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DEFENSE COMMENT

Association of Defense Counsel of Northern California and Nevada – *Serving the Civil Defense Bar Since 1959*

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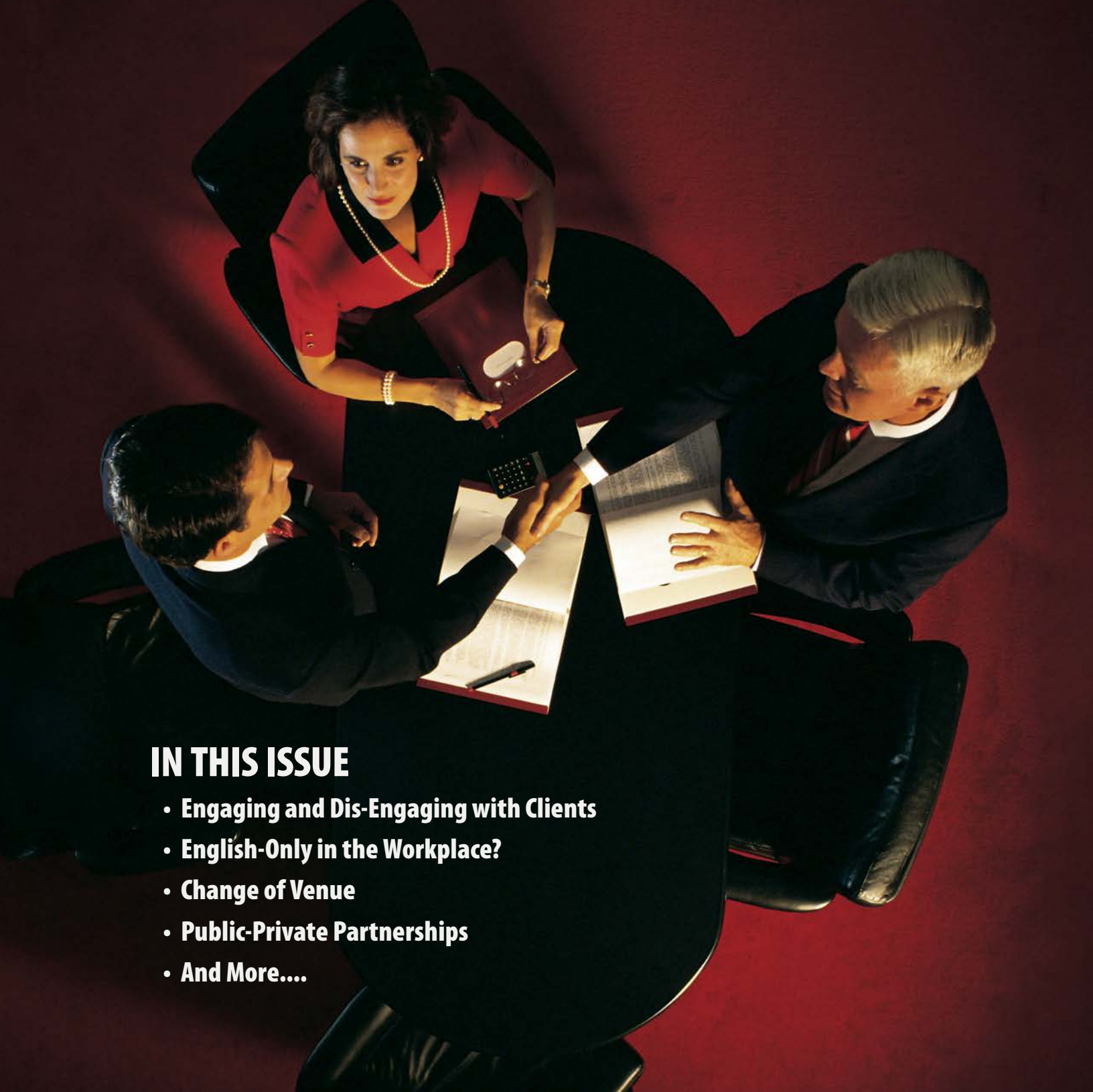

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DEFENSE COMMENT

ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA – *Serving the Civil Defense Bar Since 1959*

FEATURES

DEPARTMENTS

Defense Comment would be pleased to consider publishing articles from ADC members and friends. Please send all manuscripts and/or suggestions for article topics to: David A. Levy, Office of San Mateo County Counsel, 400 County Center 6th Floor, Redwood City, CA 94063. Phone: (650) 363-4756; Fax: (650) 363-4034; E-mail: *dlevy@smcgov.org*.

Enrique Marinez
2017 President

Mental Health and Wellness: An Important First Step

We all took a moment last month to remember the special mothers in our lives on Mother's Day. However, I was also recently reminded to take a moment and remember that May was also Mental Health Awareness Month, which has been observed every May since 1949.

It seems to me an important reminder, as I seek to become more aware of mental health issues that afflict many people, young and old, including many members of our legal profession.

The statistics are sobering and highlight the very real nature of mental illness. According to the National Alliance on Mental Illness, approximately 1 in 5 adults in the U.S. – 43.8 million, or 18.5% – experiences mental illness in a given year. Approximately 1 in 25 adults in the U.S. – 9.8 million, or 4.0% – experiences a serious mental illness in a given year that substantially interferes with or limits one or more major life activities. Approximately 1 in 5 youth aged 13-18 (21.4%) experiences a severe mental disorder at some point during their life. (See more at: *www.nami.org*.). A recent study reflects that levels of depression, anxiety, and stress among attorneys are significant, with 28%, 19%, and 23% experiencing symptoms of depression, anxiety, and stress, respectively. (Krill, Patrick R. JD, LLM; Johnson, Ryan MA; Albert, Linda MSSW, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys* (2016), Vol. 10, Issue 1, pp. 46-52, Journal of Addiction Medicine.).

How Should we Handle Mental Illness when we Become Aware of it?

Perhaps many of you are like me: peripherally aware of mental health issues but, largely unaffected by them, because they can be elusive, invisible, and silent. But I am coming to learn that perhaps it is what makes mental health issues so easy to overlook that makes awareness about them so critically important. Perhaps you have dear friends dealing with the mental health illness of their college-aged son, or a colleague with depression who is self-medicating with alcohol or drugs. When it becomes real and painful we ask, what should we do? We, as lawyers, are born of a desire to help, to make things better. We are used to fixing things – at the office, in our families, for our clients ... but these issues can seem unfixable.

Mental illness, including depression, anxiety, schizophrenia, bipolar disorder, among others, has been stigmatized in the past. It has been wrongly viewed as a weakness, an inability to adequately deal with pressure and negatively stereotyped as a result.

Many of these old stereotypes are based simply on a lack of awareness and understanding. However, mental illness is just as real as someone having a broken arm. Former First Lady Michelle Obama recently highlighted the importance of treating mental health issues as we would treat any other illness. She eloquently stated:

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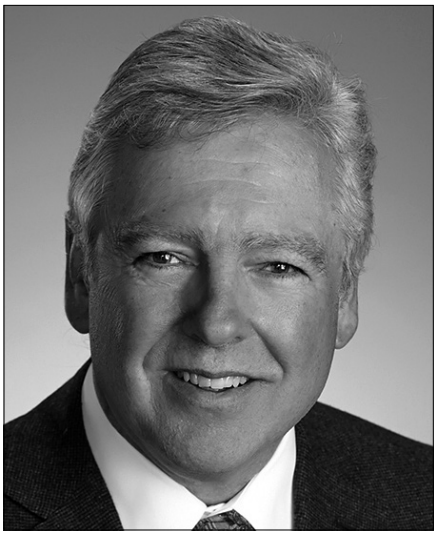

Michael D. Belote
California Advocates, Inc.

Name Your Practice Area- Legislation Affects You!

The California Legislature has been described as a bill factory, more given to volume production than in-depth analysis of a limited range of issues. Quantity over quality, in other words. It is certainly true that Sacramento introduces lots of bills, and enacts lots of law. But we tend to be a highly codified state, and often bills merely clean up or modernize existing laws.

On the other hand, what the California Legislature does can have very profound effects on the practices of ADC members. Lawyers steeped in case law are sometimes surprised, or even stunned, at how quickly and decisively bills can pass which affect lawyers and their clients.

So it is with the more than 130 separate pieces of legislation pending in Sacramento of interest to the California Defense Counsel, the political arm of ADCNCN and our sister organization in Southern California. ADC members would be hard pressed to name an area of practice that is not at issue in some pending bill. The following are major areas of practice for ADC lawyers, and a non-comprehensive selection of bills in each area:

EMPLOYMENT: Always one of the busiest areas of legislative activity, bills are pending which would extend the current parental leave law applicable to employers of 50 or more employees to smaller employers of 20-49 (SB 63); require large employers to report gender pay differentials by job classification to the California Secretary of State (AB 1209); prohibit employers from inquiring about prior salary or benefits of job applicants (AB 168); prohibit employers from inquiring about prior criminal convictions before making a conditional offer of employment (AB 1008); regulate the ability of employers to cooperate with ICE (AB 450), and more.

TOXICS: Once again asbestos is at issue, with a bill to limit to seven hours depositions of asbestos plaintiffs whose doctors declare that they are over 70 years old and will be jeopardized by longer depositions, or that there is substantial medical doubt of survival more than six months, regardless of age (SB 632); prohibit local governments from adopting clean air, water or endangered species regulations that are less stringent than "baseline" federal standards (SB 49), and limit the issuance of protective orders or confidential settlements in cases of environmental harm (AB 889); and granting the Attorney General greater power to comment on certificates of merit in Proposition 65 actions.

MEDICAL PROVIDERS: Bills are pending relating to all manner of health care service providers, including dentistry (AB 224); license probation for physicians and surgeons (AB 505); nursing homes (AB 859); (emergency service personnel (AB 1116);

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EXIT

Withdrawing from Representation? Be Careful About What You Disclose

John C. Hentschel
Livingston Law Firm

There are a myriad of articles that address how to recognize and deal with attorney-client conflicts as insurance defense counsel. This is not that article. This article assumes that whatever conflict has arisen during the course of the representation, it has come to the point where the attorney must withdraw from the representation. How is that accomplished? And more importantly, how much information can the attorney disclose to third parties, either the claims representative or the Court, as to the substance of the conflict?

California Rule of Professional Conduct, rule 3-700, governs how, why, and when an attorney can withdraw from representation. As a general matter, Court permission must be obtained if required, and a member may withdraw from employment if the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the right of the client, including giving due notice to the client, and allowing time for employment of other counsel. (*Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 916.)

Withdrawal can be either "mandatory" or "permissive." Mandatory withdrawal is required if the attorney "knows or should know" that a party is prosecuting or defending a case without probable cause and for the purpose of harassing or maliciously injuring a person, that continued employment will result in an ethical violation by the attorney, or that the attorney's "mental and physical condition renders it unreasonably difficult to carry out the employment effectively." (Rules Prof. Conduct, rule 3-700(B).) Permissive withdrawal, on the other hand, includes a client insisting that a claim or defense be made in bad faith, the pursuit of an "illegal course of conduct," the failure to pay legal fees, or "conduct that renders it unreasonably difficult for a member

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to carry out the employment effectively." (Rules Prof. Conduct, rule 3-700(C).)

Code of Civil Procedure §284 provides that Court permission is required to withdraw from a matter that is being actively litigated, and that a party can change counsel either by (1) written consent of both the party and the attorney filed with Court, or (2) by order of the Court, "upon application of either the client or attorney, after notice from one to the other." There are many reasons that a party may change attorneys during litigation and, more often than not, it can be accomplished through the simple filing of a Substitution of Attorney form [Judicial Council form MC-050]. Take note, however, that since a corporate entity must be represented by counsel (*Merco Construction Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 729), the form must be signed by an attorney who is taking over the representation. It is assumed that if the substitution is being handled voluntarily and in conjunction with an insurance carrier, new counsel in a consensual situation has already been retained prior to the substitution.

If the client, for whatever reason, will not agree to the substitution, the attorney must file a noticed motion with the Court, per Code of Civil Procedure §284(2) and California Rule of Court, rule 3.1362. The motion is made using Judicial Council Form MC-051 (the notice of motion and motion) and MC-052 (the supporting attorney declaration.) In the supporting declaration, the attorney must state why a voluntary substitution could not be effectuated. It is sufficient to cite to the specific subsection of California Rules of Professional Conduct, rule 3-700, on which the withdrawal is based. Judicial Council Form MC-053 is the required Order, which alerts the client to all upcoming litigation activities, including court and trial dates. The Order also alerts corporate and other parties that cannot be self-represented that they must obtain new counsel.[1]

While the mechanics of filing a motion to withdraw are relatively straightforward, an insurance defense attorney may face a unique ethical issue in explaining the specific reasons for withdrawal to both the insurance carrier and the Court. How much of the client's conduct can and should be disclosed to third parties in justifying the request for withdrawal? Business and Professions Code §6068(e)(1) provides that an attorney has a duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." California Rule of Professional Conduct, rule 3-100(A), precludes an attorney from disclosing confidential information without consent of the client. Therefore, if the reasons necessitating an attorney's withdrawal involve issues which implicate

the duty of confidentiality, the attorney **cannot** disclose those reasons to any third party without the client's consent. The duties set forth in Business and Professions Code §6068 extend to both the client and carrier and an attorney must disclose "all facts and circumstances ... necessary to enable each ... client[] to make free and intelligent decisions regarding the subject matter of the representation." (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 157). An insurance defense counsel, however, has an obligation at all times to protect the insured/client and may not act in any way which prevents "devoting his entire energies to his client's interests." (*Betts v. Allstate Insurance Co.* (1984) 154 Cal. App.3d 688, 715-716.) Given the inviolate duty set forth in Business and Professions Code §6068(e), if an insured reveals matters to the attorney in confidence, and these matters are not intended to be heard by the insurer, they may not be revealed. (*American Mutual Liability Co. v. Superior Court* (1974) 38 Cal.App.3d 579, 592.) The dilemma faced by the attorney as to what can and cannot be shared with the carrier is illustrative of the very type of situation which necessitates a withdrawal by the attorney, i.e., conduct that renders it unreasonably difficult for a member to carry out the employment effectively.

The same problem, to a greater degree, occurs when the Motion to Withdraw is heard by the Court. As noted above, the declaration supporting a Motion to Withdraw requires the attorney to state the reasons for the withdrawal in general terms and why written consent could not be obtained. If the Court asks the attorney for a further explanation of the conflict and orders the attorney to comply, can and should the attorney provide the details of the conflict to the Court? The Court of Appeal in *Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128 suggested that an attorney in this situation could perhaps discuss the matters in more detail with the Court *in camera*. The State Bar Standing Committee on Professional Responsibility and Conduct, however, issued Formal Opinion No. 2015-192[2] holding that an attorney seeking to withdraw cannot disclose confidential communications, either in open court **or** *in camera,* where no client consent has been obtained. In reaching its decision, the Committee relied on Evidence Code §915, which prevents a Court when ruling on whether a matter is privileged from requiring disclosure of the subject information, stating that "an attorney may testify about certain circumstances giving rise to the privileged communication – just ***not the communication itself***." (Formal Opinion No. 2015-192, page 6; emphasis in original.) The Committee stated further that since the duty of confidentiality is broader than the privilege, an attorney cannot discuss the circumstances of

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the confidences in making a Motion to Withdraw.

The Committee further addressed what an attorney must do if ordered by the Court to disclose information supporting the Motion to Withdraw. As Business and Professions Code §6103 provides that an attorney who willfully disobeys or violates a Court order could be disbarred or suspended, the attorney is faced with two horns of a dilemma, each equally sharp. What is an attorney to do in this instance? The Committee looked at other states examining this situation under the Model Rule of Professional Conduct, and found decisions supporting a decision in either direction. The Committee noted that Business and Professions Code §6103 applies only to an order to which an attorney "ought in good faith" comply. Given that client confidences are inviolate, is the failure to disclose them in response to a Court Order in bad faith? The Committee stated that it was not "obvious." In the end, the Committee did not reach a decision as to how the attorney should respond to the order, other than all avenues "short of disobedience" should be exhausted, including appellate review. If there is no

available recourse, the attorney must make her own decision on how to proceed, taking into account the legal authorities, and the particular circumstances of the case, including any prejudice to the client. The Committee did not reach a conclusion on which duty, either to the client or the Court, is paramount, but stated that "whatever choice the attorney makes, she must take reasonable steps to minimize the impact of that choice on the client."

Thus, withdrawal, either voluntary or by noticed motion, is available to the insurance defense attorney to terminate the attorney-client relationship. In doing so, however, it is paramount that the attorney protects the confidences of the client and not disclose the underlying reasons necessitating the withdrawal to any third party, including the insurance carrier representative or the Court, without the express permission of the client.

John C. Hentschel

John C. Hentschel is a Senior Counsel at the Livingston Law Firm, where he concentrates on products, professional and general liability matters. He received his Bachelor of Arts degree from Fairfield University, and his Juris Doctorate from the University of San Francisco School of Law.

ENDNOTES

1 This form solves the problem created in *Urethane Foam Experts, Inc. v. Latimer* (1995) 31 Cal.App.4th 763, decided under prior California Rule of Court 376(d), which held that an Order failing to apprise a corporate defendant that it needed representation voided the attorney's withdrawal. (31 Cal.App.4th at 766-767.)

2 This, and other ethics opinions, can be found at *http://ethics.calbar.ca.gov/Ethics/Opinions.aspx.*

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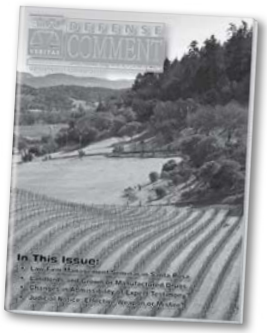

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The Viability of Language Restrictive Policies in the Workplace

Amber Eklof
Gordon Rees Scully Mansukhani, LLP

During a time when executive orders banning immigrant refugees are simultaneously upheld and overruled as discriminatory, national origin and language are at the forefront of government policy, and by association, continue to garner increased attention in the workplace. The United States is an evolving melting pot of cultures and languages, and according to the US Census Bureau, over 60,361,574 people in the United States speak a language other than English at home.[1] Against this ever-changing backdrop, employers have instituted English-only policies restricting language use in the workplace. These policies are controversial in nature and have sparked an increase in national origin discrimination litigation. In recent decades, the Equal Employment Opportunity Commission ("EEOC") has reported a 500% increase in discrimination charges connected to English-only policies.[2]

While some employers may consider language policies at work to be entirely within in their discretion, the EEOC unambiguously disagrees. Under 29 C.F.R. § 1606.7(a), the EEOC presumes that policies requiring employees to speak English in the workplace *at all times* are per se discriminatory and violate Title VII of the 1964 Civil Rights Act.[3] Restrictive language policies give rise to claims for national origin discrimination because a person's primary language is an "essential national origin characteristic" closely connected to a person's cultural identity.[4] The EEOC has determined that prohibiting employees from speaking their "primary," or "most comfortable" language at all times, "disadvantages an individual's employment opportunities on the basis of national origin," and has the potential to "create an atmosphere of inferiority, isolation and intimidation."[5]

Despite the EEOC's position on English-only policies, Title VII does not expressly prohibit restrictive language policies in the workplace. Employers have the right to regulate employees' language use at work provided the policy is "job related and consistent with business necessity,"[6] and the employer has provided notice to its employees of the policy. Notice must include "the general circumstances where employees may only speak English, and the corresponding consequences of violating the policy."[7] In California, it is an "unlawful employment practice" for an employer to enforce an English-only policy in the workplace *unless* the "restriction is justified by business necessity," and the employer has notified its employees of the policy.[8]

The ensuing question remains, when does an English-only policy qualify as a "business necessity?" A compliant, non-discriminatory policy must (1) effectively serve the employer's needs, and (2) be narrowly tailored to serve those needs.[9]

POLICIES THAT SERVE BUSINESS NEEDS

To establish that a policy serves an employer's needs, the policy must do more than "merely promote business convenience."[10] An employer must present detailed, fact-specific, and credible evidence showing the language restrictive policy is "necessary to safe and efficient job performance" or safe and efficient business operations.[11] Where an English-only policy is rooted in health and safety concerns, a court is more likely to uphold the policy.

In *Montes v. Vail Clinic, Inc.* (10th Cir. 2007) 497 F.3d 1160, the court upheld an employer's policy requiring cleaning staff to speak English at all times while working in the Clinic's operating room department to safeguard the health and safety of patients by ensuring the "sanitariness" of the operating rooms. The court emphasized that "clear and precise communication between the cleaning staff and the medical staff was essential in the operating rooms … and that most of the operating room nurses did not speak Spanish and thus could not communicate with [the Spanish-speaking staff] without resort to an English-only policy."[12] In conjunction with the narrowness of the policy, and in the absence of any evidence implying that the policy was improperly motivated, the Tenth Circuit upheld the policy.

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Conversely, in *Maldonado v. City of Altus* (10th Cir. 2006) 433 F.3d 1294, the City of Altus drafted an English-only policy for the purpose of ensuring "effective communications among and between employees and various departments of the City, to prevent misunderstandings and to promote and enhance safe work practices," with limited exceptions for necessary communications with citizens.[13] The policy was intended to allow clear radio communication among workers and to alleviate safety concerns in using a "non-common" language while operating heavy, potentially dangerous machinery. Despite the built in exceptions, the court found that the policy was not narrowly drafted so as to support a legitimate business necessity where "[t]here was no written record of any communication problems, morale problems or safety problems resulting from the use of languages other than English prior to implementation of the policy."[14]

Courts have also found English-only policies satisfy the "business need" requirement where a policy serves an employer's demographic customer, and the employee has the ability to conform to the employer's request. For example, in *Jurado v. Eleven-Fifty Corp.* (9th Cir. 1997) 813 F.2d 1406, 1411, a bilingual radio announcer started broadcasting his show in English and Spanish to expand his audience and attract Hispanic listeners.[15] When the ratings did not reflect an increase in the "program's target Hispanic Audience," the company insisted the announcer only broadcast in English, based on data from a consultant that the bilingual program "confused listeners" about the nature of the programming. The court found that the policy was *not* discriminatory because the requirement was limited to on-air time, and was reasonably related to the company's "exercise of discretion over its broadcast programming." The court further acknowledged that the announcer was capable of conforming to the English-only order, but chose not to do so. Accordingly, an employee's ability to comply with a language restrictive policy may also factor into its viability.

Lastly, courts have found English-only policies to be consistent with business necessity where the policy is necessary to enable supervisors to evaluate an employee's performance. In *Gonzalez v. Salvation Army* (M.D. Fla. 1991) 1991 U.S. Dist. LEXIS 21692, *7, the employer instituted an English-only policy after receiving complaints from other employees and clients about unprofessional and inappropriate conversations by employees speaking Spanish. The court found the policy served a legitimate business purpose by "(a) Providing the Defendant's English speaking supervisors with the ability to manage the enterprise by knowing what was said in a work area of the Defendant's enterprise; [and] (b) Providing Defendant's non-Spanish speaking employees the ability to understand what was being said within hearing distance of such employees and the probationers conducting business with the Defendant's employees."[16]

NARROWLY TAILORED

In order to be narrowly tailored, an employer's English-only policy must apply in the least restrictive circumstances consistent with the employer's stated business necessity. Policies should not apply to employee meal or rest periods, or any other employee "free time" on the employer's property.[17] Courts have repeatedly found that language restrictive policies which do not apply to employee "lunch, breaks, and employees' own time," are narrowly tailored under the federal regulation.[18]

In *Montes v. Vail Clinic, Inc.* the court upheld the clinic's English-only policy as applied to clinic cleaning staff in part because the policy applied solely to plaintiff's work in the operating room department, and did not apply to the entire clinic. Further, the policy was not enforced during plaintiff's breaks nor did it apply to discussions unrelated to the housekeeping position.[19]

Similarly in *Garcia v. Spun Steak Co.* the employer's policy mandated employees speak English in connection with "work," with the exception of "lunch, breaks, and employees' own time." The policy also allowed Spanish-speaking employees to speak Spanish to their supervisors in order to receive directions and assignments. Based on the evidence presented in *Garcia*, the court concluded the employer *had not* violated Title VII by instituting the English-only policy.[20]

Lastly, courts are more likely to uphold a policy confined to "on-the-clock" hours where the employee is bilingual and capable of complying with an English-only policy, but which permits employees to respond to customers or clients who speak to employees in a language other than English.[21]

REPERCUSSIONS OF NON-COMPLIANT POLICIES

In addition to liability for individual claims, employers instituting non-compliant language restrictive policies open themselves up to class action liability and lengthy, intrusive EEOC investigations which can result in EEOC oversight of the employer for several years following any resolution. In a 2010, EEOC settlement against Central California Foundation for Health, the EEOC required the parties to enter into a three-year consent decree requiring the Center to pay $975,000 in monetary relief, revise its policies and procedures, and submit reports to the EEOC regarding any future complaints or concerns related to the Center's policies.[22]

WHAT EFFECT WILL SUCH POLICIES HAVE MOVING FORWARD?

