association of southern california defense counsel

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Glenn T. Barger
ASCDC 2016 President

Olympic Spirit

As I write this, the year is more than half-way over and the Olympic Games are over. I have watched the Olympic spirit thrive among athletes from all countries, including Michael Phelps, Katie Ledecki, Simone Biles and her teammates in gymnastics, volleyball and track and field athletes, professional golfers playing solely for their countries instead of a large paycheck and the divers who literally don't make a splash after completing incredible flips and turns in the air. I am a competitive person and I know our members are as well. I therefore raise the Olympic spirit not solely for the need to understand how the divers do what they do and still enter the water with barely a splash, but for how the Olympic spirt translates to ASCDC and our daily practices.

Attaining the Olympic spirit of competition, sportsmanship and success at ASCDC starts with membership. By continuing to increase our membership, we enhance our collective knowledge and relationships to ensure we compete with the plaintiff's changing tactics and so that the courts and the legislation continue to give us a seat at the table for important decisions. This year the board voted to make membership more easily available to everyone through an initial membership fee of only $100. We have seen a continued growth in membership the last three years, yet we are still not back to our ten year high. We ask you to help us get the word out about ASCDC, including our continuing education programs, the amicus committee and our constantly improving substantive listserve where members can share information. Now is a great time to sign up other members of your firm and encourage colleagues to do the same.

The courts, like Olympic host cities, face funding challenges. There are only a few lawyers in the California legislature and many may not fully appreciate the inner workings of our judicial system. ASCDC is instrumental in helping communicate with legislators on the importance of fair funding for the courts. We all need to continue to support our Judges in getting the word out throughout the year that our courts are underfunded and the Judicial branch of government deserves a fair, if not equal, share of the next budget.

We also continue to work daily with the courts by attending regular bench and bar meetings so that we can provide a voice for the defense. If you have a suggestion or concern, let us know so that we can address it with the courts. We also encourage the courts to contact ASCDC with issues we can assist them in resolving to the benefit of everyone. In the Los Angeles Superior Court, there is now the real issue that cases are not getting out to trial as set due to the backlog of preference cases. We met with the court, along with the plaintiff's bar, to attempt to address this issue, including a proposal to provide a defense and plaintiff attorney to engage in CRASH settlement programs to help settle cases before trial and to allow better communication methods for cases that are trailing. ASCDC will also keep up the fight to empower courts to pare down legally tenuous causes of action, dismiss parties that should not be in an action and control the courtroom to avoid prejudicial and improper tactics.

The sportsmanship and dedication exhibited in the Olympics is incredible. We watch Olympic athletes who train their entire lives for events that sometimes last seconds and compete for only three medals in each event while the rest go home empty handed, yet they still shake hands, offer congratulations and even lift up others that have stumbled. In the same spirit, we recently completed the first annual Litigation Summit with a focus on ethics and civility which we jointly hosted with the plaintiff's bar. Continuing with the competitive spirit, the event was heavily attended with ASCDC members outnumbering CAALA members. Presiding Judge Kuhl, Assistant Presiding Judge Buckley, Supervising Judge Brazile and almost all of the PI judges participated in panel discussions, and Judge Buckley gave an outstanding presentation on ethics and civility. The judges stayed for the reception to discuss issues and socialize with the lawyers who appear before them. In years to come, we expect judges from all of the various counties to participate in this event and I encourage you to attend next year. By practicing at the highest ethical level and by engaging in simple acts such as being on time, being polite and professional to each other and importantly to court staff, ASCDC members help set the tone for our judicial system.

The spirit that wins golds at the Olympics is a spirit that thrives among ASCDC members. When you take part in ASCDC and encourage others to do so, you help ASCDC score even greater achievements with the courts, the legislature, the plaintiff's bar and most importantly among ourselves so that we ensure the highest level of representation for our clients.

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Michael D. Belote
Legislative Advocate
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Epic General Election Coming

Nothing seems to engender hyperbole quite like politics, but believe this: the upcoming general elections in November are big, very big, dare we say ... HUGE. Perhaps never in the past fifty years has an election loomed this large. At stake are control of the California Assembly and Senate, perhaps the House and Senate, and the fate of a dizzying array of ballot measures in our fine state.

Privately campaign insiders in California will admit that they have very little ability to predict election outcomes for November, because predictions are based on polls which all make assumptions about who is likely to vote, otherwise known as "turnout." If the models are wrong, the polls are wrong, sometimes dramatically. Do Republican voters show up in large numbers, even with Trump at the top of the ticket and with *both* U.S. Senate candidates from the Democratic party? Can voters turned off by Trump compartmentalize and vote for Republicans down-ticket? What is the future of the Republican party if Trump suffers a drubbing?

These are not "inside baseball" questions; instead the answers could have very real consequences even in our very "blue" state. In the 80-member state Assembly, Democrats are only two seats away from a 2/3 supermajority, which brings with it the ability to raise taxes and override gubernatorial vetoes without Republican votes. In the 40-member state senate, Democrats are only one vote from a supermajority. There are at least 7 or 8 highly competitive districts in the Assembly and a supermajority is quite possible, perhaps less so in the state senate. Right now, Republican candidates are asking themselves: is it smarter to denounce Trump to pick up moderate Democrats and decline to state voters, even at the risk of alienating Trump Republicans?

The state legislative races are made particularly important because this year marks the end of the former six-year term limits in the Assembly. At this point all six-year members will be termed out of office and everyone elected this year can serve for a maximum of twelve years in either house. No Assembly members will be termed out of office in 2018, 2020 or 2022; in other words, people elected in November can serve for a long time.

The November elections are notable also for the stunning reach of the 17 propositions on the ballot. Voters will face, among others, two death penalty proposals (one to streamline death penalty appeals, thus speeding the process, and one to eliminate the death penalty altogether), a proposal to permit early release of non-violent prisoners, legalize recreational marijuana, cap pharmaceutical prices, require voter approval of large revenue bond indebtedness, taxes on cigarettes, limits on ammunition sales, and more.

In some respects, however, the "big one" in November is the extension of the old Proposition 30 surcharge on upper income taxpayers contained in new Proposition 55. The surcharge is scheduled to expire, and Proposition 55 would extend the levy for twelve more years. Absent an extension, the expiration of the current surcharge would reduce state revenues by approximately $8 billion annually, at the same time that state income tax revenues are coming in below projections.

Regardless of one's perspective on raising taxes on upper income taxpayers, there is really no disagreement that the state is dangerously dependent upon the incomes of the top 1%. Right now Proposition 55 appears headed for passage based upon polls, but were the ballot measure to fail, there would certainly be renewed interest in other revenue sources, including property taxes and sales tax on services. Even if the measure passes, there is still discussion in Sacramento about fashioning a more stable, less volatile tax structure.

Finally, the legislature has just completed the 2015-2016 two-year session, and nearly 1,000 bills were sent to the governor for signature or veto. In recent years approximately 800 bills each year are signed into law, and many will be significant for defense practice. There will be plenty to report in the next issue of *Verdict*.

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In the 2016 #1 issue of the *Verdict* magazine, we inadvertently included Omid Khorshidi as a new member of the ASCDC. Omid Khorshidi is not a member of the ASCDC and we apologize for the error.

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Patrick A. Long

Where Lawyers Enjoy Being Together

If you're from Orange County you needn't read this. You'll already know most of what we're about to discuss. I'm going to share with you information about a meeting place, a joint, a hangout, an ethnic center of sorts. Who, you ask, would patronize this place? Well it would probably be safe to say most of the attorneys in Orange County go here on occasion. To provide you with a brief list of a few of the lawyer groups that regularly meet here, in no particular order: the Orange County Trial Lawyers, Orange County ABOTA chapter, Cal Western Law School, the Celtic Bar Association, Jewish Bar Association, the Lavender Bar Association, the Asian Bar Association, the Thurgood Marshall Bar Association, and several other groups. Additionally, many law firms in Orange County hold holiday firm dinners and other celebratory gatherings at this place.

Many of you may have already surmised the name of this special place for lawyers, yep, it's Muldoon's Irish Pub, overlooking the Newport coastline, close by Fashion Island. It's a destination for many lawyers and judges in Orange County, of Irish descent and otherwise. Its owner is my friend and from time to time my opponent, plaintiff's attorney Ron Schwartz. Ron was present at the founding of Muldoon's in 1973 and came into full ownership a year later.

As you might discern, Ron is not of Irish descent, but through the efforts of Ron and his wife Sindi, after finishing drinks and a meal at Muldoon's you'll think you're in a small village on the west coast of Ireland. Sindi and Ron have toured Ireland to study the cuisine and culture several times, and Sindi serves as chief chef. Muldoon's bakes its own currant-and-fennel-seed Irish soda bread twice a day, makes its own corned beef, and prepares apple pies from scratch.

It's not only the food and drink that smack of Irishness; on many evenings they feature live Irish music, and much of the staff working there are off the boat. One of my favorites is Mary, a general manager, who walked in twenty-seven years ago from Ireland looking for work. She got the job and is still there. About fifteen years ago my firm had its annual Christmas dinner at Muldoon's. I met Mary that night for the first time. I wasn't able to get back into Muldoon's for another five years or so, but I'll never forget as I walked in the door after five years there was Mary calling out, "Well if it isn't Pat; good to see you my friend."

Of course there's a reason why so many Orange County lawyers and law groups gather at Muldoon's. Ron Schwartz is a superb trial lawyer, a member of ABOTA, a past president of the Orange County Trial Lawyers, and he received that group's Top Gun award in 2009. I've personally litigated against Ron, and we traveled several times together for depositions to various parts of the country including Pawtucket, Rhode Island. While being a fine lawyer, he is a man of civility and honesty, and has great friendships on both sides of the bar.

As I wrote the above I was thinking that, in each of our counties making up the Association of Southern California Defense Counsel, there must be similar meeting spots where lawyers from all areas of practice congregate from time to time. Whether it's a restaurant, saloon, club of some kind, or anyplace else, I truly hope we continue to meet with each other outside of our offices, and not just in depositions and courthouses. I suggest that our country is struggling through some difficult times at present, and we need to work together regardless of which team we're on. I'd love to share a pint with you. You name the place.

Slainte'.

Patrick A. Long
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On the Importance and Advantages of Diversity In the Courtroom

by Maithilee K. Pathak, JD
and Rick R. Fuentes, PhD

Remember the saying "Birds of a Feather Flock Together"? Well, research shows they also think alike, and in a group decision-making situation – *alike* can spell *disaster*.

When people with similar backgrounds, experiences, and attitudes come together to accomplish a task, they become particularly susceptible to "groupthink," a psychological phenomenon that can result in faulty, ineffective, or unwittingly dangerous decisions – all made in an attempt to reach consensus. When "groupthink" takes hold, demographic, interpersonal, social, and/or cultural forces operate to squelch independent thinking. In the face of group pressure toward conformity and cohesion, people ignore important facts, risks, and warnings and often abandon critical analysis, reality testing, and moral judgment. The result is that a group of people begin to think with one brain, and that one brain can make bad decisions as the group ignores unpopular opinions.

