professional obligation. Thus, on at least one reasonable construction of the complaint, at least one of plaintiff's claims was not time-barred.

ASCDC submitted amicus curiae briefing in support of defendant in this case.

Legal malpractice action time-barred where **filed more than one year after attorney's act of** negligence but less than one year after plaintiff negotiated a settlement with third parties that was reduced in value due to the attorney's negligence.

Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC (2015) 238 Cal.App.4th 1031.

A creditor retained attorneys to challenge another creditor's lien when the creditors' mutual debtor declared bankruptcy. After the first creditor's attorneys missed the deadline to investigate and attack the lien, leaving the first creditor with a diminished ability to collect on its own lien, that creditor hired new counsel and entered into a settlement with the debtor for less than the full amount of its debt. The creditor sued the first attorneys for malpractice, and filed suit less than one year after the settlement but more than one year after the missed deadline. The trial court granted summary judgment to the attorneys, concluding that the lawsuit was untimely as a matter of law.

The Court of Appeal (Second Dist., Div. Two) affirmed. The court rejected plaintiffs' argument that the statute of limitations was tolled during the period before the settlement, which plaintiffs said was the date of actual injury. What matters is discovery of the fact of damage, not the amount; uncertainty as to the amount of damages does not the toll limitations period; actual injury exists even if the client has yet to sustain all, or even the greater part, of the damages occasioned by his attorney's negligence, even if the client will encounter difficulty in proving damages and even if that damage might be mitigated or entirely eliminated in the future. Thus, plaintiffs were actually injured when they lost their right to challenge the second creditor's lien, not when they later settled for less than the full amount of their debt. "A litigant that seeks to enforce a lien in bankruptcy court suffers actual injury when its negotiating position is weakened by a bankruptcy trustee's comment that the lien may not be enforceable." On the facts here, the date of injury was suitable for resolution as a matter of law, warranting summary judgment. The court also plaintiffs' argument that the statute of limitations was tolled during a period of continuing representation by defendant attorneys.

ASCDC successfully sought publication of this decision, which was original designated as unpublished.

Court provides guidance on when Civil Code section 1714.10 bars actions against attorneys sued on a theory of conspiring with a client to harm a third party.

Klotz v. Milbank, Tweed, Hadley & McCloy (2015) 238 Cal. App.4th 1339

Plaintiffs (a business entity and individuals with an interest in the entity) alleged that a former business associate of theirs conspired with the business associates' attorneys to unlawfully withdraw from the business, and to usurp a nascent business opportunity in which plaintiffs' had an interest. Plaintiffs alleged claims for breach of fiduciary duty, conspiracy, and legal malpractice. Defendants moved to strike the entire complaint as to the individual plaintiffs because plaintiffs had not obtained a prior court order permitting

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the claim against the attorneys under Civil Code section 1714.10, and no exception to that statute applied because defendants had no independent legal duty to plaintiffs nor did they act for their personal financial gain. The trial court denied the motion.

The Court of Appeal (Second Dist., Div. One) reversed the order with respect to plaintiffs' cause of action for conspiracy as to the individual plaintiffs. "The purpose of section 1714.10 is to discourage frivolous claims that an attorney conspired with his or her client to harm another. Therefore, rather than requiring the attorney to defeat the claim by showing it is legally meritless, the plaintiff must make a prima facie showing before being allowed to assert the claim." Thus, the statute performs a "gatekeeping" function. Here, the court held any advice defendants provided arose from an attempt to contest or compromise a claim or dispute within the meaning of the statute, and thus was barred for lack of a court order approving it. The opinion offers guidance on what behavior by an attorney might fall outside the ambit of the statute.

ASCDC successfully sought publication of this decision, which was original designated as unpublished.

Renewed applications for "mandatory relief" from default under Code of Civil Procedure section 473(b) must comply with the requirements applicable to motions for reconsideration.

Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC (2015) 61 Cal.4th 830.

After a default judgment was entered against them, defendants moved for "mandatory relief" under Code of Civil Procedure section 473(b), accompanied by an attorney declaration of fault. The trial court denied the motion on the ground that the declaration was not credible. However, the court granted a second motion filed over a month later that was accompanied by a new attorney declaration with a different explanation of fault, even though defendants had not satisfied the requirements for motions for reconsideration under Code of Civil Procedure section 1008. The Court of Appeal reversed, concluding that defendants' failure to show new or different facts with their second motion required that the motion be denied.

The Supreme Court affirmed the decision of the Court of Appeal. The Court held that section 1008 (which requires that a party renewing an application for an order the court has previously denied to show "new or different facts, circumstances, or law") governs renewed applications for "mandatory relief" from default under section 473(b) based on attorney fault.

Default judgment in breach of contract action is void where complaint fails to allege the **damages sought; the lack of specified damages** in the complaint cannot be cured with a statement of damages specifying damages, as such statements are appropriate only in personal injury and wrongful death claims.

Dhawan v. Biring (2015) 241 Cal.App.4th 953.

Plaintiff sued defendants alleging contract and fraud causes of action arising from a deteriorated business relationship. The complaint did not specify the amount of damages sought. Plaintiff served a statement of damages for about $2.1 million in general and special damages and $1 million in punitive damages. The trial court subsequently entered a default judgment of $1.9 million in special damages. Years later, the court granted a defense motion to vacate the judgment under Code of Civil Procedure 473, subdivision (d) on the ground that the judgment was void since it exceeded amounts demanded in the complaint and therefore violated Code of Civil Procedure section 580. Plaintiff appealed.

The Court of Appeal (Second Dist., Div. Five) affirmed. The court noted that, when a complaint does not specify the amount of damages sought, a default judgment is void and subject to collateral attack at any time. Here, plaintiff could not meet the requirements of Code of Civil Procedure section 580 by serving defendant with a statement of damages because such statements are appropriate only in cases involving personal injury or wrongful death, and the default judgment was for special damages only.

Non-California attorney is subject to California's long-arm jurisdiction for a malpractice claim arising out of phone and email communications to negotiate a sale of property to a California company.

Moncrief v. Clark (2015) 238 Cal.App.4th 1000

A California company sued its California attorney for malpractice in connection with a failed transaction for its purchase of farm equipment. The attorney filed a cross-complaint against an Arizona attorney who represented the seller, alleging negligence, misrepresentations, and concealment in relation to the failed sale. The trial court granted Arizona counsel's motion to quash service of summons for lack of personal jurisdiction.

The Court of Appeal (Sixth Dist.) reversed, holding that the Arizona attorney was subject to California's long-arm jurisdiction because he "purposefully availed" himself of the benefits of California when he communicated via telephone and electronic mail with the company's California attorney in an effort to negotiate the sale of the farm equipment sale by his Arizona clients.

When defendants submit a joint settlement offer under Code of Civil Procedure section 998, the question whether the offer exceeds the judgment cannot be determined until judgments are entered as to all defendants.
Kahn v. The Dewey Group (2015) 240 Cal.App.4th 227.

Plaintiff sued 20 defendants, alleging they were jointly and severally liable for injuries he sustained when exposed to hazardous gases at a mobile home park. All 20 defendants jointly made a $75,000 settlement offer under Code of Civil Procedure section 998, which plaintiff did not accept. The trial court subsequently dismissed the action as to 14 defendants and granted a mistrial for the remainder following a deadlocked jury, and ordered a new trial. The court granted expert witness fees to the dismissed defendants under section 998, and plaintiff appealed.

The Court of Appeal (Second Dist., Div. Three) reversed. The question whether the settlement offer exceeded the judgment could not be determined by comparing it to a judgment (or judgments) entered with respect to only some of the offering defendants (i.e., the dismissed defendants). Rather, the offer must be compared to the judgment(s) obtained against all defendants, and that would have to await a final judgment as to the remaining six defendants.

A jury should be informed of a settlement which requires settling defendants to appear and participate at trial.
Diamond v. Reshko (2015) 239 Cal.App.4th 828.

A taxi passenger sued the taxi driver, taxi company, and another motorist after she was injured in a vehicle accident. The taxi driver and company settled, agreeing to appear and participate at trial as defendants. The other motorist argued the jury should be told about the settlement to show bias in that the taxi defendants were allied against him, but the trial court excluded that evidence. The jury found the other motorist to be 60 percent to blame for the accident, and awarded about $750,000 in damages. The other motorist appealed, arguing he was denied a fair trial.

The Court of Appeal (First Dist., Div. Four) agreed and reversed. The the settlement was admissible to show bias and prevent collusion between the settling parties, and was relevant because it would have assisted the jury in evaluating the disputed evidence concerning liability and damages and assessing the credibility of witnesses, the parties, and their counsel. Had the jury known of the settlement, it was reasonably probable that some issues would have been resolved more favorably for the other motorist.

When a plaintiff in a potential class action clearly lacks standing and never had standing, the trial court may not order discovery for **purposes of finding an appropriate plaintiff.**
CVS Pharmacy, Inc. v. Superior Court (2015) 241 Cal. App.4th 300.

An employee brought a putative class action against an employer seeking injunctive relief against the employer's alleged policy of terminating employees who had not worked for 45 days. The named class plaintiff alleged the policy discriminated against individuals with disabilities, but she was not disabled and had not been terminated under the policy. The trial court granted plaintiff's motion to compel discovery of names of current and former employees in search of a potential plaintiff with standing. The employer filed a writ petition.

The Court of Appeal (Third Dist.) granted the writ petition. "The potential for abuse of the class action procedure is self-evident where the only named plaintiff has never been a member of the class." Under the circumstances, the potential for abuse outweighed any conceivable benefit to the members of the class, who would be aware of claims they would be entitled to pursue under FEHA. Moreover, the requested precertification discovery would violate the privacy rights of the potential class members.

Trial court must make a record concerning its reasoning for denying a motion to strike class allegations.
Tellez v. Rich Voss Trucking, Inc. (2015) 240 Cal.App.4th 1052.

A truck driver employee filed a putative class action against employers, alleging wage and hour law violations. The employers moved to strike the class allegations asserting that common questions of law or fact would not predominate. The trial court denied the motion without explanation, and plaintiff appealed.

The Court of Appeal (Sixth Dist.) reversed. The court noted that, without some explanation for the denial of class certification, it could not review the trial court's order. The court therefore remanded for the trial court to reconsider the motion and articulate its reasoning in the event it denies the motion again.

