association of southern california defense counsel

verdict

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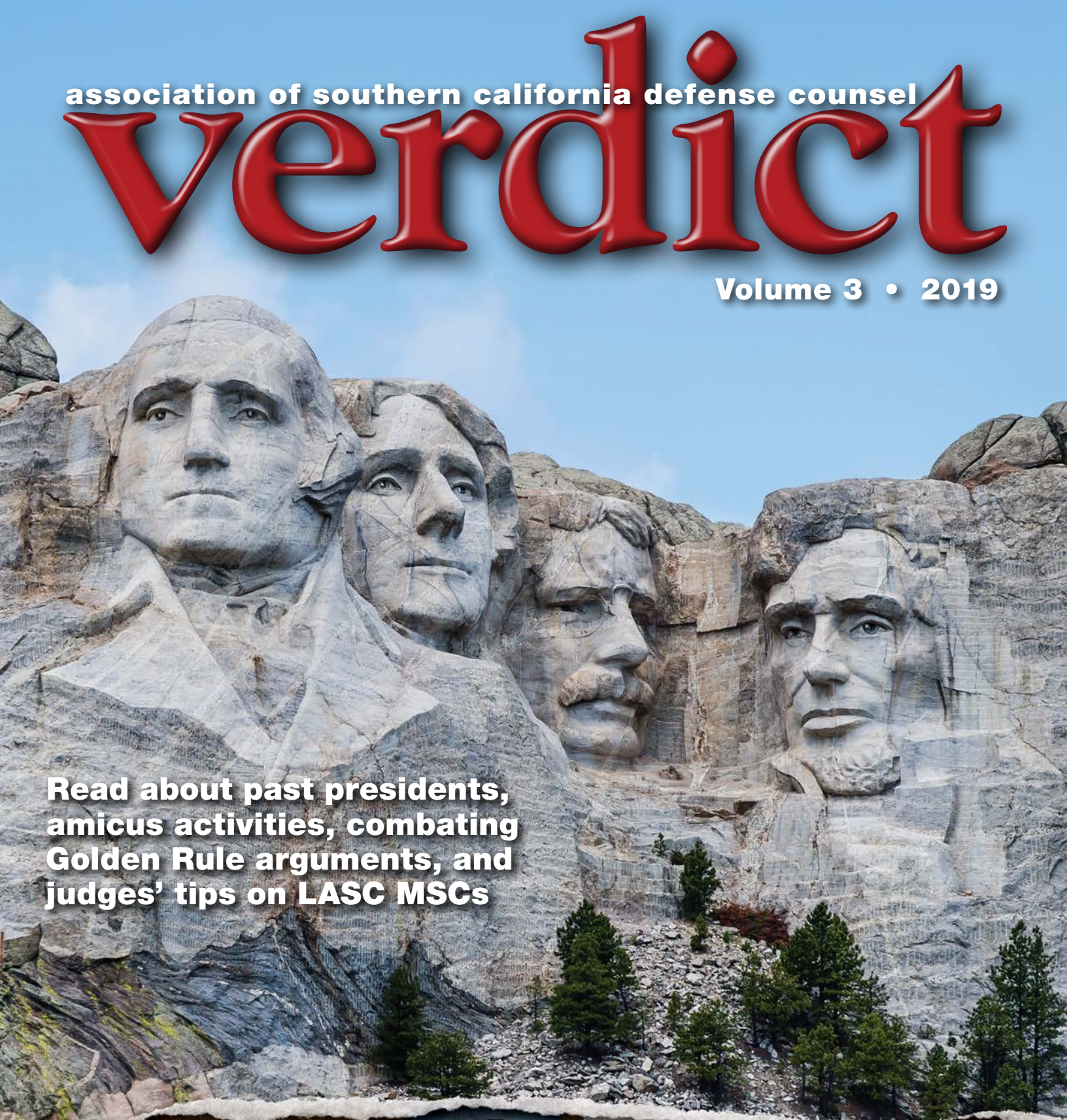

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president's message

Peter S. Doody
ASCDC 2019 President

A Wonderful Year

As I reflect on my past year as ASCDC president I am grateful for the support of our dynamic board and committee members. I have been attending ASCDC board meetings since 2004, and I can say without hesitation that our current board members are the most energetic and dedicated individuals that I have come across in my past 16 years of service. These individuals contribute countless hours of service to the success of the ASCDC, and our projects. The next time you run into an ASCDC board or committee member in court, or at a deposition, or perhaps a bar, please be sure to extend a pat-on-the-back and a thank you, or perhaps a drink, for their selfless service to ASCDC.

We had a wonderful and memorable year at ASCDC in 2019. We kicked-off the year with our annual seminar featuring keynote speaker, Professor Alan Dershowitz. Not only is Professor Dershowitz one of the best Constitutional lawyers in the nation, he is also a well-skilled prognosticator. One of the topics he presented during his speech at our luncheon, and the title of his recent book was "The Case Against Impeaching Trump." Eleven short months later, Professor Dershowitz is on the Trump legal team defending the President from impeachment articles sent to the Senate by Congress.

In June, we hosted our biannual Hall of Fame Awards Dinner at the world-famous Biltmore Hotel in Los Angeles. In the 1930s and 40s, the Biltmore ballroom was the venue for the Academy Awards where Hollywood greats received the iconic Oscar statute. This year, our Hall of Fame Award winner was our very own, Paul Fine, who was ASCDC president in 2004. That evening we also honored and recognized Judge of the Year, the Honorable Stephen Moloney and Civil Advocate of the year, Gretchen Nelson.

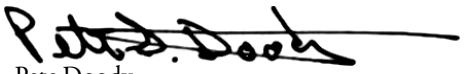
In September, our members graced the golden coast of Santa Barbara for the ASCDC Professional Liability Seminar. At the conclusion of this seminar ASCDC members and clients went on a historical walking wine tour in beautiful downtown Santa Barbara visiting the same watering holes where Richard Henry Dana once slaked his thirst.

In December, we had our Annual Evening with the Judges at the Jonathan Club and a record number of judges attended.

In between these events during the year we put on meaningful and topical seminars such as crowd-favorites the "Usual Suspects Seminar," and "Avoiding Malpractice." During the year, our Young Lawyers Committee organized several ASCDC "meet and greet" happy hours in downtown Los Angeles to give busy young defense lawyers the chance to get to know one another and to introduce new defense attorneys to ASCDC. These young defense attorneys represent the future leadership of ASCDC.

Moving forward into 2020, ASCDC is in the excellent hands of incoming president Larry Ramsey. Larry is a visionary and will bring great energy and leadership to ASCDC.

Finally, as I close my chapter as ASCDC president, I must give a special and heartfelt thank you to our executive director, Jennifer Blevins, and her team. They are the selfless behind-the-scenes individuals who keep the ASCDC running like a Swiss watch year after year.



Pete Doody
ASCDC President

Issues Come, Issues Go, Issues Remain

Michael D. Belote
Legislative Advocate
California Defense Counsel

Because legislators represent constituents, it is no surprise that issues important to the electorate tend to dominate legislative sessions. When crime goes up, bills are introduced on crime; when health care availability is a concern, health care bills are submitted. As public interest waxes and wanes, so too do bills in the legislature. As the California Assembly and Senate return to Sacramento on Monday, January 6, 2020, it is already possible to assess what the big issues will be for the year. Fearless prediction: the issues will look a lot like 2019, as several key areas remain unresolved.

The first big issue carrying over from 2019 to 2020 is privacy. The California Consumer Privacy Act became effective on January 1, and if the European experience with "GDPR" is any indication, the state should prepare for a rocky implementation period. The law simply is too complex for many businesses to comply at the outset. Those entities which have responsibilities under CCPA also are shooting at a moving target in several respects. First, there were changes to CCPA enacted this year, which must be folded into the main CCPA bills enacted in 2018. Second, the state Attorney General has promulgated draft regulations implementing the new law, which are likely to become effective during the first half of 2020. Third, proponents have announced an intention to qualify another very far-reaching privacy initiative on the November, 2020 ballot.

Since we have moved squarely into the digital age, privacy concerns will be with us for a very long time. ASCDC members may well be asked for counsel by businesses both big and small as they work to come into compliance with CCPA. Additionally, some law firms will be covered directly by CCPA, such that they must respond to requests by consumers, while others may have obligations as "third-party service providers" to covered entities.

The second major issue carrying over is independent contractor classification under the *Dynamex* decision. During 2019, the California Legislature enacted AB 5 (Gonzalez), which both codifies *Dynamex* and provides exemptions from the so-called "ABC test" contained in the decision and new law. Lawyers are expressly exempted under AB 5, which means that classification issues for members of the Bar will be governed by the Borello standard existing pre-*Dynamex*. Dozens of other exemptions are also included in AB 5, but untold occupational groups will be seeking their own exemptions in 2020, and legislators acknowledge that more work needs to be done. Here, too, the November ballot could come into play: Uber, Lyft and other "gig" companies have announced an intention to qualify a proposal for the ballot which would clarify the independent contractor status for their drivers and delivery people.

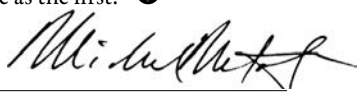
Another unresolved issue is wildfire and utility regulation. In 2019 the legislature enacted a number of bills affecting public utility preparedness for wildfires, but again, policymakers have indicated that the issues are far from over. It is possible if not likely that more law will be enacted on the doctrine of inverse condemnation, under which the regulated utilities can be liable for wildfire damages. In response, public safety power shutdowns (or "PSPS") could continue for years, and these shutdowns are absolute Kryptonite for legislators and the governor. Balanced against liability issues is the looming PG&E bankruptcy.

A carryover issue less directly applicable to ASCDC members is housing and homelessness. Public concern over the problem obviously is increasing geometrically. Housing starts continue to lag behind the need and goals created by policymakers, so we should expect continued debates about local government accountability, CEQA reform, civil liberties for the homeless, and more.

Taxation is likely to be debated in 2020 as well. Proposals to place another income tax surcharge in the November 2020 ballot seem to have stalled, in favor of a "split roll" change to Proposition 13, which could significantly raise property taxes on commercial real estate. Of more direct interest to ASCDC, though, is the possibility that the legislature could enact bills extending sales taxes to services. This issue has been percolating for years in Sacramento; during times of economic expansion, there has not been a determined push to make the change. Should California slide into recession, however, we should expect greater focus on the idea.

Finally, and old issue which could be new again in 2020 relates to medical malpractice and MICRA. A deep-pocketed out of state plaintiff's lawyer has indicated that he will bankroll a signature-gathering effort to reform MICRA on the November 2020 ballot, and proponents include a number of consumer groups. On a general election ballot which could include privacy, *Dynamex*, property taxes, bail and much more, MICRA could represent another hugely expensive ballot fight.

Except for MICRA, 2020 could feel like "second verse, same as the first."



new members november – december

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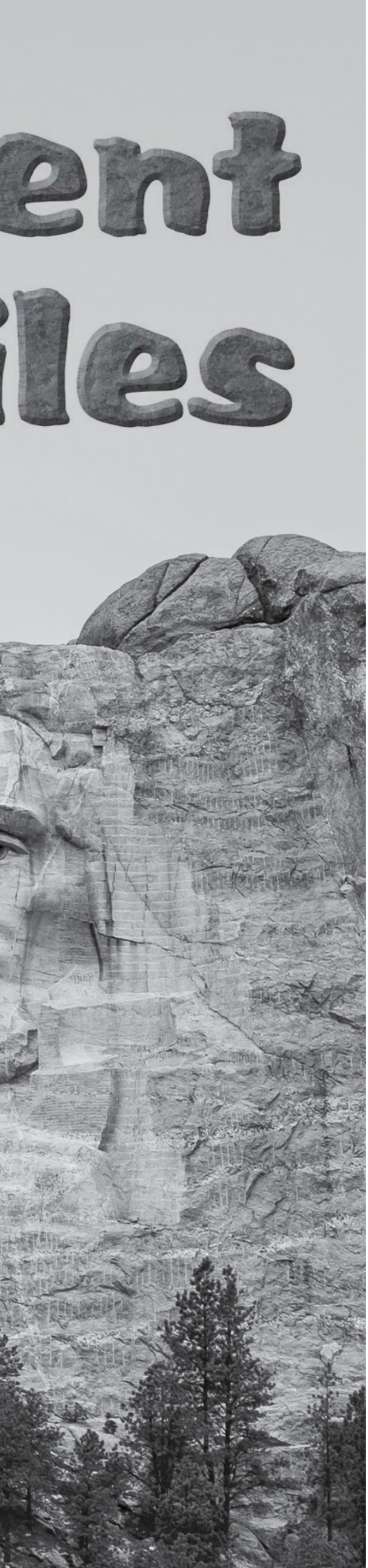


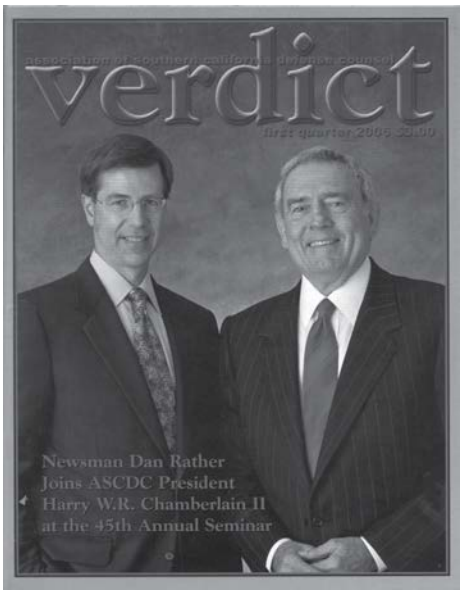
Harry W.R. Chamberlain II

ASCDC President 2006-2007

How do you feel your ASCDC membership and leadership role enhanced your practice, and what is your fondest memory of your year as president of ASCDC?

HARRY:
Participating in ASCDC for a quarter of a century has defined the most important aspects of my career, and significantly influenced my practice as an appellate lawyer in every way imaginable. In particular, I am honored to be part of Pam Dunn's vision during the 1990s to develop what has become one of the most successful amicus advocacy groups on the planet.

