association of southern california defense counsel

verdict

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president's message

Christopher E. Faenza
ASCDC 2018 President

The New "Glory Days"

For those of you who don't know me, I am a trial attorney at Yoka & Smith, LLP in Los Angeles where I have been practicing for the past 19 years. Prior to working at the firm, I practiced in New Jersey where I was raised and started both my legal career and my family. Being raised in New Jersey made certain of a few things: first that you call a whole pizza a "pie." Second, you don't go to the beach, but to the "shore." And finally, you have to love the "Boss," Bruce Springsteen. Springsteen wrote about many topics including growing up, racing in the streets and the "glory days." You might recall the song by that name in which Springsteen reminisces about old friends and a time when life was simpler and happier.

Recently, as I asked ASCDC members to attend the 2018 annual seminar, I was often told about pressing schedules and time commitments that prevented them from attending. Some of the more experienced members told me stories of the "glory days" of the ASCDC and the great seminars that they remembered from years past.

In decades past, members would meet at the Century Plaza Hotel and listen to keynote addresses delivered by speakers like former Presidents, Ronald Reagan, George H.W. Bush, and Bill Clinton, as well as retired Generals Colin Powell and Norman Schwarzkopf, and former Prime Minister Sir John Major, to name a few.

Like many professional organizations, the 2000's brought economic change and our organization has had to adapt. We have fewer United States Presidents at our luncheons, and we no longer meet in Century City. But I am proud to say that our organization is creating new glory days with a vibrant, inclusive and dynamic board and an energized membership made up of hard-working, resourceful and intelligent attorneys from throughout southern California.

Currently, our membership is around 1200 defense attorneys from Kern, Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino and San Diego Counties. Our committees hold educational seminars on exciting and topical issues such as diversity, medical malpractice, products liability, employment law, trucking, legal malpractice, general liability, public entity defense and other hot topic issues of the day. Our amicus committee is as strong as ever and helps our member firms with various issues that affect the civil defense bar.

Our annual speakers, although not former residents of 1600 Pennsylvania Avenue, have been very entertaining and informative. Hearing Bill Walton talk about his days visiting *Berrrkley* or Alison Levine recounting her struggles as the first woman to lead an expedition to Everest has fascinated and motivated our members. This past year we had the honor of hearing from the most resent ESPY Pat Tilman Award for Courage Recipient, Master Sergeant Israel Del Toro. MSGT Del Toro was the first serviceman in history to return to active duty in the Air Force after being deemed 100% disabled due to the horrendous burns he received in a Humvee explosion in Afghanistan. Hearing about how he returned to work after being in a coma for a year, having severe burns to more than 80 percent of his body, losing many of his fingers and having a disfigured face makes one cynical about the plaintiffs we encounter who often claim that they can no longer function after experiencing a low speed rear-end impact.

An analogy is sometimes made between litigation and sports. There are winners and losers, you prepare hard for the big "game" and there are teams perceived to be "good guys" and "bad guys." In sports, there are great rivalries too: Red Sox and Yankees in baseball, UCLA and USC in college football, to name a few. Those rivalries serve as added incentives for athletes to excel and to vigorously compete with integrity. In our profession, and in the California legislature, we have the plaintiffs' bar organization (CAALA) vs. the civil defense bar (ASCDC). Despite being frequently outnumbered and outspent, we strive to be a worthy opponent to our friends who sit closest to the jury. No one wants to be the legal equivalent of the Washington Generals to the plaintiffs' Harlem Globetrotters.

With the support of ASCDC, defense attorneys and their firms are better prepared to battle with the plaintiffs' bar. We greatly respect the plaintiffs' bar, and work closely with them on such things as the civility seminar, the mandatory settlement conference program and other issues involving the practice of civil law in California. Of course, we still want to beat them whenever we see them in court! This is more likely by educating our membership about various strategies and litigation tactics used by some members of the plaintiffs' bar,

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Sales Tax on Services: Has the Time Come?

Michael D. Belote
Legislative Advocate
California Defense Counsel

Every year the California Defense Counsel monitors over 200 bills of interest to members of the ASCDC and the sister defense organization in Northern California. The bills literally cover every possible area of defense practice, and some relate to civil procedure broadly, such as discovery, summary judgment, voir dire and the like. Occasionally, a bill is introduced which impacts the *business* of lawyering. A perfect example this year is SB 993 (Hertzberg), which seeks to expand the sales tax to services consumed by businesses.

Extending California's sales and use tax law to services has been introduced before in the legislature, never generating much traction. This year's proposal is decidedly more refined than prior proposals, however, and when combined with Senator Hertzberg's intellectual and political skills, must be taken far more seriously than in the past.

SB 992 proposes to extend the sales tax to services consumed by "qualifying businesses," unless exempt. Services such as health care, education, rent, tuition and a few others would be exempt, but clearly business consumption of accounting, legal, architecture, IT, real estate and hundreds of others would be covered. The bill proposes to gradually reduce the existing sales tax law on goods by up to 2%, while gradually imposing and increasing the tax on services to 3%.

By focusing on so-called "B2B" transactions, Senator Hertzberg hopes to focus on a cost which is deductible for businesses, and maintain a level of progressivity which is lost when sales taxes are extended to individuals. He also argues that the bill propertly taxes services performed in California by out-of-state professionals, while maintaining competitiveness by exempting services performed for out-of-state businesses.

Senator Hertzberg has introduced the sales tax on services issue before, and he is not wrong about the problems with current tax law. It is true that, regardless of partisan politics, California is dangerously dependent on personal income taxes to fund the government. This dependence creates very significant revenue volatility because income tax receipts are closely correlated with capital gains and the condition of the stock market; a modest dip in stocks can create very large reductions in income tax receipts. He is correct also that California's sales tax base has shrunk dramatically as a share of state revenue, as we transition to a post-industrial, service-based economy.

Accurately identifying the problem, however, is not the same as suggesting that SB 993 is the right solution. A broad range of interest groups is strongly opposed to the bill, with a litany of issues. For example, it is contended that the proposal favors large businesses, which can afford to bring services in-house, and disadvantages small businesses which must outsource many services.

A variation on the large v. small business theme was pointed out in a CDC letter of opposition to SB 993. Inasmuch as ASCDC members are often retained and compensated by insurers to represent insureds, the bill would encourage the provision of legal defense services by in-house lawyers to the disadvantage of outside counsel, for providing the same services. And in an area as large as defense services, three percent can be significant.

Since plaintiffs are far more often individuals, services to this group of clients would be exempt.

Also central to the debate is the sheer administrative complexity of implementing the tax. What about representing people in both their individual and corporate capacities? Deciding when a service is consumed by a business and when by an individual will get complex fast.

For practical and political reasons, enacting SB 993 in 2018 is likely to be a challenge. Under the California Constitution, extending the sales tax to businesses requires a two-thirds vote in both the Assembly and Senate, plus a signature by a Governor who thus far seems skeptical about the idea. Additionally, in an election year generating the required two-thirds vote will be difficult. But next year is not an election year, and at least one major candidate for Governor has expressed support for the idea.

At the end of the day, given competition in the market for legal services, a 3% tax may very well fall upon the providers of the services. The California Defense Counsel will oppose the bill because of the market disruptions which will result. SB 993 may not be enacted this year, but the issue is not going away, and your ASCDC leadership is involved.

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In Memoriam: Patrick A. Long

February 14, 1943 ~ January 11, 2018

Lisa Perrochet, ASCDC Board Member and Editor of *Verdict* Magazine:

My last words to Pat, on January 5, were in a simple email, "Thanks, Pat." He'd once again done me a small favor. I said those words to him innumerable times over the 18 years I knew him, starting when I was commissioned by Edith Matthai to write the Greensheets for this magazine, and Pat was the Editor, my predecessor in the job. He loved that job, and I loved being his understudy, because he was all about a wink and a nod and not about the Oxford comma. Remember the cover story with the lawyers on the beach? The cover story with Mike Schonbuch surrounded by admiring clients who were not the types to wear business suits? The story about how to tie a proper bow tie? Pat greenlighted those, along with all the great substantive articles he pushed into print. And as best I can tell, he approached everything with that combined sense of purpose and fun that made him so delightful to share an evening with at an ASCDC function, and such a solid partner in all of our endeavors together for the organization. It's with a heavy heart that I put out this issue of *Verdict* magazine without Pat's "What We Do" column. What We Do is miss you, Pat.

DRI:

Pat served as an officer of DRI for eight years, including two terms as DRI Secretary–Treasurer, before being elected Second Vice President and eventually serving as President in 2006–2007. He served on the DRI Board of Directors from 1999 to 2001. Pat was a prominent leader of the ASCDC, a member of the FDCC and the IADC, and was an associate member of ABOTA. He served as a neutral for Judicate West, and was the founding partner of Long & Delis in Santa Ana, California. Pat was an avid supporter of the National Foundation for Judicial Excellence, having served on the NFJE Board of Directors since 2007. Pat and his wife Casey were a fixture at DRI and ASCDC events. "Pat Long was a champion of the defense lawyer," said DRI Executive Director John R. Kouris. "He placed the interests of the defense bar at the forefront of his professional life. We will miss him greatly."

Mike Schonbuch, ASCDC Past President and Board Member:

Can we include our remembrance of Pat the time when Pat asked my wife if she was one of the strippers that I had defended? My wife and I still laugh about it.

Tom Feher, ASCDC Board Member:

What was so remarkable about Pat is that, in addition to his enormous professional success, he was always pleasant, engaging and relatable. The first time I met him he was very welcoming, immediately found ways to connect with me (despite a generational and geographical difference – I live in Bakersfield). He always had a good story. Nothing about that ever changed from the first meeting to my last. Maybe the best way I can sum it up is he was one of those people in a big room of people you don't know that you would always be comfortable sitting next to. He simply was a good man and a pleasure to know.

Steve Fleischman, ASCDC Committee Chair:

For those of you who didn't know him, he was a great, gregarious guy. I will never forget his favorite Irish toast: "Confusion to the British."

Seana Thomas, ASCDC Member:

I am just wrecked to hear of Pat's death! Pat was a friend and mentor – and, with his wife – music aficionado, whom I have been fortunate to spend time with the last 29 years. Our times at ADC were wonderful, but perhaps I always remember his mentoring in the med mal defense arena most fondly – and the concert we saw at the Stagecoach (Harry Connick, Jr.! – Such a great time). Rest well, dear friend and colleague. You are one of the greats.

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In Memoriam: Patrick A. Long

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John A. Taylor, Jr., ASCDC Member:

Some of the first litigation (and appellate work) I handled at Gibson Dunn (before moving to H&L) involved Pat Long as counsel for a co-defendant. He was always very gracious to a fairly junior attorney who was just getting his litigation sea legs.

Bob Kaufman, ASCDC Board Member:

This issue of *Verdict* magazine is the first in many years that lacks the column traditionally written by one of the true legends of our industry, Patrick A. L.ong. Pat was truly one of a kind.

I first met him in 1979. I was a young four year attorney who still thought he could save the world, and that a "five year attorney" was incredibly experienced. Pat was an "eight year attorney," so he was not just experienced – he was "old." It was the days of the first iteration of the asbestos litigation, and all the WWII veterans who were then L.A. Law legends were there, including my then-senior partner, Bill Haight. The room was filled with great lawyers, since there were so many defendants in this "bet the company" mass litigation. I watched Pat, and I learned. I learned not only lawyering skills, but also lawyering conduct. Civility, calmness, using your ears and not your mouth, not always giving into the desire to retaliate, etc. I have accomplished much over my own 42 year+ career, and much of what I learned along the way and now pass on to the "kids" came from those days with Pat. He was one of my mentors, although I do not think he ever knew that.

Pat first was just an acquaintance, and then with time, my friend. We would meet in the mornings at the ASCDC Annual Seminar or at some other multi-day professional function. And we would talk. We disagreed on politics, but found that we could communicate on anything, including politics, simply because we respected each other as human beings. We often sat together at function dinners, especially when our wives were present, since Peg and Casey hit it off the first day. Maybe it was the wine. More likely it was Casey's ebullience and personality, which, along with a shared professionalism, made her the perfect match for Pat. But the wine didn't hurt.

Anyway, professionally, Pat was a lawyer for the ages. The statistics, themselves, are impressive. 57 years as a lawyer, ABOTA member, President of DRI, CDC, and this organization. Editor of this magazine from 1993 until 2008. 14 years a "SuperLawyer" according to *Los Angeles Magazine*. Instructor at the IADC Trial Academy, ABOTA Masters in trial, and in journalism at Loyola law School.

But that is not the measure of the man. Pat was first and foremost a dedicated family man. You could see it in his face and hear it in his voice whenever he talked about his kids or, especially, Casey (especially if he was in a teasing mood). They were what life was about. He was a member of the same Happy Go Lucky Irish Clan as is my wife. He always had a smile, a laugh, an opinion, and a kind word. When you spoke with him, he always made you feel like there was nothing else in the world he'd rather be doing.

That was Patrick A. Long. This organization lost a true supporter. The profession has lost a true legend. And I, like many of us "older types," have lost a friend. I will miss you dearly Pat. We all will.

Our love goes out to Casey and their entire family. Many people are replaceable. Pat is not.

Annual Seminar Highlights

— Carol A. Sherman

The 57th Annual Seminar of the Association of Southern California Defense Counsel (ASCDC) returned to the JW Marriott at LA Live in downtown Los Angeles on Feb. 8-9, 2018. Nearly 600 members, colleagues and guests attended sessions featuring more than 30 expert speakers and panelists on a range of topics important to civil defense lawyers of all levels of experience.

Headline seminar speakers included:

- **Sgt. Israel Del Toro ("DT"),** the 2017 Pat Tillman honoree. Sgt. Del Toro delivered an inspirational keynote address, sharing his life story up to – and after – a roadside bomb nearly claimed his life while he served in the U.S. Air Force in Afghanistan.
- **Alison Levine,** author of *New York Times* best-seller, *On The Edge: Lessons From Mount Everest And Other Extreme Environments*. Ms. Levine shared leadership lessons learned as team captain of the first Women's Everest Expedition.

The Friday luncheon began with Andrea Yoka, wife of past president Wally Yoka, who delivered a flawless vocal of the National Anthem while playing the guitar. ASCDC President, Christopher E. Faenza, luncheon program emcee, recognized special guests in attendance, including family members, ASCDC Board of Directors, past presidents of the Association, and members of the judiciary. He gave special recognition to members of his law firm, Yoka & Smith, LLP, and in particular his partner and mentor Wally Yoka.

The traditional awarding of the ASCDC President's Award for outstanding service over the past year took on a new meaning, and a new name, this year. Faenza announced the award would be renamed the Patrick A. Long President's Award in recognition of ASCDC past president (1991) Pat Long who recently passed away. Pat will always be remembered for his passion for the law and his many contributions to furthering the good work of the Association on behalf of it members. Many had come to know Pat through his witty and insightful columns in *Verdict* magazine. In a fitting tribute, Pat's widow, Casey Long, was a recipient of the award in her husband's name. Accepting the award, Casey said, "Pat loved the law and the Southern California defense bar." Also receiving the inaugural Patrick A. Long President's Award was attorney Lisa D. Collinson for her outstanding achievements over the past year.

On a lighter note, Faenza surprised his wife of almost 25 years, Annette, with a beautiful bouquet of flowers as a thank you for her support and encouragement as he takes over the leadership role of one of the largest, most influential civil defense bars in the country.

In his remarks, Faenza noted that ASCDC is strong and membership continues to grow. He cited the work of the Amicus Committee, noting the multiple briefs submitted in cases pending in the courts. He acknowledged the continued efforts of legislative advocate, Mike Belote, who helps ensure the Association continues to be a strong voice for all defense counsel with the State Legislature.

In conclusion, Faenza reminded attendees, "Make the most of what you can with the gifts you have been given, even in the face of adversity."

Lisa D. Collinson receives the Patrick A. Long President's Award

Casey Long and family accepting the Patrick A. Long President's Award


John Cotter
Larry Ramsey
Pete Doody
JW MARRIOTT
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Chris Faenza

57th Annual Seminar Coverage

Against All Odds

Sgt. Israel Del Toro's Keynote Address at the 57th Annual Seminar

Carol A. Sherman

Even before Master Sgt. Israel Del Toro ("DT") began to speak at the 57th Annual Seminar luncheon, the nearly 600 ASCDC members and guests in the Diamond Ballroom were on their feet applauding this true American hero. After surviving a roadside bomb while serving in Afghanistan, DT has gone on to inspire countless people with disabilities and prove that with determination no obstacles are insurmountable.

DT shared an ESPN video honoring him as the 2017 recipient of The Pat Tillman Award for Service for his perseverance and dedication to his country. The video showed the twisted remains of the bombed-out Humvee that was carrying DT on a routine mission to call in air strikes while serving with the U.S. Air Force in Afghanistan in 2005. The explosion that wrecked the Humvee changed his life forever.

Before recounting the accident that caused third degree burns over three-quarters of his body, and that caused doctors to give DT a 15 percent chance to survive, he shared his message from his present day perspective. He has lost much, including most of his fingers, but he has never lost his sense of humor – telling the audience of mostly lawyers that everything he knows about the law he learned from watching the movie, *Legally Blonde.*

DT shared his inspirational story of growing up in Chicago where his background made him more likely to join a gang or sell drugs than enlist in the U.S. Air Force. When DT was 12, his father passed away. He

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Del Toro – continued from page 11

remembered his father telling him, "Do what is best for your family. Always take care of your family." To this day, he believes his father's words helped prepare him for when he most needed the courage and strength to go on living for his wife and son.

