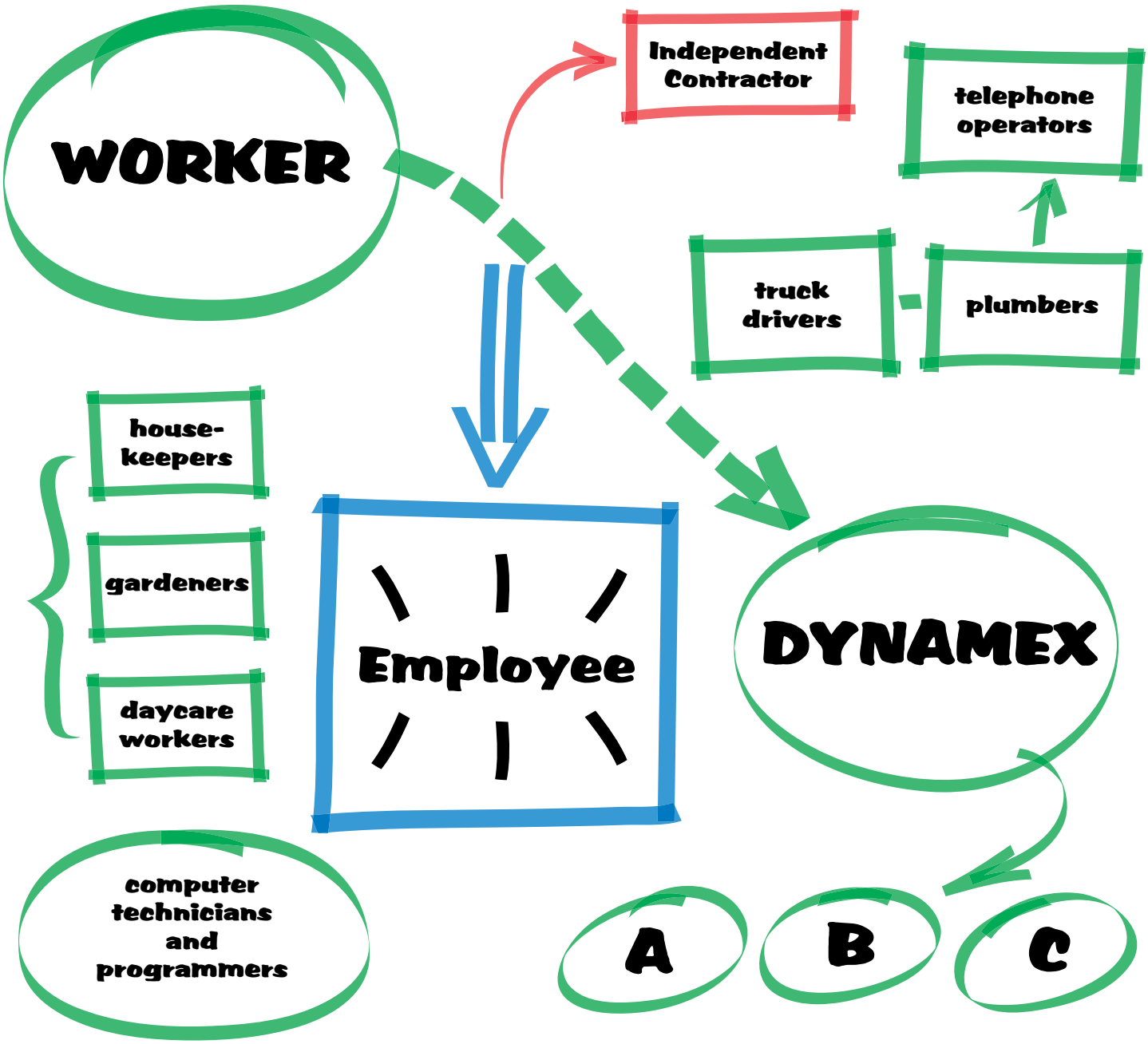
association of southern california defense counsel

verdict

Volume 2 • 2018



ALSO INSIDE:

millennials, mediations, CACI modifications, and judicial admissions

Call in the EXPERTS.

Bringing quality experts into the 21st Century.

Pro/Consul, Inc.

Technical & Medical Experts

15,000 DISTINGUISHED EXPERTS IN MULTIPLE DISCIPLINES.

"Pro/Consul's ability to locate appropriate expert witnesses is unsurpassed."

1-(800) 392-1119

Listed and recommended by the A.M. Best Company

- Rigorous standards
- Tailored service
- Prompt turnaround
- Free initial consultations
- Free resume book
- Reasonable rates

LOCAL OFFICE

Pro/Consul Inc.
1945 Palo Verde Avenue, Suite 200
Long Beach, CA 90815-3443
(562) 799-0116 • Fax (562) 799-8821
eexperts@msn.com • ExpertInfo.com

A.D.R. Division
1-877-ARBITER
Retired Judges • Attorneys
Medical Doctors • Technical Experts

the association of southern california defense counsel

verdict

2520 venture oaks way • suite 150 • sacramento, ca 95833

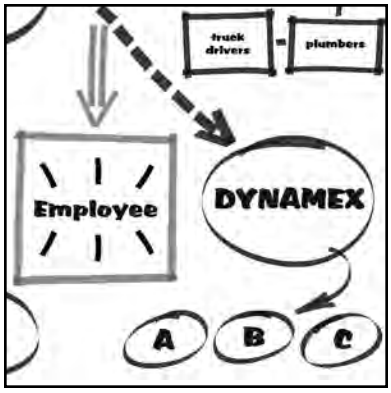
columns

features

departments

Admissions, 9

Millennials, 15



Dynamex, 19

Mediation, 26

index to advertisers

verdict

2520 venture oaks way • suite 150 • sacramento, ca 95833

For advertising information, contact the ASCDC, below

— executive office —

2520 Venture Oaks Way, Suite 150
Sacramento, CA 95833
800-564-6791 • *ascdc@camgmt.com* • *www.ascdc.org*

president's message

Christopher E. Faenza
ASCDC 2018 President

Taking the "Damn!!!!!!" Out of Damages

One of the functions of the ASCDC and the executive board is to look for and address changes and trends in our practice as defense attorneys. Anyone who reads a newspaper or their smartphone these days has noticed a huge increase in the number of massive verdicts recent years. The frequency of such verdicts continues to grow with each passing year while the injuries used to justify these verdicts seems to diminish.

Million dollar verdicts for fractured limbs are not uncommon and a one-level back surgery has resulted in verdicts of $5 million and more. I have personally seen a defamation award, for essentially a bad Yelp! review result in a $17 million verdict. Even soft tissue claims that at one time might have been filed in limited civil are now resulting in mid-six figure verdicts. This, despite their being no surgery either performed or recommended. So what is happening out there? What is causing jurors to hand out money as though they were playing Monopoly? The answer, of course, is multifaceted. But, a primary reason is that plaintiff's attorneys feel much more comfortable asking for substantial verdicts.

During deliberations jurors often send out a question seeking guidance in their attempt to quantify non-economic damages. Depending on the theme used by our friends on the plaintiffs' side, they may be comparing their awards with the value of a fighter jet, a Picasso painting, or a famous athlete's salary. All are used as tools to desensitize jurors to the value of a buck. Often, plaintiff attorneys credit defense counsel who, believing they will win a case on liability, fail to address damages at all, other than to say "give the plaintiff nothing."

We will be tackling this, and other issues, in panel discussions featuring some of the best attorneys from both sides of the aisle at the upcoming ASCDC Annual Seminar on January 30-31, 2019. With this useful guidance, and a little practice, I believe that our members will be more comfortable discussing damages and developing the very best ways to explain the difference between asking for a substantial verdict and proving that a particular plaintiff is entitled to receive it.

I hope to see you all there.

Chris

ASCDC

Association of Southern California Defense Counsel

58TH ANNUAL SEMINAR

Jan 31 - Feb 1, 2019

JW Marriott LA Live
Los Angeles, California

Novel Approach to Dealing With Big Issues

Michael D. Belote
Legislative Advocate
California Defense Counsel

The 2017-2018 two-year session of the California Legislature is now in the books, and Governor Brown is sifting through the nearly 1000-bills sent to him for signature or veto. If the past is any indication, over 800 bills will be signed into law, most taking effect in January. Some very significant bills for defense practitioners have been signed already, and more await final decisions.

2018 will be remembered as a year of big issues, one in which a novel approach was used at the intersection of legislative law-making and the initiative process. In terms of the issues demanding legislative attention, the biggest were wildfires and discussion of how to assess liability on utilities and ultimately ratepayers; the move away from cash bail in the criminal system in favor of court-conducted risk assessments; and enactment of perhaps the world's most far-reaching privacy law.

It was the privacy issue which illustrated, really for the first time, a new approach to using the initiative process as a foil for bills in the Legislature. Here's what happened: a San Francisco lawyer, concerned about the Cambridge Analytica use of Facebook data, wrote an exceedingly bold initiative on privacy, and spent millions qualifying the proposal for the November ballot. Current law now gives initiative proponents the ability to pull proposals off of the ballot if the Legislature responds satisfactorily with a bill, before the deadline for printing ballots.

Stakeholder groups, concerned about the very real possibility of losing an initiative campaign on a sensitive issue like privacy, urged the Legislature to pass a bill quickly to head off the fight. Over the space of approximately two weeks, a more refined but still hugely comprehensive bill was drafted, enacted and signed, and the initiative proponent pulled his proposal back. By the way, a similar thing happened on the issue of soft drink taxes, wherein the beverage industry was prepared to pursue a far-reaching proposal on local tax authority until the Legislature responded with a ban on new local soft drink taxes.

While some have described this new approach as akin to legislative extortion, clearly a template has been created, which could be used in 2020 and beyond. There are lots of people and groups with the resources to gather signatures to qualify initiatives, and they have no doubt taken notice. In the employment law area, how about an initiative on PAGA, or perhaps *Dynamex?*

The privacy bill which was passed was AB 375, which was immediately followed by a technical clean-up bill, SB 1121. Taken together, the bills provide individuals with the ability to know about and control the sharing of personal information to a degree beyond anything presently existing in the United States, and perhaps the world. The package also contains new liability for data breaches, which are defined very broadly, and which will certainly require representation of defendants in civil actions.

Space does not permit an exhaustive description of the many bills affected by the California Defense Counsel this year, which will be detailed in future columns and at the Los Angeles annual meeting after the New Year. But the passage or defeat of bills dealing on a broad range of subjects such as "pseudonymous filings," mediation disclosures, separate statements in discovery disputes, asbestos depositions, expert opinions under *Sanchez* and more were all significantly affected with CDC input.

Of special note was the signing of AB 2230 (Berman), suggested by CDC Immediate Past President Bob Olson, which extended from 60 to 75 days the jurisdictional deadline for courts to rule on new trial and JNOV motions.

Finally, we will shortly elect the new Legislature and a new Governor, and already 2019 is shaping up as a huge year for defense practice. It is very likely that a bill will be introduced creating a "middle tier" case level, including discovery limitations, which must be crafted with exceeding care to protect the ability to defend clients, and sales tax on services is almost certain to be revisited in the 2019 legislative year.

new members june – september

Andrews Lagasse Branch + Bell LLP
Traci S. Lagasse
Sponsoring Member: Thomas P. Gmelich, Esq – Bradley & Gmelich, LLP

Ballard, Rosenberg, Golper & Savitt
James Demerjian
Sponsoring Member: Eric Schwettmann

Bonne, Bridges, Mueller, O'Keefe & Nichols
Lorraine Hall
Michael Liu
Emma Moralyan
Sponsoring Member: Mitzie Dobson – Bonne, Bridges, Mueller, O'Keefe & Nichols

Bonnie R. Moss & Associates
Emily Corea
Sponsoring Member: Elizabeth Skane – Skane Wilcox

Carroll Kelly Trotter Franzen McBride & Peabody
Benjamin Hand
Tony Hsu
Matthew Klimkowski
Patrick Ludeman
Dilini Mendis
Sponsoring Member: David Pruett – Carroll, Kelly, Trotter, Franzen, McBride & Peabody

Chapman, Glucksman, Dean, Roeb & Barger
Molshree Gupta
Sponsoring Member: Glenn Barger

Chavez Legal Group
Irene C. Messina
Sponsoring Member: Geoffrey Hill – Chavez Legal Group

Clark Hill, LLP
Tiffany Hunter

Daniels, Fine, Israel, Schonbuch & Lebovits
Michael Eger
John Schaffer
Sponsoring Member: Michael Schonbuch – Daniels, Fine, Israel, Schonbuch & Lebovitz, LLP

Doherty & Catlow
Andrew Stefatos

Fagen Friedman & Fulfrost LLP
David A. Obrand
Sponsoring Member: Lynn Beekman

Farmer Case & Fedor
Cynthia Arce
Michele Messenger
Sponsoring Member: Christopher Faenza – Yoka & Smith

Fortin Law Group
Kelly A. Fortin

Freeman, Mathis & Gary
Amanda Figueroa

Friedenberg Mediation
Robert Friedenberg

Garrett & Tully
Joshua Engel
Sponsoring Member: Natalia Green – Garrett & Tully, P.C.

Gibbs, Giden, Locher, Turner, Senet & Wittbrodt LLP
Philip Zvonicek

Graves & King
Victor Wear
Sponsoring Member: Harvey Wimer – Graves & King LLP

Kirk & Myers
Jeffrey C. Myers

Larson & Gaston
Yasmine Hussein
Sponsoring Member: John Larson – Larson & Gaston, LLP

Latham & Watkins LLP
Rob Ellison

Law + Brandmeyer, LLP
Elizabeth Evans

Law Offices of Dublas Paniagua
Dublas Paniagua

Law Office of Eric G. Anderson
Tracy W. Goldberg
Sponsoring Member: Dwayne S. Beck

Law Offices of Keevil Markham
Keevil Markham

Michael Maguire & Associates
Juan Carlos Delgado

Murchison & Cumming, LLP
Guy R. Gruppie
Sponsoring Member: Heather L. Mills – Murchison & Cummings, LLP

Ogletree, Deakins, Nash, Smoak & Stewart
Laura DeLeon

Rinos & Martin
Michael Sabongui
Sponsoring Member: Linda B. Martin – Martin, Rinos, Martin & Sabongui

Santa Cruz Brownwood & Cannon
Sylvia Aceves

Shook, Hardy & Bacon
Kristy Schlesinger

Skane & Wilcox LLP
Meighan Cardenas
Jeffrey L. Ebright
Cynthia Sands

Slaughter, Reagan & Cole, LLP
Ryan P. Redfield
Sponsoring Member: William Slaughter – Slaugter, Regan & Cole LLP

Taylor DeMarco LLP
Cherie Lynn Lierance
Sponsoring Member: N. Denise Taylor – Taylor DeMarco, LLP

Thompson & Colegate
Leslie E. Murad

Weston & McElvain LLP
Bevin A. Berube

Wilson, Elser, Moskowitz, Edelman & Dicker
Gregory Lee
Sponsoring Member: Patrick Kearns – Wilson, Elser, Moskowitz, Edelman & Dicker LLP

ASCDC

Association of Southern California Defense Counsel

www.ascdc.org

Now showing on a small screen near you ....

