ASCDC
2023 • Volume 2

VERDICT

A Publication of the Association of Southern California Defense Counsel

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Annual Seminar Keynote Speaker

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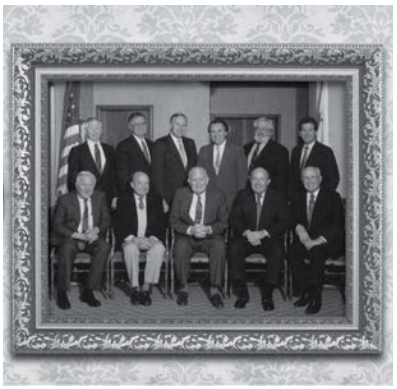

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PRESIDENT'S MESSAGE

NINOS P. SAROUKHANIOFF
2023 President

Dear Fellow Defense Lawyers

This is my first President's Message. What an honor and privilege. As part of our theme for this year, "Honor the Past, Celebrate the Future," I've literally gone to the ASCDC website and looked at the *Verdict* Magazine archives beginning with Volume 1, 2011. In that issue, our Former President Linda Miller Savitt wrote her first President's Message. Funny because even Ms. Savitt, who has tried more cases than just about anyone I know, wrote, *"I think the most stressful part of this job as President of the ASCDC is giving the speech at the annual seminar and writing the President's Message."*

I cannot agree more. As any good lawyer would do when getting ready to write something that is going to be read by many people, I did some research by going back and reading President's Messages from Linda Miller Savitt (2011), Diane Mar Wiesmann (2012), N. Denise Taylor (2013), Robert A. Olson (2014), Michael Schonbuch (2015), Glenn Barger (2016), Clark R. Hudson (2017 – by the way love the picture of Clark standing next to Bill Walton), Christopher Faenza (2018), Peter Doody (2019), Larry Ramsey (2020), Diana P. Lytel (2021), and of course, Marta A. Alcumbrac (2022).

Once I started reading all the past President's Messages, I went a step further and tried finding even older issues on-line. I got lucky. I found a message from Jeffrey Behar (4th Quarter of 1999). Twenty-four years ago, Mr. Behar talked about being mindful that lawyers do not forget the lessons of the past, *"ASCDC evolved for a handful of prominent trial lawyers who were champions of the jury system. In the past 40 years (now 63 years), ASCDC has grown into the largest and most influential local organization of its kind in the country. With the end of the century, we need to keep in mind our Association's great history."*

Mr. Behar also talked about the challenges for the lawyer of the 21st century when he said, *"As an Association, we must continue efforts to renew the trust and loyalty we once shared with the insurance industry, re-establish civility among lawyers and the judiciary, support the preservation of the jury system, while still recognizing the business aspect of the practice and the law firm's bottom line."*

Today, twenty-four years later, we still face many of the same problems that were faced by our former presidents such as Mr. Behar. Yet, some of these problems are even worse today. In talking with many of my colleagues at this year's Annual Seminar a recurring theme of rising caseloads and a shortage of lawyers, paralegals, and trained personnel, many of us are struggling to keep up with demand. We need to work together and with our clients to ensure that adequate resources and support are provided to these issues and ensure that our clients are getting the utmost representation that they deserve. To this end, the ASCDC stands here ready, willing, and able to do its part in helping our members wade through these difficult times.

Moreover, there is a growing concern about the lack of diversity in the civil defense bar. While I certainly believe that the ASCDC has made great strides in the areas of diversity and inclusion, I pledge that we will continue to work very hard to strengthen our efforts to create a more inclusive environment that welcomes people from all backgrounds and experiences. Only by doing so, can we ensure that the civil defense bar reflects the diversity of our society.

In looking toward the immediate future, I want to let you know that the Board and all of the committee chairs and members are working very hard at creating webinars and seminars that will provide our members with opportunities to earn MCLE credits as well as improving skills as lawyers. The seminars also provide us with an opportunity to meet and interact in person (not Zoom) with each other.

A brief glimpse at some of the events that we have planned for this coming year: Golf Tournament at El Segundo Top Golf; Med-Mal and General Litigation Conference in Santa Barbara; Annual Construction Seminar in Orange County; and of course, the Judicial and New Member Reception. There will be other events throughout the year as well.

In conclusion, I know that we all face many barriers that must be addressed in the coming year and for many years that follow. As

Continued on page 39

CAPITOL COMMENT

MICHAEL D. BELOTE
Legislative Advocate, California Defense Counsel

Major Civil Procedure Issues Pending in Sacramento

As spring unfolds (slowly) in Sacramento, the California Legislature is in the throes of conducting the first round of policy hearings on over 2700 new bills and resolutions for 2023. The total number of new bills is the highest in recent memory, probably because of pent-up demand coming out of the pandemic, and the lofty ambitions of an unprecedented number of new legislators. To make sure that nothing important is missed, every bill and every amendment to every bill is read and evaluated for possible impact on defense practice.

When the dust settled after the bill introduction deadline on February 17, over 160 bills were identified of interest to ASCDC members. It would be difficult to conceive of any area of practice not implicated by one or more bills. Seven of the bills are of such broad application, however, that they merit special mention here. Interestingly, all are Senate bills, and all but two are carried by Senator Tom Umberg (D-Santa Ana), who is Chair of the powerful Senate Judiciary Committee, and an accomplished civil litigator in his own right in Orange County.

SB 21 *(Umberg)*: Remote Appearances: This bill is designed to extend the July 1, 2023 sunset date on Code of Civil Procedure Section 367.75, which lays out the statutory rules relating to remote appearances in civil proceedings. Other bills address quasi-criminal matters such as civil commitments and juvenile delinquency proceedings, and criminal cases. This is such an important issue that CDC is acting as a co-sponsor of the measure, along with the Consumer Attorneys of California and the California Judges Association. CDC has argued that the ability to appear remotely, with ever-improving technology, is a benefit to lawyers, litigants and the courts, but that jury trials are not appropriate for fully-remote technology and that lawyers and parties should always have the option of appearing in-person.

SB 42 *(Umberg)*: Lawyer Misconduct: Codifies the ABA Model Rule on reporting misconduct by lawyers, an especially timely subject in California given the Girardi situation. The State Bar also is considering adopting a more narrow approach by rule. CDC is part of the discussions, along with the Consumer Attorneys, California Lawyers Association and other groups. Tricky questions relating to confidentiality and mediation privilege are part of the discussion. All parties agree that imposing new rules on reporting should avoid the possibility of weaponizing reports to the State Bar.

SB 71 *(Umberg)*: Case Thresholds: Proposes to increase the small claims limit from $10,000 to $25,000, and the limited jurisdiction limit from $25,000 to $100,000. These proposed limits are very likely to be revised down in the coming weeks. It also is likely that the number of depositions and interrogatories under limited jurisdiction in current law will be increased somewhat. Also there is discussion of exempting certain case types, such as employment, from the increases.

SB 71 *(Umberg)*: Discovery: In perhaps the most consequential of all of these bills, amends Code of Civil Procedure Section 2016.090 to require early exchange of discovery in all civil cases, similar to the rule under the Federal Rules of Civil Procedure, and increases sanctions for discovery abuses. The bill reflects longstanding frustration by the Senator with discovery disputes. CDC has argued that automatic early exchange for all civil cases will be a problem for defense counsel in complex or evidence-intensive cases, at least without federal-style judicial case management.

SB 365 *(Wiener)*: Arbitration: Reverses the rule that appeals of denials of motions to compel arbitration stay the underlying

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See page 36 for a spotlight on one of our Newest Members.

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President

OPINION

ASCDC's Annual Seminar – The Lasting Impact on Young Attorneys

Andrew Figueras & Mouna Kezbar

On February 9 and 10, 2023 at the JW Marriot in Downtown LA, amid all of the hustle and bustle, many of the best defense attorneys in the business gathered together for ASCDC's Annual Seminar. Gathered among those many preeminent attorneys were distinguished members of the Judiciary, opposing counsel, and, of course, many new attorneys. Newer attorneys in attendance were eager to learn about a new topic in the law, learn something new about the area in which they practice, or simply brush up on stuff they thought they knew. They did this while meeting many new colleagues in the defense bar, greeting friends from law school, placing a face to a fellow defense attorney colleague's name, earning MCLE credit, and most importantly, experiencing the best two-day seminar that ASCDC offers.

Whether you are a new attorney or an experienced attorney, whether you took part in the entirety of the seminar or showed up for an individual component, or whether you just showed up for the Year in Review, there was certainly something for everyone. The lasting impact on attorneys, both young and experienced, is something that cannot be overstated. We would venture to say that without a doubt, every single person who attends the ASCDC's Annual Seminar learns something new, which is part of what makes this seminar's impact so lasting.

All of the lecturers provided phenomenal learning experiences, including valuable insights and information from the members of the Judiciary and attorneys who are at the top of their areas of practice. For new attorneys, like ourselves, we encourage everyone who is able to sign up for the Annual Seminar to attend.

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Medical Evidence Session speakers (L-R): Thomas Johnston, Kenneth Sabbag, M.D., Lindy Fried Bradley, Camerin Thies, and Kathryn Canale

ASCDC 62ND Annual Seminar

February 9-10 • JW Marriott at LA Live

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One might ask, why was the ASCDC Annual Seminar so impactful? Well, a prime example of why there is such a lasting impact on those in attendance is the Year in Review hosted by ASCDC's very own Robert Olson and David Hackett. Yes, we know it is early in the morning for some, but that should not have stopped you and it should not stop you in the future from attending. Conveniently, there is a continental breakfast and importantly, COFFEE. What is covered in that 1.5 hours is highly beneficial to all attorneys, especially those who are new to the practice of law. Whether you practice general liability, employment, or anything else, the Year in Review covers the most important cases of the year that not only affect us all on the defense side, but likely affects your day-to-day practice. The lecturers covered everything from Civil Procedure to Evidence and everything in between. We understand, at least as newer attorneys, that there is a constant worry of what would happen if you write a motion or appear in front of a Judge and cite a case that was recently overturned or discuss a law that has recently changed. Not only would it cast a bad light on the new attorney, but we would be doing all of our clients a great disservice. The Year in Review allows you to keep abreast of all the new case law that you may not have been otherwise aware of and prepares you for when opposing counsel references something that has changed.

So as newer attorneys, we encourage everyone to attend ASCDC's Annual Seminar in the coming years. We cannot state the importance of the Annual Seminar enough for newer attorneys. All of the information provided, the insights gained, the new knowledge acquired, and the continuous meeting of other amazing attorneys and members of the Judiciary is far too valuable to pass up. In stating that, we encourage all who are more experienced, and are able to do so, to send your newer attorneys to the ASCDC Annual Seminar.

The ASCDC Annual Seminar, stuck out to us as the most important reason why all those that are a part of ASCDC should not only attend the Annual Seminar, but also encourage other newer attorneys to attend. We encourage everyone to send newer attorneys to the MCLEs hosted by ASCDC, events hosted by ASCDC, to get involved with ASCDC, and most importantly, attend the Annual Seminar.

Remember: "I've failed over and over and over again in my life, but I attended the ASCDC Annual Seminar and that is why I succeed." – What Michael Jordan Probably Wanted to Say. V

Andrew K. Figueras

Andrew Figueras is an associate at Yoka | Smith, LLP. Andrew received his Juris Doctor degree from Southwestern Law School. He attended the University of Arizona where he graduated in three years and received his Bachelor of Arts in Political Science with an emphasis in Law and Public Policy.

Mouna Kezbar

Mouna Kezbar is an associate at Yoka | Smith. Mouna received her Bachelor of Arts degree in Political Science and Economics from Loyola Marymount University. Mona received her Juris Doctor degree from Southwestern Law School. While attending law school, she was a board chair for the Negotiation Honors Program and a staff member for the Southwestern Journal of International Law.

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ASCDC ANNUAL SEMINAR RECAP: Time-Limited Settlement Demands

Karen M. Bray

The seminar on time-limited settlement demands focused on newly-enacted Code of Civil Procedure sections 999–999.5, statutes that are designed to lay some ground rules for how to make pre-lawsuit settlement demands to liability insurers and how to respond to those demands. The presentation outlined the history and purpose of the statutes and reviewed key terms, including mandatory components of demands, where such demands must be sent, the impact of requests for clarification or additional response time, and new requirements for insurers who decline such demands.

