association of southern california defense counsel

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Volume 2 • 2019

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- Acting Competently with Social Media Evidence
- Compensable Time Before and After Work
- Case Study of Elder Abuse Act-Based Neglect and Physical Abuse Claims Against Health Care Providers

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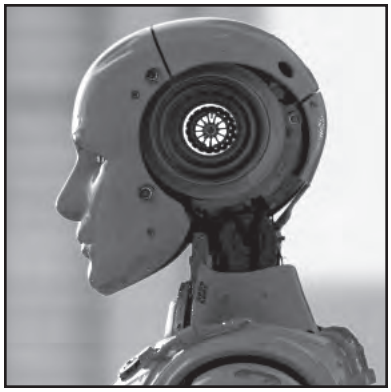

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president's message

Peter S. Doody
ASCDC 2019 President

The Importance of Your Summer Vacation

Summer is over, school has started, and fall is almost here. I hope everyone found time to break-away from their busy law practice and spend valuable vacation time with your families. We attend seminars where the importance of work-life balance is preached. But it is just another seminar topic if we don't put aside the work, and practice of the art of vacation. A 2017 report from the National Task Force on Lawyer Well-Being urged lawyers and law firms to adopt clear policies promoting vacations. This report concluded skipping vacations should not be an attorney badge of honor, and can be a set-up for anxiety, burn-out and substance abuse. Vacations increase attorney professional satisfaction, decrease stress and renew energy for one's practice.

This summer I took this vacation advice to heart. The beginning of the summer marked my 60th birthday and I fulfilled a life-long dream of a family vacation to Hawaii and surfing on the North Shore with my 21-year-old son William. In mid-summer, my family and I visited one of our favorite places which is Sun Valley, Idaho, home of America's great outdoorsman and author, Ernest Hemingway. My brave wife and daughter went parasailing with tandem instructors off 9,000-foot Bald Mountain. As a tort defense attorney, I just could not get past the waiver, so I remained on firm ground. While we were in Sun Valley, we met up with former ASCDC president Clark Hudson and his wonderful wife Debbie who hosted the Federation of Defense and Corporate Counsel meeting where, of course, one of the panel topics was the importance of work-life balance. Upon returning from Sun Valley, and after too little training, I closed out the summer by participating in a paddle-board event in my hometown of Solana Beach. I'm originally from the East Coast; when I tell my friends who still live back east that I live in Solana Beach they think I'm on a perennial vacation.

One of the highlights of my summer was the privilege of being the master of ceremonies for the ASCDC Hall of Fame Awards Dinner which took place at the Biltmore Hotel. The venue was the historical Crystal Ballroom. In the 1930's and '40's Hollywood hosted the Academy awards and honored its stars with Oscars in this very same room. We, in turn, honored our deserving legal stars. Gretchen Nelson received the Civil Advocate Award and was well supported by a posse of wranglers – all wearing cowboy hats- from the Cowboy Lawyers Association. Our Judge of the Year Award deservingly went to the Honorable Stephen Moloney, a former ASCDC president, who gave a moving and heart-felt speech. Paul Fine who was our ASCDC president in 2004 received our Hall of Fame Award for his incredible trial expertise and unending support of this organization throughout the years. Paul's law partner Michael Schonbuch, another former ASCDC president, delivered an eloquent introduction.

Moving forward into the fall, we are looking forward to our bi-annual Professional Liability Seminar in scenic Santa Barbara at the newly minted Santa Barbara Beachfront Resort (formerly known as Fess Parker's). The hotel is the same, but they changed the name because millennials don't recognize the name of Fess Parker. Perhaps if they knew he played both Daniel Boone and Davey Crockett and was responsible for the racoon-skin cap craze they would be impressed. This is always one of my favorite seminars.

Lastly, please be sure to mark on your calendars the dates of our ASCDC Annual Seminar, January 30-31, 2020. I am happy to report we are returning to the JW Marriott at LA Live. Larry Ramsey is planning a block-buster program.

Pete Doody
ASCDC President

Issues Near and Next

Michael D. Belote
Legislative Advocate
California Defense Counsel

As this column is written, there are six days left in the 2019 legislative year, the first year of the 2019-2020 two-year session. Major issues are hanging in the balance, especially proposed changes to the California Consumer Privacy Act (CCPA), and legislative attempts to codify and clarify the reach of the *Dynamex* decision on independent contractor classification. Both are object lessons on the political dynamics (pun intended) of electric-blue California.

With respect to privacy, 2019 has seen furious attempts by business to amend the package of two bills enacted last year creating the CCPA. Those bills were intentionally delayed until January 1, 2020 in order to refine the provisions of this incredibly complex suite of privacy protections. A slew of bills were introduced this year, some technical and others very substantive, and the political calculus was basically business seeking to make the CCPA more workable and clear, and privacy advocates adamant that California not walk back from CCPA consumer protections.

The most important privacy bill this year is AB 25 (Chau), which clarifies that employees are not "consumers" for purposes of CCPA. Obviously the law cannot permit employees to demand deletion of their personnel files, and AB 25 would prevent this unintended interpretation. At the same time, the labor community is concerned that surveillance of employees, such as keyboard monitoring and geolocation monitoring is a privacy problem which should be addressed. The compromise was to include in AB 25 a one-year sunset, which means that the employee clarification will expire at the end of 2020 unless extended, forcing all stakeholders back to the table next year.

Lobbying on the *Dynamex* issue has been equally pitched this year. AB 5 (Gonzalez) would both codify *Dynamex* and provide exemptions from the decision; those subject to exemptions would revert to the law under the Borello case. As the legislative year winds to a close, AB 5 is in a hugely fluid state, with various very targeted exemptions being added, and work being done on a more catch-all "business to business" exemption. At this point the bill does not appear to address application of *Dynamex* to the "gig economy," despite tremendous efforts by companies such as Uber and Lyft. Governor Newsom (and interestingly, a number of Democratic candidates for President of the United States) has endorsed AB 5, raising the bill literally to a referendum on the changing nature of work towards gig "hustles." (Editor's Note: Subsequent to the submission of this column, AB 5 was signed by Governor Newsom on September 18, 2019, effective on January 1, 2020. Issues relating to Uber and Lyft and the gig economy were not resolved. The Governor and many legislators have acknowledged that much more work remains on *Dynamex*, for the 2020 legislative year and beyond.)

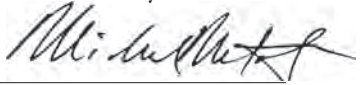
Of course, CDC members practicing in the employment arena must evaluate *Dynamex* and AB 5 for their clients. On the other hand, privacy affects members both as counsel for their clients and as business entities. Some member firms will meet the CCPA thresholds to be covered by the bill, and must be preparing to implement CCPA provisions in January. Contrary to rumors, the CCPA will not be delayed past January by the legislature, and those not in compliance can pay a heavy price.

Even as these mega-issues are pending in 2019, there are at least two high-profile issues affecting CDC members looming for next year. The first are proposed changes to the regulation of the practice of law itself. The State Bar is evaluating a series of recommendations which would permit expanded practice by non-lawyers, liberalize fee-sharing between lawyers and non-lawyers, and allow non-lawyer ownership of law firms.

CDC will be commenting on the recommendations prior to the September 23 deadline established by the Bar. Implementation of virtually all of the recommendations would require statutory changes by the legislature, and this promises to be an exceedingly controversial issue. Please watch for communications from ASCDC on this critical issue.

The second major issue looming relates to sales tax on services. Particularly when (not if) the state enters the next recessionary period, the issue of taxes will come into sharp relief, since California remains dangerously reliant on income taxes paid by the wealthy, and the sales tax base continues to shrink. Governor Newsom has expressed general support for the concept of extending the sales tax to services, but on this issue as with many others, the "devil is in the details." We have written about this issue many times in the past, but it is quite possible that actual legislative proposals could emerge for 2020.

Following commencement of the legislative fall recess on September 13, Governor Newsom will receive many hundreds of bills requiring a signature or veto. Watch this space for a rundown of key bills enacted this year.



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Crossing the Intersection of Artificial Intelligence and Risk Management

Matthew K. Corbin

Today more and more law firms are using artificial intelligence-based technologies ("AI") to improve the efficiency and quality of client services and grow revenue. The most widely-recognized use of AI remains electronic discovery in litigation, where technology assisted review categorizes massive quantities of documents as responsive or privileged using techniques that are better, faster, and cheaper than purely human review. Perhaps the most rapidly growing area is contract analytics, which employs the same techniques used in electronic discovery to handle due diligence in connection with mergers and acquisitions and major corporate transactions. In the realm of analytics, AI also predicts the outcome of litigation using statistics and data about prior cases. Instead of roaming the office to obtain opinions from colleagues about a certain judge or lawyer, lawyers can use AI to obtain the summary judgment grant rate for every federal district judge, develop motion strategies, and determine how parties and lawyers behave in litigation. For more routine regulatory or compliance questions, expertise automation companies enable lawyers to build self-help, "lawyer in a box" software that dispenses immediate answers to business clients. And for even basic legal research, AI delivers not only improved search results, but also the ability to inform a court or adversary which relevant cases a litigant fails to cite in a brief.

Despite steady progress in the legal industry, AI technologies are still only scratching the surface to help lawyers solve problems for clients. Rest assured, though, that AI will not replace lawyers. AI does not generalize very well. Rather, AI is a collection of specifically defined and independently

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developed and trained programs that enhance, accelerate, and simplify what lawyers can achieve for their clients in discrete areas. AI also cannot match human judgment, empathy, curiosity, self-awareness, creativity, or adaptability. These distinctive qualities – which culminate in making real connections with clients – remain beyond the capacity of AI. At the end of the day, AI primarily affects mundane, repetitive, and repetitious legal work, freeing lawyers to perform higher level work for clients.

As with most new technologies, AI's advancements raise difficult questions for law firms. What level of AI competency must lawyers possess? Is the data used to train AI trustworthy? How do lawyers evaluate and assure the quality of AI's work product? What level of supervision is necessary? Will AI vendors adequately safeguard confidential client information? Must lawyers disclose to clients the use of AI? How will liability be determined when (not if) AI makes a mistake? This Article addresses a few key professional liability and responsibility challenges that surround the use of AI and offers some related risk management considerations for law firms.

Here's a rundown of some AI challenges for law firms:

A. CORE COMPETENCY

Lawyers need not become AI experts. The duty of competence obligates lawyers to acquire a baseline understanding about the risks and benefits of the AI technology that they use in representing clients, or to surround themselves with people who understand AI's capabilities and limitations, how machine-learning and algorithms work, and what questions to ask when evaluating vendors and their software. Model Rules of Prof'l Conduct R. 1.1 cmt. 8 (2019) [hereinafter Model Rules].

Some forward-thinking law firms appoint a chief technology officer, chief innovation officer, or head of knowledge management to track emerging technology, set strategy, and serve as in-house subject matter experts on AI. Other firms prefer to appoint several members of the firm to a technology or innovation committee. Depending on the circumstances, a firm may look outside its walls for the desired expertise. This could involve the hiring of data analysts, scientists, or statisticians who are proficient in the relevant AI technology, appreciate concepts like statistical regression, histograms, and distribution curves, and possess the skills to analyze and present data to lawyers. Regardless of the path, law firms jumping into AI cannot afford to mishandle the threshold competency issue.

> **There is no one singlar definition of AI. AI is an umbrella term. At its essence, AI is about technology, software, and systems acting a bit more like people and demonstrating human intelligence.**

B. RELIABLE DATA

One of AI's biggest hurdles is access to solid data infrastructures. Training AI to become smarter over time, solve problems, and answer various questions calls for large amounts of reliable data. Otherwise, the classic "garbage in, garbage out" principle applies. Small or limited data sets can trigger under-informed algorithms and incorrect results. The implicit biases of the programming teams who write algorithms, as well as the biases contained in the data sets that coders use to train algorithms, may also lead to improper decision-making.

There is no single, simple answer. The logical starting point for law firms is to ask the right questions of AI vendors (or hire a consultant to assist in the process). Where did the data come from? How did the provider train the system or software? What sampling, cross-checking, or other process did the provider perform to verify the precision and accuracy of the results? The end goal should be to unearth any data reliability issues and reach a level of prudence with the chosen AI platform. For its part, the AI industry is focused on forming diverse programming teams and developing algorithms to police other algorithms and limit bias.

C. DEFENSIBLE DECISIONS

Another significant obstacle for AI is transparency, as the inner workings of AI systems are often inaccessible. AI's difficulty in communicating the factors underlying a decision becomes particularly pronounced for the legal profession. Indeed, advancing cogent reasons to support a desired outcome is a lawyer's bread and butter. It is therefore reasonable for clients, courts, and adversaries to demand an explanation as to why or how an AI tool reached a specific conclusion. If not, then the practice of law becomes governed by the proverbial black box.

Compounding matters, AI is not 100% accurate (even though there is a tendency to assume that AI is infallible or should at least be held to a higher standard because it is software). AI makes measurable and predictable mistakes, rather than randomly different mistakes like people do. AI enjoys a better statistical error rate than its human counterparts, in part, because AI does not get tired. Nevertheless, quality assurance is significant. While lawyers make judgments, decisions, and recommendations with varying degrees of confidence each day, they must still have confidence in AI. In short, lawyers must be able convey to clients, courts, and adversaries why a certain level of precision is satisfactory.

As one might expect, there is no silver bullet for explaining the decisions produced by AI. At a minimum, lawyers must appreciate the analytics, variables, parameters, and other input programmed in the AI tool, and document or record this information framework. What were the rules that the AI software used in the decision-making process? Choosing the right AI vendor or AI consultant to help interpret the AI product's results will go a long way in this regard. Expect reputable vendors to explain quality assurance, testing, regression testing, etc. to satisfy lawyers that the software is coming to the right results. There is also a push to develop "explainable AI" that can produce clear models about how AI tools generate

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answers. Newer products are slowly moving toward the ability to audit AI's decision-making processes.

In addition, lawyers will need to make their key constituents comfortable with AI's inherent uncertainty. Fortunately, much of the AI software carries the ability to generate error rate data and measure the degree of certainty, resulting in lawyers possessing more knowledge about AI's accuracy than human accuracy. Still, lawyers should be prepared to answer hard questions. What kind of quality assurance is involved? How do you know the AI tool is coming to the right answers? What level of confidence is good enough for AI?

D. MEANINGFUL SUPERVISION

AI technologies are in effect computerized nonlawyers which lawyers must meaningfully supervise. Model Rules R. 5.3. Satisfying this ethical obligation begins with exercising reasonable care in selecting AI vendors. This requires a thorough investigation and review of the vendor's reputation – and a prudent law firm should document the process along the way. Firms not in a position to conduct the requisite due diligence should consult with an AI technology expert who can offer related recommendations. To ensure that the AI vendor is reputable, law firms should scrutinize the vendor's qualifications, experience, and financial stability. In appropriate circumstances, it may be wise to check references and interview members of the company's principal team.

At the risk of sounding like a broken record, baseline competency in the specific AI tool is imperative for lawyers to meet their supervisory obligation. Lawyers must be able to spot mistakes and exercise independent professional judgment. When first working with an AI tool, lawyers should check the tool's performance with a small sample test and verify that human output matches AI output. Even after an AI tool establishes a successful track record, periodic human review and oversight of AI-generated outputs should continue to ensure that the results are as accurate as possible. In sum, lawyers cannot abdicate their supervisory responsibilities by blindly trusting or relying on AI's conclusions.

E. MAINTAINING CONFIDENTIALITY

Most AI technologies require access to a law firm's systems and produce significant amounts of new data, thereby triggering lawyers' ethical obligation to preserve and protect the confidentiality and security of client information. Model Rules R. 1.6.

AI vendors should be prepared to address who will have access to client confidential information and the security measures they follow to safeguard such information, as well as who has access and ownership rights to AI-generated data. Law firms should insist on an AI vendor's legally enforceable commitment to protect and secure confidential information as part of any service agreement. Other key provisions include permitting only the vendor's necessary employees to access the law firm's IT systems, prohibiting a vendor's access to client information for any purpose other than performing the agreed-upon services, directing the vendor to obtain authorization prior to disclosing or sharing client information to third parties, confirming the location of any servers hosting client information, granting the law firm access to any hosted client information if the vendor ceases operations or suspends service, obligating the vendor to notify the firm if a third party subpoenas or requests client information, and requiring the vendor's adherence to all applicable privacy and data security laws, regulations, and industry standards. Some vendors may want to retain AI-generated data after the agreement is concluded to further train AI algorithms, so the agreement should also cover the ownership or user rights of such output. The agreement, however, should neither state nor imply that an AI vendor owns or acquires a proprietary interest in a client's information.