As the nation and our workforce evolve, we will continue to see challenges to English-only policies, even those which are not expressly written. Employers must be cautious of verbal policies and managerial/supervisory instructions which may be construed as language restrictive, but which are not expressly delineated in the employer's policies. Indeed, the Department of Fair Employment and Housing is presently championing a claim against the corporate clothing giant Forever 21, in which no written English-only policy existed, but where employees claim managers prevented employees from speaking Spanish on the floor, as well as in the break room.[23]

Employers using a language restrictive policy must ensure the policy serves a legitimate business purpose, is narrowly tailored to meet that purpose, and is adequately and timely conveyed to all employees. Understandably, the policy must also be

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applied equally to all employees and all languages, and should not single out any particular language. Employers utilizing language restrictive policies should include the policy in their Employee Handbook (or equivalent), review the policy with their employees upon hire, and have all employees sign an acknowledgment form indicating the employee has reviewed and understands the applicable policies.

In reviewing language restrictive policies, courts will look to the totality of the circumstances surrounding the policy to determine whether the policy is statutorily compliant and is not motivated by any improper animus. As is the case with any other claim for discrimination, the current state of affairs on a national and local level implicitly impacts the circumstances under which policies are scrutinized and the manner in which employees respond to various policies, and can affect the suitability of a given policy. Moving forward, employers should be mindful of any cultural and/or legal controversies within the company when implementing any language restrictive policy to maintain compliance with Title VII.

Amber Eklof

Amber A. Eklof is an associate in the San Francisco office of Gordon & Rees and is a member of the Employment Practice Group. Her practice includes defending employers in all phases of employment litigation including discrimination, harassment, wrongful termination, retaliation and whistleblower claims, and alleged wage and hour violations. She received her undergraduate degree from U.C.L.A., and her J.D. from the University of San Francisco School of Law.

ENDNOTES

1 U.S. Census Bureau, 2009-2013 American Community Survey, (Oct. 2015) *www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html.*

2 EEOC Press Release, *EEOC Settles English-Only Suit For $2.44 Million Against University Of Incarnate Word*, April 20, 2001; see also, David E. Gevertz, Ana C. Dowell, *Are English-Only Policies in the Workplace Discriminatory of National Origin*, American Bar Association, (Mar.13, 2014) *https://apps.americanbar.org/litigation/committees/civil/articles/spring2014-0514-are-english-only-policies-workplace-discriminatory-national-origin.html.*

3 29 C.F.R. § 1606.7(a).

4 EEOC Enforcement Guidance On National Origin Discrimination ("EEOC Guidelines"), § V.C.3, (Nov. 18, 2016) *www.eeoc.gov/laws/guidance/national-origin-guidance.cfm#_Toc451518821*; 29 C.F.R. § 1606.7.

5 29 C.F.R. § 1606.7(a).

6 29 C.F.R. § 1606.7.

7 29 C.F.R. § 1606.7(c).

8 Cal. Gov. Code, § 12951(a).

9 EEOC Guidelines § V.C.3.d.

10 EEOC Guidelines § V. C.3.d, citing, *El v. Se. Pa. Trans. Auth.* (3d Cir. 2007) 479 F.3d 232, 242.

11 See *EEOC v. Premier Operator Servs., Inc.* (N.D. Tex. 2000*)* 113 F. Supp. 2d 1066, 1070-71, (holding the employer presented "[i]nsufficient credible evidence" to establish business necessity where there was no credible evidence of "discord" between employees due to Spanish being spoken in the workplace; and there was insufficient evidence to establish that employees were unable to communicate with their supervisors in carrying out their job duties and responsibilities.).

12 *Montes, supra,* 497 F.3d at 1171.

13 *Maldonado, supra,* 433 F.3d at 1299.

14 *Id.* at 1305-1306.

15 *Jurado*, 813 F.2d at 1411.

16 *Ibid.*

17 *Maldonado, supra,* 433 F.3d at 1299, finding a policy unlawful where plaintiffs produced evidence the policy encompassed lunch hours, breaks, and private phone conversations, and Defendants conceded that there would be no business reason for such a restriction.

18 *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480, 1489; see also *Garcia v. Gloor* (5th Cir. 1980) 618 F.2d 264, upholding an English-only policy that was confined to the work place and work hours, and did not apply to employee conversations during breaks or any other employee "free-time."

19 *Montes, supra*, 497 F.3d at 1171.

20 *Spun Steak Co., supra,* 998 F.2d at 1490.

21 *Garcia, supra,* 618 F.2d at 270.

22 EEOC Press Release, *Delano Regional Medical Center to Pay Nearly $1 Million in EEOC National Origin Discrimination Suit*, (Sept. 17, 2012) *www.eeoc.gov/eeoc/newsroom/release/9-17-12a.cfm.*

23 See *Department of Fair Employment and Housing v. Forever 21 Retail, Inc.,* (Super. Ct. S.F. County, 2017, Case No. CGC 17-557825).

The Benefits of Public-Private Partnership Projects In the United States

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A public-private partnership ("P3'") is a contractual relationship between a public entity and a private sector agency. In the construction context, P3 projects involve a long term partnership between a public entity owner with a private developer (known as a "concessionaire") who finances, designs, builds, operates and often maintains a substantial public works project. Typically, P3 projects involve the construction and operation of public infrastructure with an intended revenue stream, which is used to repay the concessionaire over time.

P3 projects bridge the infrastructure gap in the United States by utilizing private capital for the construction of public projects that are desperately needed. Typical projects include roads, bridges, transit, water projects and the like, as well as, social infrastructure such as hospitals, courthouses, correction facilities, and other public amenities. Overall, P3's are an important tool for funding necessary projects, which often lack government funding.

A typical P3 project involves a development and operation team that has no interest in the land. The concessionaire has to be able to finance, construct and oftentimes maintain and/or operate the public work improvement. There are a variety of payment methods that can be used to repay the concessionaire. One model is through user fees where fees are collected from the use of improvements such as road tolls, water bills, and sewage fees. Another model is for payment by the municipality of a fixed amount. This type of arrangement may be contingent upon the quality of work and involves less risk than the user fee model. Additionally, there are various project delivery methods including: design-build, design-build-maintain, design-build-operate, design-build-operate-maintain, and design-build-finance-operate-maintain. There are also P3 templates which exclude design, such as build-operate-transfer, build-own-operate, and buy-build-operate.

THE HISTORY OF P3 PROJECTS

P3 projects are not a new concept. One hundred eighty years ago the U.S. Supreme Court decided a case with a P3 for a bridge across the Charles River in Massachusetts. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge* (1837) 36 U.S. 420. P3 projects have been utilized globally, especially in Europe, Canada and Australia. Governments in these countries have embraced P3's as a solution for the need for transportation and healthcare infrastructure where public funding for such services was lacking. P3 projects have seen a recent rise in the U.S. due to the fiscal crisis in the public sector, increased capital mobility for the private sector and the acknowledged benefits of transferring risk to a private sector investor.

In 1996, California enacted the Infrastructure Finance Act ("IFA") (codified in Gov. Code §§5956, et seq.), which allowed local governments to utilize P3's for public projects, and the legislature recognized that:

> Local governmental agencies have experienced a significant decrease in available tax revenues to fund necessary infrastructure improvements. If local governmental agencies are going to maintain the quality of life that this infrastructure provides, they must find new funding sources. One source of new money is private sector investment capital utilized to design, construct, maintain, rebuild, repair, and operate infrastructure facilities. Unless private sector investment capital becomes available to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities, some local governmental agencies will be unable to replace deteriorating infrastructure. Further, some local governmental agencies will be unable to expand and build new infrastructure facilities to serve the increasing population. Cal. Gov. Code §5956.

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THE BENEFITS OF P3 PROJECTS

The key difference between typical public projects and P3 projects is the source of the funding. Public projects are customarily funded through public bond financing, which can be supplemented by federal grant money, and those funds are used to pay the design and construction costs over the term of the design and construction of the project. However, with P3 projects, the concessionaire obtains most if not all of the financing and is repaid through the project's revenue stream. Overall, although P3 projects involve a contractual arrangement, they differ from typical service contracting in that the private-sector partner usually makes a substantial cash, at-risk, equity investment in the project and the public sector gains access to new revenue or service delivery capacity without having to pay the private-sector partner (other than the percentage of ownership interest in the P3).

A significant benefit of P3 projects is that they shift the risks of public projects over to the private sector. Many of the risks with P3 projects are also present in typical public construction projects and include: unreasonable design review by the interested public entity, stringent requirements by the authority that has jurisdiction over the projects (i.e. permitting), as well as costs associated with unforeseen project conditions, schedule delays, unexpected maintenance and/or latent defects in the assets. The shift of risk is accomplished through engaging the concessionaire in a bundled contract for the life of the asset.

Major benefits to the public include:

- Governments do not pay for the asset until it is built and operational;
- A substantial portion of the contract is paid out over the longer term, and often only if the asset performs well and is properly maintained;
- The lifetime cost of the asset is known upfront, meaning that taxpayers are not on the hook for costs that arise unexpectedly during the contract period; and
- The extended financing structure allows public entity owners to spread their financing over longer projects terms and more projects.

There are also a number of benefits to the private sector participant, which include:

A business opportunity that allows the developer a great role in the design, building, financing, and/or operation of public infrastructure;

A project that allows private companies to deliver a broad range of services over an extended period of time;

The opportunity to work with stable, bankable partners in governments;

Fewer competitors and often a qualitative element (i.e. best value as opposed to lowest bidder) to the bid selection process; and

A potentially long term revenue stream.

REQUIREMENTS FOR P3 PROJECTS IN CALIFORNIA

In California, enabling legislation is a prerequisite for the use of P3's. These statutes typically dictate the types of projects that qualify and the selection methodology. As discussed above, an example is the IFA, which enables local governments to use private capital to design, build and operate "fee producing infrastructure." The IFA applies to the following categories of projects: (a) Irrigation; (b) Drainage; (c) Energy or power production; (d) Water supply, treatment, and distribution; (e) Flood control; (f) Inland waterways; (g) Harbors; (h) Municipal improvements; (i) Commuter and light rail; (j) Highways or bridges; (k) Tunnels; (l) Airports and runways; (m) Purification of water; (n) Sewage treatment, disposal, and water recycling; (o) Refuse disposal; and (p) Structures or buildings, except structures or buildings that are to be utilized primarily for sporting or entertainment events. Cal. Gov. Code §5956.4.

In enacting the IFA, it was the express intent of the legislature for the act to be construed as "creating a new and independent authority for local governmental agencies to utilize private sector investment capital to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities." Cal. Gov. Code §5956.2. The IFA requires that the public entity select the private entity partner pursuant to a competitive negotiation process. Cal.

Continued on page 14

Gov. Code §5956.5. The primary selection criteria must include the demonstrated competence and qualifications of the concessionaire. *Id.* The selection criteria must also ensure that the "the facility be operated at fair and reasonable prices to the user of the infrastructure facility services." Notably, the "competitive negotiation process shall not require competitive bidding." *Id.*

Moreover, "[p]rojects may be proposed by the private entity and selected by the governmental agency at the discretion of the governmental agency." *Id.* In selecting a private entity partner, the public entity may also consider prior conduct of the applicant, such as acts constituting fraud or violation of state or federal securities law. Cal. Gov. Code §5971. The IFA requires P3 agreements to include an obligation to obtain a performance bond to "ensure completion of the construction of the facility and contractual provisions that are necessary to protect the revenue streams of the project" and a payment bond to secure payment to subcontractors and material suppliers. Cal. Gov. Code §5956.6.

Other types of P3 enabling legislation in California include legislation for transportation projects (l Sreer ts & Hwy Code § 143), court facilities (Gov. Code §§70371.5 and 70391), and high speed rail (Pub. Util. Code § 185036). In addition to the above enabling statutes, more are needed in order to accommodate the growing need for a wide array of infrastructure projects in California. Moreover, nationally, the market for P3 projects is robust.

There are several federal statutes which support P3 projects. In 2015, Congress passed the Fixing America's Surface Transportation Act, which includes various measures to make transportation projects more efficient, including P3 projects. Moreover, in 2014, Congress passed the Water Infrastructure Finance and Innovation Act, which provides federal credit assistance to P3's for water infrastructure. Ultimately, these types of programs will be integral in enabling public entities across the country to meet the growing infrastructure needs of their populaces.

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This year's Annual Meeting will take place once again at the historic St. Francis Hotel on December 7th and 8th, and will feature innovative programs. "Helping Women Lawyers Succeed" will be the showcase event and will bring together a wide range of influential women with prominent legal careers. The topics will include ways to empower men and women to build infrastructure to help attorneys of all genders thrive.

Speakers will include Hon. Elena J. Duarte, Associate Justice of the Court of Appeal, Hon. Beth Freeman, US District Court, Northern District, Hon. Barbara Kronlund of the San Joaquin Superior Court, and Amy Fox, Associate General Counsel at Oculus. Other prominent attorneys and judges will likely be added.

Look for presentations on Marijuana Law, including product liability concerns for businesses and insurance, artificial intelligence, and 3D scanning. Panels on Civility in the Law, how lawyers can combat pit bull lawyering and "Speed Speaking," 6-10 minute presentations by young lawyers on substantive issues will be featured as well. Many other topics are also being addressed, and will include the updates in CA and NV law, as well as compelling speakers.

Stay tuned for more details via e-mail and written mail, and make plans to join your colleagues, meet new ones, and *learn* (legal developments and practice tips) and *earn* (MCLE credits).

Ch-Ch-Ch-Changes: Strategies for Successfully Moving to Change Venue Based on Inconvenience

Craig A. Livingston & Crystal L. Van Der Putten
Livingston Law Firm

In California state courts, personal injury plaintiffs are free to file suit in any one of several venues, including where the incident occurred or where any defendant resides. In multi-party cases, the opportunity to forum shop increases with each new defendant. A venue transfer motion under California[1] Code of Civil Procedure section 397, subdivision (c), based on the convenience of witnesses, is one of few tools available to defendants to escape an unfavorable jurisdiction. A successful motion can truly become a "game changer" and the ruling is difficult to overturn on appeal. But such motions require careful planning, proper drafting and extensive factual support. This article provides the roadmap for how to prepare a successful venue transfer motion.

THE BASICS

Defendants are typically at a plaintiff's mercy on venue if suit is filed in a proper county[2] – which varies depending on the parties and the claims asserted in the lawsuit. (*See generally* Code Civ. Proc., §§ 392, 393, 394, 395, 395.1, 395.2, 395.5.) Even so, a defendant may have recourse if the plaintiff's chosen forum is inconvenient to non-party witnesses *and* the ends of justice will be met by a transfer of venue. (Code Civ. Proc., § 397, subd. (c) [stating the court "may, on motion, change the place of trial ... [w]hen the convenience of witnesses and the ends of justice would be promoted by the change."]; *see also Peiser v. Mettler* (1958) 50 Cal.2d 594, 607.) The grant or denial of such a motion is subject to reversal only on a clear showing of an abuse of discretion. (*See State Bd. of Equalization v. Super. Ct.* (2006) 138 Cal.App.4th 951, 954; *Fontaine v. Super. Ct.* (2009) 175 Cal.App.4th 830, 836.) Nonetheless, the defendant's burden is significant and not easily met.

A. Inconvenience

When evaluating a change of venue motion, the Court looks to the inconvenience of *non-party witnesses*. (*Wrin v. Ohlandt* (1931) 213 Cal. 158, 159-160; *Corfee v. S. Cal. Edison Co.* (1962) 202 Cal.App.2d 473, 478 ["Ordinarily only convenience to third-party disinterested witnesses will be considered."].) The convenience of the parties,[3] party-affiliated witness (such as the parties' employees[4] and the parties' expert witnesses) and the parties' attorneys or experts is not considered in determining whether to transfer venue. (*See Dillman v. Super. Ct.* (1962) 205 Cal. App.2d 769, 773-774; *see also Lieberman v. Super. Ct., supra*, 194 Cal.App.3d 396, 401 ["[T]he court may not consider the convenience of the *parties* or of their *employees* in passing upon the motion." (citations omitted, emphasis added)]; *Lieppman v. Lieber* (1986) 180 Cal.App.3d 914, 920 ["Convenience of counsel is not a permissible basis for a change of venue motion."]; Weil and Brown, *et al.*, Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group 2016) § 3:556-57.)

But before the Court considers the convenience of the witnesses, the defendant must show the inconvenienced witnesses' proposed testimony is admissible, relevant and material to some issue in the case as shown by the record before the court. (*Peiser v. Mettler, supra*, 50 Cal.2d at p. 607.) Cumulative testimony will be given little consideration. (*See Int'l Investment Co. v. Chagnon* (1959) 175 Cal.App.2d 439, 446.)

B. Promoting the Ends of Justice

Courts do not require direct evidence that transferring venue will promote the ends of justice. (*See Benjamin v. Benjamin* (1954) 128 Cal.App.2d 367.) Rather, a conclusion that the ends of justice are promoted can be drawn because moving a trial closer to the residence of the non-party witnesses will avoid delay and expense in court proceedings as well as save the non-party witnesses' time and expense. (*Pearson v. Super. Ct.* (1962) 199 Cal.App.2d 69.) When

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the courthouse is closer, the witnesses' "personal attendance can be compelled; [t]hey can easily be recalled or, where their attendance has been compelled by subpoena, can be held subject to call under appropriate directions of the court." (*Id.* at p. 79.) The Court may look to direct facts set forth in supporting declarations and it may also consider any reasonable and relevant inference arising therefrom. (*Benjamin, supra,* 128 Cal.App.2d 367.)

Presumably the ends of justice will also be promoted in instances where the transferee venue is also the venue where the subject incident occurred (assuming this is not the original venue), or if the action has other strong ties to the requested transferee venue. This seems especially true where police and fire personnel are non-party fact witnesses because of the substantial burden on city and county resources if emergency personnel must attend trial at distant locations and are unavailable to respond to emergencies in their home county. Though there is no appellate case on this point, some courts have been receptive to the argument that public employees who must travel to testify in a distant court are taken away from important public safety work and the public employers must then pay overtime or make other accommodations to provide the same services. (*See Hong Sheng Chen, individually and on behalf of Estate of Yong Li Zhang; Jing Zhang; Wei Zhang v. Victor Wang and Mu Jing* (Super. Ct. Santa Clara County, No. 114CV261745), Order Granting Defendants' Motion to Change Pursuant to Code of Civil Procedure section 397, July 6, 2015.)

GATHERING THE EVIDENCE

To make a sufficient showing of witness convenience and promoting the interests of justice, defendants will use declarations and/or deposition testimony. The supporting facts – however presented – must show: (1) the name of each witness; (2) the expected testimony of each witness; and (3) facts showing why the attendance of said witnesses at trial will be inconvenient and why a transfer would serve the ends of justice. (*Peiser v. Mettler, supra,* 50 Cal.2d at p. 607.) Simply providing a name, a general statement of inconvenience to the witness and a vague or general idea of the witness' testimony will likely be insufficient.

Thus, when eliciting deposition testimony or preparing declarations on the issue of inconvenience, be sure to include as many *specific facts* as possible about why traveling to the current venue is inconvenient and why the transferee venue will be less so. For example, include statements regarding large distances (or shorter distances where the commute time would result in hours of travel) between the witnesses' residence or employment and the current venue (including the use of Google Maps print-outs), childcare difficulties, financial hardships, physical hardships (if witness is ill, fragile or elderly), and time away from necessary work, as the Court may find such facts persuasive. Do not be shy about asking for and including such details in the moving papers.

The moving papers must also show *each witnesses' testimony* is relevant to the action and admissible. Again, something more than a general statement regarding the witnesses' testimony is needed to show relevance and admissibility – otherwise the testimony may simply appear cumulative. For example, in *Corfee, supra*, 202 Cal. App.2d 473, a wrongful death/personal injury case arising out of an electrocution occurring in Santa Barbara County but filed in Los Angeles County, the moving party's attorney submitted a declaration listing witnesses by name and address with only "a brief notation" under the name of each witness "only briefly indicating the general subject of the testimony." (*Id.* at p. 475.) The court could only determine seven or more of the witnesses listed "would testify regarding the physical condition at the scene of the accident." (*Id.* at pp. 477-78.) Without more specific information, "the [trial] court could do little more than speculate as to whether the testimony was unnecessarily duplicative." (*Ibid.*)

While the moving defendants do not need to specifically state the testimony the witnesses will provide, they should indicate specific topics or areas of testimony as well as how testimony may/will differ among witnesses. Witnesses who *differ* in their testimony on certain facts are not cumulative, so highlighting factual disputes may justify the consideration of more witnesses in the inconvenience analysis. For example, if the third-party witnesses are first responders to an incident with catastrophic and fatal injuries, their individual testimony may differ depending on their tasks at the scene of the incident, positioning at the scene, treatment of different individuals, the exact location of vehicles, evidence observed at the scene, etc. Thus, a supporting declaration from the individual witnesses should give more detail than simply saying the witnesses will testify regarding observations made at the scene of the subject incident. And if the substance of witnesses' testimony is known from depositions, provide key transcript excerpts with the moving papers.

Finally, there is no magical number of witnesses who must be inconvenienced before a court will grant a change of venue motion. However, the more witnesses you can find who are inconvenienced and will provide non-cumulative, relevant and admissible testimony the better. (*See generally Garrett v. Super. Ct.* (1967) 248 Cal.App.2d 263 [finding an abuse of discretion where the trial court denied a motion to change venue despite the defendant identifying ten (10) witnesses either in or within subpoenaing distance of the transferee county which he intended to call at trial in support of his answer, counterclaim and cross-complaint and where the plaintiff made no showing the transfer would inconvenience other witnesses].)

TIMING

As demonstrated above, a proper showing to transfer venue requires many facts which may not be apparent at the outset of litigation. Thus, unlike a venue motion based on improper venue (which must be brought within the same time limits as a responsive pleading), there is no express time limit within which to file a motion to change venue based on inconvenience. Rather, case law states such a motion cannot be "entertained" until after the defendant(s) have filed an answer "for the obvious reason that until the issues are

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joined the court cannot determine what testimony will be material." (*Pearson v. Super. Ct., supra,* 199 Cal.App.2d at p. 75.) Thus, courts allow a "reasonable time" after an answer is filed to file this motion. (*Thompson v. Super. Ct.* (1972) 26 Cal.App.3d 300, 306; *see also* Code Civ. Proc., §396b.)

However, what constitutes a "reasonable time" is not well-defined and a defendant should file the motion as soon as sufficient supporting evidence is gathered – which will likely require early contact with third party witnesses and obtaining declarations or deposition testimony from third party witnesses. In any event, the moving defendant should include details regarding when deposition testimony or information supporting the motion was obtained to demonstrate it acted reasonably and timely.[5]

AND ONE MORE THING...

Where a venue transfer order is based upon inconvenience, *the defendant* is responsible for paying the costs and fees for transfer *at the time the notice of motion is filed*. (Code Civ. Proc., § 399, subd. (a).) In addition to the standard motion filing fee, a separate $50 fee to the transferor court is required for processing. (Gov. Code, § 70618.) A further separate check for the uniform filing fee must also be provided to the transferor court and will be transferred with the file to the transferee court. (*Ibid.*) Strict compliance with these requirements will eliminate a procedural ground for denial. However, check with the transferor court on payment of fees as some clerks do not want the additional fees until *after* the motion is granted.

SO NOW WHAT?

If the motion for change of venue is *denied*, a defendant who has not previously filed a response will have 30 days to move to strike, demur, or otherwise plead (Code Civ. Proc., § 396b, subd. (e); *see also* Cal. Rules of Court, rule 3.1326.)

If the motion for change of venue is *granted*, the transferring court is divested of jurisdiction (except to dismiss the case if the transfer fees are not paid). (*See Moore v. Powell* (1977) 70 Cal.App.3d 583, 587; *see also* Code Civ. Proc., § 399.) If the defendant has not yet filed a response, the defendant will have 30 days to do so after the transferee court sends notice the case was received and a new case number assigned. (Code Civ. Proc., § 586, subd. (a)(6)(B); Cal. Rules of Court, rule 3.1326.)

Once the time to seek a writ of mandate challenging the transfer order expires (and after payment is made of the costs and fees of the transfer), the transferor court's clerk will transmit the papers and pleadings in the case to the clerk of the transferee court. The transferee court's clerk must then mail notice to all parties who have appeared in the action providing the date transmittal occurred and the new case number. (Code Civ. Proc., § 399.)

CONCLUSION

Imagine how the evaluation of most defense cases would change for the better if venue moved from San Francisco to Sutter County, or Oakland to Lake County. To be sure, the liability and damages aspects of a case could improve dramatically in a less liberal venue. All the more reason to give serious thought to a venue transfer motion and to invest the requisite time and expense to marshal the evidence necessary to bring the strongest possible motion at the earliest opportunity.

Craig A. Livingston

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ENDNOTES

1 All statutory references are to California state statutes.

2 This article addresses strategies for change of venue motions based on inconvenience of witnesses only; motions to change venue based on improper venue or other grounds are not discussed.

3 It is well-established the "convenience of the parties is not to be considered in the absence of unusual circumstances of hardship." (*Union Trust Life Ins. Co. v. Super. Ct.* (1968) 259 Cal.App.2d 23, 28). However, little guidance exists as to what might serve as a "hardship." The only "hardship" identified is when "'the serious illness of a party will prevent his [or her] traveling to attend the trial in the other county and his [or her] testimony is material....'" (*Lieberman v. Super. Ct.* (1987) 194 Cal.App.3d 396, 401 [citations omitted].)

4 But when an adverse party calls the employees as witnesses (as opposed to on behalf of their employer), the employees' inconvenience may be considered. (*See J.C. Millett Co. v. Latchford Marble Glass Co.* (1959) 167 Cal.App.2d 218, 227 ["... when such employees are being called by an adverse party, the court may properly consider their convenience. [Citation.]"]; *see also Harden v. Skinner & Hammond* (1955) 130 Cal.App.2d 750, 757 ["... these [employee] witnesses are not being called by their employer to testify for such employer. They are being called by the adverse party and so are, as to him, ordinary witnesses."].)