The panel presented a broad spectrum of perspectives, including plaintiff's counsel, insurance claims, defense counsel, coverage/bad faith counsel, and appellate counsel. Panel members discussed how the statutes will impact the nuts and bolts of their day-to-day handling of such demands, and noted some significant loopholes in the statutes and unanswered questions that will inevitably become a basis for future litigation. Some great tips were offered concerning how to use the statutes as a shield and how to avoid some potential traps the statutes may create. V

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ASCDC ANNUAL SEMINAR RECAP: Lien On Me: Pushing Back on Unusual, Uncustomary, and Unreasonable Charges

Benjamin J. Howard

The "Plaintiff's Personal Injury Industry" is using lien-based healthcare to artificially inflate the value of their cases. No longer concerned with making their clients whole, post-Pebley plaintiffs are now incentivized to seek the most expensive (and sometimes even unnecessary) care. Los Angeles is the epicenter of this problem on the West coast, so it was only fitting the topic was covered at ASCDC's 62nd Annual Conference February 9-10, 2023. Henry Lubow, M.D., Donna Maryanski, Esq., and Steve Toschi presented together to educate and arm defense counsel with tools to fight these unreasonable, uncustomary, and unreasonable charges.

We learned there is no such thing as a "billing expert," as the charges compiled by lien-based healthcare providers are more akin to a gambling ticket. The provider is placing a bet they will be paid at a future date, by an unknown entity, in an unknown amount. There is no expertise on these "bills" as there is no market or historical data to rely on. Liens are agreements made between the seller physician and an ambiguous customer. While the plaintiff is the recipient of the services, they do not expect to pay for them and have no interest in being frugal. Rather, the plaintiff wants the defendant, who had no role in the cost negotiations, to pay on their behalf.

Instead, we were taught a better descriptor for this expertise is a "Reasonable Value expert." An expert in this field only needs three pieces of information to place a reasonable value on healthcare services: a CPT (Current Procedural Terminology) code or descriptor, the date the service was rendered, and the geographic location of the service. Frequent tactics used by the plaintiff's bar to inflate the reasonable value include unbundling individual CPT codes into multiples, using newer CPT codes (years after the service was provided), and using the 95th percentile of historic payments for these codes to assign value.

Attendees were also instructed on using depositions to set their reasonable value experts up for success at the time of trial. Tips included asking plaintiffs how they found their doctor, where the lien was signed, what they expected to pay for the services, and whether anyone explained the ramifications of the lien to them. Treating physicians should agree they will not opine on billing (one issue, one expert), whether they ran a credit report on the plaintiff's ability to pay, and how the office handles lien collections. As for the plaintiff's "Reasonable Value expert," they need to identify their sources and whether any of these sources are based on lien-based healthcare (there are not any!). Last, these experts need to explain their step-by-step methodology for assigning values. Many times, these methodologies are self-designated as proprietary, which means the expert's work cannot be replicated and thus ripe for a challenge.

This stand out presentation was just one of many hot topics covered at the ASCDC Annual Seminar, and part of ASCDC's ongoing mission to educate and prepare its membership to face the ever-evolving litigation landscape. Look for more informative topics to be covered in the coming year as part of the Association's webinars and in-person conferences.

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ASCDC ANNUAL SEMINAR RECAP: California Defense Counsel Legislative Update

John Taylor, Jr.

In his annual legislative update, ASCDC lobbyist Mike Belote once again treated us to an insider's look at what's going on in Sacramento, as relevant to defense counsel practice. Mike's insights illustrated the value of his tireless review of pending bills, his personal connections with lawmakers and the judiciary, his decades of navigating the legislative process, and his zealous advocacy of ASCDC members' interests (made possible by ASCDC member dues and PAC contributions).

First, Mike discussed how "green" our law makers are these days. He noted that out of California's 120 total legislators, 31 are newly elected. By January 1, 2025, almost two-thirds of the Legislature will be new to the job. For the first time in Mike's experience, last year legislators who were not termed out decided to retire, likely because the convivial atmosphere in the Legislature has been affected by Covid-19. Getting acquainted with a new group of people in a short time presents challenges for the lobbying industry.

The Democratic party continues to wield a two-thirds supermajority in the Legislature: in the State Assembly the Democrats have a 62-18 majority, and a 32-8 majority in the State Senate. Regardless of one's politics, that imbalance is generally unhealthy, because better policy emerges when there is a more equal balance of power and a need to compromise on proposed legislation. But Democrats cannot be blamed for winning elections; if the Republican brand is not winning, that is like building a car that people aren't buying – the party needs to build a better car.

Each year about 2,000 bills are proposed and the Legislature passes about 1,000 new laws. Mike studies them all, and he recounted various bills of interest to the defense bar, including SB-40 (authorizing the State Bar to collect fees, which must be enacted every year); SB-42 (the "snitch rule" that requires attorneys to report misconduct when they see it): SB-71 (increasing the unlimited jurisdiction limit in state courts from $25,000 to $100,000); and SB-235 (increasing judicial authority to impose sanctions in discovery disputes).

Mike expects additional legislation will be proposed in the current term regarding (1) informal discovery conferences, whose authorizing statute expired on January 1, 2023; and (2) court reporting, possibly replacing education requirements for court reporters with a proficiency test in order to address the court reporter shortage. The current court reporting situation is unsustainable, but there is strong opposition to electronic reporting, and a number of different solutions are likely to be pursued in 2023.

Mike's annual recap, with his insightful overview and candid responses to audience questions, is one of the best reasons to attend the ASCDC seminar. V

Heather L. Mills
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Los Angeles County Superior Court

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ASCDC ANNUAL SEMINAR RECAP: The Lead-up to Trial: Best Practices for Trial Preparation

Mary R. Fersch

Getting advice from trial lawyers and judges on practical trial tips is what the ASCDC Annual Seminar is all about. There was no question about trial preparation that this all-star panel could not answer with the wealth of experience among them. Los Angeles County Superior Court judges Hon. Rupert Byrdsong and Hon. Lauren Lofton gave insight on what judges actually expect from us lawyers when we answer ready for trial.

Plaintiff's trial attorney Rahul Ravipudi and defense trial attorney Heather Mills provided advanced tips on strategies for pre-trial motions, trial documents, and more.

In addition to the practice tips from the panel, a packet of useful written materials was distributed to seminar attendees including a trial deadlines cheat sheet, trial checklist, and sample pre-trial motions and trial documents. With post-Covid trials gearing up, this panel was certainly one to attend!

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John M. Coleman

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Backdoor Attorney Fees: Costs-of-Proof Awards

Laura Lim

Where a party prevails at trial or on summary judgment but has no contractual or statutory basis to recover all attorney fees – or even where a party loses at trial or on summary judgment – the possibility of a fee recovery remains. Increasingly, plaintiffs are using the pre-trial denial of requests for admissions ("RFAs") to seek substantial attorney fees for having to prove an issue, notwithstanding the general rule that each party bears its own fees. Such fees are also a potential tool in the defense arsenal.

RFAs are useful tools for narrowing the scope of discovery, eliminating undisputed issues, and expediting trial. They can help reduce your litigation costs if the other side admits discrete facts. And they also can serve as a basis for *recovering* substantial attorney fees and costs, if they are reasonably propounded and unreasonably denied. Reasonably propounded requests include, for example, the defense asking the plaintiff to admit that the plaintiff was driving in excess of the speed limit at the time of the accident, or that certain other factors caused at least some of the damages claimed. Code of Civil Procedure, section 2033.420 ("section 2033.420") allows the requesting party to recover its costs of proof when the other side unreasonably denies one or more RFAs and the requesting party proves the truth of those matters at trial.

This article sets forth section 2033.420's parameters and requirements, as well as practical tips for parties moving for or defending against costs-of-proof awards.

Overview

"Section 2033.420 is a procedural mechanism designed to expedite trial by reducing the number of triable issues that must be adjudicated." (*Doe v. Los Angeles County Dept. of Children & Family Services* (2019) 37 Cal.App.5th 675, 690 (Doe).) Under the statute, if a requesting party proves the truth of an RFA that the other party previously denied, the requesting party "may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees." (Code Civ. Proc., § 2033.420, subd. (a).) Legislators intended this fee-shifting statute to reimburse the requesting party for costs of proof, i.e., expenses incurred in proving the requested matter. (*City of Glendale v. Marcus Cable Associates, LLC* (2015) 235 Cal.App.4th 344, 353-354, 359 (*City of Glendale*).)

Parties may seek costs of proof regardless of which side filed the initial complaint or even ultimately prevailed at trial. (E.g., *City of Glendale, supra*, 235 Cal.App.4th at pp. 349-350 [defendant and cross-complainant filed a motion to recover its costs of proof under section 2033.420].) Even if the moving party ultimately loses at trial, the moving party still may recover the costs and expenses of proving an RFA that the other side unreasonably denied, so long as the losing party prevailed on the particular question that was at issue in the RFA. (*Smith v. Circle P Ranch Co.* (1978) 87 Cal.App.3d 267, 274-275 (*Smith*) [fee shifting for denial of plaintiff's RFAs permitted even where jury returned a general verdict for the defense: such a verdict does not "establish that defendants were justified in their pretrial denials of specific facts later proved true. Nor does it constitute a determination that plaintiff failed to prove all facts to which defendants' denials were relevant"]; *id.* at pp. 277-278 [trial court awarded fees "on the basis that the genuineness of certain photographs and truth of matters of fact were 'wrongfully denied'" by the defendant whose agents had taken the photos].)

Parties may only seek costs of proof against other parties. They may not seek such costs against parties' attorneys. (*City of Glendale, supra*, 235 Cal.App.4th at p. 354.)

While parties most commonly file section 2033.420 motions after trial, they also may do so after the court grants summary judgment in their favor. (*Barnett v. Penske Truck Leasing* (2001) 90 Cal.App.4th 494, 497-499.)

Key Parameters and Requirements For Recovery

Relevant timeframe. A court may award only costs of proof incurred *after* the RFA denial. (*Yoon v. Cam IX Trust* (2021) 60 Cal. App.5th 388, 395.) And the moving party must wait until after it was forced to prove the matter requested in the RFA, either at trial or by another dispositive process such as summary judgment. (See *Wagy v. Brown* (1994) 24 Cal.App.4th 1, 6 (*Wagy*) [costs of

Continued on page 22

proof are recoverable only where the party requesting the admission proves the truth of that matter, not where the party merely prepares to do so].) In essence, the clock for accruing costs of proof "starts" when the responding party denies the RFA, and "ends" when the moving party *proves* the requested matter.

The RFA response must be complete. Section 2033.420 applies only where the responding party "fails to admit" an RFA. (Code Civ. Proc., § 2033.420, subd. (a).) If the responding party simply objects to the RFA, the requesting party first must move to compel further answers. (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 636.) Failure to file a motion to compel waives the right to further responses and the right to costs of proof under section 2033.420. (See *Association for Los Angeles Deputy Sheriffs v. Macias* (2021) 63 Cal. App.5th 1007, 1028 (*Macias*) [if a party provided complete responses to the RFAs, there is no need to compel further responses and the requesting party does not waive its right to costs-of-proof fees].)

A response that a party has insufficient information to admit or deny the matter requested is a complete response and a motion to compel further responses is unnecessary. (*Macias, supra*, 63 Cal. App.5th at pp. 1028-1029.)

The moving party must *prove* the fact denied in the RFA. The moving party may recover only where it actually proved the matter requested in the RFAs. (*Grace v. Mansourian* (2015) 240 Cal.App.4th 523, 529-530 (*Grace*).) This means the moving party must have introduced evidence. (*Ibid*. [citing Evid. Code, § 190, which defines "proof" as "the establishment by evidence of a requisite degree of belief concerning a fact" in the mind of the jury or court].) "Until a trier of fact is exposed to evidence and concludes that the evidence supports a position, it cannot be said that anything has been proved." (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 865-866 (*Stull*).)

The court may not award costs of proof if the parties stipulated to facts, even if the responding party had previously denied

them. (*Grace, supra*, 240 Cal.App.4th at p. 530.) The matters denied in the RFAs actually have to be litigated at trial, rather than simply conceded or ignored. If a responding party refuses to admit an RFA during discovery but later concedes its truth before trial begins, section 2033.420 does not apply because there is no need to offer proof. (See *Stull, supra*, 92 Cal. App.4th at pp. 865-866.) Thus, for example, if a party admits liability on the eve of trial, there are no costs-of-proof fees available for the prior denial.