In high school, DT lost his mother to a drunk driver. He nonetheless surpassed expectations by enrolling in a four-year college. But then his beloved grandfather had a stroke and passed away a year later. He decided to join the U.S. Air Force in 1977 at age 22, but would lose his grandmother and a close cousin not long afterwards. Despite each setback that could have caused many to give up, he got his jump wings to become a parachutist. He was the first member of his family to serve in the military.

Through the losses of family members, he was always able to draw on his experience playing football, baseball and soccer when growing up. He learned at the early age how to push himself and strive to be better, lessons that would help him later on.

DT described the years following the 2001 attack on the U.S. on 9/11 as a series of highs and lows in his life. While serving in Iraq, he saw first-hand the causalities of war. Returning home, he married and had a son. Other assignments took him to Korea and Italy.

In 2005, he had the difficult job of telling his wife he would be serving in war-torn Afghanistan. "She wanted me to leave the military. She feared the worse and didn't want our son to grow up without a father." But DT knew he had to do it: "God did have a plan for my life." That plan took an unexpected turn on December 5, 2005.

While on routine patrol, the Humvee DT was riding in drove over a mine and exploded. He recalls the incident as if time had slowed.

"When I got out of the truck, I was on fire from head to toe." DT was helped to a nearby creek, all the time thinking to himself that if he didn't make it, he would break his promise to his father to always take care of his family.

He credited a team mate, who had also survived the blast, with keeping him alive. "Fight for your wife. Fight for your son. He made me yell it, too." DT did keep on fighting in spite of losing most of his fingers and being in a coma for nearly three months. His wife and fellow servicemen remained at his side. "The military is all about family. We take care of each other."

When he woke from the coma, the doctors told him he would never walk or breathe on his own, and he would need to remain in the hospital for at least another year. Perhaps the worst news of all was hearing that his military career was over. But DT never accepted that prognosis.

Defying all odds, DT walked out of the hospital two months later, breathing on his own, and determined to return to the military. He was awarded the Purple Heart. "I had to show my son to always keep a positive mind and find that fire inside to overcome any obstacle." So every day forward, DT pushed himself, more determined than ever to take back his life.

During his rehabilitation, he excelled at a type of physical therapy the focused on sports. It was in the gym and later on the track that he began to see himself in a new light and with a new mission. It took almost five years of hard work to achieve that mission. In 2010, he became the first 100 percent combat disabled Air Force technician to re-enlist. Today, he continues to serve in the military as a training instructor and member of the Air Force "Wings of Blue" Parachute Team.

He also went on to set world records in the shotput, discus, and javelin, and winning a gold medal for shotput at the 2016 Invictus Games, a competition for wounded service men and women founded by Prince Harry.

But DT still had one goal left; he wanted to parachute again, a nearly impossible feat given is disabilities. Undeterred, DT made that jump 12 years after his last jump.

There was a time when DT looked in the mirror and believed he had nothing to live for. Now, when DT looks in the mirror, "I see a guy who had a bad day at work." Today, DT continues to look beyond his physical limitations. "If I can help one person it's all worth it. I tell my son, 'Stay strong; finish strong.'"

57th Annual Seminar Coverage

On the Edge of Our Seats

Extreme Adventurist Alison Levine Shared Lessons Learned From Mount Everest

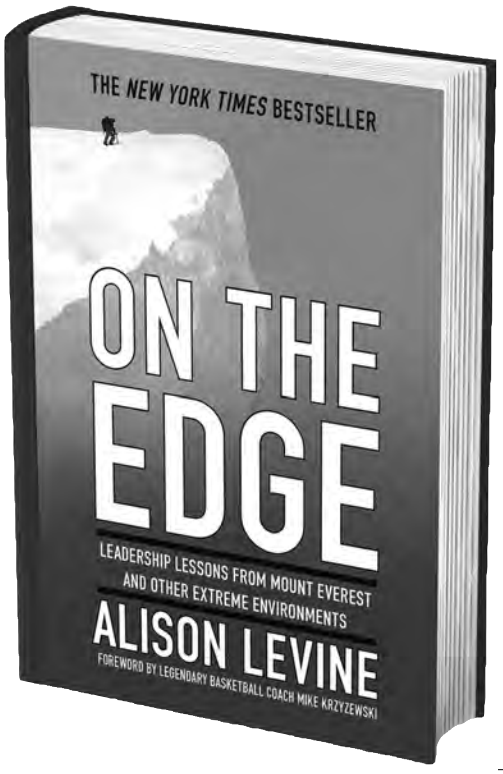
Carol A. Sherman

Speaking at the 57th Annual Seminar on Friday, February 8, 2018, Alison Levine, author of the *New York Times* best seller, *On The Edge*, took the audience on a breath-taking visual journey up – and down – Mount Everest as team captain of the first American Women's Everest Expedition. No stranger to extreme environments and unimaginable challenges, her impressive resume includes climbing the highest peaks on six continents and skiing 600 miles across west Antarctica while towing 150 pounds of gear.

Despite her accomplishments, she almost didn't accept the offer to lead the women's expedition, initially doubting whether she had the experience and ability to take on the challenge. But when she considered that there would be only one first American Women's Everest Expedition, she knew she had to try. "It's all about will power," she said.

Funding the expedition was the first challenge. Fortunately, automaker Ford agreed to sponsor the entire trip because they were about to launch a new model, the Ford Expedition. "It was a match made in heaven!" she joked, adding that Ford was a much better choice than Chevrolet whose full size SUV was called the Avalanche.

With funding in place, Levin sought advice from Duke University basketball coach, Mike Krzyzewski ("Coach K") to help her recruit the best team for the expedition. Coach K also wrote the foreword for her book. His recruiting advice proved invaluable, telling her to recruit people with ego. "People who are good at what they do know it." Next, Coach K advised her to make sure the recruits also had "team ego," meaning they want to be a part of something bigger than themselves.



Following Coach K's advice, Levine assembled a highly skilled five-women team, which included herself and ranged in age from 34 to 58, and with over 100 years of combined climbing experience. Collectively, the team had reached six of the world's seven highest summits, and several members had done all.

With her team in place, the reality of the challenge ahead was daunting. "The thought of having to go from sea level to 29,000 feet made my head spin." Acclimating their bodies to the extreme altitude took time and patience. Following a 10-day hike to base camp at over 17,000 feet, and several days there to get used to the altitude, the next days and weeks were spent hiking to the higher elevation camps, spending the night, only to hike back down the next day.

This up and down the mountain, moving higher with each climb, allowed the team to slowly acclimate. She explained that at altitudes above 18,000 feet, the human body begins to deteriorate. With each trip back to base camp, their bodies were allowed to regain strength. "Not only is it very physically challenging to be going up and back down and up higher and back down again, but psychologically it's incredibly frustrating."

continued on page 14

Levine – continued from page 13

Her lesson here, applicable far beyond the context of extreme mountain climbing: Progress does not happen in one particular direction. Levine shared one of her favorite lines: "Backing up is not the same as backing down."

Among the stunning images Levine shared were those of the team navigating the treacherous Khumbu Icefall where most accidents occur on the mountain. Here, 2,000 feet of shifting ice chunks put climbers in constant danger of being crushed or slipping into a deep crevasse. Again, her message resonates for many of us, in a variety of contexts: "Fear is okay. It's a normal human emotion. Complacency is what will kill you."

One of the longest days on the mountain was the hike to camp three. Levine showed a photo of herself smiling, taken just as she arrived at camp, only to admit that she was violently ill just moments before. "This photo is a reminder to me that when you're in a leadership position, even when you feel like absolute hell, you still have to get out there and do your job." Many in the audience could relate all too well to the sentiment.

Camp four, at 26,000 feet and known as the Death Zone, was the spot from which the attack on the summit was launched. At this extreme altitude, the human body deteriorates at an accelerated rate, and such a climb requires taking 5 to 10 breaths for every step. To summit the following day, they began their final assent of 3,000 vertical feet shortly before midnight with headlamps illuminating the way.

They climbed through the entire night and stopped just a couple of hundred feet below the summit. Here, Levine described one of her most frightening experiences, when a valve on her oxygen tank malfunctioned, causing her to become disoriented. No sooner had the valve been fixed, storm clouds rolled in. Levine had to make the tough call to turn around and begin their descent. There would be no summiting Everest for the first American Women's Everest Expedition.

In spite of their preparation and will power, it was the unpredictability of the mountain weather that caused them to turn back just a few hundred feet from the summit. "The key to surviving this is that you have to be able to take action on the situation at the time."

She explained, "Turning around and walking away is harder than continuing on. It doesn't matter how much blood, sweat and tears you personally put into this, if conditions aren't right, you turn around and cut your losses – and you walk away."

The team was caught in whiteout conditions on the way down, forcing them to camp until the storm passed. When they reached the treacherous Khumbu Icefall, Levine and a teammate were nearly killed by an ice avalanche. The conditions validated the tough decision not to summit, and highlighted the need not to lose steam when the finish line is near. "Summiting the mountain is only half of the goal. You have to get yourself all the way back."

Levine spoke of the frustration after returning home without summiting, and the difficulty of conveying that even though the women didn't summit it was still a huge accomplishment, including a new altitude record for everyone on the team.

But Levine's Everest journey did not end there. In 2010, eight years after leading the women's expedition, Levine returned to the mountain to honor a friend who had recently passed away and who had been an inspiration to Levine. "I wanted to do something to honor my friend. And the thing I'm most passionate about is climbing mountains."

This time, Levine was able to draw from the lessons learned from her previous attempt to make it to the summit. "We all know that you cannot control the environment, all you can do is control the way you react to it." This time when a storm forced a group of climbers back down, and Levine within hours from the top, she carefully considered the conditions and forged ahead, putting one foot in front of the other. On May 24, 2010, Levine sat atop the world's tallest mountain.

"It's not about spending a couple of minutes on the summit, it's about the lessons you learn along the way when you're fighting like hell to get up there." She concluded, "I wasn't as afraid the second time around."

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Questioning CACI

Especially When Medical Expense Damages Are at Issue!

H. Thomas Watson, Horvitz & Levy LLP

Hope for the best, but plan for the worst. That's good general advice, and it applies in the context of litigation as well. In the litigation context it means that defense counsel should attempt to establish and preserve potential appellate issues that can be asserted in the event of an unfavorable trial outcome. One good way to preserve potentially meritorious appellate issues is, in appropriate cases, to question CACI.

The standard CACI jury instructions are written by committee, may reflect compromises, and may not always reflect current law.

The CACI instructions are approved by the Judicial Council as the state's "official [jury] instructions." (Cal. Rules of Court, rule 2.1050(a).) The Rules of Court "strongly encourage[s]" trial judges to use them. (Cal. Rules of Court, rule 2.1050(e).) As a result, trial courts almost always use the CACI instructions as written, and routinely reject requests to modify them. This circumstance presents a challenge and an opportunity to preserve potential appellate issues.

The CACI instructions are produced by the 22-member Judicial Council Advisory Committee on Civil Jury Instructions, which is composed of California judges, law professors, and practicing attorneys with divergent practices and views of the law. (Cal. Rules of Court, rule 10.58.) The committee also solicits comments from CACI users and views these standard instructions as "the work product of the legal community" as a whole. (Preface to CACI Updates (Nov. 2017).) Accordingly, the CACI instructions are often the product of compromise that may infect instructions with imperfections, which can be cured by seeking appropriate modifications.

Additionally, CACI instructions are not always completely up to date. As acknowledged in the preface to CACI, "[t]hese instructions, like the law, will be constantly changing. Change will come not only through appellate decisions and legislation but also through the observations and comments of the legal community." (Preface to CACI (Sept. 2003).) Accordingly, counsel should not hesitate to request modifications to the standard CACI instructions to ensure that the instructions given to the jury correctly state the law, and even anticipate imminent changes in the law, regarding the legal theories and defenses governing the litigation.

Litigants have the right to legally correct, nonargumentative jury instructions on every litigation theory supported by the evidence.

California law regarding a litigant's right to legally correct, nonargumentative jury instructions is clear. " 'A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him [or her] which is supported by substantial evidence.' " (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 475, quoting *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*); accord, Code Civ. Proc., § 609.) Additionally, a party generally *must* request an "additional or qualifying instruction" in the trial court to preserve the right to challenge an instruction on appeal on grounds it is "too general, lacks clarity or is incomplete." (*Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 81 (*Bell*); see *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal. App.4th 655, 694 (*Bullock*) [" 'Each party has a duty to propose instructions in the law applicable to his own theory of the case. He has no duty to propose instructions which relate only to the opposing theories of his adversary.' "].)

"A court may refuse a proposed instruction if other instructions given adequately cover the legal point." (*Bullock*, *supra*, 159 Cal. App.4th at p. 685.) However, "[t]he trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case." (*Soule*, *supra*, 8 Cal.4th at p. 572 [trial court erred by refusing defendant's proposed causation instruction that was tailored to its defense theory, and instead giving general causation instruction that was legally correct but not tailored to the case]; see *Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1277.)

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The trial court will " 'refuse a proposed instruction that incorrectly states the law or is argumentative, misleading, or incomprehensible to the average juror....' " (*Bell*, *supra*, 209 Cal.App.4th at p. 80; *Bullock*, *supra*, 159 Cal.App.4th at pp. 684-685.) And the "trial court has no duty to instruct on its own motion, nor is it obligated to modify proposed instructions to make them complete or correct." (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 526.) Accordingly, to ensure that potential appellate issues are properly preserved, extreme care should be taken to ensure that proposed special or modified CACI instructions are complete, correct, and nonargumentative. (See Cal. Rules of Court, rules 2.1050(e), 2.1055(b) [governing form and format of proposed instructions], 2.1058.)

Defendants should request modified CACI instructions in cases where medical expense damages are in issue.

With these principles in mind, following this article are sample modified CACI instructions that defense counsel may consider proposing in cases involving medical expense damages claims. Such claims are being extensively litigated in the wake of *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 (*Howell*) and its progeny. As a result, the CACI instructions need to be modified to reflect the new appellate decisions addressing these important issues. (See, e.g., *Pebley v. Santa Clara Organics, LLC* (May 8, 2018, B277893) __ Cal.App.5th __ [**2018 WL 2112307, *8 & fn. 4**] [Where CACI 3903A, which refers to medical " 'cost' instead of any type of 'value,' " was used *without objection* the trial court did not err by admitted plaintiff's evidence regarding billed amounts for medical services].)

First, CACI Nos. 105 and 5001 on the admissibility of evidence regarding insurance should be modified. As written, these instructions prohibit the jury from considering evidence of insurance for any reason. Yet, as explained in one of the authorities cited in the Sources and Authorities following these CACI instructions, "Evidence of insurance coverage may be admissible where it is

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SAMPLE MODIFIED CACI INSTRUCTIONS FOR MEDICAL EXPENSE DAMAGES LITIGATION
[additions to CACI indicated in bold text]

Modified CACI Nos. 105 and 5001
(Evidence of Insurance)

You must not consider whether any of the parties in this case has insurance **[for the purpose of determining liability issues]**. The presence or absence of insurance is totally irrelevant **[to liability issues]**. You must decide **[the liability issues in]** this case based only on the law and the evidence.

Supporting Argument: Evidence Code section 1155 (section 1155) states that "[e]vidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is *inadmissible to prove negligence or other wrongdoing*." (Emphasis added.) The modified instruction comports with the plain language of section 1155.

Evidence that a plaintiff has insurance that pays for needed medical services is generally inadmissible under the "collateral source rule." (*Helfend v. Southern Cal. Rapid Transit Dist*. (1970) 2 Cal.3d 1, 16-18; *Acosta v. Southern Cal. Rapid Transit Dist*. (1970) 2 Cal.3d 19, 25-26.) However, the collateral source rule should not apply to a plaintiff who elects not to use medical insurance and instead seeks medical treatment from lien providers (so they can claim inflated "billed" amounts as damages). The predicate for the application of the collateral source rule is "if an injured party *receives some compensation for his injuries*...." (*Helfend*, at p. 6, emphasis added.) By definition, if available insurance is *not used*, the injured plaintiff is not "receiv[ing] some compensation."

Moreover, even if health insurance were a collateral source benefit, such evidence may be admissible in the court's discretion if it is relevant to another issue, such as malingering or the failure to mitigate damages. (*Id*. at pp. 16-17; *Hrnjak v. Graymar, Inc*. (1971) 4 Cal.3d 725, 733 [plaintiff's receipt of collateral insurance benefits is admissible upon a persuasive showing that it "is of substantial probative value" on an issue such as malingering]; *Blake v. E. Thompson Petroleum Repair Co., Inc*. (1985) 170 Cal.App.3d 823, 831; *ML Healthcare Services, LLC v. Publix Super Markets, Inc.* (11th Cir. 2018) 881 F.3d 1293, 1298-1304.) However, counsel should acknowledge the recent divergent decision in *Pebley v. Santa Clara Organics, LLC* (May 8, 2018, B277893) __ Cal.App.5th __, [2018 WL 2112307, *6], but urge the trial court to follow *Blake* and *Hrnjak* rather than *Pebley*, thereby preserving this potential appellate issue.

green sheets

NOTES ON RECENT DECISIONS

Lisa Perrochet

Emily Cuatto

The Green Sheets, although published later than most current advance sheets because of copy deadlines, should serve as a useful review of recent important decisions. Readers are invited to suggest significant decisions for inclusion in the next Green Sheets edition. Please contact:

LPerrochet@horvitzlevy.com or *ECuatto@horvitzlevy.com*

To make the Green Sheets a useful tool to defense counsel, they are printed in green and inserted in the middle of *Verdict* magazine each issue. They can be easily removed and filed for further reference. Of course, the Green Sheets are always one attorney's interpretation of the case, and each attorney should thoroughly read the cases before citing them or relying on this digest. Careful counsel will also check subsequent history before citing.

