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VERDICT
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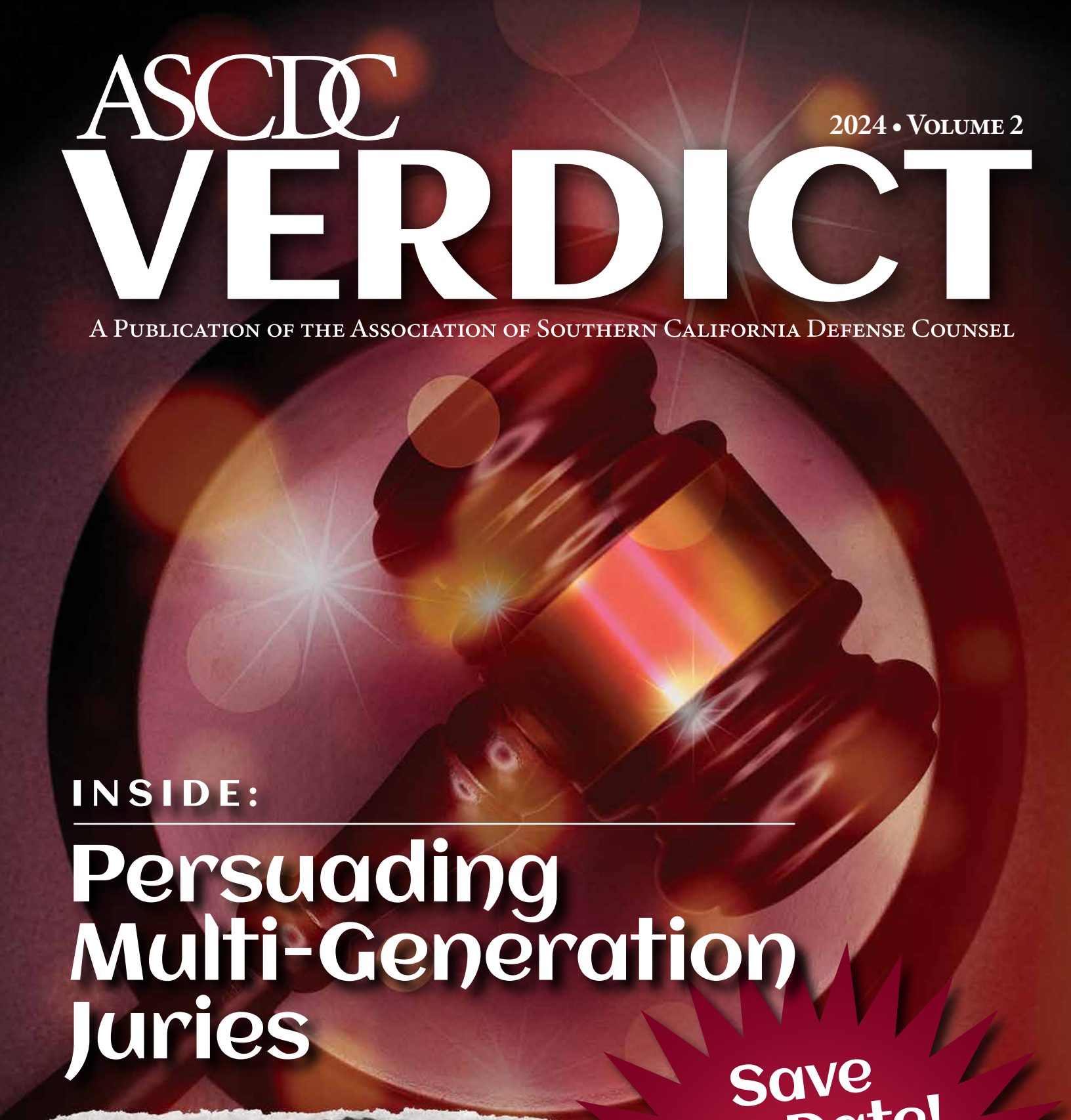

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Persuading Multi-Generation Juries

ALSO:

- 2024 in Pictures!
- Choosing the Right Posttrial Motion
- Using Dash Camera Evidence to Combat Fraud

