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verdict

Volume 1 • 2016

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Sen. Tom Daschle

Glenn T. Barger
2016 ASCDC President

Sen. Trent Lott

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Happy Birthday, ASCDC

Glenn T. Barger
ASCDC 2016 President

Fifty-five years ago, a small group of defense lawyers organized our Association so that their professional interests would be independently represented. A lot has changed over these many years, but a lot has remained the same, including the fact we are still battling the plaintiffs' bar in and out of court, appellate decisions and legislation are impacting our practices on a daily basis and we are providing our clients with outstanding representation, all while attempting to be successful lawyers and professionals.

Over these many years, ASCDC has grown into one of the nation's preeminent and largest regional defense organizations which continues to represent the defense bar's interests with judges, the legislature and our Southern California communities through our bench and bar committees, our amicus efforts and continuing legal education. We accomplish all of these things because of our membership, which remains strong.

As we continue our way through 2016, I have specific goals for our organization.

1) Continue to Provide Tools and Resources For The Defense Bar To Continue To Achieve Outstanding Results

Among the many issues our 2016 Board will be working on, we will be monitoring attempts in Sacramento to add a service tax to our invoices, knowing that if it is difficult to raise rates now, a tax on top of our invoices would only make it more difficult. We will keep you updated on this legislation. We will also continue to monitor all appellate issues and file amicus briefs to support our members and clients; we will continue to provide educational programs for all of our diverse practices, young lawyer events and Judges Nights throughout Southern California; and we will continue to improve our Listserv so that our members can better communicate, strategize and be prepared to face our adversaries. As a collective whole, working together, with a strong organized membership, we can continue to succeed and excel in our practices.

2) Encourage The Practicing of Law At The Highest Ethical Level With Maximum Civility Toward Each Other And Our Opponents.

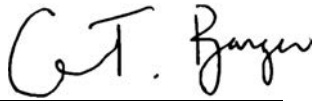
At our Annual Seminar this past February, we were fortunate to have former Senate Majority Leaders, Trent Lott, a Republican from Mississippi and Tom Daschle, a Democrat from South Dakota, and authors of *Crisis Point, "Why We Must – and How We Can – Overcome Our Broken Politics in Washington and Across America,"* as our guest speakers. Senators Lott and Daschle wrote in their book, "[t]imes have changed enormously, but the fact remains the U.S. government is made up of people, and the chemistry among them and the relationships between them are absolutely critical parts of the institution." If you simply change "U.S. Government" to our "Judicial System," the quote applies equally to the practice of law. Although the stakes are high and our system of justice is based at least in part on the adversarial system, we must make even greater efforts to communicate and treat Judges, court staff, opposing counsel and everyone involved in our daily practices with civility, all while practicing at the highest ethical level.

In order to accomplish this goal, ensuring that the defense bar remains the leaders among all lawyers, to practice at the highest ethical level and continue to exercise civility even under challenging circumstances, we have scheduled a **New Annual Litigation Summit event this year which will take place on May 25th in Los Angeles.** This Litigation Summit will be jointly hosted with the plaintiffs' bar along with the judge's active involvement and support, with the focus on ethics and civility to be followed by a reception. I hope that you will make time for this important event in your busy schedules.

3) Grow Our Membership

We are creating new membership opportunities for new members, young lawyers and even law students. I ask you to reach out to members of your firms, your co-counsel and even your competitors and let them know the work ASCDC does on behalf of the defense bar and how it can benefit their practices and firms. This is especially important because the plaintiffs' bar is large and well-funded and through our efforts as a whole, it will help all of us continue to improve our practices, obtain defense verdicts and reach favorable settlements on behalf of our clients.

I believe ASCDC is strong and with your continued support, we can continue our success. I look forward to serving as your President and working with all of you to better our professional lives, while continuing to achieve outstanding results for our clients.



Money, As Usual, At Issue

Michael D. Belote
Legislative Advocate
California Defense Counsel

We have noted in the past how the legislative process, similar to the world of litigation, moves from a series of deadlines to deadlines. The first important deadline in Sacramento every year is the date by which new bills must be introduced; this year that deadline occurred in late February and resulted in over 2400 new bills for the year. From that deadline until the adjournment of session at midnight on August 31, bills either continue to meet a series of committee and floor deadlines, or fall away and are dead for the year.

Every bill and every amendment to every bill must be read and evaluated for possible impact on defense practice. Nearly 125 bills have been indentified of interest to ASCDC members, and all may be viewed through an electronic folder assessable through the ASCDC website. Any member taking even a casual look at the bills through the website would see that pretty much every possible area of defense practice is represented by some bill, whether it be employment, premises, public entities, transportation, professional negligence, construction, and more.

But at the exact same time that 2400 bills are moving through the legislative process (imagine attempting to conduct the first hearings on 2400 bills over about an eight-week period), the legislature and governor also must enact the state budget for the fiscal year commencing on July 1. The budget process is really a sort of "parallel universe" with its own series of deadlines and committee hearings. Budget decisions also affect defense practice, because the state has been slowly moving to increase court funding following the devastating cuts during the Great Recession, and because court funding cuts of necessity disproportionately impact civil operations.

In general, Governor Brown is approaching budget issues conservatively, not wanting to over-commit the state at t time when recession may be looming. So what about the courts? While the Governor's budget proposal for fiscal year 2016-2107 contains no "across-the-board" increases for the courts, there are targeted increases to support additional Proposition 47 caseload impacts, funds to backfill for reductions in filing fee revenue, additional money for "innovation grants", and more. To the extent that courts receive additional funding in specific areas, there is hope that the need to divert resources away from civil should be reduced.

The Governor is also proposing to provide some mechanism to shift vacant judgeships amongst counties based upon workload. The Judicial Council is working now to determine how such shifts might be accomplished.

At the same time that 2400 bills are being introduced and the state budget is being put together, public policy issues are being readied for presentation in yet another venue-the November ballot. We are rapidly approaching the date when proponents will have to turn in signatures to qualify measures for November, or risk running out of time for signature verification. Experts believe that as many as fifteen or more major items may qualify for November, and once again, state revenue issues may be front and center.

Specifically, surcharges on income taxes and sales enacted several years ago in Proposition 30 are scheduled to "sunset" at the end of this year and the end of 2018 respectively, and a 12-year continuation of the income tax surcharge is in signature circulation for the November ballot. Why is this of interest to ASCDC members, other than as citizens of California? Because the continuation of income tax surcharges could significantly affect the interest in, and potential willingness to, fundamentally restructure the sales tax to cover services.

If put before voters in November, which appears likely, will voters approve extending income taxes on people they perceive as rich (the so-called "Kobe Bryant effect")? If income tax surcharges are not approved, what revenues will replace them? How might voter behavior change if a certain person from New York is on the presidential ballot?

By the next issue of Verdict, the budget will be finished, the November ballot will be set, and we will have a very good idea of which bills have survived the 2016 legislative gauntlet.

new members january – april

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Vote Early, Vote Often

Patrick A. Long

"If you can keep your head when all about you/Are losing theirs and blaming it on you...." I'll get back to Mr. Kipling in a moment.

I'm about to violate a firm rule passed on to me by one of my grandmothers many years ago. She said, "Don't ever discuss religion or politics with anyone except immediate family." Gosh Grandma, please accept these words which follow as my single violation of your rule.

There's one other thing I should note before I sin. The time lag between the date we turn in our articles for publication in Verdict, and the date the magazine is mailed to you can be somewhat lengthy, say a month or a little more. Well heck, it takes a careful read by our editors to edit out the curse words and defamatory remarks that find their way into these utterances. Suffice it to say that much can happen in the political world between the time I type this, and the time you read it.

From approximately last November we have been inundated by the media concerning our run up to the Presidential elections in November of this year. All of the networks, and cable folks like CNN, MSNBC, *Fox News,* as well as newspapers, talk radio, magazines, feature daily stories about past, present and maybe future candidates. It appears that the primary focus of most of this reporting is to help us understand the positions of the candidates on the major issues, domestic problems, foreign policy, immigration, women's rights, etc.

When this brouhaha began in November, Republicans had about 17 candidates for President; Democrats had two. Following November there were numerous debates, and periodic "town hall meetings," and one on one interviews with newscasters. I'm advised by a number of our members (seven of us who met at a coffee house) that most of the folks in ASCDC felt it necessary to watch these debates and interviews to get a feel for the positions of the candidates on the issues, and to gain an appreciation of the candidates' personalities and demeanors. But hey, even though the total number of Presidential candidates is now down to five (or more or less by the time you read this) it is somewhat disconcerting to look forward to another seven months of nonstop candidate caterwauling in the media

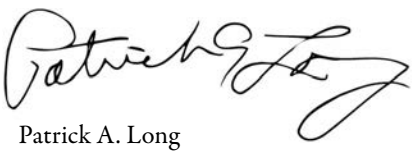
Our members with whom I've spoken (I promised not to name names) were pretty much in general agreement about this. Regardless of their party affiliation they were tired of the constant focus of the media on the Presidential campaign, although they clearly recognize that it isn't going to stop, and that it's part of our culture every four years. This is America; we are a democracy. Anyone can be a candidate. Candidates are successful only if we make them so.

There seemed to be a consensus among our colleagues that the political furor is a little more deafening this year than in previous years. I think I agree with this. I tried to think about previous elections as far back as the '80s and '90s and earlier, but I sure drew a blank as to whether those elections of years past drew as much noise and constant coverage as this year.

I am confident that our ASCDC membership, and ABOTA, and our colleagues in the plaintiffs' bar follow closely the political machinations in these election years, and I'm grateful for this. I may not always agree with Brian Panish or Bruce Broillet on a specific political issue or candidate, but I trust their intelligence and their desire to elect the candidates who will do the best job in guiding America. Having said that, I do believe there's something Brian and Bruce and I do agree upon – that the next seven months is going to bring far too much political blathering.

Now to return to Mr. Kipling. His phenomenal poem, "IF," was published in 1910. Go to Google and pull it up and read it. It's not long. See if you don't agree that it provides guidance for potential political candidates. Here's how it ends: "If you can fill the unforgiving minute/With sixty seconds' worth of distance run,/Then yours is the Earth and everything that's in it,/And – which is more – you'll be a Man my son!"

My hat's not in the ring.



Patrick A. Long
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55th Annual Seminar Luncheon Highlights

– by Carol A. Sherman

The spectacular JW Marriott LA Live in the downtown Los Angeles' sports and entertainment district, provided the setting for ASCDC's 55th Annual Seminar, February 25-26, 2016. The traditional Friday luncheon ceremony culminated one and one-half days of outstanding speakers on important and timely topics of interest to all civil defense attorneys.

The Annual Seminar Luncheon is known for its traditions – the introduction of the incoming ASCDC President, special awards and recognitions, and the special guest speaker. This year's event not only had an exciting new location, but two outstanding guest speakers shared the podium. U.S. Senators Tom Daschle and Trent Lott offered opposing sides of the political spectrum and what inspired them to co-author their new book, *Crisis Point*.

The program began with ASCDC Board member and pitch-perfect vocalist, Lauren Kadish, singing the National Anthem to the more than 400 members, colleagues and guests in attendance. ASCDC Vice President, Clark R. Hudson, acknowledged the many familiar faces in the Diamond Ballroom – Past Presidents, Board of Directors, Committee Chairs and members of the judiciary. He thanked ASCDC Executive Director Jennifer Blevins and her staff for their efforts and hard work on behalf of ASCDC, one of the largest and most influential defense organizations in the country.

In keeping with tradition, newly-elected President, Glenn Barger, presented outgoing President Michael Schonbuch with the President's Plaque for his leadership during the past year. "Mike is an amazing President and an outstanding lawyer. He epitomizes what this organization stands for." Accepting the plaque, Schonbuch summed up his past year as President as "the biggest honor of my life."

Standing in for Pat Long, Past President of both ASCDC and the Defense Research Institute (DRI), ASCDC President Glenn Barger honored Schonbuch with DRI's President's Award for outstanding service.

ASCDC Legislative/CDC Liason Committee Chairman, Lawrence R. Ramsey, received the much-coveted President's Award, whose recipient is chosen by the President and announced at the luncheon. In presenting Ramsey with the award, Schonbuch said, "Larry has shown exemplary service to our organization. He is being honored for his commitment to excellence and hard work with our Board and his hard work with the California Defense Counsel."

In his final Presidential act, Schonbuch introduced newly-elected President Barger as "the hardest working member of our organization. He'll take this organization to the next level."

In his prepared remarks, Barger drew similarities to the past and present as ASCDC celebrates its remarkable 55th Annual Seminar anniversary. "Over these years many things have changed, but I would venture to guess that we enjoy many of the same successes today as well as face many of the same challenges in court, and our daily practices, our initial members faced 55 years ago." Barger noted, "I am confident that I can also confirm that our original members were battling plaintiffs' newest strategies. Appellate decisions and new legislation were impacting their practices, and they were providing their clients with outstanding representation while also attempting to run successful businesses." Commenting on today's legal landscape, he said, "We are still battling the plaintiff's bar." ... "We are providing our clients with outstanding representation, all while trying to run successful businesses."

Barger thanked members for their continued support of ASCDC, noting the growth in

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membership under Schonbuch's leadership, the continued success of the amicus committee's briefs filed in the appellate courts, improved group mail communication, as well as the excellent educational seminars held throughout the year. He acknowledged the efforts of CDC and legislative advocate Mike Belote. "ASCDC has a front row center seat at the table with our judges, including California's chief justice and with legislators on all of the important issues which impact us and our clients on a daily basis." Barger asked for members' continued support in recruiting new members and letting other lawyers know about the great work of the Association on behalf of the defense bar and their practices and firms.

Looking ahead, Barger highlighted a series of initiatives for the year to "help the defense bar achieve outstanding results while practicing law at the highest ethical level and maximum civility for each other and our opponents." The list included continued support of CDC, monitoring of appellate issues and filing amicus briefs, an expanded seminar program, and continued improvements to the group's e-mail networking and news sharing. "I look forward to working with all of you to better our professional lives while continuing to achieve outstanding results for our clients."

2016 Annual Seminar Photos















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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

Finding Common Ground

Senators Tom Daschle and Trent Lott Address the 55th Annual ASCDC Seminar

by Carol A. Sherman

With almost 60 years of service between them, Senators Tom Daschle and Trent Lott shared the podium at the 55th Annual Seminar Friday luncheon, Feb. 26, 2016, at the JW Marriott LA Live in downtown Los Angeles. The highly respected and influential senators expressed a deep admiration and respect for the other, forged while serving as their parties' leaders, beginning in the 1990s into the current century.

Daschle, a liberal democrat from South Dakota, was elected to the U.S. Senate in 1986. He is one of the longest serving Senate democratic leaders in history, and the only one to serve twice, both as majority and minority leader. Senator Lott, the conservative republican son of a Mississippi shipyard worker, began his career as an insurance defense attorney before being elected to the U.S. Senate in 1989. Both Daschle and Lott served in the U.S. House and U.S. Senate.

With the release of their new book, *Crisis Point,* they vowed to continue to work to build bridges between their two political parties during one of the most contentious periods in history.

"I tell people all of the time the most important aspects of our democratic republic is that it's built on four pillars," Daschle began. "It's built on the quality of tolerance we have in our society. It's built on our level of participation, the quality of our leadership and our commitment to the rule of law."