F. CLIENT COMMUNICATION

Model Rule 1.4 requires lawyers to communicate sufficient information for clients to make informed decisions about representations. Must lawyers therefore disclose to clients the use of AI? The closest parallel is the use of cloud computing technology, where the consensus among ethics opinions is that lawyers are not generally obligated to advise clients about their cloud technology practices unless the information in play is highly sensitive or the client expressly requires disclosure. Alaska Eth. Op. 2014-3, 2014 WL 3362072, at *3 n.7 (Alaska Bar Ass'n, Ethics Comm. 2014); Cal. Eth. Op. 2010-179, 2010 WL 5579444, at *5 (Cal. State Bar, Comm. on Prof'l Responsibility 2010); Ky. Eth. Op. E-437, at 7 (Ky. Bar Ass'n, Ethics Comm. 2014); Mass. Eth. Op. 12-03, at 2 (Mass. Bar Ass'n 2012); N.H. Adv. Op. 2012-13/4, at 2 (N.H. State Bar Ethics Comm. 2013); Ohio Adv. Op. 2013-03, at 6 (Ohio State Bar Ass'n, Professionalism Comm. 2013); Pa. Eth. Op. 2011-200, 2011 WL 12863573, at *5 (Pa. Bar Ass'n, Comm. on Legal Ethics & Prof'l Responsibility 2011); Vt. Eth. Op. 2010-6, at 7 (Vt. Bar Ass'n, Prof'l Responsibility Comm. 2010); Wis. Eth. Op. EF-15-01, at 1 (Wis. State Bar 2015).

By the same token, a lawyer's use of AI technology should not generally trigger a duty to communicate unless the AI requires access to the client's highly sensitive information or the client expressly requires disclosure. It is reasonable to rely on the client's implied authorization so long as the client's information remains confidential and the AI vendor uses appropriate safeguards.

Additionally, the ethics rules would seem to compel disclosure if the lawyer's use of AI software impacts a significant decision in the client's representation. For example, a litigator may use an e-discovery tool to make a statistically defensible decision not to review a large fraction of documents extracted from a client's computer systems or produced by an adversary. In this scenario, the lawyer should discuss with the client her decision to rely on a statistical determination to forgo a page-by-page human review of every document. While perhaps not ethically required, it is probably pragmatic for a lawyer to disclose the use of an AI tool to a client when she is working with an AI tool for the first time, or where the AI tool is either experimental or not widely-used.

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Beyond these scenarios, lawyers must judge whether the specific circumstances warrant client consultation about the use of AI. The client's needs and expectations, the scope of the representation, and the sensitivity of the information involved are all relevant to this analysis.

G. RISK ALLOCATION

When an AI technology makes a mistake and harms a client, it is conceivable that the developer of the AI technology, the consultant who recommended the AI technology, and the person who trained the AI technology will all be named as defendants should the client sue. But it is almost a certainty that the client will hold the lawyer accountable for damages caused by a lawyer's reliance on an AI product.

Accordingly, law firms should scrutinize the AI vendor's service agreement up front. These agreements frequently contain liability and indemnification provisions that are tilted in the vendor's favor. Some limit the vendor's liability to the amount paid by the law firm for the software and exclude all consequential and punitive damages, while others refuse to indemnify the firm if the AI technology errs. At bottom, these agreements should protect law firms if the AI vendor fails to honor its confidentiality and security obligations. Firms should also confirm that the AI vendor carries sufficient liability insurance to cover an AI vendor's negligence or the intentional acts of a company's rogue employees. Awareness of these critical provisions ahead of time is good risk management.

Many challenging questions remain because AI is still an evolving, emerging technology. Will the applicable standard of care – at least in certain practice areas – ultimately require lawyers to use AI? Will lawyers' ethical duties one day compel them to alert clients to the option of using AI products that will save substantial fees and arrive at quicker or more accurate results? It is difficult to predict if or when either time could arrive. The current leading candidates are technology-assisted review tools for electronic discovery, but even those tools are used in less than one-fourth of eligible cases despite enjoying over a decade of longevity and featuring rigorously-tested techniques. At the very least, an affirmative answer to either question will require an increased acceptance of AI by courts and commentators across the legal industry, a proven track record of statistically defensible results, and robust client demand for AI tools as an efficiency or cost-cutting measure. In the meantime, law firms entering the AI fray should keep in mind the related risk management concerns and implement proper policies, procedures, and workflows governing the appropriate use of AI.

Matthew K. Corbin

Matthew K. Corbin is a Senior Vice President with Aon 's Professional Services Group. As a member of Aon 's loss prevention team, Matt consults with Aon's law firm clients on a wide range of professional responsibility and liability issues.

Acting Competently with Social Media Evidence

Joseph Jones

A recently released study found that social media users have an average of 7.1 social media accounts and about 80% of people have at least one account. Over the last ten years, the use of social media has grown from a quick way to connect with family and friends, to a multi-platform personal journal. This dramatic intensification of social media use has brought a new aspect of discovery that is still in the developing stages! In general, anything found online with relevance to your case is evidence, and needs to be treated as such. Long gone are the days that a quick Facebook search is sufficient. No longer can a photo be printed from a subject's public Facebook page and brought in before the judge. Social Media Investigators today should take a deep dive into a subject's entire internet footprint, with real time forensic preservation.

Everyone is familiar with rule 1.1(c) of the California Rules of Professional Conduct, which requires attorneys to act competently in all areas that they practice. Understanding how to gather and use social media and online evidence for your case is no exception. After finding relevant content, the most important principles are: authentication, forensic preservation, and laying the foundation. This article aims to provide a reasonably in-depth overview of the important factors at play in the world of social media evidence.

Finding Relevant Content

People search social media for different reasons. They might want to find information about the opposing party – is the plaintiff who claims to be permanently disabled going on ski trips? They might want information about witnesses – is a client's key witness subject to impeachment because of some unseemly behavior? They might want information about jurors – do any of them have a law enforcement background or family/friend relationships that they didn't disclose during voir dire?

In the early days of our involvement in Social Media Investigations (SMI), if someone said they wanted a SMI, what they really meant was that they wanted us to do a Facebook search. And perhaps for a while that was sufficient for the intended purpose. But in today's landscape, focusing on just Facebook, or even just the top three (Facebook, Instagram and Twitter) can leave a significant amount of information on the table.

With new platforms popping up constantly, with platforms constantly changing, and with users habits constantly evolving, the types and ways of searching that are done today may not work tomorrow. Additionally, some platforms (such as Snapchat) work only on mobile devices, without a computer interface, which creates a unique set of challenges for locating content.

Besides social media platforms, where does one start when looking for information online? Most would answer that a basic Google search for a person's name is the quickest way. The problem is that Google constantly wants to flex its nerd muscles, and provide as many results as possible; often burying the golden nuggets deep down where they'll never be seen. To dive deeper into the web and get past the irrelevant information that Google gives you during a basic search, try using Boolean search logic. In a Boolean search, the user tells Google more specifically what to look for, by using operators and modifiers in the search terms. This greatly reduces search results, and increases the relevance of the results returned.

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In a recent assignment, Bosco was retained by a client to look for information to help assist them in completing a multimillion-dollar RFP, where they really wanted to know their competition's profit margins. Their college interns had spent days scouring the internet with no real success, but after a few hours of utilizing Boolean search logic, we were able to locate documents online that contained what the client needed, and they found that their bid was too low.

Authentication

To authenticate a social media account, it is recommended to start by finding the account using a method that strongly ties it to the subject. Many names are so common that a link to the name alone will not ensure that an account pertains to the person who is the subject of the search. The most preferable methods are linking it to a known phone number, e-mail address, and/or user handle.

From there, look for at least 3-5 points of additional information which the courts have termed as "specific indicia" contained within the account. This helps establish that the person portrayed is in fact the person in control of the account. Specific indicia refers to pieces of information posted by the subject (or by their friends/family) to their account, that only they would know. Photos, as well as references to employers, birthdays, high school reunions, events attended, church groups, etc. are all great examples. This stage of the investigation should be conducted with the idea that the person being investigated and eventually impeached with information found on social media may likely claim "that's not me," which has proven to be an effective method of neutralizing social media content that hasn't been properly authenticated and preserved.

Recently Bosco was retained in a case where a defendant was accused of making numerous racial slurs and incendiary comments online, with the supporting evidence being several printouts from what appeared to be the defendant's Facebook page, showing his name and photo alongside the comments. The evidence appeared to be authentic and would have passed several of the aforementioned authentication tests.

Deeper examination found that the posts in question actually came from a clone account set up by a political enemy. Just like the popular internet meme reads, "You can't always believe what you read on the internet"- Abraham Lincoln.

Forensic Preservation

Without question, the most common issue we see and hear about with social media evidence is that evidence is being excluded because it has not been properly preserved. Screenshots are a major issue, and the case law excluding screenshots is robust and growing daily.

Once an account has been authenticated and the content is found to be of interest to the case, it needs to be forensically preserved. It is important to understand that social media content is very fluid, meaning that what's there today may not be there tomorrow, or that if it is, it may be significantly changed. If you find something of interest, preserve it immediately. Forensic preservation entails two steps: preserving the content as it appeared on the date found (i.e. the image or post), and then *preserving the associated metadata with that content*. Metadata is computer code that sits behind and makes up the post. This step requires the use of specialized software, of which there are several options.

From there, take the forensically preserved item and review the metadata to confirm that the posts actually came from the person indicated, at the time/date in question. After the metadata has been reviewed and confirmed, a "hash" for the content needs to be created, which is essentially a digital fingerprint that can be traced to make sure that the evidence wasn't tampered with and that it can be validated. This hashing process is also done by specialized software (typically the same one that is used for forensic preservation).

A recent amendment to Federal Rule 902(14) indicates that evidence that is presented with the appropriate hash values can be considered self-authenticating. The amendment states that the hash value "allows self-authentication by a certification of a qualified person that checked the hash value of the proffered item and that it was identical to the original."

While not every case goes to trial and not every judge or opposing council is aware of these issues, it is a best practice to always forensically preserve content right away, so that when it comes time for trial, you don't have a problem getting the evidence in. Bosco regularly gets calls on the eve of trial from firms that are in full blown panic mode

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because they just realized their "smoking gun" social media/online evidence wasn't properly preserved. While we're happy to help in such situations, it's always easier to have it done right the first time.

Foundation

If the evidence is going to be used at trial, the foundation will have to be properly laid. This is a major reason why forensic preservation is so important; because if the content has been forensically preserved, most of the information needed for laying the foundation is easily accessible.

The content contained in the metadata that will need to be used includes: the web address (URL), the date/time posted, the account user ID, and exactly what the content looked like at the time of capture. Other information needed will be who captured the content, when they captured it, and some assurances that the content wasn't altered (hash value). Keep in mind that the person capturing the content needs to be eligible to testify in court; therefore, attorneys need to be careful about conducting their own research or having their staff do it.

Recently Bosco assisted in defending a $30,000,000 personal injury case where we conducted a SMI and found significant online content that greatly changed the landscape of the case, in the favor of the defense. In pre-trial motions, our evidence was almost excluded because the firm had inadvertently included content that their in-house paralegal had found, along with our findings. The content found by the paralegal, while posted after the incident, was generated pre-incident. Opposing council picked up on this discrepancy (and rightfully so), and brought it up in pre-trial motions. Thankfully, during the course of our investigation, we had found the same content but had excluded those particular photos from our report, because upon analyzing the metadata, we had determined that they were taken pre-incident. Being able to demonstrate this not only resolved the issue at hand, but it strengthened the validity of the evidence that we provided. That case ended with a defense verdict, with the plaintiff bearing the defense costs, largely because of our evidence.

An Ever-Changing Landscape

Just as society's use of social media is constantly evolving, the way that a SMI needs to be is conducted is also constantly changing. For example, after the Facebook/Cambridge Analytica scandal of 2018, platforms began to change their user privacy policies and to restrict available information. Certain tools that were previously very helpful, such as the ability to search for users based on phone number or e-mail within the Facebook search bar, were removed. More recently, Facebook also removed the "graph search," which had enabled relatively simple searching for content associated with a subject, such as photos tagged.

While these changes can be a nuisance to those conducting SMI's, that's the nature of the beast; and with enough effort, workarounds can be found. Just like anything, there are various levels of understanding on any given topic, and for those wishing to act competently in the area of social media evidence, it is imperative to stay abreast of the latest changes and case law.

E-mail *investigations@boscolegal.org* for help on a case, general questions, or interest in firm MCLE presentation.

Joseph Jones

Joseph Jones is a licensed Private Investigator and the Vice President of Bosco Legal Services, Inc. Joseph is a Certified Social Media Intelligence Expert, a Certified Expert in Cyber Investigations, and holds multiple certifications in Open Source and Cyber Intelligence. He also has degrees in Psychology and Social & Behavioral Sciences.

Jan Roughan, RN

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LIFE CARE PLANNING

The California Supreme Court Addresses Compensable Time Before and After Work

Cynthia Flynn, Esq.

Most California employers know by now that employees must be paid for all time worked. But there are several types of pre- and post-shift tasks that could qualify as "time worked." California law holds that employers must pay for this time, but some activities fall within a legal gray area.

Getting to the Worksite: When Is Travel to Work – By Bus or By Foot – Compensable?

An employer who provides bus transportation from a set location to the worksite and who makes that transportation *mandatory* must pay for the employees' time spent riding the bus. This is because the employee is in the employer's control during that time. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575.) On the other hand, an employer who provides *voluntary* transportation to the work site – that is, the employer-provided transportation is merely an offered convenience – does not have to pay for employees' riding time. (*Vega v. Gasper* (5th Cir. 1994) 36 F.3d 417, distinguished by *Morillion,* 22 Cal.4th at 589, fn. 5.)

While this may seem like a simple dividing line, the next question is, "how voluntary is voluntary?" The California Court of Appeal in *Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263 had to draw that line when Disneyland employees sued their employer. Disneyland required employees to park their cars in a lot "far, far away" from their designated clock-in area, but it provided a shuttle to the park's staff entrance. The employees argued that the far-flung location of the parking lot made taking the shuttle from the lot to the entrance effectively mandatory. The Court of Appeal disagreed, finding that employees had the choice to come to work by different means – taking the public buses, getting a ride or cab, etc. Employees could also choose to walk to the park entrance from the designated employee lot. Therefore, *Morillion* did not apply and Disneyland did not have to pay employees for time spent riding the shuttle. (*Id.*, 269-271.)

Morillion continues to be a notable exception to the ordinary rule that an employer does not have to pay, either in wages or in reimbursement of expenses, for an employee's time commuting to or from work. (*Morillion*, 22 Cal.4th at 586-587; *see also Alcantar v. Hobart Service* (9th Cir. 2015) 800 F.3d 1047.) Yet lawsuits continue to test *Morillion's* boundaries.

The latest example is *Stoetzl v. Department of Human Resources* (2019) 7 Cal.5th 718, in which correctional employees claimed that they should be paid for the significant amount of time they spent walking from the sign-in point to their work location within the facility. The employees also contended that they were required to perform other tasks before and after clocking in and out, such as attending briefings, donning and doffing equipment, undergoing security checks and inventorying weapons. (*Id.* at 722-23.)

This case turned in part upon a unique situation: the application of a collective bargaining agreement between the workers and the State of California.

In *Stoetzl*, there were two sets of class members: those who were represented in collective bargaining and subject to a Memorandum of Understanding (MOU), and those who were unrepresented and not subject to the MOU. (*Id.* at 723.)

The Court of Appeal, in *Stoetzl v. Superior Court* (2017) 14 Cal.App.5th 1256, agreed with the trial court that the FLSA applied to represented employees who were bound by the MOU, but that the California Labor Code covered non-unionized employees, who had entered no such agreement. (*Id.* at 1273.) The trial court had ruled in the State's favor, holding that the FLSA – rather than the California Labor Code – applied to represented and unrepresented employees alike. (*Id.* at 1267.) Unlike California's expansive definition of compensable time, which includes all time spent under the employer's "control," the FLSA's language starts the employee's time clock at the "first principal activity" of the workday. (*Id.* at 1262, 1267.) If the FLSA governed, the plaintiffs would have no claim.

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Compensable Time – continued from page 17

The Court of Appeal in *Stoetzl* found that the MOU was more than just an agreement, and more than a typical collective bargaining agreement. The MOU resulted from collective bargaining between the California Correctional Peace Officers' Association (CCPOA) and the State of California, and because the State was involved, the contract had actually been codified into a law. As a result, the state claimed – and the Court of Appeal agreed – that this contract superseded the California Labor Code and IWC Wage Orders. (*Id*. at 1269-1272.) Because the MOU specified that the FLSA applied, the court had to apply the FLSA's definition of compensable time, rather than California's. (*Id*. at 1273, 1276.) The Court of Appeal thus found that the unionized employees had no claim. (*Id*. at 1269-1272.)