ASCDC's influence on California precedents in the three decades since then are many – running the gamut from defining "legal causation" (*Viner v. Sweet,* 30 Cal.4th 1232 (2003)); the privileges and immunities afforded to lawyers under the First Amendment (*Jarrow Formulas, Inc. v. LaMarche,* 31 Cal.4th 728 (2003)) and to physicians who conduct medical peer review (*Kibler v. No. Inyo County Hosp. Dist.,* 39 Cal.4th 192 (2006)); the scope of evidentiary privileges (*Costco Wholesale Corp. v. Superior Court,* 47 Cal.4th 725 (2009)); the statute of limitations for claims arising from an attorney's "professional services" (*Lee v. Hanley,* 61 Cal.4th 1225 (2015)); the elements of malicious prosecution (*Parrish v. Latham & Watkins,* 3 Cal.5th 767 (2017); the legal duties owed to third parties by financial professionals (*Summit Financial Holdings Ltd. v. Continental Lawyers Title Co.,* 27 Cal.4th



1160 (2002)) and by landowners (*Vasilenko v. Grace Family Church,* 3 Cal.5th 1077 (2017)).

Across the state, ASCDC members appear daily in newsworthy trials. They are the best of the best. We continue to support our members in their most important cases – sometimes long after the trial is done. Take a look at the amicus materials on our website. The list goes on for pages.

I cannot single out just one memory from 2006-2007 when I was privileged to serve as ASCDC president. There are too many to mention. Then as now, our amicus committee chaired by Steve Fleischman has been second to none. As in every other year I've been

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Past Presidents – continued from page 9

a member, the Association was the voice of the civil defense bar in the courts – and through California Defense Counsel, in the Legislature.

What do you consider your greatest achievement? Tell us about one or two of your favorite trial or appellate court moments.

I'm proud of my work on ASCDC's amicus committee, including any of six or seven cases I've participated in as amicus counsel for ASCDC before the California Supreme Court. A few are noted above.

My most "interesting" appearance on appeal was before the United States Supreme Court. I was not appearing as counsel, but as the client representative in *Musick, Peeler & Garrett v. Employers Ins. of Wausau,* 508 U.S. 286 (1993). The lawyer who opposed us was Ted Olson. An educational day.

Who was your favorite annual seminar speaker and why?

Bill Clinton – always an entertaining and provocative speaker. But what I most enjoyed was the 15 minutes of impromptu standup that ASCDC's incoming president Dennis Thelan did when Mr. Clinton was late in arriving to the stage. My year as president, Dan Rather – on role of the press and First Amendment – was pretty darn terrific too.

What do you consider your best quality?

Standing up for principles that matter. Getting involved, and joining the fight with others who share those values – like the group of attorneys involved in ASCDC.

What trait would you change?

Impatience. You have to stay in it to win it; just ask the Washington Nationals. Handling appeals imposes the discipline of deferred gratification. Not my natural predisposition.

Whom do you admire the most?

Two of our past presidents. Edith Matthai and her husband Jim Robie. Both of whom define what a lawyer ... and a friend ... should be.

What Celebrity would you most enjoy having dinner with?

Sandra Day O'Connor – what a life! Or Margaret Atwood who uncannily (often disturbingly) predicts the future.

What are your favorite hobbies or pastimes currently? When are you most content?

Mountain biking on the trails with my wife and our dogs. Lake Tahoe, Santa Monica mountains are nice. Scuba diving (near resorts with warm water, and umbrella drinks after).

What advice do you have for young lawyers?

The practice of law is a contact sport. That means personal contact with your clients and your peers. Occasionally stop tweeting, and find the time to go out and do something with your colleagues. There's a lot of important pro bono work for young lawyers – domestic violence, immigration and veteran's legal assistance clinics, to name a few. Local bar associations, including ASCDC, offer many educational programs and committees that will enhance your practice skills. You'll gain valuable experience in the process. As one of my partners is fond of saying, "We do our best work for free." It's true. Become involved ... you'll do well, and some good.

Bob A. Olson
ASCDC President 2014-2015

What do you consider your greatest achievement as ASCDC President?

Bob

My proudest accomplishment was starting a movement, I hope, to have more involvement by more members and bringing new blood into the organization. That is certainly a theme that has been carried on by those who have followed me.

Share a memorable moment from your year as President.

My most memorable day from that year was when we launched the listserv and it blew up with people replying to all to get off the distribution list. The accomplishment was persevering and getting it up and running several weeks later.

What is your favorite ASCDC event?

As much as I love the annual seminar (and I love presenting the year in review) my favorite ASCDC event is the annual Holiday Party at the Jonathan Club. The President's Speech is an appropriate length (23 seconds maximum) and I love the mixture of judiciary, seasoned trial lawyers who know the judges because

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Past Presidents – continued from page 10

they have tried cases before them, and younger, emerging lawyers. I love it when the newer lawyers end up talking with the judges.

How did you first become involved in ASCDC?

I kind of fell into being an ASCDC member. I'd never heard of it. I was working on a case with Jean Lawler who asked me if I'd be interested in presenting the year in review. I jumped at the opportunity. Jean's partner Chip Farrell and I have now been making the presentation for 19 or 20 years and I slowly but surely became more enmeshed in the organization starting with the now-famous (and justly so) amicus committee under Pam Dunn's leadership. (By the way, a shout out to the many women who have been my mentors in ASCDC – Jean and Pam, Linda, Denise, Diane and many others).

Share something being ASCDC President taught you – how has leadership enhanced your practice?

As President, one writes three columns for *Verdict* Magazine. (Fun fact: *Verdict* goes not only to members but to every judge in the State; we get as much feedback from judges as from members; my wife Gail's outside counsel whose spouse is a judge remarked on the profile article on me that mentioned Gail as well). My favorite column was one I almost didn't write. I had two ideas, one was pretty staid, the other was to rework the Scout Law (you know, the Trustworthy, Loyal, Helpful, Friendly, etc.) for lawyers as to characteristics that we should strive to embody. Lisa Perrochet, *Verdict* editor extraordinaire, encouraged me to do the latter topic and it turned out to be a great thought exercise. The most surprising point to me was "efficient," not just as a billing concept but in terms of analysis (find the simple answer) and presentation (get to the heart of the matter). (Lisa had me change a reference to the value of being "paranoid" to being "neurotic.")

What advice do you have for newer lawyers?

As for newer lawyers (I hate "younger," it makes me "old"; I prefer "emerging"), I think that I was late to the game in getting involved in ASCDC and I regret that. The first couple of times at events one doesn't know anyone. But introduce yourself and after a bit people are familiar with you and are very willing to share their experiences. I think that being a newer lawyer is hard. There is so much to absorb that is not taught in law school. Law schools rarely talk about the physical and emotional challenges of being a lawyer. Note that really good lawyers know how to be nice to staff (both court and their own) and to get along with the other side. Take advantage of opportunities, especially to do something that is outside of one's comfort zone. But in all of this, don't lose yourself. Live, Love, Do. Law is ultimately a societal endeavor. It is how society organizes and governs itself, defining rights and responsibilities. I don't think one can be a good lawyer if one is disconnected from society at large. I've learned through the ASCDC that really good trial lawyers often have big personalities and certainly are themselves. Appellate lawyers like me tend to be more quirky. But having a personality while embodying fundamental lawyer characteristics is a good thing.

What character trait would you change?

I wish I had better social skills – writing thank you letters, reaching out to people. Fortunately, through serendipity I ended up with someone – Gail – who has great such skills.

Who was your favorite annual seminar speaker?

My favorite annual seminar speakers tend to be those connected with politics. I thought that James Carville was great and I found Karl Rove, with whose politics I generally completely disagree, to be utterly charming, a lesson in how we can disagree yet get along.

Share your favorite observation on the North (ADC) v. South (ASCDC) rivalry?

I love that the South has so much more musical talent (certainly not me or to date any of the Presidents) than the North, including Linda Hurevitz at Linda Savitt's firm, my daughter (yes, I get to be a proud parent), Mike Schonbuch's daughter, Glenn Barger's associate, who have all sung the National Anthem at our annual seminar. The North cringes with envy!

Whom do you admire the most?

Winston Churchill, Teddy Roosevelt.

What Celebrity would you most enjoy having dinner with?

Probably Gen. Mattis.

Tell us about one or two of your favorite moments in court.

I like winning (don't we all?). That said, my favorite oral arguments tend to be the ones where it looks like I'm losing because I get to be so completely involved. I once had an appellate justice thank me for a reference in a footnote to where movie scripts might be found online which I loved because it meant that he had actually read a footnote.

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An Introduction to the Los Angeles Superior Court Judicial Mandatory Settlement Conference Program

By Judge Abraham Khan and Judge Zaven V. Sinanian

A version of this article appeared previously in CAALA's *Advocate* magazine.

Plaintiff John Blanco was hired by Defendant Precision Tool and Dye Company in 2010. He earned $10.00 per hour as a machine operator. He claims he often worked 8 hour days, but sometimes 9 to 10 hour days, occasionally missing meal and rest breaks. On June 10, 2016 he severely injured his back while attempting to move heavy machinery. Mr. Blanco immediately reported the incident and sought urgent medical care and claims. Precision refused to permit him to see a doctor. Plaintiff complained of pain throughout the day until finally defendant relented and took him to a doctor. The doctor placed Plaintiff on modified duty, where he was restricted from lifting, pushing or pulling more than 10 pounds of weight. Defendant failed to accommodate Plaintiff's work restrictions by placing him back on regular duty. Over the next few weeks Plaintiff claims he complained about the worsening pain and the need for an accommodation. Plaintiff worked under these conditions, sometimes 9 to 10 hours, and sometimes without a meal or rest break, until he could no longer endure the pain and asked for a Medical Leave of Absence. Rather than giving him a medical leave or discuss with him the availability of alternate positions for him at the company, he claims they instead immediately terminated his employment. Plaintiff has filed suit under FEHA for disability discrimination, failure to engage, failure to accommodate, retaliation, unpaid overtime wages, meal and rest break claims, non-accurate wage statements, waiting time, and related claims. Plaintiff also claims defendant only paid for 40 hours a week, and did not keep timecards for its employees. Defendant claims that the plaintiff was on medical leave, collected disability, and chose not to return; that payroll records show overtime was regularly paid; that employees filled out daily time sheets, and that plaintiff lied on his employment application. Defendant would call to inquire about plaintiff's medical condition, and he never returned the phone calls. The case was mediated twice without success. Plaintiff cannot afford a third mediation, the parties have completed discovery, are back in court for a Post-Mediation Status Conference, with a trial date that is 60 days out. What should the parties do?

Resolution Before Trial – The Judicial Mandatory Settlement Conference

In the scenario above, the parties attempted early mediation without success because they had not engaged in enough discovery to be able to fairly evaluate the value of the case. In the second attempt at mediation, the economic climate for defendant Precision Tool and Dye had changed for the worse, and while the parties were now better able to evaluate the case, defendant's offers to settle were now based on an entirely different economic reality. Neither side could afford nor saw any value in conducting a third mediation. This was the perfect time, pursuant to California Rules of Court 3.1380 and Los Angeles Superior Court Rule 3.25 (d)/(e), for the trial court on its own motion or at the request of any party, to order the parties to attend a Judicial Mandatory Settlement Conference ("MSC"). While courts may hear their own MSCs, the preferred practice is to refer the matter to the court's MSC Program.

Resolution Before Trial – Brief Description of Los Angeles Superior Court's Mandatory Settlement Conference Program

The Los Angeles Superior Court's Mandatory Settlement Conference Program is free of charge and is staffed by experienced sitting civil court judges who dedicate their time exclusively to presiding over MSCs. The judges presiding over the MSC conferences and their locations are identified on the Court's website. In addition to the authors, the other judges in the program are: Judge James R. Dunn, Judge Lisa Hart Cole, Judge Edward A. Ferns and Judge Debre K. Weintraub. The MSC Program was recently expanded from four to six full-time dedicated judges under the leadership of Presiding Judge Kevin P. Brazile,

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and under the supervision of Civil Division Supervising Judge Samantha P. Jessner.

This program is available in general jurisdiction cases by order of the Independent Calendar (IC) and Complex Courts. While the Personal Injury Master Calendar Courts now have their own Personal Injury Mediation Program, staffed by volunteer attorneys, those cases sometimes end up in the Judicial MSC program when the case is deemed "complicated" and is pending in a IC department.

While we may preside over complex cases and cases of well-funded litigants, we are also the no cost alternative for parties who cannot afford private mediation and would have nowhere else to turn for ADR services. It is our preference that we see the parties within the last 60 days before the trial. The lawyers tell us how much they appreciate that a program such as this exists where the parties can interact with and resolve their disputes with the help of a sitting judge so close to the trial date. However, and to be clear, the Court's MSC Program is not in competition with private ADR providers. It is an asset and resource that is available preferably after private mediation or without the benefit of prior mediation.

Resolution Before Trial – The MSC Referral, Intake Process, and Governing Rules and Procedures

Referrals to the Court's MSC Program are initiated by court order, and are accompanied by an MSC intake form that can be obtained from the court's website: ***LACourt.org*, Division, Civil, Judicial Mandatory Settlement Conference**. The intake form must be j**ointly completed** and once completed, **emailed to *SSCMSC@LACourt.org***. The intake form will require certain information, such as preferred MSC dates, trial date, law and motion status (pending MSJ, discovery, etc.), brief description of the case, last demands and offers, etc. It may take some time after receipt of the completed intake form for the court to respond to the parties with an assigned date and judicial officer. Once that occurs the parties will be instructed to submit a 5-page settlement statement (do not submit a recycled brief in lieu of a responsive 5 page MSC statement).

The California Rules of Court (CRC 3.1380) and the Superior Court Rule (Rule 3.25e) require that the settlement statement be served on the opposing side. There are no exceptions to the rule. The settlement statement facilitates a more productive conference where both sides are better informed about their respective positions in advance of the meeting. The parties are also allowed to file a 5 page (or less) **Confidential Settlement Statement** which need not be served on opposing sides, and should be captioned as "**Confidential**." The rules also require that these statements be submitted 5 court days in advance of the hearing. The statements should be e-mailed or lodged with the Settlement Court, but not e-filed. The failure to comply with these rules places an unfair burden on our Courtroom Assistants, who already spend far too much time tracking down lawyers to get them to file timely settlement statements. So, please remember the 5 + 5 rule for all MSCs.

