A·D·C VERITAS

DEFENSE COMMENT

Volume 38 #2
Summer, 2023

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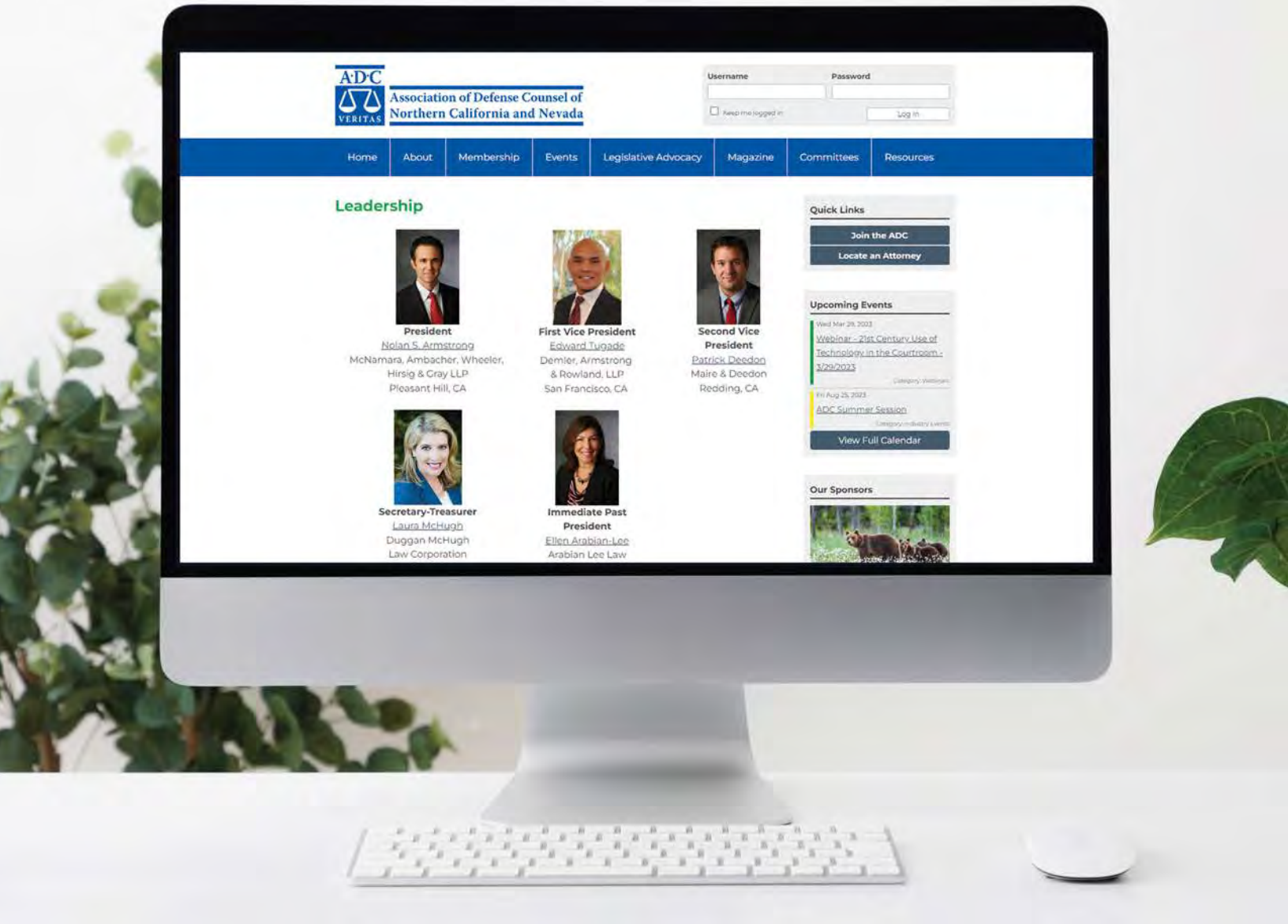

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FEATURES

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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:

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PRESIDENT'S MESSAGE

NOLAN S. ARMSTRONG
2023 President

2023: The Year of Reconnecting

The good news continues to roll in for the ADC as we transition away from the COVID-19 pandemic. The ADC remains in very good financial condition and membership counts are holding steady. We remain focused on growing the membership, including attracting young lawyers who can serve as the next generation of ADC leaders. The ADC Membership Committee meets on a monthly basis and its members should be credited for their efforts in promoting the ADC through various social events held during the course of the year. If you or other attorneys at your firm are looking for a way to get more involved with the ADC, I would strongly recommend joining the Membership Committee.

The shift from in-person education seminars to lunchtime webinars has continued this year. The webinar format is ideally suited to provide worthwhile and necessary education for our members on a variety of cutting-edge topics affecting our practice as civil defense attorneys. However, we remain committed to holding in-person events as a means to boost comradery and connect our members. Our recent educational and Judicial Reception in Sacramento was well received by attendees, and it was great to see many new faces in attendance. We hosted our in-person Construction Seminar (June 16 in Pleasanton) and will be hosting our Summer Session (August 25-26 in Lake Tahoe). Our golf tournament is set for September 15, with a new location: The Presidio Golf Course in San Francisco. The Summer Session will again be held at the Everline Resort & Spa in Olympic Valley. Please review your email announcements for information about our upcoming events.

Please also make sure to mark your calendar for December 7-8, for the Annual Meeting at the St. Francis in San Francisco. The 2022 Annual Meeting was a success for the ADC after holding the event remotely in 2020 and 2021. Attendees gave positive reviews to the changed structure of the event including the Thursday luncheon, and the programming was as good as ever. I really enjoyed reconnecting with colleagues who I had not seen. The Board of Directors considered holding the 2023 Annual Meeting at potential alternative venues throughout Northern California, and felt that sometimes change can be a positive force. After much deliberation, however, we ultimately arrived at the decision that the ADC's needs are best served at the St. Francis. We also value the tradition of holding the event at this beautiful and festive location. Our theme this year is "Exceeding Excellence." I look forward to seeing you at the St. Francis.

Finally, I want to thank our members for continuing to support the ADC. Please do not hesitate to contact me if you would like information about how to get more involved in the ADC. The ADC affords its members with opportunities for professional development and also building lifelong connections and friendships that are vital to our success and happiness as civil defense attorneys. The more you put into the ADC, the more you will get out personally and professionally.

Look forward to seeing you soon,

Nolan S. Armstrong,
2023 ADC President

CALIFORNIA DEFENSE COUNSEL REPORT

MICHAEL D. BELOTE
California Advocates, Inc.

The Other Way to Make Law

Steeped in the law school focus on case law and *stare decisis,* practicing lawyers are sometimes surprised by how suddenly and significantly legislatures can change the law through statutes. One litigator once told me that I had to be wrong about the effect of a given bill signed by the Governor, exclaiming, "but that's not the law!" I decided not to respond by asking him exactly what he thought the legislature was doing in Sacramento.

As the California Assembly and Senate steam towards the conclusion of the legislative year in mid-September, one bill has already been enacted with important implications on defense practice, and a very significant change in discovery seems likely to be enacted as well. And in terms of suddenness, unless a bill is designated to take immediate effect, or has a delayed operative date, all bills take effect on January 1 of the following year. Given that the Governor generally has the month of September to sign or veto bills, that means that significant changes in civil procedure can become operative in as little as three months from signature.

The bill already signed into law, and effective on January 1, SB 652 (Umberg), relates to experts and the recent case of *Kline v. Zimmer*. By adding new Evidence Code Section 801.1, the bill intends to align the "reasonable medical probability" standard of plaintiff and defense medical experts. In subdivision (a) of the new section, the bill requires that where a party bearing the burden of proof proffers medical expert testimony that must meet the reasonable medical probability standard, the party not bearing the burden of proof may offer a contrary expert only if the expert can opine that alternative causes also meet the reasonable medical probability standard. However, this subdivision is modified with language suggested by CDC, in subdivision (b): "Subdivision (a) does not preclude a witness testifying as an expert from testifying that a matter cannot meet a reasonable degree of probability in the applicable field, and providing a basis for that opinion."

Subdivision (b) is intended to clarify that a defense expert may opine that the plaintiff has not met the required burden of proof, because alternative theories exist which are non-speculative and non-conjectural, even if each alternative theory is not greater than 50% likely.

After the Governor's signature, a question arose whether SB 652 could be read to unintentionally apply to criminal cases. In the final weeks of the legislative year, a second bill will be enacted to make clear that the new law applies only to general civil cases.

The discovery bill referenced above has not yet reached the Governor's desk, but at this point in the legislative year, passage should be viewed as likely. The bill is SB 235, and it is also carried by Senator Tom Umberg (D-Santa Ana), Chair of the Senate Judiciary Committee. A bit of context is important here. Senator Umberg is quite a rarity in Sacramento these days, in that he serves in the legislature while also carrying on an active litigation practice. His perspective is thus informed by actual trial experience, and he has a particular disdain for what he views as unnecessary and wasteful discovery disputes. Senator Umberg has authored discovery bills in recent years which were not successful, but SB 235 has moved through the Senate and is currently sitting in the Assembly Appropriations Committee, just two short steps from the Governor's desk.

SB 235 proposes a very significant retooling of Code of Civil Procedure Section 2016.090. Where current law allows judges to order early exchange of discovery upon stipulation of the parties, SB 235 makes such early exchange mandatory unless the parties stipulate otherwise. The exchange must be made within 60 days following the demand

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Applying AI to the Practice of Law – New Tricks for an Old Dog

W. Stuart Home, III
Clapp Moroney Vucinich Beeman & Scheley

I graduated from law school in 1991, and although I do not consider myself "old," I have still witnessed a lot of changes in technology in the legal profession. Although I have never had to use a punch-card like my father did when he practiced law, I can still remember when he bought his first punch-card reader for his practice in the 1970s. I remember when, as a first year associate, my firm transitioned from a text-based "DOS" system to a "GUI" (pronounced "gooey"), or graphical user interface system, called "Windows." In other words, we transitioned from entering lines of text using a system level prompt to clicking pictures (similar to applications) on a screen. When I told a colleague about these technological advances, he looked at me as if I was from another planet – now this made me feel old!

During my legal career, I've been painfully aware of the reluctance of attorneys to embrace and utilize new technology. I remember in the late 1990s trying to convince a new boss that using email was superior to phone slip messages that his staff used. "Why?" he asked. "How could it be more convenient than these little pink slips that my staff writes out for me? I can take these with me when I leave the office." I remember sitting there stymied, thinking, "What can I say to convince this guy?"

So, here I am now in my 50's – See? I'm NOT THAT OLD! I'm watching the rise of AI, and in a lot of ways it feels like the change from DOS to Windows. We may very well be at the dawn of a new era, and one that will make a monumental shift in the legal profession. And yet, my experience tells me that the legal profession will likely be a little slow to adopt this new technology. The professional culture in the legal profession is very conservative; because of time demands, such as billable hours and large caseloads, attorneys often rely on old tools rather than take the necessary time to learn new technology. Case-in-point: I still know attorneys using WordPerfect, and despite loud protests

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from IT personnel, are still fighting the transition to Microsoft Word.

The American Bar Association's Model Rules of Professional Conduct Rule 1.1 on "competent representation to a client," includes a comment that an attorney must understand "the benefits and risks associated with relevant technology...." Cmt. 8. In other words, as AI develops, attorneys will need a working knowledge and understanding of available AI tools to comply with the ethical obligation to provide competent representation to clients. They will need to know which tools will best meet their clients' needs and understand how to use those tools. While this article cannot dive into the "nuts and bolts" of how to use any particular tool, it strives to give the legal practitioner an overview of what is available.

OVERVIEW OF AI

Although Artificial Intelligence (AI) is a broad subject and covers a large swath of technology and tools, AI within the practice of law may be defined as, "The theory and development of processes performed by software instead of a legal practitioner, whose outcome is the same as if a legal practitioner had done the work." Sergio David Becerra, *The Rise of Artificial Intelligence in the Legal Field: Where We Are and Where We are Going,* 11 J. Bus. Entrepreneurship & L. 27 (2018). While programs like Dragon, NaturallySpeaking, or editing programs like WordRake are rudimentary forms of AI, their application is much broader than the legal profession, and do not speak to the narrow application AI can have within the legal profession.

Currently, the legal profession uses AI for the following:

1. Legal Research and Analysis:

AI-powered tools can assist lawyers in conducting extensive legal research by quickly analyzing and extracting relevant information from vast databases of case law, statutes, regulations, and legal documents. Natural Language Processing (NLP) algorithms enable these tools to understand complex legal language and provide precise answers to legal queries.

2. Document Review and Due Diligence:

AI can automate the labor-intensive task of document review and due diligence. Machine Learning (ML) algorithms can scan and analyze large volumes of legal documents, contracts, and agreements to identify relevant information, flag potential risks or anomalies, and extract specific clauses or provisions. This significantly speeds up the review process, reduces costs, and improves accuracy.

3. Predictive Analytics for Case Outcomes:

AI algorithms can analyze past case histories, judicial rulings, and other relevant data to provide predictive insights into the potential outcomes of legal cases. By assessing various factors, such as the specific jurisdiction, judge, and case details, AI tools can help lawyers evaluate the strength of their arguments and make more informed decisions about settlement negotiations, trial strategies, and risk assessments.

4. Legal Assistance and Virtual Lawyers:

AI-powered virtual assistants can provide legal guidance and support to individuals without the need for direct human involvement. These virtual lawyers leverage NLP algorithms to understand user queries, provide legal information, and offer recommendations based on relevant laws and regulations. Virtual lawyers can address common legal issues, such as creating basic contracts, answering legal questions, or providing legal advice within predefined boundaries.

5. Contract Analysis and Generation:

AI can streamline the contract analysis process by automatically extracting key provisions, identify potential risks, and highlight discrepancies between different clauses. AI tools can also assist in generating standard contracts and templates by leveraging previous examples and adapting them to specific requirements. This helps lawyers save time and ensures consistency and accuracy in contract creation.

6. Legal Compliance and Risk Management:

AI systems can monitor and analyze vast amounts of data to detect patterns and anomalies related to legal compliance and risk management. For example, AI algorithms can review corporate activities to identify potential violations of regulations, flag suspicious transactions for anti-money laundering purposes, or assess data privacy compliance. AI can also provide recommendations and alerts to help organizations stay compliant with changing legal requirements.

