A·D·C VERITAS

DEFENSE COMMENT

Volume 38 #3
Winter, 2023

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

Association of Defense Counsel of Northern California and Nevada

64TH Annual Meeting

DECEMBER 7-8, 2023

WESTIN ST. FRANCIS HOTEL, SAN FRANCISCO, CA

EXCEEDING EXCELLENCE

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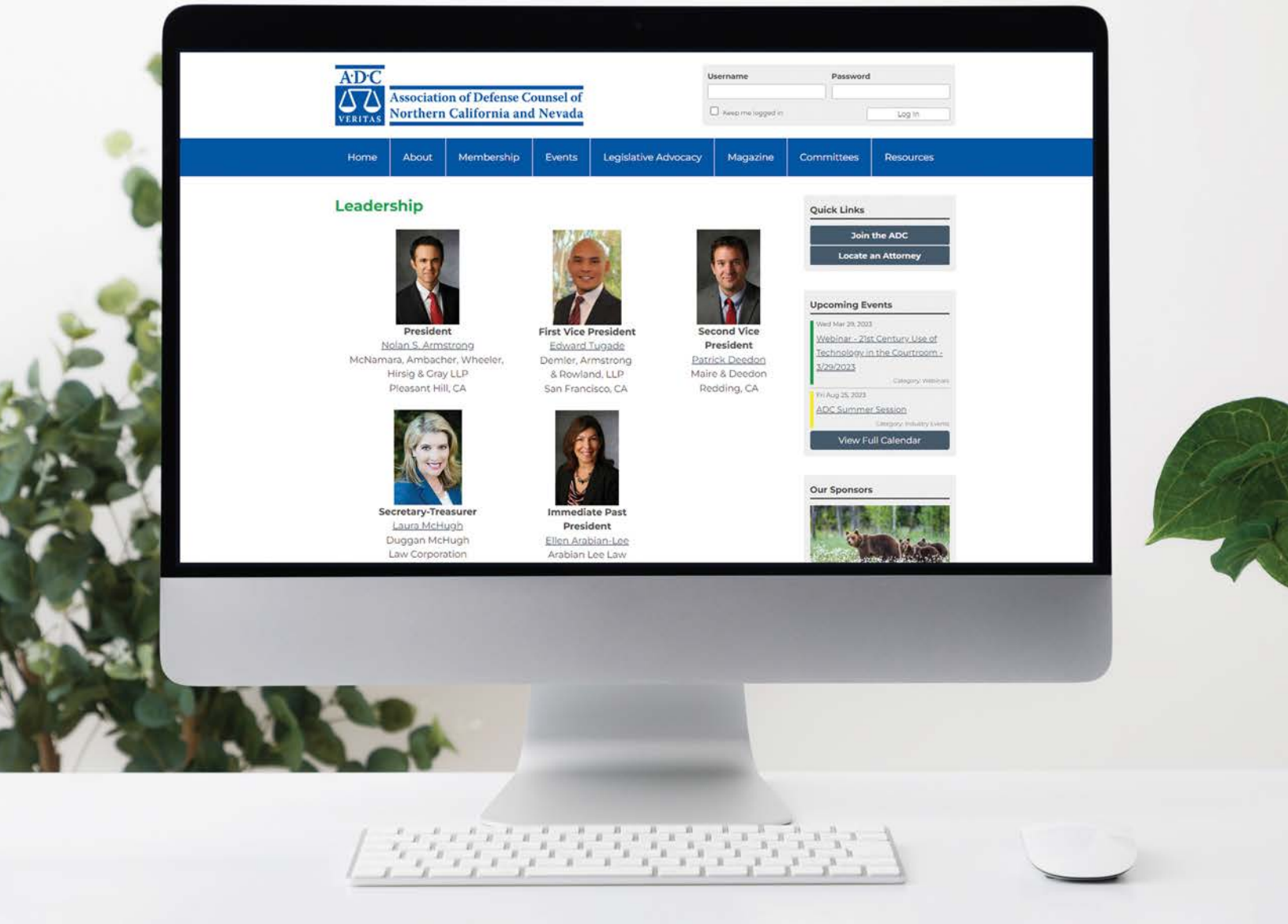

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A·D·C VERITAS DEFENSE COMMENT

FEATURES

DEPARTMENTS

DEFENSE COMMENT would be pleased to consider publishing articles from ADC members and friends. Please send all manuscripts and/or suggestions for article topics to:

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PRESIDENT'S MESSAGE

NOLAN S. ARMSTRONG
2023 President

See you at the St. Francis!

It's hard to believe, but 2023 is already coming to an end. What a year it's been for the ADC! Thank you to all of our members who have contributed to the organization's success this year. It truly has been a group effort. Special thanks to the ADC Board of Directors, who continue to work tirelessly on behalf of the organization including through planning of our in-person events at the Sutter Club in Sacramento in April, Summer Session in Lake Tahoe in August, and golf tournament at the Presidio Golf Course in San Francisco in September. We also continue to build on the successful education webinars offered to our members. Board members Sean Moriarty and Lisa Costello deserve special recognition for the webinars. The success of all ADC events would not be possible without the assistance provided by our Executive Director Jennifer Blevins and her team at CAMS. We are also grateful for our dedicated sponsors. Their support and attendance at ADC events is vital to our success.

We are so excited for the 64th Annual Meeting in December at the St. Francis in San Francisco. If you have not registered, please do so as soon as possible. Patrick Deedon, ADC's 2nd Vice President, has secured great speakers and developed a cutting-edge program which will be of value to all of our members. The changes to ordering of events implemented during the 2022 Annual Meeting were well received by our members and will be in place again this year. Keeping with tradition, though, we'll have the Thursday night cocktail party, "Mike Brady Year in Review," and Mike Belote's Annual Legislative Updates. We think you'll agree that the 2023 Annual Meeting again provides the best education programming around for defense attorneys.

We have achieved my goals as your 2023 ADC President. Membership remains strong, with younger attorneys becoming increasing involved in the ADC. Our educational events continue to focus on training the next generation of defense trial attorneys. And we've done all of this while having fun and reconnecting through our in-person events. It has been a pleasure and honor serving as the 2023 ADC President. The ADC will be in good hands next year with incoming President Ed Tugade.

Nolan S. Armstrong,
2023 ADC President

CALIFORNIA DEFENSE COUNSEL REPORT

MICHAEL D. BELOTE
California Advocates, Inc.

A Bill Factory

A nationally-recognized but now largely forgotten former state senator from Los Angeles (major bonus points for any Jeopardy-level trivia buff who guessed Tom Hayden, once married to Jane Fonda and eulogized by no less than Kurt Vonnegut) once described the California Capitol as a "bill factory." While Senator Hayden's political views tended to the extreme, he wasn't wrong about the prodigious output of the California legislature. For 2023, the first year of the current 2023-2024 legislative session, over 2700 hundred separate pieces of legislation were introduced, with nearly 900 enacted and signed into law.

Moving from the general to the specific, of those 2700 bills, 175 were identified by the California Defense Counsel as relevant to defense practice. Of those, 68 were signed into law, with an additional 15 vetoed by Governor Newsom. All ADC members are encouraged, or even urged, to review the list of active legislation through the ADC website, as virtually every possible area of practice is represented by one or more proposals. If your specialty is employment, for example, this year brought the usual bounty of new or different requirements on employers; perhaps the most universal is SB 616, expanding paid sick leave from three days to five, and changing rules for accrual and use. The level of detail involved in the changes is daunting, and the bill takes effect in mere weeks on January 1.

2023 also has been a very significant year in the legislature for bills affecting civil procedure more generally. Among these bills, practitioners should be aware of the following:

- **SB 235 (*Umberg*): Discovery.** This bill imports a sort of FRCP Rule 26-type of early disclosure into California Code of Civil Procedure Section 2016.090. Since we last reported on the bill over the summer, the bill was amended from "automatic unless stipulated otherwise" into invocable by any party, but still eligible for stipulations. SB 235 arguably represents the most significant change in California civil procedure in many years, and like SB 616, the provisions go into effect on January 1, less than two months away. Nearly 200 ADC members and guests participated in a two-hour webinar on the subject a few weeks ago, and the legal and strategic questions raised are quite granular and very significant. CDC was very involved in negotiations over the bill, which will be in effect from January 1, 2024 until January 1, 2027, unless extended by the legislature. The webinar is available for viewing through the ADC store, and no member will want to be surprised by a party invoking the early disclosure provisions for cases filed right after the first of the year.

- **SB 133 (*Budget Committee*): Remote Appearances.** This bill extends the remote appearance provisions in civil cases contained in Code of Civil Procedure Section 367.75, which were scheduled to expire, or "sunset" on July 1 of this year. Enacted in a budget trailer bill which took effect immediately on June 30, the bill extends the law until January 1, 2026. The whole issue of remote appearances in civil cases, and perhaps even more so in criminal cases, is tangentially related to the court reporter availability problem, and is therefore politically quite controversial in Sacramento. Significantly, the bill retains the principle that parties have a right to appear in-person at their election.

- **SB 71 (Umberg): Case Thresholds.** Effective also on January 1, SB 71 increases the limit on small claims jurisdiction from $10,000 to $12,500, and on limited jurisdiction civil cases from $25,000 to $35,000. The bill made no changes to discovery provisions in limited civil cases. Even as minor as the

Continued on page 25

Association of Defense Counsel of Northern California and Nevada

64TH Annual Meeting

DECEMBER 7-
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CELLEN

"Exceeding Excellence" 64TH Annual Meeting December 7-8, 2023

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!

Click Here to Register Online

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Association of Defense Counsel of Northern California and Nevada

64TH Annual Meeting

EXCEEDING EXCELLENCE

THURSDAY, DECEMBER 7, 2023

8:30 am – 8:45 am	**Welcome and Annual Business Meeting**		
8:45 am – 9:45 am	**Plenary Speaker:** Jan McInnis "Finding the Funny – DIffusing Conflict"		
9:45 am – 10:30 am **1ST A.M. SESSION**	**State of the Courts** by Bay Area Judges		
10:30 am – 10:45 am	**Break** – Colonial and Italian Rooms		
10:45 am – 12:00 pm **2ND A.M. SESSION**	**The 2023 "Mike Brady Year in Review"**		
12:00 pm – 1:45 pm	**Luncheon – Keynote Speaker:** Former California Chief Justice, Tani Cantil-Sakauye		
2:00 pm – 3:00 pm **1ST P.M. SESSION**	**The Puzzle of Shifting Liability – A Case Study**	**DEI Policies in Employment**	**Motorcycle Litigation**
3:00 pm – 3:15 pm	**Break** – Colonial and Italian Rooms		
3:15 pm – 4:15 pm **2ND P.M. SESSION**	**Reporting Obligations: Navigating New Rule 8.3**	**IT Security and Breach**	**AI Technology**
4:15 pm – 4:30 pm	**Break and Vendor Prizes** – Colonial and Italian Rooms		
4:30 pm – 5:30 pm **3RD P.M. SESSION**	**Appellate Preservation in Trial – Rules & Realities**	**Traumatic Brain Injury (TBI): What the Science Says in 2023**	**The Resilient Mind: Navigating Workplace Pressures to Avoid Burnout and Cultivate Resilience**
5:30 pm – 7:30 pm	**President's Reception**		

FRIDAY, DECEMBER 8, 2023

8:30 am – 9:15 am	**"Breakfast with Mike" Legislative Update with Mike Belote**
9:15 am – 9:30 am	**Break** – Colonial and Italian Rooms
9:30 am – 10:30 am	**Inspirational Speaker:** Michael Putnam
10:30 am – 10:45 am	**Break** – Colonial and Italian Rooms
10:45 am – 12:00 pm	**Improving Courtroom Persuasion**
12:00 pm	**Adjourn**

KEYNOTE SPEAKER

Hon. Tani Cantil-Sakauye (Ret.)

Chief Justice Tani Cantil-Sakauye, former leader of California's judicial branch, now mediator and appellate consultant with ADR Services, Inc. brings her over 30 years of legal expertise across virtually all levels of judicial service to the realm of dispute resolution. She made history as California's first woman of color Chief Justice, navigating the state through the Great Recession and COVID-19. An advocate for transparency and access to justice, she revitalized civic learning and improved public engagement with the courts. Her expertise extends to remote court proceedings and effective crisis response. As a dispute resolution professional, she offers mediation, case evaluations, consultations, drawing on her background in employment, business, healthcare, and appellate disputes. Throughout her career, Chief Justice Cantil-Sakauye has remained committed to the principles of fairness, integrity, and justice. Her unwavering dedication to these values has made her a standout neutral able to resolve even the most emotionally challenging and factually complex disputes with aplomb and sensitivity.

INSPIRATIONAL SPEAKER

Michael Putnam

Michael is a husband, father of twins, mountain climber, and seeker of adventure. His pursuit of a fulfilling life and making an impact on those he encounters influences, at a high level, his professional life as well. After nearly a decade in another industry, where he helped take a business from $330k in annual revenue to nearly $3M in less than four years, Michael made the move into real estate in 2011. His commitment is to serving people, while achieving outstanding results, and he believes that each needs the other to reach their highest

Continued on page 7

levels. Michael has been a top 1% agent in his market, took his personal sales team to over 200 clients served per year, and led a national real estate team that expanded into over 160 locations. He now serves in the role of President for Keller Williams Advisors, a family of Keller Williams brokerages and affiliated businesses in Northern and Southern California, with combined sales of over $3B and revenues of over $15M per year. He also serves as the Director of Growth and Outreach for KW Clarity, a community focused on providing KW agents with the support they need while they or their loved ones navigate recovery from addiction. For the better part of a decade, Michael has been primarily focused on team building, business coaching and consulting, and the implementation of standards, processes, and programs that help to bring the best out in people so that they may lead the best businesses possible and build the lives they desire. His personal motto is "make a habit of going places not easily reached" and he strives to do this in all areas of his life while helping others do the same.

A·D·C VERITAS

Association of Defense Counsel of Northern California and Nevada

64TH Annual Meeting

DECEMBER 7-8, 2023

WESTIN ST. FRANCIS HOTEL, SAN FRANCISCO, CA

THURSDAY, DECEMBER 7, 2023

7:30 am – 7:00 pm **Registration Open**

7:30 am – 4:30 pm **Vendor Fair and Refreshments**

7:30 am – 8:30 am **Continental Breakfast with Vendors**

8:30 am – 8:45 am **Welcome and Annual Business Meeting**

Welcome to the 64TH Annual Meeting by Patrick L. Deedon, Second Vice President and Annual Meeting Chair, and Annual Business Meeting with ADC President, Nolan S. Armstrong. Please join your colleagues to conduct annual association business as well as elect the officers and board members for 2024.

PLENARY SPEAKER (MCLE – 1.0 hours General Credit)

8:45 am – 9:45 am **Finding the Funny – Diffusing Conflict**

Jan McInnis
Writer / Comedian

The rapid, continuous change we've been experiencing recently results in fear, tension, and miscommunication. What are some practical tips that can help leaders in difficult times? Jan McInnis has spoken across the country on the use of humor in organizational leadership. Attendees will learn how to diffuse tension & conflict instantly, initiate tough conversations, and facilitate communications through using humor. These practical tips, infused with plenty of Jan's humor, will have you walking away laughing and learning.

1ST A.M. SESSION (MCLE – 0.75 hours General Credit)

9:45 am – 10:30 am **State of the Courts Update**

Please join us for a State of the Courts address with judges from Contra Costa, Alameda, San Francisco and Santa Cruz.

Hon. Barry Baskin (Ret.)
Mediator and Arbitrator, JAMS

Hon. Ann-Christine Massullo
San Francisco County Superior Court

Hon. Noel Wise
Alameda County Superior Court

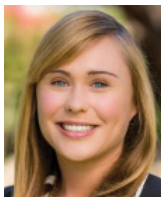
Hon. Timothy Volkmann
Santa Cruz County Superior Court

10:30 am – 10:45 am **Break**

2ND A.M. SESSION (MCLE – 1.25 hours General Credit)

10:45 am – 12:00 pm **The 2023 "Mike Brady Year in Review"**

Worried you may have missed an important new precedent? In your own practice area or another important to defense work? The ADC has you covered with the review of key legal developments. Top attorneys, Don Willenburg, Ashley Meyers and Cody Oldham will lead the presentation. Do not miss this essential program!



Ashley Meyers
Clapp Moroney Vucinich Beeman Scheley

Cody Oldham
Lewis Brisbois Bisgaard & Smith, LLP

Don Willenburg
Gordon Rees Scully Mansukhani, LLP

LUNCHEON (MCLE – 0.5 hours General Credit)

12:00 pm – 1:45 pm **Annual Luncheon with Keynote Speaker: Former Chief Justice of the Supreme Court of California**

Chief Justice Tani Cantil-Sakauye

In this keynote program, former California Supreme Court Chief Justice Tani Cantil-Sakauye will explore the distinctive characteristics of the California judiciary that set it apart from other states, highlighting the remarkable contributions of attorneys in promoting justice, tireless advocacy efforts that have paved the way for significant policy changes, and why the California legal system is often hailed as one of the nation's finest. The Chief Justice will share her perspective on what makes California's legal system stand out and how attorneys have been instrumental in making it a beacon of justice and progress. Don't miss this opportunity to learn from one of California's legal luminaries and gain a deeper understanding of the successful alchemy that has transformed California lawyers' advocacy efforts into policy gold.