Similarly, the requesting party may not recover costs of proof incurred in preparing for trial if the case settles or is dismissed before trial. (See Wagy, supra, 24 Cal.App.4th at p. 6 [expenses not recoverable where the moving party merely prepares to prove the matters requested].) However, the requesting party still may recover costs of proof where the trial starts and the requesting party proves the requested matters, but the case ultimately ends in a nonsuit. (See Doe, supra, 37 Cal. App.5th at p. 692.)

The Moving Party's Burden of Proof: Identifying and Segregating the Applicable Fees and Costs

The moving party has the burden to show that it incurred the requested costs of proof specifically to prove the issues the other side should have admitted. (*Grace, supra*, 240 Cal.App.4th at p. 529.) "The requested amounts must be segregated from costs and fees expended to prove other issues." (*Ibid*.; see also *Smith, supra*, 87 Cal.App.3d at pp. 279-280 [remanding for calculation of fees where record did not demonstrate fees were reasonably related to proofs necessitated by denial: "no assessment may be made for expenses unrelated to the specific grounds of the motion before the court"].)

The moving party must make a specific accounting of the costs and fees incurred as a result of the denied RFAs. (*In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 807-808.) Conclusionary declarations failing to set out an hourly fee or any accounting of time are insufficient. (*Garcia, supra*, 28 Cal.App.4th at p. 737; see also Edmon & Karnow, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2022) ¶ 8:1413.1 [As with any other motion, "the moving party must set forth *specific facts supporting the amount* of costs and expenses sought"].)

It is not necessary to allocate fees and costs to each specific RFA, particularly where the pertinent RFAs all relate to a single issue, such as liability. (*Macias, supra*, 63 Cal. App.5th at pp. 1030-1031.) Nevertheless, the moving party must allocate the amount of fees and costs incurred in proving the specific *issues* addressed by the denied RFAs – i.e., segregate the requested fees and costs from those incurred in proving issues outside the RFAs' scope. (*Id*. at p. 1031.) "The rule is that a party cannot recover costs of proof for *other* issues." (*Ibid*.)

Continued on page 23

Lisa Perrochet

Notes on Recent Decisions

Emily Cuatto

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

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

PROFESSIONAL RESPONSIBILITY

Attorney's knowing use of privileged information supported disqualification.

Militello v. VFarm 1509 (2023) __ Cal.App.5th __.

In this business dispute, plaintiff downloaded defendant's private spousal communications from the company's network and provided them to her attorney. Plaintiff's counsel used the communications in related litigation. Defendant then moved to disqualify plaintiff's counsel for knowingly using the privileged marital communications. Plaintiffs' counsel argued that defendant had no reasonable expectation of privacy for spousal e-mails residing on the company's network, and that even if the e-mails were privileged, he should not be disqualified for using materials be obtained from his own client. The trial court disqualified him.

The Court of Appeal (Second Dist., Div. Seven) affirmed. Although plaintiff had administrative credentials permitting her to review corporate e-mail accounts, she did not show that defendant consented to having her e-mail account monitored or that the company had a policy that e-mail accounts would be monitored. Plaintiff also had not shown that she was acting in good faith in a fiduciary capacity for the company to ensure compliance with company rules when she accessed the defendant's e-mails. Plaintiff therefore failed to show that defendant did not have a reasonable expectation of privacy in her spousal communications. Further, while an attorney should not be disqualified simply for discussing privileged information with his client, he can be disqualified for knowingly using the privileged information.

See also *Basset Unified School District v. Superior Court* (Ross) (2023) __ Cal.App.5th __ (Second Dist., Div. One) [trial judge not subject to disqualification where she communicated with judge who expressed bias but promptly disclosed the communications and did not herself do anything suggesting impartiality].

ATTORNEY FEES AND COSTS

Code of Civil Procedure section 998 offer was valid despite not specifying that the plaintiff would be the prevailing party for purposes of costs and expenses.

Smalley v. Subaru of America, Inc. (2022) 87 Cal.App.5th 450.

The plaintiff in this lemon law case rejected the automaker's Code of Civil Procedure section 998 offer to pay $35,000 plus either (a) $10,000 in fees and costs, or (b) fees and costs to be determined by the court. At trial, the jury awarded the plaintiff only about $27,000. The trial court therefore awarded the automaker its postoffer costs, which more than offset the plaintiff's prevailing party costs. The plaintiff appealed, arguing the section 998 offer was invalid because it did not specify that he would be the prevailing party entitled to recover costs and expenses, and plaintiff further argued the offer was not issued in good faith.

The Court of Appeal (Fourth Dist., Div. Three) affirmed, rejecting both of plaintiffs' arguments. Section 998 does not require the offer to specify who will be the prevailing party, and the fact that the offer here specifically provided options for the recovery of attorney fees rendered the plaintiff's argument borderline "specious." Further, case law establishes that an accepting party may recover costs and expenses in addition to the settlement amount where the offer is silent on certain items. Lack of specificity did not render an offer incapable of being evaluated and thus invalid. The offer was also presumptively in good faith given that it exceeded the verdict.

See also *Chen v. BMW of North America, LLC* (2022) 87 Cal. App.5th 957 (Sixth Dist.)[same: "defects" in a settlement offer that did not specify that the manufacturer were comply with statutory requirements after repurchasing plaintiff's vehicle or that litigation expenses would be paid along with fees and costs do not "prevent a reasonable person from evaluating the offer against the prospects of proceeding to trial."] V

CIVIL PROCEDURE

A motion for summary judgment served electronically must be served at least 107 days before trial, and compliance requires the court to schedule a hearing on the timely filed motion.

Cole v. Superior Court (Zeiner) (2022) 87 Cal.App.5th 84.

The defendant in this property damage suit served a motion for summary judgment on October 5, 2022, but due to the trial court's congested calendar, was unable to reserve a hearing date until January 27, 2023 – a week after the scheduled January 20, 2023, trial date. The defendant moved ex parte to set an earlier hearing date or continue the trial, but the trial court denied the motion. The defendant sought a writ of mandate, arguing that it timely served its motion more than 105 days before the scheduled trial date and was entitled to have the motion heard before the start of trial.

The Court of Appeal (Fourth Dist., Div. One) issued the writ. In so doing, the court ruled that Code of Civil Procedure section 1010.6 [setting forth the rules governing electronic service] applies to motions served under Code of Civil Procedure section 437c, meaning that the two additional days provided to respond to an electronically-served document must be added to the statutory notice period for a summary judgment motion. Thus, the motion was due 107 day before the scheduled trial date – not 105 days as the defendant assumed. Nonetheless, by serving two days earlier than he thought he had to, he served the motion timely and was therefore entitled to have it heard before the schedule trial date. V

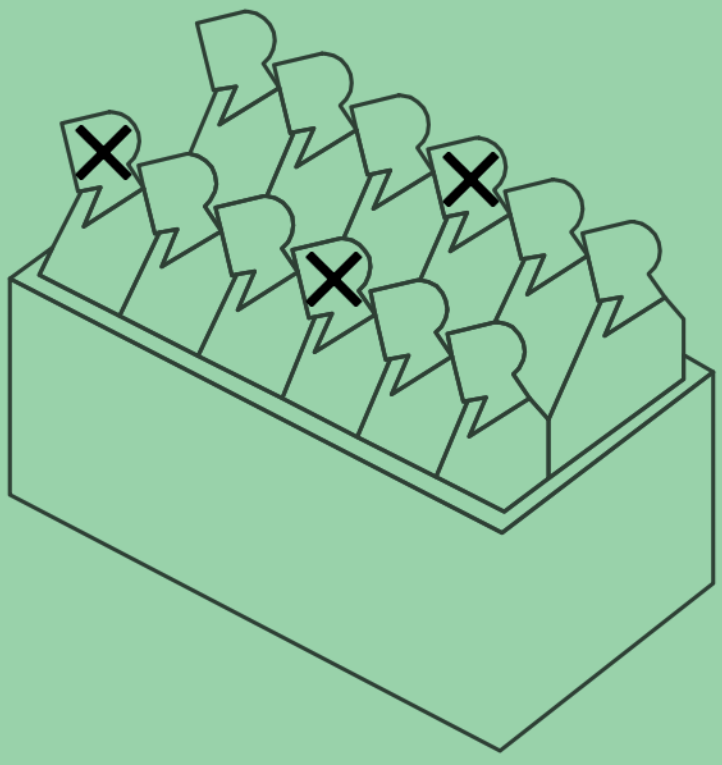
RECENT CASES

Peremptory strikes may not be used to remove jurors with disabilities or disabled family members from the jury on that basis.

Unzueta v. Akopyan (2022) 85 Cal.App.5th 67.

In this medical malpractice case against an anesthesiologist, the plaintiff alleged that a negligently performed epidural caused her to suffer permanent paralysis in her leg. The jury found that the anesthesiologist's negligence was not the cause of the plaintiff's injury. The plaintiff appealed, arguing that the anesthesiologist's counsel improperly used his peremptory challenges to strike all the Hispanic jurors. The Court of Appeal reversed with directions that the trial court conduct a hearing on whether counsel had a race-neutral explanation for his strikes. At the hearing, counsel offered various explanations for striking the jurors, including that one of them had a disabled child and another had a disabled husband. Plaintiff objected that disability is a protected class and cannot be a valid basis for a peremptory strike. The trial court disagreed and ordered the verdict reinstated.

The Court of Appeal (Second Dist., Div. Seven) reversed and remanded for a new trial. Physical and mental disability are protected characteristics under California Government Code section 11135. Under Code of Civil Procedure section 231.5, peremptory strikes may not be made on the basis of any protected classifications. Trial counsel was therefore not allowed to rely on juror disability, or the disability of jurors' family members, as a basis to remove them from the jury. V



To establish personal jurisdiction over a product manufacturer, the plaintiff's injury must arise out of the manufacturer's forum activities concerning the specific product in issue.

Yamashita v. LG Chem (9th Cir. 2022) 48 F.4th 993.

Plaintiff, a resident of Hawaii, was injured when the lithium-ion battery in his cigarette lighter exploded. Plaintiff sued the manufacturer and distributor of the battery. Although the manufacturer and distributor shipped certain batteries to Hawaii, and provided the particular lithium-ion battery in issue to third parties for incorporation into products or resale on websites, neither the manufacturer nor the distributor shipped the specific type of lithium-ion battery that harmed plaintiff to Hawaii. The defendants therefore moved to dismiss plaintiff's products liability suit for lack of personal jurisdiction. The district court granted the motion, without permitting jurisdictional discovery.

The Ninth Circuit affirmed. Neither defendant was incorporated or headquartered in Hawaii, and neither had sufficient ongoing contacts with Hawaii to warrant the exercise of general personal jurisdiction over them. Further, while both defendants did purposefully avail themselves of the Hawaii forum by doing some shipping and sales in the state, those activities were not the but for cause of the defective battery's introduction into Hawaii. While defendants were aware that their lithium-ion batteries would be placed in other products sold in Hawaii, and that their batteries would be sold by third parties in Hawaii, that establishes only that defendants placed the product in the stream of commerce, which alone is not enough to establish purposeful a ailment – selling the product directly or otherwise controlling its sale in the territory is required. Thus, plaintiff did not establish that his injury was related to the particular activities defendants did in Hawaii. Also, the district court did not abuse its discretion in denying jurisdictional discovery. Defendants submitted sworn declarations that they did not sell the subject lithium-ion batteries directly to consumers in Hawaii and plaintiff's mere "hunch" to the contrary did not overcome that showing. V

EVIDENCE

At trial, a corporation cannot rely on testimony from a "corporate representative" whose knowledge is based on hearsay rather than personal knowledge of the facts.

LAOSD Asbestos Cases (Ramirez v. Avon Products, Inc.) (2023) 87 Cal.App.5th 939.

The defendant in this asbestos case moved for summary judgment on the ground that the plaintiffs could not establish that its talcum powder contained asbestos. In support of the motion, the defendant offered a declaration from its designated corporate representative who described the defendant's products and activities in the 1970s – long before the corporate representative worked for the company. The plaintiffs objected that the declaration lacked foundation and contained inadmissible hearsay. The trial court overruled the objections and granted summary judgment.