ATTORNEY FEES AND COSTS

Trial courts may deny statutory attorney fees to a plaintiff who successfully proves discrimination played a role in his termination but who ultimately receives no recovery.

Bustos v. Global P.E.T. (2018) __ Cal.App.5th __

The plaintiff sued his employer for disability discrimination. The jury found that the plaintiff's physical condition or perceived physical condition was "a substantial motivating reason" for his termination, but ultimately found for the defense and awarded no damages. Relying on *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, which held that "a plaintiff subject to an adverse employment decision in which discrimination was a substantial motivating factor may be eligible for reasonable attorney's fees and costs expended for the purpose of redressing, preventing, or deterring that discrimination," even if the discrimination did not "result in compensable injury," the plaintiff sought attorney fees. The trial court acknowledged *Harris* but determined that under the circumstances, where the jury denied the plaintiff all relief, it would exercise its discretion to deny fees.

The Court of Appeal (Fourth Dist., Div. Two) affirmed the denial of fees. *Harris* does not hold that fees are mandatory; it merely says the court "may" award fees. A trial court still retains discretion to deny fees. The trial court here did not abuse its discretion by denying fees to a plaintiff who ultimately obtained none of his litigation objectives, even if the jury answered the "substantial motivating factor" question on the special verdict form in his favor.

See also *Marina Pacifica Homeowners Assn. v. Southern California Financial Corp.* (2018) 20 Cal.App.5th 191 [Second Dist., Div. Eight: trial courts have discretion to decide neither party is entitled to attorney fees in a contract case where neither party achieved a complete victory].

Prevailing defendant in nonfrivolous Fair Employment Housing Act case was not entitled to costs otherwise recoverable under Code of Civil Procedure 998.

Arave v. Merrill Lynch (2018) __ Cal.App.5th __

The plaintiff brought various claims against his employer and others alleging violations of the Fair Employment and Housing Act (FEHA) and other laws. The defendants prevailed at trial. The trial court awarded defendants over $54,000 in costs and $29,000 in expert fees based on the plaintiff's rejection of the defendants' $100,000 offer to compromise under Code of Civil Procedure section 998 (section 998). The plaintiff appealed.

The Court of Appeal (Fourth Dist., Div. Two) reversed the cost award. FEHA's limitation of cost recovery to the defense of frivolous claims "overrides" Code of Civil Procedure section 998, which authorizes trial courts to award defendants their expert costs if they offer to settle for an amount greater than the verdict. The court expressly disagreed with holdings in *Holman v. Altana Pharma US,*

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Inc. (2010) 186 Cal.App.4th and *Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514 that a blanket prohibition of section 998 costs in FEHA cases would erode the strong public policy of encouraging settlements.

NOTE: Because there is now a split of authority, superior courts in all California jurisdictions may choose which appellate court decision the superior court judge believes is better reasoned. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 454-456.)

ANTI-SLAPP

The principal thrust/gravamen analysis remains a viable tool by which to assess whether a plaintiff's claim arises out of protected speech.

Okorie v. Los Angeles Unified School District (2017) 14 Cal.App.5th 574

Teacher filed a lawsuit against his employer, Los Angeles Unified School District (LAUSD), alleging discrimination, harassment, and retaliation in violation of the Fair Housing and Employment Act (FEHA) and other tort claims arising from an internal investigation LAUSD undertook in response to a molestation allegation made against the teacher. LAUSD filed an anti-SLAPP motion seeking to strike the entire complaint, which the trial court granted.

The Court of Appeal (Second Dist., Div. One) affirmed. Although the Supreme Court's decision in *Baral v. Schnitt* (2016) 1 Cal.5th 376 approved of striking distinct claims within pleaded counts, it still allows a motion attacking an entire pleading. Where the plaintiff's protected and unprotected claims are enmeshed within one another, "the principal thrust/gravamen analysis remains a viable tool by which to assess whether a plaintiff's claim arises out of protected activity" and thus is subject to a motion to strike in its entirety. The gravamen of the teacher's complaint arose from protected speech in connection with an internal investigation, and the teacher had failed to show a probability of success on his claims, so the motion to strike was properly granted.

See also *Optional Capital v. Akin Gump Strauss Hauer & Feld* (2017) __ Cal.App.5th __ [Second Dist., Div. One: applying gravamen analysis to affirm grant of anti-SLAPP motion in favor of attorneys accused of conspiring to use funds their client had allegedly converted from plaintiff to pay a settlement with a third party].

But see *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1169 [Third Dist.: "when deciding whether claims based on protected activity arise out of protected activity we do not look for an overall or gestalt 'primary thrust' or 'gravamen' of the complaint"].

Anti-SLAPP motion must be based on the allegations in the complaint, not evidence and argument concerning what activity the defendant believes underlies the claims.

Central Valley Hospitalists v. Dignity Health (2018) __ Cal.App.5th __.

A medical group sued the defendant hospital where its doctors worked, alleging the hospital interfered with the doctors' care of patients and induced doctors to leave the group so they would not have to work at the hospital. The hospital filed a special motion to strike, supported by evidence, arguing that the only viable theory of liability would depend on peer review activities and accordingly, the lawsuit arose out of protected petitioning activity. The trial court denied the motion, reasoning that the complaint contained no allegations concerning petitioning activity and the motion could not be granted based on the hospital's beliefs and characterizations about what the claims were based on.

The Court of Appeal (First Dist., Div. Two) affirmed. The complaint did not allege claims based on peer review activities and specifically disavowed any such claims. The defendant's anti-SLAPP motion therefore not only lacked merit, but was an abuse of the protections of the anti-SLAPP law.

A plaintiff may amend her complaint to add a new defendant despite pendency of anti-SLAPP motion.

Dickinson v. Cosby (2017) 17 Cal.App.5th 655

William Cosby, though a demand letter and a press release issued by his attorney, accused Janice Dickinson of being a liar for making statements that Cosby sexually assaulted her. Dickinson sued Cosby for defamation. Cosby filed an anti-SLAPP motion. While that motion was pending, Dickinson filed an amended complaint adding Cosby's attorney as a defendant. Cosby and his attorney moved to strike the amended complaint based on the rule that a plaintiff may not amend her complaint while an anti-SLAPP motion is pending. The trial court granted the motion to strike the amended complaint and then ruled on the anti-SLAPP motion, granting it as to the demand letter but denying it as to the press release.

The Court of Appeal (Second Dist., Div. Eight) reversed the order striking the amended complaint as to the attorney (as well as the order granting Cosby's anti-SLAPP motion as to the demand letter). The rule prohibiting amendments to a complaint while an anti-SLAPP motion is pending furthers the anti-SLAPP law's purpose in providing defendants with a quick escape from a strategic lawsuit against public participation. That rationale does not apply when it comes to a new defendant. Here, the attorney was not previously a party and had not filed the anti-SLAPP motion, so there was no basis to strike the amended complaint as to him.

ARBITRATION

Claims for unpaid wages based on Labor Code section 558 are not "civil penalties" and thus are subject to arbitration.

Esparza v. KS Industries, L.P. (2017) 13 Cal.App.5th 1228

Employee filed a putative wage and hour class action seeking civil penalties under the Private Attorney General Act (PAGA) and unpaid wages under Labor Code section 558. The trial court denied employer's motion to compel arbitration and employer appealed.

The Court of Appeal (Fifth Dist.) affirmed the order insofar as it denied arbitration of the employee's PAGA representative claims seeking civil penalties, but remanded for consideration of whether arbitration should proceed on employee's unpaid wages claim. A representative action under PAGA that seeks only civil penalties—a term of art meaning 75 percent allocation of monetary relief to the Labor and Workforce Development Agency and 25 percent to the aggrieved employees—is not subject to arbitration. Unpaid wages under Labor Code section 558, however, are not a "civil penalty" within the meaning of PAGA and the rule adopted in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348. Thus, to the extent employee sought unpaid wages, such private claims would be subject to arbitration pursuant to the terms of the parties' arbitration agreement and the Federal Arbitration Act.

NOTE: Review has been granted in Lawson v. ZB, N.A. *that declined to follow* Esparza *(see Supreme Court Pending Case Summaries below).*

See *Mandviwala v. Five Star Quality Care, Inc.* (9th Cir. Feb. 2, 2018) ___ Fed. Appx. ___, 2018 WL 671138, at *2 [9th Cir.: recognizing conflict with between *Lawson v. ZB, N.A.,* and *Esparza,* and following *Esparza*]. ▼

Employer's arbitration agreement with third party did not apply to employee's lawsuit against that third party.

Jensen v. U-Haul Co. of California (2017) __ Cal.App.5th __

Virgil Jenson was injured when a U-Haul truck he was driving blew a tire. Jenson's employer had rented the truck and instructed Jenson to use it to transport equipment. Jenson sued U-Haul, which moved to compel arbitration under the rental agreement between it and Jenson's employer. The trial court denied the motion to compel.

The Court of Appeal (Fourth Dist., Div. Two) affirmed the trial court's denial of U-Haul's motion to compel arbitration with Jenson. Jenson was not a signatory to the arbitration agreement. The doctrines that permit enforcement of an arbitration agreement against a nonsignatory did not apply. Jenson was not an intended beneficiary of the agreement; Jenson's employer did not execute the agreement as Jenson's agent; and Jenson's claims did not depend on the terms of the agreement. ▼

The Ninth Circuit has jurisdiction over appeals from orders vacating an arbitration award and remanding for a new arbitration.

Sanchez v. Elizondo (2018) 878 F.3d 1216

The plaintiff sued his investment advisor for mismanaging his investments. The parties submitted to Financial Industry Regulatory Authority (FINRA) arbitration. FINRA rules provide for one arbitrator for claims valued between $50,000 and $100,000, and three arbitrators for claims larger than that. The plaintiff initially claimed $100,000, but later increased his claim to $125,000 without amending his complaint. Over the advisor's objection, the arbitrator proceeded with the arbitration based on the initial $100,000 claim. The arbitrator awarded the plaintiff $75,000. The advisor then moved to vacate the arbitration award, arguing the arbitrator exceeded his authority by hearing a case with a claim that required three arbitrators. The district court vacated the award and remanded for a new arbitration.

The Ninth Circuit reversed the order vacating the arbitration award. Following the precedent set in other circuits, the Ninth Circuit held that an order vacating a final arbitration award and remanding for a new arbitration is appealable. On the merits, the arbitrator did not act irrationally or in manifest disregard of the law by deciding to proceed based on the complaint's $100,000 figure rather than the $125,000 figure under the circumstances. ▼

CLASS ACTIONS

Unnamed class members must intervene to appeal a class judgment, settlement, or attorney fee award.

Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260.

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 fee award of over $9 million. 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 affirmed the dismissal of the appeal. Unnamed class members do not become parties of record who are able to appeal a class judgment, settlement, or attorney fee award unless they intervene in the action. This ensures "a manageable process under a bright-line rule that promotes judicial economy by providing clear notice of a timely intent to challenge the class representative's

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settlement action." Thus, *Eggert v. Pac. States S. & L. Co.* (1942) 20 Cal.2d 199, remains the law of California, despite a number of federal and other states' courts adoption of broader standing rules.

A PAGA notice is legally inadequate if it refers to solely to the plaintiff's individual claim.

Khan v. Dunn-Edwards Corp. (2018) ___ Cal.App.5th ___

As a condition of bringing a representative action under the California's Private Attorneys General Act (PAGA) to recover civil penalties for wage-related violations of California's Labor Code, an employee must provide notice to the employer and the Labor and Workforce Development Agency of the specific provisions of the Labor Code alleged to have been violated, including the facts and theories supporting the alleged violation. Here, plaintiff's PAGA notice referred only to the plaintiff himself and did not assert that it was being provided on behalf of all aggrieved employees. The trial court granted summary judgment in favor of the employer on the ground that the employee's notice was inadequate to meet the administrative notice requirements.

The Court of Appeal (Second Dist., Div. Eight) affirmed. Because it referred only to himself, the employee's PAGA notice was legally inadequate to provide proper notice to the employer of the alleged PAGA violations. The employee's PAGA claims were therefore properly dismissed.

Sargon applies to evaluations of whether expert testimony is admissible at the class certification stage.

Apple v. Superior Court (Shamrell) (2018) 19 Cal.App.5th 1101

Plaintiffs moved to certify a class of Apple iPhone owners whose iPhones' power buttons allegedly stopped working during the warranty period. They proffered expert testimony to show that damages could be calculated on a classwide basis. Apple argued that, under *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, the plaintiffs' experts' methodologies were unreliable and irrelevant and therefore not sufficient to support class certification. The trial court certified the class, ruling that *Sargon* did not apply at the class certification stage.

The Court of Appeal (Fourth Dist., Div. One) vacated the trial court's class certification order and remanded for reconsideration. *Sargon*'s standards for admissibility of expert testimony apply at the class certification stage just as they do at the summary judgment and trial stages.

But see *ABM Industries Overtime Cases* (2017) __ Cal.App.5th __ [trial court abused its discretion in denying class certification after erroneously excluding expert analysis of the timekeeping data necessary to plaintiffs' common practice allegations]

In California court, a putative class action plaintiff must show ascertainability, predominance, and superiority to obtain class certification even if the complaint seeks only declaratory relief on a legal question.

Hefczyc v. Rady Children's Hospital (2017) 17 Cal.App.5th 518.

Uninsured plaintiffs brought a class action alleging a hospital charged them based on "Chargemaster" rates for services, which the plaintiffs alleged exceeded the "reasonable value" of the services they agreed to pay under their contracts with the hospital. The class action complaint sought only declaratory relief on the meaning of the contract's "reasonable value" provision. Applying California's class action requirements of ascertainability, predominance, and superiority, the court found that class treatment was not warranted because it would be unduly difficult to ascertain class members, common issues did not predominate, and the class action mechanism was not the superior way to proceed. The trial court rejected plaintiffs' argument that the court should certify the class based on an analogy to Federal Rules of Civil Procedure 23(b)(2), which provides that a class action may be maintained where the defendant has acted in a way common to the class such that injunctive or declaratory relief would be appropriate on a classwide basis.

The Court of Appeal (Fourth Dist., Div. One) affirmed the denial of class certification. No California authority supports the contention that ascertainability, predominance, and superiority as required under Code of Civil Procedure section 382 are not required in state court, even if a proposed class action would be certified under Federal Rules of Civil Procedure if it were proceeding in federal court.

See also *Kendall v. Scripps Health* (2017) 16 Cal.App.5th 553 [affirming denial of class certification in similar case for similar reasons]

CIVIL PROCEDURE

The tolling provision of 28 U.S.C. § 1367 suspends the statute of limitations on state law claims.

Artis v. District of Columbia (2018) 138 S.Ct. 594

Plaintiff filed a wrongful termination lawsuit alleging violation of Title VII and Washington, D.C. local laws in federal district court. The employer successfully moved to dismiss the Title VII claim. The district court then declined to exercise supplemental jurisdiction over the remaining state law claims and dismissed them under 28 U.S.C. § 1367(c)(3). Fifty-nine days later, plaintiff re-filed her non-federal claims in superior court. The defendant moved to dismiss, arguing the re-filed claims were untimely under 28 U.S.C. § 1367(d), which provides that "[t]he period of limitations" for any state law claims eligible for supplemental jurisdiction "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed," unless state law provides otherwise. The superior court granted the employer's motion. The D.C. Court of Appeals affirmed.

The United States Supreme Court reversed. The plain meaning of § 1367(d) is that the state limitations period is "tolled"—meaning suspended—while the case is pending in federal court and then is extended by an additional 30 days. Thus, here, since the plaintiff had a month left on her statute of limitations when she filed her lawsuit in district court, she had that month *plus* 30 more days to timely re-file in state court. It does not mean that there is merely a 30-day grace period to refile the claim and that, because the statute would have expired while plaintiff's claims were pending in federal court, she had to re-file in only 30 days.

For purposes of determining diversity jurisdiction based on corporate citizenship of a holding company with essentially no operations, the "principal place of business" is where the company holds its board meetings.

3123 SMB LLC v. Horn (9th Cir. 2018) 880 F.3d 461.

Subsidence issues rendered a building in Santa Monica, California, uninhabitable. 3123 SMB LLC was a holding company whose sole activity was to manage the vacant property. It had no officers or directors or other operations. Its principals, who reside in Missouri, formed a new Missouri corporation, Lincoln One, to hold the sole membership in the 3123 SMB LLC and file a malpractice lawsuit against the California attorney who allegedly mishandled litigation involving the property. 3123 SMB LLC filed the malpractice action in federal court, asserting subject matter jurisdiction existed on the basis of diversity. The district court dismissed the case, reasoning that the citizenship of 3123 SMB LLC is determined by the citizenship of its member Lincoln One, and that Lincoln One's principal place of business is Santa Monica, where the property was located. Accordingly, the parties were not diverse.