The rules mandate that trial counsel, parties, and persons, including insurance company representatives, with full settlement authority must attend in person, unless the settlement judge (not the trial judge) excuses personal appearance for "good cause." While the court maintains confidentiality, the parties are reminded that the MSC is governed by Evidence Code § 1152 and not Evidence Code § 1115-1128, which provides confidentiality in the context of Mediations. The relevant rules and code sections are set forth below:

California Rules of Court 3.1380 Mandatory Settlement Conferences

(a) Setting conferences

On the court's own motion or at the request of any party, the court may set one or more mandatory settlement conferences.

(b) Persons attending

Trial counsel, parties, and persons with full authority to settle the case must personally

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Mandatory Settlement – continued from page 14

attend the conference, unless excused by the court for good cause. If any consent to settle is required for any reason, the party with that consensual authority must be personally present at the conference.

(c) Settlement conference statement
No later than five court days before the initial date set for the settlement conference, each party must submit to the court and serve on each party a mandatory settlement conference statement containing:

(1) A good faith settlement demand;

(2) An itemization of economic and noneconomic damages by each plaintiff;

(3) A good faith offer of settlement by each defendant; and

(4) A statement identifying and discussing in detail all facts and law pertinent to the issues of liability and damages involved in the case as to that party.

The settlement conference statement must comply with any additional requirement imposed by local rule.

(d) Restrictions on appointments
A court must not:

(1) Appoint a person to conduct a settlement conference under this rule at the same time as that person is serving as a mediator in the same action; or

(2) Appoint a person to conduct a mediation under this rule.

Los Angeles Superior Court Rule 3.25 (d) and (e)

(d) **Settlement Conference**:
The court may set a settlement conference on its own motion or at the request of any party.

(1) **Attendance**. Unless expressly excused for good cause by the judge, all persons whose consent is required to effect a binding settlement must be personally present at a scheduled settlement conference, including the following: (1) the parties; (2) an authorized representative of any insurance company which has coverage, or has coverage at issue, in the case; and (3) an authorized representative of a corporation or other business or government entity which is a party. These persons must have full authority to negotiate and make decisions on settlement of the case.

(2) **Excuse from Attendance**. A request to be excused from attending the settlement conference made by a person who is required to personally attend must be made by written stipulation of the parties or an ex parte application made in compliance with Local Rule 3.5. A person excused by the court must be available for telephone communication with counsel and the court at the time set for the settlement conference.

(3) **Familiarity with Case**. Counsel must attend the settlement conference and be familiar with the pertinent available evidence involving both liability and damages. Counsel must be prepared to discuss the case in depth and, except for good cause shown, must be the person who will try the case.

(e) **Written Statements for Settlement Conferences**.
Each party must submit to the court and serve all other parties a written statement no later than five court days before the conference. The written statement must contain a concise statement of the material facts of the case and the factual and legal contentions in dispute. The statement must identify all parties and their capacities in the action and contain citations of authorities which support legal propositions important to resolution of the case. The written statement of a party claiming damages must list all special damages claimed, including all expenses incurred up to the time of the settlement conference, state any amounts claimed as general and punitive damages, and provide a total amount of damages claimed. The written statement must also include the general status of the case, including settlement offers. The written statement must be submitted directly to the courtroom in which the settlement conference is calendared and not sent to the clerk's office. The written statements

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will not be filed; they are only used at the settlement conference and will be returned to counsel or destroyed at the conclusion of the conference

California Evidence Code § 1152

1152. Offer to compromise

(a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

(b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving an additur or remittitur, or on appeal.

(c) This section does not affect the admissibility of evidence of any of the following:

(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim.

(2) A debtor's payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty.

Resolution Before Trial – Preparation Before and the Mechanics of the Settlement Conference

Lawyers should spend time educating and explaining the MSC process to their clients. It is a time for Civility, Collaboration, Cooperation, Consideration, and Compromise (5 C's) **not war**. It is a time, with the MSC Judge's assistance, to manage client expectations. You must be patient and trust the process, especially when negotiations between the parties are moving slowly. Even when the parties begin the settlement conference with strongly held entrenched views and expectations, with trust and patience, breakthroughs often occur and favorable outcomes are achieved.

The mechanics of a settlement conference are much like mediation. When all parties, trial attorneys, and decision makers are present, they will be asked to sign a "Statement of Policies and Procedures for Mandatory Settlement Conferences" which explains the process, the rules governing the process, the impartiality of the judges, techniques used during the settlement conference, confidentiality, and that the ultimate decision to settle rests with each party and their counsel. While each MSC judge may employ different settlement styles and approaches, the parties are generally separated into private rooms, where settlement discussions are conducted privately, and the clients are invited to take an active role in settlement discussions. The discussions will involve "distributive bargaining," and may be "evaluative" as well as "facilitative," while the settlement judge maintains fairness and neutrality throughout the process. MSC judges strive to understand and appreciate each sides' settlement position without prejudging while moving the parties closer to resolution.

Resolution Before Trial – When a Settlement is Reached

Resolution between some or all the parties to a complaint and/or cross-complaint will be reduced to writing when agreed upon by each party and their counsel. The court will supply the parties with a short-form settlement agreement. Occasionally the parties have proposed settlement agreements that they seek to use instead which can work if agreed upon by all parties. Court reporters are not available at the conference. Plaintiff and/or cross-complainant will be directed to file a Notice of Settlement in the IC court. Often the settlement judge will also advise the IC judge that the case has settled and to set an OSC re Dismissal, but at no time will the judge presiding at the MSC communicate with the trial judge about the settlement negotiations.

Resolution Before Trial – Some Final Thoughts

Remember, we generally see cases when all avenues of dispute resolution have been exhausted or were never initiated. This could be your last stop with a neutral who happens to be a sitting judge before the start of a lengthy, stressful, and uncertain trial. Mistrials, lengthy appeals, delays, and damaged relationships often occur. Settlements bring control, closure, and certainty over the outcome. You and your client must fully engage and trust the process, and in the end, after a hearty try, if the parties cannot close the deal, at least you will have done your best to avoid the unpredictable outcomes of trial. We finally ask that you remember the 5+5+5 rules, i.e., 5 page briefs, 5 days before the MSC, and conduct yourselves with Civility, Collaboration, Cooperation, Consideration, and Compromise (5 C's). We are committed to helping you settle your cases!

Judge Abraham Khan

Judge Abraham Khan is a judge of the Superior Court of Los Angeles County. He began his judicial career in 1988 after working as a Deputy City Attorney for Los Angeles. He has received numerous awards for community service, and continues to serve the legal community in many ways, including as his role presiding over the Settlement Court in the Civil Division of the Spring Street courthouse.

Judge Zaven Sinanian

Judge Zaven Sinanian is also a Los Angeles Superior Court judge who has served with distinction since 2002, following a carreer with the California Department of Justices' Office of the Attorney General. Among other duties, he oversees the Los Angeles Superior Court Judicial Mandatory Settlement Program.

"Want Ads" and Limos:

What's the Next Variation on the "Golden Rule" Argument?

By Jessica M. Leano

In a recent personal injury case before the California Court of Appeal, plaintiff's counsel asked jurors during closing argument to picture plaintiff seconds before the car accident giving rise to the lawsuit. Time stops, and a limousine pulls up. A man wearing a black suit and a black hat then steps out of the car and offers plaintiff a duffel bag containing $1 million in cash. Yet, there is a catch – all plaintiff has to do to get the money is get into a car accident, live with severe pain, undergo physical therapy and surgery, develop a fear of driving, and forgo beloved hobbies like hiking and playing sports. Plaintiff inevitably declines the fictional offer, choosing their health and well-being over any sum of money. Returning the jury to reality, counsel tells the jury that plaintiff, in fact, had no choice to accept or reject the money because defendant made that choice for them.

This type of argument is a variant of what earlier was framed as a "want ad" argument – a device by which plaintiffs' lawyers ask jurors how much they would have to be paid to respond to a hypothetical advertisement in a newspaper for a job requiring them to face the same accident and undergo the same injuries as the plaintiff.

Through this device, counsel effectively asks jurors to award damages based on how much they would want to be compensated to step into plaintiff's shoes. (*Collins v. Union Pacific Railroad Co.* (2012) 207 Cal. App.4th 867, 883 (*Collins*).) This tactic is improper. Juries must determine damages "based upon evidence specific to the plaintiff." (*Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 764 (*Loth*).) Regardless, attorneys frequently appeal to jurors to use their subjective judgment when calculating damages in closing argument, asking how much the jury would " 'charge' " to undergo plaintiff's injuries. (Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2019) ¶ 3:669.)

Courts have long recognized the power, and the impropriety, of making a "Golden Rule" argument, which plays upon the maxim that one should treat others how they want to be treated. While admirable and desirable in other aspects of society, the Golden Rule should not be used in litigation – under any guise – as a metric for calculating damages. (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1198 ["The condemnation of Golden Rule arguments in both civil and criminal cases, by both state and federal courts, is so widespread that it is characterized as 'universal' "]; accord, *id.* at p. 1199 & fn. 12 ["California's condemnation [of Golden Rule arguments in criminal cases] also applies to civil cases 'in which counsel asks jurors to put themselves in the plaintiff's shoes and ask what compensation they would personally expect' "]; *Loth, supra,* 60 Cal.App.4th at pp. 764-765 ["The only person whose pain and suffering is relevant in calculating a general damage award is the plaintiff. How others would feel if placed in the plaintiff's position is irrelevant."]; *People v. Pitts* (1990) 223 Cal. App.3d 606, 696 ["it is improper . . . to urge [the jurors] to view the case from a personal point of view"]; *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 484 ["The appeal to a juror to exercise his subjective judgment ... cannot be condoned"].)

Federal courts, too, have condemned the use of Golden Rule arguments in both civil and criminal cases. (See, e.g., *Caudle v. District of Columbia* (D.C. Cir. 2013) 707 F.3d 354, 359 [collecting cases rejecting Golden Rule arguments; "it is impermissible (1) to ask jurors how much the loss of the use of their legs would mean to them, [citation]; (2) to tell jurors 'do unto others as you would have them do unto you,' [citation]; or (3) to tell jurors, in a reverse golden rule argument, 'I don't want to ask you to place yourself in [the plaintiff's] position' "]; *Joan W. v. City of Chicago* (7th Cir. 1985) 771 F.2d 1020, 1022 ["This so-called 'Golden Rule' argument has been universally condemned by the courts"].)

Despite this established prohibition, offspring of Golden Rule arguments

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continue to emerge, including the "want ad" and "limousine" variation in closing argument. Courts in California and elsewhere have held these arguments are just as improper as a direct Golden Rule argument.

In *Collins,* the California Court of Appeal addressed the propriety of a closing argument asking the jury to imagine a newspaper ad seeking someone to undergo the same injuries as plaintiff, who was injured clearing railroad tracks after a train collision. (*Collins, supra,* 207 Cal.App.4th at pp. 872, 883.) The court deemed the newspaper ad narrative an improper Golden Rule argument that asked the jury to step into plaintiff's shoes "and award such damages as they would charge to undergo equivalent pain and suffering." (*Id.* at pp. 883-884.)

The *Collins* court referred to the argument by a different name, calling it a " 'surrogate victim' " argument. (*Collins, supra,* 207 Cal. App.4th at p. 883.) But by any name, it is an argument that invites jurors to draw on their own fears and biases when awarding damages. Plaintiffs' counsel can be counted to continue to find subtle and not-so-subtle ways to accomplish this.

To help a trial court appreciate the pernicious effect of any version of the Golden Rule argument, it may help to point to how courts in other states have addressed the issue, to show that defense counsel is not overreacting to the problem of using "want ad" arguments and the like, as other courts have found that closing arguments using *hypotheticals that are not tied to the plaintiff's actual situation can* violate the Golden Rule prohibition even where the attorney does not directly ask the jurors to step into plaintiff's shoes.

The Supreme Court of Nevada found a "want ad" argument improper in *Capanna v. Orth* (Nev. 2018) 432 P.3d 726, 731 (*Capanna*). In *Capanna,* a student athlete with a scholarship to play college football sued his surgeon after the surgeon operated on the wrong herniated disc and severely damaged it, resulting in additional surgeries and severe pain. (*Id.* at p. 730.) Counsel for the athlete asked " '[w]ho would volunteer ... to ... give up their hopes and dreams and suffer a lifetime—' " at which point opposing counsel objected. (*Id.* at p. 731.) After the court overruled the objection, counsel then asked " 'what reasonable person would give up their hopes, their dreams and agree to suffer a lifetime of pain, discomfort and limitation for money? Would it be a million dollars ... today, but I give you a 65-year-old man's spine, you won't be able to finish playing your college career, you're going to have discomfort and as you get older, it's going to get worse with time, you're going to need future surgeries, who would do that? Who would sign up for something like that?' " (*Ibid.*)

The *Capanna* court noted that counsel "walked a fine line" in the attempt to circumvent the prohibition on Golden Rule arguments, "artfully wording his argument as a hypothetical at times." (*Capanna, supra,* 432 P.3d at p. 731.) However, asking the jurors who would sign up for plaintiff's injuries was "precisely the type of argument [the court has] prohibited as golden rule argument." (*Id.* at pp. 731-732, citing *Lioce v. Cohen* (Nev. 2008) 174 P.3d 970, 984.) Although counsel did not ask the jurors if *they* personally would sign up for plaintiff's injuries, the argument effectively asked them "to consider how they would feel if they were faced with the same challenges as [plaintiff] due to [the doctor's] negligence," which "veered from hypothetical to [plaintiff's] exact scenario." (*Id.* at p. 731.)