Click Here to Register Online

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1ST P.M. SESSION – Track A (MCLE – 1.0 hours General Credit)

2:00 pm – 3:00 pm **The Puzzle of Shifting Liability – A Case Study**

In this session, we will walk through a case study with potential liability around every corner. We will explore the variety of ways to shift liability away from your client and transfer it to other parties or carriers, as well as how to defend against indemnity claims, and how to resolve these claims. We will consider the differences between pursuing or defending an indemnity claim related to work by a contractor, supplier or designer, including issues that arise when the contractor is also a designer. We will also consider shifting liability to other carriers, and how an OCIP policy may impact indemnity.

Yvonne Jorgensen
Van De Poel, Levy, Thomas LLP

Steven McDonald
Bledsoe, Diestel, Treppa & Crane LLP

Karl Molineux
Karl Molineux Professional Corporation

Wakako Uritani
Lorber, Greenfield & Polito, LLP

1ST P.M. SESSION – Track B (MCLE – 1.0 hours Elimination of Bias Credit)

2:00 pm – 3:00 pm **DEI Policies in Employment**

Being a cutting-edge employer requires bold implementation of new ideas and strategies, especially when it comes to hiring and retaining diverse talent. Join panelists Karen Clopton, Sarah George, and Kesha Kent to learn about DEI developments in the employment world. Panelists will discuss novel recruiting strategies, including Fair Chance hiring, robust mentorship programs and ERGs, and why the Supreme Court's recent affirmative action decision does not impact employers' continued DEI efforts.

Karen Valencia Clopton
San Francisco Human Rights Commissioner

Sarah George
Husch Blackwell

Kesha Kent
Husch Blackwell

1ST P.M. SESSION – Track C (MCLE – 1.0 hours General Credit)

2:00 pm – 3:00 pm **Motorcycle Litigation**

Edward C. Fatzinger, Jr.
Momentum Engineering

In this informative session, we will dive into the intricate world of motorcycle litigation and motorcycle accident reconstruction, shedding light on the unique dynamics involved in two-wheeled accidents. Our expert forensic engineer will discuss the legal aspects surrounding motorcycle accidents, highlighting key issues, case studies, and best practices. Moreover, we'll explore the science of accident reconstruction as it pertains to motorcycle collisions, unveiling the complexities specific to these situations. Whether you're an attorney, investigator, or just curious about the intricacies of motorcycle accidents, this session provides valuable insights into the legal and technical aspects of these cases.

3:00 pm – 3:15 pm **Break**

2ND P.M. SESSION – Track A (MCLE – 1.0 hours Ethics Credit)

3:15 pm – 4:15 pm **Reporting Obligations: Navigating New Rule 8.3**

This session provides an in-depth understanding of the recently updated reporting requirements outlined in Rule 8.3 of the California Rules of Professional Conduct. Through a combination of theoretical exploration, practical case studies, and interactive activities, you will learn: how to identify situations that create reporting obligations; how to report and when a report should be made; when a lawyer may or may not be required to report; when a lawyer may be prohibited from reporting; and other relevant rules and authorities that are critical to complying with the reporting obligations of Rule 8.3.

Erika Doherty
State Bar of California

Catherine Ongiri
State Bar of California

Bill Muñoz
Freeman Mathis & Gary, LLP

2ND P.M. SESSION – Track B (MCLE – 1.0 hours General Credit)

3:15 pm – 4:15 pm **IT Security and Breach**

A horrible lightbulb went off on March 21, 2023 – six days after a wire transfer of $500,000. "The settlement money has been stolen by internet thieves." This cautionary tale with a positive outcome will be told by the two defense attorneys whose emails with plaintiff counsel were hacked and the High Tech Crime Detective who miraculously recovered the money. It is a wild tale involving internet thieves believed to reside in Nigeria, a British Special Forces Office stationed in Yemen whose identity was stolen, Maria, the owner of a struggling beauty parlor in Arlington Texas, and two major banks.

Matthew Jaime
Matheny, Sears, Linkert & Jaime

Richard Linkert
Matheny, Sears, Linkert & Jaime

Det. Justin Varner
High-Tech Crimes Task Force, Sacramento County Sherriff's Office

2ND P.M. SESSION – Track C (MCLE – 1.0 hours General Credit)

3:15 pm – 4:15 pm **AI Technology**

Monique McNeill
Casetext

Serena Wellen
LexisNexis

Legal tech hype has oversold AI for decades, but recent advancements in artificial intelligence and machine learning are beginning to fulfill our expectations. Join Monique McNeill and Serena Wellen for a presentation that introduces the practical benefits of incorporating the most advanced AI available to lawyers in your legal practice, including legal research, document and contract review, contract analysis and redlining, eDiscovery, transaction intelligence, and more.

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4:15 pm – 4:30 pm **Break**

3RD P.M. SESSION – Track A (MCLE – 1.0 hours General Credit)

4:30 pm – 5:30 pm **Appellate Preservation in Trial Rules & Realities**

Rosanna W. Gan
Hanson Bridgett LLP

Gary A. Watt
Hanson Bridgett LLP

Join Hanson Bridgett appellate attorneys Gary A. Watt and Rosanna W. Gan for analysis of critical trial strategies regarding interim orders, statements of decision, appeals and cross-appeals. Topics to be covered include: The Demurrer Conundrum: Amend, Appeal or What?; The Collateral Order Doctrine: Know It When You See It?; Statements of Decision: Objections, Yes, No, Kind of?; Cross-Appeals: Necessary or Not?

3RD P.M. SESSION – Track B (MCLE – 1.0 hours General Credit)

4:30 pm – 5:30 pm **Traumatic Brain Injury: What the Science Says in 2023**

In this presentation, participants will gain a better understanding of the following: 1) How the presence and severity of traumatic brain injury (TBI) are determined; 2) Factors that hinder TBI recovery; 3) Factors that enhance TBI recovery; 4) Commonly used methods and techniques that claim to determine how TBI has affected a particular individual (e.g., DTI, VNG, thorough medical records review); 5) Commonly cited TBI studies and pre-studies including those from the NFL BAP. 6) The type of neuro-specialists and techniques that attorneys may need in order to prepare their case for the trier of fact.

Jeremy B. Freedman
Dinsmore & Shohl, LLP

Sean Moriarty
Cesari, Werner & Moriarty

June Yu Paltzer, PhD

3RD P.M. SESSION – Track C (MCLE – 1.0 hours Competency Credit)

4:30 pm – 5:30 pm **The Resilient Mind: Navigating Workplace Pressures to Avoid Burnout and Cultivate Resilience**

Michele M. Tugade, Ph.D.
Vassar College

In today's world, leaders in the legal profession are empowered with skills, motivation, and talents to achieve success; yet sometimes, the very goal of success and excellence can lead to perfectionism. Indeed, this is a paradox. In a success-driven culture, perfectionism and stress have become dual-barriers to mental health and well-being. Those who achieve the traditional hallmarks of success are often the most at risk for mental illness and physical health issues. The World Health Organization (WHO) recently reported that burnout is at an all-time high, particularly for those in the legal profession. Recent public health research illustrates the prevalence of mental health issues (depression, anxiety) and heightened substance use among this group.

This talk focuses on "resilience," which is the ability to bounce back from stress and effectively navigate burnout from the many pressures of our lives. Dr. Tugade will discuss science-based strategies to overcome burnout and achieve resilience. The overall aim will be to consider how legal professionals can manage personal well-being for effective leadership and success in the courtroom and in their communities.

5:30 pm – 7:30 pm **President's Reception**

FRIDAY, DECEMBER 8, 2023

7:30 am – 12:00 pm **Registration Open**

7:30 am – 12:00 pm **Vendor Fair and Refreshments**

LEGISLATIVE UPDATE (MCLE – 0.75 hours General Credit)

8:30 am – 9:15 am **Legislative Update and Continantal Breakfast**

Michael D. Belote
California Advocates, Inc.

Join us for a continental breakfast, bloody marys, and a Legislative Update. In addition to providing great education, your ADC membership gives you and your clients a voice in government. Other than the plaintiff personal injury bar, the only other attorney group that has a voice in Sacramento is the ADC. Among other things, the ADC provides input into proposed Code of Civil Procedure changes as well as jury instructions. California Defense Counsel Legislative Advocate, Mike Belote, will present an interesting review of legislation impacting defense practice in California. Mike will bring you up-to-date on what has happened over the past year and what may surprise us in the future.

9:15 am – 9:30 am **Break**

INSPIRATIONAL SPEAKER

9:30 am – 10:30 am **Take Control of Your Future – One Habit at a Time**

Michael Putman

This talk will focus on how we as people tend to overcomplicate our businesses, daily focuses, and even lives and will provide a specific, tactical approach to re-discovering our true goals and putting in place priorities that allow us to grow our businesses while simultaneously leading a more purposeful life.

10:30 am – 10:45 am **Break**

(MCLE – 1.25 hours General Credit)

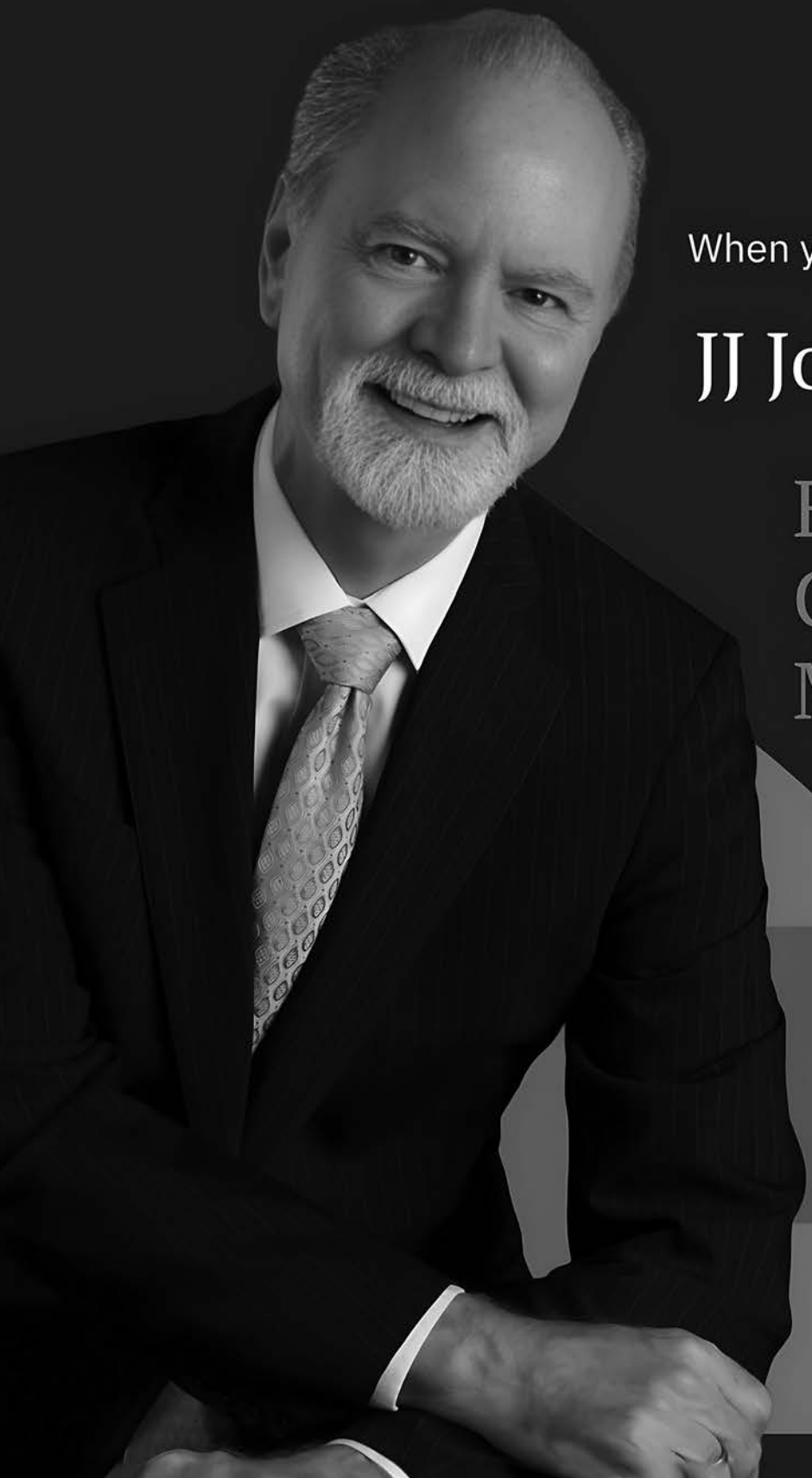
10:45 am – 12:00 pm **Improving Courtroom Persuasion**

James Brosnahan
Morrison Foerster LLP

Christopher Wood
Dreyer Babich Buccola Wood Campora, LLP

Based on nearly 200 cases tried between the two of them, Mr. Brosnahan and Mr. Wood will discuss experiences they have had over the years that could assist the audience taking into account the great collective knowledge of the members. They will also talk about some new approaches and new ideas in trying cases.

JOHNSTON
MEDIATION



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Insurrectionists, Birthers and the Disqualification Clause of the 14th Amendment

D. David Steele Demler Armstrong & Rowland, LLP

Every lawyer once studied Constitutional Law – therefore every lawyer once studied the 14th Amendment. It was ratified in 1868, following the bloody American Civil War and set forth the twin famous judicial doctrines known as the Due Process and Equal Protection clauses. Most attorneys and lay folks alike recognize its notable Supreme Court progeny: *Brown v. Board of Education* (racial discrimination), *Roe v. Wade* (privacy rights), *Bakke v. Univ of California* (affirmative action) and *Bush v. Gore* (Presidential election of 2000).[1]

After "Con Law" class in law school, though, most lawyers tend to shift focus from lofty idealistic visions of the 14th Amendment to their concrete careers. Billable hours and client development generally take a front seat.

Recently, though, the 14th Amendment has been stimulated into action above and beyond the Due Process and Equal Protection clauses. It has five sections, including the long dormant Section 3, which reads:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, **shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.** But Congress may by a vote of two-thirds of each House, remove such disability.[2]

Section 3 appears to impose an *additional* constitutional qualification to hold public office, i.e., that the person ***not*** have engaged in insurrection or rebellion, nor given aid and comfort to those who did. If correct, in practical terms, this would mean that to serve as President of the United States, a person must be: (a) a natural born citizen, (b) 35 years old, (c) a resident of the United States for 14 years[3] and (d) not be an insurrectionist.[4]

But who determines whether this new *additional* qualification is or is not met? Is it a Court? Is it Congress? Is it a Secretary of State of say, Michigan? Section 5 of the 14th Amendment states:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

As noted by Harvard Professor Emeritus, Alan Dershowitz, Section 3 applies to both *candidates* and current officeholders.[5] This means Section 3 can be used not only to take someone off the ballot, but to *remove* a person from office – a junior varsity legal mechanism for impeachment and removal, as it were.[6]

Now, the age and citizenship of a potential candidate or current officeholder is typically a concrete fact, not subject to dispute or interpretation. In contrast, the label "insurrectionist" or "rebel" is a different legal animal. It invites dispute. It requires interpretation. One man's insurrectionist can be another man's revolutionary. The British – had they prevailed in 1776 – would have likely hanged General Washington for his insurrection. But our nation's first president and his allies prevailed – so we call them patriots and name capitals, bridges, cities, and law schools after them.

Thankfully, since 1865, we have not had an *actual* civil war with *actual* rebel forces trying to overthrow the U.S. Government. Consequently, we've had no opportunity to bar or remove such individuals from public office.

Not so fast. In Fall of 2023 – one year out from a contentious presidential rematch between Joe Biden and Donald Trump, a large and varied group of legal scholars from the ranks of Harvard (Alan Dershowitz and Larry Tribe), University of Chicago (Will Baude and Tom Ginsburg), Stanford University (Michael McConnell), UC Berkeley (John Yoo), George Washington University (Jonathan Turley), University of Alabama (David Beito), University of St. Thomas (Michael Paulsen) and others have recently written articles and/or publicly debated the

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pressing constitutional question – does Section 3 of the 14th Amendment bar former President Trump from holding future public office?[7]

In other words, did then-President Trump's speech and actions on January 6, 2021, and the subsequent protest/riot it spawned constitute an insurrection that would disqualify him from holding future office? No matter what side of the political spectrum one sits, the damage and consequences of January 6 were quite substantial, including five deaths – four protestors and one Capitol policeman by stroke.[8] More so, six of the convictions were for seditious conspiracy under 18 USC Section 2334, although none were for insurrection under 18 USC Section 2335. Mr. Trump has not been charged with seditious conspiracy or insurrection in any of the four actions he now faces.[9]

Again, no matter what side of the political spectrum one sits, the thought of potentially disenfranchising 70-80 million voters from their chosen candidate might cause one to pause to reflect on the political and social ramifications for our Republic. The law of unintended consequences can be a bear.