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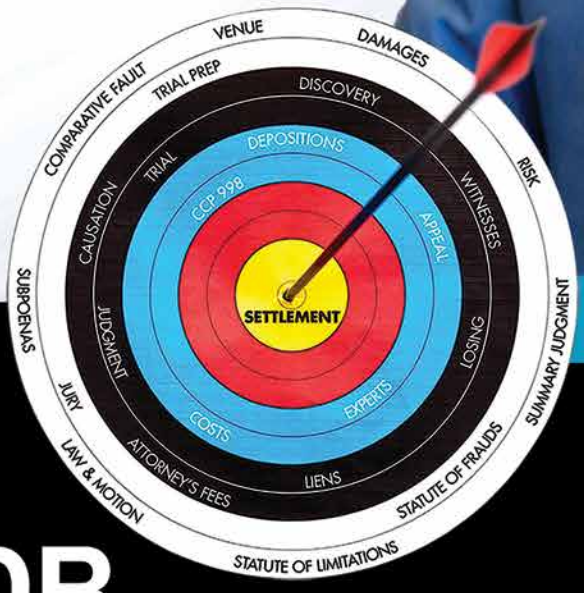

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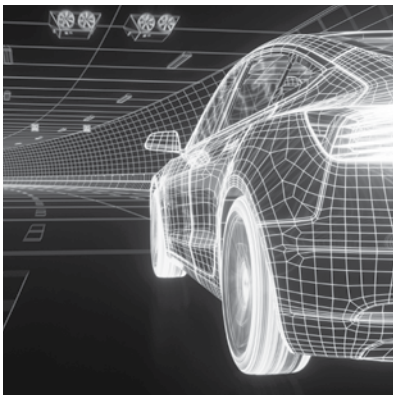

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PRESIDENT'S MESSAGE

ERIC C. SCHWETTMANN
2024-2025 President

It is my great honor and privilege to serve as your 2024-2025 ASCDC President. Our tremendous executive committee and board of directors are truly grateful for the trust and confidence you have placed in us, and we are committed to serving you to the best of our abilities.

Many would say that our nation and the world are angry, polarized, and frightening places. These are fairly accurate sentiments, which makes the theme of my term, the "Three C's - Civility, Cooperation, and Collaboration" all the more appropriate than it was when I began in February 2024.

Some highlights from the year so far:

Annual Seminar: We started 2024 with our "super bowl" - the 63rd Annual Seminar. As is always the case, the program was a smashing success. The Past Presidents dinner, Casino night with Taylor Jules & Friends as the live band, and keynote speaker Bob Kendrick were amazing.

Hall of Fame Dinner: In June, we held our biannual Hall of Fame dinner honoring Civil Advocate John Taylor, defense Hall of Famer Denise Taylor, and Judge of the Year Maria D. Hernandez. It was another huge hit and gave the bench and both sides of the bar the opportunity to celebrate one and all. Also, a number of Rising Stars were celebrated for their contributions to the association and defense practice.

"**Fun":** In October, we held our second golf outing at Top Golf in El Segundo. Never have so few played so well and so many played so poorly. A great time was had by all regardless. Kudos to Gary Montgomery and Charlie Schmitt for putting on the event.

Law Practice Management Seminar: In November, we held our law practice management seminar. This is a highly informative event for firm managing partners and administrators chock full of data analytics and speakers on the less-than-glamorous job of running a law practice in California. Thanks to Tom Feher and Matt Pascale for their tireless efforts in putting this event together.

Joint Implicit Bias Program: Also in November, we participated in a Joint Implicit Bias Training program with Judge Samantha Jessner, Judge Sergio Tapia, Judge Esther Kim, CAALA President Ibiere Seck, LA-ABOTA President Jim Rosen and yours truly. Featured Speaker Joyce Aiko McCulloch was simply amazing. This was one of several events that we have collaborated with CAALA, LA-ABOTA, LACBA and other organizations. A special thanks to Laura Hummasti for her assistance with the planning of this very important event. Words have meaning and can be hurtful.

ADC Annual Seminar: In December, a number of us had the privilege of attending the Association of Defense Counsel of Northern California and Nevada's annual seminar in San Francisco. Congratulations to Past President Edward Tugade, new President Patrick Deedon, and First Vice President Laura McHugh for a great show. Additional thanks to Past Presidents Mike Kronlund and John Cotter for their usual hospitality around the City by the Bay.

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CAPITOL COMMENT

MICHAEL D. BELOTE
Legislative Advocate, California Defense Counsel

WE KNOW ABOUT 2024, BUT WHAT ABOUT 2025?

A long time ago there was a nationally-syndicated radio host named Paul Harvey, whose noon show included the famous tag-line "And now you know...the rest of the story." Writing a column the day after the November general elections which is intended to summarize the 2024 legislative year, and to look ahead to 2025 is a, ahem, challenge. We know the story of 2024, but what about the new two-year session beginning in Sacramento on Monday, December 2, 2025?

