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Volume 1 • 2020

Annual Seminar Keynote
Laila Ali

Incoming ASCDC President
Lawrence R. Ramsey

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The ASCDC acknowledges Patricia Egan Daehnke for authoring the PAST PRESIDENT PROFILES in the 2019 Vol. 3 issue of the *Verdict* magazine.

Patricia Egan Daehnke

Tricia heads up the medical malpractice team at Collinson, Daehnke, Inlow & Greco. Her practice includes the defense of complex, high damage, high risk cases in California and Nevada. Tricia is a member of the American Board of Trial Advocates (ABOTA) and is recognized as a prominent attorney in both California and Nevada. She has been named one of California's Top 100 Women Lawyers by the Los Angeles Daily Journal, a Woman of Distinction by the California Women Lawyers, a Top Medical Malpractice Lawyer by NPR's Desert Companion and Vegas, Inc. and has been selected as a Super Lawyer in Medical Malpractice Defense every year since 2007.

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president's message

Stay Healthy, Stay Safe

Lawrence R. Ramsey
ASCDC 2020 President

I hope all of you and your families are staying safe and healthy.

As I reflect back to our Annual Seminar in the end of January, I remember having a completely different viewpoint of what 2020 would hold for the Southern California legal community. California was in good financial shape, and the proposed budget for court funding was promising. Judicial positions (at least at the state level) were filled and the courts were in full swing to handle civil matters. Partners in my firm were in and out of trials, and my own calendar was stacked with trials starting in the Spring.

Instead, our realities have changed. As with many of you, I now spend my time at home, working in a home-office environment. I have become appreciative of the opportunity to do so, and certainly do not object to the sounds of children, as well as dogs, birds and other critters while speaking with others by phone.

Our court system has faced particular struggles during this time period. With stay-at-home orders in place, courts have either closed or been reduced to essential activities. This has caused significant impact to our civil practice, as the priorities of the courts to address criminal and health and welfare concerns have resulted in significant, albeit temporary, curtailing of civil matters. Trials and hearings have been continued and/or vacated, creating much uncertainty. Court leaders are reacting to changing circumstances, resulting in new and modified orders as we move forward. Since each of our counties face unique issues, respective court leaderships have responded differently. From these struggles come innovation as our courts adopt to the pandemic. Most courts are arranging for remote appearances for case management conferences, status conferences and law and motion hearings. Some of these changes may be implemented on a permanent basis to improve the efficiency of the courts in handling civil matters. LASC will be implementing remote Mandatory Settlement Conferences this Summer.

A cornerstone of our ability to move forward during these uncertain times is through cooperation with the court and other counsel. The need for civility has never been greater. It is in the best interests of your practice and clients to cooperate on the basic issues such as scheduling, professional extensions, and other matters that are not going to impact the ability to win or lose on the merits of our cases. Reaching across the aisle to develop a workable schedule for all via stipulation to be presented to the court removes much of the uncertainty we face within our industry. Please consider this option.

ASCDC's activities this first half of 2020 have been very different than expected. After our highly successful 2-day Annual Seminar at the end of January and our excellent *Howell* Seminar in early March, we have shifted to providing our members with complimentary webinars. Our Webinar Group, consisting of Wendy Wilcox, Lindy Bradley and Bron D'Angelo, has done a great job in the set-up and presentation of our webinars, and we plan to continue to make these available on subjects that are topical to our members. Our Amicus Committee, CACI Committee, and CDC lobbying participants have been as active as ever, bringing value to the members of this organization even when the membership doesn't know about it.

From a personal perspective, my term as ASCDC President has also been very different than anticipated in January. I have been conducting ASCDC Board of Director's meetings via Zoom. I have participated with Executive Committee Members Diana Lytel, Marta Alcumbrac, Ninos Saroukhanioff and Pete Doody, and others from the ASCDC Board, in working groups and other liaison roles with our courts to provide assistance and options for the courts to consider in these unprecedented times. There has not been a moment when I have become bored. My role as part of a professional organization has kept me engaged on so many levels.

With the potential for our practice to migrate to more remote appearances and fewer visits to court, I encourage you to participate in ASCDC activities (write articles for *Verdict* magazine, volunteer for charitable fundraising efforts, post tips on the listserv). Take an active role in other affinity bar groups as well. I have been blessed to have worked with two firms over my career, and both have recognized the importance of focusing on the legal community. Starting with Morgan, Wenzel and McNicholas, I have witnessed Lee Wenzel, Wally Yoka and Gretchen Nelson as stellar bar leaders. At Bowman & Brooke, I am privileged to work with Mike Madokoro, Rick Stuhlbarg and Hannah Mohrman, who have stepped up in leadership roles. I encourage you to help other leaders in your firms see the value of such participation, adding to professional growth, business development, and job satisfaction.

We hope to see you later this year at an in-person event where we can gather and celebrate.

Legislation During the Pandemic

Michael D. Belote
Legislative Advocate
California Defense Counsel

As California approaches the middle of The Year No One Expected, the California Legislature is attempting to reassert its role as a constitutional co-equal branch of government. While the state was essentially governed entirely by the executive branch, the state court system went into survival mode, and the legislative branch went home. Now that the counties are slowly reopening, all branches of government are assessing the damage.

Governor Newsom has projected a $54 billion budget deficit over the coming three years. While the budget picture is certainly not good, most experts believe that the actual deficit is much lower. Much depends upon the shape of the recovery: U, V, or L. The Governor has presented his May Revision of his proposed budget for fiscal year 2020-2021, which includes cuts to virtually all areas of government, including the courts. The Senate recently released a budget plan which avoids many of the Governor's proposed cuts, with or without possible federal aid, relying more on reserves and borrowing.

Around the state, there are vast disparities in how local courts are handling the crisis. Some have continued to move civil cases forward on a limited basis, while others instituted essentially a complete shutdown of civil filings and hearings. One lesson of the pandemic is that the statutory authority of the Chief Justice of California, in her role as Chair of the Judicial Council, to issue emergency orders is surprisingly limited. The authority clearly is designed to address localized emergencies, such as fires, earthquakes and the like, which affect one court. That authority is far too limited to address situations like this one, where the entire state is affected. One measure, AB 3366, would give the Chief Justice more authority to issue emergency orders affecting multiple courts.

As courts gradually reopen, judges are pondering how to conduct jury trials. Compliance with jury summons' is not great in the best of circumstances; in light of the pandemic, will jurors appear, and how can they be distanced, both before selection and while serving?

For its part, the legislature is concerned about their lack of involvement and oversight of the Governor's emergency spending, and what they perceive as a lack of engagement on issuing emergency orders. They face a constitutional requirement to adopt a balanced budget by June 15, even though revenue numbers will not be clear until after the delayed tax filing deadline of July 15. Recently the Assembly employed an unusual procedural move, convening the entire body as a "committee of the whole," in order to discuss a multitude of budget issues. One key issue will be potential tax changes, including limitations on net operating loss deductions, and various corporate tax credits, including research and development. No one at this point has raised an issue of great interest to many professional groups, including CDC: expanding the sales tax to services.

Clearly, one effect of the pandemic will be a major reduction in legislative output for 2020. In a typical year, some 800-1000 bills are enacted and signed into law. With both houses attempting to limit bills to those perceived as COVID-critical (this test is fluid and sometimes in the eye of the beholder), it is likely that only a few hundred bills will be enacted this year. In the area of civil procedure, there are sunset dates looming for meet and confer requirements on demurrers and other motions; these are likely to be suspended.

Controversial legislation has been introduced on peremptory challenges, and CDC will engage on this. Clarifications are being made on e-filing, remote depositions, and e-service of notices on opposing counsel.

Away from the legislative front, CDC is active on two working groups convened by the State Bar, one relating to the unauthorized practice of law, and one on potential licensing of legal paraprofessionals. CDC submitted a comment strongly opposing nonlawyer ownership of law firms, but the Bar is continuing to examine narrower approaches to this very controversial subject.

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LIFE CARE PLANNING

Highlights from the 59th Annual Seminar

— Carol A. Sherman

The bustling JW Marriott LA Live in downtown Los Angeles was the setting for the Annual Seminar of the Association of Southern California Defense Counsel (ASCDC), held January 30-31, 2020. ASCDC's Super Bowl of events attracted more than 500 ASCDC members and guests and featured the best and brightest speakers from the bench and defense and plaintiff bars.

Cutting-edge seminar topics included the new California Consumer Privacy Act, preserving challenges to CACI jury instructions, admitting and objecting to evidence, multimedia and the modern juror, the ABCs of Traumatic Brain Injuries, how emotional intelligence links to ethical compliance and more.

Legislative advocate Michael D. Belote updated attendees on new and pending legislation impacting the defense practice and an expert attorney panel reviewed case highlights of 2019.

FRIDAY LUNCHEON PROGRAM

In keeping with tradition, the Friday luncheon featured the transition of ASCDC leadership, special awards and keynote speaker. Laila Ali, undefeated professional boxer and daughter of boxing legend Mohammad Ali, delivered the keynote.

The luncheon opened with the National Anthem, beautifully sung by the talented Candice Shikar, attorney with Bowman & Brooke.

Following lunch, Annual Seminar Committee chairman and 2020 ASCDC president Lawrence R. Ramsey introduced the head table – California Defense Council president Michael Kronlund, 2019 Executive Committee members Peter S. Doody, Diana Lytel, and Marta Alcumbrac, and keynote speaker Laila Ali.

Ramsey acknowledged his family and Bowman & Brooke partners in attendance along with members of ASCDC board of directors and committee chairs, past presidents and members of the judiciary. He thanked both Belote, for "keeping the playing field level and advocating for us," and members of ASCDC's management team, led by Jennifer Blevins, for their work throughout the year.

2020 President, Lawrence R. Ramsey

Ramsey presented outgoing ASCDC president Peter S. Doody with the President's Plaque "for your great work all these years, both as a board member, as an officer and as a president."

The Pat Long Presidential Award for exceptional service went to Board of Directors member Benjamin J. Howard for his efforts in helping to organize ASCDC's many seminar programs. "You could count on this individual to always get the job done," said Doody when presenting the award.

In his final act as 2019 ASCDC president, Doody welcomed Ramsey as incoming president. "This organization is in fantastic hands." A partner with Bowman and Brooke, Ramsey has been with the firm for 25 years. In 2016, he received the ASCDC President's Award for outstanding service to the organization.

In his remarks, Ramsey reflected on the many changes over the past several decades in how attorneys practice. "When I started, if you wanted to address another lawyer, it was by written correspondence. You would mail a letter and you might hear back in two weeks. Today, if somebody doesn't respond within a day, you might get rattled by a client or by opposing counsel. There were no mediations back in the early 80's. Judges, when they retired, actually really retired." He also talked about the importance of ASCDC and its important role in education, civility and maintaining a balance with the plaintiff's bar.

> "It's the relationships you make in this organization, and the confidence you gain through the educational process and meeting with judges. So when you go to court, especially as young lawyers, you're going to do your best. Education is huge." He also commented on the importance of civility.

> "When you talk to the judges, what's the most important thing that they want to hear from the bar? They don't want people bickering and arguing when they come in court. Let's get to the issues. Let's advocate." He also touched on the need to continue to work to preserve the legal system and support the efforts of California Defense Counsel so "justice will continue to be served for our clients."

The luncheon program concluded with an inspirational keynote address from Laila Ali.

Knock Out

Laila Ali Addresses the 59th Annual Seminar

Carol A. Sherman

With grace, wit and poise, Laila Ali delivered the keynote address before a packed ballroom at the Association of Southern California Defense Counsel's 59th Annual Seminar. Laila, age 42, shared her inspirational journey, from growing up as the daughter of boxing legend Muhammad Ali, to becoming an undefeated professional boxer at a time when few knew women were competing in the sport.

When she retired in 2007 after professionally boxing for eight years, Laila turned her attention to television, most recently competing on *Late Night Chef Fight* on the Food Network. She's also co-hosted *American Gladiators*, made the finals on *Dancing with the Stars*, and sang on *Masked Singer*. An advocate for fitness and wellness, she authored the books, "Reach! Finding Strength, Spirit and Personal Power" and "Food for Life," while managing a lifestyle brand that includes a line of nutritional products.

Laila's competitive spirit was evident at an early age, as seen in a series of photographs she shared with the audience. They included ones from her early years growing up in Los Angeles with a famous father and mother, Veronica Porché. Eighth of nine Ali children, Laila was only four when her father retired from boxing, too young to attend his fights.

"I remember riding down Wilshire Boulevard in his brown Rolls-Royce, no seat belts, kids

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Annual Seminar: Ali – continued from page 11

in the car, top down, just hair blowing. He'd often pull over to the side of the road and give money to homeless people."

She joked about watching her father do magic tricks at Bob's Big Boy, a once popular hamburger restaurant in the Burbank area. "Even though he was a global icon and loved around the world, he always stopped and took time to smile at people, to shake hands, to kiss babies. That's how people knew him."

Early on, Laila was determined to carve out her own path in life.

"I was very shy growing up. I remember always wanting to be independent. I didn't want to just be Muhammad Ali's daughter. I wanted to make my own way." At age 18, she became a licensed manicurist and opened a nail salon in Marina del Rey. "I had moved out of the house. That was my plan. I was living on my own."

It wasn't her father who inspired her to box. "He inspired me in a lot of ways, but not to become a fighter." She joked that her sister Hana, who "tried to beat me up all of the time," was more of an inspiration than her father. The inspiration to box came while watching a televised pre-bout match to a Mike Tyson fight. "These women come into the ring. I was in awe when they started boxing, and it turned bloody." She went home that night dreaming of becoming a professional fighter.

In spite of being told she was too pretty, Laila was determined. "I didn't tell anybody that I actually was thinking about becoming a boxer because I wanted to make sure that I actually had what it took."

Over the coming months, she trained hard, and never missed a day at the gym. She attributes her mother for her competitive spirit.

"I remember my mom taking me to the beach for the first time. She was always very athletic. She used to run and say, 'We're going to run for 30 seconds and we're going walk for a minute. We did intervals until I could run for a mile or two. So anytime I start something new, I know that there's a process that you need to go through, and you have to do the work."

When her father found out Laila was an inspiring boxer, he was less than supportive. She recalled him telling her, "You don't have any idea what it's going to be like when you get in that ring." At that time, he didn't believe boxing was a sport for women.

"Me and my dad have had about three really, really serious conversations, this would be one of them." She recalled telling him, "Dad, I respect the way that you feel, but I'm going to do it anyway. So you're either going to support me or you're not."