One tragic example of groupthink resulted in the mid-air explosion of the space shuttle "Challenger" in January of 1986. Before the launch, the subcontractors who made the O-rings for the rocket boosters raised concerns about test results showing the corrosive impact of cold temperatures, but after a 5-minute meeting with NASA officials, the decision was made to launch anyway. The fairly homogeneous group of NASA and subcontractor management decisionmakers were driven by a desire to preserve cohesiveness and avoid a weather delay. Groupthink inhibited the free flow of opposing views, and the shuttle exploded 73 seconds after launch.

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Similar group dynamics can be found in the jury room. In the classic 1957 movie *Twelve Angry Men*, Henry Fonda thwarted the effects of groupthink on a homogenous jury panel deciding the fate of a young man accused of murder. As the title suggests, it was an all-male jury, and the pressure to conform to the majority opinion, maintain cohesiveness, and avoid conflict in the group was palpable. The result was dogmatic thinking, repeated reliance on and justification of shaky evidence, and rampant stereotyping. The first vote was 11-1 Guilty. Henry Fonda was the lone dissenting juror, and but for his willingness to voice a different perspective – challenge the beliefs of the powerful majority leader in the room to battle on behalf of the defendant – the verdict would have been swift, severe , and flat wrong.

Socially diverse groups are more likely to overcome herd mentality as each participant advances a different perspective on a problem.

True diversity goes beyond demographic differences and includes experiential diversity. We must consider not just race, gender, age, and education, but also the different experiences of people who hail from very different cultures and backgrounds and who harbor differing socio-political views, and express differing attitudes.

Consider the parable of the blind men and the elephant. Each man touches only one part of the beast, and goes on to characterize the animal for the group. The man touching the ear describes a fan, the one touching the tail describes a rope, the one touching the tusk describes a pipe, etc. Not surprisingly, the group cannot reach consensus on the nature of the animal. The story is used to illustrate that one person's experience and perspective can be true and accurate, but it is not definitive or exhaustive because it is constrained by the experiences of that individual. Only by weaving together the experiences of all of the individuals can the group truly "see" the elephant.

Diverse groups are higher performing, more creative, and more innovative – i.e., they make *better* decisions.

The advantages of diversity have been demonstrated in the business world. Research shows that diversity adds value and often gives the company a competitive advantage. For example, racial and gender diversity in senior management of top companies in the S&P 500 resulted in an increase of $42M in the value of those companies. These companies were also more creative and innovative in their fields.

Likewise, social and cultural diversity in groups can enhance discussion. For example, organizational structures that are "flat and interactive" encourage people to speak their mind more than do those that are "hierarchical and authoritarian." The clash of differing perspectives can produce new ideas and better solutions.

The lack of diversity can derail the American jury system, which relies wholly on a group of complete strangers coming together to solve difficult legal disputes.

This unique problem-solving task facing jurors presents many inherent challenges. For example, jurors are often deciding complex cases in completely unfamiliar domains (e.g., medical malpractice, patents, anti-trust, fraud, murder, etc.). Jurors often feel anxiety and stress about their ability to solve the case, and these feelings can erode confidence in their individual assessments of the case – especially when faced with the prospect of having to express and defend those opinions in the deliberation room. While it is true that jurors often grumble about being *seated* on a jury panel, once selected, jurors take their jobs very seriously and are singularly motivated by a desire to reach the RIGHT decision. Group composition and dynamics during deliberations can either enhance or inhibit the chances of that happening.

Simply put, if you believe your side *should* win based on a searching and intelligent review of the facts and the law, you will be better served by a diverse jury that is motivated and equipped with the tools needed to avoid groupthink.

Why does diversity improve group decision-making?

The more diverse the group, the greater the breadth and depth of experiences and opinions expressed in the discussion – that is the story of the blind men and the elephant – each brought differing experiences to the discussion.

This is true not only in a litigation setting. For an automotive engineering and design team, for example, it stands to reason that it is important to have diversity in scientific training or academic discipline to ensure that all aspects of the vehicle are addressed: the engine, ergonomics of the interior design, the tires, etc. These examples speak to the question of what *unique information and perspective* each participant brings to the table.

But, research also shows that *social* diversity in groups enhances *information processing* as well because it changes how people think, talk, and listen – and how they work to influence other group members.

In one study, Democrats and Republicans participated in an exercise requiring that they persuade another person on a particular issue. Some participants were told that their study partner was of their political party, while others were told that their study partner belonged to the opposite party. Results showed that both Democrats and Republicans were more diligent and creative in preparing their arguments and evidence when they thought they had to convince someone with *different* political beliefs. Authors characterized this as the power of anticipation, explaining that people in homogenous groups rest on the belief that members will share similar views and will therefore reach consensus more easily. As the authors put it, diversity "jolts us into cognitive action in ways homogeneity does not." Heterogeneous groups anticipated that members would have dissimilar views and

continued on page 11

therefore assumed that they would have to work harder to come to consensus.

In another study focusing on jury decision-making, racially diverse jury groups were found to share a wider range of information in greater detail during deliberations on a sexual assault case, as compared to homogenous groups. Mixed-race jury groups (4 White and 2 African American jurors) demonstrated better recall of relevant case information and a greater openness to discussing the role of race in the case, as compared to the homogenous jury groups (6 White jurors). The diverse jury groups were more accurate and detailed in considering case facts, and made fewer errors in recalling relevant information during deliberations. Authors concluded that these results were due to the fact that jurors in the diverse groups actually changed their communication behavior. In the presence of diversity, all jurors were more diligent and open-minded about differing perspectives.

One can infer from this study that lawyers who are confronting a diverse jury are similarly challenged to be creative and multi-faceted in presenting the evidence and crafting persuasive arguments. Lawyers will rise to the occasion to in find, themes and language, and perspectives that will resonate with a panel consisting of jurors from all walks of life.

Not only does diversity improve the quality of discussion and the decisions reached, jurors value diversity in deliberations and ultimately have greater confidence in the group's decision.

Jurors in a mock trial exercise were asked which would make them feel better about their decision: having a jury panel composed of people with diverse perspectives and backgrounds or one composed of people with similar perspectives and backgrounds.

The majority of jurors (56%) said they would feel better about a decision made by a diverse panel. Jurors' verbal responses tell the story:

"The more perspectives available, the better. Odds are that something outside my own considerations could be brought to light."

Better decisions result "because of differing intelligence, experiences, ideas, and emotional responses."

"Varied opinions often lead to a better overall decision."

"It is important to hear other opinions and views. Everybody's brain works differently, and somebody may consider a perspective you hadn't."

All of this translates to the lawyers presenting the case, as well – just as it takes sopranos, altos, tenors, and baritones to make a good choir, it takes all kinds of lawyers to make a good trial team.

Diverse trial teams are also apt to be better prepared, more creative, more astute, and more comprehensive than homogenous trial teams. Experience with diverse trial teams shows that people work harder to reach consensus and are more willing to implement new and creative trial solutions.

continued on page 12

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Diversity – continued from page 11

The net result is a more effective presentation of the case and more favorable trial outcomes.

To be clear, jurors report noticing and appreciating diversity in trial teams – but, it has to be "real" diversity to pass muster. Jurors are often cynical and sensitive to being "played." Companies that simply assign an African American lawyer to a legal team for a high-stakes fraud trial in a predominantly African American community – or assign a woman to a sexual harassment case – risk the ire of jurors today. Jurors balk when the "diversity lawyer" is perceived to be a "token" appointment on the eve of trial and has little substantive role in trying the case. Trial teams with different voices are better prepared, and sing loudest and best.

In sum, the accuracy and quality of the discussions engaged in by senior executives, jurors, and lawyers improves as the group becomes more diverse. People of differing social, cultural, racial, and socioeconomic backgrounds bring new and unique perspectives to the table, and – by their mere presence – change the way people at the table think and prepare, and how they talk and listen to one another. In the presence of diversity, everyone tends to be more diligent, more detailed, more accurate, and more open-minded because they are prompted to work harder to reach consensus.

In short: Diversity Works. Use it.

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Both have worked on cases spanning all areas of law including contracts, anti-trust, intellectual property, tort, product liability, and professional malpractice.

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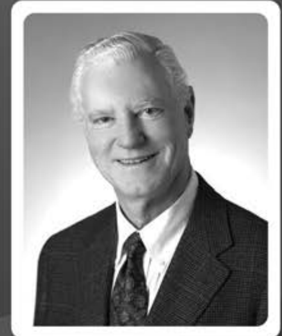

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No Reporter's Transcript? Here's What It Means For Your Appeal

By Alana H. Rotter

Failing to designate an adequate reporter's transcript is one of the surest ways an appellant can doom its appeal: It is an appellant's burden to show prejudicial error on appeal, and in many cases it is impossible to show error, much less prejudicial error, without a transcript of the oral proceedings that led to the challenged ruling – absent a transcript, the appellate court will presume that whatever happened at the hearing or trial supported the result.

The importance of reporter's transcripts has become a common theme in California appellate decisions since budget cuts led courts throughout the State to stop providing reporters in civil proceedings. Over and over again, courts have noted that the appellant failed to provide a reporter's transcript and have affirmed based on the principle that the judgment is presumed correct. (*E.g., Elena S. v. Kroutik* (2016) 247 Cal.App.4th 570.)

Given the importance of transcripts, attorneys should arrange for a private court reporter to cover any hearing that might be relevant to a future appeal, and for all days of any trial. If there is any doubt as to whether a hearing will be relevant, err on the side of overinclusiveness. The cost of a reporter is far outweighed by the potential adverse consequences of forgoing a transcript.

But what happens when this lesson comes too late – when, for whatever reason, a hearing was not reported? In that situation, there are two things to consider. First, is this the type of appeal that in fact requires a transcript? And if it is, what, if anything, can be done to fill the gap? Recent decisions, and the California Rules of Court, provide some answers.

Does the appeal require a transcript?

A reporter's transcript is not always critical to an appeal. The California Rules of Court sensibly require a transcript only if "an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court." (Rule 8.120(b).) Consistent with that standard, courts have held that no transcript is required where an appeal presents a purely legal issue subject to de novo review. *Chodos v. Cole* (2012) 210 Cal.App.4th 692, for example, held that the appellate court does not need the transcript of an anti-SLAPP hearing to determine whether the anti-SLAPP statute applied to the pleadings.

But *Chodos* demonstrates that proceeding without a reporter's transcript can be risky. In addition to challenging application of the anti-SLAPP statute, the appellant also challenged an award of attorney fees. *Chodos* reversed the anti-SLAPP ruling and, on that basis, reversed the fee award. But had it affirmed the anti-SLAPP ruling and reached the reasonableness of the fee award, the record would likely have been inadequate. As the court in *Chodos* acknowledged, many attorney fee issues require a reporter's transcript. (*Id.* at 699-700.)

An oral record of proceedings is particularly critical in substantial evidence appeals. As

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Transcript – continued from page 15

one opinion put it, "There is not much we can do without a reporter's transcript when the appellant challenges the sufficiency of the evidence." (*Portfolio Recovery Associates, LLC v. Majano* (2016) 2016 WL 3064533 (unpublished).) Generally, the appellate court will presume that the transcript would have included evidence supporting the judgment, and will affirm.