But let us sidestep politics and examine the legal precedents that bear on this Constitutional question.

1920: THE EUGENE DEBS RACE FOR PRESIDENCY

On September 1, 2023, Professor David Beito from the University of Alabama, wrote about famous presidential candidate, Eugene Debs, who got 914,000 votes for President from his prison cell:

> In 1918, Debs went to jail on sedition charges because he had given a speech in solidarity with three men jailed for obstructing the draft. He said the nation 'always taught you that it is your patriotic duty to go to war and slaughter yourselves at their command,' but that citizens 'never had a voice in the war.' He continued: 'The working class who make the sacrifices, who shed the blood, have never yet had a voice in declaring war.'[10]

Eventually, the Debs case went to the United States Supreme Court, where his 10-year sentence and loss of citizenship were upheld. Moreover, the Sedition Act of 1918, under which Debs was convicted, was upheld.[11] Nonetheless, in 1920, the new President, Warren G. Harding, commuted the sentence of Debs, and the new Congress, repealed the Sedition Act.

Forgotten in this historical anecdote was that Debs had been previously elected to the Indiana House of Representatives in 1884. This meant, under Section 3 of the 14th Amendment, he had previously taken an oath to serve as a member of a state legislature, and thus was potentially subject to disqualification under Section 3. Yet, nobody raised the issue. Debs appeared on 40 of the 48 ballots and won 3.4% of the popular vote.

HARRY TRUMAN AND THE PUERTO RICAN SEPARATISTS

In *United States v. Lebron*, 222 F.2d 531 (2nd Cir. 1955), the circuit court of appeal wrestled with actual insurrectionists. In *Lebron*, 17 members of the Nationalist Party of Puerto Rico first legally sought to obtain independence for their protectorate, but then launched a violent revolution in 1950 to gain independence, which failed. (*Lebron*, 222 F.2d at 533.)

At the same time, they spread their wings to New York and Chicago. In 1950, they attempted to assassinate President Harry Truman (killing a secret service agent). In 1954, from the gallery of the House of Representatives, they shot and wounded five congressmen. (*Lebron*, 222 F.2d at 533.)

Eventually, the 17 members were indicted and convicted under 18 USC Section 2384 – seditious conspiracy. As for Section 3, none of the 17 convicts had previously served in any public office, so Section 3 would not apply. But, if they had served in public office, would this have been the type of insurrection to quell any future presidential or congressional aspirations?

BERG V. OBAMA

In August 2008, attorney Philip Berg, a life-long Democrat sued Sen. Barack Obama in Federal Court in Pennsylvania, alleging that Mr. Obama was ineligible to serve as President, because he was not a natural born citizen as required under Article 2, Section 1 of the Constitution.[12] As federal court practitioners well know,

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filing a Motion to Dismiss under FRCP 12(b)(1) & (6) requires the court to "take as true the well-pleaded facts of the Amended Complaint."[13]

So, for purposes of the motion, the federal court accepted as true that Mr. Obama was not a natural born citizen. Nonetheless, it dismissed the case, because it found that the obscure lawyer Berg had no "standing" to sue Mr. Obama, and thus it lacked subject matter jurisdiction to hear the case.[14] "[A] voter fails to present an injury-in-fact when the alleged harm is abstract and widely shared or is only derivative of a harm experienced by a candidate."[15] The *Berg* decision on lack of standing for individual voters was upheld by the Third Circuit Court of Appeals[16] after Mr. Obama was elected. *Berg* remains good law.

CAPLAN ET AL. V TRUMP – THE DOCTRINE OF EQUIVALENT POULTRIES

Under the old legal adage, what's good for the goose is good for the gander, on August 24, 2023, another lawyer filed a Complaint in Federal Court in Florida against Donald Trump,[17] alleging (like his ideological brother in *Berg*) that Trump was not eligible to become president. This time, though, it wasn't a claim of failing to meet the citizenship qualification, it was the insurrection clause of Section 3 in the 14th Amendment.[18]

Judge Robin J. Rosenberg (an Obama appointee) was having none of it. Citing *Berg*, Judge Rosenberg – *sua sponte* – issued an order dismissing the action within a week, based on a lack of standing:

> However, an individual citizen does not have standing to challenge whether another individual is qualified to hold public office.[19]

The lessons from *Berg* and *Caplan* are that no individual voter can meet the standing requirement to assert any type of disqualification claim under Article 2 or the 14th Amendment against a sitting president or candidate for the presidency. So, if not voters, is there someone who would have standing?

NEW MEXICO COUNTY COMMISSIONER

In 2018, Couy Griffin was elected to a seat as District Commissioner for Otero County, New Mexico, covering Tularosa, Three Rivers, La Luz, the western parts of Alamogordo, and the Mescalero Apache Reservation. The vote total? 3,090 votes to 1,635. In 2021, though, Mr. Griffin sought to extend his political profile by founding "Cowboys for Trump." Political advocacy, acceptable. Trespassing on the Capitol grounds on January 6, 2021? Not a good idea. Griffin was tried, convicted and sentenced to 14 days of jail with one year of supervised release.[20] However, in a separate action filed by the State of New Mexico, Judge Francis Mathew held that Section 3 of the 14th Amendment applied to remove Mr. Griffin from his office, based on a finding that he engaged in insurrection on January 6, 2021.

In his lengthy, scholarly opinion, no doubt Judge Matthew must have been aided by an impressive array of *Amici Curae* briefing

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from such notable scholars as Erwin Chemerinsky, Laurence Tribe and Floyd Abrams.[21] Apparently, Mr. Griffin missed the deadline to appeal, so the decision still stands. Does an obscure decision in New Mexico involving the removal of a county commissioner (4,500 votes) serve as precedential value to exclude a candidate from a Presidential race of nearly 150 million voters?

WHERE IT STANDS TO DATE

On November 5, 2024, we know there will be a Presidential election, because the US Constitution tells us so. We also know it takes 270 Electoral votes to win, not a majority of actual voters.[22] We don't yet know who the candidates will be, but as of this writing, it looks like a rematch between Biden and Trump. We reasonably assume the road to election day will take many twists and turns.

In the meantime, citizens and non-profits have been peppering Secretaries of States to remove Trump from the ballot for being an "insurrectionist."

The Secretary of State of Arizona, Democrat Adrian Fontes, has looked at the issue (for his state only), and declared,[23] "Now, the Arizona Supreme Court said that because there's no statutory process in federal law to enforce Section 3 of the 14th amendment, you can't enforce it."

The Secretary of State of New Hampshire, Republican, David Scanlan apparently flirted with this idea as well:

> Not being a lawyer and not wanting to make a decision in a vacuum, I will be soliciting some legal opinions on what is appropriate or not before I make any decision. I have some in-house staff attorneys that are election experts. I will be asking the attorney general's office for their input. And ultimately whatever is decided is probably going to require some judicial input.[24]

In 2020, California overwhelmingly voted for Biden over Trump, 63% to 34%. The Golden State has taken a more aggressive approach.[25] Nine Democrat lawmakers have written to California Attorney General, Rob Bonta, demanding he file a Declaratory Relief action to tee up the disqualification issue in a California court:

> We all watched in horror Mr. Trump's insurrection against the United States when he ordered a mob of his supporters to the United States Capitol on January 6, 2021 to intimidate Vice President Pence and the United States Congress.[26]

To date, no such case has been decided, let alone filed.

PREDICTIONS

As of now, Trump appears to have a commanding lead in the Republican primary. As for general election, according to the Real Clear Politics average, Trump and Biden are basically tied, 45 – 45.[27] This despite four criminal indictments of Trump in New York, Georgia, Florida, and the District of Columbia.

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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
Gordon Rees Scully Mansukhani, LLP

PUBLIC ENTITY

PUBLIC ENTITY: No "catalyst" award to plaintiff where records were not produced in response to the litigation.

Valenti v. City of San Diego (2023 4th Dist. Div. 1) 94 Cal.App.5th 218

Requester sued city for violation of Public Records Act. Bench trial: defense verdict. Requester moved for costs and attorney fees under the catalyst theory, arguing that the lawsuit and caused the city to produce documents (10 e-mails) it would not have otherwise. The trial court denied the motion, and the Court of Appeal affirmed.

"Under the catalyst theory ... correlation does not equal causation... '[m]ore than post hoc, ergo propter hoc' must be demonstrated.' ... '[A] PRA plaintiff does not qualify as a prevailing party merely because the defendant disclosed records sometime after the PRA action was filed.'"

Ultimately, Valenti's appeal was doomed because he failed to address the appellate standard of review. "Valenti, as the appealing party, therefore bears the heavy burden of establishing that there is an absence of evidence in the record to support the trial court's ruling. Rather than take on this burden, he merely reargues his trial court motion. This is not a strategy that can succeed on appeal, because the question this court must answer is different from the question that was presented to the trial court. We must determine not whether there is evidence in the record supporting Valenti's request for fees, but whether there is an absence of evidence supporting the trial court's rejection of the fee request."

PUBLIC ENTITY: No treble damages for cover-up of childhood sexual assault by public entity.

L.A. Unified School Dist. v. Superior Court (2023) 14 Cal.5th 758

Code of Civil Procedure section 340.1 (b)(1), which allows treble damages when a plaintiff suing in tort for childhood sexual assault proves that the assault was as the result of a cover up, cannot be awarded against a public entity. It is trumped by Government Code section 818: "Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant."

"Notwithstanding any other provision of law" means what it says!

PUBLIC ENTITY / EMPLOYMENT: An elected official is not an employee for the purposes of Labor Code section 1102.5 (retaliation).

Brown v. City of Inglewood (2023 2d Dist. Div. 1) 92 Cal.App.5th 1256

The city treasurer sued, alleging that after she reported concerns about financial improprieties, the City and individuals defamed and retaliated against her. Defendants filed an anti-SLAPP motion, which was granted except as to claims for retaliation under Labor Code section 1102.5. The Court of Appeal reversed and remanded to the trial court to strike the retaliation claim, "because an elected official is not an 'employee' for the purposes of that statute."

The Court of Appeal did so as a matter of statutory interpretation:

> Notably, the Legislature did not reference elected officials as falling within the scope of the term 'employee' for the purposes of section 1102.5. Yet when the Legislature intended to include elected officials within the scope of the term 'employee' elsewhere in the code – namely, in defining the term for purposes of workers' compensation – the Legislature expressly defined the term " '[e]mployee' ... [to] include ... [¶] ... [¶] ... [a]ll elected ... paid public officers." (§ 3351, subd. (b).)

PUBLIC ENTITY / TORTS: Knowing about one bully does not make school district liable for acts of another bully, and primary assumption of the risk doctrine does not apply to activity that is part of a mandatory physical education class.

Nigel B. v. Burbank Unified School District (2023 2d Dist. Div. 5) 93 Cal.App.5th 64

A bullied student got creamed in a "touch" football game. "[T]he District's failure to inform Washausen about [one bully's] conduct toward plaintiff does not justify imposing liability against the District for [another bully's] conduct toward plaintiff." Judgment against the District reversed.

The trial court had rejected defense arguments to apportion damages between the intentional tortfeasor student bully and the allegedly negligent coach. The Court of Appeal ordered a retrial on apportionment; that Prop. 51 addresses negligent tortfeasors does not mean they are not entitled to a reduction in damages for the fault of intentional tortfeasors.

The court did, however, reject another defense argument, and held that "the trial court did not err when it refused to instruct the jury on the primary assumption of risk doctrine," because participation was not voluntary but instead part of a mandatory physical education class.

PUBLIC ENTITY: Public employee immunity for wrongful prosecutions does not cover injuries inflicted during law enforcement investigations.

Leon v. County of Riverside (2023) 14 Cal.5th 910

Government Code section 821.6 "immunizes public employees from claims of injury caused by wrongful prosecution." In *Leon*, the Supreme Court rejected the holdings of several Courts of Appeal that "it also confers immunity from claims based on other injuries inflicted in the course of law enforcement investigations." (E.g., *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205.) "While other provisions of the Government Claims Act may confer immunity for certain investigatory actions, section 821.6 does not broadly immunize police officers or other public employees for any and all harmful actions they may take in the course of investigating crime." Thus, a widow could pursue her NIED claim based on police leaving the largely naked body of her husband, a shooting victim, in the driveway for 8 hours.

The trial court granted summary judgment to the County, and the Court of Appeal affirmed, but the Supreme Court reversed. A concurring COA opinion felt constrained by the years of precedent, which should only be overturned by the Supreme Court. The Supreme Court decision contains a nice history of governmental tort immunity.

RECENT CASES

SLAPP

SLAPP: Newsgathering about academic integrity at public universities is protected activity.

Ihlo v. Regents of the Univ. of California (2023 4th Dist. Div. 3) __Cal.App.5th __, 2023 WL5444336

A UC professor sued the Regents to prevent it from responding to a California Public Records Act (CPRA) request from a watchdog group for documents related to the fact that "several academic journals retracted articles Iloh had written due to concerns about possible plagiarism or inaccurate citation references." She then added the watchdog, Center for Scientific Integrity (CSI), which responded with an anti-SLAPP motion. The trial court denied the motion, finding that although protected activity may have led to the petition, it was not the "basis" for the petition.

The Court of Appeal reversed. "In issuing the CPRA request, CSI was engaging in newsgathering so it could report on matters of public interest, such as how a public university funded largely by taxpayer dollars resolves quality or integrity problems in its professors' publications. CSI was therefore engaged in protected activity when it issued the CPRA request. [¶] Iloh filed her petition for writ of mandate to prevent UCI from complying with CSI's CPRA request. By targeting and seeking to impede CSI's newsgathering activity, Iloh's petition threatens to chill CSI's speech-related processes like newsgathering; if successful, this could inhibit CSI's exercise of free speech. This is the type of lawsuit the anti-SLAPP statute is designed to address, and it should be stricken if Iloh cannot demonstrate a probability of prevailing on her petition."

Because the trial court had not ruled on the second prong, "probability of prevailing," the Court of Appeal remanded for the trial court to consider that in the first instance.

Side note: The professor argued that "an anti-SLAPP motion is not available to CSI because it is not a named defendant, and because Iloh's petition for writ of mandate does not assert any claims against it." The Court of Appeal rejected this argument. "A real party in interest may bring an anti-SLAPP motion if it has a direct interest in the subject of the mandamus proceeding and will be impacted by the litigation's outcome."

SLAPP: Direct your motion to specific claims, because if not, it will be denied if any part of the complaint is not a SLAPP.

Park v. Nazari (2023 2d Dist. Div. 5) 93 Cal.App.5th 1099

Defendants' motion was directed to entire complaint. The trial court denied their motion, and the Court of Appeal affirmed. "Where a defendant moves to strike the entire complaint and fails to identify, with reasoned argument, specific claims for relief that are asserted to arise from protected activity, the defendant does not carry his or her first-step burden so long as the complaint presents at least one claim that does not arise from protected activity. Here, the Nazaris not only failed to identify specific claims for relief arising from protected activity, they expressly asked the court to perform the type of gravamen analysis disapproved in *Bonni*. At no point did the Nazaris 'identify the activity each challenged claim rests on and demonstrate that that activity is protected by the anti-SLAPP statute.' (*Wilson, supra*, 7 Cal.5th at 884.) And there are obviously claims in the complaint that do not arise from anti-SLAPP protected activity."

"If a defendant wants the trial court to take a surgical approach, whether in the alternative or not, the defendant must propose where to make the incisions. This is done by identifying, in the initial motion, each numbered paragraph or sentence in the complaint that comprises a challenged claim and explaining "the claim's elements, the actions alleged to establish those elements, and wh[y] those actions are protected." (*Bonni, supra*, 11 Cal.5th at 1015.)

SLAPP: Defamation claim with evidence of "willful blindness" satisfies actual malice standard, so SLAPP dismissal reversed on appeal.

Collins v. Waters (2023 2d Dist. Div. 8) 92 Cal.App.5th 70

Unsuccessful candidate who challenged incumbent for seat in Congress brought defamation claim against incumbent, based on incumbent's accusation that candidate had been dishonorably discharged from the Navy. The Superior Court granted incumbent's anti-SLAPP motion to strike and awarded attorney fees to incumbent. Candidate appealed.

The Court of Appeal reversed. The defeated candidate met the second prong of the analysis by a minimal showing that he could satisfy *New York Times* actual malice standard for overcoming incumbent's First Amendment free speech protection against defamation liability for false statements about candidate as public figure. He presented her with a document saying that he had not been dishonorably discharged, but the incumbent "neither denied this nor checked. Her appellate briefing asserts that today, years later, she still does not know the truth about whether Collins's discharge was dishonorable. This disinterest in a conclusive and easily-available fact could suggest willful blindness ... [which] created a possible inference of Waters's willful blindness, which is probative of actual malice."