The Association of Southern California Defense Counsel has a wealth of valuable information available to you at *www.ascdc.org,* including an Attorney Locator, an Expert Witness database and an Amicus section, a Calendar of Events, online meeting registration, archives of important and timely articles and legislative updates including back issues of *Verdict* magazine, and a Members-Only section.

Log on today.

A Defense Lawyer's Complaint:

Some Judges Don't Get It About Judicial Admissions

Timothy M. Kowal
Brendon M. Loper

A man is handing out leaflets in the train station, an old Soviet joke has it, when he is stopped by an officer. Examining the leaflets, the officer discovers they are just blank pieces of paper. "What is the meaning of this?" the officer asks. "What is there to write?" the man replies. "It's so obvious!"

The pleading practice of filing fully detailed leaflets in court has sometimes lurched toward the practice of the man in the train station. The federal "short and plain statement," and California's "ultimate fact" pleading, not only provide the barest of notice of what sort of mischief defendant is believed to have gotten up to, but also allow inconsistent allegations bordering on alternative realities, and amendments of charging allegations right up to, during, and – in a case of remand after appeal – even after judgment. Defendants less notorious than Stalin are likely to ask that grievances against them be made rather more obvious than liberal pleading norms allow them to be.

And when those grievances are stated plainly, they should, by all rights, be binding on the plaintiff as judicial admissions. Though they do not always recognize it, lawyers and judges rely on judicial admissions routinely. Every demurrer is based on judicial admissions after a fashion – i.e., that the well-pleaded factual allegations in the complaint be accepted as true as against the plaintiff, binding the plaintiff to their legal effect. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) Under this standard, only the plaintiff, and not the defendant, is saddled with the effect of the fact in the complaint, which is why defendants rest easy invoking the statute of limitations without fear of being accused of having admitted liability. (E.g., *Uram v. Abex Corp.* (1990) 217 Cal.App.3d 1425, 1433.) And of course defendants are not made "to play a risky game of roulette"

continued on page 10

by acceding to facts in a complaint "for summary judgment purposes" to expose plaintiff's legal theories as untenable. (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal. App.4th 735, 746-748.)

Or take for example the judicial admissions in pleadings against defendants who settle out prior to trial. The remaining defendant at trial has good reason to point to those allegations in support of alternative causes of the injuries or contributing fault by the absent defendants. Those allegations, after all, earned plaintiff leverage against the settling defendants. Yet some judges seem reluctant to hold the plaintiff to the truth of their own allegations.

The source of this reluctance, in many cases, is the tension between judicial admissions, which are conclusive and binding, and pleading rules, which are pliable and, in some cases, optional. Where a judicial admission is based in the pleadings, its enforceability depends, by definition, on the durability of those pleadings. Under rules that allow plaintiffs to rewrite their complaints as if working from a blank leaflet, admissions rooted in the pleadings will be elusive. Employee defendants, for instance, may find themselves accused in a personal-injury complaint of acting in the "course and scope" of their employment (making their employer vicariously liable), then, when the same defendants invoke their employer's arbitration rights, newly accused of acting *outside* the course and scope, and then, finally – to suit plaintiff's substantive theory – back again to having acted within the course and scope. (See *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199.)

On closer inspection, however, many such cases fall outside the judicial-admissions canon – the *24 Hour Fitness* case, for example, did not directly discuss judicial admissions. No known cases criticize judicial admissions. But liberal pleading standards, taken to extremes, undermine the doctrine: allowing pleaders to keep their hand always at the plow makes for inhospitable soil for judicial admissions to take root.

OVERVIEW OF JUDICIAL ADMISSIONS

An "admission of fact in a pleading is a 'judicial admission.'" (*Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 187 (citing *Valerio v. Andrew Youngquist Construction (2002) 103 Cal.App.4th 1264, 1271.*) The rule applies equally to unverified pleadings (see Code Civ. Proc., §§ 420, 422.10; *Womack v. Lovell* (2015) 237 Cal. App.4th 772, 786), and attorneys' authority to file pleadings on behalf of their clients is a rebuttable presumption. (Evid. Code, §§ 1222 et seq.; *Dolinar v. Pedone* (1944) 63 Cal.App.2d 169, 176-177.) Once a party has pleaded facts "in support of a claim or defense, the opposing party may rely on the factual statements as judicial admissions." (*Myers*, *supra*, 178 Cal.App.4th at p. 746.)

The judicial admission is commonly a creature of pleading (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324-1326), though it also appears in the forms of stipulations (*Morningred v. Golden State*

continued on page 11

Co. (1961) 196 Cal.App.2d 130, 137) and requests for admission that have been admitted or deemed admitted. (*Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1578, disapproved on other grounds in *Wilcox v. Birtwistle* (1999) 21 Cal.4th 973, 983, fn. 12.)

Distinctive about its nature, then, is the judicial admission "is entirely different from an evidentiary admission. The judicial admission is not merely evidence of a fact; it is a conclusive concession of the truth of a matter which has the effect of removing it from the issues...." (*Troche v. Daley* (1990) 217 Cal.App.3d 403, 409, quoting *Walker v. Dorn* (1966) 240 Cal.App.2d 118, 120; *Heater v. Southwood Psychiatric Ctr.* (1996) 42 Cal.App.4th 1068, 1079, fn. 10.)

A judicial admission, no mere flesh wound, cuts to the bone: a trial court "may not ignore a judicial admission in a pleading, but must conclusively deem it true as against the pleader." (*Bucur*, 244 Cal.App.4th at p. 187 (citing *Thurman v. Bayshore Transit Management, Inc. (2012) 203 Cal.App.4th 1112, 1155*).)

OVERVIEW OF PLEADING AMENDMENTS

For such reasons have courts historically insisted on good reason for amending pleadings. Honesty in pleading, at least, has been required since at least Justinian, whose code required parties to swear on the justice of their cause, and even expected lawyers to resign their case if they found it dishonest.

The California Supreme Court continues to take a dim view of situational pleading, holding that "'[a]s a general rule a party will not be allowed to file an amendment contradicting an admission made in his original pleadings" unless "upon very satisfactory evidence that the party has been deceived or misled, or that his pleading was put in under a clear mistake as to the facts.'" (*Brown v. Aguilar* (1927) 202 Cal. 143, 149; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 836-837 [amended complaint properly dismissed where plaintiff gives no explanation for omitting prior allegations]. As a safeguard, superseded pleadings may be considered for the purpose of impeachment. (*Meyer v. State Board of Equalization* (1954) 42 Cal.2d 376, 385; *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1412 [error to refuse to admit unverified, dismissed cross-complaint to impeach]; *Cahill Brothers, Inc. v. Clementina Co.* (1962) 208 Cal.App.2d 367, 383.) And pleadings from a *prior* action may be asserted either as direct or impeachment evidence. (*Coward v. Clinton* (1889) 79 Cal. 23, 29 [commenting, but not deciding, that prior pleadings also should be considered admissions]; *Kamm v. Bank of California* (1887) 74 Cal. 191, 197-198. Accord *Magnolia Square Homeowners Association v. Safeco Ins. Co.* (1990) 221 Cal. App.3d 1049, 1061 [allegations in prior action are evidentiary in nature]; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 707; *Nungaray v. Pleasant Valley Lima Bean Growers and Warehouse Assn.* (1956) 142 Cal.App.2d 653, 667; *Dolinar v. Pedone* (1944) 63 Cal.App.2d 169, 176-177.)

BETWEEN A ROCK AND A SOFT PLACE: RELAXING THE RULES OF PLEADINGS UNDERMINES JUDICIAL ADMISSIONS

Though binding and irrevocable, a judicial admission is rooted in the pleadings, and rests on a shaky foundation when courts treat pleadings as pliable. One court has reasoned that a judicial admission "is not set in stone" because the trial judge "has discretion to relieve a party from the effects of a judicial admission by permitting amendment of a pleading." (*Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 446, 452, fn. 2. See also *Dang v. Smith* (2010) 190 Cal.App.4th 646, 659, fn. 8.) Parties seeking to avoid a judicial admission, then, might simply – as though seeing themselves caught between a rock and a soft place – seek to amend their pleadings. "Occasionally he stumbled over the truth," Churchill once remarked of former Prime Minister Stanley Baldwin, "but he always picked himself up and hurried on as if nothing had happened."

The correct analysis is reflected in *Valerio v. Andrew Youngquist Constr.* (2002) 103 Cal. App.4th 1264, 1272, reversing a quantum meruit judgment on the grounds plaintiff judicially admitted the existence of a written contract when answering the cross-complaint. The court noted that, though this judicial admission could have been excused had Valerio moved to amend his pleading, and that such motion "would have been granted" (*id.* at p. 1273), the pleadings otherwise stand: "While the result here is rigorous, the rule is clear and [defendant] is entitled to rely upon it. To hold otherwise would undermine well-settled rules of pleading relied upon to properly structure litigation." (*Id.* at pp. 1273-1274.)

Not only that, to allow a plaintiff to assert new factual theories virtually at will would replace Justinian with civil procedure according to Groucho Marx: *Those are my allegations, and if you don't like them... well, I have others.*

A CASE STUDY: THE SECOND AND FOURTH DISTRICTS DIVERGE ON WHETHER A PLAINTIFF'S ALLEGATIONS OF DEFENDANTS' AGENCY RELATIONSHIP ARE JUDICIAL ADMISSIONS SUPPORTING A MOTION TO COMPEL ARBITRATION

In 2012, the Fourth District, Division One considered judicial admissions in the context of a motion to compel arbitration. In *Thomas v. Westlake* (2012) 204 Cal. App.4th 605, plaintiff sued an investment firm and various brokers, advisors, and other defendants, who petitioned to compel arbitration. Plaintiff protested that none of the defendants save one was a signatory to the arbitration agreement and thus were not entitled to arbitrate. When defendants pointed out that plaintiff alleged in his complaint that defendants "acted as an agent of each other," plaintiff insisted that was "only a theory of tort liability" and not, presumably, anything plaintiff had expected anyone to take seriously.

Thomas rejected plaintiff's cynical view of his own pleadings: "Having alleged all defendants acted as agents of one

continued on page 12

another, [plaintiff] is bound by the legal consequences of his allegations." (*Id.* at p. 614.) It "would be unfair to defendants to allow [plaintiff] to invoke agency principles when it is to his advantage to do so, but to disavow those same principles when it is not." (*Id*. at p. 615.)

Yet just one year later, however, the Second District, Division One ruled quite differently on a similar set of facts. In *Barsegian*, *supra*, 215 Cal.App.4th 446, plaintiff made similar allegations of defendants' agency relationships with one another. As in *Thomas*, certain defendants invoked the arbitration rights held by their codefendants – their "agents," in plaintiff's telling. The trial court denied the motion. Unlike in *Thomas*, however, this time the Court of Appeal affirmed.

Barsegian distinguished *Thomas* on the ground that *Thomas* "does not make clear whether the mutual agency of the defendants was conceded by all sides for all purposes," whereas the moving defendants in *Barsegian* explicitly did not concede the allegation that they were agents of each other. (*Id*., at p. 453.) Perhaps the reason why *Thomas* did not "make clear" whether defendants agreed with the agency allegations is because it shouldn't matter: a judicial admission bars "the party whose pleadings are used against him or her," not the party the pleadings are asserted against. (*Id*., at p. 451, citing *Myers*, *supra*, 178 Cal.App.4th at p. 746 (emphasis added).) Inverting this rule, the reader will recall, would "force defendants to play a risky game of roulette" when asserting a judicial admission against the pleader. (*Myers, supra*, 178 Cal.App.4th at p. 748.) But the gap between *Thomas* and *Barsegian* is indeed the space to watch: courts will likely enforce a judicial admission to bind a plaintiff to the legal effect of the pleadings (e.g., *Uram, supra*, 217 Cal.App.3d at p. 1433), but will not likely enforce a judicial admission merely to estop a plaintiff from correcting factual errors. (E.g., *Dang v. Smith* (2010) 190 Cal. App.4th 646, 659, fn. 8.)

A procedural motion such as a petition to compel arbitration makes for a harder case, which in *Barsegian* yielded questionable law. Distracted, perhaps, by the possibility of an inequitable result, *Barsegian* stated that

a judicial admission is a "*factual allegation by one party that is admitted by the opposing party*. The factual allegation is removed from the issues in the litigation because the parties *agree as to its truth*." (*Id*., at p. 452.) The court supplies the italics, but no citations. Instead, the court reasoned that a judicial admission is binding only "because the parties *agree* to its truth." (*Id*.) And thus a judicial admission in the *Barsegian* court means the fact "is effectively conceded *by both sides*."

As discussed above, however, the stipulation is but one of at least three species of judicial admission. Although *Barsegian* acknowledges that facts admitted in response to requests for admission are also judicial admissions, it fails to note that, like judicial admissions in pleadings, they are not stipulative in nature. But who knows? When *Barsegian* concludes, pedal down, throttle out, that "a judicial admission is therefore conclusive both as to the admitting party *and as to that party's opponent*" (*id*., italics in original), attorneys who have recently propounded RFAs might feel that last bit an unwelcome finger pointed in their direction: *will the responses to my discovery prove "conclusive both as to the admitting party and to that party's opponent"?*

If courts follow *Barsegian* rather than *Thomas*, factual allegations in a complaint would be binding only to the extent the defendant counter-admits them. The holding of *Barsegian*, if adopted, would fundamentally narrow and indeed redefine the judicial-admissions doctrine.

RE-ADMISSION: THE FOURTH DISTRICT'S 2012 OPINION SHOWS THE PATH TO ESTABLISHING JUDICIAL ADMISSIONS

The Fourth District's 2012 opinion in *Thurman*, *supra*, 203 Cal.App.4th 1112 offers a roadmap to establishing a judicial admission consistent with *Thomas*, and notwithstanding *Barsegian*. There, the operative verified complaint sought recovery for Labor Code meal- and rest-break violations. It alleged defendants had been providing meal periods from July 2003 onwards, yet the trial court nonetheless awarded the plaintiff recovery for missed meal periods after that date, finding the plaintiff not bound by the admission: the trial court felt it would "elevate pleading form over the facts" and "would give dignity to the 'gotcha' theory of litigation." (*Id*., at p. 1154.)

Reversing, the Court of Appeal noted the steps the defendants took to highlight that admission, and the steps plaintiff failed to take to relieve himself from it. (*Id*., at pp. 1156-1157.) The defendants worked overtime to enforce the admission, "clearly object[ing] before, during, and after trial, to the admission of evidence of missed meal periods after July 2003," and filing a motion in limine to prohibit introduction of such evidence. (*Id*.) And the plaintiff failed to

continued on page 13

amend the complaint despite indicating it would do so in its opposition to the motion in limine. (*Id*., at p. 1156.)

The Court of Appeal also noted that the defendants "prejudicially relied on [the] judicial admissions," as the defendants prepared a settlement offer under Code of Civil Procedure section 998, calculating the amount of the statutory offer in reliance on the admission that they had no liability for missed meal periods after July 2003, and that permitting the plaintiff to walk back his judicial admission could allow him to recover damages in excess of the offer. (*Id*., at p. 1157.) (Emphasis on prejudice, however, probably causes the judicial-admissions analysis to tread on judicial estoppel's turf. (See *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1383-1384.))