5 Moreover, take advantage of delays caused by challenges to the Complaint and use the time to gather supporting evidence. For example, in one instance, a successful motion to change venue was filed approximately one year after filing of the original Complaint. The delay in filing an Answer occurred because defendants challenged the original Complaint, First Amended Complaint and Second Amended Complaint via motion to strike.

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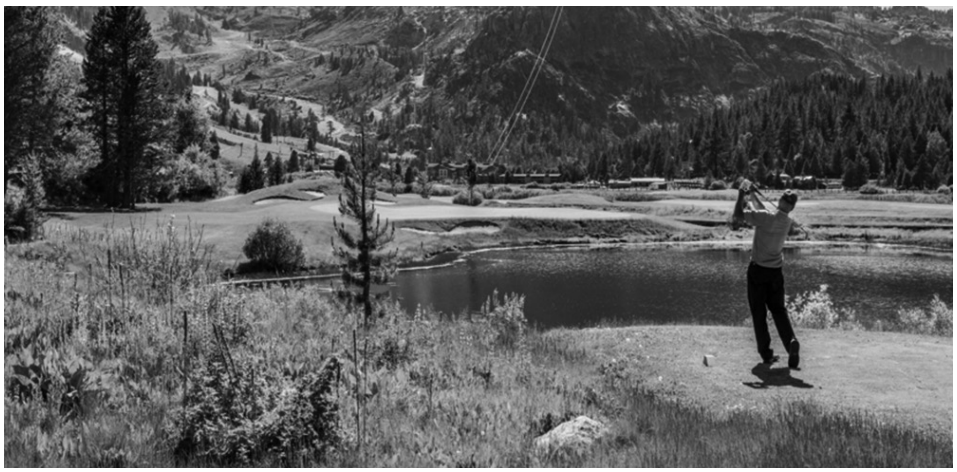

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Summary of Selected Federal and California Supreme Court and Appellate Cases

Editor's Note: As always, remember to carefully check the subsequent history of any case summarized as the reported decisions may have been depublished or have had review granted.

By Michael J. Brady
Ropers, Majeski, Kohn & Bentley

CALIFORNIA SUPREME COURT CASES

HEALTH CARE; DELEGATION OF FINANCIAL RESPONSIBILITIES; DUTY TO MONITOR FINANCIAL CONDITION OF PAYOR; HMOS

Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.
(2016) 1 Cal.5th 994, 209 Cal.Rptr.3d 280
(California Supreme Court)

FACTS: Defendant is an HMO. Plaintiffs are emergency room physicians. Plaintiffs have no contract with the HMO requiring the HMO to pay them for their services. Defendant HMO delegated its financial responsibilities to pay physicians to an IPA (by paying a capitation fee to the IPA). This is permitted under California law. The IPA developed financial difficulties and the emergency room physicians were not paid. They brought suit directly against the HMO, alleging that the HMO knew that the IPA was having financial difficulties when they made the delegation and violated a continuing duty to monitor and assess the financial condition of the IPA. Plaintiffs alleged that this resulted in non-payment and damages to the plaintiff emergency room physicians.

The trial court sustained the HMO demurrer without leave to amend.

The Court of Appeal reversed.

SUPREME COURT DECISION: Court of Appeal affirmed. The Supreme Court held that an HMO, under the circumstances, had a common law duty, even though it had no contract directly with the plaintiffs, not to delegate its financial responsibilities to pay to IPA that it knew was in financial trouble. Furthermore, the Court held that the duty was a continuing duty to assess, in limited fashion, the ability of the IPA to continue to make such payments. Accordingly, the Plaintiffs stated a proper claim under California law.

NEGLIGENCE; PREMISES LIABILITY; ASBESTOS; DUTY OF CARE; SECONDARY VICTIMS

Kesner v. Superior Court
(2016) 1 Cal.5th 1132, 210 Cal.Rptr.3d 283
(California Supreme Court)

FACTS AND HOLDING: In this asbestos case, the California Supreme Court examines the extent of duty owed to people in the immediate victim's household who were exposed to asbestos fibers on the clothing, tools, and vehicles handled by the decedent who dies of mesothelioma. The Court says that a duty is owed to all household members who come into contact with such substances brought home by the decedent. Generally, the same principles apply to premises owners (here, a railroad) who were sued on theories of premises liability and negligence.

PROFESSIONAL LIABILITY; REAL ESTATE BROKERS; ASSOCIATE LICENSEES

Horiike v. Coldwell Banker Residential Brokerage Company et al.
(2016) 1 Cal.5th 1024, 210 Cal.Rptr.3d 1
(California Supreme Court)

FACTS: Cortazzo was an associate licensee for the real estate broker Coldwell Banker. Cortazzo was handling a residential property. The permit information indicated the property was around 11,000 square feet and there were several buildings on the property. On the Multiple Listing, Cortazzo listed the property as having 15,000 square feet. He had a potential buyer and told the buyer that the buyer could retain an expert to verify the square footage. The buyer lost interest in the property, however. Then new buyers showed up (Horiike),

this case continued on page ii

this case continued from page i

the present plaintiffs. Cortazzo furnished various documents to plaintiffs, including the 15,000 square foot representation. After the plaintiff purchased the property, they discovered the error and a lawsuit was filed against Cortazzo and Coldwell Banker. The trial court held that Cortazzo did not owe a fiduciary duty to plaintiffs. This was on the breach of contract claim. The case went to the jury on other theories such as negligence and intentional misrepresentation, but the jury returned a verdict for Cortazzo. On appeal, the Appellate Court reversed the breach of contract decision. The case then went to the California Supreme Court.

SUPREME COURT DECISION: Court of Appeal affirmed. The case is remanded to the trial court for further proceedings, and plaintiffs are allowed to proceed on the breach of contract claim. An associate licensee such as Cortazzo owes the same duty as his real estate broker employer, Coldwell Banker. The governing statute is Civil Code section 2017.

DAMAGES; PUNITIVE DAMAGES

Nickerson v. Stonebridge Life Insurance Co.
(2016) 5 Cal.App.5th 1, 209 Cal.Rptr.3d 690
(California Supreme Court)

FACTS: This is an important California Supreme Court case on punitive damages. The Appellate Court case (decided on remand after the Supreme Court case) is important on punitive damages. Plaintiff was a disabled veteran. He was confined to a wheelchair. When the wheelchair was being unloaded from a van, the chair was dropped and plaintiff broke his leg. He was taken to a VA hospital where he was treated and remained for 109 days. Plaintiff had an insurance policy with defendant. The policy had a provision in it that defendant would only pay for medical expenses which were "medically necessary." Defendant took the position ultimately that it would only pay for 19 days of hospitalization. Plaintiff sued for breach of contract and bad faith. Plaintiff also sought punitive damages.

During the trial, plaintiff produced evidence of emotional distress in the sense of frustration, anger and upset. In the punitive damage phase of the case, plaintiff introduced evidence that the net worth of the defendant was about $368,000,000. Plaintiff was also successful in getting introduced into evidence a "binder" which showed other cases in which the defendant insurer had reduced claims for medical bills under the "medically necessary" standard. The case went to the jury. The jury returned a verdict for $31,000 for compensatory damages (economic damages for the medical bills) and $35,000 for the emotional distress claim. The parties had not introduced evidence pertaining to the so-called "Brandt fees," that is, the amount of the attorney fees plaintiff had expended in proving that policy benefits were owed (coverage was owed). The parties stipulated that after the jury verdict, the Brandt fees could be determined by the trial court. This was done, and the trial court found that the attorney fees were $12,500.

The jury awarded $19,000,000 in punitive damages. The trial court then reduced the punitive damages to $350,000. The trial court did not include the Brandt fees as compensatory damages for purposes of calculating what the proper amount of punitive damages should be.

The case was then appealed to the Court of Appeal (more on that, infra). From there, the case went to the California Supreme Court.

SUPREME COURT DECISION: The main issue before the California Supreme Court was whether Brandt fees are "compensatory damages" and, therefore, can be used as an element to increase the proper amount of punitive damages when calculating the ratio between compensatory and punitive damages. The Supreme Court indicated that Brandt fees should be treated as compensatory damages in a bad faith punitive damages case brought against an insurer. The Supreme Court then remanded the case to the Court of Appeal for a final decision on the proper damage award, in toto.

COURT OF APPEAL DECISION ON REMAND: The Court of Appeal decision has several interesting features. The ultimate result is that the Court says that the amount of the punitive damages which will be entered is $475,000, which is 10 times the amount of the award for emotional distress and Brandt fees combined. The award for "policy benefits" is not properly allowed in the compensatory damages column because these are damages for breach of contract; only tort compensatory damages are allowed in calculating the propriety of the size of the damage award and in calculating the ratio between punitive and compensatory damages.

In examining the reprehensibility of the defendant's conduct, the U.S. Supreme Court case of BMW v. Gore pointed out that more reprehensibility will be assigned to the defendant when the defendant's conduct results in physical injuries as distinguished from economic harm. In the present case, while it is true that plaintiff was awarded $35,000 for emotional distress, that emotional distress did not manifest itself into physical injuries (such as, plaintiff becoming specially disabled because the emotional distress was so severe that physical injuries such as a nervous breakdown result). In the present case, plaintiff's emotional distress was frustration, anger, and upset, nothing more.

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COMMENT: This is an important feature in insurance bad faith cases. Almost always, the insurer's conduct will not be characterized as "violent" and the damages will most often be economic only, as distinguished from real physical injuries. This, therefore, takes the "reprehensibility" of the defendant insurer down to a lower level than, for example, that of a product manufacturer who knows they are manufacturing a dangerous product but allows it to go on the market anyway; or the situation in which the defendant commits a violent assault.

The Court of Appeal also considered plaintiff's claim that the punitive damages should be allowed to be higher because plaintiff was uncompensated for potential harm that he might suffer. This is a phrase lifted from some of the U.S. Supreme Court cases (State Farm and Gore) several years ago which has been relied upon by the plaintiff's bar. The Court of Appeal, however, did not think much of that argument and gave it little weight, which should be somewhat comforting for insurers who should be leery of such claims.

The Court also rejected the insurer's argument that the verdict represented punishment of the defendant for the way it had handled other claims, rather than this particular plaintiff. Remember that a binder showing the way that the insurer had denied other claims based upon the "medically necessary" provision was introduced into evidence. The Court did not seem to have a problem with the introduction of this evidence, although this issue was not treated in great depth. The State Farm U.S. Supreme Court case imposes a rather heavy burden of proof on a plaintiff who relies upon the insurer's treatment of "other claims and other suit," requiring that there be a close similarity between those and the plaintiff's suit. That will probably continue to be the rule.

Finally, the Court of Appeal does accept the admonition from the U.S. Supreme Court that rarely will an award of more than 10 times compensatory damages withstand Constitutional muster under the due process clause.

GENERAL COMMENT: We failed to mention that the breach of contract committed by the insurer lies in the fact that its "medically necessary" limitation on payments was found to be ambiguous and, therefore, unenforceable by the trial court, with the court saying that the insurer had unreasonably relied upon this provision. When you consider the facts of this case were pretty egregious against the insurer and in favor of the vulnerable plaintiff, it is surprising that the jury award for emotional distress was so low, given the sympathy that must have been present. The huge punitive damage award of $19,000,000 illustrates to defendants how important the U.S. Supreme Court decisions of State Farm and Gore are in capping, in almost all the cases, the limits on the size of punitive awards.

Another lesson in the case is that plaintiffs' attorneys should generally make sure that the jury knows what the attorney fees are for obtaining policy benefits. It just increases the compensatory damages argued before the jury and can result in a higher verdict. However, there may be special cases in which that issue is complicated and plaintiff's counsel feels that it should properly be decided by the court. The California Supreme Court in the Nickerson case does sanction that procedure. (It was actually stipulated to by the parties in Nickerson.)

COMMENT: This case reminds us of the movie The Rainmaker about a bad faith case.

(Note: The Court of Appeal gets to the $475,000 total judgment affirmance as follows: $35,000 emotional distress plus $12,500 Brandt fees totals $47,500 total compensatory damages x (times) 10 equals $475,000 for the punitive damages.)

INTENTIONAL TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc. (2017) 2 Cal.5th 505 (California Supreme Court)

FACTS: Two plaintiffs and the defendant were in the asphalt and asphalt sealing business. They all had an opportunity to make bids for some asphalt sealing work. The bid was awarded to the defendant who submitted the lowest bid. Plaintiffs, the unsuccessful bidders, sued the defendant under a theory of intentional interference with prospective economic advantage. They claimed that the reason why defendant got the bid was because they violated the prevailing wage law and did not pay his workers what the law required, enabling him to underbid the plaintiffs.

The trial court sustained the defendant's demurrer. The Court of Appeal reversed.

SUPREME COURT DECISION: Court of Appeal reversed. No claim has been stated. In order for a claim for intentional interference with prospective economic advantage to be stated, there must be an existing relationship between the potentially harmed plaintiffs and the public entity and there must also be an expectation of economic benefit. None of this exists in the public entity bidding process context. These plaintiffs did not have an ongoing economic relationship with the public entity. They simply *hoped* that they would

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get the bid. Furthermore, public entities are required to give the bid to the lowest bidder, although they have considerable discretion in connection with that decision in quality of the bidder, quality of the bid, etc. The probability of economic gain is too speculative in this case and in the public entity context. The issue of public entity contracts is heavily regulated, in any event, and it would be unwise to fasten the tort of intentional interference with prospective economic advantage upon this field.

CALIFORNIA COURT OF APPEAL CASES

EMPLOYMENT TORTS; ANTI-SLAPP LAW

Wilson v. Cable News Network, Inc.
(2016) 6 Cal.App.5th 822, 211 Cal.Rptr.3d 724

FACTS: Plaintiff was a news producer for defendant Cable News Network. Plaintiff was a "behind-the-scenes" person, working in the backroom on news matters. Plaintiff was not a reporter and did not appear on camera. Plaintiff sued defendant claiming discrimination, wrongful termination, retaliation, and defamation. Among other claims, plaintiff claimed that defendant wrongfully accused plaintiff of plagiarism. Defendant filed a motion to strike which was granted by the trial court.

APPELLATE COURT DECISION: Reversed. Defendant's claim of free speech rights is rejected. This case did not involve issues of free speech or public interest. Plaintiff was a behind-the-scenes person, unknown to the public, and was not a reporter. The purposes, therefore, behind the anti-SLAPP laws are not furthered.

There was a dissent, and the dissent took the position that the case really involved an employer's control over staffing and other employment decisions, and that this did involve free speech rights.

GOVERNMENT LIABILITY; PLAN OR DESIGN IMMUNITY

Gonzalez v. City of Atwater
(2016) 6 Cal.App.5th 929, 212 Cal.Rptr.3d 137

FACTS: Plaintiff was a pedestrian and was hit by a car at an intersection. An action for wrongful death was filed against the driver of the car and the City of Atwater. The claim was that the intersection was in a dangerous condition. At trial, the plan or design immunity defense was presented (Government Code section 830.6). It was conceded that the design of the intersection, and the facing of the signaling devices, was causally related to the accident. Evidence was produced that the facing design had been approved by a public official who was empowered with discretion to make the decision. The third element of the plan or design immunity is that the plan or design must have reasonable support. On that subject, plaintiff's counsel, during the trial when discussing a witness' testimony, conceded that there was a reasonable basis for the design. The jury returned a verdict for $3.2 million in favor of the plaintiff.

APPELLATE COURT DECISION: Reversed. The plan or design immunity had been established. The causal relationship was established. The reasonableness of the design was established due to the concession on the part of plaintiff's attorney. Furthermore, there was substantial evidence that a person entrusted with discretion to approve the design had made such a decision.

INSURANCE; DUTY TO DEFEND; FIRE OCCURRING AFTER EXPIRATION OF POLICY

Tidwell Enterprises, Inc. v. Financial Pacific Insurance Co., Inc.
(2016) 6 Cal.App.5th 100, 210 Cal.Rptr.3d 634

FACTS: The owner of the home was Fox. He built the home in the 2007-2008 time period. The home had a fireplace in it. Fox hired Tidwell, the insured contractor, to install a device in the fireplace which would have protected the flue from excessive heat. Tidwell did this work during the time the home was being constructed. Tidwell was insured by Financial Pacific from 2003 through 2010. The policy was a commercial general liability policy which insured for damages which occurred during the policy period. A fire occurred in 2011 resulting in damage to the Fox home. Fox was insured by State Farm under a homeowner's policy. State Farm paid the damage and then sued in subrogation Tidwell. Tidwell referred the matter to Financial Pacific and requested a defense. Financial Pacific refused, contending that the damages happened after the expiration of the policy. Tidwell filed a complaint for declaratory relief and bad faith. The trial court granted summary judgment for Financial Pacific on grounds that the damages had occurred after the expiration of the policy.

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APPELLATE COURT DECISION: Reversed. At the trial, expert evidence had been produced concerning a phenomenon known as pyrolysis. This concept stood for the proposition that when fires are burning in the fireplace, the heat from the fires can cause the deterioration of the wood framing around the fireplace, and this could lead to the occurrence of the fire itself. The insurer is obligated to defend if there is any potential for coverage. The insurer has the obligation to negate conclusively facts which could show the potential for coverage. In this case, the argument of the insured is that the policy provides coverage for losses "because of" property damage. The argument is that property damage was occurring to the wood framing (deterioration caused by increased heat) while the policy was in effect, and that that led to the fire which occurred after the policy had expired. Thus, a potential for coverage was established and the insurer had a duty to defend.

COMMENT: This pyrolysis theory is controversial. Nevertheless, this case is a "revisit" to the old Montrose issues which held that if damage was happening during the policy, even though no one knew about it, that was enough to trigger a duty to defend. The twist in the Tidwell case is the focus on this policy language "because of." The Court also did not give any weight to the claim State Farm was only seeking damages for the fire, not for damages to the wood frame.

INSURANCE COVERAGE; EXCESS COVERAGE; BURDEN OF PROOF; ADDITIONAL INSURED ISSUES; GENERAL CONTRACTOR AND SUBCONTRACTOR

Advent, Inc. v. National Union Fire Insurance Co.
(2016) 6 Cal.App.5th 443, 211 Cal.Rptr.3d 685

FACTS: Kielty was the injured party. He was a direct employee of the subcontractor; the construction site was being managed by the general contractor. The subcontractor's insurer was National Union. The general contractor's insurer was Topa. The National Union policy made the general contractor an "additional insured" if the accident arose out of acts or conduct of the subcontractor.

The instant dispute arises between National Union and Topa and concerns each insurers' excess policies. Kielty's injury case was ultimately settled for $10,000,000. Topa paid $5,000,000 (the limits of its excess policy). National Union only paid $1,000,000 under its excess policy. At that point, Topa brought an equitable contribution action against National Union contending that National Union should at least have paid a pro rata share of the settlement. The circumstances of Kielty's accident were largely speculative: he had been directed by the subcontractor's foreman to fetch a piece of plywood. He could easily have retrieved the piece of plywood without entering the building. Instead, he went inside the building and was hurt while doing so. He did not remember the circumstances of the accident, why it occurred, and no one else did. It was all speculation (including whether the subcontractor had done anything negligent in connection with the accident).

In the equitable contribution action, the trial court ruled in favor of National Union.

APPELLATE COURT DECISION: Affirmed. First of all, the Appellate Court handed down what is probably a new rule on the burden of proof. In the present case, both National Union and Topa had been participating in the defense. National Union, however, refused to participate in an equal settlement and, therefore, would be viewed as a "non-participating" [for purposes of settlement] carrier. Under those circumstances, the non-participating insurer has the burden of proving that there is no coverage under its policy, even though that same carrier is participating in the defense.

However, in this case, the general contractor is only an insured under the subcontractor's policy (National Union's) if Kielty's accident was caused by negligence on the part of the subcontractor. There is no proof as to the circumstances of the accident and, therefore, Topa fails to make its case for equitable contribution and coverage from National Union.

Finally, in dealing with two excess policies, and one is specific and one is general, the specific excess carrier pays first. In this particular case, the National Union obligation to pay was only triggered after exhaustion of the "other insurance" provided by Topa. The Topa policy was specifically written on top of another policy (Landmark), whereas the National Union policy was written on top of not only its primary policy, but other available and collectible insurance. Under those circumstances, the Topa policy would be considered "specific" and the National Union policy "general." Under those circumstances, Topa would pay first and National Union would only be obliged to pay after complete exhaustion of Topa limits, and there would be no proration.

Recent Cases

NEGLIGENCE; INDEPENDENT CONTRACTORS; PECULIAR RISK OF LIABILITY; SAFETY REGULATIONS; NON-DELEGABLE DUTIES

Khosh v. Staples Construction Co., Inc.
(2016) 4 Cal.App.5th 712, 208 Cal.Rptr.3d 699

FACTS: The University campus needed some new electrical systems installed. Staples was hired to do the work. Staples hired one subcontractor who in turn hired another subcontractor (Myers) to do certain specific work. Khosh worked for Myers. The plans were for the entire electrical system at the University to be turned off for three days so that the necessary new electrical work could be done. Khosh arrived on the day the work was supposed to start, and he arrived a few hours early. He started work while the electrical system was still turned on and an electric arc flashed and Khosh was injured. He sued Staples under the peculiar risk doctrine. Staples had agreed with the University to be responsible for safety at the site.

The lawsuit was under the peculiar risk doctrine and on the theory that Staples retained control and had "affirmatively contributed" to the circumstances of the injury. The trial court granted summary judgment for Staples.

APPELLATE COURT DECISION: Affirmed. In the first part of the Appellate Court decision, the Court indicates what "affirmative contribution" to the circumstances of the accident means. The Court says although Staples was aware of the hazardous condition and did nothing to prevent it, it does not constitute affirmative contribution. This is but another statement of the general rule that Staples simply made a general promise to be responsible for safety; it would not be responsible for an omission. In other words, if Staples simply makes a general promise to be responsible for safety on the site without a specific promise to be responsible for specified safety regulations, this is not enough. On the issue of the delegation of safety duties, if the promise by Staples was just to be generally responsible for safety on the site, the safety regulations would be delegable, which is what Staples did. Safety regulations become non-delegable only when the injured party is actively engaged at the time in the activity to which that particular safety regulation was in the work undertaken by the injured party's direct employer, the subcontractor.

COMMENT: This case will be particularly useful to general contractors who are charged with omissions, the argument being that such omissions can amount to affirmative contribution to the accident. The Court disapproves of such arguments.

NEGLIGENCE; RIGHT TO REPAIR LAW; CONFLICT AMONG DISTRICTS

Elliott Homes, Inc. v. Superior Court
(2016) 6 Cal.App.5th 333, 210 Cal.Rptr.3d 889

FACTS AND HOLDING: This case holds that a homeowner suing for defective construction under common law theories of recovery is also bound by the Right to Repair law, and the litigation was stayed pending homeowner's compliance with that law. This decision is in conflict with two other Appellate Court decisions and, therefore, there is a high likelihood that the California Supreme Court will grant review of this case.

ANTI-SLAPP MOTION

Dual Diagnosis Treatment Center, Inc. v. Buschel
(2016) 6 Cal.App.5th 1098, 212 Cal.Rptr.3d 75

FACTS: Plaintiff was a facility for the treatment of alcohol and drug abuse. Plaintiff sued a defendant (publisher) which had republished an article which was critical of plaintiff's license procedure and validity. Plaintiff sued defendant for libel and negligence. Defendant filed a motion under C.C.P. section 1425.16 (anti-SLAPP motion). The trial court denied the motion.

APPELLATE COURT DECISION: Affirmed. An anti-SLAPP motion cannot be filed unless the matter involved is one of widespread public interest. This case involved something said about the plaintiff alone, not about the drug rehab industry as a whole or any ongoing major controversy. The trial court correctly denied the motion.

DEFAMATION; ANTI-SLAPP STATUTE; FAIR AND TRUE COMMENT PRIVILEGE

Healthsmart Pacific, Inc. v. Kabateck
(2017) 7 Cal.App.5th 416, 212 Cal.Rptr.3d 589

FACTS: Drobot operated a company called Healthsmart. This company owned a hospital in Long Beach. Healthsmart advertised the hospital as a specialist in spinal injury treatment. Drobot also controlled the company which allegedly furnished hardware to be used in the spinal surgery (although the hardware was really manufactured by another company). It was also apparently represented that the hardware was FDA approved. Drobot became involved in a criminal action brought by the State concerning bribery of Senator Calderon. The criminal matter involved bribes of Calderon by Drobot to

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get Calderon to introduce legislation which would allow the passing on of the costs of the surgical implants to workers compensation carriers. The criminal matter charged that Drobot charged highly excessive costs for the implant devices and that he was further involved in kick-back schemes with various doctors and medical providers to "refer" patients to the Drobot hospital.

A woman named Cavalieri brought a lawsuit against Drobot, et al., alleging that she was a victim of substandard implants. She had attorneys named Kabateck and Hutchinson. These attorneys gave interviews to the media commenting on the allegations in the complaint. This resulted in a defamation action brought by Drobot, et al., against the attorneys. The attorneys filed an anti-SLAPP motion under C.C.P. section 425.16 which was granted by the trial court.