Recent appellate decisions also demonstrate that a missing transcript can defeat an argument that the trial court lacked jurisdiction to issue a ruling. The appellate court in one case where no transcript was provided presumed that the appellant had submitted to a commissioner deciding his case. (*Elena S., supra,* 247 Cal.App.4th at 576.) In another, the court found the appellant had made a general appearance, not a special appearance. Any jurisdictional challenge was therefore deemed waived. (*In re Marriage of Obrecht* (2016) 245 Cal. App.4th 1, 9.)

The dissent in *Chodos* recounted numerous other situations in which courts have refused to address the merits of an appellant's arguments based on the lack of an adequate record of oral proceedings, including new trial rulings, nonsuit motions, and claims of instructional error. (*Chodos, supra,* 210 Cal.App.4th at 707-708.) The bottom line: Some appellate arguments don't require a reporter's transcript, but many do.

Overcoming a missing transcript

It is the appellant's burden to provide an adequate record. (*In re Marriage of Obrecht, supra,* 245 Cal.App.4th at 9.) If proceedings relevant to the appeal were reported, the appellant can designate them for inclusion in the appellate record as provided in Rule 8.121. But if some of the relevant proceedings were not reported, all is not necessarily lost. There are two tools that can help fill in the gap: agreed statements and settled statements.]

Agreed statements

An agreed statement is what it sounds like – the parties agree on a statement of what happened. An agreed statement must explain three things: (1) "the nature of the action," (2) "the basis of the reviewing court's jurisdiction," and (3) "how the superior court decided the points to be raised on appeal." (Rule 8.134.) The agreed statement is limited to "only those facts needed to decide the appeal," and must be signed by the parties. (*Ibid.*)

An appellant planning to use an agreed statement must file the statement, or a stipulation that the parties are working on a statement, with the notice designating the record on appeal. If the appellant files a stipulation and the parties subsequently agree on a statement, it must be filed within 40 days after the notice of appeal. If the parties do not agree, the appellant must file a new designation of record within 50 days of filing the notice of appeal. (*Ibid.*)

Settled statements

An appellant who does not anticipate being able to work out an agreed statement can also turn to the court for help, through the settled statement process. This route is a multi-step process.

The appellant's first step is to move for a settled statement. The motion, filed *in the trial court* along with the record designation, must make one of three showings: (1) that the "oral proceedings were not reported or cannot be transcribed"; (2) that a settled statement will save "substantial cost[s]" and can be done "without significantly burdening opposing parties or the court"; or (3) that the appellant cannot afford to purchase a transcript. (Rule 8.137.) The trial court has limited discretion in ruling on the motion. If the statement can be settled with the respondent' suggestions, the judge's memory and notes, or other available resources, the court must grant the motion. (*Mooney v. Superior Court* (2016) 245 Cal. App.4th 523, 531; *Western States Const. Co. v. Municipal Court* (1951)38 Cal.2d 146, 150.)

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NOTES ON RECENT DECISIONS

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:

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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.

Lisa Perrochet

ATTORNEY FEES AND COSTS

In federal court, opposing counsel has a due process right to examine billing records used as a basis for an attorney fee award.

Yamada v. Nobel Biocare Holding AG (2016) 825 F.3d 536

Class counsel sought an award of attorney fees, but opposed allowing defense counsel to review the billing records because the bills contained privileged material. Rather than requiring class counsel go through the cumbersome process of redacting its billing records so defense counsel could review them, the district court examined the billing records in camera to determine the reasonableness of the claimed fees.

The Ninth Circuit reversed the fee award. The defendant's right to due process outweighed the district court's interest in efficiency. District courts "must allow Defendants access to the timesheets, appropriately redacted to remove privileged information, so they can inspect them and present whatever objections they might have concerning the fairness and reasonableness of Plaintiffs' fee request."

Prevailing parties' entitlement to fees under CCP section 1032 is no longer subject to "unity of interest" exception.

Charton v. Harkey (2016) 247 Cal.App.4th 730

The plaintiffs sued an investment company, its principal shareholder/CEO, and his wife for breach of fiduciary duty and other claims. The plaintiffs recovered a substantial judgment against the shareholder and company, but lost on the claims against the wife, who then sought an award of prevailing party costs under Code of Civil Procedure section 1032. The plaintiffs moved to tax costs on the ground the wife had a unity of interest with the shareholder and his company (the same lawyer represented them all, and the pleadings were jointly filed). The trial court granted the motion to tax in part, awarding only 25% of what the wife sought based on the fact she was one of four defendants, but refusing to apply the unity of interest exception to bar costs altogether.

The Court of Appeal (Fourth Dist., Div. Three) affirmed in part and reversed in part. After the unity of interest exception developed, the legislature amended section 1032, eliminating the language upon which the exception was based. The statute now unequivocally allows a prevailing party to obtain costs, even though it was united in interest with aligned parties who did not prevail. The award here nonetheless had to be reconsidered. The trial court's method of discounting the costs based on the plaintiff's proportion of participation was inappropriate. When joint efforts are involved, the court must apportion the costs based on which costs were reasonably necessary for litigating on behalf of the prevailing party.

One-way fee provision in Labor Code section 1194 bars employer's fee claim under Labor Code section 218.5, where employer who prevailed on overtime claims that were were "inextricably intertwined" with meal period claims on which employee succeeded.

Ling v. P.F. Chang's China Bistro, Inc. (2016) 245 Cal.App.4th 1242

The plaintiff brought wage and hour claims against her employer, and the parties arbitrated the claims. The arbitrator found for the employer on plaintiff's claim for unpaid overtime, although it found for the employee on part of the her claim for missed meal periods. The arbitrator awarded the defendant legal fees under Labor Code section 218.5, which permits either party to an employment dispute to recover fees if they prevail in an action for nonpayment of wages or benefits. The trial court vacated that award and remanded to the arbitrator to determine the amount of fees the plaintiff was entitled to for prevailing on her missed meal period claims.

The Court of Appeal (Sixth Dist.) affirmed. Under Labor Code section 1194, subdivision (a), an employee who prevails on overtime claims may recover attorney fees, but an employer who defeats such claims may not. This reflects legislative intent to encourage employees to vindicate their right to overtime pay. Because the plaintiff's claims were all "inextricably intertwined," section 1194 "prohibits an employer from recovering attorney's fees for defending a wage and hour claim, even if the employer's efforts defended a related claim for which it otherwise would have been entitled to attorney's fees as the prevailing party" under section 218.5.

Plaintiff was not, however, entitled to an award of attorney fees for her attorneys' efforts in convincing the trial court to vacate the arbitrator's initial fee award, as there is "no authority supporting the notion that a statutory attorney's fees provision applying to a substantive claim extends to a petition to vacate an arbitration award resolving that claim."

ARBITRATION

Provision in arbitration agreement stating that parties may seek preliminary injunctive relief in the superior court does not render agreement unconscionable, even if employer may be more likely to take advantage of provision.

Baltazar v. Forever 21, Inc. (2016) 62 Cal.4th 1237

Employee was required to sign arbitration agreement as a condition of obtaining employment. The agreement provided that the parties "mutually agree" to arbitrate all claims arising out of the employment, although the parties could apply to the superior court for injunctive relief. Employee later resigned her employment due to alleged harassment. Employer moved to compel arbitration, but the trial court denied the motion, holding the agreement was unconscionable. The Court of Appeal (Second Dist., Div. One) reversed , holding the agreement was not unconscionable.

The California Supreme Court affirmed the Court of Appeal. As for procedural unconscionability, although the agreement was imposed as a condition of employment, it was not a surprise. As for substantive unconscionability, even assuming the injunctive relief provision was more likely to benefit the employer because the employer was more likely to have claims amenable to injunctive relief, the provision merely stated existing law embodied in Civil Procedure Code section 1281.8(b).

Compare *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227 [Fourth Dist., Div. Three: arbitration clause was both procedurally and substantively unconscionable where, among other things, it was imposed on the employee as a term of her employment; employee had no notice of which AAA rules would apply; and agreement allowed employer to obtain injunctive relief in court while requiring employee to seek relief through arbitration].

"Browsewrap agreements" to arbitrate that arise merely from engaging in a retail transaction on a website setting forth the agreement must be sufficiently conspicuous to be enforceable.

Long v. Provide Commerce, Inc. (2016) 245 Cal.App.4th 855

Plaintiff brought a class action against an online retailer. The retailer moved to compel arbitration based on the website's "Terms of Use," which were accessible through a hyperlink at the bottom of the computer screen. The "Terms of Use" constituted a "browsewrap agreement." Unlike a "clickwrap agreement," which requires the user to affirmatively click a button agreeing to the terms, "browsewrap agreements" assert the user is bound simply by transacting on the website. The trial court declined to enforce the arbitration agreement in the "Terms of Use" because the link to the terms was not conspicuous enough to place a reasonable user on inquiry notice that she was being bound.

The Court of Appeal (Second Dist., Div. Three) affirmed. A link at the bottom of the screen called "Terms of Use" is not conspicuous enough to give constructive notice of the particular terms to which the retailer is attempting to bind the user, including the arbitration provision. "Online retailers would be well-advised to include a conspicuous textual notice with their terms of use hyperlinks going forward."

A defendant can authenticate an electronic signature on an arbitration agreement by providing detailed evidence that only the plaintiff could have provided his electronic signature.

Espejo v. Southern California Permanente Medical Group (2016) 246 Cal.App.4th 1047

Defendants petitioned to compel arbitration per an agreement the plaintiff had allegedly signed electronically on defendants' internal website. The plaintiff opposed arbitration, arguing that his electronic signature was not authenticated. Defendants filed a declaration explaining detailed security precautions regarding transmission and use of an applicant's unique user name and password required to access the website, as well as steps an applicant would have to take to place his or her name on the signature line of the electronic agreement. The trial court excluded the declaration as untimely because it had not been filed with the initial moving papers. Without the declaration, defendants could not authenticate the electronic signature, so the trial court denied the petition to compel.

The Court of Appeal (Second Dist., Div. Four) reversed. The declaration was timely because defendant was not obligated to authenticate the signature until it was challenged. And because the declaration provided the details necessary for the trial court to conclude only the plaintiff could have place his name on the electronic signature line, there was a valid agreement to arbitrate.

CIVIL PROCEDURE

Order granting anti-SLAPP motion as to fewer than all defendants is not appealable in federal court.

Hyan v. Hummer (9th Cir. 2016) 825 F.3d 1043

In this legal malpractice action against several defendants, the district court granted an anti-SLAPP motion in favor of only two defendants. The plaintiff appealed.

The Ninth Circuit dismissed the appeal for lack of appellate jurisdiction. An order granting an anti-SLAPP motion and striking claims against only some of the defendants is not a "final decision." Although the grant of an anti-SLAPP motion is treated as final in California, that is a procedural rule for Erie purposes that does not apply to a federal court sitting in diversity. And unlike the denial of an anti-SLAPP motion, which deprives the defendant of an immunity from suit, the grant of such a motion is not reviewable under the collateral order doctrine. The order can be reviewed on appeal from the final judgment.