In terms of establishing a judicial admission, the job description in *Thurman* involves long hours with few rest breaks: the admission in the complaint was clear and unequivocal; it was relevant to a material fact in the case; it was invoked as to the merits rather than in a procedural motion; and the complaint, seasoned through litigation, discovery, and trial, including objections and a motion in limine, was not susceptible to amendment without prejudicing the defendant.

But the *Thurman* factors are not all indispensable elements, and the judicial-admissions canon merely requires a clear allegation in a pleading. Against healthy judicial concerns against elevating form over function, the judicial admission follows from the principle that a lawyer may not file a complaint absent grounds to believe the allegations are true. It is the pleader who engages in "sharp practice" in making factual allegations against the named defendants "unless, after a reasonable inquiry, the plaintiff actually believes that evidence has been or is likely to be found" to support the assertions; the actual-belief standard of pleading "requires more than a hunch, a speculative belief, or wishful thinking: it requires a well-founded belief. (*Kojabadian v. Genuine Home Loans, Inc.* (2009) 174 Cal.App.4th 408, 421-22 [citing Supreme Court precedent].) If a lawyer files a complaint with factual allegations without the requisite actual belief in their truth, the lawyer can be sanctioned (Code Civ. Proc., § 128.7, subd. (c)) and is subject to other disciplinary action. (*Pickering v. State Bar* (1944) 24 Cal.2d 141 (*per curiam*); see Bus. & Prof.Code, § 6068, subd. (d).) Not every allegation, in other words, is a stick good enough to beat a defendant with.

Yet despite these fundamental rules of honest and reasoned pleading, some trial courts – like the one reversed in *Thurman*– may feel that invoking the doctrine of judicial admissions would work a "gotcha" on plaintiff. Pity, as a proper application of the doctrine might inspire more discipline in pleading practice. For many litigants are not unlike Mark Twain when he observed he "could remember anything, whether it had happened or not." Give them enough liberties in pleading practice and they'll prove it.

SIGNATURE

RESOLUTION

Experience. Commitment. Results.

SIGNATURERESOLUTION.COM

633 W. 5th Street, Suite 1000
Los Angeles, CA 90071
213.622.1002

Lars Johnson, Esq.

Now a Full-Time Mediator

Decades of experience as an attorney specializing in the following types of claims:

- Personal Injury and Wrongful Death
- Premises and Product Liability
- Insurance Bad Faith
- Nursing Home and Elder Abuse
- Professional and Medical Malpractice

Millennials: Not Your Mother's Jury

Julia M. Beckley and Jayme C. Long

Millennial Contributors:
Stephanie Peatman and Blakeley Oranburg

8:57 am **@millennialjuror:**
Jury duty today ... set the iPhone alarm before bed, woke up, grabbed Starbucks, and Uber'd to the courthouse. Hope a bunch of suits aren't going to bore me to death!

10:11 am **@millennialjuror:**
Judge says I have to put my phone away except for "recess" and "lunch" – am I in elementary school again?!?

12:00 pm **@millennialjuror:**
Never been so excited for lunchtime! These lawyers don't know what they're doing – they are just shuffling through stacks of paper!

2:48 pm **@millennialjuror:**
OMG, if I have to see one more power point slide with bullet points I'm going to poke my eyes out!

5:03 pm **@millennialjuror:**
Done for the day! But I have nine more days of this ... UGH!!

Born between 1980 and 1996, millennials represent approximately 20 percent of the population and nearly half of the workforce. They are estimated to be more than a quarter of the average jury pool. This younger, tech-savvy and fast-paced generation demands a modern trial to match the world they live in.

Millennials are powerful jurors because they:

- are more likely than previous generations to award high damages
- have less trust in corporations than any other generation;
- have a "change the world" mentality and are susceptible to the so-called reptile effect;[1]
- are highly confident and believe their opinions are as valuable as anyone else's – regardless of age; and
- as they were born in a digital era, expect lawyers to know how to use technology – and to use it well.

WHAT MILLENNIALS WANT FROM A TRIAL LAWYER

It's showtime! Without access to smartphones and social media while court is in session, the trial must provide them with the entertainment they are prohibited from using.

Millennials value their time and appreciate brevity and speed in presentation. They expect technology in the courtroom, including computer-generated visuals, video, graphics and charts. With most millennials never having lived without digital technology, they infer that a lawyer's failure to appropriately use technology means that she or he is not prepared; or is careless, disorganized and unprofessional.

Millennials grew up being exposed to all types of characters and cultures through the Internet, and want a courtroom to reflect this diversity. Millennials also place high value on authenticity, and will reject anyone they view as fake or dishonest. Raised in an era of reality television, millennials prefer a trial that is seemingly unscripted; they are turned off by obviously rehearsed speeches and spiels.

continued on page 16

THE PROBLEM WITH GIVING MILLENNIALS WHAT THEY WANT

Millennials want quick blurbs and material they can quickly scan so they can move on to the next headline. But by giving them the concise information they desire, trial lawyers run the risk of the jury not retaining information long enough to get through the deliberations. Trial lawyers must balance the brevity millennial jurors expect with the need to have them remember important evidence so they can store it, retrieve it and argue for your side.

ADAPTING TO THE MILLENNIAL JUROR

Meeting millennials' expectations without alienating jurors of other generations presents a unique challenge for today's trial lawyer. Here are some tips for overcoming this challenge, and effectively presenting your case at trial:

1. USE TECHNOLOGY, AND USE IT WELL

- Use of PowerPoint in openings, closings and with key witnesses is helpful – but it *must* go beyond bullet points
- Use video clips where possible
- Create and use demonstrative evidence
- Employ audio, not just visual aids

For example, your opening statement should immediately capture jurors' attention by setting the stage for what is about to unfold. Introduce the cast of characters and the role each one will play, using pictures or video clips wherever possible. Use technology to show the jury the evidence they should be on the lookout for during trial.

2. CHANGE IT UP, CHANGE IT UP, CHANGE IT UP

- Do *not* stick to one medium throughout the trial.
- Switch between visual media (e.g., from a PowerPoint to the Elmo).
- Show some real paper, stack some books.
- Go black. Turn off all visual media and interact directly with the jury.
- Use long, strategic pauses to regain the attention of your jurors, especially before you have something important to say.
- Always remember, a picture is worth a thousand words.

Change-ups not only keep the juror's attention, but they also capture perceptual strengths of each juror (i.e., you will have visual, verbal, aural, and physical learners on your jury). Change-ups will also ensure you are not alienating jurors from other generations.

3. IF YOU DON'T HAVE EVIDENCE, EXPLAIN WHY

Jurors are skeptical of a void in evidence – especially young ones, as they expect everything to be accessible online or captured by video surveillance. Tell them early and often why a document or video footage does not exist so they do not hold it against you/your client.

4. BE POSITIVE

- To combat anti-corporation biases, weave positive company themes into your presentations and examinations.
- Try to have a company representative present at trial, but be strategic in your selection of this representative.

5. SHORT, SIMPLE, REPEAT

- Key themes should be short and in simple language.
  - Remember, this is a generation that tweets in 140 characters or less and can carry on entire conversations using only emojis.
  - Just think, the widely-known and well-received TED Talks are limited to 18 minutes; long enough to be serious, but short enough to hold people's attention.
- If possible, the entirety of the defense case should be short and succinct, including the

continued on page 17

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

Ambiguous Code of Civil Procedure 998 offer may be construed by reference to other documents.

Prince v. Invensure Insurance Brokers (2018) 23 Cal.App.5th 614

Plaintiff sued defendant and defendant cross-complained. Under Code of Civil Procedure 998 offer, plaintiff offered to have judgment in his favor and against defendant for $400,000. Defense counsel responded that if the offer was to settle only plaintiff's complaint, defendant wanted more time to consider it, but if the offer was to settle both the plaintiff's complaint and the defendant's cross-complaint, it was rejected. Plaintiff's counsel clarified that the offer was to settle the entire action. The offer was thus rejected and the case proceed to trial. Plaintiff obtained a jury verdict in excess of $600,000 and the defendant took nothing on the cross-complaint. Plaintiff accordingly sought post-offer costs for having done better than his 998 offer. The trial court granted the defendant's motion to tax, reasoning that plaintiff's 998 offer was ambiguous because it was not clear whether it covered the entire action.

The Court of Appeal (Fourth Dist., Div. Three) reversed the order taxing costs. Although the original settlement offer was ambiguous, the subsequent written correspondence between counsel clarified the extent of the offer. The offer was thus valid.

See also Timed Out LLC v. 13359 Corporation (2018) 21 Cal.App.5th 933 [2nd Dist., Div. 1: Code of Civil Procedure section 998 offer for $12,500 was not ambiguous in providing amount was "exclusive of reasonable costs and attorney fees, if any," and so was valid to preclude recovery of post-offer fees following a judgment of $4,483.30 plus $29,820 in fees]

ANTI-SLAPP

Where a complaint alleges protected activity, an anti-SLAPP motion should be granted even if the defendant denies the protected activity occurred.

Bel Air Internet, LLC v. Morales (2018) 20 Cal.App.5th 924

Plaintiff company alleged that defendants, two of its employees, wrongfully encouraged other company employees to quit and to sue the company for constructive termination. Plaintiff sued for intentional interference with contractual relations, breach of contract, and breach of the implied covenant. Defendants filed an anti-SLAPP motion to strike the allegations that they had encouraged other employees to sue, which would be protected prelitigation activity if done. To show that plaintiff was unlikely to prevail on the merits, defendants also submitted declarations denying that they had encouraged other employees to sue. The trial court denied the motion, reasoning that the defendants' declarations denying that they had encouraged other employees to sue precluded a finding that the complaint arose out of protected prelitigation activity.

The Court of Appeal (Second Dist., Div. Two) reversed. The complaint's allegations described protected pre-litigation activity. While the anti-SLAPP statute "requires a court to consider both the 'pleadings' and the 'supporting and opposing affidavits stating the facts upon which the liability or defense is based," where the face of the pleading reveals protected activity, the motion to strike should be granted, regardless of what might be in the defendants' affidavits concerning the merits of the plaintiff's claims. Any other result "would create an irrational procedure in which a defendant is precluded from mounting an anti-SLAPP challenge to factually baseless claims."

continued on page ii

continued from page i

See also *Planned Parenthood Federation v. Center for Medical Progress* (9th Cir. 2018) 890 F.3d 828 [Federal Rule 12(b)(6) standards apply to an anti-SLAPP motion founded on purely legal arguments, whereas summary judgment standards apply to such a motion founded on a challenge to the factual sufficiency of the claim]

Under the anti-SLAPP law, a defendant must move to strike a cause of action within 60 days of service of the earliest complaint containing that cause of action.

Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism (2018) 4 Cal.5th 637

In this lawsuit arising out of a sublease dispute and related unlawful detainer action, the defendants moved to strike the Third Amended Complaint under Code of Civil Procedure section 425.16, subdivision (f), which provides that an anti-SLAPP motion "may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." The plaintiffs argued the anti-SLAPP motion was untimely because it was not brought within 60 days of any of the earlier complaints containing the same causes of action. The trial court denied the anti-SLAPP motion as untimely and the Court of Appeal (Fourth Dist., Div. Three) affirmed.

The California Supreme Court affirmed. Under subdivision (f), an anti-SLAPP motion is timely if filed within 60 days of service of an *amended* complaint only if the moving party could not have brought the motion against an earlier pleading. Motions that could have been brought against an earlier pleading are untimely if filed more than 60 days after service of the first pleading that would support the motion, subject to the trial court's discretion to permit a late motion. To the extent *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, indicated to the contrary, it was disapproved.

Community group's petitioning the government to stop commercial development was activity protected under the anti-SLAPP law regardless of whether it was commercial speech (it was not).

Dean v. Friends of Pine Meadow (2018) 21 Cal.App.5th 91

Golf course owners and a developer executed a contract to turn the golf course into a residential development. By attending community meetings and posting to the internet, a community group successfully lobbied the local government not to amend its General Plan in a way that would permit the development. The owners sued the community group for defamation and intentional interference with prospective economic advantage, alleging that the community group had made misrepresentations to the public to stop the development. The community group successfully filed a successful anti-SLAPP motion against the owners' lawsuit. The owners appealed, arguing the community group's activities were commercial speech because they proposed that someone other than the developer purchase the property, and so were entitled to diminished protection under the anti-SLAPP law.

The Court of Appeal (First Dist., Div. Four) affirmed the order striking the owners' complaint. The defamation and interference claims were all based on statements made in connection with petitioning the City not to amend its General Plan, which plainly constituted petitioning activity on an issue of public interest. "The fact that defendants opposed an official government action (i.e., approval of the general plan amendment) by proposing that someone other than [developer] purchase the golf course did not make them competitors or transform their political action into commercial speech." In any event, commercial speech is still entitled to some First Amendment protection. The anti-SLAPP law defines broadly what activities are protected and includes the activity at issue in this case regardless of whether it could be described as "commercial."

ARBITRATION

The National Labor Relations Act does not displace the Federal Arbitration Act's mandate that class action waivers in employment-related arbitration agreements be enforced.

Epic Systems Corporation v. Lewis (2018) 138 S.Ct. 1612

In these consolidated cases, employees sued their employers for allegedly violating wage-and-hour laws. The employers moved to compel individual arbitration of each claim based on arbitral class action waivers. The employees argued the waivers were illegal and therefore unenforceable because the National Labor Relations Act (NLRA) confers a substantive right to pursue employment claims on a class or collective basis, and this substantive right overrode the Federal Arbitration Act's (FAA) general mandate that arbitration agreements providing for individualized proceedings must be enforced according to their terms. The National Labor Relations Board (NLRB) agreed with the employees, and various other courts agreed or deferred to the Board.

The United States Supreme Court disagreed with the NLRB and enforced the class action waivers and thus, the arbitration agreements. The FAA's saving clause – which allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract" – applies only to defenses that apply to enforcement of contracts generally, not defenses that apply only to arbitration like the employees' defense that the NLRA does not permit class action waivers. Any other result would defeat the purpose of the FAA.

An arbitrator lacks authority to decide that a nonsignatory to an arbitration agreement is an alter ego of a signatory.

Benaroya v. Willis (2018) 23 Cal.App.5th 462

Benaroya Pictures contracted with Bruce Willis to perform in a movie. The parties' agreement included an arbitration clause and was signed by Michael Benaroya, the president of Benaroya Pictures. When financing for the project collapsed, Willis commenced an arbitration against Benaroya Pictures. Willis successfully moved to amend the arbitration demand to add Michael Benaroya individually as an alter ego of Benaroya Pictures. In the arbitration award, the arbitrator found that Michael Benaroya was the alter ego of Benaroya Pictures and awarded damages against both of them. The trial court confirmed the award and entered judgment for Willis.

The Court of Appeal (Second Dist.. Div. Four) reversed the order confirming the arbitration award against Michael Benroya in his individual capacity (while affirming the order as to Benaroya Pictures). Because Michael Benaroya had not signed the agreement in his individual capacity, the arbitrator had exceeded his powers by compelling him to arbitrate in his individual capacity.

An integration clause does not preclude introduction of evidence of a later-signed arbitration agreement.