The son of South Dakota bookkeeper, Daschle joked that his hometown was so small that it wasn't until he was about six years old that he realized its name wasn't "resume speed." In 1978, he was elected to the U.S. House of Representatives by 14 votes. "It took a year and 21 days for me to be declared officially the winner." With his congressional future pending, he sought the advice of elder statesman Congressman Claude Pepper, first elected to the Senate in 1936, and later to the House of Representatives where he became Chairman

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of the Rules Committee. The advice Pepper gave the newly elected Daschle was about the importance of being constructive, not destructive, in the political and legislative processes.

The lesson was an important one to Daschle, who called Lott, "a capital C" constructive, adding, "That's one of the reasons I respect him as much as I do."

Lott said of their close friendship. "People say, you guys seem to like each other. You can disagree philosophically and still be able to agree on how you get things done or want to get things done on behalf of your country. Tom and I went through a lot of tough times together as leaders of our parties."

Their ability to work together was never more evident than when they were both in leadership roles in early 2001, the final weeks of the Clinton presidency, when the Senate was evenly split between Democrats and Republicans. During that time, Congress passed the No Child Left Behind Act of 2001, and major tax cut legislation.

Both Senators spoke with reverence about the history and "magic" of the old Senate chamber, the neoclassical room in the U.S. Capitol that once served as the chamber for the U.S. Senate and later the U.S. Supreme Court. Daschle said, "You sit in that chamber and you can appreciate the magnitude of history. It was in that chamber that the great compromise of 1850 took place. It was in that room that all of the contentious debates leading up to the Civil War occurred on a daily basis. Emotions and confrontations and civility became so much of a problem that they actually passed a resolution that fists-a-cuff have to take place outside of the chamber."

Daschle told the story when in 1856, Representative Preston Brooks attacked Senator Charles Sumner with a walking cane over a speech given by Sumner. And he spoke of the historic "giants" who spent their entire congressional careers in that chamber. "When you sit there and realize the magnitude of the history and the contributions made by John Calhoun and Daniel Webster and all of those wonderful leaders like Henry Clay, you have a great appreciation of the opportunity that we have to be leaders too."

Lott also talked about the magic of the old Senate chamber where in 1998 a bipartisan caucus retreated to hammer out a compromise plan for how to proceed after the U.S. House of Representatives had voted to impeach Bill Clinton. "Not too long in the discussion, Ted Kennedy got up and made a bombastic statement on how to proceed. And then Phil Gramm from Texas got up from the Republican side and gave his idea on how to proceed. It sounded like they said the same thing." This became known as the Kennedy-Gramm alignment and enabled both sides to move forward with the impeachment trial. After the failed vote to impeach, "Tom and I shook hands and said we did our job." In a remarkable show of bipartisanship, Lott got a call from President Clinton the following week. "He wanted to talk about a bill that was before the Senate and was being held up. He never mentioned the impeachment trial. He never mentioned that I had voted to remove him from office. But we talked. That's the way government should work."

During their decades of political service, Daschle and Lott served with Senators who are now remembered in history books. Daschle spoke about Senator Robert C. Byrd from West Virginia, who served for 51 years, the longest serving Senator in history, and how he would recite poetry on the Senate floor for hours, and once regaled the Queen of England at a state dinner by reciting all the kings and queens of England.

They also served with Senator Strom Thurmond, who still holds the record for the longest Senate filibuster, lasting 23 hours and 17 minutes. Daschle told how Thurmond, at age 95, dropped to the floor of Sen. Bob Dole's office to show British Prime Minister Tony Blair that he could still do 50 push ups in response to Blair asking how Thurmond stayed so fit.

Daschle also reflected on the traditions of the Senate. New senators are assigned a unique number. "I have one that I think

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is so incredibly wonderful. Mine is 1776." Another tradition has to do with the Senators' desks. "They carve your name in the drawer of the desk so you pull out the drawer and you see the names carved for everyone who sat at the desk all through history." Daschle's Senate desk had Lyndon Johnson's name carved in a drawer.

"Our country is going through a period as divisive and as troubling as that period in the 1850s, the days of Henry Clay and John Calhoun," Daschle said. "We are divisive and polarized in a way that we haven't experienced in over a 100 years. Partly it's a debate over our country's future and role of government whether it should be far more committed to government or far less committed. That's the strategic debate that plays itself out in the context of almost every issue that comes before the Congress. But it's also a tactical debate; a debate between those who believe that they were sent to Washington to stand their ground and never capitulate, and those who believe that the only way you can bring 300 million people together and govern is by finding common ground."

Lott made the point, "You can disagree, but you should be able to agree on what you can do for your country."

Daschle called the current political debate an "unprecedented level of dysfunction," noting that when Lyndon Johnson was majority leader from 1954 to 1960, there was one filibuster during that entire period. In the last six years, there have been 422 filibusters.

Their book, *Crisis Point,* makes a case for the need for congressional and electoral reform with far more citizen participation. "We as a country badly need good leadership." Daschle pointed to the increasingly fragile state of global regions of order and regions of disorder, the challenge faced by thousands of migrants fleeing hostile regions, and the threat of extremists groups and radical terrorists acquiring weapons of mass destruction.

Lott added, "Leadership is such an important thing. It's not that complicated. You have to be able to take a stand, and

to show courage. If you step out and lead, people will follow." He talked about the days when members of Congress moved their families to Washington D.C. "We did things together, like the singing senators. We enjoyed each other's company." An idea shared from their book suggests that high school graduates serve one year in public service, like Teach America, the National Guard or the Peace Corps, "to appreciate the unbelievable thing called the American dream."

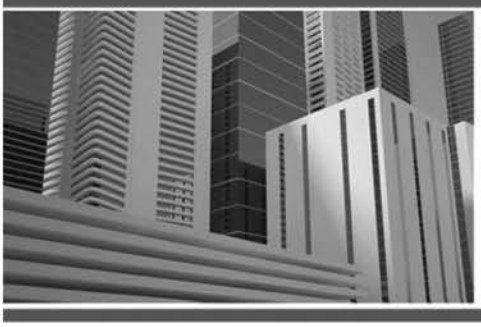
Commenting on the 2016 election, both expressed concern. Lott, who supports Governor John Kasich, described it as "the weirdest one I've ever seen," with "enormous consequences." Daschle pointed to the low approval rating of Congress and the lack of faith in government and its leaders as the source of public frustration fueling the current election debate. "It's between outsiders and insiders more than it is between democrats and republicans," Daschle said. He described Donald Trump as "the quintessential outsider" and Hilary Clinton as the candidate of the insiders. "It could be a Clinton Trump choice, the clearest choice today between an outsider and an insider in all of American history."

Lott talked about the need for a return to a Congress when leaders communicated with each other, regardless of party. "When Reagan was President, he met weekly with both party leaders. We met all of the time." When Clinton was President, he was known for calling all hours of the night." He also described Bush as a good communicator, especially in the aftermath of 9/11. "Now, the President doesn't like to talk. Democratic leaders don't like to talk to Republican leaders. You can't lead that way."

Daschle concluded on a more somber note, reciting the line, "We leave you our deaths: give them their meaning," from the poem, Our Dead Young Soldiers, written in 1941 by poet Archibald MacLeish while he was acting as Librarian of Congress. The poem speaks on behalf of the soldiers who had lost their lives in World War II, yet remains relevant today. "Many men and women have died for our country so we enjoy freedoms we enjoy today. All we have to do is to work to give those lives meaning."

Carol Sherman

Carol Sherman is a freelance writer and marketing consultant, located in Playa del Rey, California. A frequent contributor to *Verdict* magazine, she has covered ASCDC's Annual Seminar for more than a decade.



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A Blog Is Not Just a Blawg

By Laura Reathaford

Is there value to blogging? Why do lawyers blog? Does blogging actually generate business? These are just a few questions that lawyers ask themselves (and their fellow partners) before deciding to blog or, as some more blog-savvy lawyers call it, "b**law**g." As I was in the process of creating *www.employmentclassactions.com* I faced these questions, and many others.

Taking the time to write or create an internet blog might not seem like it will generate an immediate return on investment. While spending a couple of hours crafting one blog post, you may contemplate your billable rate...and the fact that you may never get those two hours back! You also might not generate $1000 of business as a result of the blog (at least not right away). In fact, you may never receive a phone call from a client just because you blogged. However, there are other intangible benefits to blogging that I will discuss here.

I wrote my first blog post in January 2011, when I was an associate and submitted a guest entry for someone else's blog. It never occurred to me that spending *nonbillable* time writing on topics related to my practice area was, in any way, a waste of my time. To the contrary, I found the experience very rewarding and a great impetus to keep abreast of current and changing developments in my field. In fact, I kept at it even though it was not until five years had passed that one of my clients called to tell me that this first blog post answered one of his pending questions after he did an Internet search!

As I advanced with my career, I continued to blog – mainly in the wage and hour area. A number of my blog entries were reposted on other websites: SHRM, Corporate Counsel, CBS News, IMAL, Martindale.com, JD Supra - just to name a few. When the opportunity came to start my own blog, I was excited because I knew it would not only increase the opportunity for me to put out more content but it provided my firm (Venable) with an additional Internet marketing source.

I was challenged to determine an appropriate focus and audience for my blog. But being a wage and hour class action defense lawyer, I knew generally that my audience was in-house counsel and more particularly, company owners who could be faced with having to pay a large class action judgment settlement. I also wanted to add value to the blogging community so that we could link to each other's blogs when appropriate. In my view, it is not enough these days simply to summarize a recent court decision or development. The more you can compare and contrast other blogs, articles and opinions, the more you can link to these blogs and hopefully increase readership.

Another way to increase readership is to invite subject matter experts from outside of my firm to co-write a blog. I am currently working on a PAGA article with a well-known plaintiff's lawyer and intend to post our article on the blog. Providing alternative perspectives on recent developments is always a way to increase readership and also demonstrate thought leadership in your area of expertise.

Another question I am asked quite frequently is "how often should you blog." There is no easy answer. Wage and hour class actions is a topic with a relatively narrow focus. At the same time, new developments appear almost monthly (at least at the trial court level). I try to blog at least twice per month and always report on "big news" when it hits. When I find something new and interesting that has occurred (even at the trial court level) that I think might interest my clients, I try to blog on that. Blogs with a broader focus may follow a different format, linking to others' posts with less new analysis, but more frequency – providing "one stop shopping" for those interested in the topic that the blog is built around. Both models have value to readers.

Keeping content fresh is always desirable. In the class action game, there are so many approaches to discovery and class certification that I rarely see the same decision twice. This allows for fresh content

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and, from time to time, a nice way to report on fresh and nuanced defense strategies.

We are also seeing a trend towards class actions against middle market clients. These businesses have not been "hit" with a wage and hour class action before and do not employ large human resources departments who can always keep on top of new wage and hour developments. My hope is that Venable's employmentclassactions blog will provide important information to these employers and curtail their exposure in potential class action cases. The nice thing about blogging is that the format allows one to be more nimble than some traditional media platforms when shifting focus to responding to developing trends.

At the end of the day, blogging is more than just a way to generate revenue. It is a resource to keep attorneys (and clients) current. Archived posts are also a great research repository not just for outsiders, but for the blogger herself. All the accumulated knowledge that appears in the blog can be easily accessed through the blog's search function. If one vaguely remember that there was a case on a certain issue a few years ago, it can be found quickly with the blog, helping the blogger avoid "reinventing the wheel" when working on a project or answering client and colleague questions. Finally, a blog acts as an inexpensive (yet effective) marketing tool and a way to demonstrate thought leadership in a particular area of expertise. Reporters often use blogs as a resource, and reach out to bloggers for comment that then appears in the mainstream press. This raises the blogger's and her firm's profile. Sometimes, even court personnel follow blogs with interest. While the immediate ROI might not be apparent, it can be an effective long term way to connect with clients and increase your footprint in the legal community.

Laura Reathaford

Laura Reathaford is a partner in the Los Angeles office of Venable LLP, specializing in the defense of employment matters, including wage and hour class actions and PAGA claims.

Blogging – Editor's Sidebar

By Lisa Perrochet

Thinking of starting a blog? There are so many decisions to make along the way. Some are technical: which blogging tool will you use? Some are free and some that have more features are not—but depending on your blogging style and budget, more expensive in this context doesn't necessarily mean better. What settings will you choose? Will you create "permalinks" to avoid "link rot"? Will you allow comments? If so, will you moderate them? And what will your philosophy be for declining to post certain comments?

Other decisions may be dictated by how you will distinguish yourself from the "noise" of all the other blogs out there. Will you have a distinctive "look and feel"? Will you be able to find a niche that is not already covered (or at least not covered well) by someone else? Will you find a way to publicize your blog (such as by writing articles for Verdict magazine!). Perhaps there are cross-marketing opportunities you can explore with other bloggers, and ways to take advantage of other firm marketing efforts, such as client email bulletins, to make sure your blog's existence is not overlooked.

What about honing your own blogging style? Will you go for an advocate's approach, making clear that you take sides on your topic, or will you adopt a more neutral tone? Will you report "just the facts," or include your own formal analysis, or offer casual observations and musings? Will you find pictures to accompany your posts?

How will you fit the task of creating posts into your "real" day job? Do you have a good handle on how long it will take you to create the content? Will you allow "guest" posts to supplement the work you are doing, and will you plan to blog remotely when you are on vacation or out of town on business? Think carefully about these things; consider working for a month or more on posts before "going live" with the blog. That way, you can decide early whether to pull the plug because it's a bigger drain than you realized, or whether to keep it up because it's actually kind of fun to share your thoughts this way.

Finally, put yourself in the blog reader's shoes. What blogs do you wish existed? What are your pet peeves about blogs you follow? Do you notice that there are sites you share posts from, or from which others send you posts? If so, try to figure out what stands out about those sites to make them buzz-worthy.

If you do take the plunge, be sure to browse a lot of other blogs with the questions above in mind. And, taking advantage of the ASCDC community, you might reach out to folks at other ASCDC firms who maintain blogs. Below is a list with contact information for the primary authors of several such blogs (in alphabetical order). Enjoy!

At the Lectern: Practicing Before the California Supreme Court
www.athelectern.com
David Ettinger *(dettinger@horvitzlevy.com)*

California Punitive Damages
www.calpunitives.com
Curt Cutting *(ccutting@horvitzlevy.com)*

Class Action Perspectives for Employers
www.employmentclassactions.com
Laura Reathaford *(lreathaford@venable.com)*

Dowling Aaron law blog
dowlingaaron.com/category/blogs
Steve Vartabedian
(svartabedian@downlingaaron.com)

Michael Smith's Law Blog
smithblawg.blogspot.com
Michael Smith *(smith@dfis-law.com)*

Southern California Appellate News
socal-appellate.blogspot.com
Ben Shatz *(bshatz@manatt.com)*

The American Justice System: Truth, Perception, Reality, Justice and Bias

By Justice J. Gary Hastings (Ret.)

Is a trial a search for the truth? In the third session of my American Justice System seminar at Southwestern Law School I ask my students this question. At the beginning, most of the students say "yes" or "of course," very certain about their responses. But a few others, who may have previously thought about the concept, disagree. This usually results in a heated discussion which ends with the first group of students much less certain than at the outset. Because of the nature of our justice system the question poses a conundrum. Why is this so?