The Court of Appeal (Second Dist., Div. Eight) reversed. A lay witness may testify only to matters about which he or she has personal knowledge; only experts may rely on hearsay. For purposes of discovery depositions, a corporate representative may be designated to provide information to the opposing party even where the designee lacks personal knowledge and had to gather information from hearsay sources. At trial, however, the corporation must offer witnesses with personal knowledge. The trial court therefore erred in granting summary judgment based on a declaration that contained testimony that would have been inadmissible at trial. The appellate court observed that the defendant's inability to locate a witness with personal knowledge of events that occurred long ago did not justify departing from the rules of evidence. The court rejected the defendant's argument that precluding it from relying on a corporate representative would be unfair because no witnesses with personal knowledge exist. The court reasoned that the lack of admissible evidence created hardships for both parties.

TORTS

The Privette doctrine did not shield a landowner from liability to an independent contractor hired by the landowner's tenant.

Ramirez v. PK I Plaza 580 SC LP (2022) 85 Cal.App.5th 252.

The defendant owned a shopping center. One of its tenants hired a contractor to remove an exterior sign. While on the roof in the process of removing the sign, the contractor fell through an opening and sustained injuries. The contractor sued the defendant for premises liability. The defendant moved for summary judgment, arguing that under *Privette v. Superior Court* (1993) 5 Cal.4th 689, it could not be liable to the contractor for injuries sustained while performing the work he was hired to perform. The trial court granted the motion.

A panel majority of the Court of Appeal (First Dist., Div. One) reversed. Because the contractor was hired by the tenant and not the defendant, the defendant did not delegate its responsibility for maintaining a safe roof to the contractor and Privette therefore did not apply. One justice dissented, concluding that the policy rationale behind *Privette* applied regardless of whether the landowner or the tenant hired the contractor. "[I]t [was] up to the independent contractor to make a reasonable inspection of the portions of the property" where the work was to be performed "and either take precautions in light of those conditions or elect not to do the work."

See also *Brown v. Beach House Design & Development* (2022) 85 Cal.App.5th 516 (Second Dist., Div. Three) [Privette doctrine did not shield general contractor from liability to employee of window subcontractor who suffered injuries after falling from defectively-constructed scaffolding where the general contractor had paid to have the scaffolding erected and was therefore responsible for the safety of that equipment]

See also *Degala v. John Stewart Co.* (2023) 88 Cal.App.5th 158 (First Dist., Div. Two) [Privette doctrine did not shield general contractor from liability for failing to take reasonable security precautions at construction site to prevent third party criminal assault of subcontractor's employee].

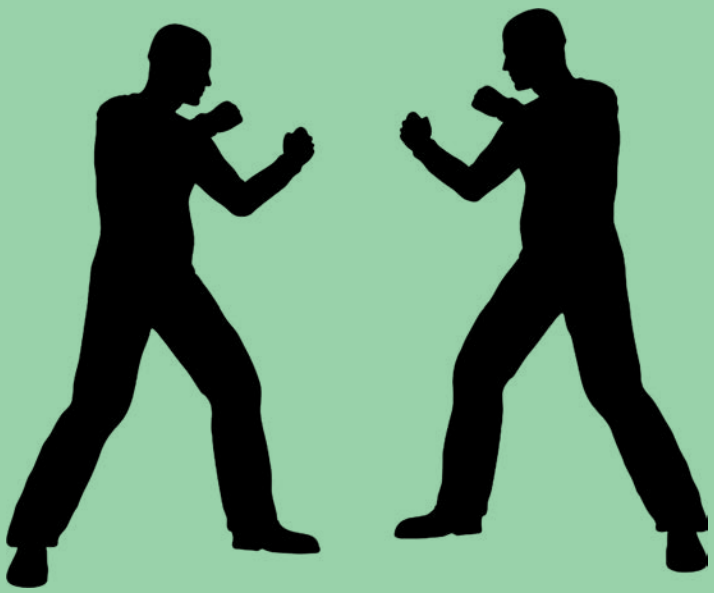
RECENT CASES

Good Samaritan who stopped fight could not be liable for injuring the fighters as he separated them.

Valdez v. Costco Wholesale Corp. (2022) 85 Cal.App.5th 466.

Plaintiff and another man engaged in a fistfight at a gas station. The defendant, an attendant at the station, intervened to stop the fight. When the defendant physically separated the men, he allegedly aggravated the plaintiff's existing shoulder injury. Plaintiff sued the attendant and gas station owner for negligence. The defendants moved for summary judgment on the ground that the attendant was immune from liability under the Good Samaritan law (Health & Saf. Code, § 1799.102, subd. (b)), which protects those who render assistance at the scene of an "emergency." The trial court granted summary judgment.

The Court of Appeal (Second Dist., Div. Two) affirmed. The fistfight qualified as an "emergency" because the attendant reasonably believed the combatants needed medical attention. By stopping the fight, the attendant acted reasonably and in good faith to render emergency nonmedical assistance to those requiring medical attention, thereby shielding him from liability as a Good Samaritan.



A national sports association was not vicariously liable for torts committed by individual franchisee-type studios that offer training in the sport.

Pereda v. Atos Jiu Jitsu (2022) 85 Cal.App.5th 759.

Plaintiff was injured while sparring during a Brazilian jiu jitsu training class at a studio called The Jiu Jitsu League. The League is affiliated with Atos Jiu-Jitsu Association, a national organization that permits its affiliated studios to compete in jiu jitsu tournaments under the Atos brand. Plaintiff sued the League and Atos. Atos moved for summary judgment on the ground that plaintiff assumed the risk of being injured while sparring and that Atos did nothing to increase the risks inherent in the sport of jiu jiutsu. In opposition, plaintiff asserted that Atos was vicariously liable for the League under an ostensible agency theory. The trial court granted summary judgment for Atos, concluding that the League was not Atos's ostensible agent and therefore plaintiff had no basis to assign liability to Atos.

The Court of Appeal (Second Dist., Div. Two) affirmed. The relationship between Atos and the League was closely akin to a franchisor-franchisee relationship. Franchisors are not liable for the torts of their franchisees unless the franchisor directly controls the acts that caused the harm or advertises its complete control over the franchisee. Any other result would allow the law of ostensible agency to swallow the law of franchising. Here, Atos did nothing other than lend its name and support to the League That is not enough to create a reasonable belief in the mind of third parties like plaintiff that Atos controlled the League's sparring activities and was thus the League's principal. The court therefore did not have to reach Atos's alternative argument for affirmance that the lawsuit was barred by primary assumption of risk doctrine. The court also noted, as a threshold matter, that the trial court did not violate plaintiff's due process rights by granting summary judgment on the basis of an issue that was not directly raised until plaintiffs' own opposition. Plaintiff had a fair opportunity to present his arguments for ostensible agency in his papers and at the motion hearing; a party is entitled to one hearing, not multiple, and so if plaintiff had more or better evidence on the point, he should have included it with his opposition papers.

HEALTHCARE

MICRA's statute of limitations applies when ambulance passengers are injured in a collision.

Lopez v. American Medical Response West (2023) __ Cal.App.5th __.

An ambulance transporting plaintiffs to a hospital collided with another vehicle. Over a year later, plaintiffs sued the ambulance company. The defendant moved for summary judgment on the ground the lawsuit was filed outside the MICRA one-year limitations period (Code Civ. Proc., § 340.5). The trial court granted the motion.

The Court of Appeal (First Dist., Div. Five) affirmed. The plaintiffs' injuries resulted from the emergency medical technicians' alleged negligence in operating the ambulance in the course of providing medical treatment. The claims therefore arose out of alleged professional negligence and MICRA's statute of limitations applied. Further, a presuit demand letter did not toll the limitations period because plaintiffs' counsel had sent an earlier demand letter that qualified as a presuit notice under Code of Civil Procedure section 364, even though the earlier letter did not specifically mention "negligence' or "medical malpractice," and was sent to the claim administrator rather than the defendant directly; the claims administrator was acting as the defendant's agent.

But see *McGovern v. BHC Fremont Hospital* (2022) 87 Cal. App.5th 181 (First Dist., Div. One) [plaintiffs' counsel's letter identifying a medical incident, requesting that the hospital preserve evidence, noting that counsel intended to gather information and present it to the hospital's insurance carrier, and advising the hospital to put its insurer on notice – but not describing the treatment and injuries or attempting to quantify damages – did not constitute presuit notice under Code of Civil Procedure section 364].

See also *Carrillo v. County of Santa Clara* (2023) __ Cal.App.5th __ (Second Dist., Div. Four) [When both MICRA and the Government Claims Act apply to a claim, the plaintiff must file suit within the shorter applicable limitations period].

ANTI-SLAPP

An attorney's prelitigation communication is unprotected extortion as a matter of law only where it falls entirely outside the bounds of ordinary professional conduct.

Flickinger v. Finwall (2022) 85 Cal.App.5th 822.

Plaintiff hired a contractor to remodel his property and later confided to the contractor that the funds for the remodel came from illegal business kickbacks. After the contractor walked off the job, plaintiff sent a demand letter threatening to report the contractor. The contractor's attorney responded by sending a letter suggesting that plaintiff's initiating litigation might result in an investigation into plaintiff's business relationships. Plaintiff went ahead and successfully sued the contractor for breach of contract. Plaintiff then sued the contractor's attorney and the contractor for civil extortion based on the attorney's response letter. The attorney moved to strike the complaint under the anti-SLAPP statute. Citing *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320 (*Flatley*) [holding that a presuit demand letter that constituted criminal extortion as a matter of law was not eligible for anti-SLAPP protection], the trial court ruled that the attorney's letter was extortion as a matter of law and so denied the motion.

The Court of Appeal [Second Dist., Div. Eight] reversed. Prelitigation communications constitute extortion as a matter of law only where an attorney's conduct falls entirely outside the scope of ordinary professional conduct, as occurred in *Flatley*, which involved extreme facts. The attorney's letter here suggesting that plaintiff might be investigated if he sued the attorney's client was within the bounds of professional conduct.

See also *Timothy W. v. Julie W.* (2022) 85 Cal.App.5th 648 (Fourth Dist., Div. Three) [wife's disclosure of secret information about husband's gambling activities to investigator she hired to discover asset information in connection with dissolution proceedings—and investigator's revelation of the information to third parties in the course of his investigation – was protected petitioning activity]

ARBITRATION

A party must move to vacate an arbitration award at the earlier of either 100 days after the award is served or 10 days after a petition to confirm is served.

Darby v. Sisyphian LLC (2023) 87 Cal.App.5th 1100.

A wage and hour arbitration resulted in an award in plaintiff's favor. Plaintiff filed a petition to confirm the award on April 1, 2021. On May 3, 2021, defendant filed and served a response to plaintiff's petition and a petition to vacate or correct the award. The trial court denied the petition to vacate or correct as untimely, and confirmed the award.

The Court of Appeal [Second Dist., Div. Two] affirmed. Under the statutory scheme governing arbitration procedure, a party that lost in an arbitration has either 100 days to move to vacate the award, or 10 days to respond to a prevailing party's petition to vacate. The earlier of these deadlines applies. Here, the defendant did not respond to the petition to confirm within 10 days of its filing, so it forfeited its challenges to the award. Likewise, because the defendant forfeited its rights to seek to vacate or correct the final arbitration award in the trial court by filing to timely file its papers, the appellate court would not consider any of defendant's challenges to the award in the first instance on appeal. V

Employers may not require employees to waive the right to seek public injunctive relief under FEHA.

Vaughn v. Tesla, Inc. (2023) 87 Cal.App.5th 208.

Plaintiffs sued Tesla for race discrimination under the Fair Employment and Housing Act (FEHA). Tesla moved to compel arbitration under the plaintiffs' employment agreements, which required the arbitration of employment-related disputes. The agreements further provided that the arbitrators could grant only individual relief and that the employees waived the right to seek public injunctions in any forum. The court granted the motion as to plaintiffs' individual claims, but denied the motion to the extent plaintiffs sought a public injunction, which was a remedy unavailable to them in arbitration per the agreements.

The Court of Appeal (First Dist., Div. Five) affirmed. FEHA allows for public injunctions, and the arbitration agreement's waiver of the right to pursue public injunctive relief in any forum under FEHA was unenforceable as a matter of California public policy. The Federal Arbitration Act (FAA), as interpreted by *Viking River Cruises, Inc. v. Moriana* (2022) ___ U.S. ___ [142 S.Ct. 1906, 213 L.Ed.2d 179] [holding that the FAA permits employers to require employees to arbitrate individual PAGA claims, even though it may deprive the employee of standing to then pursue non-arbitrable representative claims in court], did not preempt this prohibition. *Viking River Cruises* involved individual claims aggregated together under the procedural device of the Private Attorneys General Act. FEHA claims seeking public injunctive relief are not like PAGA claims – they are unitary claims seeking substantive relief that are not amenable to division between individual and representative components. Following Viking River Cruises in a FEHA case would eliminate a substantive right and remedy. V

The California Legislature's attempt to burden the formation of arbitration agreements is preempted by the Federal Arbitration Act.