Court of Appeal will affirm order granting nonsuit following opening statements when parties fail to procure a reporter to record the proceedings.
Jameson v. Desta (2015) 241 Cal.App.4th 491.

A prisoner sued a prison doctor for medical malpractice. The trial court granted an oral motion for nonsuit following opening statements to the jury, which were not reported. The prisoner appealed, challenging the nonsuit and arguing the trial court erred by failing to have the proceedings reported.

The Court of Appeal (Fourth Dist., Div. One) affirmed. The court held that the trial court did not err in failing to have the proceedings recorded by a court reporter, because the parties received notice that no reporter would be provided, and neither party arranged for a reporter to be present. The court then affirmed the order granting nonsuit on the ground that the plaintiff could not demonstrate error without a reporter's transcript reflecting the opening statements.

Punitive damages award cannot stand where plaintiff presents evidence of defendant's assets, but not liabilities.
Soto v. BorgWarner Morse TEC INC. (2015) 239 Cal. App.4th 165

The manufacturer of asbestos-containing clutch facings was found liable for the death of a former factory worker from mesothelioma. After the jury's finding of malice in a bifurcated proceeding, plaintiff's counsel was unprepared to present proper financial condition evidence

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of the defendant's net worth. The trial judge nonetheless let the case go to the jury on phase II, and the jury awarded $32.5 million in punitive damages.

The Court of Appeal (Second Dist., Div. Four) reversed the punitive damages award. The award could not stand because the plaintiff failed to introduce competent evidence of the defendant's financial condition, which is needed so that the jury can properly evaluate the amount that is no more than necessary to punish and deter the defendant based on its ability to pay. Although plaintiffs introduced evidence of the defendant's assets, they did not present evidence of the defendant's liabilities or expenses and, therefore, its ability to pay punitive damages. Plaintiffs "erroneously believed the financial information they obtained through publicly available channels would be sufficient until [the defendant] pointed out, on the eve of the punitive damages phase, that their expert had analyzed the wrong company." The Court of Appeal observed, "plaintiffs had a full and fair opportunity to engage in discovery but elected to take the wait-and-see approach. They must bear the consequences of the resultant evidentiary shortfall."

See also ***I-CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257** [affirming grant of nonsuit as to punitive damages award where plaintiff had no evidence of financial condition other than inadmissible expert testimony: consistent with Civil Code section 3295, "a plaintiff who believes that there is a substantial probability that the plaintiff will prevail on its punitive damages claim *must seek [a] court order* in order to obtain the supporting information"].

PUBLIC ENTITY LIABILITY

Summary judgment property granted to public entity defendant based on design immunity; public employee's approval of design may be an exercise of discretionary authority even if employee was unaware that design deviated from governing standards, and entity need not show employee had authority to disregard standards.

Hampton v. County of San Diego (2015) ___ Cal.4th ___.

This personal injury action arises out of an auto accident on a public roadway. A public entity may be liable for injuries caused by dangerous conditions of public property. (Gov. Code, §§ 830, 835.) An entity may avoid liability, however, through the affirmative defense of design immunity. (§ 830.6.) "A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design." The present case concerns the second element of design immunity set out in section 830.6—discretionary approval. Plaintiff argued discretionary approval was not shown because an issue of fact existed as to whether the county engineer who approved the design realized that it deviated from governing standards, and the defendant had not shown the engineer was authorized to disregard those standards. The trial court nonetheless granted summary judgment, and the Court of Appeal (Fourth Dist., Div. One) affirmed.

The Supreme Court affirmed. Discretionary approval of the design that caused the accident is established even if done by an employee who was unaware of design standards or that the design deviated from the standards. However, a public entity still must provide substantial evidence that the design was reasonable. In enacting the immunity, the Legislature "intended to avoid second-guessing the initial design decision adopted by an employee vested with authority to approve it, except to the extent the court determines that the employee's approval of the design was unreasonable." "In addition, the discretionary approval element does not require the entity to demonstrate in its prima facie case that the employee who had authority to and did approve the plans also had authority to disregard applicable standards." The opinion disapproves a 1983 decision from the First District, Division Three, and a 2013 opinion from the Second District, Division Seven.

To hold a public entity liable for a dangerous condition of public property, plaintiff need not prove that the condition caused the negligent driving of the motorist that precipitated the accident that caused plaintiff to crash into the public property.

Cordova v. City of Los Angeles (2015) 61 Cal.4th 1099.

Plaintiffs brought a wrongful death action against the City of Los Angeles after their relatives died in a car accident when another motorist caused their car to crash into a tree on a center median. Plaintiffs alleged that the configuration of the roadway was a dangerous condition of public property. The trial court granted summary judgment for the City on the ground that the property condition did not cause the accident. The Court of Appeal (Second Dist., Div. One) affirmed, noting that plaintiffs could not prove that the tree contributed to the other motorist's negligent driving.

The Supreme Court reversed. Under Government Code section 835, a public entity may be liable for injury caused by a dangerous condition of public property if the risk of injury was reasonably foreseeable and the entity had sufficient notice of the danger to take corrective measures. This section does not also require plaintiffs to prove that the allegedly dangerous condition caused the third party motorist to drive negligently, precipitating the crash into the tree.

County is not liable for social worker's sexual abuse of minor that occurred outside course and scope of worker's employment, where County had no prior knowledge of employee's propensity for abuse.

Z.V. v. County of Riverside (2015) 238 Cal.App.4th 889.

A minor in foster care sued the County of Riverside after he was sexually abused by a county social worker. The trial court granted summary judgment for the County, and plaintiff appealed.

The Court of Appeal (Fourth Dist., Div. Three) affirmed. The County was not liable under respondeat superior for the social worker's sexual abuse of the minor because it fell outside the course and scope of employment given that (a) he was not the minor's assigned social worker but merely volunteered to transport the minor to a new foster home, and (b) the abuse occurred hours after the employee's shift ended and he had already delivered the minor to the new home when he went back to pick up the minor under the pretext of building "rapport" and took him to a liquor store and then his own apartment. The court also held that the County could not be liable for negligently

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hiring or supervising the social worker where it did not have any prior knowledge of the worker's propensity to abuse a minor.

See also *Puskar v. City and County of San Francisco* (2015) 239 Cal. App.4th 1248 [Fifth Dist.: trial court properly granted summary judgment summary judgment for defendant in personal injury action arising out of alleged dangerous condition of public property. The alleged dangerous condition was the absence of a fire extinguisher from the residence plaintiff rented from defendant. Liability was precluded by the immunity accorded to a public entity for failing to provide or maintain fire protection facilities or equipment].

LABOR & EMPLOYMENT

Class certification is appropriate for employee claims that employer violated the Unfair Competition Law by failing to pay premium wages for missed meal breaks.

Safeway, Inc. v. Superior Court (2015) 238 Cal.App.4th 1138.

Grocery store employees filed a putative class action against their employer, alleging violations of the Labor Code and Unfair Competition Law (UCL) on the ground that the employer did not pay premium wages for missed meal breaks as required by law. The trial court certified the class for purposes of the UCL claim. The employer filed a petition for writ of mandate.

The Court of Appeal (Second Dist., Div. Four) issued an order to show cause, but then denied the petition. The court held that the claim that the employer, as a matter of system-wide policy, did not pay premium wages for missed meal breaks was amenable to class treatment and calculating the restitution owed to class members did not preclude class certification.

See also *Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal. App.4th 388 [class certification is appropriate for hospital employees who alleged that hospital had routinely denied employees meal and rest breaks to which they were entitled by statute, given substantial common evidence of understaffing resulting in denial of breaks];

But see *Alcantar v. Hobart Service* (9th Cir. 2015) 800 F.3d 1047 [class certification is not appropriate for claim that service technicians were deprived of meal and rest breaks to which they were entitled because questions as to *why* technicians missed breaks would predominate over questions common to the class].

Summary judgment for employer is not appropriate where plaintiff made a prima facie showing of age discrimination.

France v. Johnson (9th Cir. 2015) 795 F.3d 1170.

A federal employee filed an action against the Department of Homeland Security, alleging he was passed over for a promotion as a result of age discrimination. The district court entered summary judgment in the Department's favor because there were no disputed facts concerning the Department's nondiscriminatory reasons for not selecting plaintiff. Plaintiff appealed.

The Ninth Circuit reversed. The court held that the Department was entitled to a rebuttable presumption that an age difference of less than 10 years between plaintiff and the employee who was promoted was insubstantial. However, plaintiff established a prima facie case of age discrimination by showing that the Department generally considered age as a significant factor in promotion decisions and that a superior who may have had input into the decision considered plaintiff's age to be relevant in evaluating his potential promotion.

OTHER TORTS

University does not owe a general duty to protect its students from criminal acts committed by other students.

Regents of the University of California v. Superior Court (2015) 240 Cal.App.4th 1296.

A student sued a university after she was attacked by another student who, several months prior, had received counseling from university psychological services and was treated for symptoms suggestive of schizophrenia. The trial court denied the university's motion for summary judgment, concluding that the university owed plaintiff a duty of care based on her status as a student. The trial court also found that there were triable issues whether the university had voluntarily undertaken a duty to protect plaintiff by providing mental health treatment to the student who attacked her. The university filed a petition for writ of mandate.

The Court of Appeal (Second Dist., Div. Seven) granted the petition. A public university does not owe a general duty to protect its students from the criminal acts of other students. Moreover, the university was not liable under the negligent undertaking doctrine by failing to follow safety and violence prevention procedures, or by failing to adopt appropriate procedures, because the university did not create an increased risk of harm, it merely failed to eliminate a risk that already existed.

A contractual provision releasing claims for negligence does not bar claim for gross negligence.

Chavez v. 24 Hour Fitness USA, Inc. (2015) 238 Cal.App.4th 632.

A fitness center customer and her husband sued the fitness center after she suffered traumatic brain injury when a part of a machine fell on her while she was exercising. Plaintiffs contended that the record system used by the center to request maintenance on fitness machines was poorly kept, and that there was uncertainty as to whether or not necessary bolts and magnetic strips were missing from the machine when plaintiff used it. The trial court granted summary judgment to the fitness center based on a provision in her membership agreement releasing the center from liability for injury caused by negligence.

The Court of Appeal (Sixth Dist.) reversed. There was a triable issue of fact whether the fitness center was grossly negligent by failing to perform regular, preventative maintenance on the fitness equipment. To establish gross negligence, a plaintiff must allege that the defendant acted with "want of even scant care or an extreme departure from the ordinary standard of conduct." If found at trial, such gross negligence would not be covered by the liability release provision.