Williams v. Atria Las Posas (2018) 24 Cal.App.5th 1048

Plaintiff suffered a traumatic brain injury in an accident. He was admitted to the defendant's dependent care facility under the terms of a Residency Agreement that provided it was " 'the entire agreement between you and us regarding your stage in our Community and super[s]edes all prior agreements regarding your residency.' " The Residency Agreement did not contain an arbitration clause. However, a second agreement plaintiff executed immediately after the Residency Agreement did provide for arbitration of any claims arising out of the facility's care for him. Plaintiff suffered further injuries when he left the facility and collapsed in a ditch. His wife sued the facility, which moved to compel arbitration. The trial court refused to compel arbitration, holding the integration clause in the Residency Agreement was dispositive and precluded consideration of the separate arbitration agreement.

The Court of Appeal (Second Dist., Div. Six) reversed. "By its express terms, [the Residency Agreement] superseded 'prior' agreements. But the arbitration agreement was signed after the Residency Agreement." The Residency Agreement was therefore "not intended as the final and compete expression of the parties' agreement." The wife's loss of consortium claim was not subject to arbitration, however, because that is her own claim and she did not sign the agreement.

CLASS ACTIONS

American Pipe tolling applies only to individual claims, not successive class claims.

China Agritech, Inc. v. Resh (2018) 138 S.Ct. 1800

Stock purchasers sued defendant for violations of the Securities Exchange Act of 1934. Twice, shareholders attempted to form a class within the statute of limitations period, but both times the district court denied class certification. A third attempt at certification occurred after the expiration of the statute of limitations, which led the district to dismiss the case. On appeal, the putative class argued the previous class action filings had tolled the limitations period under *American Pipe & Construction Co. v. Utah* (1974) 414 U.S. 538, which provides for equitable tolling of putative class members' claims while a putative class action is pending certification. Defendant countered that *American Pipe* tolled only the *individual* claims of the class members, and did not toll further *class* claims. The Ninth Circuit reversed, applying *American Pipe* to class claims, concludingn that (a) tolling advanced the policy objectives of fairness and judicial economy and (b) principles of preclusion and comity would prevent abusive, repetitive filing of class actions.

The United States Supreme Court reversed. *American Pipe* tolling does not extend extend the statute of limitations during the pendency of successive class claims. Unlike individual claims, class claims are most efficiently pursued if all potential class claims are filed at the earliest opportunity, when the district court can pick the best class representatives and counsel. Further, applying equitable tolling to avoid the limitations bar on otherwise untimely class claims would permit successive claims to stack on top of one another and toll the limitations period indefinitely.

Cf. *Fierro v. Landry's Restaurant Inc.* (2018) 23 Cal.App.5th 325 [4th Dist., Div. 1: Under California procedural law, *American Pipe* applies to toll the limitations period on class members' claims during the pendency of an appeal from an order sustaining a demurrer to the class claims]

Federal courts cannot decline to consider evidence supporting class certification just because the evidence would be inadmissible at trial.

Sali v. Corona Regional Medical Center (9th Cir. 2018) 889 F.3d 623

Two registered nurses moved to certify seven classes of nurses who alleged their employers had withheld wages. The district court denied certification on the following grounds: (a) the nurses had not satisfied Federal Rule of Civil Procedure 23(a)'s typicality requirement because, to prove their injuries, they relied solely on a declaration that the court had ruled inadmissible; (b) one of the nurses was not an adequate representative because she was not a member of any of the seven classes; (c) proposed class counsel's previous sanctions in the case demonstrated the counsel would not adequately represent the class; and (d) two classes—one alleging employers had rounded time to pay employees less; the other arguing employers had failed to provide itemized wage statements—required individualized questions of fact that predominated over the class claims.

The Ninth Circuit reversed the denial of class certification. First, trial courts cannot decline to consider evidence at the certification stage solely because the evidence would be inadmissible at trial. Second, since one of the representatives was adequate, inadequacy was not a valid basis to deny certification. Third, while courts can consider prior sanctions when approving class counsel, it was "premature and an abuse of discretion" to reject the plaintiffs' attorneys at the certification stage when their "substantial and competent work in this case" and "extensive experience litigating class-action cases" indicated they were adequate. Fourth, individualized questions did not predominate because: (a) determining whether the rounding-time system underpaid employees required only "an employer-focused inquiry"; and (b) failing to provide wage statements creates a "per se injury" under Labor Code § 226, such that there are no individualized questions of damages.

CIVIL PROCEDURE

"Denials" to requests for admission are not admissible evidence.

Victaulic Company v. American Home Assurance Company (2018) 20 Cal.App.5th 948

A plumbing component manufacturer sued three of its insurers for bad faith in connection with the handling of nine underlying products liability claims. At trial, the court permitted plaintiff insured to use the insurers' denials to requests for admission (RFA's) that the nine products liability claims were potentially covered as evidence that the insurers "denied" coverage for the claims. Plaintiff used the "denials" during its cross-examination of the principal claims adjuster to suggest that, while she believed there was a potential for coverage (which was why she defended the claims under a reservation of rights), she "lied" on her verified RFA responses denying the "potential for coverage" in the coverage litigation. While this cross-examination was occurring, the trial judge took over the examination and suggested that the witness had indeed committed perjury in her RFA responses when she "denied" them under oath despite having personally believed there was a potential for coverage. The witness ultimately asserted her Fifth Amendment privilege not to testify further, in front of the jury and before the insurer defendant had the chance to question her. The jury awarded over $8 million in *Brandt* fees and $46 million in punitive damages.

continued on page iv

continued from page iii

The Court of Appeal (First Dist., Div. Two) reversed the tort and punitive damages verdict. RFA denials are not evidence admissible at trial. The court's allowance of their use as evidence was prejudicial error, as was the trial judge's misconduct in questioning the witness and improper handling of her resultant invocation of her Fifth Amendment privilege.

Sending notice of intent to sue a doctor to the doctor's address listed on the Medical Board of California website satisfied MICRA.

Selvidge v. Tang (2018) 20 Cal.App.5th 1279

In this medical malpractice suit, after being told the defendant doctor no longer worked at the facility where he had treated the plaintiffs' decedent, plaintiffs' counsel sent a notice of intent to sue to the doctor's address listed on the Medical Board of California's website. After the doctor failed to respond, plaintiffs filed suit. The defendant doctor moved for summary judgment on the ground the lawsuit was filed 85 days after the statute of limitations had expired. The plaintiffs opposed the motion, arguing that the limitations period had been tolled for 90 days under the Medical Injury Compensation Reform Act's (MICRA), provision that if "notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days...." (Code Civ. Proc., § 364, subd. (d).) The trial court granted the motion, reasoning that MICRA required either: (1) actual notice, or (2) notice sent by mail to Defendant's residence, neither of which occurred.

The Court of Appeal (Third Dist.) reversed the grant of summary judgment. MICRA does not call for any particular form of notice. All that is required is that the "plaintiff took adequate steps to achieve actual notice." Plaintiffs reasonably believed the doctor would receive a notice sent to an address that he had identified where he could be reliably contacted for professional purposes.

See also *AO Alpha-Bank v. Yakovlev* (2018) 21 Cal.App.5th 189 [4th Dist, Div. 1: where surety agreement designated defendant's Moscow address as the appropriate place for service of process and required defendant to notify the plaintiff should he move, and defendant moved without notifying the plaintiff, service at the Moscow address was sufficient to comport with due process]

Plaintiff could voluntarily dismiss suit at end of trial to avoid paying defendant's prevailing party costs.

Shapira v. Lifetech Resources (2018) 22 Cal.App.5th 429

This employment suit was tried to the court. The parties opted to file written briefs in lieu of presenting closing arguments. Four days before his closing argument was due, the plaintiff moved to voluntarily dismiss the case with prejudice pursuant to Code of Civil Procedure 581, subdivision (e) ["After the actual commencement of trial, the court shall dismiss the complaint ... with prejudice, if the plaintiff requests a dismissal...."]. The defendant opposed dismissal on the ground it was being sought merely to avoid the defendant being the "prevailing party" and therefore entitled to attorney fees. The court denied the plaintiff's motion and issued a decision on the merits against the plaintiff and awarding the defendant its costs and attorney fees.

The Court of Appeal (Second Dist., Div. Four) reversed the attorney fees award. Section 581, subdivision (e) entitles a plaintiff to voluntarily dismiss with prejudice any time before the case is submitted. The plaintiff's motive to avoid attorney fees was not a valid basis to deny dismissal, since subjective intent is irrelevant to the timeliness of a voluntary dismissal.

An issue previously appealed but not resolved by the appellate court is not precluded from later review.

Samara v. Matar (2018) 5 Cal.5th 322

Plaintiff sued her dental surgeon for professional negligence and sued the surgeon's employer on a vicarious liability theory. The trial court granted summary judgment for the surgeon on both statute of limitations and lack of causation grounds. The Court of Appeal (Second Dist., Div. Seven) affirmed the summary judgment, resting its decision solely on statute of limitations grounds and specifically declining to rule on causation. Soon after, the trial court granted summary judgment for the employer, reasoning that the claim against him was precluded by the trial court's previous finding of no causation, which was not reversed on appeal. Plaintiff appealed again. The Court of Appeal reversed, holding that there was no requisite "final judgment on the merits" on the causation issue in the prior appeal, so preclusion did not apply.

The Supreme Court affirmed the Court of Appeal, overruling *People v. Skidmore* (1865) 27 Cal. 287. It was inherently unfair to attach preclusive effect to a ground properly appealed but passed over by an appellate court.

A party must be given an opportunity to withdraw an improper reconsideration motion before monetary sanctions are imposed.

Moofly Productions v. Favila (2018) 24 Cal.App.5th 993

A production company sued several defendants for unfair business practices and unfair competition. The trial court entered terminating sanctions against the plaintiff company for failing to respond to discovery requests and disobeying court discovery orders. Plaintiff moved for relief from the sanctions, arguing that its discovery violations were the result of excusable neglect. The defendants argued that plaintiff's motion was actually a mislabeled motion for reconsideration under Code of Civil Procedure section 1008, which required motions for reconsideration to be founded on new facts, circumstances, or law. Because plaintiff had made identical arguments in a previous motion, it did not comport with section 1008's requirements, which led the defendants to request further sanctions under Code of Civil Procedure section 128.7. Although plaintiff requested to withdraw its motion, the court granted sanctions against plaintiff and its attorney for $10,499.51.

The Court of Appeal (Second Dist., Div. One) reversed the order for monetary sanctions. The plain language of section 128.7 did not permit sanctions unless the trial court allowed a 21-day safe harbor for the party to escape sanctions if the offending motion is withdrawn. The trial court violated this requirement by imposing sanctions without allowing plaintiff the ability to withdraw its improper motion for reconsideration.

EVIDENCE AND PRIVILEGES

Where text messages had not been preserved, witness could offer secondary evidence of their content.

Meeks v. AutoZone, Inc. (2018) 24 Cal.App.5th 855

The plaintiff sued her employer and a coworker for sexual harassment. Among other things, the plaintiff contended that the coworker had sent her multiple pornographic videos and images via text message. However, neither the plaintiff nor the coworker had preserved the texts. The trial court prohibited the plaintiff from providing detailed testimony about the contents of those texts, ruling it would amount to secondary evidence that would not be reliable or fair. The court also excluded testimony from four other female employees who alleged the same coworker had harassed them, because the plaintiff was not a "party" to those interactions. The jury found for defendants.

The Court of Appeal (Fourth Dist., Div. Two) ordered a new trial. The secondary evidence rule did not prohibit testimony about the texts because (a) failure to remember the exact wording of the texts did not render testimony untrustworthy and (b) as to fairness, defendants could offer contradictory testimony and challenge the plaintiff's memory on cross-examination. Further, the evidence of gender bias against the other female employees – aka "me too" evidence" – should not have been excluded *per se* since it could be relevant to the claim that there was an objectively offensive work environment.

Trial court did not abuse its discretion in excluding treating doctor's standard of care testimony as speculative and cumulative.

Belfiore-Braman v. Rotenberg (2018) 25 Cal.App.5th 234

The plaintiff brought a medical malpractice action against the defendant orthopedic surgeon, alleging he negligently performed a hip surgery, causing nerve damage. In the initial expert witness exchange, the plaintiff designated a nontreating expert doctor to provide testimony on the standard of care, causation, and damages, and also identified a number of treating doctors, including her primary care provider, as potential witnesses. Her primary care provider then referred her to another doctor for an MR neurography study. In her amended expert exchange, the plaintiff disclosed that she had undergone the study and added the later treating physician to her list of non-retained experts. At deposition, he stated that he believed there were several possible causes for the plaintiff's nerve problems relating to improper placement of a hip retractor during the surgery. The defendant moved to preclude this doctor from testifying at trial. After an Evidence Code section 402 hearing, the trial court determined that his proposed testimony on causation and damages would be too speculative because he does not perform hip replacement surgery and had not read the operating report. It was also unduly duplicative of other designated expert testimony. The trial court limited the doctor to testifying as to his observations based on the imaging study and the neurography test results. The jury found for the defendant.

The Court of Appeal, (Fourth Dist., Div. One), affirmed the judgment. The trial court had a reasonable basis to conclude that the doctor's opinions on causation were speculative, and the court had the discretion to decide that his proposed testimony on causation would be unduly cumulative.

TORTS

Universities have a duty to protect students from foreseeable violence on campus.

Regents of the University of California v. Superior Court (Rosen) (2018) Cal.5th 607

Plaintiff (a university student) sued defendant (another student), the university, and several university employees after defendant stabbed plaintiff during a chemistry lab. Plaintiff claimed the university owed her a duty to take "reasonable protective measures" to ensure her safety against violent attacks and from reasonable foreseeable criminal conduct on its campus. Plaintiff alleged that the university breached this duty because it was aware of defendant's dangerous propensities based on his behavior prior to the attack. Evidence of notice included defendant's admission that he had thought about hurting other dormitory residents, his continued reports of auditory hallucinations and paranoid thoughts, and his expulsion from dormitory housing after another resident reported defendant had pushed him twice and claimed it was his "last warning." A teaching assistant also reported defendant's weekly "routine" of accusing other students, including plaintiff, of calling him stupid. The university moved for summary judgment on the ground it owed no duty to protect plaintiff from defendant's violent conduct, and the Court of Appeal affirmed.

The California Supreme Court reversed. "[U]niversities have a special relationship with their students and a duty to protect them from foreseeable violence during curricular activities." Colleges provide students with a "discrete *community*" and have control over and the ability to protect students by imposing campus and classroom rules to maintain a safe environment. However, the duty should not be expanded to impose an "impossible requirement that colleges prevent violence on their campuses," but simply a duty "to act with reasonable care when aware of a foreseeable threat of violence in a curricular setting."

A driver who rearends another may be free from liability under the "sudden emergency" defense, where another driver's recklessness or "road rage' triggers an accident.