Code of Civil Procedure section 998 offer requiring execution of undefined settlement agreement is invalid.

Sanford v. Rasnick (2016) 246 Cal.App.4th 1121

Defendants in this auto accident case served an offer to compromise under Code of Civil Procedure section 998 for $130,000 in exchange for a dismissal and execution of "a written settlement agreement and general release." The offer did not identify any of the terms of the proposed settlement agreement. The offer lapsed and the matter went to trial, resulting in a judgment of about $144,000, reduced to about $122,000 for plaintiff's comparative fault. The parties filed competing costs bills. The trial court granted costs for both parties, although it taxed some of plaintiff's costs. Plaintiff appealed.

The Court of Appeal (First Dist., Div. Two) reversed the costs order. Although a 998 offer may require execution of a release, it may not require execution of an "undescribed and unexplained" settlement agreement, which renders the offer conditional and uncertain. Defendants' offer was thus invalid, so they were not entitled to costs. Additionally, under Code of Civil Procedure section 1033.5(a), the trial court has discretion to award costs "reasonably necessary to the conduct of the litigation," even if those costs are not expressly listed in the statute. The court's decision to tax plaintiff's delivery charges and mediation expenses because those costs were not expressly listed was an abuse of discretion. Reconsideration was required.

See also *Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362 [Second Dist., Div. Six: after recent legislative amendment to section 998 clarifing that a defendant may recover only "postoffer" expert witness fees, cost award had to be remanded for reconsideration to ensure only postoffer costs were included].

The deadline for filing a peremptory challenge against a judge following an all-purpose assignment runs from the date of actual notice of the assignment.

Jones v. Superior Court (People) (2016) 246 Cal.App.4th 390

This criminal matter was assigned to the sole judge in the Truckee branch of the Nevada County Superior Court. Through counsel, defendants made a general appearance, but they did not receive a file-stamped copy of the complaint reflecting that the case had been assigned to the Truckee judge "for all purposes" until sometime later. When defendants moved to strike the judge under Code of Civil Procedure section 170.6(a)(2), more than 30 days had elapsed since their appearance. Because section 170.6(a)(2) requires a peremptory challenge against a judge of a court "authorized to have no more than one judge" be made within 30 days of a party's first appearance, the judge denied the motion. Defendants sought a writ of mandate.

The Court of Appeal (Third Dist.) issued the writ. The Government Code now authorizes at least two superior court judges for every county. Nevada County is authorized to have six. The "one judge" provision of section 170.6(a)(2) thus no longer has any practical applications. Defendants' challenge was valid so long as it was filed within the statutory time set for filing a challenge after receiving notice of an all-purpose assignment (10 days for criminal cases and 15 for civil cases). To calculate the deadline, the court looked to the date defendants received the complaint showing the all-purpose assignment – i.e., the date defendants received actual notice of the assignment. The court rejected an argument that constructive notice of the assignment was sufficient: "Were constructive notice to trigger the deadline, parties and courts would have to guess about when proceedings reach a stage at which constructive notice ripens into a duty to inquire whether a judge has been assigned for all-purposes."

Trial court did not abuse its discretion by granting evidentiary and terminating sanctions against plaintiff whose counsel repeatedly violated in limine orders.

Osborne v. Todd Farm Service (2016) 247 Cal.App.4th 43

The plaintiff, who worked with horses, was injured when a bale of hay she was standing on collapsed. At trial, she planned to testify as her own expert about how she knew the hay came from the defendants, as opposed to some other source. In limine, the court precluded her from testifying as an expert as to the source of the hay because she failed to comply with the rules for expert disclosure. The court also precluded her from introducing hearsay testimony about the source of the hay based on her conversations with the man who delivered it. Throughout trial, plaintiff's counsel repeatedly violated the in limine rulings. After a particularly egregious violation, the trial court granted terminating sanctions and entered judgment for all defendants.

The Court of Appeal (Second Dist., Div. Six) affirmed. Plaintiffs' repeated violation of the court's in limine orders excluding hearsay and opinion testimony was a proper ground for dismissing her action with prejudice as to all defendants. "California courts possess inherent power to issue a terminating sanction for 'pervasive misconduct'" and courts' "inherent authority to control the proceedings before them" includes "the authority to impose a terminating sanction where a party willfully violates the court's orders." Moreover, "In a multi-defendant case, there is no rule requiring that misconduct must relate to a specific defendant as a prerequisite to a terminating sanction as to that defendant."

Federal district courts have limited power to recall a jury after discharge to correct a verdict in a civil case.

Dietz v. Bouldin (2016) 578 U.S. __ [136 S.Ct. 1885,195,L.Ed.2d 161]

The jury in this personal injury action returned a liability finding for plaintiff but awarded $0 in damages. Immediately after discharging the jury, the court realized that the verdict was legally impermissible because the parties had stipulated to about $15,000 in damages. The court recalled the jurors, all of whom were still in the building (although one may have gone outside). The court confirmed the jurors had not discussed the case. The jurors corrected the damages portion of the verdict. The Ninth Circuit affirmed the judgment.

The U.S. Supreme Court affirmed. In a civil case, a federal district court has power to recall a discharged jury for further deliberations after identifying an error in the jury's verdict, although that power should be exercised only when, as here, there is no risk the jurors have been influenced by outside sources.

CLASS ACTIONS

Class action plaintiffs may not sue for violations of federal statutes without suffering actual or imminent harm.

Spokeo, Inc. v. Robins (2016)
578 U.S. [136 S.Ct. 1540,194,L.Ed.2d 635]

Spokeo operates a "people search engine" which aggregates publicly available information. The plaintiff brought a putative class action alleging that Spokeo violated the Fair Credit Reporting Act (FCRA) by reporting inaccurate information about him online. The Ninth Circuit held that Spokeo's alleged violation of FCRA alone – without any allegation of actual harm – sufficed to create constitutional injury-in-fact for standing purposes, and that the remaining elements of standing – causation and redressability – were automatically satisfied by the finding of injury-in-fact.

The Supreme Court vacated the Ninth Circuit's opinion and remanded. Congress cannot confer Article III standing on a private litigant who has suffered no concrete harm simply by creating a private right of action for the bare violation of a federal statute. The Court also held that concreteness and particularity of harm are two separate and independent components of the injury-in-fact requirement for Article III standing. The fact that the plaintiff's injury was particularized and not a generalized grievance was insufficient to show that the injury was also concrete, so plaintiff had not established Article III standing.

Defendants may not moot a Ninth Circuit class action by tendering an offer of judgment that would resolve the named plaintiff's individual claims.

Chen v. Allstate Insurance Company (9th Cir. 2016) 285 F.3d. 1136

Plaintiff in this class action alleged Allstate Insurance Company violated the Telephone Consumer Protection Act. Before the named plaintiffs had a chance to move for class certification, Allstate served a Federal Rule of Civil Procedure 68 offer of judgment to resolve the two named plaintiffs' individual claims. Allstate offered to keep the judgment open until further notice, and then moved to dismiss the complaint as moot. The district court refused dismissal on the ground that under *Pitts v. Terrible Herbst, Inc.* (2001) 653 F.3d 1081, the action remained viable so long as class certification was still possible.

The Ninth Circuit permitted an interlocutory appeal and affirmed. Pitts remains good law in the Ninth Circuit despite the Supreme Court's decision in *Genesis Healthcare Corp. v. Symczyk* (2013) 133 S. Ct. 1523, holding that employee whose individual claims were satisfied could not pursue Fair Labor Standards Act collective action on behalf of putative, unnamed claimants. *Genesis* did not apply to class actions. Further, even if a defendant could moot the entire action by mooting a plaintiff's individual claims, the individual claims are not moot where relief has merely been tendered rather than received.

LABOR AND EMPLOYMENT

Dismissal of a groundless Title VII case on procedural grounds rather than on merits may support a finding that defendant is a prevailing party entitled to fees.

CRST Van Expedited, Inc. v. Equal Employment Opportunity Commission (2016) 578 F.3d __ [136 S.Ct. 1642,194,L.Ed.2d 707]

Monika Starke filed an EEOC charge alleging she was sexually harassed at work. The EEOC investigated and determined there was reasonable cause to believe the defendant had subjected Starke and others to harassment. Efforts at conciliation failed, and the EEOC sued on behalf of Starke and others. The district court ultimately dismissed the case because the EEOC had not complied with the requirement to seek conciliation with respect women besides Starke. The court then awarded defendant $4 million in attorney fees. The EEOC appealed. The Eighth Circuit reversed the fee award, reasoning that the dismissal based on the EEOC's failure to satisfy presuit requirements was not a "ruling on the merits" for purposes of determining whether defendant was a prevailing party entitled to fees under Title VII.

The United States Supreme Court reversed the Eighth Circuit. A defendant who defeats the plaintiff's "frivolous, unreasonable, or groundless" action may be deemed to have prevailed, even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason, such as the failure of the EEOC to adequately investigate and attempt to conciliate the claim before filing suit.

Employers must provide seats for employees if, under the totality of the circumstances, the employee's job reasonably permits sitting in the location where a suitable seat is claimed.

Kilby v. CVS Pharmacy, Inc. (2016) 63 Cal.4th 1

Class plaintiffs alleged that their employers failed to provide seats during work hours in violation of two California Wage Orders that "require that an employer provide 'suitable seats' to employees 'when the nature of the work reasonably permits the use of seats.' " The Ninth Circuit asked the California Supreme Court for guidance on the meaning of the Wage Orders.

The California Supreme Court construed the phrase "nature of the work" to mean "an employee's tasks performed at a given location for which a right to a suitable seat is claimed," rather than referring to a "holistic" consideration of the entire range of an employee's duties anywhere on the jobsite during a complete shift. "If the tasks being performed at a given location reasonably permit sitting, and provision of a seat would not interfere with performance of any other tasks that may require standing, a

continued on page v

seat is called for." Further, "Whether the nature of the work reasonably permits sitting is a question to be determined objectively based on the totality of the circumstances. An employee's business judgment and the physical layout of the workplace are relevant but not dispositive factors. The inquiry focuses on the nature of the work, not an individual employee's characteristics." Finally, "The nature of the work aside, if an employer argues there is no suitable seat available, the burden is on the employer to prove unavailability."

The Fair Employment and Housing Act requires employers to provide reasonable accommodations to employees who are associated with a disabled person.

Castro-Ramirez v. Dependable Highway Express, Inc. (2016) 246 Cal.App.4th 180

For several years, plaintiff's employer accommodated plaintiff's need to work shifts that would allow him to be home early enough to administer dialysis to his son. Plaintiff was then assigned a new supervisor, who repeatedly scheduled plaintiff to shifts that did not permit him to be home in time to perform the dialysis. Plaintiff was fired when he declined to work the assigned shifts. He sued for associational disability discrimination. The trial court entered summary judgment for the employer, reasoning that plaintiff could not show that his employer terminated him for requesting accommodation to care for a relative with a disability.