We utilize an adversary system in which the parties present their positions before an impartial tribunal which will then render a decision hopefully resolving the dispute. But the trial takes place after the events giving rise to the dispute, and the parties seek to reenact those events by calling witnesses and presenting documentary and physical evidence in support of their positions. Some of the witnesses may provide uncertain or contradictory testimony about the events. And the documentary and physical evidence may also be contradictory or uncertain. How does the tribunal decide who should prevail?

THE PERCEPTION OF TRUTH: A HYPOTHETICAL

To demonstrate the problem, I'll use a scenario from Eldon Taylor presented in "The Perception of Truth" posted January 21, 2014, on the Huffington Post *www.huffingtonpost.com/eldon-taylor/truth_b_4631982.html*:

- Police receive a phone call in the evening that a homeowner has caught a burglar and is holding him on the front lawn of his house. The police arrive, arrest the alleged burglar and he is now on trial.
- One of the officers testifies that when he arrived on the scene he saw an individual standing over another who was kneeling on the lawn. The person standing was holding a gun over the kneeling person. The officer was told by the person holding the gun he was the homeowner and as he came out of his front door chasing a burglar he yelled at the other individual to stop and wait for the police. The officer identifies the defendant as the person who was kneeling on the lawn.
- The homeowner testifies he was in bed with his wife when he heard a commotion in one of the other rooms. No one else was home and he suspected there may be a burglar. He grabbed the gun he kept next to his bed, called out that he was coming out with a gun, and he then left the bedroom as he heard the other person running out the front door. He followed out the front door, saw a person on his front lawn and told him to stop or he would shoot. The person stopped and knelt down and they waited until the police arrived. He identifies the person as the defendant.
- A woman from next door testifies that the defendant is her boyfriend who was staying with her on the night in question. He said heard a noise, looked out the window and then ran out of the house.
- Another person who had been driving by testifies that he saw a man crawling into the house through a downstairs window. He identifies the defendant as the person he saw.
- Another witness from across the street testifies that she heard a commotion across the street, looked out the window and by the time she got dressed and went outside she saw her neighbor holding a gun over the defendant. She also testifies that the person who drove by the house could not have seen what he claims to have seen because the lighting was inadequate.
- The defendant testifies that he was with his girlfriend when he heard a noise, looked out the window and saw a person running out the front door of the house next door. He ran out of his girlfriend's house to chase the other person and while he was on the front lawn the owner came out with a gun and yelled at him to stop or else be shot. He did

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so and remained on his knees until the police arrived.

It may be that all of the witnesses are testifying "truthfully." But their "truth" is based on their perceptions. As noted by Eldon Taylor: "Perception is an interesting human faculty in that science has clearly shown that there are many shared illusions, preferences, beliefs and so forth that literally reinforce false perceptions." Based on this testimony the tribunal must decide the case. And when it hands down its ruling, no matter what it is, does that mean the "truth" has been found?

The only "reality" in the scenario is that the defendant was arrested and is on trial for burglary. We can't know the "truth" of what actually transpired for sure. There is a chance the tribunal may make a mistake and convict an innocent defendant or acquit a guilty one. And there have been many wrongful convictions overturned by DNA over the past dozen years. So how does our system handle this problem?

"JUSTICE" THROUGH THE RULE OF LAW

Our system relies upon the "rule of law." "Perhaps the most important application of the rule of law is the principle that governmental authority is legitimately exercised only in accordance with written publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process." (Wikipedia) "Public confidence in the judicial institution is one of the essential elements of the preservation of the rule of law." (David M. Rothman, California Judicial Conduct Handbook, 3d, Thomson West, §1.20, p. 7.) Our rule of law requires the prosecuting party, whether in a civil trial or a criminal trial, to meet a particular burden of proof to prevail. In a civil case the burden is preponderance of the evidence, i.e., the evidence is more likely true than not. (CACI 200.) In a criminal case the prosecutor must prove guilt "beyond a reasonable doubt." (Cal. Penal Code §1096.) Therefore, in the scenario above, if the tribunal has reasonable doubt whether the defendant was the burglar, it must find him not guilty. The homeowner may not be happy with the outcome and believe that "justice" was not served. On the other hand, if the defendant is found guilty and was not the burglar, he will believe that "justice" has been denied. So how do we provide "justice" in a system where mistakes can be made?

First, we must recognize that the concept of "justice" is primarily philosophical. And it can be very subjective, as evidenced by reports out of Ferguson, MO., New York City, N.Y. and Baltimore, Md. relating to treatment of detainees by police agencies of those cities. There is no doubt but that under clear and unambiguous circumstances a great majority of the public can agree on whether "justice" has been served. But where the evidence is contradictory or ambiguous there may be opposing views on whether "justice" has prevailed. "According to John Rawls, a philosopher widely known for his book *A Theory of Justice*, the stability of a group or a society depends on the extent to which the members of that society feel that they are being treated justly." (Jayne Reardon, 9/2/2015, "What Is Justice?"*www.2civility.org/what-is-justice.*) How do we retain the public's confidence in the system given that the outcome of a particular trial may not reflect "the truth" and may be perceived as not providing "justice"?

HOW WE EXPECT JUSTICE TO WORK

In the Winter 2006 volume of California Courts Review, Tom R. Tyler, PhD., published an article titled "What Do They Expect?" which reported on studies done to determine what people want from the courts. His conclusion was that people are more interested in how their cases are handled, which he called "procedural justice," than whether they win their case, which he called "distributive justice." He wrote:

> "The idea that people might be more interested in how their cases are handled than whether or not they win often strikes people as counterintuitive and wrong headed. Yet it is the consistent finding of numerous studies conducted over the last

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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.

ATTORNEY FEES AND COSTS

A plaintiff who obtains a settlement obtains a "net monetary recovery" and is the sole party entitled to ordinary costs as prevailing party.

DeSaulles v. Community Hospital of the Monterey Peninsula (2016) 225 Cal.App.4th 1427.

In this employment case, some of the plaintiff's claims were settled by oral agreement, placed on the record, to pay $23,500 and others claims were voluntary dismissed. Some, however, were summarily adjudicated, and plaintiff appealed those rulings, but lost. The trial court awarded the defendant mandatory prevailing party costs under Code of Civil Procedure section 1032. The Court of Appeal (Sixth Dist.) reversed the cost award to the defendant, and ordered mandatory prevailing party costs be awarded to the plaintiff instead. The settlement entered orally before the court constituted a settlement accomplished through "legal process" and therefore constituted a "net monetary recovery" for purposes of determining who was the prevailing party entitled to recover costs.

The Supreme Court affirmed the Court of Appeal. If a defendant pays money to settle a case, the plaintiff obtains a "net monetary recovery," and a subsequent dismissal is not a dismissal "in [the defendant's] favor" within the meaning of section 1032(a)(4). As there can be only one prevailing party in an action for purposes of a cost award, plaintiff was the sole prevailing party even though defendant prevailed on most of plaintiff's claims. This is, however, only a "default rule; *settling parties are free to make their own arrangements regarding costs*."

See also *511 S. Park View, Inc. v. Tsantis* (2015) 240 Cal.App.4th Supp.44 [Appellate Division, LASC: Trial court erred when it awarded attorney fees to prevailing tenants in excess of the limit specified by the parties' lease agreement.].

But see *Dorsey v. Superior Court (Crosier)* (2015) 241 Cal.App.4th 583 [Fourth Dist., Div. One: statute capping attorney fee awards in small claims cases at $150 trumps contractual provision in lease that would allow for greater fees; public policy set forth in section CCP 116.780(c) trumps the freedom to contract for a different amount of attorney fees].

In determining an attorney few award in a section 1988 action, the district court may consider settlements with other parties in evaluating the degree of success achieved by the plaintiff.

Bravo v. City of Santa Maria (9th Cir. 2016) 810 F.3d 659.

Plaintiffs brought a civil rights case under 42 U.S.C. section 1988 against two cities whose police officers allegedly conducted an unlawful search of plaintiffs' home. Before trial, plaintiffs settled with one of the cities for $360,000, which included $169,856 in attorney fees, and $16,208 in costs. The jury later awarded plaintiffs $5,000 against the second city. The district court then awarded plaintiffs $1,023,610 in attorney fees and $13,376 in costs, concluding that the plaintiffs had obtained an excellent result overall.

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The Ninth Circuit affirmed the fee award of over $1 million despite the damages award of only $5,000. In considering a fee award under section 1988, it is appropriate to take into account a plaintiff's success in establishing a public benefit and in obtaining a settlement against another party arising out of the same facts. However, the non-settling city was entitled to offset the cost award (including the fee portion of that award) with the settling city's cost/fee payment to avoid a double recovery.

Compare *Sharif v. Mehusa, Inc.* (2015) 241 Cal.App.4th 185 [Second Dist., Div. 5: When separate causes of action invoke separate fee shifting statutes, there can be a prevailing party for one cause of action and a different prevailing party for the other cause of action.]

ARBITRATION

When interpreting a contract that refers to the enforceability of the arbitration agreement under the "law of your state," state courts may not apply state law that has been preempted by the FAA.

DIRECTV, Inc. v. Imburgia
(2015) 577 U.S. __ [136 S.Ct 463,193, L.Ed.2d 365].

Plaintiffs filed a class action suit against DirectTV, and Direct TV moved to compel arbitration. The parties' arbitration agreement provided that it was governed by the Federal Arbitration Act (FAA), but that the agreement would be unenforceable if "the law of your state" prohibited class action waivers. At the time the plaintiffs signed the agreement, California law held that class action waivers were unenforceable. But intervening United States Supreme Court authority invalidated the California prohibition against class action waivers as preempted by the FAA. The trial court declined to compel arbitration and the California Court of Appeal affirmed, reasoning that the parties had contracted around the federal rule.

The U.S. Supreme Court reversed. No state would interpret the language referring to "the law of your state" as applying an *invalid* law. The FAA does not permit a state court to apply a different rule of contract interpretation (and one that disfavors arbitration) to arbitration agreements than it would apply to contracts generally.

An order dismissing representative PAGA claims is appealable.

Miranda v. Anderson Enterprises, Inc.
(2015) 241 Cal.App.4th 196.

In this wage and hour class action raising a Private Attorneys General Act claim, the trial court dismissed plaintiff's representative PAGA claim and compelled the plaintiff's individual claims to arbitration pursuant to an arbitration agreement under which the plaintiff agreed to arbitrate all employment claims and waived his right to arbitrate class claims. The plaintiff appealed the trial court's order dismissing his representative PAGA claim, but defendants argued the order was not appealable.

The Court of Appeal (First Dist., Div. Five) held the order was appealable. Under the "death knell" exception to the one final judgment rule, an order is immediately appealable if it amounts to a de facto final judgment for absent plaintiffs, under circumstances where the persistence of viable but perhaps di minimis individual plaintiff claims creates a risk no formal final judgment will ever be entered. The doctrine applies to representative PAGA claims just as it does to traditional class claims.

But see *Western Security Bank v. Schneider Limited Partnership* (9th Cir. 2016) 816 F.3d 587 [an interlocutory appeal from an order refusing to stay trial pending arbitration under section 16(a) of the Federal Arbitration Act is available only when a petition to compel arbitration has been denied, not when a party seeks a stay based on an ongoing parallel arbitration].

And see *Gastelum v. Remax International, Inc.* (2016) 244 Cal.App.4th 1016 [Second Dist., Div. Five: an order lifting a litigation stay entered after the arbitrator dismissed the arbitration for the defendant's failure to pay the arbitration filing fee was not appealable; an order lifting a litigation stay is appealable only when it accompanies an order denying a petition to compel arbitration].

An arbitrator may decide whether a non-compete agreement is enforceable.

SingerLewak LLP v. Gantman (2015) 241 Cal.App.4th 610.

An accounting firm partner agreed to be bound by a partnership agreement containing an arbitration agreement and a non-compete agreement. A dispute arose concerning the non-compete agreement and the parties submitted the dispute to arbitration. The arbitrator found for the former partner, but the trial court vacated the award on the ground the non-compete was illegal and unenforceable under Business and Professions Code section 16602 because it contained no geographic limitation.

The Court of Appeal (Second Dist., Div. Eight) reversed. Although non-compete agreements may violate public policy or statutory rights in some cases, determining whether such an agreement is unlawful is within the permissible scope of arbitration. The arbitrator's decision that the agreement was enforceable, even if erroneous, was not reviewable.

Class action waivers remain unenforceable as to "transportation workers" who are exempted from the Federal Arbitration Act.

Garrido v. Air Liquide Industrial U.S. LP
(2015) 241 Cal.App.4th 833.

The plaintiff was a truck driver who carried products across state lines. When he brought a class action against his employer for failure to provide proper meal and rest breaks, the employer sought to compel arbitration and enforce a class action waiver per the parties' arbitration agreement. The trial court denied the motion to compel arbitration on the ground the class action waiver was unenforceable under *Gentry v. Superior Court* (2007) 42 Cal.4th 443. While the case was pending on appeal, the California Supreme Court held in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, that the Federal Arbitration Act (FAA) preempted the *Gentry* rule.

The Court of Appeal (Second Dist., Div. Two) nonetheless affirmed the trial court. Because the FAA exempts "transportation workers," the *Gentry* rule holding that class action waivers are unconscionable and unenforceable remains good law as to them. Although the parties'

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agreement specified it was governed by the FAA, the *Gentry* rule applied because under the FAA, its provisions did not apply to "transportation workers" like plaintiff.

But see *Performance Team Freight Systems, Inc. v. Aleman* (2015) 241 Cal.App.4th 1233 [Second Dist., Div. Two: Truck drivers who had "independent contractor agreement[s]" with a motor carrier did not have "contracts of employment" for purposes of the FAA exemption for "transportation workers," so the drivers' claims were subject to the FAA].

ANTI-SLAPP

Where the plaintiff's claims are fail under the anti-SLAPP statute, a trial court should dismiss the complaint without leave to amend.

Mobile Medical Services for Physicians and Advanced Practice Nurses, Inc. v. Rajaram (2015) 241 Cal.App.4th 164.

The plaintiff nurse had a contract with the defendant medical director of a rehabilitation facility to would provide services to the facility's patients. The plaintiff sued the defendant for allegedly making false statements about plaintiff's conduct to the California Nursing Board, leading to disciplinary action. One claim was that some statements to the board were a breach of contract, i.e., breach of the parties' agreement to collaborate. The defendant successfully moved to strike the complaint on the ground that the plaintiff's claims all arose from protected activity in connection with a public issue, and that plaintiff could not prevail because the claims were barred by the litigation privilege. The plaintiff filed an amended complaint for breach of contract. The defendant filed a second motion to strike, but the trial court denied it.

The Court of Appeal (Fourth Dist., Div. Three) reversed. Once the trial court had determined the conduct at issue was constitutionally protected, it should not have granted leave to amend. Any other result would allow a plaintiff to plead around the defect in the claims, thus undermining the quick dismissal remedy intended by the anti-SLAPP statute.

Defendant's statements to limited audience **accusing student of falsifying data in scientific** papers were not protected activity.