In its July 2019 opinion, the California Supreme Court agreed with this part of the appellate decision. (*Stoetzl, supra,* 7 Cal.5th at 737-738.) It explained that under the Dills Act of 1977 (Cal. Gov. Code § 3512), California government employees have the right to collective bargaining. That statute holds that when a provision of the collective bargaining agreement conflicts with California law, the agreement supersedes the law. (*Id*. at 738.) Importantly, the Supreme Court noted that this "is not a case in which a party to a labor agreement agreed to waive state law protections that are not subject to waiver." (*Id*. at 740.)

As to those employees *not* covered by the MOU and not represented in collective bargaining, the Court of Appeal found California labor laws – including the minimum wage laws prescribed by the IWC Wage Orders – applied. (14 Cal.App.5th at 1273-1276.) Although the state provided a Pay Scale Manual that referenced the FLSA, the Court of Appeal held that the manual did not carry the same weight as the MOU, which was enacted law, and that it did not exclude pre- and post-work activities from compensable time. (*Id*. at 1275-1276.) The court found that Wage Order 4 applied to these state employees. (*Id*. at 1275.)

For these non-unionized employees, the California Supreme Court reversed, finding they had no claim under the Wage Orders. The Supreme Court discussed at length the statutes and legal schemes that enabled the California Department of Human Resources to set compensation for its employees and that underlying the Wage Orders. (*Stoetzl, supra,* 7 Cal.5th at 744-745.) The Court observed that, "[g]iven these two broad delegations of quasi-legislative authority, it is not obvious that, in the case of a direct conflict, the decisions of the IWC should invariably prevail over those of CalHR." (*Id*. at 745.) After close analysis, the California Supreme Court ruled that the Pay Scale Manual and Wage Order 4 could not be "harmonized," and therefore, "the Pay Scale Manual must be treated as a statutorily authorized exception to Wage Order 4." (*Id*. at 748.)

Bag Checks, Security Screenings and Compensable Time

Another major gray area is whether and under what circumstances a "bag check" counts as hours worked. Many employers, especially retailers who sell valuable or small, theft-prone goods, and who have

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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.

PROFESSIONAL RESPONSIBILITY

A one-year statute of limitations applies to malicious prosecution claims against attorneys.

Connelly v. Bornstein (2019) 33 Cal.App.5th 783

Following a voluntary dismissal of an unlawful detainer action, a tenant brought a malicious prosecution action against his landlord and her attorney more than one year after the unlawful detainer action had been dismissed. The trial court dismissed the malicious prosecution action against the attorney, holding that it was time barred under Code of Civil Procedure section 340.6, which provides a one-year statute of limitations for "[a]n action against an attorney for a wrongful act of omission, other than for actual fraud, arising in the performance of professional services." The tenant appealed, arguing that his malicious prosecution action was instead governed by the two-year statute of limitations set forth in Code of Civil Procedure section 335.1, which applies generally to negligence claims.

The Court of Appeal (First Dist., Div. Five) affirmed the trial court. By its plain terms, section 340.6 covers all claims that depend on an attorney's violation of his or her professional duties, as opposed to general, nonprofessional duties. Malicious prosecution implicates an attorney's violation of professional obligations not to file actions without probable cause, and accordingly is within the more specific statute, as are malpractice claims.

ATTORNEY FEES AND COSTS

Trial court did not abuse its discretion in holding that a plaintiff's Code of Civil Procedure section 998 offer was not in good faith when it was served before defendant had sufficient time to evaluate liability.

Licudine v. Cedars-Sinai Medical Center (2019) 30 Cal.App.5th 918

In this medical malpractice case, less than a month after the complaint had been filed and only 5 days after the answer had been filed, plaintiff served an offer to compromise under Code of Civil Procedure section 998 for $249,999. Defendant objected to the offer as premature, and it lapsed.. After judgment was entered for $5.6 million, the plaintiff sought prejudgment interest for having "beat" the 998 offer.. The trial court denied the motion, finding the offer was not in good faith because it was served before defendant had a reasonable chance to investigate the claim.

The Court of Appeal (Second Dist., Div. Two) affirmed. For a 998 offer to be valid, the offeror must know that the offeree has sufficient information to intelligently evaluate it. The court identified three "especially pertinent" factors relevant to determining whether the offeror could have had a good faith

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belief that its offer could be intelligently evaluated: "(1) how far into the litigation the 998 offer was made; (2) the information available to the offeree prior to the 998 offer's expiration; and (3) whether the offeree let the offeror know it lacked sufficient information to evaluate the offer, and how the offeror responded." All three factors in this case supported the trial court's ruling that the offer was invalid.

See also *Linton v. County of Contra Costa* (2019) 313 Cal. App.5th 628 [where applicable law required a finding of liability before a plaintiff could recover attorney fees, the plaintiff's 998 offer that provided for "attorney's fees allowed by law" but did not establish the defendant's liability did not provide a basis for a fee award on top of the amount offered in the 998].

See *Maleski v. Estate of Albert Hotlen* (2018) 29 Cal.App.5th 616 [Third District: a decedent's insurer who is defending a personal injury action against the decedent's estate is a "party" for purposes of Code of Civil Procedure section 998 and therefore can be responsible for the enhanced costs imposed for rejecting a reasonable settlement offer].

A party that relies on reliable expert testimony to deny a request for admission is not liable for costs of proof.

Orange County Water District v. Arnold Engineering (2019) __ Cal.App.5th __

In this groundwater contamination case, the defendant served requests for admission (RFAs) seeking a concession from the plaintiff water district that the defendant's activities did not release the chemicals at issue. The plaintiff denied the RFAs in reliance on its expert's opinions that the defendant's activities involved the subject chemicals under circumstances that could have caused the contamination. Following a bench trial, the court found, based on its view that the defendant's witnesses and experts were more persuasive, that the defendant's activities did not cause the release of the chemicals at issue. The trial court then granted the defendant its costs of proof.

The Court of Appeal (Fourth Dist., Div. One) reversed the costs of proof award. "Whether a party has a reasonable ground to believe he or she will prevail necessarily requires consideration of all the evidence, both for and against the party's position, known or reasonably available to the party at the time the RFA responses are served." "Where a party's position is supported by a credible opinion from a qualified expert, the mere fact that an opposing party also has a credible opinion from a qualified expert will not in most cases preclude the party from reasonably believing it would prevail. Something about the state of the evidence must make the party's reliance on its own expert's opinion unreasonable." Where, as here, the responding party relied on testimony from a qualified expert whose opinions had a factual foundation in the record, it had a good faith belief it would prevail on the issue at trial and could not be liable for costs of proof.

ANTI-SLAPP

A lawsuit alleging a city breached an exclusive agency agreement in connection with procuring an NFL stadium did not arise out of protected activity.

Rand Resources, LLC v. City of Carson (2019) 6 Cal.5th 610

The plaintiff alleged that the City of Carson breached its exclusive agency agreement by allowing other developers to act as the City's agent in securing an NFL stadium. Plaintiff also accused the City and developers of concealing their meetings and communications to circumvent that agreement. The trial court granted defendants' anti-SLAPP motion to dismiss plaintiff's lawsuit.

The Court of Appeal (Second Dist., Div. One) reversed, holding that although the City's overall goal of bringing an NFL team and stadium to Carson was a matter of public interest, plaintiff's complaint focused on the identity of the City's agent, which was not an issue of public interest. The Court of Appeal also determined that defendants' speech was not made in connection with a legislative proceeding because the allegations concerning the City were too remote in time from the City's legislative action.

The California Supreme Court mostly affirmed the Court of Appeal. Whether conduct is connected to an issue of public interest must be analyzed by focusing on "the speech at hand, rather than the prospects that such speech may conceivably have indirect consequences for an issue of public concern." The city officials' allegedly fraudulent statements denying the City's breach of a contract relating to plaintiffs' right to negotiate with the NFL did not satisfy this standard and were not made in connection with a public issue. The only statements at issue in the case that were protected were certain statements made in connection with one of the developers' lobbying activities.

For a statement to concern an issue of "public interest" and therefore be within the anti-SLAPP statute's protection, the statement must contribute to public discourse.

FilmOn.com Inc. v. DoubleVerify Inc. (2019) 7 Cal.5th 133

An Internet-based entertainment media provider sued an authentication company for falsely classifying the provider's websites as "Copyright Infringement-File Sharing" and "Adult Content" in reports to online advertisers who later cancelled their advertising agreements with the media provider. Applying the catchall provision of the anti-SLAPP statute, which specifies that the law encompasses claims based on "conduct in furtherance of the exercise of ... the constitutional right of free speech in connection with ... an issue of public interest," the Court of Appeal (Second Dist., Div. Three) held: (1) the media provider's lawsuit was based on the authentication company's conduct in furtherance of its right of free speech, and (2) the authentication company's reports concerned an issue of public interest. Thus, the media provider's action was subject to an anti-SLAPP motion to strike.

The California Supreme Court reversed. Whether conduct falls under the broad, catchall provision calls for a two-part analysis of (a) the content of the speech, i.e., what issue of public interest the speech in question implicates, and (b) the context of the speech – such as its speaker, audience, and purpose – to assess what functional relationship exists between the speech and public discourse about the issue of public interest. To satisfy the second, contextual standard, " 'the statement must in some manner itself contribute to the public debate.' " Courts must therefore examine "whether a defendant – through public or private speech or conduct – participated in, or furthered, the discourse that makes an issue one of public interest." The defendant's conduct in this case did not meet this standard because it involved for-profit entities engaged in a private dispute over one entity's characterization – in a confidential report – of the other's business practices.. But the Court emphasized that none of the individual elements – "not [the defendant's] for-profit status, or the confidentiality of the reports, or the use to which its clients put its reports," or the fact the statements involved commercial speech—was in itself "dispositive," and the Court stressed that "[s]ome commercially oriented speech will, in fact, merit anti-SLAPP protection."

See also *Wilson v. Cable News Network* (July 22, 2019) __ Cal.5th __[There is no exception to the anti-SLAPP statute for discriminatory or retaliatory employment actions; if the case involves protected activity by the employer, a plaintiffs' claim that a defendant had invidious motives for terminating his employment does not shield the claims "from the same preliminary screening for menial merit that would apply to any other claim arising from protected activity." The employer's purely private, defamatory statements concerning its reasons for terminating the plaintiff, however, are not protected by the statute.].

Evidence opposing an anti-SLAPP motion need not be admissible so long as it is reasonably possible admissible evidence on the subject will be available at trial.

Sweetwater Union High School District v. Gilbane Building Co. (2019) 6 Cal.5th 931

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

The California Supreme Court affirmed. In determining whether a plaintiff has shown a likelihood of prevailing on the merits for purposes of the second-prong of the anti-SLAPP analysis, "the court may consider affidavits, declarations, and their equivalents if it is reasonably possible the proffered evidence set out in those statements will be admissible at trial. Conversely, if the evidence relied upon *cannot* be admitted at trial, because it is categorically barred or undisputed factual circumstances show inadmissibility, the court may not consider it in the face of an objection."

ARBITRATION

Ambiguities in arbitration agreements must be resolved in favor of arbitration.

Lamps Plus, Inc. v. Varela (2019) 139 S.Ct. 1407

When an employee filed a class action against his employer, the employer moved to compel the employee to arbitrate his claims on an individual basis. The district court compelled class arbitration instead. The Ninth Circuit affirmed, concluding that because the arbitration agreement was ambiguous as to whether it permitted class arbitration, the agreement must be interpreted to allow for class arbitration given California law requiring ambiguities in contracts to be construed against the drafter.

The United States Supreme Court reversed. Under the Federal Arbitration Act (FAA), an agreement can be construed to authorize class arbitration only if it expressly permits class arbitration – a contractual ambiguity on the issue is insufficient to permit class arbitration. To the extent California contract law requiring ambiguities to be construed against the drafter compelled a different conclusion, this state law was preempted by the FAA. This conclusion was "consistent with a long line of cases holding that the FAA provides the default rule for resolving certain ambiguities in arbitration agreements" – particularly the FAA rule "that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration."

The Federal Arbitration Act does not preempt the California rule that arbitration agreements may not waive a plaintiff's right to seek public injunctive relief under state consumer protection laws.

Blair v. Rent-A-Center, Inc. (9th Cir. 2019) ___ F.3d ___ [2019 WL 2701333]

Plaintiffs brought a class action alleging that Rent-A-Center violated California's Karnette Rental-Purchase Act by charging excessive prices for rent-to-own items. Rent-A-Center moved to strike the class claims and compel arbitration against the individual plaintiffs under the rental purchase agreements, which purported to provide for a class action waiver. The district court denied Rent-A-Center's motion.

The Ninth Circuit affirmed. In *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, the California Supreme Court held that, where an arbitration agreement waives a plaintiff's right to seek public injunctive relief in any forum under state consumer protection statutes like the Karnette Rental-Purchase Act, this waiver is unenforceable under California law. *McGill* also held that this rule is not preempted by the Federal Arbitration Act. The Ninth Circuit agreed that the Federal Arbitration Act does not preempt the *McGill* rule.

Where there was a high degree of procedural unconscionability in the execution of the agreement, an arbitration agreement's purported waiver of "Berman" procedures was unenforceable.

OTO, LLC v. Kho (2019) __ Cal.5th __

An employee filed an administrative claim for unpaid wages and requested a "Berman" hearing under California Labor Code section 98 (i.e., an administrative hearing to resolve his wage claims). His employer filed a petition to compel arbitration pursuant to an arbitration agreement in which the employee had waived his right to such a hearing. The trial court held that the arbitration agreement was substantively unconscionable, invoking *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109. In *Sonic-Calabasas*, the California Supreme Court held that the Federal Arbitration Act preempted state law that guaranteed an employee's right to an informal "Berman" hearing for wage-related claims before the Labor Commissioner, meaning that an employment contract may validly require arbitration of such claims, but suggested that a waiver of "Berman" hearing rights may be unconscionable if it left the employee without an "accessible and affordable" forum for resolving wage disputes. The employer appealed, arguing that the agreement satisfied the affordability and accessibility requirements where the employer would pay the costs of arbitration and the proceeding would resemble civil litigation. The Court of Appeal (First Dist., Div. One) agreed with the employer, and ordered the trial court to grant the motion to compel arbitration.

The California Supreme Court reversed. While a waiver of "Berman" procedures does not itself render an arbitration agreement unconscionable, here there was a high degree of procedural unconscionability and the alternative arbitration procedures provided for by the arbitration agreement appear difficult to access and more burdensome than the expeditious "Berman" procedure. The waiver was thus unenforceable.

California's *Iskanian* rule that PAGA waivers in arbitration agreements are unenforceable survives the U.S. Supreme Court's recent pro-arbitration decision in *Epic Systems.*

Correia v. NB Baker Electric, Inc. (2019) 32 Cal.App.5th 602

Plaintiffs sued their former employer alleging breach of contract, statutory unfair competition, and sought civil penalties under the Private Attorneys General Act of 2004 (PAGA) for wage and hour violations. Defendant petitioned for arbitration of all claims under the parties' arbitration agreement, which provided that arbitration shall be the exclusive forum for any dispute and prohibited employees from bringing a "representative action." The arbitration petition was granted for all causes of action except for the PAGA claim. The trial court followed the California Supreme Court decision of *Iskanian v. CLS Transportation Los Angeles*, LLC (2014) 59 Cal.4th 348 (*Iskanian*), which held that agreements to waive the right to bring PAGA representative actions in any forum are unenforceable.

The Court of Appeal (Fourth Dist., Div. One) affirmed. Waiver of the right to bring PAGA representative actions in any forum is unenforceable under *Iskanian*. While the U.S. Supreme Court's decision in *Epic Systems Corp. v. Lewis* (2018) __ U.S. __ [138 S.Ct. 1612] (*Epic*) reaffirmed the broad preemptive scope of the Federal Arbitration Act, *Epic* is distinguishable from *Iskanian* as it did not involve a PAGA-like claim for civil penalties brought on behalf of the government. Thus, *Iskanian* retains vitality notwithstanding *Epic*.

CLASS ACTIONS

A class is "ascertainable" where it is defined by objective characteristics and common transactional facts.

Noel v. Thrifty Payless, Inc. (2019) ___ Cal.5th ___ (S246490)

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

The California Supreme Court reversed. A named class representative sufficiently "articulates an ascertainable class" where the proposed class definition "defines the class 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary.' " There is no requirement at the class certification stage that the plaintiff produce evidence to show how the class members could be individually identified.

Federal Rule of Civil Procedure 23(f)'s 14-day deadline for seeking leave to appeal an order granting or denying class certification is not subject to equitable tolling.

Nutraceutical Corporation v. Lambert (2019) 138 S.Ct. 710

The plaintiff brought a class action alleging that the defendant violated California consumer protection laws in its marketing of dietary supplements. The district court initially certified the class, but later decertified it. Rather than seek permission to appeal the decertification order within 14 days as required by Rule 23(f), the plaintiff sought reconsideration. When reconsideration was denied, the plaintiff then sought leave to appeal. The Ninth Circuit held that the appeal was timely because the plaintiff had acted "diligently," even though he had not filed his appeal within 14 days of the decertification order.