Chamber of Commerce of the United States of America v. Bonta (9th Cir. 2023) __ F.4th__.

A group of trade associations and business groups sued the State of California to enjoin Assembly Bill 51, which made it is an unlawful employment practice (and a criminal misdemeanor) for an employer to require employees to waive the right to litigate certain claims as a condition of employment. The plaintiffs argued that the bill was preempted by the Federal Arbitration Act, which reflects a federal policy not to burden the formation of arbitration agreements. The district court concluded that the plaintiffs were likely to succeed on their claims and issue a preliminary injunction.

The Ninth Circuit affirmed. The FAA's preemptive scope is not limited to state rules affecting the enforceability of arbitration agreements, but also extends to state rules discriminating against the formation of arbitration agreements. The FAA preempted the bill in its entirety because the bill's penalty-based scheme to inhibit arbitration agreements before they are formed violated the "equal-treatment principle" inherent in the FAA and was the type of device or formula evincing hostility towards arbitration that the FAA was enacted to overcome. V

INSURANCE

Telephone Communications Privacy Act claims may be covered by the defendant's liability insurance for personal injury claims arising from the "publication, in any manner, of material that violates a person's right of privacy" if consistent with the insured's reasonable expectations.

Yahoo v. National Union Fire Insurance Company of Pittsburgh, PA (2022) 14 Cal.5th 58.

Yahoo! was sued in several class actions alleging that it sent unsolicited text messages to consumers violating the federal Telephone Communications Privacy Act (TCPA). Yahoo! tendered defense of the lawsuits to its insurer under its general liability policy, asserting that it had coverage for TCPA claims under the coverage for "personal injury" claims arising out of the "publication, in any manner, of material that violates a person's right of privacy." The insurer declined coverage. Yahoo! later sued the insurer in federal district court for breach of contract. The district court concluded that the coverage language did not apply to TCPA claims because under the last antecedent rule, the "material" is what must violate a person's right to privacy. Hence, the coverage applied only to material that revealed secret information, and not sending out unsolicited text messages in violation of the right to be left alone.

Answering the 9th Circuit's certified question, the California Supreme Court held that the last antecedent rule was no help in interpreting the coverage provision, since the phrase "that violates a person's right of privacy" could relate to either the word "material" or the phrase "publication of material." The court concluded that both parties' interpretations of the coverage clause were plausible, and the coverage clause was therefore ambiguous. However, the court did not apply the rule that ambiguities are construed against the insurer in favor of coverage, which the court emphasized is a rule of last resort. Before that rule applies, courts must consider whether the ambiguity can be resolved by the other rules of contract interpretation and the insured's objectively reasonable expectations. The court ruled that there needed to be "further litigation" over various issues, including Yahoo!'s objectively reasonable expectations and the factual circumstances surrounding the alleged TCPA violations before the ambiguity could be conclusively resolved in this case. V

Equitable contribution is not available between general liability and workers' compensation carriers, whose policies cover mutually exclusive risks.

California Capital Insurance Co. v. Employers Compensation Insurance Company (2023) __ Cal.App.5th __

Plaintiff was injured when driving to a party with his drunk coworker. Plaintiff sued the driver's employer – the restaurant where both the driver and plaintiff worked – alleging that the restaurant provided the driver with alcohol and a vehicle and then failed to prevent him from driving drunk, and that the driver was in the course and scope of his employment at the time of the accident that injured plaintiff. The complaint did not mention that plaintiff was also an employee of the restaurant. The restaurant tendered the defense to its general liability insurer, who accepted the defense but reserved its rights to deny coverage under an exclusion for bodily injuries arising out of the plaintiff's employment. After learning during discovery that plaintiff was an employee of the restaurant, the general liability carrier demanded the restaurant's workers' compensation carrier contribute to the defense and settlement of the case, but the workers' compensation carrier refused. The general liability carrier settled the passenger's suit and then sued the restaurant's workers' compensation carrier for equitable contribution. The trial court awarded contribution, holding that there was a potential for coverage under the workers' compensation policy given that it was a close question whether the coworkers were in the course and scope of their employment when the accident occurred.

The Court of Appeal (Fourth Dist., Div. Three) reversed. Equitable contribution applies only between insurers who cover the same risk at the same level. The general liability policy excluded coverage for workers' compensation claims and the workers' compensation policy covered only those claims. The policies thus covered mutually exclusive, not coextensive, risks. Further, the workers' compensation policy did not include a duty to defend to the same extent as the general liability policy, since workers' compensation exclusivity would have barred the worker's lawsuit. V

CLASS ACTIONS

An order denying class certification but leaving intact a PAGA claim may nonetheless be appealable where the PAGA claim is wholly derivative of the unsustainable class claims.

Allen v. San Diego Convention Center (2022) 86 Cal.App.5th 589.

Plaintiff filed a class action labor lawsuit against her former employer, the San Diego Convention Center. The Center demurred, arguing that it was exempt from liability as a government entity. The court sustained the demurrers in part, but overruled them as to one claim for unpaid wages and Unfair Competition Law and PAGA claims derived from the unpaid wages claim. Plaintiff moved for class certification as to her surviving claims, but the court denied the motion on the grounds the plaintiff could not establish typicality. Plaintiff appealed.

The Court of Appeal (Fourth Dist., Div. One) affirmed. As a threshold matter, the order denying class certification was appealable. Although prior case law has held that orders denying class certification are not appealable where a plaintiff has also brought a representative claim under PAGA and therefore the denial of class certification is not the "death knell" of her ability to seek representative relief, here, the PAGA claim was wholly derivative of the plaintiff's unsustainable wage payment claim, so the denial of class certification effectively ended her case. The trial court did not err in ending the case, however, because the defendant had established as a matter of law that it was a public entity exempted from the Labor Code provisions plaintiff alleged it had violated. V

An individual required to arbitrate his individual PAGA claim retains standing to pursue a representative claim under California law, the United States Supreme Court's statement to the contrary notwithstanding.

Piplack v. In-N-Out Burgers (2023) __ Cal.App.5th __

Plaintiff brought wage and hour claims against his employer, including a PAGA claim. The employer moved to compel arbitration, but the trial court denied the motion as to the PAGA claims under then-controlling law precluding arbitration of PAGA claims. The employer appealed. Relying on *Viking River Cruises, Inc. v. Moriana* (2022) ___ U.S. ___ [142 S.Ct. 1906, 213 L.Ed.2d 179], which was decided after the trial court issued its order and held that PAGA claims could be split between arbitrable individual claims and non-arbitrable representative claims, the employer argued that the trial court should have compelled arbitration of the employee's individual PAGA claim and to dismiss the representative claims for lack of standing.

The Court of Appeal (Fourth Dist., Div. Three) reversed the denial of the motion to compel arbitration of the individual claim, but held that the employee retained standing to pursue the representative PAGA claim in court. Although the U.S. Supreme Court's decision in *Viking River Cruises* held that a plaintiff whose individual claims had to be arbitrated lacked standing to prosecute the representative claim, *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73 – which is binding on California intermediate appellate courts – requires a different result. Under Kim, any "aggrieved employee" may pursue a representative PAGA action, and to constitute an "aggrieved employee," the person need only show he or she "was employed by the defendant and suffered one or more of the alleged violations" – not that he or she has any unredressed individual injury.

But see *Rocha v. U-Haul of California* (2023) 88 Cal.App.5th 65 (Second Dist., Div. One) [once an arbitrator has resolved individual PAGA claims against the plaintiff, that finding can have issue preclusive effect on any representative claims]. V

LABOR & EMPLOYMENT

A worker's conclusory and self-serving allegations of pretext are not enough to overcome an employer's showing that it had a nondiscriminatory reason to terminate the worker.

Opara v. Yellen (9th Cir. 2023) 57 F.4th 709.

Plaintiff sued for wrongful termination of employment, alleging age and national origin discrimination under the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. The district court granted summary judgment in favor of the defendant on the grounds that plaintiff (1) failed to establish a prima facie case of discrimination, and (2) failed to show that the defendant's proffered reasons for her termination were pretextual.

The Ninth Circuit affirmed. Given the low bar for making a prima facie showing of discrimination, plaintiff here made such a showing by alleging that an official involved in proceedings relating to her termination had previously made disparaging age-related comments. But defendant met its burden to provide a legitimate, nondiscriminatory reason for terminating plaintiff by demonstrating that the acts plaintiff pointed to as discriminatory – her proposed removal and reassignment, and her eventual termination – were consistent with the defendant's internal guidelines. Further, plaintiff failed to show the defendant's proffered reasons for terminating her were pretextual. Although very little evidence is necessary to raise a genuine issue of fact regarding an employer's motive, plaintiff's uncorroborated and self-serving allegation about an official's comments regarding age was not enough to create an issue as to pretext.

But see *Lin v. Kaiser Foundation Hospitals* (2023) 88 Cal.App.5th 712 (Second Dist. Div. Four) [plaintiff made a prima facie case of discrimination by showing she was terminated after negative reviews arising from her disability; the fact she was scheduled for layoffs before becoming disabled did not meet employer's shifted burden to show nondiscriminatory motive where the layoffs did not occur as planned and were eventually tied to performance]. V

CALIFORNIA SUPREME COURT PENDING CASES

Published decisions as to which review has been granted may be cited in California cases only for their persuasive value, not as precedential/binding authority, while review is pending. (See Cal. Rules of Court, rule 8.1115.)

Addressing the time limit for a motion to vacate a void judgment under Code of Civil Procedure section 473, subdivision (d).

California Capital Insurance Company v. Hoehn, S277510
Review Granted – January 25, 2023

In 2010, an insurance company filed a subrogation action against the defendant. The insurer's process server made five attempts to serve the defendant and eventually attempted substituted service on the defendant's girlfriend and mailed copies of the summons and complaint to the defendant's house. A default judgment was entered in 2011. Nine years later, the defendant moved to set aside the default under Code of Civil Procedure section 473, subdivision (d), on the grounds the judgment was void due to extrinsic fraud. The defendant argued that the insurer's assertions that his girlfriend was a co-occupant of his residence were fraudulent and that he never received the complaint. The trial court denied the motion as untimely and unpersuasive. The Court of Appeal (Third Dist.) affirmed, holding that while 473, subdivision (d) does not set a time limit to set aside a void judgment, a two-year period applies by analogy to section 473.5's two-year statutory period for relief from a default judgment. The appellate court further held that the trial court did not abuse its discretion in rejecting the extrinsic fraud claim because, even if the process server was "wrong" about the girlfriend's occupancy status, that mistake did not indicate fraud or bad faith.

The Supreme Court granted review of the following issues: (1) Is there a time limitation for filing a motion under Code of Civil Procedure section 473, subdivision (d), to vacate a judgment that is allegedly void based on extrinsic evidence? (2) In the alternative, does an equitable motion to vacate an allegedly void judgment for lack of service require proof of intentional bad conduct to show extrinsic fraud? V

RECENT CASES

Addressing insurance coverage for business losses stemming from the COVID-19 pandemic.

Another Planet Entertainment v. Vigilant Insurance Company, S277893 (Certification Granted Mar. 1, 2023)

An entertainment venue operator had to suspend its business operations during the COVID-19 pandemic. It sought insurance coverage for its lost profits under its standard commercial property policy, which covered losses resulting from the "direct physical loss of or damage to" the insured's property. The operator claimed that the COVID-19 virus was present on its property – or would have been but for the government shut-down orders – and that droplets containing the virus physically alter airspace and surfaces, resulting in property damage. The district court dismissed the case with prejudice, concluding it seemed unknowable whether the virus was present on the insured's premises.

The Ninth Circuit successfully ordered certification of the following question to the California Supreme Court: Can the actual or potential presence of the COVID-19 virus on an insured's premises constitute "direct physical loss or damage to property" for purposes of coverage under a commercial property insurance policy?

See also *Best Rest Motel v. Sequoia Insurance* (2023) 88 Cal. App.5th 696 (Fourth Dist., Div. One) [Hotel that lost business during COVID-19 shut-downs did not show it lost business income due to "direct physical loss or damage" of its property entitling it to insurance coverage].