The Ninth Circuit reversed. The typical "nerve center" test for determining a company's principal place of business does not work in the case of a newly-formed holding company that has essentially no actual business activities. In such cases, the holding company's principal place of business is where its board meetings are held (unless evidence shows that the corporation is actually directed from elsewhere). Thus, because the one meeting of Lincoln One's board took place in Missouri, the parties were diverse.

Under Federal Rule of Civil Procedure 37, a district court may order a party to produce its nonparty expert at a deposition and sanction the party for noncompliance.

Sali v. Corona Regional Medical Center (9th Cir. 2018) __ F.3d __

Employees brought a putative class action against their former employer for alleged violations of wage and hour laws and sought class certification based in part on expert declarations. The employer sought to depose one of plaintiffs' experts, but plaintiffs did not produce him for deposition. The employer moved to compel plaintiffs to produce the expert for deposition and for sanctions under Federal Rule of Civil Procedure 37's general discovery enforcement provisions. The district court granted the motion and plaintiffs appealed.

The Ninth Circuit affirmed. Although Federal Rule of Civil Procedure 45, not Rule 37, governs subpoenas to nonparty witnesses and sanctions against witnesses for failure to appear, Rule 45 is not the exclusive mechanism for compelling a nonparty to appear at a deposition and obtaining sanctions for noncompliance. Under Rule 37, "a court can order a party to produce its nonparty expert witness at a deposition and, if the party makes no effort to ensure that its witness attends the deposition, sanction the party's counsel when the witness fails to appear unless the failure to produce the expert 'was substantially justified or other circumstances make an award of expenses unjust.' "

Parties must request that the court retain jurisdiction to enforce a settlement under Code of Civil Procedure section 664.6 before dismissing the suit.

Sayta v. Chu (2017) 17 Cal.App.5th 960

In this lawsuit concerning the defendants' efforts to terminate the plaintiff's tenancy, the parties reached a confidential settlement. The settlement agreement provided that the trial court would retain jurisdiction to enforce the settlement under Code of Civil Procedure section 664.6 (section 664.6), but the parties did not make a request in the trial court for an order retaining jurisdiction. The suit was dismissed. Later, the plaintiff moved to enforce the settlement. The

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court denied the motion on its merits, finding no violation of the agreement, and the defendants appealed.

The Court of Appeal (First Dist., Div. Five) affirmed the denial of the motion without reaching defendants' arguments on the merits. The trial court lacked jurisdiction to entertain the motion to enforce the settlement because, while the lawsuit was pending, the parties never asked the trial court to retain jurisdiction under section 664.6. The fact the parties' settlement agreement contemplated that the trial court would retain jurisdiction was not sufficient to endow the trial court with continuing jurisdiction.

See also *Howeth v. Coffelt* (2017) 18 Cal.App.5th 126__ [Fourth Dist., Div. One: parties could not rely on section 664.6 to seek rulings on new disputes that arose after settlement about one of the parties' alleged breaches of the agreement].

Trial courts lack discretion to deny a proper request for a settled statement.

Rhue v. Superior Court (Sam Nam LLC) (2017) 17 Cal.App.5th 892

Purported landowner brought action to quiet title against defendants. The trial court initially entered a default judgment for the landowner, but then, on its own motion, vacated the default, dismissed the entire action, and denied landowner's motion for reconsideration without providing any explanation of its grounds for doing so. It then denied landowner's request for a settled statement under California Rules of Court, rule 8.137, concluding, "no settled statement is necessary or required." Landowner filed a petition for writ of mandate.

The Court of Appeal (Second Dist., Div. Seven) granted the writ and directed the trial court to prepare a settled statement. The trial court had abused its discretion by failing to provide reasons demonstrating a "justifiable excuse" for denying landowner's motion for a settled statement. The discretion of the trial court to deny such requests is limited. It cannot, by its own decisions, deprive a litigant of her right to appeal by failing to provide the appellate court with the information necessary to rule on the merits of the litigant's appeal.

Privately retained superior court reporters may not charge more than statutory transcription rates.

Burd v. Barkley Court Reporters (2017) 17 Cal.App.5th 1037

A private court reporter retained to serve as an official court reporter pro tempore charged plaintiff fees for a copy of an official transcript that exceeded the fees stated in Government Code sections 69950 and 69954. Plaintiff filed an action against the court reporter for excessive fees, and the trial court granted defendant's demurrer because it believed that the Government Code did not regulate the transcription fees chargeable by privately retained official reporters pro tempore.

The Court of Appeal (Second District, Division Two) reversed, reasoning that neither section 69950 nor 69954 distinguishes between court reporters employed by the superior court and privately retained court reporters. Privately retained reporters who serve as official reporters pro tempore become ministerial officers of the court who are subject to the jurisdiction of the court during the period of their appointment to the same extent as an official reporter employed by the court.

A Code of Civil Procedure section 998 offer to compromise from joint plaintiffs may be valid, even if their injury is divisible.

Gonzalez v. Lew (2018) 20 Cal.App.5th 155.

In this wrongful death case against the owners of the rental home that burned and killed the decedents, there were two groups of heirs. The heirs served a joint offer to compromise under Code of Civil Procedure section 998 for $1.5 million total, without any allocation among the plaintiffs. The defendants (husband and wife) rejected the offer. At trial, the jury awarded $2.2 million to one group of heirs and $357,000 to the other group. The trial court granted the heirs their costs under section 998.

The Court of Appeal (Second Dist., Div. Three) affirmed the costs award. An offer from a defendant that fails to allocate the offer among multiple plaintiffs may place the plaintiffs in an unfair position of having to get consent from all to accept the offer. That is not true for a joint offer *from* multiple plaintiffs *to* a defendant, as happened here. "If plaintiffs with disparate claims want to make a global settlement offer which would put an end to the litigation at hand (and work out the details [of allocation] among themselves, they should be encouraged to do so." Further where, as here, it is obvious at least one of the plaintiffs did better than the offer, there is no concern that the offer did not permit the defendant a fair chance to evaluate the offer, as even if all plaintiffs but one had a worthless claim, the defendant would have done better by accepting the offer. There was, therefore, no reason in this case to find the offer invalid.

TORTS

Primary assumption of risk barred dirt biker's claim against co-participant in the activity.

Foltz v. Johnson (2017) 16 Cal.App.5th 647

A recreational dirt biker suffered severe injury after being thrown from her dirt bike during a ride in the desert with her then-fiancé. The dirt biker sued her ex-fiancé for negligence, arguing that he increased the inherent risks of dirt biking by taking her on a dangerous route despite her relative lack of experience. The trial court granted the ex-fiancé's motion for summary judgment based on primary assumption of risk.

The Court of Appeal (Second Dist., Div. Four) affirmed. Dirt biking is inherently dangerous, and the defendant neither increased the inherent risks of dirt biking nor recklessly engaged in conduct totally outside the normal range of the activity by leading the plaintiff through the desert and up a sand dune. Plaintiff was not a child, and defendant did not unduly pressure or threaten her to take undesired risks. Primary assumption of risk doctrine applied even though the plaintiff was a less experienced dirt biker than defendant.

See also *Grotheer v. Escape Adventures* (2017) 14 Cal.App.5th 1283 [Fourth Dist., Div. Two: primary assumption of risk doctrine applied to crash landing in hot air balloon caused by pilot's negligence]

Hotel maintenance worker who undertook to check on condition of hotel guest could be liable for negligently performing that task.

O'Malley v. Hospitality Staffing Solutions (2018) 20 Cal.App.5th 21

A woman staying in a hotel did not answer her husband's repeated cell phone calls. The husband became concerned that something was wrong and called the hotel front desk, told the clerk that his wife might be injured, and asked him to send someone to his wife's room to check on her condition. The clerk sent a maintenance worker to investigate. The maintenance worker went to the room, knocked several times, opened the door, stepped in and called out to see if anyone was there. All the lights were off and the maintenance worker could see only the shapes of furniture. The maintenance worker returned to the front desk and told the clerk no one was in the room. The next morning, the woman was found lying on the floor of the room, having suffered an aneurism which resulted in brain damage. In her subsequent suit for negligence, the hotel successfully moved for summary judgment that it had no duty to the woman.

The Court of Appeal (Fourth Dist., Div. Three) reversed the summary judgment. The court believed a reasonable trier of fact could find the hotel *assumed* a duty to check on the woman and determine her condition. "[T]he scope of this duty would depend on the nature of the harm that was foreseeable . . . , [and] [t]he risk that [the woman] was incapacitated and needed assistance may have been reasonably foreseeable" under the circumstances. A reasonable trier of fact could further find that some portion of the woman's injuries were the result of a lack of reasonable care in the performance of the undertaken duty.

See also *Lichtman v. Siemens Industry* (2017) 16 Cal.App.5th 914 [Second Dist., Div. Five: private company that had contractually undertaken to provide battery back-up power for traffic lights may have a duty to a driver injured in collision that occurred when the power failed].

Employee driving to work to pick up documents of his own accord, on his own time, was not on a "special errand" for his employer that would bring his negligence while driving within the course and scope of his employment.

Morales-Simental v. Genetech (2017) 16 Cal.App.5th 445

Employee caused a vehicle accident while driving to work late at night, on his day off, ostensibly to pick up resumes he wanted to review as part of his work responsibility to hire some new employees. The injured plaintiffs sued the negligent driver's employer on a respondeat superior theory. The trial court granted summary judgment to the employer, holding that the going-and-coming rule barred liability. The court rejected the plaintiffs' arguments that the "special errand" exception to the going-and-coming rule applied, which would have brought the employee's trip back within the course and scope of his employment.

The Court of Appeal (First District, Div. Four) affirmed the ruling that the driver was not acting in the course and scope of his employment as a matter of law. The employee was driving his own vehicle and there was no evidence the employer specifically requested the employee drive to work to pick the resumes, especially not at the particular time he decided to go. Although the employee had some supervisory authority, he did not have the authority to assign himself to go on a "special errand" that would make the employer liable for his negligence while performing such self-imposed duties.

The Right to Repair Act's prelitigation process applies to all claims arising out of alleged construction defects.

McMillin Albany LLC v. Superior Court (2018) 4 Cal.5th 241

Plaintiff homeowners sued a builder for construction defects, alleging common law claims and violation of Civil Code section 896's building standards. Because section 896 is part of the Right to Repair Act, plaintiffs were required to give the builder the opportunity to repair the defects in a nonadversarial prelitigation process. Because they failed to do so, the builder was entitled to a stay of the lawsuit. Rather than face a stay, plaintiffs dismissed their

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section 896 cause of action and proceeded only on the common law claims, which they said did not trigger the duty to comply with the Right to Repair Act. The trial court agreed, and the builder sought a petition for writ of mandate. The Court of Appeal (Fifth Dist.), granted the writ, holding that the Right to Repair Act applies, by its plain terms, to "any" action seeking recovery for residential construction defects and cannot be avoided by pleading only common law claims.

The Supreme Court affirmed the Court of Appeal. The Right to Repair Act is "virtually [the] exclusive remedy not just for economic loss but also for property damage arising from construction defects" in homeowner lawsuits.

INSURANCE

Under an additional insured endorsement providing coverage for "liability arising out of" the named insured's "ongoing operations," the additional insured potentially has coverage for claims alleging property damage that *began* while the named insured was doing work.

Pulte Home Corporation v. American Safety Indemnity Company (2017)
14 Cal.App.5th 1086

Homeowners brought latent construction defect claims against the general contractor of a housing project. The general contractor sought a defense under its subcontractors' general liability policies, which provided the general contractor with coverage as an "additional insured." Specifically, under an endorsement to the subcontractors' policies, the general contractor would be considered an additional insured, but "only with respect to liability arising out of" the named insured's (i.e., subcontractor's) work "which is ongoing" (or "only as respects ongoing operations" the named insured performed for the additional insured). The insurers declined the defense on the ground the homeowners' latent construction defect claims were not liabilities arising out of the named insured's "ongoing" operations. Rather, they arose out of "completed" operations. The general contractor filed a coverage and bad faith action against the insurers. Following a bench trial, the court entered judgment for the general contractor.

The Court of Appeal (Fourth Dist., Div. One) affirmed. Under the language of the additional insured endorsement, "[t]he coverage potential depends on when the property became physically damaged," not when the homeowners became financially damaged by the purchase of their home. Thus, so long as it is possible the property damage occurred while the subcontractors' work was ongoing, there would be a potential for coverage, even if the claim for damages arose later.

See also *McMillin Management Services v. Financial Pacific Ins. Co.* (2017) __ Cal.App.5th __ [Fourth Dist., Div. One: language granting coverage to an additional insured for "liability arising out of" the named insured's "ongoing operations" grants coverage for claims based on property damage that began to occur while the named insured was doing work, even if the legal claims do not accrue until after the named insured's work is complete]

Where an excess insurer denied coverage on the ground it had no duty to indemnify its insured until all of the insured's primary policies and retentions were exhausted (horizontal exhaustion), and it was ultimately unsuccessful on that argument, it owed mandatory prejudgment interest on the indemnity amount.

State of California v. Continental Insurance Company (2017)
15 Cal.App.5th 1017

In litigation over responsibility for environmental clean-up costs, a federal district court found in 1998 that the State of California was liable for the cleanup costs. In April 2001, the State settled its liability for $99.4 million. The State sought coverage for the settlement under multiple insurance policies covering multiple policy periods, including under a Continental excess policy that was excess to a large retention amount (which the State had insured). After long-running coverage litigation, the State prevailed on its arguments that it was entitled to coverage and was entitled to stack its policies—i.e., it could recover under multiple policy periods. The State also prevailed on its argument that it could access its excess policies (vertical exhaustion) without first exhausting all of its retentions or primary policies (horizontal exhaustion). As a result, Continental became obligated to pay indemnity of $15 million, which it paid in February 2015. Continental and the State then disagreed about the amount of prejudgment interest due on the $15 million payment. The trial court held that the State was entitled to prejudgment interest from the date of the district court's 1998 judgment holding the State liable for the cleanup costs.

The Court of Appeal (Fourth Dist., Div. Two) affirmed the prejudgment interest award in full. Under Civil Code section 3287, subdivision (a), "[a] person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day." Although Continental's liability to pay its $15 million policy limits turned on the applicability of vertical and horizontal exhaustion, resolution of such issues involved the purely legal task of interpreting Continental's policy. Continental "could have calculated how much it should pay, if it had known how a court would ultimately rule on [those] legal issues" as early as the 1998 judgment.

See also *Montrose Chemical Corp. v. Superior Court*, case no. S244737. (review granted October 6, 2017) [Petition for review after the Court of Appeal granted in part and denied in part

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a petition for peremptory writ of mandate. This case presents the following issue: When continuous property damage occurs during several periods for which an insured purchased multiple layers of excess insurance, does the rule of "horizontal exhaustion" require the insured to exhaust excess insurance at lower levels for all periods before obtaining coverage from higher level excess insurance in any period?]

Workers' compensation lienholder was entitled to recover full amount of lien, including lost wages, out of worker's judgment against the third-party tortfeasor, even though the worker did not seek lost wages as an item of damages in the third-party lawsuit.

Duncan v. Hartford Accident & Indemnity Co. (2017) __ Cal.App.5th __.

While at a Wal-Mart store in the course and scope of her employment, the plaintiff was injured. She recovered $152,000 in workers' compensation benefits, consisting of $115,000 in medical expenses and $37,000 in lost wages, from Hartford. She then brought suit against Wal-Mart and recovered $355,000 for medical expenses and pain and suffering. She did not receive a judgment for lost wages, as she had not sought such damages at trial. Hartford sought and obtained a lien on the judgment, but the trial court reduced the lien recovery to $53,000, which represented the total $152,000 lien *minus* the amount the court attributed to reasonable attorney fees and the portion of the lien attributable to lost wages. Hartford appealed, arguing it was entitled to recover on portion of the lien attributable to lost wages.

The Court of Appeal (Fourth Dist., Div. Three) agreed with Hartford. The workers' compensation statutes provide no basis to deduct lost wages from a lien simply because the plaintiff did not seek that type of damages at trial. Ensuring the employer is fully reimbursed for amounts paid to the worker following an injury serves the goal of ensuring employees are promptly and fully compensated when they are injured. "Allowing the employee to manipulate the employer's reimbursement rights by selectively seeking only certain items of damages form a third party tortfeasor would undermine the system."

LABOR & EMPLOYMENT

The federal OSHA does not preempt consumer law claims arising out of alleged workplace safety violations.

Solus Industrial Innovations, LLC v. Superior Court (People) (2018) 4 Cal.5th 316

Two factory workers were killed when a water heater exploded in the defendant's manufacturing facility. After the Division of Occupational Safety and Health assigned fault for the explosion to the defendant, the district attorney filed a civil action against the defendant that included a request for civil penalties under California's Unfair Competition Law (UCL) and the False Advertising Law (FAL). The defendant argued the claim was preempted by federal workplace safety regulations under the Occupational Safety and Health Act (OSHA). The trial court disagreed and overruled the defendant's demurrer. The defendant sought writ relief. In granting the writ, the Court of Appeal (Fourth Dist, Div. Three) reversed, finding preemption.