APPELLATE COURT DECISION: Affirmed. The first prong of the anti-SLAPP motion is satisfied, since the matter does involve an issue of widespread public interest. Under the second prong of the statute, when the public issue prong is satisfied, the burden shifts to the plaintiff to show that plaintiff has the probability of prevailing with the lawsuit. But here, that prong cannot be satisfied because defendants will enjoy the benefit of the privilege provided in Civil Code section 47(d) known as the "fair and true comment" privilege. Under that statute, defendants and others are protected from liability for their fair and true comments regarding judicial proceedings. This is what the defendants did in the present case, commenting on the allegations in the Cavalieri lawsuit. Hence, plaintiffs are unable to demonstrate that they have a probability of prevailing in the suit for defamation.

INSURANCE COVERAGE; MEANING OF "ACCIDENT;" SETTLEMENT WITHOUT ALLOCATING "PREVAILING PARTY;" ATTORNEY FEES

Navigators Specialty Insurance Co. v. Moorefield Construction, Inc.
(2016) 6 Cal.App.5th 1258, 212 Cal.Rptr.3d 231

FACTS: Moorefield was a general contractor. Moorefield was insured by Navigators under a standard commercial general liability policy which provided coverage for property damage arising out of an "occurrence." In a large shopping center, contracts were let for the installation of carpet tile and vinyl tile over a concrete slab. Moorefield was the general in charge of the work and used subcontractors for some of the work. The contract specifications called for "vapor emission level" testing to make sure that the concrete slab was sufficiently dry when the tiles were laid down. Specific levels of the vapor emission testing were set forth. These levels indicated that the concrete was too wet and was still emitting too much moisture. Nevertheless, Moorefield represented to the owner "Best Buy" that he had encountered this situation before, had gone ahead and installed the tile, and that everything worked out satisfactorily. The tile was installed and shortly thereafter, moisture began oozing from the edges of the tiles. Best Buy itself took care of the problem, replacing the floor for $377,000 and withholding rent from the owner of the store (with whom Moorefield had contracted) to recover the repair of the floor amount. Lawsuits had been filed against Moorefield by Best Buy and others.

Navigators was defending under a reservation of rights. Navigators paid its $1,000,000 policy limits and there was no allocation as to how the $1,000,000 settlement was to be allocated.

Coverage disputes then arose and declaratory relief actions were filed. The trial court ruled that there was no coverage because what happened was not "an occurrence," meaning that there was no accident as required under the policy. Moorefield also claimed that in the settlement, Best Buy was the "prevailing party" and that in the contract Moorefield had with Best Buy/owner, the prevailing party was entitled to attorney fees. Moorefield claimed that Moorefield was entitled to be covered by Navigators for "prevailing party attorney fees." The trial court imposed on Moorefield the burden of proving what portion of the settlement was allocated to prevailing party attorney fees.

APPELLATE COURT DECISION: Affirmed in part, reversed in part. The Appellate Court agreed with the long line of California cases and found that there was no occurrence or accident in this case. When a party deliberately intends to act, even though there is no intention to cause harm and even though the harm may be unforeseen, there is still no occurrence or accident. This was the circumstance in the present case: Moorefield took a chance and did the work even though the test results indicated the concrete floor was not yet dry. In fact, the problem was so well known that one of the subcontractors demanded a release from Moorefield in case problems developed. When you have such a deliberate act, even though the consequences may be unforeseen, this is still not an accident and there is no coverage/duty to indemnify.

The trial court erred, however, on the misallocation of the burden of proof. The burden of proof as far as the "prevailing party attorney fees" should have been placed on Navigators, not the insured. Navigators had the burden of proving what portion of the settlement was attributable to prevailing party attorney fees and what portion was attributable to non-covered damages. We know that the only damages (cost of

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repair for the floor) were $377,000. There was no accounting in the settlement documents for the rest of the payment ($623,000). Therefore, the case is remanded for that purpose and for application of a new burden of proof standard.

COMMENT: This case raises difficult issues for insurers, insureds, and claimants in cases involving construction defects (and possibly other classes of cases). "Allocation" of settlements is often difficult. Insurers will usually want to do everything they can to protect the insured from liability for all claims being brought by the claimant. Those claims would include damages suffered by the claimant and possibly prevailing party attorney fees being asserted by the plaintiff against the insured. The insurer should be interested in having the claimant release the insured from all claims whatsoever (for example, in return for the insurer's payment of policy limits). But the insured then may face claims from the insurer that what it paid in settlement was not covered, or the insured faced with a prevailing party attorney fees claim may want to allocation a settlement more to that rather than to what amount was paid out for "damages" in the underlying lawsuit [possibly because the insured thinks it will be easier to get coverage for the prevailing party attorney fees claim, because that is part of the duty to defend]. But to avoid years of delay and more litigation, it probably is advisable that settlement of cases under such circumstances contain allocations for prevailing party attorney fees so that the parties better know where they stand in future declaratory relief/coverage disputes.

FALSE ADVERTISING; CONSUMER TORTS

Veera v. Banana Republic, LLC
(2016) 6 Cal.App.5th 907, 211 Cal.Rptr.3d 769

FACTS: Plaintiff was walking past the Banana Republic store. Plaintiff saw a sign in the window saying "40% off" and interpreted this to mean that there was a 40% discount on all merchandise. Plaintiff went in and selected numerous items. When she got to the cash register and the clerk started ringing up the purchases, she noticed that some were at full price and some were discounted. When she questioned the clerk, the clerk said that the 40% off did not apply to all the merchandise, but only to selected merchandise. Plaintiff had waited in line, and there were many customers behind her. She was embarrassed. Plaintiff elected to purchase some of the items, but not all of them. She sued Banana Republic for false advertising, a breach of three California consumer protection statutes.

The trial court sustained the defendant's demurrer, largely on grounds that plaintiff could have avoided everything by simply not purchasing anything. The trial court granted summary judgment for Banana Republic.

APPELLATE COURT DECISION: Reversed. For purposes of summary judgment, triable issues of fact exist. It is necessary to show an economic injury in order to establish standing to sue for false advertising. This can be shown if there is a substantial invasion of a legally protected interest. If plaintiff can prove before a jury the facts as she claims exist, plaintiff will have established a false advertising claim. Here, she says she was misled, commenced shopping, selected goods, was embarrassed when she discovered the discrepancy, felt pressure, and went on to purchase some of the goods. This, if true, would establish sufficient evidence to show standing to sue for false advertising.

There was a dissent: The dissent pointed out that plaintiff's realization of the misrepresentations allowed her to prevent herself from being injured; nonetheless, she purchased some of the items, and she does not have standing to sue.

COMMENT: In this writer's opinion, the dissent is better reasoned.

DEFAMATION; ANTI-SLAPP SUIT; MALICIOUS PROSECUTION

Argentieri v. Zuckerberg
(2017) 8 Cal.App.5th 768, 214 Cal.Rptr.3d 358

FACTS: This is a complicated "Silicon Valley" case involving a dispute between an attorney, his client and Facebook. The client is Ceglia. His attorney was Argentieri. Ceglia claimed that years ago, he entered into a contract called "work for hire contract" with Zuckerberg which provided that for Ceglia's providing $1,000, Ceglia became an 84% owner of Facebook(!). Ceglia pursued the matter in litigation. Argentieri associated in in New York State litigation, including Federal Court in New York. Argentieri associated several law firms in the action. Argentieri retained an e-discovery expert who allegedly "found" the original "work for hire" contract on a computer. The New York court ordered expedited discovery. As discovery developed, it became apparent that the contract had been forged and altered. The other law firms that Argentieri had brought into the case began to withdraw from the case, leaving Argentieri alone. Ultimately, the Ceglia lawsuit was dismissed.

Facebook then brought a malicious prosecution against Ceglia and Argentieri. In connection with that malicious prosecution action, Stretch, general counsel for Facebook, issued a press

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release in New York saying that the underlying claim had been permeated with fraud, that Ceglia was an ex-convict involved in many scams, etc. In complicated proceedings in New York, the Facebook malicious prosecution action was ultimately dismissed, but the Appellate Court reversed the dismissal.

The next litigation occurred in California where Ceglia and Argentieri sued Facebook and Stretch for defamation based on what had been said in the press release. In this defamation action in California, defendants filed a motion to strike. The motion to strike was granted by the trial court.

APPELLATE COURT DECISION: Affirmed. What Stretch said in the press release was protected by Civil Code §47(d). It was a fair and true report of a judicial proceeding (the complex proceedings in New York had to do with forged documents). This is absolutely privileged. For that reason, plaintiffs in the defamation case could not establish the probability of prevailing, and it was therefore proper to grant the motion to strike.

EMPLOYMENT TORTS; DISABILITY; FAILURE TO ACCOMMODATE

Atkins v. City of Los Angeles
(2017) 8 Cal.App.5th 696, 214 Cal.Rptr.3d 113

FACTS: Plaintiffs were five police recruits for the City of Los Angeles. They were enrolled in the Academy and were engaged in training activities when they were injured. They took some time off to recover from their injuries. State law and regulations allowed a period of two years for police officers who had been too injured to complete their Academy work. The City had its own policy (which was adopted after plaintiffs had suffered their injuries in training) that there was a six-month period allowed after the injury and then there could be termination if the employee was unable to complete the Academy program, including the probationary period. The City also had something called a "Recycle" program under which injured employees were placed in the program and accommodated to a certain extent taking into account their disability and their injury.

Plaintiffs were fired and filed suit for disability discrimination under the FEHA. A jury returned a verdict of $12 million in favor of the five plaintiffs.

APPELLATE COURT DECISION: The jury verdict on liability was supported, but the damages were speculative. The Court found that the City policy allowing termination was adopted after the plaintiffs were injured and, therefore, plaintiffs were being treated differently than other employees who had been in the Academy and who were injured before the new City policy was adopted. The City, therefore, was charged with responsibility for "accommodating" plaintiffs due to their injury, and the evidence support a verdict in favor of plaintiffs on this point.

However, the damages were speculative. The damages were based upon the expert's testimony and assumption that plaintiffs would have graduated from the Academy and would have been police officers until the time of their retirement. This was entirely too speculative and the damages award cannot stand.

ANTI-SLAPP STATUTE; USE BY PUBLIC ENTITIES; GOVERNMENTAL IMMUNITIES

Doe v. State of California
(2017) 8 Cal.App.5th 832, 214 Cal.Rptr.3d 391

FACTS: Several years ago, plaintiff had been convicted as a sex offender and was placed in the State registry of sex offenders. Plaintiff registered as such from time to time. Unbeknownst to plaintiff, his conviction was ultimately overturned. Apparently, this information was not relayed to the proper authorities, and he was arrested by the San Diego Police Department for failing to register as a sex offender. His public defender attorney found out the facts and plaintiff was released. He sued the San Diego authorities for damages and civil rights violations.

The defendant public entities and officials filed a motion to strike under C.C. P. §425.16 which was granted by the trial court.

APPELLATE COURT DECISION: Affirmed. Plaintiff is unable to show a probability of prevailing. The acts alleged against the public officials and entities arise from prosecutorial and investigative activities which are immunized under the Government Code. Furthermore, plaintiff himself could have checked on his status to make sure that his name was removed from those who are required to be registered as sex offenders (plaintiff's name had never been removed, which is why the San Diego Police Department thought they had the right to arrest him).

Recent Cases

PROFESSIONAL LIABILITY; MEDICAL; EXPERT EVIDENCE; AMBULANCE COMPANY

Sanchez v. Kern Emergency Medical Transportation Company
(2017) 8 Cal.App.5th 146

FACTS: Plaintiff suffered a head injury in a football game. The paramedic at the scene administered a Glasgow test (to assess severity of coma). He then called a transport ambulance to take plaintiff to the hospital. The ambulance arrived about nine minutes later. Spinal precautions were taken. Nonetheless, plaintiff suffered a subdural hematoma and had to have a craniotomy after he reached the hospital. Plaintiff apparently had a stroke shortly after the surgery. California law requires that in a suit against an ambulance, plaintiff must prove gross negligence. The trial court granted summary judgment in favor of the defendant on grounds that plaintiff's expert had not adequately dealt with the causation issue.

APPELLATE COURT DECISION: Affirmed. Plaintiff's expert had not addressed defense expert information that a moderate delay in getting plaintiff to the hospital would often not cause an increase in the damage. There were no serious delays in this particular case. There was also evidence that the stroke followed the surgery and was not brought on by the original injury. The trial court correctly granted summary judgment based upon the failure of plaintiff's expert to deal with such matters.

DANGEROUS CONDITION OF PUBLIC USE; NEGLIGENCE; TRAIL IMMUNITY; GOLF COURSE

Levya v. Crockett & Company, Inc.
(2017) 7 Cal.App.5th 1105, 212 Cal.Rptr.3d 879

FACTS: A golf course had given to the County an easement which allowed the County to create a trail for public use. The trail was alongside the golf course. Plaintiff and his wife were walking along the trail when an errant golf ball struck plaintiff in the eye. He sued the golf course on the grounds of negligence and negligent infliction of emotional distress.

The trial court granted summary judgment in favor of the golf course based upon the immunity set forth in Civil Code section §831.4, commonly called trail immunity (no liability for injuries suffered because of the condition of any trail).

APPELLATE COURT DECISION: Affirmed. The law encourages private landowners to grant such easements to public entities, and after doing so, the private landowner is entitled to the immunity afforded by the statute.

NEGLIGENCE; VICARIOUS LIABILITY; RESPONDEAT SUPERIOR

Secci v. United Independent Taxi Drivers, Inc.
(2017) 8 Cal.App.5th 846, 214 Cal.Rptr.3d 379

FACTS AND HOLDING: Court of Appeal reverses a trial court which refused to find vicarious liability when a taxi driver was negligent and involved in an accident. The basis for agency liability arose because of the extensive State regulation of taxi companies and drivers; the trial court refused to allow these regulations into evidence. Their admission would have sustained a finding of agency relationship because of the extensive controls that the taxi association was required to exercise over drivers.

ANTI-SLAPP STATUTE; RACIAL EPITHET

Daniel v. Wayans
(2017) Cal.App.5th 367, 213 Cal.Rptr.3d 865

FACTS: Plaintiff was a minor actor in a film produced by Mr. Wayans who was well-known in movie circles. Wayans was noted for poking fun at pop culture and racial stereotypes. Plaintiff was compared to the cartoon character Cleveland Brown and in promotions in the Internet had the word "nigga" under his photograph. Plaintiff brought suit against Wayans. The trial court granted the motion to strike.

APPELLATE COURT DECISION: Affirmed. All of this arises out of protected activity; namely, free speech. It was also within the creative activity of making films. Plaintiff demonstrated no probability of prevailing in the action. The motion to strike was properly granted.

DAMAGES; EMOTIONAL DISTRESS; TRESPASS; NUISANCE

Hensley v. San Diego Gas & Electric Company
(2017) 7 Cal.App.5th 1337

FACTS: Husband and wife owned a house in which they lived with their daughter. Husband was out of town. A fire occurred at the home and it was claimed that the fire was caused by defendant utility company. Suit was filed and theories of nuisance and trespass were alleged against the utility company, along with claims for emotional distress. The trial court ultimately threw out the claim for emotional distress.

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APPELLATE COURT DECISION: Reversed. When a plaintiff alleges property damage under theories of nuisance and trespass, the plaintiff may also recover emotional distress, even though the plaintiff was not at the home he owned at the time that the fire occurred.

COMMENT: Years ago, the California Supreme Court in *Thing v. LaChusa* held that in a negligence claim arising out of an automobile accident, causing injury to plaintiff's relative, the plaintiff could not sue for emotional distress unless plaintiff actually witnessed the accident. Coming on the scene a short time later will not suffice. The *Hensley* case above, however, involves the owner of real property, with a stake in the property, and the Court does not limit recovery in the manner in which *Thing* limited recovery.

DEFAMATION; ANTI-SLAPP MOTION

Charney v. Standard General, L.P.
(2017) 10 Cal.App.5th 149, 215 Cal.Rptr.3d 889

FACTS: Plaintiff had been CEO for a corporation. The corporation issued a press release indicating that the plaintiff had been investigated by a third party and that he was terminated for cause. Plaintiff brought a defamation suit and defendant moved to strike under C.C.P. §425.16. The trial court granted the motion to strike.

APPELLATE COURT DECISION: Affirmed. The plaintiff has to demonstrate that he has a probability of prevailing, and he has failed to do so. Simply saying that plaintiff was being investigated by a third party was in fact true and no other facts concerning the investigation or the results were present, there was therefore no falsity, and nothing derogatory. Furthermore, saying that plaintiff had been terminated "for cause" gives none of the reasons, and therefore, cannot form the basis of a defamation case. Therefore, plaintiff did not demonstrate the probability of prevailing and striking his complaint was proper.

DEFAMATION; PRIVILEGE

Lemke v. Sutter Roseville Medical Center
(2017) 8 Cal.App.5th 1292

FACTS: Plaintiff was a nurse working in a hospital. She claimed that she saw another nurse improperly treating an elderly patient. She complained to her supervisors and to the hospital. They started an investigation of the plaintiff and plaintiff heard that the nursing board was investigating her based on reports received from the hospital. Plaintiff sued the hospital for defamation. The trial court granted summary judgment in favor of the hospital.

APPELLATE CIRCUIT DECISION: Affirmed. A report by a hospital to a nursing board concerning alleged misconduct on the part of the nurse is absolutely privilege under Civil Code section 47(b)(4), and this applies even though bad faith may be involved on the part of the hospital. Summary judgment was properly granted in favor of the hospital on the defamation claim.

ANTI-SLAPP STATUTE; MEDICAL STAFF PRIVILEGE SUSPENSION; PRIVILEGE

Melamed v. Cedars-Sinai Medical Center
(2017) 8 Cal.App.5th 1271

FACTS: Plaintiff was a physician at Cedars-Sinai specializing in scoliosis surgery. He planned to operate on a 12-year-old girl. The patient was placed on the operating table and the operation commenced. After the commencement of the operation, plaintiff realized that the table was not the right size and that the padding was too small. He requested the nurses to get a new table and padding, but this was not possible and they were not available. Plaintiff continued with the surgery which lasted 11 hours (it was supposed to last no longer than five). The patient had a bad result and plaintiff realized that within days corrective surgery would have to be undertaken. Plaintiff did not complain to the hospital itself about the lack of adequate equipment, but he told the parents of the girl patient that the hospital had not had adequate equipment. When the hospital found out all the facts, a Dr. Brien intervened aggressively and ultimately plaintiff was suspended. He was not permitted to operate on pediatric patients, but only adults. Hearings were held, including a peer review hearing, and plaintiff's suspension was upheld for a limited period of time, but he was allowed to resume surgery on pediatric patients. Plaintiff ultimately brought suit claiming that his suspension was wrongful and in retaliation (he had never claimed retaliation before).

The defendant hospital filed a motion to strike under C.C.P. §425.16 which was granted by the trial court.

APPELLATE COURT DECISION: Affirmed. The anti-SLAPP statute does apply to physicians in the context of this case. There are special privileges for the actions of peer review committees and, therefore, plaintiff will not be able to demonstrate the probability of prevailing. Another factor

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undermining plaintiff's case is the fact that he did not complain to the hospital itself about inadequacy of hospital equipment (he just complained to the parents of the girl patient). The trial court correctly granted the motion to strike.

INSURANCE COVERAGE; NON-OWNED VEHICLES; REGULAR USE

Medina v. GEICO Indemnity Co.
(2017) 8 Cal.App.5th 251, 213 Cal.Rptr.3d 502

FACTS: Flores worked for Pacific Bell. Flores had her own car which was insured by GEICO. Pacific Bell allowed Flores to use a company van (owned by Pacific Bell) to make deliveries related to work. They also allowed Flores to use this van for personal use and she often took it home and to run personal errands. On the day in question, Flores had had some wine to drink with lunch. She drove the van to assist her daughter who needed some money to pay the vet. Flores was intoxicated and was involved in an accident with Medina. Medina sued Flores. Pacific Bell was self-insured and ultimately paid $15,000 to Medina (ownership liability). They took the position that Flores was not an "insured" under their program because she was not in course and scope. GEICO took the position that Flores was not covered under its policy because the van had been furnished for her regular use and was therefore not covered under "non-owned" auto coverage. Under non-owned auto coverage, an insured (Flores) is covered for driving a non-owned automobile provided that the non-owned automobile is not furnished for her regular use. In light of the position of Pacific Bell and GEICO, Flores ultimately stipulated to a judgment of more than $512,000 in favor of Medina. Then a bad faith action was filed against GEICO.

In the bad faith action, the trial court granted summary judgment in favor of GEICO.

APPELLATE COURT DECISION: Affirmed. This vehicle, owned by Pacific Bell, was furnished for the regular use of Flores and therefore not covered under the GEICO policy. She used it not only for business purposes, but also for personal purposes and there were few restrictions on her personal use. Summary judgment for GEICO was proper on the coverage issue.

DUTY; SPECIAL RELATIONSHIP; SEXUAL ABUSE OF CHILDREN; YOUTH SOCCER LEAGUES

Jane Doe v. United States Youth Soccer Association
(2017) 8 Cal.App.5th 1118, 214 Cal.Rptr.3d 552

FACTS: Plaintiff was a 12-year-old girl who was sexually abused by her soccer coach, Emanuele Fabrizio. She sued him and her local, regional, and national youth soccer league affiliates. She alleged that they had a duty to protect her and further had a duty to do background checks on the coaches. Had a background check been done, it would have been discovered that Fabrizio had been convicted of domestic violence. The trial court sustained the defendants' demurrer and dismissed the case.

APPELLATE COURT DECISION: Reversed. There is a distinction in law between misfeasance and nonfeasance. Generally, a defendant accused of nonfeasance (not doing something to prevent harm to the plaintiff by third party) is not liable and there is no duty unless there is a special relationship. In organizations like youth soccer, there is such a special relationship with the league in loco parentis with the child. A background check is required to be done on employees and volunteers for the soccer league. In the present case, a background case would have only cost about $2.50, which could have been passed on. Therefore, plaintiff stated a cause of action against the defendants. However, there is no duty on the part of the defendants to educate or warn plaintiff the risks of sexual abuse. This would be imposing too great a duty and burden upon the youth athletic associations. This is a responsibility instead for the parents of the children. Finally, claims of willful misconduct do not lie in this particular case.

COMMENT: This is an explosive area: millions of children are engaged in youth athletic activities and leagues embracing all sports across the country. We all know that the instances of sexual abuse have increased dramatically. It is a real societal problem. It does not only exist in the athletic area; it is very prominent in school systems and in school districts where teachers have been found guilty of sexual molestation of children. The California Supreme Court addressed this several years ago (in the Randy W. case) in which they said that a school district can be liable for "recommending" a teacher to another school district when the recommending district knows that the teacher has a history of sexual misconduct. The issue of a duty to perform criminal background checks is also controversial, but the present court had no problem in imposing such a duty.

An unanswered question is the cost of providing insurance for this new exposure to which soccer leagues and other athletic leagues will be subject. It is probably not insubstantial and

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these volunteer and youth organizations run on a shoestring budget and, therefore, that is a problem also to be faced.

This Appellate decision from the Sixth District is to be commended for its strong regard for the safety of children and what society must do to carry out that responsibility.

CONSTRUCTION DEFECT LITIGATION; SB 800 (RIGHT TO REPAIR ACT)

Acqua Vista Homeowners Ass'n v. MWI, Inc.
(2017) Cal.App.4th 1129, 213 Cal.Rptr.3d 323

FACTS: Most litigation we have seen under SB 800 (2002), commonly called the Right to Repair Act, concerns the requirement that a homeowner or a homeowners association must do certain things in trying to remedy the problem with the builder before formally instituting a lawsuit. This case, however, deals with the detailed standards under the Act that are imposed upon builders, general contractors, and material suppliers. The homeowners association in this case brought suit against a material supplier called MVI. MVI supplied pipe made in China which allegedly corroded and leaked. The lawsuit was filed under SB 800 only, and not under any common law theories such as strict liability. The plaintiff attempted to argue that under the violation of the standards for construction projects set forth in the act, plaintiff was not limited to negligence theory, but could also recover for strict liability. A jury returned a verdict for plaintiff, but the Court of Appeal reversed.

APPELLATE COURT DECISION: When a plaintiff brings suit for violation of the Act (statute), then the theory of liability is limited to negligence or breach of contract. Strict liability is not permitted under the Act, although the plaintiff can sue also under a common law theory of strict liability, if it applies. In the present case, the problem appears to be one laid at the door of the manufacturer of the pipe in China. MVI did not manufacture the pipe. SB 800 allows a negligence or breach of contract claim under the Act, but there is no evidence that MVI was negligent or could have detected the problem, or that MVI breached any contract. There is no evidence of an express warranty.

COMMENT: If the plaintiff had brought a claim under strict liability in addition to claims under the Act, they might have been able to recover because the materials supplier in strict liability is normally liable for a manufacturing defect, even though there is no active negligence on the supplier's part.

NINTH CIRCUIT CASES

CONSUMER RIGHTS; UNSOLICITED SPAM CALLS AND TEXTS; FEDERAL AND STATE LAW

Van Patten v. Vertical Fitness Group, LLC
(2017) 847 F.3d 1037

FACTS: Plaintiff signed up to join a gym. In the contract, plaintiff provided a cell phone number. A few days after plaintiff signed up for the gym, he cancelled the membership. Two years later, the gym started soliciting him to join the gym as it was under new ownership. These were typical "spam" texts sent to plaintiff's cell phone. Plaintiff brought a class action for violation of Federal law and State law (Unfair Competition Law in California). The Federal law is called the Telephone Consumer Protection Act (TCPA) 47 U.S.C. § 227(b)(1)(C). It prohibits an unsolicited advertisement, and this can be by telephone, cell phone, or text. The Federal law allows standing to exist without economic harm and on claims of aggravation, etc.