Laila's determination won out, and Ali did eventually become one of her biggest fans. The public found out when Laila appeared on *Good Morning America* with Diane Sawyer, although some thought her boxing was a publicity stunt.

Although not televised, her pro debut drew scores of media attention. "This was my moment to prove to the world, to my father and to myself that I had transformed myself into an athlete. I taught myself how to run, how to do all those things that I didn't know how to do before. I was 100 percent confident." Fifty-four seconds into the first round, Laila knocked out her opponent.

"I remember looking over at my dad and he had this smile on his face and that was all I needed to keep going."

Laila would go on to win her next 23 matches, 20 by knock out.

Her most notable fight was against Jackie Frazier, Joe Frazier's daughter. "Our fathers fought and had history. So there's a lot of heat in that ring." Laila regretted not having a rematch with Jackie because that was one of only three of her fights that went the distance. "I had the flu in that fight. Nobody knew that back then." Rather than pursue a rematch, Laila continued her quest for a championship belt, believing that would earn her the respect of all those who had not taken her seriously.

Laila also fought Christy Martin, the woman who first inspired Laila years earlier. "It was a really big fight in women's boxing because before me, she was the first woman to be promoted on a major undercard. She had gotten more exposure than even I had. So for us to have the opportunity to fight each other was big."

Ali attended most of Laila's fights, even while he was battling Parkinson's disease. She recounted that after one particular fight, he asked to speak with her. While she expected bad news, he instead apologized, telling her how proud he was of her. "In

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that moment, we both started crying and hugging because I had wrapped myself in armor, not caring if he comes or not or what he thinks. But I really did care."

She said, "You want the support of your parents, especially when you're doing something that they did. You're following in their footsteps. So that was amazing. And it was not only a win for me, I felt like it was a win for women because I had changed the way that he thought about women and what we can do."

Jokingly, she told the story of how her father wanted to teach her how to use a jab after she had earned a world title. "I'm like, Dad, I'm kind of past that. You know, I've got the world titles. But, if Muhammad Ali wants to teach you something, you go ahead and you take it, right?"

Reflecting back, she knew that boxing was considered by most as an all-men's sport. Yet she was able to draw upon what she had learned at a very young age by believing, "if you just put your head down and do the work, you're going to earn respect. Don't expect anybody to give it to you until you earn it. And that's something that I pretty much can apply in every area of my life."

At age 26, and wanting to start a family, Laila chose South Africa for her last professional fight where Nelson Mandela witnessed her first round knockout.

The year her boxing career ended, Laila turned her competitive drive to television as a contestant on the fifth season of *Dancing with the Stars*. "I remember when the call came and I was like, no way. I'm not doing that." A savvy business woman, Laila did eventually agree to appear on the show as a way to gain visibility beyond the boxing arena. The exposure paid off, and the following year, Laila co-hosted *American Gladiators* with celebrity wrestler Hulk Hogan.

Married to her second husband, former NFL player Curtis Conway, they have two children, son Curtis Jr, age eight, and daughter Sydney, age 11. Through her lifestyle brand and speaking engagements, Laila promotes fitness and wellness,

"encouraging others to be the absolute best version of themselves through lifestyle choices."

When asked where she finds her inspiration, she said, "It comes back to my competitiveness of wanting to be the best that I can be. That drive and confidence comes from preparation. I can stand up here and be proud about all of my knockouts, because I know how hard it was."

Like her famous father, Laila wants her legacy to be not only her accomplishments in the ring but what she has done outside of the ring.

"That's why it's important to me to live my best life, but also help others on the way up. I think that we can be amazing at what we do and be wildly successful. But at the same time, be a kind person, be a good person, be a giving person. I know we can, because I watched my father do it."

ASCDC

Association of Southern California Defense Counsel

59TH ANNUAL SEMINAR

Year in Review

For the 22nd consecutive year, Bob Olson from Greines Martin Stein & Richland LLP and Chip Farrell of Murchison & Cumming LLP presented that annual Year in Review wrap up of the past year's appellate cases. They were joined this year by Ellie Ruth of Greines Martin Stein & Richland LLP. The session was well attended. Once again, the appellate courts gave the panel much to work with. Issues touched upon included jurisdiction, what it means for counsel to approve as to form and content, *People v. Sanchez* applications, the economic loss rule, the scope of Privette and *Dynamex,* calculating limitations periods, premises liability, assumption of risk, staff privileges, insurance coverage for employment practices and "war," the fate of horizontal exhaustion, tone deaf briefing, damages, damages, and more damages.

Robert A. Olson

Evidence: "Prove it!"

moderated by
Ninos Saroukhanioff

This panel was moderated by incoming ASCDC Secretary/ Treasurer Ninos Saroukhanioff of Maranga Morgenstern and included: Judge Stephanie Bowick from the California Superior Court for the County of Los Angeles; CAALA's 2018 Rising Star Tom Fehr of Fehr Law, APC; ASCDC member Lauren Lofton of Yoka & Smith, LLP; and ASCDC Board Member David Byassee of Klinedinst PC.

There was a robust discussion of law relating to evidence and implementation of the rules of evidence from the perspective of judges, plaintiff's attorneys and defense attorneys. A few of the topics addressed were: (1) hearsay testimony from expert witnesses – *People v. Sanchez* (2016) 63Cal.4th 665; (2) evidence of attorney referrals to medical providers on lien and billing - *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266; (3) traffic collision reports and ambulance records; and (4) subrosa. Many experiences and insightful tips for success in trial were shared.

David J. Byassee

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ASCDC Gives Back at the Second Annual Toiletry Drive!

The ASCDC held its second annual toiletry drive at the Annual Seminar on January 30-31. The ASCDC collected hundreds of toiletries from our generous members. The toiletries collected were given to Twinderful Toiletries to be packaged and donated to shelters for homeless teens and young adults. If you would like to donate to Twinderful Toiletries you can contact them at *info@twinderfultoiletries.com.*

ASCDC Board of Directors Adopts a Family for Christmas!

The ASCDC Board of Directors adopted a family of six as well as two foster kids for the holidays. The Board provided numerous Christmas gifts to a family who was unable to afford to buy gifts for each other or their kids at Christmas. The Board also generously provided Christmas gifts to two foster children whose foster parents could not afford to buy them Christmas gifts. The Board was happy to make a difference in the lives of the less fortunate and experience the true spirit of the holiday season!

Lisa Collinson

2020 Annual Seminar Photos












2020 Annual Seminar Photos














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green sheets

NOTES ON RECENT DECISIONS

Lisa Perrochet

Emily Cuatto

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

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

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

PROFESSIONAL RESPONSIBILITY

A state agency's attorney does not have an attorney-client relationship with a person who files a complaint with the agency.

Wood v. Superior Court (CFG Jamacha)
(2020) 46 Cal.App.5th 562

Christynne Wood submitted a complaint to the Department of Fair Employment and Housing (DFEH) asserting that her health club engaged in gender discrimination. Following an investigation, DFEH filed a lawsuit against the club. Ms. Wood intervened and the club sought to discover her communications with the DFEH attorney. Ms. Wood refused to produce a prelitigation email to the DFEH's attorney claiming privilege. The trial court granted the club's motion to compel production. Ms. Wood sought a writ of mandate.

The Court of Appeal (Fourth Dist., Div. One) affirmed the order compelling production of the email. DFEH's lawyers have an attorney-client relationship with the State of California, not complainants to the department. Thus, Ms. Wood's prelitigation email sent to a DFEH lawyer was not protected by the attorney-client privilege.

ATTORNEY FEES AND COSTS

Code of Civil Procedure section 998 offer conditioned on acceptance by multiple defendants is invalid.

Anthony v. Li
(2020) 47 Cal.App.5th 816

While driving a rental car rented from and insured by Avis, the defendant caused an accident with the plaintiff. The plaintiff sued both the defendant driver and Avis, but later dismissed Avis. He then served a Code of Civil Procedure section 998 offer on the defendant and Avis jointly. Neither accepted. The plaintiff did better at trial than his section 998 offer and sought costs. The trial court denied the costs, holding the section 998 offer was invalid.

The Court of Appeal (First Dist., Div. Three) affirmed. An offer conditioned on acceptance by multiple defendants is invalid, as is an offer to a party who has been dismissed with prejudice from the action. The plaintiff's argument that the offer was directed to Avis only in its role as the defendant's driver's insurer did not change the outcome. Even if an offer directed at the insurer and insured jointly could be valid, there was nothing in the offer that made clear that the offer to Avis was only in its role as an insurer of the defendant driver rather than as a (former) party the action.

ANTI-SLAPP

A defendant's celebrity status does not alone suffice to make all of his conduct a matter of public interest protected by the anti-SLAPP statute.

Bernstein v. LeBeouf
(2019) 43 Cal.App.5th

During a verbal altercation with a bartender, actor Shia LeBeouf called the bartender a racist. The bartender sued for assault, slander, and emotional distress. LeBeouf moved to strike the complaint under the anti-SLAPP statute, arguing that the claims were based on protected speech on a matter of public interest – because, he argued, his celebrity status rendered even his day-to-day conduct a public issue, especially where, as here, a video of that conduct was posted on the Internet and shown on television. The trial court disagreed that the claims were based on protected speech about a matter of public interest and denied the motion.

The Court of Appeal (Second Dist., Div. Three) affirmed the denial of LeBeouf's motion to strike. Whether speech or expressive conduct concerns a matter of public interest depends on its subject matter. Here, the subject of LeBeouf's statements and conduct related to a private dispute with a bartender who was not in the public eye. Neither LeBeouf's celebrity status nor the fact that the altercation was later publicized brought the claims about his verbal assault on a private person within the protection of the anti-SLAPP statute.

See also *Jeppson v. Ley* (2020) 44 Cal.App.5th 845 [Second Dist., Div. Eight: one neighbor's hostile internet post about another neighbor was not speech on a topic of public interest].

See also *Pott v. Lazarin* (2020) 47 Cal.App.5th 141 [Sixth Dist.: claim that defendant used photos of plaintiffs' daughter, whose suicide was the topic of a movie, on Facebook to promote teen suicide prevention arose from protected activity, and plaintiffs were not likely to prevail on the merits of their claim for unauthorized use of another's likeness under Civil Code section 3344.1 because the defendant's use was not commercial].

A plaintiff's refusal to indemnify the defendant against the plaintiff's own claims is protected petitioning activity.

Long Beach Unified School District v. Margaret Williams, LLC
(2019) 43 Cal.App.5th 87

An LLC entered into an agreement with Long Beach Unified School District to manage a school construction and environmental compliance project. The District's contract was offered on a "take it or leave it basis," and contained an indemnity clause effectively requiring the LLC to defend and indemnify the District against all claims arising from the relationship. The LLC had various business-related disputes with District over how the project was being handled. And, while working on the project, the individual who owned the LLC contracted arsenic poisoning. The LLC and the individual sued the District for contract-related claims and personal injury. The District cross-claimed against the LLC for indemnity. The LLC moved to strike the District's cross-complaint, arguing that the indemnity claim was predicated on the plaintiffs' protected petitioning activity (anti-SLAPP prong one) and that the District had no chance of prevailing because the indemnity provision was unconscionable (anti-SLAPP prong two). The trial court granted the motion to strike.

The Court of Appeal (Second Dist., Div. Four) affirmed. The plaintiffs' refusal to fund the District's defense of the plaintiffs' own lawsuit against the District was protected activity. Thus, the cross-claim arose from protected activity and was subject to a motion to strike. Further, the District was unlikely to succeed on its cross-claim because the indemnity provision was indeed unenforceable: it was moderately procedurally unconscionable because it was not open to negotiation, and it was highly substantively unconscionable because it purported to bar any possibility of meaningful recovery by the LLC for the District's wrongdoing.

But see *C.W. Howe Partners Inc. v. Mooradian* (2019) 43 Cal. App.5th 688 [Second Dist., Div. Seven: in a homeowners' lawsuit against the contractors and designers of their home, the general contractor's cross-claims against the homeowners for contractual indemnity did not arise out of protected activity].

But see *Wong v. Wong* (2019) 43 Cal.App.5th 358 [First Dist., Div. 1: the plaintiff's claim that the defendant breached a contractual agreement to indemnify the plaintiff against an underlying claim did not arise out of protected activity].

Fraud-related claims based on the defendants' failure to make substantial progress on a documentary that plaintiff had funded arose out of protected activity.

Ojjeh v. Brown
(2019) 43 Cal.App.5th 1027

The plaintiff invested in the defendants' documentary film project about the Syrian refugee crisis. Alleging that the defendants did not make substantial progress on the film and instead used the invested funds for other purposes, the plaintiff sued the defendants for breach of contract, breach of the covenant of good faith and fair dealing, fraud, false promise, unfair competition, conversion, and unjust enrichment. The defendants filed an anti-SLAPP motion, arguing the claims arose out of their protected free speech rights concerning an issue of public interest. The trial court disagreed and denied the motion at the first step of the anti-SLAPP analysis, holding that the failure to make a film was not conduct in furtherance of free speech.

The Court of Appeal (First Dist., Div. Three) reversed and remanded. The catchall provision of the anti-SLAPP law (Code Civ. Proc, § 425.16, subd. (e)(4) [defining protected activity to include "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in

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connection with a public issue or an issue of public interest"], protects "all conduct in furtherance of the exercise of [the free speech right] ... undertaken in connection with a public issue or issue of public interest." Because the plaintiff's claims "target[ed] the quality or sufficiency of the defendants' actions in preparing to exercise their right to free speech on a matter of public significance," the catchall provision applied. The plaintiff had thus satisfied the first prong of the anti-SLAPP analysis and the trial court had erred in not proceeding to the second prong.

See also *Serova v. Sony Music Entertainment* (2020) 44 Cal.App.5th 103, review granted April 22, 2020, case no. S260736 [Second Dist., Div. Two: unfair competition and false advertising claims based on allegations that the defendant had improperly identified Michael Jackson as the lead vocalist on several tracks of an album arose out of protected free speech activity on an issue of public interest].

ARBITRATION

Where an arbitration agreement provides that "enforcement" of the agreement will be governed by the FAA, procedural objections to enforcement of the agreement are governed by federal law.

