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Volume 2 • 2020

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Lisa Perrochet

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president's message

Lawrence R. Ramsey
ASCDC 2020 President

2020 and Beyond

I write this message with the hope that all is well with you, both personally and professionally, as we complete our navigation of the unique year of 2020.

As with most industries, we in the legal profession have accepted the challenge of functioning remotely as an alternative to personal contact. Skype, Zoom, WebEx, RingCentral, Microsoft Teams, and social media platforms have allowed us to stay connected with clients, courts, colleagues, and each other. More and more, we are switching on our cameras and "seeing" each other during regular calls and meetings both internally and externally. More and more, clients, businesses, and the courts have urged us to further pursue this path, with the potential of long-lasting changes to the practice of law.

As the prevalence of virtual meetings and hearings continues to grow, we in the legal profession will need to master our communication technologies. For our members that have grown up in this information technology age, what a head start you have! For those of us old school lawyers who tried cases with felt pens and butcher paper, adapting to new technologies is no longer a matter of choice, but instead a necessity that we take the next step in our own professional development.

I am proud that ASCDC has been able to provide value to our members in 2020. Significant areas are as follows:

California Defense Counsel (CDC): Jointly supported by ASCDC and ADC (our companion organization from the north), CDC has been very active during this tumultuous year. Led by our lobbyist Mike Belote and members of the CDC Board, and through interaction with the CA Judicial Council, the governor's office, and the CA legislature, we have expressed viewpoints beneficial to our membership and client base. This has led to even-handed Emergency Orders enacted to address these pandemic times and acknowledgement of the defense lawyers' perspective amidst the whirlwind of senate and assembly bills in Sacramento. Of particular benefit was excluding reference to civil trials from new voir dire requirements pursuant to AB 3070.

***Amicus* Committee**: Our *Amicus* Committee has submitted numerous amicus briefs to the CA Appellate Courts and Supreme Court. We have had particular success in promoting the publication of well-reasoned appellate decisions that will be valuable for citation in future cases, with ten publication requests granted so far in 2020. These are joined by defense wins in other decisions in the Supreme Court and appellate court. Led by Steve Fleischman and Ted Xanders and supported by committee members comprised of many of the best legal minds in our organization, our amicus committee activities have never been more robust.

Webinar Presentations: ASCDC has maintained an aggressive schedule of webinar presentations on topics of interest to our members. Our Webinar Committee Chairs, Lindy Bradley, Wendy Wilcox, and Bron D'Angelo, supported by a number of ASCDC members and in coordination with other professionals associated with the legal community, have continually provided excellent educational opportunities to our members. We have maintained our commitment in 2020 that attendance at these webinars will be complimentary to our members.

Bench-Bar Relations: ASCDC members have served on working groups with other bar leaders to assist Southern California counties during the pandemic. ASCDC has also co-sponsored many bench-bar webinars to help educate the legal profession on the ever-changing legal horizon.

Listserv: Our listserv has been a source of information for our members regarding orders enacted by our courts, as well as more case-specific questions. It has also been a sounding board for encouragement of civility in the legal profession.

***Verdict* Magazine**: *Verdict* Magazine remains a source of information, education and entertainment for ASCDC members and others in the legal community. Many thanks to our editor, Lisa Perrochet!

So, what is missing in 2020? The ability to gather. We miss personal interaction with our judiciary, our clients, opposing counsel (at least for the most part!), and each other. I am confident this will change in 2021 as our opportunities to be social will increase.

I want to thank all of the Committee Chairs and Board Members of ASCDC for their efforts this year. Particular thanks to Executive Committee members: President-Elect Diana Lytel, Vice President Marta Alcumbrac, Secretary-Treasurer Ninos Saroukhanioff, and Past-President Pete Doody, as well as ASCDC Executive Director Jennifer Blevins.

Particular thanks to our editor of over twenty years, Lisa Perrochet, whom we are proud to feature (as a surprise to her) on the cover of this edition! Much deserved.

All the Best!

Lawrence Ramsey

Legislative Session Winds to a (Merciful) Close

EDITOR'S NOTE: This column was written prior to the November general elections, where several national and state races remain in doubt. As of now, it appears that Democrats will pick up three or four seats in the state Senate, creating a dominant majority of 32-8 or even 33-7 over Republicans. Republicans actually picked up one seat in the Assembly, leaving Democrats with a majority of 60 Democrats, 18 Republicans and 1 independent. 2021 will be a busy year for CDC as all three branches of government confront the continuing COVID challenge. We continue to believe that taxation will be a hot issue next year.

Michael D. Belote
Legislative Advocate
California Defense Counsel

No segment of society, public or private, could possibly be unaffected by COVID-19. Knowing that every ASCDC member is dealing with the vicissitudes of local courts attempting to navigate the pandemic, the California Legislature has been impacted as well, in very fundamental ways. For most participants in the Sacramento process, the constitutionally-mandated adjournment of the 2019-2020 session on August 31 brought a most welcome end to the proceedings.

The midnight, August 31 adjournment could not be extended by the legislature, even for one minute. There was a time that the legislature would literally stop the clocks in each chamber prior to midnight, pretending that the witching hour had not arrived, but in recent years the deadline has been observed scrupulously. Additionally, a ballot proposition several years ago required that all bills be "in print" for 72 hours prior to final enactment, in an attempt to prevent last minute hijinks at the end of sessions. Still, bills are amended suddenly in the final week of session in unexpected ways necessitating great vigilance.

The legislature was forced to recess for nearly three months of this year, and to operate in a virtually empty Capitol, as the vast majority of legislative staff have been working from home since March. Public participation in hearings has been facilitated by giant conference calls, but this has proven far more challenging than remote appearances in courts because the legislature literally has thousands of people attempting to call in at the same time.

Infections among legislators also required the Assembly and Senate to experiment with proxy and remote voting, although it is unclear whether this is constitutionally permissible. A positive COVID test by one Senator exposed nearly the entire Senate Republican Caucus, so 10 of the 11 Republican Senators had to quarantine, voting from their homes. It does not appear that any bills were passed that needed remote votes to obtain the requisite majorities, so legal challenges are unlikely.

One manifestation of the stresses on the legislative process was a dramatically smaller number of new laws enacted. In a typical year, the legislature forwards perhaps 1200-1400 bills to the governor for signature, and approximately 1000 bills are ultimately signed into law. This year senators more or less tried to limit bills to those which are COVID-critical; when the governor completed his obligation to sign or veto bills at the end of September, the total number of new laws was fewer than 400.

The legislative process was quite significantly impacted by the George Floyd tragedy and Black Lives Matter movement. In addition to bills dealing with police misconduct and disproportionate sentencing, the Legislature grappled with AB 3070, enacting very fundamental changes to peremptory challenges. The bill is modeled after a Washington State rule of court, which makes a variety of peremptory challenge bases presumptively invalid. Because the underlying arguments for the reform were almost completely related to criminal proceedings, and because approximately 99% of the reported appellate cases relating to *Batson-Wheeler* challenges are criminal, CDC joined with the Consumer Attorneys of California in requesting that civil cases be excluded from the bill.

On July 28, AB 3070 was amended to exclude civil cases. Later, the exclusion was made subject to a January 1, 2026 sunset clause, meaning that if nothing changes in the ensuing five years, civil cases would be subject to the new provisions in 2026. Of course, five years is a very long time in legislative terms, so there will be sufficient opportunity to revisit the issue as appropriate.

Other civil procedure issues on which CDC participated include remote depositions, e-service of CCP notices, authority to execute settlement agreements, extensions of sunsets on meet and confer requirements, and more. We also were involved in an important measure clarifying the authority of the Chief Justice of California to make orders during emergencies.

Following the November general elections, the new legislature will be sworn into office to begin the 2021-2022 session on Monday, December 7. Given the effects of the pandemic on governmental revenues, the watchword for 2021 will be ... taxes. We expect to be involved with a robust discussion on extending sales taxes to services.

Here's to never having a year like 2020 again!

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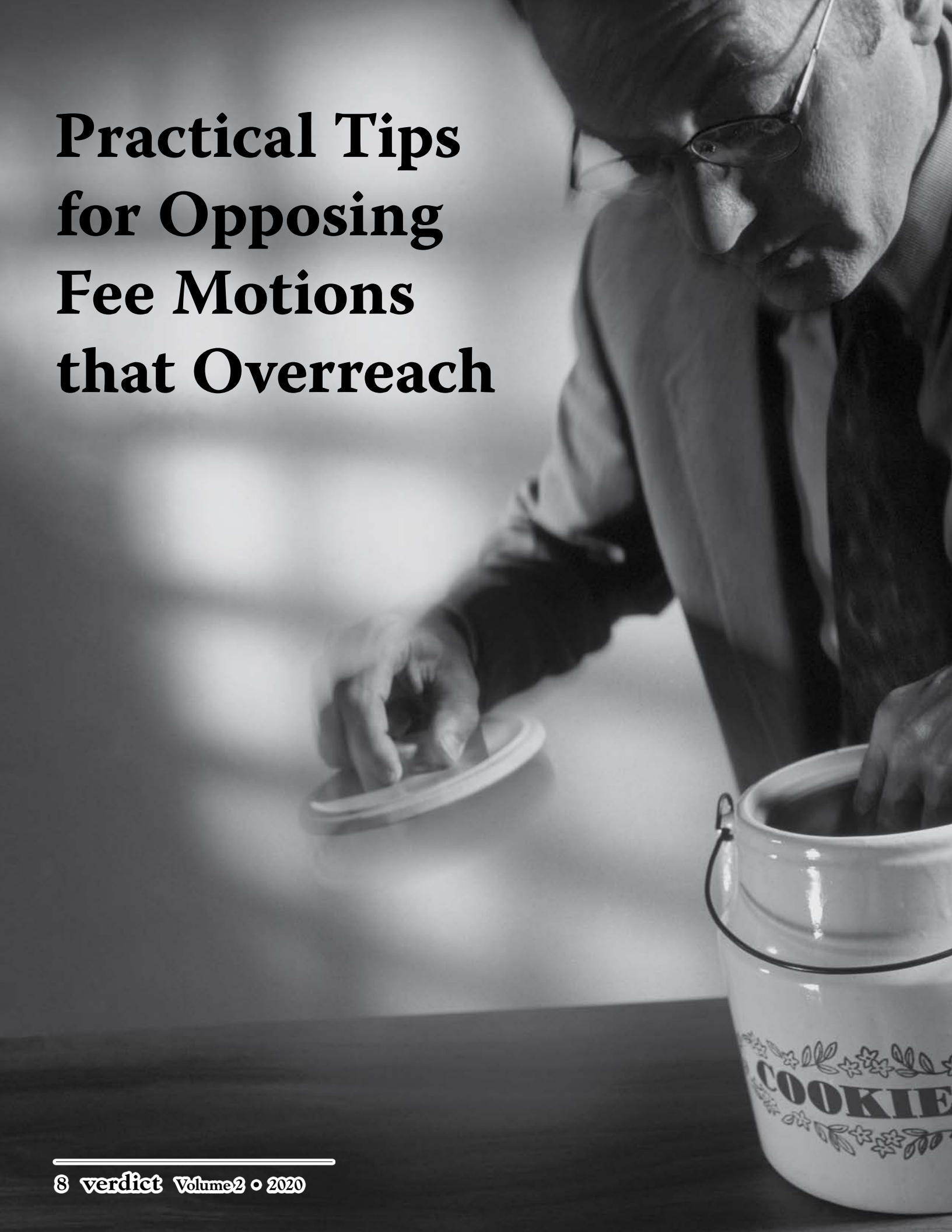
Practical Tips for Opposing Fee Motions that Overreach



Michael Chung

Opposing fee motions in cases where the prevailing plaintiff is entitled to statutory or contractual fees can be an arduous and complicated endeavor. Having just lost or settled the case, defense counsel is then tasked with opposing another attorney's fees request that can surpass the judgment or settlement amount. In many cases, the best course is to ask for the other side's fee calculations and supporting documents, and then seek to negotiate a reasonable resolution. If the other side submits a reasonable fee statement that makes sense for the case, and assuming there are no disputes about who is the prevailing party, litigating the fee dispute only adds to the other side's recovery.

However, where the law firm seeking to recover fees has overreached, not just in hours, but also rates and compensability of certain tasks, defense counsel must step up to the task of opposing the claim. A challenge to the credibility of opposing counsel might be called for. "The time spent on the work done is excessive; counsel used forms and could not reasonably have taken the amount of time billed." "The time has been block-billed; there is no way for the court to determine the reasonableness of the time spent for each task." "The time spent was on tasks for which no fees are recoverable." These arguments and others challenging the declarations and submitted itemized billing must be made in an opposition that is fully supported by legal authority and competent evidence.

This article is intended to provide some practical tips on how to efficiently seek to resolve or oppose a fee motion where it is conceded the other side is the prevailing party, taking into account recent developments.

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I. The Starting Point – Actual Billing Records

While there is California case law holding that an attorney declaration alone can be sufficient to support an attorney fee award (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254), law firm timekeeping software has become so widespread that it is rare for fee motions not to include itemized time entries broken down by timekeeper, work description, time spent and hourly rate. Depending on how the information is formatted, it may be possible to confirm that the time entries were likely entered contemporaneously.

On the other hand, if the entries appear in a Microsoft Excel spreadsheet or Word chart, the format may conceal that the time entries were reconstructed, perhaps long after the work was (allegedly) performed. Of course, it is widely known by defense counsel – even if not obvious to some trial judges – that law firms primarily litigating cases on a contingency fee basis with the prospect for a statutory fee award often reconstruct their time entries at the end of the case if they win, instead of going to the trouble in every case of entering them contemporaneously.

Sometimes, courts do recognize this issue, and the potential it creates for undue inflation of fee claims. In *Degrinis v. Ford Motor Co.*, the Court admonished a well-known lemon law firm (O'Connor Mikhov – now renamed Knight Law Group or KLG) and associated counsel, for improper billing practices as follows:

- "A particularly glaring example of questionable billing is demonstrated by the entry on June 4, 2014 by attorney Kelly Bond of five hours ($1,750) to draft plaintiff's trial brief. Bryan Altman also billed an unknown portion of 4.5 hours the following day to revise the trial brief. The trial brief filed on June 9 was a two page document consisting of three sentences. It is these types of billing entries which, together with other billing entries such as those mentioned above, call into question the validity of the total amounts claimed for attorney work in this case."
- "Attorney Bryan Altman billed 11 hours, a total of $7,150, on the last day of trial for 'Travel to court; await verdict; respond to jury questions; consult with co-counsel re the same; return to Los Angeles.' As the jury verdict was read in the morning, and court adjourned at 10:30 a.m., the court does not find the time spent on these tasks to have been reasonably incurred."
- "The court also notes that for the first three days of trial, attorney Ungs billed 21.1, 19.4 hours and 20. 9 hours, respectively. If believed, Ms. Ungs was thus left with only 10. 6 hours over a 72-hour period for such other usual, non-work dally activities as sleeping and eating. This is simply not credible to the court and, from the court's observation, Ms. Ungs did not appear at trial as a sleep-deprived person who had experienced only 10 hours of sleep or less over a three day period. The court concludes her billing entries must be inflated."

Upon receipt of the other side's itemized statement, typically in Adobe Acrobat pdf format, one can convert the statement into a Microsoft Excel or other spreadsheet for analysis. This allows time entries to be efficiently grouped for analysis and presentation to the Court on separate worksheet pages. Or a spreadsheet can be provided for all of the entries containing the grounds for objections, the proposed alternative time for challenged entries, and the proposed alternative rates, with the total alternative award summed up.

Some cases may warrant hiring a legal fee auditor who can perform the above analysis and prepare a declaration for the opposition to the fee motion. Not only do such auditors have experience dissecting itemized time keeping records, but they typically have knowledge of the reasonable rates for the community where the case was litigated and the ability to provide opinions in this regard.

Discovery?

Since the decision in *Oak Grove School District v. City Title Insurance Co.* (1963) 217 Cal.App.2d 678, 708-713, courts have recognized the right of discovery in post-judgment proceedings relating to the award of costs and attorneys' fees. Discovery might include, among other things, seeking data on the aggregate hours billed by timekeepers whose time seems unduly exaggerated, to help verify the accuracy of the time records. Discovery might also entail inquiries into the plaintiff's fee agreement with counsel.

In the face of the inevitable objection on privilege grounds, it may be worth pointing out that Evidence Code section 953 makes clear that the " 'holder of the privilege' " to assert any such confidentiality is "the client," not counsel. And courts are well within their rights in checking that the *client* (who often stands to see no benefit whatever from an inflated fee award) is making an *informed* decision to assert the privilege. (See *Lofton v. Wells Fargo Home Mortgage* (2018) 27 Cal.App.5th 1001, 1021 [law firm "was required to show that its clients were 'insisting that [attorney-client privileged] information remain confidential' "; instead, the record was "silent on whether [the firm] sought any such waivers"]; *Willis v. Superior Court* (1980) 112 Cal.App.3d 277, 291 ["not every communication during the attorney-client relationship is deemed matter given in confidence," and because the privilege "tends to suppress otherwise relevant facts, it is construed so that certain species of information communicated to the attorney may nevertheless be subject to disclosure as nonprivileged"; "the nature of the attorney's fee arrangements with his client, in an appropriate case, is not absolutely protected by the ambit of the privilege"].)

II. Basic Arguments

The theme of an opposition to a fee motion can vary. An opposition can and should be somewhat conciliatory, acknowledging that the other side prevailed, attacking only those time entries and hourly rates that are demonstrably improper in light of the big picture facts of both the underlying case and the litigation.

On the other hand, in some cases a more strident tone is appropriate. This is because overreaching in fee motions is against public policy. Where a law firm overreaches and unreasonably inflates its hours, a court

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is empowered to disallow fees altogether. (*Serrano v. Unruh (1982) 32 Cal.3d 621, 635 [*"A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether"]; accord *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 990.)