The trial court dismissed the Federal claims and the State claims for violation of the Unfair Competition Law.

NINTH CIRCUIT DECISION: Affirmed. Under the Federal law, plaintiff might have had a claim if plaintiff had not "consented" to the calls. When plaintiff gave his cell phone number to the gym, this was sufficient "consent" to being called, and this defeats plaintiff's Federal cause of action.

Under the State law claims, mere aggravation is not enough. Plaintiff has to show economic harm or injury. Plaintiff claims that he had to pay for the texts and this would constitute economic harm, which is a necessary element for standing under the Unfair Competition Law. However, the phone service that plaintiff had signed up for allowed *unlimited* texting for both sending and receiving texts and, therefore, plaintiff is unable to demonstrate concrete economic harm from the receipt of the texts.

COMMENT: I am sure all of you will sympathize with the plaintiff in this case. Please note this Federal statute and the possible remedy that it affords to those of you who are bothered constantly by unsolicited calls or texts. Standing under the Federal law is much easier to establish than under State law.

Recent Cases

ARBITRATION; FORMATION OF CONTRACT

Norcia v. Samsung Telecommunications America, LLC
(2017) 845 F.3d 1279

FACTS: Norcia purchased a Samsung phone at Verizon. Inside the box where the phone was was a limited warranty brochure, and this document had a binding arbitration clause in the limited warranty brochure. Norcia filed a class action against Samsung claiming that the phone had been tested at higher speeds than represented. Samsung moved to compel arbitration, but this was denied by the trial court.

NINTH CIRCUIT DECISION: Affirmed. The parties had not "agreed" to arbitration of the dispute that was before them. The lawsuit was not for breach of warranty; it was for non-warranty matters. Therefore, there was no arbitration agreement between the parties.

INVASION OF PRIVACY; ANTI-SLAPP STATUTE

Safari Club International v. Rudolph
(2017) 845 F.3d 1250

FACTS: Safari Club International (SCI) was a private club having to do with wildlife conservation. Rudolph had been active in the club for years and was eventually selected as president. After his term as president was over, the club hired Rudolph to be a public relations person. Bad feelings between Rudolph and SCI then developed and Rudolph was terminated. He sued SCI for defamation. Whipple became president of the club. He and Rudolph were long-time friends. Rudolph called Whipple and invited him to have lunch to discuss old times and the club. Whipple attended a five-hour lunch in a public restaurant. Rudolph assured Whipple that their conversation was confidential and whenever one of the waiters would come over to the table, they would both stop talking. Unbeknownst to Whipple, however, Rudolph had arranged for the conversation to be audio recorded and video recorded. Rudolph later produced a film of this conversation (which reflected on many club activities) and this film was shown to or available to the 50,000 members of SCI.

Whipple then sued Rudolph for several causes of action, including invasion of privacy. Rudolph filed a motion to strike under C.C.P. §425.16 (the action had been removed to Federal Court under diversity jurisdiction and the action was founded upon state law). The trial court denied the motion to strike.

NINTH CIRCUIT DECISION: Affirmed. The fact that this conversation took place in a public restaurant does not defeat the claim. Rudolph had taken great precautions for a secret (surreptitious) recording, and Rudolph had lured Whipple to the lunch, assuring him that they were old friends and would remain friends and Whipple believed this. Whipple had a reasonable expectation of privacy and confidentiality. The recording was illegal under Penal Code section 632. A motion to strike should be denied when the plaintiff has a reasonable probability of prevailing. Whipple's claims demonstrate that he has a reasonable probability of prevailing and, therefore, the motion to strike was properly denied.

Summary of Selected Nevada Supreme Court Cases

By Mary-Ann Ellis
Georgeson Angaran, Chtd.

JUDGMENTS

Simmons v. Briones
390 P.3d 641, 133 Nev. 9, Nev., March 2, 2017.

The Nevada Supreme Court considered whether a judgment for attorney's fees and costs against an insured driver in a motor vehicle accident action is a judgment for purposes of NRS Chapter 485 (Nevada's nonpayment of judgment statutes).

In this matter, Briones filed a complaint against Simmons for negligence as a result of a motor vehicle accident. Under the mandatory arbitration program, the arbitrator found in favor of Briones but reduced the award due to her comparative fault. Briones requested a trial de novo. Briones' award at the short trial failed to exceed the arbitration award by 20%; therefore, Briones was liable for Simmons' attorney's fees and costs under NAR 20(B)(2)(a). The judge offset the damages and the attorney's fee award, resulting in a net judgment in favor of Simmons.

Briones failed to pay the judgment, so Simmons notified the DMV and Briones' driving privileges were suspended pursuant to NRS 485.302. Briones requested an administrative hearing to contest the suspension, arguing that NRS 485.302 did not apply to a judgment for attorney's fees and costs. The administrative law judge dismissed the suspension. Simmons filed a petition for judicial review, which was denied by the district court. Simmons appealed.

NRS 485.301 and 485.302 state that the DMV must suspend the license and registration of any person against whom a judgment was entered as a result of a motor vehicle accident where a person fails to satisfy that judgment within 60 days and the judgment creditor forwards a certified copy of the judgment to the DMV. The term "judgment" is defined under NRS 485.035.

The Nevada Supreme Court held that NRS 485.302, when considered as a whole and based on its purpose, does not apply to judgments exclusively for attorney's fees and costs. A judgment under this Chapter is one entered based on damages awarded for injury to person or property as a consequence of tortiously maintaining or operating a motor vehicle.

Here, where Simmons received attorney's fees and costs pursuant to the Nevada Arbitration Rules and not as a measure of damages for a motor vehicle accident, NRS 485.302 did not apply and Briones' driving privileges could not be suspended for nonpayment of the judgment. The district court's order was affirmed.

COMPLAINT IN INTERVENTION

Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A
388 P.3d 226, 133 Nev. Adv. Op. 3, Nev., Jan. 26, 2017.

The Nevada Supreme Court considered whether the district court properly dismissed a complaint in intervention with prejudice when it dismissed the original action for failure to prosecute under NRCP 41(e).

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This matter involved a contest over the ownership of various lots of real property. A foreclosure agent (CGMA) recorded a notice of delinquent assessment lien against the lots and a notice of default and election to sell the lots. On December 15, 2009, Susan Louise Hannaford filed a complaint against CGMA challenging an arbitration award relating to the Property.

Saticoy appeared at the foreclosure sale of the property and purchased two lots. Saticoy moved to intervene in the Hannaford action and filed a complaint in intervention seeking injunctive relief, quiet title, declaratory relief and issuance of a writ of restitution on September 30, 2013. An answer was filed on November 6, 2014.

On March 17, 2015, the district court entered an order to show cause directing the parties to show why the action should not be dismissed for failing to bring the action to trial within 5 years under NRCP 41(e). Ultimately, the district court entered an order dismissing the complaint and complaint in intervention with prejudice. Saticoy appealed.

First, the Nevada Supreme Court considered whether mandatory dismissal under NRCP 41(e) includes complaints in intervention. Dismissal under NRCP 41(e) is mandatory and not discretionary. It gives five years for the trial of an "action", which includes the original claim, crossclaims, counterclaims and third party claims. Complaints in intervention are treated as part of the original "action" by other jurisdictions and by the Nevada Rules of Civil Procedure. Therefore, complaints in intervention are part of the original "action" for purposes of mandatory dismissal under NRCP 41(e). Here, dismissal was mandatory because Saticoy failed to timely prosecute its claims in intervention.

Next, the Court considered whether dismissal with prejudice of Saticoy's complaint in intervention was an abuse of discretion. The district court has broad discretion in determining whether dismissal under NRCP 41(e) should be with or without prejudice. Factors relevant to this determination include the "underlying conduct of the parties, whether the plaintiff offers adequate excuse for the delay, whether the plaintiff's case lacks merit, and whether any subsequent action following dismissal would not be barred by the applicable statute of limitations."

Here, the Court found that Saticoy did take adequate steps to prosecute the action and any delays were justified by the circumstances of the case, including an answer not being filed until 40 days prior to the 5 year expiration and the limited time that Saticoy itself had been a party to the action. Accordingly, the district court's order was vacated and the matter remanded.

PERSONAL JURISDICTION

Matter of Beatrice B. Davis Family Heritage Trust
388 P.3d 964, 133 Nev. Adv. Op. 4, Nev., Jan. 26, 2017.

The Nevada Supreme Court considered the issue of jurisdiction over a trust with a situs in Nevada and personal jurisdiction over a non-resident investment trust advisor.

In this case, a trust was established under Alaska law with a trust situs in Alaska. The trust protector transferred the trust situs to Nevada and appointed Christopher Davis as the investment trust advisor (ITA). The trustee, AUTC, agreed to the transfer and appointed Dunham Trust Company, DTC, as the successor trustee. The trust then created a Nevada limited liability corporation with Christopher as the manager.

Caroline Davis, a beneficiary of the trust, requested information relating to the trust and LLC. Christopher did not produce the information, so Caroline filed a petition for the district court to assume jurisdiction over the trust and Christopher as ITA. The court issued an order assuming jurisdiction, and Christopher appealed.

Caroline then filed a motion to amend or modify the initial order and the district court certified its intent that, if remanded, it would assume jurisdiction over the trust and Christopher as ITA. Christopher filed an emergency writ petition. The Nevada Supreme Court issued an order remanding the appeal to the district court. The district court issued an amended order which assumed jurisdiction over the trust, assumed personal jurisdiction over Christopher as ITA and the manager of the LLC, and confirmed the appointment of DTC as trustee and Christopher as ITA. It also required Christopher to produce the requested documents.

First, the Nevada Supreme Court held that it cannot consider issues in the district court's order other than the confirmation of the trustee. NRS 155.190(1)(h) provides that "an appeal may be taken to the appellate court of competent jurisdiction ... within 30 days after the notice of entry of an order: ... [i]nstructing or appointing a trustee." This statute does not grant the Court jurisdiction on appeal over all matters included in an order instructing or appointing a trustee. Therefore, the Court did not have jurisdiction to address the issue of whether the district

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court erred in assuming jurisdiction over the trust and Christopher or requiring the requested disclosures to be made.

The Court also considered Christopher's writ petition challenging whether a non-resident accepting appointment as a trust advisor submits to personal jurisdiction in Nevada. NRS 163.5555 specifically states: "If a person accepts an appointment to serve as a trust protector or a trust adviser of a trust subject to the laws of this State, the person submits to the jurisdiction of the courts of this State, regardless of any term to the contrary in an agreement or instrument." Therefore, by accepting a position as an ITA for a trust with a situs in Nevada, the Christopher, the ITA, consented to personal jurisdiction in Nevada.

Therefore, Christopher's appeal was dismissed and his writ petition was denied.

ANTI-SLAPP LITIGATION

Shapiro v. Welt
389 P.3d 262, 133 Nev. Adv. Op. 6, Nev., Feb. 2, 2017.

The Nevada Supreme Court considered (1) whether NRS 41.637 (part of Nevada's anti-SLAPP statute) is unconstitutionally vague, (2) whether statements made in relation to a conservatorship constitute an issue of public interest, and (3) whether those statements fall under the absolute litigation privilege.

In this case, Appellant Shapiro petitioned a New Jersey court to be appointed as the conservator for his father. The respondents, the Welts, opposed the petition and published a website making allegations regarding Shapiro's debts, criminal history, and mistreatment of his father. The website stated that it was dedicated to helping victims of Shapiro and encouraging people with knowledge of Shapiro's criminal acts to appear in court.

Shapiro filed a complaint in Nevada regarding these statements for defamation, defamation per se, extortion, civil conspiracy and fraud. The Welts filed a motion to dismiss under NRS 41.660, arguing that the statements were made in direct connection with an issue under consideration by a judicial body and in connection with an issue of public interest in a public forum. The motion was granted. Shapiro appealed.

First, the Nevada Supreme Court concluded that NRS 41.637 is not unconstitutionally vague. The Welts argued that the term "good faith" and the phrase "without knowledge of its falsehood" are vague and contradictory. The Court disagreed and held that the statute provides sufficient notice to a person of ordinary intelligence of what conduct is prohibited. The term "good faith" is part of the phrase "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." That phrase is specifically defined in NRS 41.637. The phrase "made without knowledge of its falsehood" also has an ordinarily understood meaning that the declarant must be unaware that the communication is false at the time it was made. These phrases do not make the statute unconstitutionally vague.

Second, the Nevada Supreme Court defined "an issue of public interest" in the anti-SLAPP context. The Court adopted five guiding principles used in California regarding what distinguishes a public interest from a private one: "(1) 'public interest' does not equate with mere curiosity; (2) a matter of public interest should be something of concern to a substantial number of people . . .; (3) there should be some degree of closeness between the challenged statements and the asserted public interest. . .; (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." As the district court did not apply these principles in its decision here, the district court's order was reversed and remanded.

Lastly, the Court considered whether the district court properly applied the absolute litigation privilege test. Nevada recognizes an absolute privilege for defamatory statements made during the course of judicial and quasi-judicial proceedings. To apply, the statements must be made where a judicial proceeding is contemplated in good faith and under serious consideration and the communication must be related to the litigation. A party's statements to someone not directly involved in the proceeding are protected by the privilege only if the recipient is significantly interested in the proceeding. The court must review the recipient's legal relationship to the litigation rather than his interest as an observer. This review is case specific and requires a fact intensive inquiry balancing the underlying principles of the privilege.

The district court did not do that in this case; therefore, the district court's order was reversed and remanded.

Recent Cases

ATTORNEY'S FEES

Public Employees' Retirement System of Nevada v. Gitter
– P.3d –, 2017 WL 1535379, 133 Nev. Adv. Op. 18, Nev., April 27, 2017.

The Nevada Supreme Court considered a number of issues relating to the Public Employees' Retirement Act (PERS). Relevant to the purposes of this summary, the Court considered whether the district court has discretion to award up to $1,500 in reasonable costs for a non-testifying expert consultant under NRS 18.005(5) and whether attorney's fees were appropriate.

In this matter, Freshman was a member of PERS and her daughter, Gitter, was designated as her survivor beneficiary. After Freshman was murdered by her husband, Gitter applied for the survivor benefits. Her request was denied on the basis that Freshman's husband was the only person who would have been eligible to receive benefits; however, since he murdered Freshman, he was not eligible for benefits either.

Gitter filed suit to collect the benefits. Gitter filed a motion for summary judgment, which was granted. She then filed a memorandum of costs and disbursement, which included $5,000 in expert's fees. PERS challenged this amount because it was paid to a non-testifying expert. The district court limited the expert costs awarded to $1,500. Gitter also filed a motion for attorney's fees pursuant to NRS 7.085 and 18.010, arguing that PERS' counsel acted unreasonably and vexatiously in maintaining a defense not warranted by existing law. The district court awarded attorney's fees. PERS appealed.

First, the Nevada Supreme Court held that the district court did not abuse its discretion in awarding Gitter $1,500 in costs for a non-testifying expert. Nevada law establishes that an expert must testify to recover *more than* $1,500 in expert fees. However, the case law nor the statute require an expert to testify to recover $1,500 *or less* in expert fees. Therefore, the award of costs was affirmed.

Second, the Court held that the district court abused its discretion in awarding attorney's fees and costs because PERS' defense was not frivolous and was based on reasonable interpretation of the PERS Act and NRS Chapter 41B, which was a novel and arguable issue of law. Accordingly, the district court order awarding fees was reversed.

COURTROOM REPORTING

Solid v. Eighth Jud. Dist. Ct.
– P.3d –, 2017 WL 1535378, 133 Nev. Adv. Op. 17, Nev., April 27, 2017.

The Nevada Supreme Court considered whether My Entertainment TV (MET) was a news reporter permitted to film a first-degree murder trial under Nevada law.

MET produces *Las Vegas Law*, a television "docu-drama" focused on the Clark County District Attorney's Office. Clark County, pursuant to a contract, allows MET to enter the District Attorney's office for filming. However, each individual county employee had the choice whether to be filmed. MET filed a media request to film Solid's trial. The district court granted the request, and Solid filed a motion to reconsider the request. The district court denied that motion. Solid filed a writ petition seeking interpretation of the Supreme Court rules involving media in the courtroom.

First, the Nevada Supreme Court held that MET is a news reporter under SCR 229. SCR 229(1)(c) defines a "[n]ews reporter" as "any person who gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public." Even though SEC is making a "docu-drama" and is under the editorial control of the County with royalties being paid to the County, it falls within this definition.

Second, the Court held that the footage was being used for educational or information purposes under SCR 241(1). The Court first looked at whether the content of the TV show was educational or informational and whether the footage was used for any unrelated advertising purposes. Here, the show focuses on criminal justice in Clark County, which though it may be entertaining, is for educational or informational purposes. Whether a program is entertaining is not part of the analysis of whether a program meets this requirement. Additionally, any advertising about the show would be related to the show's central educational and informational purpose.

Moreover, Solid failed to present evidence showing how MET's cameras affected the fairness of the trial, dignity of the proceedings, or the ability of trial counsel to present effective advocacy any differently than other cameras in the courtroom. The court did not err in allowing MET to film the trial.

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Lastly, the television series agreement between the County and MET did not require consent of Solid's trial counsel to film. There is also no legal requirement that attorneys consent to be filmed in the courtroom. Thus, Solid's writ petition was denied.

WORKER'S COMPENSATION

Poremba v. Southern Nevada Paving
388 P.3d 232, 133 Nev. Adv. Op. 2, Nev., Jan. 26, 2017.

The Nevada Supreme Court considered an issue regarding re-opening a worker's compensation claim and the right of an insurer to reimbursement from an injured worker's third party recovery.

In this matter, Poremba suffered injuries during the scope of his employment. He filed a worker's compensation claim, which was accepted and eventually closed. Poremba also brought a lawsuit related to his injuries and received a settlement. Poremba's injures worsened and he sought to reopen his worker's compensation claim, but it was denied.

Poremba filed an administrative appeal and his employer filed a motion for summary judgment, arguing that he could not reopen his claim because he spent his settlement funds on expenses other than medical costs. Summary judgment was granted, and Poremba petitioned the district court for judicial review. The petition was denied and Poremba appealed.

The Nevada Supreme Court held that an insurer is not entitled to reimbursement from the portion of a third-party settlement that compensates an injured worker for anything outside the definition of compensation found in NRS 616A.090.

An insurer may claim an offset when a worker receives money from a lawsuit against the party responsible for the injury. Namely, an insurer may withhold payment of medical benefits until the claimant has exhausted any funds received from a third-party settlement. However, in a lawsuit, a plaintiff may recover medical costs as well as damages for pain and suffering, lost wages, and harm to property. Damages beyond those recovered for medical costs exceed the definition of "compensation" as defined by the worker's compensation statute.

A plaintiff may spend settlement funds allocated for expenses beyond NRS 616A.090's definition of compensation without fear that the insurer will be able to refuse to reopen claims for future expenses that are within the scope of worker's compensation. For example, worker's compensation does not compensate an injured worker for pain and suffering and an insurer is not entitled to compensation from settlement funds for pain and suffering. Therefore, funds for pain and suffering can be spent and do not constitute a basis for denial of the re-opening of a worker's compensation claim.

Here, the settlement agreement was silent as to how the settlement funds were to be allocated between medical expenses versus pain and suffering, so an evidentiary hearing needed to be conducted. However, the Court stated that going forward, parties can expressly designate how settlement funds are to be allocated so that future evidentiary hearings are not necessary.

Accordingly, the district court's denial of judicial review was reversed and remanded.

APPEALS

TRP International, Inc. v. Proimtu MMI LLC
391 P.3d 763, 133 Nev. Adv. Op. 13, Nev., April 6, 2017.

The Nevada Supreme Court considered whether an order granting a motion to amend or reconsider a final judgment and vacating the judgment is appealable as a special order after final judgment.

In this case, Proimtu MMI LLC filed an amended complaint relating to the construction of a solar plant. TRP International, Inc. filed a motion to dismiss, which was granted by the district court. The judgment was certified as final under NRCP 54(b). Proimtu filed a tolling motion under NRCP 59(e), asking the court to amend or reconsider the order dismissing the complaint. The court granted the motion, vacated the previous order on the motion to dismiss, and entered an order denying the motion to dismiss. TRP appealed.

The Nevada Supreme Court directed TRP to show cause why the appeal should not be dismissed for lack of jurisdiction and questioning why the order granting the motion to amend and vacating the order was appealable.

A special order after a final judgment is appealable in certain circumstances. A special order is a post-judgment order that affects the rights of a party to the action, growing out of the previously entered judgment. The Nevada Supreme Court held that an order granting a

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this case continued from page xix

motion to amend or reconsider and vacating a final judgment is not a special order after final judgment. Once a final judgment is vacated, there cannot be a special order after final judgment unless a new final judgment is entered.

Therefore, the order was not appealable and the appeal was dismissed.

CONFLICTS OF INTEREST

New Horizon Kids Quest III, Inc. v. Eighth Jud. Dist.
392 P.3d 166, 133 Nev. Adv. Op. 14, Nev., April 6, 2017.

The Nevada Supreme Court considered whether an attorney and his firm should be disqualified from representing real parties in interest in a case against the petitioner when the attorney's prior firm previously defended the petitioner in a separate case.

In this case, Hall Jaffee & Clayton (HJC) defended Petitioner New Horizon Kids Quest II, Inc. in a tort action in 2007. Jordan Schnitzer was an associate attorney working at the firm at that time but did not represent the Petitioner. In 2011, Schnitzer left HJC and joined a new firm. At that firm, he participated in a case filed against Petitioner. Petitioner discovered that Schnitzer worked at HJC during the time it was represented by HJC and filed a motion to disqualify Schnitzer and his firm. The district court denied the motion. Petitioner filed a petition for writ of mandamus seeking review of the district court's order.

The Nevada Supreme Court held that the Nevada Rules of Professional Conduct disqualify a lawyer only when he gained actual knowledge of information protected by the rules of confidentiality while employed at the former law firm. If that lawyer acquired no confidential information about a client at his former firm, he and his new firm are not disqualified from representing a different client in the same or related matter even though the interests of the former and current clients conflict.

Here, Schnitzer did not acquire any confidential information about the Petitioner while employed at HJC. Therefore, there was no conflict of interest and the petition for writ relief was denied.

RECALL OF JUDGES

Ramsey v. City of North Las Vegas
392 P.3d 614, 133 Nev. Adv. Op. 16, Nev., April 13, 2017.

The Nevada Supreme Court considered whether a municipal judge could be removed through a special recall election.

In 2011, Catherine Ramsey was elected to a six year term as a municipal judge. A group called "Remove Ramsey Now" created a recall petition seeking to force an election to remove her from office. The group compiled signatures and submitted the recall petition to the City of North Las Vegas. The Secretary of State deemed the petition qualified. Ramsey sought an emergency injunction from the district court and filed a complaint challenging the recall petition. She argued that judges are not "public officers" subject to recall under Article 2, Section 9 of the Nevada Constitution and that the voter's approval of the judicial discipline process in 1976 superseded all other forms of judicial removal except legislative impeachment. The district court denied Ramsey's claim and Ramsey appealed.

Article 2, Section 9 of the Nevada Constitution provides that every public officer in Nevada is subject to recall from office by voters. Though the term "public officer" is not defined, the Nevada Supreme Court held that judges are "public officers" for the purposes of the constitutional recall provision.

In 1976, Article 6, Section 21(1) of the Nevada Constitution was enacted, and approved by voters, stating: "A justice of the [S]upreme [C]ourt, a district judge, a justice of the peace or a municipal judge may, in addition to the provision of Article 7 for impeachment, be censured, retired, removed or otherwise disciplined by the commission on judicial discipline." This section omits any reference to recall. It provides a comprehensive, standardized system for removing judges with a single exception allowing the Legislature to remove a judge through impeachment. No other removal method exists. Accordingly, the Nevada Supreme Court held that Article 6, Section 21 superseded and repealed voter recall of judicial officers under the Nevada Constitution.

Therefore, the recall petition against Ramsey was invalid and the district court's order was reversed.

Can't Spell Truth Without Ruth:

NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG

Don Willenburg
Gordon Rees Scully Mansukhani, LLP

What does a diminutive octogenarian Supreme Court justice have in common with a deceased 300 pound rapper? They are both tough kids from Brooklyn with outsize influence on their times. That connection forms not just the inspiration for the clever phrase that is the title of this book, and a Tumblr, but the book's organizing principle. Each chapter title is a Notorious B.I.G. song title. Yes, I admit that I recognized few, if any, titles, and I am still not sure what a Tumblr is.

No Supreme Court justices are rock stars, but RBG has come close. There are T-shirts, tote bags, greeting cards and more with her name and stylized image. The book discusses many of her cases, and has annotated excerpts from briefs and opinions. It is, however, far from a case book. Those are interspersed with stories of her life, and the book is physically laid out like a really good webpage. Or Tumblr. You do not have to be a lawyer, or a feminist, or interested in the history of the past sixty years, or receptive to a really inspiring story, to enjoy this book immensely. If you are any of those things, or like many of us, all of them, then this book is a fun must-read.