Victrola 89, LLC v. Jaman Properties 8 LLC
(2020) 46 Cal.App.5th 337

The parties to a home purchase contract signed an arbitration agreement providing that enforcement of the agreement would be governed by the Federal Arbitration Act (FAA). When defects manifested in the property, the purchasers sued the seller and others involved in the home's construction. The seller moved to compel arbitration per the agreement. The buyers opposed, arguing, among other things, that under the California Arbitration Act (CAA), a court may refuse to compel arbitration in cases like this one where nonsignatories to the agreement are involved in the litigation. The buyers relied on provisions of the agreement referencing California law, including provisions that the parties agreed to arbitration "as provided by California law" and that a party refusing to arbitrate "may be compelled to arbitrate under the authority of the California Code of Civil Procedure." The trial court agreed with the buyers that California law applied to the procedural question of whether arbitration could be compelled under the circumstances, and accordingly denied the motion to compel.

The Court of Appeal (Second Dist., Div. Four) reversed and remanded for further consideration of the buyer's unresolved equitable defenses to arbitration. The agreement's provision that "enforcement" of the agreement would be governed by the FAA meant that federal law, not the CAA, applied to determining whether arbitration could be denied due the presence in the case of nonparties to the agreement. The agreement's other references to California law did not override that clear aspect of the agreement that the FAA would govern enforcement issues.

An arbitration agreement in a nursing facility's admission documents was substantively unconscionable where its enforcement would have impeded the plaintiff from obtaining discovery necessary to proving her Elder Abuse claim.

Dougherty v. Roseville Heritage Partners
(2020) 47 Cal.App.5th 93

Having already had two other nursing facilities refuse to admit her ailing father, the plaintiff admitted her father to the defendant's facility. She signed a 70-page contract that included an arbitration provision. The arbitration agreement said that arbitration would be conducted under the AAA rules, which were not included in the agreement but which limited the discovery devices allowed. The agreement also provided for a waiver of exemplary damages and a waiver of the right to a jury trial for any claims not subject to arbitration. After the plaintiff's father died in the facility's care, the plaintiff sued for wrongful death and elder abuse. The facility moved to compel arbitration, but the trial court denied the motion on the ground the agreement was unconscionable.

The Court of Appeal (Third Dist.) affirmed. There was a modicum of procedural unconscionability created by the plaintiff's desperation to find a place for her father and the volume of material she was asked to sign. And there was a high degree of substantive unconscionability, including the predispute jury trial waiver and the incorporation of limitations on discovery that would have impeded the plaintiff's ability to meet the clear and convincing evidence standard required to obtain the heightened remedies under the Elder Abuse Act, thus frustrating the public policy goals behind that Act.

See also *Lange v. Monster Energy Company* (2020) 46 Cal. App.5th 436 [Second Dist., Div. One: arbitration agreement was permeated with substantive unconscionability where it contained provisions such as a waiver of punitive damages as a remedy for all nonstatutory claims, and a jury trial waiver for nonarbitrable claims].

But see *Prima Donna Development Corporation v. Wells Fargo Bank, N.A.* (2019) 42 Cal.App.5th 22 [Sixth Dist.: arbitration agreement was not substantively unconscionable where the arbitration provision required the arbitrator to apply California law, which meant that the arbitrator could not disregard a governing consumer protection statute].

CIVIL PROCEDURE

California does not necessarily have specific personal jurisdiction over the parties to a contract for indemnity simply because the claim to be indemnified arose in California.

Halyard Health, Inc. v. Kimberly-Clark Corporation
(2020) 43 Cal.App.5th 1062

Consumer goods manufacturer Kimberly-Clark spun off its healthcare equipment product lines, creating a separate company called Halyard Health. Halyard Health agreed to indemnify Kimberly-Clark against certain claims, including an ongoing California class action concerning medical gowns. When the class action resulted in a punitive damages judgment against Kimberly-Clark, a Delaware corporation with its principal place of business in Texas, Halyard Health, a Delaware corporation with its principal place of business in Georgia, filed suit in California seeking a declaration it did not owe indemnity for the punitive damages award. Kimberly-Clark moved to quash the suit on the ground that the parties agreed Kimberly-Clark is not subject to general personal jurisdiction in California and that the requirements for specific personal jurisdiction were lacking here. The trial court agreed, concluding that although the underlying action involved the sale of gowns in California, the indemnity dispute had no connection to California.

A majority of the Court of Appeal (Second Dist., Div. Five) affirmed. While Kimberly-Clark purposefully availed itself of the California market by selling gowns here, and the parties' indemnity agreement specifically contemplated indemnity for the California class action, the declaratory relief action concerning the meaning of the parties' agreement raised distinct legal issues from the underlying products liability lawsuit. Thus, the declaratory relief action lacked a sufficient nexus to Kimberly-Clark's California activities to require it to litigate that action in California. A dissenting justice argued, however, that the indemnity suit concerning litigation in California litigation had a sufficient nexus to California permit California to assert jurisdiction over Kimberly-Clark.

Code of Civil Procedure section 473, subd. (b) applies to defaults and dismissals only, not "analogous" situations.

Shayan v. Spine Care and Orthopedic Physicians
(2020) 44 Cal.App.5th 167

After receiving a personal injury recovery, the injured plaintiff's attorney filed an interpleader action to permit the plaintiff and various medical lienholders to litigate entitlement to the proceeds. The interpleader action went to trial on the merits, but two of the lienholders failed to participate. The absent lienholders then sought mandatory relief under Code of Civil Procedure §473(b). The trial court denied the motion, holding that the statute did not provide for relief under the circumstances.

The Court of Appeal (Second Dist. Div. Eight) affirmed. The plain language of section 437, subdivision (b) is that it applies to a "default" or a "default judgment or dismissal." It does not apply to situations that are merely analogous to defaults or dismissals, such as the defendants' failure to show up for a properly noticed trial on the merits.

Code of Civil Procedure section 1008 cannot be used to circumvent the procedural notice and hearing requirements of the summary judgment statute.

Torres v. Design Group Facility Solutions, Inc.
(2020) 45 Cal.App.5th 239

In this lawsuit involving an injury to a subcontractor's employee, the defendant moved for summary judgment under *Privette v. Superior Court* (1993) 5 Cal.4th 689. The trial court continued the hearing on the motion to allow plaintiff to obtain additional discovery. The trial court then denied summary judgment, finding the plaintiff's evidence gathered after the motion was filed created triable issues on whether the defendant retained control of the worksite, thus avoiding application of the *Privette* doctrine. Defendant timely moved to reconsider the ruling based on new evidence—namely, further portions of the testimony taken during plaintiff's additional discovery efforts showing that in fact the defendant did not exercise any retained control. The trial court granted reconsideration, concluding the evidence was new because it was not available when the defendant filed its summary judgment motion and it could not have been presented in the defendant's reply in support of summary judgment without violating the plaintiff's due process rights. On reconsideration, the trial court granted the motion for summary judgment.

The Court of Appeal (Second Dist., Div. Three) reversed. The defendant could not circumvent the procedural due process requirements of Code of Civil Procedure section 437c by moving for reconsideration under Code of Civil procedure section 1008. Before the motion for summary judgment could be granted, the plaintiff was entitled to the same notice and opportunity to respond to the defendant's evidence that it was entitled to under the summary judgment statute.

EVIDENCE

Under *Sargon*, an expert's opinions are properly excluded where based on calculations performed by another who had not followed a proper methodology.

San Francisco Print Media Company v. The Hearst Corporation
(2020) 44 Cal.App.5th 952

The San Francisco Examiner sued the San Francisco Chronicle, claiming the Chronicle was selling its newspaper advertisements below cost in violation of the Unfair Practices Act's (UPA) predatory pricing provision. To prove damages, the Examiner planned to rely on the testimony of an expert who, in turn, relied on a cost analysis performed by the Chronicle's own finance director, who had privately run his own cost analysis and concluded that the Chronicle's average ad sale was being sold far below cost. There was no evidence that the Chronicle's finance director's analysis was done for the purpose of determining whether there was a UPA violation, however, and the director testified it wasn't. Accordingly, the Chronical moved to exclude the Examiner's expert under *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, asserting that the Examiner's expert lacked foundation to opine that the Chronical was engaged in predatory pricing because (1) he had no independent knowledge about how newspaper costs are allocated in the industry, and (2) was predicating his testimony on speculation about the Chronicle's finance director's methodology. The Chronical further moved for summary judgment, asserting that without the damages expert's testimony, there was insufficient evidence of damages. The Examiner opposed the motion, pointing out that other evidence beyond the Chronicle's finance director's analysis supported the Examiner's expert's opinions. The trial court granted both of the Chronicle's motions.

The Court of Appeal (First Dist., Div. Three) affirmed. Under *Sargon*, an expert must *actually* rely on the evidence supporting his conclusions for his or her opinions to be reliable. Here, regardless of what other evidence might have supported the expert's opinion, the expert actually relied only on the Chronicle's finance director's analysis. Because that analysis was not based on a sound methodology for determining whether the advertisements were sold below cost for UPA purposes, the expert could not reasonably rely on it to support his opinions on that issue.

Under *Sanchez*, expert did not relate impermissible "case-specific hearsay" when he identified a controlled substance using a database providing traditional background information.

People v. Veamatahau
(2020) 9 Cal.App.5th 16

The defendant was convicted of possessing a controlled substance based on testimony from an expert who "identified the controlled substance the defendant was charged with possessing by comparing the visual characteristics of the pills seized against a database containing descriptions of pharmaceuticals" and discussed the database's contents. On appeal, the defendant challenged is conviction under *People v. Sanchez* (2016) 63 Cal.4th 665, which held that an expert may not relate case-specific hearsay unless a hearsay exception applies. The Court of Appeal (First Dist.. Div. One) disagreed, holding that the expert's testimony related permissible background information that an expert reasonably relies on and may relate to the jury under Evidence Code section 802.

The Supreme Court affirmed. "[I]nformation from the database is not case specific but is the kind of background information experts have traditionally been able to rely on and relate to the jury."

Company files are not necessarily "business records," and declarations based on reviews of such files should contain foundation for overcoming hearsay objections.

Ducksworth v. Tri-Modal Distribution Services
(2020) 47 Cal.App.5th 532

In this employment discrimination and retaliation lawsuit, one defendant moved for summary judgment on statute of limitations grounds. In support of his motion, he submitted a declaration from the vice president of operations describing when certain personnel decisions were made. The VP stated the information was based on personal knowledge, but it appeared that some of the information might have come from a review of personnel files prepared by others. The plaintiff objected that the declaration contained hearsay, and no foundation to establish the business records exception or another exception . The trial court overruled the objection and granted the motion.

The Court of Appeal (Second Dist., Div. Eight) affirmed the trial court's ruling on the declaration's admissibility, finding no abuse of discretion on the close question of admissibility. The personnel files would indeed be hearsay, given the lack of foundation to show the files were business records, but there was a plausible basis for the trial court to conclude the testimony was based on personal knowledge given his time at the company. The court cautioned: "There is a lesson here for litigators: know your Evidence Code when working with declarations. It was risky business to omit the foundation for the business records exception in [the] declaration."

TORTS

In cases involving injuries from occupational risks, primary assumption of risk doctrine protects only the plaintiff's employer.

Gordon v. Arc Manufacturing (Golden Eagle Insurance)
(2019) 43 Cal.App.5th 705

A company considering buying a warehouse hired the plaintiff to inspect the warehouse's roof. The warehouse owner's employee met the plaintiff at the warehouse for the inspection, but failed to advise the plaintiff of the full extent of the known problems with the roof. The plaintiff fell through the roof and sued the current owner. The trial court refused to instruct the jury on primary assumption of risk doctrine, and the jury found for the plaintiff. The building owner appealed.

The Court of Appeal (Fourth Dist., Div. One) affirmed the verdict against the building owner. Although primary assumption of risk doctrine bars claims for injuries caused by the very risk the person was hired to control, that doctrine protects only the person who engaged the plaintiff to confront that risk. Here, the building owner had not hired the plaintiff and so had not paid to be relieved of the ordinary standard of care. No public policy reason supported protecting the owner here against the consequences of a negligent failure to disclose a known but concealed hazard on the roof.

See also *Kim v. County of Monterey* (2019) 43 Cal.App.5th 312 [Sixth District: the presence of sandbags alongside motorcycle race track was not an inherent risk of the sport; plaintiff's claims based on injuries from crashing into sandbags could survive summary judgment].

City had no duty to erect barrier on its property to prevent public access to railroad tracks on an adjacent property.

Hedayatzadeh v. City of Del Mar
(2020) 44 Cal.App.5th 555

The plaintiff's 19-year-old son was struck and killed by a train when attempting to take a "selfie." The plaintiff sued various defendants, including the City of Del Mar, who owned the property 40-50 feet away from the tracks on either side. It was undisputed that the City knew people used its property to access the adjacent property upon which the tracks were located, and that there had been many accidents on the tracks. However, the City argued that it could not be liable for accidents on the tracks since it had no control over the property upon which the tracks were located. The trial court agreed and granted summary judgment for the City.

The Court of Appeal (Fourth Dist., Div. One) affirmed the summary judgment. Public entities may be liable for dangerous conditions on adjacent property where a hazard on the public property crosses the boundary onto the adjacent property, or where the public entity's use of its own property lures people to a hazard on the adjacent property. But "case law does not extend liability to circumstances in which the public entity has not engaged in any affirmative act regarding the use of its property ... but has merely failed to erect a barrier to prevent users of the public property from leaving the public property and willfully accessing a hazard on adjacent property."

See also *Soto v. Union Pacific Railroad Company* (2020) 45 Cal. App.5th 168 [Second Dist., Div. Seven: railroad company was not liable for collision with pedestrian at crossing where the railroad had contractual use of the crossing but did not own or significantly control it, and its alleged common law duty of care in operating the train was preempted by federal law].

See also *Loeb v. County of San Diego* (2019) 43 Cal.App.5th 421 - [Fourth Dist., Div. One: trail immunity applied to paved pathway between campground and restrooms where plaintiff conceded the pathway was at least partially used for recreational purposes].

See also *Reed v. City of Los Angeles* (2020) 45 Cal.App.5th 979 [Second Dist., Div. One: the dangerous condition of property created by a badminton net being stretched across a trail existed only because of its connection to the trail, so trail immunity applied].

Unsupported allegation that employee's driving was impaired by a work-related injury did not render going-and-coming rule inapplicable.

Bingener v. City of Los Angeles
(2019) 44 Cal.App.5th 134

A city water inspector struck and killed a pedestrian on his commute into work. The pedestrian's heirs filed a wrongful death suit against the city, which moved for summary judgment on the ground that the "going and coming" rule protected the city from respondeat superior liability for the accident. The heirs argued that the inspector had suffered a back injury at work and was unfit to drive, and that the employer should therefore be responsible for his negligent driving under the "work spawned risk" exception to the "going and coming" rule. The trial court granted the motion.