PROFESSIONAL RESPONSIBILITY

Egregious misconduct by defense counsel required reversal of defense judgment and referral of attorney to the State Bar.

Martinez v. State of California Department of Transportation (2015) 238 Cal.App.4th 559.

A motorcyclist brought a personal injury action against Caltrans alleging a dangerous condition of public property caused an accident. Concerned over the negative perception of motorcyclists, plaintiff's attorney filed several successful in limine motions to exclude references to plaintiff's "membership in any motorcycle club/gang," a 2003 termination from employment, and evidence designed to elicit sympathy for Caltran's dire financial condition. Notwithstanding those orders, defense counsel made several statements besmirching plaintiff's character, such as by linking him to Nazis, and alluding to Caltran's financial status. This behavior continued despite plaintiff's counsel's repeated objections and the trial court's admonitions. The jury returned a defense verdict and plaintiff appealed, arguing that misconduct by defense counsel deprived him of a fair trial.

The Court of Appeal (Fourth Dist., Div. Three) reversed, finding misconduct that the court characterized as "egregious." The Court of Appeal agreed, and was critical of the trial court's apparent tolerance for allowing the attorney's contemptuous behavior to go as far as it did. The court reversed the defense judgment and referred the matter to the State Bar.

Federal statute authorizing sanctions for bad faith litigation conduct applies to individual **attorneys, not entire law firms.**

Law v. Wells Fargo Bank (9th Cir. 2015) 799 F.3d 1290.

A district court imposed sanctions against a law firm based upon the bad faith litigation conduct of one of its attorneys, and the firm appealed.

The Ninth Circuit reversed, holding that 28 U.S.C. section 1927 authorizes monetary sanctions for bad faith litigation tactics against individual attorneys only, not law firms.

CASES PENDING IN THE CALIFORNIA SUPREME COURT

Addressing whether denial of a defendant's summary judgment motion establishes the plaintiff had probable cause to bring the law suit, for purposes of defeating a later malicious prosecution action; also addressing which statute of limitations applies to a malicious prosecution action against an attorney.

Parrish v. Latham & Watkins (case no. S228277; review granted Oct. 14, 2015).

In a prior action, former employers sued former employees for misappropriation of trade secrets. The former employees lost on their summary judgment motion, but prevailed at trial. The former employees then sued the law firm that represented the employers, alleging malicious prosecution. The trial court granted the firm's anti-SLAPP motion. The Court of Appeal (Second Dist. Div. Three) affirmed. The court held that the malicious prosecution lawsuit was timely because the one-year statute of limitations for some actions against attorneys (Code Civ. Proc., § 340.6) did not apply. However, the court held that the denial of summary judgment for the former employees in the underlying action barred their malicious prosecution claim, finding the interim ruling on the merits established probable cause even though the employees subsequently prevailed at trial and the trial court sanctioned the other side for bringing the action in bad faith.

The California Supreme Court granted review to address the following issues: (1) Does the denial of defendant former employees' motion for summary judgment in a prior action for misappropriation of trade secrets conclusively establish that their former employer had probable cause to bring the action and thus preclude the employees' subsequent action for malicious prosecution, even if the trial court in the prior action later found it had been brought in bad faith? (2) Is the former employees' malicious prosecution action against the employer's former attorneys barred by the one-year statute of limitations in Code of Civil Procedure section 340.6?

Addressing the scope of coverage under an automobile liability insurance policy where the claim against the insured arises from something other than the ordinarily understood "use" of an automobile in transit.

Gradillas v. Lincoln General Insurance Company (case no. S227632; 9th Circuit's request for certification granted Aug. 12, 2015).

A passenger who was sexually assaulted by the driver on a party bus obtained a stipulated judgment against the bus owner, who assigned to the passenger his rights against his insurance carrier. The passenger then sued the insurer in federal court, alleging that the insurer breached its duty to defend and indemnify its insured. The district court granted plaintiff summary judgment, and the insurer appealed. The Ninth Circuit certified the following question to the Supreme Court: "When determining whether an injury arises out of the 'use' of a vehicle for purposes of determining coverage under an automobile insurance policy and an insurance company's duty to defend, is the appropriate test whether the vehicle was a 'predominating cause/ substantial factor' or whether there was a 'minimal causal connection' between the vehicle and the injury?"

The California Supreme Court granted the certification request, rephrasing the question as follows: "For purposes of coverage under an automobile insurance policy, what is the proper test for determining whether an injury arises out of the 'use' of a vehicle?"

ASCDC 55TH ANNUAL SEMINAR

February 25-26, 2016 • JW Marriott LA Live

Register online at: *www.ascdc.org*

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Thursday, February 25, 2016

7:30 am – 5:00 pm *Diamond Foyer* — **Registration Open**

7:30 am – 9:00 am *Diamond Foyer* — **Morning Hospitality**

7:30 am – 4:00 pm *Diamond Foyer* — **Vendor Faire**

8:45 am – 9:00 am *Salon 4* — **Annual Business Meeting**

9:00 am – 10:45 am *Salon 4* — **"A Year in Review" – Case Highlights of 2015**

(MCLE – 1.75 hours of general credit)

The ASCDC Annual Review featuring 2015 California and Federal appellate decisions of importance to the civil defense bar and insurance claims personnel.

Edmund G. 'Chip' Farrell, III
Murchison & Cumming

Robert A. Olson
Greines, Martin, Stein & Richland, LLP

10:45 am – 11:00 am *Diamond Foyer* — **Break**

11:00 am – 12:00 noon *Salon 4* — **Slay the Reptile – How to Defend and Defang Plaintiff's Reptile Theory**

(MCLE – 1.0 hour of general credit)

This accomplished panel composed of a nationally recognized defense trial consultant, a veteran trial attorney with over 150 jury trials, and a trial embedded appellate attorney will present the winning strategy to combat Reptilian tactics pervasively used during discovery and trial by the plaintiff's bar. The program will explain the theory behind plaintiff's "Reptile Revolution" and how to tactically and persistently defuse and combat these Reptile tactics from the deposition of defense witnesses stage all the way through closing argument.

Peter S. Doody
Higgs, Fletcher & Mack

Steven Fleischman
Horvitz & Levy

William Kanasky, Jr., Ph.D.
Courtroom Sciences Inc.

Stephen C. Pasarow
Knapp, Petersen & Clarke

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Thursday, February 25, 2016 – *continued*

12:00 noon – 1:30 pm — **Lunch On Your Own**
Visit *www.lalive.com* for restaurant listings.

TRACK 1

1:30 pm – 2:30 pm *Salon 4* — **Successfully Defending the Traumatic Brain Injury Case**

(MCLE – 1.0 hour of general credit)

This panel will explore the unique challenges in defending a traumatic brain injury case. The program will address the importance of assembling the right team of experts, and which experts are imperative in every brain injury case. The presentation will also discuss how to effectively attack the latest pseudo-scientific theories utilized by the plaintiff's bar in brain injury litigation.

Larry R. Ramsey
Bowman & Brooke

R. Bryan Martin
Haight, Brown & Bonesteel

Marcel O. Ponton, Ph.D.
Persona Neurobehavior Group

Hon. Patricia Schnegg (Ret.)
Judicate West

TRACK 2

1:30 pm – 2:30 pm *Salon 5* — **Navigating the Outside Counsel / Insurance Representative Relationship in Litigation: A View from the Inside ... and Out**

(MCLE – 1.0 hour of general credit)

This panel will consist of insurance industry representatives and outside counsel who will discuss the dynamics of selecting and retaining panel counsel, trends in litigation, and the dynamics of litigation management, including budgeting, reporting and case evaluation and resolution. The panel will also discuss insurance industry metrics and analytics such as efficiency and cost per case used by the industry to grade lawyer and law firm performance.

Christopher E. Faenza
Yoka & Smith

William Garcia
Liberty Mutual Insurance Co.

Laura Kerrigan
Capitol Insurance Group

John C. Trimble
Lewis Wagner, LLP

Steven H. Weinstein
Farmers Group, Inc.

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Thursday, February 25, 2016 – *continued*

TRACK 3

1:30 pm – 2:30 pm
Salons 1-3

For New (and Not So New) Attorneys – WRITTEN DISCOVERY

(MCLE – 1.0 hour of general credit)

WRITTEN DISCOVERY – This session will address the nuts and bolts of written discovery. Specific topics covered will include key objections and privilege logs, meet and confer efforts, protective orders and third party subpoenas including out of state and out of country subpoenas.

P. Molly Ford
Maranga Morgenstern

Lauren S. Kadish
Chapman, Glucksman, Dean, Roeb & Barger

Megan Winter
Slaughter, Reagan & Cole, LLP

2:30 pm – 2:45 pm
Diamond Foyer

Break

TRACK 1

2:45 pm – 3:45 pm
Salon 4

Good Cases Gone Bad, Lessons Learned from Adverse Verdicts

(MCLE – 1.0 hour of general credit)

Preeminent defense attorneys will discuss recent runway verdicts in cases against different prominent plaintiff attorneys. The attorneys will discuss defenses, and how to deal with issues such as bad faith, late breaking evidence, reptile tactics, client preparation, trial presentation, and juror misconduct.

Linda Miller Savitt
Ballard, Rosenberg, Golper & Savitt

N. Denise Taylor
Taylor Blessey LLP

MCLE Credit

This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of **7.5 hours**, including **1.0 hours Ethics credit.**

The Association of Southern California Defense Counsel certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

Please make sure to include your State Bar I.D. number on the registration form in order to receive your MCLE credits.

Additionally, please make sure you sign the attendance sheet located in the Diamond Foyer and retain the Certificate of Attendance for your records.

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Thursday, February 25, 2016 – *continued*

TRACK 2

2:45 pm – 3:45 pm
Salon 5

Navigating the Outside Counsel / Corporate Client Relationship in Litigation: A View From the Inside

(MCLE – 1.0 hour of general credit)

This panel will consist of corporate in-house litigation counsel who will discuss the dynamics of selecting and retaining outside counsel, trends in litigation, and the dynamics of litigation management, including budgeting, reporting, case evaluation and resolution.

R. Bryan Martin
Haight, Brown & Bonesteel

Ashley Harper
Waste Management

Robert A. Morgenstern
Maranga Morgenstern

Yves St-Arnaud
Bombardier Recreational Products Inc.