When she went to law school in the 1950s, women in the profession were exceedingly rare and hardly encouraged. She was one of only a handful of women law students at Harvard, one of only two on law review. There were no women's bathrooms in the building where exams were given. She again was one of only a handful of women law students when she transferred her third year to Columbia (she transferred because her husband graduated a year ahead of her and took a job in New York: Harvard declined to give her a degree). Looking for a job after law school, "she had three strikes against her: She was a woman, she was the mother of a four-year-old, and a Jew." She nevertheless found work at the ACLU, became one of only two women law professors at Rutgers, and later became the first tenured female law professor at Columbia. She was only the second woman ever appointed to the United States Supreme Court, and after Justice O'Connor retired she was for a while, the only woman on the court.

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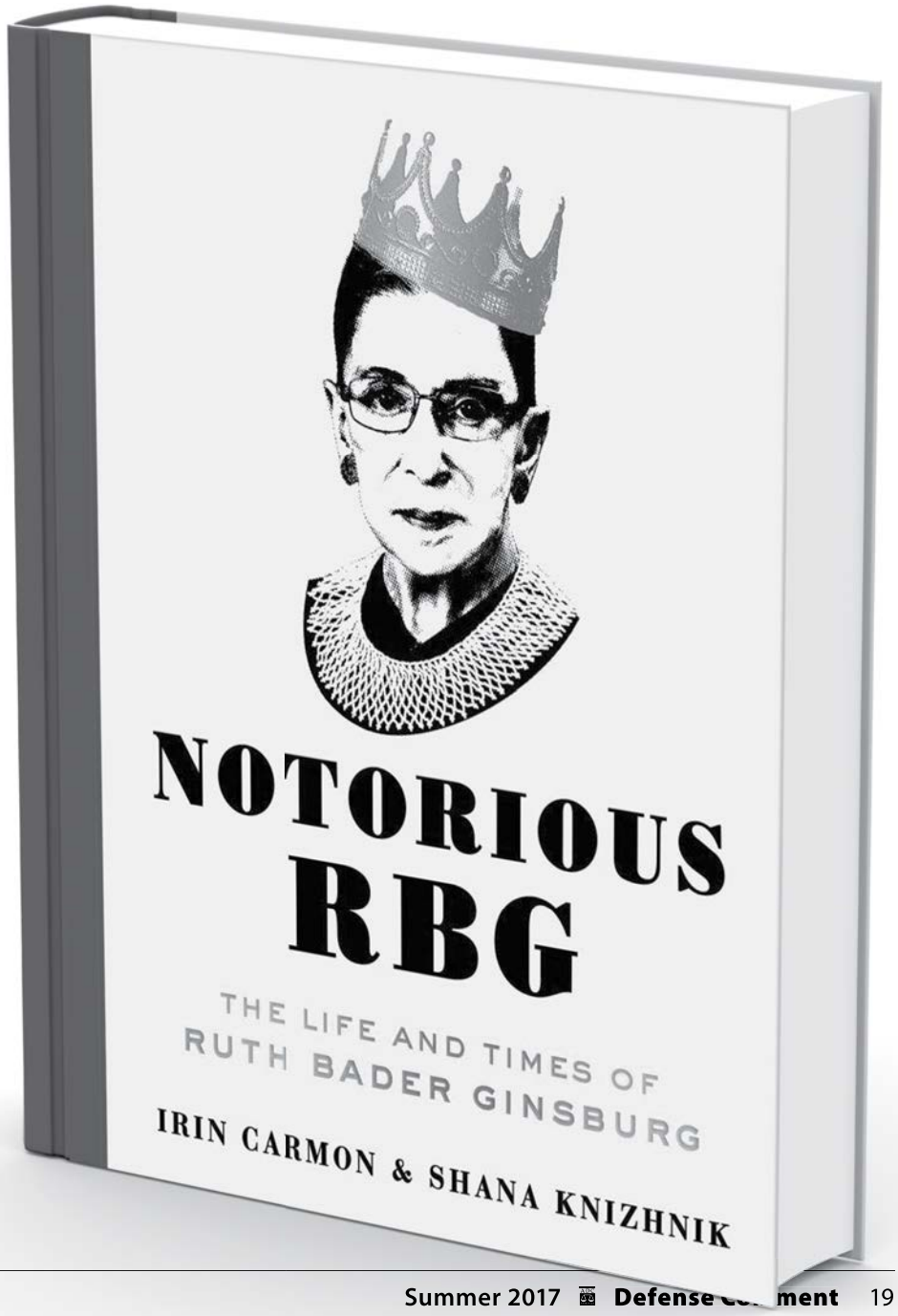

One of her early cases, *Frontiero v. Richardson*, involved an Air Force lieutenant whose husband had been denied the same housing, medical, and dental benefits as the wives of male officers. The U.S. Supreme Court is a famously "hot" bench, and lawyers frequently have trouble getting out a full sentence without questions. RBG delivered her entire presentation without a single interruption. Five months later she found that she had won. Justice Harry Blackmun, who in his diary graded lawyers on their performance, gave RBG only a C+, calling her a "very precise female."

Reed v. Reed challenged an Idaho law that allowed only men to serve as executors of their children's estates. She won this case too. This passage from her brief is telling:

"Laws which disable women from a full participation in the political, business and economic arenas are often characterized as 'protective' and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage."

Another case involved a woman in the Air Force who got pregnant and was told, consistent with Air Force policy, that she either had to have an abortion or would lose her job. This was at a time that military bases were one of the only places abortion was legal. The government changed this policy while the case was pending at the Supreme Court to avoid an adverse result with precedential effect. For RBG, "abortion rights" cuts both ways, and it should always be the woman's choice, not the government's.

Many of her gender discrimination cases were on behalf of men. One example was *Wiesenfeld v. Weinberger*. Plaintiff was a widower whose wife had died in childbirth. She had been a teacher while he "played homemaker." Yet he could not get Social Security benefits: only widows could get mother's benefits. This was RBG's "chance to show that sexism hurt everybody." And she did: even Rehnquist voted against this gender discrimination,

though he said he did so only for the benefit of the child.

Her own life, married to a very successful spouse with both sharing child and home duties, was a model of what she hoped the law would allow. She was married for 56 years to Marty Ginsburg, with whom she went to law school. He was a tax lawyer at a white shoe New York firm as she rose in the ranks of the ACLU and then as an academic and judge. The warmth of the stories of their relationship is very touching, and you should simply read the book to feel it.

In law school, she was at a dinner with professors and the few other female students when the dean asked them why the female students could justify taking the place of a man. She answered: "I want to know more about what my husband does so that I can be a sympathetic and understanding wife." Of course, she was lying: Marty had to work to keep up with her.

Many years later she returned to her alma mater and spoke to a crowd of students that included many women, including her own daughter. She could not resist: "I understand some of the men come to HLS these days because what better place to find a suitable woman?"

No discussion of Justice Ginsburg or her time at the court is complete without some account of her friendship with ideological antipode Antonin Scalia. As RBG said, however, if you can't genuinely like people who disagree with you, then you should have a different job. They shared many interests, including opera and her husband Marty's cooking. There is a picture of the two of them on an elephant in India that is pretty hilarious. The oddity (to others) of their friendship was eventually captured in, what else, an opera. Composed by a lawyer and musician (so there are footnotes to the libretto), it is titled "Scalia/Ginsburg: A (Gentle) Parody of Operatic Proportions." Sample lyric, from Ginsburg to Scalia: "You are searching in vain for a bright line solution/ To a problem that isn't easy to solve/ But the beautiful thing about our Constitution/ Is that, like our society, it can evolve."

There is plenty in this book about her extraordinary work ethic and her perfectionism in legal writing. "The mantra in her chambers is 'get it right and keep it tight.' " Justice Ginsburg adds, "I think the law should be a literary profession and the best legal practitioners regard the law as an art as well as a craft." "It's a hard job but I can do it at least as well as these guys."

The author observes: "A conversation with her is a special pleasure because are no words that are not preceded by thoughts."

One nice idiosyncratic touch is that RBG wears different collars (word for the day: *jabons*) with her judicial robes. On opinion day, she has a different collar, depending on whether in the dissent or majority.

She works out every day, and can still do 20 pushups at a time. Consider that next time you hear her described as "frail."

Relate, be inspired, or get out of the way. Read this book. And Google "Tumblr."

Don Willenburg

Don Willenburg is a partner at Gordon & Rees LLP in its Oakland office, and chairs the firm's appellate practice group. He received his Bachelor of Arts degree from Loyola University of Chicago, and his J.D. degree from Stanford University. He is a member of the ADCNCN Board of Directors, and is chair of the Association's Amicus Committee.

AROUND THE ADC

Ethics in Advocacy

Patrick Deedon
ADCNCN Board Member

Thirty attorneys attended a seminar entitled "Attorneys Behaving Badly – Ethics in Advocacy" on May 5 in Redding, presented by the ADC Litigation Section, in partnership with the Shasta-Trinity Counties Local Bar Association. It was a great opportunity to hear from two Shasta County Superior Court Judges and interactively review examples of "Attorneys Behaving Badly." The speakers were (left to right) Gary Watt, Esq., of Hanson Bridgett, San Francisco; Hon. Stephen Baker, Shasta Superior Court, Don Willenburg, Esq., Gordon & Rees of Oakland, and Hon. Tamara Wood, Shasta Superior Court.

Annual Golf Tournament

J. Scott Donald
ADCNCN Board Member

Grab those clubs you have been neglecting and join your fellow ADC members in beautiful Napa for our annual golf tournament on September 22nd. We are back at the spectacular Silverado Resort in the heart of the Napa Valley. For the non-golfers, significant others of golfers and out-of-commission golfers, we have a wine testing option. In depth tasting of two of Napa's best along the Silverado Trail. **Shuttle service will ensure you are back in time to join the golfers for a post-tournament reception.**

Jury Psychology Seminar & Judicial Reception

The annual Judicial Reception was held at Sacramento's Sutter Club in the shadow of the state capitol building on March 24, following a presentation on Jury Psychology by plaintiffs' counsel Robert Buccola of Sacramento's Dreyer Babich Buccola Wood Campora; defense attorney Tim Halloran of Murphy, Pearson, Bradley & Feeney in San Francisco; and jury consultant Dana Meeks, Psy.D. Chief Justice Tani Cantil-Sakauye addressed the reception attendees on current issues affecting the state, and the nation, and approximately 25 other judges and justices were present, and mingled with many of the attorneys present following the seminar.

Sacramento Superior Court Presiding Judge Kevin R. Culhane is flanked by ADC Board of Directors members (left to right) Holiday Powell, Erin McGahey, Jeffrey Ta and Jennifer Wilhelmi Diaz

Former ADC President Karen Jacobsen and Chief Justice Canti-Sakauye intently listen to Judge Kevin R. Culhane.

San Joaquin Superior Court Judge Ronald A. Northup, and Sacramento Superior Court Judges David I. Brown and Geoffrey A. Goodman.

AROUND THE ADC

Diversity Report

The Diversity Committee looks forward to bringing you further networking opportunities for 2017 and continues in its work to encourage, support and further diversity and inclusiveness within our organization. Please let us know your ideas and comments which can be sent to your Diversity Committee Chair, Maria Quintero (*mquintero@hinshawlaw.com*).

Did you know? In 2016, women comprised 31.1 percent of the total number of state court judges.

What Is DRI? Can It Help You?

Glenn M. Holley
ADCNCN Board Member

dri The Voice of the Defense Bar™

Many resources are available to you through membership with the Association of Defense Counsel. The Defense Research Institute (DRI), the national (and international) defense organization, is also available for your needs.

DRI maintains numerous publications on nearly every facet of the defense business and they are available for your reference. DRI generally reviews and comments on information on a more national level which may touch on issues that affect various states and the individual defense organizations.

For example, the DRI Center for Law and Public Policy, through its many committees, publishes research materials and extensive amicus briefs to the United Supreme Court on numerous substantive law issues. One of its committees reviews proposed legislation and rules and works with local defense organizations, to provide assistance and resources. DRI also maintains an extensive expert witness bank and a database of experienced mediators and arbitrators. A variety of DRI educational events take place in many states, including California.

Educational opportunities and resources are available to defense attorneys through the Association of Defense Counsel of Northern California and Nevada (*www.ADCNC.org*), our sister organization, the Association of Southern California Defense Counsel (*www.ASCDC.org*) and DRI (*www.DRI.org,*)

Toxic Torts 2017

The ADC Toxic Torts Substantive Law Section presented two seminars in May. In *Debunking Junk Science and Measuring the Experts in Expert Opinion*, panelist John Brydon (*Delmer, Armstrong & Roland, LLP*) examined the California Supreme Court's recent retraction from excluding potentially questionable expert opinion. Although *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal. 4th 747, authorized courts to be "gatekeepers" to exclude invalid or unreliable expert opinion, subsequent case law appears to limit the application of *Sargon*. Co-panelist Amit Lakhani, Ph.D., P.E. (*JuriLitics, LLC*) offered insight and potential methods to put reliable science back into the courtroom. By offering an analytical approach, such as finding neutral peers within the particular field to perform peer reviews of the literature, defense counsel can seek to exclude unreliable opinions via expert declarations and related motion practice.

The second night delved into recent litigation gaining spotlight in the news – *Talc*. Panelists Robert Betette (*Foley & Mansfield*) and Rachel Novick (*Cardno ChemRisk*) discussed asbestos-related cosmetic talc litigation, including developing a cosmetic talc contamination defense, the case from the plaintiff's perspective, and the unique state of the art issues related to the knowledge of the hazards of alleged asbestos-contaminated talc. The evening concluded with a discussion by Ania Urban (*Cardno ChemRisk*) about epidemiological studies in talc-related ovarian cancer cases. In light of the massive jury verdicts against Johnson & Johnson, Ms. Urban offered a critical analysis of cohort and case-control studies of ovarian cancers and whether perineal use of talc was actually a risk factor for ovarian cancer.

EDITOR'S NOTE:

This is the third in our new feature, "Ask a Senior Partner," which is intended to provide answers to practical questions newer lawyers may be uncomfortable asking their senior partner. This month's answers are provided by ADCNCN Board of Directors Marie Trimble Holvick and Jeffrey Ta. Marie is the assistant managing partner of Gordon & Rees' San Francisco office, where she specializes in employment matters. Jeff is a partner with the Bledsoe Law Firm and specializes in complex personal injury, wrongful death, and landlord tenant litigation.

Q What if I make a mistake?

A Jeffrey Ta: If you make a mistake, always inform your supervising partner. Trying to cover up things is not a good idea. It will be worse if your supervisor learns about your mistake from someone other than you. Come up with a plan to fix the mistake, and let your supervising attorney know about your plan. Litigation occurs usually because of someone's mistake. Our job as defense lawyers is to figure out how to minimize the effect of the mistake on your client. Coming up with a plan to fix your own mistake shows that you are capable of solving problems, which could lead to greater responsibility and more interesting work assignments.

Do not blame others (another attorney, your assistant, paralegal, etc.) for your mistake. It is not professional. If you take responsibility and own your mistakes, you earn respect from your peers. The most important is that you learn from your mistakes, don't repeat it, and move on.

A Marie Trimble Holvick: Honesty is always the best policy. Once you discover a mistake, develop a plan to fix the mistake and ask to speak to the partner in person. A personal conversation (rather than an e-mail) shows maturity and responsibility. During the meeting, be prepared to identify the mistake, identify the solution, and propose methods for explaining the mistake to the client. You should also be prepared to fix the mistake for free. No client wants to pay for extra work to fix an attorney's mistake.

Keep in mind that judges and clients are often willing to overlook small mistakes if the attorney takes ownership and fixes the problem immediately. Failing to address the issue, blaming it on someone else, or trying to hide the problem only makes the matter worse.

Q How do I keep with up with new law?

A Jeffrey Ta: Join and participate in ADCNCN. Continuing education is a primary focus of the association. The ADC provides legal updates via periodic MCLE seminars, publications, and ongoing "Newsflashes." If you are already a member of ADC, get involved in a substantive law section that specializes in your area of practice. The ADC's substantive law sections include 1) Business Litigation; 2) Construction; 3) Employment; 4) Insurance; 5) Landowner liability; 6) Litigation; 7) Medical/Health Care; 8) Public Entity; 9) Toxic Torts; and 10) Transportation. Most ADC members practice in more than one of these practice areas. Take advantage of CLE seminars offered through your local Bar Association. Many of these CLE seminars can be completed during your lunch hour. It is a good excuse to get out of the office, keep up to date with new law and meet your MCLE requirements, and to meet other attorneys with similar professional interests.

A Marie Trimble Holvick: In addition to joining ADC, be sure to register for alerts from state and federal government websites. For example, the Department of Industrial Relations sends regular email updates on changes to labor and employment law. Many industry groups provide similar notifications. For example, CalChamber and SHRM both send out employment law updates to their list serves. In addition to email notifications, attending CLEs and seminars in person is a great way to network while also keeping up with legal changes. Finally, become an avid consumer of local news. Major legislative changes are well-reported by the *San Francisco Chronicle, Sacramento Bee,* KQED, and local news stations.

The Lawyer's Lawyer

William A. Muñoz
Murphy Pearson Bradley & Feeney

You Have Landed the Client, Now What? Formulating the Attorney/Client Relationship

This is the second in a series of articles by The Lawyer's Lawyer providing key insights into potential ethical issues that arise in your daily practice and ways to avoid malpractice claims. The first article focused on the initial client contact and whether you as the lawyer want to accept the person or entity as a client. Well, you have made the decision to accept the client, now how do you formalize the retention to avoid issues down the road?

THE LEGAL SERVICES AGREEMENT – IN GENERAL

It is amazing how many attorneys do not have a written legal services agreement ("LSA")[1] with their clients. Perhaps this is because the attorney has a long-standing relationship with the client or the attorney simply does not understand the importance of a written LSA.

Business and Professions Code §§ 6146-6148 are the regulations concerning written fee agreements. Section 6146 defines the specific requirements for written LSAs for medical malpractice actions. Section 6147 deals with contingent fee agreements in all other cases aside from medical malpractice actions. And, Section 6148 sets forth the requirements for written LSAs in all other circumstances not defined by Sections 6146 and 6147. Each, however, have their own nuances.

For instance, Section 6146 sets forth the maximum contingent fee recoverable by the attorney and requires the agreement to state that the maximum fees are set by Section 6146. (Bus. & Prof. Code §§ 6146(a)(1)-(4), 6147(4).) In non-medical malpractice contingency fees cases governed by Section 6147, the written LSA needs to identify the contingency fee agreed upon, how costs and disbursements will affect the fee, and that the fee is not set by law but negotiable between the attorney and client. (Bus. & Prof. Code § 6147(a)(1)-(4).) Significantly, there is no requirement that the attorney maintain or provide billing records to the client to substantiate the contingency fee.

However, for those cases falling within the scope of Section 6148, the LSA must be in writing, be signed by the client and attorney with a duplicate copy provided to the client at the time the LSA is entered into. (Bus. & Prof. Code 6148(a); *see also* Bus. & Prof. Code § 6147(a).). Additionally, the LSA must contain:

- Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.
- The general nature of the legal services to be provided to the client; and
- The respective responsibilities of the attorney and the client as to the performance of the contract.

Failure to comply with any of these requirements gives the client the right to void the LSA, but permits the attorney to recover the reasonable value of the services provided to the client. (Bus. & Prof. Code §§ 6147(b), 6148(c).)

Thankfully, the lack of a written LSA is not a disciplinable offense under the State Bar Rules. (*See Matter of Harney* (1995) 3 Cal. State Bar Ct. Rptr. 266, 276.) In fact, a written LSA is not required in every circumstance. (*See* Bus. & Prof. Code 6148(d).) Nor will the lack of a written LSA preclude payment of attorney's fees incurred on the client's behalf in the event of a dispute or if the written LSA is voided by the client for failure to comply with Section 6148. (Bus. & Prof. Code 6148(c); *Leighton v. Forster* (2017) 8 Cal.App.5th 467, 490.)

If lack of a written LSA, or one that does not comply with Sections 6146-6148, does not constitute a disciplinable offense and does not prevent me as the attorney from recovering fees for the work performed, why do we need written LSAs? For legal malpractice practitioners, the answer

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is simple – scope of duty and statute of limitations.

A WRITTEN LSA DEFINES THE SCOPE OF AN ATTORNEY'S DUTY TO THE CLIENT

The attorney-client relationship is contractual by nature and thus created by some form of contract, whether express or implied. (*Fox v. Pollack* (1986) 181 Cal. App.3d 954, 959.) The existence of the attorney-client relationship therefore defines the scope of duty that the attorney owes to the client. (*Ibid*.) However, the attorney-client relationship cannot be forced upon the attorney for services that the attorney does not agree to undertake. (*See Zenith Ins. Co. v. Cozen O'Conner* (2007) 148 Cal.App.4th 998, 1010 (holding that a putative client's subjective belief that an attorney-client relationship exists cannot, standing alone, create such a relationship or establish a duty of care owed by the attorney.)) Thus, failing to set forth the terms and conditions of the attorney-client relationship and what the attorney will and will not do in a written LSA can subject the attorney to unintended consequences of a relationship (and duty) that he or she did not agree to undertake.

For example, attorney represents client in a personal injury matter and has a contingency fee agreement to memorialize the relationship for that matter. However, during the representation on the personal injury matter, the client asks the attorney for legal advice on an unrelated family law matter. The attorney does not bill for the time and otherwise does not memorialize the agreement to provide advice concerning the family law matter. The advice turns out to be wrong and the client has an adverse decision against him in the family law matter. In the subsequent malpractice action against the attorney, the likelihood of prevailing on a lack of duty argument stating that the attorney did not owe the client a duty due to lack of a LSA will most likely fail, at least for purposes of a motion for summary judgment. (*See Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126; *see also Beery v. State Bar* (1987) 43 Cal.3d 802, 811-812.)

Thus, the significance of the written LSA defines what the attorney will and will not do for the client. There is no prohibition under the Rules of Professional Conduct or the case law about the attorney's ability to limit his or her scope of representation, and thus duty owed to the client. (Rule Prof. Cond., rule 3-400.) However, that is not to say that the attorney must turn a blind eye to potential legal problems that are reasonably apparent to the attorney that the client may not be aware of even if they fall outside the scope of the written LSA. (*See Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684; *but see Broadway Victoria, LLC v. Normington* 2017 WL 1398470 (Apr. 19, 2017) (malpractice claim against client's lawyer in related bankruptcy action not reasonably apparent to client's other lawyer in breach of contract action.)) In those situations, however, all that is required is that the attorney advise the client of the potential legal problems and to seek counsel for those problems.

The takeaway is to expressly provide in the written LSA what you agree to do as well as stating what you will not do. For example, "Attorney will represent client in business dispute with ABC Corporation entitled *XYZ Corporation v. ABC Corporation* through trial and post-trial motions. Attorney will not undertake any appeals or provide any legal services in any other matters absent a separate written agreement." For insurance defense counsel assigned cases from carriers, typically the scope of the duty owed is limited to the defense of the claims against the carriers insured and does not require a written LSA. (Bus. & Prof. Code § 6148(d)(1).) However, best practice is to confirm the retention in writing with the carrier and the insured identifying the scope of the retention, who the firm will represent and hourly rates to be charged.

WRITTEN LSAS ARE CRITICAL TO A STATUTE OF LIMITATIONS DEFENSE TO A MALPRACTICE CLAIM

Along the same lines, a written LSA can be critical to a statute of limitations defense to a legal malpractice claim pursuant to Code of Civil Procedure section 340.6. The statute of limitations for attorney malpractice is one year from the date the plaintiff discovers, or through use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. (Code Civ. Proc. § 340.6(a).)

The statute, however, can be tolled under four limited circumstances, including if the attorney continues to represent the client regarding *the specific subject matter in*

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which the alleged wrongful act or omission occurred. (Code Civ. Proc. § 340.6(a)(2).) Under this "continuous representation" tolling provision, the written LSA is critical. This is best exemplified by way of example.

Attorney represents client in a business litigation matter on an hourly basis pursuant to a written LSA. During the representation in the business matter, the client seeks out the attorney's advice regarding an unrelated real estate transaction. There is no written LSA for the real estate matter and the attorney bills the client on his regular monthly bill for the business litigation matter. The erroneous real estate advice occurs on January 1, 2016 and the real estate transaction goes south as a result of the attorney's advice on February 1, 2016. At that time, the client is aware of the bad advice, but is still represented by the attorney in the business litigation matter that ultimately concludes by way of settlement on April 1, 2016. The attorney does not provide any further legal advice to the client on any other matters.

The client sues the attorney for malpractice regarding the erroneous real estate advice on March 31, 2017, contending that the attorney-client relationship arose by way of the written LSA for the business litigation matter and the attorney continued to represent him within a year of filing the malpractice lawsuit pursuant to the terms of the written LSA for the business litigation matter. Does the attorney prevail on a statute of limitations defense? Probably not because the attorney made the mistake of representing the client pursuant to the terms of the business litigation LSA and billed the client for the real estate matter in the business litigation matter. At the very least, there will be a triable issue of fact on a motion for summary judgment.

Now change the scenario slightly. Attorney has a written LSA for the business litigation matter and a written LSA for the real estate matter, each with separate billing records. Attorney did not provide any further legal advice in the real estate matter after January 1, 2016 and sent one bill for those services in February 2016. Would these facts change the result on the attorney's motion for summary judgment on the statute of limitations ground in the subsequent malpractice action? Yes, because the representation regarding the specific subject matter of the alleged malpractice (the real estate transaction) ended on January 1, 2016. The argument that attorney's continued representation in the business litigation matter tolled the statute will fail.