The Court of Appeal (Second Dist., Div. Three) affirmed. The employee was on his normal commute when the accident happened. He was not driving a company vehicle; he was not required to use his personal vehicle for work; and he was not on a special errand for his employer. Finally, the "work spawned risk" exception that applies when something that occurs at the workplace impairs the employee's driving did not apply based on the work-related back injury. No non-speculative evidence supported the assertion that the employee's back injury impaired his driving, and the only evidence in the record was that his physician had cleared him to drive. In short, nothing about the water inspector's job made hitting a pedestrian while commuting a foreseeable risk of his particular type of employment or job responsibilities; this was a paradigm case where the "going and coming" rule was intended to apply.

Parents are not responsible for the actions of their adult children simply because they provide financial support to them.

K.G. v. S.B.
(2020) 46 Cal.App.54th 625

The defendant's adult son and the son's girlfriend had a history of drug abuse. The defendant continued to financially support his son, even though he knew of the drug use. When the son's girlfriend overdosed and died, her heirs sued the defendant, arguing that it was foreseeable to the defendant that his son would use the money to procure drugs. The defendant demurred to the complaint and the trial court sustained the demurrer.

The Court of Appeal (Fourth Dist., Div. One) affirmed. While a parent has a special relationship with a dependent minor child that can give rise to a duty to protect third parties from the minor child, that duty does not extend to protecting third parties against the actions of adult children. To hold a parent liable for the conduct of adult children, the plaintiff must show the defendant controlled the adult child and that the *Rowland* factors favor finding a duty of care under the circumstances. The plaintiff could not make that showing based on the mere fact the father provided his son with financial support, even if it was foreseeable the son might choose to use the money for drugs. Public policy does not support imposing liability on a family member for providing financial assistance to another family member.

See also *Tarin v. Lind* (2020) 47 Cal.App.5th 395 [Second Dist., Div. One: California law does not recognize a cause of action seeking damages for causing estrangement between a parent and child].

The statute of limitations for medical malpractice does not accrue until the plaintiff is on inquiry notice that the defendant breached the standard of care.

Brewer v. Remington
(2020) 46 Cal.App.5th 14

The plaintiff underwent shoulder surgery on April 22, 2013. She woke up the next morning with paralysis and was examined by the defendant (who had not been involved in the shoulder surgery). The defendant performed a spinal decompression surgery on May 30, 2013. The defendant had made no representations that the spinal surgery would improve the plaintiff's condition, although it did improve her condition a little. The plaintiff filed a medical malpractice action against the doctors involved in her initial shoulder surgery. During discovery, in July 2015, the plaintiff's expert opined that the defendant had been negligent in not performing the spinal surgery immediately, and that the persistence of plaintiff's paralysis was caused by that delay in treatment. The plaintiff then amended her complaint to add the defendant. The defendant moved for summary judgment, arguing that the claims against him were untimely under Code of Civil Procedure §340.5 ["the time for the commencement of the action shall be three years after the date of the injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first"] because the plaintiff had known about her injury since 2013 and should have joined all doctors involved her care who might have contributed to her paralysis at the outset of the litigation. The trial court granted the motion, but the plaintiff moved for a new trial and the trial court reversed itself. The defendant appealed.

The Court of Appeal (Fifth Dist.) affirmed the trial court's order granting a new trial. The plaintiff had testified that she did not have any reason to believe the persistence of her symptoms were linked to the delay in her spinal surgery, rather than entirely the result of the shoulder surgery that caused her paralysis that the spinal surgery was simply unable to cure. On this record, a jury could find that the plaintiff was not even on inquiry notice that the defendant's conduct in delaying her surgery was below the standard of care until her expert rendered that opinion in July 2015.

INSURANCE

"Vertical exhaustion" rule applies for access to excess insurance policies.

Montrose Chemical Corp. of California v. Superior Court
(2020) 9 Cal.5th. 215

In this coverage litigation arising out of environmental contamination, Montrose Chemical Company had established in an earlier stage of litigation that it was entitled to coverage for continuing, progressive environmental claims under primary and excess policies over many decades. Having exhausted all of the primary policies dating from 1961 through 1985, Montrose argued it was entitled to "stack" coverage and obtain benefits under any excess policy once it exhausted a directly underlying excess policy for the same policy period ("vertical exhaustion"). The insurers disagreed and argued that Montrose had to exhaust all of its lower layer excess coverage across all relevant policy periods ("horizontal exhaustion") before accessing any of its higher layer coverage. The Court of Appeal (Second Dist., Div. Three) held that the sequence in which the policies could be accessed had to be decided on a policy-by-policy basis, taking into account the relevant provisions of each policy, and that at least some of the policies required horizontal exhaustion before Montrose could access any higher-level policies.

The Supreme Court held in favor of Montrose, adopting the "vertical exhaustion" rule. An insured is "entitled to access otherwise available coverage under any excess policy once it has exhausted directly underlying excess policies for the same policy period." However, an insurer who provides coverage may "seek reimbursement from other insurers that would have been liable to provide coverage under excess policies issued for any period in which the injury occurred."

An arbitration clause in an insurance policy can bind non-signatory additional insureds.

Philadelphia Indemnity Insurance Company v. SMG Holdings, Inc.
(2019) 44 Cal.App.5th 834

Philadelphia's insured, the Future Farmers of America, hosted an event at a property owned by SMG Holdings. In its rental contract with SMG, Future Farmers promised to name SMG as an additional insured under its liability policy. Future Farmers obtained a policy that did not expressly name SMG but did insure (1) any "managers, landlords, or lessors of premises" for any claims arising out of the named insured's rental of the premises, and (2) anyone the named insured was required to insure under a contract, so long as the claims arose out of the named insured's negligence. When a Future Farmers event attendee was injured in the property's parking lot, SMG demanded Philadelphia defend it. Philadelphia refused, arguing that injuries occurring in the parking lot were not covered because Future Farmers' rental agreement did not cover use of the parking lot, and failure to maintain the parking lot was not the result of Future Farmers' negligence. Philadelphia petitioned to compel arbitration of the coverage dispute under the policy's mandatory arbitration provision, which applied to, among other things, coverage disputes. The trial court refused to compel arbitration, holding that SMG was not a third-party beneficiary of the insurance contract, and that Philadelphia was equitably estopped from seeking to compel arbitration. The trial court reasoned that Philadelphia could not take the " 'inconsistent' " position that SMG was not covered by the policy but was covered by the arbitration provision. Philadelphia appealed.

The Court of Appeal (Third Dist.) reversed. While SMG was not a signatory to the arbitration agreement, the agreement was intended to benefit "managers" of leased premises like SMG, so it was a third-party beneficiary of that agreement. Further, SMG's attempt to take advantage of the policy was predicated on it being a beneficiary of the policy. Similarly, SMG's attempt to invoke the policy's benefits estopped it from denying it was bound by the arbitration agreement.

See also *Lewis v. Liberty Mutual Insurance Company* (9th Cir. 2020) 953 F.3d 1160 [a third party judgment creditor bringing a direct action against an insurer "stands in the shoes" of the insured and is therefore bound by an enforceable forum selection clause in the policy].

LABOR & EMPLOYMENT

Cause of action for age discrimination in disability payment plan accrued each time a disability check was issued.

Carroll v. City and County of San Francisco
(2019) 41 Cal.App.5th 805

The plaintiff began receiving disability retirement payments from the City of San Francisco in 2000. After learning in 2017 that the City calculated disability retirement payments in a way that benefitted employees who started working for the City at a younger age, she filed a class action suit alleging disparate treatment age discrimination under the California Fair Housing and Employment Act. The City demurred to the complaint, arguing that the claim accrued in 2000 when the plaintiff first obtained disability, meaning the claim was barred by the one-year statute of limitations for submitting a claim to the Department of Fair Employment and Housing. The trial court sustained the demurrer.

The Court of Appeal (First Dist., Div. Four) reversed. Case law recognizes that "an employer's discriminatory decision to take an unlawful employment act is not actionable only when made but instead when statutorily prohibited acts or practices occur pursuant to that decision." Accordingly, a new cause of action accrues every time a discriminatory payment is made, and the plaintiff's claims based on checks issued during the limitations period were timely. Further, under *Alch v. Superior Court* (2004) 122 Cal.App.4th 339 (Alch), plaintiff's disparate treatment claim was timely under a theory that the discrimination occurred pursuant to City policy of discrimination that created a "continuing violation," although recovery under that theory would be limited to harm from acts that occurred during the limitations period.

See also *Brome v. California Highway Patrol* (2020) 44 Cal.App.5th 786 [First Dist., Div. Five: in sex discrimination case, there were triable issues on whether plaintiff's constructive discharge claims were subject to equitable tolling during the period his workers' compensation claim was pending, and whether he could seek recovery for conduct from before the limitations period under the continuing violation doctrine that permits recovery for past harassment linked to current harassment].

Employees can pursue representative PAGA claims even if they settle and dismiss their individual wage claims.

Kim v. Reins International California, Inc.
(2020) 9 Cal.5th 73

In this putative wage and hour class action alleging misclassification of employees, the named plaintiff accepted a settlement of his individual claims, leaving only his representative Private Attorneys General Act (PAGA) claim for Labor Code violations. The defendant then moved for summary judgment asserting that the plaintiff lacked standing to pursue the PAGA claim because he was no longer an "aggrieved employee" as required to bring a representative action. The trial court granted summary judgment and the Court of Appeal (Second Dist., Div. Four) affirmed.

The California Supreme Court reversed. A person has statutory standing to pursue a PAGA claim as an "aggrieved employee" if he or she was allegedly employed by the company that subjected the person to at least one alleged violation of certain provisions of the Labor Code. Employees who bring individual claims as well as a representative PAGA claim and satisfy PAGA's standing requirement do not lose standing to pursue the representative PAGA claim if they settle and dismiss their individual claims.

See also *Brooks v. AmeriHome Mortgage Co., LLC* (2020) 47 Cal. App.5th 624 [Second Dist., Div. 6: a plaintiff who had filed a single representative cause of action under PAGA "cannot be compelled to separately arbitrate whether he was an aggrieved employee."].

FEHA disability discrimination can occur from a mistaken application of a legitimate company policy.

Glynn v. Superior Court (Allergan)
(2019) 42 Cal.App.5th

The plaintiff, a pharmaceutical sales representative, developed a disability that prevented him from driving. He went on temporary medical leave and requested reassignment to a position that would not require driving. A human resources representative mistakenly believed that she was required to terminate the plaintiff's employment because he suffered from a permanent disability. The plaintiff responded that he had not applied for permanent disability, only temporary disability, and that he could be reasonably accommodated through reassignment. He was not reinstated however, and so filed suit for disability discrimination and other Fair Employment and Housing claims. Eventually the company offered to return him to work, with back pay, but without specifying the position or salary. The plaintiff did not accept the offer, asserting it was not made in good faith, and proceeded with his lawsuit. The employer moved for summary adjudication on most of the plaintiff's claims, which the trial court granted. The plaintiff sought a writ of mandate.

The Court of Appeal (Second Dist., Div. Four) issued a writ directing the trial court to reverse its summary adjudication order. The plaintiff's evidence that he was terminated due to his disability, despite the possibility of reasonable accommodation, provided a prima facie claim of disability discrimination, even if the termination was made without animus and based on a mistaken belief that the termination was permitted under the company's lawful policy providing for termination where an employee's disability is permanent and therefore not subject to reasonable accommodation.

But see *Doe v. Department of Corrections and Rehabilitation* (2019) 43 Cal.App.5th 721 [Fourth Dist., Div. Two: "FEHA was not designed to make workplaces more collegial" and less stressful when dealing with supervisors, "its purpose is to eliminate more insidious behavior like discrimination and harassment based on protected characteristics"; summary judgment properly granted against employee's discrimination and retaliation claims where he was not subjected to an adverse employment action; he voluntarily, rather than involuntarily took medical leave, during which time he was paid; and his claim of disability lacked medical substantiation that would have permitted the employer to determine a proper accommodation].

Prior rate of pay is not a "job related factor" that can serve as an affirmative defense to an Equal Pay Act claim.

Rizo v. Yovino
(2020) 950 F.3d 1217

The female plaintiff accepted a job as a math consultant to the Fresno County Office of Education. Her pay was determined by a salary schedule based on her prior rate of pay. She eventually learned that she was being paid less than all of her male colleagues, including those with less experience and education. She brought a claim under the 1963 Equal Pay Act, but the County asserted that prior pay was a "factor other than sex," which defeated her Equal Pay Act claim. The district court disagreed, but certified the issue to the 9th Circuit. An en banc panel of the 9th Circuit affirmed the district court. However, the lead author of the en banc opinion died before the opinion issued, and the United States Supreme Court reversed and remanded the case for a new decision.

A majority of the 9th Circuit en banc panel issued a second opinion affirming the district court and thus, rejecting the County's argument that prior pay constituted a "factor other than sex." "The express purpose of the Act was to eradicate the practice of paying women less simply because they are women. Allowing employers to escape liability by relying on employees' prior pay would defeat the purpose of the Act and perpetuate the very discrimination the EPA aims to eliminate."

Medical clinic's third-party office service administrator was not a joint employer with the clinic for purposes of nurse's whistleblower retaliation claim.

St. Myers v. Dignity Health
(2019) 44 Cal.App.5th 301

The plaintiff, a nurse, brought a constructive discharge suit against Dignity Health, which owned the clinic in which she worked, and Optum360, which provided the clinic with end-to-end revenue cycling services, such as scheduling, patient registration, health information management, billing, and collections. The plaintiff alleged numerous complaints about her workplace, including problems with patient care, and that she was retaliated against for complaining about these issues, including by being subject to harassing work schedules. She alleged that Optum360 was her joint employer along with Dignity Health. Optum360 moved for summary judgment on the ground it was not her joint employer and so was not liable for employment-related claims. The trial court granted summary judgment for Optum360.

The Court of Appeal (Third Dist.) affirmed. The evidence showed that Optum360 was a third party service provider that had minimal control over plaintiff's working conditions and the patient care issues about which she had complained. While it did have some control over scheduling and pay, that was not sufficient to render Optum360 her joint employer under the circumstances.