Bikkina v. Mahadevan (2015) 241 Cal.App.4th 70.

Plaintiff alleged that his former professor defamed him by telling university faculty and a group of scientists with whom plaintiff worked that plaintiff had falsified data in two papers. The defendant moved to strike the complaint under the anti-SLAPP statute. The trial court denied the motion.

The Court of Appeal (First Dist., Div. Four) affirmed. Although the statements concerned academic study about global warming, the statements were published only to a limited number of interested persons and concerned papers that were not themselves of widespread public interest. Additionally, the plaintiff had shown a probability of prevailing because defendant's written and oral statements stated plaintiff had falsified and plagiarized data in his scientific papers, and plaintiff denied having done so, thus satisfying the requirements for libel and slander per se.

Defendant's misleading use political opponent's name as internet domain to direct internet **traffic to defendant's views arose from protected** activity.

Collier v. Harris (2015) 240 Cal.App.4th 41.

Plaintiff and defendant supported opposing school board candidates. Defendant registered domain names that appropriated plaintiff's name, and then used the domains to redirected internet traffic to information about defendant's preferred candidates. Plaintiff sued, claiming that defendant violated Business and Professions Code section 17525 (prohibiting misleading use of domain names). The trial denied defendant's motion to strike the motion, finding that the defendant's activities did not arise from protected speech.

The Court of Appeal (Fourth Dist., Div. Three), reversed. The defendant's use of the internet domains was in furtherance of his free speech rights on a matter of public interest. Thus, defendant had satisfied the first prong of the anti-SLAPP analysis (whether the defendant's conduct arose from protected activity). Remand was appropriate to give the trial court the first opportunity to determine whether the plaintiff was nonetheless likely to prevail (prong two of the anti-SLAPP analysis).

EVIDENCE

Inadvertent production of privilege documents pursuant to a Public Records Act request does not waive the privilege.

Ardon v. City of Los Angeles (2016) 62 Cal.4th 1176.

Plaintiff filed a class action lawsuit against the defendant city raising tax issues. In discovery, the city withheld certain documents as privileged and attorney work product. Later, one of plaintiff's attorneys served a Public Records Act request for documents relating to the same issues. The city's administrative office provided the documents. When alerted by plaintiff's attorneys to this production, the city said the documents had been inadvertently produced and moved for an order compelling return of the documents. The trial court ruled that the production of documents under the Public Records Act waived the privilege, and the Court of Appeal (Second Dist., Div. Six) affirmed.

The California Supreme Court reversed. Under Government Code section 6254.5, a public entity's inadvertent disclosure of a privileged document to a requestor under the Public Records Act does not waive the privilege.

See also *Catalina Island Yacht Club v. Superior Court (Beatty)* (2015) 242 Cal.App.4th 1116 [Fourth Dist., Div. Three: Trial courts may not sanction a party for a untimely and inadequate privilege log by deeming the privilege waived; Evidence Code section 912 provides for waiver of the attorney-client by voluntary disclosure, failure to raise the privilege, or failure to timely object to a production demand. It does not provide for a forced waiver of the privilege based on an inadequate privilege log. The remedy for a deficient privilege log is an order compelling the withholding party to provide a further privilege log that includes the necessary information to rule on the objection to disclosure, or monetary sanctions].

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See also *League of California Cities v. Superior Court (San Diegans for Open Government)* (2015) 241 Cal.App.4th 976 [Fourth Dist., Div. One: nonparty to trial court proceedings who would be irreparably harmed by the disclosure of public documents under a Public Records Act request is a "party" for purposes of the Act, so may challenge a trial court order compelling disclosure of documents; if the parting asserting the privilege requests in camera review to establish the privileged nature of the documents, a trial court should grant the request before concluding the privilege does not apply].

See also *Caldecott v. Superior Court (Newport-Mesa Unified School District)* (2015) 243 Cal.App.4th 212 [Fourth Dist., Div. Three: the public interest in disclosing documents relevant to claims of wrongdoing by school district officials outweighed any privacy interests, requiring production of the documents under the Public Records Act so that requestor could make them public, subject to the trial court's in camera review to determine if any were protected by the attorney-client privilege].

Defendants must meet certain conditions to introduce evidence of amount paid by factor to purchase plaintiff's health care lien, to show purchase price demonstrates reasonable value of treatment.

Uspenskaya v. Meline (2015) 241 Cal.App.4th 996.

An uninsured plaintiff contracted with her medical providers to treat her in exchange for a lien on whatever she might recover in her personal injury lawsuit. A non-party "factor," MedFin Managers, then paid to purchase that lien for less than the face amount of the lien. Applying Evidence Code section 352, the trial court excluded evidence of the amount of MedFin's discounted payment for the lien as evidence of the reasonable value of the medical services.

The Court of Appeal (Third Dist.) affirmed. Under *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, personal injury plaintiffs are limited to recovering the amounts actually paid for medical costs, not the inflated amount supposedly "billed" by their medical providers. Here, evidence of the discounted payments had the potential to show the reasonable value of the plaintiff's medical services, but to establish relevance the defendant needed to present additional evidence (beyond the lien's purchase price) showing a nexus between the amount paid by the factor and the reasonable value of the medical care. The defendant did not meet its burden because it did not present evidence showing that the amount of MedFin's payment represented the reasonable value of the plaintiff's medical treatment rather than just a discount reflecting the difficulties of collecting the debt.

CIVIL PROCEDURE

An attorney's affidavit attesting to mistake, inadvertence, surprise, or neglect in support of a motion to vacate under the mandatory relief provision of Code of Civil Procedure section 473(b) need not disclose the reasons for the mistake.

Martin Potts & Associates, Inc. v. Corsair, LLC (2016) 244 Cal.App.4th 432.

In this contract action, the defendant defaulted. It then moved to set aside the default under Code of Civil Procedure section 473, subd. (b), submitting an affidavit from its long-time counsel explaining that the default resulted from his failure to respond to the legal documents but declining to state the reasons for that failure. The trial court set aside the default and ordered the defendant to pay reasonable compensatory legal fees.

The Court of Appeal (Second Dist., Div. Two) affirmed. The mandatory relief provision of section 473, subd. (b), requires an attestation to the fact of mistake, inadvertence, surprise, or negligent, not the reasons behind it, as it applies even in the event of inexcusable neglect.

See also *Austin v. Los Angeles Unified School District* (2016) 244 Cal. App.4th 918 [Second Dist., Div. Seven: to obtain relief from default under section 473(b), normally the moving party establishes the facts supporting relief by submitting affidavits or declarations that are verified or signed under penalty of perjury, but there is no requirement the motion itself be verified or sworn to under penalty of perjury]

See also *Garibotti v. Hinkle* (2015) 243 Cal.App.4th 470 [Fourth Dist., Div. Three: The time limits specified in Code of Civil Procedure section 663a for vacating a judgment are jurisdictional. The trial court's power to rule on a motion to vacate expires 60 days from notice of entry of judgment or, if not notice has been given, 60 days from the notice of intention to move to vacate. An order granting the defendant's motion to vacate a default judgment more than 90 days after notice was given was void].

A stipulated order "staying" the trial date but requiring the parties to respond to discovery and participate in mediation is not a "stay" **for purposes of tolling the five-year period for** bringing a case to trial.

Gaines v. Fidelity National Title Ins. Co. (2016) 62 Cal.4th 1081.

In this real estate dispute, the parties stipulated to a 120-day stay of the trial date so they could engage in mediation, although they agreed that discovery would continue. When the case was not brought to trial within the five-year period required by Code of Civil Procedure section 583.310, the defendant moved to dismiss. The trial court granted the motion. In counting the time accrued towards the five year period, the court declined to exclude the 120 day stay period, finding that it did not qualify as a time when the trial was "stayed or enjoined" "impossible, impracticable or futile" for purposes of section for purposes of section 583.340, subds. (b) or (c). The Court of Appeal affirmed.

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The California Supreme Court affirmed. The order striking the trial date and "staying" the proceedings pending the mediation did not effect a complete stay of the prosecution of the action because discovery was ongoing and it ordered the parties to participate in mediation. Also, the order functioned more as a continuance than a true stay, which is usually dependent on external events. The order further did not create a circumstance of impracticability because plaintiff agreed to the order, remained in control of the proceedings, and made meaningful progress towards resolving the case during the stay period.

See also *Castillo v. DHL Express (USA)* (2015) 243 Cal.App.4th 1186 [Second Dist., Div. Three: Under Code of Civil Procedure 1175.7(b), while participation in a court-sponsored mediation program during the last 6 months of the 5 year period for bringing a case to trial extends the 5 year deadline, participation in private, non-court-sponsored mediation does not].

Trial court properly granted terminating sanctions based on lawyer's outrageous misconduct.

Crawford v. JPMorgan Chase Bank, N.A.
(2015) 242 Cal.App.4th 1265.

At a deposition, an attorney representing himself threatened opposing counsel with pepper spray and a stun gun. Defendants moved for terminating sanctions, which the attorney opposed contemptuously, referring to the trial judge as "defense counsel's pet dog," as well as "sick and demented." The trial court entered terminating sanctions.

The Court of Appeal (Second Dist., Div. Six) affirmed. "If ever a case required a terminating sanction, this is it." The attorney "made it impossible to continue with the litigation. Far from the trial court abusing its discretion, it would have been an abuse of discretion not to impose a terminating sanction."

See also *Haeger v. The Goodyear Tire & Rubber Company* (9th Cir. 2015) 793 F.3d. 1122 [district court did not abuse its discretion in awarding over $2.2 million in sanctions against defendant and its counsel based on their decision to withhold relevant evidence, amounting to a fraud on the court].

CLASS ACTIONS

Defendant cannot moot federal class action by offering complete relief to certain class members to "pick off" named class representative.

Campbell-Ewald Co. v. Gomez
(2016) 577 U.S. __ [136 S.Ct 663,193, L.Ed.2d 571].

The named plaintiff brought a class action under the Telephone Consumer Protection Act for unsolicited text messaging. The defendant made an offer of judgment under Federal Rule of Civil Procedure 68, offering to provide all the relief the plaintiff sought individually. After the plaintiff failed to accept the offer, the defendant moved to dismiss the suit as moot. The district court denied the motion. In the appeal from the ultimate judgment, the Ninth Circuit held that neither the named plaintiff's individual claims nor the class claims were mooted by the unaccepted offer of judgment.

The U.S. Supreme Court affirmed, holding that the unaccepted offer of judgment had no legal effect and thus could not moot the case even if the offer would have provided complete relief if accepted. However, the Court left open the issue of whether a defendant's *payment* of complete relief to the named plaintiff would moot the case.

U.S. Supreme Court permits use of statistical sampling in some class actions under the FSLA.

Tyson Foods, Inc. v. Bouaphakeo
(2016) 577 U.S. __ [135 S.Ct 2806,192, L.Ed.2d 846].

Tyson Foods employees claimed they were not compensated for time spent donning and doffing protective equipment, and for time spent walking to and from the plant floor. They sought class certification based on expert evidence of the average time employees spend on those tasks. The district court certified the classes, the case went to trial, and the jury returned a verdict against Tyson Foods, which the Eighth Circuit affirmed.

The U.S. Supreme Court affirmed, holding that the use of statistical evidence and representative testimony to certify a class was proper because the Fair Labor Standards Act (which governed) permitted such techniques to determine liability and damages in an individual case where the employer failed to fulfill its statutory duty to keep adequate time records. The Court left open for a future case the question whether class damages are permissible where the class includes uninjured members.

A named plaintiff who never had standing as a **class member was not entitled to precertification** discovery.

CVS Pharmacy, Inc. v. Superior Court (Deluca)
(2015) 241 Cal.App.4th 300.

The named plaintiff brought a class action alleging the defendant had an unlawful termination policy. The plaintiff, however, had not been terminated and was not otherwise affected by the allegedly unlawful aspects of the policy. She therefore lacked standing. The trial court sustained the defendant's demurrer but gave her 90 days to find a substitute plaintiff, and ordered the defendant to produce the names and contact information of its current and former employees. The defendant sought a writ of mandate.

The Court of Appeal (Third Dist.) issued the writ precluding the discovery. A trial court must balance the benefits to be gained through precertification discovery against the actual or potential for abuse. Here, there was a significant potential for abuse because the discovery would infringe on the employees' privacy rights, and would not have benefits because any class members who had been wrongfully terminated could bring individual actions. Because the moving party was never a member of the class, "[t]he potential for abuse of the class action procedure is self-evident."

Cosmetic packaging stating correct product weight was not deceptive even though it did not state that some of the product could not be used.

Ebner v. Fresh, Inc. (9th Cir., Mar. 17, 2016, No. 13-56644) __ F.3d __ [2016 WL 1056088].

In this putative class action based on California consumer statutes, the plaintiffs alleged that the defendant's lip balm was deceptively labeled because it did not disclose that 25% of the product would remain in the tube, unable to be used. The district court dismissed the action with prejudice on the ground no plausible cause of action could be stated.

The Ninth Circuit affirmed. The labels complied with law requiring them to state the weight of the product. And even if plaintiffs could state a claim based on the failure to include a supplemental statement that not all of the product could be used, no reasonable consumer would be deceived by the lack of such a statement because the consumer could see that some of the product remains in the tube when it is fully screwed open and so could not reasonably expect that all of the product would be usable.

TORTS

Design immunity does not shield a government entity from liability for "add-on" features that are not part of an approved design.

Castro v. City of Thousand Oaks (2015) 239 Cal.App.4th 1451.

A car struck a group of pedestrians crossing at an intersection controlled by a warning signal. The driver saw neither the pedestrians nor the signal. The injured pedestrians sued the city alleging that the signal lulled them into thinking it was safer to cross at the intersection than it was. The city moved for summary judgment on the basis of design immunity, contending that the city engineer had discretion to place and maintain traffic control devices and that, even though the signal was not part of the approved design, the city could not be liable for adding even greater safety features than called for by the approved plan. The trial court granted summary judgment.

The Court of Appeal (Second Dist., Div. Six) reversed. Design immunity requires the public entity to have approved the design. Design features that are not part of the approved design and that are merely discretionary "add-ons" do not qualify for the defense. Whether the signal made the intersection more or less safe was a jury issue.

Contractor who supplied allegedly toxic building materials to jobsite years before claimed exposure can be strictly liable for product defects.

Hernandezcueva v. E.F. Brady Company, Inc. (2016) 243 Cal.App.4th 249.

In this suit for personal injuries arising from exposure to asbestos, the plaintiff named as a defendant a subcontractor who had installed drywall and joint compound at the plaintiff's worksite twenty years prior. The subcontractor moved for summary judgment on the ground it was not a supplier of asbestos products, and instead merely installed such products that had been purchased from others. The trial court granted summary judgment.

The Court of Appeal (Second Dist., Div. Four) reversed. Given that about 25% of the subcontractor's bid was for materials and the subcontractor selected the materials and brought them to the worksite, there was sufficient evidence from which a jury could conclude the subcontractor was more than an "occasional seller" of asbestos-containing joint compound and drywall, and accordingly was within the stream of commerce and subject to strict liability.