Shiver v. Laramee (2018) 24 Cal.App.5th 395

The plaintiff sued the driver of a tractor-trailer and his employer for injuries resulting from a traffic collision. The tractor-trailer was traveling in the far right lane of the freeway when he noticed the cars ahead of him had stopped. They had stopped because, as a group of cars was merging onto the freeway, one of the drivers recklessly passed and then cut off the other cars that were trying to merge. The plaintiff was the furthest back in the merging group, and the tractor-trailer rear-ended his vehicle. The trial court granted summary judgment for the defendants under the "sudden emergency" doctrine, under which there is no liability when (1) a "sudden and unexpected emergency situation" arises "in which someone was in actual or apparent danger of immediate injury," (2) the defendant did not cause the emergency, and (3) the defendant "acted as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer." The reckless driver's sudden braking while merging onto the freeway gave rise to a sudden and unexpected emergency, as vehicles merging onto a freeway generally increase their speed and do not slam suddenly on their brakes; the recklessness was the sole cause of the emergency. Further, the defendant driver, who had the right of way, owed no duty to foresee "road rage" or that cars will merge unsafely and then slam on their brakes.

continued on page vi

continued from page v

The Court of Appeal, (Second Dist., Div. Six) affirmed the summary judgment. This was a "rare" case where the sudden emergency doctrine applied to shield the defendants from negligence liability.

See also *Sakai v. Massco Investments* (2018) 20 Cal.App.5th 1178 [2nd Dist., Div. 1: owner of parking lot where food truck parked and parking congestion resulted owed no duty to protect food truck patron from being struck while standing outside his vehicle to discuss a fender bender that occurred in the parking area]

Plaintiffs who choose to obtain medical treatment outside their insurance plan may recover as damages the full value of the out-of-plan costs.

Pebley v. Santa Clara Organics, LLC (2018) 22 Cal.App.5th 1266

Plaintiff was injured in a vehicle collision and he sued another driver and its employer. Although plaintiff first sought treatment for his injuries through his health insurance carrier, he later chose to obtain most of his medical services outside his insurance plan, from a doctor who offered treatment in return for a lien on any tort recovery plaintiff might obtain. The lien doctor offered unpaid "bills" as representing the value of the service provided. Defendants argued that the bills did not reflect the true value, and also argued that plaintiff failed to mitigate his medical expenses by seeking treatment outside of his insurance plan, which would have been far less expensive. The trial court allowed plaintiff to introduce evidence of the billed charges for his past medical services, based on his expert's testimony confirming that the bills represented the reasonable and customary costs for such services in the Southern California community. The jury awarded $269,000 for past medical expenses and $375,000 for future medical expenses.

The Court of Appeal, (Second Dist., Div. Six) affirmed the judgment. Notwithstanding the lack of any evidence that the lien doctor's care was superior in any way to treatment available within the insurance plan, the Court of Appeal held mitigation principles did not apply because plaintiff had the right to seek the "best" care available. The court speculated as to reasons plaintiff might have offered to justify choosing the lien doctor. The court also attempted to distinguish the California Supreme Court's decision in *Howell v. Hamilton Meats & Provisions, Inc*. (2011) 52 Cal.4th 541, which held that "[a]n injured plaintiff with health insurance may not recover economic damages that exceed the amount paid by the insurer for the medical services provided." The court said the insured plaintifff's choice of physician rendered him volitionally "uninsured" for purposes of making third party tort claims. The court then declined to follow other authority holding that the *Howell* rule applies equally to insured and uninsured plaintiffs, insofar as it set the reasonable market value as the ceiling on the measure of damages for medical care.

INSURANCE

Negligent hiring, supervision, or retention of employee may qualify as an "accident" under a commercial general liability policy.

Liberty Surplus Insurance Co. v. Ledesma & Meyer Construction Co. (2018) 5 Cal.5th 216

A molestation victim sued the perpetrator's employer alleging a cause of action for negligent hiring, retention, and supervision of the employee who abused her. The employer's commercial general liability policy covered bodily injury caused by an "occurrence," which in turn was defined as an "accident." The insurer sought declaratory relief in federal court, contending it had no obligation to defend or indemnify. The district court granted summary judgment for the insurer. The employer appealed, and the Ninth Circuit Court of Appeals sought the California Supreme Court's opinion.

The Supreme Court held that, although the employee's conduct was intentional and beyond the scope of insurance coverage, there was a potential for coverage of the employer's separate acts of negligence. Even if the hiring, retention, and supervision of the employee were deliberate acts, the employee's molestation could be considered an accident because it could be viewed as an "additional, unexpected, independent, and unforeseen happening" which followed the employer's conduct and caused the injury.

Liability coverage for "personal injury" claims arising out of "invasion of a right of private occupancy" may include claims for nonphysical invasions of real property rights, such as interference with use.

Albert v. Truck Insurance Exchange (2018) 23 Cal.App.5th 367.

A landowner had an easement across his neighbor's property to access his adjacent, undeveloped parcel. The burdened property owner (plaintiff in the present action) built a chain-link fence that partially blocked the easement. The landowner whose easement was blocked brought an underlying action for abatement of private nuisance, alleging that the fence interfered with his enjoyment of and access to his property. Plaintiff tendered that lawsuit to her umbrella insurer, seeking a defense and indemnity under her "personal injury" coverage for "injury arising out of ... wrongful entry ... or invasion of the right of private occupancy." The insurer refused to defend, and the insured brought the present breach of contract action against the insurer. The trial court granted the defendant insurer's motion for summary judgment, holding that there was no potential for coverage because the insured had built the fence on her own property, so she did not wrongly enter anyone else's property in a manner that triggered a potentially covered liability.

The Court of Appeal (Second Dist., Div. Seven) reversed the summary judgment. Although the fence over the easement was not a "wrongful entry" onto another's property, it still potentially invaded a right of "private occupancy." That term in the insurance policy is ambiguous and may include nonphysical invasions of rights in real property. The underlying claim against the insured alleged that the fence limited the claimant's ability to develop his own property, which could be an invasion of his right of private occupancy in that property.

LABOR & EMPLOYMENT

For purposes of applying wage orders, a "suffer or permit to work" standard applies to determining who might be an employee versus independent contractor, and creates a rebuttable presumption that all workers are employees.

Dynamex Operations West v. Superior Court (Lee) (2018) 4 Cal.5th 903

The California Supreme Court held a "suffer or permit to work" standard is among the tests that can be applied to determine whether an individual should be classified as an employee or as an independent contractor in wage-and-hour cases alleging violations of obligations imposed by wage orders. And under this "suffer or permit to work" standard, a court "presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business satisfies each of three conditions described more fully in the Dynamex article in this issue of *Verdict Magazine.*

But see *Curry v. Equilon Enterprises, LLC* (2018) 22 Cal.App.5th 772 [4th Dist., Div. 2: service station owner who hired a third-party to operate the service station was not the employer of the third-party's employees because the owner did not control the third-party's employees' wages, hours, or working conditions.]

California's labor laws are not subject to a di minimis doctrine.

Troester v. Starbucks Corporation (2018) 5 Cal.5th 829

Plaintiff brought a putative class action in federal district court against Starbucks alleging he had to perform various store losing duties every day but was not compensated for this time. The district court granted summary judgment for Starbucks, reasoning that the uncompensated time was too minimal to warrant compensation. The Ninth Circuit certified the question of whether the de miminis doctrine that applies under the Fiar Labor Standards Act also applies to California's wage and hour laws.

The California Supreme Court held that there is no de minimis doctrine under California's labor laws that would preclude a lawsuit seeking to recover unpaid wages for several minutes of off the clock work per day. However, the Court declined to decide "whether there are circumstances where compensable time is so minute or irregular that it is unreasonable to expect the time to be recorded."

A Private Attorneys General Act (PAGA) plaintiff may proceed with representative claims for violations of the employer's obligation to provide and maintain accurate wage statements without a showing of her own injury.

Raines v. Coastal Pacific Food Distributors (2018) 23 Cal.App.5th 667

The plaintiff brought both individual claims and representative claims under the Private Attorneys General Act alleging her employer violated Labor Code section 226, subdivision (a), which requires an employer to provide and maintain accurate wage statements. Plaintiff sought statutory penalties authorized by Labor Code section 226, subdivision (e), which provides that an "employee suffering injury as a result of a knowing and intentional failure by an employer" to comply with subdivision (a) may recover damages and statutory penalties. The trial court granted summary judgment for the employer, holding there were no triable issues on the plaintiff's individual claim violation of subdivision (a), and that without an individual claim, she could not proceed with her PAGA claim.

The Court of Appeal (Third Dist.) reversed the summary judgment on the PAGA claim. While the undisputed facts showed the employer did not violate Labor Code section 226, subdivision (a) with respect to plaintiff herself and so plaintiff could not recover statutory penalties under subdivision (e), Labor Code section 226.3 provides for civil penalties without proof of individual injury. Thus, the PAGA claim could proceed under section 226.3.

See also *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745 [6th Dist.]: A plaintiff employee affected by at least one Labor Code violation may pursue Private Attorneys General Act penalties for all Labor Code violations committed by that employer].

HEALTHCARE

Allegations concerning a disagreement between a health care provider and patient does not state a cause of action for elder abuse.

Alexander v. Scripps Memorial Hospital La Jolla (2018) 23 Cal.App.5th 206

A patient with end-stage terminal cancer presented herself for care at the defendant hospital. The defendant hospital reviewed the patient's medical records and, despite her advanced health care directive stating she desired advanced life-saving treatments, recommended against providing such measures, concluding that they would be futile. The hospital concluded the most appropriate care would be to preserve the woman's mental and physical comfort. The patient's son's maintained that the health care directive should be followed and requested that the patient be transferred to another facility. The patient died an hour and a half before her scheduled transfer. The hospital did not attempt to resuscitate her per the directions of a palliative care doctor. The patient's estate and family sued the hospital for negligence, wrongful death, and elder abuse. The trial court granted summary judgment for the defendants, holding that the allegations concerning disagreements between physicians and the patient about the care to provided did not give rise to a cause of action.

The Court of Appeal (Fourth Dist., Div. One) affirmed. Plaintiffs' allegations about disagreements over care were insufficient to create a triable issue on the elder abuse and negligence claims. Further, the defendants were immune from liability under section 4740 of the Health Care Decisions Law, which requires health care providers to act in good faith and in accordance with generally accepted health care standards. Under that law, a "physician may decline to comply with a patient's health care instruction that requires medically ineffective health care, which is treatment that would not offer the patient any significant benefit." The defendants had produced sufficient evidence showing that their actions were directed at providing "only medically beneficial and medically effective care" without causing the woman further "pain, suffering, or harm."

CALIFORNIA SUPREME COURT PENDING CASES

[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.)]

Addressing whether di minimis work in California qualifies for protection under California's labor laws, including PAGA.

Ward v. United Airlines, S248702
(Ninth Circuit certification request granted July 11, 2018.)

Pilots and flight attendants who work for United Airlines sued the airline, alleging that it violated California Labor Code § 226 by issuing noncompliant wage statements. The plaintiffs sought an injunction and statutory penalties under § 226 and civil penalties under the Private Attorneys General Act (PAGA). The federal district court granted summary judgment for United, holding that § 226 does not apply to class members who work primarily outside of California.

The California Supreme Court agreed to answer the following questions at the Ninth Circuit's request: (1) Does California Labor Code section 226 apply to wage statements provided by an out-of-state employer to an employee who resides in California, receives pay in California, and pays California income tax on her wages, but who does not work principally in California or any other state? (2) The Industrial Wage Commission Wage Order 9 exempts from its wage statement requirements an employee who has entered into a collective bargaining agreement (CBA) in accordance with the Railway Labor Act (RLA). Does the RLA exemption in Wage Order 9 bar a wage statement claim brought under California Labor Code section 226 by an employee who is covered by a CBA?

See also *Oman v. Delta Air Lines*, S248726 (Ninth Circuit certification request granted July 11, 2018) [answering Ninth Circuit's certified questions about the application of California Labor Code provisions to employees who work a de minimis amount of time in California]

Addressing whether expert's use of a database to identify pill based on its appearance is "case-specific" hearsay under *People v. Sanchez.*

People v. Veamatahau, S249872
(review granted Sept. 12, 2018), (2018) 24 Cal.App.5th 68

A police sergeant pulled the defendant over while driving. The sergeant found a cellophane wrapper containing ten pills in the defendant's coin pocket, five personal checks in his back pocket, and cocaine base in the vehicle. At the subsequent criminal trial, the prosecution introduced expert testimony from a forensic laboratory criminalist that the tablets found "[c]ontained alprazolam," known by the generic name of Xanax. The expert explained that tablets are identified by their logos and no chemical testing is done unless requested. The expert also testified that he identified the contents of the tablets by a database search of the logos on the tablets, which was the generally accepted method of testing for the substance in the scientific community. The defendant was convicted of possession of alprazolam. The defendant appealed his conviction, arguing that the prosecution expert's testimony about the tablets constituted case-specific hearsay under *People v. Sanchez* (2016) 63 Cal.4th 665, 686 *(Sanchez)*, which was issued two days after his conviction. The Court of Appeal, (First Dist., Div. One), affirmed the conviction. The only case-specific fact relayed in the expert's testimony was the marking he saw on the pills, which was not hearsay because it was based on his personal observation. The information in the database was "clearly hearsay," but it was not based on the specific pills found; it was general information "about what pills containing certain chemicals look like." This type of background information "has always been admissible under state evidentiary law."

The California Supreme Court granted review to decide: "Did the prosecution's expert witness relate inadmissible case-specific hearsay to the jury by using a drug database to identify the chemical composition of the drug defendant possessed? Did substantial evidence support defendant's conviction for possession of a controlled substance (Health & Saf. Code, § 11375, subd. (b)(2))?"

See also *People v. Perez,* S245612 (review granted Feb. 28, 2018), (2018) 22 Cal.App.5th 201 [addressing retroactive application of *People v. Sanchez's* holding that "case-specific hearsay" is inadmissible]

cross-examinations, opening statements and closing arguments. You do not want to be the one viewed as wasting their time.

- Millennials can take in a lot of information at one time, but that doesn't mean they can store it all, so when making a critical point:
  - Repeat it. Then repeat it again.

6. KEEP IT REAL

- Be authentic and relatable.
- Be prepared, but don't look too rehearsed.
- Don't underestimate the value of voir dire. It is a great time to convey to jurors that you are not a slick corporate lawyer out to trick them.

7. BE DIFFERENT

Millennial jurors want to see a cast of characters, each one different from the others. Your trial team should be diverse, where possible. And women and minority attorneys should be given a meaningful role during trial, not simply be note-takers or runners.

CONCLUSION

It can no longer be business-as-usual in a courtroom. Millennial jurors have the potential to greatly influence outcomes. Understanding this demographic is a necessary safeguard against adverse verdicts and high damage awards.

@millennialjuror:
The judge says no texting, blogging, tweeting, etc. aboUt the trial! So....

The end.

ENDNOTES

1 The Reptile Theory stems from the Golden Rule to "do unto others as you would have them do unto you" which asks the jury to place themselves into the plaintiff's shoes. Plaintiffs' lawyers employ tactics throughout the course of the trial to tap into the jury's "reptilian brains," associated with their survival instinct, which drives them to protect not only themselves but their entire community as well.