See also *Salazar v. McDonald's Corporation* (2019) 944 F.3d 1024 [McDonald's was neither a joint employer with, nor an ostensible agent of, its individual franchisees, so was not potentially liable for the franchisee's alleged wage and hour violations]

But see *County of Ventura v. Public Employment Relations Board (SEIU Local 721)* (2019) 42 Cal.App.5th 443 [Second Dist., Div. Six: Ventura County was a joint employer of employees of private medical clinics operating under contracts with the County under which the County had substantial control over the conditions of employment]

See also *Grande v. Eisenhower Medical Center (Flexcare)* (2020) 44 Cal.App.5th 1147 [Fourth Dist., Div. Two: joint employers are not vicariously liable for each other's Labor Code violations, so settlement of wage and hour class action against temporary staffing agency that placed plaintiff at the defendant's medical center was not res judicata against the medical center itself]

See also *Scalia v. Employer Solutions Staffing Group, LLC* (9th Cir. 2020) 951 F.3d 1097 [employer could not escape liability for Fair Labor Standards Act violations simply because the violations were committed by a low-level manager, nor could it seek contribution from joint employer].

Under California law, employees are entitled to compensation for the time spent having their personal belongings searched.

Frlekin v. Apple Inc.
(2020) 8 Cal.5th 1038

In this putative wage and hour class action, non-exempt Apple employees sought compensation for the time they spent on Apple's premises waiting for and undergoing required exit searches of packages, bags, or phones they voluntarily brought to work purely for their own convenience. The federal district court granted summary judgment for Apple, holding that the time was not compensable. On appeal, the 9th Circuit certified the question to the California Supreme Court.

The California Supreme Court disagreed with the federal district court. The time spent on an employer's premises waiting for and undergoing required exit searches of personal belongings is compensable as "hours worked" within the meaning of California Industrial Welfare Commission wage order No. 7-2001. Apple's argument that only time spent on "required" and "unavoidable" employee activities is compensable, if adopted, "would limit the scope of compensable activities, resulting in a narrow interpretation at odds with the wage order's fundamental purpose of protecting and benefitting employees." The answer would be different under federal statutory law, but that law " 'differs substantially from the state scheme, [and] should be given no deference.' "

See also *Ridgeway v. Wal-Mart Stores, Inc.* (9th Cir. 2020) 946 F.3d 1066 [although Wal-Mart was legally required to provide 10-hour work-free layovers for its truck drivers to rest, Wal-Mart owed compensation to them durign that time because "Wal-Mart's layover policy imposed constraints on employee movement such that employees could not travel freely and avail themselves of the full privileges of a break"].

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 when depositions from prior cases may be used at trial in a later case under Evidence Code section 1291.

Berroteran v. Superior Court (Ford Motor) (2019) 41 Cal.App.5th 518, review granted February 11, 2020, case no. S259522

The plaintiff in a lemon law case sought to introduce deposition testimony from defense witnesses taken in cases years earlier, in lawsuits outside of California. The trial court excluded the hearsay deposition testimony, finding it did not fall within the exception under Evidence Code 1291 for testimony taken in a case where the objecting party had a similar motive and interest to cross-examine the witnesses as it would have if the testimony were offered live in the current proceeding. Plaintiff sought a writ of mandate. The Court of Appeal (Second Dist., Div. One) issued the writ, holding that the depositions were admissible under the prior testimony hearsay exception, believing that the defendant "had the right and opportunity to cross-examine its employees and former employees with a similar motive and interest as it would have in the instant case." The court concluded the defendant had not proven otherwise. The court expressly disagreed with an earlier appellate decision (*Wahlgren*) that had held that parties generally do *not* have a motive and interest in cross-examining *their own witnesses* during a deposition initiated by the opponent.

The Supreme Court granted review to resolve the split of authority on this issue: Does a party against whom former deposition testimony in a different case is sought to be admitted at trial under Evidence Code section 1291, subdivision (a)(2), have a similar interest and motive at both hearings to cross-examine a friendly witness?

Addressing standard for establishing the existence of a duty to prevent sexual misconduct by third parties.

Brown v. USA Taekwondo (2019) 41 Cal.App.5th 567, review granted January 2, 2019, case no. S259216

A group of taekwondo athletes filed suit against their coach, Marc Gitelman, the United States Olympic Committee (Olympic Committee), USA Taekwondo (US Taekwondo), and others for the sexual abuse committed by Gitelman. Against the Olympic Committee and US Taekwondo specifically, the plaintiffs alleged several causes of actions rooted in negligence. The Olympic Committee and US Taekwondo filed demurrers, claiming they had "no duty of care to plaintiffs to prevent Gitelman's sexual abuse." The trial court sustained the demurrers and dismissed both defendants. Court of Appeal (Second Dist., Div. Seven) reversed as to US Taekwondo, holding that under the *Rowland* factors, USA Taekwondo owed a duty to protect their youth athletes from abuse by their coaches. However, the Court of Appeal affirmed as to the Olympic Committee, reasoning that even though it had the ability to control USA Taekwondo, the Olympic Committee did not have a special relationship with the athletes or the coach involved.

The California Supreme Court granted the plaintiffs' petition for review. The issue is: What is the appropriate test that minor plaintiffs must satisfy to establish a duty by defendants to protect them from sexual abuse by third parties?

Addressing a corporation's vicarious liability for employee negligence in causing a forest fire.

Presbyterian Camp and Conference Centers v. S.C. (California Department of Forestry and Fire Protection) (2019) 42 Cal.App.5th 1173, review granted January 22, 2020, case no. S259850

The defendant's employee negligently caused a forest fire. CalFire filed suit against the defendant and its employee to recover fire suppression and investigation costs. The defendant sought to dismiss the case under the majority decision in *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154, which held that corporations cannot be held liable for the costs of suppressing and investigating fires their agents or employees negligently set. The trial court declined to dismiss the lawsuit and the defendant sought a writ of mandate. The Court of Appeal (Second Dist., Div. Six) denied the petition on the merits, holding that the trial court correctly concluded that Health and Safety Code sections 13009 and 13009.1 expressly permit the recovery of fire suppression and investigation costs from a corporation, when one of its agents or employees " 'negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by [them] to escape onto any public or private property.' "

The Supreme Court granted review of the following issue: Can a corporation be held liable under Health and Safety Code sections 13009 and 13009.1 for the costs of suppressing and investigating fires that its agents or employees negligently or illegally set, allowed to be set, or allowed to escape?

See also *Scholes v. Lambirth Trucking Co.* (2020) 8 Cal.5th 1094, case no. S241825 [review granted June 21, 2017, to address this question: are the double damages provisions of Civil Code section 3346 applicable to negligently caused fire damage to trees?].

Addressing whether forum selection clauses containing a jury trial waiver are enforceable.

Handoush v. Lease Finance Group, LLC (2019)
41 Cal.App.5th 729, review granted February 11, 2020, case no. S259523

A shop owner filed a fraud, recession, and unfair competition action against a company that had leased it credit card processing equipment. The parties' lease agreement contained a New York forum selection clause which contained a jury trial waiver. The defendant successfully moved to dismiss the action based on the forum selection clause. The plaintiff appealed, and the Court of Appeal (First Dist., Division Three) reversed, holding that pre-dispute jury trial waivers are unenforceable as a matter of California public policy.

The Supreme Court granted review. The issues are: (1) Is a forum selection clause in a contract formed in another state and governed by non-California law, which chooses a non-California forum for litigation, per se unenforceable if the contract also contains a pre-dispute jury trial waiver? (2) Under what circumstances, if any, may the burden of proof on a motion to enforce a forum selection clause be shifted to the party seeking enforcement of the clause?

Addressing how to calculate premium wages due for failure to provide meal and rest breaks.

Ferra v. Loews Hollywood Hotel (2019)
40 Cal.App.5th 1239, review granted January 22, 2020, case no. S259172

In this wage and hour class action, the plaintiff alleged the defendant hotel underpaid the class members the premium pay they were due for missed meal and rest periods. Specifically, the plaintiff alleged that under Labor Code section 510, premium payments for overtime work are based on the "regular rate of pay," which includes nondiscretionary bonuses in addition to base salary. The defendant had not included nondiscretionary bonuses in calculating the premium payment rate, asserting that under Labor Code section 226.7, which applies specifically to calculating premium pay for missed meal and rest periods, it was obliged to base its premium payments on base salary only. The defendant based its argument on the fact that Labor Code section 266.7 refers to the employee's "regular rate of compensation," not "regular rate of pay" as in Labor Code section 510. On summary judgment, the trial court agreed with the defendant. and a majority of the Court of Appeal (Second Dist., Div. Three) affirmed, concluding that the difference in statutory language was intentional and reflected a legislative intent to consider "compensation" different than "pay."

The Supreme Court granted review of the following issue: Did the Legislature intend the term "regular rate of compensation" in Labor Code section 226.7, which requires employers to pay a wage premium if they fail to provide a legally compliant meal period or rest break, to have the same meaning and require the same calculations as the term "regular rate of pay" in Labor Code section 510 subdivision (a), which requires employers to pay a wage premium for each overtime hour?

See also *Naranjo v. Spectrum Security Services, Inc.*, (2019) 40 Cal. App.5th 444, review granted January 2, 2020, case no. S258966 [reviewing (1) whether a violation of Labor Code section 226.7, which requires payment of premium wages for meal and rest period violations, gives rise to claims under Labor Code sections 203 and 226 when the employer does not include the premium wages in the employee's wage statements but does include the wages earned for meal breaks? (2) the applicable prejudgment interest rate for unpaid premium wages owed under Labor Code section 226.7].

How to Counteract the Anchoring Effects of Plaintiff's Damages Request

Christina Marinakis, J.D., Psy.D.

In just the last few weeks, we've seen juries award non-economic damages of $1.25 million to a woman on an insurance bad faith claim (*Momeni-Kuric v. Metropolitan Property and Casualty Insurance Co. et al.*), $1.3 million to a phlebotomist who experienced racial harassment (*Birden v. The Regents of the University of California*), $1.9 million to a cyclist who broke her hip and wrist after being struck by a car (*Mitchell v. Anderson*), $3 million to a teen who fell 30 feet from a ski lift (*Hache v Wachusett Mountain Ski Area, Inc.*), and $7.6 million to a man who alleged chronic pain from a defective implant device (*Kline v. Zimmer Holdings Inc.*). Without any concrete guidelines from the courts, how do jurors arrive at such subjective figures? King Solomon would be disappointed. Indeed, jurors in the ski lift case appeared to merely "split the baby," issuing an award that fell between the $6 million requested by plaintiff's counsel and $700,000 suggested by the defense. Would the result have been any different had counsel from either side not provided a number at all? Consider the following exchange:

Question: ***How did the jury arrive at the decision to award the plaintiff $20 million in damages?***

Actual Juror #1: ***We came up with a percentage approach, and that's what we all discussed. We started with what the plaintiff was asking for – $80 million, which seemed like a very high amount, and went down and down from there.***

Actual Juror #2: ***None of us had been on a jury before, so we had no idea where to start. What's a life worth? It would have been nice to have some precedent to go by, but we didn't. So, we started with what they gave us, and then took off a percentage.***

These conversations, which I had with two jurors following a surprisingly large plaintiff's verdict, are not unlike what we often hear when observing jury deliberations following mock trial presentations or when interviewing other jurors post-verdict. Jurors are often at a loss when it comes to determining what constitutes fair and reasonable non-economic damages. Lawyers, who are constantly privy to plaintiff demands, settlement values, and jury verdicts, sometimes forget that most jurors have no references aside from the jaw-dropping figures they hear in the news. Indeed, in another post-verdict interview, a third juror commented, "*Since trial, I've learned there are many lawsuits related to this product, and our damages award was on the high side – to say the least – but we didn't know what the norm was. All we had to go by is what the plaintiff was asking for.*"

Anchoring and Adjustment

Years of experience talking to jurors and watching them deliberate have taught us that the amount they award in damages, after finding for a plaintiff, is almost always influenced by the amount of the demand. In psychological terms, we call that "anchoring." Anchoring and adjustment is a psychological heuristic that influences the way people intuitively assess numerical estimates. That is, when asked to come up with an appraisal or estimate, people will start with a suggested reference point (i.e., "anchor") and then make incremental adjustments based on additional information or assumptions.

Academic research shows that these adjustments are usually insufficient, giving the initial anchor a great deal of influence over future assessments. In a jury deliberation setting, we see this all the time. Consider this exchange between mock jurors:

Juror A: ***What was it they were asking for – 50 million? That's ridiculous. No way.***

Juror B: ***What's fair then? Half of that? 25?***

Juror A: ***That still seems a little high. I'd cut that in half – make it an even 13.***

Juror C: ***Yeah, but you have to figure the lawyers are going to take at least a third of it, and another third will probably go to taxes, so you need to bump that up. I'd say $30 million, that way he'll end up with 10.***

Juror A: ***$30 million still seems a bit high to me.***

Juror B: ***But that's still a lot less than what he's asking for.***

Juror A: ***Okay, I can go with $30 million.***

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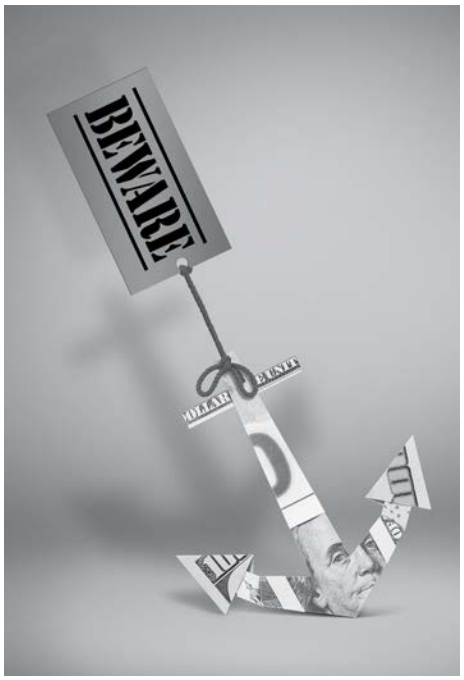
Anchors – continued from page 19

These jurors, who thought they were being tough on the plaintiff by only awarding "a lot less than what he's asking for," still rendered a verdict that would be eye-popping for many of us. Had the plaintiff's attorney only requested $30 million, it is very likely the jury would have made similar adjustments and ultimately settled on a figure far less than $30 million. Most plaintiff lawyers realize this and "shoot for the moon," knowing that they'll end up among the stars even if they miss the mark. So how can defense counsel prevent jurors from using the plaintiff's request as an anchor? While there are many strategies, we suggest three methods that have been effective in our experience:

1) Removing the Anchor

Jurors assume that the lawyers know everything about the law, and the same applies when it comes to damages. Why would a plaintiff lawyer ask for an amount that is beyond the realm of possibility? Surely, if that's an amount he or she is comfortable asking for, it's because some jury in the past has given it. These faulty assumptions lead jurors to defer to the lawyers. In fact, some jurors assume assessing damages is an "all or nothing" determination; we've had jurors submit questions in actual trials asking whether they're permitted to award amounts different from what the parties suggested and we've seen jurors make similar remarks in mock jury simulations. Therefore, it's important to inform jurors that they're not bound by the plaintiffs' numbers, that those numbers are completely arbitrary, and to suggest that the jury give no weight to figures that are merely requests. We call that "Removing the Anchor." Here's an example of how that can be implemented in closing:

> If a jury finds a defendant liable, the jury must then determine what is fair and reasonable compensation. That's what the judge will instruct you. It's about fair compensation. The plaintiff's attorney has asked you to award a specific amount, but that's just a request; it has no basis in fact – it's not based on anything other than what they want. So that doesn't mean that if you decide the plaintiff wins, then you must award what they're asking for. As the jury, you – and you alone – get to decide what is fair and reasonable if – and only if – you think the defendant is liable. Should you decide my client is liable, although we firmly believe it is not, then we ask that you come up with your own figure that is fair and reasonable, and give no deference whatsoever to a number that is merely a request without any basis.