The California Supreme Court reversed the Court of Appeal. There is a "strong presumption against preemption, arising both from the fact that federal legislation addresses this area that has been the long-standing subject of state regulation and from the fact that California has assumed responsibility under the federal OSHA to regulate worker safety and health, thereby preempting federal law." The "principal goal" of the federal law was to "address the problem of uneven and inadequate state protection of employee health and safety" by supplying a "nationwide floor of protection for workers," and not to limit a state's ability to go further. Thus, the California district attorney's civil penalties action under the UCL for workplace safety violations was not preempted.

A claim for constructive discharge requires proof of objectively, rather than subjectively, intolerable working conditions.

Simers v. Los Angeles Times Communications (2018) __ Cal.App.5th __

T.J. Simers quit his job at the Los Angeles Times following an investigation into his conduct as a sports columnist that resulted in the loss of his column. Although the Times subsequently offered to restore Simers' column, Simers resigned and sued the Times for age and disability discrimination, contending that he was constructively terminated because his working conditions at the Times were intolerable. At trial, a jury awarded Simers over $7 million in damages, including $5 million in noneconomic damages. The trial court granted the Times's motion for judgment notwithstanding the verdict on constructive discharge and rejected the jury's associated economic damages award. Because the trial court could not determine the portion of the jury's noneconomic damages award

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attributable to the constructive discharge theory, the court also ordered a new trial on noneconomic damages.

The Court of Appeal (Second Dist., Div. Eight) affirmed the trial court's posttrial orders. Simers' personal feelings of anxiety and embarrassment were insufficient to show that his working conditions were *objectively* intolerable. Simers' working conditions were not so objectively intolerable that a reasonable employee in his position would have been compelled to resign.

Employee stated viable FEHA claim against employer for failing to protect her from rape by a trespasser who was known to be on property and harassing other employees.

M.F. v. Pacific Pearl Hotel Management LLC (2017)
16 Cal.App.5th 693

Hotel employee sued hotel for violation of the Fair Employment and Housing Act (FEHA) after she was raped by a nonemployee trespasser. Employee alleged that an engineering manager was aware of the trespasser's presence on the hotel grounds and that management was aware that the trespasser had approached other employees and made sexually harassing comments. The hotel demurred, alleging the complaint failed to state a cause of action under FEHA because employee had not pled sufficient facts to show hotel knew or should have known about any conduct by the trespasser requiring action by hotel or putting it on notice that sexual assault might occur. Thus, hotel argued that employee's claims were barred by the workers' compensation exclusivity doctrine. The trial court sustained the demurrer and dismissed employee's complaint with prejudice.

The Court of Appeal (Fourth Dist., Div. One) reversed. Employee sufficiently stated a claim under the FEHA for sexual harassment by a nonemployee and for failure to prevent such harassment. Once hotel was informed that the trespasser had confronted and harassed housekeeping employees, it had a duty to take immediate and appropriate remedial action within its control. Because the complaint stated viable FEHA claims against hotel, the workers' compensation exclusivity doctrine did not apply.

CALIFORNIA SUPREME COURT PENDING CASES[1]

Addressing scope of homeowners' liability to injuries suffered by independent contractors.

Gonzalez v. Mathis
case no. S247677 (review granted May 16, 2018)

The defendant home owner hired an independent contractor to wash roof skylights. While on the roof, the contractor lost his footing and fell off the roof. The contractor sued the owner, claiming that loose rocks, pebbles, and sand on the roof constituted a dangerous condition that caused his fall. The trial court granted summary judgment for the owner on grounds, among others, that the contractor was aware of these hazards. The Court of Appeal (Second Dist., Div. Seven) reversed the summary judgment, agreeing with the plaintiff. "[T]he hirer can be held liable when he or she exposes a contractor (or its employees) to a known hazard that cannot be remedied through reasonable safety precautions." In this case, there was a triable issue of fact whether the contractor "could have remedied the dangerous conditions on the roof through the adoption of reasonable safety precautions."

The California Supreme Court granted review to consider the following question: "Can a homeowner who hires an independent contractor be held liable in tort for injury sustained by the contractor's employee when the homeowner does not retain control over the worksite and the hazard causing the injury was known to the contractor?"

Addressing whether an employee who settles his individual claims is still an "aggrieved employee" with standing to pursue a Private Attorneys General Act action.

Kim v. Reins International California, Inc.
case no. S246911, (review granted February 6, 2018)

A plaintiff filed a wage-and-hour class action against his former employer alleging both individual and class claims. He also sought civil penalties under California's Private Attorneys General Act (PAGA). The trial court compelled the plaintiff to arbitrate his individual claims, reserved for the arbitrator the question of whether the plaintiff could proceed with class arbitration, and stayed the PAGA claim pending arbitration. While arbitration was pending, plaintiff settled and dismissed his individual claims with prejudice. The trial court granted summary adjudication in favor of the employer on the plaintiff's remaining PAGA claim, concluding that the plaintiff was no longer an aggrieved employee with standing to sue under PAGA. The Court of Appeal (Second Dist., Div. Four)

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1 Published decisions as to which review has been granted may be cited in California cases only for their persuasive value, not as precedential/binding authority, while review is pending. (See Cal. Rules of Court, rule 8.1115.)

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affirmed dismissal, holding the plaintiff "essentially acknowledged that he no longer maintained any viable Labor Code-based claims against" the employer, no longer met the definition of 'aggrieved employee' under PAGA," and therefore lacked standing to maintain the PAGA action.

The California Supreme Court granted review to consider the following question: "Does an employee bringing an action under the Private Attorney General Act (Lab. Code, § 1698 et seq.) lose standing to pursue representative claims as an "aggrieved employee" by dismissing his or her individual claims against the employer?"

Addressing whether PAGA claims for underpaid wages are subject to arbitration.

Lawson v. ZB, N.A.
case no. S246711 (review granted January 26, 2018)

A plaintiff filed a claim under California's Private Attorneys General Act and the employer defendant moved for arbitration of the claims. The trial court bifurcated plaintiff's underpaid wage claims from the claims of statutory penalties, found arbitration was unavailable as to the penalty claims, and granted the motion only as to the claims for underpaid wages. The Court of Appeal (Fourth Dist., Div. One) reversed, finding that bifurcation was improper, and none of the claims were subject to arbitration. Expressly disagreeing with another recent decision on the subject, the court held that PAGA claims for underpaid wages are part of the "civil penalties" provided under Labor Code section 558 and are therefore not subject to arbitration. The court concluded that the Federal Arbitration Act did not preempt state law barring arbitration of such claims.

The California Supreme Court granted review to consider this question: "Does a representative action under the Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.) seeking recovery of individualized lost wages as civil penalties under Labor Code section 558 fall within the preemptive scope of the Federal Arbitration Act (9 U.S.C. § 1 et seq.)?"

See also *Melendez v. San Francisco Baseball Associates*, case no. S245607 (review granted November 27, 2017 [Petition for review after the Court of Appeal reversed an order denying a motion to compel arbitration in a civil action. The court limited review to the following issue: Does plaintiffs' statutory wage claim under Labor Code section 201 require the interpretation of a collective bargaining agreement, and is it therefore preempted by section 301 of the Labor Management Relations Act?].

See also *Stewart v. San Lis Ambulance*, case no. S246255 (review granted January 3, 2018) [Request under from Ninth Circuit to decide the following questions: "1. Under the California Labor Code and applicable regulations, is an employer of ambulance attendants working twenty-four hour shifts required to relieve attendants of all duties during rest breaks, including the duty to be available to respond to an emergency call if one arises during a rest period? 2. Under the California Labor Code and applicable regulations, may an employer of ambulance attendants working twenty-four hour shifts require attendants to be available to respond to emergency calls during their meal periods without a written agreement that contains an on-duty meal period revocation clause? If such a clause is required, will a general at-will employment clause satisfy this requirement? 3. Do violations of meal period regulations, which require payment of a 'premium wage' for each improper meal period, give rise to claims under sections 203 and 226 of the California Labor Code where the employer does not include the premium wage in the employee's pay or pay statements during the course of the violations?"].

Addressing the scope of recovery under the Song-Beverly Consumer Warranty Act.

Kirzhner v. Mercedes-Benz USA
case no. S246444 (review granted February 21, 2018)

Plaintiff leased an allegedly defective Mercedes that could not be repaired after multiple attempts. Plaintiff accepted Mercedes' offer to compromise under Code of Civil Procedure section 998, which included a provision for restitution under the Song-Beverly Consumer Warranty Act (California's "lemon law"). Plaintiff accepted the offer and sought costs. The court granted the costs, except it denied plaintiff's request for a $680 vehicle registration renewal fee. The Court of Appeal affirmed, holding that the lemon law's provision for the recovery of "registration fees" allows for recovery of only those fees paid when buying the car and not renewal fees. Renewal fees were standard costs of owing a vehicle and did not result from the vehicle's defectiveness.

The Supreme Court granted review to consider the following question: "When a consumer chooses restitution as a remedy for a defective vehicle under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.), is the consumer entitled to receive registration fees paid after the time of sale as part of the restitution payable under Civil Code sections 1794 and 1793.2(d)(2)(B)?"

Addressing when tortfeasor who caused environmental disaster may be liable for economic losses suffered by businesses affected by the disaster.

Southern California Gas Leak Cases
case no. S246669 (review granted February 28, 2018)

Businesses adversely affected by the Aliso Canyon gas leak sued Southern California Gas Company (SoCalGas) based on negligence for economic loss. SoCalGas demurred, arguing that absent personal injury, property damage, or a special relationship, it had no duty to prevent the business' economic losses. The trial court overruled

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the demurrer on the ground there is no bar to recovery for purely economic loss where it results from a mass tort. SoCalGas petitioned for a writ of mandate. The Court of Appeal (Second Dist., Div. Five) issued the writ, directing the trial court to sustain SoCalGas's demurrer on the ground SoCalGas owed no duty to the businesses.

The Supreme Court granted review to consider the following question: "Can a plaintiff who is harmed by a manmade environmental disaster state a claim for negligence against the gas company that allegedly caused the disaster if the damages sustained are purely economic?"

Addressing whether a plaintiff must show that records exist to identify class members before moving for class certification.

Noel v. Thrifty Payless, Inc.
case no. S246490 (review granted February 28, 2018)

Plaintiff brought a putative class action against a retailer under the Consumer Legal Remedies Act and other laws alleging the retailer sold inflatable swimming pools that were smaller than advertised. The superior court declined to certify the class, finding the proposed class was not ascertainable, and denied the plaintiff's motion for a continuance to permit him to more fully develop the facts supporting ascertainability. The Court of Appeal (First Dist., Div. Four) affirmed, reasoning that the plaintiff's failure to do sufficient discovery to ensure all class members could be identified (and thus, have their rights adequately protected) before seeking class certification justified denial of the motion. The court further held that the trial court did not abuse its discretion in denying the plaintiff a continuance on a motion he brought.

The Supreme Court granted review to consider the following question: "Must a plaintiff seeking class certification under Code of Civil Procedure section 382 or the Consumer Legal Remedies Act demonstrate that records exist permitting the identification of class members?"

coupled with other relevant evidence, provided that the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance. (*Blake v. E. Thompson Petroleum Repair Co., Inc.* (1985) 170 Cal.App.3d 823, 831 [216 Cal.Rptr. 568].)" (Use Note to CACI No. 105 p. 17; Use Note to CACI No. 5001 p. 1283.) That's almost always the case when medical expense damages are at issue, since the negotiated rates paid by health insurers are only a small fraction of the nominally "billed" amounts that plaintiffs often offer as a benchmark for recovery. Moreover, a plaintiff may be found to have failed to mitigate damages where medical services are obtained at rates significantly higher than comparable care available at these lower negotiated rates. However, counsel should acknowledge the recent divergent decision in *Pebley v. Santa Clara Organics, LLC*, *supra*, __ Cal.App.5th __ [2018 WL 2112307, *6], but urge the trial court to follow *Blake* and *Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 733 [plaintiff's receipt of collateral insurance benefits is admissible upon a persuasive showing that it "is of substantial probative value" on an issue such as malingering] rather than *Pebley*. The proposed modified CACI Nos. 105 and 5001 instructions below address this problem with the CACI instructions, and preserve the issue for further appellate review.

Modified CACI No. 3903A
(Medical Expense Damages)

[Past] [and] [future] medical expenses. [To recover damages for past medical expenses, [name of plaintiff] must prove the reasonable [value] of reasonably necessary medical care that [he/ she] has received.] **[Your award of past medical expense damages must be the lesser of (1) the amount actually paid or incurred for the necessary medical care, or (2) the market value of the necessary medical care.]**

[To recover damages for future medical expenses, [name of plaintiff] must prove the reasonable [value] of reasonably necessary medical care that [he/she] is reasonably certain to need in the future.] **[Your award[s] of medical expense damages must be based on the market value for such services.]**

[The market value of medical care is measured by the amounts typically accepted as payment in full for those services when rendered to patients in plaintiff's circumstances, and may not be based on billed amounts that will not actually be paid for such services. You should award plaintiff an amount of damages that is reasonably necessary to compensate [him/her] for any harm caused by defendant, but should award no more than that amount.]

Supporting Authorities: *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 555 ("We agree with the *Hanif* court that a plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less."); *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 640; see *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 179-181 (" 'the reasonable market or exchange value of medical services will not be the amount *billed* by a medical provider or hospital, but the "amount *paid* pursuant to the reduced rate negotiated by the plaintiff's insurance company" ' "); *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050 (*Howell*'s market value approach "applies to the calculation of future medical services"); *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1331 (the "full amount billed for past medical services is *not relevant* to a determination of the reasonable value of future medical services" and evidence of billed amounts "cannot support an expert opinion on the reasonable value of future medical expenses" (emphasis added)); see also *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1043 ("[A] person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure.

The next modified instruction is CACI No. 3903A regarding medical expense damages. This instruction requires the jury to award damages based on the *market value* of medical services as measured by the amount typically *accepted as payment in full* for those services (and not the much larger amounts stated in unpaid medical "bills"). Numerous California appellate decisions supporting this modified instruction are included.

The final modified instruction is CACI No. 3930 concerning mitigation of damages. Unlike the unmodified version of CACI No. 3930, the modified version explains that plaintiffs have the *duty* to take all reasonable steps to *minimize medical expense damages.* Defense counsel can cite this modified instruction when informing the jury that plaintiff is not allowed to recover damages

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in excess of the amount that would have been incurred, or will be incurred, through available health insurance that provides comparable care at lower rates rather than so-called "billed" rates. Once again, counsel should acknowledge the recent divergent decision in *Pebley v. Santa Clara Organics, LLC*, *supra*, __ Cal.App.5th __ [2018 WL 2112307, *6], but urge the trial court to follow the *Howell/Corenbaum* line of authority rather than *Pebley*, thereby preserving the issue for appellate review.

Proposing modified CACI instructions may lead to more accurate verdicts and/or preserve strong appellate issues.

These legally correct, nonargumentative instructions on defense theories regarding medical expense damage claims should lead to a verdict that more accurately measures the plaintiff's actual harm. If the court refuses them, the proposed instructions preserve potentially meritorious appellate issues, which could lead to reversal of an adverse judgment on appeal, or a settlement due to the prospect for reversal.

Modified CACI No. 3930
(Mitigation of Personal Injury Damages)

If you decide **[defendant]** is responsible for the **[plaintiff's injury, plaintiff]** is not entitled to recover damages for **[past and future medical expenses that plaintiff]** could have avoided, **[or will be able to avoid in the future]**, with reasonable efforts or expenditures.

You should consider the reasonableness of **[plaintiff's]** efforts in light of the circumstances facing [him/her] at the time, including [his/her] ability to make the efforts or expenditures **[to minimize his/her medical expenses]** without undue risk or hardship.

If **[plaintiff]** made reasonable efforts to avoid **[incurring damages]**, then your award should include reasonable amounts that [he/she] spent for this purpose.

Supporting Argument: Virtually all plaintiffs claiming medical expense damages either had or could have had health insurance covering such expenses, which is available to everyone regardless of pre-existing conditions. (42 U.S.C. §§ 300gg-1(a), 300gg-2(a), 18031(a); see *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 179-181.)

The plaintiff has the duty to take reasonable steps to minimize the loss allegedly caused by a defendant's actions. (See *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568 ["A plaintiff has a duty to mitigate damages and cannot recover losses it could have avoided through reasonable efforts"]; *Placer County Water Agency v. Hofman* (1985) 165 Cal.App.3d 890, 897; *Mayes v. Sturdy Northern Sales, Inc.* (1979) 91 Cal.App.3d 69, 85-86 ["A plaintiff cannot recover damages that would have been avoidable by his or her ordinary care and reasonable exertions ... [and] [i]ncreased loss due to the plaintiff's willfulness or negligence is the plaintiff's own burden" (citations omitted)]; see also *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1043 ["a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure"]; *Pattee v. Georgia Ports Authority* (S.D.Ga. 2007) 512 F.Supp.2d 1372, 1381-1382 [plaintiff's failure to purchase private health insurance following his termination evinces a failure to mitigate future medical expense damages]."); but see *Pebley v. Santa Clara Organics, LLC* (May 8, 2018, B277893) __ Cal.App.5th __, [2018 WL 2112307, *6].)