"Trial courts must carefully review attorney documentation of hours expended; 'padding' in the form of inefficient or duplicative efforts is not subject to compensation." (*Ketchum v. Moses (2001) 24 Cal. 4*th 1122, 1132.) "The evidence should allow the court to consider whether the case was overstaffed, how much time the attorneys spent on particular claims, and whether the hours were reasonably expended." (*Christian Research Inst. V. Alnor* (2008) 165 Cal. App.4th 1315, 1320.)

Moreover, in addition to protecting the defendant from inflated fee claims, courts have an obligation to ensure that lawyers are not unethically seeking excessive amounts that impair their own clients' net recovery, as can happen depending on whether the structure of the attorney's fee agreement fails to offset a statutory recovery against a contingency payment and depending on whether the statutory recovery – even if paid directly to the counsel – will result in a higher tax liability to the plaintiff.

Here are seven issues and things to do when scrutinizing the opposing party's fee entries.

A. Object to the Disputed Fees

As a general rule, the prevailing party has the initial burden of presenting its fee request. *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320. It is then incumbent on the opposing party to object. The objection can and should be asserted in one or more declarations opposing the fee motion, signed by defense counsel and/or the legal auditor expert. Preferably, it is an objection that addresses specific time entries and hourly rates. Once objection to claimed fees and costs is raised, the party seeking fees has the burden of showing that all of the claimed fees were reasonably necessary. (*En Palm, LLC v. Teitler Family Trust* (2008) 162 Cal. App 4th 770, 775.)

Where the award of fees is based upon a fee shifting statute, the language of the particular statute has a bearing on which objections will lie. For example, is the fee shifting mandatory or discretionary with the judge? If it is mandatory, an objection that the fees awarded were in general terms disproportionate to the total amount of the settlement or judgment is, standing alone, not a proper objection. (*Warren v. Kia Motors America, Inc.* (2018) 30 Cal.App.5th 24, 37.) On the other hand, a reduced award might be fully justified by a general observation that an attorney over-litigated a case or submitted a padded bill or that the opposing party has stated valid objections.

(*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 101.)

B. Block Billing

Parties submitting fee motions frequently use block billing to hide non-billable (and therefore non-compensable) tasks and inflate their award. "Block billing occurs when 'a block of time [is assigned] to multiple tasks rather than itemizing the time spent on each task.'" (*Mountjoy v. Bank of America, N.A.* (2016) 245 Cal.App.4th 266, 279 citing *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1010.)

Counsel encountering block billing entries should object to these entries. While not objectionable per se, it increases the risk that a trial court, in the exercise of its discretion, will find that the party seeking fees failed to meet the burden of proving the time spent was reasonably necessary, and discount a fee request. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1325.)

"Block billing presents a particular problem seeking to allocate between reimbursable and unreimbursable fees, and trial courts are granted discretion 'to penalize block billing when the practice prevents them from discerning which tasks are compensable and which are not.'" (*In re Marriage of Nassimi* (2016) 3 Cal.App.5th 667, 695.)

C. Too Many Attorneys

"In evaluating whether the attorney fee request is reasonable, the trial court should consider 'whether the case was overstaffed, how much time the attorneys spent on particular claims, and whether the hours were reasonably expended.'" (*Morris v. Hyundai Motor America* (2019) 41 Cal. App.5th 24, 38, citing *Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 271.)

In *Morris*, the Court of Appeal affirmed the trial court's order reducing plaintiff's attorneys' initial request of $191,688.75 to $73,864.00. The trial court noted that the use of seven attorneys in a simple Song-Beverly warranty case involving a used 2011 Hyundai vehicle was inefficient: "two people at the most is all that is needed and would

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make either the prosecution or the defense of that litigation efficient and productive. Just because attorneys' fees are provided under the Song-Beverly Act doesn't give any counsel carte blanche to put unlimited people on the case doing different things, because every time that somebody new to the file picks the file up in order to do whatever the task is, there's a certain amount of building startup [time]." (*Id.* at 33.)

The Court of Appeal in *Morris* agreed with the trial court's ruling, holding that "it is appropriate for a trial court to reduce a fee award based on its reasonable determination that a routine, non-complex case was overstaffed to a degree that significant inefficiencies and inflated fees resulted." (*Id.* at 39.)

Interestingly, several lemon law attorneys engaged in a concerted amicus campaign to see depublication of the *Morris* opinion. Their briefing did not disclose to the Supreme Court that a number of the attorneys who were nominally from different firms shared the same office space and clients. Fortunately, the California Supreme Court rejected the Plaintiffs' attorneys efforts at depublication.

The *Morris* decision has been cited by both federal and state courts to reduce attorneys' fees awards. In *Watts v. Ford Motor Co.* (2020) PSC 1300795 (Riverside County), the trial court, relying on *Morris*, reduced the requested award of $596,755.33 to $245,586. The trial court noted that "it appears no fewer than 20 attorneys billed on this case, as did several paralegals. This army of billing attorneys is not intended to create efficiency, and in fact in this case resulted in duplicative and unnecessary work—a fact counsel for Plaintiffs acknowledged at the hearing on this motion."

The subsequent appellate decision in *Mikhaeilpoor v. BMW of North America, LLC* (2020) 48 Cal.App.5th 240 expanded on *Morris*. 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, holding that the trial court properly considered factors such as the use of 10 attorneys working on the file.

Such holdings may foster more prompt and fair settlement of cases that otherwise would be driven to court litigation because of the incentive inherent in fee shifting statutes. As one judge explained in early 2019, "lunchroom wisdom" shows that close to half of the cases then on the docket of individual calendar judges in Los Angeles Superior Court's Mosk courthouse involved a fee-shifting statute, with 30-35 percent consisting of employment cases, and another 10 percent being lemon law cases. (Richard Fruin, 2019 Motion Statistics for an Individual Calendar Civil Court (Jan. 29, 2020) Daily Journal, available at *www.dailyjournal.com/articles/356060-2019-motion-statistics-for-an-individual-calendar-civil-court*.)

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D. Vague Entries

Counsel prevailing in statutory actions that provide for the award of attorneys' fees to the prevailing parties often seek reimbursement based on vague entries. These entries should always be challenged as they are an improper way in which the bills are padded.

One example of how vague entries may be reduced occurred in *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, in which the prevailing defendant in an anti-SLAPP motion to strike contended that his counsel worked 638.6 hours on the motion to strike and the ensuing appeal (228.8 hours on the pretrial motion and approximately 410 hours on the appeal) for a total award of over $250,000.00. *Id.* at 1319. The trial court disagreed with the claimed hours and reduced the award to just 71 hours.

The trial court specifically found that "counsel inflated the fee claim with a multitude of time entries devoted to matters other than the motion to strike, thereby undermining the credibility of counsel's other entries." (*Id.* at 1325.) In addition, the trial court found that counsel "compounded the boldness of unauthorized reimbursement requests with vague billing entries." (*Ibid.*) At least 20 entries described the trial-level work for which counsel sought fees as merely "further handling." (*Ibid.*) In addition, more than one-third of the billing entries submitted for counsel's trial level work made no reference to work done for the motion to strike or to anti-SLAPP work, thus compounding the issues with vagueness and leading the trial court to disallow these fees.

Where counsel opposing a fee motion containing billing spreadsheets with numerous vague or unintelligible entries for questionable work, such as entries for "communications with client," consultation with plaintiff," or "settlement discussions," these entries should be closely scrutinized and often challenged. Trial courts may be inclined to disallow such claimed fees where it is impossible to discern what kind of work was done and whether the actual work done was for work that is properly reimbursable.

E. Use of Attorneys to Perform Administrative Tasks

Prevailing attorneys often seek reimbursement for routine, administrative tasks such as filing pleadings with the court, serving documents on opposing counsel or preparing fee agreements with their clients. These entries should be challenged on the grounds that they were not in furtherance of the activities involved in the fee-shifting statute. For example, in *Christian Research Institute*, billings for obtaining the docket at the inception of the case, obtaining unspecified but numerous court documents, and attending the trial court's mandatory case management conferences were all disallowed by the trial court because they would have been incurred regardless of whether or not the motion to strike, which allowed for the prevailing party to get paid his attorneys' fees, was filed. (*Christian Research Institute*, 165 Cal.App.4th at 1325.) Thus, counsel opposing fee motions should be on the lookout for entries where the handling attorneys performed tasks that were necessary for the entire case, not just the part of the case that pertained to a fee-shifting statute.

F. Inflated Hourly Rates

The hourly rate claimed by the prevailing party in a fee motion will often be a source of contention in fee motion hearings. After all, plaintiffs' counsel have seen that there is no downside to inflating their rates as well as their hours, "anchoring" their claim to high figures so that judges feel they are doing the defendant a favor by reducing the award to an amount that would in fact have been lower if rates customarily charged by competent counsel in the community charging on an hourly basis had been the starting point for discussion. Despite the legal authority for denying fees entirely to lawyers to cheat on the numbers in the fee claim, few judges are willing to apply that authority, with the result that fee disputes are far more common than they would be if plaintiffs' counsel had any incentive to be reasonable from the outset.

Generally speaking, courts have stated that the trial judge is in the best position to value the services rendered by the attorneys in his or her courtroom. (*569 East Country Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 436.) In making its calculation, the trial court may rely on its own knowledge and familiarity with the legal market, as well as the experience, skill, and reputation of the attorney requesting fees, the difficulty or complexity of the litigation to which that skill was applied and affidavits from other attorneys regarding prevailing fees in the community and rate determinations in other cases. (*Id.* at 437.)

Counsel objecting to claimed hourly rates from prevailing parties should submit opposing declarations putting into question whether the rates claimed are in fact common in the community and other similar cases. This can be a difficult task, because the counsel seeking fees always point to the highest figures they and their colleagues have received in other cases as a benchmark, and defense counsel have a more difficult task in collecting data on lower rates charged by perfectly competent counsel and paid by defendants without the need for a fee motion. This results in a one-way upward ratchet when a misleading comparison is done to prior awards.

Reviewing recent court decisions on what local rates to apply is also important. For example, in a recent case from Butte County (*Anderson v. Ford Motor Co.* (2019) STK-CV-UBC-2013-0007198), the trial court took into account the failure of the Los Angeles-based plaintiff's attorneys to hire local counsel and reduced the requested rates of $225 to $650 for associates and partners, to the local prevailing rates of $225 to $375.

Counsel opposing fee motions should also argue that the claimed fees are not appropriate given the level of complexity of the matter, whether or not a case went to trial, whether partners were doing work that should have been done by lower-billing attorneys, and whether all of the attorneys were doing work that could have been done by paralegals.

In *Morris v. Hyundai Motor America*, the Court of Appeal affirmed the trial court's

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order reducing the hourly rate of the two lead attorneys from the two law firms that litigated the case from $650 per hour to $500 per hour and $500 per hour to $400 per hour. The trial court's order reducing the rates of all of the associates who worked on the matter to $300 per hour, was also affirmed by the Court of Appeal. The Court of Appeal found that the trial court did not abuse its discretion in ordering these reductions in the claimed hourly rates because the trial court "could have reduced the rates based on its finding that the matter was not complex; that it did not go to trial; that the name partners were doing work that could have been does by lower-billing attorneys; and that all the attorneys were doing work that could have been done by paralegals." (*Morris*, supra, 41 Cal.App.5th at 41.)

The number of hours expended on strategic decisions should also be challenged. In *Leinberger v. Keystone RV Co.* (2015) 2015 WL5766546 (unpublished) at *3, the trial court's order reducing the number of hours charged from 250 to 180, based on the fact two high-billing attorneys were assigned to handle a "routine lemon law" case, was affirmed by the Court of Appeal (Fourth District, Division Three, case no. G049341). The Court of Appeal noted that filing in federal court and insisting on a jury trial also mandated a reduction in the number of hours charged. (*Id.*)

G. Arguing Against a Lodestar Multiplier

Plaintiff's counsel often argue that a lodestar multiplier is justified because the particular case that they are seeking reimbursement for was particularly complex and difficult, or because the potential for counsel to be paid was "contingent." These arguments often misconstrue the factors set forth by the California Supreme Court for adjusting the lodestar figure: "(1) the novelty and difficulty of the questions involved, and the skill displaying in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; and (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1251-1252.) Defense counsel should explain why the facts of a particular case, when viewed through the lens of these factors, do not justify a fee enhancement, and may even warrant a negative multiplier.

In Song-Beverly Warranty Act cases, plaintiffs' Counsel will frequently argue that the contingency risk is great since there is a good chance they will not recover anything. Frequently missing from their briefing is what percentage of cases they actually take on and receive nothing. They don't offer this information because, in fact, the contingency risk is virtually nonexistent in Song-Beverly Act cases. The elements for proving lemon law liability are easily met in any legitimate case; the defendants have strong business reasons (customer satisfaction, brand loyalty, company reputation) to settle rather than fight

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nonmeritoriouis claims; and fee-shifting is mandatory under the Song-Beverly Act (Cal. Civil Code § 1794, subd. (d).) and the CLRA (Cal. Civil Code § 1780, subd. (d).)

Moreover, to the extent the trial court has already considered factors such as complexity in setting the lodestar amounts, counsel should object to double counting those factors to support a multiplier. In *Flannery v. California Highway Patrol* (1998) 61 Cal. App.4th 629, a FEHA case stemming from alleged gender discrimination of a CHP officer, the Court of Appeal remanded the trial court's order granting a multiplier because the trial court used the "skill and experience" prong to set both the reasonable hourly rate component of the lodestar as well as the multiplier. In light of this double-counting of inflationary factors for the award, the Court of Appeal held that "when the trial court explicitly takes such factors into account in setting the lodestar, there is no logical basis for using them again to enhance or apply a multiplier to the award. *Id.* at 647.

Finally, it may be helpful to the court to understand that granting a multiplier can actually *harm* the consumer plaintiff. The higher the fee award is to the attorney, the lower the consumer's net recovery will be where the fee agreement allows the attorney to pocket the award, and yet the consumer is on the hook for tax liability on the recovery. (See 26 C.F.R. § 1.6041-1(f)(2) (2019) [even when defendant remits separate checks to plaintiff and plaintiff's attorney after judgment or settlement, defendant must include the sum of both payments on the Form 1099 filed with the IRS with respect to plaintiff]; Polsky, *Taxing Litigation: Federal Tax Concerns of Personal Injury Plaintiffs and Their Lawyers* (2018) 22 Fla. Tax Rev. 120, 133-135, 137 [describing the 2017 law that eliminated the deduction for attorney fees and costs incurred in recovering penalties and punitive damages, and illustrating tax effect of "phantom income" for fees awarded to taxpayer's lawyer].)

V. Conclusion

Thoroughly scrutinizing the numerous time entries submitted by prevailing parties in fee motions is crucial to ensuring that fee awards are fair and accurate. As the above analysis shows, without this scrutiny, there would be no counterbalance to the fee requests submitted by prevailing parties and this would certainly lead to fee awards that are grossly disproportionate to the work reasonably performed in a given case.

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"Reasonable Value" After *Pebley*

Douglas J. Petkoff

Just over two years ago, in the case *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, the sixth division of the Second Appellate District upended, to the chagrin of personal injury defendants, and to the joy of personal injury plaintiffs, what the former had too optimistically believed was settled law on economic damages in personal injury cases. That law had come down from the California Supreme Court in its decision in the seminal case *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 566. Under *Howell*, the measure of economic damages was held to be the lesser of 1) the dollar amount actually incurred for a patient's treatment, or 2) the reasonable market value of that treatment. Amounts stated in "bills" – which were rarely paid by anyone, nor almost ever expected to be paid – did not inform that measure of damages. *Howell's* most vigorous offspring perhaps was *Corenbaum v. Lampkin* (2013) 215 Cal. App.4th 1308. The court in *Corenbaum* ruled, building on the logic of *Howell*, that not only are medical "bills" not the measure of damages in personal injury cases; such bills are, in fact, inadmissible, since they are irrelevant to determining those damages. Still, under *Howell's* reading of the collateral source rule, plaintiffs who never paid for their care out of pocket were able to recover amounts their insurers had paid for their care.

It was widely felt that *Howell* and *Corenbaum* had dealt a serious blow to the ability of personal injury plaintiffs to inflate recovery of medical damages by alleging sums far in excess of the cost actually pegged by the relevant marketplace for medical care (See, e.g., "Supreme Court Puts Plaintiffs Through The Hamilton Meats Grinder," Gary Simms and Michael Danko, Plaintiff, *https://www.plaintiffmagazine.com/recent-issues/item/supreme-court-puts-plaintiffs-through-the-hamilton-meats-grinder*.) In recent years, to circumvent the impact of *Howell* and *Corenbaum*, personal injury attorneys have creatively adverted more frequently to advising their clients to use medical providers who are outside the plaintiff's provider network – even when the plaintiff could have obtained care, sometimes even from the *same doctors*, through their private insurance or Medicare. With the *Pebley* decision, this strategy seems to have been vindicated. How did plaintiff personal injury claimants manage to carve out such an apparently incongruous exception to the commonsense regime of *Howell?*

"Reasonable Value" and the "Wide-Ranging Inquiry"

The answer to that question starts with the observation that *Pebley* decided that *plaintiffs who treat outside their medical provider network are, for damages purposes, equivalent to being an uninsured plaintiff*, even if the plaintiff had insurance that he might have otherwise utilized. The consequences of being reckoned an uninsured plaintiff means, according to *Pebley*, that a plaintiff's damages are evaluated only under *Howell's* "reasonable value" prong, rather than its "paid or incurred" prong.