Jayme C. Long

Jayme Long is a trial lawyer in the Complex Tort division of Dentons' Los Angeles office, which was named a "Litigation Powerhouse" in Product Liability Litigation by BTI Consulting Group's Litigation Outlook. She defends companies faced with complex litigation matters in a broad array of areas, including product liability and premises liability suits. Ms. Long represents companies in the petrochemical, construction, manufacturing, safety, medical, maritime and automotive industries in state and federal courts across the country.

Julia M. Beckley

Julia Beckley is Counsel in the Complex Tort division of Dentons' Dallas office. She has litigated through all stages of complex torts and products liability cases on both coasts, in state and federal courts. Ms. Beckley has served as trial counsel on behalf of local companies and as well as Fortune 500 corporations.

Hodson P.I.

Investigative Solutions

Justin D Hodson, CPI, CSMIE is an internationally renowned professional investigator based California. Hodson has proven himself over the years in several areas of investigations, saving his clients time and millions of dollars while providing the power of information. Hodson works with individuals, law firms, insurance companies, municipalities, and large corporations to discover information that will provide Hodson's clients with the upper hand in their cases.

Serving all of California

Toll Free: (855) HodsonPI

Office: (714) 646-4545

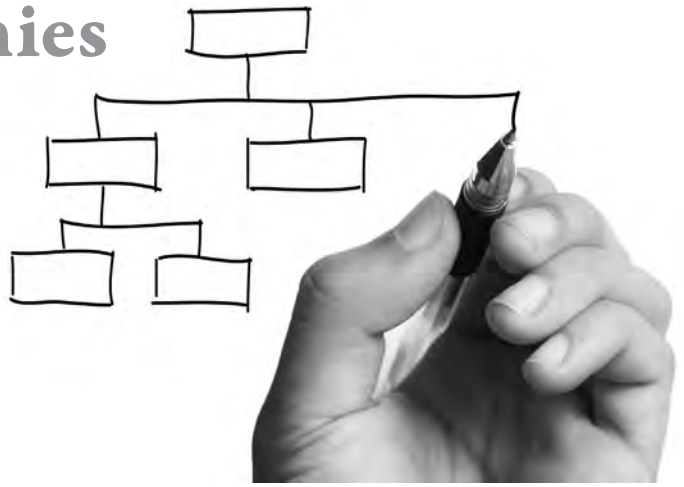
Info@HodsonPI.com

- **Social Media Investigation**
  - Comprehensive Searches
  - Accurate Results
  - Deep-Web Results
  - Trial Ready Evidence
  - Evidence Preservation
  - Obtained Legally and Ethically
- **Subrosa Surveillance**
  - High-Definition Video Evidence
  - Detailed & Accurate Reporting
  - Trial Tested Investigators
- **Witness Investigations**
  - Locate Witnesses
  - Witness Statements
  - Spanish-Speaking Investigators
- **Background Investigations**
  - Accurate Results
  - Detailed Reporting
  - Direct Source Reporting
  - Direct Courthouse Searches
- **Voir-Dire Investigations**
  - Immediate Results
  - Detailed & Accurate Reporting
  - Trial Tested Investigators

www.HodsonPI.com

CA PI 23796

B Is for Beware: Companies Should Heed Factor "B" of the New Dynamex "ABC" Test



Cynthia Flynn

The California Supreme Court's landmark decision in *Dynamex Operations West v. Superior Court*, 4 Cal. 5th 903 (2018) threw out the 30-year old criteria established in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations,* 48 Cal. 3d 341 (1989) used to determine if a worker is properly classified as an independent contractor, or if they must be an employee. The *Dynamex* "ABC" test simultaneously simplified the test *and* made it more restrictive for employers. Factor "A" requires that, to be a true independent contractor, the worker must be free from the hirer's "control and direction," which is not a great departure from similar factors under *Borello*. Factor "C" requires that the contractor ordinarily works in the trade for which the hirer is seeking her services, which again, is not a major change. Yet businesses must pay careful attention to *Dynamex* factor "B," which holds that to be an "independent contractor, a worker must perform work "that is outside the usual course of the hiring entity's business." *Id*. at 955-57. This spells potential trouble for certain app-based "gig economy" companies, whose participants in their primary business are independent contractors. But it also may affect much smaller companies who rely on temporary or part-time labor to provide goods and services for customers.

In order to appreciate the nature of the change in law, it is important to examine *Borello* and some of the key cases interpreting it. In *Borello*, which was decided almost thirty years ago, the California Supreme Court listed the factors that were to be evaluated and balanced to determine whether employees are properly classified as independent contractors: (1) whether the hirer can "control the manner and means" of accomplishing the work; (2) whether the worker is in a distinct occupation or business from the hirer; (3) whether the type of work involved is typically done without supervision; (4) what skills are required for the work; (5) who supplies the instrumentalities, tools, and locations of the work; (6) whether the work is temporary or permanent in duration; (7) whether the worker is paid by the hour or by the job; (8) whether the work is part of the regular business of the hirer; and (9) whether the hirer and worker believe that the worker is an independent contractor. *Borello,* 48 Cal. 3d at 350-51.

The most important, and the most heavily litigated, of the *Borello* factors, was the "control" factor. *Ayala v. Antelope Valley Newspapers*, 59 Cal. 4th 522, 533 (2014), proclaimed that "control over how a result is achieved lies at the heart of the common law test for employment." Yet that court clarified that "what matters under the common law is not how much control a hirer *exercises*, but how much control the hirer retains the *right* to exercise." *Id*. (emphasis in original) (citing, e.g., *Toyota Motor Sales U.S.A., Inc. v. Superior Cour*t, 220 Cal. App. 3d 864, 875 (1990) (a hirer is considered to "control" the work if the hirer has the ability to fire the worker if he or she disobeys the hirer's instructions).

In 2010, another California Supreme Court case addressed related – but not quite identical – questions regarding "joint employer" relationships. In *Martinez v. Combs*, 49 Cal. 4th 35, 50 (2010), seasonal agricultural workers alleged they were not paid minimum wage, and sued not only their direct employer, but also the merchants to whom the employer sold the strawberries the workers had picked. The question presented was whether the merchants could be liable for the alleged Labor Code violations as joint employers. *Martinez* discussed *Borello* at length, and ultimately determined that "to employ ... has three alternative definitions. It means: (a) to exercise control over the wages, hours, or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship." *Id*. at 64. Based on this definition, the *Martinez* Court found the merchants were not the strawberry pickers' employers. *Id*. at 78.

Enter *Lee v. Dynamex*. Defendant Dynamex provided same-day courier and delivery services, and employed drivers for this purpose. *Dynamex*, 4 Cal. 5th at 917. However, in 2004, Dynamex converted all of its employees to "independent contractors." *Id*. From that point forward, Dynamex's drivers had to provide their own vehicles and vehicle insurance, as well as to pay for their own gas, tolls, vehicle maintenance, and workers' compensation insurance. *Id*. Dynamex continued to find and make arrangements with customers, set the rates for delivery, and assign drivers to routes. *Id*. Although the drivers were able to choose their own work days and the sequence in which they delivered packages on their assigned routes, the drivers had to notify Dynamex of their work days, and the drivers were liable for any failed deliveries. *Id*. at 918.

continued on page 20

Dynamex – continued from page 19

Plaintiffs, representing a putative class of drivers, moved for class certification of their Labor Code claims on the theory that they were misclassified as independent contractors, and should have been classified as employees. The trial court certified the class of drivers and denied defendant's motion for decertification. *Dynamex* appealed the denial of decertification, and the case ultimately made its way to the California Supreme Court, which – purportedly – intended to resolve the question of whether the *Martinez* test applied to the misclassification issue as plaintiff argued, or whether defendant was correct that the multi-factor *Borello* test applied. *Id*. at 920-21, 941-42.

Ultimately, of course, the California Supreme Court chose neither, adopting a different standard from that of either *Borello* or *Martinez*, and upholding class certification.

The *Dynamex* Court began by clarifying that its ruling applied to independent contractors "*for purposes of California wage orders*, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees." *Id*. at 913-14 (emphasis added). The Wage Orders only apply to non-exempt employees – so the *Dynamex* decision does not apply to employees covered by exemptions – for example, doctors, lawyers, and teachers. In *Dynamex*, the IWC Wage Order that applied was number 9-2001 for the transportation industry. *Id*. at 914. That Wage Order – like many others – defines employment as "to suffer or permit to work." *Id*. at 916, 925-26. But what did that phrase mean in real-life situations?

Plaintiffs argued for the *Martinez* test, and in particular, its "suffer or permit to work" definition. Yet, as defendant Dynamex pointed out, if "suffer or permit to work" was taken literally, it would apply to every single work situation – including those that are clearly independent contractor relationships. *Id*. at 948-49. To use an example, it would mean that anytime a hirer knew about the work and allowed it to happen, the worker would be an employee – even if the worker was a plumber, with his own business, who was hired to fix a leak in a grocery store's bathroom.

The *Dynamex* Court did not apply the term literally, but found that "suffer or permit to work" is nonetheless relevant in distinguishing independent contractors from employees. *Id*. at 950. The Court also found useful *Martinez's* language that employees should include "all individual workers who can reasonably be viewed as '*working in the [hiring entity's] business*.'" *Id*. at 953 (quoting *Martinez*, 49 Cal. 4th at 69) (emphasis and brackets in original).) By contrast, an independent contractor – like a plumber hired for occasional repairs to facilities – "would have been realistically understood, instead, as *working only in his or her own independent business*." *Id*. (emphasis in original).

Although some of the language in *Martinez* was instructive, the Court did not adopt the *Martinez* standard in its entirety. Yet it was also unconvinced that *Borello* had correctly separated employees from contractors over the years. *Id*. at 953-55. The Court observed that *Borello's* multi-factor balancing test made it difficult for both hirers and workers to know when the relationship was one of employment or of independent contract. *Id*. at 954-55. Not only did *Borello* leave both parties "in the dark," the Court found it also enabled less well-intentioned employers to avoid complying with the wage and hour laws. *Id*.

Thus, choosing neither of the two options before it, the *Dynamex* Court reached outside California to adopt a test used in other jurisdictions, including Massachusetts, Delaware, and New Jersey - the "ABC" test. (*Dynamex*, 4 Cal. 5th at 956, n. 23 (citing Mass.G.L., ch. 149, § 148B; Del.Code Ann., tit. 19, §§ 3501(a)(7), 3503(c).); N.J. Stat. Ann. § 43:21-19(i)(6)(A-C)).). The ABC test begins with a critical presumption: *that all workers are employees unless proven otherwise*. And a hirer can only prove its workers are not employees if all three parts of the test are met. *Id*. at 955-56. Part "A" is a hirer's control, which derives from the "suffer or permit to work" definition. Control is determined "in fact," that is, as the company's practices actually work, not just what the written contract provides. *Id*. at 958.

Factor "B," however, asks whether the worker is working "in the hiring entity's business?" *Id*. at 959 (citing *Martinez*, 49 Cal. 4th at 69). Although this factor was relevant to joint employment in *Martinez*, and was one of many factors that could be weighed under *Borello* (and could theoretically be ignored in favor of other factors), *Dynamex* has now made this factor mandatory. As the Court explained,

> Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter by sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation....

Id. at 959-960.

Moreover, *Dynamex* adopted the most stringent form of the ABC test as it exists in other jurisdictions. The New Jersey standard, for example, allows a hirer to meet "B" if either (1) the work is outside the usual course of the business, ***or*** (2) that the work performed is outside the ***places*** of business of the hiring entity. *Id*. at 956, n. 23. The California Supreme Court, however, noted that this would allow employers to designate people who worked remotely as independent contractors, even if they were working in the employer's primary business. *Id*. Accordingly, *Dynamex* chose to adopt the more stringent version used in Massachusetts, in which the work must be outside the hirer's usual course of business in order to qualify as an independent contractor relationship. *Id*.

continued on page 21

Dynamex – continued from page 20

Consequently, "a hiring entity *must* establish that the worker performs work that is outside the usual course of its business in order to satisfy part B of the ABC test." *Id*. at 960 (emphasis added).

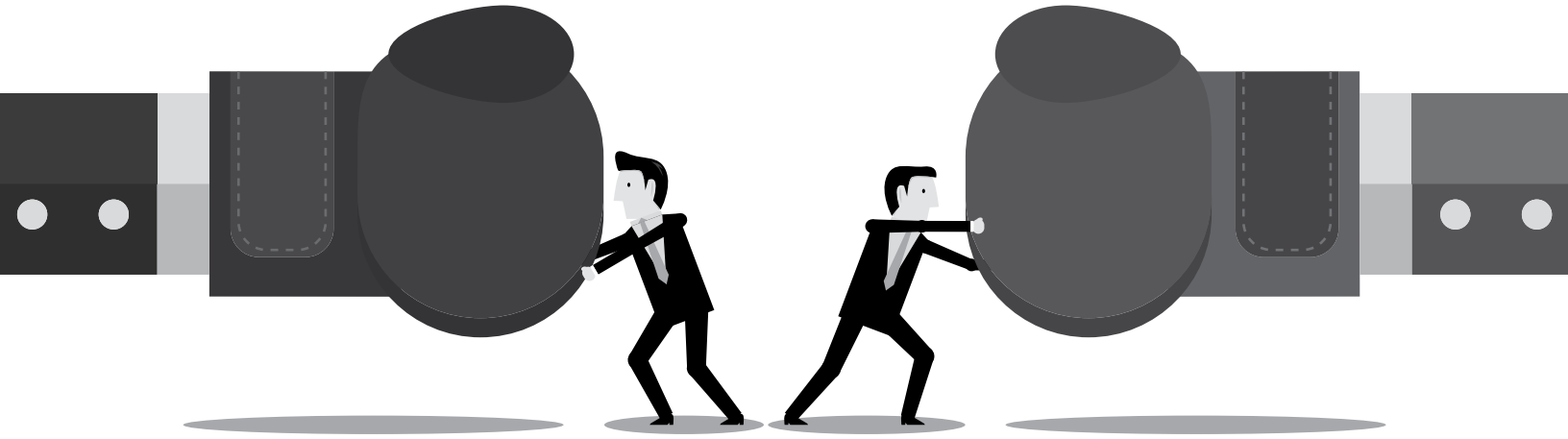
Factor "C" is related to B, in that the nature of the worker's business is once again critical. This factor requires the hirer to show that the worker is engaged in an independent trade or business. *Id*. at 960-63. In evaluating this factor, courts should look at whether the worker has taken "the usual steps to establish and promote" this business, including "through incorporation, licensure, [and] advertisements...." *Id*. at 962. Importantly, the worker cannot simply "volunteer" to be an independent contractor and waive employees' legal protections, due to the concern that such "volunteers" displace employees. *Id*. at 960.

It is unclear at this time what overall impact the new "ABC" test, and especially B, will have on companies who have relied on independent contractors. The potential implications for the "gig" economy are apparent. Yet, as of 2015, studies across several states had found that approximately 10-20% of workers are misclassified. Francois Carre, "(In)dependent Contractor Misclassification," Economic Policy Institute, June 8, 2015, available at: *www.epi.org/publication/independent-contractor-misclassification*. Misclassification was even more prevalent in industries like construction, housekeeping, and trucking. *Id*. At least one commentator has wondered if franchisees' employees could someday be considered employees of the franchisor under an expansive reading of *Dynamex*. *See* Tony Marks, "The California Supreme Court Deals a Blow to Independent Contractors." *Forbes*, May 29, 2018, available at: *www.forbes.com/sites/tonymarks/2018/05/29/the-california-supreme-court-deals-a-blow-to-independent-contractors*.