TRACK 3

2:45 pm – 3:45 pm
Salons 1-3

For New (and Not So New) Attorneys – DEPOSITIONS

(MCLE – 1.0 hour of general credit)

DEPOSITIONS – Even the most experienced attorneys can learn new deposition strategies. This session will provide practice pointers to enhance your deposition skills.

James P. Baratta
Grant, Genovese & Baratta

Kelly M. Douglas
Pettit Kohn Ingrassia & Lutz

Anthony Kohrs
Hennelly & Grossfeld LLP

3:45 pm – 4:00 pm
Diamond Foyer

Break

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Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Thursday, February 25, 2016 – *continued*

TRACK 3

4:00 pm – 5:00 pm
Salons 1-3

For New (and Not So New) Attorneys – PRE-TRIAL PREP

(MCLE – 1.0 hour of general credit)

PRE-TRIAL PREP – Trial Preparation is often the most labor-intensive and litigious part of a case. This session will provide an overview of expert discovery and strategy, motions in limine considerations, preparing pretrial documents, how to lay a foundation for records and prepare witnesses for trial or arbitration.

Ben Cramer
LaFollette, Johnson, DeHaas, Fesler & Ames

Hannah L. Mohrman
Bowman & Brooke LLP

Alice Chen Smith
Yoka & Smith

SPECIALTY ETHICS MCLE CREDIT SESSION

4:00 pm – 5:00 pm
Salon 5

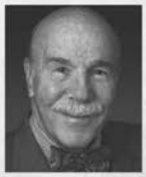
Top Ethical Issues For Civil Defense Trial Lawyers and Litigators

(MCLE – 1.0 hour of Ethics credit)

Topics include: Recurring conflicts of interest issues in defense practice; E-discovery: traps and pitfalls; Confidential documents and information: "O.P.P. [other people's privilege]" problems; Ethics in negotiation/mediation confidentiality and the absolute bar; Termination of engagement and withdrawal from representation.

Wendy Wen Yun Chang
Hinshaw & Culbertson

Ken Feldman
Lewis Brisbois Bisgaard & Smith



Hon. Michael Marcus (Ret.)
ADR Services, Inc.

5:00 pm – 7:00 pm
[Room TBD]

Cocktail Reception

Join your fellow members and colleagues for appetizers and cocktails at the Annual Seminar Reception – an opportunity to wrap up your day and enjoy the camaraderie amongst seminar attendees.

Register Online at *www.ascdc.org*

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Friday, February 26, 2016

8:00 am – 12:00 noon
Diamond Foyer

Registration Open

8:00 am – 9:00 am
Diamond Foyer

Morning Hospitality

8:00 am – 11:00 am
Diamond Foyer

Vendor Faire

8:30 am – 9:15 am
Salon 5

California Defense Counsel Legislative Update

(MCLE – 0.75 hours of general credit)

Michael D. Belote, Esq.
California Advocates, Inc.

Hear the latest from California Defense Counsel Legislative Advocate, Mike Belote, who will provide attendees with a review of new and pending legislation impacting the defense practice in California.

9:15 am – 9:30 am
Diamond Foyer

Break

9:45 am – 10:45 am
Salon 5

Shots Fired! Risk Analysis, Response and Expectations To an Active Shooter Incident

(MCLE – 1.0 hour of general credit)

- Raise awareness related to active shooter events.
- Learn about the history of violence and explore common myths.
- Explain the dynamics of an Active Shooter and Code Silver.
- Provide the best routes of escape from your area, and the best place for safety within your department.
- Identify the emotional responses during an Active Shooter event.
- Learn about common myths about threats related to active shootings.
- Recognize threat indicators and potential perpetrators of active shooters.
- Learn about the Run Hide Fight protocols for mitigating violence in the workplace.
- Explore and discuss effective strategies to prevent, assess and mitigate threats.
- Learn how to assess an active shooter event, and discuss "duty to act" related to patient care.

Josef Levy
Embassy Consulting Services, LLC

Melvin McGuire
Long Beach Police Department

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Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Friday, February 26, 2016 – *continued*

10:45 am – 11:00 am *Diamond Foyer* — **Final Break with Prize Drawings**

11:00 am – 11:45 am *Salon 5* — **Inspirational Session**

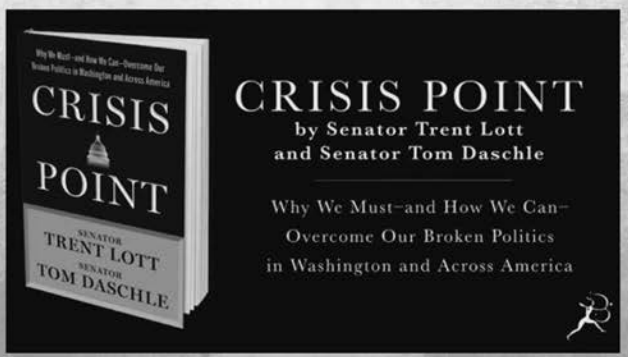
Recipient of the Silver Star in Iraq, and Purple Heart after surviving an RPG blast. Gunnery Sgt. Popaditch will talk about overcoming adversity. Attendees will have the opportunity to purchase Sgt. Popaditch's book *Once a Marine*.

Gunnery Sgt. Nick Popaditch (USMC-Ret.)

12:00 noon – 2:00 pm *Salons 1-4* — **Annual Seminar Luncheon with Keynote Speakers**

Senator Tom Daschle & Senator Trent Lott
Former Senate Majority Leaders and Co-Authors of Crisis Point

In this joint-program, former Senator Tom Daschle shares the stage with former Senator Trent Lott. Passionate in their views, yet respected by both parties, the two draw upon over 60 years of service in public office as they discuss a wide range of topics in American politics, from tax policy to healthcare and more. By agreeing to meet each halfway and putting the needs of the country ahead of partisan squabbles, Daschle and Lott had a ready-made basis for their upcoming book, *Crisis Point: Why We Must – and How We Can – Overcome Our Broken Politics in Washington and Across America.* Bringing a keen and reasoned insight for restoring effectiveness to the American government, strengthening democracy, and fixing an all too caustic governing process, they have created a starting point for an all-too-important discussion as we head toward the 2016 election season and its potential implications.



Registration Form

Register online at *www.ascdc.org* Save paper and postage!

REGISTRATION FEES:	EARLY by 1/22/16	REGULAR from 1/23/16 to 2/22/16	ON-SITE
☐ ASCDC Members	$395	$425	$450
☐ Claims Personnel	$175	$175	$175
☐ Non-Member Attorneys	$495	$525	$550
☐ Young Lawyer Member	$295	$325	$350
☐ Reception Companion Ticket	$ 75	$ 75	$ 75

* In practice up to five years

Name/State Bar ID:

Companion's Name for Reception:

Company/Firm:

Address:

City/State/Zip:

Phone:

Fax:

E-mail:

LUNCHEON TABLE RESERVATION:

Please reserve ____ table(s). *(You must register 10 people to reserve a table.)*

PAYMENT INFORMATION:

☐ Enclosed is my check for $_____

☐ Please charge $_____ to my ☐ MasterCard ☐ Visa ☐ AmEx

Card Number:

CID Number: Expiration Date:

Signature:

Name as Appears on Card:

Credit Card Billing Address:

City/State/Zip:

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PUBLIC ENTITY DEFENSE:

Use of Force on Pretrial Detainees in the Wake of *Kingsley v. Henderson*

by Douglas J. Lief and Jeanne L. Tollison

The recent decision of the Supreme Court in *Kingsley v. Henderson* should not have surprised anyone. The issue was whether, in a civil rights action asserting improper use of force against a pre-trial detainee in custody, the defendant's actions should be judged by (1) the same objective reasonableness standard as pre-detention/arrest force, (2) whether the force used was actually "punishment," or (3) whether the force was in reckless disregard of the detainee's rights and safety. All nine Justices favored the objective standard and opined that the major difference between detained and non-detained persons was whether the force used amounted to punishment. The majority and dissenting justices disagreed, however, as to what inferentially constitutes "punishment."

The Facts

In *Kingsley*, a prisoner in the County Jail who was awaiting trial refused, after several requests, to remove a paper with which he had covered the light bulb in his cell, making visibility into the cell difficult for guards. Four officers entered the cell, handcuffed plaintiff behind his back, and placed him face down on a bed in a nearby receiving cell. A factual dispute arose regarding what happened next.

The witnesses disagreed as to whether and to what degree plaintiff resisted and disobeyed further orders to rise and go back to the cell door. All witnesses agreed that an officer later placed his knee in Kingsley's back to control him, and that Kingsley used "impolite language" toward the officers. Kingsley claims the officers then slammed his head into the concrete side of the bunk, but all officers denied that happened.

Not surprisingly, Kingsley sued defendants under 42 *U.S.C.* section 1983 for violation of his civil rights through the use of excessive force. No Fourth, Fifth, or Eighth Amendment claims were made in the lower courts – only a Fourteenth Amendment claim.

At trial, the district court granted a defense request for a jury instruction stating that the proper standard was whether plaintiff had proved that the officers "recklessly disregarded [his] safety" and "acted with reckless disregard of [his] rights." Using this "reckless disregard" standard, the jury returned a defense verdict, and plaintiff appealed. The Court of Appeals affirmed. A divided Supreme Court vacated the judgment and remanded, in a 5-4 vote in which two dissenting opinions were filed. The majority opinion, authored by Justice Breyer, was joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan. One dissent was written by Justice Scalia, and joined by Justice Thomas and the Chief Justice. Justice Alito filed his own dissent on a largely procedural ground.

The Decision of the Supreme Court

The majority recognized, and the dissent did not disagree, that the law of excessive force was essentially settled in *Graham v. Conner*, 490 U.S. 386 (1989). In that case, the Court had stated the parameters of use of non-lethal force "out on the streets" as a fairly straightforward, "who, what, and when" test. **Who** may use force? A objectively reasonable officer with the same training and experience as the actual officer involved and under the facts known to the officer at the time (not using 20-20 hindsight). **When** may the force be used? To gain or maintain control of the situation.

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And **what** level of force may be used? Any amount within the range of force options which our hypothetical "reasonable and equally trained and experienced officer under the same circumstances" would deem reasonable. There is no requirement that the force used be the lowest level that might have controlled the situation.