See also *Johnson v. United States Steel Corporation* (2015) 240 Cal. App.4th 22 [First Dist., Div. Three: a raw materials supplier of a chemical (benzene) used by the purchaser to make another product (auto repair solvent) that allegedly harmed plaintiff is not entitled to summary judgment without demonstrating that its product was non-defective as sold, which would defeat a consumer expectations theory of liability].

See also *Brady v. Calsol, Inc.* – (2015) 241 Cal.App.4th 1212 [Second Dist., Div. 8: trial court erred in granting summary judgment to mineral spirits supplier in absence of definitive evidence the mineral spirits were not inherently dangerous as sold].

Workers' compensation exclusivity applies to asbestos exposures from materials acquired at worksite, even if at least some of the allegedly harmful exposure occurred when materials were used at home.

Melendrez v. Ameron Internat. Corp. (2015) 240 Cal.App.4th 637.

Employee claimed he developed mesothelioma from exposure to asbestos-containing pipe materials he used at work and sometimes took home for personal use with his employer's permission. His survivors sued the employer, which moved for summary judgment on ground of workers' compensation exclusivity. The trial court granted the motion. The trial court also awarded the defendant its expert witness fees, concluding that the defendant's pretrial offer to waive costs was a good faith offer to compromise under Civil Code section 998.

The Court of Appeal (Second Dist., Div. Four) affirmed. Workers' compensation provided the survivors' exclusive remedy, even if some of the employee's exposures to asbestos occurred while working at home on personal projects with materials he took from work with his employer's permission. Additionally, given that the survivors were aware of the workers' compensation exclusivity defense and that the defendant had retained an asbestos-removal expert, the defendant's offer to waive costs was a good faith settlement offer when made.

When an injured plaintiff and a county lienholder dispute entitlement to funds from the tortfeasor, the tortfeasor may not simply issue a joint check; it should interplead the funds.

County of Santa Clara v. Escobar (2016) 244 Cal.App.4th 555.

Escobar received treatment at a county hospital for injuries he sustained in an auto accident with Fresh Express's employee. Escobar sued Fresh Express, and the county asserted a lien against any recovery for the value of the medical services provided. Escobar later obtained a judgment against Fresh Express. Because Escobar claimed the lien was excessive, Fresh Express tendered a check jointly payable to Escobar and the

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county, leaving Escobar and the county to resolve their differences. But Escobar refused to pay the county, so the county sued both Escobar and Fresh Express. Fresh Express demurred on the ground it had no further liability beyond its payment of the full judgment. The trial court sustained the demurrer without leave to amend.

The Court of Appeal (Sixth Dist.) reversed. Government Code section 23004.1 authorizes a county to obtain reimbursement for medical treatment rendered at county expense to persons injured through the torts of others either by suing the tortfeasor directly or by imposing a lien on the injured person's recovery. It is the tortfeasor's obligation to satisfy the county's judgment or lien. Thus, in the event of a dispute between the injured person and the county, the tortfeasor must interplead the funds to allow the court to distribute them, or pay each party the appropriate sum and demand a satisfaction of judgment under statutory procedures. It may not simply "wash its hands" by issuing a joint check.

LABOR & EMPLOYMENT

Under Labor Code sections 98.7 and 6312, filing a complaint with the Labor Commissioner is not a precondition to bringing suit.

Sheridan v. Touchstone Television Productions, LLC
(2015) 241 Cal.App.4th 508.

After being fired from the television show *Desperate Housewives*, the plaintiff actress sued alleging she was terminated in retaliation for complaining about a battery supposedly inflicted on her by the show's creator. Defendant demurred, arguing the plaintiff failed to exhaust her administrative remedies because she never filed a claim with the Labor Commissioner. The trial court granted the demurrer.

The Court of Appeal, (Second Dist., Div. Four) reversed. Under the relevant statutes, Labor Code sections 98.7 [providing that employee "may" make a claim to the Labor Commissioner] and 6312 [prohibiting discrimination against employee who complains about unsafe working conditions], filing a complaint with the Labor Commissioner was permissive, not mandatory. Subsequent legislative amendments to those sections stating that the exhaustion is not required merely clarified the statutes, and did not indicate exhaustion was mandatory before the amendments. Filing a Labor Commissioner complaint is mandatory only when the relevant Labor Code section expressly requires exhaustion of administrative remedies.

A plaintiff who claims wrongful termination due to disability alleges a termination of violation of public policy, not a worker's compensation claim.

Prue v. Brady Co./San Diego, Inc.
(2015) 242 Cal.App.4th 1367.

The plaintiff allegedly became disabled due to a workplace injury. After he was terminated, he filed a complaint alleging he was terminated due to his injury and was therefore discharged in violation of fundamental public policy for purposes of the Federal Employment and Housing's Act's prohibition on discrimination against the disabled. The defendant employer moved for summary judgment on the ground the plaintiff's claim was merely only for workers' compensation retaliation under Labor Code section 132a, and therefore barred by workers' compensation exclusivity and the FEHA one-year statute of limitations applicable to private actions. The trial court granted the employer's motion.

The Court of Appeal (Fourth Dist., Div. One) reversed. The allegations in the plaintiff's complaint made numerous references to the FEHA and plainly alleged a termination in violation of public policy, not a claim for disability benefits. And the action was timely because plaintiff's common law wrongful termination claims were not subject to FEHA's one-year limit; rather Code of Civil Procedure section 335.1's two-year statute of limitations for tort actions based on injuries caused by the wrongful act of others applied.

CONTRACTS

Court of Appeal enforces agreement to prohibit extrinsic evidence in interpreting contract.

Hot Rods, LLC v. Northrop Grumman Systems Corp.
(2015) 242 Cal.App.4th 1166.

In this lawsuit arising from the sale of real property, the parties' written contract included an integration clause stating that "no extrinsic evidence whatsoever may be introduced in any judicial proceedings involving this Agreement." The referee before whom the case was tried considered such evidence, however, and found for the plaintiff.

The Court of Appeal (Fourth Dist., Div. Three) reversed. While ordinarily, even for an integrated contract, evidence from beyond the four corners of the written agreement may be admitted to explain the meaning of ambiguous contractual language, parties may contract out of the rule. It was therefore error to admit extrinsic evidence to interpret the document.

INSURANCE

The efficient proximate cause doctrine is the "preferred method" for determining first-party coverage for losses caused by multiple perils.

Vardanyan v. Amco Ins. Co.
(2015) 243 Cal.App.4th 779.

The defendant insured the plaintiff's rental house, which suffered damage to the flooring allegedly because of various covered perils. The insurer denied coverage, relying on a number of policy exclusions. In the ensuring breach of contract and bad faith trial, the trial court refused to give a jury instruction stating that when a loss is caused by both covered and excluded risks, the loss is covered if the most important or predominant cause (i.e., the efficient proximate cause) is a covered risk. Instead, the trial court stated it would instruct the jury that the damage was not covered if any peril not specifically listed as covered contributed to the collapse. Based on this ruling, the trial court granted the defendant's motion for a directed verdict, and the plaintiff appealed.

The Court of Appeal (Fifth District) reversed. The efficient proximate cause doctrine is the "preferred method" for determining coverage of first-party property losses caused by multiple risks, at least one of which is covered by the policy and one of which is not. The court rejected the insurer's contention that a loss is covered only if no peril other than covered perils contributed to the loss.

When "collapse" is defined as "sudden and complete breaking down," there is no coverage for building repairs even to avoid imminent collapse.

Grebow v. Mercury Ins.Co.
(2015) 241 Cal.App.4th 564

Mercury's insureds incurred $91,000 to repair damage to the deck and second story of their home and sought coverage under their homeowners' policy, arguing the costs were necessary to avoid an imminent collapse and mitigate damages. Mercury denied coverage because the policy defined "collapse" as "sudden and complete breaking down or falling in or crumbling into pieces or into a heap of rubble or into a flattened mass," and excluded "a condition of imminent danger of collapse of a structure or building." In the insureds' coverage suit, the trial court granted summary judgment for Mercury.

The Court of Appeal (Second Dist., Div. Five) affirmed. Under this policy language, an imminent collapse is not covered. Further, the policy's requirement that insureds mitigate their damages did not create coverage for imminent collapse, because the mitigation requirement applies only to covered losses. To read the mitigation obligation as creating coverage for costs incurred to avoid covered losses would convert the policy into a maintenance agreement.

CASES PENDING IN THE CALIFORNIA SUPREME COURT

Addressing whether Right to Repair Act applies even when homeowners bring common law causes of action for residential construction defects.

Albany v. S.C. (Van Tassell) (2015) 239 Cal.App.4th 1132
(Review granted Nov. 24, 2016, S229762.)

Plaintiff homeowners sued a builder for construction defects, alleging common law claims and violation of Civil Code section 896's building standards. Because section 896 is part of the Right to Repair Act, plaintiffs were required to give the builder the opportunity to repair the defects in a nonadversarial prelitigation process. Because they failed to do so, the builder was entitled to a stay of the lawsuit. Rather than face a stay, plaintiffs dismissed their section 896 cause of action and proceeded only on the common law claim; which they said did not trigger the duty to comply with the Right to Repair Act. The trial court agreed, and the builder sought a petition for writ of mandate. The Court of Appeal, Fifth District, granted the writ, holding that the Right to Repair Act applies, by its plain terms, to "any" action seeking recovery for residential construction defects and cannot be avoided by pleading only common law claims.

The California Supreme Court granted review to address whether the Right to Repair Act (Civ. Code, § 895 et seq.) precludes a homeowner from bringing common law causes of action for defective conditions that resulted in physical damage to the home.

Addressing whether the anti-SLAPP statute **applies to actions taken in official proceedings** when the relief sought is not based on protected communications.

Park v. Board of Trustees of California State University
(2015) 239 Cal.App.4th 1258
(Review granted Dec. 16, 2016, S229728.)

In this college faculty member's suit alleging that CSU denied him tenure and subsequently terminated him based on his national origin, CSU moved to strike the complaint on the ground the tenure process is an "official proceeding authorized by law" for purposes of the anti-SLAPP statute, Code of Civil Procedure section 425.16, subdivision (e)(1). CSU argued the suit was based on statements and written reviews generated during that tenure process, which made the statements were protected communications. The trial court denied the motion, but the Court of Appeal (Second Dist., Div. Two), reversed, holding that the tenure denial decision did "arise out of" protected communications.

The California Supreme Court granted review on the following issue: "Does Code of Civil Procedure section 425.16 authorize a court to strike a cause of action in which the plaintiff challenges only the validity of an action taken by a public entity in an 'official proceeding authorized by law' but does not seek relief against any participant in that proceeding based on his or her protected communications?"

Addressing whether civil litigants who obtain fee waivers are entitled to have the court provide a court reporter.

Jameson v. Desta (2015) 241 Cal.App.4th 491
(Review granted Jan. 27, 2016, S230899.)

In this case involving a pro per (incarcerated) plaintiff, the defendant orally moved for nonsuit, which was granted. The nonsuit proceedings were not reported because the superior court adopted a policy requiring the parties to provide their own reporters for civil trials, and plaintiff could not afford a reporter. The Court of Appeal (Fourth Dist., Div. One) held that the trial court did not err in failing to have the proceedings reported, despite that the plaintiff had obtained a fee waiver, and that accordingly, the nonsuit had to be affirmed because there was no record of the proceedings available for appellate review.

The California Supreme Court granted review to address this issue: "In the case of a litigant who has been granted a fee waiver (Gov. Code, § 68631), can a county's superior court employ a policy that has the practical effect of denying the services of an official court reporter to civil litigants who have been granted such a fee waiver, if the result is to preclude those litigants from procuring and providing a verbatim transcript for appellate review?"

several decades, including a recent study of California state courts. These studies show that people use ethical criteria to evaluate their experiences, and that they particularly focus on their views about appropriate ways for authorities to act when deciding on how to resolve legal problems." (*Id.* at pg. 22.)

He identified four factors that "dominate evaluations of procedural justice":

1. "Voice" – people want to be able to explain their case to legal authorities.
2. "Authorities' neutrality" – they want the authorities to make decisions "based on consistently applied legal principles and the facts of the case, not personal opinions *and biases*."
3. "Respectful treatment" – they want to be treated with dignity and politeness.
4. "Trust in authorities" – "People react favorably to the judgment that the authorities are benevolent and caring and are sincerely trying to do what is best for individuals." (*Id.* at 22-23, italics added.)

Probably the most troubling factor among the four identified by Tom Tyler is the issue of bias. In her posting "What is Justice?" Jayne Reardon made the following observation: "It seems as if justice is as elusive as ever. The social unrest following the killing of citizens by police officers from Ferguson to New York to Baltimore supports the feeling that not enough has changed with respect removing race from the justice equation. They also confirm the warning of philosopher Rawl that when there is a perception that the system does not treat people fairly, society becomes unstable."

Bias is inherent in our system of justice: "Bias is not about being good or bad. It's about being human." (Verna A. Myers, Esq. *Moving Diversity Forward* ABA 2011.) "Even the most well-meaning person unwittingly allows unconscious thoughts and feelings to influence seemingly objective decisions." (Dr. Mahzarin R. Banaji, *Harvard Business Review* (2003).) How can we address bias in our system?

BIAS AND PERCEIVED BIAS IN THE JUSTICE SYSTEM

Explicit bias refers to attitudes and beliefs we have about a person or group on a conscious level. We have addressed explicit bias in a number of ways. For example, California Rules of Professional Conduct, Rule 2-400(B) prohibits discrimination "on the basis of race, national origin, sex, sexual orientation, religion, age or disability in the management or operation of a law practice." In jury selection it is improper to use a peremptory challenge against one or more persons of a recognized group based on perceived bias of that group. (*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.)

While explicit bias is a problem, it is implicit bias that is more difficult to address. "An implicit bias is a positive or negative mental attitude towards a person, thing, or group that a person holds at an unconscious level.... Research has found that our implicit and explicit biases often diverge. For example, a person may consciously express a neutral or positive opinion about a social group that they unconsciously hold a negative opinion about." (From a presentation at The American Bar Association Young Lawyers Division 2014 Spring Conference, Pittsburgh, PA: "Practicing Law While Breaking the Confines of Implicit Bias in and Outside the Courtroom." *www.americanbar.org/content/dam/aba/administrative/young_lawyers/2014_spring_conference/practicing_law_while_breaking_confines_bias.authcheckdam.pdf)*

In other words, a person may believe he or she is totally unbiased toward a given race or ethnic background, but his or her actions may reflect an unconscious belief based on stereotypes.

For example, when I was a trial judge we were selecting a jury for a case involving medical malpractice. Plaintiff's counsel was inquiring whether any of the jurors or their family members had training in the medical field. One of the prospective jurors, a middle-aged African-American woman, raised her hand and told counsel she was a nurse and her father had been a medical

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doctor; to which counsel replied: "And, of course, he went to Howard University." Her response: "No, he graduated in the late 1940s from the University of Southern California." Counsel's response suggested an understanding based on racial stereotyping.

More recent examples of racial or ethnic stereotyping are exhibited in a posting on BuzzFeed from December 9, 2013 under the title, "21 Racial Microaggressions You Hear On A Daily Basis." *www.buzzfeed.com/hnigatu/racial-microagressions-you-hear-on-a-daily-basis#.qwRgLJz51* The article defines the term microaggression as '"brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults toward a people of color.'"