2) Exposing the Anchor

Psychological research has shown that people are less likely to fall prey to mental processing errors when the tendency to engage in such thought is outwardly exposed. In other words, by drawing attention to the fact that the plaintiff's counsel is attempting to influence jurors with an anchor, jurors will be less likely to be persuaded by it. Here's an example of how this can be done in closing:

> Most people have heard the term, "Anchors aweigh!" When a ship is in the water, a heavy anchor tied to the boat keeps the ship in place so that it can't drift too far from the anchor. What you probably didn't know is that anchoring is a psychological persuasion tactic as well. Let me give you an example:
>
> I was at a business conference in Las Vegas and wanted to bring back something nice for my wife, so I walked into one of those high-end purse stores. The salesman brings over a bag he thinks my wife will like, and I take a look at the price tag – $11,000! I tell the salesman, "Hey, I love my wife, but that's just too high." "Ah! I have just the one for you, then," he says, and he brings over a different one. I check the tag, and this purse was $2,000. "Okay," I'm thinking, "This is much more reasonable. I'll take it." When I got home from the trip, my wife was VERY happy, but asked why I would spend so much. I realized I really didn't know anything about purses and asked her how much some of her other ones cost; they were a couple hundred dollars, at most. Then it hit me. If the salesman had never shown me that $11,000 one, there is no way I would have spent $2,000 on a purse. That's just too much, especially when there are many very nice purses out there for a few hundred dollars. But, by showing me the purse that was outrageously priced, the $2,000 one seemed reasonable in comparison.

That's what anchoring is all about. And guess what? That's what the plaintiff's lawyer just tried to do to you: ask for an outrageously high amount and hope you'll agree to something that's maybe a bit little less, but still extraordinarily high. The plaintiff's lawyers are trying to drop that anchor far beyond an area of reasonableness, with the goal of keeping the jury tethered around it. That $10 million request was an anchor, aimed at keeping you from drifting too much lower. It can be easy to be lulled into believing that these numbers must have basis in fact, but they don't. They're just an ask, so it's important to keep that in mind. Only you, as jurors, ultimately decide where that anchor touches down; it's not for the plaintiffs to set it for you.

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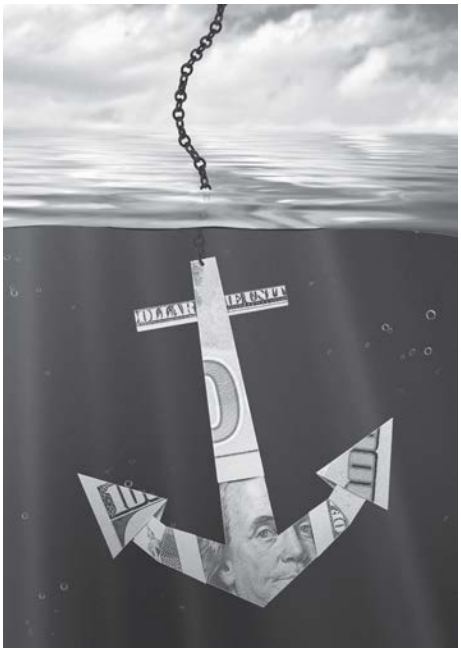

3) Lowering the Anchor

Although exposing and removing the anchor have some effect on minimizing damages, we know that in the absence of competing values for damages, jurors will still often use the plaintiffs' figures as the starting point for negotiations. Though somewhat controversial, we sometimes recommend that defense counsel identify an alternative dollar amount that is fair and reasonable, without conceding responsibility. That is, in certain situations, the defense should suggest that *if* there is a finding of liability, the plaintiff should be compensated for specific damages (and specific amounts) that ensure the plaintiff's needs are met without providing a windfall from the tragedy. By offering a counter-figure, the defense essentially "Lowers the Anchor" and gives the jury another starting figure to negotiate from. You can see how this can play out in the following exchange between mock jurors:

Juror A: ***For non-economic damages, what do you all think?***

Juror B: ***The plaintiff lawyer said $30 million, which seems like way too much.***

Juror C: ***I'm thinking closer to what the defense lawyer said, $2 million. The point is to put him whole, not put him up in a mansion.***

Juror B: ***I think he needs a little more than 2 – that doesn't last very long in this day and age.***

Juror C: ***Okay, what if we bump it up to 5?***

Juror A: ***Can everyone agree to $5 million? [all hands raise] Okay, we'll go with 5.***

As you can see, offering an alternative figure gives defense supporters and conservative jurors something to argue from, effectively anchoring down the ultimate award.

We've also learned over the years that anchors are most effective – and have the most "pull" – when they're tied to a factual figure, and the empirical research supports this observation. (Campbell, J., Chao, B. & Roberston C. *Time is Money: An Empirical Assessment of Non-Economic Arguments.* Washington University Law Review, 95 (2017).) For example, defense counsel might suggest "twice the amount of the hospital bills" or "$20,000 for each year since the accident." Jurors tend to give more weight to figures that appear to be tied to evidence than to numbers that seem completely arbitrary (this is true for both plaintiffs' requests as well as defense counter anchors).

Does Lowering the Anchor Admit Liability?

As I hinted at earlier, offering an alternative damages figure is a controversial technique, and we often see clients reluctant to do so in fear that jurors will misconstrue the offer as a concession of liability or use the suggestion as a damages "floor." Years of experience talking to hundreds – if not thousands – of jurors have convinced me this is usually not the case. This is especially true with a sophisticated jury and when counsel is clear that there is no liability, so there should be no damages, but he or she is providing an alternative calculation merely to give the jury some guidance in the event they disagree with the defense's position.

Rather than relying on anecdotal evidence, we can turn to the empirical research as support for this technique. Legal professors at the University of Denver and the University of Arizona studied this very issue. (Campbell, J., Chao, B., Roberston C., & Yokum, D. *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments,* 101 Iowa L. Rev. 543 (2016).) Their 2016 published study was a randomized controlled experiment in which mock jurors were presented with a medical malpractice trial, manipulated with six different sets of damages arguments in a factorial design. The plaintiff demanded either $250,000 or $5 million in non-economic damages. The defendant responded in one of three ways: (1) offering the counter-anchor that, if any damages are awarded, they should only be $50,000; (2) ignoring the plaintiff's damage demand; or (3) attacking the plaintiff's demand as outrageous. Mock jurors were then asked to render a decision on both liability and damages.

The study confirmed that anchoring has a powerful effect on damages; damages were 823% *higher* when the plaintiff requested $5 million as opposed to $250,000. When the plaintiff's request for damages was low, the defense response had no effect on the amount awarded. However, when the plaintiff's demand was high, jurors awarded 41% *less* damages when the defendant offered a counter anchor than when the defense merely ignored the request or attacked it as unreasonable. Since plaintiff attorneys are known for being overzealous, this supports our recommendations for defense counsel to offer a counter anchor in response to plaintiffs' requests. Most importantly, jurors were actually *more* likely to render a complete defense verdict when the defendant offered a counter anchor, suggesting that not only do most jurors not view the counteroffer as a concession of liability, but it may even enhance the defense's credibility.

For those who still aren't convinced, unpublished studies had similar results with respect to liability. In 2006, another researcher provided mock jurors with written case scenarios with four different defense strategies: no counter-anchor, or counter-anchors of $0, $80,000, or $200,000. Participants were asked to determine both liability and damages in what turned out to be a close case (i.e.,

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overall, 52.7% returned a verdict for the plaintiff). While the various defense strategies had little influence on the average damage awards (likely because the damages request was relatively low to begin with), the counter-anchors nevertheless did not influence the percentage of jurors who found the defendant liable. (Decker, T.L. *Effects of Counter-Anchoring Damages During Closing Argument* (2006) (unpublished Ph.D. dissertation, University of Kansas).)

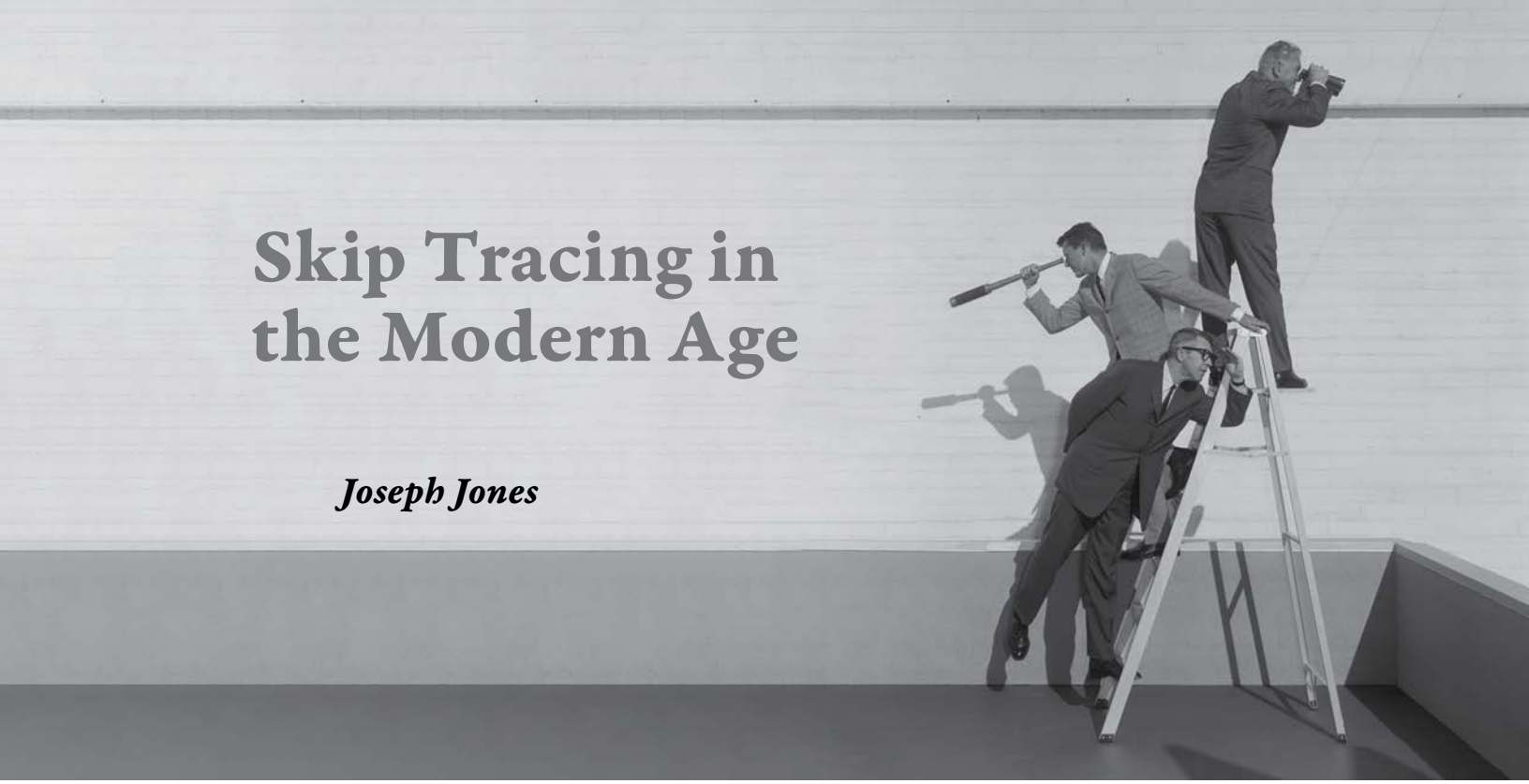
In a more robust study using actual jurors, another researcher manipulated: (1) the strength of the defense case and (2) the amount of the defendant's recommended damages (no anchor, $500, $14,000, or $21,000). This 2002 study found that counter anchors significantly reduced overall awards and had no effect on findings of liability when the defendant's case was weak or moderately strong. (Ellis, L. *Defense Recommendations, Verdicts and Awards: Don't find my client liable, but if you do....* (2002) (unpublished Ph.D. dissertation, University of Illinois).) However, when the defense case was very strong, more jurors found the defendant liable when the defense offered a counter anchor than when it did not. The takeaway from this study is that in *most* cases, providing a counter anchor will not impede your chances of obtaining a defense verdict and will help reduce damages in the event of a plaintiff verdict. However, a counter anchor may be ill-advised when the defense case is particularly strong. As a practical matter, a counter anchor may also be problematic with an unsophisticated jury whose members are unable to comprehend the notion of alternative arguments.

Case-by-Case

If there's one thing we can all agree upon, it's that there's no one-size-fits-all approach to litigating a case, and what's good for the goose isn't necessarily good for the gander. The only way to be sure that an approach is the right one for your case is to test it – either at trial, or with jury research. We think the latter will cause fewer ulcers. In fact, Litigation Insights frequently conducts jury research on specific cases using manipulations much like those employed by empirical researchers. Presenting your case to mock jurors, using varied approaches to arguing damages, is the best way to determine the most effective approach for trial. To speak to an experienced research consultant about how creative jury research designs can be used to test trial strategies in your case, visit *www.litigaitoninsights.com* or e-mail *cmarinakis@litigationinsights.com*.

Christina Marinakis, J.D., Psy.D.