A Florida appellate court deemed another form of the "want ad" argument improper in *Philip Morris USA, Inc. v. Cuculino* (Fla. Dist.Ct.App. 2015) 165 So.3d 36, 38-39. There, the improper argument was not a fictional ad explicitly seeking someone to undergo the same *injuries* as plaintiff, but a job advertisement. (*Id.* at p. 38.) Counsel equated plaintiff's injuries to a "job," telling the jury that defendant gave plaintiff the " 'job' of 'suffer[ing] from progressive heart disease,' " and just like actors, athletes, and expert witnesses, plaintiff deserved payment for this " 'job.' " (*Ibid.*) Counsel then asked " '[w]ho in their right mind would want to trade places with [plaintiff] and take this job[?]' " (*Ibid.*) Although the court sustained defendant's objection, counsel continued, asking if " 'someone [would] do it for a million dollars an hour,' " or if " 'someone [would] do it for anything?' " (*Ibid.*) The court referred to the argument as "improper" and cautioned against use of similar arguments in future trials. (*Ibid.*)

In another Florida case, plaintiff's counsel asked the jury to imagine that a " 'magic button' " was in front of one juror and $6 million was in front of another. (*Bocher v. Glass* (Fla.Dist.Ct.App. 2004) 874 So.2d 701, 703.) Plaintiffs, the parents of a 19-year-old killed in a motorcycle crash, were then given the hypothetical choice of pressing the button to "bring their son back," or taking the money. (*Id.* at pp. 702-703.) Counsel then said that plaintiffs "would walk past the money and press the button," leading defense counsel to make a Golden Rule objection. (*Id.* at p. 703.) The court recognized "that the 'magic button' argument did not explicitly ask the jurors how much they would want to receive had their own child died in an accident," but found it "nonetheless improper." (*Ibid.* ["The only conceivable purpose behind counsel's argument was to suggest that jurors imagine themselves in the place of [the deceased's] parents"].) Regardless of the exact words used, the " 'magic button' argument had the same effect" as any other Golden Rule argument, and "[i]f jurors are to remain fair decision-makers, the trial court must guard against a deliberate act of counsel that serves to put the jury center stage in the drama that should be the trial." (*Ibid.*)

Based on these cases, it is irrelevant that counsel does not directly ask the jurors whether *they* personally would undergo plaintiff's injuries in exchange for monetary payment. Formalism does not make a Golden Rule argument proper; if the jury can infer it is being asked to calculate damages based on a subjective judgment, the argument is improper. (See *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 860 [opening argument contained "a number of statements from which the jury might have inferred it was proper in calculating damages to place themselves in [plaintiff's] shoes and award the amount they would 'charge' to undergo equivalent disability, pain and suffering"].) Instead, courts look to the practical realities of whether the argument was designed to skirt the Golden Rule.

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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

Attorney's former role as company executive did not disqualify his current law firm from representing the company's employee in a lawsuit against the company.

Wu v. O'Gara Coach Co., LLC (2019)
38 Cal.App.5th 1069.

Thomas Wu retained Robert Lu of Richie Litigation to represent him in a racial discrimination in employment lawsuit against O'Gara Coach Company. Richie Litigation's principal, Darren Richie, had formerly served as O'Gara's president and chief operating officer. Wu gave informed, written consent to the representation. O'Gara moved to disqualify Richie and his firm, arguing that : (1) Richie would likely be a "key percipient witness"; (2) Richie was directly involved in matters related to Wu's claims and had knowledge of confidential and privileged information; and (3) Richie owed a fiduciary duty of confidentiality to his former company. The trial court granted disqualification, finding Richie was involved in developing and implementing O'Gara's anti-discrimination policies, likely communicated with outside counsel for O'Gara regarding these matters, and would most likely be an important witness at trial.

The Court of Appeal (Second Dist, Div. Seven) reversed. Richie's knowledge gained as a nonlawyer executive was "playbook information" – i.e., information relating to an adversary's "general business practices or litigation philosophy acquired during the attorney's previous relationship with the adversary." A law firm's possession of "playbook" information requires disqualification only where the information is material to the current matter, meaning either directly in issue or of "critical importance" the current matter. Here, O'Gara's evidence that Richie "was the primary point of contact at the company for outside general labor and employment counsel regarding the handling of employee complaints," was insufficient to meet the materiality test because it failed to establish what category of information gained by Richie was directly at issue in, or had a critical relationship to, the specific claims in Wu's lawsuit. Further, Wu's informed written consent to the representation eliminated any ethical concerns about Richie potentially being a witness at trial.

But see *The National Grange of the Order of Patrons of Husbandry v. California Guild* (2019) Third dist. [disqualification appropriate when a law firm hired an attorney who had previously worked for a client adverse to a current client in related pending litigation].

Under Code of Civil Procedure section 128.5, a subjective bad faith standard applies to determining whether a party's or his attorney's conduct is sanctionable.

In re Marriage of Sahafzadeh-Taeb & Taeb (2019) 39 Cal.App.5th 124

In this dissolution action, despite having represented to the court she was ready to proceed to trial, husband's attorney failed to appear for trial because she was still in trial in another criminal matter. Although the attorney attempted to explain her nonappearance by saying her other trial had run long because her criminal client unexpectedly chose to exercise his constructional right to testify, she knew her client was going to testify the day before she told the trial court in the dissolution action she would be ready for trial. The trial court sanctioned her under Code of Civil Procedure section 128.5, which permits sanctions for "actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay."

The Court of Appeal (First Dist., Div. One) affirmed the sanctions against the attorney. In so holding, the court emphasized that "no vestige remains" of the holding in *San Diegans for Open Government v. City of San Diego* (2016) 247 Cal.App.4th 1306. that the standard for imposing sanctions under Code of Civil Procedure section 128.5 is objective; the legislative amendments to that statute following *San Diegans* overruled that case. The current statutory language makes clear that the standard is subjective bad faith.

See also *Primo Hospitality Group, Inc. v. Haney* (2019) 37 Cal. App.5th 165 [Second Dist., Div. Five: no evidence supported awarding sanctions under Code of Civil Procedure section 128.7 against an attorney whose only involvement in the case at the time the sanctions motions was served had been submitting a declaration stating he was taking over the case from prior counsel]

ATTORNEY FEES AND COSTS

A trial court did not abuse its discretion in reducing claimed fee award by reducing the number of attorneys whose time would be considered.

Morris v. Hyundai Motor America (2019) 41 Cal.App.5th 24

Plaintiff sued Hyundai under the Song-Beverly Consumer Warranty Act. The parties settled pre-trial for $85,000. Plaintiff moved for $191,688.75 in attorney's fees seeking to recover for 11 attorneys working on the matter. Hyundai contended that this was a "simple case" that did not justify such extensive attorney staffing. The trial court awarded $73,864 in fees and plaintiff appealed.

The Court of Appeal (Second Dist., Div. Seven) affirmed. The trial court did not abuse its discretion in awarding attorney's fees for only five of the eleven attorneys who billed on the matter, rather than calculating an attorney-by-attorney reduction for duplicative work or an across-the-board percentage reduction from the overall fee award, the approved approach in prior cases.

Pre-offer costs must be included in determining if the net judgment is more favorable for the plaintiff than the defendant's Code of Civil Procedure section 998 offer.

Hersey v. Vopava (2019) 38 Cal.App.5th 792

In this habitability suit, the defendant served two section 998 offers on the plaintiff – the first for $10,000 and the second for $20,001. Both offers excluded attorney fees and costs. Following a bench trial, the court awarded plaintiff damages of $7,438. Concluding that the plaintiff did not do better than the defendant's section 998 offers, the trial court awarded defendant costs, including attorney fees.

The Court of Appeal (Second Dist., Div. Eight) reversed the costs award to the defendant and remanded for further consideration of the costs issues. While post-offer costs are not included in measuring whether a section 998 offer was more or less favorable than the ultimate judgment, pre-offer costs are included. Plaintiff established that she had $4,731 in recoverable pre-offer costs and attorney fees before the first $10,000 offer, and $12,752.30 in recoverable pre-offer costs and attorney fees before the second $20,001 offer. Thus, adding the judgment to the costs recoverable at the time of each offer, the plaintiff obtained a net judgment more favorable than both offers at the time they were each made. In holding that "where an offeree achieves a judgment more favorable than

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a first offer, the determination of whether an offeree obtained a judgment more favorable than a second offer should include all costs reasonably incurred up to the date of the second offer," the court noted that any other rule would undermine section 998 by permitting a defendant to freeze the offeree's costs at the date of an early, low offer.

ANTI-SLAPP

Even if attorney lacked malice in issuing a defamatory statement on his client's behalf, thus entitling him to relief under the anti-SLAPP statute, a plaintiff may still be likely to prevail on the merits against the client who authorized or ratified the attorney's false statements.

Dickinson v. Cosby (2019)
37 Cal.App.5th 1138.

In Janice Dickinson's defamation lawsuit against William Cosby, Ms. Dickinson filed a First Amended Complaint (FAC) naming both Cosby and his attorney, Martin Singer, as defendants. The FAC alleged that both Cosby and Singer were liable for defaming her in a demand letter and several press releases issued by Singer which implied or overtly stated Dickinson had lied when she accused Cosby of rape. Both defendants filed anti-SLAPP motions. The trial court granted Singer's motion, finding insufficient evidence of actual malice on his part. However, the court denied Cosby's motion in part, reasoning that Dickinson established a likelihood of success on her claim because she could show that Cosby is liable for his attorney's defamatory statements. Cosby appealed, seeking a complete grant of his motion.

The Court of Appeal (Second Dist., Div. Eight) affirmed. Dickinson had sufficient evidence to establish Cosby's directly liability for his attorney's defamatory statements because he either approved, authorized and/or ratified them. Singer testified that he had a "general practice" of discussing the contents of and receiving client approval for all press statements prior to publishing, and that he had at least one conversation with Cosby and Cosby's publicist around when the press releases were issued. This evidence would permit a reasonable inference that Cosby approved or authorized the press releases. Alternatively, because "[a] principal's failure to discharge an agent after learning of his wrongful acts may be evidence of ratification, " the evidence would permit a finding by continuing to retain Singer and refusing to issue retractions, engaged in "conduct inconsistent with disapproval," which satisfied the test for ratification. The court rejected Cosby's argument that Dickinson's authorization theory would require Cosby to waive the attorney-client privilege to defend himself. Cosby could "defend himself by producing evidence of non-privileged communications in which he explicitly disapproved the statements or otherwise forbade Singer from issuing them" or by producing evidence that no communications about the statements occurred between him and Singer at all.

See also *Litinsky v. Kaplan* (2019) 40 Cal.App.5th 970 [Second Dist., Div. Two: In malicious prosecution case, attorney defendant's anti-SLAPP motion properly granted where attorney prosecuted claims based on evidence from her client that, while contradicted by other parties, was not "indisputably false"];

See also *Abir Cohen Treyzon Salo, LLP v. Lahiji* (2019) 40 Cal.App.5th 882 [Second Dist., Div. Two: In case alleging that the plaintiff posted defamatory reviews on Yelp, the defendant's anti-SLAPP motion was properly granted because the plaintiff lacked sufficient evidence that the defendant personally authored the reviews].

Orders denying an anti-SLAPP motion on the basis of the commercial speech exemption are not appealable.

Benton v. Benton (2019)
39 Cal.App.5th 212.

Husband and wife jointly operated a dental practice. They divorced, and wife opened a separate practice. Husband filed suit against wife alleging misappropriation of trade secrets, defamation, and other claims. Wife filed an anti-SLAPP motion, arguing that husband's lawsuit stemmed from protected activity: namely, notices she sent to patients regarding her departure and new practice and the divorce petition. The trial court held the "gravamen of the action" was not protected activity and the statute's commercial speech exemption (Civ. Code, § 425.17, subd. (c) ["a person primarily engaged in the business of selling or leasing goods or services" cannot seek to strike claims based on statements about the business to actual or potential customers]) applied to all the claims. Wife appealed.

The Court of Appeal (Fourth Dist., Div. Two) dismissed the appeal. While orders granting or denying anti-SLAPP motions are ordinarily appealable, orders denying anti-SLAPP motions based on one of the exemptions to the statute in section 425.17– including the commercial speech exemption – are not appealable. Further, the statute did not permit the appellate court to review the merits of the trial court's ruling on the applicability of the exception in the process of determining its jurisdiction; so long as the trial court based its ruling on the exempted ground, the order was not reviewable.

Insurance bad faith claims arising out of an insurer's alleged failure to provide independent counsel do not arise out of protected activity for purposes of the anti-SLAPP statute.

Miller Marital Deduction Trust v. Zurich American Insurance Company (2019) 41 Cal.App.5th 247

Two trustees of a property once for dry cleaning sued the prior owner and lessees of the property to recover environmental remediation costs. Zurich American Insurance Company insured the prior owner, and agreed to defend prior owner against the trustees' lawsuit. When the lessees filed a counterclaim against the trustees for contribution and negligence, the trustees tendered defense of the counterclaim to Zurich, contending that they qualified as additional insureds under the prior owner's policy. Zurich agreed to defend subject to a reservation of rights. The trustees then asked Zurich to allow them to select independent *Cumis* counsel given the conflict of interest between the trustees and the prior owner, who remained adverse in the main action. Zurich refused and instead retained panel counsel to defend the trustees. The trustees sued Zurich for bad faith. Zurich filed an anti-SLAPP motion arguing that the trustees' claims arose from allegations about the conduct of the attorneys representing Zurich's insureds in the course of the environmental action, and that such allegations arose from protected petitioning activity. While the trial court agreed with Zurich that a bad faith action could be subject to the anti-SLAPP statute where the asserted basis of liability was a judicial communication, it denied the motion on the ground that Zurich had failed to show that the litigation privilege barred the entirety of the trustees' claims. Zurich appealed.

The Court of Appeal (First Dist., Div. Three) affirmed. What gives rise to Zurich's potential liability in the bad faith action is not the fact of counsels' communications in the course of a judicial proceeding, but the fact that Zurich breached its obligation to provide the trustees with conflict-free counsel. Where counsels' communications are described in the complaint only to provide factual context for the harm the insureds suffered from the insurer's breach of the duty to provide independent counsel, and are not the basis for liability, the anti-SLAPP statute does not apply.

ARBITRATION

Defendant who extensively litigated class action prior to seeking to compel arbitration against last remaining plaintiff had waived the right to arbitrate.

Spracher v. Paul M. Zagaris, Inc. (2019) 39 Cal.App.5th 1135

In this class action alleging the defendant company committed fraud in connection with providing certain real estate services, two years into the litigation, the defendant moved to compel arbitration against the last remaining named class member. Prior to filing the motion to compel arbitration, the defendant filed multiple rounds of demurrers, propounded extensive discovery, filed a summary judgment motion, and otherwise litigated the case. The trial court denied the motion to compel arbitration, ruling that the defendant had waived the right to arbitrate.

The Court of Appeal (First Dist., Div Three) affirmed. The trial court's waiver finding was supported by the defendant's conduct in actively and extensively litigating the case for nearly two years and filing the motion to compel arbitration shortly before the deadline for the plaintiffs to seek class certification. Further, forcing plaintiffs to arbitration only after they spent significant time and resources litigating the outside of the more efficient arbitral forum would have prejudiced them. The fact that the different named plaintiffs had different arbitration provisions, making it more desirable for the defendant to litigate in court while the other named plaintiffs were still in the case, did not justify the defendant's delay in seeking arbitration.