7. E-Discovery:

In legal cases involving large volumes of electronically stored information (ESI), AI-powered e-discovery tools can

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significantly speed up the process of data analysis and document review. Machine Learning algorithms can automatically categorize and prioritize documents based on relevance, confidentiality, or privilege, reducing the time and effort required for human review. This enhances efficiency, reduces costs, and improves the accuracy of the discovery process.

8. Sentiment Analysis and Jury Selection:

AI techniques, such as sentiment analysis and social media monitoring, can assist in jury selection. By analyzing public data and social media posts, AI algorithms can identify potential biases, opinions, and attitudes of prospective jurors. This information helps lawyers make more informed decisions during the jury selection process, ensuring a fair trial.

SPECIFIC AI APPLICATIONS IN THE LAW

There are several AI tools and technologies in use in the legal profession. Here are some examples:

1. Legal Research and Analytics:

Westlaw and LexisNexis: These AI-powered platforms provide comprehensive legal research databases, enabling lawyers to search and analyze case law, statutes, regulations, and legal documents.

ROSS Intelligence: This AI legal research tool uses natural language processing to provide relevant answers to legal queries based on a vast database of legal information.

2. Document Review and Due Diligence:

eDiscovery Tools: Platforms like **Relativity, Everlaw, and Catalyst** use AI algorithms to assist in the identification, categorization, and review of electronic documents for litigation and investigations.

Kira Systems: This AI contract analysis tool helps with contract review, due diligence, and extraction of key provisions, and allows lawyers to quickly identify risks and relevant information.

3. Predictive Analytics and Case Outcome Analysis:

Blue J Legal: This AI platform utilizes machine learning algorithms to provide predictive analysis and insights on tax and employment law cases.

Premonition: Analyzes vast amounts of court data to help lawyers assess the success rates of particular attorneys, judges, and law firms.

4. Virtual Assistants and Chatbots:

ROSS: In addition to legal research, ROSS provides AI-powered virtual legal assistants that can answer legal questions, provide legal guidance, and assist in legal processes.

DoNotPay: This chatbot helps with a range of legal issues, such as drafting legal documents, fighting parking tickets, and filing small claims lawsuits.

5. Contract Analysis and Generation:

LegalSifter: Uses AI to analyze contracts, flag potential issues, and recommend revisions and negotiation.

LawGeex: This platform automates contract review processes, and highlights potential risks and discrepancies.

6. Legal Compliance and Risk Management:

Compliance.ai: Leverages AI to help organizations stay up to date with regulatory changes, track compliance requirements, and analyze legal documents for potential risks.

DiligenceVault: This platform uses AI to streamline due diligence processes and risk assessments in legal and financial transactions.

7. Sentiment Analysis and Jury Selection:

Lex Machina: Combines AI and legal analytics to provide insights into judges, courts, and opposing counsel, aiding in trial strategy and jury selection.

These are a few examples of the AI tools being used in the legal profession. The landscape of AI in law is rapidly evolving, and new tools and technologies are continually emerging to address various legal tasks and challenges.

LIMITATIONS AND ETHICAL CONSIDERATIONS IN THE USE OF AI

Using AI in the legal profession brings about several limitations and ethical considerations, including:

Lack of "Explainability":

AI systems, such as deep learning neural networks, can be complex and difficult to interpret. They often function as

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"black boxes," and make it challenging to understand how the systems arrived at their decisions or predictions. This lack of "explainability" raises concerns about transparency as legal professionals and clients may not understand the reasoning behind AI-generated outcomes.

Bias and Discrimination:
AI models are trained on historical data, which may contain biases and discriminatory patterns. If the training data reflects societal prejudices or discriminatory practices, the AI system may perpetuate those biases and contribute to unfair outcomes. It is crucial to ensure that the training data is diverse, representative, and free from discriminatory patterns to mitigate such risks.

Data Privacy and Confidentiality:
AI systems in the legal profession often handle sensitive and confidential information. Ensuring data privacy and maintaining client confidentiality is a significant ethical consideration. Legal professionals must implement robust security measures to protect the privacy of client data and prevent unauthorized access or breaches.

Accountability and Responsibility:
When AI systems make decisions, it's challenging to assign accountability and responsibility for the outcomes. Determining who is liable for errors, biases, or unethical behavior arising from AI-generated decisions is a complex issue. The legal profession must establish guidelines and frameworks to address these concerns and allocate responsibility appropriately.

Professional Judgment and Responsibility:
AI can assist legal professionals in various tasks, but it cannot replace human judgment, ethical considerations, or responsibility. Lawyers have an ethical obligation to exercise their professional judgment and act in the best interests of their clients. The reliance on AI should not undermine the core responsibilities and ethical obligations of legal professionals.

Unintended Consequences and Unforeseen Risks:
The deployment of AI systems in the legal profession can lead to unintended consequences and unforeseen risks. It is challenging to anticipate all potential ethical dilemmas and risks associated with AI use. Legal professionals must remain vigilant, conduct ongoing assessments, and actively manage and mitigate any emerging risks or unintended consequences.

Access to Justice:
While AI has the potential to enhance efficiency and accessibility to legal services, it can also create a divide in access to justice. AI tools may be expensive to implement and maintain, thus making them less accessible to smaller law firms or individuals with limited resources. Ensuring equitable access to AI-enabled legal services is an important ethical consideration.

Technological Competence and Education:
Legal professionals should develop the technological competence to understand and effectively use AI tools. Ongoing education and training programs can help lawyers stay updated on AI advancements, the ethical implications of AI, and best practices for the responsible deployment of AI It is essential to balance embracing technological innovations and maintaining professional standards and ethical obligations.

To address these limitations and ethical considerations, legal professionals and organizations need to establish clear guidelines, codes of conduct, and regulatory frameworks for the development, deployment, and use of AI systems. Collaboration between legal experts, AI developers, and policymakers is crucial to ensure that AI technologies align with legal ethics, fairness, and the principles of justice.

CONCLUSION

Using AI technology offers a new world to the legal practitioner, and one that can save countless hours collecting and compiling information. AI does not replace the attorney's role, particularly regarding the creative process, but it can free up considerable time on ordinarily mundane tasks so the attorney's attention can be more focused, such as on the art of persuasion and story-telling. As a case-in-point, and in the interests of full disclosure, I entirely wrote the first through fifth paragraphs of this article and its conclusion. Although I carefully reviewed, fact checked and performed a few minor edits, a Chatbot essentially compiled and wrote the rest.

W. Stuart Home, III

W. Stuart Home, III has specialized in construction defect litigation for over 30 years representing contractors and subcontractors in complex construction defect litigation. His extensive experience in insurance defense for construction defect litigation provides him with an in-depth knowledge of insurance companies, insurance claim handling and the efficient handling of complex litigation. He joined Clapp Moroney in 2022 as a Senior Trial Attorney.

TRIAL TALES: Loss of Consortium of a Dwarf

David A. Levy

David Levy is a semi-retired trial attorney, who tried nearly 50 jury trials, primarily in medical malpractice, police and motor vehicle cases. He currently does some ADR and hearing officer work, and is a former member of the ADC Board of Directors, and past Editor-in-Chief of ADC *Defense Comment*. **This is a true story of a case he tried more than 30 years ago, with only the names of witnesses and parties changed.**

The boss walked into David's office, and told him that one of their colleagues had just quit, and David needed to try a case in two months. A realtor had been touring homes listed for sale, and walked through a back door onto an old wooden deck, which collapsed and the plaintiff-realtor fell 10 feet, sustaining a T-12 thoracic fracture. Her suit against the homeowner was settled, but her husband had a cause of action for loss of consortium. They were divorced shortly after her settlement. "Oh, did I forget to mention that the (now) ex-husband is a dwarf?"

David learned that the ex-husband, Grover Cleveland,[1] was an achondroplastic dwarf, a genetic condition in which the trunk is of normal size, the head is large, but the arms and legs, fingers and toes are disproportionally short. Sadly, it is a degenerative condition. As a young boy, Grover could run around, but eventually needed crutches and later a wheelchair. Grover became a successful jeweler and a local television station had once done a feature on him. Despite his successes, Grover still needed an attendant help him with activities such as bathing and personal hygiene.

He demanded several hundred thousand dollars to settle his claim. Loss of consortium claims usually include an element of loss of sexual relationship, but the couple had not been intimate for many years. He could not sue for general damages for the divorce, as California law by statute bars an "alienation of affection" claim. Grover, however, claimed that he had to pay a lot more for attendant services after his wife hurt her back, because she could not physically assist him, and then when she recovered – and left him – he had increased costs for the attendant help.

Plaintiff's counsel arranged for an elaborate "Day in the Life" video, and hired an economist to prove that Grover suffered economic loss by having to pay more for an attendant. The economist, well known to the plaintiffs' bar, Seamus Murphy, Ph.D., talked with the gift of gab that one might expect of an Irish poet. (In fact, he was a bit short, spoke with a bit of a lilt, and even resembled a leprechaun.) Murphy only reviewed the canceled checks for the attendant services prior to Mrs. Cleveland's injury, and simply added a large number for inflation to ensure many thousands of dollars for attendant care into the future. David had heard a rumor about Murphy's exaggeration of his academic credentials, so he subpoenaed his education records.[2]

THE DEFENSE

The facts regarding the underlying fall were somewhat aggravated, so David decided to admit liability, but defend the case on causation and damages. After unsuccessfully moving *in limine* to exclude the "Day in the Life" tape, David focused on damages. Economist Murphy testified about his B.A., M.A. and Ph.D. degrees in Economics from UC Berkeley, that he taught an introductory Economics at Cal State Hayward (now California State University, East Bay), and authored an Economics textbook. When asked whether his text was used in college economics courses, he chuckled, "It is in *my* classes!"

The cross-examination started:

Q: "Sir [not doctor], isn't it true that you do not have a Ph.D. from U.C. Berkeley?"

A: "No, I did receive my doctorate degree from U.C. Berkeley."

Q: "Sir, let me show you a copy of your transcript, which we subpoenaed from U.C. Berkeley. You see here where the registrar signed off, and attested under penalty of perjury that this is a true and correct copy of your transcript, but no doctoral dissertation was completed nor Ph.D. ever awarded? Can you explain that to the jury?"

A: "No, I got my doctorate from Berkeley."

At that point, David moved the transcript into evidence, and cross-examined him on all the checks which post-dated the wife's injury, which showed that the costs for attendant care had increased about 3-4% per year before her fall, and continued to rise at the same rate after that, consistent with the cost of living, and that the number

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of hours per week did not increase. In other words, Grover did not sustain additional economic damages due to her fall.

The plaintiff's attorney decided to rehabilitate Murphy on re-direct, but only succeeded in digging a deeper hole:

Q: "Dr. Murphy, is there any doubt in your mind that you got your Ph.D. from U.C. Berkeley?"

A: "No."

Q: "Do you need to have a Ph.D. to teach at Cal State Hayward?"

A: "No."

Q: "Does your textbook state that you received your Ph.D. from Berkeley?"

A: "I don't know."

Q: "Did you actually receive a diploma for your Ph.D.?"

A: "Yes."

Q: "Where is it now?"

A: "I don't know."

Plaintiff's counsel quickly moved on to another topic.

CLOSING ARGUMENT AND VERDICT

David argued that Murphy falsely testified that he had a Ph.D.,[3] had no explanation for why his academic records did not reflect it, and that he didn't know whether it said so in his textbook, nor where the diploma was. David argued that he had worked his way through law school, and was proud when the Supreme Court Justice[4] handed the diploma to him, and it was framed on the wall behind his desk, and he was quite sure that the judge and plaintiff's attorney knew exactly where their diplomas were. Also, David pointed out that Murphy turned beet red when he was being questioned about his degree.

David asked the jurors to fill in the blank on the Verdict form with "No damages." And they did.[5]

ENDNOTES

1 The plaintiff was actually named after a U.S. President, although not the 22nd and 24th.

2 It was much easier to subpoena education records in the previous millennium, and plaintiff's counsel never even looked at the records prior to Murphy's testimony, probably figuring it would be a waste of his time.

3 Several years later it came out that he had received his doctorate degree from a mail order college, not Berkeley.

4 Hon. Matthew Tobriner.

5 I submitted the result to *Jury Verdicts Weekly*, and they did print it. If it happened today, I would also send it in to *ADC Defense Comment – Trials and Tribulations* – as everyone reading this magazine would do, too.

David A. Levy

David A. Levy, Office of San Mateo County Counsel, is a former member of the ADC Board of Directors and former Editor-and-Chief of the *Defense Comment* magazine.

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"To Hire a Certified Court Reporter, or Not To? That is the Question."

Salin Ebrahamian
Demler Armstrong & Roland, LLP

You are at a deposition. As the noticing party, you have contacted a court reporting agency and believe you have retained the services of a certified court reporter. You attend the deposition only to find out at the deposition that the agency did not send a certified court reporter. Rather, the agency perhaps sent a notary, who can administer the oath to the witness and supervise the digital recording of the deposition, of which a certified court reporter can later transcribe. Do you go forward with the deposition or postpone until a certified court reporter appears at the deposition? Below are some of the few key statutes that assist in navigating this issue and one potential way to avoid such a dilemma.

The cause of why agencies are not always sending certified court reporters is unclear, whether it is due to a shortage of certified court reporters or whether more non-California agencies are being hired that are unfamiliar with California-specific rules. Regardless, whether it is due to the shortage of certified court reporters or because the deposition is going forward outside California and a non-California court reporting agency has been hired pursuant to local non-California rules, lawyers must consider if they can go forward with the deposition, or risk the California courts' exclusion of the testimony for future motion practice and/or trial due to inadmissibility. The California Legislature was recently presented with this issue in Senate Bill 662, which would have permitted the electronic recording of all civil proceedings, upon a finding that a Certified Shorthand Reporter was unavailable, was held in committee as a two-year bill. However, it did not pass this year, but it still could potentially pass in 2024.

In the meanwhile, the California rules governing the appearance of a certified court reporter that may provide some assistance are as follows:

Pursuant to California Code of Civil Procedure §2025.220(a)(5), a party, who wants to take the deposition of a person will need to give notice in writing and include the following in the notice:

> *"Any intention by the party noticing the deposition to record the testimony by audio or video technology, in addition to recording the testimony by the stenographic method as required by Section 2025.330 and any intention to record the testimony by stenographic method through the instant visual display of the testimony. If the deposition will be conducted using instant visual display, a copy of the deposition notice shall also be given to the deposition officer...."*

Pursuant to California Code of Civil Procedure § 2025.330(b), if a deposition is taken stenographically, then it must be taken by a certified court reporter.