The United States Supreme Court reversed the Ninth Circuit. While Rule 23(f) is properly classified as a non-jurisdictional claim-processing rule, and therefore its time limitations can be waived by the opposing party, it is nonetheless mandatory and must be followed when the opposing party asserts the rule. The text of Rule 23(f), in context of the other Federal Rules, leaves no room for equitable tolling of the Rule 23(f) 14-day deadline even where grounds for equitable tolling exist.

See also *Fierro v. Landry's Restaurant, Inc* (2019) 32 Cal. App.5th 276 [Fourth Dist., Div. 1: discussing *American Pipe* tolling of statutes of limitations, and holding that, as to a second class action asserting the same claims as a prior class action, the limitations period for the former is not tolling during the time that the latter was pending].

A pretrial ruling striking class claims is not a "trial" for purposes of Code of Civil Procedure § 583.310's requirement that an action "be brought to trial within five years after the action is commenced against the defendant."

Rel v. Pacific Bell Mobile Services (2019)
33 Cal.App.5th 882

Plaintiffs commenced a putative class action in 2003. The trial court issued two pretrial rulings dismissing the class allegations, and the Court of Appeal reversed both rulings. Further proceedings ensued, and in 2017, the trial court dismissed the putative class action lawsuit because plaintiffs failed to comply with the five-year rule under Code of Civil Procedure section 583.310.

The Court of Appeal (First Dist., Div. Five) upheld the dismissal. A pretrial order dismissing the class claims does not qualify as a "trial" resulting in a final disposition, and therefore does not satisfy the five-year dismissal statute. Further, an appellate decision reversing such an order does not result in a remand for a new trial and therefore does not trigger a three-year extension of the five-year rule under Code of Civil Procedure section 583.320, subdivision (a)(3).

CIVIL PROCEDURE

A cross-complaint that simply seeks "damages according to proof" without stating an amount cannot support a default judgment, even if it references an initial complaint that frames the damages at issue.

Yu v. Liberty Surplus Insurance Corporation (2018)
30 Cal.App.5th 1024

The plaintiff sued a general contractor for defective construction of a hotel and prayed for damages of "not less than $10 million." The general contractor cross-complained against a subcontractor and prayed for "damages according to proof." The plaintiff resolved the suit with the general contractor and obtained an assignment of the general contractor's rights against the subcontractor. The plaintiff obtained a $1.2 million default judgment against the subcontractor and then sought to collect that judgment from the subcontractor's insurer. The trial court held that the default judgment was void because the cross-complaint did not state an amount of damages sought. The plaintiff appealed.

The Court of Appeal (Fourth Dist., Div. Three) affirmed. Under Code of Civil Procedure section 580, the amount of a default judgment cannot exceed the amount prayed for in the complaint or stated in a statement of damages. A cross-complaint that prayed for "damages according to proof" did not provide adequate notice of the amount at stake to support a default judgment. Although the cross-complaint "incorporated by reference" the initial complaint, it did so "for identification and informational purposes only." Absent a clear and unequivocal intent to incorporate by reference the $10 million figure, the cross-complaint did not incorporate that amount by reference.

But see *Insurance Company of the State of Pennsylvania v. American Safety Indemnity Company* (2019) 32 Cal.App.5th 898 [Second Dist., Div. Eight: default judgment proper where complaint incorporated by reference an attachment listing plaintiffs' damages for property loss].

The litigants, not their attorneys, must request a court retain jurisdiction to enforce a settlement under Code of Civil Procedure section 664.6.

Mesa RHF Partners v. City of Los Angeles (2019)
33 Cal.App.5th 913

The parties to a dispute over a development plan in downtown Los Angeles settled their claims under an agreement providing that the court would retain jurisdiction to enforce the settlement under Code of Civil Procedure section 664.6. Counsel for the plaintiffs then filed a dismissal of the claims on Judicial Council form CIV-110, but adding language that the court was to retain jurisdiction to enforce the parties' settlement. The form did not attach the actual settlement agreements. When a dispute over the settlement arose, the plaintiffs moved to have the settlements enforced. The trial court denied the motions on the merits.

The Court of Appeal (Second Dist., Div. One) affirmed, on different grounds. On the record before the trial court, the trial court lacked jurisdiction to enforce the settlements under section 664.6 because that statute requires the parties themselves to request the trial court retain jurisdiction, and they had never done so. Judicial Counsel form CIV-110, signed only by plaintiffs' counsel and not attaching the settlement agreements signed by the parties, was insufficient to comply with the statute. "In this case, the parties could have easily invoked section 664.6 by filing a stipulation and proposed order either attaching a copy of the settlement agreement and requesting the trial court retain jurisdiction under section 664.6 or a stipulation and proposed order signed by the parties noting the settlement and requesting that the trial court retain jurisdiction under section 664.6. The process need not be complex. But strict compliances demands that the process be followed."

Counsel's signature on settlement agreement, even if purporting to approve it only as to "form and content," may bind counsel to terms of the agreement to which the facts show counsel intended to be bound.

Monster Energy Company v. Schechter (2019) __ Cal.5th __ (S251392)

Plaintiffs and defendant entered into a confidential settlement of a wrongful death suit. Plaintiffs' attorneys signed the agreement "as to form and content," but were not identified as parties to the agreement. Plaintiffs' attorneys gave a media interview disclosing various terms of the settlement. The defendant sued the attorneys for breach of the contract's confidentiality clause and other claims. The attorneys moved to strike the complaint, arguing, among other things, they were not parties to the contract and so could not be sued for breaching it. The Court of Appeal (Fourth Dist., Div. Two) held that the attorneys' signature approving the settlement agreement "as to form and content" meant only that "they were signing solely in their capacity of attorneys who had reviewed the settlement agreement and had given their clients their professional approval to sign it." This did not make them parties to the agreement who were bound by it.

The California Supreme Court reversed the Court of Appeal. "An attorney's signature on an agreement containing substantive provisions imposing duties on counsel may reflect an intent to be bound even though counsel also approve the document for his client's signature." It was for the factfinder to determine whether, under all the circumstances, the attorneys agreed to be bound. Where, as here, the substantive confidentiality provisions of the agreement appeared to be intended to bind counsel as well as the parties, the defendant had shown a possibility of prevailing on its breach of contract claim, precluding the grant of a motion to strike.

TORTS

U.S. Supreme Court rejects "bare metal" defense in maritime cases.

Air & Liquid Systems v. Devries (2019) 139 S.Ct. 986

The families of naval veterans who had died of asbestos-related diseases brought products liability claims against the manufacturers of pumps, blowers, and turbines used on naval ships, claiming that the manufacturers had a duty to warn of the risks of asbestos-containing insulation the Navy used with their products. The district court granted summary judgment for the manufacturers, holding that under the "bare metal" defense, a manufacturer is not liable for failing to warn about asbestos-containing products used with its products that the manufacturer did not supply. The Third Circuit Court of Appeals reversed, holding that the manufacturers had a duty to warn because it was "foreseeable" that asbestos-containing products would be used with their products.

A majority of the Supreme Court affirmed the Third Circuit's decision to reverse the summary judgment and remand for reconsideration, but adopted what it described as a middle approach, rejecting both the "bare metal" defense and the "foreseeability" test. The Court held that "[i]n the maritime tort context, a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger."

A defendant owes no general duty in a negligence action to plaintiffs seeking to recover purely economic losses unaccompanied by personal injury or property damage.

Southern California Gas Leak Cases (2019) 7 Cal.5th 391

Businesses in the vicinity of the Alison Canyon gas leak who did not themselves experience property damages but who lost customers due to the leak sued Southern California Gas Company (SoCalGas) based on negligence for economic loss. SoCalGas demurred, arguing that absent personal injury, property damage, or a special relationship, it had no duty to prevent the businesses' economic losses. The trial court overruled the demurrer on the ground there is no bar to recovery for purely economic loss where it results from a mass tort. SoCalGas petitioned for a writ of mandate. The Court of Appeal (Second Dist., Div. Five) issued the writ, directing the trial court to sustain SoCalGas's demurrer on the ground SoCalGas owed no duty to the businesses.

The California Supreme Court affirmed, upholding the economic loss doctrine as followed by the majority of courts across the county and the Restatement of Torts. The court emphasized that it could find "no workable way to limit geographically who may recover purely economic losses," and that accordingly, recognizing a duty would give rise to "indeterminate liability, over-deterrence, and endless litigation."

An expert testifying on the reasonable value of medical services may rely upon Medicare reimbursement rates without violating the collateral source rule.

Stokes v. Muschinske (2019) 34 Cal.App.5th 45

The plaintiff in a personal injury action opted to seek medical treatment from a doctor who accepted a lien against the plaintiff's anticipated judgment as payment. At trial, the plaintiff sought to recover the full amount "billed" by his medical providers. The defense challenged the reasonableness of those charges through the testimony of an expert who based his opinions on Medicare reimbursement rates. The jury rendered a verdict largely in favor of the defense and the plaintiff appealed, arguing that the defense expert's testimony violated the collateral source rule.

The Court of Appeal (Second Dist., Div. Eight) affirmed the jury's verdict. The evidence regarding Medicare reimbursement rates "merely provided context and background information" on plaintiff's past medical treatment "and on some aspects of [the defense expert's] calculations of past and future medical expenses. They were helpful and even necessary to the jury's understanding of the issues."

The defendant bears the burden of proving the method for reducing award of future damages to present value.

Lewis v. Ukran (2019) __ Cal.App.5th __

Plaintiff was injured in an automobile accident and awarded over $1.6 million in damages, including $1.2 million for future lost earning capacity. The defendant moved for a new trial arguing that the future damages had to be reduced to present cash value. The trial court denied the new trial motion explaining that there was no evidence presented regarding how the present value calculation should be made.

The Court of Appeal affirmed. "[I]n a contested case, a party (typically a defendant) seeking to reduce an award of future damages to present value bears the burden of proving an appropriate method of doing so, including an appropriate discount rate. A party (typically a plaintiff) who seeks an upward adjustment of a future damages award to account for inflation bears the burden of proving an appropriate method of doing so, including an appropriate inflation rate. This aligns the burdens of proof with the parties' respective economic interests. A trier of fact should not reduce damages to present value, or adjust for inflation, absent such evidence or a stipulation of the parties."

Expert testimony is not required to establish breach of a professional standard of care where the negligence is obvious to laymen.

Ryan v. Real Estate of the Pacific (2019) 32 Cal.App.5th 637

Plaintiffs listed their home for sale. During an open house, plaintiffs' real estate broker learned that plaintiffs' neighbor planned to renovate her home in a manner that would obstruct the plaintiffs' home's ocean views. The broker did not inform plaintiffs about the anticipated renovations on the neighboring property, nor did anyone inform the prospective buyers. Only after the sale was completed did the buyers learn about the renovations. The buyers obtained rescission of the purchase and additional damages against the plaintiffs. The plaintiffs then sued their broker. The trial court granted summary judgment for the broker on the ground that the plaintiffs did not designate an expert witness to opine that the broker committed professional negligence.

The Court of Appeal (Fourth Dist., Div. One) reversed. In professional malpractice cases, while expert opinion testimony is usually required to prove that the defendant violated the prevailing standard of care, it is not required in cases where the negligence is obvious to laymen. An expert witness was not necessary to establish professional negligence where it was obvious that the broker possessed material information impacting the value of the property and yet withheld that information from its client.

But see *Fernandez v. Alexander* (2019) 31 Cal.App.5th 770 [Second Dist., Div. Eight: medical expert declaration that "did not explain the basis for, or state any facts or reasons to support, his opinion that defendant's conduct caused plaintiff's injury" was not sufficient to defeat summary judgment for defendant doctor].

Hirer of independent contractor could not be liable for injury to independent contractor's employee simply because it left one unsafe ladder, among other ladders, at the worksite.

Johnson v. Raytheon Company (2019) 33 Cal.App.5th 617

Plaintiff, the employee of a contractor hired by Raytheon, was injured while using the top half of an extension ladder that slipped out from under plaintiff as he used it. Plaintiff sued Raytheon alleging it negligently failed to ensure that the ladder was safe for plaintiff's use. Raytheon successfully moved for summary judgment under *Privette v. Superior Court* (1993) 5 Cal.4th 689 [an employee of an independent contractor may not sue the hirer for a work-related injury]. Plaintiff appealed, arguing that Raytheon could be liable under the exception to *Privette* for liabilities arising out of the hirer's negligence in

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maintaining safety conditions over which it retained control – specifically, Raytheon's leaving the unsafe ladder at the worksite.

The Court of Appeal (Second Dist., Div. Eight) affirmed the summary judgment for Raytheon. Raytheon could not be liable either on a retained control or premises liability theory because another, safe ladder was available in a nearby storage room, but plaintiff opted not to use it. Further, a hirer may reasonably assume a contractor will conduct a reasonable inspection of the equipment at a work site used in work-related activities.

Government Code section 850.4's firefighter immunity is an affirmative defense to liability, not a jurisdictional bar.

Quigley v. Garden Valley Fire Protection District (2019) __ Cal.5th __ (S242250)

A firefighter was injured when she was run over by a fire truck while sleeping at a fire base camp. The trial court granted nonsuit in favor of the defendant fire protection districts under Government Code section 850.4's firefighting immunity, even though defendants had not raised immunity as an affirmative defense in their answer. The Court of Appeal (Third Dist.) affirmed, holding that (1) governmental immunity is jurisdictional and can be raised at any time and thus is not subject to the rule that failure to raise a defense by demurrer or answer waives that defense; (2) the plaintiff firefighter's injuries were covered by the immunity rule of section 850.4.

The California Supreme Court reversed the Court of Appeal. Section 850.4 does not deprive a trial court of fundamental jurisdiction; it provides an affirmative defense to liability. But the Court of Appeal had to determine in the first instance whether the defense had been adequately pleaded by the defendant's answer. If not, the case had to be remanded to the trial court for consideration of whether a belated amendment to the answer to permit the defense would be appropriate.

See *Last Frontier Healthcare District v. Superior Court (Harper)* (2019) 33 Cal.App.5th 492 [Third District: "giving notice of an intent to file a medical malpractice action under Code of Civil Procedure section 364 does not alter the jurisdictional deadlines underlying an application for relief from the Government Claims Act (Gov. Code, § 81 et seq.) requirement of presenting a timely claim to a public entity before bringing an action for damages against it"].

CONSUMER PROTECTION

A defendant's offer to correct a violation of the Consumer Legal Remedies Act may not include conditions beyond those the plaintiff included in its notice to correct.

Valdez v. Seidner-Miller, Inc. (2019) 33 Cal.App.5th 600

Plaintiff brought a lawsuit under the Consumer Legal Remedies Act alleging that the defendant committed fraud in connection with its lease of vehicle to plaintiff. The defendant moved for summary judgment, arguing that the action was barred because in response to plaintiff's pre-suit notice to correct, it made a timely and appropriate offer to correct, as provided for by the statute. The trial court granted summary judgment.

The Court of Appeal (Second Dist., Div. Seven) reversed. The defendant's offer to correct was not appropriate because it conditioned relief on a broad release of separate claims that were not encompassed by the plaintiff's notice to correct. While a defendant is free to try to negotiate a settlement of all claims in the suit, it may not attempt to exact such conditions as part of the offer to correct.

INSURANCE

The "notice-prejudice" rule limiting insurers' ability to deny coverage for first-party claims based on an insured's incurring of expenses before notifying the insurer is a fundamental public policy of California for purposes of choice of law analysis.

Pitzer College v. Indian Harbor Insurance Co. (2019) __ Cal.5th __ (S239510)

The insured discovered environmental contamination on its property and undertook remediation. Only after the remediation was complete did it notify its insurer. The insurer denied coverage based on the insured's failure to timely notify it of the need for remediation. The insured sued, and the district court granted summary judgment for the insurer, holding that the policy was governed by New York law and under New York law, there was no need for the insurer to establish prejudice from the late notice before denying coverage. The insured appealed to the Ninth Circuit, which certified the question of whether California's notice-prejudice rule was a fundamental public policy of California for purposes of choice-of-law analysis.

The California Supreme Court answered the certified question in the affirmative. California courts may refuse to enforce a contractual choice-of-law provision when enforcement would defeat a "fundamental public policy" of this state. Fundamental public policies may be found not only in legislative enactments

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but also in judicial decisions. The judicially created "notice-prejudice rule" – under which a first-party insurer cannot avoid its coverage obligations based on late notice of a claim unless it demonstrates actual prejudice – is a fundamental public policy of California for purposes of choice-of-law analysis. In so holding, the court distinguished consent provisions in third party liability policies (requiring that an insured obtain insurer's consent before incurring costs to resolve the third-party claim). California appellate courts have generally refused to apply the notice-prejudice rule as to liability insurers, in light of the insurer's paramount right to control defense and settlement of third party claims.

Bad faith denial of an insurance claim do not give rise to liability for financial elder abuse against insurers' coverage attorneys.