See also *Newirth v. Aegis Senior Communities, LLC* (9th Cir. 2019) 931 F.3d 935 [applying federal law: defendant who waited to seek arbitration until after filing a motion to dismiss and after the plaintiff had incurred litigation costs waived right to arbitrate].

Arbitration award had to be vacated because arbitrator failed to disclose his ownership interest in JAMS.

Monster Energy Company v. City Beverages, LLC (9th Cir. 2019) 940 F.3d 1130.

Monster Energy Company granted Olympic Eagle Distributing exclusive distributing rights of Monster's products. After a dispute arose regarding termination rights, Monster successfully compelled Olympic Eagle to arbitration. The chosen arbitrator, a member of JAMS, disclosed their "economic interest in the overall financial success of JAMS," and how the parties should assume JAMS arbitrators likely have participated in proceedings with parties in this case. The

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arbitrator found for Monster, who then petitioned the court to confirm the award. Olympic Eagle cross-petitioned to vacate the award, asserting an evident partiality claim based on its discovery that the arbitrator was actually a co-owner of JAMS. The court confirmed the award and denied the cross-petition, finding that Olympic Eagle had waived its partiality claim because the pre-arbitration disclosures put it on constructive notice of the claimed partiality.

The Ninth Circuit reversed and vacated the award. The arbitrator's disclosure mentioned only a general economic interest in JAMS, not an ownership interest. Thus, the disclosure did not portray the "totality of JAMS's Monster-related business" and was insufficient to put Olympic Eagle on notice of the non-partiality. Further, the nature of the undisclosed information required vacatur of the award. Arbitrators must "disclose their ownership interests, if any, in the arbitration organizations with whom they are affiliated in connection with the proposed arbitration, and those organizations' nontrivial business dealings with the parties to the arbitration." As a co-owner entitled to JAMS's profits, the arbitrator had a "sufficiently substantial" interest in JAMS to require the ownership interest to be disclosed, and given that JAMS had conducted 97 arbitrations for Monster over the past five years, Monster and JAMS were "engaged in nontrivial business dealings."

Order denying arbitration of Unfair Competition Law claim was appealable but correct given the arbitration agreement's express exemption for unfair competition claims.

Lacayo v. Catalina Restaurant Group Inc. (2019) 38 Cal.App.5th 244

Plaintiff filed a class action alleging wage and hour violations and seeking, among other remedies, injunctive relief under the Unfair Competition Law (Bus. & Prof. Code, § 17200 *et seq.*). The defendants moved to compel arbitration of the individual claims and dismiss the class claims pursuant to the parties' arbitration agreement, which contained a class action waiver. The trial court granted the motion to compel arbitration of the individual claims; declined to dismiss the class claims, leaving the decision whether the class action waiver was valid to the arbitrator (per the agreement's provision vesting the arbitrator with exclusive authority to resolve disputes over the agreement's validity); and denied the motion to compel arbitration of the UCL claim based on an express provision in the agreement excluding claims for "equitable relief for unfair competition." The defendants appealed, arguing the order was an effective denial of their motion to compel arbitration.

The Court of Appeal (Fourth Dist., Div. Two) dismissed the appeal in part and affirmed in part. Under Code of Civil Procedure section 1294, only orders denying arbitration are appealable. The trial court's order declining to dismiss the class claims, in favor of allowing the arbitrator to decide if they were arbitrable or instead waived, was not equivalent to an order denying the motion to compel. The only appealable portion of the trial court's order was the portion denying arbitration of the UCL claim. On that issue, the trial court was correct given the express carve-out in the arbitration agreement.

See also *Clifford v. Quest Software Inc.* (2019) 38 Cal.App.5th 745 [Fourth Dist., Div. Three: plaintiff's UCL claims seeking private injunctive relief and restitution based on employer's failure to pay him proper wages were arbitrable; the legal prohibition on arbitrating UCL claims applies only to claims seeking public injunctive relief];

But see *Mejia v. Merchants Building Maintenance* (2019) 38 Cal.App.5th 723 [Fourth Dist., Div. One: employer's motion to compel arbitration properly denied where plaintiff brought a single cause of action under the Private Attorneys General Act claim seeking to recover both civil penalties and underpaid wages; such a cause of action may not be "split" between the arbitrable underpaid wages claim and nonarbitrable civil penalties claim].

CLASS ACTIONS

Plaintiffs presented an inadequate class action trial plan where their only evidence on liability and damages was an expert who relied on an anonymous, double-blind survey of class members.

McCleery v. Allstate Insurance Company (2019) 37 Cal.App.5th 434

A group of property inspectors filed a class action against their employers and two insurance companies with whom their employers contracted to provide property inspection services. The plaintiffs alleged that they were jointly employed by their employers and the insurers (collectively, defendants), and that the defendants had misclassified them as independent contractors to avoid paying minimum wages and overtime. The plaintiffs also alleged that the defendants failed to establish a meal or rest break policy. In support of their motion for class certification, the plaintiffs presented an expert declaration describing an anonymous survey of class members he performed that he claimed would permit him to testify about liability and damages on a class-wide basis. The trial court determined that the study was methodologically sound, but that the expert's testimony based on it was not sufficient to render the class claims manageable. The "survey results failed to specify for which insurers inspections were performed, or to explain whether the inspectors' failure to take meal or rest

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breaks was due to preference or to the exigencies of the job. Also, the survey's anonymity foreclosed the defendants from cross-examining witnesses to verify responses or test them for accuracy or bias." Accordingly, the trial court denied class certification.

The Court of Appeal (Second Dist., Div. One) affirmed. The expert admitted his survey did not require class members to identify which insurer they performed services for at which times, making it impossible to tell whether any class member worked overtime for that insurer or was entitled to a meal or rest break from that insurer. Further, "plaintiffs expressly admit they intend to answer the ultimate question in this case based only on expert testimony—testimony founded on multiple hearsay that defendants could never challenge." Allowing the claims to proceed based on the expert's testimony founded on the anonymous survey would violate defendants' due process rights, "no matter how scientific the survey may be."

See also *Modaraei v. Action Property Management, Inc.* (2019) 40 Cal.App.5th 632 [Second Dist., Div. One: where the defendant employer presented evidence of variations in proposed class member job duties, the trial court's refusal to certify class of property managers allegedly misclassified as non-exempt employees was supported by substantial evidence].

A benefit-of-the bargain model of class action damages is cognizable under California's consumer protection statutes.

Nguyen v. Nissan North America, Inc. (2019) 932 F.3d 811

Plaintiffs brought a class action under California's Consumers Legal Remedies Act (CLRA) and the Song-Beverly Act alleging a dangerous defect in a vehicle's hydraulic clutch system. In support of their motion for class certification, plaintiffs presented a "benefit-of-the-bargain" model of damages in which they sought the difference in price between a defective and nondetective vehicle as measured by the cost of replacing the defective clutch system. The district court denied class certification, reasoning that the proposed measure of damages assumed the defective component had zero value even though class members received some value, and the value each class members received would vary considerably.

The Ninth Circuit reversed. Under the CLRA, the consumer is entitled to "any damage," and courts have broad discretion to restore plaintiff to the position he or she would have been in absent the defendant's deceptive practices. Further, the Song-Beverly Act expressly permits damages measured by replacement cost. Accordingly, the plaintiffs' damages theory was consistent with their liability theories and cognizable under California law. And because plaintiffs were not seeking to recover for diminished performance, but rather the cost to replace the defective part, which did not vary between consumers, their theory satisfied Federal Rule 23(b)(3)'s predominance requirement.

When a notice of removal plausibly alleged jurisdiction under the Class Action Fairness Act (CAFA), a district court cannot remand without giving the defendant a chance to present evidence supporting federal jurisdiction.

Arias v. Residence Inn by Marriott (9th Cir. 2019) 936 F.3d 920.

The defendant, Marriott, removed this wage and hour class action to federal court asserting federal jurisdiction under CAFA. To establish the jurisdictional requirements of minimal diversity, a class size of over 100, and an amount in controversy of over $5 million, Marriott submitted the following: (1) an allegation that it is a citizen of Maryland and Delaware, whereas the named plaintiff alleged she is a citizen of California; (2) a declaration from a human resources officer identifying the class as including at least 2,193 employees; and (3) an estimation that between $5.5 and $15 million was at stake given the complaint's class definition and estimated rate of violations. Marriott also argued that the potential attorney fee award should be included in the amount in controversy estimate. The district court sua sponte remanded the case, asserting that Marriott's amount in controversy allegations, including its assessment of its potential exposure for attorney fees, were speculative.

The Ninth Circuit reversed. The district court did not find Marriott's amount in controversy allegations implausible; it found them lacking sufficient proof. "[W]hen a notice of removal plausibly alleges a basis for federal court jurisdiction, a district court may not remand the case back to state court without first giving the defendant an opportunity to show by a preponderance of the evidence that the jurisdictional requirements are satisfied." Further, since plaintiff sought attorney fees in her complaint and they are recoverable under California wage and hour laws, the district court erred in not including estimated attorney fees in determining whether the amount in controversy requirement was met.

See also - *Ehrman v. Cox Communications, Inc.* (2019) 932 F.3d 1223 [when a defendant removes a case to federal court under to CAFA, a short and plain statement of the parties' citizenship, based on information and belief, is sufficient; further proof is required only when the non-removing party launches a factual attack on the jurisdictional allegations].

CIVIL PROCEDURE

A defendant's right to mandatory dismissal for failure to bring a case to trial within five years prevails over a plaintiff's right to voluntary dismissal.

Cole v. Hammond (2019)
37 Cal.App.5th 912

To satisfy his obligation to pay his attorney's fees, a landlord assigned his attorney the right to receive his tenant's rent payments. When the tenants refused to pay their rent directly to the attorney, the attorney sued the tenants, alleging breach of contract and related claims. A few months later, the tenants began paying their rent to the attorney. After the parties conducted some initial discovery, the case languished for many years. Nearly seven years after the lawsuit was initiated, the tenants moved under Code of Civil Procedure section 583.360 for mandatory dismissal of the action for failure to bring the case to trial within five years. At the hearing on the motion, the attorney sought to voluntarily dismiss the case without prejudice pursuant to section 581, subdivision (b)(1). The trial court granted the attorney's motion for voluntary dismissal.

The Court of Appeal (Second Dist., Div. Four) reversed. While a plaintiff has a right to voluntarily dismiss an action pursuant to Code of Civil Procedure section 581, subdivision (b)(1) "at any time before the actual commencement of trial," the meaning of the term "trial" is not restricted to jury or court trials on the merits. Rather, it includes other procedures that effectively dispose of the case, such as a defendant's right to dismissal due to a plaintiff's failure to prosecute the case. Section 583.360 provides that dismissals due to a plaintiff's failure to prosecute the case "are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute." A trial court has a mandatory duty to dismiss the action upon the elapsing of five years from the date the action was commenced. Thus, a plaintiff loses the right to voluntarily dismiss a case in the face of a defendant's motion for mandatory dismissal because of the "legal inevitability" of dismissal.

Physician who had examined plaintiff in another case but who had not been designated as an expert in the current case was not permitted to offer medical opinions.

Pina v. County of Los Angeles (2019)
38 Cal.App.5th 531

Plaintiff brought a personal injury suit against the County of Los Angeles for injuries he allegedly suffered in a 2013 bus accident. At trial, plaintiff admitted he was injured in a separate bus accident in 2016, for which he sued the Metropolitan Transportation Authority (MTA). Nevertheless, plaintiff's retained medical expert opined that the 2013 accident caused the injuries for which plaintiff claimed damages, including injuries requiring future surgery. To counter that opinion, the County called the physician the MTA had retained to examine plaintiff in the other lawsuit. The County had not designated the physician as an expert in the present case. The physician testified that plaintiff's expert was wrong about the cause of plaintiff's injuries and that plaintiff had no indications of needing surgery for injuries caused by the 2013 accident. The jury found the County liable but awarded plaintiff only $5,000 in damages. Plaintiff appealed.

The Court of Appeal (Second Dist., Div. Four) reversed. Code of Civil Procedure, section 2034.310, subdivision (b), provides that while impeachment by an undesignated expert "may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness," it "may not include testimony that contradicts the opinion." As a result, disagreement with an opposing expert's understanding or application of medical science exceeds the scope of permissible impeachment, as it does not concern the falsity or non-existence of foundational facts on which the opposing expert relied. Thus, the trial court abused its discretion in admitting testimony from an undesignated expert that the opposing expert's causation opinion was not medically substantiated.

TORTS

In the absence of conclusive evidence of a link between talc use and cancer, talc manufacturer was entitled to judgment as a matter of law on punitive damages.

Johnson & Johnson Talcum Powder Cases (2019)
37 Cal.App.5th 292

The plaintiff brought suit against Johnson & Johnson and its wholly-owned subsidiary JCII alleging that she contracted ovarian cancer from using Johnson & Johnson talc products and asserting a single claim for failure to warn. Johnson & Johnson had ceased manufacturing the produce in 1967, at which point JCII took over the manufacturing. At trial, plaintiff presented epidemiological evidence linking talc use to ovarian cancer starting in the 1980s. She also presented expert testimony from her treating gynecologist who performed a "differential diagnosis" and concluded that talc use specifically caused the plaintiff's cancer. The jury found for the plaintiff against both defendants and awarded punitive damages. The trial court, however, granted defendants' motions for judgment notwithstanding the verdict and, in the alternative, a new trial.

The Court of Appeal (Second Dist., Div. Three) affirmed the order granting judgment notwithstanding the verdict in favor of Johnson & Johnson. There was no evidence Johnson & Johnson knew or should have known of a link between talc use

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and ovarian cancer in 1967, and the plaintiff presented no valid theory that Johnson & Johnson had a continuing duty to warn after it stopped manufacturing the product or was vicariously liable for its subsidiary's torts. The court reversed the order granting judgment notwithstanding the verdict in favor of JCII. The plaintiff presented sufficient evidence of causation and breach of duty to permit a jury verdict in her favor. On the issue of specific causation, any failure of the treating gynecologist to consider relevant factors in her differential diagnosis, including the high rate of unknown or spontaneous causes, went to the weight rather than the admissibility and sufficiency of her testimony. Further, on the issues of general causation and breach, there was sufficient evidence that JCII should have known of the possibility of a link between talc use and ovarian cancer by the 1980s and therefore should have warned. However, because the evidence of the asserted link between talc use and cancer was highly conflicting, the trial court did not abuse its discretion in granting a new trial. Thus, the new trial order was affirmed. Also, given lack of any conclusive scientific link between talc use and ovarian cancer, the trial court correctly granted JCII judgment notwithstanding the verdict on the plaintiff's punitive damages claim.