> *"Unless the parties agree or the court orders otherwise, the testimony, as well as any stated objections, shall be taken stenographically. If taken stenographically, it shall be by a person certified pursuant to Article 3 (commencing with Section 8020) of Chapter 13 of Division 3 of the Business and Professions Code."*

Pursuant to California Code of Civil Procedure §2025.310(a), the court reporter does not have to appear in person, but rather can appear remotely to the deposition.

> *"At the election of the deponent or the deposing party, the deposition officer may attend the deposition at a different location than the deponent via remote means. A deponent is not required to be physically present with the deposition officer when being sworn in at the time of the deposition."*

California Code of Civil Procedure § 2026.010, addresses the court reporting rules for out of state depositions.

> According to California Code of Civil Procedure § 2026.010(a), *"[a]ny party may obtain discovery by taking an oral deposition, as described in Section 2025.010, in another state of the United States, or in a territory or an insular possession subject to its jurisdiction. Except as modified in this section, the procedures for taking oral depositions in California set forth in Chapter 9 (commencing with Section 2025.010) apply to an oral deposition taken in another state of the United States, or in a territory or an insular possession subject to its jurisdiction."*
>
> Further, California Code of Civil Procedure § 2026.010(d) states that *"[a] deposition taken under this section shall be conducted in either of the following ways: (1) Under the supervision of a person who is authorized to administer oaths by*

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the laws of the United States or those of the place where the examination is to be held, and who is not otherwise disqualified under Section 2025.320 and subdivisions (b) to (f), inclusive, of Section 2025.340. (2) Before a person appointed by the court."

Whilst the California Legislature continues to review and address the manner in which depositions can be reported to cure concerns over admissibility, attorneys can refer to the above-mentioned existing statutes for some guidance. One potential way to avoid this dilemma at your next deposition would be to meet and confer with all counsel of record in your case prior to the deposition, ensure the deposition notice is clear if the deposition will proceed using a stenographic method and that a certified court reporter will attend, and a certified court reporter is specifically requested from the court reporting agency. Remember, asking the question is already a first step in addressing how you can avoid this potential issue that can impact the admissibility of the testimony.

SUMMARY OF SELECTED 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.

DON WILLENBURG
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PUBLIC ENTITY

Immunity for roadway design does not preclude liability for failure to warn

Tansavatdi v. City of Rancho Palos Verdes (2023) 14 Cal.5th 639

Design immunity immunized City of Rancho Palos Verdes from liability for creating a dangerous traffic condition as the result of a plan or design, but did not preclude a claim for failure to warn of a known dangerous traffic condition. The Supreme Court affirmed its prior decision in *Cameron v. State of California* (1972) 7 Cal.3d 318 holding the same, ruling that "the City has failed to identify any subsequent development in the law or other special justification that warrants departure from the doctrine of stare decisis."

The dangerous condition: "lane drop," where the City had striped a bicycle lane along a busy street except for one steeply pitched block.

Whether 1 ¾ inch sidewalk defects were too trivial was properly left to the jury

Stack v. City of Lemoore (2023 5th Dist.)
91 Cal.App.5th 102, 2023 WL 3220918

"The City's sole argument in this appeal is that the sidewalk condition where plaintiff tripped was too trivial, as a matter of law, to constitute a dangerous condition under section 835. We disagree and hold the question was properly left to the jury for a factual determination of the condition's dangerousness."

"Although we agree with the premise that the size of the defect is the primary determinant of triviality ... we modify the prevailing two-step framework into a holistic, multi-factor analysis."

1. Size of the defect. "None of the cases cited in the briefs involved a differential of one and three-quarter inches or greater, and our

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this case continued from page i

independent search reveals just one case in which an equal or greater sidewalk height differential was deemed trivial."

2. The nature and quality of the defect (including whether it has jagged breaks or cracks).

3. Whether anything was obstructing or concealing the defect (for instance, an object, debris, or other substance).

4. The lighting and weather conditions at the time of the incident.

5. Whether the defect has caused other accidents.

6. Plaintiff's familiarity with the area.

As to the latter factor, the court noted "plaintiff's own extensive history of jogging along that part of Fox Street some 300 times over the previous two years without incident," but held that was only one factor to be weighed. After all, "a condition's dangerousness can be established even when the plaintiff did not use due care when encountering it."

PUBLIC ENTITY / TORTS

Scooter rental company is liable for negligently parked scooters under Civil Code section 1714, but the city that issued discretionary permit is immune under the Government Claims Act

Hacala v. Bird Rides, Inc. (2023 2d Dist. Div. 3) 90 Cal.App.5th 292

Bird runs an electric scooter rental business. A key feature is its "dock-less" system, whereby customers can pick up and leave scooters anywhere. Plaintiff was "walking on a City sidewalk just after twilight. The sidewalk was crowded with holiday shoppers and Hacala did not see the back wheel of a Bird scooter sticking out from behind a trash can. She tripped on the scooter, fell, and sustained serious physical injuries." She sued Bird and the City.

The trial court sustained demurrers without leave to amend, on the rationale that it was a third party user that had parked the scooter.

A 2-1 Court of Appeal affirmed as to the City, but reversed against Bird.

"Because plaintiffs' claims against the City are premised on the public entity's discretionary authority to enforce the permit, the City is immune from liability under the Government Claims Act (Gov. Code, § 810 et seq.). In contrast, regardless of the permit's terms, Bird may be held liable for breaching its general duty under section 1714 to use "ordinary care or skill in the management of [its] property." (§ 1714, subd. (a).)

"Section 1714 establishes the default rule that each person has a duty to exercise, in his or her activities, reasonable care for the safety of others." "Bird's general duty encompasses an obligation, among other things, to use ordinary care to locate and move a Bird scooter when the scooter poses an unreasonable risk of danger to others." "[B]ecause it was foreseeable that someone could be injured if Bird breached this duty, and because Bird agreed to take measures to prevent such injuries when it obtained the permit from the City," there is no public policy supporting an exception to the fundamental principle that a company like Bird is liable for injuries proximately caused by its want of ordinary care in the management of its property." "We emphasize again that plaintiffs' negligence claims are grounded on *Bird's* conduct in managing *its property*."

The majority opinion understandably found *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764 "instructive." There, a truck driver stopped his rig off the highway to have a snack. Decedent negligently veered off the freeway and rear-ended the rig. The Court of Appeal reversed a jury verdict, holding that Ralphs had no duty to avoid a collision between a negligent driver and the stopped truck. The Supreme Court reversed and reinstated the jury verdict. The "legal decision" that a defendant owes a plaintiff a legal duty "is to be made on a more general basis suitable to the formulation of a legal rule," in contrast to "the fact-specific question of whether or not the defendant acted reasonably under the circumstances," which is reserved for the trier of fact. Exceptions should be found only in statutes or where clearly supported by public policy, and there is no such policy applicable to scooters on the sidewalk.

A spirited dissent contended that this meant "that plaintiffs [will] be able to recover for injuries on a strict liability basis rather than to be limited to claims arising from negligence. If dock-less bicycle and scooter companies could be held liable for failing to immediately retrieve illegally parked bicycles and scooters, most of them, to avoid liability, would simply go out of business." The majority said no, they were just determining the existence of a duty, not whether there had been a breach.

RECENT CASES

TORTS-CAUSATION

MSJ proper despite duty and injury where plaintiffs' proposed ameliorative measures would not have prevented third-party assault

Romero v. Los Angeles Rams (2023 2d Dist. Div. 8)
91 Cal.App.5th 562, 2023 WL 3451437

Patron was beaten in a fight in the stands at an LA Rams game, so sued the Rams and the security company that did not stop the fight. "Having assumed duty and breach, the trial court decided the summary judgment motion on the basis of no causation. The trial court found that none of the breaches were a substantial factor in causing Enrique's injuries, specifically that it was not more probable than not that the ameliorative measures proposed by appellants would have prevented the attack."

Plaintiffs argued that security company CSC should have provided more personnel. Citing *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 776, the court ruled that "the bare claim that more security personnel could have prevented a criminal attack shows only 'abstract negligence.' There must be direct or circumstantial evidence showing that the assailant took advantage of the defendant's lapse or omission 'in the course of committing his attack, and that the omission was a substantial factor in causing the injury.'"

Plaintiffs also argued that the security company should have kept plaintiff and his assailants physically separated. But one CSC employee did stand between them and got knocked over. "The court found there was no evidence that another CSC employee would have been able to separate the parties without being attacked or that Mayhan's attempt to separate the parties was deficient. Put differently, the undisputed evidence showed that the physical presence of a CSC employee did not prevent the attack from occurring."

For the Rams, this win was in part a result of bad lawyering by the plaintiffs. "We will treat appellants' omission on appeal of the ameliorative measures they identified for the Rams in the trial court as a concession that there were no ameliorative measures which the Rams should have taken to prevent Enrique's injuries." Ouch.

TORTS-DUTY

Hirer not liable under *Privette* where safety delegated to contractor that employed decedent: contract provision giving hirer "final decision" on "manner of performance of work" was not exercised control that affirmatively contributed to death

Marin v. Dept. of Transportation (2023 1st Dist. Div. 5)
__ Cal.App.5th __

"[P]laintiffs failed to present evidence that the DOT retained control over the construction site where decedent was killed and actually exercised that retained control in such a way as to affirmatively contribute to his injuries, as required under California law. (*Sandoval v. Qualcomm Inc.* (2021) 12 Cal.5th 256, 264 (Sandoval).) Accordingly, we affirm the trial court's grant of summary judgment."

Decedent worked for a DOT contractor repairing I-580 at night. A drunk driver blew into the well-marked construction zone and killed him. "[T]he trial court concluded that, under *Privette* and its progeny, the DOT was not liable for decedent's death as a matter of law because the DOT delegated to O.C. Jones its duty to provide a safe work environment." The Court of Appeal affirmed.

"[P]laintiffs concede[d] the DOT 'did not direct or order the means and methods used by O.C. Jones to provide worker safety' and 'did not have the responsibility for setting up the barriers, cones or warning signs.' Plaintiffs further concede the DOT 'did not prevent OC Jones from complying with its obligation to provide a safe work site.'" Because "it was undisputed the DOT did not direct the means or methods of decedent's work on the day in question or instruct his employer on how to provide for his or his coworkers' safety, summary judgment was appropriate."

Plaintiffs argued that there was an issue of fact as to whether DOT exercised control in a manner that affirmatively contributed to decedent's demise, based on a provision in the contract "that the DOT's residential engineer at the project site ... is authorized to make the final decision on questions regarding the contract, including as to '[w]ork quality and acceptability' and the 'manner of performance of the work.'" Such a provision is common, and the Court of Appeal held it does not create liability: it "refers to work quality/acceptability and the manner of work performance, not project site safety."

Similarly, the Court of Appeal ruled that "[e]vidence that the DOT could have authorized a lane closure or use of an attenuator vehicle, 'at most, [proved] that [DOT] safety personnel were aware of an unsafe practice and failed to exercise the authority they retained to correct it,'" which is not enough to fall under the *Hooker* exception to *Privette*.

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GET THE TRIAL COURT TO RULE SPECIFICALLY ON YOUR EVIDENTIARY OBJECTIONS – PUT IT IN YOUR PROPOSED ORDER. The trial court sustained 31 of the DOT's 32 evidentiary objections "without explanation." The Court of Appeal said this was the equivalent of waiver of those objections: "Where the trial court failed to discharge its obligation to expressly rule on the DOT's individual objections in a manner that would allow a meaningful basis for our review, we give plaintiffs the benefit of the situation and consider all the evidence in the record, including the Engelmann declaration, as though the DOT's objections were waived."

The decision seems wrong in light of *Reid v. Google* (2010) 50 Cal.4th 512 (Reid). Citing *Demps v. San Francisco Housing Auth.* (2007) 149 Cal.App.4th 564, 578, Marin held in section I that "where the trial court failed to discharge its obligation to expressly rule on the DOT's individual objections in a manner that would allow a meaningful basis for our review, we give plaintiffs the benefit of the situation and consider all the evidence in the record, including the Engelmann declaration, *as though the DOT's objections were waived*." (Typed opn. p. 8, emphasis added.)

In *Reid*, the Supreme Court disapproved *Demps* by overruling the key authorities on which *Demps* relied (id. p. 523at fn. 5), and reached a result flatly contrary to *Demps* (id. at pp. 534-535). After *Reid*, a party that asserts a timely objection but then fails to obtain a sufficiently overt or detailed ruling by the trial judge will not be held to have waived the objections, contrary to the conclusion in Marin. Rather, the Court of Appeal must decide for itself the merits of the evidentiary objections. (See id. at pp. 534-535.)

Further, if the trial court has an "obligation to expressly rule on the DOT's individual objections in a manner that would allow a meaningful basis for our review," then even checking the boxes on the required proposed order on evidentiary objections (3.1354(c)) will not be enough to preserve the objections. "Indeed, for 28 of these objections, the DOT offered four or five separate grounds for exclusion. Yet, given the court's blanket ruling, we have no way of knowing whether the court accepted all of these grounds or just one." Most evidentiary objections filed state multiple grounds.

TORT-DUTY & CAUSATION

Tenant use of roof to access his top-floor balcony may result in landowner liability

Razoumovitch v. 726 Hudson Ave., LLC (2023 2d Dist. Div. 7) 91 Cal.App.5th 547, 2023 WL 3407005

"Having accidentally locked himself out of his apartment, and unable to obtain assistance from the managers of the building, Arkadi Razoumovitch went to the roof of the building and attempted to drop down onto the balcony of his top-floor apartment to enter his unit. He was unsuccessful, instead falling to the ground and suffering injuries."

Landlord "defendants moved for summary judgment, arguing Razoumovitch could not establish that they owed him a duty of care or that their alleged breaches of that duty caused his injuries. The trial court agreed with them on both issues and granted the motion. We disagree with both conclusions: California law imposes a duty on everyone, including landlords, to exercise reasonable care, and the ... defendants have not shown public policy considerations justify departing from that general duty; and causation, as it is in most cases, is a factual issue."

Defendants argued that "it was not foreseeable that a breach of any of these alleged duties would result in a tenant intentionally climbing down the building from the roof." The Court of Appeal disagreed, and declined to hold that plaintiff's injuries were so unforeseeable as to negate the duty of care.