"Free speech is vital in America, but truth has a place in the public square as well. Reckless disregard for the truth can create liability for defamation. When you face powerful documentary evidence your accusation is false, when checking is easy, and when you skip the checking but keep accusing, a jury could conclude you have crossed the line. It was error to end this suit at this early stage." "While a defendant's failure to investigate an issue will not, alone, support a finding of actual malice, the fact a defendant purposely avoided learning the truth can support that finding."

SLAPP: Effect on protected speech not enough for SLAPP protection, if claim is not based on that speech.

Hastings College Conservation Committee v. Faigman (2023 1st Dist. Div. 4) 92 Cal.App.5th 323

A group of alums sued to prevent implementing the name change at the former Hastings College of the Law after revelations of misconduct by the namesake founder. Defendants filed an anti-SLAPP motion. The trial court denied the motion, and the COA affirmed. "We can agree that the success of plaintiffs' claims would, at a minimum, prevent the College Defendants from expressing a new official designation for the College, but even assuming that future speech in which the College Defendants use the new name is protected activity within the meaning of the anti-SLAPP statute, it is not the reason plaintiffs have sued them. Because plaintiffs' claims are not based on the College Defendants' speech [but instead on Legislature's enactment changing the name], we conclude that the trial court properly denied the motion."

RECENT CASES

EMPLOYMENT

DISCRIMINATION, HARASSMENT, WRONGFUL TERMINATION

EMPLOYMENT/FEHA: Agents of employers may be liable for FEHA violations.

Raines v. U.S. Healthworks Medical Group (2023) _Cal.5th __, 2023 WL 5341067

The court interpreted the FEHA definition of employer – "'[e]mployer' includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly" -- to mean that "an employer's agents are subject to all the obligations and liabilities that the FEHA imposes on the employer itself." Thus, "an employer's business entity agents can be held directly liable under the FEHA for employment discrimination in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer." Hello, staffing and payroll agencies! Here, the agency conducted pre-hiring screening, including a questionnaire that plaintiffs said asked improper questions. A district court dismissed plaintiffs' FEHA claim on the rationale that FEHA applied only to the actual employers, and the Ninth Circuit asked the California Supreme Court to weigh in on the legal issue.

The court found support in federal cases, and in public policy behind FEHA. "This interpretation imposes FEHA liability not only on the employer but also extends it to the entity that is most directly responsible for the FEHA violation. Moreover, when, as is often the case, the business-entity agent has expertise in its field and has contracted with multiple employers to provide its expert service, this interpretation extends FEHA liability to the entity that is in the best position to implement industry-wide policies that will avoid FEHA violations. [¶] In addition, reading the FEHA to authorize direct liability on an employer's business-entity agents furthers the statutory mandate that the FEHA 'be construed liberally' in furtherance of its remedial purposes."

The decision rejected defendants' arguments that they were only acting under control of the principal, so the principal should be solely liable. "[D]efendants' argument relies heavily on the common law of agency. Here, however, we are interpreting the scope of statutory language referencing agent liability, and so the common law of agency is not determinative." Defendants also argued that employers may not delegate their FEHA obligations. "However, the question we decide here is not whether an employer may delegate its FEHA obligations to its business-entity agents, but whether, under the language of the FEHA, the business-entity agents of an employer can be liable for violations of *their own* FEHA obligations."

EMPLOYMENT: New Title VII: must accommodate religious practice unless accommodation would pose "substantial hardship."

Groff v. DeJoy (2023) __U.S. __

Title VII requires employers to accommodate an employee's religious practice unless it imposes "undue hardship." Many courts have interpreted this as anything more than "de minimis" hardship. SCOTUS rejected this standard, and formulated a new one: "[C]ourts should resolve whether a hardship would be substantial in the context of an employer's business in the same commonsense manner that [they] would employ in applying any such test." The Court sent the case back to the lower courts to assess whether the Post Office could accommodate the plaintiff's refusal to work on Sundays.

WHISTLEBLOWER RETALIATION: Labor Code section 1102.5(b) includes reporting to employer facts employer already knows.

People ex rel. Garcia-Brower v. Kolla's, Inc. (2023) 14 Cal.5th 719

The Court of Appeal affirmed the trial court's judgment on the section 1102.5(b) claim, "concluding that a private employee's report of unlawful activity directly to his or her wrongdoing employer is not a protected disclosure under section 1102.5(b). The court reasoned that the term "disclose" requires "the revelation of something new, or at least believed by the discloser to be new, to the person or agency to whom the disclosure is made." The court explained that Estrada, as the owner of the nightclub, "was at least aware of – if not responsible for – the non-payment of wages" and that an employee's report to the employee's supervisor about the supervisor's own wrongdoing is not a disclosure and is not protected whistleblowing activity, because the employer already knows about his or her wrongdoing."

The California Supreme Court reversed and remanded.

"The Court of Appeal held that the word "disclosure" means "the revelation of something new, or at least believed by the discloser to be new, to the person or agency to whom the disclosure is made." But dictionary definitions of "disclose" include "to make openly known" (4 Oxford English Dict. (2d. ed. 1989) p. 738, col. 1) and to "open up to general knowledge" (Webster's 3d New Internat. Dict. (2002) p. 645, col. 2). The Labor Commissioner argues that according to these definitions the information disclosed need not be previously unknown to the recipient. We agree. To "make [something] openly

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known" (4 Oxford English Dict., supra, p. 738, col. 1) or "open [something] up to general knowledge" (Webster's 3d New Internat. Dict., supra, p. 645, col. 2) does not require that the "something" be unknown to the current recipient."

Thus, the court rejected the argument that "whistleblower protections apply only to the first employee to report wrongdoing, such that a "disclosure" cannot include information previously reported by other employees.

EMPLOYMENT: K-12 teacher properly terminated for failing to vax or test for COVID.

Rossi v. Sequoia Union Elementary School (2023 5th Dist.) __Cal. App.5th __, 2023 WL____

"Plaintiff was placed on unpaid administrative leave and then terminated from her employment with defendant Sequoia Union Elementary School District (the School District) after refusing to either provide verification of her COVID-19 vaccination status or undergo weekly testing as required by a then-operative order of the State Public Health Officer" related to K-12 school workers. Plaintiff brought suit under the Confidentiality of Medical Information Act (CMIA) (Civ. Code, § 56 et seq.) The trial court sustained the District's demurrer.

The Court of Appeal affirmed. "Plaintiff argues ... that the question of whether an employer's action was "necessary" is an inherently factual question which must be left for the fact finder to answer – and therefore cannot be resolved on a demurrer. We disagree." Here, "the employer was acting not out of a general sense of duty or business efficiency but so as to comply with a lawful order of the State Public Health Officer." "Contrary to plaintiff's assertion, the lack of any express enforcement provisions within the Order, such as imposing penalties for noncompliance, does not change the Order's legal effect." "Faced with plaintiff's refusal to allow defendants to comply with either their verification or test-reporting obligations, defendants had no choice but to impose disciplinary consequences precluding plaintiff from working in person until she at least started reporting test results weekly."

EMPLOYMENT: Employees entitled to reimbursement for work-at-home expenses during COVID.

Thai v. International Business Machines Corp. (2023 1st Dist. Div. 5) 93 Cal.App.5th 364

"Plaintiffs contend IBM failed to reimburse Mr. Thai and other employees for the expenses necessarily incurred to perform their work duties from home. The trial court sustained IBM's demurrer, concluding the Governor's order was an intervening cause of the work-from-home expenses that absolved IBM of liability under [Labor Code] section 2802. Because the court's conclusion is inconsistent with the statutory language, we reverse."

"To accomplish his duties, he required, among other things, internet access, telephone service, a telephone headset, and a computer and accessories. It may be inferred from the complaint that IBM provided those items to its employees in its offices." When COVID hit and the Governor directed people to stay at home, plaintiffs "personally paid for the services and equipment necessary to do their jobs while working from home." IBM argued that the Governor's orders were an "intervening cause" excusing IBM from liability. The trial court agreed, sustaining a demurrer.

The Court of Appeal reversed, relying on the "plain language" of the statute. "The [trial] court and IBM read the statute as if it requires reimbursement only for expenses *directly caused* by the employer. But that inserts into the analysis a tort-like causation inquiry that is not rooted in the statutory language." The statute requires: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer." The statute defines "necessary expenditures or losses" as including "all reasonable costs, including, but not limited to, attorney's fees incurred by the employee enforcing the rights granted by this section."

RECENT CASES

EMPLOYMENT: Refusing to get required flu vaccine is not a disability.

Hodges v. Cedars-Sinai Medical Center (2023 2d Dist. Div. 8) 91 Cal.App.5th 894

"Plaintiff ... is a former employee of defendant Cedars-Sinai Medical Center (Cedars). As a condition of her continued employment, she was required to get a flu vaccine unless she obtained a valid exemption – one establishing a medically recognized contraindication to getting the flu vaccine. Her doctor wrote a note recommending an exemption for various reasons, including her history of cancer and general allergies. None of the reasons was a medically recognized contraindication to getting the flu vaccine. Cedars denied the exemption request. Plaintiff still refused to get the vaccine. Cedars terminated her. Plaintiff sued Cedars for disability discrimination and related claims under the Fair Employment and Housing Act, Government Code 1 section 12900 et seq. (FEHA). The trial court granted Cedars's motion for summary judgment. We affirm."

EMPLOYMENT: Playing "sexually graphic, violently misogynistic" music at warehouse could constitute hostile work environment; "equal opportunity harassment" no shield.

Sharp v. S&S Activewear, LLC (9th Cir. 2023) 69 F.4th 974

"Blasted from commercial-strength speakers placed throughout the warehouse, the music overpowered operational background noise and was nearly impossible to escape. Sometimes employees placed the speakers on forklifts and drove around the warehouse, making it more difficult to predict – let alone evade – the music's reach. In turn, the music allegedly served as a catalyst for abusive conduct by male employees, who frequently pantomimed sexually graphic gestures, yelled obscenities, made sexually explicit remarks, and openly shared pornographic videos. Although the music was particularly demeaning toward women, who comprised roughly half of the warehouse's workforce, some male employees also took offense."

"The district court granted S&S's motion to dismiss and denied leave to amend the music claim, reasoning that the music's offensiveness to both men and women and audibility throughout the warehouse nullified any discriminatory potential. The court countenanced S&S's argument that the fact that "both men and women were offended by the work environment" doomed Sharp's Title VII claim."

"We disagree. In this preliminary posture, plaintiffs should have had their allegations taken as true or, at minimum, been granted leave to amend. We vacate the decision below and instruct the district court to reconsider the sufficiency of Sharp's pleadings in light of two key principles: First, harassment, whether aural or visual, need not be directly targeted at a particular plaintiff in order to pollute a workplace and give rise to a Title VII claim. Second, the challenged conduct's offensiveness to multiple genders is not a certain bar to stating a Title VII claim. An employer's 'status as a purported 'equal opportunity harasser' provides no escape hatch for liability.'"

PAGA

ARBITRATION / PAGA: Employee who must arbitrate individual claim nevertheless retains standing to pursue PAGA claims.

Adolph v. Uber Technologies Inc. (2023) 4 Cal.5th 1104

"The question here is whether an aggrieved employee who has been compelled to arbitrate claims under PAGA that are "premised on Labor Code violations actually sustained by" the plaintiff (*Viking River*, *supra*, 596 U.S. at p. __ [142 S.Ct. at p. 1916]; see §§ 2698, 2699, subd. (a)) maintains statutory standing to pursue "PAGA claims arising out of events involving other employees" (*Viking River*, at p. __ [142 S.Ct. at p. 1916]) in court. We hold that the answer is yes. To have PAGA standing, a plaintiff must be an "aggrieved employee" — that is, (1) "someone 'who was employed by the alleged violator' " and (2) " 'against whom one or more of the alleged violations was committed.' " (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 83, 84 (*Kim*), quoting § 2699, subd. (c).) Where a plaintiff has brought a PAGA action comprising individual and non-individual claims, an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA."

Even though SCOTUS ruled the other way in *Viking River*!

PAGA/ARBITRATION: Plaintiffs required to arbitrate their individual claims can still pursue non-individual PACA claims in court.

Barrera v. Apple American Group, LLC (2023 1st Dist. Div. 2) __Cal.App.5th __, 2023 WL 5620678

Plaintiffs sued nationwide chain Applebee's for Labor Code violations to them and other employees. The employer moved to compel arbitration, and the trial court denied the motion.

The Court of Appeal affirmed in part and reversed in part.

"Based on *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ––– –, 142 S.Ct. 1906, 213 L.Ed.2d 179 ... and the Federal Arbitration Act ... (9 U.S.C. § 1 et seq.), we conclude the parties' agreements require arbitration of plaintiffs' PAGA claims that seek to recover civil penalties for Labor Code violations committed against plaintiffs. On an issue of California law that the California Supreme Court has recently resolved, we conclude plaintiffs' PAGA claims that seek to recover civil penalties for Labor Code violations committed against employees other than plaintiffs may be pursued by plaintiffs in the trial court. (*Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104.)"

Notably, the Court of Appeal rejected plaintiffs' argument that defendants had waived the right to arbitrate by litigating the case for over a year before filing the motion, The Court of Appeal excused the delay on the ground the motion was filed shortly after decided *Viking River.*

PAGA/INTERVENTION: Plaintiffs in "overlapping" PAGA actions may be entitled to permissive intervention.

Accurso v. In-N-Out Burgers (2023 1st Dist. Div. 4) __Cal.App.5th __, 2023 WL 5543525

Lead plaintiffs in two PAGA representative actions learned of settlement negotiations in an overlapping PAGA action against the same employer. They moved to intervene in that action. The trial court denied the motion, "relying principally on *Turrieta v. Lyft, Inc.* (2021) 69 Cal.App.5th 955, review granted Jan. 5, 2022, S271721 ... and distinguishing ... *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56."

The Court of Appeal vacated the denial and remanded for reconsideration. "We ... conclude the court was correct to deny Piplack and Taylor's section 387 motion to the extent it sought intervention as-of-right, but we vacate the order to the extent Piplack and Taylor sought permissive intervention and remand for further consideration of that issue as well as the issue of a possible stay in some form." "We join other courts that have adopted the phrasing used in Federal Rules of Civil Procedure, rule 24 cases [citations omitted]) and hold that non-party PAGA claimants who seek to intervene in overlapping PAGA cases must have a "significantly protectable interest" that meets the threshold requirements of section 387. A personal interest is not required."

That was not enough for intervention as-of-right, because: "Although we believe Piplack and Taylor as deputized LWDA proxies have significantly protectable interests, in the end we conclude that they failed to bear their burden of proving inadequate representation or potential impairment of their protectable interests."

All the same, though, "the denial of permissive intervention was an abuse of discretion. In relying on Turrieta's holding that a non-party PAGA claimant seeking to intervene in another PAGA case has no interest warranting intervention, the court based its exercise of discretion on an erroneous legal premise, and as a result effectively failed to exercise discretion at all. Had the court moved past Turrieta, and found an interest sufficient to satisfy the threshold requirement for intervention, as we conclude it should have, the permissive intervention standard does not require a showing of inadequate representation, which is the stumbling block Piplack and Taylor fail to overcome for mandatory intervention. The governing permissive intervention statute, section 387, subdivision (d)(2), does not mention that issue. Because the analysis of permissive intervention fundamentally boils down to a discretionary weighing of whether Piplack and Taylor propose to add anything to this case the importance of which outweighs any objections," the court remanded.

ARBITRATION: enforces carve-out for PAGA claims.

Duran v. EmployBridge Holding Company (2023 5th Dist.) 92 Cal.App.5th 59

The arbitration agreement contained a carve-out: "claims under PAGA ... are not arbitrable under this Agreement." The employer's motion to compel arbitration was denied, and the Court of Appeal affirmed.

"We conclude the language stating claims under PAGA are not arbitrable under the agreement is unambiguous. It cannot be reasonably interpreted to mean the parties agreed to arbitrate the category of PAGA claims seeking to recover civil penalties that will be split 75 percent to the state and 25 percent to plaintiff – that is, the claims seeking to recover penalties for Labor Code violations suffered by plaintiff."

"If Select Staffing intended the clause to be a truism – that is, only nonarbitrable PAGA claims would not be arbitrable under the agreement – it should have drafted the clause to say so."

RECENT CASES

998s, OTHER SETTLEMENTS

SONG-BEVERLY: Release in pre-litigation settlement void as against public policy.

Rheinhart v. Nissan North America, Inc. (2023 4th Dist. Div. 1) 92 Cal.App.5th 1016

Plaintiff complained about malfunctions in his leased car. He asked Nissan to repurchase, which it declined, and the parties then reached a case settlement. The settlement agreement contained a release. When problems persisted, he sued. The trial court granted summary judgment, holding that the Act's anti-waiver provisions only applied to warranties "on the front end."