But see *Shusha, Inc. v. Century-National Insurance* (2023) 87 Cal.App.5th 250 (Second Dist., Div. Seven) [Trial court erred in denying leave to amend in connection with dismissal of COVID-19 business interruption coverage suit where policy covered losses due to communicable disease events].

Addressing whether one individual's grant of authority to another for making healthcare decisions conveyed authority to agree to arbitration.

Logan v. Country Oaks Partners, S276545
Review Granted – November 16, 2022

The plaintiff executed an advanced health care directive and power of attorney appointing his nephew as his agent for making "health care decisions." In the process of admitting the plaintiff to a skilled nursing facility, the nephew executed an arbitration agreement. The plaintiff later sued the skilled nursing facility for elder abuse and other claims. The skilled nursing facility petitioned to compel arbitration, but the trial court denied the petition. The Court of Appeal (Second Dist., Div. Four) affirmed. Disagreeing with *Garrison v. Superior Court* (2005) 132 Cal. App.4th 253 [holding that signing an arbitration agreement was part of the health care decision-making process authorized by a health care power of attorney], the appellate court concluded that an agent's authority to make decisions affecting a principal's "physical or mental health" does not confer the authority to waive a jury trial because it is "not a health care decision" but rather a "decision about how disputes over health care decisions will be resolved."

The Supreme Court granted review to resolve the split in authority.

Addressing whether non-California courts are "competent jurisdictions" to adjudicate a defendant's motion to compel arbitration in cases in which the plaintiff invokes Labor Code section 925 as a defense to the motion.

Zhang v. S.C. (Dentons U.S.), S277736
Review Granted – February 15, 2023

A law firm terminated the plaintiff, a partner, after he asserted that the firm attempted to fraudulently divert client funds. He sued the firm for wrongful termination in California court. The firm sought arbitration in New York based on arbitration and delegation clauses in the firm's partnership agreement, and then filed a motion to stay the California wrongful termination suit under Code of Civil Procedure section 1281.4 [requiring California courts to stay actions for which another court of "competent jurisdiction" has ordered arbitration]. The California trial court granted the motion over the plaintiff's objection that under Labor Code section 925 [prohibiting an employer from requiring a California employee to agree to a provision requiring the employee to adjudicate outside of California a claim arising in California], his employer could not compel him to arbitrate his California-based employment claims in New York. The Court of Appeal (Second. Dist., Div. Eight) affirmed, concluding that New York was a court of competent jurisdiction under Code of Civil Procedure section 1281.4 that could order arbitration of the dispute, even though the plaintiff asserted that the forum selection clause in the arbitration agreement violated Labor Code section 925.

The Supreme Court granted review of the following issues: (1) If an employer moves to compel arbitration in a non-California forum pursuant to a contractual forum-selection clause, and an employee raises as a defense Labor Code section 925, is the court in the non-California forum one of "competent jurisdiction" (Code Civ. Proc., § 1281.4) such that the motion to compel requires a mandatory stay of the California proceedings? (2) Does the presence of a delegation clause in an employment contract delegating issues of arbitrability to an arbitrator rather than the court prohibit a California court from enforcing Labor Code section 925 in opposition to the employer's stay motion? V

Addressing whether employers are permitted to use neutral time-rounding practices to calculate employees' work time.

Camp v. Home Depot U.S.A., S277518
Review Granted – February 1, 2023

Plaintiffs filed a putative class action for unpaid wages against Home Depot, alleging that they were paid for less time than reflected in the timekeeping system (which captures each minute worked by employees) because the company used a quarter-hour rounding policy that resulted in at least one putative plaintiff losing credit for over 400 minutes of work time. Home Depot moved for summary judgment the ground that its policy was neutral on its face and as applied, and therefore met the standard articulated in *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889 [permitting time rounding that is fair and neutral and did not, over time, result in a failure to compensate]. The trial court granted the motion, but the Court of Appeal (Sixth Dist.) reversed on the ground that time rounding is not permissible when it results in an employee failing to receive compensation for all actual work time.

The Supreme Court granted review of the following issue: Under California law, are employers permitted to use neutral time-rounding practices to calculate employees' work time for payroll purposes? V

The Responding Party's Burden of Proof: Showing Reasonableness of The Denial

Once the moving party has satisfied its burden of proof, *the responding party* has the burden to establish any of the exceptions in section 2033.420, subdivision (b). (*Samsky v. State Farm Mutual Automobile Ins. Co.* (2019) 37 Cal.App.5th 517, 523-524 (*Samsky*).)

Section 2033.420 precludes costs-of-proof awards where:

1. The party failing to make the admission had reasonable ground to believe that it would prevail on the matter.

2. The admission sought was of no substantial importance.

3. An objection to the request was sustained or a response to it was waived under section 2033.290.

4. There was other good reason for the failure to admit.

(Code Civ. Proc., § 2033.420, subd. (b).)

If the responding party fails to establish an exception, the award of fees and costs is *mandatory*. (*Grace, supra*, 240 Cal.App.4th at p. 529.)

The court has discretion to determine whether there was good reason to deny an RFA and whether the admission sought was of substantial importance. (*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 753.)

A party's reasonable belief that it will prevail on the matter must be grounded in the evidence. (*Spahn v. Richards* (2021) 72 Cal. App.5th 208, 217.) Self-serving testimony may be insufficient. (*Ibid.*)

Expert opinion evidence could bolster a party's argument that it reasonably believed it would prevail. "[W]here RFAs require sophisticated analyses of technical issues, courts are more willing to credit a party's reasonable belief that it would prevail based on expert opinion evidence." (*Orange County Water Dist. v. The Arnold Engineering Co.* (2018) 31 Cal.App.5th 96, 120-121 (*Orange County*).) Where a qualified expert's credible opinion supports a party's position, the fact that the other side also has a credible opinion from a qualified expert will not – in most cases – preclude the party from reasonably believing it would prevail on the matter. (*Id.* at p. 118.)

But even in the expert opinion context, whether a court credits a party's reasonable belief that it would prevail depends on factors within the party's reasonable understanding, such as "whether the expert has sufficient qualifications and experience to opine on the matter at issue, whether the expert's opinions will likely be admissible at trial, whether the facts underlying the expert's opinions are supported by the evidence, whether the expert's methodology appears reasonable, and whether the expert's analysis is grounded in logic."

Continued on page 24

(*Orange County, supra*, 31 Cal.App.5th. at p. 117.) A party cannot simply rely on a plainly unqualified expert to avoid having to pay costs of proof. (*Ibid*.)

Lay evidence is equally important in defending against a costs-of-proof motion. Whether the responding party reasonably believes it will prevail "necessarily requires consideration of *all* the evidence, both for and against the party's position, known or reasonably available to the party at the time the RFA responses are served." (*Orange County, supra*, 31 Cal.App.5th at p. 118, italics added.) Accordingly, a party arguing that it had good reason to deny the RFA also must show that it met its duty to reasonably investigate the facts before the denial. (See *Macias, supra*, 63 Cal.App.5th at p. 1029; see also *Smith, supra*, 87 Cal. App.3d at p. 275 ["where it becomes clear from evidence introduced by either party at trial that the party who denied for lack of information or belief had access to the information at the time requests for admissions were propounded, sanctions are justified because that party has a duty to investigate"].) Even if the party ultimately loses at trial, it still may be able to show it had a reasonable basis to deny the RFAs at issue, based on the evidence it offered. (See *Universal Home Improvement, Inc. v. Robertson* (2020) 51 Cal.App.5th 116, 132 [losing party's robust evidence contesting the RFAs constituted reasonable ground for denying the RFAs and proceeding to trial on the issue].)

Practice Tips

When propounding RFAs:

- Defense counsel should consider framing RFAs in terms specific enough that the opposing party might reasonably be expected to investigate and respond affirmatively. Courts generally should deny costs-of-proof attorney fee requests based on a single RFA where plaintiff declined to "admit that defendant is not negligent."

- Counsel should track their time and costs carefully such that they can later correlate time spent and costs incurred with proving matters on an issue-by-issue basis.

- Counsel must move to compel further responses upon receiving incomplete responses (e.g., objections to the RFAs without any response) to preserve the right to recover costs of proof.

When answering RFAs:

- Counsel should keep in mind that they may later be required to articulate a basis for any denials. Parties should carefully consider the evidence for and against their position, including potential expert opinion evidence.

- When parties deny requests or fail to admit requests for lack of information or belief, counsel should be prepared to show they reasonably investigated the facts before denying the RFAs.

- When appropriate, RFA denials should be qualified, e.g., "Defendant admits that the accident may have caused plaintiff some damage but denies that the accident caused plaintiff all of the claimed damages," or "Defendant admits that he was driving one of the vehicles involved in the accident but denies that he was at fault or was solely at fault." Again, counsel should think about how they might later articulate and document the basis for such responses.

When moving for costs of proof:

- Counsel moving for costs of proof must directly tie all requested expenses to proving the specific matters denied and establish the reasonableness of the fees. They should submit declarations in support of the motion, setting forth a detailed accounting and attaching evidence of time spent proving the specific issues denied in the RFAs. The absence of such evidence is fertile ground for opposing a costs-of-proof motion.

When defending against a costs-of-proof motion:

- A party opposing a motion for costs of proof should review the exceptions listed in section 2033.420, subdivision (b) to see if any apply to the RFA denials at issue. In particular, the party should be prepared to demonstrate the reasonable basis for denying the RFA grounded in the evidence presented at trial. It is *crucial* in opposing a costs-of-proof motion that the party put on an *evidentiary* showing as to the basis for its denial. Fees and costs must be granted if the opposing party cannot establish one of the statutory exceptions.

- Counsel should scrutinize the moving party's attempt to tie requested fees to matters that were denied to ensure that the opponent in fact demonstrably proved as true the precise question the defendant denied, as framed in the RFA. If the plaintiff asked the defendant entity to admit it was negligent in three different ways, and the verdict shows only that the defendant was negligent, the jury may have found for the plaintiff on only one theory of negligence. In that case, the plaintiff will arguably be unable to establish which denied fact was decided in the plaintiff's favor, and thus may not have preserved the ability to allocate time to a winning issue as necessary for the motion.

- Counsel should also examine whether there are grounds to challenge the *reasonableness* of the claimed rates or hours spent. A failure to properly allocate time or show reasonableness warrants denying the motion. V

Laura Lim

Before joining Greines, Martin, Stein & Richland, Laura was a research attorney for Justice John S. Wiley Jr. at the California Court of Appeal and a law clerk for Judge George H. Wu in the Central District of California. Laura also worked at a major international law firm as a litigator with an emphasis on data privacy. Laura graduated from the University of California, Berkeley, School of Law, where she earned the Prosser Prize and Best Brief Award in Written and Oral Advocacy.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ASCDC Past Presidents

Ninos P. Saroukhanioff

It is my great honor and privilege to serve as the 63rd President of this amazing Organization. I will live up to the example set by those who came before me and, to that end, I undertook some research into the earliest predecessors in this job. Here, I'd like to share with you some historical background on ASCDC's first five illustrious Presidents: Forrest Betts (1960), Joseph W. Jarrett (1961), Clarence S. Hunt (1962), Hon. Gerold C. Dunn (1963) and Hon. John A. Loomis (1964), respectively.

President #1: Forrest Betts (1960)

Mr. Betts was with the firm of Betts, Ely & Loomis. Court records show he and his firm handled a number of matters for the defense that went up on appeal, including *Contractor's Safety Association v. California Compensation Insurance Company* (1957) 48 Cal.2d 71. The case involved complex analysis of arcane insurance code provisions, and the Supreme Court agreed with Mr. Betts' argument on the issues, affirming an order sustaining the defendant's oral demurrer to the introduction of evidence on behalf of the plaintiff. Mr. Betts also succeeded in obtaining a writ of mandate overturning an order denying a motion to quash service of a complaint, which is no small feat! (*Ben-Yehoshua v. Superior Court* (1963) 214 Cal.App.2d 719.)

Another case that Mr. Betts handled was one that went up on appeal: *Ervin v. City of Los Angeles* (1953) 117 CA2 303. Mr. Betts represented the City of Los Angeles. The plaintiff, Ms. Ervin was injured when she was struck by a falling boulevard sign at the southeast corner of Hollywood Boulevard and Sycamore Avenue in Los Angeles. The falling sign "injured her very seriously." The case proceeded to trial before a jury resulting in a verdict for the plaintiff in the amount of $37,774.50 – a "nuclear verdict" at the time. Mr. Betts appealed the verdict on behalf of his client.