It did not matter to the result, but Brad Avrit testified that "'the roof should have been for emergency egress only, and not for arbitrary and/or unauthorized access by tenants and/or visitors,' and that the defendants' 'use of an unlocked roof access door and unlocked metal gate alone" – without "any warning signage,' alarm, or 'other control mechanism' – did not sufficiently prevent or deter unauthorized access to the roof." Keep him away from my building.

RECENT CASES

TORTS

Hearing accident while on the phone is not enough to plead NIED

Downey v. City of Riverside (2023 4th Dist. Div. 1) 90 Cal.App.5th 1033

Plaintiff's daughter was involved in a motor vehicle accident while the two were speaking on cell phones with each other. Plaintiff alleged she was contemporaneously aware that there was an accident and that her daughter was injured. Plaintiff pled causes of action against the City of Riverside for dangerous condition of public property and against the real property owner for failure to maintain vegetation causing an unsafe obstruction in viewing vehicular traffic. The trial court sustained the defendants' demurrers without leave to amend and dismissed the action. The trial court ruled that Downey failed to sufficiently allege contemporaneous awareness of the "injury-producing event" and the "causal connection between defendants' tortious conduct and the injuries Vance suffered."

The Court of Appeal agreed with the rationale, but reversed to allow plaintiff to amend. The plaintiff must be both contemporaneously aware of the connection between the injury-producing event and the victim's injuries, and also have a "contemporaneous sensory awareness of the causal connection between the negligent conduct and the resulting injury." Downey did not allege the causal connection, but the Court of Appeal ruled she should have the chance to so allege.

A concurring and dissenting opinion agreed with the result, but would not impose the higher requirement. "Nothing requires that [the plaintiff] be aware of each and every separate act of negligence that may have contributed to the accident." The dissent opined that all that need be alleged is the plaintiff contemporaneously perceived the event and understood that her daughter was injured.

TOXIC TORTS/EXPERTS

Court appropriately excluded a general causation expert who relied on a single epidemiological study whose authors said was not controlling, and who abused the Bradford-Hill criteria; once expert was excluded, summary judgment appropriate, and court need not re-open expert discovery

Onglyza Product Cases (2023 1st Dist. Div. 4)
__ Cal.App.5th __, 2023 WL 3001055

The Court of Appeal excluded an expert witness who "(1) unreliably found causation based on [a single] study alone while disregarding other human data ...; (2) analyzed animal data even though he was unqualified to do so; and (3) misapplied [several] of the nine factors of the Bradford Hill analysis." The case involved claimed negative cardiovascular effects from a diabetes medication. The rulings are broadly applicable to expert witnesses generally, and the minefield that is Bradford Hill.

"A trial court does not abuse its discretion in excluding expert testimony on general causation when the expert's opinion is based on a single study that provides no reasonable basis for the opinion offered." Here, the studies' authors said more study was needed to address causation.

"We do not hold that one randomized controlled trial is never sufficient to establish general causation, but on this record, the trial court did not abuse its discretion in finding that Dr. Goyal's reliance on SAVOR alone to establish general causation was logically unsound, especially given Dr. Goyal's own agreement that SAVOR's finding needed to be replicated in order to determine causation."

The trial court's "its decision was based on various methodological defects it found in Dr. Goyal's application of six of the nine Bradford Hill factors, and that because he failed to weigh them together, it could not identify any predicate opinion on a specific factor that was not essential to his ultimate opinion. As a result, it concluded that methodological defects in any of the factors would upset the ultimate opinion on causation. This was a proper exercise of the court's gatekeeping responsibility."

In some instances, the court ruled that the expert was "refusing to engage with a factor of the Bradford Hill analysis on its terms," by essentially re-defining the terms to suit his opinions. Sound familiar?

For example, "consistency ... is upheld when the same finding is shown in multiple studies across different populations and settings." Yet the expert relied on only one study. He also relied on data from preclinical animal studies, though he was not qualified to interpret animal data.

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Similarly, "specificity" is met "if the exposure is associated only with a single disease or type of disease." The expert testified that specificity was nonetheless met through the single study because "the randomized controlled trial allows you to fulfill that criterion." "[A]nother example of Dr. Goyal refusing to engage with a factor of the Bradford Hill analysis on its terms."

"'Biological plausibility' refers to whether there is a plausible biological mechanism to explain a cause and effect relationship between exposure and disease. ... The trial court noted that the strongest mechanism Dr. Goyal could identify was only 'a proposed hypothesis.'" His opinion was therefore rejected because he did "not undertake an analysis of whether the data that exists supports or undermines his opinion that the proposed mechanisms are plausible."

"'Analogy' considers whether there have been associations found between a related or similar substance to the one at issue and the disease or outcome." The expert analogized to a different class of diabetes medication than the one at issue (DPP-4). "The trial court reasonably concluded that this opinion was not reliable because the only reason for Dr. Goyal to analogize Saxagliptin to TZDs rather than to other DPP-4 inhibitors was that the former supported his ultimate conclusion on causation and the latter did not."

Bonus for the defense: because general causation must be proven by expert evidence, and plaintiffs' sole expert on general causation was excluded, summary judgment followed. The trial court denied plaintiffs' request to re-open discovery and allow them to find another expert. The Court of Appeal affirmed that too.

LITIGATION

Changing an in limine ruling does not suggest impropriety: nor do tangential, non-substantive encounters with a fellow judge who years earlier had worked with plaintiffs' law firm and supportive of their case

Basset Unified School District v. Superior Court (Ross) (2023 2d Dist. Div. 5) 89 Cal.App.5th 273

Disqualification requires more than this scenario:

"Following a multimillion dollar jury verdict in favor of Ross, the trial judge in this action, Honorable Stephanie Bowick, received a text message from another judge on the court, Honorable Rupert Byrdsong. According to Judge Bowick, "I received a text message from Judge Byrdsong on my cellphone that stated, quote, '$25 Million!! [Confetti emoji], [confetti emoji].' I did not respond to the text message." Judge Byrdsong had previously informed Judge Bowick that attorneys from his former firm were trying the case. On one occasion he had greeted Ross's counsel in Judge Bowick's courtroom during a break in the proceedings and later brought Judge Bowick a food item. On another, Judge Byrdsong had briefly observed, from the audience, the jury selection in Judge Bowick's courtroom, until Judge Bowick had a note passed to him asking him to leave."

"Upon receipt of the post-verdict text message, Judge Bowick disclosed to the parties the entire course of events involving Judge Byrdsong. Pointing to Judge Byrdsong's apparent support for Ross and the resulting verdict in Ross's favor, the school district sought Judge Bowick's disqualification, asserting that a " 'person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial' " (Code Civ. Proc., § 170.1, subd (a)(6)(A)(iii))."

The defense was particularly peeved because Judge Bowick changed her ruling on a key evidentiary issue after one of these visits. Judge Bowick denied any influence or impropriety, and said she never discussed the merits of the case with Judge Byrdsong.

The judge hearing the disqualification motion denied it, and the Court of Appeal affirmed. "We conclude that no disinterested observer would reasonably question Judge Bowick's impartiality because of any change in her ruling." Further, no "objective person would reasonably entertain a doubt about Judge Bowick's impartiality because of Judge Byrdsong's actions."

120-day preference limit is absolute, at least outside a coordinated proceeding

Pabla v. Superior Court (Dual Arch International, Inc.) (2023 5th Dist.) __ Cal.App.5th __

Section 36 empowers courts in some circumstances, and requires them in others, to set trial within 120 days of hearing of the motion for trial preference. Here, plaintiff qualified due to age and disability, but the trial court set trial a year later.

Arch argued a later date was proper under *Isaak v. Superior Court* (2022) 73 Cal.App.5th 792, which had balanced interests of judicial economy with the preferential trial setting provisions of section 36. The Court of Appeal disagreed, ruling: "*Isaak* involved a Judicial Council Coordination Proceeding, and its ruling did not intend to address the functioning of section 36 in other contexts. *Isaak* held 'section 36 does not supersede California Rules of Court, rule 3.504, which governs coordinated proceedings.'"

The Court of Appeal thereupon granted plaintiff's writ petition, and ordered the trial court to set trial within 120 days of the hearing.

RECENT CASES

998: Applies when parties resolve via settlement, even if no judgment

Madrigal v. Hyundai Motor America (2023 3d Dist.) __ Cal.App.5th __

Hyundai made two 998 offers, both of which were rejected. "After a jury was sworn in, plaintiffs settled with Hyundai for a principal amount that was less than Hyundai's second section 998 offer. The parties elected to leave the issue of costs and attorney fees for the trial court to decide upon motion. Under the settlement agreement, once the issue of costs and attorney fees was resolved and payment was made by Hyundai, plaintiffs would dismiss their complaint with prejudice."

Plaintiffs moved for costs and attorney fees. The trial court granted them, but the Court of Appeal reversed. Under these facts, the court held that "section 998's cost-shifting penalty provisions apply when an offer to compromise is rejected and the case ends in settlement." (It may be that settlements reached in a different manner would not invoke section 998.)

A vigorous dissent would have held that the purposes of section 998 were met when the parties settled before trial, so the cost-shifting provisions should not have been invoked.

JURISDICTION

No specific jurisdiction where the only in-forum activities related to products other than the model at issue

Preciado v. Freightliner Custom Chassis Corporation
(2023 4th Dist. Div. 1) 87 Cal.App.5th 964

1. Failure to hold a hearing on motion to quash service of summons within 30 days did not require denial of the motion; hearing was noticed for the first hearing date available on the trial court's calendar, which was 99 days after motion was filed.

2. No general jurisdiction where: "the undisputed facts are that FCCC is a Delaware corporation, and its principal place of business is in South Carolina. It does not have any offices or facilities in California. Plaintiffs have submitted website printouts suggesting that some of FCCC's products are sold and serviced in California (through independent dealers), but those types of contacts do not establish that FCCC is "at home" in California."

3. No specific jurisdiction either. "Plaintiffs' sparse evidentiary submission in opposition to FCCC's motion to quash did not establish the type of facts that Ford Motor relied upon to conclude that the plaintiffs' claims arose out of or were related to the defendant's contacts with the forum states," because they shoed different model chassis than the one at issue, and "there is no evidence that authorized service centers in California have serviced the model of chassis involved in this lawsuit." "We agree that if it were reasonable for us to presume that other similar models of chassis sold by FCCC in California had the same alleged defect as the 2014 Freightliner S2 chassis involved in this litigation, that would likely be sufficient to demonstrate that the Plaintiffs' claims arise out of or relate to FCCC's forum-related activities. But we see no basis for such a presumption on this record." Thus the showing was not like that found sufficient to establish specific jurisdiction in *Daimler Trucks North America LLC v. Superior Court* (2022) 80 Cal.App.5th 946.

INSURANCE

No coverage for COVID business disruption

Starlight Cinemas v. Massachusetts Bay Insurance
(2023 2d Dist. Div. 7) 91 Cal.App.5th 24 , 2023 WL 3168354

"Starlight's complaint alleged it was forced to suspend business operations due to government orders in response to the COVID-19 pandemic, resulting in 'a loss of the functional use' of its theaters, or, as alternatively alleged, "a functional loss" of its property. Starlight did not allege that the COVID-19 virus was present in its theaters or that there was any physical alteration of its property as a result of either the virus or the government orders." The Court of Appeal agreed with the majority of other decisions holding that this was not a covered loss under a policy for lost business income (*Apple Annie; United Talent; Musso & Frank; Inns-by-the-Sea*) and disagreeing with the outlier *Coast Restaurant Group.*

COVID business income losses covered by insurance, but excluded by other parts of policy

Coast Restaurant Group, Inc. v. AmGUARD Insurance Company
(2023 4th Dist. Div. 3) 90 Cal.App.5th 332

Insured showed that "business income losses resulting from governmental orders prohibiting on-site dining at its restaurant due to the COVID-19 virus were covered under the relevant insurance policy." Unfortunately for the insured, two exclusions precluded coverage. "Under the ordinance or law exclusion, 'loss or damage caused directly or indirectly by ... enforcement of any ordinance or law ... [that regulates] the construction, use or repair of any property' are not covered." The policy also contained a virus exclusion for any loss or damage caused by a virus or other microorganism.

COVID does not trigger lost business income coverage

Best Rest Motel v. Sequoia Insurance (2023 4th Dist. Div. 1)
88 Cal.App.5th 696

A hotel did not sustain lost business income due to the necessary 'suspension' of its operations caused by direct physical loss of or damage to the insured property where the hotel could not have been operating were it not for the presence of the COVID-19 virus within its facility.

Payment under consent decree is "voluntary" and therefore not covered

Santa Clara Valley Water District v. Century Indemnity Company (2023 6th Dist.) 2023 WL 2707023

The insured water district sought coverage for claim that resulted in consent decree with the US Fish and Wildlife Service regarding mercury contamination. The trial court granted the insurer's MSJ, and the Court of Appeal affirmed.

The Court of Appeal enforced a no voluntary payment provision ("The [District] shall not, except at [its] own cost, voluntarily make any payment, assume any obligation or incur any expense") and ruled that the insurer need not show prejudice. "Although the settlement by the Trustees and the District took the form of a consent decree, this did not alter the fact that it was an agreement to settle a third-party claim without the consent of the insurer." "Concluding that this agreement, because it took the form of a consent decree, was not subject to the NVP provisions of the excess policies "would be a triumph of form over substance."

The court also ruled that there was no "adjudication" meeting the contract's definition of an ultimate net loss. "An adjudication suggests a matter submitted by the parties that is decided by the court. It is '[t]he legal process of resolving a dispute; the process of judicially deciding a case.' (Black's Law Dict. (11th ed. 2019), p. 52, col. 1 ... It cannot be reasonably concluded that the procedure employed here by the Trustees and the District (i.e., the pre-suit execution and later filing of the Consent Decree), involved '[t]he process of judicially deciding a case.'"

EMPLOYMENT

Ministerial exception does not apply to art teacher/ administrator employed at religious school

Atkins v. St. Cecilia Catholic School (2023 2d Dist. Div. 8)
90 Cal.App.5th 1328

Atkins was a long-term employee of St. Cecilia Catholic School, both as an art teacher and office administrator. Following her discharge, Atkins sued for age discrimination. "The trial court granted St. Cecilia's motion for summary judgment on the ground that Atkins's suit was barred by the ministerial exception, a constitutional doctrine that precludes certain employment claims brought against a religious institution by its ministers."