The Court of Appeal (Second Dist., Div. Eight) reversed. Under the plain language of FEHA, "physical disability" includes association with a person with a physical disability. Accordingly, FEHA's requirement that employers reasonably accommodate persons with physical disabilities applies in the associational disability context. Evidence that the plaintiff had complained that his supervisor was being unreasonable in scheduling his shifts for times that made it difficult to care for his son raised an inference that his termination was retaliatory.

TORTS

The sophisticated intermediary defense applies to product liability claims in California.

Webb v. Special Electric Company, Inc. (2016) 63 Cal.4th 167

The plaintiff claimed injury from a product sold by Johns-Manville (J-M), the world's leading supplier of asbestos-containing materials. The defendant, Special Electric, acted as a broker for the sale of raw asbestos to J-M. At trial, the jury found Special Electric liable solely on a failure to warn theory. The trial court granted judgment notwithstanding the verdict under the sophisticated intermediary doctrine because no warnings from Special Electric were needed, given that J-M already knew everything there was to know about asbestos dangers. The Court of Appeal (Second Dist., Div. 1) reversed.

The Supreme Court affirmed the Court of Appeal. The Court agreed with defendant that the sophisticated intermediary doctrine applies in California: However, to establish the defense, "a product supplier must show not only that it warned or sold to a knowledgeable intermediary, but also that it actually and reasonably relied on the intermediary to convey warnings to end users." JNOV had to be reversed because, while it was undisputed J-M was a sophisticated entity, Special Electric had not conclusively established that it reasonably relied on J-M to give warnings to its customer.

See also *Moran v. Foster Wheeler Energy Corporation* (2016) 246 Cal. App.4th 500 [Second Dist., Div. Four: there was insufficient evidence to support a sophisticated user defense even though plaintiff was frequently involved in the removal and installation of insulation and refractory at his clients' facilities, where there was no evidence he or his professional peers were aware of the relevant asbestos risks].

A raw product supplier is not insulated from strict liability if the product causes injury when used in a manner intended by the supplier.

Ramos v. Brenntag Specialties, Inc. (2016) 63 Cal.4th 500

While working for a metal parts manufacturer, plaintiff allegedly sustained respiratory injuries when he breathed fumes emitted from the melting of aluminum supplied by Alcoa. Ramos sued Alcoa for strict products liability. Alcoa demurred on the ground that a supplier of a nondefective, multiuse raw material, like aluminum stock, is not responsible under any product liability theory for injuries resulting from the manufacturing of the raw material. The trial court sustained the demurrer, but the Court of Appeal (Second Dist., Div. Four) reversed, holding the claim could go forward because liability flows from injuries caused by all "intended" uses of a raw material, even where the supplier has no control over the myriad of manufacturing processes that occur once the raw material leaves the control of the supplier.

The California Supreme Court affirmed the Court of Appeal. "[T]he protection afforded to defendants by the component parts doctrine does not apply when the product supplied has not been incorporated into a different finished or end product but instead, as here, itself allegedly causes injury when used in the manner intended by the product supplier." The Court clarified, however, that the plaintiff must still establish "either (1) that the *supplied product* was defective under a design defect theory and that the defect caused the injury or (2) that the supplier should be held responsible for the injury under a duty to warn theory" before it may obtain a liability finding.

Limitations period for professional negligence (CCP 340.5) applies to injuries resulting from equipment used to implement doctor's orders.

Flores v. Presbyterian Intercommunity Hospital (2016) 63 Cal.4th 75

Plaintiff sued Presbyterian Intercommunity Hospital for premises liability and negligence, seeking damages for injuries she sustained (more than one year before filing suit) when a rail on her hospital bed collapsed and she fell to the floor. The Hospital argued MICRA's one-year statute of limitations for professional negligence barred the action. (Code Civ. Proc., § 340.5.) The trial court sustained the Hospital's demurrer without leave to amend and dismissed the action. Plaintiff appealed, arguing that the accident amounted to general (not professional) negligence, which is subject to a two-year statute of limitations. (Code Civ. Proc., § 335.1.) The Court of Appeal (Second Dist., Div. Three) reversed, holding that the action sounded in general negligence because the bed rail did not collapse while the hospital was rendering professional services.

The California Supreme Court reversed the Court of Appeal and reinstated the trial court's dismissal. "[I]f the act or omission that led to the plaintiff's injuries was negligence in the maintenance of equipment that, under the prevailing standard of care, was reasonably required to treat or accommodate a physical or mental condition of the patient, the plaintiff's claim is one of professional negligence under section 340.5."

Elder abuse neglect claims may not be asserted unless the defendant assumed significant responsibility for attending to the basic needs of an elder or dependent adult.

Winn v. Pioneer Medical Group, Inc. (2016) 63 Cal.4th 143

Defendants provided outpatient medical care to plaintiffs' mother, who ultimately died. Plaintiffs sued the treating physicians for elder abuse. The trial court sustained defendants' demurrer, but the Court of Appeal (Second Dist., Div. Eight) reversed on grounds the outpatient facility had a custodial relationship with its patients sufficient to support an elder abuse claim.

The Supreme Court reversed the Court of Appeal. "[A] claim of neglect under the Elder Abuse Act requires a caretaking or custodial relationship – where a person has assumed significant responsibility for attending to one or more of those basic needs of the elder or dependent adult that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." Because the plaintiffs failed to adequately allege that the decedent "relied on defendants in any way distinct from an able-bodied and fully competent adult's reliance on the advice and care of his or her medical providers," their complaint was insufficient to support an Elder Abuse cause of action. Applying the Elder Abuse Act neglect standard whenever a physician provides medical treatment to an elderly patient at an outpatient facility "would radically transform medical malpractice liability."

A public employer may not avoid its obligations to defend and indemnify employees for torts committed in the scope of employment by relying on the plaintiff's unproven allegations that the employee committed a tort outside the scope of employment.

Daza v. Los Angeles Community College District (2016) 247 Cal.App.4th 260

Community college student sued a counselor and his employer, the community college district, alleging the counselor sexually assaulted her. The counselor denied the allegations. The district settled the suit without admitting fault. The counselor then cross-complained against the district seeking costs of defense and indemnification under the Government Code sections requiring public employers to defend their employees against actions arising out of acts or omissions in the scope of their employment. The district demurred, arguing that sexual assault was outside the scope of the counselor's employment.

The Court of Appeal (Second Dist., Div. Eight) held the trial court erred in sustaining the demurrer. Although sexual assault was beyond the scope of the counselor's employment, the counselor's allegations in his cross-complaint for indemnity stating that he did not assault the plaintiff had to be taken as true for purposes of demurrer. Relying only on the unproven allegations of the plaintiff's complaint would have "unsettling consequences," including depriving the employee of a factual determination of his liability, placing the employee's fate in the hands of the plaintiff who accused him of assault, and "encourag[ing] employers to settle with third parties without admitting liability in order to insulate themselves" from indemnity liability.

EVIDENCE

Trial courts may not determine whether attorney-client privilege applies based on in camera review of the content of the attorney-client communication.

DP Pham, LLC v. Cheadle (2016) 246 Cal.App.4th 653

Robert Obarr contracted to sell the same property to both DP Pham LLC and Westminster MHP Associates, LP. Obarr later died. Pham and Westminster both sued for specific performance of the sale, and Obarr's estate interpleaded the property. Westminster moved for summary judgment. Pham opposed the motion based on emails between Obarr and his attorney, which Pham obtained from Obarr's assistant. Obarr's estate objected to Pham's evidence on privilege grounds, and moved to disqualify Pham's counsel. Ultimately, the trial court determined the attorney-client privilege did not protect the emails because the attorney's statements in the emails suggested the attorney was not representing Obarr in the sale of the property.

The Court of Appeal (Fourth Dist., Div. Three) reversed. Once a party makes out a prima facie case that a communication was a confidential one between an attorney and his or her client, the privilege applies and the burden shifts to the party seeking to defeat the privilege to establish otherwise. In meeting that burden, neither a party nor the court may rely on the content of the communication. The court specifically noted that to the extent *OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, suggests the court may review the contents of a privileged communication to determine waiver of the privilege, it is no longer good law after the Supreme Court's decision in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725. Additionally, the fact Obarr was deceased did not create an exception to the privilege. Evidence Code section 957 provides that the privilege does not apply to communications relevant to an issue between parties who all claim through a decedent. That exception is intended to effectuate the decedent's intent, not to allow a party to use a privileged communication to establish a liability of the estate.

PROFESSIONAL RESPONSIBILITY

A nonclient can seek attorney disqualification for ethical violations only where the representation poses a risk to the nonclient.

In re Marriage of Murchison (2016) 245 Cal.App.4th 847

In divorce proceedings, the wife was awarded the marital home on condition she sell it. She did not pay the mortgage, however, and the bank initiated foreclosure proceedings. Rather than lose the house, wife transferred the house to her attorney. The husband then sought to have the attorney disqualified on the ground he entered into an unethical business relationship with his client. The trial court granted the disqualification, and the wife appealed.

The Court of Appeal (Second Dist., Div. One) reversed. So long as the wife wanted to be represented by the attorney, and the husband could not demonstrate he had a personal stake in disqualifying the lawyer (i.e., he would be harmed by the continued representation), he lacked standing to seek to disqualify the wife's attorney. Disqualification is allowed only as a prophylactic measure to ensure the continuing integrity of the court proceedings. If the attorney committed ethical violations, the remedy was to report the attorney to the state bar, not to disqualify him.

INSURANCE

Brandt fees awarded by court after the jury renders its verdict may be considered in ratio analysis used to evaluate whether a punitive damages award is excessive.

Nickerson v. Stonebridge Life Insurance Company (2016) 63 Cal.4th 363

In this coverage and bad faith action, the jury found for the plaintiff and awarded him $35,000 in bad faith compensatory damages for emotional distress, and $19 million in punitive damages. After the verdict, the court determined that the insurer also owed $12,500 in *Brandt* fees. During posttrial proceedings, the court ruled that the punitive damages award was constitutionally excessive, and offered the plaintiff a remittitur of the punitive damages to $350,000, representing the constitutional maximum of a ten-to-one ratio of punitive damages to compensatory damages. The plaintiff appealed, arguing the trial court should have considered the *Brandt* fees when calculating the remittitur, even though that additional sum was awarded by the court after the jury reached its punitive damages verdict.

The Supreme Court agreed with the plaintiff. In determining whether a punitive damages award in an insurance bad faith case is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered. The effect of excluding consideration of the fees "would be to skew the proper calculation of the punitive-compensatory ratio, and thus to impair reviewing courts' full consideration of whether, and to what extent, the punitive damages award exceeds constitutional bounds."

"Other insurance" clause in one primary carrier's policy's does not that carrier of obligation to contribute to defense costs paid by another primary insurer.

Certain Underwriters at Lloyds, London v. Arch Specialty Ins. Co. (2016) 246 Cal.App.4th 418

Underwriters and Arch issued successive primary policies to the insured. When the insured was sued in several construction defect suits raising claims triggering coverage under both insurers' policies, Underwriters defended but Arch declined. Arch argued that an "other insurance" clause expressly limiting Arch's duty to defend to matters in which no "other insurance" afforded a defense rendered its policy excess to Underwriters' policy. The trial court agreed with Arch and granted it summary judgment on Underwriters' claim for equitable contribution.