Strawn v. Morris, Polich & Purdy (2019) 30 Cal.App.5th. 1087

State Farm's insured lost his home and truck in a fire. State Farm suspected arson and did not pay the claim. The insured sued for breach of contract and bad faith. In the course of discovery, the insured's accountant disclosed the insured's privileged tax returns to State Farm's coverage counsel, who then sent the returns on to State Farm for review. The insured added claims for elder abuse and invasion of privacy, and named both State Farm and coverage counsel to those causes of action. Coverage counsel moved for dismissal and the trial court granted the motion.

The Court of Appeal (First Dist., Div. Two) affirmed dismissal of the elder abuse claim against the attorney but reversed dismissal of the invasion of privacy claim. With respect to the elder abuse claim, the court pointed to federal decisions finding that an insurer's bad faith denial of a claim can support a cause of action for financial elder abuse *against the insurer.* However, under *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, an insurer's *agents* are not personally liable for bad faith, so coverage counsel – acting as State Farm's agent – could not be personally liable on the elder abuse claim.

Insurer acted reasonably in not settling uninsured motorist claim prior to final resolution of the insured's workers' compensation claim.

Case v. State Farm Mutual Automobile Insurance Company (2018) 30 Cal.App.5th 397

While driving in the course and scope of her employment, State Farm's insured was injured in an automobile accident with an uninsured motorist. She incurred medical expenses for which she did not claim and thus had not yet received worker's compensation benefits. She asked State Farm to pay those expenses under its UM coverage, which included a loss-payable-reduction provision that the UM benefit "shall be reduced by any amount paid or payable to ... the insured [¶] ... [¶] . . . under any workers' compensation, disability benefits, or similar law." State Farm withheld payment of UM benefits until it received confirmation that the insured was not eligible for any additional workers' compensation benefits, i.e., that no additional benefits were "payable." On receiving confirmation, State Farm promptly paid the claim. The insured alleged State Farm acted in bad faith by delaying settlement of her UM claim. The trial court granted summary judgment for State Farm.

The Court of Appeal (Second Dist., Div. Four) affirmed. The loss-payable-reduction provision in the policy authorized State Farm to reduce UM benefits to reflect past and future medical expenses for injury-related treatments payable through workers' compensation benefits, whether or not the insured actually sought payment. Accordingly, State Farm was justified in requesting a determination within the workers compensation system of the extent to which the insured's past and future medical expenses could be paid through that system. State Farm acted reasonably by postponing payment of policy benefits until it received confirmation that the insured was not eligible for any additional workers' compensation benefits.

See *Mazik v. GEICO General Insurance Company* (2019) 35 Cal.App.5th 455 [Second Dist., Div. Two: insurer's knowing reliance on medical information it knew to be incomplete to justify repeated low-ball offers to settle uninsured motorist claim warranted punitive damages.]

LABOR & EMPLOYMENT

The nonpayment of wages does not give rise to a conversion claim.

Voris v. Lampert (2019) __ Cal.5th __ (S241812)

After he had a falling-out with the start-up companies for which he worked, the plaintiff sued the companies and their principals to recover wages he believed he was owed. He brought many claims, including contract claims, Labor Code claims, and a claim for conversion, and prevailed at trial. On appeal, the Court of Appeal (Second Dist., Div. Three) held that his claims against the individual officers of the companies could succeed on a conversion theory.

The California Supreme Court reversed the Court of Appeal's holding that the failure to pay wages could give rise to a common law conversion claim against the individual officers of the company. "[A] claim for unpaid wages resembles other actions for a particular amount of money owed in exchange for contractual performance – a type of claim that has long been understood to sound in contract rather than as the tort of conversion."

Employees were entitled to compensation for the time period before their shifts when they had to call in to find out if they had to report to work.

Ward v. Tilly's, Inc. (2019) 31 Cal.App.5th 1167

Under defendant-employer's on-call shift scheduling, employees were assigned on-call shifts but were not told whether they should come in to work until they called in two hours before their shifts started. They were paid only for shifts they worked, not for time "on call." Plaintiff-former employee sued the employer, alleging that the failure to pay for the two hour "on call" time was violating wage order No. 7-2001 (Wage Order 7), which requires employers to pay employees "reporting time pay" for each workday "an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work." Defendant demurred to the complaint, arguing that employees "report for work" only by physically appearing at the work site at the start of a scheduled shift. The trial court sustained the demurrer without leave to amend.

The Court of Appeal (Second Dist., Div. Three) reversed. On-call shifts burden employees, so an employer violates Wage Order 7, which has the force of law, by requiring employees to contact the employer two hours before on-call shifts without compensation unless they are instructed to come in to work. To constitute "report[ing] for work" under Wage Order 7, "an employee need not necessarily physically appear at the workplace to 'report for work.'" The telephonic requirement was sufficient.

HEALTHCARE

A hospital's decision simply not to schedule a staff anesthesiologist for any work was the functional equivalent of a termination of staff privileges requiring a peer review hearing.

Economy v. Sutter East Bay Hospitals (2019) 31 Cal.App.5th 1147

After an anesthesiologist repeatedly violated hospital policy for administering medication, the hospital, without notice or a hearing, advised the anesthesiologist's employer (a medical group) that the hospital would no longer approve coverage schedules that included the anesthesiologist. The medical group then terminated the anesthesiologist's employment. The anesthesiologist sued the hospital for violating his due process rights to notice and a peer review hearing before terminating his staff privileges. The hospital responded that no peer review was required because it never formally rescinded the physician's privileges, and the medical group rather than the hospital terminated the physician's employment. In a bench trial, the trial court rejected the hospital's arguments and awarded the anesthesiologist nearly $4 million for lost income.

The Court of Appeal (First Dist., Div. Four) affirmed. "[T]he hospital's decision not to accept any schedule on which [the anesthesiologist] was included effectively prevented the anesthesiologist from exercising clinical privileges at the hospital and engaging in the practice of medicine" and was the functional equivalent of a suspension and revocation of privileges. If the hospital's argument were accepted, the anesthesiologist's "right to practice medicine would be substantially restricted without due process and, despite the hospital's concern that plaintiff was endangering patient safety, the state licensing board would never be notified."

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 employers can round employee time in the context of meal periods.

Donohue v. AMN Services (2018) 29 Cal.App.5th 1068, review granted March 27, 2019, S253677

In this class action, the trial court granted summary judgment for the plaintiffs' employer, AMN Services, on the class' claims that AMN's practice of rounding employee meal period times

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violated wage and hour laws. The Court of Appeal (Fourth Dist., Div. One) held that AMN established that its time-rounding policy was fair and neutral, in compliance with law and the case law allowing for rounding policies in the overtime context.

The California Supreme Court granted review to address the following issue: "Can employers utilize practices upheld in the overtime pay context to round employees' time to shorten or delay meal periods?"

Addressing insurance coverage for Telephone Communications Privacy Act (TCPA) claims.

Yahoo! v. National Union Fire Insurance Company of Pittsburg, Pennsylvania
(N.D.Cal. 2019) __ F.Supp. __, Question of State Law Request Granted March 27, 2019, S253593

Yahoo! was sued in several class actions alleging it sent unsolicited text message advertisements in violation of the TCPA. It sought insurance coverage for defending and settling the lawsuits from its commercial general liability insurer under a policy covering " 'personal injury,' " defined as " 'injury ... arising out of ... [o]ral or written publication ... of material that violates a person's right of privacy.'" The insurer denied coverage on the ground that TCPA claims do not fall within the coverage provision because they are not predicated on a public release of private information. The federal district court found no coverage, and Yahoo! appealed.

The California Supreme Court granted the Ninth Circuit's request that it address "an insurer's duty under state law to defend its insured against a claim that the insured violated the federal Telephone Consumer Protection Act."

Addressing when the statute of limitations begins to run after the end of a tolling period.

Shalabi v. City of Fontana (2019) 35 Cal.App.5th 639, review granted August 14, 2019, S256665 –

In this 42 U.S.C. § 1983 action alleging that an officer wrongfully shot and killed the plaintiff's father, the plaintiff reached the age of majority on December 3, 2011, and filed his complaint on December 3, 2013. Relying on the calendar method for calculating when the statute of limitations begins to run, the trial court held that the clock started "the first minute" after the plaintiff attained the age of majority and that, accordingly, the complaint was filed one day after the two-year statute of limitations expired. The Court of Appeal (Fourth Dist., Div. Two) reversed, holding that the anniversary method, rather than the calendar method, applies to the calculation of the final date for a statute of limitations period, and under that method, the statute of limitations began to run on the day after the plaintiff's 18th birthday.

The California Supreme Court granted review of the following issue: Code of Civil Procedure section 12 provides: "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded." In cases where the statute of limitations is tolled, is the first day after tolling ends included or excluded in calculating whether an action is timely filed?

Addressing the amount of damages awardable by default in actions for an accounting.

Sass v. Cohen (2019) 33 Cal.App.5th 942 review granted May 22, 2019, S255262

The plaintiff filed a complaint seeking an accounting of the defendant's assets and income, but did not specify the amount sought. The case proceeded to a default judgment, which the defendant then moved to vacate on the ground that the relief granted exceeded the (unspecified) amount demanded in the operative complaint. Citing *Cassel v. Sullivan, Roche & Johnson* (1999) 76 Cal.App.4th 1157 (*Cassel*), the trial court denied the motion to vacate, holding that "there is no notice requirement for damages sought before entry of default judgment" "where a plaintiff alleges a cause of action for accounting and knowledge of the debt due is within the possession of the defendant." The Court of Appeal (Second Dist., Div. Two) reversed, holding that the plain language of Code of Civil Procedure section 580 provides that the "relief granted" in the default judgment "cannot exceed" what the plaintiff "demanded in the [operative] complaint."

The Supreme Court granted review of the following issues: "(1) In a complaint that seeks an accounting of specified assets, is the plaintiff required to plead a specific amount of damages to support a default judgment, or is it sufficient for purposes of Code of Civil Procedure section 580 to identify the assets that are in defendant's possession and request half of their value? (2) Should the comparison of whether a default judgment exceeds the amount of compensatory damages demanded in the operative pleadings examine the aggregate amount of non-duplicative damages or instead proceed on a claim-by-claim or item-by-item basis?"

high turnover, require all employees to undergo security checks before leaving the store. These security checks range from brief and targeted (searches of purses or backpacks only) to thorough (searches of bags, coats, and pants pockets). Litigation of this issue tends to center on not only the length of the search, but the length of time the employee must wait for a manager to come and conduct the search. If this time is compensable, damages and penalties can quickly add up if all employees have to be checked before leaving for rest breaks, meal breaks, and at the end of the day.

Several federal courts have certified classes of plaintiffs in cases brought under the California Labor Code where all employees must undergo security screenings. In *Cervantez v. Celestica Corp.* (C.D. Cal. July 30, 2008) 253 F.R.D. 562, the plaintiffs, who were shipping facility workers, had to pass through security checkpoints before and after each shift, and they spent 30-60 minutes a day on average waiting in security lines. (*Id*. at 567.) The employer did not pay employees for that time. (*Ibid*.) The court certified the class after determining that the key legal issue was that of the employer's control, per *Morillion*, 22 Cal.4th at 585. (*Cervantez*, 253 F.R.D. at 570-572.) The court found that there was no common question of law as to security screenings at the *start* of the shift, because employees could choose when to arrive before their shift began. The court did find commonality as to post-shift security screenings, because employees had no choice but to go directly to the security line after their shifts. (*Id*. at 571-572.)

Here, as in other cases, the courts attempted to draw a fine line along the question of whether and to what extent the employees had choices that affected their preliminary and post-liminary activities. (See *Greer v. Dick's Sporting Goods, Inc*. (E.D. Cal. April 13, 2017) No. 2:15-cv-01063-KJM-CKD, 2017 WL 1354568 [certifying class of retail workers who were required to bring jackets, bags, and all personal belongings to the exit and wait for a manager to inspect them, after clocking out]; *Ogiamien v. Nordstrom, Inc.* (C.D. Cal. Feb. 24, 2015) No. 2:13–CV–05639–ODW–JCG, 2015 WL 773939, at *5 [denying certification to a security check class where only bags were checked and evidence showed 25% of the class did not bring bags to work].)

Of course, the question of whether a security check class is certifiable is distinct from the ultimate question of whether and under what circumstances the time spent off-the-clock waiting for and undergoing a security check is compensable.

In 2017, the California Supreme Court decided to hear the question in perhaps its most common form – whether time spent waiting for a manager and having bags searched, assuming employees are voluntarily bringing bags, counts as hours worked under

the California Labor Code. The issue was originally presented to the Ninth Circuit Court of Appeals in *Frlekin v. Apple, Inc.,* 870 F.3d 867 (9th Cir. August 16, 2017), which certified the wait time question to the California Supreme Court. The issue as framed by the California Supreme Court is:

> Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 7?

(Case no. S243805.)

The plaintiffs' claim in *Frlekin* arise from Apple's requirement that employees at its Apple retail stores have all "personal packages and bags checked by a manager or security before leaving the store." Employees who brought bags are required to undergo searches before leaving the store or risk discipline, including termination of employment. (*Id*. at 870.) Employees clock out before having their bags checked, so they are not paid for bag check time.

The question the Ninth Circuit certified to the Supreme Court was limited to employees who bring bags "for personal convenience" due to issues with class certification that arose at the district court level. Specifically, there were concerns regarding commonality and typicality as between employees who truly chose to bring bags, and employees who needed to bring bags to work.

Apple acknowledged, during the Ninth Circuit appeal, that employees are under Apple's control while they are waiting for and undergoing the searches. However, Apple contended (and the District Court had agreed in granting summary judgment for Apple) that the searches were not required because employees did not *have* to bring bags to work. The Ninth Circuit acknowledged that this line of reasoning followed *Morillion* and its progeny, because "the searches here are voluntary in the antecedent sense that employees may choose not to bring a bag or package to work." (*Frlekin*, *supra,* 870 F.3d at 872.)

The Ninth Circuit, however, was not certain that the voluntariness test of *Morillion*, which dealt with transportation, was dispositive of a case regarding bag checks:

> First, unlike *Morillion*, *Overton*, and other cases, this case does not involve a question about time spent traveling to a work site. Instead, this case involves an on-site search during which the employee must remain on the employer's premises. That difference may matter.

(*Id*. at 872.) The reason traveling to work versus remaining at work may be a distinction *with* a difference, the Ninth

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Compensable Time – continued from page 19

Circuit explained, is the nature of the employer's interest. In travel time cases like *Morillion*, the employer's interest in providing transportation (whether mandatory or voluntary) is to have the employee arrive on time. "It is irrelevant to the employer how an employee arrives, so long as the employee arrives on time." (*Id*. at 872.) The employer's interest in conducting bag checks, by contrast, is loss prevention. Moreover, the level of control over the employee is greater for bag checks. Although the Ninth Circuit did not elaborate as to how employer control during bag checks is greater, the difference is easy to see. One of the defendant's arguments in *Morillion* was that employees could sleep, read a book, listen to music, etc., on the company bus, but the California Supreme Court still found the control element met. (*Morillion*, 22 Cal.4th at 586.) By contrast, an employee can, as a practical matter, do nothing while waiting for a manager, and must simply stand and permit the search during the bag check. The time belongs to the employer entirely.

Due to the increased employer control involved in a bag check, the Ninth Circuit was uncertain as to whether the "voluntariness" element from *Morillion* should even apply.

Moreover, even if *Morillion* applied, the Ninth Circuit questioned just how "voluntary" bringing a bag to work truly is. The court suggested there is a "spectrum" of how voluntary certain activities are, and in this case, bringing a bag to work falls somewhere on that spectrum between the absurd (bringing a vintage "steamer trunk" to work) and the potentially necessary (bringing a jacket in a cold climate). (*Frlekin, supra,* 870 F.3d at 873.) The court did not give further examples, but ubiquitous items in employee bags could include mobile phones, prescription medications, feminine hygiene products, contact lens solution bottles – all of which employees could contend they effectively must have with them during the eight or more hours they are at work. And employer policies could vary significantly, such as by allowing quick scans of small clear plastic bags that hold necessary items, and more extensive searches of larger bags that employees might choose to carry.

The California Supreme Court's decision may ultimately turn on whether it views these, and similar types of items, as effectively requiring a majority of employees to carry bags.

The anticipated California Supreme Court opinion in *Frlekin* has the potential to clarify – or even change – the landscape of the law regarding the types of pre-work and post-work activities that employers must pay for.

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Focus On the Facts

Leena Danpour

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Leena Danpour

Each side in a personal injury case can be considered in a different light. On one side, there is a human with feelings and emotions, who might be perceived under the light of sympathy by a jury. The other side, often a business without human attributes, might be perceived as a non-emotional profit generator. In other words, the jury might not feel compassion towards the business, as they do for the human who is injured. In fact, it is my natural instinct, even as I work with a defense firm, to sympathize with the injured. But this can cloud one's decision in determining liability. In this article, I will discuss defense attorneys' challenging but important role of focusing on and bringing to light all the cause-and-effect facts of the case, to show exactly how and why a plaintiff's injury occurred. This can help disperse the shadows cast by a jury's emotion arising from the unfortunate fact of someone having been injured.