The Court first observed that the instant case was a Fourth/Fourteenth Amendment case, dealing with action by state officers and not dealing with imposition of cruel or unusual punishment. Therefore, in accordance with the law of several circuits, the test for use of force on prisoners awaiting trial was no different than for street detentions (*i.e.*, the objective test set forth in *Graham v. Connor, supra*), *except that*, once the prisoner was in a detention facility, the legitimate policies and procedures of the facility must be accorded deference. To this point, the majority opinion and the dissent of Justice Scalia are not significantly divergent. No justice voted to approve the trial court's standard of "reckless disregard of rights and safety." And no justice disagreed that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." (Citing *Graham v. Connor, supra* at 395; and *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

The real divergence in the opinions of the justices centered on the definition of "punishment." The majority felt that any intentional application of force that is objectively unreasonable in degree is a use of excessive force that "amounts to punishment." Three dissenters (Scalia, Thomas, and Roberts) rejected that definition as too simplistic; they favored adding an additional requirement that to be actionable, the force used also must lack "any reasonable relationship to a valid governmental interest. Justice Alioto's dissent declined to reach this issue, positing that the Court had put the cart before the horse; *i.e.*, review had been improvidently granted, because the case was based on the Fourth Amendment and the law was not yet settled that a detained prisoner awaiting trial had a Fourth Amendment right at all to bring a claim for excessive force. However, Justice Alito stated his opinion that, if the law were to determine that such a claim could be brought in the first instance, he agreed with the remaining Justices that the standards to apply "would be indistinguishable from the substantive due process claim that the Court discusses."

It is somewhat confusing to reconcile the apparently inconsistent portions of the majority opinion. On the one hand, the majority specifically allows a reasonable officer to consider the current situation, including the range of force reasonable to regain or obtain control. Logically, this control would have to include goals consistent and proportionate to valid governmental policies and interests. Indeed, the majority specifically recognizes the need to give deference to the reasonable policies and procedures of an incarceration facility. Yet the majority, in the end, appears to adopt a definition of punishment that disregards this fact.

It would seem that the proper way to interpret this case is to first conclude that the Court re-affirmed the vitality of the *Graham v. Connor* objective test. Therefore, whether the force used is unreasonable and therefore excessive necessarily includes a circumstantial factor; specifically, one of the circumstances in the factual situation known to the acting officer is whether the coercive control he wishes to impose is "reasonably related to a valid governmental interest," including the reasonable policies and procedures of the incarceration facility. If, after considering all those circumstances, the force is still excessive, then a definition of punishment is met which all but one Justice (and perhaps all) may have accepted.

Douglas J. Lief

Mr. Lief has been practicing law for ten years and, since 2012, has been an associate in the law firm of Woodruff, Spradlin & Smart. In addition to representing public entities, he has represented Fortune 500 firms and practiced product liability, toxic torts, and consumer law. He has been named a Rising Star in *Orange County Magazine's* Superlawyer edition.

Jeanne L. Tollison

Jeanne Tollison, who has practiced law for ten years, has been an associate in the law firm of Woodruff, Spradlin & Smart since 2011. In addition to representing public entities, she has represented Fortune 500 firms and practiced litigation in areas including consumer law, product liability, personal injury, premises liability, and employment law. She is also a member of the Nevada Bar.

A prior version of this article was published in the Newsletter of the Civil Rights and Public Entity Liability Section of the FDCC.

STATE RULES RECAP

State Law Amendments Recap: Big Changes a Comin'

by Bob Olson and Mike Belote

It has been a very active legislative session for civil procedure this year. The result is that there will be substantial changes in how cases will need to be litigated beginning in January.

Expedited Jury Trials

The potential for expedited jury trials has been around for almost five years. Under the existing program expedited trials are voluntary, each party has no more than 3 hours to present its case, there is an 8-person jury and three peremptory challenges per side and there is no right to appeal. (Code Civ. Proc. §§ 630.03, 630.04.) They are also very rarely used.

That will change January 1 when AB 555, adding Code of Civil Procedure sections 630.20 to 630.30, becomes effective. Under the new statutory process:

- Expedited jury trials will be *mandatory* in all limited jurisdiction cases (complaint seeks less than $25,000 and no equitable relief). (AB 555 adding Code Civ. Proc. § 630.20, subd. (a).) Exceptions:
  - punitive damages are sought,
  - an insurer has reserved rights
  - damages sought exceed policy limits
  - intentional wrongdoing is alleged
  - a judgment might adversely affect a professional license,
  - attorney fees are sought other than contract fees under Civil Code section 1717,
  - a party can make a like showing that an expedited jury trial is inappropriate.

  (*id.*, subd. (b).)
- The parameters of the expedited jury trial are a little more liberal.
  - Each side will have 5 hours, including voir dire (as opposed to the prior 3 hours per side not including voir dire) to present its case
  - There is now a right to appeal to the superior court appellate division (of course, most appellate issues will require a party to have had a court reporter at trial; some courts proved reporters, others do not).
  - Each side will have four peremptory challenges (up from three).
  - 8-person jury, but six of eight jurors will suffice for a verdict.

  (AB 555 adding Code Civ. Proc. §§ 630.23; 630.26,.)

The existing voluntary expedited jury trial system remains available and parties may stipulate to other arrangements.

The mandatory expedited jury trial experiment sunsets on July 1, 2019 (i.e., after 2½ years) unless extended. It should provide greater opportunities for jury trials of limited scope in smaller cases. The twofold hope is that smaller cases can move through the system faster and that more lawyers, especially newer lawyers, will be able to obtain jury trial experience

Demurrers

Perhaps the biggest coming change, effective January 1, will be with demurrers.

- Meet and confer.
  - Counsel will first have to meet and confer to attempt resolve differences before bringing a demurrer, similar to what is required in federal court before a motion to dismiss.
  - The meet and confer must be in person or by phone; exchanging emails or letters won't suffice. (*Ibid.*)
  - Moving counsel must provide a declaration that the meet and confer occurred, but the adequacy of the meet and confer will not be a ground to overrule the demurrer.
  - The meet and confer must take place at least five days before filing the demurrer. If counsel does not have time to meet and confer (e.g., counsel just received the complaint

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from the client, opposing counsel is unavailable), demurring party can submit a declaration to the effect that a good faith attempt was or could not be made and receive an automatic 30 day extension to bring the first demurrer.

- The demurring party is to identify the demurrable defects in the pleading and provide legal authority for that position; the party filing the pleading is to provide legal authority for any claim that the pleading is sufficient. (SB 383 amending Code Civ. Proc., § 430.41, subd. (a)

- The court has discretion to order a conference before an amended pleading may be filed; the time to demur to such an amended pleading will not begin to run until after the court holds that conference. (SB 383 amending Code Civ. Proc., § 430.41, subd. (c).)
- The party opposing demurrer may not voluntarily amend the pleading, after the deadline to oppose the demurrer, i.e., no eve-of-hearing amendments. (SB 383 amending Code Civ. Proc., § 472, subd. (a).)
- A demurring party need not re-demur on the same ground that has been previously overruled (assuming no amendment to the applicable claim); any such ground is preserved for appeal based on the overruled demurrer. (SB 383 amending Code Civ. Proc., § 430.41, subd. (g).)
- By the same token, any demurrer ground must be raised at the first opportunity; a claim or defense that has not been changed in an amended pleading, may not be challenged by demurrer for the first time in the amended pleading. (SB 383 amending Code Civ. Proc., § 430.41, subd. (b).)
- ***Most important,*** upon successive demurrers, a pleading is not to be amended more than three times (i.e., the trial court is not to grant leave to amend more than three times) absent "an offer to the trial court as to such additional facts to be pleaded" that will make it reasonably possible that the pleading is sufficient. Trial courts, thus, are empowered and directed not to grant endless leave to amend where the party has been unable to state a claim after three amendments. A party seeking more than three amendments has to proffer additional, specific *facts*, not just broad generalities that that party thinks it might come up with something.

These rules apply equally to demurrers to complaints, cross-complaints, answers, etc. The new rules sunset effective January 1, 2021.; in other words, this is a five-year experiment.

Deposition Notices

AB 1197 adds to the information that must be provided in a notice of deposition under the oral deposition statute, Code of Civil Procedure section 2025.220.

- The notice now must contain two additional disclosures:
  - if the noticing party *or a third party who is financing all or part of the action* (read insurance carrier or other institutional client) has a contract with the court reporter *or the court reporting agency* that extends beyond the particular deposition *and*
  - if the party or a third party financing the litigation has directed counsel to use a particular reporter or court reporting agency.

  The first disclosure is limited to what the noticing party knows, so if the third party financing the litigation has such a contract, but the party is unaware of that contract (presumably counsel's knowledge is impute to the party however), no disclosure is required. But the second disclosure is required based on *counsel's* knowledge of whether counsel has been directed or not. It is unclear what, if any, disclosure has to be made if counsel has been directed to select from a panel of approved providers. Presumably that would mean that counsel has not been directed to use a "particular" reporter or agency.'
- No remedy is specified for a failure to make the required disclosures and it is not clear that there is one.

In any event, counsel may be well advised to consider modifying currently used standard deposition notice forms.

CALIFORNIA DEFENSE COUNSEL'S ROLE IN MONITORING AND SHAPING LITIGATION

It has been a busy civil procedure year in the California Legislature. How is that civil defense bar knows – and affects – what is happening in Sacramento? The answer is California Defense Counsel (CDC). CDC is jointly sponsored by the Association of Southern California Defense Counsel (ASCDC) and its sister organization, the Association of Defense Counsel of Northern California and Nevada (ADC). All ASCDC and ADC members are CDC members. There is also a separate CDC political action committee (CDC-PAC). ASCDC and ADC do not fund (and are not allowed to fund) CDC-PAC. Rather, it is separately funded (or not) by individual firms and members.

CDC, though, has a large, indeed outsized, impact in Sacramento. The new demurrer rules are an excellent example. Some members of the judiciary were convinced that demurrers were clogging up the system. They partnered with the plaintiffs' bar to suggest eliminating demurrers altogether. Other ideas that were seriously floated were to make it *optional* for a court to rule on a demurrer if brought. The trial court would have been allowed to ignore a demurrer if it did not want to be bothered, for any reason, with considering it.