THE TAKEAWAY

Clearly define in a written LSA what you will and will not do for the client and stick to it. Avoid the temptation of lumping cases together and billing them to the client in one bill; otherwise it may come back to bite you if things do not go well. You may create by implication duties that you did not agree to undertake and providing a broader net of potential malpractice claims with the inability to pursue a statute of limitations defense to the claims.

If you represent a client in more than one matter, have separate LSAs and bill each matter separately. While it may be tedious or create more paper, it will save you a much bigger headache down the road if faced with a malpractice claim.

Until next time!

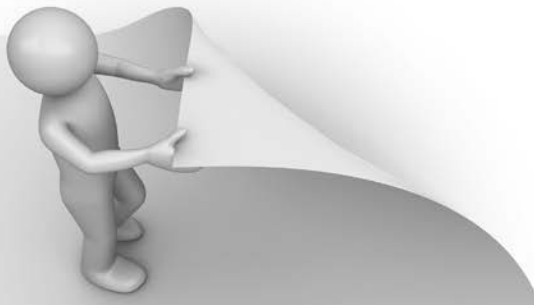
ENDNOTES

1 Legal services agreement is referred to by different names, such as engagement letter or retainer agreement. For purposes of this article, the names are interchangeable.

William A. Muñoz

Bill Muñoz is a shareholder at Murphy Pearson Bradley & Feeney in Sacramento, where he specializes in legal malpractice and other business matters. He received his Bachelor's degree from University of California, Davis, and his J.D. from Hamline University School of Law. Bill is a member of the ADCNCN Board of Directors.

ADC Amicus Corner



By Don Willenburg
Gordon & Rees LLP

The ADC's amicus briefs committee exists to bolster and provide institutional support for the defense position at courts of appeal and the California Supreme Court. The committee also provides excellent opportunities for members (this means you or the smart colleagues at your office) to write amicus merits briefs, letters supporting review, and letters supporting publication or depublication on cases involving important defense issues.

Since the last issue, the amicus committee has helped secure the following victories for the defense community: two California Supreme Court cases in which the ADC filed an amicus brief and one Court of Appeal decision ordered published.

1 Summary judgment and experts: if can't testify at trial, can't defeat summary judgment.

In *Perry v Bakewell* (Feb. 23, 2017) 2 Cal.5th 536, plaintiff failed to respond to a demand for simultaneous exchange of expert witness information. In response to a motion for summary judgment, however, he submitted two expert declarations. The trial court excluded the declarations and granted summary judgment. Both the Court of Appeal and the Supreme Court affirmed.

Plaintiff argued that the expert witness disclosure statutes refer to evidence and testimony at "trial," so he should be able to use the undisclosed experts for other purposes. The Supreme Court viewed the summary judgment statute as determinative. "The condition that an expert's declaration [in opposition to summary judgment, § 437c, subd. (d)] must set out admissible evidence, however, has determinative importance. Even if all the references to 'trial' in the expert witness disclosure statutes are read strictly, including the specification that the 'trial court' must exclude the testimony of an undisclosed expert (§ 2034.300), the summary judgment statute still requires the evidence provided in declarations to be admissible at trial."

Many cases will not involve summary judgment motions being heard so late in the case, after expert witness designations have been demanded. But every summary judgment motion by the defense can benefit from the general principle that if it isn't going to come in at trial, it doesn't block summary judgment.

2 Prompt presentation of government tort claims required, even for minors.

In *J.M. v Huntington Beach Union High School District* (March 6, 2017) 2 Cal.5th 648, the minor plaintiff/claimant argued that the fact of minority required that the district approve his application to file a late claim. The defense won at the trial court, Court of Appeal and Supreme Court levels. Our amicus brief pointed out the central issue:

If this Court were to accept Petitioner's invitation to create an exception for minority not present in the Act, that would encourage minor claimants to ignore the requirement of submitting a timely tort claim, to thereafter submit an inadequate application for leave to submit a late claim that does not provide a public entity with information to investigate claims and avoid lawsuits, and then arbitrarily impose the burden of litigation on public entities funded by tax dollars by simply filing lawsuits under the assertion that the minors' applications should not have been denied in the first instance.

3 Product liability; no inference of liability where multiple suppliers.

In *Johnson v. Arvinmeritor* (Feb. 2, 2017) 9 Cal.App.5th 234, plaintiff argued that because defendants supplied brake linings for the brand of trucks on which his father had worked, and that there was therefore a triable issue of fact as to whether his father brought home asbestos dust from those linings. The evidence, however, was "that Defendants were among multiple suppliers and thus does not support an inference that Johnson probably encountered asbestos from Defendants' products."

This case should be useful any time a defendant is one of many suppliers, where there is no evidence which supplier's product actually caused the injury. (Accord: *Garcia v. Joseph Vince Co.* (1978) 84 Cal. App.3d 868, 873-874 [no liability where defective product "was made and supplied by either (a) American or by (b) Vince, not by both; but which one of the two was unknown."]) (Full disclosure: Amicus committee chair was one of the winning counsel, but recused from consideration of whether to seek publication.)

Res judicata – construction defect. The committee filed a request for publication in *Lovell v. Fong*, (April 3, 2017, No. A144637) in which plaintiff lost a lawsuit over defects in her home, then brought another asserting different theories of recovery than in the first suit. The court held that because the same "primary right" was involved, the second suit was barred by res judicata, even if not by collateral estoppel.

Continued on page 28

Whether this letter was successful was unknown as of press time, but should be readily discoverable by the time you read this.

Wage and hour issues. The amicus committee has also weighed in on other cases with less success. For example, we joined with the ASCDC on a brief supporting writ review in *Macy's West v. Superior Court,* where we argued that "the Court should find that Macy's did not violate California law by advancing commissions pending the expiration of an eligible return period and reporting these wages on the employee's paycheck in the next applicable pay period, as opposed to subsequent and/or multiple reporting thereafter as the sales ultimately became final over time." The Court of Appeal summarily denied the writ, and a petition for California Supreme Court review is pending.

WHAT CAN, AND DOES, THE ADC'S AMICUS BRIEFS COMMITTEE DO FOR YOU?

The ADC's amicus committee can help support you and your clients in a case of general defense interest in all the following ways:

1. Requests for publication or depublication of court of appeal decisions.
2. Amicus brief on the merits at the court of appeal.
3. An amicus letter supporting a petition for California Supreme Court review.
4. Amicus brief on the merits at the Supreme Court.
5. Share oral argument time, with court approval.
6. Help moot court advocates in advance of oral argument.

In many cases, the ADC works jointly with our Southern California colleagues, the Association of Southern California Defense Counsel. That does not always happen, but getting the chance to bat around these issues with lawyers from across the state is another great benefit of being on or working with the amicus committee.

If you are involved in a case that has implications for other defense practitioners, or otherwise become aware of such a case, or if you would like to get involved on the amicus committee, contact any or all of your amicus committee: Don Willenburg at dwillenburg@gordonrees.com; Patrick Deedon at *pdeedon@maire-law.com;* Jill Lifter at *jlifter@rallaw.com;* Sam Jubelirer at *samuel.jubelirer@dentons.com.*

Don Willenburg

Don Willenburg is a partner at Gordon & Rees, Oakland/San Francisco, where he chairs the firm's Appellate Department. He is Chair of the ADCNCN Amicus Committee, and also serves as a Representative of the State Bar on the Information Technology Advisory Committee to the Judicial Council of California.

Defense Verdicts

Robert Zimmerman & Preston Young
Schuering Zimmerman & Doyle, LLP
- *Duket v. Ozeran*

Robert Zimmerman
Schuering Zimmerman & Doyle, LLP
- *Weitzman v. Gemberling*
- *Verant v. Gotham*

Do you have a defense verdict you'd like to share with your colleagues?

Send it in today so that your name will appear in the next issue of

DEFENSE COMMENT

E-mail the details of your verdict to:

adcncn@camgmt.com

A·D·C VERITAS

DO YOU AGREE OR DISAGREE?

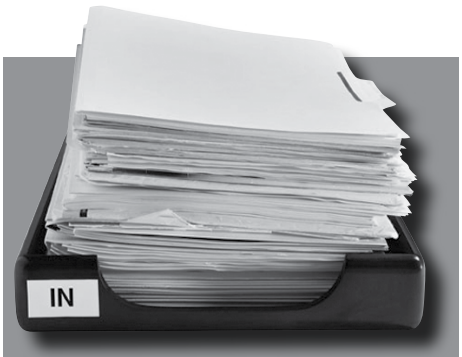
... with the author of an article that you've read in *Comment?*

Do you have a brilliant practice pointer for fellow defense counsel?

Is there a subject that you would like to see addressed in a continuing legal education seminar?

Is there something legislators in Sacramento can do to make your professional life easier?

Send a Letter to the Editor. See page 1 for editorial information.



Defense Comment* wants to hear from you. Please send letters to the editor by e-mail to David A. Levy at *dlevy@smcgov.org

We reserve the right to edit letters chosen for publication.

SUBSTANTIVE LAW SECTION REPORTS

Are you interested in writing an article? Joining one or more substantive law committees? Do you have a suggestion for a topic for a seminar? We are always looking for ways to involve our ADC Members, and encourage you to be active in as many substantive law committees as you are interested. Please contact the section chairs (see roster of section and contact information for co-chairs in box below) and let them know how you would like to participate.

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or visit *www.adcncn.org/SubLaw.asp*

BUSINESS LITIGATION

Holiday D. Powell | *Co-chair*
Michon Spinelli | *Co-chair*

In Business Litigation news, a new case highlights the fraught relationship between the United States Supreme Court and the California Supreme Court on the question of enforceability of consumer arbitration clauses subject to the Federal Arbitration Act (FAA). Recent case law will interest those of you with clients who regularly use arbitration agreements.

On April 7, 2017 the California Supreme Court issued a unanimous decision in *McGill v. Citibank,* No. S224086 (April 7, 2017). The Supreme Court held an arbitration agreement that waives the right to public injunctive relief in other forums is contrary to public policy and unenforceable. The court relied on two California Supreme Court cases, *Broughton v. Cigna Healthplans* and *Cruz v. PacifiCare Health Sys., Inc.*, which established that agreements to arbitrate claims for public injunctive relief under the CLRA, UCL or the false advertising law are unenforceable in California.

In McGill, filed in 2011, plaintiff sought monetary damages, restitution, and injunctive relief against her credit card company, Citibank, under (1) California's Consumer Legal Remedies Act, Civil Code § 1750 et seq. ("CLRA"), (2) Unfair Competition Law, (3) Business and Professions Code § 17200 et seq. ("UCL"), and (4) the False Advertising law, and (5) Business and Professions Code §

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17500 et seq. ("FAL"). The trial court, relying on California's *Broughton/Cruz* rule, which provides that agreements to arbitrate claims for public injunctive relief under the CLRA, UCL, or FAL are unenforceable, severed McGill's claims for public injunctive relief from the other claims which were subject to arbitration.

The Court of Appeal reversed, concluding that the *Broughton/Cruz* rule was preempted by the FAA, and therefore, because the arbitration provision in plaintiff's Citibank account agreement made all claims subject to arbitration, Citibank was entitled to compel the plaintiff to arbitrate all her claims. The appellate court reasoned that, under *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), the "FAA preempts all state-law rules that prohibit arbitration of a particular type of claim because an outright ban, no matter how laudable the purpose, interferes with the FAA's objective of enforcing arbitration agreements according to their terms." *McGill v. Citibank, N.A.*, 232 Cal. App. 4th 753, 757 (2014).

The plaintiff sought review on two grounds: First, the Court of Appeal erred in holding *Broughton/Cruz* was preempted by the FAA, and second, that the arbitration provision was unenforceable because it waived McGill's right to seek public injunctive relief in any forum, not just arbitration. McGill, No. S224086, Slip Op. at 4.

The Court did not tackle the first question as to whether the *Broughton/Cruz* rule was preempted. Instead, the Court took on some unusual language in the arbitration clause itself, which purposed to prevent plaintiff from seeking public injunctive relief "in any forum," not just in the arbitration context. The Court invoked the "savings clause" of the FAA, which "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract[.]'"

The Court held that, consistent with other rulings it had made, the FAA requires courts to place arbitration agreements on "equal footing with other contracts." *Id.* at 15 (quoting *Concepcion*, 563 U.S. at 339)). "A provision in *any* contract ... that purports to waive, in all forums, the statutory right to seek public injunctive relief under the UCL, the CLRA, or the [FAL] is invalid and unenforceable under California law. The FAA does not require enforcement of such a provision, in derogation of this generally applicable contract defense, merely because the provision had been inserted into an arbitration agreement. To conclude otherwise would, contrary to Congress's intent, make arbitration agreements not merely 'as enforceable as other contracts, but ... more so'." *Id.* at 16 (citing *Prima Paint*, 338 U.S. at 404 n.12). The Court noted that public injunctive relief available under consumer protection laws are primarily "for the benefit of the general public," such that waiver of such rights "in any forum" would "seriously compromise the public purposes the statutes were intended to serve."

The California Supreme Court's citation to language from *Concepcion* is interesting, since the ruling itself seems to contradict the U.S. Supreme Court's *Concepcion* decision, which provides that the Federal Arbitration Act (FAA) preempts all state-law rules that prohibit arbitration of a particular type of claim, and found the FAA did not preempt California's policy.

The reach of McGill is difficult to know. First, the case may be limited because of the particular "any forum" language found in the arbitration agreement. Second, because the Court sidestepped the other appealable issue, the case does little to clarify whether parties can waive claims for public injunctive relief in agreeing to individual arbitration, which is currently prohibited by *Broughton/Cruz*.

It is very possible that if the decision were appealed to the U.S. Supreme Court, the ruling will not favor plaintiff (who had to twice opt out of the provision in question). In the last few years, the U.S. Supreme Court has pushed back on the California Supreme Court's continued attempts to limit arbitration provisions. In *DIRECTV, Inc. v. Imburgia* (2015), SCOTUS rejected outright the California Supreme Court's refusal to enforce the arbitration agreement, citing "well-established law." And since *Concepcion*, the Supreme Court has continued to enforce arbitration agreements with class-action waivers, evidencing a "liberal federal policy favoring arbitration." *See e.g., American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064 (2013); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466 (2015).

Given this recent history, it is not surprising that the much anticipated case, *MHN Government Services, Inc. v. Zaborowski*, which involved California's arbitration-only severability rule, settled. And notably, in early February of this year, the Court informed litigants in *Epic Systems Corp. v. Lewis* that it will defer hearing argument in that case until the October 2017 term. The *Epic Systems* case poses the question of whether an employer's use of mandatory arbitration clauses in employment contracts violates the National Labor Relations Act. In spring 2016, the Seventh Circuit determined such class action waivers were unlawful and unenforceable, in contravention of rulings from the Second, Fifth, and Eighth Circuits

Despite its unanswered questions, the factual limitations of the *McGill* decision, suggests that a prudent business might want to review the language of its arbitration provisions and consider whether or not to waive the right to pursue public injunctive relief in any forum, which might allow it to blunt the impact of the decision.

We will continue to provide new developments on legislation and other relevant cases through the ADC forums and newsflashes. Please sign-up to become a member of the Business Litigation Sub-Law section to receive that information. In addition, we always encourage suggestions from our members about other topics for seminars or programs they'd like to see, or to submit articles to the ADC *Comment.*

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CONSTRUCTION

Jill J. Lifter | *Co-chair*
Jennifer L. Wilhelmi | *Co-chair*

The Construction Sub-Law Section has been busy the first part of the year. Thank you to all of the members who have been active by way of submitting case summaries for our Newsflashes, volunteering to speak on our panels, as well as to those communicating to us areas of interest for future seminars. We encourage everyone to be actively involved!

On April 28, the Section presented its annual Construction Seminar. Our seminar topics and panels encouraged all of us to think a little differently and to focus on more traditional construction law issues which many of our clients face outside of construction defect litigation, such as bonds, liens, surety claims, and dealing with the CSLB. In presenting this seminar, we invited our section members to expand their thinking beyond construction defect defense issues and to become more versed in the traditional construction claims which are trending upward in our practice. Our goal was and is to help you become more valuable to your construction industry clients.

A special thank you to Steve McDonald of Bledsoe, Diestel, Treppa & Crane LLP who was instrumental in arranging for Jessie Flores of the Contractors State License Board to speak on the panel addressing licensing requirements and enforcement. Mr. Flores provided invaluable insight with regard to the Board's enforcement procedures and actions.

During the Seminar, the panelists discussed the new legislation potentially affecting many contractors including AB1793 and AB2486. AB1793 amends Business and Professions Code §7031 with regard to the factors affecting the judicial doctrine of substantial compliance with the licensing laws by contractors. AB1793 eliminates the "knowledge requirement" by removing §7031(e)(3) which required that a contractor show that it "did not know or reasonably should not have known that he or she was not duly licensed," in order to prove substantial compliance. The legislative purpose of the bill was to "soften a harsh rule" by protecting contractors from the disgorgement provisions of §7031(b) in certain circumstances. The amendment was intended to mitigate the consequence of unintended or inadvertent acts that temporarily made a contractor unlicensed where that contractor was otherwise duly licensed and generally acted in good faith to maintain his or her license. A contractor can now prove substantial compliance by showing that the contractor: (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract; (2) acted reasonably and in good faith to maintain proper licensure; and (3) acted promptly and in good faith to remedy the failure to comply with the licensure requirements upon learning of the failure. (§7031(e)(3)).

AB2486 requires the Contractors State License Board to create a system or "an enhancement to the current contractor license check search function that permits consumers to search for a licensed contractor by either ZIP Code or geographic location." The legislation requires that this new search feature be implemented prior to January 1, 2019.

Our section also has been busy circulating Newsflashes this year. The Newsflashes are our way of keeping the membership informed about recent and relevant decisions affecting our practice group. One of our more recent Newsflashes reported on the ***Oltmans Construction Co. v. Bayside Interiors, Inc.*** decision wherein the Court of Appeal of California, First Appellate District, addressed the interpretation of a contractual indemnity provision and CCP section 2782.05. In its decision, the Court held a general contractor is entitled to contractual indemnity for liability attributable to the fault of others, but not for its own active negligence. The Court analyzed the contract language specific to the *Oltmans Construction v. Bayside Interiors* matter, based on *Rossmoor* and other familiar cases and noted the legislative intent of CCP 2782.05 was to assure each party on a construction project was liable only for its negligence.

As reported to our members last year, the state Supreme Court granted the petition for review of the *McMillin Albany LLC v. The Superior Court of Kern County* (2015) 239 Cal. App.4th 1132 decision following the split in authorities between the Fourth and Fifth District Court of Appeals. As stated in the News Release by the Supreme Court of California, the Petition for Review was granted with the following issue presented: Does the Right to Repair Act (Civ. Code, § 895 et seq.) preclude a homeowner from bringing common law causes of action for defective conditions that resulted in physical damage to the home? The ADC submitted an *amicus* brief last year. The opinion should decide the issue of whether Title 7 of the Civil Code, also known as SB 800 or The Right to Repair Act, provides the exclusive remedy for residential construction defect claims, regardless of whether the alleged violation has caused physical damage. Expect a Newsflash when the decision is published.

INSURANCE

Glenn M. Holley | *Chair*

For those of us working in and with the insurance industry there are a number of "hot topics" that may affect your practice and the state of the law.

There are issues that face the insurance lawyer, claims representative, in-house counsel, coverage counsel and even policy holders. Among these issues is the tripartite relationship and how each entity, counsel, carrier and insured, can and must, deal with issues that arise during litigation. This subject, among others, is ripe for a discussion among the members of the Insurance Committee and membership at large.

Other issues you may be facing in your relationship with carrier representatives, may involve investigation, including the use of social media and other electronic information. We are also seeing potential exposure to policies in general liability or E&O situations regarding data breaches,

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server hacking and the like. If you have interest, expertise, or even information regarding these or other issues of concern, we encourage you to become involved with the Insurance Committee. Your help and experience would be appreciated by the membership and others who may attend seminars, round table discussions or read ADC *Defense Comment.*

Along with the Insurance Liaison Committee, we are putting together a program for the December Annual meeting in San Francisco. We anticipate that the program will cover the "front burner" issues of early policy limit demands in the context of both general liability and UM/UIM claims, and avoiding bad faith. Look for more information in the coming months. So, mark your calendars for December 7-8, 2017 to be at the St. Francis!

Insurance Section member, Blaine Smith, of Farmer, Smith & Lane, Sacramento, authored the following discussion, that will be of interest to anyone handing auto and transportation claims.

WILL A POST-ACCIDENT CASH DEPOSIT BEAT PROP 213?

Over the past year, more than one client has been confronted with an argument raised by plaintiff's counsel to defeat the application of the Prop. 213 (CC §3333.4) prohibition on recovery of general damages by an uninsured plaintiff driver.

1. The Plaintiff's Argument

Prop. 213 does not necessarily apply whenever the plaintiff lacks "insurance." Technically, it applies where a plaintiff has not established "financial responsibility." Buying an insurance policy is not the only way to establish financial responsibility. A vehicle owner or operator can also establish financial responsibility by making a cash deposit in the amount of $35,000 with the Department of Motor Vehicles. Doing this establishes the "financial responsibility" that our Vehicle Code requires. Understandably, this is a relatively uncommon way of establishing financial responsibility; most folks just buy insurance. So, argues the plaintiff's counsel, a cash deposit will suffice. Nothing startling in that position.

The plaintiff's argument next seizes on the wording of Vehicle Code § 16054.2. That statute states, in pertinent part:

> "Evidence may also be established by any of the following:
>
> (a) By depositing with the Department cash in the amount specified in section 16056."

Here comes the startling part. Notice how the statute is silent as to *when* the deposit has to be made? Some members of the plaintiffs' bar also noticed this. They rely on this lack of specificity as to time, and the more specific reference as to time used in some related statutes, to argue that somehow the Legislature intended to allow the operator to *retroactively* establish their financial responsibility, and thus evade Prop. 213, by making a cash deposit with the DMV *after* the accident.

2. What Is Wrong

Section 16054.2, which allows cash deposits in lieu of insurance, is part of Article 3 of Chapter 1 of Division 7 of the California Vehicle Code. That Article concerns proving financial responsibility to the Department of Motor Vehicles *after* a reportable accident (see section 16050). The *preceding* Article, Article 2, sets the general ground rules for evidence of financial responsibility. The first section in that article, section 16020, states, in pertinent part, that:

"(a) every driver and every owner of a motor vehicle shall *at all times* be able to establish financial responsibility pursuant to section 16021, and shall *at all times* carry in the vehicle evidence of the form of financial responsibility in effect for the vehicle." (emphasis added.)

This section answers, with its "at all times" language, the argument that section 16054.2 by its silence, allows the cash deposit to be made *after* the accident. And it answers it "No." Vehicle Code §16020(b)(2) expressly defines the "evidence of financial responsibility" that a driver or owner must be able to establish "at all times" to include the "assignment of deposit letter" that the Department of Motor Vehicles issues *after* the driver/owner makes the deposit with the Department. Obviously, one needs to actually make the deposit *before* the DMV will issues the "assignment of deposit letter."

LANDOWNER LIABILITY

Jeffrey Ta | *Chair*

We previously reported via Newsflashes on *Coyne v. City and County of San Francisco* (2017) 9 Cal.App.5th 1215, in which the Court of Appeal affirmed invalidation of San Francisco ordinances increasing the relocation assistance payments property owners owe their tenants under the Ellis Act, Gov. Code 7060, finding the ordinances facially preempted by the Act. Just weeks following the *Coyne* decision, the Court of Appeal issued another opinion limiting the relocation benefits under the Ellis Act.

In *Danger Panda, LLC v. Launiu* (2017) _ Cal.App.5th _, 2017 WL 1231378, the appellate court ruled that minor children who are occupants of rental units under their parents' rental agreement are not entitled to separate relocation payments in Ellis Act evictions. The San Francisco Rent Ordinance requires that tenants who are served with Ellis Act eviction notices to remove the rental units from the rental market are entitled to relocation assistance. Each tenant in occupancy is entitled to a separate share of the monetary relocation assistance payable under San Francisco Rent Ordinance 37.9A(e). Seniors, disabled persons, and households with minor children are entitled to receive additional relocation payments. In *Danger Panda,* the Court ruled that minor children are not tenants under the Rent Ordinance definition because while they may have the right to occupy the unit with their parents, they do not have the legal capacity to enter into binding rental contracts. This result would be different under the provision for relocation assistance in case other than Ellis Act evictions, because section 37.9C

Continued on page 33

specifically includes children as occupants who are entitled to receive monetary relocation assistance.

We will continue to provide new developments in case law and interesting trial outcomes to landowner liability practitioners though the ADC forums and newsflashes so don't forget to sign up to become a member of the Landowner Liability Sub-Law section to receive that information. We always encourage suggestions from our members about other topics for seminars or programs they'd like to see. In addition, any article submissions for the ADC Comment are greatly appreciated.

MEDICAL MALPRACTICE AND HEALTHCARE

D. Marc Lyde | *Co-chair*
Erin S. McGahey | *Co-chair*

DECEMBER 2017 ADCNC ANNUAL MEETING SEMINAR

The Medical Malpractice Section will present a seminar at the Annual Meeting on the physician's perspective on medical professional liability litigation. The panel at this seminar will be comprised of two physicians and a medical malpractice defense attorney. The focus will be on the physician's experience in medical malpractice cases, both as defendant and expert witness. Topics will include attorney interaction, electronic medical records, deposition, trial, settlement and medical board repercussions.