In many cases, injury can be caused by unforeseen circumstances. For example, *in Hernandez v. City of Beaumont* (9th Cir. 2018) 742 F. App'x 257, Hernandez, a motorist, was stopped at a traffic light and pulled over by a police officer. (*Id.* at p. 259.) During the course of their interaction, the police officer pulled out and deployed his pepper spray. (*Ibid.*) This would have been a rather common occurrence for a police officer, except that Hernandez was now permanently blind. Reading this far, without any further information, my initial thought was that the pepper spray must have been defective, and the manufacturer was to blame. Maybe

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May the "Forest" Be With You

Sydney D. Taylor

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Sydney D. Taylor

Before starting law school, I was employed as a paralegal at an insurance defense firm in Orange County. Currently, I'm spending my summer interning at yet another insurance defense firm as a law clerk.

Early on in my legal career, while the partner I worked under (who was known for being very meticulous with his files) was explaining to me how to properly review and analyze records, he referenced the oft-quoted idiom, "don't forget to see the forest through the trees." The wisdom of these words has stuck with me. Essentially, the phrase is a reminder not to focus so much on the details that you ignore the bigger picture. As when viewing a painting by Monet or Seurat, if you focus in too closely on the individual brush strokes then you will see nothing but an incomprehensible messy blur, but by pulling back ever so slightly, a coherent image begins to emerge from the chaos.

Over the years, I've summarized hundreds of records, countless responses to written discovery, and more deposition transcripts than I could even venture a guess. I've worked on cases from the claim referral to sending out the settlement draft and closing the file, and it seems to me that lawsuits ultimately culminate in a win for whoever tells the best story. Telling the "best" or most compelling story from a defense point of view might involve disputing the plaintiff's claimed version of events entirely, or perhaps admitting liability but questioning the nature and extent of the harm.

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Focus On the Facts – continued from page 21

the formula was too strong, or maybe the quantity deployed too high. However, the court held that the manufacturer of the pepper spray was not at fault, and the pepper spray was not the cause of Hernandez's blindness. Instead, it was the manner in which the police officer used the pepper spray, being only one foot from Hernandez's eyes. (*Ibid*.) The officer was much too close, and violated the product's safety warning. (*Ibid*.)

Another example is *Huitt v. Southern California Gas Co*. (2010) 188 Cal.App.4th 1586. There, two plumbers were injured in a gas explosion at a construction site. (*Id*. at 1588.) One of them had opened a gas line to bleed air from the line. (Id. at p. 1590.) Natural gas accumulated and exploded when the plumbers ignited the pilot light on a hot water heater. (Ibid.) They sued the gas company on a failure-to-warn theory, arguing that the gas company should have warned them that new steel piping could absorb the odorant added to natural gas. (Id. at p. 1588.) They prevailed at trial, but the Court of Appeal reversed, stating that the plaintiffs needed to prove not only the lack of a warning, but that, if a warning had been given, they "would have learned of the warning and altered their conduct because of the warning." (*Id*. at p. 1603.) They explained that plaintiffs failed to carry their burden of proof because (1) they failed to prove they would have seen any warning from the gas company (Id. at pp. 1597-1599), and (2) they failed to prove they would have *followed* a warning if they had seen it (Id. at pp. 1599-1600). On the latter point, *Huitt* emphasized that the plaintiffs did not read the installation manual on the water heater they were installing: "If it is acceptable for plumbers to ignore the warnings and installation manuals, what certainty is there that they will read or heed a warning about odor fade placed on the water heater or mailed to them?" (*Id*. at pp. 1599-1600.)

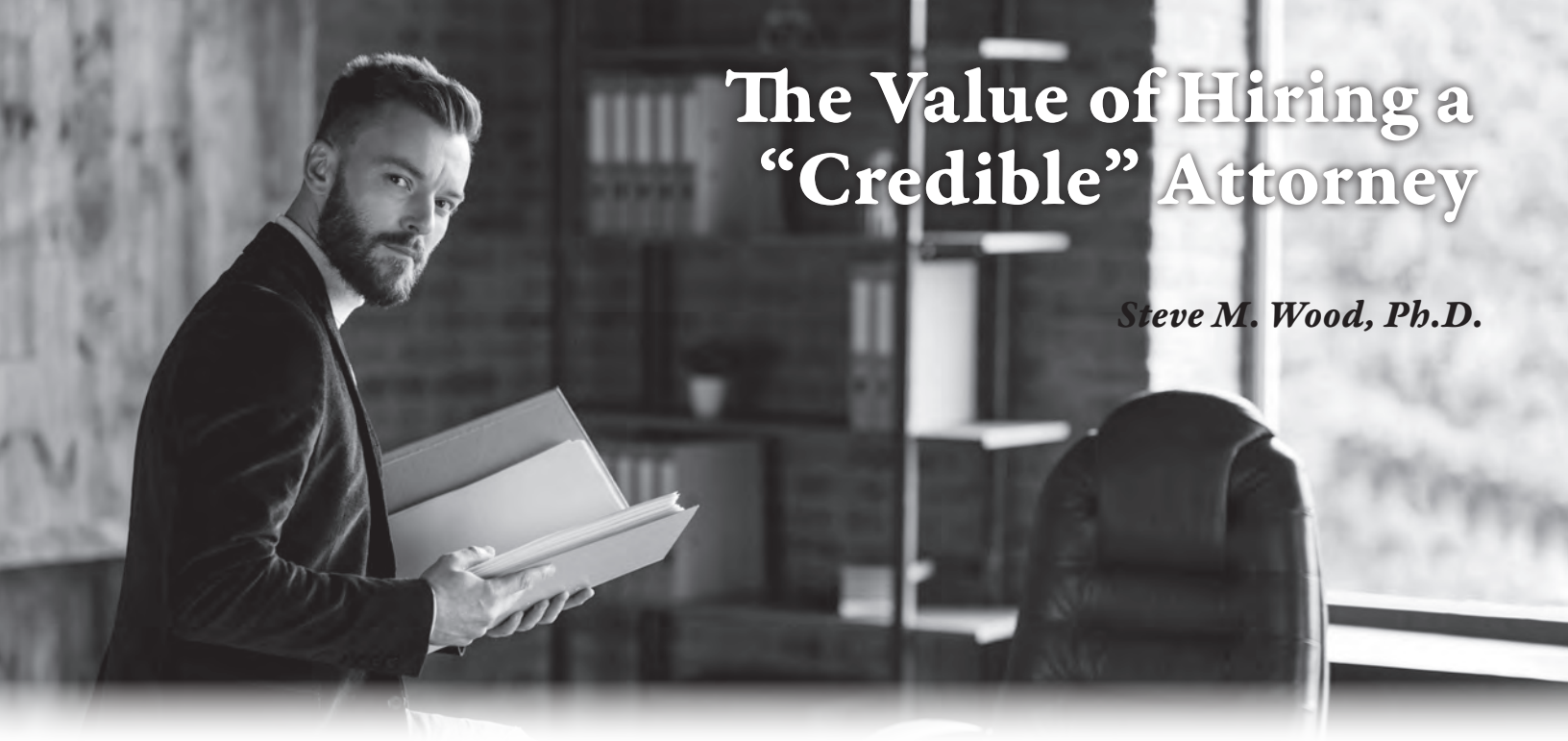
There are many similar fact patterns dealing with a product manufactured by the defendant, involved in injuring the plaintiff, but ultimately not *responsible* for injuring the plaintiff. These injuries, often severe, can trigger a deep sense of emotion in a jury, made up of humans with the same feelings and emotions as the injured plaintiff. However, such cases show why it is so important for defense lawyers to shed light on the facts, and battle through the emotion of the jury. While I too sympathize with a plaintiff who might have been innocently injured by a product by total accident, the defendant might still not be at fault. In any case, it takes factual investigation and analysis to show true cause of injury.

As a law clerk at Yoka & Smith, a personal injury defense firm in Los Angeles, my work involves supporting the defense attorneys who strive to bring these facts to the forefront of the case. Though the initial complaint is told from the plaintiff's side, these defense attorneys must conduct the necessary factual investigations and analyses to test that story. I have observed how a well thought-out defense can triumph over emotion, even where the plaintiff might have been severely injured. I continue to learn and improve my ability to issue-spot, especially in looking for small but key pieces of information that can come to light during discovery. This plays a role in showing that the defendant-business was not actually liable, even where one's feelings or emotions might suggest otherwise.

May the "Forest" – continued from page 21

In cases with a personal injury component, reviewing medical records is often an exercise involving T.M.I. (in every sense of the phrase). However, critical evidence that would otherwise remain buried may come to light simply by stepping back from the hyper-focused details of page after page of diagnoses and complaints and considering the information in a broader context. For example, during my summer internship, the importance of savvy record analysis was underscored by my supervising attorney (a partner who handles numerous premises liability cases) who triumphantly shut down a slip-and-fall claim in the midst of litigation. With mediation lurking just around the corner, she formed her pièce de résistance by contextualizing the plaintiff's testimony that he had fallen and injured himself in a dark theater – allegedly due to insufficient lighting – with a cross-reference to his medical records from the date of the incident which established that he had checked in at an ER several miles away only a few minutes before the movie's stated start time. This revelation, along with percipient witness testimony, led to substantive evidence that the theater lights were actually fully up at the time of the purported fall, which successfully countered his claim that the fall was caused by negligence on behalf of the theater. If she had merely viewed the plaintiff's medical records as a lone tree in the forest, then the significance of the information would have been forever lost in a vacuum

It's no secret that studying and practicing the law is a constant barrage of sensory overload that is at times difficult to process, but whenever it starts to feel overwhelming, take a moment to remember that there is an entire forest to be seen.



The Value of Hiring a "Credible" Attorney

Steve M. Wood, Ph.D.

Attorney credibility has been a topic of interest to attorneys for quite some time. Based on the literature and personal discussions with many trial attorneys, there appears to be two camps when it comes to this topic. The first camp often states, "Of course attorney credibility matters," while the second camp often espouses sentiments such as, "What does the attorney's credibility have to do with the case? The facts are the facts." There does not appear to be much middle ground – it is an all or nothing proposition.

However, the answer to the question, "Does an attorney's credibility matter in the courtroom?" may not be that straightforward. The literature is replete with recommendations on how attorneys can become more persuasive in the courtroom; however, there are only a few scientific studies related to civil litigation that examine whether the perceived characteristics of attorneys are related to courtroom outcomes. Moreover, there has been little discussion about the things that *jurors* have stated that attorneys should *not* do in the courtroom. This article's purpose is four-fold: (1) define what attorney credibility is and what it is not; (2) examine how attorney credibility influences verdict outcomes; (3) identify the actions and behaviors of attorneys that lead them to lose credibility with jurors; and (4) provide insight into juror decision-making so attorneys can increase their ability to deliver when the "bright lights come on" and the clients and jurors are watching.

Defining Attorney Credibility

Before beginning this discussion, we must specify what is meant by "attorney credibility." A credible source is commonly defined as someone who is perceived to possess two traits: expertise and trustworthiness. Expertise is the degree to which the audience perceives a speaker to be capable of making valid arguments, while trustworthiness is the extent to which the audience perceives a speaker's assertions to be ones that the speaker believes to be correct. Perceptions of expertise and trustworthiness are *subjective* qualities that are attributed to a communicator by an audience; they are not an objective trait that a communicator possesses.

It should be noted that likeability is not considered a component of attorney credibility. Likeability is a separate construct, with separate determinants, and the two are often discussed as distinct characteristics of an individual. For example, books, internet articles, and journal articles clearly differentiate between the concepts of "credibility" and "likeability." We understand, however, that it is difficult to disentangle these two aspects when discussing factors used to form perceptions about a person.

Another distinction must be made between attorney credibility and evidence strength. These concepts may seem intertwined, but they are not inextricably linked. Attorney credibility and evidence strength have been found to affect courtroom outcome independently of one another. In a study that experimentally manipulated plaintiff attorney credibility, defense attorney credibility, and case strength, jurors perceived the case to be stronger when the plaintiff attorney was credible versus non-credible. That is, a credible plaintiff attorney increased jurors' perceptions of the case strength compared to a non-credible plaintiff attorney. Jurors' perceptions of the case strength were not influenced, however, by defense attorney credibility.

Attorney Credibility in the Courtroom

With a clearer understanding of what attorney credibility is, the question remains, "Does it matter to courtroom verdicts?" Within the realm of civil litigation, the answer to this question is, "It depends." Specifically, it depends on (1) how attorney influence is being measured and (2) which attorney is being referred to.

A study that experimentally manipulated the plaintiff and defense attorneys' credibility (credible or non-credible) and the plaintiff's evidence strength (strong or ambiguous) in a toxic tort case, attorney credibility was found to be an influential factor in jury decision making. Across liability, causation, and compensatory damage verdict decisions, attorney credibility, and not case evidence,

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was found to be the primary determinant in jurors' decision making. However, as will be shown next, not all attorneys have equal influence on jurors.

The plaintiff attorney's credibility had a more direct influence on liability, causation, and compensatory damage decisions than the defense attorney's credibility. Regarding liability decisions, participants were more likely to render liability verdicts when the plaintiff attorney was credible versus non-credible. (For the sake of parsimony and clarity, only the results related to the ambiguous evidence condition are reported for liability verdicts. For results related to the strong evidence condition, please contact the author. The findings for causation and compensatory damage awards are presented independent of evidence strength.) However, this only occurred when the defense attorney was credible. When the defense attorney was not credible, the plaintiff attorney's credibility did not influence liability verdicts. This suggests that a credible defense attorney can place the onus on the plaintiff attorney to ensure that he or she is seen by jurors as a credible source. If the plaintiff attorney cannot do this, the likelihood of a favorable verdict decreases.

When the defense attorney is not credible, the onus on the plaintiff attorney to be perceived as credible is removed. Therefore, a non-credible plaintiff attorney could still be successful against a non-credible defense attorney, but a non-credible plaintiff attorney will *not* be successful against a credible defense attorney.

Table 1. Percentage of Liability Verdicts by Attorney Credibility

Plaintiff Attorney Credibility	Defense Attorney Credibility	Liability Verdicts
Non-Credible	Non-Credible	60 %
Non-Credible	Credible	52 %

Regarding causation verdicts, an individual's need for cognition interacted with the plaintiff's credibility. "Need for cognition" relates to an individual's tendency to engage in and enjoy effortful thinking. Individuals with high need for cognition engage in and enjoy effortful thinking more than individuals with low need for cognition. Results showed that individuals who had higher need for cognition were more likely to render a causation verdict in favor of the plaintiff when the plaintiff attorney was credible versus non-credible. For individuals who had low need for cognition, the plaintiff attorney's credibility did not matter. Therefore, individuals who enjoy effortful thinking are attending to a plaintiff attorney's credibility when rendering causation verdicts more so than individuals who do not enjoy effortful thinking. It is believed that the reason why this occurs is that high need for cognition individuals are scanning their environment and looking for pieces of information that they can use to make an informed decision. The plaintiff attorney's credibility is seen by these individuals as an additional piece of evidence, rather than some periphery piece of information.

Interestingly, across both groups, the defense attorney's credibility did not influence causation verdicts. This suggests that jurors were focusing more on the plaintiff attorney's credibility when making causation determinations than the defense attorney's credibility. This is yet another example that jurors are placing the burden on plaintiff attorneys not only to prove their case, but also to prove that they are credible. Jurors will make plaintiff attorneys pay if they fail to meet their burden. Such a burden is not being placed on defense attorneys.

Table 2. Percentage of Causation Verdicts by Attorney Credibility and Need for Cognition

Plaintiff Attorney Credibility	Defense Attorney Credibility	Low Need for Cognition	High Need for Cognition
Non-Credible	Non-Credible	70 %	60 %
Non-Credible	Credible	71 %	58 %

Finally, only the plaintiff attorney's credibility mattered when jurors were considering compensatory damage awards. The plaintiff was more likely to receive the amount that she asked for ($500,000), or more than she asked for (average award of $3,161,666.67), when the plaintiff attorney was credible versus non-credible. Alternatively, the plaintiff was more likely to receive less than she asked for (average award of $224,016.04) when the plaintiff attorney was non-credible versus credible. These findings suggest that jurors are monetarily rewarding credible plaintiff attorneys and their clients, while punishing non-credible plaintiff attorneys and their clients.

The data is clear: hiring credible attorneys is beneficial to plaintiffs and defendants. Fortunately, credibility is something that can be measured. We strongly encourage clients to contact experienced litigation psychologists who are skilled in evaluating attorney credibility.

What Decreases Attorney Credibility?