The Court of Appeal reversed. The Act's anti-waiver provision deems "contrary to public policy" and "unenforceable and void" "[a]ny waiver by the buyer of consumer goods of the provisions of this chapter, except as expressly provided in this chapter." (Civ. Code, § 1790.1.) "The Act's antiwaiver provision is extremely broad; it is not limited to warranties or any particular time frame during the purchase process, but encompasses all mandated remedies afforded to buyers. Such an interpretation follows the directive to give the Act a construction calculated to bring its benefits into action."

TORTS and DUTY

TORTS / DUTY: Employer has exception to general duty of care to worker's spouse who contracted COVID.

Kuciemba v. Victory Woodworks (2023) 14 Cal.5th 993

"(1) If an employee contracts COVID-19 at the workplace and brings the virus home to a spouse, does the California Workers' Compensation Act (WCA; Lab. Code, § 3200 et seq.) bar the spouse's negligence claim against the employer? (2) Does an employer owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members?"

"The answer to the first question is no. Exclusivity provisions of the WCA do not bar a nonemployee's recovery for injuries that are not legally dependent upon an injury suffered by the employee. The answer to the second question, however, is also no. Although it is foreseeable that an employer's negligence in permitting workplace spread of COVID-19 will cause members of employees' households to contract the disease, recognizing a duty of care to nonemployees in this context would impose an intolerable burden on employers and society in contravention of public policy."

"[T]he origin of an employee's infection is ultimately impossible to trace. Because the virus is highly contagious, an employee could have contracted COVID-19 from an exposure while commuting to work, stopping at the grocery store on the way home, or even at work but without fault of the employer. ... tracing the source of an infection would be even more difficult at a construction jobsite than at most workplaces because construction sites typically involve multiple contractors and subcontractors working side by side, along with other professionals. The situation here is thus distinguishable from that in *Kesner* [*v. Superior Court* (2016) 1 Cal.5th 1132, finding duty to protect family members from take-home asbestos], where the only plausible source of asbestos fibers brought home was the employee's workplace."

"The duty we considered in *Kesner* involved a relatively small pool of defendants: companies that used asbestos in the workplace. There was also a much smaller pool of potential plaintiffs: household members who were exposed to asbestos from an employee's clothing and then went on to develop mesothelioma. Here, by contrast, a duty to prevent secondary COVID-19 infections would extend to all workplaces, making every employer in California a potential defendant. And unlike mesothelioma, which is known to be "a very rare cancer, even among persons exposed to asbestos" (*Hamilton v. Asbestos Corp* (2000) 22 Cal.4th 1127, 1135–1136), the virus that causes COVID-19 is extremely contagious, making infection possible after even a relatively brief exposure. Even limiting a duty of care to employees' household members, the pool of potential plaintiffs would be enormous, numbering not thousands but millions of Californians."

"In addition to dire financial consequences for employers, and a possibly broader social impact, the potential litigation explosion facilitated by a duty to prevent COVID-19 infections in household members would place significant burdens on the judicial system and, ultimately, the community. As amicus curiae CEA aptly put it, 'If there was ever a 'floodgates' situation, this is it.'"

"Imposing on employers a tort duty to each employee's household members to prevent the spread of this highly transmissible virus would throw open the courthouse doors to a deluge of lawsuits that would be both hard to prove and difficult to cull early in the proceedings. Although it is foreseeable that employees infected at work will carry the virus

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home and infect their loved ones, the dramatic expansion of liability plaintiffs' suit envisions has the potential to destroy businesses and curtail, if not outright end, the provision of essential public services. These are the type of "policy considerations [that] dictate a cause of action should not be sanctioned no matter how foreseeable the risk." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 274.) In some cases, "the consequences of a negligent act must be limited in order to avoid an intolerable burden on society." (*Ibid.*) This is such a case."

UNIVERSITIES: May discipline students for intimate partner violence without cross-examining victim and witnesses; flexibility in procedure allowed.

Boermeester v. Carry (2023) 15 Cal.5th 72

A former student sued USC when it expelled him after its investigation determined that he violated USC's policy against engaging in intimate partner violence with another student. He filed a petition for administrative mandate alleging that he was deprived of the "fair trial" required by Code of Civil Procedure section 1094.5.

From the Supreme Court opinion:

> A divided Court of Appeal agreed, with the majority concluding that "USC's disciplinary procedures ... were unfair because they denied Boermeester a meaningful opportunity to cross-examine critical witnesses at an in-person hearing." More specifically, the Court of Appeal majority determined that USC's disciplinary procedures were unfair because USC should have afforded Boermeester the opportunity to attend a live hearing at which he or his advisor-attorney would directly cross-examine the alleged victim, Jane Roe, as well as the third party witnesses, or indirectly cross-examine them by submitting questions for USC's adjudicators to ask them at the live hearing. The Court of Appeal majority made clear that the witnesses need not be "physically present to allow the accused student to confront them" and could instead appear "by videoconference, or by another method that would facilitate the assessment of credibility." Nevertheless, the Court of Appeal majority believed that accused students must be able to contemporaneously hear and observe the real-time testimony of the accuser and other witnesses at a live hearing to have a "meaningful opportunity to respond to the evidence against [them]" and ask follow-up questions.

The Supreme Court reversed. "We hold that, though private universities are required to comply with the common law doctrine of fair procedure by providing accused students with notice of the charges and a meaningful opportunity to be heard, they are not required to provide accused students the opportunity to directly or indirectly cross-examine the accuser and other witnesses at a live hearing with the accused student in attendance, either in person or virtually. Requiring private universities to conduct the sort of hearing the Court of Appeal majority envisioned would be contrary to our long-standing fair procedure admonition that courts should not attempt to fix any rigid procedures that private organizations must "invariably" adopt. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555 (Pinsker II).) Instead, private organizations should "retain the initial and primary responsibility for devising a method" to ensure adequate notice and a meaningful opportunity to be heard. (*Ibid.*) We accordingly reverse the Court of Appeal's judgment."

The court made a point of saying fair procedure does not have the requirements due process has, and is more flexible.

> In short, though the fair procedure doctrine requires adequate notice of the charges and a reasonable opportunity to respond, applying the doctrine to this context requires us to give private universities primary responsibility for crafting the precise procedures meant to afford a student with notice and an opportunity to respond. (Pinsker II, supra, 12 Cal.3d at p. 555.) Private universities generally know best how to manage their own operations, and requiring a fixed set of procedures they must utilize in every situation when determining student discipline would constitute an improper "'intrusion into the[ir] internal affairs.'"

TORTS / DUTY: Corporations may be liable for sexual abuse by sole shareholder.

Safechuck v. MJJ Productions, Inc. (2023 2d Dist. Div. 8) 94 Cal.App.5th 675

The trial court agreed that corporations owned by The King of Pop owed no duty to minors alleging abuse, sustaining the demurrer as to one plaintiff and granting summary judgment as to the other. The trial court reasoned that there was no evidence defendants exercised control over Jackson, and instead, that "defendants had no legal ability to control Jackson because of Jackson's complete and total ownership of the corporate defendants."

The Court of Appeal reversed. "Following the guidance in *Brown v. USA Taekwondo* (2021) 11 Cal.5th 20 ... we conclude a corporation that facilitates the sexual abuse of children by one of its employees is not excused from an affirmative duty

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to protect those children merely because it is solely owned by the perpetrator of the abuse." The court rejected defendants' argument that "[p]arties cannot be liable for neglecting to exercise powers they simply do not have."

TORTS: Knowing about one bully does not make school district liable for acts of another bully, and primary assumption of the risk doctrine does not apply to activity that is part of a mandatory physical education class.

Nigel B. v. Burbank Unified School District (2023 2d Dist. Div. 5) 93 Cal.App.5th 64

A bullied student got creamed in a "touch" football game. "[T]he District's failure to inform Washausen about [one bully's] conduct toward plaintiff does not justify imposing liability against the District for [another bully's] conduct toward plaintiff." Judgment against the District reversed.

The trial court had rejected defense arguments to apportion damages between the intentional tortfeasor student bully and the allegedly negligent coach. The Court of Appeal ordered a retrial on apportionment; that Prop. 51 addresses negligent tortfeasors does not mean they are not entitled to a reduction in damages for the fault of intentional tortfeasors.

The court did, however, reject another defense argument, and held that "the trial court did not err when it refused to instruct the jury on the primary assumption of risk doctrine," because participation was not voluntary but instead part of a mandatory physical education class.

PRODUCT LIABILITY / UCL: "Merely" ambiguous front label not misleading where ingredients spelled out on back label.

McGinity v. The Procter & Gamble Co. (9th Cir. 2023) 69 F.4th 1093

Plaintiff claimed he was misled by products labelled "with the words 'Nature Fusion' in bold, capitalized text, with an image of an avocado on a green leaf" into believing that "the Products are natural, when, in fact, they contain non-natural and synthetic ingredients."

The Ninth Circuit affirmed dismissal. "[T]he front label containing the words 'Nature Fusion' is not misleading – rather, it is ambiguous. Unlike a label declaring that a product is '100% natural' or 'all natural,' the front 'Nature Fusion' label does not promise that the product is wholly natural."

"[W]hen, as here, a front label is ambiguous, the ambiguity can be resolved by reference to the back label. ...Upon seeing the back labels, it would be clear to a reasonable consumer that the avocado oil is the natural ingredient emphasized in P&G's labeling and marketing. The ingredients list, which McGinity alleges includes many ingredients that are synthetic and that a reasonable consumer would not think are natural, clarifies that the rest of the ingredients are artificial and that the products thus contain both natural and synthetic ingredients."

The decision also trashes a consumer survey plaintiff offered, mostly because "the survey participants did not have access to the back label of the products."

ARBITRATION, MEDIATION, ADR

ARBITRATION / PAGA: Employee who must arbitrate individual claim nevertheless retains standing to pursue PAGA claims.

Adolph v. Uber Technologies Inc. (2023) 4 Cal.5th 1104

"The question here is whether an aggrieved employee who has been compelled to arbitrate claims under PAGA that are "premised on Labor Code violations actually sustained by" the plaintiff (*Viking River, supra*, 596 U.S. at p. __ [142 S.Ct. at p. 1916]; see §§ 2698, 2699, subd. (a)) maintains statutory standing to pursue "PAGA claims arising out of events involving other employees" (*Viking River*, at p. __ [142 S.Ct. at p. 1916]) in court. We hold that the answer is yes. To have PAGA standing, a plaintiff must be an "aggrieved employee" — that is, (1) "someone 'who was employed by the alleged violator' " and (2) " 'against whom one or more of the alleged violations was committed.' " (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 83, 84 (*Kim*), quoting § 2699, subd. (c).) Where a plaintiff has brought a PAGA action comprising individual and non-individual claims, an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA."

Even though SCOTUS ruled the other way in *Viking River*!

ARBITRATION: Fees must be timely received by arbitrator; "check is in the mail" does not cut it.

Doe v. Superior Court (Na Hoku, Inc.) (2023 1st Dist. Div. 3) __Cal.App.5th __, 2023 WL 5813102

Plaintiff sued her former employer and manager for claims arising from sexual harassment. Defendants successfully moved to compel arbitration. A former employee sued for sexual harassment. And Under Code of Civil Procedure section 1281.98, subdivision (a)(1), arbitration fees and costs must be "paid within 30 days after the due date." In this case, however, "the arbitrator received the payment on October 5, two days after the statutory 30-day grace period expired. This delay was because real parties opted to mail a check on Friday, September 30 for the full amount due on Monday, October 3 even though payment could be submitted by credit card, electronic check (also referred to as "ECheck"), or wire transfer."

The trial court denied plaintiff's motion to vacate the order compelling arbitration on the basis of the untimely payment.

The Court of Appeal issued a writ compelling the trial court to grant the motion, and address plaintiff's request for sanctions. "[W]e strictly enforce the 30-day grace period in section 1281.98(a)(1) and conclude fees and costs owed for a pending proceeding must be received by the arbitrator within 30 days after the due date. We do not find that the proverbial check in the mail constitutes payment and agree with petitioner that real parties' payment, received more than 30 days after the due date established by the arbitrator, was untimely."

ARBITRATION: Fail to pay fees timely = lose your right to arbitrate, even if panel throws you a lifeline.

Cvejic v. Skyview Capital (2023 2nd Dist. Div. 8) 92 Cal.App.5th 1073

Defendant won a petition to compel arbitration. Plaintiff timely paid his arbitration fees, but defendant did not. After the initial deadline had passed, the panel extended the deadline. Defendant paid by the extended deadline, Plaintiff filed a section 1281.98 notice of election to withdraw. The trial court granted plaintiff's request to withdraw from arbitration, vacated the order staying proceedings, and awarded reasonable expenses under section 1281.99.

The Court of Appeal affirmed. "The statute does not empower an arbitrator to cure a party's missed payment. There is no escape hatch for companies that may have an arbitrator's favor. Nor is there a hatch for an arbitrator eager to keep hold of a matter. As the trial court observed, 'If ... the drafting party were permitted numerous continuances for failure to pay arbitration fees, therefore delaying the proceedings, C.C.P. section 1281.98 would have no meaning, force, or effect.'"

ARBITRATION: District court proceedings must be stayed during interlocutory appeal of denial of motion to compel arbitration.

Coinbase, Inc. v. Bielski (2023) 599 U.S. --, 143 S.Ct. 1915, 2023 WL 4138983

Federal practice finally catches up to California. California has long held that appeal of the denial of a petition to compel arbitration stays remaining trial court proceedings. SCOTUS resolved a split among circuits on the issue, and reversed the Ninth Circuit here. "[I]t 'makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one.'" "A right to interlocutory appeal of the arbitrability issue without an automatic stay of the district court proceedings is therefore like a lock without a key, a bat without a ball, a computer without a keyboard – in other words, not especially sensible."

RECENT CASES

ARBITRATION: Nonsignatory manufacturer cannot enforce arbitration provisions in retail dealer agreement with buyer.

Yeh v. Superior Court (Mercedes-Benz USA, LLC) __Cal.App.5th __, 2023 WL 5741703

Car buyers signed retail contract with dealer to finance the purchase. They sued the manufacturer solely under Song-Beverly on express and implied warranties after multiple attempts to fix defects. The trial court rejected the manufacturer's argument that it was a third-party beneficiary of the agreements, but agreed with the manufacturer's equitable estoppel argument, relying on what was then the only California appellate opinion on the issue, *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486, and the manufacturer's argument that "the warranties upon which petitioners sue are an integral part of petitioners' contracts with the dealer that contain the agreements to arbitrate."

The Court of Appeal disagreed, and issued a writ compelling the trial court to vacate the order compelling arbitration. The court rejected *Felisilda* in favor of three more recently decided cases: *Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324, review granted July 19, 2023, No. S279969; *Montemayor v. Ford Motor Co.* (2023) 92 Cal.App.5th 959; and *Kielar v. Superior Court* (Aug. 16, 2023, C096773) __ Cal.App.5th___, all of which disagreed that "the sales contract was the source of the warranties."

"[P]etitioners' complaint does not reference either of the two agreements with the dealer and does not allege that MBUSA breached obligations based on those agreements. MBUSA is not mentioned in the agreements and does not have any obligations arising out of the agreements. Petitioners' claims are thus not "intimately founded and intertwined" with the agreements [citation omitted], but instead arise from a statutory scheme separate and apart from the contracts."

"We are not persuaded by MBUSA's assertion that the Act 'makes express warranties an integral part of the sales contract.' The purpose of the Act is to provide greater consumer protection than previously existed."

ARBITRATION: Parties may agree that arbitration award may be reviewed on the merits, but they may not agree to review in the Court of Appeal in the first instance rather than Superior Court.

Housing Authority of the City of Calexico v. Multi-Housing Tax Credit Partners (2023 4th Dist. Div. 1) __Cal.App.5th __, 2023 WL 5521226

The arbitration clause provided that an award could be reviewed by a court on the merits. It had some contradictory language about whether that review would be by the Court of Appeal or the trial court. The trial court affirmed the award without undertaking any review.

The Court of Appeal reversed. "We conclude that, in instances in which the parties have agreed that an arbitration award may be subjected to judicial review, it is the superior court and not the Court of Appeal that has original jurisdiction to undertake that review in the first instance, that the superior court is without power to yield that original jurisdiction to the Court of Appeal, and that the superior court should thus have performed the review." The court ruled that *Moncharsh*, the first step in a discussion of the court's review of an arbitration award, did not describe the "universe of permissible bases for vacating an arbitration award," and that the parties' freedom to contract allowed them to provide that the court could review on the merits.

ARBITRATION: Enforces carve-out for PAGA claims.

Duran v. EmployBridge Holding Company (2023 5th Dist.) 92 Cal.App.5th 59

The arbitration agreement contained a carve-out: "claims under PAGA ... are not arbitrable under this Agreement." The employer's motion to compel arbitration was denied, and the Court of Appeal affirmed.

"We conclude the language stating claims under PAGA are not arbitrable under the agreement is unambiguous. It cannot be reasonably interpreted to mean the parties agreed to arbitrate the category of PAGA claims seeking to recover civil penalties that will be split 75 percent to the state and 25 percent to plaintiff – that is, the claims seeking to recover penalties for Labor Code violations suffered by plaintiff."