Shopping center had no duty to protect plaintiff from assault simply because of the general foreseeability of criminal conduct.

Williams v. Fremont Corners, Inc. (2019)
37 Cal.App.5th 654

An unknown bar patron assaulted another patron in the parking lot of the shopping center where the bar was located. The injured patron sued the shopping center, alleging that, given the nature of the bar business and "prior similar occurrences" on the premises ,the defendant's duty to keep the premises reasonably safe for the public included protecting from the reasonably foreseeable criminal acts of third parties. He alleged that defendant breached its duty by failing to provide adequate security, monitor the parking lot near the bar, and properly light the area, which created or permitted dangerous conditions to exist and formed a substantial factor in causing his injuries. The trial court granted the shopping center's motion for summary judgment.

The Court of Appeal (Sixth Dist.) affirmed. A shopping center's general knowledge of the possibility of criminal conduct on its property is not in itself enough to create a duty to protect a patron from an assault on the premises. Absent evidence of the shopping center's knowledge of prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults, the high degree of foreseeability required to create a duty to provide guards to protect patrons from third-party crime not exist. The shopping center had no legal duty to implement additional measures to discover incidents of criminal acts on the premises and secure the premises against possible third-party conduct.

See also *Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 1077 [national organization in charge of sport had a duty to protect participants from sexual misconduct by coaches, but Olympic Committee did not], review granted Jan. 2, 2020, case no. S259216.

Homeowners were not liable for failing to remedy building code violations that they were unaware of and did not create.

Jones v. Awad (2019)
39 Cal.App.5th 1200

Plaintiff sued defendant homeowners for premises liability after she tripped on a step in defendants' garage. At the time of the incident, the lighting was sufficient for plaintiff to see where she was stepping and no debris or obstacles covered the steps. While the garage steps violated seven provisions of the Uniform Building Code, defendants were not aware of the violations. Defendants were also not aware of anyone else ever tripping or falling down the steps during the 25 years that they lived in the home. Defendants successfully moved for summary judgment on the ground that no reasonable jury could find that they failed to act with reasonable care. In granting summary judgment, the trial court rejected plaintiff's argument that allowing the Building Code violations constituted negligence per se.

The Court of Appeal (Fifth Dist.) affirmed. While there was an indistinct change in elevation between the steps that was not an open and obvious danger to an individual descending the steps, potentially giving rise to a duty to warn, absent evidence that there was a discernable feature of the steps or prior incident that would have notified the owners of that dangerous condition, the plaintiff could not raise a triable issue of material fact as to breach of that duty. Also, the doctrine of negligence per se based on Building Code violations was inapplicable to homeowners who did not take part in any aspect of the design or construction of the noncompliant steps.

See also *Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092 [Fourth Dist., Div. Two: where sidewalk height differential was less than one inch and in open view, city was entitled to summary judgment of plaintiff's claim that the sidewalk constituted a dangerous condition of public property because the sidewalk defect was trivial as a matter of law (see Govt. Code, § 830.2)];

See also *Dobbs v. City of Los Angeles* (2019) 41 Cal.App.5th 159 [Second Dist., Div. Eight: city entitled to design immunity in plaintiff's suit for injuries incurred in walking into a concrete ballard at a convention center].

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See also *Lee v. Department of Parks and Recreation* (2019) 38 Cal.App.5th 206 [First Dist., Div. Four: government entitled to trail immunity under Govt. Code, §831.4(b) in plaintiff's suit for premises liability arising out of her fall on an uneven stairway connecting a parking area to a camp ground at a state park];

See also *Churchman v. Bay Area Rapid Transit District* (2019) 39 Cal.App.5th 246 [First Dist., Div. Five: civil Code, § 2100, which imposes a duty of utmost care on common carriers to ensure passenger safety, "does not apply to minor, commonplace hazards in a train station"];

But see *Kim v. United States* (9th Cir. 2019) 940 F.3d 484 ["[O]nce Park officials undertook to evaluate the danger of the trees in the campground, they were required to do so according to the technical criteria set forth in the Park's official policies;" alleged failure to do so precluded Park officials from asserting immunity defense in case alleging two boys were killed by a falling tree at the campground].

Anchoring in response to juror question was neither improper nor prejudicial.

Fernandez v. Jimenez (2019)
40 Cal.App.5th 482

In this drunk driving wrongful death action, the jury awarded $11,250,000 in noneconomic damages to each of decedent's 4 children. Defendants appealed the damages as excessive. Among other arguments, defendants argued that plaintiffs' counsel improperly preconditioned the jury during voir dire to award inflated damages by "anchoring"—i.e., asking if the jury would be okay awarding $200 million dollars.

The Court of Appeal (Second Dist., Div. Three) affirmed the verdict. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination of appropriate damages in a wrongful death action on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding. Additionally, plaintiffs' counsel did not improperly precondition the jury because counsel did not introduce the $200 million number. Rather, that number was introduced by a juror when asking a clarifying question about the plaintiffs' demand. This was not improper because it is not impermissible preconditioning for a plaintiff's attorney to inform the jury of the damages being sought.

The discovery rule applies to toll the statue of limitations on claims for medical battery.

Daley v. Regents of the University of California (2019)
39 Cal.App.5th 595.

In 2015, after seeing an attorney advertisement suggesting that people like her who participated in a certain clinical trial might have a legal claim, the plaintiff filed suit against the defendant alleging claims for medical battery based on a medical procedure she underwent in 2003 as part of the clinical trial. The defendant argued that plaintiff's claim was untimely because it was filed well after expiration of the two-year statute of limitations period for battery claims set forth in Code of Civil Procedure section 335.1.. Plaintiff countered that her claim was timely since the discovery rule, which "postpones accrual of a cause of action until the plaintiff discovers ... the cause of action," applied and tolled the limitation period to the time she learned that she had been subject to a procedure to which she had not consented. The trial court dismissed the complaint, holding that the discovery rule does not apply to medical battery claims and that battery claims are only tolled by proof of fraudulent concealment.

The Court of Appeal (First Dist., Div. Five) reversed. The discovery rule does apply to medical battery claims. The rule, historically, has applied to a wide range of claims, including claims under the prior version of section 335.1. Further, applying the rule to medical battery claims aligns with the fundamental purpose of the rule, which is "to protect people 'who, with justification, are ignorant of their right to sue.' "

INSURANCE

A third party claimant could bring an action for fraudulent transfer to void an insurer-insured settlement purporting to release the insurer for bad faith refusal to settle.

Potter v. Alliance United Ins. Co. (2019)
37 Cal.App.5th 894.

Christopher Potter was injured in an auto accident with Alliance United Insurance Company's (AUIC) insured, Jesus Remedios Avalos-Tovar. AUIC did not respond to Potter's offered to settle his personal injury claims for Tovar's $15,000 policy limit, so the case went to trial. The jury awarded nearly $ 1 million, but the court granted a new trial. Before the case was retired, Tovar accepted $75,000 from AUIC to "release" any bad faith claim against AUIC resulting from its failure to respond to Potter's settlement offer. After the second trial, the jury again awarded Potter over $1 million. Since Tovar was insolvent, Potter sued AUIC, alleging that Tovar's release of his bad faith claims was a fraudulent conveyance under the Uniform Voidable Transactions Act (UVTA). The trial court granted AUIC's demurrer, holding that Tovar's bad faith

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claim against AUIC was not an "asset" that was "transferred" for UVTA purposes because there was no judgment against Tovar at the time he settled with and released AUIC. Potter appealed.

The Court of Appeal (Second Dist., Div. Five) reversed. Under the UVTA, a creditor can void "a transfer by the debtor of property to a third person undertaken with the intent to prevent [the] creditor from reaching that interest to satisfy a claim." Potter stated a UVTA claim. Potter was a "creditor" under the UVTA because he had a claim against Tovar; Tovar's right to sue for bad faith was an assignable "asset" even if Tovar was not yet facing an excess judgment – indeed, it is common practice for an insured to assign a potential future bad faith claim to a third party claimant; and the settlement and release constituted a "transfer" of that asset for the purpose of preventing Potter from recovering the full value of his judgment against either Tovar or AUIC.

See also *Mancini & Associates v. Schwetz* (2019) 39 Cal. App.5th 656 [Second Dist., Div. Six: where, following a plaintiff's judgment in an employment case, the plaintiff and defnddant reconciled and purported to enter into a settlement and release, the plaintiff's attorney, who had a lien on the judgment for his fees, could sue the defendant for tortiously interfering with contractual relations].

Insured's ordinary homeowners' policy did not cover injury to tenant at insured's rental property.

Terrell v. State Farm General Insurance Company (2019) 40 Cal.App.5th 497.

Plaintiffs rented out their home starting in 2003 and obtained a rental dwelling policy from State Farm General Insurance Company. Considering moving back in, plaintiffs changed their policy to a standard homeowners policy. But they did not move back in, and instead continued renting the property. When the home's porch collapsed, injuring a tenant, the tenant sued plaintiffs. Plaintiffs tendered the claim to State Farm, which denied the claim based on an exclusion in the homeowners' policy "for bodily injury or property damage arising out of business pursuits of any insured or the rental or holding for rental of any part of any premises by the insured." Plaintiffs then sued State Farm for breach of contract and bad faith. The trial court granted summary judgment for State Farm.

The Court of Appeal (First Dist., Div. One) affirmed. Under the plain language of the homeowners' policy's "business pursuits/rental exclusion," coverage was barred because the injury arose solely out of the plaintiffs' rental of their home. The court rejected plaintiffs' argument that an exception to the "business pursuits/rental exclusion" for "activities which are ordinarily incident to non-business pursuits" applied. Plaintiffs had been renting the property and living elsewhere for more than a decade; this was not a case where the ordinary use of the home was as plaintiffs' primary residence and they had a tenant only temporarily. The court rejected the idea that plaintiffs could "fold into a homeowners policy coverage for the commercial risks attendant to renting their home as a for-profit venture," which was a type of risk covered by a different kind of policy they declined to purchase.

LABOR & EMPLOYMENT

A plaintiff cannot bring a PAGA claim seeking underpaid wages under Labor Code section 558.

Z.B. N.A. v. Superior Court (Lawson) (2019) 8 Cal.5th 175

A plaintiff filed a claim under California's Private Attorneys General Act (PAGA) seeking to recover underpaid wages and statutory penalties under Labor Code section 558. The employer defendant moved to compel arbitration. Given that the PAGA claim for statutory penalties was nonarbitrable under *Iskanian v. CLA Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, the trial court bifurcated plaintiff's underpaid wage claims from the statutory penalty claims and granted the motion only as to the claim for underpaid wages. The Court of Appeal (Fourth Dist., Div. One) reversed, finding that bifurcation was improper and that accordingly, the motion to compel should have been denied in its entirety.

The California Supreme Court affirmed the Court of Appeal on different grounds. Section 558's provision permitting recovery of unpaid wages relates to compensatory damages, not statutory penalties. That remedy cannot be sought in a PAGA action. Thus, the plaintiff's only valid PAGA claim was for statutory penalties, which are not subject to arbitration. Accordingly, the trial court should have denied the motion to compel arbitration. On remand, however, the trial court would be permitted to consider whether to strike the unpaid wages allegations from the PAGA complaint or whether the plaintiff should instead be permitted to amend her complaint to request unpaid wages under an appropriate personal cause of action.

Franchisor is not a joint employer with franschisee.

Salazar v. McDonald's Corporation (9th Cir. 2019) 944 F.3d 1024

Employees of a McDonald's franchisee brought a wage and hour class action claiming that McDonald's Corporation was their employer under a joint employment theory. Plaintiffs alleged the settings on McDonalds' in-store timekeeping system, which the franchisee voluntarily used, did not recognize overtime hours or missed rest breaks and caused workers to take delayed meal periods. The district court granted summary judgment for McDonald's.

The Ninth Circuit affirmed. McDonald's is not a joint employer of its franchisees' employees under any of the three definitions of an "employer" recognized under California wage and hour law. Although McDonald's imposes some requirements on its franchisees' employees to ensure quality control and maintain brand standards, these requirements are essential to modern franchising and differ from exercising control over wages, hours, or working conditions (the "control" definition) or the manner and means of the work performed (the common law definition), as well as from suffering or permitting work (i.e., failing to prevent work from being done when one has the power to do so).

See also *Henderson v. Equilon Enterprises* (2019) 40 Cal. App.5th 1111 [First Dist., Div. One: the ABC test the California Supreme Court adopted in *Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903, 914 (*Dynamex*), to address claims of worker misclassification does not apply to claims of joint employer liability in which there is already a primary employer responsible for ensuring compliance with wage and hours laws; *Martinez v. Combs* (2010) 49 Cal.4th 35 continues to provide the governing standard for determining the existence of a joint employment relationship];

See also *Gonzales v. San Gabriel Transit* (2019) 40 Cal. App.5th 1131 [Second Dist., Div. Four: the *Dynamex* ABC test applies retroactively to pending wage and hour litigation and applies to claims and applies to all Labor Code claims to enforce wage order requirements, but the *S.G. Borello and Sons v. Department of Industrial Relations* (1989) 48 Cal.3d 341 test still provides the standard for determining misclassification in cases not involving the wage and hour laws], review granted and case helf pending outcome of *Vazquez v. Jan-Pro Frnachising International, Inc.,* case no. S258191;

But see *Jimenez v. U.S. Continental Marketing Inc.* (2019) 41 Cal.App.5th 189 [Fourth Dist., Div. One: for purposes of Fair Employment and Housing Act claims, a temporary staffer may be jointly employed by the temporary staffing agency and the contracting company, so the contracting company may be liable to the temporary employee for harassment or discrimination within the control of the contracting company].

HEALTHCARE

Nursing home's arbitration agreement signed by the patient's husband as her "representative" was not sufficient to bind the patient or her family to arbitration.

Valentine v. Plum Healthcare Group, LLC (2019) 37 Cal.App.5th 1076

In this survival and wrongful death action for elder abuse against the owners and operators of a skilled nursing facility, the defendants moved to compel arbitration under an agreement the decedent's husband had signed. The trial court denied the motion, finding that the while the husband signed as his wife's "representative" at the facility's direction, there was no evidence his wife actually authorized him to enter into an agreement as her agent, nor was there any evidence about the parties' relationship or course of dealing that would permit the facility reasonably to have concluded that the husband was acting as his wife's ostensible agent when he signed the agreement.