The Court of Appeal (Third Dist.) reversed. Public policy does not permit successive primary insurers to escape liability on the basis of "other insurance" clauses. Contrary to the trial court's view, the fact Arch's "other insurance" clause appeared in the "coverage" section of the policy in addition to the "limitations" section made no difference. Insurers may not avoid the public policy limitation on the application of "other insurance" clauses simply by placing the clause in a particular section of the policy.

CASES PENDING IN THE CALIFORNIA SUPREME COURT

Addressing admissibility of industry custom and practice evidence in design defect cases.

Kim v. Toyota Motor Corporation case no. S232754 (rev. granted April 13, 2016)

Mr. Kim lost control of his pickup truck when he swerved to avoid another vehicle. Plaintiffs alleged the accident occurred because the pickup lacked electronic stability control and that the absence of that device or system was a design defect. The Court of Appeal (Second Dist., Div. Seven) held that the trial court did not abuse its discretion in denying plaintiff's motion in limine to exclude all evidence of industry custom and practice. While compliance with industry customs is not a complete defense, such evidence may be relevant in a strict liability action tried on a risk-benefit theory, depending on the nature of the evidence and the purpose for which the proponent seeks to introduce the evidence.

The Supreme Court granted review of the following issue: Is evidence of industry custom and practice admissible in a strict products liability action?

Addressing advance conflict waivers and whether an attorney disqualified due to a conflict of interest is entitled to any payment for work performed before disqualification.

Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc., case no. S232946 (rev. granted April 27, 2016)

A law firm retained to represent the defendant in qui tam action was disqualified after it was discovered the firm simultaneously represented one of the real parties in interest on whose behalf the qui tam action was brought. The law firm then prevailed in an arbitration between the law firm and its former client over payment of the law firm's pre-disqualification fees. The Court of Appeal (Second Dist., Div. Four) reversed the fee award. The entire representation agreement – even including the arbitration clause – was illegal because of the conflict of interest created by the concurrent representation of adverse clients, and the firm was not entitled to any fees for work performed after the conflict arose.

The Supreme Court granted review of the following issues: (1) May a court rely on non-legislative expressions of public policy to overturn an arbitration award on illegality grounds? (2) Can a sophisticated consumer of legal services, represented by counsel, give its informed consent to an advance waiver of conflicts of interest? (3) Does a conflict of interest that undisputedly caused no damage to the client and did not affect the value or quality of an attorney's work automatically (i) require the attorney to disgorge all previously paid fees, and (ii) preclude the attorney from recovering the reasonable value of the unpaid work?

Addressing whether rule requiring exclusion of untimely-disclosed expert information applies to summary judgment proceedings.

Perry v. Bakewell Hawthorne, case no. S233096 (rev. granted April 27, 2016)

In this premises liability suit, the defendant moved for summary judgment, arguing that plaintiff could not establish the defendant was on notice of a dangerous condition on the property. The plaintiff opposed the motion, attaching declarations from two expert witnesses who would opine the property violated building regulations. The defendant objected to the declarations on the ground they had not been disclosed per a co-defendant's Code of Civil Procedure section 2034.300 demand for an exchange of expert information, with which defendant had complied but plaintiff had not. The trial court sustained the defendant's evidentiary objections to the declarations and then granted summary judgment. The Court of Appeal (Second Dist., Div. Two) affirmed.

The Supreme Court granted review of the following issue: Does Code of Civil Procedure section 2034.300, which requires a trial court to exclude the expert opinion of any witness offered by a party who has unreasonably failed to comply with the rules for exchange of expert witness information, apply to a motion for summary judgment?

Addressing appealability of an order denying a Code of Civil Procedure section 663 motion to vacate.

Ryan v. Rosenfeld, case no. S232582 (rev. granted April 27, 2016)

The trial court dismissed the plaintiff's case in October 2014. The plaintiff later brought a motion to vacate the judgment under Code of Civil Procedure section 663. That motion was denied in June 2015. Plaintiff filed a notice of appeal from the order denying his section 663 motion. The Court of Appeal (First Dist., Div. Four) dismissed the appeal, reasoning that the plaintiff had failed to appeal from the order of dismissal within the jurisdictional deadline to appeal, and the order denying the motion to vacate the dismissal order was not separately appealable. The appellate court reasoned that "[t]o permit an appeal from an order denying a motion to vacate would effectively authorize two appeals from the same decision."

The Supreme Court granted review, limited to the following issue: Is the denial of a motion to vacate a judgment under Code of Civil Procedure section 663 separately appealable?

Addressing whether grand jury testimony, even though hearsay, may be used to show plaintiff's probability of prevailing on the merits in opposition to anti-SLAPP motion.

Sweetwater Union School District v. Gilbane Building Company, case no. S233526 (rev. granted April 5, 2016)

Plaintiffs alleged defendants engaged in a "pay to play" scheme to obtain a lucrative construction contract with a school district. Defendants filed an anti-SLAPP motion, arguing that their conduct in providing perks such as tickets to sporting events to school officials was part of their protected petitioning activity. In opposing the motion, plaintiffs argued defendants' activities were illegal as a matter of law and produced grand jury testimony and plea agreements from a related criminal investigation to show their likelihood of prevailing on the merits of their claims. Defendants argued their activity was not illegal as a matter of law, and that plaintiffs' evidence was not admissible. The trial court denied the motion. The Court of Appeal (Fourth Dis., Div. One) affirmed. The activities were not necessarily illegal as a matter of law, but the plaintiffs had shown a probability of prevailing. "Although the transcripts of the grand jury testimony are hearsay, and therefore inadmissible at trial unless they meet an exception to the hearsay rule, the transcripts are of the same nature as a declaration in that the testimony is given under penalty of perjury. The grand jury transcripts, like the plea forms and the factual narratives incorporated into those forms, may be used in the same manner as declarations for purposes of motion practice."

The Supreme Court granted review of following issues: (1) Is testimony given in a criminal case by persons who are not parties in a subsequent civil action admissible in that action to oppose a special motion to strike? (2) Is such testimony subject to the conditions in Evidence Code section 1290 et seq. for receiving former testimony in evidence?

Addressing whether unnamed class members must intervene to gain standing to appeal.

Hernandez v. Restoration Hardware, Inc., case no. S233983 (rev. granted June 22, 2016)

After a bench trial in a class action against a retailer under the Song–Beverly Credit Card Act, the class representatives requested the court order an attorney fees award of over $9 million. (25 percent of the total maximum fund of $36,412,350 created by the judgment) to be payable to class counsel from the fund. The defendant agreed not to contest that request. Francesca Muller, a class member, requested the court order notice of the attorney fee motion to be sent to all class members. The court denied Muller's request, granted the attorney fee motion, and entered judgment in the action. Muller then appealed from the judgment. The Court of Appeal (Fourth Dist., Div. One) dismissed the appeal, holding that the customer who was not a class representative was not a "party of record," and thus could not appeal.

The Supreme Court granted review of the following issue: Must an unnamed class member intervene in the litigation in order to have standing to appeal?

Addressing which statute of limitations applies to claims that prenatal injuries were caused by toxic exposures.

Lopez v. Sony Electronics, Inc., case no. S235357 (rev. granted June 22, 2016)

Plaintiff sued for personal injuries allegedly caused by prenatal exposure to toxic substances. The trial court __________. The Court of Appeal (______) ruled in a divided opinion that each statute applied on its face and, in resolving the conflict between the statutes, the court held such actions are governed by the statute of limitations set forth in Code Civ. Proc., § 340.4, which applies to tort actions for birth and prebirth injuries, rather than the more liberal statute of limitations set forth in § 340.8, which applies to tort actions for exposure to hazardous materials and toxic substances.

The Supreme Court granted review to decide which statute of limitations applies to such actions.

Transcript – continued from page 16

If the court denies the motion, the appellant has 10 days to file a new record designation. But if the court grants the motion, the appellant moves on to step two: preparing "a condensed narrative of the oral proceedings that the appellant believes necessary for the appeal." (Rule 8.137.) The evidence may be presented "by question and answer." (*Ibid.*) If the narrative covers only part of the testimony, the appellant must specify what points will be raised on appeal. Getting this specification correct is important – the appellant cannot raise other points on appeal "unless, on motion, the reviewing court permits otherwise." (*Ibid.*)

An appellant can bolster its proposed narrative by attaching some or all of the following documents: the judgment or order appealed from; documents that were filed or lodged in the trial court; exhibits admitted, refused, or lodged; jury instructions submitted in writing and/or given by the court; and deposition excerpts presented or offered into evidence. (*Ibid.;* Rule 8.122(b).) If the appellant intends to use the settled statement to replace both the reporter's transcript and the clerk's transcript (i.e., to be the entire appellate record), the appellant also must include copies of all of the items that are required for a clerk's transcript: the notice of appeal, the judgment or order appealed from and notice of its entry, any post-trial motion and notice of entry, the notice or stipulation to proceed by settled statement, and the register of actions. (*Ibid.;* Rule 8.137.)

The appellant must file and serve the condensed narrative within 30 days of the court clerk or a party serving the trial court order agreeing to settle the statement. The respondent then has 20 days to propose amendments to the condensed narrative. (Rule 8.137.) The respondent may bolster its amended narrative with the same types of documents that the appellant can use. (*Ibid.*)

Once the parties have filed their respective proposals, the trial court must hold a hearing to "settle the statement." (*Ibid.*) The timeline is short: The hearing is supposed to be within 10 days of the respondent filing its proposed amendments or the deadline for doing so, whichever is earlier. (*Ibid.*)

The appellant then must prepare, serve, and file the statement as settled by the trial court, by whatever deadline the court imposes at the hearing. (*Ibid.*) The statement should conform to the formatting rules for reporter's and clerk's transcripts "insofar as practicable." (Rule 8.144(f).)

Finally, if the respondent does not object to the filed statement within five days, the clerk must "present it to the judge for certification." (*Ibid.*) Alternatively, "[t]he parties' stipulation that the statement as originally served or as prepared is correct is equivalent to the judge's certification. (*Ibid.*) The court rules do not specify what happens if the respondent does object to the filed statement; presumably, the trial court must rule on the objections and then certify the resulting statement.

If the appellant chooses a settled statement in lieu of both the reporter's transcript and the clerk's transcript, the record is deemed complete once the statement is certified. (Rule 8.149.) The same is true if the appellant opts to use a settled statement and an appendix, (*Ibid.*) If the appellant instead opts for a settled statement and a clerk's transcript, the record is complete after both the statement and the clerk's transcript are certified. (*Ibid.*)

Once the record is complete, the trial court clerk must transmit it to the Court of Appeal clerk for filing. (Rule 8.150.) That filing starts the clock running for the appellant's opening brief (Rule 8.212) – and then the real work begins!