Dr. Marinakis has 18 years of jury research, study, and applied practice in law and psychology. With homes in Los Angeles and Baltimore, Christina has assisted trial counsel during jury selection and with daily trial monitoring in venues across the country, helping clients obtain favorable outcomes in notoriously difficult jurisdictions including New York, Baltimore, Miami, St. Louis, Los Angeles, Philadelphia, and San Francisco.



Skip Tracing in the Modern Age

Joseph Jones

By virtue of working in the legal field, most readers of this article will regularly have the need to track somebody down. Whether it's a defendant, a witness, or a long-lost heir to an estate, the ability to locate an individual *(aka skip trace)* is a need that almost every legal professional has. Whether this is the sort of thing that is regularly handled in-house, or if your firm regularly contracts with a Private Investigation firm to conduct skip traces, it behooves everyone in the legal field to at least have a working knowledge of the latest techniques available for skip tracing. In this article, we'll address some standard techniques for those new to skip tracing, and address some of their most common pitfalls. Additionally, this article will address some advanced techniques, that most readers probably haven't heard of and/or utilized before.

Standard Techniques

Databases

Databases are great. They have absolutely revolutionized the skip tracing industry, and are a must have tool in any skip tracing toolbox. Databases will often search information from billions of public and private records and combine them into one spot. Records will typically include information from phone companies, credit bureaus, property records, utility records, along with numerous other sources. There have been many debates about which databases are the "best," but the truth is that all databases have their own sets of strengths and weaknesses. As a personal preference, the author does not believe that Westlaw or LexisNexis *(both of which are very common in law firms)* are among the more effective tools for skip-tracing; however, they are often better than the free resources available online, and may be necessary to use, if that is all the firm has available. In the author's opinion, tools such as Clear, Tracers, and TLO are typically much better at finding current address information.

While databases are great, the most common mistake among legal professionals is the tendency to rely too much on them. It's important to recognize that computers are the ones pushing out the information, and they do not have the same ability to interpret data in the same way that a live person does. Databases can sometimes provide outdated or inaccurate information, and so it's important to try and verify the information located from a database with as many other sources as possible, before acting on it.

Property Records

Any real property bought or sold in the United States must be documented at the recorder's office in the county where the property is located. These records are oftentimes free or low cost to view, and frequently can be accessed online. These records typically contain very useful information including the name of the owner, when they bought or sold the property, an indication if the property is listed as being owner occupied or not, and the address where the tax bill is being sent to. This is all invaluable information to the skip tracer, especially when dealing with a subject who owns multiple properties, because often times, the address where the tax bills are being sent, will be a valid address.

United States Postal Service

Locating and/or confirming an address through the United States Postal Service is a great way to establish diligence while skip tracing, and can be extremely helpful when the person being searched for is being evasive. To do this, one needs to complete and submit a "Request for Change of Address or Boxholder Information" form to the USPS office that services the address in question. The post office is required to complete the form and indicate if a person is currently receiving mail at the address in question, if they are having their mail forwarded, or if they are not currently receiving mail at the

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Skip Tracing – continued from page 23

address provided. In addition, that same form can be used to obtain the physical address that the post office has on file for a P.O. boxholder.

Advanced Techniques

Social Media
In this day and age, many people put their entire lives on their internet; it's actually quite ridiculous at times, but it can be a gold mine for skip tracers. An entire article could be written on this subject alone, especially since Social Media and Cyber Investigations are the author's primary area of expertise; however, the following main points will provide some high-level guidance:

1) Never use personal accounts to investigate or track someone down; it opens the user up to significant risk and can be traced back to the person conducting the investigation. Individuals conducting these sorts of investigations should always use a blank account.

2) Don't look only at Facebook. Yes, Facebook is still relevant, but other platforms such as Instagram, Twitter, Snapchat, TikTok etc. are likely to have useful information as well.
3) Locate and review the accounts of the subject's friends/family for relevant information.
4) Social media can be a black hole, so make sure that the time spent investigating on social media is not disproportionate to the total time available to work on the locate.

License Plate Recognition Tracking
In California and many other states, attorneys and private investigators who go through a vetting process can obtain direct access to various types of DMV records, including obtaining license plate information. Armed with a current license plate number for the subject, one can potentially identify the location of the subject's vehicle through a technology called License Plate Recognition (LPR).

The concept of LPR is simple, there are thousands of vehicles on the road (typically tow trucks) that have cameras mounted to them which scan every license plate they see; creating an image tagged with the date time and geolocation, which is then fed into a database. With the proper credentials, attorneys and investigators can access this information to see when and where a vehicle has been spotted. It doesn't always work, but when it does, it works wonderfully and can help establish not only a residence, but also

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Skip Tracing – continued from page 24

a work location, a gym, favorite coffee shops, etc. The options are almost limitless.

Digital Honeypots/ Tripwires
Those operating online "anonymously" behind fake social media accounts or burner e-mail addresses, often operate under the belief that their true identity and location cannot be identified, and commit any number of bad acts with little concern of getting caught. While the more sophisticated bad actors can potentially avoid detection, frequently with the right knowledge, skills, and circumstances, these individuals can be identified, located and brought to justice.

It is usually a complicated process; but it starts first with identifying the Internet Protocol address (IP) for the individual to be located. Think of the IP address as the return address put on an envelope, except most users don't even know there is one. If the person to be located is sending e-mails through their own e-mail server (i.e. boscolegal.org) it may be as "simple" as pulling the IP right out of the e-mail header. If they are using a public service (i.e. Gmail) or sending messages through social media, it will usually require a honeypot/tripwire. These digital tools allow the investigator to imbed links into images, websites, or links that capture the subject's IP address when they view it.

Once the IP is obtained, the Internet Service Provider (ISP) who the IP is registered to (i.e. Charter) can be identified using a variety of available tools. From there, a subpoena can be issued to the ISP which can produce the subscriber information and/or the physical location that the IP belongs to. Usually, there are one or more complications that arise with these kinds of locates; however, for those determined to succeed, it is often possible.

Other Ideas
Most individuals who need to be located in conjunction with legal proceedings will be able to be located utilizing the aforementioned "standard" tools and techniques. There are, however, a smaller percentage of individuals, who for various reasons cannot be located easily. In this day and age, almost anyone can be located, the question usually just becomes "Is it worth it?" In addition to the advanced techniques outlined above, a few additional ideas to consider for locating people could include:

1) Using financial transactions to trace frequented businesses & setting up surveillance.
2) Locating/contacting friends/family to "turn up the heat."
3) Tracing utility accounts (even if the bill goes to a P.O. Box, the utility company has to know what address to service).
4) Contact the subject under pretense, to get them to disclose their location.

**Note some of the tactics mentioned above may or may not be practical and/or legally permissible, depending on the scenario in which they are being utilized for, and the rules may vary by jurisdiction. Please consult with an attorney for any questions about the legalities in your particular situation.*

Conclusion
While the objectives and reasons for skip-tracing have changed little over the last decade, the methods to do so effectively have. Even if you are not the one conducting the locates, by having a working knowledge of how skip-tracing is done, it will help you to be able to speak intelligently with your clients about what the options are, better set expectations about the outcomes and know alternative methods for accomplishing your objectives.

Joseph Jones

Joseph Jones is a licensed Private Investigator and the Vice President of Bosco Legal Services, Inc. Joseph is a Certified Social Media Intelligence Expert, has degrees in Social & Behavior Sciences and Psychology, and holds multiple certifications in Open Source and Cyber Intelligence. He is a court recognized expert and has received specialized training from the military, various law enforcement agencies, and the nation's top private intelligence firms, and has also provided training to the same. When he's not tracking down bad guys or helping law firms and insurance companies uncover the truth, he enjoys spending time with his beautiful wife and four active children.

"Nuclear Verdicts: Defending Justice For All" by Robert F. Tyson, Jr.

Ninos Saroukhanioff

This book, "**Nuclear Verdicts: Defending Justice for All**," was recommended to me by my dear friend, Steven Fleischman of Horvitiz & Levy when we were discussing a seminar that Steven was going to be presenting with, among others, the book's author, Robert Tyson. For those of you that may not know, a "nuclear verdict" is generally considered to be more than $10 million or a verdict that ends up being substantially more than what the lawyers or their clients had expected. Years ago, we also used to call these types of verdicts – the "runaway jury."

In any event, as a trial lawyer at a firm where we defend several large trucking entities and corporations, the thought of a "nuclear verdict" is very real and extremely scary to my partners and me. I was also familiar with Mr. Tyson who I have watched from afar as his firm, Tyson & Mendes, has continued growing as well as the many successful jury verdicts won by Mr. Tyson himself. (As discussed in the book, Mr. Tyson is the defense lawyer who tried and then successfully argued the *Howell v. Hamilton Meats* case. Yes, the Howell decision is his.)

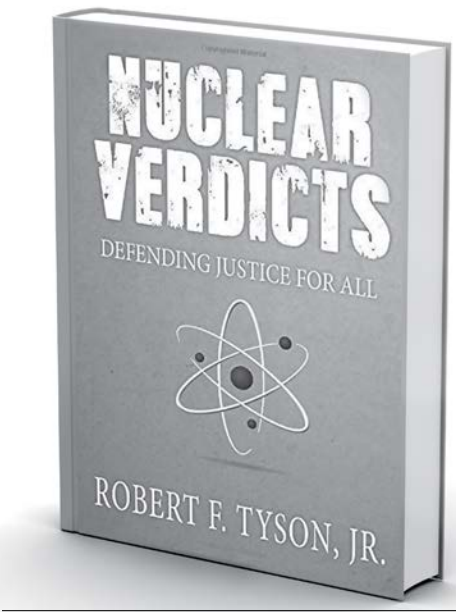
So, I immediately went on-line to Amazon, hit "Buy" and got the book delivered by the next day. (This was pre-coronavirus, so I also bought a package of toilet paper and paper towels which were delivered the next day. Imagine that concept, right?) As soon as I got the book, I read it from cover to cover. I then posted a quick message on the ASCDC ListServ about the book and recommending that everyone on the defense bar get a copy for themselves, their colleagues and most importantly, for their clients. I have since read the book two more times.

As Mr. Tyson discusses in the book, and we are all probably aware, over the past ten to twelve years we have seen a dramatic rise in these "nuclear verdicts." Many articles have been written discussing the various reasons for the rise such as "corporate mistrust," or "litigation financing," or "social pessimism and jury sentiment favoring plaintiffs." But, as discussed by Mr. Tyson, the number one reason for this growing trend is anger. When the jurors are made to feel anger, that is when they are most likely to award plaintiff a "nuclear verdict." Anger can be fueled in many different ways and certainly the plaintiff's bar is well-equipped to develop anger in the mind of a jury with strategies like the "Reptile," or the "Trojan Horse."

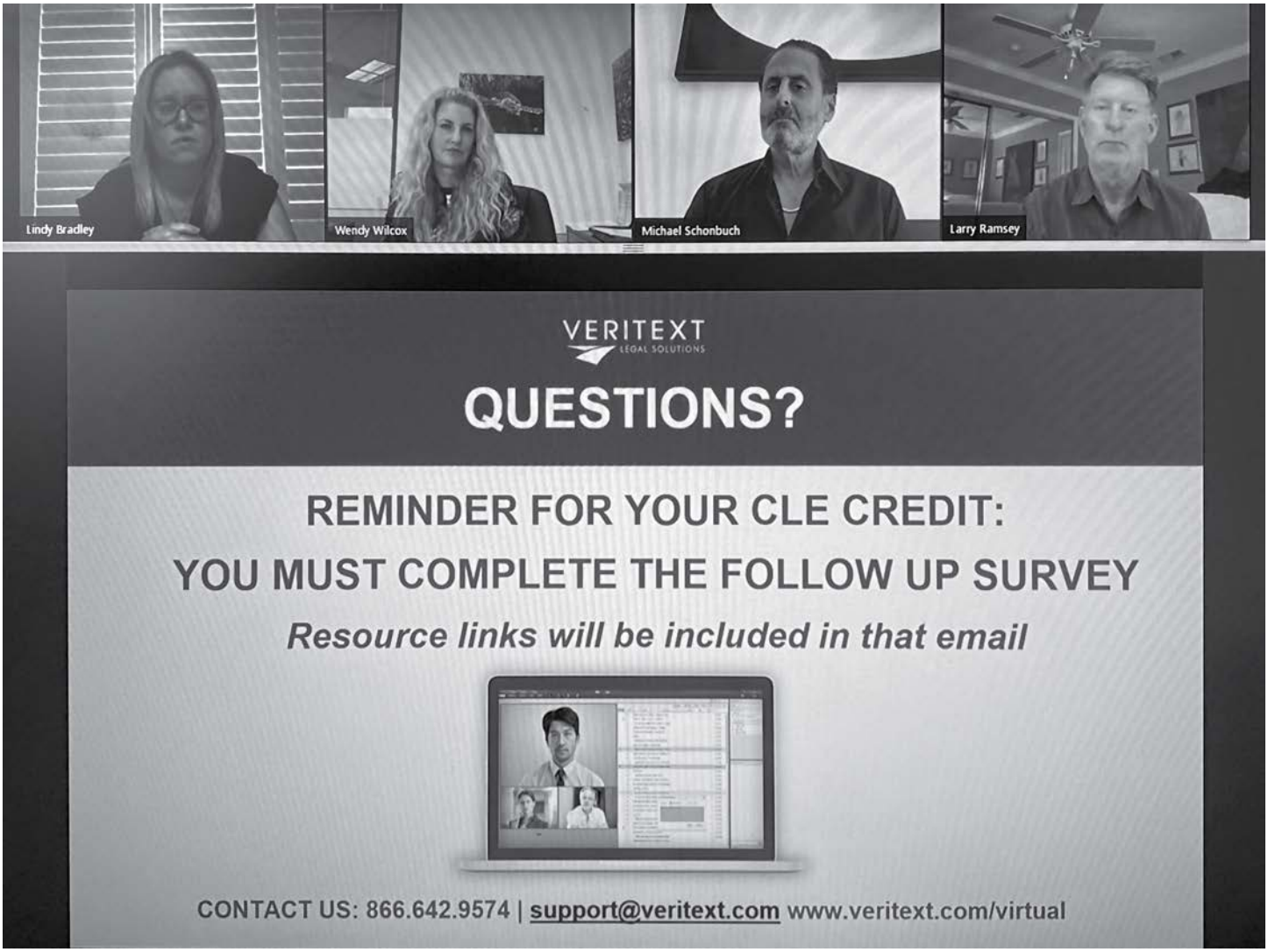
In the face of the above, Mr. Tyson has written what I believe may be the first ever book strictly for the defense providing strategies and techniques on how to avoid making a jury angry and avoiding a "nuclear verdict." The book is very well-written. It provides lots of practical and useful suggestions and recommendations. It also provides real-life examples of cases tried by Mr. Tyson where, in spite of the facts, he was able to avoid a "nuclear verdict" on behalf of his clients.