The Court of Appeal (Third Dist.) affirmed. Substantial evidence supported the trial court's conclusion that defendants did not establish that the decedent's husband signed the arbitration agreements as his wife's agent. Nothing the decedent did could reasonably cause defendants to believe that her husband was authorized to execute arbitration agreements for her, and agency cannot be implied from a marriage relationship alone. Further, because the decedent's children were third parties who were not bound by the arbitration agreement and whose related claims would have to be litigated in court, the trial court did not abuse its discretion in refusing to compel arbitration.

See also *Lopez v. Bartlett Care Center* (2019) 39 Cal.App.5th 311 [Fourth Dist., Div. Three: in action against skilled nursing facility for the wrongful death of the plaintiff's mother, sufficient evidence supported trial court's conclusions that plaintiff was not her mother's agent when she signed arbitration agreement, thus precluding arbitration of the survivor claims, and that the agreement was not enforceable against plaintiff individually].

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 standards for pleading intentional interference with a contract.

Ixchel Pharma v. Biogen (2019)
930 F.3d 1031, Question of State Law Request
Granted September 11, 2019, S256927

Ixchel Pharma and Forward, both biotechnology companies, entered into a "Collaboration Agreement" to develop and market a new drug. Forward could terminate the agreement by written notice and did so during negotiations with Biogen, another pharmaceutical company, who was developing a drug similar to Ixchel's. Ixchel sued Biogen, and the district court dismissed the initial and amended complaint, the latter of which alleged that Forward violated section 16600 of the California Business and Professions Code through their agreement with Biogen. Ixchel appealed to the Ninth Circuit.

Thee California Supreme Court accepted the Ninth Circuit's request to decide the following issues: "Does section 16600 of the California Business and Professions Code void a contract by which a business is restrained from engaging in a lawful trade or business with another business? Is a plaintiff required to plead an independently wrongful act in order to state a claim for intentional interference with a contract that can be terminated by a party at any time, or does that requirement apply only to at-will employment contracts?"

Golden Rule – continued from page 18

Yet several articles in a 2019 plaintiffs' bar magazine issue on trial skills champion closing arguments that lead jurors to see the case as significant to themselves. One article encourages the "young practitioner" to remind jurors "why *they* would be upset, why *they* would think this scenario is wrong, and why *they* would never want their family members to be treated the same way." (George, *Closing Argument: Now What?* (Jan. 2019) Advocate <*www.advocatemagazine.com/article/2019-january/closing-argument-now-what*> [as of Sept. 27, 2019].) Another article, advices lawyers to ask themselves, "What message does the story convey that will result in a jury seeing the case's significance to themselves...?" (Pantages, *Storytelling At Trial: Beginning, A Middle And An End* (Jan. 2019) Advocate <*www.advocatemagazine.com/article/2019-january/storytelling-at-trial-beginning-a-middle-and-an-end*> [as of Sept. 27, 2019].)

A more recent article argues that there is nothing wrong with the use of " 'you' " directed towards the jury as implicating the Golden Rule, and recommends that one insulate variations of the Golden Rule argument from objections by simply telling the jury that the facts of the case are specific to plaintiff. (Simon, *Damages In Spine-Injury Cases* (June 2019) Advocate <*www.advocatemagazine.com/article/2019-june/damages-in-spine-injury-cases*> [as of Sept. 27, 2019].)

In practice, such a disclaimer would have little prophylactic effect. Telling jurors to think only about plaintiff and not themselves causes them to do just the opposite – like the old joke about telling someone, "Don't think about an elephant." The technique embodies paralepsis, "the rhetorical trick of making a point by telling your audience you do not want to make that very point." (*Martinez v. Department of Transportation* (2015) 238 Cal. App.4th 559, 565 & fn. 5; see *id.* at pp. 565-566, fn. 5 [Marc Antony's famous "lend me your ears" speech, as written by Shakespeare, is the epitome of paralepsis; Antony says he "came to bury Caesar, not praise him," but "the whole point of the speech, in context, is that he really did come to *praise* Caesar"].) Paralepsis is not a fiction – psychological studies indicate "that when we try not to think of something, one part of our mind does avoid the forbidden thought," but the other part ensures that the prohibited thought "is not coming up – therefore, ironically, bringing it to mind." (Winerman, *Suppressing the " 'white bears' "* (Oct. 2011) 42 Monitor on Psychology 44 <*www.apa.org/monitor/2011/10/unwanted-thoughts*> [as of Sept. 27, 2019]; see McGowan, *Mind Control: Unwanted Thoughts* (Jan. 2004) Psychology Today <*www.psychologytoday.com/us/articles/200401/mind-control-unwanted-thoughts*> [as of Sept. 27, 2019].)

Cautioning jurors not to think of themselves would not immunize them from effective paralepsis or the psychological principle of thought suppression, which an attorney could draw upon to subtly encourage a subjective measure of damages. (See Bornstein & Greene, *Jury Decision Making: Implications For and From Psychology* (2011) Current Directions in Psychological Science 63, 63 <*www.law.nyu.edu/sites/default/files/upload_documents/Jury-Decision-Making.pdf*> [as of Sept. 27, 2019] ["[J]ury decision making has implications for psychological research," and theoretical concepts informing "reasoning, ... judgment and decision making" manifest in jury verdicts].) A disclaimer to think only of plaintiff would have little remedial effect and could even increase the likelihood of a subjective damages award. (Indeed, this is why some defense lawyers prefer *not* to have jurors instructed that they must not consider the availability of insurance or award compensatory damages to cover attorney fees – it can have the effect of making them consider doing just that, when they otherwise might not have done so.)

Any variant of a "want ad" closing argument violates the prohibition on Golden Rule arguments and cannot be made proper simply through slight alternations on the narrative or telling the jurors to think only of plaintiff before making the improper argument. Despite their creativity, these arguments violate established law, and their use should be curtailed.

Attorney Jessica Leano is Judicial Law Clerk at United States District Court, Central District of California.

Jessica Leano

ASCDC Fights For the Cure!

In October, for Breast Cancer Awareness month, the Association of Southern California Defense Counsel partnered with City of Hope, a nationally recognized leader in the research and treatment of breast cancer. The generous members of the ASCDC participated in *31 Days of Providing Hope* to raise funds in support of breast cancer treatment and research at the City of Hope. Our members donated over $3,600!

The Board of Directors met in October for a Board meeting and wore pink ribbons it show their support of Breast Cancer Awareness Month.

ASCDC members sent touching notes about the fundraiser. Here are a few thoughts that were shared:

> **This is wonderful news. I am a survivor. 11 months of treatments and surgeries in 2013-2014. I'm hanging in there and, so far, in remission. So many people don't talk about it. People all around us are survivors.**

— ASCDC Member & Breast Cancer Survivor

> **Thank you for this advertisement for City of Hope! I was just diagnosed with breast cancer last month after locating a lump during a self-breast exam. It's so imperative we educate, educate, educate women to take their health into their own hands (quite literally) and support reputable organizations that push us closer to a cure. As someone directly impacted by this disease, I personally appreciate the effort by colleagues such as yourself.**

— ASCDC Member & Breast Cancer Patient

continued on page 21

I am a survivor. We are all around. Treating patients need to know they are not alone and there is hope. Thank you to all who are donating.

— ASCDC Member Susan Beck

In honor of my friends and family who have fought this disease and are winning. Thanks ASCDC for highlighting this very worthy cause.

— ASCDC Past President Diane Wiesmann

I have been privileged to be married for over 32 years to Gail Reisman, Deputy General Counsel for COH. I know through her the wonderful work COH does. My mother and my mother-in-law were both breast cancer survivors. I have a wonderful wife, a marvelous daughter and two great sisters. I have plenty of reasons to contribute.

— ASCDC Past President Robert Olson

I have several family members who are breast cancer survivors. Thank you for encouraging people to donate to this important cause.

— ASCDC Member Maureen Clark

This disease takes far too many, including persons dear to me. Thank you ASCDC for encouraging us to help support this worthy cause.

— ASCDC Member Michael Lloyd

Happy to contribute to such a worthy cause.

— ASCDC Past President Mike Schonbuch

Very happy to support such a great cause and such a great facility. Also to outdonate Schonbuch by $1.

— ASCDC Board Member (and class clown) Eric Schwettmann

I'm inspired by all my dear aunts and cousins (there are way too many of them) who have faced down this disease. Also inspired by Eric.

— ASCDC Board Member Lisa Perrochet

My Mom was a two time breast cancer survivor.

— ASCDC Board Member Patricia Daehnke

Such a worthy cause.

— ASCDC Secretary Diana Lytel

Thank you for doing this. My sister died this year after over a 20 year battle.

— ASCDC Member

Supreme Court No. S254938

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CONSERVATORSHIP OF ESTATE OF O.B.

Second District Court of Appeal No. B290805

T.B., et al.,

Petitioners and Respondents,

vs.
O.B.,

Objector and Appellant.

Check out this amicus brief on the clear and convincing evidence standard!

From a Decision by the Court of Appeal
Second Appellate District, Division Six
Case No. B290805

APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF SUPPORTING DEFENDANT AS REGARDS THE APPROPRIATE APPELLATE STANDARD OF REVIEW

PROPOSED AMICUS CURIAE BRIEF ON BEHALF OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF SUPPORTING DEFENDANT AS REGARDS THE APPROPRIATE APPELLATE STANDARD OF REVIEW

GREINES, MARTIN, STEIN & RICHLAND LLP
*Robert A. Olson (SBN 109374)
Edward L. Xanders (SBN 145779)
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Attorneys for Prospective Amicus Curiae
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

Read about these and other amicus efforts on your behalf in the Amicus Report at p. 33 of this magazine. To see more briefing from the ASCDC amicus committee, go to the Amicus page at *ASCDC.org*.

INTRODUCTION

Courts and judges, both appellate and trial, routinely apply evidentiary proof and standards of review prisms in evaluating the sufficiency of evidence. A distinct minority of Court of Appeal decisions have held that courts and judges are incompetent to do so in one specific context—appellate review of the sufficiency of evidence to meet a clear and convincing standard of proof. Although this issue is presently before this Court in a conservatorship context, it arises in many others, most notably punitive damages for which liability, by statute, must be established by clear and convincing evidence. (Civil Code, § 3294.) A noted treatise lists 22 distinct civil subjects on which clear and convincing proof is required. (1 Witkin, Cal. Evid. (5th ed. 2019) Burden of Proof, § 40 see, e.g., *Estate of Duke* (2015) 61 Cal.4th 871, 879 ["reformation (of wills is only) permissible if clear and convincing evidence establishes an error in the expression of the testator's intent and establishes the testator's actual specific intent at the time the will was drafted"].) *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, requires such a level of evidence in a defamation claim brought by a public figure or on a public issue.

Procedurally, appellate *and* trial courts confront the issue of whether the evidence suffices to meet a heightened evidentiary standard at a variety of stages, e.g.: whether a punitive damages claim may be pleaded against a healthcare provider or religious institution (Code Civ. Proc., §§ 425.13 & 425.14), on an anti-SLAPP motion (Code Civ. Proc., § 425.16) involving a defamation claim brought by a public figure, on motions for summary judgment, summary adjudication, nonsuit, directed verdict, and judgment notwithstanding verdict. Yet the minority rule appears to be the appellate judges, who routinely set aside their personal views in determining whether evidence meets a preponderance standard or whether a trial court has properly exercised discretion, are uniquely incapable of evaluating evidence according to a clear and convincing evidence yardstick.

This Court should adopt the majority rule. That rule is that courts—trial, when acting in a nonfactfinding capacity, and appellate—evaluate the sufficiency of evidence through the prism of the applicable standard of proof. Evaluating evidence through evidentiary proof and standard of review prisms is what both trial and appellate judges do day in and day out. They are as capable of doing so when the standard is clear and convincing evidence as they are in any other context.

ASCDC
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Good News - this one was granted. ☺

October 1, 2019

Presiding Justice Dennis M. Perluss
Associate Justice Laurie D. Zelon
Honorable Natalie P. Stone
Court of Appeal of the State of California
Second Appellate District, Division Seven
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Re: ***Morris v. Hyundai Motor America***
Court Case No. B290693
Request for Publication; Opinion filed September 16, 2019

Dear Presiding Justice Perluss, Associate Justice Zelon, and Judge Stone:

Pursuant to California Rules of Court, rule 8.1120(a), the Association of Southern California Defense Counsel (ASCDC) requests that this court publish its September 16, 2019 opinion in *Morris v. Hyundai Motor America* (*Morris*).

ASCDC is the nation's largest and preeminent regional organization of lawyers primarily devoted to defending civil actions in Southern and Central California. ASCDC has approximately 1,100 attorney members, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is actively involved in assisting courts on issues of interest to its members, the judiciary, the bar as a whole, and the public. It is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. ASCDC is also actively engaged in assisting courts by appearing as amicus curiae. Many of ASCDC's members specialize in defending cases brought under the Song-Beverly Act or other cases in which attorney fees are sought by a party and, thus, the organization has an interest in the publication of this opinion.

This court's opinion in *Morris* provides a comprehensive discussion of a trial court's discretion in fixing the reasonable amount of attorney fees awardable under Civil Code section 1794, subdivision (d), of the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.) (Song-Beverly Act). These issues arise repeatedly, not just in Song-Beverly Act cases, but in other cases in which attorney fees are sought under California law. In addition, the court's opinion explains an important distinction between California and federal law regarding a trial court's required explanation of its reasons for reducing an award of attorney fees. If published, the decision will clarify the requirements for California trial courts as well as provide guidance for appellate courts when reviewing a trial court's decision to award reduced attorney fees.

Publication of the court's opinion in this case is warranted under California Rules of Court, rule 8.1105(c). A Court of Appeal opinion "*should* be certified for publication . . . if the opinion: [¶] . . . [¶] (3) [m]odifies, explains, or criticizes with reasons given, an existing rule of law" or "(5) [a]ddresses or creates an apparent conflict in the law." (Cal. Rules of Court, rule 8.1105(c)(3), (5), emphasis added.) This court's opinion fits both criteria.