The Court of Appeal reversed. The court ruled that the defense evidence that plaintiff promoted "Christ-like" behavior in her class did not establish that she performed vital religious duties for St. Cecilia or otherwise qualified as a minister. "St. Cecilia does not contend that Atkins is subject to the ministerial exception based on the job duties that she performed as an office administrator. Instead, the school asserts that Atkins qualified as a " 'minister' " within the meaning of the exception '[g]iven the nature of her teaching work.' However, there is no evidence that Atkins ever completed a job application, or received a job description, for a teaching position. Thus, Atkins's agreement to conduct herself in conformity with the teachings, standards, and mission of the Catholic Church while performing her office position does not demonstrate that St. Cecilia entrusted her as 'a teacher with the responsibility of educating and forming students in the [Catholic] faith.'"

Because there were triable issues of material fact as to whether the ministerial exception applied to plaintiff's former job positions as an art teacher and an office administrator, the Court of Appeal reversed summary judgment.

RECENT CASES

Most of Prop. 22 valid, except for legislative amendment

Castellanos v. State of California (2023 1st Dist. Div. 4)
89 Cal.App.5th 131

Voters approved Proposition 22, the Protect App-Based Drivers and Services Act. Various plaintiffs "filed a petition for writ of mandate seeking a declaration that Proposition 22 is invalid because it violates the California Constitution. The trial court granted the petition, ruling that the proposition (1) is invalid in its entirety because it intrudes on the Legislature's exclusive authority to create workers' compensation laws; (2) is invalid to the extent that it limits the Legislature's authority to enact legislation that would not constitute an amendment to Proposition 22, and (3) is invalid in its entirety because it violates the single-subject rule for initiative statutes."

The Court of Appeal reversed as to both challenges to the Proposition "in its entirety," but "conclude[d] that the initiative's definition of what constitutes an amendment violates separation of powers principles." Accordingly, the Court of Appeal so severed those provisions and affirmed the trial court's judgment on that point.

Late night sexting between employees with personal relationship outside work ≠ employer liability

Atalla v. Rite Aid Corporation (2023 5th Dist.) 89 Cal.App.5th 294

Supervisor and employee knew each other for years before she started working there. They were great friends, including with their spouses, including "an extensive texting relationship." Late one night after hours the supervisor texts her at home "a video of himself masturbating and a still picture of his" you can fill in the rest. She calls him on it, tells him to stop, and he does. She never goes back to work. Her lawyer calls the employer, claims harassment and constructive termination, and proposes early mediation. The employer investigates and promptly fires the supervisor.

Ruling: "The employer is not strictly liable for a supervisor's acts of harassment resulting from a completely private relationship unconnected with the employment and not occurring at the workplace or during normal working hours." Because the offending texts "spawned from a personal exchange that arose from a friendship," not work, summary judgment was proper. Added bonus: under these circumstances, the employee was not constructively terminated.

Originally unpublished: ADC request for publication granted.

If planned layoff does not take place before employee becomes disabled, it's for the jury to decide motivation

Lin v. Kaiser Foundation Hospitals (2023 2d Dist. Div. Four)
88 Cal.App.5th 712

Defense MSJ reversed.

"As part of a round of employee layoffs, Kaiser planned, at least tentatively, to terminate Lin before Lin became disabled. Kaiser's plan to terminate Lin before she became disabled, by itself, was (of course) not discrimination against Lin because of a disability. But Kaiser did not complete its layoff plans – or, a reasonable jury could find, make its final determination to terminate Lin – until after Lin had become disabled. On the record here, there was evidence from which a reasonable jury could conclude that Kaiser's ultimate decision to terminate Lin was motivated, at least in substantial part, by concerns Kaiser had about Lin's disability. That allows Lin's complaint to survive summary judgment."

Employees may file PAGA claims for penalties for violation of the Healthy Workplaces, Healthy Families Act of 2014

Wood v. Kaiser Foundation Hospitals (2023 4th Dist. Div. 1)
88 Cal.App.5th 742

The phrase "on behalf of the public as provided under applicable state law" in Labor Code §248.5(e) restricts such litigants to "equitable, injunctive, or restitutionary relief," not money damages, for violation of the Healthy Workplaces, Healthy Families Act of 2014 requiring at least three paid sick days per years. The trial court held that this applied to a PAGA action seeking penalties. The Court of Appeal reversed, holding that the phrase was intended to refer to actions prosecuted under the Unfair Competition Law – not the Private Attorney General Act.

"The judiciary's responsibility to interpret statutes often places courts in the position of trying to decide how the Legislature would have resolved an issue we strongly suspect it never actually considered. We endeavor, as best we can, to be prognosticators. Sometimes, however, our role in statutory interpretation is more that of a detective ... In this case we function largely as detectives, hopefully more like Sherlock Holmes than Inspector Clouseau."

ARBITRATION

Tiny font size, that only the employee signed the arbitration agreement, and failure to attach arbitration rules are not substantive unconscionability

Fuentes v. Empire Nissan, Inc. (2023 2d Dist. Div. 8)
90 Cal.App.5th 919, 2023 WL 3029968

Fuentes signed an arbitration agreement with Empire Nissan, Inc. Following Nissan's termination of her employment, Fuentes sued for discrimination and wrongful termination and Nissan moved to compel arbitration. The trial court denied the motion, ruling the arbitration contract was unconscionable. The Court of Appeal reversed, holding that while the arbitration agreement met the standard for procedural unconscionability, it was not substantively unconscionable.

First, "Tiny font size and unreadability go to the *process* of contract formation, however, and not the substance of the outcome. Font size and readability thus are logically pertinent to procedural unconscionability and not to substantive unconscionability."

The court founds that mutuality was no lacking even though there were later trade secret contracts. "The arbitration contract has supervening force because it specifies it can be modified only in a writing signed by the company president, and that president never signed any modification."

"Another argument about substantive unfairness is that Fuentes was the only one to sign the arbitration agreement, and this shows a lack of mutuality. This argument is misplaced. Nissan's missing signature is irrelevant to whether the substance of the contact is fair. A missing signature cannot make a fair deal unfair. The presence of a signature might be pertinent to whether a contract exists at all, but that is not our issue. The issue here is only whether an existing contract is fair. These questions are analytically separate."

"Fuentes's final argument is that the arbitration agreement is unfair because it did not explain how to initiate arbitration" or include a copy of the arbitration rules. The Court of Appeal rejected this, following Alvarez v. Altamed Health Services Corp. (2021) 60 Cal. App.5th 572. "Fuentes's agreement states the procedural rules of the California Arbitration Act apply. Fuentes does not challenge these rules, which are not unconscionable. In this situation, failing to include instructions does not establish substantive unconscionability."

Basith v. Lithia Motors, Inc. (2023 2d Dist. Div. 8) __ Cal.App.5th __ 2023 WL 3032099

The same issues, same Nissan arbitration agreement, and same result as in Fuentes.

FAA preempts California law criminalizing requiring arbitration agreements as a condition of employment

Chamber of Commerce v. Bonta (9th Cir. 2023) __ F.3d __

"California enacted Assembly Bill 51 (AB 51) to protect employees from what it called 'forced arbitration' by making it a criminal offense for an employer to require an existing employee or an applicant for employment to consent to arbitrate specified claims as a condition of employment. But AB 51 criminalizes only contract formation; an arbitration agreement executed in violation of this law is enforceable. California took this approach to avoid conflict with Supreme Court precedent, which holds that a state rule that discriminates against arbitration is preempted by the Federal Arbitration Act (FAA). This appeal raises the question whether the FAA preempts a state rule that discriminates against the formation of an arbitration agreement, even if that agreement is ultimately enforceable. We hold that such a rule is preempted by the FAA."

The court ruled that AB 51 was barred obstacle preemption, because the statute "'specially impeded the ability of [employers] to enter into arbitration agreements' and 'thus flouted the FAA's command to place those agreements on an equal footing with all other contracts.'" "AB 51's deterrence of an employer's willingness to enter into an arbitration agreement is antithetical to the FAA's "'liberal federal policy favoring arbitration agreements.'"

When unconscionable terms permeate the contract, the court can refuse to order arbitration and need not sever the offending provisions

Alberto v. Cambrian Homecare (2023 2d Dist. Div. 4)
91 Cal.App.5th 482 2023 WL 3373522

"The trial court found that even if the parties had formed an arbitration agreement [it was missing a signature by the employer], the agreement had unconscionable terms, terms that so permeated the agreement they could not be severed. [P] We affirm. The agreement, read together – as it must be – with other contracts signed as part of Alberto's hiring, contained unconscionable terms. The trial court had discretion to not sever the unconscionable terms, and to refuse to enforce the agreement."

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Thus, provisions in a separate Confidentiality Agreement executed the same day were properly considered. "Failing to read them together artificially segments the parties' contractual relationship. Treating them separately fails to account for the overall dispute resolution process the parties agreed upon.

So, unconscionability in the Confidentiality Agreement can, and does, affect whether the Arbitration Agreement is also unconscionable. To hold otherwise would let Cambrian impose unconscionable arbitration terms, and then avoid a finding of unconscionability because it put the objectionable terms in a (formally) separate document."

The unconscionable provisions were many familiar culprits: lack of mutuality (employer could seek injunction, employee relegated to arbitration for all disputes); prohibition on discussion of wages; waiver of PAGA claims.

"Unlike our de novo review of Alberto's unconscionability defense, the decision on whether to sever unconscionable terms from an agreement is "reviewed for abuse of discretion" under Civil Code section 1670.5." The Court of Appeal easily affirmed the trial court's decision not to sever.

Manufacturer cannot rely on arbitration provision in contract between independent dealers and consumers

Ochoa v. Ford Motor Company (Ford Motor Warranty Cases) (2023 2d Dist. Div. 8) __ Cal.App.5th __

"FMC could not compel arbitration based on plaintiffs' agreements with the dealers that sold them the vehicles. Equitable estoppel does not apply because, contrary to FMC's arguments, plaintiffs' claims against it in no way rely on the agreements. FMC was not a third party beneficiary of those agreements as there is no basis to conclude the plaintiffs and their dealers entered into them with the intention of benefiting FMC. And FMC is not entitled to enforce the agreements as an undisclosed principal because there is no nexus between plaintiffs' claims, any alleged agency between FMC and the dealers, and the agreements."

Consent of the parties to a contract must be free, mutual, and communicated by each to the other; a defendant could not compel arbitration under an agreement plaintiff was not provided

Fleming v. Oliphant Financial (2023 1st Dist. Div. 1) 88 Cal.App.5th 13

Customer signed up for a credit card via online application. His bills referred him to his "Cardmember Agreement," which apparently had an arbitration clause, but he never read or received a copy of the Cardmember Agreement. Customer filed a class action complaint for violation of the Fair Debt Collection Practices Act. Defendant filed a motion to compel arbitration, but the trial court denied it, and the Court of Appeal affirmed.

Enforceable where website provides reasonably conspicuous notice, and where consumer takes some action, such as clicking a button or checking a box, that manifests assent to those terms

Oberstein v. Live Nation Entertainment (9th Cir. 2023) 60 F.4th 505 2023 WL 1954688

Defendants moved to dismiss a putative class action and compel arbitration on the basis of their websites' terms of use. The trial court dismissed, and the Ninth Circuit affirmed. Plaintiffs argued that the Terms failed to use Defendants' full legal names. The Ninth found that there was no doubt who the parties were (Live Nation and Ticketmaster, trade names referred to frequently in the Terms) and there was no requirement that the full name be used. Plaintiffs also claimed they had no notice of the arbitration provision terms. The Ninth disagreed: an enforceable agreement may be found where "(1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms." That was satisfied here: "At three independent stages – when creating an account, signing into an account, and completing a purchase – Ticketmaster and Live Nation webpage users are presented with a confirmation button above which text informs the user that, by clicking on this button, 'you agree to our Terms of Use.'"

Federal rule lenient on waiver of right to arbitrate.

Armstrong v. Michael Stores (9th Cir. 2023) 59 F.4th 104

The trial court affirmed an order compelling arbitration, and the Ninth Circuit affirmed.

Even though the defendant did not immediately move to compel arbitration, its actions did not amount to a relinquishment of the right to arbitrate where the defendant "repeatedly reserved its right to arbitration, did not ask the district court to weigh in on the merits, and did not engage in any meaningful discovery." The Ninth Circuit acknowledged that a party opposing arbitration no longer bears a "heavy burden" to show waiver, but even under that lighter standard the order was affirmed.

The change came as the result of *Morgan v. Sundance, Inc.,* 142 S. Ct. 1708 (2022), which clarified that the pro-arbitration 'federal policy is about treating arbitration contracts like all others, not about fostering arbitration.' "Put differently, the pro-arbitration federal policy is "to make 'arbitration agreements as enforceable as other contracts, but not more so.'" ■

PAGA

Collective claims may proceed in court even if individual claims subject to arbitration

Seifu v. Lyft, Inc. (2023 2d Dist. Div. 4)
2023 WL 2705285 89 Cal.App.5th 1129

Another decision holding that, SCOTUS's Viking River notwithstanding, an employee whose individual claim is subject to arbitration remains "an 'aggrieved' employee within the meaning of PAGA with standing to assert PAGA claims on behalf of himself and other employees." ■

PAGA and PUBLIC ENTITIES

Applicability may vary

Stone v. Alameda Health System (2023 1st Dist. Div. 5)
88 Cal.App.5th 84

While the Wage Orders exempting "employees directly employed by the State or any political subdivision thereof, including any city, county, or special district" and "municipal corporations" did not apply to county-owned health system. The system did, however, fall under the exemption for "other governmental entity" within the meaning of section 226. ■

PAGA / ARBITRATION

An employee may be compelled to arbitrate an individual claim arising from the Labor Code violations suffered by the plaintiff or plaintiffs themselves, even if the state does not consent to or participate in the arbitration. The claim advanced on behalf of harms suffered by others, however, is not subject to arbitration

Piplack v. In-N-Out Burgers (2023 4th Dist. Div. Two)
88 Cal.App.5th 1281

"The standing question associated with the representative PAGA claims presents us with a dilemma. On the one hand, the California Supreme Court, in the case *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73 (*Kim*), provided us with a recent, definitive, and (most importantly) binding interpretation of the relevant portions of PAGA controlling standing. We read *Kim* as recognizing two (and only two) requirements for standing under PAGA, neither of which is affected in any way by moving the individual component of a PAGA claim to arbitration. On the other hand, in *Viking,* the United States Supreme Court, citing the very same *Kim* case, concluded a plaintiff whose individual PAGA claim is compelled to arbitration loses standing to pursue representative PAGA claims. [Citing *Viking River Cruises, Inc. v. Moriana* (2022) ___ U.S. ___ [142 S.Ct. 1906, 1925].]"