Ascertaining what was "paid or incurred" for a medical service is a straightforward exercise under Howell when one has and uses insurance. One simply identifies the amount paid for the service, or the amount that the insurance company and the provider agree will be paid for the service – an amount that is never the same as the original so-called bill. But courts have not agreed on a formula for arriving at the "reasonable value" of a service outside the insurance context. As the court in *Bermudez v. Ciolek* (2015) 237 Cal. App.4th 1311 noted,

> [T]he holding in *Howell* ultimately depended upon the "paid or incurred" prong of the test, not the "reasonable value" prong (Citations) ... ***¶Howell* offered no bright line rule on how to determine "reasonable value" when uninsured plaintiffs have incurred (but not paid) medical bills**. *Bermudez*, 1329.

Because *Howell* left "reasonable value" undefined, *Bermudez* also declined to provide any clear parameters. Instead, in the course of analyzing *Howell* and some of its successor cases, *Bermudez* announced

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what is essentially a recommendation that parties engage in a broad investigation into reasonable value: "the measure of damages for uninsured plaintiffs who have not paid their medical bills will usually turn on a wide-ranging inquiry into the reasonable value of medical services provided...." (*Bermudez, supra,* 237 Cal.App. 4th at pp. 1330-1331.) *Pebley* nominally endorsed this "wide-ranging inquiry" process as a rule for determining reasonable value for "uninsured" plaintiffs. (*Pebley, supra,* 22 Cal.App.5th at pp. 1278, 1280.)

Whereas the "paid or incurred" prong of the *Howell* damages holding is simple, straightforward, and results in a dollar figure to which all parties often reasonably stipulate, the "reasonable value" prong of *Howell,* utilizing *Bermudez's* "wide-ranging inquiry" process, is unclear as a methodology, and yields no easily predictable results. As the court in *Bermudez* perhaps wryly put it, "The ramifications of *Howell* on the proper measure of damages in a case brought by an uninsured plaintiff (who has not paid his bill) are less clear [than the measure for insured plaintiffs]." (*Bermudez, supra,* 237 Cal.App.4th at p. 1329.)

Reasonable Value and "Market Value"

There has been little consensus among the courts, as yet, as to what methodology or even basic logic should be used by trial courts and experts in order to establish what "reasonable value" is in cases where a provider offers services in return for payment later, out of the proceeds of any judgment on settlement on which the provider is granted a lien. If we understand, following *Bermudez*, that "reasonable value" is equivalent to "market value," the question arises as to how this market value is to be determined, and what market, exactly, is being, or can be, referred to in lien cases.

Howell recognized the difficulty created by its holding for determining reasonable value outside the context of the insurance market: "how a market value other than that produced by negotiation between the insurer and the provider could be identified is unclear." (*Howell,* supra, 52 Cal.4th at p. 562.) A feeling that the use of the modifier "unclear" is perhaps tongue-in-cheek arises when considering the nature of markets and the means by which they ordinarily determine the value of a good or service. Markets consist of buyers and sellers negotiating the price of a product or service by determining, under the circumstances, how much money the buyer is willing to spend, and the seller willing to receive, for that product or service. Because money has value to each party to the transaction, when the buyer and seller are able to agree that the "market value" is whatever dollar amount each agrees to pay and receive for a service, it is fair to conclude that this price is also the "reasonable value" of that product in a particular marketplace. This is precisely the process which insurers and providers engage in when they decide what providers will be reimbursed for their services.

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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:

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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

Legal malpractice statute of limitations was not tolled by former client's unreasonable belief attorney was still representing her.

Nguyen v. Ford
(2020) 49 Cal.App.5th 1

Plaintiff brought a malpractice action against the attorney who represented her in both the trial court and the appellate court in the same case, but under two different engagement agreements. The attorney, who had obtained an order permitting her to withdraw from the appellate court more than a year earlier, moved to dismiss the malpractice action on statute of limitations grounds. Plaintiff asserted, however, that because no similar withdrawal order was issued in the trial court, she believed the attorney still represented her in that court, making her claims timely under the continuous representation tolling rule, which provides that the statute of limitations for attorney malpractice actions "shall be tolled during the time that ... [¶] ... [¶]. [t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred" (Code Civ. Proc., § 340.6(a)(2)). The trial court granted the attorney's motion to dismiss.

The Court of Appeal (Sixth Dist.) affirmed. After the appellate court granted the attorney's withdrawal motion, the attorney filed notices in the trial court describing herself as plaintiff's former attorney and stating she was seeking recovery for "legal services rendered" from any judgment in plaintiff's favor. Under the circumstances, any objectively reasonable client would have understood that the attorney was no longer representing her in either court. The plaintiff's contrary belief was unreasonable as a matter of law and could not support tolling.

But see *Doe v. Marten* (2020) 49 Cal.App.5th 1022 [in medical malpractice case, defendant physician who had accepted the plaintiff's invalid arbitration demand and thereby induced the plaintiff not to file a timely suit in court was equitably estopped from asserting the statute of limitations as a bar to the later filed malpractice claim].

ATTORNEY FEES AND COSTS

In reducing attorney fees claimed by counsel, trial court may take into account attorney's failure to have kept contemporaneous time records, which are the superior form of evidence for a fee claim.

Taylor v. County of Los Angeles (Traylor)
(2020) 50 Cal.App.5th 205

Michael Traylor briefly represented the plaintiffs in a wrongful death action. The plaintiffs obtained new counsel, who requested Traylor's files. Traylor provided none. After the wrongful death case settled for $7 million, Traylor filed an attorney fee lien notice, seeking fees of over $300,000, supported by inconsistent and vague invoices that appeared to have been created after the fact. The trial court awarded only about $17,000, and Traylor appealed.

The Court of Appeal (Second Dist., Div. Eight) affirmed, noting the trial court's award of anything was "an act of grace." The inconsistent, non-contemporaneous time records were weak evidence of the time Traylor actually spent and what work he performed. Further, the fact Traylor produced no files suggested he in fact did no work, or at least none of value. The appellate court provided this professional advice: "contemporaneous time records are the best evidence of lawyers' hourly work. They are not indispensable, but they eclipse other proofs."

The costs of preparing photocopies of exhibits and demonstratives may be recoverable even if they are not used at trial.

Segal v. ASICS America Corporation
(2020) 50 Cal.App.5th 659

After the defendant prevailed in this complex fraud action, it filed a memorandum of costs. Its costs bill included preparing photocopies of exhibits, exhibit binders, and demonstratives; travel expenses; and interpreter fees. The plaintiff moved to tax those costs, arguing that many of the exhibit copies and demonstratives were not even used at trial. The trial court declined to tax those costs.

The Court of Appeal (Second Dist., Div. Four) affirmed. Recognizing the split of authority on whether costs may be recovered for preparing photocopies, demonstratives, and models prepared for trial but ultimately not used, the court followed the cases permitting recovery of such costs. Interpretation of the applicable statute governing costs recovery "must reflect the reality of how complicated cases are tried." "[P]rudent counsel must prepare exhibits and demonstratives well in advance of trial," and advanced preparation expedites the proceedings and should therefore be encouraged. Also, the trial court did not abuse its discretion in allowing costs for two attorneys to travel to depositions, because complicated cases often do require multiple attorneys to attend a deposition. Finally, interpreter fees were properly awarded where the witness was not proficient in English.

See also *Pacifica First National, Inc. v. Abekasis* (2020) 50 Cal. App.5th 564 [another reminder from the appellate court about reasonably necessary costs: "When appreciable sums are in play, it is mysterious why lawyers on both sides think the small cost of court reporting is a good cost to avoid. We publish this opinion in part to discourage misplaced thrift."]

Trial court abused its discretion in awarding attorney fees as a cost of proof based on requests for admission on ultimate issues served very early in the case.

Universal Home Improvement, Inc. v. Robertson
(2020) 51 Cal.App.5th 116

In this fraudulent transfer action, only about a month after answering the complaint, the defendants served requests for admission (RFAs) on the plaintiffs asking them to admit the defendant had not received a fraudulent transfer – i.e., asking plaintiffs "essentially ... to admit that they had no claim." Plaintiffs denied the RFAs, and successfully fended off the defendant's summary judgment motion. However, plaintiffs ultimately lost at trial. The defendant moved for costs of proof based on the denied RFAs, and the trial court awarded $35,000 in fees for such costs.

The Court of Appeal (First Dist., Div. Two) reversed the cost award. The court was "troubled" at the assertion "that a defendant can at the very inception of litigation, at a time when, as best we can tell, no discovery had taken place, and certainly no deposition, serve RFAs essentially seeking responses admitting that plaintiff had no case, and then, if plaintiff ultimately proves unsuccessful, recover costs of proof attorney fees." "That cannot be the law." The court concluded that the record showed the plaintiffs had a reasonable basis for their denials, including their success at defeating summary judgment and efforts to vigorously dispute the issues raised in the RFAs at trial, supported by evidence. Under the circumstances, the trial court abused its discretion in awarding the costs of proof.

A client's unsuccessful challenge to counsel's fee bills, pursued in a mandatory fee arbitration, cannot serve as the basis for a malicious prosecution claim.

Dorit v. Noe
(2020) 49 Cal.App.5th 458

Unsatisfied with his attorney's efforts to evaluate a medical malpractice claim, the attorney's client initiated a mandatory attorney fee arbitration act (MFAA) proceeding under Business & Professions Code section 6200 et seq. The attorney prevailed in the arbitration and filed a malicious prosecution action against his former client. The former client moved to strike the complaint under the anti-SLAPP statute, and the trial court denied the motion.

The Court of Appeal (First Dist., Div. Four) reversed the trial court's denial of the anti-SLAPP motion. "MFAA arbitrations qualify as

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official proceedings because they are both established by statute and part of the State Bar's comprehensive licensing scheme for attorneys." Accordingly, the former client satisfied the first prong of the anti-SLAPP statute. Further, the attorney could not show a probability of prevailing on his malicious prosecution claim, as required to defeat a motion to strike under the second prong of the anti-SLAPP law, because – considering the various public policies behind both the MFAA and the malicious prosecution tort – an MFAA proceeding may not be the basis for a malicious prosecution action.

Unilateral dismissal can satisfy the favorable termination element of malicious prosecution.

Roche v. Hyde
(2020) 51 Cal.App.5th 757

Ram's Gate Winery brought an action against Roche for breach of contract, fraud, and negligent nondisclosure. Ram's Gate voluntarily dismissed the suit "in the face of a terminating sanctions motion that was almost certainly going to be granted for discovery abuse, and ... the dismissal was accompanied by a negotiated payment of some but not all of Roche's attorney fees – with Roche signing no settlement agreement, releasing no claims, and expressly reserving his rights...." Roche then brought a malicious prosecution action. The trial court denied Ram's Gate's anti-SLAPP motions, concluding that Roche had shown a probability of prevailing on its malicious prosecution claims. Ram's Gate appealed, asserting, among other things, that Roche could not satisfy the favorable termination requirement of a malicious prosecution action.

The Court of Appeal (First Div., Div. Four) affirmed the denial of the anti-SLAPP motions. While a favorable termination does not occur merely because a party complained against has prevailed in an underlying action – rather, the termination must reflect that the prevailing party was innocent of the alleged wrongful conduct – Roche met its prima facie burden to show favorable termination in this case. The agreement between the parties that preceded the dismissal was not a compromise that left open the question of who would prevail. It reflected the foregone conclusion that Ram's Gate was imminently about to lose on the merits.

ANTI-SLAPP

The anti-SLAPP statute applies to federal claims brought in California state court.

Patel v. Chavez
(2020) 48 Cal.App.5th 484

Plaintiff employers sued defendant, their former employee, alleging the employee violated 42 U.S.C. § 1983 by testifying falsely against the employers at a labor hearing. Defendant employee moved to strike plaintiffs' complaint based on the anti-SLAPP statute (Code Civ. Proc., § 425.16). The trial court granted the motion. Plaintiffs appealed, arguing that the anti-SLAPP statute does not apply to causes of action based on federal law.

The Court of Appeal (Second Dist., Div. One) affirmed. Federal claims brought in state court are governed by state rules of evidence and procedure "unless application of those rules would affect plaintiffs' substantive federal rights." The anti-SLAPP statute does not affect a plaintiff's substantive rights under federal law because it "applies neutrally to all types of causes of actions and does not ... target government conduct." Thus, the anti-SLAPP statute, which is a procedural rule, applies to federal claims when those claims are brought in state court.

The anti-SLAPP statute protects a hospital's statement about a doctor's qualifications and competence.

Yang v. Tenet Healthcare Inc.
(2020 48 Cal.App.5th 939

Doctor Suzanne Yang sued a hospital and its medical staff for defamation based on statements defendants made to the public and the medical community questioning Dr. Yang's qualifications, competence, and medical ethics, and directions defendants gave to other physicians not to refer patients to her. The defendant health care providers filed an anti-SLAPP motion. The trial court denied it, ruling that the statements did not arise from the exercise of free speech about a matter of public interest.

The Court of Appeal (Fourth Dist., Div. Two) reversed and directed the trial court to grant the motion. Defendants' speech regarding Dr. Yang's "qualifications, competence, and professional ethics" directly concerned the public issue of physician competency. Further, there was a "functional relationship" between the statements and the public issue because defendants made statements to the public, not just to the medical staff. In so holding, the appellate court disagreed with *Dual Diagnosis Treatment Center, Inc. v. Buschel* (2016) 6 Cal.App.5th 1098 (suggesting that local healthcare provider qualifications are not a matter of public issue), since that case did not have the benefit of the California Supreme Court's recent decision in *FilmOn.com Inc. v. DoubleVerify, Inc.* (2019) 7 Cal.5th 133. Finally, Dr. Yang had not shown a probability of prevailing since her defamation claim was time barred.

A party whose anti-SLAPP opposition seeks attorney fees as a sanction for a frivolous anti-SLAPP motion need not separately comply with the 21-day safe harbor provision of Code of Civil Procedure Section 128.5, subd. (f).

Changsha Metro Group Company, Ltd. v. Xuefeng
(2020) 49 Cal.App.5th 175

When defendants filed an anti-SLAPP motion in this case, the plaintiff company argued in opposition that the motion was frivolous and requested the trial court award it attorney fees under Code of Civil Procedure section 425.16, subd. (c)(1), which provides that a court shall award attorney fees as a sanction for a frivolous anti-SLAPP motion "pursuant to Section 128.5" of the Code of Civil Procedure. The trial court concluded the motion was indeed frivolous and awarded fees. The defendants appealed, arguing that the trial court should not have awarded fees without first giving them a 21-day safe harbor to cure their allegedly frivolous filing, as provided for under section 128.5, subd. (f).

The Court of Appeal (First Dist., Div. Two) affirmed the fee award. Section 128.5 provides for two methods of awarding attorney fees as sanctions for frivolous filings – either in connection with a request made in the requesting party's moving or opposition papers to which the sanctioned party had an opportunity to respond (Code Civ. Proc., § 128.5, subds. (a) & (c), *or through a separate motion filed after a 21-day safe harbor period (Code Civ. Proc., § 128.5, subd. (f). Here, the plaintiff complied with the first method by requesting fees in connection with its opposition to the anti-SLAPP motion, and the defendants were given a fair opportunity to respond. In fact, using the first method is the only feasible way to seek fees for a frivolous anti-SLAPP motion, because providing the 21-day safe harbor would delay resolution of anti-SLAPP motions, contrary to the goal of the statute to resolve such motions expeditiously at the outset of the case.*

ARBITRATION

State law equitable estoppel doctrines permitting enforcement of an arbitration agreement by or against nonsignatories may apply even to cases falling under the New York Convention, governing international arbitration.

GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC
(2020) 140 S.Ct. 1637

A U.S. steel producer and a French engineering company entered into a contract related to building steel mills at a plant in Alabama. The contract contained an arbitration provision. The French engineering company subcontracted some of the work to a French subsidiary of General Electric. The subcontractor's work was defective, and the U.S. steel producer sued the subcontractor, which moved to compel arbitration even though it was not a signatory to the arbitration agreement. The Eleventh Circuit held that under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), an international arbitration agreement could be enforced only by the signatories to the agreement.

The United States Supreme Court reversed. Nothing in the New York Convention conflicts with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories. Accordingly, the Court of Appeals erred in not considering whether those doctrines would permit the French GE subsidiary to enforce the agreement against the signatory U.S. steel producer.

See also *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486 [automaker sued along with car dealer whose sales contract with plaintiff car buyer included an arbitration agreement could invoke arbitration agreement to which it was not a signatory];

But see *Jarboe v. Hanlees Auto Group* 53 Cal.App.5th 539 [petition for review and depublication requests pending] [corporate affiliates who were not signatories to an arbitration agreement in plaintiff's employment contract could not rely on equitable estoppel doctrine or third party beneficiary doctrine to force plaintiff to arbitrate his employment claims against them by virtue of their corporate relationship to one defendant with whom the plaintiff had an arbitration agreement].

An arbitration "award" suitable for confirmation and subject to limits on post-award modification is a ruling that is not interlocutory, but resolves all issues between the parties capable of resolution at the time.

Lonky v. Patel
(2020) 51 Cal.App.5th 831

A doctor sued the partner in his medical practice alleging that the partner misappropriated partnership funds. The parties submitted the dispute to arbitration, which was trifurcated into three phases to determine first, liability for compensatory and punitive damages; second, the amount of punitive damages and liability for attorney fees and costs; and third, the amount of any attorney fees and costs. The arbitrator issued several interim rulings, including one (the "Second Interim Ruling") that resolved all the phase one and two issues, but not the phase three issue concerning the amount of attorney fees and costs. More than 30 days later, the arbitrator then issued a modification of the Second Interim Ruling, increasing the amount of compensatory damages. After the arbitrator later issued a final award including the attorney fees and costs, the plaintiff sought to confirm the award in the trial court while the defendant sought to have it corrected to reinstate the lower compensatory damages award. According to the defendant, under Code of Civil Procedure section 1284 [providing that an arbitrator may "correct the award" no more than 30 days after it is served], the arbitrator was powerless to reduce the compensatory damages award more than 30 days after the award issued. The trial court agreed with the defendant and "corrected" the award downwards.