"If Select Staffing intended the clause to be a truism – that is, only nonarbitrable PAGA claims would not be arbitrable under the agreement – it should have drafted the clause to say so."

LITIGATION

DISCOVERY: Co-defendants' failure to respond to RFAs does not bind co-defendant that denied them.

Inzunza v. Naranjo (2023 2d Dist. Div. 4) __Cal.App.5th __, 2023 WL 5344893

Employee co-defendant failed to respond to RFAs. Plaintiff argued that was binding on the employer too, even though the employer had denied the same RFAs. The trial court agreed with the plaintiff, who eventually won a sizeable judgment.

The Court of Appeal REVERSED. It observed that the statute makes matters deemed admitted "conclusively established against the party making the admission," not against anyone else. (Code Civ. Proc., 2033.410.) Although the employee was the employer's agent at the time of the accident, he "was not acting as CRGTS's agent when he failed to timely deny the requests for admissions addressed to him. Thus, while it is fair to hold CRGTS liable for Inzunza's actual actions and inactions during the course and scope of his employment as its agent, it is unfair to hold CRGTS liable for deemed admissions of fault resulting from Inzunza's failure to timely respond to the requests for admissions." "In sum, we conclude an agent's deemed admissions do not bind the principal codefendant, even when the basis for the action against the principal codefendant is vicarious liability arising from the acts of the agent."

DISCOVERY: Statement of compliance need not identify requests, unlike actual document production.

Pollock v. Superior Court (2023 2d Dist. Div. 1) 93 Cal.App.5th 1348

Plaintiff counsel got sanctions reversed. His statement of compliance with respect to document requests did not identify which documents would relate to which requests. The defense moved to compel, and the trial court awarded sanctions.

REVERSED. The Court of Appeal distinguished a statement of compliance from actual production. "[A] statement of compliance in response to a production demand need not identify which document pertains to which request; such identification need only occur when the documents are produced," per a recent and much-criticized statutory change.

JURISDICTION: Minimal in-state contacts not enough to create jurisdiction.

Davis v. Cranfield Aerospace Solutions (9th Cir. 2023) __F.4th __

"This case asks whether a federal court in Idaho may exercise personal jurisdiction over an English corporation in an action brought by plaintiffs from Louisiana and Indiana for an accident that occurred in Indiana. Because this case involves an out-of-state accident, out-of-state plaintiffs, and an out-of-state defendant with no minimum contacts with the state, we say no." Plaintiffs argued that the airplane crashed because of the failure of a "load alleviation system," which was manufactured by corporation with its principal place of business in Idaho, and that a years-long course of dealings between that parts maker and the English corporation were enough to create specific personal jurisdiction. The Ninth Circuit disagreed.

JURISDICTION: Registering to do business in a state may be consent to personal jurisdiction.

Mallory v. Norfolk Southern Railway Co. (2023) 600 U.S. --, 143 S.Ct. 2028,- 2023 WL 4187749

HELD: A Pennsylvania statute that requires out-of-state corporations to consent to personal jurisdiction in Pennsylvania courts as condition of registering to do business in the Commonwealth does not violate the Due Process Clause.

Here, plaintiff was exposed to carcinogens while working in Ohio and Virginia. After he left the company, he lived briefly in Pennsylvania before returning to Virginia. The Pennsylvania Supreme Court held that was not enough for personal jurisdiction, and ruled the "consent statute" unconstitutional. SCOTUS disagreed and reversed. Even though plaintiff "no longer lives in Pennsylvania and his cause of action did not accrue there ... none of that makes any ... difference." Registration meant consent to the terms of the registration statute, including general jurisdiction.

Though this decision is based on specific statutory language, it may open the door for courts to find such registration a significant, or even dispositive, factor in determining whether there has been "purposeful availment," which like consent can establish jurisdiction.

RECENT CASES

CIVIL PROCEDURE (FEDERAL): If MSJ denied on purely legal issue, need not raise again to preserve issue for appellate review.

Dupree v. Younger (2023) __U.S. __

The U.S. Supreme Court unanimously ruled that when a district court denies summary judgment based on a pure issue of law, the aggrieved party need not raise the issue again at trial or post-trial via a Rule 50 motion in order to preserve the right to appellate review. The opinion can be found here: *https://www.supremecourt.gov/opinions/22pdf/22-210_7mi8.pdf*.

The Court acknowledged that "the line between factual and legal questions can be 'vexing' for courts and litigants," and noted that "it would not be surprising if 'prudent counsel ... make sure to renew their arguments in a Rule 50 motion' out of an abundance of caution."

The Court contrasted these orders with orders denying summary judgment on sufficiency of the evidence grounds. "[A]n appellate court's review of factual challenges after a trial is rooted in the complete trial record, which means that a district court's factual rulings based on the obsolete summary-judgment record are useless. A district court's resolution of a pure question of law, by contrast, is unaffected by future developments in the case. From the reviewing court's perspective, there is no benefit to having a district court reexamine a purely legal issue after trial, because nothing at trial will have given the district court any reason to question its prior analysis. We therefore hold that a post-trial motion under Rule 50 is not required to preserve for appellate review a purely legal issue resolved at summary judgment."

The Court declined to apply the "unaffected by future developments in the case" standard to the case before it, because the Fourth Circuit had dismissed the appeal out of hand:

"We need not decide whether the issue Dupree raised on appeal is purely legal – the Court of Appeals may evaluate that and any other properly preserved arguments in the first instance."

While there is this possible "escape hatch," the default rule about preserving error in federal court remains – err on the side of filing 50(a) and 50(b) motions if there is any doubt at all about whether you are raising a purely legal issue that was previously rejected on summary judgment.

LITIGATION: Failure to timely move to tax costs = waiver.

Briggs v. Elliott (2023 4th Dist. Div. 1) 92 Cal.App.5th 683

Defendant prevailed on an anti-SLAPP motion in a suit arising from a contested political election. Defendant filed a memorandum of costs, and then another after collection efforts were futile. Plaintiff paid one set of costs and served a demand to acknowledge satisfaction of judgment. Defendant filed a motion for attorney's fees and costs. Plaintiff argued defendant "was not entitled to the requested fees and costs because he delivered the cashier's check to her – and satisfied the judgment in full – hours before she filed her motion for fees and costs."

The trial court awarded costs to the defendant, and the Court of Appeal affirmed. "The statutory deadline for a judgment debtor to move to tax costs (§ 685.070, subd. (c)) and the statutory deadline for a judgment creditor to respond to a demand to acknowledge satisfaction of the judgment (§ 724.050, subd. (c)) operate independently of one another, and a party's duty to comply with one deadline does not alter the other party's duty to comply with the other deadline."

SANCTIONS for appeal of MSJ where no evidence or separate statement in opposition; can't raise unpleaded theories in opposition to MSJ.

Champlin/GEI Wind Holdings, LLC v. Avery (2023 2d Dist. Div. 6) 92 Cal.App.5th 218

"On the day before the hearing, appellant filed an opposing brief that lacked any separate statement and included no supporting evidence. Respondent supported its motion for summary judgment with a declaration from an accountant. ... Appellant's opposition did not challenge this calculation or offer an opposing expert opinion regarding the project's rate of return. Simply asserting that appellant is entitled to additional compensation without any supporting admissible evidence is not sufficient to create a disputed factual issue for trial."

"The appeal here is frivolous because it indisputably has no merit. As we have explained, appellant's opposition to the motion for summary judgment was untimely and insufficient because it did not include any supporting evidence. The oral request to amend the cross-complaint was equally inadequate because appellant did not file a motion to amend or the proposed amendment. The rules attendant to summary judgment and summary adjudication of issues are not arcane and should be known to a reasonable attorney appearing at a law and motion hearing."

Continued on page xvi

this case continued from page xv

There was also, no surprise, "reason to believe the appeal was taken for purposes of delay. Appellant's mechanic's lien remains active in Hawaii, despite the fact that the trial court ruled he was not entitled to any additional compensation for services rendered to the project. Rather than withdraw the lien in deference to the trial court's judgment, appellant filed this appeal to which delays the finality of that judgment. Appellant must know his claims are without merit, yet he continues to pursue additional compensation through the mechanic's lien action."

ATTORNEY FEES

ATTORNEY FEES AND COSTS: Attorney fees and costs are available under Code of Civil Procedure §1021.5 where a litigant defends against a suit that sought to limit the government's power to protect important public rights.

City of San Clemente v. Department of Transportation (Sierra Club) (2023 4th Dist. Div. 2) 92 Cal.App.5th 1131

Environmental Parties defeated motions by a homeowners group (Reserve) to invalidate agreements with CALTRANS and others re siting of a highway. Reserve dismissed its suit. The trial court rejected Environmental Parties' request for attorney fees. The Court of Appeal reversed and remanded.

We believe the trial judge should resolve the factual question of whether the Environmental Parties' private enforcement actions were necessary.

We will therefore remand the case to the trial court for a consideration of that question and for the trial judge to exercise discretion in determining whether to make an ultimate award of attorney fees and costs. In making that determination, the trial judge should take into consideration the fact that the Environmental Parties were the advocates for the Avoidance Area as a resolution of their dispute with the Corridor Agency in the prior litigation and were signatories of the settlement agreement. The judge should also consider the fact that the Environmental Parties were named by the Reserve as real parties in interest. They did not seek to intervene in the litigation on their own.

RECENT CASES

UCL

UCL: Organization has standing to sue under UCL on its own behalf where it spent resources to counter unfair or unlawful practice.

California Medical Assn. v. Aetna Health of Cal., Inc. (2023) 14 Cal.5th 1075

This decision expands the pool of potential UCL plaintiffs beyond those actually doing business with the defendant. "We hold that the UCL's standing requirements are satisfied when an organization, in furtherance of a bona fide, preexisting mission, incurs costs to respond to perceived unfair competition that threatens that mission, so long as those expenditures are independent of costs incurred in UCL litigation or preparations for such litigation. When an organization has incurred such expenditures, it has "suffered injury in fact" and "lost money or property as a result of the unfair competition." (§ 17204.)"

The trial court granted summary judgment to the defendant on standing grounds, and the Court of Appeal affirmed. The Supreme Court reversed, finding triable issues of fact as to whether resources were expended (mostly the time of salaried employees) and whether those were independent of the litigation.

HEALTH CARE: No UCL or CRLA violation for not posting EMS fees not required by law.

Moran v. Prime Healthcare Management, Inc. (2023 4th Dist. Div. 3) 94 Cal.App.5th 166 PETITION FOR REVIEW?

Self-pay emergency room patient brought a putative class action against hospital, claiming that failure to provide additional information, like signage, about fees charged in the emergency room (e.g., EMS) violated the Unfair Competition Law (UCL) and Consumer Legal Remedies Act (CLRA). The trial court granted a motion to strike. The Court of Appeal exercised appellate jurisdiction under the death knell doctrine, applied abuse of discretion review, and affirmed.

"[T]he California Legislature, the United States Congress, and numerous rulemaking bodies have already decided what pricing information to make available in a hospital's emergency room. Just as importantly, they have decided what not to include in those requirements. The reason for this extensive statutory and regulatory scheme is to strike a balance between price transparency and dissuading patients from avoiding potentially life-saving care due to cost." "A hospital's duty to list, post, write down, or discuss fees it may or may not charge an emergency room patient starts and ends with its duty to list prices in the chargemaster, which must be available in accordance with state law."

The court affirmed as to the CRLA on an additional ground: no reliance. "Moran's history at each of his three visits suggest serious and legitimate medical emergencies where he would have had no realistic opportunity to compare prices or consider leaving. At each visit, he was charged a level four EMS fee, the second highest, indicating a 'high severity' emergency. He received CT scans at his first and third visits. None of these facts suggest a reasonable inference that disclosing the EMS fees would have resulted in Moran seeking treatment elsewhere."

The decision recognized a split in authority. Moran followed *Gray v. Dignity Health* (2021) 70 Cal.App.5th 225 and *Saini v. Sutter Health* (2022) 80 Cal.App.5th 1054, "and decline[d] to follow" *Torres v. Adventist Health System/West* (2022) 77 Cal. App.5th 500, and *Naranjo v. Doctors Medical Center of Modesto, Inc.* (2023) 90 Cal.App.5th 1193, "to the extent [they] hold otherwise."

PRODUCT LIABILITY/UCL: "Merely" ambiguous front label not misleading where ingredients spelled out on back label.

McGinity v. The Procter & Gamble Co. (9th Cir. 2023) 69 F.4th 1093

Plaintiff claimed he was misled by products labelled "with the words 'Nature Fusion' in bold, capitalized text, with an image of an avocado on a green leaf" into believing that "the Products are natural, when, in fact, they contain non-natural and synthetic ingredients."

The Ninth Circuit affirmed dismissal. "[T]he front label containing the words 'Nature Fusion' is not misleading – rather, it is ambiguous. Unlike a label declaring that a product is '100% natural' or 'all natural,' the front 'Nature Fusion' label does not promise that the product is wholly natural."

"[W]hen, as here, a front label is ambiguous, the ambiguity can be resolved by reference to the back label. ... Upon seeing the back labels, it would be clear to a reasonable consumer that the avocado oil is the natural ingredient emphasized in P&G's labeling and marketing. The ingredients list, which McGinity alleges includes many ingredients that are synthetic and that a reasonable consumer would not think are natural, clarifies that the rest of the ingredients are artificial and that the products thus contain both natural and synthetic ingredients."

The decision also trashes a consumer survey plaintiff offered, mostly because "the survey participants did not have access to the back label of the products."

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.

CODY M. OLDHAM
Lewis Brisbois Bisgaard & Smith, LLP

Disclosures – Nevada's Public Records Act

Conrad v. City of Reno, 139 Nev. Adv. Op. 14 (June 15, 2023)

The Nevada Supreme Court clarified the standards that the district court must consider when a police department refuses to disclose or redact information in a public record request. The Court found that (1) the district court must make specific findings through an individualized determination that confidential records must be withheld instead of redacted and (2) redacting police officer's faces in body-worn camera footage is appropriate.

Conrad petitioned the district court in 2021, seeking disclosure of various governmental materials. In short, the district court granted part of Conrad's request. However, it denied the petition for an investigation report of a former sergeant and unredacted body-worn footage showing police officer faces during a sweep of a homeless encampment.

First, the Court examined the district court's denial of the investigation report of the former Sergeant. The Court noted that the district court identified the correct standard (*i.e.*, the *Bradshaw* Balancing Test); however, the Court found that the lower court abused its discretion by not making specific findings regarding the investigation report, instead wholly relying on the police department's affidavit. Thus, the district court needed to make further, specific findings regarding withholding the investigation report under the Nevada Public Records Act.

The Court then turned its attention to the redacted body-worn camera footage, and explained that NRS 289.025(1) provides that "the home address and any photograph of a peace officer in the possession of a law enforcement agency are not public information and are confidential." The Court found that this provision does not conflict with NRS 289.830(a), making any record open to public investigation because NRS 289.025(1) is more specific and can be harmonized together. Accordingly, the police department appropriately redacted the body-worn footage.

Medical Malpractice – Affidavit-of-Merit Requirements

Monk v. Ching, 139 Nev. Adv. Op. 18 (July 6, 2023)

The Nevada Supreme Court restated NRS 41A.071's affidavit-of-merit requirement in medical malpractice lawsuits. The Court ruled that an affidavit of merit must sufficiently specify the acts of negligence and express an opinion as to the medical standard of care breached for each defendant.

Here, the plaintiff – special administrator for the decedent's estate – filed a complaint against three physicians who allegedly took part in the decedent's post-operative care. In part, the plaintiff alleged that the decedent underwent surgery to remove a tumor at the base of her tongue. The surgical wound became infected, necessitating a second surgery to place a skin graft. The infection worsened, so the defendants placed gauze and a wound vac at the surgical site. Months later, it was discovered that the gauze was never removed, causing the decedent ongoing pain and recurring infections. The decedent subsequently passed away.

The plaintiff supported his complaint with a declaration from a nurse and her curriculum vitae. The nurse's declaration averred that the nursing and physical therapy staff breached the nursing standard of care by (1) "failing to prevent infection" and (2) failing to remove the gauze causing recurrent infection. The defendants moved to dismiss the lawsuit, arguing that the nurse's declaration failed to show that she was qualified to opine on a physician's standard of care, identify the alleged negligence, and state her opinions to a reasonable degree of medical probability. The district court granted the defendants' motion and dismissed the lawsuit.

The Nevada Supreme Court affirmed the district court's ruling. While NRS 41A.100 provides an exception to the affidavit requirement when foreign objects are left in a body during surgery, here the gauze which was left in the wound was during a post-operative procedure, and the court held that objects left in a wound as part of post-operative care are not foreign objects left during surgery for the purposes of the statute. The Court noted that the nurse's declaration did not adequately identify the specific roles played by each defendant, did not identify the relevant standards of care, and did not opine on which standards of care the defendants breached, and noted that the alternative theory of res ipsa loquitur fails because the gauze was not placed during surgery.