Those were obviously unacceptable proposals. Yes, there are sometimes abuses on both sides of the aisle. There are demurrers that should not have been brought. But the bigger problem has been the inability to get demurrers heard, eve of hearing complaint amendments by plaintiffs, and the inability

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to get demurrers sustained without leave to amend when complaints truly are legally insufficient.

CDC made clear from the outset that the defense bar *favors* an efficient and effective process to challenge the legal sufficiency of what are sometimes legally baseless and often overblown and meandering pleadings. The judiciary and the plaintiffs' bar think that a meet and confer process, similar to what happens in federal court, will weed out unnecessary demurrers *including by voluntary curative amendments* by pleading parties. We are not sure, but we are willing to give it a try if it means that meritorious demurrers will be ruled on *and sustained without leave to amend*. Faced with the likelihood that *some* legislative action would be taken on demurrers, CDC was able to obtain important pro-defense provisions, provisions that should benefits clients and carriers by reducing overall litigation expense. Those changes included eliminating the practice of eve-of-hearing amendments and giving real teeth to limiting the number of amendments before sustaining a demurrer without leave to amend.

CDC made similar contributions to the expedited jury trial statute – a statute that should create opportunities for the defense bar to develop of bench of lawyers with jury trial experience. The exceptions to the mandatory expedited jury trial statute come from CDC's input, along with other stakeholders, as to cases that may require more attention that a day and half trial. Likewise, CDC actively supported expanding the length of expedited jury trials and adding an additional peremptory challenge.

And CDC actively worked to eliminate any prejudicial consequences on the validity of a deposition taken under a notice that may not have the new required disclosures.

And, CDC biggest role for the defense bar relates to a legislative proposal that has yet to have a hearing in Sacramento, SB 8, proffered legislation to impose a sales tax on services, i.e., on lawyer's bills.

CDC does yeoman's work for the defense bar. Its ability to influence though depends on the presence of CDC-PAC. CDC-PAC cannot operate without funding from defense bar firms and lawyers. As it currently stands, the plaintiff's bar outspends CDC by 30-1 in Sacramento. If every member of ASCDC contributed just $100, CDC-PAC's funding would double. So, that is the goal: $100 per member. As this year reflects, CDC is involved in ways that make a direct difference to defense lawyers' practices and lives. Please contribute. Any amount makes a difference.

Thank you.

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Michael D. Belote

FEDERAL RULES RECAP

2015 Amendments to the Federal Rules of Procedure: Could They Reduce Abusive Discovery Practice?

by Peder Batalden

Rain or shine, amendments to the Federal Rules of Procedure arrive each December. This year is no exception. Revised Bankruptcy Rules and new and revised Rules of Civil Procedure will take effect on December 1, 2015. (There are no proposed changes in this cycle to the other three sets of Rules – Appellate, Criminal, and Evidence.) These proposals have been approved by the Judicial Conference, by the U.S. Supreme Court, and (through inaction) by Congress itself. *See* 28 U.S.C. §§ 2072, 2075.

Many of the amendments are modest in scope. But some of the changes to federal discovery practice – including an overarching principle of "proportionality" intended to restrict what is subject to discovery – could curb serious abuses if district courts faithfully apply the drafters' intentions.

All of the changes are described below. Space constraints prevent us from reprinting the full text of all amendments or a redlined version, but they are available at *www.uscourts.gov/rules-policies/pending-rules-amendments.*

Rules of Civil Procedure

a. Rules 1, 4, 16, 26, 30, 31, 33, and 34: reducing discovery costs and delays

Building on ideas discussed at a 2010 Duke Law School conference on discovery, the Advisory Committee proposed a package of changes to federal discovery practice. The proposals elicited a deluge of comments, and the Committee heard from more than 100 witnesses at three public hearings held at sites across the country. Briefly, the amendments are as follows:

- Rule 1 declares that *parties* share responsibility with *courts* to cooperate to resolve cases as quickly and cheaply as possible.
- Rules 4(m) and 16 shorten multiple initial deadlines and emphasize the need for early, proactive judicial case management.
- Rules 26, 30, 31, 33, 34, and 36 – the workhorse rules governing disclosure and discovery of documents and witnesses – are amended so that they embody the principle that discovery should be proportional to the case. Perhaps the most important addition is the new statement of purpose (in italics) in revised Rule 26(b)(1): "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit*." The key Rules on taking depositions, serving interrogatories, and demanding documents have been modified to include cross-references to this revised Rule 26(b)(1) so that they "reflect the recognition of [the] proportionality" principle, in the words of the Advisory Committee's Notes.

The Advisory Committee had initially recommended more sweeping changes that would have reduced the length and number of depositions under Rules 30 and 31, reduced the number of interrogatories under Rule 33, and established a limit on requests to admit under Rule 36. Those initial proposals were ultimately withdrawn under intense lobbying pressure from the plaintiffs' bar.

b. Rule 37(e): failing to preserve electronic information

Rule 37(e) provides that, "[a]bsent exceptional circumstances, a court may not impose sanctions ... on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Multiple splits of authority arose among courts applying the Rule. The Advisory Committee studied the Rule and determined that it was insufficiently attentive to problems that often arise when electronic information becomes unavailable because of something other than a party's intentional destruction. The Committee elected not to propose a

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highly detailed rule specifying the trigger, scope, and duration of a preservation obligation. Instead, the Committee has simply accepted a core principle from the case law, which establishes that a duty to preserve applies "when litigation is reasonably anticipated." The Committee therefore proposed a rule addressing how a court may respond when a party has failed to preserve information that should have been preserved in anticipation of litigation. The amended Rule 37(e) states the following:

> **(e) Failure to Preserve Electronically Stored Information**. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

c. Rules 4 and 84: abolishing sample forms

Rule 84 authorizes the Advisory Committee on Civil Rules to promulgate sample forms designed to illustrate the simplicity and brevity of the most common documents prepared during litigation in the district courts. The first forms were approved more than 60 years ago, and they now include sample complaints, summons, simple motions, and judgments. The Advisory Committee has long complained about the difficulty in maintaining and updating the forms, and has long questioned whether the forms provide meaningful help to litigants. After debating the wisdom of having and maintaining these forms, the Committee finally decided to abolish the Appendix of Forms, along with its enabling Rule 84. Only two forms will survive. Both of them (Form 5 and Form 6) are sample waivers of service of process, and they will now be located as attachments to Rule 4(d)(1)(D), rather than in the old Appendix.

d. Rule 55(c): setting aside defaults

Rule 55 addresses defaults and default judgments. Subsection (c) authorizes a court to "set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)." The amendment adds the word "final" before "default judgment." This amendment is designed to eliminate an ambiguity that arises when a plaintiff obtains a default against one of multiple defendants. When that occurs, no final judgment should be entered because plaintiff's claims against the remaining defendants persist. *See* Fed. R. Civ. P. 54(b). Alas, some district judges enter default judgments in these circumstances anyway. If a district judge does so, and the defaulting party later moves to set aside that "judgment," a question arose whether the moving party was obliged to satisfy the stringent standard of Rule 60(b) – based on the *last* clause of Rule 55(c) – or whether the moving party needed only to satisfy the lesser standard of "good cause" – based on the *first* clause of Rule 55(c) – since no judgment should have been entered. The addition of the modifier "final" is intended to clarify that, in that situation, a defaulting party need only satisfy the "good cause" standard.

Bankruptcy Rule 1007: Relabeling schedules

At the outset of certain bankruptcy proceedings, a debtor must file particular schedules listing names and addresses of creditors. The labeling of some of those schedules has changed as a result of the Rules Committee's broad Forms Modernization Project, and those changes have required an amendment to Federal Rule of Bankruptcy Procedure 1007(a) so that it correctly cross-references the schedules.

That's all for now. Be sure to check back next December for a fresh batch of amendments.

Peder Batalden

Peder Batalden is a partner specializing in civil appellate practice at Horvitz & Levy, and he co-authors the leading treatise on civil appeals before the U.S. Court of Appeals for the Ninth Circuit, the Rutter Group's *Ninth Circuit Civil Appellate Practice*.

Dining Around the Counties

EDITOR'S NOTE: We invited a few of our ASCDC members to offer their observations about places to get sustenance while at trial in some of our near and far courthouses. Below are responses we received. Feel free to pass along your own ideas, and maybe we'll compile them into an update in a future edition of* Verdict *magazine. In the meantime, bon appetit!

SAN BERNARDINO

By Jeff Walker

There's slim pickins by the San Bernardino courthouse, but here goes:

City Hall Cafeteria – next to old historic courthouse; lots of quiet tables for trial preparation or morning witness meetings. 1 block north of new civil courthouse.

El Torito – on Hospitality about 10 minutes from courthouse. Good for post-trial margarita or hanging out while jury is deliberating.

In-N-Out – two-minute drive from court for hearty eaters.

Isabella's Trattoria – Italian casual dining within walking distance of courthouse at Isabella's Tratorria at 201 N E St. Wear a napkin so as not to ruin nice white shirts!

Lotus Garden – on Hospitality. Excellent Chinese food served family style, quick but good. Good environment with lots of table space; good for meeting with large groups (clients, fellow defense counsel).

SAN DIEGO

By Patrick Kearns

Restaurants

There is fast food in the courthouse, but if you want a great "business lunch" during trial or after a hearing, try **Dobsons**. It's a few blocks from the courthouse, has an old-world, "east coast" feel, and is a designated "lawyer bar" after hours. The food is fantastic for both lunch and dinner.

A few blocks east of the downtown Court house is **Tender Greens**, a great spot for soup and salad and a popular lunch place. This is a good place for a lighter, quicker lunch.

A few blocks west of the Courthouse on C street is another local favorite, **Waters**. This is a popular and fairly "quick" restaurant with indoor and outdoor seating. It specializes in gourmet sandwiches, soup, and various entrees. Although there is often a line around lunch time, you order at the counter and sit down once you get your food, so it can be quick if you're on a time crunch.

Just east of the courthouse is **Currant**, another good sit-down restaurant within two blocks. They are used to serving "fast" lunch but be careful what you discuss. This place is popular with jurors as they offer a 10% discount to anyone with a juror badge.

Hotels

The most convenient hotel for people staying for trial or a hearing is the **Westin** on Broadway. It is literally across the street from the courthouse and fairly nice. There is both a formal restaurant and a bar in the lobby, as well as a deli.

The **W Hotel** in downtown San Diego is also very convenient for courthouse access. It is approximately two blocks from the courthouse and it contains two bars that also serve food.