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The Court of Appeal (Second Dist., Div. Two) reversed. For purposes of the statutory rules concerning correcting, confirming, and vacating an arbitration "award," an "award" refers only to those rulings "that resolve every part of the parties' controversy that can be resolved at that time." Here, the arbitrator's modification to the Second Interim Ruling was permissible because that ruling was not a final "award." The only "award" was the final ruling that resolved all issues, including the amount of attorney fees and costs.

CLASS ACTIONS

A plaintiff's settlement of his individual claims moots his class claims unless the settlement agreement provides that he retains a financial stake in the class claims.

Brady v. Autozone Stores, Inc.
(9th Cir. 2020) 960 F.3d 1172

A putative class action plaintiff brought wage and hour claims against Autozone. After the district court denied class certification, the plaintiff settled his individual claims for $5,000. While the settlement agreement did not purport to resolve the class claims, it did not specify that the plaintiff retained any continuing financial stake in the class claims. The parties filed a stipulation providing that the settlement resolved the plaintiff's individual claims, and the district court then entered judgment. The plaintiff appealed the denial of class certification.

The Ninth Circuit dismissed the appeal as moot. "[W]hen a class representative voluntarily settles his individual claims, he must do more than expressly leave class claims unresolved to avoid mootness. A class representative must also retain – as evidenced by an agreement – a financial stake in the outcome of the class claims."

Collateral estoppel does not bind an absent class member to a decertification order finding that the claims are not suitable for class treatment, so former class member may pursue a second class action identical to the first.

Williams v. U.S. Bancorp Investments, Inc.
(2020) 50 Cal.App.5th 111

In 2005, two named plaintiffs brought a wage and hour class action against U.S. Bancorp. In 2008, a different plaintiff filed a class action alleging the same claims, but for a later time period. The plaintiff in the second class action qualified as a member of the class in the first class action, and so the second class action was stayed pending resolution of the first. In 2011, following substantial discovery, the superior court decertified the class in the first class action for lack of commonality. Based on this ruling, the superior court dismissed the second class action as precluded by the first.

The Court of Appeal (First Dist., Div. Four) reversed, over the dissent of one justice. Under existing law, unnamed members of a putative class action in a prior proceeding are not barred by res judicata from seeking class certification in a subsequent proceeding alleging the same claims. The rationale for this rule is that unnamed class members were not actually represented in the prior proceeding. The same rationale applies where a class was originally certified but later decertified. Once the superior court determined that the first class action could *not* proceed as a class action, the unnamed class members' class claims were not actually litigated and determined in that action, so the unnamed class members were not precluded from bringing a subsequent class action.

A trial court has broad discretion to strike or discount employee declarations submitted to oppose class certification where it appears those declarations were obtained under coercive circumstances.

Barriga v. 99 Cents Only Stores LLC
(2020) 51 Cal.App.5th 299

The plaintiffs brought wage and hour claims against 99 Cents Only stores. In its opposition to the motion for class certification, the company submitted 174 employee declarations disputing that the asserted wage and hour violations occurred with any regularity. The plaintiffs moved to strike the declarations as being procured through abusive processes. The trial court concluded it had no statutory authority to strike the declarations, and based on them, denied class certification. The plaintiff appealed the denial of class certification.

A Court of Appeal (Fourth Dist., Div. Two) majority reversed and remanded for reconsideration of the class certification motion. The trial court has inherent authority to manage a class action, and that includes the ability to consider the circumstances under which employee declarations were created and strike them if they were created under coercive or abusive circumstances. Because it was not clear how the trial court would have ruled but for that error, reconsideration of the motion was required. The third justice on the panel disagreed with the majority's approach as treating the evidentiary error concerning the declarations – which the plaintiff had net directly challenged on appeal – as reversible per se, and ignoring the primary issue on appeal whether the denial of class certification itself was an abuse of discretion. According to the dissenting justice, under the majority's holding, "a party challenging a certification order can ask the appellate court to review every evidentiary ruling made leading up to the order ... and, if the appellate court finds any error, it *must* send the case back to the trial court to start over from the place of the interim ruling."

The defendant can show the amount in controversy requirement for CAFA jurisdiction is met by reference to punitive damages awards in other cases raising the same claims.

Greene v. Harley-Davidson Inc.
(9th Cir. 2020) 965 F.3d 767

The plaintiff brought this consumer class action alleging Harley-Davidson engaged in deceptive pricing of its motorcycles. He sought damages of "not less than $1,000,000" per year for up to three years, attorney fees, and punitive damages. Harley-Davidson removed the case under the Class Action Fairness Act, asserting that the punitive damages claim brought the case value above the $5 million jurisdictional minimum. To support that assertion, Harley-Davidson presented examples of cases under the same consumer protection statutes in which punitive damages above a 1:1 ratio were awarded. The district concluded that Harley-Davidson's showing was inadequate, and that it needed to analogize this case to the others to show a greater than 1:1 ratio would be permissible here. The district court also concluded that Harley-Davidson's statute of limitations defense would limit the scope of damages. The district court therefore remanded the case for failure to meet the $5 million in controversy requirement. Harley-Davidson filed a petition for permission to appeal.

The Ninth Circuit granted permission to appeal and reversed the remand order. To show the amount at stake, it is sufficient for the defendant to show the reasonably possible amount of liability, not establish that such an amount of liability is probable. A defendant can meet its burden to show the possible amount at stake by citing cases showing punitive awards in cases under the same consumer protection statutes have exceeded a 1:1 ratio. Requiring the defendant to analogize the cases would be practically burdensome at such an early stage of the proceedings where the facts remain undeveloped. Also, in determining whether the amount in controversy requirement was met, the district court should not have assumed Harley-Davidson would prevail on its statute of limitations affirmative defense. Such merits-based arguments cannot be "smuggled in" to the threshold inquiry whether the complaint as pleaded satisfied the jurisdictional criteria.

CIVIL PROCEDURE

The Judicial Council and trial courts have broad authority to manage courts in response to the COVID-19 pandemic. [depublished opinion included for informational purposes only]

Ayala v. Superior Court
(2020) forerly published at 48 Cal.App.5th 387

In response to the COVID-19 pandemic, the Judicial Council adopted emergency rules including Emergency Rule 4, which set an emergency bail schedule that included setting bail at $0 for various offenses. The San Diego superior court implemented the rule by through adopting a general order that retained the court's discretion to set bail differently as the facts and circumstances warranted. In this writ proceeding, criminal defendants challenged the San Diego superior court's implementation of the rule, arguing the court was required under the Emergency Rule to follow the schedule and set their bail at $0 and lacked discretion to depart from it. The criminal defendants also objected to the superior court's adoption of local emergency provisions for handling bail disputes by remote or telephonic hearings without their consent, in violation of their constitutional and statutory rights.

The Court of Appeal (Fourth Dist., Div. One) declined to grant writ relief to compel the trial court to set bail at $0, concluding that the Emergency Rule set a presumptive schedule but trial courts had discretion to depart from the schedule. In so holding, the opinion addressed the interaction of local and state rules enacted in response to the COVID-19 pandemic. The court explained that through "Executive Order N-38-20, the Governor of California conferred on the Judicial Council unprecedented authority to promulgate rules governing court administration, practice, and procedure as necessary to address the emergency." The court also concluded it would not order writ relief to prevent telephonic or remote bail hearings absent specific facts about particular hearings. Emergency Rule 3 "authorizes courts to require that judicial proceedings and court operations be conducted remotely, 'in order to protect the health and safety of the public, including court users, both in custody and out of custody defendants, witnesses, court personnel, judicial officers, and others, '" and none of the local orders were inconsistent with it.

See also *Stanley v. Superior Court (People)* (2020) 50 Cal.App.5th 164 [The COVID-19 pandemic provides good cause for trial continuances, even where criminal speedy trial rules otherwise apply]

But see *Bullock v. Superior Court* (2020) 51 Cal.App.5th 134 [The COVID-19 pandemic did not provide good cause to delay custodial preliminary hearing]

The clear and convincing standard must be taken into account on appellate review of the sufficiency of the evidence.

Conservatorship of O.B.-SC
(2020) 9 Cal.5th 989

The trial court granted a request to impose a conservatorship on a woman with autism. She appealed, challenging the sufficiency of the evidence to support a conservatorship, which requires clear and convincing evidence of inability to care for oneself. The Court of Appeal affirmed. In so doing, the Court of Appeal ignored the clear and convincing evidence standard, reasoning that the standard applies only in the trial court but not on appeal.

The California Supreme Court reversed, resolving a long-running split of authority.

"[A]an appellate court must attune its review for substantial evidence to the heightened degree of certainty required by" the standard of proof. While an appellate court must "not reweigh the evidence itself," "the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable factfinder could have found it highly probable that the fact was true." The Supreme Court's opinion makes clear that Courts of Appeal should take this approach in any case where the clear and convincing evidence standard applies, including punitive damages cases.

Including a fact in the separate statement may be deemed a concession that it is material, thus mandating denial of a summary judgment motion if included fact are disputed.

Insalaco v. Hope Lutheran Church of West Contra Costa County
(2020) 49 Cal.App.5th 506

The plaintiffs filed this lawsuit alleging a Church and other nearby landowners caused excess water runoff into a creek, ultimately causing a landslide that damaged the plaintiffs' home. Before a trial date had been set and while discovery remained open, the Church moved for summary judgment against plaintiffs, and against a neighboring landowner who had cross-complained, based on expert declarations opining that the cause of the landslide was not excess water runoff from the Church. The plaintiffs asked for a continuance to investigate the Church's experts' conclusions, but the trial court denied it, accepting the Church's argument that the plaintiffs had been dilatory in investigating their case. The trial court granted the summary judgment motions.

The Court of Appeal (First Dist., Div. Two) reversed. Where, as here, no trial date had been set and discovery remained open, and the requested additional discovery would be essential to opposing the motion, a continuance was "virtually mandated." The trial court thus abused its discretion in denying the continuance and granting the summary judgment motion against the plaintiffs. As to the summary judgment against the cross-complaints, that too had to be reversed because the cross-complainants had disputed the facts in the Church's separate statement. The Church could not avoid denial of its motion by arguing the disputed facts were not material, because by including them in the separate statement, it conceded they were material. *Editor's query*: if a *fact* is "conceded" to be material, does that mean a *dispute* as to the fact is also necessarily material? In a summary judgment motion based on statute of limitations, the fact of the date of an accident must be included in the separate statement as that is material, but if the plaintiff disputes the fact by saying the accident occurred one day later – but the defense argument s that the action was filed one year too late – is summary judgment improper because of the dispute as to a material fact?

Relief under Code of Civil Procedure section 473, subd. (b) was unavailable for attorney's failure to file timely fee motion.

Hernandez v. FCA US LLC
(2020) 50 Cal.App.5th 329

The parties settled this lemon law case and agreed that plaintiff could seek attorney fees on top of the settlement. The trial court set an order to show case regarding dismissal of the settled case several months out, notifying the parties that the fee motion had to be filed before that date. Plaintiff's counsel failed to notify co-counsel who would be preparing the fee motion of the deadline, and counsel therefore missed the deadline. At the OSC hearing date, the trial court dismissed the case. Plaintiff then moved ex parte for relief under Code of Civil Procedure §473(b) to vacate the dismissal so she could file her fee motion. The trial court denied relief.

The Court of Appeal (Second Dist., Div. Eight) affirmed. While the first three requirements for relief under section 473(b) were satisfied – the motion was brought within six months of entry of judgment, the motion was in proper form, and included an attorney's declaration of fault – the requirement that the *dismissal* be caused by the attorney's mistake was not satisfied. Plaintiff's counsel's failure to file the fee motion on time did not cause the dismissal of the case, which was caused by the settlement. It simply resulted in the loss of the right to obtain fees. "Section 473 provides no relief for such error."

The three-year time period for serving a complaint may be tolled by a stay that creates a practical, as opposed to legal, impediment to service.

Steciw v. Petra Geosciences
(2020) 52 Cal.App.5th 806

The plaintiff filed this construction defect action against the defendant real estate developer and several Does. The case was then stayed to permit the parties to engage in an alternative dispute resolution procedure under which the developer was allowed to inspect and attempt to cure the alleged defects. When those efforts failed, the case proceeded to discovery and the plaintiff discovered the identify of one of the Doe defendants, whom the plaintiff then served. However, the service occurred 38 days after the three-year time period for serving a complaint under code of Civil Procedure section § 583.210, subd. (a). Plaintiff claimed the late service was excused because the three-year period was tolled under Code of Civil Procedure § 583.240, subd. (b) ,which provides for tolling if "the action was stayed and the stay affected service." Focusing on the fact that the stay did not legally prohibit service, the trial court dismissed the action as to the new defendant.

The Court of Appeal (Fourth Dist., Div. Three) reversed and remanded for further factual findings. The tolling provision of section 583.240, subdivision (b), does not require a legal bar to service; it applies even where a stay "affects" service simply as a practical matter. Where discovery is necessary to identify a Doe defendant, and discovery is stayed, that is a practical impediment to service. Whether the plaintiff could have discovered the identity of the Doe defendant despite the stay of discovery here was a factual question to be resolved on remand.

EVIDENCE

The mere possibility of causation does not provide adequate foundation for an expert causation opinion.

Waller v. FCA US LLC
(2020) 48 Cal.App.5th 888

The plaintiff brought this lemon law case related to power loss in his vehicle. The plaintiff claimed the power loss was related to a faulty fuel pump and intended to present a mechanical expert to offer opinions supporting that causation theory. The trial court excluded the expert, however. His testimony was speculative because he did not provide any rational explanation of how a faulty fuel pump could cause the power loss that occurred, and repeatedly said the fuel pump was only a possible, not the probable, cause of the power loss. Plaintiff appealed, arguing that exclusion of the expert testimony was an abuse of the trial court's discretion.

The Court of Appeal (Second Dist., Div. Two) affirmed. Expert testimony is only permissible if it "assists the trier of fact." The expert's testimony concerning "possibilities" did not meet that standard: "possibilities are irrelevant [to determining facts], because anything is possible." Absent any rational explanation of how a faulty fuel pump relay could have caused the power loss that occurred, the expert's opinions were properly excluded.

See also *Grodzitsky v. American Honda Motor Company, Inc.* (2020) 957 F.3d 979 [expert's failure to use a workable standard supporting his design defect theory was proper ground to exclude his testimony under *Daubert*];

See also *Lowery v. Kindred Healthcare Operating, Inc.* (2020) 49 Cal. App.5th 119 [in wrongful death case alleging defendants failed to obtain appropriate medical treatment for the decedent's stroke, a medical expert's declaration that failed to demonstrate his specific qualifications to opine on the cause or treatment of stroke, and that provided only conclusory assertions that a different course of treatment would have had a better outcome for the decedent, was properly excluded from consideration at summary judgment];

See also *McAlpine v. Norman* (2020) 51 Cal.App.5th 933 [trial court erred in granting summary judgment in medical negligence case based on defendant's conclusory expert declaration saying that the defendant's treatment was within the standard of care and that the injury the plaintiff suffered was a "known risk" of the procedure, but not elaborating on how the defendant met the standard of care].

A company's name and logo on an invoice is admissible circumstantial evidence of product origin.

Hart v. Keenan Properties, Inc.
(2020) 9 Cal.5th 442

In this asbestos personal injury action, the plaintiff claimed he was exposed to asbestos-containing pipes the defendant supplied to his worksite in the 1970s. The only testimony supporting the plaintiff's exposure to the defendant's products was testimony from the worksite foreman that he saw the defendant's name on invoices. The jury found for plaintiffs and the defendant appealed. The Court of Appeal (First Dist., Div. Five) reversed the judgment, holding that the foreman's testimony about what the invoices said, offered to prove who supplied the pipes, was hearsay not subject to any exception, and that without that testimony, there was no substantial evidence to support a jury finding that the plaintiff was exposed to the defendant's products.

The California Supreme Court reversed. The witness's description of a logo and company name he recalled seeing on an invoice was not hearsay because it was not offered to prove the truth of any statement contained in the invoice. Rather, the witness's description of the invoice, which was unavailable at the time of trial, was circumstantial evidence of defendant's identity as the source of asbestos-containing pipes at the plaintiff's worksite. Because the evidence was admissible, it (along with other circumstantial evidence) supported the conclusion that defendant supplied the pipes that injured the plaintiff.

Trial court properly admitted helpful enhanced video evidence.

People v. Tran
(2020) 50 Cal.App.5th 171

In the defendant's assault trial, the prosecution presented video evidence compiled by a forensic video analyst. The video, a composite of various security videos that captured the assault from different angles, was enhanced to synchronize the various video clips, correct blurring, and add color coded arrows to identify certain individuals. The trial court admitted the video over the defendant's objection that the forensic video enhancement was not made with a universally accepted technique and the law regarding its use was unclear. Thus, the defendant had argued, the video was inadmissible under the *Kelly-Frye* test, which requires the proponent of the evidence derived from a new scientific technique to establish that "(1) the reliability of the new technique has gained general acceptance in the relevant scientific community, (2) the expert testifying to that effect is qualified to give an opinion on the subject, and (3) the correct scientific procedures were used." The defendant was convicted, and appealed.

The Court of Appeal (Fourth Dist., Div. One) affirmed. A "computer *animation*" which is "merely used to *illustrate* an expert's testimony," does not need to be analyzed under the *Kelly-Frye* test; only a "computer *simulation*" which is itself substantive evidence "contain[ing] scientific or physical principles requiring validation" is subject to application of the *Kelly-Frye* test. The video evidence here *was a form of computer animation, not a computer simulation. Moreover, the forensic analyst simply assisted the jury in understanding the raw video footage by modifying and highlighting specific areas of that footage. Therefore, the Kelly-Frye* test did not apply and the trial court did not abuse its discretion in admitting the video.

TORTS

Proposition 51's provision that a defendant is liable only for its proportionate share of noneconomic damages does not apply to intentional tortfeasors.