Service – Clarifying the Mailbox Rule's Applicability

Jorrin v. The State of Nevada, 139 Nev. Adv. Op. 29 (Sept. 7, 2023)

In Jorrin, the Nevada Supreme Court revisited whether NRCP 6(d)'s three-day mailing rule ("mailbox rule") applies to petitions for judicial review under NRS 612.530(1). The Court ruled that the mailbox rule does not apply to extend the period for filing a petition for judicial review under NRS 612.530(1) and overruled its previous decision in Kame to the extent it holds otherwise.

Here, the appellant sought and was denied unemployment benefits. She then sought relief from NESD's Board of Review. NESD sent a letter denying the appellant's request on August 27, 2021, stating that the decision became final on September 7, 2021. The letter further stated that the appellant had until September 20, 2021 to appeal the decision. The appellant filed her petition for judicial review on September 21, 2021. NESD moved for dismissal, arguing that the untimeliness of the petition stripped the district court of jurisdiction. The appellant argued that her petition was timely because NESD served its decision by mail. Thus, NRCP 6(d) provided her with three additional days to file. The district court granted NESD's motion to dismiss.

The Nevada Supreme Court explained that NRCP 6(d) only applies when service triggers the time for a party to act. Under NRS 612.530(1), a party has 11 days after NESD's Board of Review's decision becomes final. Accordingly, because the statute uses the date the decision becomes final instead of its service date, NRCP 6(d) does not apply.

As a political matter, the last two presidential elections were basically decided in three states, Wisconsin, Michigan, and Pennsylvania. In 2016, Trump narrowly won all three; in 2020, Biden narrowly won all three.

Will any of the Secretaries of State in these three states (all Democrat officeholders) pull the trigger to disqualify Trump from the ballot under Section 3?

My gut is that a Secretary of State of a blue state (like California) may test the legal waters first. Trump won't win California, in any event, so whatever happens it won't be outcome determinative. If California gets the ruling it wants, then, based on the established legal predicate, one of the big three (Wisc, Mich, & Penn) might try to follow suit (no pun intended) to exclude Trump from the ballot.

Is this a good idea though? Again, relying on the wise, old legal maxim of "equivalent poultries," what's to stop Texas, in response, from removing Biden from its ballot, based on its Secretary of State's *interpretation* that Biden has committed insurrection by failing to faithfully execute the immigration laws with respect to the Texas border? What's good for the goose might be good for the gander, but not good for the country.

The 14th Amendment may be old, but it remains alive and well. Come November 2024, it may have as big an impact on our Nation's future as it did 150 years ago, in the aftermath of the Civil War.

D. David Steele

Before joining Demler, Armstrong & Rowland, Mr. Steele was a partner at Yaron & Associates in San Francisco and Oakland, specializing in toxic torts and serving as National Counsel for trials in other states including, Illinois, Missouri, Hawaii, Washington, and New York. Mr. Steele has extensive trial experience in California Superior Court and United States Districts Courts in California.

ENDNOTES

1 See *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct 2228 (2022); *Students for Fair Admissions v. Harvard* 142 S. Ct. 895 (2023).

2 U.S. Const., 14th Amendment, Section 3.

3 U.S. Const., Article 2.

4 But, see, Mukasey, "Was Trump 'an Officer of the United States?'" Wall Street Journal, 9.7.23, *https://www.wsj.com/articles/was-trump-an-officer-of-the-united-states-constitution-14th-amendment-50b7d26#.* The former Attorney General, Michael Mukasey argues that the Presidency is not "an officer of the United States."

5 Debate between Professor Alan Dershowitz and Professor Tom Ginsberg, *https://reason.com/volokh/2023/09/04/prof-alan-dershowitz-harvard-vs-prof-tom-ginsburg-chicago-on-whether-trump-is-disqualified-under-%c2%a7-3-of-the-14th-amendment/.*

6 U.S. Const., Article 1, Sections 2 & 3; Article 2, Sections 2 & 4.

7 One notable scholar, Professor Steven Calabrese of Northwestern initially thought that Section 3 would bar Trump from office, but then changed his mind, stating that Section 3 does not apply to Presidents. Liptak, "An About-Face on Whether the 14th Amendment Bars Trump from Office," The New York Times, *https://www.nytimes.com/2023/09/18/us/politics/trump-calabresi-14th-amendment.html.*

8 The DOJ recorded 1116 arrests, 645 guilty pleas, and 92 convictions ranging from destruction of public property to seditious conspiracy.

9 1. *People of the State of New York v Trump* (NY); 2. *State of Georgia v, Trump, et al.* (Georgia); 3. *United States of America v. Trump et al.*, (USDC, Southern Dist. Of Florida, Case No. 23-CR-80101) and 4. *United States of America v. Trump* (USDC, District of Columbia, Case No. 1:23-cr-00257).

10 Beito, "The 14th Amendment case against Trump disregards history and precedent," The Hill, *https://thehill.com/opinion/judiciary/4181061-the-14th-amendment-case-against-trump-disregards-history-and-precedent/.*

11 *Debs v. United States*, 229 U.S. 211 (1919).

12 *Berg v. Obama*, 574 F.Supp.2d 509, 512 (E.D. of Pennsylvania 2008)

13 *Berg*, 574 F.Supp 2d. at 515.

14 *Berg*, 574 F.Supp 2d. at 530.

15 *Berg*, 574 F.Supp 2d. at 518, *citing Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 194 (2d Cir. 2001)

16 *Berg v. Obama*, 586 F.3d 234 (3rd Cir. 2009)

17 *Caplan et al v. Trump*, Case No. 0Z:23-cv-61628-RLR (Dkt 1.), United States District Court, Southern District of Florida.

18 Plaintiff specifically alleged: "Of particular note, Section 3 of the 14th Amendment, automatically excludes from future office and position of power in the U.S. government and as well, from any office and position of power in the sovereign states and their many subdivisions, any individual who has previously taken an oath to support and defend our Constitution and after which acts so as to rebel against that charter, either via overt insurrection or by giving aid or comfort to the Constitutions' enemies." (*Caplan et al v. Trump*, Case No. 0Z:23-cv-61628-RLR (Dkt 7.), United States District Court, Southern District of Florida, First Amended Complaint, pg. 6.)

19 *Caplan et al v. Trump*, Case No. 0Z:23-cv-61628-RLR (Dkt 17), United States District Court, Southern District of Florida, Order of Dismissal, pg 3.)

20 Rabinowitz *et al*, "New Mexico County Commissioner and Cowboys for Trump founder removed from elected office for role in US Capitol riot," CNN Politics, (*https://www.cnn.com/2022/09/06/politics/couy-griffin-new-mexico-january-6/index.html.*)

21 Brief of Amici Curae, State of New Mexico, *ex re.* v. Griffin, 2022 WL 3908966, dated August 1, 2022.

22 U.S. Const., Article 2.

23 *https://thehill.com/homenews/state-watch/4179561-trump-cant-be-barred-from-arizonas-2024-ballot-says-democratic-secretary-of-state/.*

24 *https://www.nbcnews.com/politics/2024-election/trump-supporters-flood-nh-election-office-calls-false-claims-ballot-ac-rcna102252.*

25 *https://www.politico.com/news/2023/09/18/democrats-effort-kick-trump-off-california-ballot-00116476.*

26 Findings of Fact, Conclusions of Law and Judgment, *State of New Mexico, ex re. v. Griffin*, 2022 WL 4295619, dated September 6, 2022.

27 *https://www.realclearpolitics.com/epolls/2024/president/us/general-election-trump-vs-biden-7383.html.*

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TRIAL TALES: The Reverend and the Business Card

David A. Levy

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

How often do lawyers actually read those records they subpoenaed? How often do we simply read the summaries our paralegals or law clerks prepare, rather than the records themselves? How often do we do more than peruse interrogatory responses, rather than follow up on seemingly unimportant responses?[1]

I still recall my first real "Perry Mason" moment as a young lawyer. I inherited a case set for trial in a couple months from a lawyer who left the firm seeking fame and fortune (unclear whether he accomplished either). It was a clear liability automobile case with soft tissue injuries the insurance carrier believed to be overstated, but we couldn't really prove it. My predecessor had subpoenaed all of the medical and employment records, sent out comprehensive interrogatories, and deposed the plaintiff. The only real sticking point was a wage loss claim. Plaintiff alleged that in addition to a modest salary, he received $4,000 - $6,000 cash per month. The accident occurred in 1979, probably making that the equivalent of $20,000 per month today.

THE PLAINTIFF WAS A REVEREND

The plaintiff, Reverend George Johnson, was the preacher at an African-American church in the San Francisco Bayview district. He had been the pastor there for over 25 years and, except for a volunteer office worker, he was the only employee. He controlled all the financial records and documents for the church. He was a very distinguished looking gentleman, who always wore impeccable black suits, white dress shirts and conservative ties. His monthly church salary was less than $1,000, but he testified that once a month he traveled to churches around the country, and would preach in evangelical revival meetings. At the end of each service, he would exhort everyone to make a donation (always in cash of course) and he would collect the donations as his fee. His records were handwritten in pencil, and looked like this:

March 1978 – Memphis ($4,100)
April 1978 – Philadelphia ($5,200)
May 1978 – Atlanta ($3,900)
June 1978 – Dallas ($4,700)
Etc.

The Reverend claimed these revival meetings required extensive physical gyrations on his part, but due to his sore neck and back he was no longer able to perform – and without the drama he couldn't get folks to make big donations. So, he essentially claimed he had lost more than $50,000 a year for the prior five years, meaning that a case which might be worth $35,000 or so (the medical specials were about $10,000) could easily result in a verdict in excess of $300,000. The carrier declined to offer more than $50,000, which I was authorized to offer pursuant to CCP 998 (Defendant's auto policy had limits of $100,000). Plaintiff's counsel threatened to sue for bad faith when he received what he was sure would be a verdict in excess of policy limits.[2] In fact, he analogized bad faith law to a "tree with golden leaves" that he was sure to pluck.

Well, if this fellow was exaggerating, how could I prove that? Just asking the jury to ignore the Reverend's obviously self-serving, hand-written (and probably fictional) records was unlikely to succeed, especially given the sober image he portrayed. No wonder my predecessor bailed rather than try and defend this case without any defense.

So, I decided to read through all of the discovery. Most of it was pretty typical, but I noticed in interrogatory responses the Reverend was divorced. And then, while reading through his primary care physician's records, I noticed a photocopy of a business card for an investigator the District Attorney's Office Family Support Division employed.[3] I was curious; if the

Continued on page 18

Reverend's ex-wife truly believed he was injured and unable to pay spousal support, as well as child support, why was she spending her energy pursuing him through the DA's Office?

FIELD TRIP TO THE COURTHOUSE

I met with the ex-wife, but she refused to testify. She knew the Reverend was lying, but he was very influential in the community and it would be very bad for her to testify against him. Yes, I know what a trial subpoena is, and I actually had one in my briefcase, but I knew she would be a reluctant and unpredictable witness, so I implemented Plan B – going to the Court Clerk's office.

I visited the Clerk's office, then located in the beautiful domed building that is City Hall.[4] I requested the court file for the Johnson divorce,[5] and saw they were divorced in 1976, and the Reverend had filed three financial declarations prior to the accident, each asserting he earned around $900 per month; certainly nothing like the $5,000 each month he was claiming in wage loss! I obtained certified copies of the three declarations.

TRIAL

The trial proceeded pretty much as plaintiff's counsel anticipated. He put the Reverend on the stand, who testified as expected, dramatically explaining the physical contortions and stamina required for doing evangelical prayer revivals, and that he had lost more than $50,000 each year in income. At 11:50 am, plaintiff's counsel had no more questions, and it was my turn to cross-examine. I desperately wanted to wait until after lunch to introduce the court documents, because I didn't want to let his lawyer have the chance to come up with some convoluted explanation to undercut our impeachment of the plaintiff. So, I asked all of my other questions, and stalled until the judge called for the lunch recess.

After lunch, I resumed cross-examination:

Q. "Sir, let me show you what the clerk has just marked as Defendant's Exhibit A. It is a certified copy of a financial declaration signed by you in December, 1976. I have handed a courtesy copy to your lawyer. Please take a look at it. Please review the second page, which lists your monthly income. Kindly look at the amount claimed to be your monthly income, and tell the jury what that figure is."

A. "$900."

Q. "And what is the name of the individual who signed this document?"

A. "George Johnson."

Q. "And do you see this line on the bottom of the page, where it states, 'I declare under penalty of perjury that

Continued on page 19

the foregoing is true and correct'? Whose signature is at the end of that oath under penalty of perjury?"

A. "It's mine."

I repeated this process twice more, and as I handed each subsequent courtesy copy to plaintiff's counsel, his face betrayed his understanding that his big bad faith verdict was not going to happen.

I introduced Exhibits A, B, and C, and advised plaintiff's counsel, "Your witness." There was no re-direct.

There was other defense testimony (a pretty good IME doctor who described how plaintiff exaggerated his symptoms), but the case was pretty much decided when I concluded my cross-examination of the Reverend.

Interestingly, plaintiff's counsel put his client back on the stand for rebuttal to try and rehabilitate him. It wasn't really rebuttal, but I think the Judge felt sorry for the plaintiff, and may have calculated that it wasn't going to make any difference in the outcome. The Reverend came up with a convoluted explanation for his signature on the damning declarations (I don't recall his explanation, other than it was pretty obviously bogus.) I think my re-cross was something like, "Oh, that was your signature under penalty of perjury on Exhibits A, B, and C, right?" He acknowledged that, and everyone in the courtroom knew he had lied on direct examination.

THE VERDICT

The jury returned a verdict of $40,000, but because that was less than our CCP 998 offer of $50,000, not only was plaintiff unable to recover any costs, but I was able to deduct the defense ordinary and expert costs, which were $6,000 (recoverable costs were a lot less in those days). The check my carrier wrote to the Reverend and his attorney was for less than $34,000, and this case goes in the books as a defense win. Although Perry would have gotten the plaintiff to admit his falsehood on the stand, I'd like to think Erle Stanley Gardner would have otherwise approved my script.

David A. Levy

David A. Levy is a semi-retired trial attorney with nearly 50 cases taken to jury trial, primarily in medical malpractice, police and motor vehicle matters. He currently engages in some ADR and hearing officer work, and is a former member of the ADC Board of Directors, as well as past Editor-in-Chief of ADC *Defense Comment*.

ENDNOTES

1 You don't have to answer out loud; these are simply rhetorical questions. Or are they?

2 This case was tried prior to *Moradi-Shalal v. Fireman's Fund Ins.* Cos., 46 Cal. 3d 287, 303 (1988), which barred third-party bad faith claims, like the one plaintiff's attorney was threatening.

3 In days of yore, the District Attorney's Offices had the responsibility to pursue unpaid spousal support and child support (usually, but not always fathers/ex-husbands) for the custodial parent and former spouse. About 25 years ago that responsibility was taken from the DAs, and given to a newly created state Department of Child Support Services, with branches in each of the 58 counties.

4 City Hall is now the office of the San Francisco Mayor and the Board of Supervisors, as well as a few city administrators. For many years all San Francisco civil cases were tried at City Hall, in charming courtrooms with ancient wooden tables and chairs (and equally ancient ventilation systems). The windows opened to Market Street where all the ambient urban sounds – Muni buses, car horns, pedestrians and street denizens' shouts – competed on equal footing with voir dire questions and testimony.

5 It was possible to read the actual files, which included all the financial information of the parties. That information is no longer available to members of the public.

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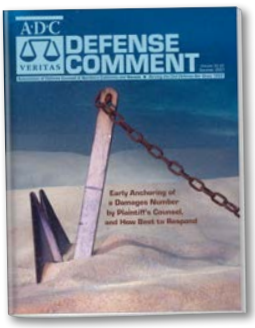
Do you have an article or trial success story to share with readers?

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.

All submissions should be sent to *ellen@arabian-leelaw.com* and *jlifter@rallaw.com.*



Trials and Tribulations

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

Ninth Circuit affirms District Court's Order directing insured to dismiss a separate state bad-faith action against the insurer arising out of its acceptance of a 998 Offer in prior litigation filed against it by the insured and decision to file a federal interpleader action rather than pay the judgment directly to the insured.

Aguila and his related corporation, Thee Aguila, Inc. (collectively "Aguila Parties"), filed a civil action against Penn-Star Insurance Company ("Penn-Star"), alleging breach of a commercial liability-insurance policy and insurance bad faith ("Insurance Action"). While the action was pending various creditors of Aguila Parties filed and served notices of liens against Aguila Parties' recovery in the Insurance Action. Thereafter, Aguila Parties served a CCP §998 Offer to Compromise upon Penn-Star in the amount of $1,995,000, payable directly to Aguila Parties, who would assume responsibility for discharge of the liens. Aguila Parties would dismiss their complaint and the parties would enter into a settlement and release agreement. Penn-Star accepted the offer. Thereafter, however, one of Aguila Parties objected to the settlement. In response, Aguila Parties drafted and presented to the court for entry a Judgment for $1,995,000 in their favor and against Penn-Star, which Judgment was silent as to discharge of liens. The objecting creditor approved the proposed judgment, Penn-Star filed a non-opposition to its entry, and the court entered it.