Meanwhile, post-*Dynamex* precedent has begun to evolve. *Curry v. Equilon Enterprises, LLC*, 23 Cal. App. 5th 289, 313 (2018), an opinion that was first issued in April 2018 but modified post-*Dynamex*, held that the Supreme Court in *Dynamex* did not intend the ABC test to apply to joint employer relationships. After all, Dynamex had expressly declined to adopt the Martinez standard to the independent contractor issue while appearing to leave *Martinez* in place for joint employer questions. *Id*. In *Lawson v. Grubhub,* 15-CV-05128-JSC, 2018 WL 2735400, at *2 (N.D. Cal. June 7, 2018), following a trial regarding violation of the Labor Code, which included a determination of independent contractor status, the federal District Court stayed an order for plaintiff (as losing party at trial) to pay defendant's Bill of Costs so that the Ninth Circuit could consider whether the *Dynamex* ABC test should apply. *Id*. The court viewed it as a "strong likelihood" that the Ninth Circuit would at least remand the case in light of *Dynamex*. *Id*.

Of course, if the Ninth Circuit in *Grubhub* does remand for application of the ABC test, that would mean that *Dynamex's* provisions are retroactive, that is, whether past, pre-*Dynamex* independent contractor relationships may be evaluated by the courts using the ABC test. Whether *Dynamex's* provisions are retroactive is an important open question, which no California appellate court (state or federal) has yet ruled on. If the courts do ultimately begin applying the ABC test retroactively, under *Dynamex*, many California workers will need to be reclassified as employees – and paid minimum wage, overtime, and provided with meal and rest breaks according to the California Labor Code. If the Economic Policy Institute's report, cited above, is correct that 10-20% of employees were misclassified before *Dynamex* changed the test to make it harder for hirers to classify their workers as independent contractors, it is possible that a significantly larger percentage of California workers are misclassified under the ABC test.

Regardless of whether *Dynamex* is held to apply retroactively, and regardless of how the ABC test is interpreted going forward, Dynamex is bound to have an impact on California businesses of all sizes and types. Therefore, it is advisable, if a business or lawyer advising a business is unsure about the countours of *Dynamex* and its interpretation going forward, to stay abreast of legal developments and to consult with an attorney specializing in employment law.



It Happened In Mediation – Believe It Or Not (part 2 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.

JAIL TIME FOR BOORISH MEDIATION BEHAVIOR: A young, rich, creator and purveyor of soft porn videos was sued in a one-judge town in the deep South by under-aged girls claiming that the "auteur" plied them with alcohol until they were drunk, and then filmed them exposing their breasts. Proving that wealth does not always come with wisdom, or even common sense, the defendant arrived at the mediation four hours late (he claimed his private jet was delayed waiting for his expensive big city attorney to finish a hearing across country), unshaven, wearing flip-flops, a backwards baseball cap, shorts, and a t-shirt. When the plaintiffs' attorneys were asked to come to the defense room to make an opening statement, they found the man-child playing video games on his "electronic devise" with his dirty bare feet on the table. The attorneys didn't

get four words into their statement when the defendant jumped up and started screaming "Don't expect to get a f***ing dime – not one f***ing dime!" When it was clear the attorneys were not going to be able to say their piece, they prepared to

continued on page 24

Mediation – continued from page 24

leave. At this point, the defendant "got in their face," and started yelling "We will bury you and your clients! I'm going to ruin you, your clients, and all of your ambulance chasing partners!" The plaintiffs filed a sanctions motion the next day, describing this behavior, and claiming "bad faith" and a violation of the court's order to mediate. From here, things got complicated, but the end result? The defendant found himself in jail on multiple contempt charges initially arising out of his "colorful negotiating tactics" at the mediation. (See any confidentiality issues here, anyone? Filed with the court, really?) The film buff eventually settled, which released him of his civil contempt charges, but he remained in jail for criminal contempt (he seemed to have forgotten to appear for his court-ordered incarceration by the federal judge's deadline), and was later transferred to federal prison for tax evasion. It was no surprise when the slow learner was sued again a few years later for groping an 18 year-old girl at another party he sponsored (with his video camera in tow).

MOM'S LOVE: Speaking of grown up adolescents with too much money, three wealthy septuagenarian brothers were in litigation against one another over the family business. One brother appeared at the mediation via Skype from overseas with his lawyer appearing by telephone from the east coast. A second brother appeared in person, bringing with him for "moral support" (i.e., "inside dirt") the ex-wife of the third brother. The third brother, learning that his ex-wife had now sided with the second brother, was apoplectic and didn't want to talk. The first thing out of the 76 year-old oldest brother's mouth once the mediation got under way was: "Mom always loved Charlie best." The mediator was pretty sure this would take more than the *four hours* the parties had reserved....

INANIMATE CONSULTANTS: The mediator walked into the plaintiff's mediation room only to find an extra participant, a life-sized Kermit the Frog doll. Throughout the mediation, the plaintiff unabashedly consulted the doll for advice. The mediator, more of a Miss Piggy fan if truth be told, nonetheless must have made a decent impression on the frog because Kermit ultimately recommended that the plaintiff accept a settlement

proposal. (Thankfully, her lawyer agreed with Kermit that the deal was a good one.) In an unrelated matter, the mediator found her plaintiff consulting a different inanimate object, this one a small jeweled box that the plaintiff held tightly to her body throughout the mediation. It was only after the settlement was reached that the mediator learned from the plaintiff's counsel that the box contained the ashes of his client's dog. (We know, that's very sad.)

BEWARE THE MEN'S ROOM: In contentious cases, mediators are always aware of where the parties are physically, and take great care to avoid situations and confrontations that might inflame the dispute rather than tame it. The parties in these highly emotional disputes are usually directed to separate caucus rooms, while the mediator does his or her best Henry Kissinger or Madeleine Albright

impersonation and shuttles back and forth between rooms. But the call of nature is universal, and mediators can't be everywhere at all times, as one mediator found out the hard way. Two bitter, aggressive, and angry former business partners were in the midst of a mediation when the morning's coffee began to show its effects ... simultaneously. In an unfortunate turn of bad timing, both disputants ended up in the men's room at the same time. Words were exchanged, a shove here, a push there, and a full brawl erupted, leading to a surprise visit by the EMTs and an expensive ambulance ride to the hospital. For some reason, the mediator was unsuccessful in resolving the case that day. On the bright side, the mediator got another opportunity to try to resolve the case in a second session a year later, this time with an "assault in a men's room" added as a cause of action.

WE LIKED TO SMOKE WEED: Two business partners were entrenched in litigation over the dissolution of what had been a profitable business venture. When the mediator asked the two parties to describe what they liked to do together back when the relationship was strong, they both chimed in "we liked to smoke weed." The mediator, thinking quickly and stepping out of the mythical "box," grabbed both parties, put them in his car, and drove to a remote Bhuddist temple where he left the former friends alone to contemplate their situation together. When the mediator returned two hours later, he found the two former partners sitting side by side on the ground, with their backs against the wall, shooting the breeze. They had settled the case an hour

continued on page 25

Mediation – continued from page 24

earlier. It was never clear whether the former stoners revisited their early years in any way other than by memory.

SHOOTING BLANKS: It's always exciting when, at mediation, one party pulls out the theretofore hidden metaphorical *smoking gun* and bandies it about. You never can tell how the other side will react, how quickly they will think on their feet, how cleverly they will recover. It makes for good drama. But sometimes, the gun shoots blanks. For instance, in one mediation, the defense claimed to have a video of the injured plaintiff not just without his crutches or neck brace, but actually doing calisthenics in a gymnasium. Making a Hollywood production out of it, the defense set up the projector and screen, invited the plaintiff and his attorneys into their room, and started the video. As the video played, the defense stood in the back corner, looking very self-assured, waiting for the fireworks. Sure enough, the video depicted a man looking exactly like the plaintiff, without crutches or braces, running through a strenuous exercise regimen, the literal picture of perfect health. The plaintiff and his attorneys watched the video intently, without saying a word. As the video concluded, the smug defense attorney declared with a little too much glee, "we rest our case." "Well done," responded the plaintiff. "And if my *twin brother* ever sues you for personal injuries, you will win for sure. Now, can we get back to talking about *my* case?"

PUTTING YOUR MONEY WHERE YOUR MOUTH IS: It's always the client's case, the client's decision, the client's settlement. Always. But sometimes, it seems to the outside observer that the client's decision is just wrong. Indeed, sometimes, the plaintiff's lawyer is looking at what he believes to be (to quote a reality star) a *huge* potential verdict, but has a client who prefers the certainty of a sub-optimal settlement. Well, one risk-taking plaintiff's attorney (is there any other kind?) just couldn't stand it. His client had what he was sure was a multiple seven-figure case, but the most the defense would put up in mediation was $400k. The plaintiff was tempted. More than that, the plaintiff *wanted* the deal. More precisely, the plaintiff wanted

the seven-figure result, but he *needed* the certainty of the six figure recovery. What's an enterprising attorney to do? In the private caucus room of the mediation, this foolishly courageous (or brilliantly confident) attorney cut a deal with his own client. If the client would allow the attorney to try the case, the attorney *guaranteed his client $400k.* In other words, if after trial the jury were to come back for the defense, or with a verdict under $400k, the attorney would make up the difference from his own personal funds. Guaranteed. It was an offer the plaintiff couldn't refuse. The mediation ended in impasse and the plaintiff's attorney got his trial. He also scored a $2 million jury verdict. When the verdict came in, the lawyer's sigh of relief could be heard all the way across town in the mediator's conference rooms.

BEYOND THE PALE: We can't tell whether this was real, or merely an obscene effort to bias the mediator in one's favor. Either way, it is very disconcerting. Following the first session of a mediation of an international real estate dispute between three partners, one of the partners was killed under suspicious circumstances. Despite the death, the dispute continued, and the two remaining partners returned to the same mediator for a second session. In private caucus, one of the parties told the mediator that he was *convinced,* absolutely convinced, that the other partner had murdered the third. He couldn't prove it, and didn't want the mediator to say anything (as *if:* "Hey, by the way, I heard you murdered your partner, is that true?"), but he wanted the mediator to know that he could be mediating with a psychopathic killer. "I'm not trying to bias you at all, I just wanted you to know who you might be dealing with." If true, is the mediator in danger? If false, has one party just unfairly attempted to impact the mediator's neutrality? Does a mediator have an obligation to recuse herself at this point? In case you were wondering, this is the type of stuff mediators love talk about over beers. And people think we are boring. Hah, take that, accountants.

We could go on and on with these wild and crazy stories. But then we'd have nothing to regale you with at our next cocktail party as we try desperately to prove we are so much wittier than the CPAs. (By the way, if you ever need some help falling asleep, just ask a mediator to discuss his or her thoughts on bracketing, joint sessions, or mediator's proposals.) Until next time, *up, up, and away....*

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.

Appellate Mediation – Doing Our Part to "Settle" the Last Frontier of ADR

Ignazio Ruvolo

To some, "appellate mediation" may sound like an oxymoron. After all, one side has already "won," and the losing party has filed an appeal hoping that legal arguments can be thrown at the seemingly insurmountable wall of appellate standard of review sufficient to breach it.

But, those of us who have worked to establish appellate mediation as a worthy sibling to trial case mediation know that the change in forum also brings with it changes in procedural dynamics that make mediation success likely at the appellate level.

For example, like trial litigation, the appellate process is expensive; sometimes the costs of preparing the record, the preparation of formal briefs, and attending oral argument exceed the costs incurred below, particularly if the judgment was obtained through a summary disposition.

The latest Court Statistics Report (2017) published by the California Judicial Council reveals what many laboring through the intermediate state appellate process already experience: the median time for appeals from notice of appeal to a filed opinion is 842 days with a range from 622 to more than 1200 days. Ironically, like the trial delays of the 1980s and 1990s that drove litigants and lawyers to erect alternative dispute resolution processes for lower court cases, so too appellate delay is contributing to the momentum behind appellate mediation's growth.

Compounding the impact of appellate delay is the unique reality that an appellant who appeals from an adverse monetary judgment will have to pay 10% annualized post-judgment interest if the judgment is affirmed. Thus, the time value of the judgment itself becomes relevant in comparing the post-judgment interest rate to the rate of investment return available during the pendency of the appeal, particularly when the process will not be completed for two to four years.

As significant to the success of appellate mediation as any of the above factors is the relatively high reversal rates for civil appeals generally. For example, the most recent Judicial Council annual report reveals reversal rates for civil appeals in 2013, 2014, and 2015 at 20% with another 10% of judgments modified. These reversal rates are consistent with my own experience at the First Appellate District over more than two decades.

Therefore, it is little wonder that far from being an oxymoron, appellate mediation does produce settlements. As Chair of the First District Mediation Program from 2000 until 2012 when budgetary constraints required the program be suspended, I wrote about these settlement results—results that have remained consistent over almost two decades. (Ruvolo, *Appellate Mediation, "Settling" the Last Frontier of ADR* (2005) 42 San Diego L.Rev. 177.) During the initial two-year pilot program, appeals mediated by our panel of First District volunteer mediators, achieved an overall settlement rate of 43.3%. While the settlement rates varied depending on the subject matters of the appeals, the nature of the judgment being appealed (trial verdicts, summary judgments, judgments following demurrers), and the timing of the mediation, the overall annual settlement rates were remarkably similar during much of the program's life with most years reporting settlement rates of 40-50%.

More recent data confirms that appellate mediation remains an important component of alternative dispute resolution generally. For example, the Third Appellate District in Sacramento began its program in 2006, and continues today. Like the First District, this program utilizes the volunteer services of about 80 attorneys who are specially trained in appellate mediation techniques. Currently, 70-75 pending appeals are admitted to the program annually. Of these approximately 50-60% are settled at or after the mediation session, and an additional 10-20% are resolved after counsel are contacted about the program, but before the mediation takes place.

Similar to the statistical conclusions reached in the First District, the Third discovered that, in descending order, the settlement rates were highest for appeals from court trial verdicts, followed by jury trial judgments, and then motions for summary judgment. The lowest rate was in appeals from judgments entered after demurrer.

Examining settlement rates by area of substantive law involved, both courts have found that probate and family law appeals, which almost always involve the practicality

continued on page 27

Appellate Mediation – continued from page 26

of "wasting assets," and which often arrive at the appellate level with the parties emotionally exhausted, enjoy the highest settlement rates.

Commercial/business appeals also are good candidates for appellate mediation: "A major explanation is that many of the litigants are in the same or related industries. For this simple reason, many will be economically coerced to do business with each other in the future. If not, some will nonetheless see the prospect of voluntary future mercantile relations as offsetting what is at risk in the litigation. This can be an asset for the ingenious mediator who will leverage future prospects of doing business to greatest advantage in presenting alternatives to continued, distracting, and expensive litigation. Of course, the ability to restructure business relationships is one unique to the mediation setting. Appeals are focused on the resolution of discrete legal issues, or the search for error committed by a trial court. These limited inquiries rarely allow for the positive realignment of business relationships, which can be achieved by agreement." (Ruvolo, *supra* 42 San Diego L. Rev. at p. 218.)