By neglecting to obtain, maintain or use health insurance the plaintiff fails to mitigate medical expense damages, since the negotiated rates actually paid by health insurers are substantially less than the billed rates quoted by providers. (See, e.g., *Sanjiv Goel M.D., Inc. v. Regal Medical Group, Inc.* (2017) 11 Cal.App.5th 1054, 1058-1059 [emergency physician billed more than $275,000 (nearly 30 times) the $9,660 found to be the reasonable value of his medical services, based on expert testimony "that the average range of [negotiated] rates by private payors in the industry ranged from 135 percent to 140 percent of the Medicare rates"]; *Luttrell v. Island Pacific Supermarkets, Inc.* (2013) 215 Cal. App.4th 196, 199 [$690,548 billed, but $138,082 accepted as full payment – a discount of 80 percent]; *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 306-307, 309 [$17,168 in damages at billed rate reduced to $3,600 the hospital accepted as full payment – a discount of nearly 80 percent].)

It is critical to make a clear record regarding the proposed modified instructions and defense counsel's objection (or at least lack of agreement) to instructions that the court actually gives. (See *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364 ["When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two."]; see also Code Civ. Proc., § 647 [counsel is presumed to object to instructions given by the court absent *express acquiescence* in the instructions].)

The standard of review governing instructional error is relatively favorable to the appellant. The propriety of jury instructions is a question of law reviewed de novo, so the appellate court does not give any deference to the trial court's ruling on instructions. (*Yale v. Browne* (2017) 9 Cal.App.5th 649, 657; *Alamo*, *supra*, 219 Cal.App.4th at p. 475.) To determine whether instructional error is prejudicial, the appellate court reviews the entire record,

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not simply the evidence that supports the verdict. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801-802 (*Cassim*) ["errors in civil trials require that we examine 'each individual case to determine whether prejudice actually occurred in light of the entire record' "].) Moreover, the appellate court *views the evidence in the light most favorable to the party claiming error*, and assumes that the jury, had it been given proper instructions, might have drawn different inferences more favorable to the appellant and rendered a verdict in the appellant's favor on those issues. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 (*College Hospital*); *Chanda v. Federal Home Loans Corp.* (2013) 215 Cal.App.4th 746, 755; *Bourgi v. West Covina Motors, Inc.* (2008) 166 Cal.App.4th 1649, 1664.)

Finally, an appellate court will deem instructional error to be prejudicial if " 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*Clifton v. Ulis* (1976) 17 Cal.3d 99, 105-106.) " '[P]robability' in this context does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility*." (*College Hospital*, *supra*, 8 Cal.4th at p. 715; accord, *Cassim*, *supra*, 33 Cal.4th at p. 800.)

In sum, defense counsel always should carefully scrutinize the applicable CACI instructions and recent appellate decisions to determine whether to propose modifications to the standard instructions. Doing so reflects sound planning for the worst-case trial outcome.

Enhancing Your Understanding of Statutory Fee Claims

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What's a reasonable attorney fee? Trial judges routinely have to decide the value of attorney services when fees are claimed under one of California's many fee-shifting provisions. The formula that has developed over time is straightforward in theory: multiply the reasonable number of hours by the reasonable hourly rate to arrive at a "lodestar" market-based figure, and in unusual cases, enhance or reduce as necessary to reach a reasonable fee. But in practice, confusion over when a fee enhancement is proper has resulted in some truly startling fee requests and awards.

Recently, however, some courts have taken a closer look at the problem, going back to first principles expressed by the California Supreme Court: attorney fees awarded by statute must provide *reasonable* compensation for the work performed. Some courts have placed heavy emphasis on one factor bearing on reasonableness: the uncertainty that counsel would prevail and obtain any recovery at all, which courts have referred to as the "contingency" factor. While that factor was crafted in the context of access-to-justice cases in which little or no monetary recovery was available even if counsel were successful, some courts came to believe that virtually any cases handled on a "contingency" basis warranted an enhancement. Lately, however, we have seen courts adhering more closely to the rationale behind the "contingency" factor, examining whether the attorney's proposed lodestar rate already incorporates a contingency risk, and whether the nature of the claim significantly reduced any real contingency risk.

This article analyzes key decisions regarding the circumstances under which fee enhancements are proper, and then discusses three cases – one in the Court of Appeal, and two in the trial court – where the courts declined to award a fee enhancement on the basis that none was warranted, even though the client representation was undertaken on a contingency basis. Together, these cases provide guidance for how to reasonably compensate attorneys for their work without awarding an unwarranted windfall, and without injecting perverse incentives to engage in extended litigation rather than settling for payments that reasonably compensate both the plaintiff and his or her counsel.

The Guidance: *Serrano III, Ketchum,* and *Weeks*

In *Serrano v. Priest* (1977) 20 Cal.3d 25 *(Serrano III),* the California Supreme Court established the two-step process for determining a reasonable fee award. The trial court first determines a lodestar figure, based on a "careful compilation of the time spent and reasonable hourly compensation of each attorney ... involved in the presentation of the case." The trial court is expected to set the reasonable hourly rate based on comparable hourly rates in the community for someone with the attorney's skill and experience, and to reduce any time spent for inefficient or duplicative efforts.

Once the court determines the lodestar figure, the court may, at its discretion, adjust that figure up or down based on a number of factors indicating unusual circumstances, including "(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; [and] (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award."

The Court clarified the *purpose* of fee adjustments in *Ketchum v. Moses* (2001) 24 Cal.4th 1122. *Ketchum* explained that fee adjustments should be made "to fix a fee at the fair market value for the particular action." To that end, a fee enhancement might be warranted in "cases involving enforcement of constitutional rights, but little or no damages," in order to make "such cases economically feasible to competent private attorneys."

A lodestar enhancement is not automatically warranted simply because the attorney took the case on a contingency basis. Instead, "the trial court should consider whether, and to what extent, the attorney and

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client have been able to mitigate the risk of nonpayment." That may occur where the client has agreed to pay some portion of the lodestar amount regardless of outcome, or may occur because the attorney stands to collect significantly *more* than the lodestar amount if the client obtains a monetary recovery that is then shared with the attorney on a percentage basis. (An attorney who spends ten hours to present a demand that produces a $50,000 settlement, and who collects 40% of that payment, will have earned $2,000 per hour for her efforts.) The court should also consider the degree to which the hourly rate described for the relevant market already compensates for contingency risk, extraordinary skill, or other factors under *Serrano III.*

The *Ketchum* opinion relied in part on the *Weeks v. Baker & McKenzie* (1998) 63 Cal. App.4th 1128. *Weeks* addressed a fee claim where the plaintiff prevailed in a FEHA case against her employer, and the court awarded attorney fees with a 1.7 multiplier over and above the lodestar. The Court of Appeal *reversed* the fee order on the ground that the multiplier was excessive, even though the representation was on a contingency basis, and even though the principle behind the lawsuit – preventing workplace sexual harassment – is a meritorious public goal. The court reiterated that the goal of fee enhancements is "to fix a reasonable fee in a particular action," and cautioned against "awarding enhanced fees, particularly in private actions, that will then encourage future litigation of questionable claims."

Weeks also noted that FEHA has a fee-shifting provision that enables contingency-fee counsel to collect significant fees even if the ultimate monetary recovery is small, so that a percentage-based recovery would amount to little compared to the work performed. In such ordinary tort cases pursuing statutorily guaranteed rights, the need for a fee enhancement is low compared to cases where "the public value of the case is great and the risk of loss results from the complexity of the litigation or the uncertainty of the state of the law."

Weeks warned that fee enhancements "should not be a tool that encourages litigation of claims where the actual injury to the plaintiff was slight," or "compel a defendant to settle frivolous claims under threat that the weaker the claim the more likely it is that any fees awarded will be enhanced should the plaintiff manage to prevail."

Lodestar Enhancements – Uses and Abuses

Serrano III, Ketchum, and *Weeks* establish that lodestar enhancements should do no more than bring a fee award in line with the approximate market-level compensation based on what an attorney would earn if providing those services on an hourly basis. Where the right to be vindicated is private, where finding counsel to take on the matter would not be unduly difficult, and where the law supporting the claim clearly allows for significant monetary recoveries as well as a mandatory fee-shifting provision, an enhancement is likely not warranted under *Ketchum*.

But that has not stopped some attorneys from seeking significant fee enhancement in such cases. For example, in *McCullough v. FCA US LLC* (San Diego Super. Ct., No. 37-2015-00013501-CU-BC-CTL), the court awarded the plaintiff $17,163.83 in damages following a bench trial on the plaintiff's Song-Beverly ("Lemon Law") claim. Plaintiff's counsel then requested $125,055 in attorney fees. (The court wryly remarked in its order addressing the fee claim, "This is not a typographical error.") The $125,055 amount was reached through plaintiff's claim of a lodestar of $83,370 and a request for a 1.5 "bonus multiplier" over and above that amount.

The court's response in *McCullough* is discussed later in this piece, but it is not uncommon for multipliers of 1.5, or even higher, to be sought in Lemon Law cases, employment (FEHA) cases, and others involving similar circumstances. One

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perverse aspect of this dynamic is that *courts have provided no disincentive for seeking a multiplier,* because such requests have often been granted, awarding an effective hourly rate of $1,000 or more in many cases, far exceeding what counsel handling the cases on an hourly basis are earning.

A Return to the Principles of *Ketchum?*

Despite the trend of plaintiffs' attorneys requesting significant fee enhancements as a matter of course, recent Court of Appeal opinions and trial court orders suggest that courts are returning to the principles of *Ketchum* and its limits on enhancements. In particular, courts have recognized that causes of action with mandatory fee-shifting provisions, which virtually guarantee some recovery for the plaintiff's attorney handling this type of work (especially given that the vast majority of such cases settle), do not present the kind of "contingency risk" that warrants a multiplier under *Ketchum* and *Serrano III.* Discussed below are three examples of the courts' growing unwillingness to award an outsized fee simply because the matter was taken on contingency.

Campos v. Kennedy: Beware Double Counting

The Second District of the Court of Appeal addressed the runaway fee enhancement problem in a recent unpublished decision, *Campos v. Kennedy* (Feb. 13, 2018, No. B266663). The trial court had awarded a 2.0 multiplier on a fee award in a sexual battery case. The trial judge stated, as he had been known to do in other cases, that "[a]lthough some trial judges only award a multiplier in unusual cases, this Court understands *Ketchum* to advice that a multiplier should normally be awarded."

The Court of Appeal reversed, explaining explained that the trial court's understanding of *Ketchum* was incorrect. The trial court abused its discretion by granting a fee enhancement on the assumption that they should "normally" be awarded.

In remanding the case for further consideration, the Court of Appeal discussed some of the *Serrano III* factors that the trial court should consider. First, the Court of Appeal warned against awarding a multiplier for amounts already accounted for in the lodestar figure. The trial court had believed that the legal issues presented were not particularly novel, but that the case presented difficult issues of fact which required significant time to develop. The Court of Appeal noted, however, that the time taken to develop the facts of the case were already accounted for in the lodestar's "reasonable hours spent." To enhance the lodestar further for the time spent would be "improper double counting," which *Ketchum* prohibits.

The Court of Appeal also noted that a fee enhancement for the attorneys' skill will also result in improper double counting under *Ketchum*. The quality of the representation will be encompassed in the lodestar, because "a more skillful and experienced attorney will command a higher rate" than a less skilled one. To comply with *Ketchum,* a fee enhancement for skill should be given only where "the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation." Anything else results in unfair double counting and an unreasonable award.

Finally, the Court of Appeal cautioned that even multipliers for contingency risk can result in " 'unfair double counting' of factors already included in the calculation of the lodestar amount." The plaintiff's attorney in *Campos* had two separate billing rates – $300-350 per hour when being paid hourly, and a fictional, or aspirational, $650 per hour when working on contingency matters. (That rate, of course, was untested in the market, because by definition, it was never paid by the client who entered into the contingency fee agreement.) Accordingly, under *Ketchum,* where an attorney's lodestar rate is based on a figure that already incorporates the contingency risk by being higher than what the attorney is actually able to charge in hourly rate cases, no further fee enhancement would be warranted.

The unpublished *Campos* decision cannot be cited in California state court proceedings, but its analysis nonetheless provides guidance to counsel examining this issue in their own cases.

Sorbel v. Ford Motor Company: Not Every Contingency Case Warrants a Multiplier

Trial courts, too, have begun to reject the knee-jerk application of multipliers, instead deciding to rely on *Ketchum's* caution that fee enhancements are not proper in routine cases.

In one such case, *Sorbel v. Ford Motor Company* (L.A. Super. Ct., BC633608), the trial court considered a fee request arising out of a Song-Beverly claim. Plaintiff submitted a fee motion asserting a lodestar

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fee amount of $42,375 and requesting a 1.5 multiplier. According to the plaintiff, the multiplier was broken down into two parts: a 20% enhancement "to compensate for the risk that Plaintiff may not have prevailed," and a 30 % enhancement "for the delay in payment inherent in any contingency representation."

The defendant argued that, if the court was going to modify the lodestar amount, the court should modify it downward, to account for the simplicity of the claim: " 'This was a run-of-the-mill Lemon-Law case, so lacking in novelty or complexity that Plaintiff's counsel admits in the motion to having prosecuted it by rote.' " The defendant also argued that the matter did not present the kind of contingency risk that the court in *Ketchum* was concerned with – a risk that threatened the ability of clients to find competent counsel if an enhancement were not allowed.

The court "agree[d] with defendant" and declined to award a multiplier.

The trial court's recognition that the " 'the generous nature of the Song-Beverly Act and its mandatory fee-shifting statute substantially diminishes the risk of prosecuting a Lemon-Law claim on a contingency basis' " is a long time coming. Lemon Law claims have become something of a cottage industry in California, with plaintiffs' attorneys' websites trumpeting "record settlements" for their clients and promising that the auto manufacturer will pay the clients' attorney fees. This is a far cry from the public interest litigation in *Serrano III,* where the attorneys represented the clients without any expectation of recovering fees.

McCullough v. FCA: Don't Be Ridiculous

In the *McCullough* case – where the attorneys requested $125,055 in fees (including a 1.5 multiplier) for a $17,163.83 damages award – the trial court's order described the fee application as containing "equal measures of overreaching and frivolousness" and said it was "sorely tempted to deny the request in its entirety as a result." That outcome would be well-supported under the law. "A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315,1322; see also *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 991 (conclusion that plaintiff's attorney fee request in the amount of $870,935.50 for 1,851.43 attorney hours was "grossly inflated" was "alone was sufficient to justify denying attorney fees altogether"].) An occasional order along those lines would go far to staunch the practice of asking for the moon on a fee award on the fairly safe assumption (at least so far) that the worst that can happen from extending the litigation through overreaching fee motion practice is recovery of an award based on the lodestar figure.

Instead, the court exercised its discretion to award $18,685 in fees (which, as the court noted, was still more than the damages awarded in the case).

In its analysis, the trial court easily dispensed with the request for a 1.5 multiplier over and above the lodestar, calling it "not a close question." Indeed, the court suggested that a *negative* multiplier might be proper instead. The court relied on *Weeks* and two main aspects of the plaintiff's claim to deny the multiplier request.

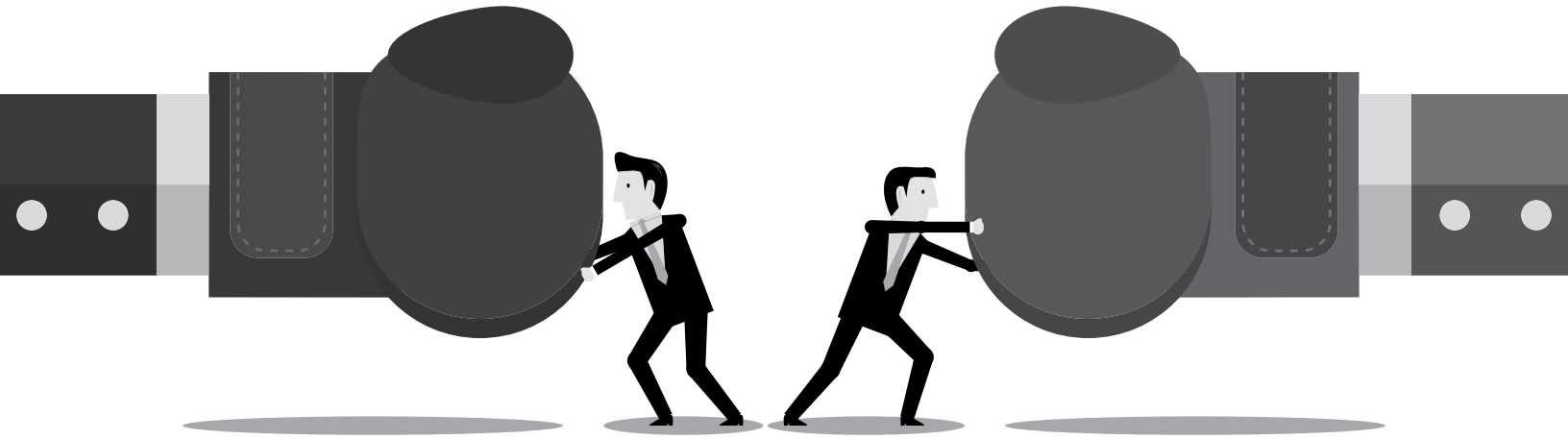
First, the court noted that Song-Beverly's fee-shifting provision significantly lessened the risk to the attorney of nonpayment. Although plaintiffs' attorneys in Song-Beverly lawsuits frequently cite the risk of nonpayment as a reason to grant a fee enhancement or multiplier, the actual risk of nonpayment is quite low, especially given how frequently Song-Beverly cases settle with a little boilerplate work-up by a paralegal and only an insignificant contribution by any skilled trial counsel needed.