B.B. v. County of Los Angeles
(2020) 10 Cal.5th 1

Darren Burley died from suffocation and cardiac arrest during a violent struggle with the police. Burley's family brought an action for wrongful death alleging intentional excessive force against the officers. The jury found for plaintiffs and awarded $8 million in noncomic damages. Despite the jury's finding that Burley was 40 percent at fault and the officer only 20 percent at fault, the trial court entered judgment against the officer in the full amount because the jury found he had acted intentionally and so could not take advantage of Civil Code section 1431.2's limitation on a defendant's liability for non-economic damages to his proportionate share. The Court of Appeal (Second Dist., Div. Three) reversed.

The California Supreme Court reversed the Court of Appeal, thus affirming the trial court. The allocation of fault under section 1431.2 applies only actions "based on principles of comparative fault," which refers to actions involving negligent and strictly liable tortfeasors, not intentional, tortfeasors. "California principles of comparative fault have never required or authorized the reduction of an intentional tortfeasor's liability based on the acts of others."

The retained control exception to the premises liability defense based on the Privette doctrine did not apply absent evidence the hirer of the independent contractor affirmatively contributed to the harm.

Horne v. Ahern Rentals, Inc.
(2020) 50 Cal.App.5th 192

Plaintiffs sued Ahern Rentals, a lessor of construction vehicles, for the alleged wrongful death of their decedent, an employee of a contractor hired to service Ahern's vehicles. The employee sustained fatal injuries on Ahern's premises while replacing tires on a forklift. Plaintiffs claimed Ahern was negligent in allowing the tire change to proceed with the forklift parked on an uneven surface, with its boom raised, which caused the forklift to sway and collapse during the tire change. Ahern moved for summary judgment based on the

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Privette doctrine, under which one who hires a contractor is generally not liable for work-related injuries to the contractor's employees. In opposition, plaintiffs invoked the retained control exception, under which a hirer may be liable where it affirmatively contributes to the alleged injuries. The trial court granted the motion.

The Court of Appeal (Second Dist., Div. Eight) affirmed the summary judgment. Plaintiff's retained control theory was based on evidence showing at most that Ahern passively permitted an unsafe condition to arise. That did not rise to the level of affirmative contribution. *Editor's note:* The scope of the retained control exception is currently pending in the California Supreme Court in *Sandoval v. Qualcomm* (S252796) and *Gonzalez v. Mathis* (S247677).

See also *Alaniz v. Sun Pacific Shippers* (2020) 48 Cal.App.5th 3323 [where *Privette* doctrine applies, the standard negligence and premises liability instructions are not a proper statement of the applicable law; thus, even absent a proper request for a *Privette* instruction by the defendant, the trial judge committed reversible error by instructing the jury that the party that hired an independent contractor could be liable for injuries suffered by the contractor's employee without also telling the jury these principles only applied to the hiring party if its negligent exercise of retained control over safety conditions affirmatively contributed to the harm].

Going and coming rule shielded hospital from vicarious liability for negligence of volunteer.

Savaikie v. Kaiser Foundation Hospitals
(2020) 52 Cal.App.5th 223

On his way home from providing volunteer pet therapy services to a Kaiser assisted living facility patient, while driving his personal vehicle, the volunteer struck and killed a minor. In the ensuing wrongful death suit, Kaiser moved for summary judgment, arguing the going and coming rule shielded it from vicarious liability for the volunteer's accident while commuting. The trial court granted the motion.

The Court of Appeal (Second Dist., Div. Eight) affirmed. The going and coming rule applied to the volunteer's drive home, and plaintiff had not shown a triable issue on any exceptions to the rule. As to the "required vehicle" exception, there was no evidence that Kaiser required the volunteer to use his own vehicle to transport his dog or to provide pet therapy. Further, as to the asserted "incidental benefit" plaintiff claimed Kaiser derived from the volunteer's mode of transportation, that did not create a basis for imposing vicarious liability on Kaiser, because there was no evidence that Kaiser received any different or additional benefit from the volunteer's use of his own vehicle than it would have received if he used any other method of transportation.

See also *Marez v. Lyft, Inc.* (2020) 48 Cal.App.5th 569 [at fault driver was not in the course and scope of his employment for rideshare company on day he did not work, even though he was driving a vehicle rented through the rideshare company].

Primary assumption of risk did not apply to collision with dog on hiking trial.

Wolf v. Weber
(2020) 52 Cal.App.5th 406

Plaintiff was injured when she collided with an off-leash dog on a hiking trail. The hiking trail permitted dogs to be off-leash *if they were under the control of their owners at all times*. Plaintiff sued, and defendant argued plaintiff's claim was barred by the doctrine of primary assumption of the risk. The trial court granted summary judgment for defendant.

The Court of Appeal (First Dist., Div. Four) reversed. The doctrine of the primary assumption of risk did not bar the plaintiff's claims because her use of the trail did not include an inherent risk of an uncontrolled, unleashed dog, which was against the trail rules. Plaintiff did not assume the risk of being knocked over on a hiking trail by an unleashed dog that, in violation of the local ordinance, was not under defendant's control at all times.

See also *Sharufa v. Festival Fun Parks, LLC* (2020) 49 Cal.App.5th 493 [waterslide operator owed the duty of a common carrier, and thus could not rely on primary assumption of risk doctrine to shield itself from liability for the plaintiff's injury on the slide].

Absent heightened foreseeability of criminal conduct, sorority hosting off-campus party had no duty to prevent criminal attack by following university safety protocols.

Hanouchian v. Steele
(2020) 51 Cal.App.5th 99

Plaintiff sued members of a college sorority after being attacked by a non-student guest at a party defendants hosted at their sorority house. Plaintiff argued that defendants' party violated numerous safety rules established by the university and agreed to by the sorority, and that as a result, defendants breached a duty owed to plaintiff. Defendants demurred, arguing that they had no duty to prevent the criminal assault. The trial court sustained the demurrer and dismissed the action.

The Court of Appeal (Second Dist., Div. Three) affirmed the dismissal. Defendant "did not owe plaintiff a legal duty to follow [the university's] fraternal organization safety protocols to prevent a third party criminal attack." The protocols, including permitting guest checks by campus police and hiring security, were "highly burdensome [and] require a heightened degree of foreseeability to impose." Plaintiff did not meet the heightened foreseeability requirement because he established only that defendants had knowledge of the *possibility* of violence, not its *foreseeability*. The court noted that "'constructive knowledge' or imputed foreseeability by 'common sense' is not sufficient to impose, as a *legal duty* the burdensome measures Plaintiff proposes."

The consumer expectations test for design defect does not apply, andonly the risk-benefit test applies, where plaintiff's defect theory depended on expert testimony about the merits of competing designs.

Verrazono v. Gehl Company
(2020) 50 Cal.App.5th 636

The plaintiff was injured when a forklift he was operating tipped over. He sued the manufacturer for design defect. At trial, he presented no evidence of the reasonable expectations of a hypothetical forklift user under the circumstances of the accident, and instead relied on expert testimony about the costs and benefits of alternative designs. The trial court refused the plaintiff's request for a jury instruction on design defect under the consumer expectations test, and instructed the jury on the risk-benefit test only. The jury found for the defendant, and the plaintiff appealed, arguing the failure to give the consumer expectations test was error.

The Court of Appeal (First Dist., Div. One) affirmed. There was no evidence upon which the jury could have determined that the product was defectively designed based on the objective attributes of the product. While plaintiff argued he presented evidence as to the ordinary expectations of forklift users, all of his evidence in that regard was expert testimony about the merits of the design. Under those circumstances, the risk-benefit test and not the consumer expectations test applied.

See also *Pankey v. Petco Animal Supplies, Inc.* (2020) formerly published at 51 Cal.App.5th 61 [depublished opinion included for informational purposes only: a pet rat that carries an inherent risk of disease to humans, although the rat itself is not sick, is not a product subject to the consumer expectations theory of design defect for purposes of strict products liability].

Compelled self-defamation is a viable theory of liability, and can support punitive damages; appellate court reduced excessive punitive damages to a 1.5 ratio compared to compensatory damages.

Tilkey v. Allstate Insurance Co.
(2020) ___Cal.App.5th ____ [opinion as issued after rehearing]

Allstate Insurance Company terminated plaintiff's employment as a life insurance broker based on his arrest for domestic violence. Allstate reported its reason for the termination to a government agency on a form accessible to any firm that hires licensed brokers, incorrectly stating that plaintiff had "engag[ed] in threatening behavior and/or acts of physical harm or violence" to another person. Plaintiff sued Allstate under a theory of compelled self-published defamation, alleging that Allstate published a non-privileged, untruthful written explanation for plaintiff's termination on a government form available to plaintiff's prospective employers – thereby compelling plaintiff to explain the reason for his discharge to prospective employers. The case proceeded to a jury trial, and the jury found for the plaintiff, and awarded punitive damages.

The Court of Appeal (Fourth Dist., Div. One) largely affirmed. Where, as here, it was foreseeable that plaintiff would be compelled to disclose the defendant's statement to third party prospective employers after learning the contents, compelled self-published defamation was a viable liability theory. Further, the theory supported punitive damages liability. However, in determining the amount of punitive damages, the amount should be compared only to the defamation damages, and not the entire compensatory award that included damages for wrongful termination, as occurred here. In its original opinion, the Court of Appeal remanded the case for the trial court to determine the proper amount of punitive damages based solely on defamation. But after granting rehearing, the court reduced the punitive damages rather than ordering a new trial. The court says "[t]here is some authority that doing so is appropriate," but no authority is cited. The opinion reduces the punitive damages award to the amount of $2.5 million, which is about 1.5 times the amount of compensatory damages. *Editor's note:* That remedy seems to deprive Allstate of its right to have a jury decide in the first instance the proper punishment for the defamation alone, and potentially to award a lower amount. But the 1.5 multiplier at least avoids another excessive verdict that might come back up to the Court of Appeal.

INSURANCE

"Genuine Dispute" doctrine did not shield insurer from potential bad faith liability where triable issues existed on whether reliance on expert report concerning the cause of damage was reasonable.

Fadeeff v. State Farm General Insurance, Co.
(2020) 50 Cal.App.5th 94

Homeowners filed an insurance claim for smoke damage to their home and property after the 2015 Valley Fire. The insurer made initial payments after the original adjuster found the house was "well maintained" and the damage was caused by the fire. The insurer denied supplemental claims, however, based on a recommendation by a third party unlicensed adjuster and two experts, who concluded the damage was caused by wear and tear, not smoke and soot. The homeowners sued for insurance bad faith and punitive damages. The trial court granted summary judgment to the insurer based on the "genuine dispute" doctrine.

The California Court of Appeal, (First Dist., Div. Two) reversed. The genuine dispute doctrine permits summary judgment for the insurer only if it is undisputed that the insurer conducted a "full, fair and thorough" investigation. Here, there were triable issues on whether the insurer's reliance on an independent unlicensed adjuster whose opinions in some respects appeared inconsistent with the insurer's own adjusters' conclusions earlier in the investigation. The insurer also failed to show it was indisputably reasonable to rely on experts to deny claims where there was evidence that the unlicensed adjuster failed to direct the experts to investigate the owner's specific claims and took no steps to determine the accuracy of the experts'

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conclusions. Finally, there were triable issues about whether the scope of the investigation was too narrow.

See also *Ghazarian v. Magellan* (2020) 53 Cal.App.5th 171 [insurer could be liable for bad faith where it unreasonably reviewed a claim, even where the decision on its face appeared reasonable because one expert agreed with the insurer's conclusion];

But see *501 East 51st Street, Long-Beach-10 LLC v. Kookmin Best Insurance Company, Ltd.* (2020) 47 Cal.App.5th 924 ["genuine dispute" doctrine applied to bar bad faith liability for an insurer who relied on an expert report concerning the cause of the damages].

Subcontractor's insurer who defended construction defect suit against general contractor was entitled to equitable subrogation from other subcontractors who breached their contractual duty to defend the general contractor.

Pulte Home Corp. v. CBR Electric, Inc.
(2020) 50 Cal.App.5th 216

Pulte Home, the general contractor on a housing project, was sued for constructive defects in a housing project. Pulte tendered the defense to its subcontractors' insurers, claiming additional insured status under the subcontractors' policies by virtue of its contracts with the subcontractors obliging the subcontractors to defend Pulte against claims arising out of the subcontractors' work. Two of the subcontractors' insurers accepted the tender, including St. Paul Mercury Insurance, who had insured a landscaping subcontractor. Following resolution of the underlying construction defect litigation, St. Paul filed an equitable subrogation action against the subcontractors who declined to defend Pulte. The trial court found for the defendants, holding that the equities tipped against St. Paul because it would be unfair to shift the "entire" loss onto the defendant subcontractors on a joint and several basis.

The Court of Appeal (Fourth Dist., Div. Two) reversed. Although one of the elements of equitable subrogation is that " 'justice requires that the loss be entirely shifted from the insurer to the defendant,' ... the word 'entirely' in that context refers not to the total amount the plaintiff (or subrogee) paid, but refers instead to 'the claimed loss' ... the subrogee is seeking from the defendant." "In other words, subrogation entirely shifts the claimed loss, but the claimed loss doesn't have to be the entire loss the subrogee suffered." Thus, the trial court erred in rejecting the equitable subrogation claim on the ground it required shifting liability for the defense costs fully and jointly and severally on the defendants; the trial court could have shifted onto each defendant only that the portion of the defense costs incurred to defend the defendant's own work.

But see *Carter v. Pulte Home Corporation (Travelers Property Casualty Co. of America)* (2020) 52 Cal.App.5th 571 [insurer who defended certain subcontractors in construction defect suit was not entitled to equitable subrogation against other subcontractors where insurer insisted it was entitled to shift entire loss onto subcontractors who were responsible for only part of the loss].

HEALTHCARE

Hospital admission form notice that its physicians were independent contractors precluded medical malpractice plaintiff's from arguing that ER doctor was hospital's ostensible agent.

Wicks v. Antelope Valley Healthcare District
(2020) 49 Cal.App.5th 866

Plaintiff went to a hospital emergency room for stomach, chest, and neck pain. Hospital nurses and two ER doctors evaluated him. He was then discharged with instructions to see a cardiologist the next day, but he died eight hours later. His family sued the hospital, alleging among other things that the ER doctors, although independent contractors, were ostensible agents of the hospital. The trial court granted summary judgment for the hospital.

The Court of Appeal (Second Dist., Div. Eight) affirmed. The ER doctors were not ostensible agents of the hospital because the hospital admissions forms provided clear notice that the ER physicians were independent contractors.

LABOR & EMPLOYMENT

California wage and hour statutes apply to multi-state workers whose "base of work operations" is California.

Ward v. United Airlines, Inc.
(2020) 9 Cal.5th 732

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

The California Supreme Court held that the employer airline must provide wage statements that comply with California statutes if the employees' principal place of work is in California. "Principal place of work" means "if the employee works a majority of the time in California or, for interstate transportation workers whose work is not primarily performed in any single state, if the worker has his or her base of work operations in California." And "base of work operations" means "California serves as the physical location where the worker presents himself or herself to begin work." The Court rejected a rule that would have applied California law only if an employee performed their work entirely or mostly in California because, "if every state were to adopt the same rule, then many transportation-sector employees – from interstate truck drivers

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to train conductors to the airline employees here – would not be entitled to the protections of any state's law."

See also *Oman v. Delta Airlines, Inc.* (2020) 9 Cal.5th 762 [same].

Trial court's protocol of beginning trial with a video played to the jury about civil rights was error, as was admitting evidence of discrimination as to persons outside the plaintiff's protected class to prove a discrimination claim.

Pinter-Brown v. The Regents of the University of California
(2020) 48 Cal.App.5th 55

Plaintiff, a professor of medicine at UCLA, sued The Regents of the University of California for gender discrimination. At the outset of the case, the trial court made comments that "framed this case as part of a centuries-long fight against discrimination and inequality" and lauded civil rights leaders. During trial, the court allowed in evidence consisting of a campus wide report about racial and ethnic bias, and a list of discrimination complaints filed with the state Department of Fair Employment and Housing against the entire University of California system.

The jury found for the plaintiff and the defendant appealed.

The Court of Appeal (Second Dist., Div. Eight) reversed for a new trial. "It was a grave error for the court to begin a gender discrimination trial with a presentation highlighting the great achievements our nation's civil rights leaders have made toward creating a world free of discrimination and telling the prospective jurors they were carrying on that quest." Further, allowing "the jury to hear about and view a long list of discrimination complaints from across the entire University of California system that were not properly connected to [plaintiff's] circumstances or her theory of the case" was erroneous and prejudicial. While "[c]ourts have sanctioned the use of "evidence of an employer's alleged gender bias 'in the form of harassing activity against women employees other than the plaintiff' in certain circumstances," this "doctrine ... does not permit a plaintiff to present evidence of discrimination against employees outside of the plaintiff's protected class to show discrimination or harassment against the plaintiff." Thus, while such evidence "can be admissible to prove intent, motive, and the like with respect to the plaintiff's own protected class, it is never admissible to prove an employer's propensity to harass."

CONTRACTS

A claim for tortious interference with an at-will contract requires proof of independent wrongfulness.

Ixchel Pharma v. Biogen, Inc.
(2020) 9 Cal.App.5th 1130

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

The California Supreme Court held that tortious interference with a contract that is terminable at will requires proof of an independently wrongful act even though no such showing is required for tortious interference with a contract for a term. Unlike a contract for a term, where the parties cement their future relationship and act in reliance on it, an at-will contract creates only speculative interests in which neither party has a legal right to a continued relationship. The Court further held that a rule of reason rather than a per se rule governs the validity of a contract that allegedly restrains business operations and commercial dealings in violation of section 16600. The Court incorporated the rule of reason standard from another California antitrust statute, the Cartwright Act, thereby ensuring the consistency of California's antitrust laws.