Experience also suggests that personal injury judgments are good appellate mediation candidates, particularly where the judgment being appealed was one in favor of the injured party.

Based on almost two decades of results, it is clear that appellate mediation often can serve the needs of the litigants in certain cases even more beneficially than an appellate adjudication. I urge those of you engaged in appellate work to join the burgeoning army of legal pioneers exploring and "settling" this last frontier of ADR.

ASCDC
Association of Southern California Defense Counsel

2520 Venture Oaks Way, Suite 150 • Sacramento, CA 95833
(800) 564-6791 • (916) 239-4082 • (916) 924-7323 – Fax
ascdc@camgmt.com • www.ascdc.org

Judicial Council of California
Attn: Invitations to Comment
455 Golden Gate Ave.
San Francisco, CA. 94102

EDITOR'S NOTE: Here's one of the letters submitted in August 2018 by ASCDC's CACI committee in response to the Judicial Council's Requests for Public Comment.

Re: Public Comment on Proposed Modification to the Use Note for CACI 435

Pursuant to the request for public comment on the potential modifications to CACI, this letter brief is provided to address a proposed addition to the "Directions For Use" under CACI 435. This public comment is provided by the Association of Southern California Defense Counsel ("ASCDC"), which is the nation's largest regional organization of lawyers who specialize in defending civil actions. ASCDC counts as members approximately 1,200 attorneys in Southern and Central California, and is actively involved in assisting courts on issues of interest to its members. It has appeared as amicus curiae in numerous cases before the California Supreme Court and Courts of Appeal. The members of the ASCDC have clients who are frequently sued in asbestos exposure cases where CACI 435 and 430 are used in many trials.

For the reasons set forth below, we respectfully submit that the proposed addition to the "Directions For Use" under CACI 435 is not accurate—which will foster uncertainty and protracted litigation in the trial and appellate courts—because it erroneously suggests that there is a conflict concerning whether CACI 430 or 435 should be applied in asbestos cases based on *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078 and *Petitpas v. Ford Motor Co.* (2017) 13 Cal. App.5th 261.

Respectfully, we believe that the following text that we have placed in red should be deleted:

> "This instruction is to be given in a case in which the plaintiff's claim is that he or she contracted an asbestos-related disease from exposure to the defendant's asbestos-containing product. This instruction is based on *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 [67 Cal.Rptr.2d 16, 941 P.2d 1203], which addresses only exposure to asbestos from "defendant's defective asbestos-containing products." Whether the same causation standards from *Rutherford* would apply to defendants who are alleged to have created exposure to

continued on page 29

> asbestos but are not manufacturers or suppliers of asbestos-containing products is not settled. (Compare *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298–299 [220 Cal.Rptr.3d 185] [not error to give both CACI Nos. 430 and 435 in case with both product liability and premises liability defendants] with *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084 [109 Cal.Rptr.3d 371] [*Rutherford* causation standards cited in case against contractor alleged to have created exposure to asbestos at construction site].) See the discussion in the Directions for Use to CACI No. 430, *Causation: Substantial Factor,* with regard to whether CACI No. 430 may also be given."

In *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 290-92, 298-302, Division Four of the Second Appellate District analyzed in detail the propriety of a trial court's decision to instruct the jury in an asbestos case under the causation standards set forth in CACI 430 and 435. The *Petitpas* Court directly rejected Plaintiffs' "argument that CACI No. 430 should not be given in an asbestos case that includes a defendant that is not a manufacturer or supplier." (*Id.* at 299.)

In *Whitmire v. Ingersoll-Rand Co.* (201) 184 Cal.App.4th 1078, 1081, Division Four of the Second Appellate District affirmed an order granting summary judgment "because plaintiffs failed to establish a triable issue of fact regarding whether Whitmire was exposed to asbestos for which Bechtel was responsible." That holding was supported by the appellate court's determination that the trial court properly "disregarded [plaintiff's] declaration on the basis that it contradicted [his] previous deposition testimony and interrogatory responses, and thus did not create a triable issue of fact." (*Id*. at 1085, 1089-90.)

Because *Whitmire* involved a pre-trial motion for summary judgment, it obviously did not involve the issue of whether a jury should be instructed under CACI 430 or 435. Moreover, in *Petitpas*, Division Four of the Second Appellate District did not in any way suggest or state that its decision was in conflict with its prior decision in *Whitmire*. Thus, it is respectfully submitted that the proposed modification to the "Directions For Use" in CACI 435, which states there is a conflict or unsettled issue based on Division Four's two decisions in *Whitmire* and *Petitpas* is incorrect. *Whitmire* should not be read or construed to create a conflict about an instructional issue that it did not involve. (*See e.g. Styne v. Stevens* (2001) 26 Cal.4th 42, 57 ["An opinion is not authority for a point not raised, considered, or resolved therein."]; *Elisa B. v. Superior Ct.* (2005) 37 Cal.4th 108, 118 ["Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered."].)

Thank you very much for your consideration of this public comment.

Very truly yours,
POLSINLLI, LLP

By: _____/s/_____
David K. Schultz

Attorneys for
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

cc: See attached Proof of Service

defense verdicts june – october

Sean D. Beatty
Beatty & Myers, LLP
McWilliams v. Toyota Motor Sales

Rob Bergsten
Hosp, Gilbert & Bergsten
McCamey v. Rodriguez
Schieschke v. OHI Resort Hotels

Raymond Blessey
Reback, McAndrews & Blessey LLP
Rafifar v. Providence St, Johns, et al.

Elaine Fresch & Jerry Popovich
Selman Breitman
Cox v. MGM Grand Hotel LLC

Clark R. Hudson
Neil, Dymott, Frank, McCabe & Hudson, APLC
Hill v. Chao
Madision Garr v. Dr. Aruna Garg

Elizabeth Kolar
Kolar & Associates
Nguyen v. House of Imports, Inc., et al.

Robert L. McKenna III
Kjar, McKenna & Stockalper, LLP
Baldwin v. Marquart
Tirado v. Miller

Robert J. O'Connor
Wade & Lowe
Bernal v. Lopez

Robert B Packer & Paul M. Corson
Packer, O'Leary & Corson
Volpe v. Jackson

Hugh S. Spackman
Clinkenbeard, Ramsey, Spackman & Clark
Ceder v. Hauser and Tarleton
Farley v. Arroyo Grande Community Hospital
Riddle v. Benson

Tami G. Vail & Matthew J. Liedle
Liedle, Larson, Lidl & Vail, LLP
*Wood v. San Diego Metropolitan Transit System**
*net judgment for the defense

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:

ascdc@camgmt.com

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 case:

1) ***Webster v. Claremont Yoga*** (2018) 26 Cal. App.5th 284. **Publication of Favorable Opinion Granted!**

Plaintiff claimed she was injured while adjusting her posture during a yoga clase, and sued the yoga studio and instructors for negligence. The defendant moved for summary judgment, relying on an expert witness declaration that the instructor did not breach the standard of care. Plaintiff's opposition did not include an opposing expert declaration. The trial court granted summary judgment and the plaintiff appealed, arguing an expert was not necessary to raise a triable issue of fact. The Court of Appeal affirmed, holding that plaintiff was required to submit an opposing expert witness declaration to rebut the defense expert's opinion. Ben Shatz from Manatt Phelps submitted the successful publication request.

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. ***Pierce v. Gray*** (G055432): This is a *Howell* case pending before the Court of Appeal (Fourth District, Division Three in Santa Ana). An insured plaintiff sought lien treatment from Dr. Gerald Alexander. After a 402 hearing, it was disclosed that plaintiff had Medicare and that Dr. Alexander accepts Medicare. The trial court ruled that the "billed" lien amount was thus inadmissible. Bob Olson and Ted Xanders from Greines Martin Stein & Richland submitted an amicus brief on the merits on behalf of ASCDC. Oral argument has not yet been scheduled.

2. ***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 under Labor Code section 2699. Laura Reathaford from Blank Rome submitted an amicus brief on the merits on behalf of ASCDC. The matter was argued before the Court of Appeal on October 5, 2018 and an opinion is expected within 90 days of that date.

3. ***Burch v. Certainteed Corporation*** (A151633)

   This is an asbestos case pending in the Court of Appeal addressing whether apportionment under Proposition 51 applies to intentional tort claims. The California Supreme Court recently granted review in a case involving a similar issue: *B.B. v. County of Los* Angeles, S250734. J. Alan Warfield and David Schultz from Polsinelli, Susan Beck from Thompson Colgate and Don Willenburg from Gordon Rees submitted an amicus brief on behalf of both ASCDC and the Association of Defense Counsel of Northern California and Nevada in the *Burch* case, which is now fully briefed. Oral argument has not yet been scheduled.

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:

Steve S. Fleischman
(Co-Chair of the Committee)
Horvitz & Levy • 818-995-0800 *SFleischman@HorvitzLevy.com*

Ted Xanders (Co-Chair of the Committee)
Greines, Martin, Stein & Richland LLP
310-859-7811 • *EXanders@GMSR.com*

Susan Knock Beck
Thompson & Colegate • 951-682-5550

Stephen Caine
Thompson Coe & O'Meara • 310-954-2352

Harry Chamberlain
Buchalter Nemer, PC • 213-891-5115

Michael Colton
The Colton Law Firm • 805-455-4546

Renee Diaz
Clark Hill LLP • 213-417-5103

Scott Dixler
Horvitz & Levy • 818-995-0800

Rachel Hobbs
Selman Breitman LLP • 310-689-7048

Richard Nakamura
Clark Hill • 213-891-9100

Bob Olson
Greines, Martin, Stein & Richland LLP 310-859-7811

David Pruett
Carroll, Kelly, Trotter, Franzen, McBride & Peabody
562-432-5855

Laura Reathaford
Blank Rome • 424-239-3400

David Schultz
Polsinelli LLP • 310-203-5325

Eric Schwettmann
Ballard Rosenberg Golper & Savitt
818-508-3740

Ben Shatz
Manatt, Phelps & Phillips • 310-312-4000

Josh Traver
Cole Pedroza • 626-431-2787

J. Alan Warfield
Polsinelli LLP • 310-203-5341

executive committee

Christopher E. Faenza
President

Peter S. Doody
President-Elect

Larry Ramsey
Vice President

Diana P. Lytel
Secretary-Treasurer

Clark R. Hudson
Immediate Past President

board of directors

Marta A. Alcumbrac

Alice Chen Smith

Michael A. Colton

Jean Daly

Julianne DeMarco

Thomas P. Feher

Natalia Greene

Colin Harrison

Benjamin J. Howard

Patrick J. Kearns

Michael LeBow

R. Bryan Martin

Lisa J. McMains

Gary T. Montgomery

David A. Napper

Lisa Perrochet

Ninos P. Saroukhanioff

Eric Schwettmann

Patrick Stockalper

Jeffrey A. Walker

the association of southern california defense counsel

2520 venture oaks way
suite 150
sacramento, ca 95833
800.564.6791
www.ascdc.org

With every accident, there's a fine line between what happened, and what people *think* happened.

Serving the Profession since 1964…let us help you see what happened…no cost initial consultation!

Some of our Clients:

- 7-Eleven Corporation
- 99¢ Only Stores
- A to Z Enterprises, Inc
- AAA Insurance
- Admiral Insurance Company
- AIG Insurance
- All American Asphalt
- Alleghany Insurance Holdings
- Allstate Insurance
- AMCO Insurance
- Arch Insurance Company
- Arrow Wood LLC
- Avis Rentals Corporation
- Beach Manufacturing
- C Construction Inc.
- Carl Warren Insurance
- Central Fence
- CH2M Hill
- City of Anaheim
- City of Carlsbad
- City of Cerritos
- City of Clovis
- City of Costa Mesa
- City of Fountain Valley
- City of Hesperia
- City of Inglewood
- City of Irvine
- City of Lake Forest
- City of Los Angeles
- City of Malibu
- City of Morro Bay
- City of Newport Beach
- City of Rancho Cucamonga
- City of Redlands
- City of Riverside
- City of Tustin
- Clarendon Insurance Group
- Cooley Construction
- Costco
- CZ Masters
- D.K. Environmental
- Dave's Transportation Services
- Eberle Design, Inc
- Emory Air Freight
- Fine Grade Materials
- Gallagher Bassett Svcs.
- Gifford Construction
- Hartford Insurance
- HNTB
- Illinois Union Insurance
- Insurance Company of the West
- Irish Construction
- Jack In The Box
- James River Insurance Company
- Jaxon Enterprises
- L.A. Unified School District
- Landmark American Insurance
- Liberty International Underwriters
- Los Angeles County
- Las Vegas Paving Corp.
- Lexington Insurance Co.
- Liberty Mutual
- Los Angeles D.W.P.
- Los Angeles M.T.A.
- Los Vientos Association
- Lucky Stores Corporation
- Madonna Construction
- Maryland Casualty Company
- MCM Construction
- Mel Smith Electric
- Mercury Insurance
- National Interstate Insurance
- Ntnl Union Fire Ins of Pittsburgh
- Nationwide Insurance Co.
- Navigator's Insurance
- Network Adjusters
- Norcal Waste Systems, Inc.
- Nordic Industries
- Northern Insurance
- Oxnard Pacific
- Pacific Bell
- PBS & J
- Penhall Co.
- Quality Refrigeration
- Rasic Construction
- Riverside County
- RoadOne West, Inc
- RSKCo Services, Inc.
- RSUI Indemnity Company
- San Bernardino County
- Shoring Engineers
- Skanska
- Specialty Risk Services (SRS)
- Spinello Construction
- Star Corporation
- State Farm Insurance
- State of Washington
- Statewide Safety & Signs, Inc.
- Steiny Company
- Structural Shotcrete Systems
- Structural Systems
- Sully Miller
- Superior Traffic Services
- T.& R. Construction
- T.I.G. Insurance
- The Tile Guys
- Top Hat Industries, Inc.
- Tri Vision Transportation
- U.S. Dept. of Justice
- U-Haul International Inc.
- United Parcel Service (UPS)
- United Rentals
- United Rentals Highway Technologies
- Universal Productions
- University of Southern California
- Victory Partnership
- W.A. Rasic Construction
- West Coast Arborists
- Wilshire Insurance Company
- Yasuda Insurance
- Zenith Insurance Co.
- Zurich Insurance

INFO@FieldAndTestEngineers.COM (800) 675-7667 **WWW.FieldAndTestEngineers.COM**

Web includes some of our Video Depositions!

Field & Test Engineers, Inc

18000 Studebaker Road, Suite 700 • Cerritos, California 90703

Also: 7272 Indian School Road, Suite 540 • Scottsdale, Arizona 85251

Traffic Engineering, Street & Highway Design, Work Zone Traffic Control, Pedestrian, Cycle & Major Highway/Rail Crossing & Heavy Equipment Accidents

the association of southern california defense counsel
verdict
2520 Venture Oaks Way • Suite 150 • sacramento, ca 95833

PRE-SORT
FIRST CLASS
U.S. POSTAGE
PAID
PERMIT #1660
Sacramento, CA