Alana H. Rotter

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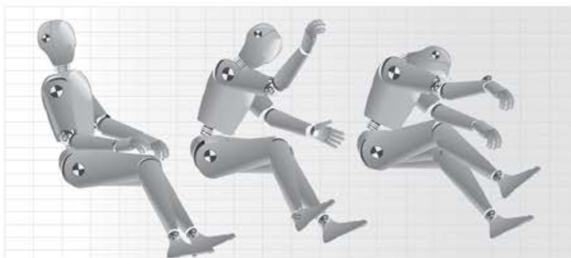

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Structuring a Non-Injury Settlement

By Patrick Farber and Mark Morales

When most people think of structured settlements, they think of physically injured individuals, limited or unable to work, who must make their settlement last for years or even a lifetime. While this is true with most structured settlements, there are scenarios where a structured settlement may make sense for non-physically injured individuals – and for the defense. Even when cases do not qualify for tax-exempt status, the tax-deferred and financial planning aspects of the settlements could still make them worthwhile.

Issues to Consider

The regular stream of income produced by a structured settlement comes from annuities created by high-rated insurance companies. Payments are made through an assignment company (typically an affiliate of a life insurance company). The assignee takes over the liability from the defendant in the case, and begins making payments to the plaintiff according to the agreed-upon payment schedule. The defendant and its insurance company are no longer involved in the payment process. This holds true for physically injured ("qualified") settlements as well as non-injury ("non-qualified") settlements.

When the structured settlement is devised for a physical injury or workers' comp claim, the plaintiff receives the income tax-free (thus the qualified status). It does not matter if the injured party receives the income during the first year of the settlement or 10 or 15 years after the settlement. The tax-free status of the payment from the qualified structured settlements for physical injured parties was codified in the Periodic Payment Settlement Act of 1982 (Public Law 97-473).

A structured settlement for non-physical injuries (non-qualified) works in a similar fashion, with the biggest caveat being that these settlements do not enjoy the same tax-free status. These types of annuity products were first introduced in 1981. While interest accumulates tax-free in the structured annuity, it is fully taxable once withdrawn.

Although still a small percentage of the over $5 billion in structured annuities written each year, the percent of non-qualified structures versus qualified structures is increasing. According to Melissa Evola-Price, who compiles structured settlements statistics each year, premiums for non-qualified structured settlement annuities increased from $182.3 million in 2014 to $190.3 million in 2015.

Non-qualified settlements that are typically considered for structuring include such employment-related instances as wrongful termination, age, gender or race discrimination, harassment and errors and omission-related claims.

For example, a 62-year-old employee at a bank is let go after having a gender change operation. The plaintiff sues and nets $275,000 in the settlement. The plaintiff requests $75,000 in cash upfront. Taxes must be paid on this amount for the current year. The remaining $200,000 is structured into a non-qualified monthly lifetime annuity starting the following year. Payments are $1,000 per month for the plaintiff's lifetime, guaranteed for 15 years. The plaintiff will receive an IRS 1099 form from the annuity company for tax purposes showing the amount received during a specific year.

Other non-qualifying injuries can also be considered for structured settlements involving construction defect, environmental litigation, malpractice, property disputes, breach of contract and fraud claims.

In another example, a privately held company enters into employment contracts with two investigators. They are terminated before their contracts expire. Each sues the company and receives a $1 million net settlement. They each structure their entire settlement to lessen the tax burden. The

continued on page 20

first plaintiff is a 59-year-old male who will receive $4,800 a month for life guaranteed for 20 years, while the second plaintiff, a 57-year-old male, will receive $4,700 a month for life, also guaranteed for 20 years. The IRS will send them a 1099 form at the end of each year indicating only the amount of the annuity payments received in that given year, thereby alleviating the tax issue for the year of the settlement.

Cases involving divorce settlements, punitive damages and attorney fees all are suitable for non-qualified structured payments.

Recently, a jury awarded $3 million in punitive damages in a wrongful termination case. In lieu of taking the punitive damages amount in cash, the plaintiff elected to receive an annuity that would pay out annually for the next 15 years. By doing so, the plaintiff avoided paying taxes on the entire amount in the year of the judgment and, instead, spread the tax obligation over 15 years.

Timing is Everything

Just as with a qualified structured settlement, a non-qualified structure should be discussed with the plaintiff early in the settlement negotiations. In fact, a good plaintiff's attorney will talk about structures and familiarize the claimant with the option before beginning settlement discussions with defense counsel. That way, when the parties convene at the negotiating table, the defense can promptly receive the structured settlement proposal for evaluation. If laid out properly, this can reduce the amount of time and cost needed to settle the case. A structured settlement broker on the defense side can help in this process by reviewing the proposed payment plan and making a recommendation as to the kinds of annuities the individual needs while protecting the defense's interests.

Annuity Safety

Measures that safeguard the integrity of the structured settlement annuity enable these settlements to proceed with confidence for both plaintiff and defense. Insurance companies offering non-qualified annuities all have an A or higher rating from A.M. Best, a company that provides rating services to insurance companies.

Going a step further, state and federal solvency standards and regulations provide annuity policyholders with a number of checks and balances to protect their investments. Regulators prevent insurers from investing heavily in risky investments. Investments are typically investment-grade fixed-income securities including government-backed securities. When factoring in their tax-free status, structured settlement annuity returns are favorable to taxable returns in traditional investment portfolios.

In addition, each state insurance department regulates insurance companies headquartered in their state. In California, for example, companies offering structured settlements must first be approved by the California Department of Insurance. The department evaluates the insurance carrier's solvency and whether the carrier complies with California regulations. Carriers are also subject to mandatory annual audits and other financial compliance requirements.

Plaintiff Benefits

Besides the deferred tax liability on income received through a non-qualified structured settlement, the plaintiff, as seen in the examples above, has the ability to select the timing of when payments are received. This could mean using the settlement proceeds to pay for immediate needs, delay payments for future large purchases, retirement or travel, or choose to receive monthly or annual payments – options are limitless. If the claimant decides to fund his or her retirement with the proceeds, the funds will accumulate and grow in the annuity investments tax-free until withdrawn to build up the retirement account over a number of years.

Defense Benefits

A structured settlement in a non-injury case offers the defense a number of benefits. Like any other settlement, it takes away the inherent risk of going to trial where a jury might render a decision giving the plaintiff a larger award than would have been negotiated in a settlement.

A mutually agreed-upon structured settlement puts an end to ongoing litigation expense. Since the structured settlement payments come from a third party, not the defendant or its insurance company, interaction between the defendant and the plaintiff over compensation payments is eliminated.

Finally, because the payment stream to the plaintiff can be customized to meet a variety of his or her needs – for the short or long-term – the plaintiff is more likely to be satisfied with the outcome so a messy chapter for both the plaintiff and the defendant can reach closure.

Patrick Farber

Mark Morales

Patrick Farber and Mark Morales are structured settlements brokers with Atlas Settlement Group in California. They work with attorneys throughout the country to create structured settlement annuities for physical and non-physical injury cases. They provide support and advice during all phases of the settlement process – at no cost to attorney or client. Reach them at 800-734-3910, *pat@patfarber.com, mmorales@Atlassettlements.com.*

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Spotlight On the Attorney Client Privilege Ruling in *City of Petaluma v. Superior Court,* and Your Amicable Friends at ASCDC.

A NOTE FROM THE EDITOR: On June 8, the First District Court of Appeal (San Francisco) issued an opinion in a case arising out of sexual harassment and discrimination claims by a firefighter. Your ASCDC Amicus Committee was instrumental in getting the Court of Appeal to publish the decision, which will benefit employment defense lawyers and their clients who wish to investigate employees' claims thoroughly and impartially without losing the protections of privileges that attach to such investigations. The case is *City of Petaluma v. Superior Court (Waters)*, case no. A145437.

In this case, the City Attorney retained outside counsel to conduct an impartial investigation that would assist in preparing to defend the City in anticipated litigation. The trial court, confronted with a discovery dispute, found the employer's prelitigation factual investigation was not protected by the attorney client privilege or work product doctrine when the outside counsel was specifically directed not to provide legal advice as to which course of action to take. The court also concluded the employer waived any privilege that might be claimed by asserting an avoidable consequences defense and thereby placing the investigation at issue.

The City of Petaluma, represented by the Greines Martin firm, filed a writ petition challenging that order. The Court of Appeal granted the petition, reversing the trial court's order because the dominant purpose of outside counsel's factual investigation was to provide legal services to the employer in anticipation of litigation. Outside counsel was not required to give legal advice as to what course of action to pursue in order for the attorney-client privilege to apply. Further, the employer's assertion of an "avoidable consequences" defense did not waive the privilege as to an investigation initiated after the employee had already left his or her job with the employer.

The Court's opinion initially was unpublished (as is true of most intermediate appellate court rulings in California), so it could not be cited in other cases. ASCDC's Amicus Committee, however, took note of the opinion and saw that it addressed a recurring issue of statewide importance. Accordingly, committee member Eric Schwettman at the Ballard Rosenberg firm drafted an amicus curiae letter seeking publication. ASCDC's sister organization, the Association of Defense Counsel of Northern California and Nevada (ADCNCN) joined in the letter. The Court of Appeal issued its publication order on June 30.

Kudos to Eric and to Gordon & Rees partner, Don Willenburg (chair of the ADCNCN Amicus Committee) for helping the appellate court appreciate the valuable guidance that the City of Petaluma decision provides to lower courts and litigants! Below is an excerpt from the publication request.

— LP

The decision in *City of Petaluma* is important to the ASCDC and ADCNCN, not only because many of their members practice employment law, but also because the organizations are particularly interested in development of the law relating to evidentiary and summary judgment standards in this area.

The Court's opinion in *City of Petaluma* meets the standards for publication because it "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions" (Cal. Rules of Court, rule 8.1105(c)(2)), "explains … an existing rule of law" (id., rule 8.1105(c)(3)), and "[i]nvolves a legal issue of continuing public interest" (*id*., rule 8.1105(c)(6)). Thus, publication of this opinion would be appropriate at this time.

The Court's opinion is of the utmost importance to employers in California given the frequently litigated questions regarding the discoverability of employee complaint investigations and the applicability of the attorney-client privilege and work product doctrine. These issues arise in hundreds, if not virtually all, of employment-related cases across the state each year.

Here, the Court found that an investigation conducted by retained outside counsel to be privileged, even though it expressly did

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not include the rendering of legal advice as to recommended action. The Court's clear and thoughtful analysis of *Evidence Code* § 954 (privilege), *Code of Civil Procedure* § 2018.010 *et seq*. (work product) and the "dominant purpose" test as established by *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 provides a clear roadmap for attorney investigators (both in-house and outside counsel) as to the steps needed to maintain investigatory privilege while expressly distinguishing and differentiating pre-termination investigations.

The opinion clarifies that *Evidence Code* § 954 requires the provision of legal service *or* advice in order for an attorney-client relationship to be established, not both. Thus, the failure to render an ultimate legal opinion or recommended remedial action does not transmute the retention of an outside attorney investigation into a simple non-privileged "fact finder." In fact, the Court expressly notes that fact finding which pertains to the provision of legal advice is privileged. In this regard, the Court clarifies the opinion in *Wellpoint Health Networks, Inc. v. Superior Court* (1997) ("*Wellpoint*") 59 Cal.App.4th 110 and the instances where attorney-led investigations were or were not subject to privilege. The Court's analysis of the *Wellpoint* burden-shifting analysis is likewise noteworthy since the City of Petaluma met its *prima facie* case based on the evidence and declarations submitted regarding the intent and purpose of the City in retaining outside counsel, and the actions consistent with that retention by the investigator. The Plaintiff failed to present any relevant evidence to rebut this showing.