"Despite the deep deference we afford the United States Supreme Court, even on purely state law questions where the United States Supreme Court's opinions are only persuasive, not binding, we conclude we must follow *Kim* and hold that plaintiffs retain standing to pursue representative PAGA claims in court even if their individual PAGA claims are compelled to arbitration."

"*Viking's* modification to the rules set forth by the California Supreme Court in Iskanian created the present rule: arbitration agreements between employers and employees that require arbitration of the individual portion of a PAGA claim are enforceable, but arbitration agreements that require arbitration (or waiver) of the representative portion of a PAGA claim are not enforceable." ■

RECENT CASES

Individual PAGA claims may be subject to arbitration, but claims for violations suffered by employees other than plaintiff are not

Galarsa v. Dolgen California (2023 5th Dist.) 88 Cal.App.5th 639

Plaintiff sued her employer for PAGA penalties. The employer moved to compel arbitration. The superior court denied the motion; the Court of Appeal affirmed; US Supreme Court granted a cert petition, vacated the affirmance and remanded to consider in light of *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___ [142 S.Ct. 1906].

The Court of Appeal ruled:

1. Arbitration was proper for her individual claims, as directed by *Viking River.* But:

2. "PAGA claims seeking to recover civil penalties for Labor Code violations *suffered by employees other than plaintiff* may be pursued by plaintiff in court. Thus, we disagree with the United States Supreme Court's conclusion that California law requires the dismissal of those claims. More specifically, we conclude plaintiff is an aggrieved employee with PAGA standing and the general rule against splitting a cause of action does not apply to the two types of PAGA claims."

(The decision called these Type A claims and Type O claims, respectively.)

"[W]e conclude the rule precluding the waiver of the right to bring a representative action under PAGA is an aspect of *Iskanian* that is not preempted by federal law and remains good law."

To similar effect as *Piplack* and *Galarsa*

Gregg v. Uber Technologies (2023 2d Dist. Div. 4) 89 Cal.App.5th 786

"[T]he ... PAGA Waiver is invalid and must be severed from the Arbitration Provision. We then conclude that under the Arbitration Provision's remaining terms, Gregg must resolve his claim for civil penalties based on Labor Code violations he allegedly suffered (i.e., his individual PAGA claim) in arbitration, and that his claims for penalties based on violations allegedly suffered by other current and former employees (i.e., his non-individual PAGA claims) must be litigated in court. Lastly, we conclude that under California law, Gregg is not stripped of standing to pursue his non-individual claims in court simply because his individual claim must be arbitrated. Consequently, his non-individual claims are not subject to dismissal at this time. Instead, under the Arbitration Provision, they must be stayed pending completion of arbitration.

Accordingly, we affirm in part and reverse in part the order denying Uber's motion to compel arbitration. We remand the case to the trial court with directions to: (1) enter an order compelling Gregg to arbitrate his individual PAGA claim; and (2) stay his non-individual claims pending completion of arbitration."

SLAPP

Statements made when an employer terminates an employee are not protected by anti-SLAPP law solely because the employer asks the employee to sign a release

Nirschl v. Schiller (2023 2d Dist. Div. 4)
91 Cal.App.5th 386, 2023 WL 3334959

"Statements made when an employer terminates an employee are not protected by California's anti-SLAPP law solely because the employer asks the employee to sign a release of claims."

The employers had "asked a friend (who ran a nanny placement service and had helped hire Nirschl)" to propose a release in exchange for a severance payment. The nanny declined and sued on wage and hour claims. She then added a cause of action for defamation based on what the employers told the intermediary.

The employers brought an anti-SLAPP motion as to both the defamation and the wage-and-hour claims. "The trial court denied the anti-SLAPP motion and required the Schillers to pay some of Nirschl's attorney fees."

The Court of Appeal affirmed. "[T]he Schillers did not show that Nirschl's defamation claim was based on activity protected by the anti-SLAPP law. And the portion of the Schillers' motion seeking to strike Nirschl's non-defamation claims was frivolous. Thus, the Schillers must pay some of Nirschl's attorney fees."

"Statements made to try to settle potential litigation (i.e., a dispute that has not yet ripened into an actual lawsuit) may, depending on context, be protected by the anti-SLAPP law. However, such statements are not automatically protected just because the context might be called 'settlement negotiations.'" Instead, protection of pre-litigation statements "only arises at the point in time when litigation is no longer a mere possibility, but has instead ripened into a proposed proceeding that is actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving the dispute." That was not the case here, because "the fundamental allegation is that the statements were made as part of a negotiation –the negotiation over the severance payment and release – that could have been resolved without a lawsuit before litigation was ripe, or even threatened." "[W]ithout without a demand letter or other evidence of potential litigation that has ripened into a proposed proceeding, release negotiations will lead to litigation only if negotiations fail, and future litigation is merely

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theoretical rather than anticipated and the conduct is therefore not protected prelitigation activity."

Key point: the nanny denied that she had ever told the employer or the intermediary that she believed her termination was wrongful or that she intended to sue. The defense had a contrary declaration, but at this stage the court looks only to the plaintiff's evidence.

Acts that precede suit are not necessarily the basis of the claims

Durkin v. City and County of San Francisco (2023 1st Dist. Div. 3) 90 Cal.App.5th 643

Property owner filed a petition for writ of mandate against various city planning agencies and a complaining neighbor (Kaufman) after a final mitigated negative declaration for renovations was disapproved. Kaufman filed an anti-SLAPP motion arguing that the petition arose from protected petitioning activity. The trial court agreed and granted the motion.

The Court of Appeal reversed. "[T]he the trial court erred in finding the mandamus petition arose from Kaufman's protected conduct, as the activities that form the basis for the petition's causes of action are all acts or omissions of the Board. That Kaufman's administrative appeal preceded or even triggered the events leading to the petition's causes of action against the Board did not mean that the petition arose from Kaufman's protected conduct within the contemplation of the anti-SLAPP law."

"[T]he petition discloses no specific factual allegations that Kaufman was at least partially responsible for the challenged practices of the Board that gave rise to this litigation. ... Instead, the petition's sole allegation regarding Kaufman is that he filed the underlying administrative appeal."

Extortion can be difficult to prove, and LITIGATION PRIVILEGE protects attempts to settle

Geragos v. Abelyan (2023 2d Dist. Div. 8) 2023 WL 2258094, 88 Cal.App.5th 1005

Client sued for recovery of fees claiming former counsel did not perform legal services. Former counsel counter-claimed against client and new counsel for extortion, etc., by threatening to file disciplinary charges against former counsel unless former counsel agreed to immediately pay a disputed bill. Client and new counsel filed an anti-SLAPP motion. The trial court granted the motion and the Court of Appeal affirmed.

Former counsel argued that prong 1 was not satisfied, on the ground that the case did not involve protected speech because it involved extortion, citing *Flatley v. Mauro* (2006) 39 Cal.4th 299.) The trial court found former counsel's evidence "'not sufficient to meet the high burden of producing conclusive evidence of illegal activity, and thus [the] narrow exception [per *Flatley*] does not apply.'"

The Court of Appeal agreed. "We note two very important distinctions the Supreme Court discussed in *Flatley*. First, it 'note[d] that, in the proceedings below, Mauro did not deny that he sent the letter nor did he contest the version of the telephone calls set forth in [the] declarations in opposition to the motion to strike.' This is why the Court viewed the evidence as uncontroverted as a matter of law." In *Geragos*, the evidence was contested. "Second, the Court emphasized that its conclusion that Mauro's communications constituted criminal extortion as a matter of law was 'based on the specific and extreme circumstances of this case.'" Here, in contrast: "Misappropriation of client funds is the gravamen of the civil action against the Geragos Parties. If a threat to report such conduct to the State Bar was made, it had a reasonable connection to the underlying dispute and therefore is not comparable to the "extreme" conduct found unprotected by *Flatley*."

As to the second prong, the trial court found *Malin v. Singer* (2013) 217 Cal.App.4th 1283 dispositive and that the "Civil Code section 47 litigation privilege applies as a matter of law." The Court of Appeal agreed. "The communication thus meets the criteria stated in *Malin* and in *Flickinger* – it bears a connection or logical relation to ongoing litigation initiated by Abelyan via his civil complaint and his counsel Tiomkin's efforts to settle and avoid further litigation."

LITIGATION PRIVILEGE does not protect social media posts from defamation claims

Billauer v. Escobar-Eck (2023 4th Dist. Div. 1) 88 Cal.App.5th 953

A neighborhood activist and a lobbyist on opposite sides of a development project couldn't stop spatting on social media. They sued each other for defamation. Activist Billauer brought an anti-SLAPP motion. The trial court denied the motion, finding "that Billauer's alleged posts were protected speech under the anti-SLAPP statute, but Escobar-Eck had shown a probability of success on the merits for her libel per se claim."

The Court of Appeal affirmed. Billauer argued that his posts were absolutely privileged under the litigation privilege, Civil Code section 47, subdivision (b), "potentially in anticipation of potential litigation." The Court of Appeal rejected this argument, in part because the posts were accessible to the public, and

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"communications to nonparticipants or to persons with no substantial interest in or connection to the proceeding are not privileged." Thus, the court was "unwilling to extend the litigation privilege to cover social media posts like the ones at issue."

The Court of Appeal found that the statements in the post were actionable statements of fact, not just opinion. One post accused her "of engaging in past wrongdoing and implies that she acts unethically." Another stated "that she had published 'a storm of libelous and slanderous tweets.'" A third asserted that she was "a clueless, duplicitous person who lobbies to eliminate potential housing while lying to the community." All passed the low bar for "likelihood of success" necessary to defeat an anti-SLAPP motion. And there was evidence of malice: Billauer had threatened: "'I'm going to make sure you get sent back to where you came from.' Such a message reeks of vengeance."

No SLAPP protection if claim based on waste of assets, not pursuing baseless litigation

Starr v. Ashbrook (2023 4th Dist. Div. 3) 87 Cal.App.5th 999

Starr brought a probate petition challenging the actions of Ashbrook, the trustee of the revocable trust of Starr's father. The surcharge cause of action of the petition alleged that Ashbrook had wasted and misused trust assets by pursuing a meritless petition for instructions and using trust assets to fund litigation against Starr and his brother. Ashbrook filed an anti-SLAPP motion, which the trial court denied. The Court of Appeal affirmed. "The core issue presented by this appeal is whether the surcharge cause of action arose out of allegations of waste and misuse of trust assets, which are not activities protected under section 425.16(b)(1), or from allegations of pursuing and funding litigation, which are constitutionally protected activities. We conclude, as did the trial court, the surcharge cause of action arose from the alleged waste and misuse of trust assets; that is, the alleged waste and misuse of trust assets was the injury-producing activity allegedly giving rise to Ashbrook's liability for breach of trust." It wasn't Ashbrook's petition or litigation that were the basis of the surcharge cause of action. The claims "did not arise out of protected activity but were based on allegations that Ashbrook, as trustee, spent trust money in a manner that did not benefit the trust and wasted trust assets without authority to do so." "The core injury-producing conduct asserted by Jonathan in the surcharge cause of action is the waste and misuse of trust assets. Jonathan does not allege that either the Petition for Instructions or the elder abuse lawsuit in itself produced the injury or gave rise to liability. The injury allegedly suffered is the loss of trust assets and the reduction of the trust corpus, and that injury was produced by the waste and misuse of those assets by Ashbrook, whom Jonathan alleged was never supposed to serve as trustee."

PMQ TESTIMONY

Anything learned by PMQ Witnesses in preparation for depositions is inadmissible hearsay

Ramirez v. Avon Products, Inc. (2023 2d Dist. Div. 8) 87 Cal.App.5th 939

Ramirez v. Avon Products, Inc. holds that much PMQ testimony – anything learned by the investigation that PMQ witnesses are supposed to undertake in preparation for their depositions, as opposed to within their personal knowledge – will be inadmissible hearsay. Just because your PMQ studied up on corporate history for the deposition does not mean that anything they say is necessarily admissible in evidence.

Defendant Avon won summary judgment relying on the declaration from a PMQ that "Avon never included or used asbestos as an ingredient or component of its cosmetics products. Since the [early 1970's,] Avon has required its talc suppliers provide only asbestos-free talc." The PMQ had personal knowledge only as of the time she began work at the company in 1994, but had done "investigation" in preparation for her PMQ deposition in this case. The trial court held that was good enough, and overruled plaintiffs' objections to the declaration.

The Court of Appeal REVERSED. "The Ramirezes contend there are only two types of witnesses, lay or expert, and [PMQ] Gallo was not designated as an expert. She was therefore limited to testimony reflecting her personal knowledge and could not testify to hearsay. We agree. [¶] The Evidence Code recognizes only two types of witnesses: lay witnesses and expert witnesses," and only experts can provide an opinion based on hearsay. "There is no special category of 'corporate representative' witness." "Even trained and sworn police officers who are authorized by the State of California to investigate crimes are not exempt from the requirements of the Evidence Code when testifying at trial in a non-expert capacity. Gallo was simply a lay witness, and as such she was limited to matters as to which she had personal knowledge. [¶] The Evidence Code also does not recognize a special category of 'person previously designated as most knowledgeable' witness."

The decision distinguished admissibility from discovery. "[T]he purpose of discovery is to permit a party to learn what information the opposing party possesses on the subject matter of the lawsuit, and the scope of discovery is not limited to admissible evidence. [Citation omitted.] Thus, the mere fact that a person is asked about a matter at a deposition and provides information in response does not make that testimony admissible at trial."

"Given the time frame involved, Gallo is most likely 'channeling' information from people who not only lacked personal knowledge themselves, but acquired their information from people who

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also lacked personal knowledge. This oral passing of information raises exactly the reliability concerns which animate the personal knowledge requirement, not to mention the rule against hearsay. The trial court had no way of evaluating the reliability of the information Gallo received. Further, Gallo's repetition of that information was not reliable simply because she was repeating it as a corporate representative rather than on her own behalf. She is still a natural person, subject to the foibles of her own memory and understanding. Thus, the trial court abused its discretion in overruling the Ramirezes' objections to Gallo's statements in her declaration."

The Court of Appeal held not only that the PMQ's declaration testimony was inadmissible, but that she could not authenticate the various documents culled from corporate files. Avon apparently did not lay the groundwork for a business records exception to hearsay.