Because of the many liens against the proceeds to the Judgment, Penn-Star filed a complaint in interpleader in federal district court against Aguila Parties, their known creditors and others whom it believed claimed to have an interest in the Judgment proceeds ("Interpleader Action."). Aguila Parties filed an answer in the Interpleader Action but asserted no counterclaim against Penn-Star. Penn-Star moved for leave to deposit the judgment proceeds plus interest with the court, for discharge of liability therefore upon deposit, and for an injunction against the institution of further proceedings against it relating to the proceeds. Aguila Parties did not oppose the motion, which was granted. But one day before Penn-Star deposited the sums with the court, Aguila Parties filed a new lawsuit in California Superior Court against Penn-Star ("State Action") alleging breach of contract, bad faith, intentional infliction of emotional distress and negligence, arising out of Penn-Star's acceptance of the 998 offer, allegedly with advance knowledge of creditor objections to it, failure to pay the judgment proceeds directly to them, and institution of the interpleader action. The District Court granted Penn-Star's motion to amend its interpleader order to direct Aguila Parties to dismiss the State Action and denied Aguila Parties' request for leave to assert a counterclaim against Penn-Star in the Interpleader Action asserting the same causes of action as had been brought in the State Action. Aguila appealed to the Ninth Circuit.

On appeal, Aguila Parties argued that the State Action was not barred by the order in the Interpleader Action enjoining actions relating to the deposited funds because Penn-Star was independently liable to it in tort for bad faith acceptance of the 998 offer and thereafter failing to pay the funds to it. Penn-Star argued that all liability claimed in the State Action was related to privileged litigation activities and its decision to interplead the funds for court determination as to who was entitled to them, and therefore the District Court properly directed Aguila Parties to dismiss the State Action. Penn-Star further argued that it did not create the controversy over the funds because the controversy already existed before Aguila Parties served its 998 offer upon it. Finally, Penn-Star argued that Aguila Parties suffered no damage because, by operation of law, the judgment could not be paid directly to Aguila Parties unless and until the liens were satisfied out of the Judgment first, the creditors released the liens, or upon the court's order on motion

Continued on page 23

to approve the payment to Aguila Parties, none of which had occurred.

The Ninth Circuit affirmed. Although acknowledging that an interpleader order would not shield an interpleading party from independent tort liability for creating the conflict between various claims to the interpleaded sums, the court found that none of Aguila Parties' State Action claims plausibly alleged that Penn-Star created the controversy over the interpleaded funds or that Penn-Star was liable to Aguila Parties on any grounds independent of its decision to file the interpleader action. And because the District Court did not err in enjoining Aguila Parties from pursuing the State Action, it likewise did not err in refusing to grant Aguila Parties leave to file in the Interpleader Action a counterclaim alleging the same causes of action as asserted in the State Action. It noted that such proposed counterclaims would be "futile."

Penn-Star was represented in the Insurance Action, State Action, Interpleader Action and appeal thereof by James P. Lemieux, Andres C. Hurwitz, and Lisa L. Pan of Demler, Armstrong & Rowland, LLP.

Charles v Elcock, et al. Contra Costa County, Judge Danielle Douglas. Plaintiff Charles sued three of her Danville neighbors for damages and injunctive relief arising out of Redwood tree roots invading her property and allegedly preventing her from landscaping her front and back yards. Two of the defendants settled before trial for cash and removing trees. Our client was Ms. Elcock, an elderly woman suffering from severe dementia. Her husband had power of attorney and acted as the defendant at trial. The Elcock property sits adjacent to plaintiff's property and has five mature redwood trees. Our defense was that plaintiff could very well landscape her property even with tree roots, that plaintiff's property did not suffer a loss in value due to the tree roots and that the trees offered value to Elcock and the neighborhood. Trial began May 8 and the verdict was returned May 17. Plaintiff was represented by James Wickersham of Walnut Creek and the defense was represented by Dewey Wheeler of McNamara, Ambacher, Wheeler, Hirsig and Gray of Pleasant Hill. An eight-day jury trial heard from the parties, arborists, a landscape architect and appraisers for both sides. After one hour of deliberations, the jury returned a unanimous defense verdict.

Los Angeles Jury Returns a Defense Verdict After Plaintiffs Sought Over $100 Million

After a five-week trial, a Van Nuys jury returned a complete defense verdict in favor of a wholesale plumbing supplier, tried by Demler, Armstrong & Rowland ("DAR") partners Brian H. Buddell and Jennifer C. Rasmussen.

Asking the jury to award over $100 Million, Plaintiffs Kirtley Bjoin and his wife Allison Bjoin, claimed that Kirtley Bjoin, a 62-year-old non-smoker with Stage IV lung cancer, was exposed to asbestos from his work with and around underground asbestos cement pipe supplied by DAR's client from the 1970s through the 1990s, in this asbestos products liability action filed by Weitz & Luxenburg.

Proceeding under both negligence and strict liability causes of action, plaintiff alleged that: a) The product did not perform as safely as an ordinary consumer of asbestos cement pipe would expect; b) Defendants failed to warn about the dangers of the product; and c) The risks posed by the asbestos found in the pipe outweighed the benefits of the product.

DAR's trial team countered that: a) The product was safe if used properly; b) If the asbestos contributed to cause plaintiff's disease, it was his actions and not those of the supplier that represented a substantial factor; c) Plaintiff, as an experienced pipe layer was a "sophisticated user;" and d) Because there was no viable alternative at the time (due in part because asbestos cement pipe was utilized by the municipalities entities for whom plaintiff was installing it), the benefits did outweigh the risks.

After only three and a half hours of deliberations, the jury agreed with the defense, finding that it was plaintiff's misuse of the product that created any hazard and that the actions of the supplier did not constitute a substantial factor in increasing plaintiff's risk of developing lung cancer. All jurors spoken to were also highly complementary of the style, organization, and presentation of the DAR trial team.

Stated Jennifer Rasmussen of the verdict, "We are so pleased that the jury hung in there and listened to the entire case, giving our client an opportunity to present what we knew from the outset, to be a strong and viable defense. We hope too that this defense verdict shows that well-thought out and streamlined defenses can be successful, and that juries are willing to hear both sides of the arguments. We are also appreciative of Judge Graciela Frexies for her fair and thoughtful handling of this complicated case."

Oak Creek East HOA v Redmond, and related cross-complaint, Napa County, Judge Scott Young. Plaintiff HOA sued Mr. and Mrs. Redmond for enforcement of CCRs as Redmond built improvements not approved by the Architectural Committee. Redmond cross-complained against the HOA and its individual Directors for breach of the CCRs, negligence, negligent infliction of emotional distress and against our client, a retired SFSC Judge, a claim for intentional infliction of emotional distress, hence our involvement. Plaintiff's case was equitable in nature but the cross-complaint was legal so a jury was impaneled. The trial began August 31 and a verdict was returned September 25. The equitable claims for plaintiff still have briefing so there is no result yet on the complaint. The jury heard testimony from Mr. and Mrs. Redmond, the five directors, the building professionals involved in the construction of the improvements and medical/psychiatric experts. Plaintiff was represented by Matt Haulk of Haulk and Herrera, the cross defendants HOA and four directors were represented by Hal Chase of Law Offices of Scott Stratman, Richard Kramer was represented by Dewey Wheeler and Joseph O'Neil of McNamara, Ambacher, Wheeler, Hirsig and Gray, and the Redmonds were represented by David Dell and Caryn Hreha of Coombs and Dunlap. On all counts alleged the jury returned a defense verdict.

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jurisdictional limit increases are in the bill, the issues are remarkably contentious in Sacramento, as the Chamber of Commerce, insurance associations, the plaintiff's bar in employment and "lemon law," and others had wildly divergent views. As a point of reference, if the $25,000 limited jurisdiction threshold had simply been increased by the rate of inflation since the last change, the new amount would have been approximately $75,000.

- **SB 652 (*Umberg*): Experts.** SB 652 amends Evidence Code Section 801.1, relating to expert testimony on medical causation. Responding to the case of *Kline v. Zimmer*, the bill clarifies that the party not bearing the burden of proof may offer expert testimony only if the expert's opinions exist to a reasonable medical probability. Critically however, the bill adds a new exception to this standard, also clarifying that nothing in the section prohibits such an expert from testifying that a theory offered by the other side cannot meet a reasonable degree of probability in the applicable field, and offering the basis for that opinion.

- **SB 365 (*Wiener*): Arbitration.** This bill amends Code of Civil Procedure Section 1294 (a), adding that the appeal of the denial of a motion to compel arbitration does not *automatically* stay any proceedings in the trial court during the pendency of the appeal. The practical effect is to leave to judicial discretion the decision whether or not to stay trial court proceedings while the appeal proceeds.

The 2023 legislative year in Sacramento included many more relevant bills than can be summarized here. Please join us at the ADC Annual Meeting December 7-8 in San Francisco for a more complete discussion of bills affecting defense practice.

CALIFORNIA DEFENSE COUNSEL

MEMBERSHIP APPLICATION

Association of Defense Counsel of Northern California and Nevada

Membership

Membership in the Association of Defense Counsel of Northern California and Nevada is open by application and approval of the Board of Directors to all members in good standing with the State Bar of California or Nevada. A significant portion of your practice must be devoted to the defense of civil litigation.

Membership Categories

Annual dues for ADC membership are based on your type of defense practice (staff counsel or independent counsel) and, for independent counsel, the length of time in practice and the number of ADC members in your firm. The following are the base fees:

☐ **REGULAR MEMBER ($395)** – Independent Counsel in practice for more than five years.
☐ **YOUNG LAWYER MEMBER ($225)** – In practice zero to five years.
☐ **ASSOCIATE MEMBER ($325)** – All staff counsel (including public entity, corporate or house counsel).
☐ **LAW STUDENT MEMBER ($25)** – Currently enrolled in law school.
☐ **DUAL MEMBER ($100)** – Current member in good standing of the Association of Southern California Defense Counsel.

Information

Name:_____ Firm: _____

Address: _____

City / State / Zip:_____ Birthdate *(year optional)*: _____

Phone: _____ Ethnicity: _____

E-mail: _____ Website: _____

Law School:_____ Year of Bar Admission:_____ Bar #: _____

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

Are you currently engaged in the private practice of law? ☐ Yes ☐ No

Do you devote a significant portion of your practice to the defense of civil litigation? ☐ Yes ☐ No

Practice area section(s) in which you wish to participate *(please check all that apply)*:

☐ Business Litigation ☐ Construction Law ☐ Employment Law ☐ Insurance Law & Litigation
☐ Landowner Liability ☐ Litigation ☐ Medical Malpractice ☐ Public Entity ☐ Toxic Torts ☐ Transportation

I was referred by:

Name:_____ Firm: _____

Signature of Applicant:_____ Date: _____

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Return completed form & payment by mail or fax to: **Association of Defense Counsel • 2520 Venture Oaks Way, Suite 150 • Sacramento, CA 95833 • (916) 924-7323 – fax**

For more information, contact us at: (916) 239-4060 – phone • *info@adcnc.org* • *www.adcnc.org*

WELCOME NEW MEMBERS

Since August 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.

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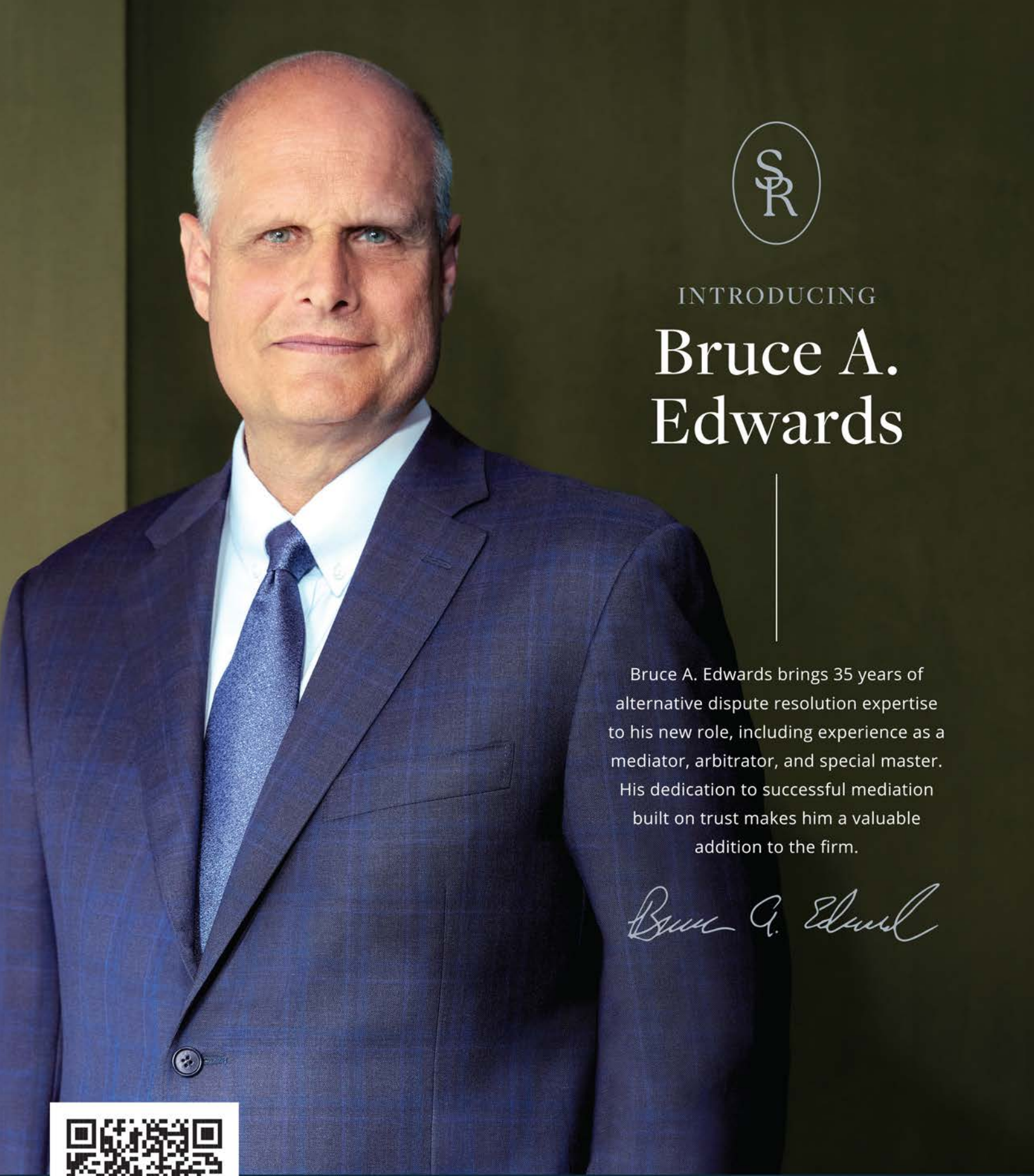

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DECEMBER 7-8, 2023

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EXCEEDING EXCELLENCE

KEYNOTE SPEAKER

Hon. Tani Cantil-Sakauye (Ret.)

Chief Justice Tani Cantil-Sakauye, former leader of California's judicial branch, now mediator and appellate consultant with ADR Services, Inc. brings her over 30 years of legal expertise across virtually all levels of judicial service to the realm of dispute resolution. She made history as California's first woman of color Chief Justice, navigating the state through the Great Recession and COVID-19. An advocate for transparency and access to justice, she revitalized civic learning and improved public engagement with the courts. Her expertise extends to remote court proceedings and effective crisis response. As a dispute resolution professional, she offers mediation, case evaluations, consultations, drawing on her background in employment, business, healthcare, and appellate disputes. Throughout her career, Chief Justice Cantil-Sakauye has remained committed to the principles of fairness, integrity, and justice. Her unwavering dedication to these values has made her a standout neutral able to resolve even the most emotionally challenging and factually complex disputes with aplomb and sensitivity.

INSPIRATIONAL SPEAKER

Michael Putnam

Michael is a husband, father of twins, mountain climber, and seeker of adventure. His pursuit of a fulfilling life and making an impact on those he encounters influences, at a high level, his professional life as well. After nearly a decade in another industry, where he helped take a business from $330k in annual revenue to nearly $3M in less than four years, Michael made the move into real estate in 2011. His commitment is to serving people, while achieving outstanding results, and he believes that each needs the other to reach their highest levels.

OTHER SESSION WILL INCLUDE:

Diffusing Conflict • Shifting Liability • DEI Policies • Motorcycle Litigation • Reporting Obligations: New Rule 8.3 • IT Security • AI Technology • Traumatic Brain Injury • Year in Review • Legislative Update • and more!