A photographer asked her friends at Fordham University's Lincoln Center campus to write down instances of racial microaggressions they had experienced. She then took pictures of the individuals with the written words posted on signs held by them. A few examples will suffice. A young black man holds up a sign that reads "You don't act like a normal black person ya' know?" A young black woman holds up a sign that reads "Courtney I never see you as a black girl." A young Asian woman holds a sign which says "So ... you're Chinese ... right?" Another young Asian woman holds a sign that reads "Can you see as much as white people? You know, because of your eyes ...?" Finally, a dark skinned woman holds up a sign that reads "You're really pretty ... for a dark skin girl." Those making the comments probably perceived them to be neutral or even favorable.

The problem with implicit bias is that we don't necessarily know or understand what biases we, or others, have. And everyone in the legal system has them: the parties, the lawyers, the witnesses, the jurors, the court staff and the judges. How do we address implicit bias in the system?

WHAT CAN WE DO TO PROMOTE JUSTICE BY ADDRESSING BIAS?

I previously referenced the presentation by The American Bar Association Young Lawyers Division at the 2014 Spring Conference titled "Practicing Law While Breaking the Confines of Implicit Bias in and Outside the Courtroom. The program identified six steps an *organization* can take to address implicit bias:

1. Develop guidelines that offer concrete strategies on how to correct for implicit bias.
2. Institute formal protocols or develop decision-support tools for guidance.
3. Conduct an organizational overview.
4. Implement peer-review.
5. Follow equal-opportunity and affirmative action (EOAA) hiring practices.
6. Bar associations can implement the tools provided by the ABA to educate others about implicit bias.

It also identified six steps an *individual* can take:

1. Allow for more time on cases in which implicit bias may be a concern.
2. Clear your mind and focus on the task at hand.
3. Seek greater contact with counter-stereotype role models.
4. Practice making counter-stereotype associations.
5. Educate yourself and others.
6. Use the ABA toolbox, which was developed by the ABA Section of Litigation to be used for group presentations offering introductory materials, a Power Point presentation and video materials. It can be accessed at *www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox.html.*

The National Center for State Courts undertook a project on implicit bias and judicial education resulting in a report titled "Helping Courts Address Implicit Bias." The report addresses what the courts as organizations can do as well as what individuals within those organizations can do to address implicit bias. It addresses six risk factors which may increase the likelihood that implicit bias may influence one's thoughts and actions:

1. Certain emotional states;
2. Ambiguity;
3. Salient social categories;
4. Low-effort cognitive processing;
5. Distracted or pressured decision-making circumstances; and
6. Lack of feedback.

It also identifies seven strategies that show promise in reducing the effects of implicit bias on behavior:

1. Raise awareness of implicit bias.
2. Seek to identify and consciously acknowledge real group and individual differences.
3. Routinely check thought processes and decisions for possible bias.
4. Identify distractions and sources of stress in the decision-making environment and reduce them.
5. Identify sources of ambiguity in the decision-making context and establish more concrete standards before engaging in the decision-making process.
6. Institute feedback mechanisms.
7. Increase exposure to stigmatized group members and counter-stereotypes and reduce exposure to stereotypes.

For the full report, see Casey, Warren, Cheesman, and Elek (2012) available at *www.ncsc.org/ibreport*.

Volume 51, Issue 3 (2015), of *Court Review*, the Journal of the American Judges Association, contains an article authored by Jennifer K. Elek Ph.D. and Paula Hannaford-Agor titled "Implicit Bias and the American Juror." It discusses implicit bias and its role in juror decision making, addressing implicit bias with jurors and provides an experimental Implicit-Bias jury instruction, with annotations, which has been tested with

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mock juries. The instruction, at page 119 of the article, provides:

"Our system of justice depends on the willingness and ability of judges like me and jurors like you to make careful and fair decisions. What we are asked to do is difficult because of a universal challenge: We all have biases. We each make assumptions and have our own stereotypes, prejudices and fears. These biases can influence how we categorize the information we take in. They can influence the evidence we see and hear, and how we perceive a person or situation. They can affect the evidence we remember and how we remember it. And they can influence the 'gut feelings' and conclusions we form about people and events. When we are aware of these biases, we can at least try to fight them. But we are often not aware that they exist.

"We can only correct for hidden biases when we recognize them and how they affect us. For this reason, you are encouraged to thoroughly and carefully examine your decision-making process to ensure that the conclusions you draw are a fair reflection of the law and the evidence. Please examine your reasoning for possible bias by reconsidering your first impressions of the people and evidence in this case. It is easier to believe statements or evidence when presented by people who are more like you. If you or the people involved in this case were from different backgrounds – richer or poorer, more or less educated, older or younger, or of a different gender, race, religion or sexual orientation – would you still view them and the evidence the same way?

"Please also listen to the other jurors during deliberations, who may be from different backgrounds and who will be viewing this case in light of their own insights, assumptions, and even biases. Listening to different perspectives may help you to better identify the possible effects these hidden biases may have on decision-making. 9

"Our system of justice relies on each of us to contribute to a fair and informed verdict in this case. Working together, we can reach a fair result."

The authors concluded that the studies done with mock jurors using this instruction were inconclusive and they believed further studies were necessary before they recommended that it be used in real trials.

CONCLUSION

Our system of justice, an adversary system, attempts to recreate events after the fact in an attempt to resolve civil or criminal disputes in a fair and unbiased manner. It relies on witnesses who may have faulty memories and different perspectives. It relies on lawyers to be ethical and professional in presentation of the case. It relies on judges to remain neutral and apply the applicable law. And it relies on triers of fact, whether the judge or jury, to determine facts and decide cases without prejudice and based on the applicable law. The problem is that all of those involved have implicit biases which may affect the decision-making process. It is important that all of us involved recognize that we have biases and attempt to prevent them from unfairly affecting the outcome of the case.

Because reasonable minds can differ, the distributive result of any particular case may not be perceived as "justice" by all involved. The best we can do is attempt to provide "procedural justice" for the parties and society. That means we must provide: "voice" for the participant so they can adequately present their case; neutral authorities who will decide the facts and apply the law with no biases; respectful treatment including civility and professionalism; and the ability to trust in the authorities by having transparency in the process.

In Memoriam
Jack Daniels

ASCDC friend, Jack Daniels, passed away on May 14, 2016. Jack Daniels of Daniels, Fine, Israel, Schonbuch & Lebovits, LLP, was a long-time member of ASCDC. Mr. Daniels served as the CAL-ABOTA President in 1996; the Los Angeles Chapter ABOTA President in 1994; and was the founder of the LA-ABOTA Jack P. Daniels Trial School.

ASCDC extends its condolences to Jack's family, business partners, colleagues and friends; he will be missed by many.

Justice (Ret.) J. Gary Hastings

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

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The Virtues and Vices of Arbitrating Legal Malpractice Cases

By Kenneth C. Feldman and Brian Slome

California courts recognize that arbitration is a favored method of resolving disputes. (*Lawrence v. Walzer & Gabrielson* (1989) 207 Cal. App.3d 1501, 1505 (*Lawrence*).) Arbitration can be fast, private, and provide a more sophisticated trier of fact. Lawyers therefore frequently draft retainer agreements that require their clients to arbitrate legal malpractice claims. Courts uphold these provisions, when they are clear, explicit, and entered voluntarily. (*Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP* (2013) 219 Cal.App.4th 1299, 1309 (*Mt. Holyoke Homes, L.P); Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102 (*Powers*); see also *Baltazar v. Forever 21, Inc.* (2016) ___ Cal.4th ___, 2016 Cal. LEXIS 1815 [California Supreme Court affirmed the Court of Appeal's holding that an employer's pre-printed arbitration provision was enforceable in an employment action].)

Sometimes, however, attorneys are better served litigating a client's legal malpractice claim in a court of law, with its formality, wide-ranging discovery, and rights of appeal. Where arbitration is appropriate, attorneys must be careful to avoid waiver, by waiting too long after being sued to seek enforcement of an arbitration provision.

ARBITRATION CLAUSES ARE ENFORCEABLE IN LEGAL MALPRACTICE CASES

California Code of Civil Procedure section 1281.4 provides that a written arbitration agreement is enforceable. Section 1281.2 provides, in pertinent part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists...."

Section 1281.2 applies in legal malpractice cases. (*Powers, supra,* 54 Cal.App.4th at p. 1106-1107.) In *Powers*, an attorney included a mandatory arbitration provision in his initial and subsequent retainer agreements with a client. The attorney was sued for malpractice and petitioned the trial court to compel arbitration. The trial court denied the attorney's petition. The Court of Appeal reversed. It found that the arbitration provision in the initial retainer agreement did not impermissibly attempt to limit the attorney's liability for legal malpractice, was not ethically improper, and violated no conflict of interest rules. The arbitration provision in the later amendment merely confirmed the existing arbitration agreement. (*Id*. at pp. 1114–1115.) In *Mt. Holyoke Homes, L.P., supra,* 219 Cal. App.4th at p. 1310, the court held that an attorney owes no duty to point out a clear and conspicuous provision compelling arbitration to his or her clients.

SHOULD ATTORNEYS WHO HAVE AN ENFORCEABLE ARBITRATION AGREEMENT IN PLACE ALWAYS SEEK TO COMPEL ARBITRATION OF LEGAL MALPRACTICE DISPUTES?

Attorneys may seek to compel arbitration for several reasons. An attorney may be concerned that a jury will sympathize with a likeable, injured plaintiff. An attorney may face certain liability and seek arbitration to try to contain damages. Sometimes an attorney prefers the privacy of arbitration out of a desire to minimize embarrassment or head off future "copy cat" claims from similarly situated potential plaintiffs. Additionally, attorneys may believe arbitration will ensure that a trained finder of fact decide technical and complex

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legal and factual issues. And an attorney who is confident of his or her blamelessness, and who feels that extensive discovery is unnecessary, may move to compel arbitration to obtain a speedy resolution of the dispute.

Although arbitration can be speedy, private, and informal, compelling arbitration is not without its downsides. Pleadings are less formal, and discovery may be limited. Thus, attorneys and their insurance carriers may be unable to properly analyze the full scope of liability or damages early in an arbitration proceeding. Demurrers and motions for summary judgment, which are effective tools to eliminate baseless legal malpractice claims, are often unavailable. And, there is no right to appeal most arbitration awards, except for very unusual circumstances.

Additionally, many insurance policies provide the insurer the right to control the defense. Thus, before seeking arbitration, an attorney should know her insurer's position and obtain written consent. The attorney should evaluate the claim and make sure she understands what is being alleged, and her potential exposure.

Finally, the attorney must be confident in her selection of a trustworthy arbitrator; she will not be able to appeal the arbitrator's decision, in all likelihood. Moreover, the attorney should make sure any relationship with the arbitrator is disclosed. The *Mt. Holyoke Homes, L.P.,* case demonstrates one risk of nondisclosure. The claimant waited until a defense award to challenge the arbitrator's impartiality. The Court of Appeal found an appearance of bias on a sketchy record merely because one of the partners in the defendant law firm had given a testimonial for the arbitrator many years earlier.

AVOIDING WAIVER WHEN ARBITRATION IS PREFERRED

Legal malpractice defendants may be tempted to avoid some of arbitration's downsides by ensuring that pleadings are settled and undertaking limited discovery prior to petitioning the court to compel arbitration. The risk in that strategy is that waiting too long can result in a waiver of the right to arbitrate.

Attorneys may rely on California's "strong policy favoring arbitration agreements [which] requires close judicial scrutiny of waiver claims...." (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).) Waiver is not lightly inferred, and any doubts regarding waiver are resolved in favor of arbitration. (*Ibid.*) The California Supreme Court has held that participating in litigation does not, in and of itself, result in waiver. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 377 (*Iskanian*).) Waiver is also not found just because a party caused the other side to incur expenses as part of litigation.

Waiting to file a petition to compel arbitration is risky, however, because California law provides no single test as to what will constitute waiver of an arbitration right. (*St. Agnes, supra*, 31 Cal.4th at pp. 1195-1196.) Instead, courts are directed to a six-factor test in assessing a waiver claim:

(1) Whether the party's actions are inconsistent with the right to arbitrate;

(2) Whether the litigation machinery has been substantially invoked and the parties are well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate;

(3) Whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;

(4) Whether a defendant seeking arbitration filed a counterclaim without asking for a stay of proceedings;

(5) Whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and

(6) Whether the delay affected, misled, or prejudiced the opposing party (*Iskanian, supra*, 59 Cal.4th at p. 375.)

Two recent cases, with similar facts, but different outcomes, highlight the risk

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involved in participating in litigation prior to seeking to compel arbitration.

In *Khalatian v. Prime Time Shuttle, Inc.* (2015) 237 Cal.App.4th 651, 662 (*Khalatian*), the trial court found that a defendant waived contractual arbitration after it delayed petitioning to compel arbitration for 14 months. The court explained that the defendants actively participated in discovery and case management conferences and meetings with opposing counsel. "Only after exhausting all other means (Defendants' demurrer was overruled, Defendants' Motion to Strike was denied, Defendants were required to file an answer to Plaintiff's Second Amended Complaint, and Defendants filed said answer) and with an impending trial looming, did the Defendants seek arbitration." (*Id.* at p. 662.)

The Court of Appeal reversed and rejected the trial court's reading of the record. The Court of Appeal highlighted the defendants taking their demurrer and motion to strike off calendar and answering the second amended complaint. While the filing of a demurrer may lead to a determination on the merits, no determination was ever made because the defendants answered the second amended complaint. "Answering a complaint does not result in waiver." (*Gloster v. Sonic Automotive, Inc.* (2014) 226 Cal. App.4th 438, 449.) The Court of Appeal also rejected the trial court's claim that trial was looming. "The trial date was more than a year away when defendants filed their motion to compel." (*Khalatian*, supra, 237 Cal.App.4th at pp. 662.)

Further, to waive a right to compel arbitration, delay — even a 14 month delay — must be coupled with "evidence that defendants stretched out the litigation process, gained information about plaintiff's case they could not have learned in an arbitration, or waited until the eve of trial to move to compel arbitration." (*Id.* at pp. 662-663.) "Because plaintiff demonstrated no prejudice from defendants' delay in moving to compel arbitration, the court erred in finding waiver." (*Ibid.*)

Conversely, in *Oregel v. PacPizza, LLC* (2015) 237 Cal.App.4th 342, the Court of Appeal affirmed the trial court's denial of a petition to compel arbitration. The plaintiff filed a class action complaint against his employer for the employer's alleged failure to fully reimburse delivery drivers for necessary expenses associated with using their personal vehicles to deliver pizza. (*Id.* at p. 345.) The defendant filed a motion to compel arbitration 17 months after the complaint was filed — citing the plaintiff's job application, which contained a clause requiring his lawsuit to be arbitrated. (*Ibid.*) Before the defendant filed its petition, the parties conducted class action discovery, and the plaintiff had prepared and filed its motion for class certification.

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The *Oregel* court explained that the defendant employer waived its right to arbitration because it had invoked the litigation machinery by propounding and responding to class based discovery, which would be irrelevant if the plaintiff was forced to arbitrate his claims. (*Id*. at p. 355-356.) It found that the defendant acted in a manner inconsistent with its intent to arbitrate, by failing to allege arbitration as an affirmative defense in its answer and failing to raise arbitration at case management conferences.