First, publication is warranted because this court's opinion explains an existing rule of law and applies it to a new factual setting. (Cal. Rules of Court, rule 8.1105(c)(2)-(3).) The opinion highlights the existing rule that "it is appropriate for a trial court to reduce a fee award based on its reasonable determination that a routine, non-complex case was overstaffed to a degree that significant inefficiencies and inflated fees resulted." (Typed opn. 19.) But the opinion then addresses the "unique issue" of "whether the trial court's decision to cut entirely the fees for six billing attorneys . . . was an appropriate way to remedy such inefficiencies and make the fee award a reasonable one." (Typed opn. 19-20.) Other courts have reduced an attorney fees award through a percentage reduction of the overall lodestar calculation rather than by cutting fees entirely for a specific number of attorneys. (See *Warren v. Kia Motors America, Inc.* (2018) 30 Cal.App.5th 24, 40 (*Warren*) [trial court reduced attorney fees requested by 33 percent].) Addressing the alternative approach applied by the trial court here, this court held that its "chosen remedy—not awarding fees for some of the attorneys—was designed to yield a revised lodestar figure that reflected a total amount of fees that were reasonably incurred." (Typed opn. 21.) This court's decision further noted that the trial court "could properly have made an across-the-board reduction of 30 percent to accomplish the same purpose." (*Ibid.*) This is an important supplement to the existing rule giving trial courts discretion to reduce attorney fees awards, especially in situations involving overstaffing of cases.

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We'll keep trying to get improvements in the CACI instructions...

August 12, 2019

VIA EMAIL

Mr. Bruce R. Greenlee, Attorney
Judicial Council of California
Advisory Committee on Civil Jury Instructions
455 Golden Gate Avenue
San Francisco, California 94102

Re: Response to Invitation to Comment on Proposed Revision to CACI No. 3709

Dear Mr. Greenlee:

On behalf of the Association of Southern California Defense Counsel, we offer conditional support for the Advisory Committee's proposed revision to CACI 3709, "Ostensible Agent," subject to the addition of a use note explaining that CACI 3709 should be given *in addition to* CACI 3700 and 3701, and not as a stand-alone instruction.

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. Its members include over 1,100 attorneys in Central and Southern California. ASCDC appears frequently as amicus curiae in appellate matters of interest to its members, and has commented on proposed legislation, rules changes, and jury instructions affecting matters of civil procedure and other aspects of ASCDC members' practices.

The CACI 3700 series sets forth form instructions for vicarious liability. CACI 3700 is an introductory instruction, which explains to the jury the basic principles of vicarious liability. CACI 3701 sets forth the factual elements necessary to hold one party liable for the acts of another, including the requirements that the plaintiff was harmed by the *agent's* wrongful conduct, and that the agent was acting in the scope of his or her agency when the wrongful act occurred.

Subsequent instructions, set forth in CACI 3703-3713, set forth the various factual scenarios that can give rise to an agency relationship sufficient to impose vicarious liability (or, in the case of CACI 3709, an ostensible agency relationship) under the elements of CACI 3701. In the experience of the ASCDC's members, however, there is an unfortunate trend of some attorneys offering, and courts agreeing to give, the fact-scenario instructions (CACI 3703-3713) *without* CACI 3700 and 3701. The result is that juries are not properly instructed on the elements necessary to give rise to a finding of vicarious liability, and in particular, are not being instructed that liability is premised upon the agent's wrongful act, and upon a showing that the act occurred in the scope of the agency relationship.

ASCDC agrees with the Advisory Committee's decision to omit the phrase "was harmed because [he/she]" from CACI 3709. The phrase is redundant to the element of harm set forth in CACI 3701. The elimination of the redundancy should help clarify that CACI 3709 does not provide an independent basis for liability, but rather should be given *in addition to* CACI 3700 and 3701 where ostensible agency has been alleged.

ASCDC's support for the revision to CACI 3709 is conditioned, however, on the Advisory Committee's addition of a use note explaining that the instruction should be given with CACI 3700 and 3701. Without that explanation, omitting the "was harmed" language will exacerbate the error in giving CACI 3709 as a standalone instruction. ASCDC also respectfully suggests that the Advisory Committee add the same use note to all of the fact-scenario instructions, to provide the same clarity the ASCDC seeks with respect to CACI 3709.

We thank the Committee for its attention to this matter.

Respectfully submitted,

ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

By: 
Allison W. Meredith

ALLISON W. MEREDITH
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defense successes october – december

Sean D. Beatty
Beatty & Myers, LLP
Jordan v. Mazda Motor of America, Inc.

Raymond L. Blessey
Reback, McAndrews, Blessey, LLP
Bogert v. Littenberg
Kruthanooch v. AHGL

Kevin T. Dunbar
Dunbar & Associates
Katsouridis v. JPMorgan Chase Bank, NA

Hannah Mohrman
Bowman and Brooke, LLP
Rush v. American Honda Motor Company

Robert B. Packer
Paul M. Corson
Parker, O'Leary & Corson
Zannini v. Henry Mayo Newhall Memorial Hospital, et al.

Richard J. Ryan
R.J. Ryan Law, APC
Gerry v. Mihranian

Linda Miller Savitt
Philip Reznik
Ballard Rosenberg Golper & Savitt, LLP
Jordan and Hubbard v. City of Los Angeles

Thomas Scully
Foley & Mansfield
Draper v Kaiser Gypsum
Sinclair v Kaiser Gypsum
Talley v Kaiser Gypsum

N. Denise Taylor
Taylor DeMarco, LLP
Weldon v The Regents of the University of California

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.

2019 YEAR IN REVIEW

In 2019, ASCDC's amicus committee filed a total of 25 publication requests, 11 of which were granted, six amicus letters supporting petitions for California Supreme Court review, two of which were granted, one letter supporting a defendant's petition for writ of mandate in the Court of Appeal, which was successful, and one depublication request (unsuccessful). In addition, there were five cases published in 2019 in which ASCDC filed an amicus briefs on the merits. In total, ASCDC participate as an amicus curiae in a total of 38 cases in 2019.

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

Don't miss these recent amicus *VICTORIES!*

The Amicus Committee successfully sought publication of the following cases:

1 ***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 North, Steven Fleischman and summer associate Erik Savitt from Horvitz & Levy drafted the publication request, which was granted.

2 ***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 differential 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.

3 ***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. 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.

4 ***Sprengel v. Zbylut*** (2019) 40 Cal. App.5th 1028: The Court of Appeal held that an attorney's representation of a closely-held corporation does not give rise to professional duties to the individual shareholders with respect to personally-held rights that are both separate from, and adverse to, the corporation itself. Defense counsel was Nemecek & Cole (Michael McCarthy, Mark Schaeffer and Tammy Q. Gallardo). ASCDC's successful publication request was submitted by Stephen Caine at Thompson, Coe & O'Meara.

5 ***Sharon v. Porter*** (2019) 41 Cal.App.5th 1: The Court of Appeal held that entry of a judgment can constitute actual injury for purposes of the statute of limitations for professional negligence claims against lawyers, Code of Civil Procedure § 340.6, and the availability of a remedial measure in an underlying legal matter does not negate a finding of actual injury. Ted Xanders from Greines Martin Stein & Richland submitted ASCDC's successful publication request.

6 ***Morris v. Hyundai*** (2019) 41 Cal. App.5th 24: A standard, boilerplate Lemon Law case filed against Hyundai settled for $85,000, plus fees. Plaintiff claimed a lodestar of $127,792 and requested a 1.5 multiplier, for a total fee request of $191,688.75. Defendant opposed the motion on various grounds, pointing out that this was routine litigation, with stock discovery responses from plaintiff, and that plaintiff was claiming recovery for 11 different lawyers working on the file. The trial court reduced plaintiff's hourly rate from $650 to $500 for partners and $300 for associates. The trial court also disallowed any fee recovery for 6 of the 11 plaintiff attorney. At the end of the day, the trial court awarded $73,864 in fees, which the Court of Appeal affirmed. Defense counsel is Bowman & Brooke. Steven Fleischman and John Taylor from Horvitz & Levy submitted a successful request for publication.

7 ***Bingener v. City of Los Angeles*** (2019) __ Cal.App.5th __: The Court of Appeal held that under the "going and coming rule" – where an employee is generally not considered to be acting within the scope of his employment when going to or coming from his or her regular place of work – defendant was not vicariously liable for the employee's tort because the employee's work did not require him to use his personal car in the performance of his job, nor was he performing a special errand for his employer. Ted Xanders from Greines Martin Stein & Richland wrote 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:

continued on page 34

Amicus Committee Report – continued from page 33

1 ***Jarman v. HCR Manorcare, Inc.*** (2017) 9 Cal.App.5th 807, review granted (S241431): Request from Amicus Committee member Ben Shatz for amicus support regarding a petition for review his firm is filing. The Court of Appeal held that the plaintiff can seek punitive damages, despite an express Legislative intent to foreclose punitive 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, in which those courts decided that plaintiffs can recover only one award for up to $500. In this case, the court allowed a $95,500 recovery based on repeated violations of the same statute. The Amicus Committee recommended supporting the defendant's petition for review, which was approved by the Executive Committee. Harry Chamberlain from Buchalter submitted an amicus letter in support of the defendant's petition for review, which was granted on June 28, 2017. The case remains pending and Harry has submitted an amicus brief on the merits.

2 ***Gonzalez v. Mathis*** (2018) 20 Cal. App.5th 257, review granted (S247677): The Supreme Court has granted review to address this issue in a *Privette* case: 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? When the Court of Appeal opinion was issued the Amicus Committee originally recommended taking no position on the defendant's petition for review because there was good and bad in the Court of Appeal opinion. The Supreme Court has granted review and the Board has approved submitting an amicus brief on the merits. Ted Xanders and Ellie Ruth from Greines, Martin, Stein & Richland have submitted an amicus brief on the merits and the case remains pending.

3 ***Kim v. Reins Internat. California, Inc.*** (2018) 18 Cal.App.5th 1052, review granted (S246911): The Supreme Court has 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? The Amicus Committee recommended filing an amicus brief on the merits, which the Executive Committee approved. Laura Reathaford from Lathrop Gage has submitted an amicus brief on the merits.

4 ***B.(B.) v. County of Los Angeles*** (2018) 25 Cal.App.5th 115, review granted (S250734): The California Supreme Court has 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?" The Amicus Committee recommended submitting an amicus brief on the merits, which was approved by the Executive Committee. David Schultz and J. Alan Warfield from Polsinelli submitted an amicus brief on the merits on May 2, 2019.

5 ***Conservatorship of O.B.*** (S254938): The California Supreme Court has granted review to address this issue: "On appellate review in a conservatorship proceeding of a trial court order that must be based on clear and convincing evidence, is the reviewing court simply required to find substantial evidence to support the trial court's order or must it find substantial evidence from which the trial court could have made the necessary findings based on clear and convincing evidence?" This issue comes up frequently in many contexts, including where review is sought of a punitive damage award. The Executive Committee approved amicus participate and Bob Olson from Greines, Martin, Stein & Richland has submitted an amicus brief on the merits.

6 ***Burch v. Certainteed Corp.*** (2019) 34 Cal.App.5th 341, review granted and held (S255969): Asbestos case pending in the Court of Appeal addressing whether apportionment under Proposition 51 applies to intentional tort claims. J. Alan Warfield and David Schultz from Polsinelli, Susan Beck from Thompson & Colgate, and Don Willenburg from the North submitted an amicus brief to the Court of Appeal. The Court of Appeal ruled in favor of the plaintiff, recognizing that the issue is presently pending before the California Supreme Court in *B.B. v. County of Los Angeles* (2018) 25 Cal. App.5th 115, review granted Oct. 10, 2018, S250734. The Supreme Court granted review and issued a "grant and hold" order pending the outcome of *B.B.*

7 ***Ferra v. Loews Hollywood Hotel, LLC*** (2019) 40 Cal.App.5th 1239: In a wage and hour class action, the Court of Appeal, held: (1) as a matter of first impression, "regular rate of compensation" for purposes of meal, rest, and recovery periods was not equivalent to "regular rate of pay" for overtime purposes; (2) defendant's rounding policy was facially neutral; and (3) records showing underpayment of small majority of employees during time window were insufficient to demonstrate systematic underpayment. Laura Reathaford from Lathrop Gage submitted an amicus brief on behalf of ASCDC. Plaintiff's petition for review remains pending.

8 ***Pacific Pioneer v. Superior Court*** (G057326): Request for amicus support from member James Colfer. Issue relates to the right of the insurance company to appeal a small claims judgment, and thus have the ability to 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.

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Amicus Committee Report – continued from page 34

There is no provision under the Code that prohibits the insurance carrier from appealing if the insured failed to appear for the initial trial. After Executive Committee approval, Harry Chamberlain from Buchalter submitted an amicus letter to the Court of Appeal supporting the petition, which was accepted for filing. The Court of Appeal has issued an order to show cause and the writ petition remains pending. Oral argument was held on November 21, 2019 and the case 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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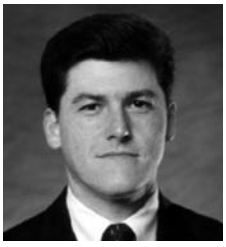

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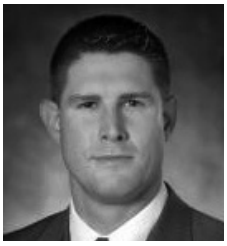

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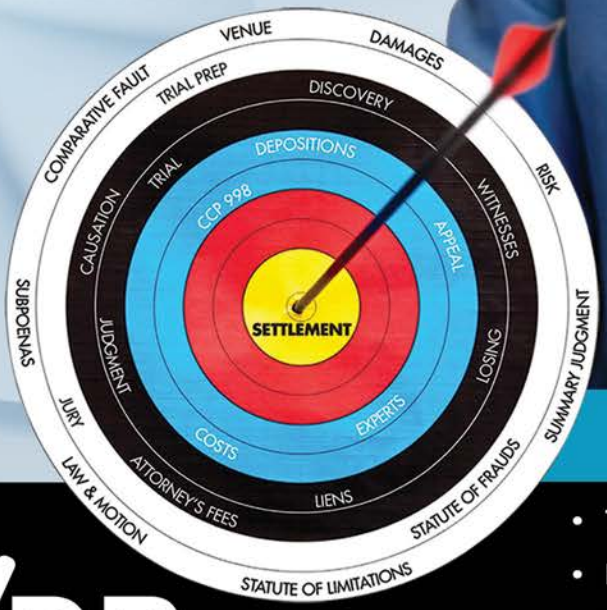

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