The opinion is interesting in that it recounts lengthy passages of witness examination by Mr. Betts. For example, Mr. Betts is quoted as examining a witness, Regulo Rodriguez, a painter for the city, who replaced the broken stop sign post.

Mr. Betts: Now, what do you mean by you don't recall – that you didn't see it or you don't recall whether it was or was not there?

A. I didn't pay much close attention to the post.

Mr. Betts: That is what I thought. You don't know whether it showed a weatherbeaten appearance or not, do you, Mr. Rodriguez? That is the truth of the matter isn't it? Just take your time on that.

A. What I meant was, 'I didn't pay much attention to the post whether it was weatherbeaten or not. '

Mr. Betts: That is right. I am trying to help you out on that proposition, that is exactly what I had in mind. You didn't pay enough attention to tell whether any portion of it was or was not weatherbeaten. That is the truth, isn't it?

A. Yes."

Despite the skill demonstrated in the transcripts cited in the opinion, the Court of Appeal found that substantial evidence supported the verdict against Mr. Betts' client. The court did find that he demonstrated error in the trial court's admission of expert testimony; the court offered an observation that remains true today: "It is not easy to draw a clear line of demarkation between the field in which experts may give their opinions, and the field which is reserved exclusively for the jury."

It appears that the challenges Mr. Betts faced in defending his clients are much like those we as defense lawyers face today. I'm grateful to his service in presiding over the creation of ASCDC as an organization to advance the cause of defense counsel in Southern California! V

President #2 Mr. Joseph W. Jarrett (1961)

Mr. Jarrett was born in 1911. He completed his undergraduate studies at University of Southern California earning a Bachelor of Arts. He then obtained his Juris Doctor at USC. He was admitted to the State Bar of California in 1936.

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There are a number of appellate cases where Mr. Jarrett is identified as the attorney for the defendant. For instance, one such case is *Hammano v. Edelson* (1967) 251 Cal.App.2d 784, in which the court affirmed the judgment on the jury's defense verdict in a premises liability case. Clearly, Mr. Jarrett was still actively litigating cases for well over 30 years by the time of the *Hammano* decision.

At the time of the *Hammano* decision, Mr. Jarrett was with the firm of Morgan, Holzhauer, Burrows, and Wenzel – those names should ring many a bell. From the Dartmouth Alumni Magazine (1943), I found an article that states, "From the West Coast Al Holzhauer joins forces with three other legal stalwarts to form Morgan, Holzhauer, Burrows, and Wenzel, specializing in negligence, criminal defense, and domestic relations at 1541 Wilshire Blvd., Los Angeles." V

President #3 Clarence S. Hunt (1962)

Photo from the American Inns of Court – The Ball/Hunt/Schooley American Inn of Court

From *A Century in the Life of a Lawyer: Reflections by Joseph A. Ball* – 36 CAWLR 77 (*California Western Law Review*), I found this about Mr. Hunt:

> I took my next associate in the law practice in 1945. I knew **Clarence Hunt from USC, where he ranked number one in our law school class**, and from the local district attorney's office. He had gone in the Navy during the war. In 1945, he came to see me to talk about his job prospects. I told him I had enough work for both of us, so he came to work for me. He became a partner in 1948, and he was with me from that time on.

Here is more information about Mr. Hunt from the American Inns of Court, summarizing his illustrious military service as well as his legal career:

Continued on page 29

Clarence S. Hunt was a third generation Californian, born in San Jose, the son of a Professor of Economics (and later Dean of the Graduate School) at the University of Southern California. He graduated from USC with a degree in Economics and went on to attend the USC Law School with his friend and classmate, and future partner, Joseph Ball, both of whom graduated and joined the California Bar in 1927.

Taking a position in the L.A. County District Attorney's office, Hunt began practice as a trial lawyer in downtown Los Angeles. During the Great Depression, however, he was re-assigned to the Long Beach office to replace Joe Ball, who had been laid off due to budget limitations, and the two future partners often found themselves opposing one another in the courtroom.

Hunt remained in the District Attorney's office in Long Beach until 1943, when he began service in the U.S. Navy as an intelligence officer. At the end of World War II, he sailed with President Harry Truman aboard the heavy cruiser U.S.S. Augusta during that ship's historic visit to Yalta, marking the beginning of the Cold War.

Following his service at the close of the war, Hunt returned to Long Beach to find that Joe Ball's private law practice was booming, and the two became lifelong partners in the firm originally known as Ball, Hunt, and Hart and eventually to become Ball, Hunt, Hart, Brown & Bearwitz. **Even though Joe Ball was a confirmed liberal Democrat and Clarence Hunt a lifetime conservative Republican, the two practiced together and headed one of the most prestigious and respected law firms in Southern California for the rest of their professional lives.**

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Clarence Hunt was known for his civility and effectiveness in the courtroom, and his professionalism and capability were widely respected by both bench and bar. During the formative meeting of the American Inn of Court named in his honor, he delivered (without notes) the Inn's opening address, in which he called on all lawyers to save the essence of our profession – the twin pillars of civility and honor; and our Inn strives to preserve and carry on his tradition of excellence, dignity, and respect in the practice of law.

President #4
Hon. Gerold C. Dunn (1963)

Photo of Judge Dunn from Wikipedia

In the finest tradition of ASCDC presidents, Judge Dunn, like Clarence Hunt, had an impressive scholastic and military background as well as a stellar legal career.

Judge Dunn was born in 1911 in Ventura, CA. He attended Stanford University, where he earned his B.A. degree in 1934, and his Bachelor of Laws (LL.B) degree in 1938. He was admitted to the State Bar of California that same year.

Judge Dunn served for a brief period as a special deputy counsel for the County of Los Angeles, California, from 1939 to 1940. After leaving his position with the County of Los Angeles in 1940, Judge Dunn entered private practice in the City of Los Angeles.

During the Second World War, Judge Dunn joined the United States Army, serving from 1942, shortly after the American entry into World War II due to the Japanese attack on Pearl Harbor, Hawaii, until 1945, when the war came to an end.

After the Second World War, Judge Dunn returned to private practice. In 1948, Judge Dunn joined Sidney A. Moss and George C. Lyon to form the firm of Moss, Lyon & Dunn. It was during his nearly 20 years of practice at Moss, Lyon & Dunn that Judge Dunn served as the 4th President of ASCDC.

In 1965, Governor Ronald Reagan appointed Mr. Dunn as a Judge of the Los Angeles County Superior Court, and he was quickly elevated to be an associate justice of the California Court of Appeal for the Second Appellate District in Division 4.

Judge Dunn would serve as an associate justice of the California appellate court for nearly nine years, retiring in 1977 at the age of 66. There are over 130 opinions either authored or joined by Judge Dunn or opinions for which he was on the panel. Judge Dunn passed away in 1980 at the age of 69.

President #5
Hon. John A. Loomis (1964)

Hon. John A. Loomis

Judge Loomis was born and raised in Huntington Park, California. Like Judge Dunn, he was educated at Stanford University (seeing a trend), where he served as student body president.

After graduating from law school and passing the State of California Bar, he joined Forrest Betts at Betts, Ely & Loomis, which eventually evolved into Loomis, Shield & Smith. The *Los Angeles Times* reported in Judge Loomis's obituary that, "As an attorney, he served as president of the Southern California Defense Counsel."

The contributions of Judge Loomis to the legal community were manifold. He was president of the Federation of Defense and Corporate Counsel (1965-1966) as well as the International Association of Defense Counsel (1968-1969). Judge Loomis was appointed to the bench by Governor Ronald Reagan in 1969, where he served until 1983. In 1981, Judge Loomis was named "Outstanding Trial Jurist" by the Los Angeles County Bar Association (LACBA). He was also named "Trial Judge of the Year" by the Los Angeles Trial Lawyers Association. He served as chairman of the California Judicial College and for nine years he headed the BAJI committee.

Judge Loomis also testified at length before the state Legislature's Joint Committee on Tort Liability in 1977, regarding the role of court-sponsored voluntary arbitrations before a panel made up of volunteers from the defense and plaintiffs' bars. (See *https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1096&context=caldocs_joint_committees.*) His remarks about the value of easing overloaded court dockets foreshadowed those our ASCDC's immediate past President, Marta Alcumbrac, who has spearheaded similar efforts to great success through the highly effective Resolve Law LA program. (See *www.ResolveLawLA.com.*)

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Law and Linguistics – Tools of Construction

Mark A. Kressel

An esteemed panel of experts recently discussed this emerging area of law.

As civil defense litigators, we often confront ambiguous statutes and contracts. Many of us turn to dictionary definitions, but dictionaries alone may not be enough to resolve ambiguous writings. As the California Supreme Court explained in *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265 when rejecting a dictionary-based approach to determining the meaning of "unfair competition" in an insurance policy, an analysis based on dictionary definitions "is probably correct as a matter of abstract philology, [but] it is defective as a matter of policy interpretation because it disregards the context."

Fortunately, we are no longer limited just to dictionaries to answer these kinds of questions. Other tools have emerged to support construction of the meanings of statutes and contracts. Recently I attended a panel on "Law and Linguistics," presented at the Appellate Judges' Education Institute Summit in Scottsdale, Arizona, which provided insights on instances when dictionary definitions may not conclusively resolve written ambiguities and the use of Corpus Linguistics to solve these kinds of problems.

Karl S. Myers, a shareholder at Stevens & Lee and the co-chair of the firm's Appellate Practice Group, was the moderator of this very well attended panel on Law and Linguistics. He began by introducing the panelists, whose biographies are at the bottom of this article. The speakers then turned to the topics summarized below.

Statutes can contain linguistic ambiguities that make it difficult for courts to reliably interpret them correctly.

Professor Anderson began the program by discussing how linguistic ambiguity can cause conundrums in statutory interpretation. She began with an example from the case of *Whiteley v. Chappell*, 4 L.R.Q.B. 147 (1968), which she called the Victorian Voter Fraud Puzzle. A voter cast a vote in the name of a deceased individual. The issue in the case was whether the defendant violated a statute that made it a crime to fraudulently "impersonate a person entitled to vote." The court held that he did not. The court reasoned that the Legislature did not use language broad enough to make impersonating a dead person a crime.

Linguists, however, would say it depends on how you read the statute, which is ambiguous. The ambiguity is "structural," not lexical, semantic, or syntactic. This ambiguity is known as "de re vs. de dicto ambiguity." "De re" means a thing-oriented meaning. For example, if you say, "I am looking for a dog," the de re meaning is that "I am looking for a *particular* dog." "De dicto" means a word- or category-oriented meaning. So if you say, "I am looking for a dog," the de dicto meaning is that "I am looking to buy a dog."

If we apply that distinction to the voter fraud problem, we see that if we use the de re meaning, the voter would not have violated the statute criminalizing fraudulently "impersonat[ing] a person entitled to vote," because the particular person that the voter impersonated was not "entitled to vote." He was dead. However if we use the de dicto meaning, the voter would have violated the statute, because he went to the voting center intending to impersonate a person entitled to vote.

What kinds of words trigger a de dicto vs. de re ambiguity? "Opaque" verbs, such as "look for" or "promise."

How Corpus Linguistics can assist with statutory and other textual interpretation.

The program then turned to Justice Lee, who discussed how Corpus Linguistics can help us understand words when there is lexical ambiguity. The search for ordinary meaning yields greater predictability in understanding meaning than any other single methodology. Justice Lee began with an example from *Muscarello v. U.S.*, 524 U.S. 125 (1998). *Muscarello* considered the meaning of 18 U.S.C. section 924(c), which imposes a mandatory prison term for any person who, during a drug trafficking crime, "uses or carries a firearm." The issue

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in the case was whether the meaning of "carries a firearm" was limited to carrying a firearm on the defendant's person, or whether it could include conveying a firearm in the glove compartment of the defendant's vehicle. Justice Breyer, writing for the majority, held that "carry" means "any form of transport," and that the most ordinary sense of "transport" is transporting in a vehicle. Justice Ginsberg, writing for the dissent, would have held that transporting on a person is not implausible and not at odds with an accepted meaning, and therefore under the rule of lenity, "carry" should be limited to transporting on a person. Notably, both justices consulted a dictionary and looked at which meaning was listed first. (This was a particularly suspect approach, because dictionaries usually state that the order of listed meanings of a single word is not related to how common that meaning is.) What this case demonstrates is that the search for a word's ordinary meaning may be complicated by the limits of human intuition and the potential for motivated reasoning.