CONSUMER PROTECTION

A district attorney bringing consumer protection claims under the Unfair Competition Law is not limited to asserting violations only within the attorney's district.

Abbott Laboratories v. Superior Court (People)
(2020) 9 Cal.5th 642

The Orange County District Attorney brought an Unfair Competition Law action against a pharmaceutical company. The company moved to strike the allegations in the complaint that sought to reach conduct outside Orange County on the theory that such conduct was beyond the District Attorney's jurisdiction. The trial court denied the motion, but the Court of Appeal (Fourth Dist., Div. One) issued a writ of mandate directing the trial court to grant the motion. The Court of Appeal held that the standing conferred on district attorneys to bring civil law enforcement actions when prosecuting under Unfair Competition Law "cannot reasonably or constitutionally be interpreted as conferring statewide authority or jurisdiction to recover such monetary remedies beyond the county the district attorney serves."

The California Supreme Court reversed the Court of Appeal, holding that the trial court properly denied the motion to strike. In a properly pleaded case, a district attorney may include allegations of violations occurring outside as well as within the borders of his county. On remand, the Court of Appeal denied writ relief.

Certain vehicle registration or nonoperation fees are recoverable "incidental damages" under the Song-Beverly Act if the plaintiff proves they were causally related to the manufacturer's breach of duty under the Act.

Kirzhner v. Mercedes-Benz USA
(2020) 9 Cal.5th 966

In this Song-Beverly Consumer Warranty Act (lemon law) case, the plaintiff accepted the automaker's Code of Civil Procedure section 998 offer to pay restitution. When the parties could not agree on the exact amount of restitution, the plaintiff submitted a postjudgment motion in the trial court to resolve the issue. The trial court's ultimate award included the initial vehicle registration fee, but not any subsequent registration fees and nonoperation fees. The Court of Appeal affirmed. The court reasoned that the Act allows for restitution of the original purchase price plus "collateral charges." In context, the "collateral charges" refer only to payments associated with the original lease or purchase. Further, the Court of Appeal held, "incidental damages" do not include fees that are simply part of the standard cost of owning or operating a vehicle.

The California Supreme Court reversed. While registration or nonoperation fees "are not recoverable as collateral charges because they are not auxiliary to and do not supplement the price of the vehicle," such fees "are recoverable as *incidental* damages if they were incurred as a result of the manufacturer's breach of the duty to promptly provide a replacement vehicle or restitution." Holding that such fees are in the nature of "preservation" costs, essentially for the manufacturer's benefit, the court contrasted "standard ownership or use costs – incurred solely for the buyer's benefit and unconnected to the manufacturer's breach," as those are incurred as a result of the owner's *choice* to drive the vehicle during the period that the manufacturer should have repurchased it: "buyers are free to choose whether to put gas or oil in the car and usually opt to expend such costs solely for their own benefit in order to drive the vehicle and keep it operational." *Editor's note: Because non-operation fees are less than registration fees, a buyer who chooses to continue to drive the vehicle and pay registration fees and insurance that would be unnecessary for "preservation" of the vehicle presumably has not incurred costs caused by the breach.*

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 successive wage and hour class actions against staffing agencies and direct employers.

Grande v. Eisenhower Medical Center (Flexcare)
(2020) 44 Cal.App.5th 1147, review granted May 13, 2020, case no. S261247

A temporary staffing agency assigned plaintiff to work as a nurse at a medical center. She was named a plaintiff in a wage and hour class action against the staffing agency brought on behalf of agency employees assigned to hospitals throughout California. The staffing agency settled with the class, including plaintiff who executed a release of claims, and the trial court entered a judgment incorporating the settlement agreement. A year later, plaintiff brought a second class action alleging the same labor law violations against the staffing agency's client, the medical center who was not a party to the previous lawsuit. The staffing agency intervened in the action asserting plaintiff could not bring a separate lawsuit against the medical center because she had settled her claims in the prior class action. The trial court ruled that the medical center was not a released party under the settlement agreement and could not avail itself of the doctrine of res judicata because the medical center was neither a party to the prior litigation nor in privity with the staffing agency, and the Court of Appeal (Fourth Dist., Div. Two) affirmed.

The Supreme Court granted review limited to the following issue: May a class of workers bring a wage and hour class action against a staffing agency, settle that lawsuit with a stipulated judgment that releases all of the staffing agency's agents, and then bring a second class action premised on the same alleged wage and hour violations against the staffing agency's client?

Addressing whether the litigation privilege can bar contract claims.

Doe v. Olson
(2019) unpublished opinion, review granted November 20, 2019, case no. S258498

Plaintiff sought a restraining order against defendant, based on alleged sexual harassment. As part of a settlement of the case, plaintiff and defendant agreed "not to disparage one another" for three years. A year later, plaintiff sued defendant for damages, based on the same instances of sexual harassment. Defendant cross-complained for breach of contract, contending plaintiff's new allegations were disparaging and breached their settlement agreement. Plaintiff claimed her allegations were protected by the litigation privilege of Civil Code section 47, subdivision (b). The trial court agreed and granted a motion to strike defendant's breach of contract claim under the anti-SLAPP statute. The Court of Appeal (Second Dist., Div. Eight) held that the litigation privilege did not bar the breach of contract claim because plaintiff had waived her right to make disparaging comments as part of the settlement agreement. Since a factfinder could determine the disparaging allegations in plaintiff's lawsuit violated the settlement agreement, the court held that enforcement of the agreement was not contrary to the public policy of the litigation privilege – promoting access to the courts – and that the litigation privilege therefore did not apply to bar defendant's contract claim.

The Supreme Court granted review of the following issues: (1) Does the litigation privilege of Civil Code section 47, subdivision (b), apply to contract claims, and if so, under what circumstances? (2) Does an agreement following mediation between the parties in an action for a temporary restraining order, in which they agree not to disparage each other, bar a later unlimited civil lawsuit arising from the same alleged sexual violence?

Addressing how to determine whether speech relates to a public issue for anti-SLAPP purposes.

Geiser v. Kuhns
(2020 unpublished opinion, review granted on limited issues July 22, 2020, case no. S262032

The plaintiff filed a petition to stop the defendants from demonstrating outside the plaintiff's home and office against the plaintiff's attempt to evict them. The defendants filed an anti-SLAPP motion. The plaintiff dismissed his petition, and the trial court denied the defendant's subsequent request for fees, reasoning that they would not have prevailed on their anti-SLAPP motion. The Court of Appeal (Second Dist., Div. Five) affirmed. Even though acknowledging that "defendants' conduct does bear certain hallmarks of classic SLAPP conduct," the appellate court concluded "defendants' challenged activity concerned a purely private issue and did not concern or further the public discourse on a public issue or an issue of public interest."

The Supreme Court granted review limited the issue: "How should it be determined what public issue or issue of public interest is implicated by speech within the meaning of the anti-SLAPP statute (Code of Civ. Proc., § 425.16, subd. (e)(4)) and the first step of the two-part test articulated in *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 149-150, and should deference be granted to a defendant's framing of the public interest issue at this step?"

Addressing whether a health care provider who may have acted outside the scope of licensure is entitled to invoke MICRA noneconomic damages limitations.

Lopez v. Ledesma
(2020) 46 Cal.App.5th 980, review granted July 29, 2020, case no. S262487

Maria Lopez sued two physician assistants for wrongful death, alleging they had failed to diagnose her infant daughter's illness. The trial court found that physician assistants were treating patients without supervision in violation of physician supervision regulations, and negligently failed to diagnose her daughter's condition. An award of $4.25 million in noneconomic damages was reduced to $250,000 under the MICRA cap (Civ. Code., § 3333.2). Lopez appealed, contending the MICRA cap was inapplicable to the physician assistants because they were acting outside the scope their license restrictions. A Court of Appeal (Second Dist., Div. Two) majority affirmed the application of MICRA, holding the physician assistants acted within the scope of their licenses.

The Supreme Court granted view of this issue: Was a physician's assistant who treated a patient without direct physician supervision entitled to invoke the limitations of Civil Code section 3333.2 on noneconomic damages?

Addressing standing to move for a new trial following a default judgment.

Siry Investment L.P. v. Farkhondehpour
(2020) 45 Cal.App.5th 1098, review granted July 8, 2020, case no. S262081

In this case involving alleged fraudulent diversion of business funds, the trial court entered a default judgment against the defendants as a sanction for discovery abuse. The defendants filed a motion for new trial. The trial court ruled that the defaulting defendants had standing to move for a new trial, and then recalculated and reduced some of the damages in the original default judgment. Plaintiff appealed. The Court of Appeal (Second Dist., Div. Two) held a party in default does have standing to move for a new trial on the ground that the trial court made an error in law in calculating damages. The appellate court further held that the trial court should not have awarded attorney fees and treble damages under Penal Code section 496, which related to damages for trafficking in stolen property.

The Supreme Court granted review of these issues: (1) May a party in default file a motion for new trial raising legal error, including the inapplicability of certain remedies under the allegations as pleaded? (2) May a trial court award treble damages and attorney fees under Penal Code section 496, subdivision (c), in a case involving the fraudulent diversion of business funds rather than trafficking in stolen goods?

By contrast, at the time the price is set in lien cases, no similar process has yet occurred. Unlike in the insurance/provider context, or in any relatively free market for that matter, in lien cases, the initial "price" is unilaterally set by the treater. This price obviously does not represent a negotiation with a purchaser of the service. It is set by the provider only, with no input from or discussion with the consumer. It would be surprising indeed to see credible evidence of an injured plaintiff undertaking an actual negotiation with a lien doctor recommended by plaintiff's counsel prior to the price for services being set. As all the participants – doctor, patient and lawyer – have an interest in setting the price high to maximize recovery against the defendant, a lien doctor's initial price for services cannot, without more, constitute a "market value," and hence, not a "reasonable value" under *Howell* or *Bermudez*.

This conclusion is entirely in line with *Bermudez'* statement that "a plaintiff who relies solely on evidence of unpaid medical charges will not meet his burden of proving the reasonable value of medical damages with substantial evidence." (*Bermudez,* 237 Cal.App.4th at p. 1335.) Interpreting "market value" to mean "whatever the unilaterally drafted bill says" would resurrect the very evil that *Howell* attempted to do away with: an award of damages for medical care in excess of the reasonable value of such care. (See *id.* at 1328-1329). It is altogether unlikely that *Howell* intended that the evil it vanquished under its first prong should nevertheless be tolerated and encouraged to flourish under its second prong.

How then, did *Pebley* arrive at the conclusion that unpaid treater bills, banished under *Corenbaum,* were admissible as evidence of reasonable value in a lien case? It seems that it did so by concluding that, under the circumstances, *treater bills by lien doctors were evidence of* ***market value***. To understand how *Pebley* could have come to this conclusion, it is helpful to consider the actual process by which lien treaters typically receive payment for their services. Initially, the treater creates a contract with the consumer/plaintiff, in the expectation that he will negotiate *at some time in the future* for what he will actually be paid for the service. After judgment or settlement, the plaintiff and provider--who has a financial interest in being cooperative so as to be referred by plaintiffs' lawyers in the future – negotiate to settle the lien amount, based on the amount of the judgment or settlement on one hand, and what the provider perceives to be the monetary value of the treatment on the other. It is only at this point therefore, where the concept of "market value" begins to make sense. The amount that the provider finally agrees to accept as payment in full, therefore, is *not* the lien or billed amount, but rather the amount settled upon *after the case is all over*. This means that the original "bill" was, in actuality, a species of a bid – much like the price set by providers in the insurance context prior to negotiation between the insurance company and the provider.

The preceding considerations underscore the fallacy involved in the argument that *Pebley* stands for the proposition that bills alone, without further evidence, can or should be admissible as evidence of reasonable value. As they bear no relation to market value, they cannot be admissible, without more, as to reasonable value.

The facts which the court in *Pebley* reflected upon in coming to the conclusion that the "bills" were admissible show that the bills were admitted *on the basis of their being evidence of market value in that instance*, and thus of reasonable value. In *Pebley,* the court noted that plaintiff testified that "he is personally liable for all of the costs of that surgery and his related treatment." (*Pebley, supra,* 22 Cal.App.5th at p. 1277.) Importantly, the plaintiff did not explain his understanding of the term "cost," and whether his payment would actually be reflected on the bill if, for example, there were a defense verdict or modest settlement. The court explicitly noted that Dr. Alexander admitted that "he does not always get paid 100 percent of his bills, *but stated he does not routinely discount them*." *Id*., 1279. The co-surgeon, Dr. Lauryssen, testified as to "the reasonable and customary all-inclusive cost for the cervical fusion surgery that Pebley underwent" and explained that the amount claimed for past surgery "would also be a realistic estimate for the reasonable and customary cost of the future cervical fusion surgery that Pebley would require." In other words, the bills in *Pebley* were treated as evidence of the market value, and thus reasonable value, of treatment based on an implicit assumption that amounts memorialized *before* litigation represented amounts which the treaters *would actually receive for their services.*

It appears that, despite its limited reference to the "marketplace" for determining reasonable value (*Pebley, supra,* 1275), the *Pebley* court was in fact looking at *the particular history of transactions of treaters in the case* as evidence of "market value" and thus of "reasonable value." That is, the "marketplace" was a very limited one, constituted mostly by the payments Dr. Alexander vaguely claimed to receive. If the marketplace in *Pebley* consists of such transactions, discovery of *how much particular lien treaters are actually reimbursed for their treatments* should be crucial to determining the market value, and thus the reasonable value, of services, under *Pebley*.

While this approach to determining market value in lien cases poses some methodological difficulties, it at least has the virtue of attempting to determine reasonable value by reference to *an actually negotiated exchange of services for money between a consumer and a provider* that, in real respects, involves some of the same processes and pressures which exist in a market, and which, as such, may be reasonably characterized as a "market value." Thus, discovery of what lien treaters are actually paid on their bills is thoroughly defensible as a discovery tactic on the grounds that it seeks information relevant to determining the market value, and hence the reasonable value, of services which the plaintiff claims to be entitled to as a measure of damages.

Is *Pebley* right?

The foregoing assumes, of course, that *Pebley* was rightly decided, and that it is reconcilable, in its essentials, with other cases decided under the *Howell* regime. There is reason to believe it may not be. See, for instance, *Libman v. Southern Wine & Spirits of America, Inc.* (December 19,

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2019) case no. B287345); *Markow v. Rosner* (2016) 3 Cal.App.5th 1027. Defense counsel, therefore, should not be too quick to forfeit opportunities to argue law in the alternative, and to follow plausible readings of *Howell, Corenbaum, Markow, Ochoa*, and other opinions that are arguably at odds with *Pebley* on the question of market value. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456 [trial courts "must make a choice between the conflicting decisions"].)

There is additional reason to hesitate before allowing *Pebley* to control legal thinking in general about market value in the lien context. *Pebley's* tendency to favor the admissibility of bills creates a structural problem leading to inflated damages awards because there is no incentive, under *Pebley,* for the provider to set a low bid price. Consideration of how prices are set in the insurance context is instructive as to why this is the case. In the insurance context, there is a zero-sum game between the provider and the insurance company. No matter how high the provider sets the initial price, no additional pressure is thereby created that would influence the insurance company to pay a higher amount to the provider for the service; no additional incentive is given to the insurance company to pay a higher amount; and no additonal monetary resource is made available to the insurance company from which to pay any higher amount. In the "lien market" by contrast, the higher the damage award, *the greater the resources available to the consumer with which to pay the provider.* Accordingly, under *Pebley,* the provider has every incentive to maximize the amount of its bill, and thus maximize plaintiff's chances for a greater damages award; and thus, at the end of the day, to maximize the chances that the provider will receive a higher payment for his services. Thus, as compared to other markets, under *Pebley*, the lien market is inherently skewed towards creating a market value for services which is artificially high.

Thus, with *Pebley*, it is clear that proving damages in the lien context has become methodologically difficult, and thus in conflict with the simplicity of *Howell's* solution to the problem of "the discrepancy in recent decades between the amount patients are billed by health care providers and the lower amounts usually paid in satisfaction of those charges." *Bermudez,* 1328. Moreover, it has also unleashed forces which will incentivize needless treatment and promote litigation generally – results that *Howell* did not likely intend.

Discovery of Particular Payments

Defendants wishing to combat damages claims made using bills which are potentially admissible under *Pebley* should endeavor to demonstrate how treaters in particular cases are actually reimbursed. To do so, they will need to obtain evidence that shows or tends to show that the treater does not, in fact, usually receive the full amount of the bill from his patients. The source of such evidence will most likely be the treater, or whoever handles bills for the treater. Such evidence should be sought during the discovery process through well-tailored document subpoenas and PMK subpoenas of treaters, and document production requests from any treaters who are also retained as experts by the plaintiff.

Care should be taken as to the specific verbiage used in such requests. For example, asking solely for what the provider's "cost" or "charge" is does not provide sufficient information to challenge the alleged market value of the bill, as providers can rationalize that the "bill" and the "cost," and thus the value of services, are identical. Ensure therefore that you ask also for what (in the words of *Howell)* the provider has in fact *accepted as payment for comparable services*. Asking both for what has been actually received in payment, and what was originally charged, provides an opportunity to compare the two items and thereby to demonstrate to the court in a motion in limine that the bills do not represent a market price, and are thus inadmissible under *Howell* and *Bermudez* to prove damages.

Anything that would tend to show circumstances in which the treater is not paid the full amount of his bill would tend in reason to show that the bill does not represent the reasonable value of treatment. Evidence of this kind would typically include both itemized and aggregated payment amounts received for particular services; and both itemized and aggregated charges for particular services. From each treater, this evidence should be obtained, if possible, from lien cases, cash patients, and insurance patients, so that lien cases may be viewed in comparison to other types of cases.