SUMMARY OF SELECTED NEVADA SUPREME COURT 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.

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CIVIL PROCEDURE

Forum Non Conveniens

Chantel Pepper v. C.R. England, 139 Nev. Adv. Op. 11 (May 4, 2023)

In *Pepper*, the Nevada Supreme Court took the opportunity to clarify an unresolved forum non conveniens issue and held that for purposes of a forum non conveniens analysis a court must consider a sister-state-resident plaintiff "foreign," and thus, her choice of a Nevada forum is entitled to less deference unless she can show her case has bona fide connections to the State of Nevada.

The direct issue on appeal in *Pepper* was whether the Eighth Judicial District Court abused its discretion by dismissing a complaint for forum non conveniens when the motion to dismiss did not include a supporting affidavit that Texas was the more appropriate forum. Under Nevada law, a motion to dismiss for forum non conveniens must be supported by affidavits. See *Mountain View Recreation v. Imperial Commercial Cooking Equipment Co.*, 129 Nev. 413, 420, 305 P.3d 881, 885 (2013). Because the defendants did not provide supporting affidavits, the Nevada Supreme Court held that the district court abused its discretion in dismissing the complaint and reversed and remanded.

Peremptory Challenges

Peggy Whipple Reggio v. The Eighth Judicial District Court, 139 Nev. Adv. Op. 4 (Mar 9, 2023)

In *Whipple*, the Nevada Supreme Court considered an original petition for a writ of mandamus or prohibition challenging an Eighth Judicial District Court order striking a peremptory challenge of a judge. In two underlying district court actions that were eventually consolidated, the Whipple family members were engaged in litigation over a family-owned-and-operated cattle farm.

In the first action, the parties did not file a peremptory challenge of the judge, and because the judge ruled on contested matters, the parties waived their right to make a peremptory challenge under Nevada Supreme Court Rule 48.1(5). In *Whipple*, the parties contested the effect of the waiver and whether it extended to the second Whipple family case that was eventually consolidated into the first.

In the second Whipple family case, the peremptory challenge was not raised until the case was consolidated with the first. The parties raising the peremptory challenge argued that even though the cases were consolidated the first case waiver had no bearing on their rights to raise a peremptory challenge under the second

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case because the cases, although consolidated, retained their "separate character." The district court disagreed, and the Nevada Supreme Court affirmed, that when a case is consolidated, the cases consolidated within it become part of that first case and the peremptory challenge waiver extends to all consolidated cases within the first. Therefore, the parties raising the peremptory challenge in the second Whipple family case waived their right to a peremptory challenge. The waiver "applies to other parties on the same side of the case."

WORKERS' COMPENSATION

Effect of Denial or Acceptance of Coverage Letter

Brett Gilman v. Clark County School District,
139 Nev. Adv. Op. 7 (Mar 16, 2023)

In *Gilman*, appellant Brett Gilman sustained injuries to his neck and back while attempting to divert a student altercation. He reported that the "Student was fleeing Administration, [r]unning at breakneck speed. I stopped the student, by the straps of the backpack. They threw a trash can between us to avoid capture, causing me to slip [and] fall."

Gilman filed for workers' compensation from Clark County School District's industrial insurer, Sierra Nevada Administrators, and was advised that Sierra would accept the claim for Gilman's "Cervical Strain (Only) [and] Thoracic Sprain (Only)." While Gilman also had pain related to his lumbar spine, Sierra did not mention the lumbar spine in its claim acceptance letter, nor did it issue a written denial of coverage of his lumbar spine. Gilman did not appeal and his claim for cervical strain and thoracic sprain was eventually closed. Almost immediately after claim closure, Gilman began to experience more pain in his lumbar spine for which he sought treatment. He requested Sierra reopen the claim for injuries related to his lumbar spine, but Sierra denied Gilman's request because "the lumbar spine was not a body part covered by the initial acceptance of his claim." Gilman also obtained medical recommendation that his case be reopened for diagnostic workup and referral to a spinal orthopedic surgeon.

Gilman appealed Sierra's denial to reopen the claim, but the hearing officer affirmed Sierra's denial on the basis that the claim had closed and that Sierra had accepted the claim for Gilman's thoracic sprain and cervical strain *only*.

The Nevada Supreme Court found that the hearing officer and appeals officer misapplied NRS 616C.065(7) – Duty of Insurer to Accept or Deny Claim – when finding that the acceptance letter implicitly excluded Gilman's lumbar spine. NRS 616C.065(7) requires an acceptance or denial to be *in writing:* "the plain language of these subsections of the statute unambiguously places the responsibility on Sierra to either accept or deny coverage of a specific body part or condition in writing when determining coverage for an industrial claim." Based on this, the hearing officer and appeals officer also erred in denying Gilman the opportunity to reopen his industrial claim for treatment of his lumbar spine. If Sierra had intended to deny coverage of Gilman's lumbar spine, it should have done so explicitly in writing.

Patrick Deedon Maire & Deedon

It is never too early to reserve your calendar for the 64th Annual Meeting to be held at the Westin St. Francis on Union Square in San Francisco on December 7-8, 2023. This is a Do Not Miss Event.

Michelangelo is credited with saying, "The greater danger for most of us lies not in setting our aim too high and falling short; but in setting our aim too low, and achieving our mark." Therefore, this year's Annual Meeting theme – "Exceeding Excellence" – is meant to encourage our members to reach high and excel in the practice of law. Such excellence naturally requires legal competence, but also passion and balance. The Annual Meeting will provide educational and motivational sessions to assist our membership in "Exceeding Excellence" in their legal careers. This will also be an excellent opportunity to obtain those specialty credits the State Bar requires and connect with friends and colleagues.

We will be following the scheduling format established at last year's annual meeting. The meeting will start off Thursday morning, December 7th, with the beloved and invaluable Year in Review and the session on State of the Courts. The luncheon will be from noon to 2 pm, featuring our keynote speaker and catered lunch. The Thursday afternoon sessions will be from 2 pm to 5:30 pm. The afternoon sessions are multi-tracked to allow attendees to choose the topics they are most interested in. Topics include: Trial Strategy and Pitfalls, Ethics, Technology-AI, Discovery/ Evidentiary Issues, Diversity, Appellate Practice, Traumatic Brain Injury, and more.

Following the Thursday afternoon sessions will be the President's Reception from 5:30 pm to 7:30 pm. Come hungry, come thirsty, and come prepared to catch up with your friends and colleagues. Also remember to check out that ice sculpture and participate in the Trivia Adventure.

Friday December 8th will begin with Mike Belote's "Breakfast with Mike." Learn all about new relevant legislative updates that impact the substantive practice of law in California. The Annual Meeting will end at noon so you can get a jumpstart on the weekend and take time to enjoy San Francisco. However, before leaving for the day, you will have the opportunity to attend "Leading an Intentional Life" – a transformative motivational session to guide you in setting goals that align with your personal mission and help you exceed excellence in your legal career.

We hope to see you there!

Jan Roughan
BSN, RN, PHN, CRRN/ABSNC, CNLCP®, CCM

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- Mini / Cost Projections (Mediation/Settlement Conference)
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LIFE CARE PLANNING

In Memoriam
John Robert Ball
March 17, 1942 – February 10, 2023

Sacramento, California - John R. Ball passed away on February 10, 2023, after battling an illness. John was born on Saint Patrick's Day, March 17, 1942, and he was always ready for a party. He was preceded in death by his parents, John H. Ball and Rubye Ball and his brother Ronnie Ball. He is survived by his wife, Nancy; children, Stacey Ball, Amy Heiser and Amy Busch and sister, Susie Slappey. He also leaves behind his beloved grandchildren, Meghan, Dylan, Madilyne, Cassidy, Max, and Tyler.

John graduated from UOP in 1964 and from Hastings College of Law in 1967, where he made many lifelong friends. John was a proud member of Delta Upsilon during his time at UOP.

John practiced law in Sacramento for forty years with his partners at Duncan, Ball, Evans and Ubaldi. John was honored to be a member of ABOTA.

Golf was a great passion for John, and he played on the golf teams at Downey High School and UOP. Later, John belonged to Valley Hi Country Club, Granite Golf Club and Del Paso Country Club.

AROUND THE ADC

Judicial Reception | Law & Motion Seminar
State of the Sacramento County Superior Court

Many thanks to Judge Christopher E. Krueger (Sacramento County), Judge Barbara A. Kronlund (San Joaquin County), and Judge Trisha J. Hirashima (Placer County) for educating ADC attendees about best practices in their courtrooms. Judge Krueger also reported on the state of the Sacramento Superior Court, including the progress of the new courthouse which is being built. This excellent presentation was both educational and entertaining, and much appreciated by the ADC.

After the educational seminar, attendees enjoyed a judicial reception which included attorneys, judges, and retired judges inside the beautiful Sutter Club in Sacramento. This event is one of the ADC's most successful and well attended educational seminars, which many members look forward to attending each year.

Hon. Trisha J. Hirashima (Placer County) and Hon. Ronald Northup (San Joaquin County).

Hon. Emily Vasquez (ret.) and Hon. David De Alba (ret.), both from Sacramento County.

Justice Elena J. Duarte and Justice Shama Hakim Mesiwala (3rd District Court of Appeals).

Panelists Christopher E. Krueger (Sacramento County), Judge Barbara A. Kronlund (San Joaquin County), and Judge Trisha J. Hirashima (Placer County).

TECHNOLOGY CORNER

AI and the Future of Legal Research

Jonathan Varnica Vogl Meredith Burke & Streza

Ever felt like legal writing is fundamentally robotic? Legal briefs tend to follow the same pattern, and for good reason. In law school, students are taught the IRAC acronym for Issue, Rule, Application, and Conclusion. Then law students are rewarded for following the IRAC system when they are trained how to write legal briefs. It is no surprise then as lawyers we generally apply the same formula to our briefs, which of course leads to formulaic writing. And since we all follow the same writing formula, the question all lawyers seem to be asking themselves and each other these days is if my legal writing seems robotic, can it be done by a robot? Right now, the answer appears to be almost.

Get two or more lawyers together in 2023 and the topic of artificial intelligence invariably comes up. In November 2022, a chatbot driven by artificial intelligence named ChatGPT was released into the world. Another program was recently released by Microsoft called Bing Chat. Chatbots are nothing new. Computer programs designed to simulate conversation with human users have been around since the 1950s. Companies have used chatbots for customer service for years. You have probably felt the frustration of chatting with a bot when you want to request a refund or register a customer service complaint.

But today artificial intelligence and chatbots can do far more than answer questions. GPT-3 was released in 2020. It was one of the largest language models ever created, with 175 billion parameters. GPT-3 has been fed an enormous amount of data, enabling it to generate human-like text and content in a wide variety of contexts. Today, ChatGPT utilizes GPT-3.5 and GPT-4, the successors to GPT-3, and is writing songs, generating pictures, and even passing law school exams.

In January 2023, CNN reported that ChatGPT passed law exams in four courses at the University of Minnesota. The University of Minnesota law school professors graded the tests blindly. The bot completed 95 multiple choice questions and 12 essay questions. On average, the bot performed at the level of a C+ student, but still passed the courses. The results have led law professors to rethink their assignments to prevent cheating. However, it remains unclear how professors can stay one step ahead of the AI-driven bot.

And the ability of bots to perform professional-level work is not limited to the classroom. GPT-4, the latest version of ChatGPT, took all sections of the July 2022 bar exam. The bot earned a score so high that it was close to the 90th percentile of all test takers. In other words, the bot passed the bar exam by a significant margin. The bot did markedly better on the multiple choice section of the test, getting 75.7% correct where humans average 68%. GPT-4 passed all seven subjects tested on the multistate bar exam. This compared to the prior version GPT-3 passing only two sections of the test. But while the bot did pass, the results were not completely free of errors. Nevertheless, the bot did pass the bar exam with flying colors.

So if an artificial intelligence bot can pass law school exams, and pass the bar exam, are we headed to a future where lawyers are replaced by robots? Not quite yet, but ChatGPT itself was asked to describe its potential use in the legal industry. This is what it said:

1. Legal research: GPT-3 could be used to assist lawyers in legal research by quickly scanning through large amounts of text data and providing relevant information on a given topic.

2. Document generation: GPT-3 could be used to generate legal documents such as contracts and briefs, saving lawyers time and effort.

3. Providing general legal information: GPT-3 could be used to provide general legal information to the public, such as answering frequently asked questions or providing basic legal advice.

4. Legal analysis: GPT-3 could be used to assist in legal analysis by providing suggestions and insights based on its understanding of the relevant legal principles and precedent.

Continued on page 20

Researchers have asked ChatGPT to draft a complaint, draft a will, and conduct legal analysis, but the results have been met with varying degrees of success. The AI is able to present the bare bones necessities of legal drafting, presenting documents in a manner one would expect from a human lawyer. Looking back at the IRAC system, the bot can identify the issue as that is typically the prompt entered into the program. However, identifying the proper rule and its application is still problematic.

As an example, an opposing counsel recently told me an anecdote about using an AI bot to conduct legal research that did not go very well. We were exchanging briefs about his client's wage loss claim. We encountered a particularly nuanced issue where his client had retired a number of years before his hand injury, but in the interim he had started a screenwriting career. His client had written a few movie scripts, but he had not sold any of the scripts prior to injuring his hand. The claim was arguably speculative, so the opposing counsel wanted to find a case to support his argument.

After we exchanged briefs, the opposing counsel told me how his client tried to help by doing a little legal research on his own. And this being 2023, the client decided to search for an applicable case to support his claim using an artificial intelligence chatbot. The client input the necessary prompt asking the bot provide analysis and legal support for the wage loss claim to go before the jury. As it turned out, the bot found the perfect case with a proper Blue Book appellate citation. And by perfect, the case was absolutely perfect. It had everything. Nearly identical facts to the case at hand, and a holding that was exactly what counsel needed to support the wage loss claim. The client happily sent it to his lawyer, expecting a pat on the back and a job well done.

Well, like anything that is too good to be true, so is the case here. The opposing counsel told me he was shocked when his client sent him the case. He had been searching for hours to find a helpful opinion, but had no luck finding anything remotely similar on the traditional legal research platforms. Now his client is sending him a case that was not only helpful, but exactly on point. And to boot, his client needed only a couple minutes to find the case using the chatbot. One can imagine the feelings of inadequacy as a lawyer when your client does your work for you, especially when the work was done so much faster. Counsel thought he had wasted hours researching.