OPINION TESTIMONY BY TREATING PHYSICIANS

The issue of opinion testimony by a treating physician often arises at trial in medical malpractice cases. In order to give opinion testimony at trial, a treating physician must be listed in the expert witness disclosure, but does not need to be included in the accompanying expert witness declaration. (*See,* C.C.P. section 2034; *Schreiber v. Estate of Kiser*, 22 Cal.4th 31 (1999)). A treating physician may express opinions not only regarding his or her clinical care of the patient, but also may opine regarding standard of care and causation. (*Id*. at 39; *see also*, *Ochoa v. Dorado*, 228 Cal.App.4th 120, 139 (2014)).

A cautionary note: opinion testimony by a treating physician may not be allowed at trial unless the opinion was elicited at the physician's deposition. Otherwise, opposing counsel may exclude the opinion testimony on the basis that they had no notice of the new opinion in sufficient time to re-depose the physician. (*See*, *Dozier v. Shapiro*, 199 Cal.App.4th 1509, 1523 (2011)).

The Medical Malpractice Section welcomes all input from ADCNC members regarding their interest in the above topics, as well as other topics of current interest in medical malpractice and health care law.

PUBLIC ENTITY

James J. Arendt | *Co-chair*
Jeffrey E. Levine | *Co-chair*

On March 2, the California Supreme Court held that when privately owned electronic devices are used by public entity officers and employees to communicate about the business of their employing public entity, the writings/communications may be subject to disclosure pursuant to the California Public Records Act ("CPRA"). *City of San Jose, et al. v. Superior Court of Santa Clara County* (2017) 2 Cal.5th 608.

In June of 2009, petitioner Ted Smith submitted a CPRA request to the City of San Jose seeking documents concerning downtown redevelopment. The request included emails and text messages "sent or received on private electronic devices" used by the mayor, two city council members, and their staff. The City responded with communications from City telephone numbers and email accounts, but not communications from the individuals' personal accounts.

Smith sued for declaratory relief arguing that the CPRA's definition of public records includes all communications about official business regardless of how they are created, communicated or stored. The City took the position that communications through personal accounts are not public records because they are not within the public entity's custody or control.

The CPRA is based on the concept that "access to information concerning the conduct of the people's business is a fundamental right of every person in this state." *Govt. Code* § 6250.

Generally, the CPRA requires disclosure of public records upon request and there is a "presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency." *Sander v. State Bar of California* (2013) 58 Cal.4th 300, 323. However, access to public records can be limited by personal privacy interests and there are a number of exemptions to the CPRA protecting those interests, e.g., personal financial records, personnel files, or medical records.

The Supreme Court defined a public record in the context of the CPRA as a writing with content relating to the public's business which is prepared by, or owned, used or retained by any state or local agency. The Court found that it is undisputed that an email, text, or other electronic platform is a "writing," for purposes of the CPRA.

The second element – content that is related to the public's business – is not quite as clear. Factors to consider include the content of the communication, the purpose for which it was written, to whom it was directed and whether it was written by an employee acting in the course and scope of employment. At a minimum, the communication must relate in some substantive way to conducting the business of the entity. "Communications that are primarily personal, containing no more than incidental mentions of agency business, generally will not constitute public records."

The third element requires that the writing be "prepared, owned, used, or retained by any state or local agency." *Govt. Code* § 6252. The Court found that a writing

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(electronic communication) has been "prepared by" a public agency if one of its employees, while conducting business for the agency, created the writing regardless of whether it was transmitted through a personal electronic device account.

The CPRA encompasses not only writings prepared by a public agency, but writings it owns, uses or retains regardless of who wrote them. A public agency uses and maintains a number of writings related to the business of the government, including records prepared by people outside the agency. Records related to public business are subject to disclosure if they are in an agency's actual or constructive possession. "[A]n agency has constructive possession if it has the right to control the records, either directly or through another person." *Consolidated Irrigation Dist. v. Superior Court* (2012) 205 Cal.App.4th 667, 710. Documents meeting the CPRA's definition of public records do not lose their status as such simply because they are located in the personal account of an employee. This prevents an agency from avoiding the duty to disclose documents by simply moving the records into an employee's personal account and claiming the agency does not have possession. The status of a document as private or public does not turn on the determination of where the document is stored.

The Court offered guidance in developing policies to assist public agencies in preparing for, and responding to, CPRA requests that will delve into personal electronic devices. The initial step should be to communicate the CPRA request to the employee(s) in question. The agency can then "reasonably rely" on the employee to search their own accounts for responsive materials. This may require training of employees on how to distinguish public records from personal records. An employee who withholds a document that is potentially responsive may be required to submit an affidavit with a factual basis stating why the record is personal. Agencies may also require that employees either use their government accounts for all communications related to business, or at least to copy their government account if a personal account is used.

So fair warning! The personal accounts of public agency employees may be subject to a CPRA request. The guidance provided by the Court relating to the development of policies to address this issue should be seriously considered.

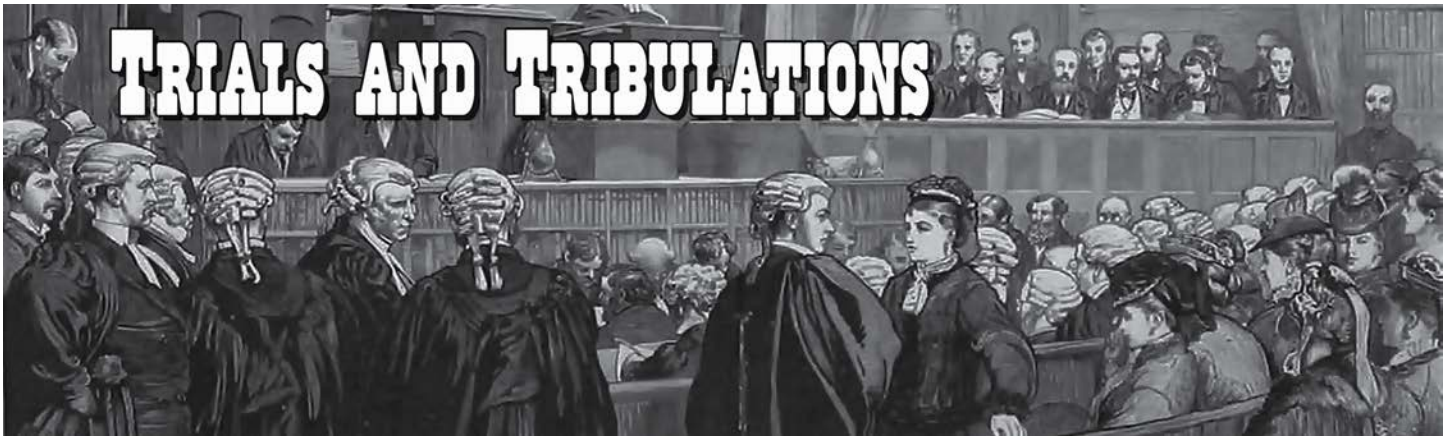
As always, please let us know of any public entity topics you would like addressed either in a Newsflash, Defense Comment magazine, at the annual meeting, or another format. We will also endeavor to keep you updated on any significant updates in public entity law. There are many benefits to being a member of ADCNCN and the subcommittee groups. Please take advantage!

TOXIC TORTS

Erin S. McGahey | *Co-chair*
Tina Yim | *Co-chair*

The California Supreme Court will review a decision from the Court of Appeal, 2nd Appellate District in *Lopez v. Sony Electronics, Inc.*, 247 Cal.App.4th 444 (2016)), to address whether the six-year statute of limitations pursuant to Code of Civil Procedure §340.4, which governs actions based on birth and pre-birth injuries and is not subject to tolling for minors, or the two-year statutes period in Code of Civil Procedure § 340.8, which applies to actions for injury based upon exposure to a toxic substance and is subject to tolling for a minor, govern an action alleging pre-birth injuries to exposure to a toxic substance. In *Lopez,* a 12-year old plaintiff's claims based on defects and permanent injuries, were time barred pursuant to C.C.P. § 340.4. A separate conclusion was previously reached by the Court of Appeal, 6th Appellate District in *Nguyen v. Western Digital Corporation*, 229 Cal.App.4th 1522 (2014), which also involved claims based on pre-natal injuries caused by exposure to toxic materials. The consensus is that the Supreme Court is more likely to uphold *Lopez*, establishing certainty regarding the proper limitations for filing lawsuits based on pre-natal injuries. Oral arguments will likely be scheduled for the Summer of 2017.

The Toxic Tort Section meets approximately once a month to discuss current trends or noteworthy events in all toxic litigation and presents its Toxic Tort Series annually every May for 5 hours of CLE credit. We encourage our members to please share thoughts, opinions, or ideas for topics of interest in this field for further seminars or brown bag luncheons.



We recognize and salute the efforts of our members in the arena of litigation – win, lose or draw.

Compiled by
Ellen C. Arabian-Lee
Arabian-Lee Law Corporation
Editor, *Defense Comment*

Dominique Pollara of Pollara Law Group, in Sacramento, represented a cardiothoracic surgeon in a medical malpractice action involving a 42-year-old pregnant patient who presented to the emergency department with a Type B acute aortic dissection. The patient was admitted after the Type B dissection was confirmed and conservative treatment initiated. A follow-up CT scan was performed which revealed the dissection was stable, and after the patient underwent a therapeutic abortion and her blood pressure was brought under reasonable control, the patient was discharged home with the plan that she would be evaluated the following week for possible endostent placement. She died suddenly the next morning when the dissection ruptured. After a three-and-a-half-week trial in Sacramento County Superior Court, the jury returned a "no negligence" verdict on behalf of both the cardiothoracic surgeon and the co-defendant radiologist. The Honorable David Abbott presided.

Robert Zimmerman and **Kia Jafari** of Schuering Zimmerman & Doyle in Sacramento, obtained a defense verdict for a physician's assistant in a wrongful death matter in Sacramento County Superior Court.

The case arose out of single orthopedic consultation for a nondisplaced ankle fracture. The decedent was a then-82-year-old woman with several co-morbidities, including diabetes. A week prior to the consultation, decedent was seen in an emergency room for the same fracture, and was provided with a fracture boot. During the orthopedic consultation, ecchymosis and swelling was noted in the lateral area of the foot, and up to her midcalf. Decedent's leg was noted as clean, dry, and intact, without gross lesion or breakdown. Conservative management of the leg was confirmed by diagnostic testing and physical exam. Decedent was instructed to maintain the fracture boot and follow-up in four weeks for a repeat x-ray. Following the consultation, decedent was taken to a board and care facility by her family members. During the next five days, decedent developed a UTI and a foul odor originating from her right leg. She was taken to the hospital and large areas of necrotic tissue was debrided from decedent's right lower extremity. Amputation was recommended by treating providers and refused on several occasions. Decedent ultimately passed away as a result of respiratory failure, sepsis, and cellulitis with gangrene. Plaintiff alleged a failure to appreciate the gravity of decedent's injuries in light of her various co-morbidities. Plaintiff further alleged that the pressure for the fracture boot attributed to decedent's leg wounds and was the cause of her death. The jury deliberated for approximately an hour and a half after a six-day trial, and returned a defense verdict.

Thomas G. Beatty of McNamara, Ney, Beatty, Slattery, Borges & Ambacher, LLP, in Walnut Creek, represented a homeowner in a dog bite case tried in Contra Costa County.

The plaintiff was on-site in her capacity as a PG&E employee, when she was bitten by the defendant's 90 lb. German Shepherd in the lower buttocks area. She complained of PTSD and took nearly a year off work. Plaintiff sought further wage loss of $1,000,000 due to her alleged inability to work for PG&E in her capacity as an employee who worked at customer properties. Plaintiff was placed in a lower paying job, complained of sexual dysfunction and frequent panic attacks.

After a 10-day jury trial, and jury deliberations of 1.5 days, the jury returned a verdict of $132,000, which was reduced to $85,000, due to section 998 costs recoverable by the defendant pursuant to a $150,000 section 998 offer served prior to trial.

Dominique Pollara of Pollara Law Group, in Sacramento, successfully defended a legal malpractice action in which her client, a plaintiff's attorney in an underlying medical malpractice action, was accused of mishandling the case leading to its dismissal. In a bifurcated case in Washoe County, Reno, Nevada, involving a complex atrial fibrillation ablation surgery, Ms. Pollara obtained a unanimous defense verdict exonerating the interventional cardiologist in the underlying case and leading to a dismissal of the legal malpractice action on the merits. The Honorable Patrick Flanagan presided.

Continued on page 36

Thomas J. Doyle and **Ian A. Scharg** of Schuering Zimmerman & Doyle, LLP, in Sacramento, obtained a defense verdict in a medical negligence action in Sacramento Superior Court. The case arose out of an acute Type B aortic dissection.

Decedent was 42 years old and was admitted to Sutter Memorial Hospital with a complaint of severe chest and upper back pain on August 3, 2013. A CT scan showed a Type B aortic dissection. A cardiothoracic surgeon was consulted and he recommended medical management as opposed to surgical intervention.

On August 5, 2013, a second CT scan was performed. Defendant read the CT scan and indicated the diameter of the aorta had increased by approximately two millimeters. He did not believe the size increase was of any significance.

Decedent remained hospitalized and underwent medical management until August 9, 2013. She was discharged home later that afternoon. The following morning, she had a sudden onset of left chest pain and fainted in her bedroom. She died within minutes.

An autopsy was performed, which showed a ruptured descending aorta and a massive left hemithorax. Her family thereafter filed suit.

Plaintiffs retained both a radiologist and vascular surgeon to testify on the standard of care and causation. Prior to trial, plaintiffs made a CCP 998 offer for $1,000,000. At trial, plaintiffs asked for $2,000,000. Defendant's pre-trial offer was a CCP 998 for a dismissal in exchange for a waiver of costs. The jury deliberated for approximately two days after an eleven-day trial and returned a verdict of no negligence.

Chris Beeman and Ashley Meyers of Clapp Moroney Vucinich Beeman & Scheley in Pleasanton, secured a Nonsuit in an unusual negligence case tried to a jury in Napa County, as a result of successfully establishing a lack of duty and foreseeability through the use of the Plaintiff's own experts.

The case arose from a burglary and arson at the Plaintiff's vacation home in Napa. The Defendant, a mother in her 40's, lived with her boyfriend and her adult son in a home that was owned by her parents who had retired out of state. Clapp Moroney represented the mother. Over the years, her son had numerous run-ins with the law for theft and possession of narcotics. When this incident occurred, he was a methamphetamine dealer and regular user, and also engaged in burglary and theft on a regular basis. He stored many of the stolen items on the large 1.5-acre family property in his bedroom and in a carport.

The son and his friends escalated their criminal activity after noticing that the Plaintiffs' property, which was about 6 miles away from the Defendant's, sat empty most of the week and appeared to have items of significant value. They decided to burglarize the home on a night when it was not occupied. Following the initial burglary, the assailants decided to return to the property to load their vehicle a second time. During this trip, the son's friend (who had an adult felony record) became concerned that he had not worn gloves while ransacking the home. He decided to set fire to the property by lighting a roll of toilet paper on fire and leaving it in a closet to destroy his fingerprints. Within two days following the burglary and arson, the perpetrators had all been identified and arrested. They eventually all pled guilty and were given various sentences.

Following the conclusion of the criminal action, the Plaintiffs brought a civil action against the Defendant, the mother of one of the criminal actors. They claimed that she was on notice that her son was operating a crime ring from the subject property and that she was negligent in her role as a property manager because she allowed him to use drugs and store stolen property in the home. Plaintiffs relied on a property management expert who testified that a property manager who suspects illegal activity has a duty to investigate that activity and take action through police involvement or through eviction. They additionally relied on the detective who investigated the case.

Defendant brought a Motion for Nonsuit based on a two-fold argument. First, case law did not support extending a property manager's duty of care to criminal activity that occurred outside the property lines of the property being managed. Second, under *Rowland v. Christian* and *Castaneda v. Olsher*, the Plaintiffs had not established that the crimes against them were sufficiently foreseeable to impose the significant burden of demanding that a mother turn her son into law enforcement or evict him.

The Court discussed the sliding scale analysis noting that the more burdensome the proposed measure, the more foreseeable or more likely the harm that the third party caused. The Court discussed that the remedies identified by Plaintiffs' expert were very socially burdensome. The Court then went on to consider that the Plaintiffs' other expert. The investigating officer acknowledged that in all the residential burglaries he had investigated (approximately 100), this was the only one which resulted in an arson. Further, neither the son nor his criminal cohorts had previously committed arson. Given this, the Court determined that the actions of the criminals on the night in question were not highly foreseeable and the balancing pointed to a lack of duty. The Court, relying on Defense counsel's arguments and citing the case law outlined in Defendant's motion, concluded that the Plaintiffs had not established the existence of a duty owed by the Defendant to the Plaintiffs. The Motion for Nonsuit was granted and the case was dismissed.

Robert H. Zimmerman and **Kat Todd** of Schuering Zimmerman & Doyle, LLP in Sacramento, obtained a defense verdict for an OB/GYN and medical group in an obstetrical medical malpractice action filed in the Eastern District of the Federal Court.

This matter involved the management of the labor and delivery of a 22-year-old prima gravida who delivered the minor plaintiff on February 3, 2010. The mother received her prenatal care at a Federally Qualified Clinic in West Sacramento. Her

Continued on page 37

prenatal care was provided exclusively by the certified nurse midwives and her labor and delivery was to be handled by the midwives once she was admitted to the hospital. This matter was venued in Federal Court due to the inclusion of the midwives as cross-defendants in the cross-complaint filed by the defendant hospital.

The mother presented for therapeutic rest in early, prodromal labor on the morning of February 3, 2010. She was at 41 weeks but only in early labor. However, she developed pregnancy induced hypertension at the hospital, and the decision was made to admit her and induce labor. Per the hospital Midwife Practice Guidelines, the midwife consulted with the on-call OB/GYN who recommended induction and admission. Thereafter, the labor continued to be managed by the midwives.

The mother remained in early labor throughout the day. She was behavioral and difficult to monitor. She had an epidural placed shortly after 9:00 p.m. and the nurses were better able to monitor maternal and fetal status thereafter. The fetal heart tracings showed moderate variability although the fetus developed some tachycardia at approximately 10:00 pm. Due to the fetal tachycardia and continued labile maternal blood pressures, the midwife consulted the OB/GYN at approximately 10:25 pm. As the fetal heart tracings continued to depict moderate variability, indicating the baby was well oxygenated, the plan was to continue the monitor fetal heart rate and maternal blood pressures.

The mother was resting in her room when a sudden fetal bradycardia occurred at 10:41 p.m.. The fetal health rate dropped first to 90 and then 60 and did not respond to intrauterine resuscitation. An emergent C-section was called. Before the C-section was commenced, the mother suddenly deteriorated and became hemodynamically unstable. Both she and the child survived, but the involved providers concluded the mother had suffered from an amniotic fluid embolus, a rare obstetrical complication. An amniotic fluid embolus is not well understood but is generally considered to be a maternal anaphylactic type reaction to fetal tissue in the maternal circulatory system. It occurs in less than 7 in 100,000 deliveries. Traditionally, it was associated with a high mortality rate for both the mother and the baby.

Plaintiff's perinatology expert (a very well-known retired perinatologist in Southern California) opined that it was below the standard of care for the OB/GYN to allow the midwives to manage this labor following her consult in the morning for pregnancy induced hypertension. He opined the mother was "high risk" and her labor required MD management. Plaintiff's expert conceded the amniotic fluid embolus could not have been predicted. However, he contended that the fetal heart rate tracings demonstrated the fetus was under stress before the sudden bradycardia, mandating a C-section well before the sudden event.

Conversely, defendants' perinatology expert opined this labor fully met criteria for midwife management and was appropriately managed by the Community Clinic midwives. Further, the OB/GYN met the standard of care in her role as a consultant. Last, the defense expert opined that no act nor omission by the OB/GYN caused the amniotic fluid embolus, and it could not have been prevented nor predicted.

Before trial, plaintiff demanded $23 million globally from all defendants. The defendant hospital ultimately settled with plaintiff before trial, and the cross-defendant midwives (represented by the United States Attorney's Office) were dismissed on a motion for summary judgment (primarily due to causation). The group and the OB/GYN offered to waive costs.

After nine days of trial, the nine-person Federal jury deliberated for three hours before rendering a unanimous defense verdict. Plaintiff agreed to waive any appellate rights in exchange for a waiver of costs.

President's Message – *continued from page 2*

"Whether an illness affects your heart, your arm or your brain, it's still an illness, and there shouldn't be any distinction. We would never tell someone with a broken leg that they should stop wallowing and get it together. We don't consider taking medication for an ear infection something to be ashamed of. We shouldn't treat mental health conditions any differently. Instead, we should make it clear that getting help isn't a sign of weakness – it's a sign of strength – and we should ensure that people can get the treatment they need."

Indeed, the Mental Health Bell, a national symbol of mental health and wellness, was cast in the 1950's from the actual chains and shackles used as restraints for persons institutionalized with mental illnesses. The Mental Health Bell is engraved with the statement, "Cast from the shackles which bound them, this bell shall ring out for the mentally ill and victory over mental illness."

My biggest struggle is how to help those friends or colleagues who are suffering tremendous pain and anguish in dealing with these issues. How do I talk to them with compassion and understanding? Is there anything I can do to alleviate the situation? Even bringing up these issues in this column left me feeling anxious; feeling ill-equipped to provide adequate information or solutions. That's when I realized that it is ok not to have all the answers; it is ok for me not to be able to fix mental illness. It's not OK to be blind to the mental health struggles of our family members, friends, and colleagues. We need to support them in their battles and struggles. Perhaps we start by simply being available to listen with an open heart and mind. Maybe there is no magic bullet, no magic drug, no magic pixie dust to fix all these issues, but the more we can understand that mental illness is real, painful, affects many of our friends, colleagues, and loved ones, the more we can begin to empathize with those affected by mental illness the way we would with those affected by a broken arm.

Starting a conversation about mental illness is a great first step and while I am far from being able to provide solutions, there are numerous resources that are available to provide assistance and professional help to treat mental illness. If you, or someone you know, are a person in danger of harming yourself or in crisis, here are some steps mental health experts recommend you take:

- If you are in immediate danger, call 911 or go to the nearest emergency room;
- Inform a parent, trusted adult, colleague or friend;
- Call one of the following numbers:

National Suicide Prevention Lifeline: 800-273-8255 or text START to 741 741

San Francisco Suicide Prevention: 415-781-0500

Santa Clara County Child and Adolescent Mobile Crisis Program: 877-41-CRISIS

San Mateo County Crisis Intervention and Suicide Prevention Center: 650-579-0350

Alameda County Crisis Support Services: 800-309-2131

Contra Costa County Crisis Center: 800-273-TALK

California Youth Crisis Line: 800-843-5200

The Other Bar: 800-222-0767

Bay Area Suicide & Crisis Intervention Alliance: 1-800-273-TALK

Sacramento Mental Health Crisis Center – 916-732-3637

Fresno – Central Valley Suicide Prevention Hotline – 888-506-5991.

Let us do what we can as caring and responsible attorneys to help folks with this very difficult condition.

CDC Report

– *continued from page 3*

podiatrists (AB 1153); providers of pain management services (SB 419); long-term care facilities (SB 481); hospitals (SB 538), and veterinarians (SB 546).

TRANSPORTATION: Not surprisingly, a number of bills have been introduced dealing with autonomous vehicles, including a bill dealing with insurance (AB 87), and accident reporting (AB 623).

PUBLIC ENTITIES: One bill would severely limit the ability of counties to contract for services, including services provided by ADC members (AB 1250); another deals with officer-involved shootings (AB 284), while another requires the use of body worn cameras (AB 748). Public school employers are covered by SB 550.

GENERAL CIVIL LITIGATION: A host of bills applicable to civil litigation generally are pending at this point in the legislative year, including bills dealing with informal discovery conferences (AB 383); meet and confer for motions to strike (AB 644); recovery of fees for electronic presentation of exhibits (AB 828); e-filing of notices (AB 976); sanctions (AB 984); delivery of electronic transcripts (AB 1450); intervention (AB 1693); deductibility of punitive damages (SB 66); video appearances in civil actions (SB 467), and voir dire (SB 658).

The point, of course, is that enactments in Sacramento can have equal or greater effect than changes in case law, even if the (chaotic, sudden, mysterious, pick another adjective) process is less familiar to trial and appellate lawyers. The list of all bills of interest to ADC members, along with language, analysis, votes and more, are available to all ADC members through the website.

Finally, sales tax on services? Probably not this year, but not dead and all bets are off if Congress turns seriously to tax reform.

Association of Defense Counsel of Northern California & Nevada

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(new rev. 07/16)

welcome, new members

Since March 2017, the following attorneys have been accepted for membership in the ADC. The Association thanks our many members for referring these applicants and for encouraging more firm members to join.

John Barron
Hall, Hieatt & Connely
San Luis Obispo
REGULAR MEMBER
Referred By: Clayton Hall

David Barron
Barron & Pruitt, LLP
North Las Vegas
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2017
Calendar of Events
Save the Dates!

August 18-19, 2017	**Law Firm Management Seminar**	Resort at Squaw Creek, *Olympic Valley, CA*
September, 2017	**Basic Training Series**	*San Francisco*
September 22, 2017	**24th Annual Golf Tournament**	Silverado Resort & Spa, *Napa, CA*
December 7-8, 2017	**58TH Annual Meeting**	Westin St. Francis, *San Francisco, CA*

Please visit the calendar section on the ADC website – *www.adcncn.org* – for continuous calendar updates.