The plaintiff was prejudiced, the court found, because he was deprived of the advantages of arbitration by the 17-month delay, which forced him to spend time and money filing a class certification motion and undertaking discovery, neither of which would not have been allowed in arbitration. (*Ibid*.) The *Oregel* Court noted that a defendant can waive its right to arbitrate with a short delay as well. It cited various cases in which defendants waived rights to arbitrate after only a few months because the defendants challenged the pleadings with demurrers and motions to strike, or sought other merit-based determinations. (*Id*. at p. 361.)

Neither the trial court nor the Court of Appeal was convinced by the defendant's argument that its delay was justified, given the state of the law at the time it filed its answer. (*Id*. at p. 356.) The defendant argued that, prior to *Iskanian, supra,* 59 Cal.4th 348, it was unclear whether arbitration provisions in job applications would be enforced. The court criticized the argument as an attempt to "rely on an erroneous interpretation of the law to justify its delay in seeking to enforce an arbitration agreement. (*Id*. at p. 358.)

In both *Oregel* and *Khalatian,* the court focused on the same six factors to determine whether extended delay created a waiver of a right to arbitration. In *Oregel*, the court seemed convinced that the delay was prejudicial because, among other things, the defendant engaged in discovery and law motion that would not have been available in arbitration. By contrast, in *Khalatian*, the court emphasized that all the discovery in which the defendant participated would have been equally available in arbitration.

Thus, a defendant wishing to arbitrate a legal malpractice claim must be careful before engaging in discovery and law motion. It may be tempting to demur prior to seeking arbitration, when the grounds for demurrer could have been litigated in arbitration or do not affect the merits of a claim, such as when based on the statute of limitations. In *Zamora v. Lehman* (2010) 186 Cal. App. 4th 1, 17, the court held "[a]s a preliminary matter, the demurrer, which was based on the statute of limitations, did not affect Lehman's and Weiss's right to arbitrate because that issue could have been properly raised in arbitration." Similarly, in *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1196–1197, the court held that, where the complaint was vague, the defendant did not waive arbitration by bringing demurrers that forced the plaintiff to clarify legal theories and identify the parties sued.

However, filing any motion that affects the merits is risky. Filing a demurrer initiates the litigation machinery and can be viewed as antithetical to a desire to arbitrate. If a demurrer is lost, a later motion to compel arbitration may be seen as forum shopping. In *Lewis v. Fletcher Jones Motor Cars Inc.* (2012) 205 Cal.App.4th 436, 450, the court explained "that litigating issues through demurrers may justify a waiver finding. The court was particularly skeptical of "engaging in multiple rounds of demurrers." (*Ibid*.)

Thus, a defendant desiring to arbitrate a legal malpractice action should promptly seek arbitration. Ideally, the defendant should raise arbitration as an affirmative defense in its answer, advise the court of its intent to arbitrate at case management conferences, and limit discovery and law motion to those arguments and devices that would be equally available in arbitration.]

SHOULD AN ATTORNEY INCLUDE A MANDATORY ARBITRATION PROVISION IN THE RETAINER AGREEMENT?

Since clear arbitration provisions that require arbitration of legal malpractice claims will ordinarily be enforced, attorneys may be tempted to include these provisions in their retainer agreements. An attorney should check with the firm's malpractice carrier before doing so. Additionally, the attorney should weigh the risk of a *client* invoking the arbitration clause to force the attorney to arbitrate a legal malpractice claim that could have been dismissed by demurrer or summary judgment. Although demurrers and summary judgments may theoretically be available in arbitrations, due to the general lack of appealability arbitrators may be particularly reluctant to grant such motions.

On the other hand, individual plaintiffs rarely are interested in arbitration, so they typically will not seek arbitration even if there is a provision in a retainer agreement. Having such a provision may lead would-be plaintiffs to have more realistic settlement expectations. Indeed, they may believe the cost of arbitration is more expensive than going forward via litigation, particularly due to the cost of an arbitrator's fees. (Sometimes retainer agreements call for three arbitrators.) This may enhance the odds of a favorable settlement.

CONCLUSION

There are virtues and vices associated to arbitrations in a legal malpractice claim. Attorneys should be conversant with the pros and cons of seeking arbitration.

Kenneth C. Feldman

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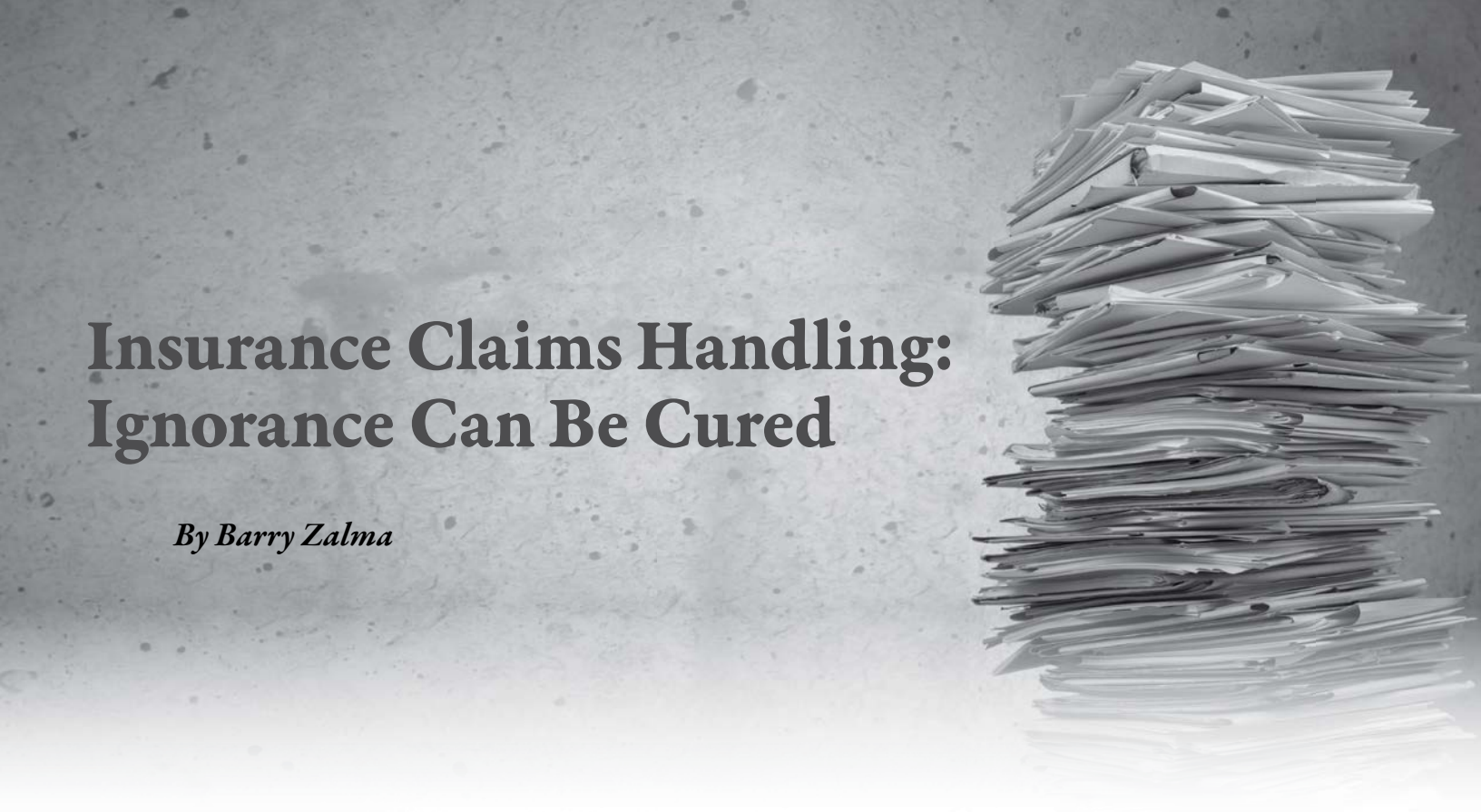
Kenneth C. Feldman and Brian Slome are partners with Lewis Brisbois Bisgaard & Smith, LLP. Mr. Feldman is a Certified Specialist in Legal Malpractice Law By The State Bar of California and is a Commissioner on the State Bar Legal Malpractice Law Advisory Commission. He is Chair of the Lewis Brisbois Bisgaard & Smith Legal Malpractice Group and is a member of the ASCDC's Lawyer Defense Committee. He practices from the firm's Los Angeles office. Mr. Slome practices from the firm's San Francisco office.



Insurance Claims Handling: Ignorance Can Be Cured

By Barry Zalma

It is a certainty that the business of insurance will act in cycles. Premiums go up. Premiums go down. Catastrophes happen regularly and in some years there are no catastrophes. Insurers pay any claim presented to avoid litigation and investigation expenses. Insurers change and refuse to pay any case where they believe there is fraud. Lawyers who defend insurers and their insureds must understand the cycles and help protect their clients from the downsides of the cycle.

Sometimes insurers are intelligent and conclude that the best way to make a profit is to maintain a staff of professional claims personnel who are dedicated to fulfilling the promises made by the insurance policy issued by the insurer, promptly, efficiently and in absolute good faith. To do so they maintain professional continuing education for the staff and insist that all claims be investigated thoroughly and all insureds be treated fairly and in good faith.

The expense incurred in keeping a professional claim staff becomes unbearable, human resources directors are instructed to eliminate expense and stop the training programs, fire the expensive and experienced claim staff, and hire in their place recent college graduates who are asked to deal with claims without training or experience.

The decimation of the professional claims staff is either due to corporate ignorance – that can be cured – or corporate stupidity which will remain until the corporation becomes insolvent.

HISTORIC BASIC CLAIMS TRAINING

In 1967 I was a young insurance claims trainee with a major insurance company. In my first month as an employee management sat me down at a desk and told me to read a classic insurance claims handling book written by Paul Thomas. Since I knew absolutely nothing about insurance reading the book gave me a basic understanding of insurance and insurance claims handling. I was then sent out to ride with experienced adjusters in every field of insurance written by the company from fire, casualty, comprehensive general liability, personal liability, all types of third-party liability, workman's compensation (now renamed worker's compensation), surety, fidelity, inland marine and motion picture insurance.

I was then allowed, under close supervision, to adjust minor claims over the telephone, for small injuries and minor theft claims. After three months of study, on the job training with experienced adjusters, and adjusting minor claims I was sent, at the insurer's expense, to their Home Office Training School where I spent 30 days with other trainees for 9 to 5 classroom training on every aspect of insurance, insurance law, insurance policy interpretation, repairing damaged structures, medicine and evaluation of traumatic injuries, insurance contract interpretation, repairing of damaged automobiles, repair of damaged structures, and claims investigations techniques.

Since I had spent three years in the military as an Army Intelligence agent I had experience and skill as an investigator and was able to convert my experience and training as an investigator to become an effective claims investigator.

After I completed the Home Office training course I was sent back to the office in Los Angeles and allowed to deal with multiple insurance claims over the telephone with less strict supervision. After a year I was promoted to field adjuster and allowed to meet with the public because I had proved to management that I understood insurance, insurance claims, the duty of good faith and fair dealing, and could be trusted with the insurer's assets.

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I was admitted to the California Bar in 1972 and stopped being an adjuster. I did not, however, give up on insurance. Rather, I directed my law practice to nothing but insurance and insurance claims handling.

THE MAJORITY OF CLAIMS TRAINING TODAY

Experienced adjusters who were trained as I was have been fired or laid off with regularity to cut down on the expenses of their relatively high salary and the low salary for which a novice adjuster can be paid.

Today, a new adjuster, recently graduated from a community college or four year college is given little or no training. Rather the new adjuster is given a check book, a cellular smart telephone with a digital camera, a digital recorder, and a company car. He or she is given discretionary authority to pay any claim up to $2500 without approval of management. As a result, if the adjuster is assigned 100 to 1000 claims a year he or she, knowing little or nothing about insurance and insurance claims handling, has the right to spend, without approval, as much as $250,000 to $2,500,000 – more than his supervisor or the company president. He or she is told they are adjusters and should resolve the claims provided to them by their supervisor. Only if they have problems with a claim are they to seek the advice of their supervisor who may only have two years of experience as an adjuster. Neither the new adjuster nor the supervisor had any formal training.

Insurance management, finding that the expense side of the ledger has moved downward, and the quarterly profit increased, believe that they are wise and have helped the insurer's profit margin. They are wrong. They are, by forgetting that insurance profitability is determined over a quarter of a century, not a quarter of a year. They are destroying the insurer and depriving the insurer of the ability to keep the promises made by the insurance policies issued by the insurer.

THE PROBLEM

The short term expense savings is penny wise and dollar foolish. Because of their lack of education and experience a young and untrained adjuster has created litigation against the insurer who employed them by:

- Writing in his file that the insured was obviously a fraud because (of any one of dozens of ethnic minorities).
- Accusing an insured of arson-for-profit without evidence of any kind.
- Denying a fire claim because it was set by a homeless person.
- Denying a claim based on an exclusion and concealing from the insured the exception to the exclusion that made the loss one that was covered.
- Denying a claim in writing by quoting only a portion of the policy wording and refusing to quote the language of the policy that made coverage clear.
- Denying a claim because the damage was done by the insured's negligence.
- Accusing an insured of fraud because there were no receipts for stolen personal property.
- Denying a claim for failure to submit a sworn proof of loss without first providing the form to the insured.
- Deciding to pay the new owner of a property who was not named on the policy because he had an insurable interest.
- Refusing to pay the named insured because he had sold the dwelling even though he kept an insurable interest by taking back a loan from the buyer.
- Refusing to pay more than $1500 for a fire damaged Persian Rug when the limitation only applied to theft claims.
- Refusing to defend an insured because a claim of defamation is an intentional tort.
- Refusing to defend an insured because he did not like the insured.
- Refusing to pay an independent lawyer because he charged too much.
- Refusing to investigate a claim because it was reported a year after the loss occurred.
- Refusing to return telephone calls from an insured because the adjuster was "too busy."
- Refusing to personally inspect the loss site because the adjuster was "too busy."
- Refusing to pay a claimant because he was not injured but had a disease only a horse could suffer.
- Refusing to pay a claimant because of his or her race.

All of these, and many more, resulted in a suit against the insurer alleging breach of contract, breach of the covenant of good faith and fair dealing and resulted in verdicts providing the insured contract damages, tort damages, and punitive damages that far overshadowed the annual savings obtained as a result firing the insurer's experienced claims staff. One judgment against an insurer for bad faith assessing tort and punitive damage can far exceed the annual payroll of the claims department.

This ignorance is not limited to insurance adjusters. Lawyers who should know better, who should understand how to analyze the wording of an insurance policy, do not. Insurance company lawyers are often referred to by lawyers working in large law firms, as "discount lawyers" who they believe deserve less than the respect that union leaders have for Walmart. That is because insurance companies, agreeing to provide regular business to a law firm, can negotiate low hourly rates from the law firms they retain to defend insureds and to advise the insurer. Of course, the law firms working to maximize profits, assign insurance claims to their least experienced and knowledgeable young associates who will be assigned to ghost write pleadings, discovery and opinion letters for a partner who will at most review the documents and usually simply sign them.