Second, the court stated that plaintiff's claim conferred no conceivable benefit on anyone but himself. Song-Beverly jurisprudence is well established, and thousands of claims under the Act have been processed to the point that any individual case now is simply a private action to return monetary benefit to the single plaintiff who brought the suit. Unlike the plaintiffs in the *Serrano* cases – who spent years litigating to bring the state's education funding in line with the state constitution, conferring a benefit on the state's school children without any prospect of monetary relief from which a share of fees could be obtained. There is, in contrast, no dearth of counsel willing and able to represent Song-Beverly plaintiffs who are, in effect, trying to get a generous refund on car purchases, boosted by a statutory doubling penalty. This is not an unworthy goal; it is simply not the kind of "public value" warranting a multiplier under *Weeks, Serrano III,* and *Ketchum.*

McCullough shows how courts can address the problem identified by *Weeks,* in which the court expressed concern that fee enhancements could be "a tool that encourages litigation [rather than settlement] of claims where the actual injury to the plaintiff was slight," or could be used to "compel a defendant to settle frivolous claims under threat that the weaker the claim the more likely it is that any fees awarded will be enhanced should the plaintiff manage to prevail." In cases like *McCullough,* where the fee request bears no reasonable relationship to the benefits obtained (for the plaintiff or for the public), trial courts should follow the *McCullough* court's lead and reduce the lodestar amount, or grant a negative multiplier, or even deny the fee claim altogether as a cautionary tale.

Going Forward and Following *Ketchum*

Ketchum gives trial courts substantial discretion to determine reasonable attorney fees. But *Ketchum* also expects that courts will get into the nitty-gritty of fee requests by examining billing records, making reductions of hours and rates as needed, and awarding fee enhancements only where necessary to bring a fee award up to a reasonable market rate that ensures an adequate supply of competent counsel to handle such claims. *Campos, Sorbel,* and *McCullough* are important examples of courts undergoing the kind of detailed analysis *Ketchum* commands, and the kind of common sense that courts should apply to outsize fee requests.



It Happened In Mediation – Believe It Or Not (part 1 of 2)

Daniel Ben-Zvi and Michael D. Young

Admit it. You believe that your favorite mediator, like Clark Kent, lives this dull and drab existence, spending the day in a suit and tie (or suit and heels), shuffling from room to room while parties and lawyers strategize and agonize over numbers and brackets, everyone trying to find that elusive "deal." Your mediator is as exciting as an accountant at a tax convention.

Or is he?

What *really* goes on behind those closed doors? How crazy are those mediators, and those warring parties, once the cloak of confidentiality has descended and, like a good shot of Cuervo, released those wild inhibitions? Is Clark Kent living a secret double life as ... *Super Mediator?*

Well, as much as we would like to think so, probably not. Our wives can vouch for that. On the other hand, despite our best efforts, wild and crazy things do happen in mediation that never reach the public eye.

Until now....

Changing names and facts just enough to avoid getting in serious trouble (we hope), your courageous and foolhardy authors have peeled back the protective cloak of confidentiality just enough to let you glimpse the wild, the unpredictable, and the utterly preposterous things that have happened in real mediations. We would like to say there are lessons to be learned here; however, unless "don't be stupid" is a lesson, there's probably not much to discern. (Although, upon reflection, maybe "don't be stupid" isn't so bad of a lesson.)

So without further ado, here we go.

OVER THE MOON: Look, we get it. When we are in the dog hours of the mediation, with settlement numbers being bandied back and forth like a hot potato, sometimes the offer or demand is not fully appreciated in the receiving room. Especially with clients who are not used to the flea market bargaining nature of the process. One client was particularly incensed when the mediator conveyed the defendant's very low opening offer. So much so that the plaintiff proceeded to pull down his pants, bend over the conference table, and shout out loud that "this," pointing to his bare rump, "is what that jerk is doing to me." It wasn't exactly clear what the plaintiff meant, but the mediator (he is an expert after all) thought it might be imprudent to ask just at that moment. Once everyone was fully clothed again, the mediation continued to a successful *end.*

SURPRISE!: In employment cases, it is rare for an employer to readily admit that it fired an employee while the employee was out on a protected medical leave. At a minimum, employers at least *try* to assert a legitimate basis, such as poor performance, for the termination decision. But not this time. After reading the briefs, the mediator understood that the employer was not contesting liability. Indeed, it seemed, if the mediator was not mistaken, that the employer was even *pleased* with what was clearly an unlawful firing. So the mediator was looking for the back-story when he entered the plaintiff's private mediation room one sunny morning. He didn't get it. Instead, the plaintiff's attorney was alone, drinking his coffee and reading emails. The lawyer explained that, according to his client's mother, the plaintiff was in court on a custody matter that morning and would be arriving at the mediation shortly. So the mediator visited the defense room, mentioning to the defendant and his attorney that the plaintiff was running a little late. The defendant and his attorney shared a smirk, and then a laugh. "He'll be late alright," the defendant finally blurted, "about 30 years late." The mediator looked inquisitive. "He's a little tied up," the defense lawyer explained. "Well, actually,

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he's a little *locked* up. No, that's not right either. He's *very* locked up." The defendant finished the thought: "The plaintiff was arrested yesterday and is in jail ... for *murder*. Now you know why we fired him when we did. Everyone at work was petrified of him, even me. So when he went out on medical leave, we finally had the guts to fire him." Back in the plaintiff's room, the mediator apprised the still unsuspecting plaintiff's attorney that his client might be gone for quite some time, like 30 years to life. The plaintiff's lawyer took the news in stride, confirmed the situation by checking the on-line records, and then reached a discounted tentative settlement with the defense (which the plaintiff later affirmed from his jail cell). The lawyer then had the unpleasant task of calling the plaintiff's mother to break the news that her loving and devoted son might be a little late returning from that "custody matter."

I'D KILL FOR A SETTLEMENT: The plaintiff was naturally upset at the defendant for publicly destroying the plaintiff's once-thriving interior design business. Indeed, the inciting episode, the defamation, the loss of business, the lawsuit, and now the mediation, was almost too much for her. And the defendant knew it. He knew the plaintiff was emotionally vulnerable, and the mediator suspected he was trying to take advantage of that fragility by dragging the negotiations out as long as possible, giving a little here and a little there, hoping that at some point the plaintiff would break and accept a low deal. The defendant almost got more than he bargained for. At 11:00 pm, the plaintiff announced to the mediator that if the case failed to settle by midnight, *she would commit suicide right then and there*. There was no smile on her face. The mediator looked the plaintiff in the eye, and then over to her attorney, trying to ascertain whether the plaintiff was serious. Was she that close to the edge? Or was she crazy like a fox, using her threatened suicide as a tactic to influence either the mediator or the defendant ... or both? Was it a fascinating game of chicken, or a cry for help from an emotionally distraught litigant? The mediator was sure this was a tactic. Well, he was pretty sure. The plaintiff's attorney was also "pretty sure" the plaintiff wasn't serious. Wisely choosing not to find out, the mediator pressed the process and helped get the case settled by 11:30 pm. He then politely escorted everyone out the door, a full half-hour before the deadline ... leaving the mediator to wonder, was he just *played?*

MIRRORING: The client and his attorney were enjoying the fresh coffee and snacks in their private caucus room, waiting for the mediator, when the door burst open and an ape – yes an ape – burst into the room flailing its arms and screeching.

Coffee flew and clients screamed. Taking "mirroring" to an extreme, the ape then began mimicking the attorney, moving his arms as the attorney moved her arms, shaking his head as the attorney shook her head, copying every gesture. The ape finally took off his head, exposing the laughing pate of their mediator, who reminded them all that it was Halloween. The first agreement of the day came a few minutes later when both parties conceded that the mediator was bananas. Bananas or not, the mediator helped the parties settle the case, convinced that his unorthodox "ice breaker" made all the difference. (We have no idea whether the clients shared this opinion, but we do know that your authors are not brave enough to try this.)

SHOWING OFF A LITTLE TOO MUCH: It was a sexual harassment case in the entertainment industry, with the plaintiff, a pretty young woman,

complaining that every time she was called into her boss' office, he would be sitting in his chair with his belt buckle open, pants undone, zipper down. The defendant denied it, of course. At the mediation, when the mediator visited the defendant's caucus room, there was the defendant, sitting in the conference room chair ... with his belt buckle open, pants undone, and zipper down. ("I've gained some weight recently," was his explanation.) His lawyer encouraged the defendant to settle ... quickly.

THEY SETTLED FOR A SONG: A mediator of a long-term boundary dispute between neighbors managed to get all parties together for a joint session limited to introductions and a meet and greet. Once

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gathered, the mediator first confirmed that those there had seen the movie *Casablanca*. He then belted out in a passable baritone the movie's iconic theme song, *"As Time Goes By."* Expressions around the table ranged from disbelief and worry to muffled laughter and enjoyment. The mediator then quizzed the parties about the movie. What does it mean that they will "always have Paris" or

that their problems "didn't amount to a hill of beans?" The discussion elicited personal stories of the parties and lawyers, leading the neighbors to discover that they had much more in common than an inability to carry a tune. Their long simmering feud ended that afternoon with warm handshakes and a promise to go to the movies together once a month. (Okay, we made that last part up, but it sounded good.)

THEY SETTLED *WITH* A SONG: Since we are on the subject of songs, the members of a popular band found themselves, as so many of them do, at odds over creative differences, the kind of creative differences that rhyme with "honey." Tired of the sound (and expense) of litigation, they tried a different tune, mediation (we know, too many bad music puns). By 4:00 p.m., with the four bandmates still far apart, the mediator prevailed upon them to do her a great favor – sing one of their earliest hits. With a little coaxing, they finally agreed, and together they sang a cappella several of their most beautiful and memorable songs. What followed (with a little subtle guidance by the clever mediator) was a sharing of the band's history, allowing the members to harken back to when they all liked each other and were excited to create music together, to tour, and to play. The good vibrations led to a settlement. The mediator got paid, and has the memory of a free private concert to cherish for a lifetime.

... And that's just the beginning. To be continued in the next issue of the *Verdict*.

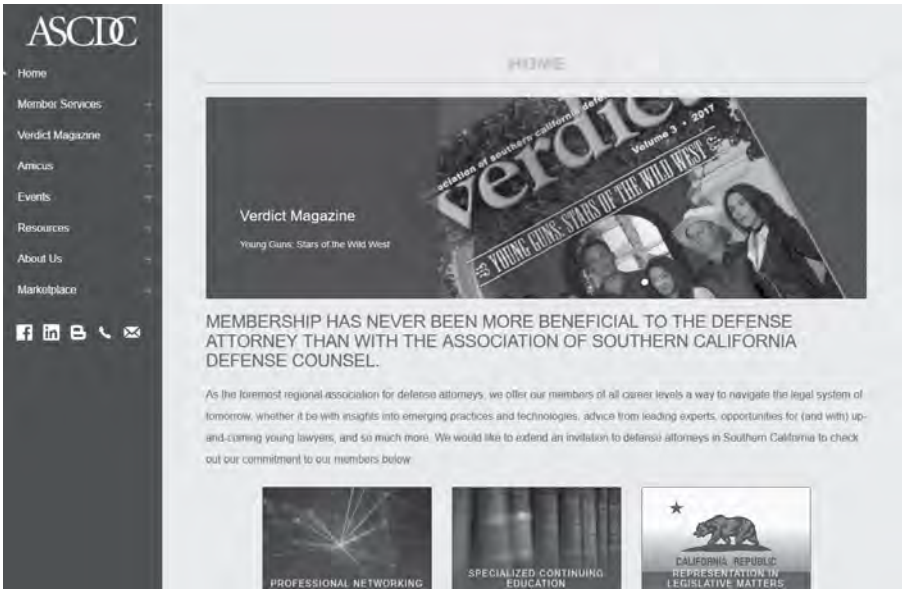
Daniel Ben-Zvi

Daniel Ben-Zvi, mediator and arbitrator with ADR Services, Inc. and AAA, is co-author of the book, "Inside the Minds – Alternative Dispute Resolution." He is a "Distinguished Fellow" [International Academy of Mediators] and "Power Mediator" [Hollywood Reporter] *who mediates in L.A. and Orange Counties with highly successful results in p.i., business, employment, real estate, construction, entertainment, i.p., and professional liability. daniel@dbmediation.com*

Michael D. Young

Michael D. Young is a full time neutral with Judicate West in California, focusing on employment, intellectual property, and other complex civil matters. He is a Distinguished Fellow and past President of the International Academy of Mediators, and was an adjunct professor in negotiation and mediation at USC Law School for nearly a decade and at Pepperdine Law School. He welcomes your comments at Mike@MikeYoungMediation.com, *or join the conversation at* www.MikeYoungMediation.com/ask-a-mediator.

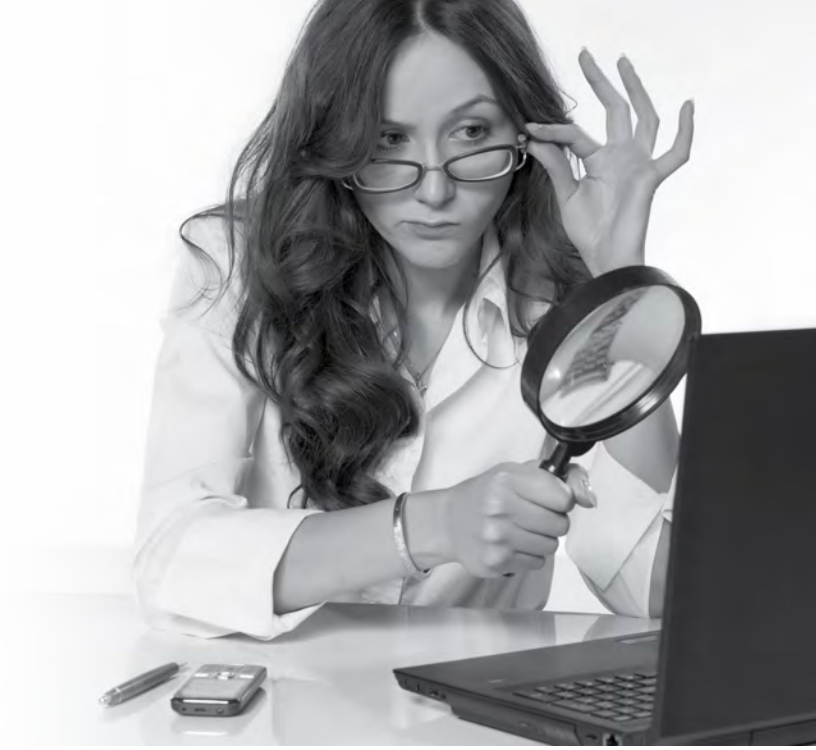
Welcome to the New and Improved ASCDC Website



The new responsive design of the *ASCDC.org* site allows it to automatically re-size to the device you are using. Phone, tablet or PC, the new ASCDC site will perfectly adjust to fit the screen.

Visit today and check it out.

Trust and Confidence in Our Legal System



Hon. John M. Pacheco

Much has been written about trust and confidence in our system of justice and for good reason.

Courts, across the nation, realize that with today's information highway much can be said about our courts and jurists which can be far reaching. For instance a single tweet about a jurist or court ruling can, within minutes, go viral and cast a bad light on a judge who has realistically committed his or her entire career to following the rule of law. People are quick to rebuke the judiciary when a ruling is contrary to the public sentiment. Through ignorance, disrespect, or both, dreadful things can be said and put out for the whole world to read. Sadly, many believe everything they read!

Several outstanding organizations, (including ASCDC), are committed to preserving the independence of our judiciary and the rule of law. Unfortunately, the lack of trust in our system continues to increase.

The purpose of this article is to call on the entire legal profession to further commit itself to community outreach and educate the weary public. We can no longer sit back and let only a select few champion efforts to improve the trust and confidence in our courts. If we care about our profession and our system of justice we must do something to preserve and enhance it. Jurists and lawyers (for both plaintiff and defense) must be proactive in the community to improve our trust and confidence by being committed to the following:

Preserving the Rule of Law

Our outreach must start with educating our community (both young and old) that the Rule of Law should govern our nation rather than an individual government official or monarch. This concept goes all the way back to the days of Aristotle where he wrote "Law should govern."

Laws, for the most part, are based on long standing principles of common decency. Throughout time laws are challenged and courts rely on the doctrine of stare decisis to maintain normalcy. Because without normocracy society is subject to further decay which leads to even more distrust in our system of government.