Coffee

If you're in a time crunch, there is a coffee stand which also serves bagels and muffins on the terrace of the courthouse itself.

If you have a few minutes before your hearing, try **Tony's Coffee Cart.** He sets up about two blocks west of the courthouse on the corner of Broadway and India street. Don't let his beard scare you away, he makes some of the best coffee in town.

If you're looking for more standard coffee shops, there are several near the courthouse. Just a block or so east is a **Coffee Bean & Tea Leaf** and about three blocks west is a **Starbucks.**

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SAN FERNANDO VALLEY

By Ninos Saroukhanioff

I'm a Valley Guy. Yes, I said it, "I'm a Valley Guy." I'm also a Valley Guy who really enjoys food, so I am here to offer some advice to those of you who may find yourself in trial in either the Chatsworth or Van Nuys branches of the Los Angeles Superior Court. If you're in Chatsworth you could eat at the cafeteria with the very unfriendly owner and get an awful sandwich, you could walk to **Appleby** or **Stonefire Grill**, or you can head to the nearby Northridge Fashion Center for some **Buffalo Wild Wings,** the **Yard House, Bone Fish Grill** or **Macaroni Grill.** (The Valley is into grills.) If you're in Van Nuys, you can walk across Van Nuys Boulevard to either **Happy Dogs** or **Outlaws Burgers**, or – oh my gawd – drive to the Sherman Oaks Galleria for **Cheesecake Factory, PF Changs** or ... another **Buffalo Wild Wings.** (The Valley is into wings.)

But, if you happen to get out early for lunch or need to spend some time "prepping" your client for his/her testimony the next day, then I say you eschew the chain establishments, and head over with your client and your adjuster to **Monty's Steak House** in Woodland Hills, located on Topanga Canyon, south of the Boulevard (that's Ventura Boulevard, for those of you not versed in Valley-speak). Monty's has been a Valley – actually a Southern California – institution for over three generations.

Monty's is currently owned and operated by Larry and Bobbi Levine and their eldest son, Michael. The food at Monty's is great. You can't go wrong with any of the appetizers, salads, soups or main entrées. The wine list is fantastic. In fact, Larry personally does a wine tasting once a week with all of his wine vendors to select wines to be placed on the wine list. The bar is fully stocked with all the best in beer and spirits of all sorts. The drinks are stiff. The staff is excellent.

Personally, I like to sit in the bar area where they have several large screen TVs. It is also a great place to watch all the action taking place at the bar. But, what really makes Monty's a great place – for either lunch, happy hour, dinner or late night drinks – is the atmosphere. Larry, Bobbi and Michael are a real treat. They make everyone feel welcome, and if you're there for a second visit you will be family. So, the next time you're in the Valley or even if you're not, go to Monty's. Order a big martini, settle into a red leather booth, get a huge steak and enjoy the people watching. Oh, and don't forget to get a piece of the cheesecake before you leave.

VENTURA

By Diana Lytel

Restaurants

If you are looking for some fresh coffee and baked goods before court, Peet's Coffee is right across the street from the courthouse. One block down Victoria is Starbucks if that is more your speed.

For breakfast or lunch, if you want to stay close to the courthouse, The Hill Street Café is a decent option. It is old school but has regular classics such as omelets, hash browns, Caesar salads, burgers and turkey club sandwiches.

For something a little more upscale, there is the Victoria Pub & Grill which is located directly across the street in the strip mall with Peet's.

If you don't mind getting in your car and driving south on the 101, BJ's Pizza and Brewery is about 10 minutes away from the courthouse. BJ's has a huge menu of salad, sandwiches, pastas and pizzas. This is also a great place to catch dinner after a long day.

In-N-Out Burger is also off of that 101 at Oxnard Blvd. for those of you that need to feed the need.

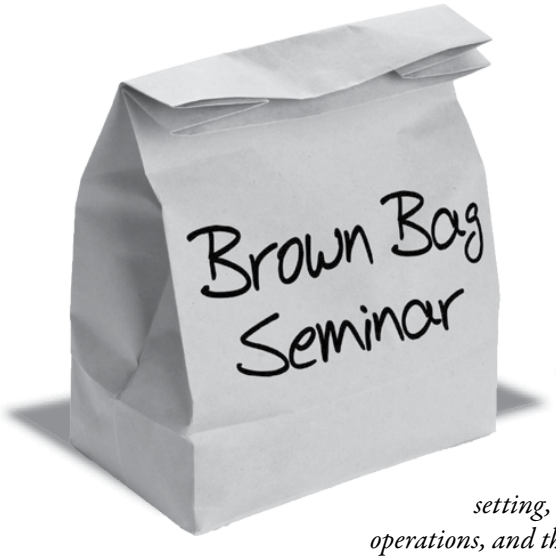
The new Collection Riverpark in Oxnard also has a ton of new restaurants and a Whole Foods for quick lunch pick up and healthier options.

Hotels

The hotel choices in Ventura and Oxnard can be sparse. If you are looking for four- and five-star digs, Santa Barbara is probably your best bet. Santa Barbara is a good 30 minute drive from Ventura Superior Court. Best bets for Ventura are The Wyndham Pierpont Inn which has a restaurant, pool, gym and business center and Four Points by Sheraton at the Ventura Harbor which offers the same amenities but does not have a business center.

Gyms

There are two main gyms to choose from in Ventura. The first is LA Fitness which is right down the street from the courthouse on Victoria. LA Fitness offers day and weekend passes. The other best bet is the brand new 24 Hour Fitness Super Sport in Oxnard. Oxnard is a short drive south on the 101 from Ventura. The Super Sport has full cardio equipment, free weights, a full sized basketball court, group classes, a pool and sauna. 24 Hour Fitness also has visitor passes available.



Reports

Editor's note: We continue to hold brown bag bench-bar events throughout the year, and the feedback we get from the judges is tremendous. In a relatively informal setting, the attending lawyers can learn some "inside baseball" information about the courts' operations, and the judges can share their observations and concerns directly with lawyers practicing before them, outside the context of a litigated matter. We urge anyone who attends these events (including the judges) to drop us a line here at Verdict *magazine, so we can share ideas with our readers. Here are a couple of reports from recent events.*

San Bernardino Superior Court Brown Bag (September 11, 2015)

Over 60 people attended this event, which was sponsored by Bosco Legal Solutions. We're always grateful to our sponsors for adding a great touch of hospitality to these gatherings. Those in attendance included local press representatives, two local mayors, a congressman's associate, and other local dignitaries.

Jeff Walker reports: Presiding Judge Marsha Slough presented an informative, interesting and positive powerpoint on the status of the courts in San Bernardino County. Her basic message: SBSC was in bad shape before the economic crisis, managed through it, and is still understaffed both for judges and support staff, but is toughening through the funding issues. The Court is taking proactive steps to refine its processes to make the Court run more efficiently and productively. Trials are getting out in SBSC, and the horizon is positive in terms of the potential for new judicial appointments in SB and Riverside Counties, given how undermanned the counties are in terms of number of judges compared to every other county in the state.

Los Angeles Superior Court (October 23, 2015)

Report from **Jean Daly**: Assistant Presiding Judge Dan Buckley graciously spent time in an intimate discussion with Los Angeles lawyers to discuss candidly both the status of the Los Angeles Superior Court and the necessity for civility among lawyers.

As to the budget, Judge Buckley said that the court is slowly getting better with the help of technology. Although 79 courts were closed initially with the slashing of the judicial budget, by January 2016, 23 courts will be reopened. They continue to strive to open more courthouses. In the last two years, the California government/legislature have given a 5 % increase the courts in the budget; however, for 2015/2016, there is no set increase, there is no guarantee that any increase will be provided. As it stands, LASC currently has 28 trial courts; two courts were added in the past year. There are currently 21 vacant judicial officer positions. The LASC is waiting to see how many appointments will be made and when they will be made.

The courts currently rely on "sustained funding," which means the courts are dependent upon fees and fines collected. Judge Buckley stated that the bar associations have been phenomenal in their support, and the courts rely on the bar associations for their help. He urged the continued involvement of the bar associations and their leadership in urging the California government and Legislature to provide additional financial support for the courts in the budget.

Judge Buckley stated that the current PI system is currently working well. A fifth PI court is being added. Time to set a hearing for a demurrer or a motion for summary judgment is taking a little less time. As for the demurrer process, the newest legislation to take effect in January 2016 requires a meet and confer to flush out the complaint and issues raised on the demurrer. Judge Buckley explained that the courts, plaintiffs' counsel and defense counsel worked very hard on this legislation, and he believes it will work to make things run more efficiently and free up the court to hear the meritorious motions

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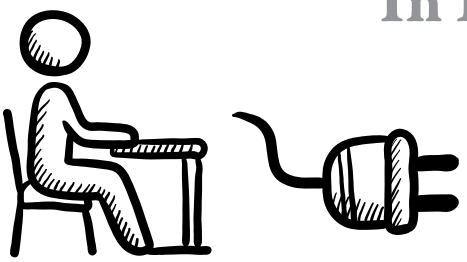
and issues in litigation. It will reduce the time for hearings and free up more slots to fit additional motions.

Technology and the case management systems have improved, promoting better communication. The LASC continues to get all court tracks up and running, working toward a new and improved case management system by Fall 2017. The plan is as follows: April 2016 for small claims; September 2016 for limited jurisdiction civil; November 2016 for general/unlimited civil jurisdiction. By July 2017 it is the hope of LASC to have mandated e-filing across the board. Judge Buckley hopes that there may be e-filing in the PI courts by January/February 2016. It is not be mandated at that time, but it is an opportunity to become familiar with e-filing. The new LASC website has become more efficient and allows individuals to access and to find information much easier. It is the hope of the LASC that new CMS systems will create portals for self-help to create efficiency throughout the court process and system.

Judge Buckley gave sage advise to all attorneys. There are three elements that all attorneys should strive to attain: (1) kiss; (2) less is more; and (3) prepare. As to KISS, keep it simple, and focus on what is critical in motions, hearings and argument. "Less is more" embodies the sample principle as KISS: focus your arguments on what it important so that the court can make decisions that address the real legal issues; do not focus on minimal or side issues. As to "prepare," a court can figure out if an attorney is prepared within 2 or 3 minutes of an argument. Always prepare for court on your matter so that there is no delay and the court can decide real legal issues that will promote efficiency in the litigation and the judicial process.