For years, we have been collecting data on attorney credibility across a wide variety of case types. Jurors are asked to indicate why they believe that the attorney was credible or non-credible. The following section provides jurors' views on the ways in which attorneys hurt their credibility. We conclude each section by providing insight into the rationale for why jurors believe that these actions and behaviors decrease an attorney's perceived credibility.

Lack of Proof

- "He didn't check all the facts of the plaintiff's case."
- "He made several assertions with little to no support shown."
- "Lots of unimportant and non-relevant information."
- "He didn't give me all the news that I needed, didn't explain himself all the way."

Even though jurors understand that the plaintiff has the burden of proof in civil trials, they still believe that defendants must disprove the plaintiff's case as well, no matter the court's admonishments. For jurors, it is never enough that the defense refutes the plaintiff's claims and pokes holes in the plaintiff's case: jurors expect the defense to provide them with credible "proof" that the plaintiff is lying, exaggerating, or

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misattributing blame. Jurors also expect the defense to provide them with evidence that the defendant acted consistently with the defendant's duties and responsibilities in the matter at hand, regardless of whether these duties and responsibilities are outlined or challenged by counsel or perceived by jurors themselves. Without this type of evidence, jurors will begin to question the attorney's credibility. This is because jurors will begin to question whether the attorney can produce the requisite evidence. It may not be a question of whether the evidence exists, but whether the attorney is skilled enough to identify what is needed for the case and then locate the evidence.

Lack of Trustworthiness

- "I didn't believe much of what she said."
- "She seemed like she was lying to us to help her client."
- "Everything she said sounded like she was spinning the truth."

It is no secret that the public does not trust attorneys. In a recent Gallup poll, only 18 percent of people indicated that attorneys have high or very high honesty and ethical standards, while 28 percent indicated that attorneys have low or very low honesty and ethical standards. As a prominent intellectual property attorney once opined, "What is important is that jurors come to the conclusion that the attorney believes what he or she is saying, not necessarily that the jurors understand what the attorney is saying." To do this, jurors must trust the attorney. What is not clear, however, is whether jurors immediately do not trust attorneys because of preconceived biases, or the attorneys gave jurors reasons not to believe them, or both. Based on our research, the last scenario is more likely because we have heard from many jurors who have commented that an attorney appeared "genuine" and "believable," which is no small task.

Lack of Humility

Humility is one of the most underrated of all aspects of person perception. Although attorneys may not necessarily worry whether jurors like them or think that they are a "nice person," what they should remember is that jurors view attorneys as the de facto representative of their client. Being perceived as arrogant has the real possibility of seeping over into jurors' perceptions of an attorney's client. As one juror noted about a male attorney, "He comes across as arrogant, at least as the face of his client, thus making the defendant seem arrogant." Interestingly, the juror who made this comment was also asked, "If you were a jury of one, who would you blame most in this case?" (This was a case with multiple defendants.) This juror indicated that she would blame the attorney's client more than the other defendants. Additionally, this juror awarded the highest apportionment of responsibility to this attorney's client. While the attorney's perceived arrogance was likely not the direct cause of the juror's verdict, it likely provided a distorted lens with which to view the case evidence.

Not Persuasive

- "She didn't show any emotion in anything she said at all ... she sounded like a robot."
- "He put me to sleep."
- "He looked like he was bored being there."
- "He didn't seem too interested in his case."

One of the primary jobs of an attorney is to convince jurors that the attorney's position is more correct than opposing counsel's. To be able to achieve this goal, attorneys must not only present jurors with evidence, but they must also provide a persuasive presentation. Based on responses from mock jurors and actual jurors in post-trial interviews, there are (at least) two ways that attorneys fail to be persuasive. First, jurors expect that the evidence will be persuasive. It is not enough just to have evidence in support of the attorney's case. Rather, jurors are looking for evidence that persuades them to believe that the attorney's position is "correct." Second, jurors appear to expect that attorneys believe in their own arguments. Attorneys lose credibility with jurors when they believe that the attorneys are just "doing their job," are "not convinced of their own arguments," and are "phoning it in."

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Lack of Remorse or Sympathy

- "She came off as if she were trying to explain a very horrific situation as insignificant and minor."
- "She came off 100% corporate and 100% insincere."
- "Her presentation was rather cold and calculated."
- "She didn't seem to care for the family and had no real feeling."

Many jurors are cognizant that they cannot let sympathy and emotion play any part in their deliberation process. However, this is not to say that jurors expect themselves to be completely devoid of emotion. This expectation is also carried over onto the attorneys representing the different parties. While jurors may not expect defense counsel to concede liability, what they do expect is some acknowledgement that a human being has been injured or killed. Some jurors will have a higher expectation of this than others. We do not suggest that defense attorneys feign emotion; rather, defense attorneys should be aware that jurors are looking for (and expecting) these attorneys to provide some genuine outward appearance of remorse or sympathy.

Unprepared

- "He seemed like he didn't know what he was going to say next."
- "He appeared to not be very well prepared."
- "While he did present some good points, he also bounced around and was a little confusing."
- "She stumbled over her words a lot, misspoke."

Jurors in real trials have been ripped from the fabric of their lives. They are asked to take hours, sometimes days, out of their normal routine to come and perform their civic duty. Those that are ultimately selected are likely not excited about serving on the jury and most prefer to be anywhere else besides the courtroom. Therefore, one of their primary goals is to get their jury service over and return to their daily routine. Standing in the way of this goal are attorneys who exhibit behaviors that indicate they have not thoroughly prepared for their presentation. As a result, the attorneys are wasting the court's time and, more importantly, jurors' time.

Although mock trials are not "real" in the sense that the verdict decisions are not legally binding, jurors still hold the attorneys to a level of preparedness on par with attorneys in actual trials. Mock jurors are told that their participation can be helpful in resolving the dispute at hand. Therefore, the jurors come to expect that the attorneys will be "putting their best foot forward." When an attorney's behaviors suggest he or she has not fully prepared a presentation, jurors begin to question the attorney's credibility. As we previously mentioned, one of the goals of a mock trial is to achieve valid results. Attorneys that appear unprepared to mock jurors run the risk of invalidating the findings. Even worse, an unprepared attorney may receive an unfavorable verdict at trial.

Putting This Information into Practice

Attending to their courtroom behaviors may not be something that all attorneys concern themselves with because they may believe that they have a good understanding of their perceived credibility. However, research has shown that defense attorneys rate their own performance more favorably than jurors. Similarly, we have heard attorneys make comments about how they believe a juror is "on their side" based on how the juror was responding nonverbally (e.g., smiling) to the attorney's presentation. But on seeing the juror's verdict orientation, it becomes clear that the juror was not on the attorney's side, and the nonverbal behaviors were suggesting that the juror did not believe the attorney. As a result of misunderstanding jurors' perceptions of them, some attorneys may be unknowingly engaging in the behaviors mentioned above.

Some attorneys may also be in the camp that believe that "the evidence will carry the day," and their perceived credibility provides little to no influence on the verdict outcome. Historic and current civil litigation data on attorney credibility shows that this is not true. Of course, evidence is an integral part of any case; however, attorneys who overlook how jurors perceive their credibility do so at their own peril. Similarly, attorneys risk impugning the credibility of their expert and fact witnesses, thereby inadvertently decreasing the strength of their own case. This latter point is extremely important when considering that the credibility and performance of fact witnesses is pivotal to case outcomes.

In closing, the comments that we have received from jurors about the things that decreased an attorney's credibility were about highly skilled, highly successful attorneys who were involved in high-exposure litigation. If these comments are being made about them, we must wonder what is being said about less-experienced attorneys. Our research demonstrates that attorneys must make a concerted effort to understand how jurors perceive their credibility. This means working with researchers who have extensive knowledge to help prepare attorneys to avoid the pitfalls that lead jurors to blame the messenger. This also means that attorneys must be open to receiving feedback from jurors. Rather than running from it, attorneys must embrace the comments that jurors are making during mock trials and post-trial interviews. In the long run, what may be a temporary discomfort may very well pay dividends in the long run in helping attorneys become more successful in the courtroom.

Steve M. Wood, Ph.D.

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PLAN TO WIN(N): A Case Study of Elder Abuse Act-Based Neglect and Physical Abuse Claims Against Health Care Providers

Richard J. Ryan and Aaron J. Weissman

Despite the binding "care custodian" analysis in *Winn v. Pioneer Medical Group, Inc*. (2016) 63 Cal.4th 148 ("*Winn*") that limits the reach of the Elder Abuse Act ("Act"), aggressive plaintiffs' counsel continue to craft creative theories for an additional source of attorney fee generation under the Act as well as for avoiding the MICRA protections for health care providers. In a recent nearly ten-week jury trial in such a case, the jury saw beyond plaintiff's strategy, finding 12-0 for the defense on both such Elder Abuse claims. We describe here some strategies developed during and from that experience.

SUMMARY OF THE CASE

At age 83, plaintiff Beverly Edwards ("Plaintiff") fell and broke her left ankle, sustaining significant bimalleolar fractures. Following surgeries, in addition to hospitalizations, Plaintiff received care at three different 24-hour skilled nursing facilities ("SNF"). All three were owned and operated by the same parent entity. Each SNF "had the 24-hour care and custody of Plaintiff and was her care custodian pursuant to *Welfare and Institutions Code* §15610.17."

While under SNF 24-hour care and custody, Plaintiff developed pressure ulcers and osteomyelitis in the left lower extremity, and contractures of the shoulders, hips, knees and ankles. Plaintiff thereafter underwent a left leg below the knee amputation.

In the *Edwards* case, Plaintiff sued the SNFs, their Medical Directors and Plaintiff's primary care providers, among others, for Elder Abuse. Plaintiff settled with these defendants about two years prior to trial for ***substantial*** sums.

During the litigation Plaintiff amended her complaint to add our client, wound consultant physician Luis Lee, M.D. ("Dr. Lee"), along with another wound consultant physician who settled under his own insurance policy, and their employer Vohra Wound Physicians of California ("Vohra"). Plaintiff added two additional related but uninvolved Vohra entities. A one-day alter-ego bench trial ultimately resulted in a judgment in their favor.

Plaintiff alleged Dr. Lee "provided grossly inadequate care" and "neglected and abused" Plaintiff as a result of his alleged "failure to assess, diagnose, document, and monitor medical problems; failure to examine and assess her overall medical condition; failure to obtain her informed consent prior to wound care procedures; failure to address her pain during procedures; failure to diagnose, document, or address her contractures; failure to send her to the hospital when her condition became life-threatening, choosing instead its 'conservative' bedside treatments which were causing pain, debilitation and depression, and prolonging any healing process...."

PRIMARY ISSUES ADJUDICATED

1. Neglect and the Care Custodian Element
2. Physical Abuse and the Care Custodian Element
3. Physical Abuse and the Battery and Consent Issues

LEGAL ANALYSIS

A. The "Care Custodian" Element is an Absolute Predicate to a "Neglect" Claim

For years, appellate courts grappled with whether the Elder Abuse Act ("Act") was intended to apply to all persons who allegedly harmed an elder. Justice Cuellar's well-reasoned analysis in *Winn* answered that question with a resounding NO, stating:

> "What [the types of conduct specified in the Act as constituting neglect] each seem to contemplate is the existence of a ***robust*** caretaking or custodial relationship – that is, a relationship where a certain party has assumed a ***significant measure of responsibility*** for attending to one or more of an elder's ***basic needs***...."

Id. at 158; emphasis added.

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In the *Edwards* case, evidence at trial established that Dr. Lee did not engage in a "substantial" or "robust" caretaking or custodial relationship with Plaintiff. He was not a care custodian of Plaintiff and could not be liable for Neglect.

B. The "Care Custodian" Element Should Also be a Predicate to a "Physical Abuse" Claim

Winn focused on neglect, but its "custodial relationship" analysis applies equally to physical abuse claims. The opinion begins with an all-encompassing summary statement:

> "What we conclude is that ***the Act*** does not apply unless the defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient."

(*Id*. at 152; emphasis added.)

By the "Act," Justice Cuellar specifically referred to "*Welfare & Institutions Code* § 15600, *et seq*.", meaning the ***entire*** Act, not some limited portion thereof. (*Id*. at 152.)

Consistent with that view, the Supreme Court in *People v. Heitzman* (1994) 9 Cal.4th 189 ("*Heitzman*"), held that a defendant without custodial responsibilities ***had no duty*** to prevent injuries to her father caused by her caretaker brothers and no criminal liability under *Penal Code* §368. (*Id*. at 214; *see also*, *Winn* analysis of *Heitzman* at 162.)

In analyzing the "caretaker" or "custodian" criteria under *Penal Code* §368, the Court reviewed the history of concern over elder abuse. Absent such analysis and the resulting limitations, *Heitzman* noted:

> "[S]uch a [literal] reading of the statutory language would create the anomaly of imposing on every individual the duty to *prevent* abuse, while a different statutory scheme, adopted *after* the enactment of section 368(a), expressly excludes everyone but a small number of health care, social services and public safety individuals from the duty to report abuse.... (Italics added.)"

(*Heitzman* at 201.)

The *Heitzman* analysis of the legislative history regarding *Penal Code* §368 included:

> "The first ... reports ... [were] released in 1981 ... California lawmakers responded ... in 1982 with legislation recognizing 'that dependent adults may be subject to ***abuse, neglect***, or abandonment and that this state has a responsibility to protect such persons.'
>
> *****
>
> "... [L]aw enforcement agencies receiving reports concerning suspected abuse or neglect of dependent adults were having difficulty finding *Penal Code* sections under which they could prosecute such cases. (Ibid.) The solution proposed by the bill was to establish ***the same criminal penalties for the abuse of a dependent adult as those found in Penal Code sections 273a and 273d for child abuse***. (Sen.Com. on Judiciary, Analysis of Sen. Bill No. 248, supra, at p. 1.) When drafting the new legislation, the bill's author lifted the language of the child abuse statutes in its entirety, replacing the word 'child' with 'dependent adult' throughout. (See id at. pp. 2-3.)
>
> "The probable justification for modeling the proposed legislation on the language of existing child abuse statutes was the assumption that ... dependent adults could neither speak for, nor protect, themselves .... [T]he Judicial Council observed that '[t]he position of [dependent adults] is analogous to that of children, in that the disabilities of age or a physical or mental condition may make them as helpless ***at the hands of a caretaking adult*** as is a small child.'"

(*Id*. at 201-203; emphasis added.)

Winn dissected the *Heitzman* analysis, stressing the importance of statutory phrases relating to the same subject being

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Elder Abuse – continued from page 28

harmonized, both internally and with each other and with their interpretation in analogous statutory provisions arising beyond the Act. Pertinent to the *Winn* analysis, Justice Cuellar stated:

> "Though the Act sets forth a rather broad definition of '"abuse of an elder,"'...section 15657 is explicitly limited to ***physical abuse and neglect***. This qualification...supports the conclusion that the Legislature ***explicitly targeted heightened remedies*** to protect particularly vulnerable and reliant elders and dependent adults. Indeed, the limited availability of heightened remedies is indicative of a determination that individuals responsible for attending to the basic needs of elders and dependent adults that are unable to care for themselves should be subject to greater liability where those ***caretakers or custodians*** act with recklessness, oppression, fraud, or malice."

(*Id*. at 160; emphasis added.)

> "Appearing not only in section 15610.57 but also elsewhere in the Act, the phrase 'care or custody' evokes a bond that contrasts with a casual or temporally limited affiliation. ***We generally presume that when the Legislature uses a word or phrase 'in a particular sense in one part of a statute,' the word or phrase should be understood to carry the same meaning when it arises elsewhere in that statutory scheme***. (*People v. Dillon* (1983) 34 Cal.3d 441, 468....)
>
> "***It is this reading of the Act that most readily fits with how we have interpreted analogous statutory provisions arising beyond the Act that nonetheless use the phrase 'having the care or custody***.' We construe this phrase in context, with the understanding that ***statutes 'relating to the same subject must be harmonized, both internally and with each other, to the extent possible***.' (*Dyna–Med, Inc. v. Fair Employment & Housing Com*. (1987) 43 Cal.3d 1379, 1387, 241 Cal.Rptr. 67, 743 P.2d 1323; see Lexin v. Superior Court (2010) 47 Cal.4th 1050, 1090–1091, 103 Cal. Rptr.3d 767, 222 P.3d 214 ['It is a basic canon of statutory construction that statutes in pari materia should be construed together so that all parts of the statutory scheme are given effect'].)"

Id. at 161; emphasis added.

In *Winn*, Justice Cuellar, specifically looking at *Penal Code* §368 and *Heitzman*, noted:

> "[T]he underlying purpose of both felony abuse statutes was to 'protect the members of a vulnerable class from abusive situations,' which usually arose where ***caretakers or custodians*** responsible for the basic needs of these vulnerable, dependent populations failed to provide for their charges."

(*Id*. at 162; emphasis added.)