Hat in hand, counsel had the case name and the citation that the bot gave his client. With disbelief, counsel input the bot's citation into Westlaw, but something was wrong. No results. Counsel entered the case name, but again, no results. Had the bot found a case so obscure that even legal research platforms could not find it? Of course not. The reason why he could not find the case is because the case did not exist. The bot made it up. There was no perfect case about a screenwriter with no income who asserted a wage loss claim after a hand injury. But the chatbot does not have an ethical responsibility to cite to real cases. The bot wanted to satisfy its user, and tapping into its vast wealth of knowledge, the bot was able to generate a legal citation and summary of a fake case that sounded so real, it momentarily tricked counsel into believing it was actual authority.

The tools are there, it just needs supervision. Ignoring the fact that the case from my anecdote was fake, the bot was able to analyze a legal issue to know how to generate a fake case. With further refinement, and perhaps a limit on what the bot can utilize as source material, it seems all but inevitable that the future of legal research will be AI-driven, and the AI will improve. Remember, the prior version of ChatGPT could not pass the bar, but the latest version did pass the 2022 exam. An AI-driven bot will likely take the 2023 exam, and will probably do even better. The bot is getting better every second it exists.

Once refined for legal research, and with proper supervision by an attorney, AI offers enormous potential to increase the speed and efficiency of conducting legal research. In all likelihood, AI-enhanced legal research will become the standard. Instead of spending hours digging through decades of authority to find the right citation, AI will have already done the digging for you. For lawyers using AI, we will need to develop a new skill of knowing where to tell the AI to dig. An efficient attorney well-versed in using AI prompts may be able to locate that perfect case in minutes instead of hours using traditional legal research platforms.

All future lawyers will need to learn how to interact with AI to stay competitive, but simultaneously maintain an ethical responsibility not to rely exclusively on AI due to its shortcomings.

Jonathan Varnica

Jonathan Varnica is a partner at Vogl Meredith Burke & Streza LLP. He has developed experience representing individuals and businesses in a wide array of civil litigation including contractual matters, construction accidents, automobile accidents, premises liability, and real estate disputes. Jonathan Varnica received his undergraduate degree from Sonoma State University before earning his Juris Doctorate degree from George Washington University, where he was a member of the Law Review.

ADC VERITAS **DEFENSE COMMENT**

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

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Do you have an article or trial success story to share with readers?

We will endeavor to publish your article or trial success story in an upcoming edition of the DEFENSE COMMENT magazine (space permitting).

Please include any digital photos or art that you would like to accompany your article or submission. All articles must be submitted in "final" form, proofed and cite checked. Trial success submissions should be short and limited to less than ten (10) sentences.

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Sixth Appellate District Affirms Denial of Award of Prejudgment Interest on an Underinsured-Motorist Arbitration Award

On April 28, 2023, in the matter of *Glassman v. Safeco Insurance Company of America ("Safeco")*, 2023 WL 3144465, the Sixth Appellate District affirmed the order of the Santa Clara Superior Court denying appellant Sherry Glassman's request for an award of prejudgment interest in an underinsured-motorist ("UIM") proceeding.

Glassman and her mother were involved in an accident when, as pedestrians, they were struck by a motor vehicle. Glassman sustained relatively minor physical injuries from the impact but witnessed her mother being struck and dragged by the vehicle. Glassman fainted at the scene, and when she recovered, learned that her mother had succumbed to her injuries. She made a claim for her own injuries and bystander emotional distress.

Glassman settled her claim for personal injuries for the liability limits of the motor-vehicle operator's insurance. She then filed a UIM claim against Safeco, which had issued her both an auto policy and umbrella policy, both of which afforded her with UIM benefits. Safeco paid the available UIM limits on its auto policy but declined to pay further UIM benefits under the umbrella policy, contending that the monies Glassman already had received adequately compensated her for her injuries from the accident (both her own physical injuries and her bystander emotional distress) by the $505,000 already received by her from insurance.

Pursuant to the terms of the policy and California law, the parties submitted the matter to UIM arbitration. A little over a year before the hearing, Glassman served upon Safeco a CCP section 998 offer for $999,999.99, one cent less than its $1,000,000 umbrella liability limit, which offer Safeco did not accept.

At the arbitration, Safeco argued, among other things, that not all of Glassman's claimed damages for emotional distress were caused by the accident, pointing to numerous other traumatic events in Glassman's life that already had caused her to under considerable mental-health treatment and to take a leave of absence from work (which she was still on at the time of the accident). Safeco also argued that recoverable damages were limited to those flowing from Glassman witnessing her mother's injury, but not from learning thereafter that her mother had died outside her presence and viewing her body.

The arbitrator acknowledged Glassman had other life stressors confirmed, but that she did not award Glassman for Glassman's observations after she fainted at the scene or of her mother's body at the hospital. Nonetheless, the arbitrator issued an arbitration award for Safeco's $1,000,000 umbrella policy limits.

Both Safeco and Glassman filed petitions to confirm the arbitration award. The court opted to rule on Glassman's petition, which also sought an award of prejudgment interest and prevailing-party costs. In her petition, Glassman sought an award of prejudgment interest pursuant to Civil Code section 3291 (authorizing prejudgment interest for unaccepted CCP section 998 offers in personal-injury actions). However, in light of the Supreme Court decision *Pilimai v. Farmers Ins. Exch. Co.* (2006) 39 Cal. 4th 133, 146, in which the high court held that section 3291 did not apply to UIM proceedings because they are not personal-injury actions but contract actions, in her motion for an award of prejudgment interest, Glassman sought interest under Civil Code section 3287 (prejudgment interest on liquidated damages). The superior court, Judge Peter H. Kirwan, presiding, denied the prejudgment-interest request, ruling that Glassman's damages were uncertain and not capable of being calculated with certainty.

Continued on page 24

On appeal the Sixth Appellate District Court affirmed the trial court's denial of prejudgment interest. On appeal, Glassman argued that, at the time the 998 offer was served, Safeco was aware that her economic losses alone exceeded the umbrella policy limits and therefore it was certain that she was entitled to recover those limits, the maximum payable under the policy. She further argued that her successful section 998 offer "liquidated her claim." The appellate court rejected both arguments, first noting:

> We reject as lacking a legal basis the claim that section 3287(a) and CCP section 998 can be read, separately or together, to provide that a successful CCP section 998 offer sufficiently liquidates a claim for damages and establishes their certainty in a UIM proceeding for purposes of mandating an award of prejudgment interest as under section 3287(a). Neither statute provides for this, nor references the other. Their respective subject matter and purposes are different. And we find no authority to support the claim, particularly to the extent the argument would displace existing law on assessing the certainty of damages for purposes of mandatory prejudgment interest under 3287(a). *Glassman v. Safeco Ins. Co. of Am.,* No. H049825, 2023 WL 3144465, at *19 (Cal. Ct. App. Apr. 28, 2023), *as modified* (May 17, 2023)

...

> ...[u]nlike section 3291, which makes prejudgment interest available to a plaintiff with a prevailing CCP section 998 offer in a personal-injury action, eligibility for prejudgment interest under section 3287(a) is not a matter of making a "simple comparison" between the judgment and the statutory offer to compromise. The test is rather whether the amount of the claimant's damages was certain, or capable being made certain. In this regard, "uncertainty over the amount of damages" should not be confused with "uncertainty as to whether there is liability for damages in an amount that is certain." (*Id*. at *17; internal citations omitted)

Then applying the "certainty" test of section 3287(a), the court held that there was a "void of evidence" in the record to establish that, at the time the section 998 offer was served, Safeco knew that Glassman's economic losses or special damages resulting from the accident – her hard costs – in fact already exceeded the umbrella-policy limits, or that this information was then reasonably available to Safeco.

As part of its ruling the Court of Appeal refused to consider additional evidence that Glassman submitted in the record below – after Judge Kirwan already had denied the request for prejudgment interest – in connection with Safeco's motion to tax costs, as well as additional evidence that was not in the trial court record at all, both of which evidence Glassman contended on appeal, established Safeco's knowledge of her special damages at the time the 998 offer was served.

Finally, the Court of Appeal rejected Glassman's alternative request (argued for the first time on appeal) that her damages became certain and liquidated no later than the date of the arbitration award, and that therefore, she should recover prejudgment interest from that later date. The court held that, by failing to address that argument at the trial level, Glassman forfeited it on appeal.

Because it affirmed the denial of prejudgment interest on other grounds, the Court Appeal left for another day consideration of Safeco's alternative arguments that (1) UIM benefits are not recoverable from an insurer under section 3287 in UIM proceedings at all because they are not "damages" caused by the insurer, but damages caused by a third party tortfeasor, and (2) to the extent prejudgment interest would be recoverable against the underinsured driver, the prejudgment interest itself is a form of "damage" subject to the policy's liability limits (which already had been awarded by the arbitrator), and thus nothing further in the form of prejudgment interest could have been awarded to Glassman under her policy.

Sherry Glassman, an attorney employed by the Supreme Court of California, represented herself in the appeal in *pro per.* Safeco was represented by John R. Brydon, George A. Otstott, and Lisa L. Pan of Demler, Armstrong, & Rowland, LLP.

AND THE DEFENSE WINS

On February 14, 2023, the Sacramento Superior Court entered summary judgment in favor of LeVangie Law Group client Cordova Recreation and Park District on the grounds that plaintiff's causes of action were barred by both the Trivial Defect Doctrine and Recreational Use Immunity as codified in Government Code Sec. 831.4.

The Cordova Recreation and Park District were represented by DRI members Antwane Mace and Jeffery Long of The LeVangie Law Group, LLP in Sacramento, CA.

THE DEFENSE WINS AGAIN

On March 10, 2023, after a 5-day bench trial, Judge Jill Talley of the Sacramento Superior Court ruled in favor of LeVangie Law Group client Target Excellence (a local non-profit business) on all causes of action. Plaintiff was a former Executive Director who brought an action for Breach of Employment Contract and Retaliation, and claimed in excess of $1.2 million for unpaid wages, retirement, and benefits. The Court issued a defense verdict as to each claim and item of damages.

Target Excellence was represented at trial by Shawn C. Loorz of the LeVangie Law Group.

Continued on page 25

Patricia Hidalgo v. Correctional Officer J. Contreras, et al.
Superior Court of California, County of Fresno
Case No. 20CECG02561

By Penn Caine of Weakley & Arendt

On December 31, 2018, Matthew Gonzales was booked into the Fresno County Jail on murder charges. While in custody, Gonzales was housed in various cells, and his last cell transfer was on May 16, 2019. At that time, he was transferred to a cell that he shared with a cellmate. Gonzales frequently communicated with his mother and an ex-girlfriend, who was the mother of his two young daughters. Gonzales, a pre-trial detainee, was found dead in his cell on September 8, 2019, and his death was determined to be a suicide.

After Gonzales's death, his mother and ex-girlfriend received letters that he had written to them that made them believe Gonzales was contemplating suicide. The letters were inspected for contraband and they were reviewed (albeit, not word-for-word) by a correctional officer prior to their mailing.

Gonzales's estate brought a survival action and a wrongful death action against two correctional officers (Officers Yepes and Contreras), alleging that they knew or should have known that Gonzales needed mental health services and acted negligently by failing to summon a health care provider. Specifically, Plaintiffs alleged that (1) in response to a request for a chaplain visit to "receive absolution for his sins before he died," Gonzales was reassigned to a single person cell, allowing his mental health to worsen, and (2) the correctional officer who searched Gonzales's mail for contraband should have thoroughly read the letters and understood that Gonzales was suicidal.

A motion for summary judgment was filed on behalf of the correctional officers on the following grounds: (1) Officer Yepes and Officer Contreras did not know, and did not have any reason to know, of Gonzales's alleged suicidal expressions, (2) Officer Contreras was not aware of Gonzales's alleged request to see a religious advisor, (3) Officer Contreras never assigned or reassigned Gonzales to any cell, including any single person cell, (4) Officer Yepes did not have any duty to read Gonzales's mail; and (5) Officer Yepes did not have knowledge of the full contents of Gonzales's mail.

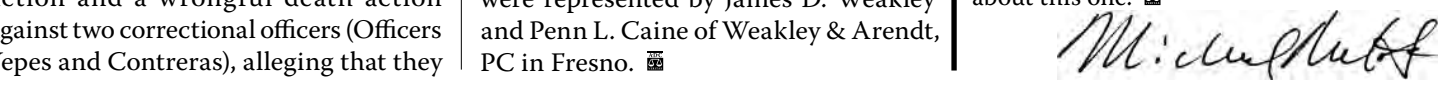
The motion for summary judgment was granted. Defendant correctional officers were represented by James D. Weakley and Penn L. Caine of Weakley & Arendt, PC in Fresno.

by a party, by all parties that have appeared in the action.

The bill is thus similar in concept to the exchange provisions in Rule 26 of the Federal Rule of Civil Procedure, but without all of the other case management provisions of federal practice. Exactly what types of information must be exchanged is articulated in the balance of Section 2016.090, with modifications from current law. The disclosure expressly excludes persons who are expert trial witnesses, or consultants who may later be designated as trial experts.

The changes to CCP Section 2016.090 are effective on January 1, 2024, but are scheduled to "sunset," meaning expire by their own terms unless extended, on January 1, 2027. Interestingly, Senator Umberg's service in the Senate also "sunsets" due to term limits in 2026, so he will have an opportunity to evaluate the impact of SB 235 before he leaves office.

Should SB 235 be signed by the Governor by the end of this year's signing period on October 14, it will be incumbent on all civil practitioners to understand the legal and strategic ramifications of the bill prior to the new year. Expect to hear a lot more about this one.



Defense Verdicts

Patrick Deedon and
John Powell
Maire & Deedon

Mr. Deedon and Mr. Powell were successful in obtaining a unanimous defense verdict as to allegations of defamation, negligent infliction of emotional distress, and battery over the course of a five-week jury trial in Shasta County. Plaintiff requested over $4M in damages.

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Years w/Firm:_____ Years Practicing Civil Defense Litigation: _____ Gender: _____

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WELCOME NEW MEMBERS

Since March 2023, 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.

REX DARRELL BERRY
Signature Resolution
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2023

Calendar of Events

Save the Dates!

August 25-26, 2023	**Summer Session**	Resort at Squaw Creek
September, 2023	**30th Annual Golf Tournament**	The Presidio Golf Course in San Francisco
September/October, 2023	**SEMINAR: Basic Training Series**	Via Zoom
December 7-8, 2023	**64th ADCNCN Annual Meeting**	TBD

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