Additionally, the Court further found that an employer does not waive any privilege or protection afforded to such an investigation by raising the avoidable consequences doctrine as an affirmative defense where the investigation occurs post-termination. The Associations believe that the Court's opinion is the first to consider the impact of raising these defenses in this context.

In sum, the opinion is an excellent review of the case authority in this area of the law and is especially relevant for the employment bar in virtually every case. The court does an excellent job of analyzing the privilege and discoverability issues and explaining when an investigation will be subject to discovery, when it will not be, and how to protect against disclosure on a practical basis. These issues are of a continual and ongoing public interest. For the reasons presented above, the ASCDC and ADCNCN urge this Court to order publication of its *City of Petaluma opinion*.

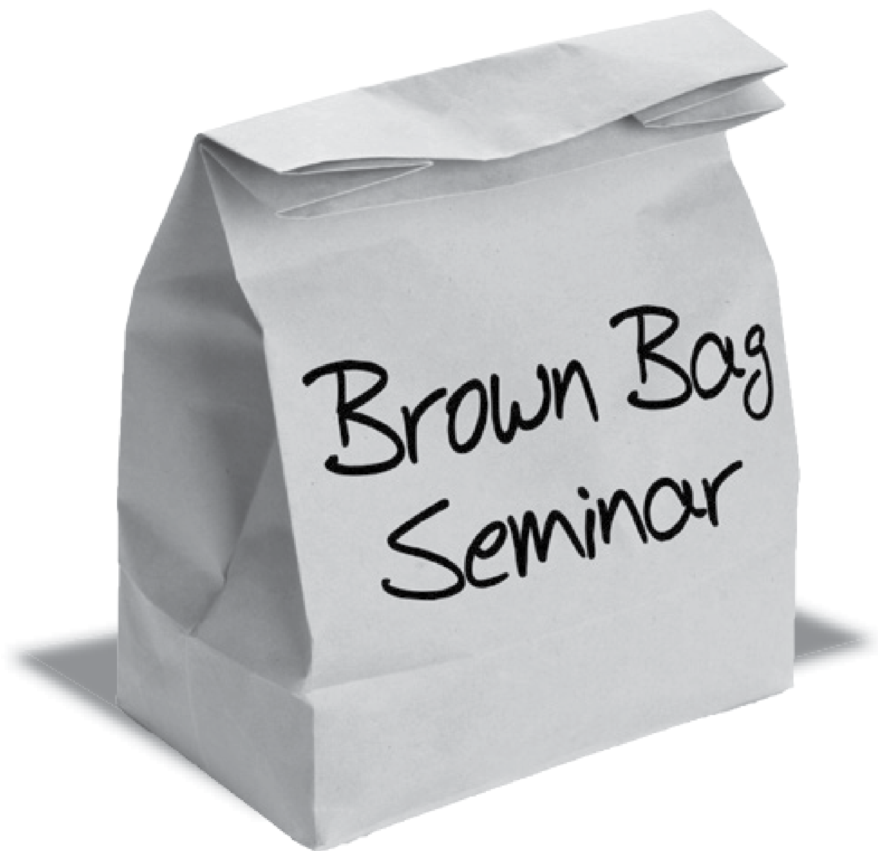
ASCDC Association of Southern California Defense Counsel

ASCDC is proud to recognize SDDL's efforts to enhance the practice of defense lawyers. ASCDC joins in those efforts in a variety of ways, including:

- **A voice in Sacramento,** with professional legislative advocacy to fend off attacks on the civil trial system (see *www.califdefense.org).*
- **A voice with the courts,** through liaison activities, commentary on rules and CACI proposals, and active amicus curiae participation on behalf of defense lawyers in the appellate courts.
- **A shared voice among members,** through ASCDC's new listserv, offering a valuable resource for comparing notes on experts, judges, defense strategies, and more.
- **A voice throughout Southern California,** linking members from San Diego to Fresno, and from San Bernardino to Santa Barbara, providing professional and social settings for networking among bench and bar.

More information, including a link to ASCDC's membership application, can be found at *www.ascdc.org*.

DISRUPTORS
Brown-bag Write-up



As a benefit to its members, ASCDC co-sponsors brown bag seminars, which are interactive roundtable discussions on cutting edge topics that affect defense attorneys, and sometimes also are of interest to insurers, risk managers, brokers, and agents. Many of these seminars have been live, often at courthouses where ASCDC members can hear news and views from members, judges, and other guest speakers. Others have been in a webinar format, for members' convenience. One of those webinars kicked off on June 28th with the first of a three-part series titled: Disruptors-Technology & Product Liability.

Living the life of George and Jane Jetson may seem to have become the norm in both the home and workplace. New technologies in our world have made many tasks more efficient or more enjoyable, but they have also created unique exposures for insureds and their insurers. The Disruptor Series answered important questions such as who is at fault when something goes wrong with our time-saving and effort-enhancing gadgets. Autonomous cars, drones, the internet of things, short term rentals (VRBO, Airbnb) and Ride-Sharing (Uber, Lyft) were are discussed in terms of their impact on individual liability, defense lawyer strategies, the insurance market and coverage, risk assessment and risk management, and cutting edge legal issues that have yet to be decided.

There was a robust discussion regarding changing trends in property damage claims and bodily injury claims, invasion of privacy claims, and cyber risks from data compromise (hacking) and involuntary data encryption (ransomware). In the area of drones, traditional aviation risks were compared to third party liability coverage, product liability coverage and terrorism coverage. The internet of things discussion addressed claims that arise in this area, and the various devices that are connected to the internet even though they are not traditionally data devices (such as computers, tablets and smart phones). A detailed exchange occurred which included what information is necessary to insurers to manage the risk of the internet and potential violations of privacy laws.

The trends and industry moves within the short term rental universe as well as ride sharing was explored in terms of coverage under homeowners policies, auto policies and first- and third-party claims. The potential for fraud both pre- and post-accident in the "ridesharing universe" was debated, as well as industry and legislative responses to the ever changing world of ride-sharing. Of course, a pervasive discussion over all of these "new inventions" was the protection against cyber intrusion and the overall impact on companies, insureds and insurers.

The second part of the series, titled "Disruptors 2," continues on September 20. Workplace and professional liability exposures will be discussed and debated. There are a total of three free webinars offered by ASCDC; check the website (www.ASCDC.org) to find the simple dial-in information. The third presentation will occur on November 15, and is titled, "To Deny or Reserve Rights." These webinars are offered as "brown bag" lunches that can be attended from your desk. They provide up-to-date views of the ever changing world we live in, as we keep up with technology and analyze how it impacts defense practice and insurance coverage.

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. *Winn v. Pioneer Medical Group, Inc.* (2016) __ Cal.4th __ [2016 WL 2941968]. The Supreme Court reversed a divided opinion from Division Eight of the Second Appellate District. The majority holds that claims for elder abuse require significant responsibility for attending to basic needs of the elder or dependent adult that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance. Defendant physicians who treated patient at outpatient clinics did not have "care or custody" required for "neglect" of patient under Elder Abuse Act. Harry Chamberlain submitted an amicus letter and brief on the merits on behalf of ASCDC.

2. *Frisk v. Cowan*, docket no. C077975. Bob Olson and Ted Xanders from Greines Martin Stein & Richland submitted an amicus brief on *Howell* issues related to a third-party lien for payment of medical expenses. The Court of Appeal ruled in favor of the defendant. A request for publication remains pending as of press time.

3. *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023. The Court of Appeal held an investigation conducted by outside counsel was protected by the attorney-client privilege and work product doctrine. The Court of Appeal granted ASCDC's publication request submitted by Eric Schwettmann of Ballard Rosenberg Golper & Savitt.

4. *Gopal v. Kaiser Foundation Health Plan, Inc.* (2016) 248 Cal.App.4th 425: The Court of Appeal held that a health care plan, emergency room hospital and hospital group were not a single enterprise making the health care plan vicariously liable under a joint enterprise theory. Josh Traver from Cole Pedroza submitted a publication request on behalf of ASCDC which was granted.

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. This case pending ing the Third District Court of Appeal in Sacramento raises *Howell* related issues. Bob Olson from Greines Martin Stein & Richland submitted an amicus brief on the merits; the appeal remains pending.

2. *McGill v Citibank*, docket no. S224086. The California Supreme Court granted review in this case to decide whether 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. Lisa Perrochet, Felix Shafir and John Quiero from Horvitz & Levy submitted an amicus brief on the merits.

3. *County of Los Angeles Board of Supervisors v. Superior Court* (*ACLU*), docket no. S226645. The California Supreme Court granted review to address the Court of Appeal holding that attorney fee invoices sent by defense counsel to the County of Los Angeles are privileged. Lisa Perrochet and Steven Fleischman from Horvitz & Levy submitted an amicus brief on the merits.

4. *Parrish v. Latham & Watkins*, docket no. S228277. The California Supreme Court granted review to address issue 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. *Perry v. Bakewell Hawthorne*, S233096. The California Supreme Court granted review to address the following issue: Does Code of Civil Procedure section 2034.300, which requires a trial court to exclude the expert opinion of any witness offered by a party who has unreasonably failed to comply with the rules for exchange of expert witness information, apply to a motion for summary judgment? The Court of Appeal, Second District, Division Two, held in a published decision that (1) a premises owner that participated in exchange of expert witness information with a premises occupant had standing to object to visitor's expert declarations in personal injury action, even if occupant, rather than owner, served demand, and (2) visitor unreasonably failed to disclose his expert witnesses such that trial court could exclude visitor's expert declarations. Steven Fleischman and Josh McDaniel from Horvitz & Levy submitted an amicus brief on the merits.

6. *B.C. v. Contra Costa County*, A143440. In this medical malpractice case pending before the First Appellate District, Robert Olson from Greines, Martin, Stein & Richland submitted an amicus brief on behalf of ASCDC addressing *Howell* and MICRA issues. The appeal remains pending.

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

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

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

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

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

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Union Square v. Western Pacific Housing

Robert T. Bergsten
Hosp, Gilbert & Bergsten
Anderson v. Los Angeles Kings

Chris Faenza
Yoka & Smith
Chularee v. The Cookson Company, Inc.

Kevin P. Hillyer
Patterson Lockwood Hillyer
Williams v. Brotman Medical Center

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Collinson Law, APC
Isom v. City of Los Angeles, et al.

Timothy J. Lippert
Demler, Armstrong & Rowland
Eidson v. Westfield LLC
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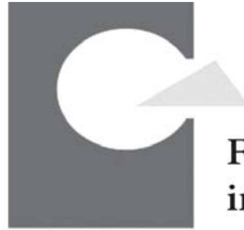

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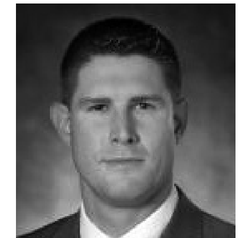
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