Since the revelation of such information may make it impossible for a treater to claim with any credibility that the treater usually gets or reasonably expects to get the full amount "billed," subpoenas and document requests of this kind can be expected to elicit strong opposition. Defendants may have to endure numerous motions to quash and requests for protective orders from plaintiffs and treaters, and will likely have to file numerous motions to compel, in order to obtain this information. The alternative is to allow trial testimony from treaters, like that of Dr. Alexander in *Pebley, who claim that* they "expect" (aspirationally) that their patients will pay in full their bills in the amounts blackboarded at trial, and that they do not "routinely" discount their bills, to go unrebutted. Filing and defending against such discovery motions is the price that defendants will have to pay until perhaps the Supreme Court crafts a formula for determining damages under its second *Howell* prong that is as mathematically elegant as its method for determining damages under the first *Howell* prong.

Douglas J. Petkoff

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Jan Roughan, RN

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- Mini (Mediation/Settlement Conference)
- Critique

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- Arbitration
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LIFE CARE PLANNING

Virtual Mediation

part 1

To Zoom or Not to Zoom – That Is No Longer the Question

David S. Schlueter

Once you have decided to take the leap into virtual mediation, preparing for it is a bit different than most of us are used to doing with in-person sessions. Although online dispute resolution has been around for many years, its use has been highlighted and more vigorously being "road tested" with the current COVID 19 health crisis. Online mediation brings its own challenges and unique limitations that have us using technology in a way that is foreign and new to many now finding themselves involved in virtual mediation for the first time. However, one thing is true for both virtual and in-person mediation: proper preparation is key in having a successful mediation and reaching resolution.

After now having handled multiple mediations via Zoom as mediator, the following are some steps in preparing that I have been found to be extremely helpful:

(1) Embrace the technology! Since we are all familiar with having the first meeting with the mediator actually being an in-person session, many parties and counsel are uneasy and unfamiliar with the technology offered by Zoom and other online platforms and are hesitant about how the mediation will work, will it be secure, how am I able to talk confidentially with the mediator, etc. This can be a daunting concept and event for many, so it is helpful to request the mediator to schedule an initial pre-mediation conference prior to the actual mediation session with all counsel and possibly parties to discuss the use of Zoom (I am using Zoom to refer to all of the various online platforms since it is the one I use most often and the one with which I am most familiar). This preliminary conference will allow parties and counsel to use and get familiar with the technology ahead of the mediation session itself, discuss how confidentiality and privacy is achieved and maintained (the use of breakout rooms, share screen, etc.), discuss scheduling and logistics using the Zoom platform with this possibly being the first time the counsel and parties actually get to meet each other, particularly in the virtual world, and encourage cooperation and collaboration among the participants. The mediator (usually being the most knowledgeable having already used Zoom for several mediations and conferences) can help put the counsel and parties at ease as to how the session will be held and lay the ground work for the eventual resolution of the case. Having this pre-mediation status conference is a great tool to allow the participants to use and get familiar with the online mediation format, have the schedule set for the mediation, answer questions about the virtual concept and allay any apprehensions of the participants regarding communication and privacy.

(2) Document exchange is key! As mediators, we are very appreciative of briefs presented in advance of the mediation, as well as having the parties provide documents and information they deem important to a full understanding of their positions. In Zoom mediation, these pre-mediation briefs and documents are of increased importance since it is more difficult for many to virtually provide briefs and documents online during the mediation. Non-confidential briefs are most useful since the mediator will know that all the parties and counsel have the same information, and that he or she can discuss the information contained in the brief without divulging any confidential information. Of course, the parties can still provide the mediator with a confidential brief with details not to be shared with the opposing party ahead of time.

Another useful tool is to consider providing your brief online via pdf as a virtual binder with bookmarks so that the mediator has it on hand during the mediation and can easily access and use it during the session. This is a very helpful way to provide your brief and documentation to the mediator (as always, a few days prior to the mediation is preferred) without having to mail a binder and numerous documents. This is also an easy way for the mediator to share this information with the opposing side if allowed by the generating party and counsel.

Zoom does have a feature called "share screen" in which parties can present and share their screen with any participants on the Zoom mediation, this feature can be used to share information just with the mediator or with as many other participants as one wants. This is a useful

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feature but it does take a little practice typically to get the hang of it.

(3) Are you ready to mediate? Once you have had the "all-hands" pre-mediation Zoom status conference and hopefully sent briefs and information to the mediator, it is helpful to have brief separate Zoom video conferences with the counsel, party and others that are going to participate in the mediation (claims adjusters and experts come to mind) to have confidential dialogue about their case and positions, and allowing the mediator to ask pertinent questions in order to get a more detailed understanding of the claims, arguments and dynamics of that party's case. This is also another opportunity for the participants to use and get familiar with the technology and answer further questions as to how the virtual mediation is going to be run, security and confidentiality issues and any other questions (including anticipated follow up if the case does not resolve during the virtual session, issues about how a settlement agreement will be finalized, etc.). This also is an opportunity for the mediator to really get to know the participants before the mediation, understand and flesh out agendas, etc. In turn, this is an opportunity for the counsel and party to confidentially discuss their case, arguments, claims and concerns with the mediator ahead of the mediation so that time is used to its best advantage once the mediation commences- an opportunity to tell their story ahead of time. I find these separate pre-conferences to be time well spent in terms of maximizing the chances of settlement during the joint virtual mediation.

(4) Lastly, in having these pre-mediation Zoom meetings and conferences, the participants have now had the opportunity to see what savings they can enjoy with the virtual mediation, as compared to the traditional in-person meeting. They will have experienced the technology and seen how easy it is to use once one has played with it a little. Also, the participants have already experienced other advantages with Zoom over in-person mediation: no travel, no parking costs, no lodging or meal costs, the ability to work from your office and on other matters when the mediator is in the other party's breakout room, and no stress about having to head out early because of traffic or a flight. I have found that in the Zoom mediation, we actually get the full attention of all the participants as much, if not more, than when we have everybody in person. This is a tremendous advantage and allows the mediator to focus on the issues with the decision makers without the stress of having that person needing to leave early or being mentally pulled out of the session by the press of other issues.

In closing, although the increased use of technology has been forced on many of us due to COVID-19, including the need to consider virtual mediation and other conferences, it is already clear that this technology is here to stay and will be used regularly because of the ease in using it and the immense savings in time, travel and costs. Embrace it, properly prepare and you will reap the great benefits of virtual mediation in the post COVID world of litigation.

David S. Schlueter

The author, attorney and mediator David S. Schlueter is founding partner of Northrup Schlueter, representing business clients and private individuals in commercial and construction litigation matters since 1983. He focuses on the fields of Construction Law, Construction Defect, Real Estate and Business Litigation. In addition to his experience in both negotiated settlement and trial matters, he has wide experience in arbitration and mediation, and is frequently referred by other attorneys to assist in resolving such cases through mediation. He now heads the firm's practice in Alternative Dispute Resolution, Neutral Solutions ADR. Practicing law since 1983 and now an AMCC neutral, Mr. Schlueter is both an effective advocate and a skillful risk manager who, by taking into account the strengths and weaknesses of a case, strategically positions stakeholders for maximum resolution opportunities early in the litigation process. His experience and training in mediation benefits Parties throughout the dispute resolution process, often leading to early settlement.

Virtual Mediation part 2

Managing Uncertainty – Litigation and Mediation in the Post-COVID-19 Era

David S. Schlueter

I was thinking about what civil litigation and resolving cases might look like once we are all able to get back to work after being quarantined and working from home for the past several months I have had discussions with some attorneys lately who have said that they hope that everything goes back to what it was like pre-COVID and even can't wait to get "back to normal." As much as we all long for so much that has been taken away by the global pandemic, life is not going to be the same as it was before and certainly not back to anything resembling pre-COVID "normal" until there is a proven therapeutic or effective and widely distributed vaccine, which is months, if not years, away. What we are going through is going to be a major game changer for litigation and how we look at disputes and resolving them for a long time to come. Why do I think this is the case? I remember the pre-9/11 days (yes, I am an elder statesman!) when there were no security checkpoints to enter an office building, to enter a sports stadium or to get on an airplane. We used to just walk right in, even had tours of airplane cockpits if we asked nicely, but that all changed on 9/11. What we are going through now is bigger than that and involves the entire planet. It is because of the awareness we now all have regarding pandemics and the knowledge that these events are happening with much more regularity, that I see physical distancing being an everyday concept we live with, just like security checks at the airport. This hyperawareness and risk aversion of large, closely packed groups of people, is likely to continue for some time even after the public is told that COVID-19 is vanquished both due to what appears to be an increasing lack of confidence in pronouncements by government authorities in the general population as well as the widely accepted fact that the risk of death from COVID is greater in those at risk, including everyone over the age of 65, a substantial and growing segment of the population.

What can we reasonably expect once the stay-at-home orders are lifted regarding civil cases? We know most courts have been completely shut down for two to three months, and opening them is going to be slow and methodical. We know that criminal matters and those matters that take precedence will have to be addressed before we begin to have non preferential civil trials again. When will civil trials actually begin again? 2020? Given the backlogs and reduced volume due to social distancing requirements, this is highly doubtful. 2021? Probably, but things may not really get moving until the second quarter of the year. The main thing we all know is that we don't know when any of this is going to take place – just like much of this pandemic, there is much more we do not know about it, than we do.

And when civil trials do finally begin, what are the parameters going to be? We already know that many courts (such as LASC) are requiring physical distancing and the wearing of face masks (even the judges) for an indefinite time period. We can assume that even after a declaration of victory over COVID-19, many people who are at risk, including folks over 65 who are historically a larger part of the jury pool, will want to continue wearing masks in public and are likely to be able to do so. Will only bench trials be allowed for a period of time due to physical distancing requirements? When will juries again be allowed to sit for a trial? What about virtual trials? Currently, most courts just do not have the technological capability to have a virtual trial, nor do most have the funds to afford the necessary equipment to outfit courts with the technology, particularly in light of further budget cuts to the courts contemplated in the governor's latest pandemic budget draft. Again, so much we just do not know.

Another consideration is whether some judges in at risk categories will opt for retirement rather than retaking the bench once the courthouse reopens? We all know many great judges that are in the risk group of being 65 years old and older – do they all want to come back under these conditions? How many retire? And for those that do, how long will it take to replace them, if at all? If bench officers are lost and not immediately replaced, then civil matters and trials will be delayed even longer.

Regarding juries and the people that fill them, even after reopening, I see a substantial impact from the ongoing pandemic. Is the fear of a prospective juror getting infected with COVID-19 from being at the courthouse and being near others a valid reason to be excluded from participating on the jury? This is more likely to be an acceptable excuse if that juror is in a high-risk category such as over the age of 65, underlying health issues, or a caregiver for someone who is

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immune-compromised. Will being in a minority group which is at a higher risk be accepted as an excuse? This could result in a significant change in the make-up of juries – is it still a jury of one's peers? A representation of society at large or only those who are either COVID risk deniers or who perceive their risk to be minimal? I'll leave it to the jury analysts to determine where such people fall on the plaintiff/defense juror desirability spectrum but wholesale elimination or dramatic reduction in jury participation by people in age, disability or ethnic groups will most certainly have an impact on trial results.

Even with all of these unknowns, the parties still have immense control of the outcome of their cases through mediation which can still be highly effective even during the pandemic. In fact, mediation may, for some time, be the one venue in which the parties and their counsel have the most input and control of the parameters and outcome of their litigation. Mediation is voluntary and the outcome is primarily determined by the ability and willingness of the parties to consider compromise and resolution of their conflict. Mediation takes the uncertainty about physical distancing out of the equation – virtual mediation via Zoom or other platforms works extremely well and are easy to facilitate, and save parties and counsel time and money as compared to the previous model of solely in person mediations. If there is a perceived need for in-person mediation, it is much easier to gain necessary physical distancing among the participants since one is not dealing with a large jury pool, court staff, etc. Most mediators can physically distance people simply by using multiple rooms. There is also the option, in larger mediations for certain groups of participants such as parties or insurance adjustors to virtually participate while the attorneys are present in person with the mediator. The possibilities are endless and can be carefully tailored by the parties and the mediators to set up the discussion for maximum resolution potential.

Having now handled numerous virtual mediations to successful resolution (I find the settlement rate to be as good as in-person mediation, if not a little better), I think virtual mediations are here to stay, even after COVID-19 is behind us, since the savings on travel time, productivity and costs are substantial. The time and cost saved in not having to drive to a location, pay for parking and then be concerned about getting back on the freeway, or the several hours it takes to get on an airplane, to get back to your office or home is immense. And with virtual mediation, counsel and parties can stay at their offices and be productive on other matters during down time – in fact, I am able to tell a party and their counsel that I am meeting with the other side for the next 30 minutes or hour, and that they can leave and come back on the virtual mediation after that time – this allows them to work on other matters or do whatever they want, but not be stuck in a room at the mediator's office. The increase in productivity is significant.

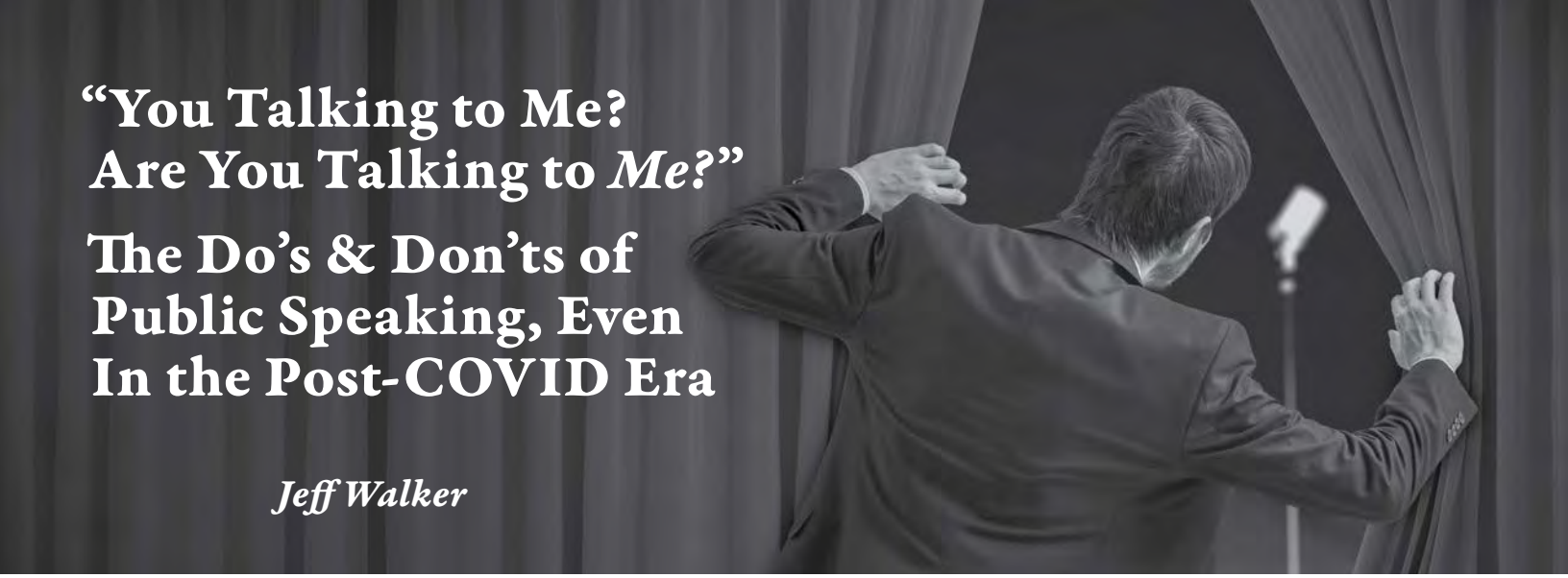
The one thing we know for sure is that civil litigation will be dramatically impacted by the COVID-19 global health crisis for a long time, even after the courts slowly start to reopen. The unknowns for resolving cases through litigation and trial have increased dramatically and will remain that way for some time and may continue even after therapeutics or vaccines are available. Mediation remains a venue of dispute resolution where the parties can guide and control their outcomes even in the post COVID era and virtual mediation is a viable and cost-effective means of resolution that should be seriously considered by parties in legal disputes.

David S. Schlueter

The author, attorney and mediator David S. Schlueter is founding partner of Northrup Schlueter, representing business clients and private individuals in commercial and construction litigation matters since 1983. He focuses on the fields of Construction Law, Construction Defect, Real Estate and Business Litigation. In addition to his experience in both negotiated settlement and trial matters, he has wide experience in arbitration and mediation, and is frequently referred by other attorneys to assist in resolving such cases through mediation. He now heads the firm's practice in Alternative Dispute Resolution, Neutral Solutions ADR. Practicing law since 1983 and now an AMCC neutral, Mr. Schlueter is both an effective advocate and a skillful risk manager who, by taking into account the strengths and weaknesses of a case, strategically positions stakeholders for maximum resolution opportunities early in the litigation process. His experience and training in mediation benefits Parties throughout the dispute resolution process, often leading to early settlement.

"You Talking to Me? Are You Talking to *Me?*"

The Do's & Don'ts of Public Speaking, Even In the Post-COVID Era



Jeff Walker

Well, if you are like me or members of my firm, your daily routine before the evening of March 19, 2020 was spent going to court for hearings, conducting trials, taking depositions, attending mediations, and speaking to groups of clients or colleagues. Since mid-March, life has taken a substantial, unprecedented swerve that has taken the dynamics of being a litigator into unknown territories, and has stood the practice of law on its head! While many of us have adapted quickly and naturally to conducting hearings via Court Call, attending and taking depositions via Zoom, and participating in mediation via Blue Jeans, other members of our defense family have struggled to adapt to the "new" norm.