In March of 2017, our Chief Supreme Court Justice, Tani G. Cantil-Sakauye, eloquently delivered our State of Judiciary wherein she stressed the importance of the Rule of Law and stated:

> "... the rule of law is being challenged. We live in a time of civil rights unrest, eroding public trust in institutions, economic anxiety and unprecedented polarization"

Community outreach should be part of the entire legal profession. Educating the public on the importance of the Rule of Law will help strengthen our justice system and help educate those less informed. By being better informed court users are more likely to respect our courts, have trust in our system and confidence that they can have their dispute heard in a fair and just manner.

Conducting Ourselves with Civility

On May 23, 2014, I had the distinct honor of swearing in my daughter as a new lawyer. Significantly it was also the first day that California Rule of Court Section 9.4, (oath), included the civility provision **"As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."** This addition to our oath was the culmination of hard work and efforts of some of the finest ABOTA lawyers in our State, Douglas DeGrave and Mark Robinson Jr., coupled with the cooperation of the California Bar and our State Supreme Court Justice. Then Cal-ABOTA president Douglas DeGrave was quoted as saying, "This revision to the oath is a historic moment for the legal community. The change in the oath should remind us of our obligations beyond that of zealous advocacy on behalf of our clients." I can state first hand that having these two distinguished trial lawyers appear before me is proof that they practice what they preach and are the epitome of civility. One can learn so much by watching legal giants, such as these two, in court.

But truth be told the reality of day in, day out advocacy promotes a "win at all costs" attitude and civility often takes a

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Trust and Confidence – continued from page 30

back seat to aggressive behavior that can only be classified as downright rudeness. In the heat of the moment we may do or say things which are actually contrary to being civil. When I think of **CIVILITY** I think of synonyms such as "respectful," "courteousness" and "polite." Think about civility when your opponent trash talks you and tells you that you are so inexperienced you have no clue what you are doing. The natural urge is to lash back with a few choice words of your own. But is that the right thing to do? Do you lower yourself to their level or is your integrity such that you refuse to go there? When you hang up the phone do you have a smirk on your face and a sense in your mind that "I really let that lawyer have it"? Think about civility as you hammer out a 35-page meet and confer letter telling the other side, in a condescending manner, why they have it all wrong! Are you being courteous, respectful and polite?

Our legal profession has been around for thousands of years. It is a very noble profession and if you want to be proud of what you do then treat one another with dignity and respect. The greatest lawyers in the world are all known for their civility, respectfulness and great advocacy. When the public sees lawyers in court or in the hallways yelling and screaming at each other, what do they think of our profession? Do you think that the public has more trust and confidence in our legal system when they observe this behavior? Of course not! We should remind ourselves that our ethics and civility requires respect for one another.

Maintaining the Trust and Confidence of our Clients

As professionals we need to remind ourselves daily of our ethical responsibilities to our clients. Simply put, it is not about you; it is about whom you represent! Regardless of your area of practice it is always about your client. Your personal feelings must take a back seat to what is best for whom you represent. For instance, never get so embroiled with your opposition that you lose sight of what is best for them. It is crucial that your client have total confidence in your counsel and advice and you should never do anything to compromise that. However, this can be "easier said than done" as times have changed and in today's world of insurance defense and house counsel, attorneys might find themselves in a bit of a quandary.

Anecdotally, I have been reminded of situations involving insureds and insurers and how a lawyer's ethical obligation to his client might be compromised because, on the one hand, the lawyer owes an obligation to the insured while the insurer controls the purse strings. To the insurance company it may be about economics but to the lawyer it is to do what is best for the client. Rarely are the interests divergent because the claims representative and insured have mutual interest in the resolution of claims, but what do you do when, as a lawyer, you believe that the insurer does *not* have the best interest of the client? This is a slippery slope that some very good lawyers struggle with day in and day out and that is why it is imperative that your client have the trust and confidence in your advice and counsel.

To conclude, we live in times where McCarthyism is prevalent, public trust and confidence is on the decline and our system of justice is being challenged daily. So what are we going to do about it? Do we get more involved in preserving our legal system and our noble profession or, do we sit back and let our trust and confidence in our courts continue to decline ... it is up to us!

Hon. John M. Pacheco

John M. Pacheco was appointed to the Superior Court bench in 2001 after practicing in personal injury work for plaintiffs since 1984. In addition to being a member of the California Judges Association, he is a member of the California Latino Judges Association, the Bench Bar Coalition, the American Board of Trial Advocates, and in 2017 he was honored as the Judicial Officer of the Year for the Western San Bernardino County Bar Association.

defense verdicts january – may

Sean D. Beatty
Beatty & Myers, LLP
Adkins, Cory and Gloria v. Toyota Motor Sales, U.S.A., Inc.

David J. Byassee
Bremer Whyte Brown & O'Meara LLP
Picazzo v. C.W. Driver, Inc. et al.

James T. Catlow & Christian X. Przbylowski
Doherty & Catlow
Stuart v. Ofori

James T. Catlow
Doherty & Catlow
Raza v. Spain and Randall

Mark V. Franzen & Steven J. Wysocky
Carroll, Kelly, Trotter, Franzen, McBride & Peabody
Benitez v. The Regents of the University of California

Clark Hudson
Neil Dymott
Lipner v. IGO Medical Group

Daniel J. Kessler
Burkhalter Kessler Clement & George, LLP
Van Loon v. Winchester- Wesselink, LLC, et al.

Anthony Kohrs
Hennelly & Grossfeld LLP
ICA Investments, Inc. v. First Metropolitan Funding Corporation Court

Elizabeth Kolar
Kolar & Associates
De La Cruz, et al. v. Surf City Nissan, et al.

Lauren A.R. Lofton
Yoka & Smith
Chaffee v. Ashford TRS CM, LLC

Robert L. McKenna III
Carroll, Kelly, Trotter, Franzen, McKenna & Peabody
Monroy v. Bhatia

Terry A. Rowland
Demler, Armstrong & Rowland, LLP
Benton v. Moctezuma

Jeffrey A. Walker
Walker & Mann LLP
Rainey v. Seip

Brian L. Williams
City of Huntington Beach – Office of the City Attorney
Kang v. City of Huntington Beach

Do you have a defense verdict you'd like to share with your colleagues?

Send it in today so that your name will appear in the next issue of verdict

E-mail the details of your verdict to:

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amicus committee report

ASCDC's Amicus Committee continues to work energetically on behalf of its membership. ASCDC's Amicus Committee has submitted *amicus curiae* briefs in several recent cases in the California Supreme Court and California Court of Appeal, and has helped secure some major victories for the defense bar.

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

Don't miss these recent amicus *VICTORIES!*

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

1) ***McMillin Albany LLC v. Superior Court*** (2018) 4 Cal.5th 241**. It's a Win in the California Supreme Court!**

The California Supreme Court ruled in favor of the defendant and held that the Right to Repair Act (Civ. Code, § 895 et seq.) precludes a homeowner from bringing common law causes of action for defective conditions that result in physical damage to the home. Glenn Barger from Chapman Glucksman submitted an amicus brief on the merits joined by Jill Lifter of Ryan & Lifter on behalf of the Association of Defense Counsel for Northern California and Nevada.

2) ***Novak v. Continental Tire North America*** (2018) 22 Cal.App.5th 189. **Publication of favorable opinion granted!**

Deceased motor vehicle passenger's daughter brought wrongful death action against tire manufacturer and mechanic, alleging that their failure to warn about the dangers of rubber degradation in old tires led to a tire blowout that injured passenger, and that the injuries impaired his mobility, necessitated his use of a motorized scooter with limited maneuverability, and led to the passenger's death after his scooter was struck by a vehicle in a crosswalk. The Court of Appeal held that failure to warn was not proximate cause of later fatal accident. Ted Xanders from Greines, Martin, Stein & Richland and Don Willenburg of Gordon & Rees of Gordon & Rees on behalf of the Association of Defense Counsel for Northern California and Nevada submitted the successful publication request.

3) ***Timed Out LLC v. 13359 Corp.*** (2018) 21 Cal.App.5th 933. **Publication of favorable opinion granted!**

The assignee of a professional model sued after the model's likeness was used for advertising without her consent. Defendant made a section 998 offer for an amount "exclusive of reasonable costs and attorney[ ] fees, if any." The trial court awarded plaintiff damages of less than the offer amount, but allowed her to seek costs and fees that would exceed the offer. Plaintiff argued that the offer was ambiguous and included fees in its sum, which would result in plaintiff's recovery exceeding the offer amount. The Court of Appeal held that the offer was unambiguous and that, by its plain language, concerned only the lesser sum of the damages. Dean Bochner and Steven Fleischman from Horvitz & Levy submitted the publication request.

4) ***Big Oak Flat-Groveland Unified School District v. Superior Court*** (2018) 21 Cal.App.5th 403. **Publication of favorable opinion granted!**

A plaintiff filed a complaint against a school district alleging childhood sex abuse. She did not file a government claim, and she successfully opposed a demurrer on the ground that Government Code Section 905(m) exempts childhood sex abuse claims from the claims presentation requirements. The Court of Appeal issued writ relief for the school district. It held that the Legislature permits local entities (under Government Code section 905) to impose their own claims presentation requirements for matters that otherwise would be exempt, and that the school district properly did so here for plaintiff's claim. Ted Xanders from Greines, Martin, Stein & Richland and Susan Beck from Thompson Colgate submitted the joint request with the Association of Defense Counsel for Northern California and Nevada.

5) ***Sakai v. Massco Investments, LLC*** (2018) 20 Cal.App.5th 1178. **Publication of favorable opinion granted!**

Sakai sued parking lot owner Massco for not sufficiently managing the crowds generated by a late night taco truck. Sakai and another driver were involved in a minor fender bender, but then Sakai was seriously injured when the other driver suddenly sped away as Sakai was asking for insurance information. In affirming the trial court's grant of summary judgment in Massco's favor, the court concluded that Massco did not owe a duty to structure its premises in a way that would avoid that type of injury to Sakai. Although the court concluded that it was generally foreseeable that a person in Massco's parking lot might be hit by a car exiting in an imprudent manner, in finding no duty the court primarily relied on the lack of a close connection between the features of Massco's parking lot and Sakai's injuries. Ted Xanders from Greines, Martin, Stein & Richland and Don Willenburg of Gordon & Rees from the Association of Defense Counsel for Northern California and Nevada wrote the successful publication request.

6) ***Delgadillo v. Television Center, Inc.*** (2018) 20 Cal.App.5th 1078. **Publication of favorable opinion granted!**

The Court of Appeal affirmed summary judgment in favor of a property owner under the *Privette* doctrine, which limits liability of property owners for work-related injuries sustained by contractors'

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employees. The court held that the owner could not be liable on the basis of a retained control theory because the owner engaged in no affirmative misconduct and left all decisions on how the work was to be done to the contractor and its employees. The court further held that the owner was not liable on a nondelegable duty of care theory (based on alleged violation of Cal-OSHA and other statutory and regulatory provisions) because the owner, in hiring the contractor, presumptively delegated to the contractor the duty to ensure its employees' compliance with safety regulations. Stephen Norris and Steven Fleischman from Horvitz & Levy submitted the successful publication request.

7) ***Khan v. Dunn-Edwards Corp.*** (2018) 19 Cal.App.5th 804. **Publication of favorable opinion granted!**

The plaintiff, a former employee, brought a representative lawsuit against an employer, seeking wage-related penalties, under the Private Attorneys General Act (PAGA). Under PAGA, aggrieved employees may only sue if they first provide sufficient notice to the Labor and Workforce Development Agency and the employer, in order to allow the agency to decide whether to investigate the allegations and permit the employer a chance to file a response with the agency. The trial court granted summary judgment for the employer because the employee failed to provide adequate notice under PAGA. The Court of Appeal affirmed, holding that the notice was inadequate since the notice referred only to the plaintiff and therefore failed to provide the agency with an opportunity to decide whether to investigate the plaintiff's representative claim and failed to provide the employer with an adequate chance to respond to the agency about anyone other than the plaintiff himself. Felix Shafir and Steven Fleischman from Horvitz & Levy submitted the publication request.

8) ***Kirzhner v. Mercedes Benz*** (2017) 18 Cal.App.5th 453, review granted S246444. **Publication of favorable opinion granted!**

Plaintiff filed a Song-Beverly claim, alleging defects in his car. Defendant made a section 998 offer, which the plaintiff accepted and then appealed when the trial court did not include his registration fees in the amount. The Court of Appeal held that automobile registration fees were not recoverable under the Song-Beverly Act. Larry Ramsey of Bowman & Brooke wrote the successful publication request on behalf of ASCDC. The California Supreme Court granted review on February 21, 2018.

9) ***Optional Capital, Inc. v. Akin Gump Strauss Hauer & Feld LLP*** (2017) 18 Cal.App.5th 95 **Publication of favorable opinion granted!**

The Court of Appeal affirmed the dismissal of claims brought against various law firms and lawyers under the anti-SLAPP statute. Among other things, the case contains important discussion holding that a court, in determining whether the anti-SLAPP statute applies, should examine the principal thrust or gravamen of the plaintiff's cause of action. The Court of Appeal criticized *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147 at length (see footnote 5), a case which rejected the principal thrust/gravamen analysis. Harry Chamberlain of Buchalter wrote the successful publication request on behalf of ASCDC.

Keep an eye on these PENDING CASES:

ASCDC's Amicus Committee has also submitted *amicus curiae* briefs on the merits in the following pending case:

1. ***Troester v. Starbucks***, review granted June 3, 2016 (case no. S234969).

The California Supreme Court will address this question: "Does the federal Fair Labor Standard Act's de minimis doctrine, as stated in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692 (1946) and Lindow v. United States, 738 F.2d 1057, 1063 (9th Cir. 1984), apply to claims for unpaid wages under California Labor Code sections 510, 1194, and 1197?" The plaintiff filed this lawsuit alleging that his employer failed to pay him for certain store closing-time activities. The federal district court granted summary judgment for the employer pursuant to the so-called "de minimis" defense, which originated in federal wage and hour lawsuits and prevents employees from recovering for otherwise compensable time if it is de minimis. The plaintiff appealed to the Ninth Circuit, arguing that this de minimis rule is inapplicable to wage and hour claims arising under California law. The Ninth Circuit certified the question to the California Supreme Court to decide the issue. Felix Shafir, Rob Wright, and Lacey Estudillo from Horvitz & Levy submitted an amicus brief on the merits on behalf of ASCDC. The case was argued on May 1, 2018 and an opinion is expected within 90 days.

2. ***Lopez v. Sony Electronics, Inc.*** (2016) 247 Cal.App.4th 444, review granted Aug. 24, 2016 (case no. S235357).

The California Supreme Court granted review to address this issue: "Does the six-year limitations period in Code of Civil Procedure section 340.4, which governs actions based on birth and pre-birth injuries and is not subject to tolling for minority, or the two-year limitations period in Code of Civil Procedure section 340.8, which applies to actions for injury based upon exposure to a toxic substance and is subject to tolling for minority, govern an action alleging pre-birth injuries due to exposure to a toxic substance?" Plaintiff brought suit claiming that prenatal exposure to toxic substances acquired while her mother worked at a Sony factory caused plaintiff's birth defects. The trial court granted defendant's motion for summary judgment on the grounds that the statute

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Amicus Committee Report – continued from page 34

of limitations had expired and the Court of Appeal affirmed. ASCDC joined the amicus brief submitted by Jeremy Rosen and John Querio from Horvitz & Levy on the merits on behalf of the US Chamber of Commerce. The case was argued on May 1, 2018 and an opinion is expected within 90 days.

3. ***Clarke v. First Transit, Inc.*** (B277109)

   The Court of Appeal requested amicus briefing to address the standards to be applied by a trial court in reviewing a proposed settlement of claims and penalties sought in connection with an action brought pursuant to Labor Code section 2699. Laura Reathaford from Blank Rome submitted an amicus brief on the merits on behalf of ASCDC. The Court of Appeal has issued an order indicating that oral argument will be limited to the issue of the objector's standing. Oral argument is currently pending.

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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President's Message – continued from page 3

such as the reptile theory as well as the best strategies to employ when dealing with medical liens and "lien doctors" and further promoting our efforts to make CACI and other jury instructions fair and accurate representations of California law.

In preparing for my 2018 ASCDC presidency, I reached out to several past presidents to reflect on what worked in the past and for advice about leading our organization this year. What better resource than to talk to the successful ladies and gentlemen whose hard work and creativity has made our organization what it is today? I spoke to past presidents including Bob Baker, Gary Ottoson, Wayne Boehle, Judge Stephen Moloney, as well as more recent presidents, Bob Morgenstern, Denise Taylor, Linda Savitt Miller and of course my mentor and partner, Wally Yoka.

What I learned was that the glory days were not always glorious and that there were challenging issues throughout the years that required hard work and dedication to overcome. I learned that no president is ever satisfied with the number of members in our organization, regardless of how many join each year. Finally, I learned that all of the past presidents are proud of the organization's accomplishments and the continued efforts being made to remain a cutting edge and beneficial resource for the civil defense bar throughout the state.

Our glory days in the future include offering more topical and interactive seminars, continuing with a very informative list-serve that allows members to stay informed about experts and opposing counsel, a commitment to diversity in both our board, our members, our speakers and our vendors.

I am very excited about the rest of the year for our organization. We have great seminars upcoming, a rising membership, active committees and a strong and active relationship with the courts. I think we are "Born to Run."

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