Corpus Linguistics is the use of a database of naturally occurring language to determine a word's meaning. The method involves using samples of real world language to see how a word is most commonly used. Some courts have begun using Corpus Linguistics tools, and it is possible we may soon see Corpus Linguistics cited in a U.S. Supreme Court opinion. Currently, if a practitioner wants to advance an argument using Corpus Linguistics, he or she needs to hire an expert who works with the relevant databases. Litigation over a word's meaning thus becomes a battle of experts.

If you are not an expert, however, but you want to get a sense of how this method works, you can search online for the Corpus of Contemporary American English. This database will give you representative samples of public usage and meaning today. The database currently contains samples from 1990 through 2019 and is regularly updated to add samples from more recent years. Another database is the Corpus of Founding Era American English. This database will give representative samples of public usage and meaning at the time of our nation's founding.

Other linguistic tools besides Corpus Linguistics can help with textual interpretation.

Next, Professor Tobiah discussed other linguistic tools that people use to determine a word's ordinary meaning. He began with the famous line from Justice Scalia that "the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny." *Johnson v. United States*, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting). The limits on this method, of course, include understanding which community is attending this particular cocktail party.

Of course, one tool for learning a word's meaning is a dictionary. But using a dictionary still requires you to make important choices, such as whether to use an ordinary dictionary or legal dictionary, or a contemporary or historical dictionary. Furthermore, many dictionaries will put emphasis on the frequency of a particular use, but the frequency of use does not necessarily correlate with the word's ordinary meaning. For example, there is what is known as the "Blue Pitta" problem. The Blue Pitta is a specific species of bird. However, this bird is so unusual that its name does not appear in the corpus linguistics databases – no one ever uses it. As another example, "black sheep" is used far more frequently than "white sheep" (at 95 percent to the latter's 5 percent), yet a white sheep is the more ordinary meaning of the word sheep.

Another helpful tool is a survey. For example, you could survey people as to whether, for purposes of a rule prohibiting

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"vehicles in the park," a bicycle is a "vehicle." People would respond differently depending on their views of whether a bicycle would generally be permitted in a park.

The future will see more advances in the use of Corpus Linguistics in the legal profession.

The panelists concluded the discussion with some final thoughts about the future of Corpus Linguistics in the legal profession. Professor Anderson predicted that linguists will begin to pay attention and weigh in on questions such as how correct lawyers' methods are when they work with the database. Some textual interpretation cases will be decided by a battle of experts criticizing each other's research methods and conclusions. Justice Lee believes we are going to see the establishment of a field called "Law and Linguistics," and there will be more interdisciplinary research in this area. Professor Tobiah predicted that the empirical work done by these scholars and experts will lead to advances in interpretary theories.

The next time you have a case in which both sides seem to be able to point to dictionaries to support their preferred meaning of a statute or contract, consider whether introducing another method such as Corpus Linguistics would support your argument.

Speakers:

Hon. Thomas R. Lee is a Principal in Corpus Juris Advisors (a consulting firm) and Lee Nielsen (a law firm), and a lecturer at the law schools of Brigham Young University, Harvard University, and the University of Chicago. He is a former Justice of the Utah Supreme Court, a former law clerk to Justice Clarence Thomas and Judge J. Harvie Wilkinson III, and a graduate of the University of Chicago Law School.

Kevin Tobiah is a Professor of Law at Georgetown University Law Center. He researched and teaches in legal interpretation, legal theory, and torts. He is a graduate of the Yale Law School, where he was awarded the Felix S. Cohen prize for legal philosophy. His work has been published or is forthcoming in the *Harvard Law Review, Yale Law Journal, Columbia Law Review,* and *University of Chicago Law Review.*

Jill C. Anderson is a professor at the University of Connecticut School of Law. She is a graduate of Columbia Law School, where she was a Lowenstein Public Interest Fellow and earned James Kent Scholar honors. Professor Anderson is known for her scholarship on language and law. Her expertise in linguistics informs her articles on statutory interpretation, which have appeared in the Yale Law Journal and Harvard Law Review, and reach substantive areas as diverse as disability discrimination, white collar crime, intellectual property, and genocide law.

Mark A. Kressel

Mark joined Horvitz & Levy as an associate and was invited to join the partnership in 2018. Before joining the firm, Mark was a litigation associate with Irell & Manella LLP. In addition to his bar admissions, he has practiced before the U.S. International Trade Commission.

ASCDC 2023 Webinars

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Social Media Ethical Evidence Collection and Use

Joseph Jones discusses various ethical issues and legal requirements relating to social media and the law. He discussed how to properly preserve and authenticate social media content, the fallacy of social media privacy and what should/shouldn't be discussed about your cases on social media.

For more information contact:
Joseph Jones | *joe@boscolegal.org*

NEW MEMBER SPOTLIGHT

Get to Know One of Our New Members

John W. Nielsen

John Nielsen is a civil litigation attorney with Price Pelletier, LLP and his areas of focus primarily include business litigation, premises liability and transportation. He is a fourth-generation San Diegan and resides in Del Cerro with his wife and two young children.

Jeff Walker
Walker Law Group, LLP
Rados v. Peraza

Pancy Lin, Esq.
Hylton & Associates
Catano v. Mt. San Antonio College
Gonzalez v. El Super, et al.

Chris Faenza, Esq. & Arpine Esmailian, Esq
Yoka | Smith
Reddy v. Twenty4Seven Hotels

Sean D. Beatty, Esq.
Beatty & Myers, LLP
Azekri v. Toyota Motor Sales, U.S.A., Inc.

Jeffrey S. Behar, Esq.
Ford, Walker, Haggerty & Behar
Figueroa v. AT&T

Gina Y. Kandarian-Stein
Gates, Gonter, Guy, Proudfoot & Muench, LLP
Charlton v. Miranda

Alice Chen Smith, Esq, & Michelle J. An, Esq.
Yoka | Smith
Henry v. Forest Lawn et al.

Alice Chen Smith, Esq., Kimberly A. Byrge, Esq. & Michelle J. An, Esq.
Yoka | Smith
Kim v. Forest Lawn

Bron D'Angelo, Esq.
Berger Meyer LLP
Jelenic v. Stipicevich

AMICUS COMMITTEE REPORT

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

Don't miss the recent amicus *VICTORY*

The Amicus Committee successfully sought publication of the following case:

1) ***Smalley v. Subaru of America, Inc.*** (2022) 87 Cal.App.5th 450: The Court of Appeal in Orange County helpfully addressed a section 998 issue that has been arising with frequency in cases involving fee-shifting statutes – whether plaintiffs may avoid the effect of having turned down a section 998 offer and then failing to do better at trial, by claiming such offers are invalid they do not specifically state that the plaintiff will "be deemed the prevailing party for purposes of a motion for attorney fees." Plaintiffs who don't beat the defendant's section 998 offer try to avoid the consequences by identifying immaterial "defects" such as that. The Court of Appeal rejected these arguments and held that the defendant's section 998 offer was valid. John Taylor from Horvitz & Levy submitted a publication request that was granted.

2) ***Chen v. BMW of North America*** (2022): 87 Cal.App.5th 957: Another section 998 opinion in a Song-Beverly case similar to Smalley above. Chris Hu from Horvitz & Levy submitted a joint publication request on behalf of ASCDC and the Association of Defense Counsel of Northern California and Nevada that was granted.

3) ***Atalla v. Rite Aid Corp.*** (2023) __ Cal.App.5th __: The Court of Appeal in Fresno affirmed the granting of defendant's motion for summary judgment in a sexual harassment lawsuit based on a supervisor's sending of inappropriate texts to an employee outside of office hours. As to two harassment causes of action, the trial court said, "The question is whether the harassment arose from a completely private relationship unconnected with the employment. I think defendants have met their burden of showing that this is the case." As to cause of action for constructive termination and retaliation, the trial court ruled: "The undisputed facts show that plaintiff quit – she was not constructively terminated." The Court of Appeal agreed. Eric Schwettmann from Ballard Rosenberg and Don Willenburg from Gordon Rees submitted a joint publication request on behalf of ASCDC and the Association of Defense Counsel of Northern California and Nevada that was granted. V

Keep an eye on these PENDING CASES

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

1) ***Bailey v. San Francisco District Attorney's Office*** (S265223): The Supreme Court has granted review in this employment case to address this issue: "Did the Court of Appeal properly affirm summary judgment in favor of defendants on plaintiff's claims of hostile work environment based on race, retaliation, and failure to prevent discrimination, harassment and retaliation?" The case involves the "stray remark" doctrine. The Amicus Committee recommended submitting a brief on the merits which the Executive Committee approved. Brad Pauley and Eric Boorstin from Horvitz & Levy submitted an amicus brief on the merits.

2) ***TriCoast Builders, Inc. v. Fonnegra*** (2022) 74 Cal.App.5th 239, review granted Apr. 27, 2022, S273368: The California Supreme Court has granted review to address these two issues: (1) When a trial court denies a request for relief from a jury waiver under Code of Civil Procedure section 631, and the losing party does not seek writ review but instead appeals from an adverse judgment after a bench trial, must the appellant show "actual prejudice" when challenging the order on appeal?; and (2) Does a trial court abuse its discretion when it denies a request for relief from a jury trial waiver without a showing that granting the request will prejudice the opposing party or the trial court? Steven Fleischman and Andrea Russi from Horvitz & Levy have submitted an amicus brief on the merits and the case remains pending. V

How the Amicus Committee Can Help Your Appeal or Writ Petition, and How to Contact Us:

Having the support of the Amicus Committee is one of the benefits of membership in ASCDC. The Amicus Committee can assist your firm and your client in several ways:

1. *Amicus curiae* briefs on the merits in cases pending in appellate courts.

Continued on page 38

2. Letters in support of petitions for review or requests for depublication to the California Supreme Court.

3. Letters requesting publication of favorable unpublished California Court of Appeal decisions.

In evaluating requests for *amicus* support, the Amicus Committee considers various factors, including whether the issue at hand is of interest to ASCDC's membership as a whole and would advance the goals of ASCDC.

If you have a pending appellate matter in which you believe ASCDC should participate as *amicus curiae*, feel free to contact the Amicus Committee:

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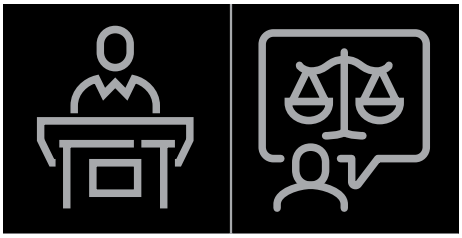

President – *continued from page 3*

leaders in the legal community, we must all come together to support our legal system and create a brighter future for everyone. The ASCDC stands ready to take on this charge.

I very much look forward to seeing you all in person at the many upcoming events that we have planned for this coming year.

Thank you.

Capitol Comment

– continued from page 5

proceeding. CDC has joined others in opposing the measure, which could waste scarce judicial resources if trials are completed before appeals of motions to compel are decided.

SB 652 *(Umberg)*: Experts: Reverses the recent appellate case of *Kline v. Zimmer*, which held that only plaintiff experts are subject to a standard of reasonable scientific probability. CDC has obtained amendments to the bill which clarify that nothing in the bill diminishes the ability of experts to opine that experts from the other side have not met their burden, and explaining the bases for that opinion.

SB 662 *(Rubio)*: Court Reporters: Includes several proposals relating to electronic recording of court proceedings, already permitted in misdemeanors and limited jurisdiction civil cases. Permits courts to order electronic recording in all civil cases if every effort has been made to secure a Certified Shorthand Reporter, and if existing official reporters are given a first right of refusal to transcribe proceedings recorded electronically. This is a very controversial measure, supported by CDC, the Consumer Attorneys, the California Judges Association and the Judicial Council of California, but opposed by labor unions and associations of court reporters.

Taken together, these measures may represent the most impactful year in memory for civil practitioners.

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August 10, 2023	**Golf Tournament**	*El Segundo Top Golf*
September, 2023	**Med-Mal and General Litigation Conference**	*Santa Barbara*
October 24-27, 2023	**DRI Annual Meeting**	*San Antonio Texas*
November 30, 2023	**Annual Construction Seminar**	*Orange County*
December 6, 2023	**ADC President's Dinner**	*Westin St. Francis, San Francisco*
December 7-8, 2023	**ADC 64th Annual Meeting**	*Westin St. Francis, San Francisco*
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