And when it comes to trial, ***fuhgeddaboudit!*** The mixture of opinions, emotions and concerns run the gamut from nervous consideration of remote trials to absolute refusals to participate. There are already state and federal trials underway despite limited access to the courts, with many using fewer than twelve empaneled jurors, while others opt for trials to be conducted by the bench as opposed to a full jury, or even stipulating to allow witnesses to attend via video conference or behind plexiglass shields. As recently as this month, there have been challenges to the facemask provisions implemented by the state. In one reported case, a public defender challenged the court's requirements of routine masks covering the mouth, and instead requested that masks be clear or with face shields so that jurors can evaluate the facial expressions and speaking movements of the witness when assessing witness veracity. And this is just the beginning, folks!

Even in the Post-COVID era, however, there are fundamental principles that all of us can use to effectively and positively represent our clients. And WHEN things return to normal (I am not only an optimist but a realist), some of these are practice pointers that I think all of us can use in our practice, whether you are a chiseled court veteran or a new shining star rising up the defense ranks.

(1) ALWAYS BE WHO YOU ARE

Juries and audiences alike can always spot a phony and an overly dramatic pontificator versus the real deal. Do not try to act like, speak like, walk like, move like, sound like, or do anything like someone who is not inherently you. Remember, the entire time that you are talking or presenting, whether in-person or over a computer screen, observers know right away whether they want to listen to you. And the more authentic you are, the greater the chances that you will capture a willing audience.

(2) OBJECTS APPEAR CLOSER IN THE MIRROR

Do not rely on objects for safety and security (e.g., a lectern), do not fumble with your favorite pen, do not chew on a pen cap or tap your fingers. At all times, your focus should be on the witness or audience at hand, taking mental notes of reactions. To my young brothers and sisters, please stop typing away furiously on your laptops during a deposition or trial, and really focus on what the witness is saying. I was engaged in a 6-week trial in April of 2019, and a young associate from opposing counsel was present every day at counsel table, typing away on the keyboards at every piece of testimony or document that came into evidence. I thought to myself: "Man, that has to be distracting to plaintiffs' counsel while he is asking questions." I was able to focus, but I could tell by reactions on the faces of the court reporter and other staff that the annoyance level was rising day-after-day. Sure enough, on the 4th or 5th day of testimony, a note from the jurors came to the court's attention and was very direct: "CAN SHE PLEASE STOP TYPING INTO HER LAPTOP FOR THE REST OF THIS TRIAL? IT IS LOUD AND IT IS DISTRACTING US!" Ooooops!

You have to drop the devices once in a while, and not put anything between yourself and the jury or audience (whether a counsel table, an elmo unit, or a cell phone while attending a proceeding online). Get close and show them that you're not afraid of them, and they will not be scared of you!

(3) ATTENTION!

Always make great eye contact to all, speak loud enough for all to hear regardless of where any one person is seated, and move around to keep their attention. A good trial lawyer or public speaker should be burning lots of calories by moving and being active, which is always more interesting than someone who stands still at a lectern or reads off of a legal notepad. Get close, get comfortable, and let the audience know that you are in it for the long haul, respecting of their time and energy to have to sit and listen for long periods of time without being able to say a word. It is key to command their attention and to keep it! And don't be

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afraid to show your passion for your client or your position. To me, too many attorneys hold back in closing arguments or during powerful parts of an argument because they want to keep things calm and "dignified." Don't get me wrong, as I am not advocating for any tearful moment or a loud tirade. But I do think that when the timing is right, the audience will feel your conviction and say to themselves: "dang, I feel where this is coming from and I believe it."

(4) TRUST AND TRANSPARENCY

Never turn your back to the jury or your audience if possible. It is fundamental to always show your audience the courtesy and professionalism that they expect and are entitled to. Being open and transparent is the key to building trust, and after all, don't you want your jurors or judge to trust you? Even if it means you have to navigate around a courtroom or a conference room, at a unique venue, or maybe even in a Zoom meeting ... keep yourself open to being seen and observed without any obstacle in their way.

(5) LET ME TELL YA, I GET NO RESPECT!

Many will tell you otherwise, but try to inject proper humor when appropriate. For me, it is always some mild self-deprecation, which is a winner, allowing the jurors or listeners to know that you are a real person. It is fine that they see you have flaws, or that you make mistakes ... that you are no different from any one of them. Now, be cautious, because this tip can only be used here and there, as you are not conducting an open mic night. Remember to be timely with your comments (i.e., no wise cracks during the crying parent testifying about the child's injury), and nothing off-color, too political or controversial. It has to be genuine and sincere, the timing has to be perfect, and oh yeah ... YOU HAVE TO BE FUNNY!

(6) SHARE YOURSELF

Make attempts to open yourself up to who you are so others will feel comfortable sharing "who they are." I don't mean share your life's story, because no one cares and the judge won't allow it. And try to not share in order to precondition. But take a chance by walking up to that edge so the audience can feel your authenticity and they feel a want to take the journey with you. There is a way to slide in an anecdote during voir dire or to ask a question of your own expert or witness that can make that person shine given your question. There is no method or step-by-step process to it. It is just a gut feel that you have to take, and in the COVID-19 era, it may be even more necessary since you'll be having to connect through a computer monitor as opposed to being face-to-face.

(7) ELECTRIC AVENUE

I am an old-schooler, so I do not rely too much on electronic presentations. Power point is great at times, but not when everyone can read on the screen the same things you plan to say aloud ... no suspense, no surprises, and the readers move ahead and stop listening. If you have to use it, have screen shots that only use 3-4 bullet points or maybe just a single word or two on a slide, where the attorney has to fill in the blanks to keep the audience attentive. To this day, I love my easel, paper and markers. I have watched attorneys use laptops and iPads at trial, some of which have worked out smoothly while others experience technical glitches, get caught up when trying to flip the right "slide" or document into place, hitting evidentiary hurdles to some of the demonstratives, or actually holding the electronic in their hands rather than confronting a witness, telling a story or making eye contact. The electronic becomes a distraction.

(8) MAKE IT UNDERSTANDABLE

Always inject concepts in the discussion that everyone understands. If you can make a clear analogy to something, go for it. Do not get overly technical on science or medicine ... let your experts do that. Instead, choose to get that way when cross-examination requires it. Do not get too complicated ... let your opponent do that. An audience or a jury will tune out if the attorney gets overly cerebral. Do not overthink the difficult, but instead break challenges down to unify the crowd so no one feels "left out" of the discussion. You can use concepts that invoke current events, public figures that everyone knows, a blockbuster film, or life lessons about courage, leadership, hardship, and determination. Your audience does not have to be your legal peers in order to understand the points you are trying to make.

(9) KISS

Keep It Simple, Stupid! This concept is connected to the "Make it Understandable" concept, but it bears reinforcing there is no need to get too technical on tough subjects. You've got to find a way to make the lesson one that can keep your kids' attention. Get in, make your point, and get out. As one of my plaintiff colleagues says during every trial that I have had against him: "Be sincere; be brief; be seated." (an FDR quote).

(10) HAVE FUN!

That's really what it's all about. I am not saying that speaking in public is always fun. And I am not saying to have fun at anyone's expense. Look, whether you are engaged in a trial on behalf of a client or conducting a presentation for your firm, the reason you are there is because your client and those around you have seen your skills, your honesty, your integrity and your leadership. And if you can smile and come across as a warm genuine person while doing so because you are actually having fun doing what you love to do, the listeners will to.

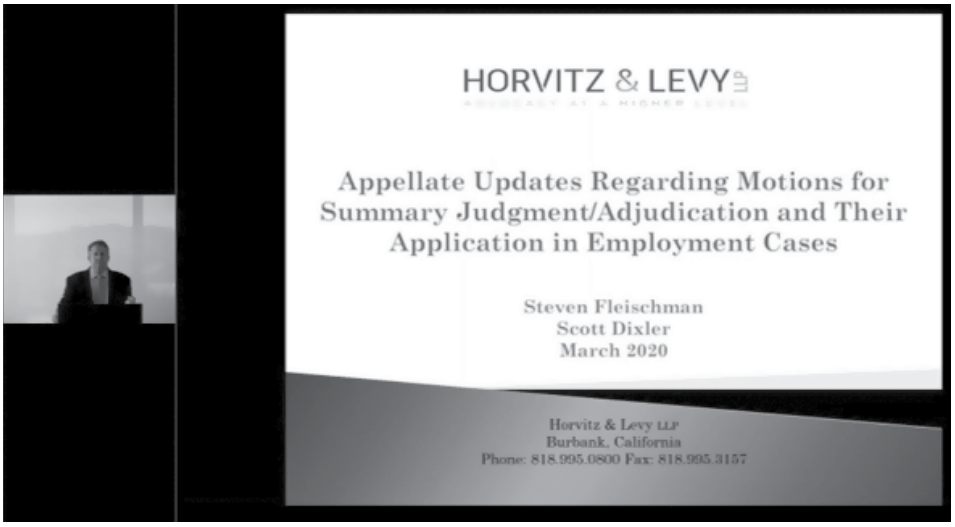
Jeffrey Walker

Jeff Walker is a managing partner at Walker&Mann, which has been in place since 2007; he is a member of ABOTA, a member of ASCDC BOD, and a member of FDCC and LCA; AV Rated Preeminent.

Recent ASCDC Webinars

Ankura

In conjunction with Ankura, on April 16, 2020, the ASCDC provided a detailed and insightful webinar on Cybersecurity Threats and Tips for working remotely. Ankura is a provider of tailored solutions in the fields of analytics & data strategy for E-Discovery, cybersecurity, economics and investment banking. Webinar attendees received practical advice intended to assist with identification of new cyber-based risks which have and will arise in the workplace due to COVID-19.



Employment

On May 21, 2020, Steve Fleischman and Scott Dixler of Horvitz & Levy LLP presented a webinar discussing recent appellate developments in the law of summary judgment, including the role of summary judgment in employment litigation. Steve and Scott discussed trends in the case law and advised attendees on how to maximize their chances of obtaining summary judgment for their clients.

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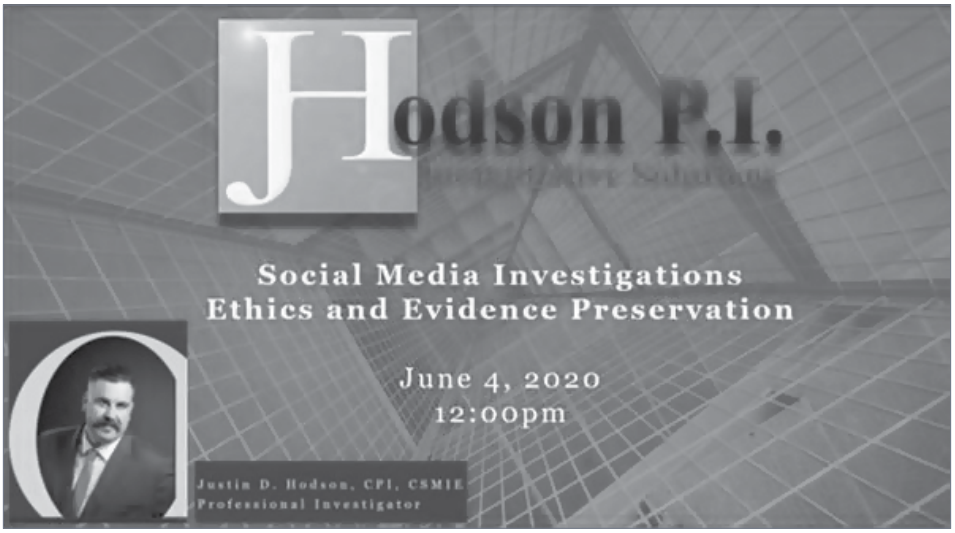
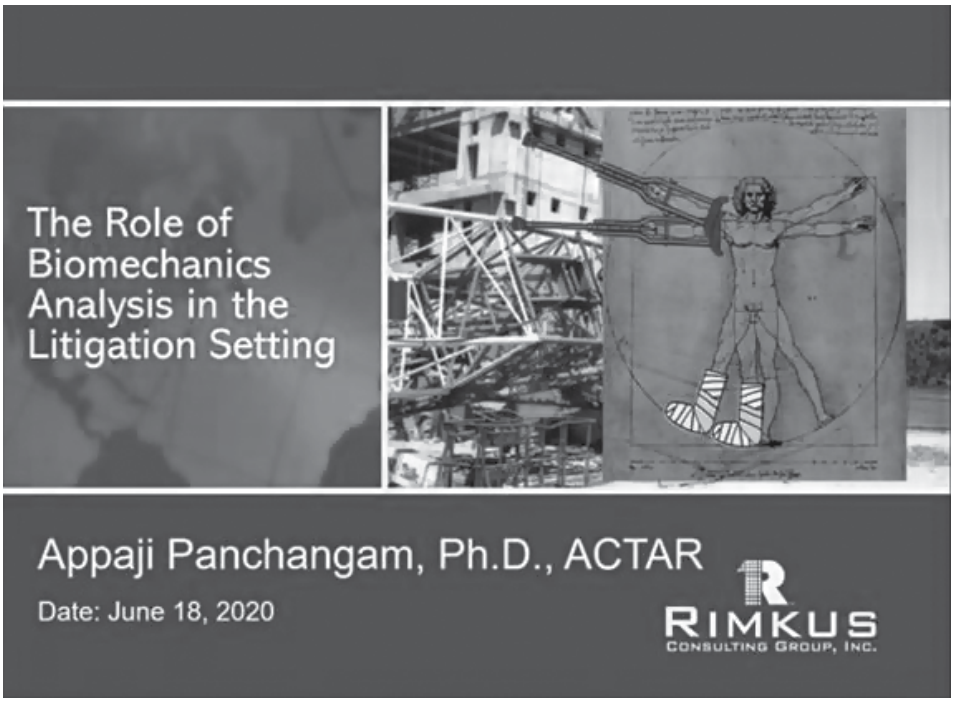
Recent ASCDC Webinars



Hodson

On June 4, 2020, Justin Hodson, CPI, CSMIE, the owner of Hodson P.I. presented a webinar which explored how California Rules of Professional Conduct, Rule 2-100 intersects with social media. Mr. Hodson presented a detailed description of how certain uses of social media platforms may constitute an ethical violation under the Rules of Professional Conduct. The webinar also covered differences between particular social media platforms and how these platforms track information, which may serve to provide notice of use to opposing parties. Mr. Hodson also discussed some real-life case profiles where social media investigations were a success.



Rimkus

Appaji Panchangam, Ph.D., ACTAR of Rimkus Consulting Group, Inc. presented a webinar on June 18, 2020 regarding the use of expert biomechanics in litigation. Dr. Panchangam discussed several aspects of expert biomechanics that can be utilized once a lawsuit is filed. There was also a discussion of how the use of biomechanical principles and applications can assist in determining if an injury was likely to occur based on the forces applied to the body by various mechanisms.

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*** (2020) 48 Cal. App.5th 240: 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. Publication was granted after Fred Cohen, John Taylor and Steven Fleischman from Horvitz & Levy submitted a publication request.

2 ***Betancourt v. OS Restaurant Services*** (2020) 49 Cal.App.5th 240: The Court of Appeal in Los Angeles reversed an award of $280,000 in attorney's fees in a wage and hour case where the plaintiff recovered $15,000 for not providing meal and rest periods. The court held that this type of claim does not entitle the plaintiff to recover attorney's fees under the California Supreme Court decision in *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244. The court also rejected plaintiff's attempts to claim that he really intended to pursue wage and hour claims as to which fees would have been recoverable because those claims were never actually asserted. Publication was granted after Eric Schwettmann from Ballard Rosenberg Golper & Savitt submitted the ASCDC publication request.

3 ***Waller v. FCA US*** (2020) 48 Cal. App.5th 888: 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*. Publication was granted after Lisa Perrochet, John Taylor and Shane McKenzie from Horvitz & Levy submitted the publication request.

4 ***Nguyen v. Ford*** (2020) 49 Cal.App.5th 1: The Court of Appeal in San Jose affirmed the sustaining of a demurrer without leave to amend under the statute of limitations for professional negligence claims against attorneys (Code Civ. Proc., § 340.6). The rejected plaintiff's allegations that the statute of limitations should be tolled under the "continuous representation" doctrine. Publication was granted after Mitch Tilner and Steven Fleischman from Horvitz & Levy submitted the publication request.

5 ***Verrazono v. Gehl*** (2020) __ Cal. App.5th __ [2020 WL 3249089]: The Court of Appeal in San Francisco affirmed a judgment in a product liability case where the plaintiff claimed the trial court erred in refusing to give a "consumer expectation" jury instruction. Publication was granted after J. Alan Warfield and David Schultz from Polsinelli submitted the publication request.

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

1 ***PPacific 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, on 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***: ASCDC submitted an 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.

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Keep an eye on these *PENDING CASES*

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 ASCDC Amicus Committee recommended, and the Executive Committee approved, supporting the defendant's petition for review. Harry Chamberlain from Buchalter submitted an amicus letter in support of the defendant's petition for review, which was granted on June 28, 2017. Oral argument was held on May 19, 2020 and an opinion is expected this summer.

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 since granted review and the Board 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 ***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. Oral argument was held on May 19, 2020 and an opinion is expected this summer.

4 ***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, and the Executive Committee approved, filing an amicus brief on the merits. David Schultz and J. Alan Warfield from Polsinelli submitted an amicus brief on the merits. Oral argument was held on June 2, 2020 and an opinion is expected this summer.

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. The Amicus Committee recommended, and the Executive Committee approved, filing an amicus brief on the merits. 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 ASCDC Amicus Committee recommended, and the Executive Committee approved, filing an amicus brief on the merits. 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

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Amicus Committee Report – continued from page 32

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. The ASCDC Amicus Committee recommended, and the Executive Committee approved, filing an amicus brief on the merits in the Court of Appeal. Laura Reathaford of Lathrop Gage submitted the amicus brief. After the favorable result on appeal, plaintiff's petition for review was granted and the matter remains pending before the California Supreme Court. Laura Reathaford will be submitting an amicus brief on the merits.

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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