Some delays are caused by a "lack of civility." Judge Buckley suggested to all attorneys to call up the opposing side or even have a face to face conversation – *no e-mails*. When you have this conversation, talk about everything but the case. Talk about any other topic. The ability to communicate and talk together about non-legal topics promotes civility. It is harder to be disrespectful to a person when you know them from prior encounters. Bottom line, lawyers need to talk with each other and try to work things out. Once you are both in the court room, you of course need to make your objections and argue your point, but refrain from personal attacks on opposing counsel. Address the court and limit the speaking objections. This also promotes civility and efficiency in the court process.

In Defense of the Public



A Message from the Public Entity Sublaw Committee

by Robert L. Kaufman, Committee Chair

When Private Property Creates a Dangerous Condition on Public Property … Who is Liable?

At some points our parents all said (or perhaps yelled) "Keep your hands to yourself!" This is not just sound child-rearing guidance. Rather, it speaks to an oft-encountered legal conundrum. Despite our best efforts to police our private spheres of influence, invariably something we do may negatively impact those around us. As we age, our sphere grows from lunchboxes and backpacks, to residences and businesses. If someone lapses in managing those arenas and creates a dangerous condition in the adjacent public space, can that public entity be held liable for failing to force the private actor to keep his figurative hands to himself? This article will address what happens when a dangerous condition exists on public property, but is actually only a symptom of a dangerous condition on adjacent private property.

This issue can present in a variety of ways. A common manifestation involves tree roots uplifting public sidewalks, leading to trip-and-fall cases. In other instances, architecture or verdigris on private property can either block or reflect the sun, potentially impairing visibility to drivers on the road, resulting in accidents. Indeed, from a legal perspective, a person may have the right to construct a giant magnifying glass on his or her property, but what to do with the resulting fire raging at the park next door?

Courts have held that a public agency has a duty to be mindful of adjacent private property because public property may be dangerous as a result of a condition of adjacent private property (*Bakity v. Riverside,* (1970) 12 Cal. App. 3d 24, 30. *Jordan v. City of Long Beach,* (1971) 17 Cal. App. 3d 878, 882, (holding a protruding pipe in broken pavement adjacent to City property rendered the public property dangerous)).

That said, being mindful is not the same as being liable. Before that liability question can even be addressed, it is critical to note that public entities play by a different set of rules than private ones. First, a special claims procedure against the public entity must be timely followed as a precursor to a suit (or cross-complaint) for money damages. Failure to follow this procedure may result in an automatic win for the public entity.

Furthermore, under the California Government Code, no causes of action can be alleged against a public entity unless specifically provided for in a statute. As such, common law torts such as negligence and premises liability do not apply. Instead, they are replaced with a somewhat analogous statutory cause of action for "dangerous condition of public property." (*Government Code,* section 830, et seq.) The code also carves out a variety of bars to such suits, including immunities for conditions that derive from an approved design (830.6), defects that are trivial (830.2), conditions caused by nature (831), and conditions created by engaging in hazardous activities (831.7), to name a few. To come out on the winning side of your case, you'll first need to determine whether any of these apply.

Assuming that none of the standard immunities apply, a key question will hinge on who is legally responsible for maintaining the subject location. Just because an incident occurs on a city sidewalk doesn't make it the city's problem. First, S*treets and Highways Code* section 5610 requires all property owners to maintain the public sidewalks fronting their property, though it does not impose liability vis-à-vis injured tort plaintiffs for failing to do so.

Second, in some instances the public entity may only own an easement at the subject location, which is outside the definition of a "dangerous condition of public property" under *Government Code* section 830(c). (*Mamola v. State of California ex rel. Dept. of Transportation,* 94 Cal.App.3d 781, 787-789 (1979)) However, much like rescuer liability, if the public entity sticks its neck out and habitually maintains that easement, it may be liable regardless of the bar in 830(c). (*Jones v. Deeter,* 152 Cal.App.3d 798, 802-803 (1984)) Assuming no habitual maintenance, such easements are created by *Government Code* section 66472, and are governed by general contract law. (See *Mikels v. Rager,* 232 Cal.App.3d 334 (1991)) The bottom line is that in most cases there is a definitive source delineating maintenance responsibility for the incident location.

Beyond that, the dangerous condition scheme has statutory notice requirements. To be liable, the entity either needs to either have created the condition, have actual notice of the condition or constructive notice. To be noticeable, the condition cannot be too transient and random (*Kotronakis v. City and*

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County of San Francisco, 192 Cal.App.2d 624, 630 (1961)).

Moreover, there is an apparent contradiction in the law as to how obvious the condition needs to be. On the one hand, to charge the entity with notice the condition must be sufficiently obvious that the entity should have stumbled upon it. (*Heskel v. City of San Diego,* 227 Cal.App.4th 313 (2014)) Indeed, if the condition is too small, it will be within the immunity for trivial defects. On the other hand, if the condition is very obvious, then the municipality has a good argument for comparative negligence because the plaintiff should noticed the the condition and had a duty to avoid it, since "no member of the public may ignore the notice which the condition itself provides." (*Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 132) In *Fredette* the plaintiff had hurt himself diving off a pier into water he knew to be shallow. So how to reconcile *Heskel* and *Fredette?* These rules indicate the condition has to be obvious to the public entity, but not to the average citizen..

Riddling these issues out begins with proper discovery. The Public Records Act (PRA) request enables a public entity's opponents to obtain pertinent maintenance and ownership records before ever tipping them off with a lawsuit. If you represent the entity, you should find out from the client whether a PRA request was made, who made the request and what documents were provided. Moreover, once the litigation is underway, it is useful to ensure any new on-topic PRA requests are routed to you, since the person normally responsible for handling such requests may have no knowledge of the pending litigation.

Many times, the internal discovery (that is obtaining documents from your own client) is more important than external discovery (obtaining documents via the normal discovery procedures once litigation has commenced) In addition to any PRA request documents, you should request from the client and/or located the following documents:

- The original as-built plans for the subject road, sidewalk or area in question. Sometimes you may have to seek these documents out from another public agency (such as a County or the State) if the City was annexed subsequent to the area being built
- Any improvement plans to the subject area
- Work Orders/Complaints concerning the subject area.
- Any documents concerning inspections: sidewalk inspections, meter readings, landscape records
- Any policies that may govern the area or may govern a private property owner's use of the public right-a-away
- Encroachment permits the adjacent property owner may have.
- Deed of Trust showing when the adjacent private property owner acquired the property

Get on this, and do so early because often the records can be hard to find. Key materials may date back to the Great Depression or even earlier. As such it may take several meetings and several months before you can retrieve all the documents needed to defend a dangerous condition of public property case.

Assuming you've done your homework and gathered everything, hopefully you will have a definitive answer as to who is responsible for what at your particular location. It could be buried in an engineering drawing on microfiche, or noted in the minutes of a decades old city council meeting, but that trump card is lurking in there somewhere. Once found, you can truly determine whose hands need to be kept to themselves.

Robert L. Kaufman

Mr. Kaufman is a senior trial counsel at Woodruff, Spradlin & Smart. He is a member of ABOTA, FDCC, & NALFA, and has been named a Top Attorney in Los Angeles and Orange Counties multiple times. For the last 40 years, he has specialized in insurance defense and representation of public entities. He also is a certified expert in attorney fee disputes and awards.

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:

1. *Sanchez v. Valencia* (2015) 61 Cal.4th 899: In this case, the California Supreme Court clarified the rules for determining the unconscionability of arbitration provisions under state law in light of *AT&T Mobility LLC v. Concepcion* (2011) 563 U. S. __, 131 S.Ct. 1740. J. Alan Warfield, Polsinelli LLP, submitted an amicus brief on behalf of ASCDC.

2. *Lee v. Hanley* (2015) 61 Cal.4th 1225: The California Supreme Court held that the one-year statute of limitations for legal malpractice actions (Code Civ. Proc., § 340.6) applies to all claims arising out of the rendering of professional services brought by a client against a lawyer. Harry Chamberlain of Buchalter Nemer submitted an amicus brief on the merits and presented oral argument to the Supreme Court on May 26, 2015.

3. *Klotz v. Milbank, Tweed* (2015) 238 Cal. App.4th 1339: ASCDC successfully sought publication of this opinion which applies the attorney-conspiracy statute (Civil Code section 1714.10) in a meaningful fashion, i.e., to provide protection to attorneys while representing their clients. Harry Chamberlain of Buchalter Nemer submitted the publication request.

4. *Shaoxing v. Keehn & Associates* (2015) 238 Cal.App.4th 1031: ASCDC successfully sought publication of this case where the Court of Appeal affirmed the granting of summary judgment under the statute of limitations (Code Civ. Proc., § 340.6). Ken Feldman from Lewis Brisbois submitted the successful publication request.

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:

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 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.

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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 favorable 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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Fischmann v. Beamer
Isbell v. Regents
Cox v. Bonni
McLean v. Miller

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Clinton & Clinton
Durieux v. Barnes & Noble

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Bayliss v. Byrnes
Faramand v. Ward

Robert L. McKenna, III
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Tuli v. Javahery

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Patterson Lockwood Hillyer
Rodriguez v. Bolivar

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Wang v. John

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Demler, Armstrong & Rowland LLP
Azizian v. Power Engineers, Inc. et al

Michael D. Sargent
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Vision West Investments LLC v. Pasternack

Terrence J. Schafer
Doyle Schafer McMahon
Hong v. Garden Grove Hospital & Medical Center, et al

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Trump v. El-Bialy

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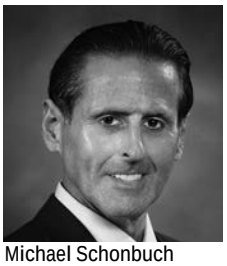
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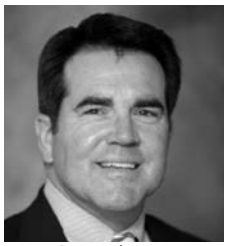
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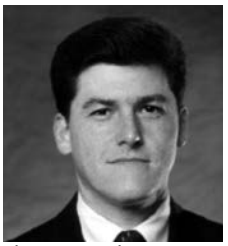
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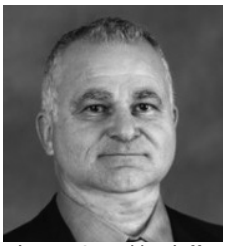
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