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Justice Cuellar tellingly concluded, "[T]he legislative history of the Act likewise suggests that the Legislature was principally concerned with particular ***caretaking and custodial relationships***, and the ***abuse and neglect*** that can occur in that context." (*Id*. at 162; emphasis added.)

Dependent adults are most "at risk" of physical abuse from their family members and caretakers. Public policy and consistent relevant judicial analysis dictate the tethering of the care custodian or caretaker requirement to claims of physical abuse under the Act.

C. Dr. Lee Was Not Plaintiff's Care Custodian

In *Winn*, plaintiff's decedent obtained periodic outpatient wound treatment from the defendant physicians and medical group (collectively, "Pioneer"). (*Id*. at 153.) Pioneer failed to refer decedent to a vascular specialist for lower extremity insufficiencies that ultimately resulted in a below the knee right leg amputation and her death. (*Id*. at 153-154.)

Winn concluded there was nothing about the "intermittent, outpatient medical treatment" that "forged a caretaking or custodial relationship" (*Id*. at 165) and recognized that merely providing or being in a position to provide medical care to an elder, is insufficient to establish the "care custodian" element under the Act. (*Id*. at 163 ["nothing in the legislative history suggests that the Legislature intended the Act to apply *whenever* a doctor treats an elderly patient"].) The required "robust caretaking or custodial relationship" (*id*. at 158) was absent.

Under *Winn*, the care custodial relationship is not based exclusively on the location of the care. (*Id*. at 160 [it may "encompass settings beyond residential care facilities"].) Rather, there was no potential elder abuse liability because "nothing" supported the inference that the decedent "relied on defendants in any way distinct from an able-bodied and fully competent adult's reliance on the advice and care of his or her medical providers." (*Id*. at 165.) The required caretaking or custodial relationship is established by the elder or dependent adult's reliance or dependence "on another for the provision of some or all of his or her fundamental needs." (*Id*. at 160.)

Plaintiff in the *Edwards* case never acknowledged just what that "***basic need … that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance***" actually was. Here, Plaintiff's "basic needs" included those in *Welfare and Institutions Code* §15610.57 (personal hygiene, food, clothing, shelter and other basic needs) ***not*** the limited and periodic wound consulting services, wound debridement (surgery) or other similar conservative forms of ***skilled medical care*** provided by Dr. Lee.

In verified discovery responses, Plaintiff ***admitted*** that she did not rely upon Dr. Lee to:

- Provide Plaintiff with daily shelter.
- Provide Plaintiff with daily bedding.
- Personally turn Plaintiff periodically for pressure relief.
- Personally provide Plaintiff with daily hygiene.
- Personally provide Plaintiff with fluids on a daily basis for hydration.
- Personally provide Plaintiff with food on a daily basis for nutrition.
- Personally toilet Plaintiff.
- Personally provide Plaintiff with daily physical activity.

Dr. Lee provided periodic, focused wound care to Plaintiff's left extremity, the same care that could have been provided on an outpatient basis (as in *Winn*). The location neither altered the character of the care nor changed the relationship.

Here, as in *Winn*, the evidence established that there was nothing about the professional medical wound consultant physician services provided by Dr. Lee to Plaintiff that forged a caretaking or custodial relationship between the two.

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D. Physical Abuse Issues

Plaintiff raised ***lack of informed consent*** for Dr. Lee's wound care (*i.e.* debridements) as "battery" and "physical abuse." Remarkably, the trial court allowed Plaintiff to proceed on this theory relying on a strained and unsupportable interpretation of the recent case of *Stewart v. Superior Court* (2017) 16 Cal.App.5th 87, which, unlike this case, involved an ***express rejection*** of a recommended procedure (*Id*. at 105.)

"Physical abuse," defined in *Welfare and Institutions Code* §15610.63, includes certain intentionally-committed, criminal acts specifically defined under the *Penal Code*. Pertinent here was "battery" (defined in *Penal Code* §242 as "any willful and unlawful use of force or violence upon the person of another.") Dr. Lee engaged in no such conduct.

Intentional physical contact becomes "unlawful" where the plaintiff expressly refuses to consent. (*See*, *Perry v. Shaw* (2001) 88 Cal.App.4th 658 [physician purposely performed breast augmentation following patient's express rejection of consent for that procedure].) ***If it isn't battery, it isn't physical elder abuse***.

In *Edwards,* the evidence established that Dr. Lee and other physicians before him informed Plaintiff of the risks and benefits of surgical wound debridement and other forms of wound treatment and obtained appropriate consent therefor. Plaintiff testified in her video deposition (displayed at trial in her strategic absence) that she believed that it was appropriate to receive wound care because, after all, she had wounds and testified to wanting wound care. Moreover, medical record evidence made it clear to the jury that when Plaintiff did not want certain care, she made her desires clearly known.

E. The Result

The jury found in favor of Dr. Lee on these Special Verdict questions:

1. On the Neglect claim, the jury found that Dr. Lee was not a care custodian to Plaintiff
2. On the Physical Abuse claim, the jury found that Dr. Lee did not physically abuse Plaintiff

LESSONS LEARNED

We often face overly aggressive plaintiffs' counsel who will take a "hammer and tongs" approach to Elder Abuse litigation seeking to increase pressure on the defense by increasing defense costs and expenses and inflating potentially recoverable plaintiffs' attorneys' fees given the one-way attorneys' fees provision. Their focus so often is on the SNF's general mishandling of their client that they tend not to have the technical expertise required to address the clinical aspects of the medicine itself. ***Know the medicine***.

To the extent possible, avoid the expense of discovery/law and motion disputes. In this case, we faced a plaintiff's counsel who led with hubris and arrogance, made discovery unreasonably contentious and costly, often without regard to civility or ethics and, in a "home-town" environment, was allowed to prosper from it. Plaintiff here took over 100 video-taped depositions and sought or compelled the production of some 100,000 pages of documents, including corporate "alter-ego" business and financial records that ultimately were irrelevant.

The use of information technology at trial (Power Point in opening and closing, with hundreds of on-video quotes at the ready to impeach) proved to be invaluable. Depose and cross-examine plaintiff, family members and others on caretaker and consent issues. While costly, video depositions, most taken at the behest of plaintiff, proved far more beneficial to the defense at trial. Displaying video impeachment testimony of plaintiff, family members and plaintiff's experts was compelling.

Retain strong experts in geriatrics, SNF care and specialty physician care to support the care custodian issue (whether at MSJ or trial) by accurately explaining the tripartite relationship among the physician, patient and SNF.

It is important to distinguish between the professional standard of care requirements applicable to physicians and the basic duties of mere caretakers. Focus questioning in deposition and trial examination on *Winn* and *CACI* elements as to "basic needs" and "custodial care" and on differentiating between professional standards of care and basic caretaker duties.

IN CONCLUSION

We acknowledge our client's courage, his willingness to defend his good reputation and his faith in counsel. We applaud the insurer who literally spent millions defending a case where there was no duty to indemnify. And we credit the jury for seeing past "red herrings" to reach the right decision.

In Elder Abuse cases involving physicians, especially in light of the heightened "clear and convincing evidence" standard, defense counsel, the carrier and the insured physician should not fear specious punitive damage claims or the one-way attorneys' fee provisions of the Elder Abuse Act and should aggressively defend under *Winn* with a mind toward its further refinement and expansion into the physical abuse realm.

Richard J. Ryan

R. J. Ryan Law Managing and Founding Shareholder Richard J. Ryan has a strong history, most significantly in the medical malpractice arena, that spans more than 36 years of litigation and trial success. He is an Associate of the American Board of Trial Advocates and is AV rated by Martindale-Hubbell. Mr. Ryan is a graduate of Southwestern University School of Law (J.D. 1982) and California State University, Fullerton (B.A. 1978). He was admitted to the State Bar of California in 1982.

Aaron J. Weissman

R. J. Ryan Law Senior Motion and Appellate Counsel Aaron J. Weissman has practiced in civil and business litigation for over 38 years. A UCLA undergraduate, Mr. Weissman is a graduate of the University of West Los Angeles School of Law (J.D. 1980). He was admitted to the State Bar of California in 1981 and is AV rated by Martindale-Hubbell.

ASCDC Gives Back to San Diego!

On May 18, 2019 the ASCDC Board of Directors held a meeting in San Diego. As part of the meeting, the group held a food drive for the homeless in North County San Diego.

We gathered hundreds of pounds of food and delivered it to the San Diego Food Bank. The Food Bank comprises the largest hunger-relief organization in San Diego County. Last year, the Food Bank distributed 28 million pounds of food. The Food Bank serves, on average, 350,000 people per month in San Diego County.

They ask groups to fill one barrel and we supplied enough food to fill three barrels. They were thrilled with the generous donations from the Board!

If you would like to donate, volunteer or learn more about the San Diego Food Bank you can follow this link. *https://sandiegofoodbank.org/about/*

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Estate of Manzullo v. Weiss, M.D.

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Stanley v. Toyota Motor Sales

Richard J. Ryan & Aaron J. Weissman
R.J. Ryan Law, APC
Edwards v. Lee

Kimberly Byrge
Yoka & Smith, LLP
Abuershiad v. Fitness International, LLC

Sean D. Beatty
Beatty & Myers, LLP
Stanley v. Toyota Motor Sales, U.S.A., Inc., et al.

Richard Carroll
Carroll, Kelly, Trotter, Franzen, McBride & Peabody
Lafky v. Bagheri

Duane A. Newton
Klute & Newton
Vasquez v. Hunter
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David J. Weiss
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Batchelder v. Shamie, M.D., et al.

Anthony Kohrs
Hennelly & Grossfeld, LLP
Go Digital Media Group v. GoDigital, Inc.
California Capital v. Whirlpool Corporation

Michael G. Martin
Graves & King, LLP
Fatu v. Roland Curtains, Inc, AVM Industries

amicus committee report

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

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

Don't miss these recent amicus *VICTORIES!*

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

1 ***Stokes v. Muschinske*** (2019) 34 Cal. App.5th 45: The Court of Appeal held that the defense did not violate the collateral source rule by having its billing expert testify about the reasonable value of plaintiff's medical services (received on a lien basis) based on 130 percent of Medicare reimbursement rates. Ted Xanders from Greines, Martin, Stein & Richland submitted the publication request on behalf of ASCDC which was granted by the Court of Appeal on April 8, 2019.

2 ***Taulbee v. EJ Distribution Corp.*** **(2019) 35 Cal.App.5th 590:** In this personal injury case, a traffic accident occurred after defendant parked a car on the "gore point" area of the highway. The Court of Appeal held that the trial court did not err in refusing to give the plaintiff an additional negligence per se jury instruction based on a violation of the Vehicle Code. Defense counsel Rob Wright and Mark Kressel at Horvitz & Levy sought publication and Harry Chamberlain from Buchalter submitted the publication request for ASCDC on May 1, 2019, which was granted.

3 ***Guillory v. Hill*** **(2019) 36 Cal.App.5th 802:** The plaintiffs in a civil rights action against the Orange County Sheriff's Department sought $1 million in damages but were awarded only $5,400. Plaintiffs' counsel then moved for $3.8 million in attorney's fees, which the trial court denied in its entirety. The Court of Appeal affirmed that ruling: "Here, in light of plaintiffs' minimal success and inflated fee request, the trial court properly exercised its discretion to deny their section 1988 motion. Plaintiffs originally sought over $1 million in damages but ultimately obtained an award of less than $5,400. Plaintiffs then moved for almost $3.8 million in attorney fees in a 392-page motion containing, in the trial court's words, 'bloated, indiscriminate,' and sometimes "'cringeworthy'" billing records. Accordingly, we affirm the court's postjudgment order." Steven Fleischman and summer associate Jenny Wilson at Horvitz & Levy wrote the publication request, which was granted.

4 ***Huckey v. City of Temecula*** **(2019) 37 Cal.App.5th 1092:** In this premises liability case, a pedestrian sued the City of Temecula for injuries that occurred when he tripped and fell on an uneven city sidewalk. The trial court granted summary judgment because the defect in the sidewalk – which had a height differentials of 9/16" and 7/32" – was trivial. The Court of Appeal affirmed, holding the defect was trivial as a matter of law. Steven Fleischman and summer associate Lorraine Wang at Horvitz & Levy wrote the publication request, which was granted.

5 ***People v. Pierce*** **(2019) 38 Cal.App.5th 321:** In this criminal case, the Court of Appeal held that a provision of the Penal Code applies to all fraudulent workers' compensation claims. That interpretation broadens the range of predicate offenses for which insurers can pursue civil penalties against fraudsters. And the opinion's language will help insurers resist meritless subpoenas from criminal defendants who claim insurance companies control criminal prosecution of insurance fraud. Steven Fleischman and Christopher Hu at Horvitz & Levy wrote the publication request, which was granted.

6 ***Williams v. Fremont Corners, Inc.*** **(2019) 37 Cal.App.5th 854:** In this premises liability and negligence case, the plaintiff was assaulted in the parking lot of a shopping center. The court affirmed the granting of summary judgment, holding that the defendant shopping center owner did not owe a duty to constantly monitor security cameras in the parking lot. Working with Don Willenburg from the Association of Defense Counsel of Northern California and Nevada, Steven Fleischman and summer associate Erik Savitt from Horvitz & Levy drafted the publication request, which was granted.

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 ***Jarman v. HCR Manorcare, Inc.*** (2017) 9 Cal.App.5th 807, review granted (S241431): The Court of Appeal held that the plaintiff can seek punitive damages, despite an express Legislative intent to foreclose such damages. The opinion also allows serial recovery against nursing homes for violations of the Resident Rights statute, Health & Safety Code section 1430(b). The opinion expressly disagrees with two other recent Courts of Appeal published opinions. Harry Chamberlain submitted an amicus letter in support of the defendant's petition for review, which the California Supreme Court granted on June 28, 2017 to address this issue: "(1) Does Health and Safety Code section 1430, subdivision (b), authorize a maximum award of $500 per 'cause of action' in a lawsuit against a skilled nursing facility for violation of specified rights or only $500 per lawsuit? (2) Does section 1430, subdivision (b), authorize an award of punitive damages in such an action?" The case remains pending and Harry has submitted an amicus brief on the merits.

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Amicus Committee Report – continued from page 34

2 ***Gonzalez v. Mathis*** (2018) 20 Cal. App.5th 257, review granted S247677: The California Supreme Court granted review to address this *Privette* issue: "Can a homeowner who hires an independent contractor be held liable in tort for injury sustained by the contractor's employee when the homeowner does not retain control over the worksite and the hazard causing the injury was known to the contractor?" Ted Xanders and Ellie Ruth from Greines, Martin, Stein & Richland submitted an amicus brief on the merits and the case remains pending.

3 ***B.(B.) v. County of Los Angeles*** (2018) 25 Cal.App.5th 115, review granted (S250734): The California Supreme Court granted review to address this issue: "May a defendant who commits an intentional tort invoke Civil Code section 1431.2, which limits a defendant's liability for non-economic damages 'in direct proportion to that defendant's percentage of fault,' to have his liability for damages reduced based on principles of comparative fault?" David Schultz and J. Alan Warfield from Polsinelli submitted an amicus brief on the merits on May 2.

4 ***Kim v. Reins Internat. California, Inc.*** (2018) 18 Cal.App.5th 1052, review granted S246911: The California Supreme Court granted review of the Court of Appeal's decision to address this issue: "Does an employee bringing an action under the Private Attorney General Act (Lab. Code, § 1698 et seq.) lose standing to pursue representative claims as an "aggrieved employee" by dismissing his or her individual claims against the employer?" Laura Reathaford from Blank Rome LLP has submitted an amicus brief on the merits and the case remains pending.

5 ***Pacific Pioneer v. Superior Court*** (G057326): Request for amicus support from member James Colfer. In this case pending in the Court of Appeal, the issue relates to the right of an insurance company to appeal a small claims judgment, and have counsel appear to argue at the small claims appeal. Under C.C.P. § 116.710(c), the insurer is permitted to appeal the small claims judgment so long as the carrier acknowledges the amount in controversy exceeds $2,500 and the claim is covered. There is no provision under the Code that prohibits the insurance carrier from appealing if the insured failed to appear for the initial trial. Harry Chamberlain submitted an amicus letter to the Court of Appeal supporting the petition. The Court of Appeal has issued an order to show cause and the writ petition remains pending while the parties await oral argument.

6 ***Ramos v. Superior Court*** (2018) 28 Cal.App.5th 1042, review denied (Feb. 13, 2019), cert. pet. pending: The Court of Appeal held that an arbitration provision between a lawyer and her former law firm was unenforceable under *Armendariz*. The defendant has filed a petition for certiorari with the United States Supreme Court. ASCDC, through Ben Shatz of Manatt, Phelps and Phillips, joined an amicus brief asking the Supreme Court to grant cert. to determine if *Armendariz* is preempted by the FAA. The petition for certiorari remains pending.

How the Amicus Committee can help your Appeal or Writ Petition, and how to contact us

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

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

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

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

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