The young lawyers, although they charge low hourly fees, spend dozens – if not hundreds – of hours reinventing the wheel and learning their trade. The experienced lawyers and partners do little to help. When I was a young lawyer the law firm for which I worked gave me 250 litigation files and told me to start work explaining that if I had any questions the answers were in the firm's law library (before computers, let alone computer aided research). I learned the hard

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way because no one would help me. Some clients paid the cost of my learning how to properly represent their interests.

Today I see even less from young lawyers whose advice caused an insurer to be sued. Their errors are too broad to list in detail but are as bad as the list of errors made by the adjusters. In fact, wanting to please their client, the young lawyers will adopt the adjuster's opinions because they believe the adjuster – probably accurately – knows more about the subject than the lawyer. They will, rather, file a standard answer to the complaint they are asked to defend, serve multiple statutory forms of interrogatories, send custom draw interrogatories and requests for admission, and notice depositions of every person involved in the claim.

The ignorance that resulted in claimed savings by dismissing experienced claims people and refusing to pay the fees of experienced and knowledgeable claims counsel, can be cured. The stupidity that believes that the savings are appropriate and add to the insurer's profits can never be cured.

If insurers wish to make a reasonable profit and actually keep the promises made by the policies they issue in good faith and deal with their insureds fairly and good faith they must give up on the short term savings on the expense side of the ledger. Rather, insurers need to create a program requiring excellence in claims handling. Insureds will be pleased, claims people will be confident, and litigation against the insurer will be rare and easily defended. If not they will continue to be an easy victim of fraud and they will be sued for bad faith regularly. Profits will dissipate and those who refuse to learn will become insolvent.

AN EXCELLENCE IN CLAIMS HANDLING PROGRAM

To avoid claims of bad faith, punitive damages, and losses, and to make a profit, insurers must maintain a claims staff dedicated to excellence in claims handling. That means they recognize that they are obligated to assist the policyholder and the insurer to fulfill all the promises made by the insurer in the wording of the policy. The insurer that wants to create a claims staff dedicated to excellence in claims handling must, at least:

- Hire insurance claims professionals.
- If professionals are not available, the insurer must use the services of professional independent adjusters.
- If professionals are not available the insurer must establish a system to train all members of the existing, and new members of the claims staff, to be insurance claims professionals.
- Requiring each member of the claims staff to be trained annually on the local fair claims settlement practices regulations and SIU Regulations.

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- Employ insurance professionals who can intelligently supervise the work of each claims handler.
- Supervise each claims handler closely to confirm all claims are handled professionally and in good faith.
- Train, regularly, each member of the claims staff on the meaning of the covenant of good faith and fair dealing.
- Require that the claims staff treat every insured with good faith and fair dealing.
- Demand excellence in claims handling from the claims staff.
- Let the claims staff know that failure to provide excellence in claims handling to those insured will result in immediate dismissal of any claims handler.
- Be ready to have an executive of the insurer meet with an insured who was not treated professionally, apologize for the failure, advise that the offending claims person has been dismissed, and provide a means to fulfill the promise of good faith and fair dealing.

If any experienced claims professionals exist on the insurer's staff, the insurer must cherish and nurture them and use their experience and professionalism to train new claims people. If none are available, the insurer has no option but to train its people from scratch. Those claims people who treat all insureds and claimants with good faith and fair dealing and provide excellence in claims handling must be honored with increases in earnings and perquisites. Similarly, those who do not treat all insureds and claimants with good faith and fair dealing should be counseled and given detailed training. If they continue with less than professional conduct they must be fired. The insurer must make clear to all employees that it is committed to immediately eliminating staff members who do not provide excellence in claims handling.

An excellence in claims handling program can include a series of lectures supported by text materials. It must be supplemented by meetings between supervisors and claims staff on a regular basis to reinforce the information learned in the lectures.

The insurer also must institute a regular program of auditing claims files to establish compliance with the subjects studied. The insurer's management must support the training and repeat it regularly. There is no quick and easy solution. The training takes time; learning takes longer. If the insurer does not have the ability to train its staff it should use outside vendors who can do so.

The excellence in claims handling program requires thorough training providing each member of the claims staff with a minimum of the following:

TRAINING

The insurer seeking to create an excellence in claims handling program should institute regular training of its claims staff in all or more of the following subjects:

1. How to read and understand the contract that is the basis of every adjustment, including but not limited to:

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a. The formation of the insurance policy.

b. The rules of interpretation.

2. Tort law including negligence, strict liability in tort, and intentional torts.
3. Contract law including the insurance contract, the lease agreement, the bill of lading, nonwaiver agreements, proofs of loss, releases and other claims related contracts.
4. The duties and obligations of the insured in a personal injury claim.
5. The duties and obligations of the insurer in a personal injury claim.
6. The duties and obligations of the insured in a first party property claim.
7. The duties and obligations of the insurer in a first party property claim.
8. The Fair Claims Practices Act and the regulations that enforce it.
9. The thorough investigation:

a. Basic investigation of an auto accident claim.

b. Investigation of a construction defect claim.

c. Investigation of a non-auto negligence claim.

d. Investigation of a strict liability claim.

e. Investigation of the first party property claim.

f. The recorded statement of the first party property claimant.

g. The recorded statement or interview of a third party claimant.

h. The recorded statement of the insured.

i. The red flags of fraud.

a. The SIU and the obligation of the claims representative when fraud is suspected.

This training can be accomplished in several ways. The claims person may be required to read a chapter every week of "Insurance Claims: A Comprehensive Guide" available from National Underwriter Company at *www.nationalunderwriter.com/reference-bookstore/property-and-casualty/zalma-insurance-claims-library.html*. In addition, the claims person can be required to view a three to four minute video training session by starting at volume 1 and going through all videos, one or more a day, at Zalma Insurance 101.

CLAIMS REPORT WRITING

The new adjuster and new insurance lawyer must understand that an insurer needs information to evaluate the risks it is asked to take. To fulfill the needs of the insurer the claims person must recognize that report writing is essential to the duty imposed on the adjuster and insurance lawyer. The reports must include:

- The name and address of each person insured.
- The identity of the insurer.
- The policy number.
- The persons named as insured.
- All persons who are insured or additional insureds by means of the policy wording.
- The date of the loss.
- The cause of the loss.
- The risks of loss insured against by the policy.
- The limits of liability available to the insured.
- Whether the cause of the loss is due to a peril insured against.
- Whether there are any exclusions in the policy that might apply to the situation.
- The estimated exposure face by the insured so that appropriate reserves can be set.
- The evaluation and settlement of the personal injury claim.
- Whether there is a need to retain defense counsel to represent the insured.
- Whether there is a need to retain coverage counsel to aid the insurer when a coverage issue is detected.
- The need to control coverage counsel and defense counsel.
- The need to evaluate the charges presented by defense and coverage counsel.
- An evaluation of the plaintiff's lawyer whose client is suing the insured or the insurer.
- Dealing with personal injury defense counsel.
- The evaluation of the injuries claimed by a plaintiff suing an insured.
- The evaluation and settlement of the property damage claim.
- The need for arbitration or mediation.
- The estimated jury value of the case.
- The estimated settlement value of the case.

WHY AN EXCELLENCE IN CLAIMS HANDLING PROGRAM?

The answer is simple: an ability to keep all the promises made by the policy and an ability to make a profit by performing better than all other insurers.

Barry Zalma

Barry Zalma, Esq., CFE, practiced law in California for more than 43 years as an insurance coverage and claims handling lawyer. He now limits his practice to service as an insurance consultant and expert witness specializing in insurance coverage, insurance claims handling, insurance bad faith and insurance fraud almost equally for insurers and policyholders. He also serves as an arbitrator or mediator for insurance related disputes.

Ninos Saroukhanioff Interviews a Celebrity

By Ninos Saroukhanioff

I'm a fan of *Vanity Fair* magazine. My favorite section is at the end where a celebrity answers the Proust Questionnaire.

According to Wikipedia, the Proust Questionnaire is a gauge of one's personality. Its name and modern popularity as a form of interview is owed to the responses given by the French writer Marcel Proust when responding to the questions posed by television host Bernard Pivot, who saw an opportunity for a writer to reveal at the same time aspects of his work and his personality. Pivot traditionally subjected his guests to the questionnaire at the end of the French broadcast Apostrophes.

Inspired by Pivot, James Lipton, the host of the TV program *Inside the Actors Studio,* gives an adapted version of the Proust Questionnaire to his guests. Lipton has often incorrectly characterized the questionnaire itself as an invention of Marcel Proust.

A similar questionnaire is regularly seen on the back page of *Vanity Fair* magazine, answered by various celebrities. I figured that Michael Schonbuch, our immediate past president, is one such celebrity. Over a career that has spanned almost three decades, Michael Schonbuch has been a force to be reckoned with — from representing high profile individuals to what some would call seedy bars, to his most recent defense verdict in a wrongful death case where he was retained just weeks prior to trial. Here, Mr. Schonbuch reflects on his fears, extravagances and favorite names among other things. Enjoy!

What is your idea of perfect happiness?

A long weightlifting session followed by a day on the beach in Maui.

What is your greatest fear?

Dying anonymously.

What is your greatest extravagance?

Expensive wristwatches.

On what occasion do you lie?

Only when I don't want to embarrass someone.

What is the quality you most like in a man?

Self confidence and lack of worry.

What is the quality you most like in a woman?

Self sufficiency.

Which words or phrases do you most overuse?

Yes.

If you could change one thing about yourself, what would it be?

More patience.

What do you consider your greatest achievement?

Having so many people I consider to be friends.

If you were to die and come back as a person or a thing, what would it be?

Ronald Reagan.

What is your most treasured possession?

The Cardioverter implanted in my chest.

What is your most marked characteristic?

Loyalty.

What do you most value in your friends?

Loyalty and sense of humor.

Who are your favorite writers?

Lawrence Sanders and Nelson DeMille.

What are your favorite names?

Dylan and Taylor.

What is it that you most dislike?

Laziness.

How would you like to die?

Quickly.

What is your motto?

Improve yourself each and every day.

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 cases:

1. *S.M. v. Los Angeles Unified School Dist.* (2015) 240 Cal.App.4th 543, ordered depublished Jan. 13, 2016: In this sexual abuse case, the Court of Appeal held that negligent supervision liability required knowledge only that the defendant teacher had a "potential" rather than actual "dangerous propensity" to commit sexual abuse. Laura Reathaford from Venable submitted a request for depublication to the California Supreme Court which was granted on January 13, 2016.

2. *Hernandezcueva v. E.F. Brady Company, Inc.* (2015) 243 Cal.App.4th 249, as amended Jan. 15, 2016: In this asbestos case, the Court of Appeal originally stated in dicta that defendants in asbestos cases are not entitled to setoffs for amounts plaintiffs receive from bankruptcy trusts established for the benefit of asbestos plaintiffs. David Schultz from Polsinelli LLP wrote an amicus letter asking the Court of Appeal to delete this language from the opinion. On January 15, 2016, the Court of Appeal modified the opinion and deleted the language in question.

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:

1. *Moore v. Mercer*, docket no. C073064, *Howell*-related issue pending at the Third District Court of Appeal in Sacramento. Bob Olson from Greines Martin Stein & Richland has submitted an amicus brief on the merits; the appeal remains pending.

2. *McGill v Citibank*, docket no. S224086, pending in the California Supreme Court. The Supreme Court granted review decide if the Federal Arbitration Act (FAA) preempts the so-called "*Broughton-Cruz*" rule. This rule consists of two prior California Supreme Court decisions holding that parties cannot be compelled to arbitrate claims for public injunctive relief brought under California's Unfair Competition Law and Consumers Legal Remedies Act under the so-called "vindication" exception to the FAA. Lisa Perrochet, Felix Shafir and John Quiero from Horvitz & Levy have submitted an amicus brief on the merits.

3. *County of Los Angeles Board of Supervisors v. Superior Court* (*ACLU*), docket no. S226645, pending in the California Supreme Court. The Court of Appeal held that attorney fee invoices sent by defense counsel to the County of Los Angeles are privileged. On July 8, 2015, the Supreme Court granted the ACLU's petition for review and the case remains pending. Lisa Perrochet and Steven Fleischman from Horvitz & Levy have submitted an amicus brief on the merits.

4. *Parrish v. Latham & Watkins*, docket no. S228277, pending in the California Supreme Court. The primary issue is whether the one-year statute of limitations (Code Civ. Proc., § 340.6) applies to claims for malicious prosecution brought against attorneys. Harry Chamberlain from Buchalter Nemer will be submitting an amicus curiae brief on the merits.

5. *Frisk v. Cowan*, docket no. C077975, pending appeal in the Third Appellate District involving *Howell* issues related to third-party lien for payment of medical expenses. Bob Olson and Ted Xanders from Greines Martin Stein & Richland have submitted an amicus brief on the merits.

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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Horvitz & Levy
818-995-0800

Ted Xanders (Co-Chair of the Committee)
Greines, Martin, Stein & Richland LLP
310-859-7811

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Jeremy Rosen, *Horvitz & Levy*
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213-891-9100

defense successes
january – april

Robert W. Armstrong
Demler, Armstrong & Rowland
Schmidt v. Westfield, LLC

Sean D. Beatty
Beatty & Myers, LLP
Chan v. J.H.H. Motor Cars, Inc.

Daniel S. Belsky
Belsky & Associates
Scott v. Sharp Memorial Hospital

Richard Carroll
Carroll, Kelly, Trotter, Franzen, McKenna & Peabody
Klotz v. Caffarelli

Matthew Gibbs
Tharpe & Howell, LLP
Adsit v. Bell

Robert W. Harrison
Wilson Elser Moskowitz Edelman & Dicker LLP
Israel v. Silliman

Timothy J. Lippert
Demler, Armstrong & Rowland
Johnson v. Morales

Barry Reagan & Michael Brody
Slaughter, Reagan & Cole LLP
Buehler v. Baum

Terrence J. Schafer
Doyle Schafer McMahon, LLP
Jefferson v. San Bernardino Urological Associates

Michael Schonbuch & Normandy Kidd
Daniels, Fine, Israel, Schonbuch & Lebovits
Villalobos v. Arana Tour Line

Christopher P. Wesierski
Wesierski & Zurek, LLP
Gonzalez v. L.B.S., Inc.

Brian L. Williams
Sullivan, Ballog & Williams
Gordon v. East Bay Golden Cab

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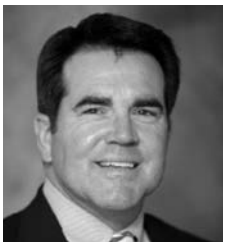
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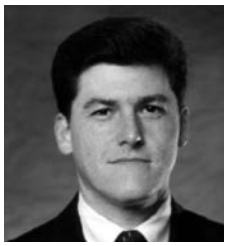
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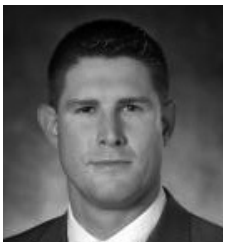
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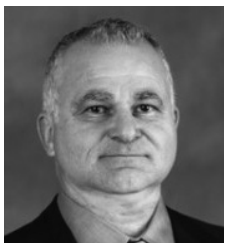
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