Some of the concepts in the book are very familiar. While others are a bit unorthodox. But, in this day and age, if we, the defense bar, don't look "outside the box" and learn to fight from an "unorthodox stance," then we might as well take a dive because the plaintiff's bar is way, way outside the box in their fighting methods.

Bottom line, as I hope you can tell, I am a huge fan of this book. I would recommend that each and every one of you buy and read this book. Buy a copy for all your colleagues. And, most important of all, buy and send a copy of this book to your clients – corporate counsel, in-house counsel, insurance adjusters, claims handlers, third party administrators, etc. because it is only by getting our clients to understand what is going on in the real-life world of litigation that we can work together to avoid the "nuclear verdict."



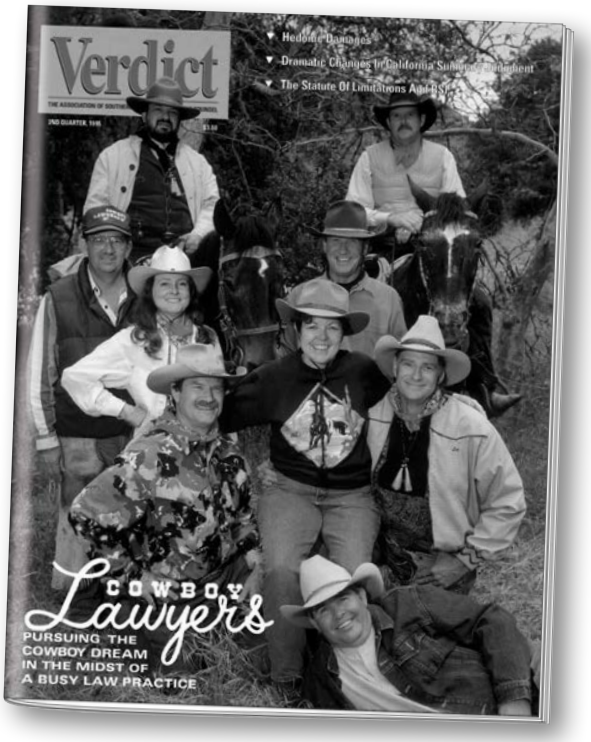
ASCDC Complimentary Webinars



ASCDC has been presenting frequent complimentary webinars to ASCDC members in 2020, addressing topical substantive and procedural subject areas with accompanying CLE credit.

Webinar Committee members Wendy Wilcox, Lindy Bradley and Bron D'Angelo welcome you to join us on our upcoming webinars.

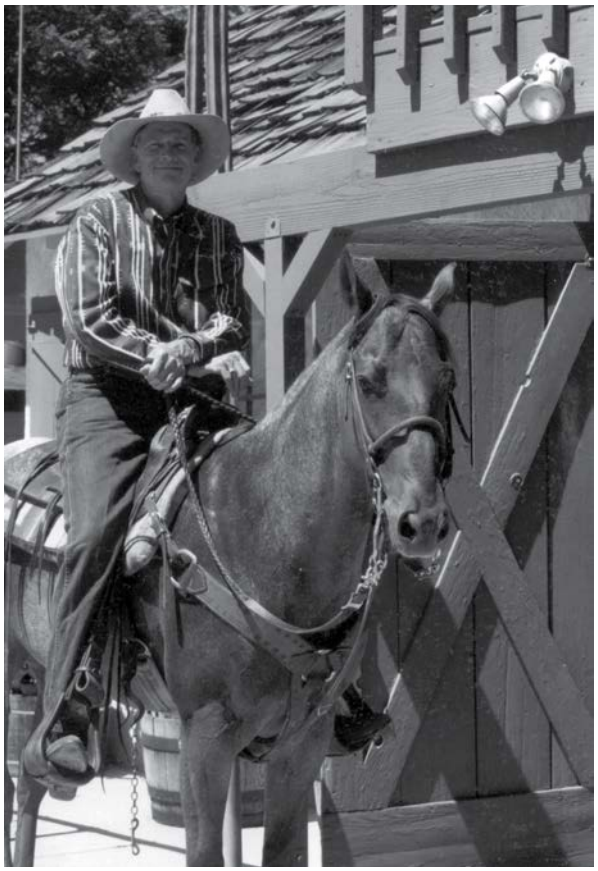
Cowboy Lawyers Association



Jim Nichols

In 1995 *Verdict* Magazine featured the Cowboy Lawyers Association on its cover. I framed that cover and I mist up looking at it because several of those lawyers are gone. Not just out of state, but riding the heavenly range.

The Cowboy Lawyers Association is over 30 years old and thriving. It is purposed to promote among lawyers and judges who enjoy riding horses. Actually it's more than that. It is for those practitioners who love sitting around campfires, two stepping at a party and wearing boots. The key is a love of the West and western things.



Jim Nichols and Chili

☞ **Does one have to ride a horse to join?**
Yes, there are mandatory qualifying rides.

☞ **Do you have to own a horse to join?**
No, the Association has a Stock Contractor who will provide and take care of the horse for a fee. Sweet! Show-up, climb on, ride, then hand the reins over when returning to camp.

☞ **Is sponsorship required?**
Yes. We'll get you a sponsor if you are cut from cowboy cloth.

☞ **Are there judges in the association?**
Yes, since the beginning. One of the founding members was an L.A. Superior Court judge.

☞ **Do the lawyers discuss their cases and law at the gatherings?**
No. The Cowboy Lawyers events are a break from one's practice. Fun Time!

☞ **Where do the lawyers ride?**
Mostly ranches, state and national parks in Southern California. All beautiful venues.

☞ **How many rides per year?**
Usually four. There are also backyard parties and a fabulous President's Dinner Dance every year.

So there you have it. Sign up! Just get 'er done!

amicus committee report

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

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

Don't miss these recent amicus *VICTORIES!*

The Amicus Committee successfully sought pulication of the following cases:

1 ***Mikhaeilpoor v. BMW of North America, LLC. et al.*** (Apr. 1, 2020, B293987) __ Cal.App.5th __ [2020 WL 1973877]: Favorable attorney's fees opinion from the Court of Appeal in Los Angeles. Plaintiff was awarded $35,805.08 in damages in a Song-Beverly action. Plaintiff's counsel then moved for $344,639 in attorney's fees. The trial court awarded $95,900 in fees and plaintiff appealed. The Court of Appeal affirmed making several holdings that are helpful to the defense bar regarding overbilling by the plaintiff's attorney, including seeking to recover for 10 attorneys working on the file. Fred Cohen, John Taylor and Steven Fleischman from Horvitz & Levy submitted a publication request which was granted.

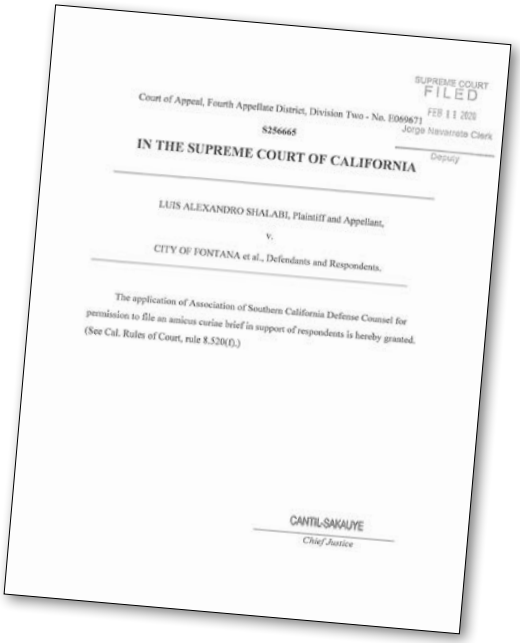
2 ***Waller v. FCA US*** (Apr. 16, 2020, B292524): Favorable opinion from the Court of Appeal in Los Angeles affirming a defense verdict in a Song-Beverly case. The court affirmed the exclusion of plaintiff's expert witness as speculative and lacking foundation under *Sargon*. Lisa Perrochet, John Taylor and Shane McKenzie from Horvitz & Levy submitted the publication request which was granted.

ASCDC's Amicus Committee recently participated as *amicus curiae* in the following case:

1 ***Pacific Pioneer Ins. Co. v. Superior Court*** (2020) 44 Cal.App.5th 890: Harry Chamberlain from Buchalter submitted an amicus letter to the Court of Appeal on behalf of ASCDC supporting the defendant's petition, which was accepted for filing as a brief on the merits. The Court of Appeal held, in an issue of first impression, that an insured's failure to appeal in a small claims action does not annul the right of the insurer to appeal under Code of Civil Procedure section 116.710(c).

2 ***Berroteran v. Superior Court*** (2019) 41 Cal.App.5th 518, review granted Feb. 11, 2020, S259522: The Court of Appeal held that former deposition testimony of unavailable witnesses was admissible under the prior testimony hearsay exception. (Evid. Code, § 1291.) In doing so, the court created a conflict with *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543, which held that parties generally don't have a motive to examine friendly witnesses at deposition and, thus, deposition testimony was generally inadmissible in another case. J. Alan Warfield and David Schultz from Polsinelli LLP submitted a letter supporting the defendant's petition for review, which was granted. The case remains pending in the California Supreme Court.

3 ***LAOSD Asbestos Cases, JCCP 4674***: Amicus letter brief in support of proposed modifications to asbestos litigation General Orders, which have been requested by the defense bar to impose early disclosures by plaintiffs to remedy the prejudice caused by the deposition time limits in newly enacted Code of Civil Procedure section 2025.295. J. Alan Warfield and David Schultz from Polsinelli, and Don Willenburg from the North submitted the amicus letter brief to the Asbestos Coordination Judges.



SUPREME COURT
FILED
FEB 11 2020
Jorge Navarrete Clerk
Deputy

Court of Appeal, Fourth Appellate District, Division Two - No. E069671

S256665

IN THE SUPREME COURT OF CALIFORNIA

LUIS ALEXANDRO SHALABI, Plaintiff and Appellant,

v.

CITY OF FONTANA et al., Defendants and Respondents.

The application of Association of Southern California Defense Counsel for permission to file an amicus curiae brief in support of respondents is hereby granted. (See Cal. Rules of Court, rule 8.520(f).)

CANTIL-SAKAUYE
Chief Justice

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

1 ***Jarman v. HCR Manorcare, Inc.*** (2017) 9 Cal.App.5th 807, review granted June 28, 2017, 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 submitted an amicus letter in support of the defendant's

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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 May 16, 2018, 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 ***B.(B.) v. County of Los Angeles*** (2018) 25 Cal.App.5th 115, review granted Oct. 10, 2018, 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 and the case remains pending.

4 ***Conservatorship of O.B.*** (2019) 32 Cal.App.5th 626, review granted May 1, 2019, 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 participation and Bob Olson has submitted an amicus brief on the merits.

5 ***Burch v. Certainteed Corp.*** (2019) 34 Cal.App.5th 341, review granted and held July 10, 2019, 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.*

6 ***Shalabi v. City of Fontana*** (2019) 35 Cal.App.5th 639, review granted Aug. 14, 2019, S256665: The California Supreme Court has granted review to address this issue: "Code of Civil Procedure section 12 provides: 'The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded.' In cases where the statute of limitations is tolled, is the first day after tolling ends included or excluded in calculating whether an action is timely filed? (See *Ganahl v. Soher* (1884) 2 Cal.Unrep. 415.)" The Board previously approved amicus support. Steven Fleischman and Scott Dixler from Horvitz & Levy submitted an amicus brief on the merits and the case remains pending.

7 ***Fera v. Loews*** (2019) 40 Cal.App.5th 1239, review granted Jan. 22, 2020, S259172: In wage and hour class action, the Court of Appeal (2nd Dist., Div. 3), 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 of Lathrop GPM submitted an amicus brief on behalf of ASCDC. Plaintiff's petition for review was granted and the matter remains pending before the California Supreme Court.

8 ***Oto v. Kho*** (2019) 8 Cal.5th 111, cert. filed Jan. 15, 2020, No. 19-875: Cert. petition pending at the United States Supreme Court addressing the enforceability of arbitration provisions under California law and the extent to which California law is preempted by the Federal Arbitration Act. Ben Shatz from Manatt Phelps signed onto an amicus brief on behalf of ASCDC which was submitted by California New Car Dealers Association. The court has requested an answer and the petition remains pending.

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Amicus Committee Report – continued from page 32

9 ***Summer J. v. United States Baseball Federation*** (2020) 45 Cal. App.5th 261: Request for amicus support from John Taylor at Horvitz & Levy. The Court of Appeal (2/7) held in a published opinion that a plaintiff could state a claim against the operator of a baseball game for being injured by a foul ball. The Court of Appeal's ruling creates a conflict with the "baseball rule," originally created by Justice Cardozo, under which fans assume the risk of being injured by a foul ball. The Amicus Committee overwhelmingly voted in favor of supporting the defendant's petition for review which the Executive Committee approved. Ted Xanders and Bob Olson from Greines, Martin, Stein & Richland submitted an amicus letter supporting the defendant's petition for review, which 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 factors, 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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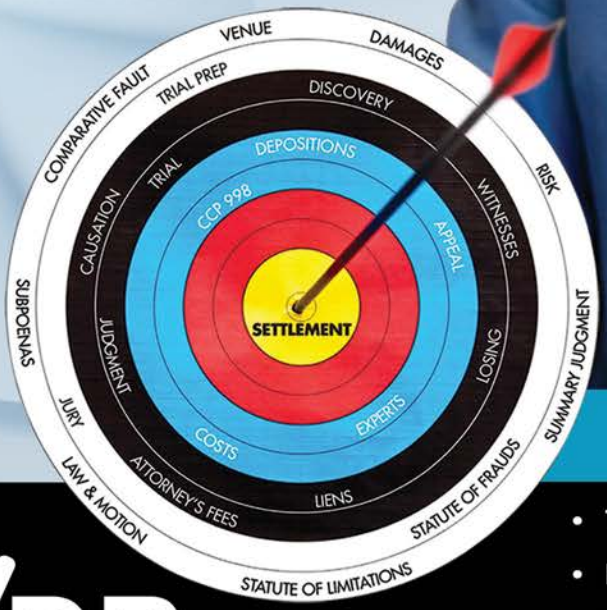

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