2024 was a year of quite conspicuous successes for the California Defense Counsel in Sacramento. On three high-profile issues, CDC work in California's capitol yielded wins of note. Those three issues are the following:

- **Remote Appearances:** CDC has been an integral part of an ongoing dialogue between bench and bar over statutory authorization for remote appearances in civil cases. This authority is contained in California Code of Civil Procedure Section 367.75. Remote appearances are a remarkably controversial subject in Sacramento, despite the fact that hundreds of thousands of proceedings every year now include some remote participation. Because of the controversy about whether these proceedings are working successfully or not, the authority has never been made permanent. Instead the legislature keeps extending the authority in the CCP for short periods of time. This year, AB 170 was enacted to extend the remote appearance authority for two more years, until January 2, 2027. CDC's position is clear, and was well-delivered by former CDC President John Cotter in legislative hearings: remote appearances are an appropriate tool for many civil proceedings, not including jury trials, but lawyers should have the discretion to determine if an in-person appearance is necessary on a case-by-case basis. This very principal is upheld in the language on AB 170.
- **Summary Judgment:** CDC has been working for years to refine the summary judgment timeline in CCP Section 437c. Specifically, the mission has been to provide judges with more time to review summary judgment replies before MSJ hearings. This year the mission was accomplished with the passage of AB 2049, effective on January 1, 2025. Constituting the first structural change to the MSJ statute in 20 years, the bill adds six calendar days to each of the deadlines in the statute. The notice period is extended from 75 days prior to the hearing to 81; oppositions will be due 20 days prior to the hearing instead of 14, and replies will be due 11 days in advance instead of 5. Judges, some of whom have indicated that they begin the evaluation of the motion by reading the reply, strongly supported the change. There are two additional things of note: first, AB 2049 clarified usual practice by indicating that each party is limited to one MSJ per case, unless leave of court is granted for good cause: and second, the bill codified case law by prohibiting the introduction in replies of new evidence or material facts not raised in the motion or opposition.
- **Lemon Law:** While lemon law cases may represent a fairly small niche within defense practice, the explosion of lemon law cases in California, particularly in large Southern California courts, has contributed very significantly to civil court congestion. This year AB 1755 was enacted to streamline the civil processes within lemon law cases. Along with the "Big-3" domestic automakers, California Judges Association, and Consumer Attorneys of California, CDC strongly supported the reforms in AB 1755, which are intended to resolve Song-Beverly claims within months rather than years, standardizing document exchange, requiring mandatory mediation, limiting the length of time to file claims, and much more. Again, obviously not every ASCDC member handles lemon law matters, but those who do simply must become familiar with AB 1755, and those who don't should benefit from fewer motions to compel clogging up our civil courts.

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The Colbert Questionnaire

ERIC C. SCHWETTMANN

Best sandwich?

Beef French Dip with grilled onions.

What's one thing you own that you really should throw out?

50 or so old Iphones, Ipods, Ipads, Nanos, etc. Big Apple product hoarder.

What is the scariest animal?

Racoons. Those trash pandas are seriously creepy.

Apples or oranges?

Apples (see 2).

Have you ever asked someone for their autograph?

Yes, and Bono from U2 obliged me.

What do you think happens when we die?

Universe far too complex for me to say.

Favorite action movie?

Tie – John Wick 1-4.

Favorite smell?

Hot meat lovers pizza fresh out of oven.

Least favorite smell?

The hot dust that blows out of the vents in my actual office.

Exercise: worth it?

100%. Have to keep the mind and body in shape. Plus it's an hour or two where my phone is "off."

Flat or sparkling?

Flat.

Most used app on your phone?

New York Times Crossword/ Wordle

You get one song to listen to for the rest of your life: what is it?

According to Itunes, One by U2.

What number am I thinking of?

14?

Describe the rest of your life in 5 words?

He was misunderstood but loved.

How to Persuade Multi-Generation Juries

By Dr. Noelle Nelson, Ph.D.

Jurors under 30 are serving more on juries as the old guard ages out. These GenZers rely heavily on the Wild West of social media to shape their perspective. Most litigators are in the over 30 group (often in the "well over 30" group), and have little if any genuine understanding, much less appreciation, of how GenZers see the world, and thus their case. The presence of these jurors poses a conundrum: how to influence a group that is so little known to most attorneys?

But here's the thing: no jury is ever composed of a single generational group. Jurors are a mix of the generations, from the barely emerging GenY through GenZ, Millennials, GenX and Boomers, to the Silent Generation, each of which has decidedly different attitudes, lifestyles and world views.

What's a litigator to do? It's impossible to speak to each of these distinct generations. Or is it? The solution is to address commonalities and to speak in a way that bridges the divide between the generations.

There are two categories of commonalities: the "what," that is common to all generations, and the "how" to address jurors persuasively across their diverse ages.

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The "What" Commonalities

Safety and Security

We are a society that values safety and security. Public safety is generally considered the highest priority among jurors. This cuts across not only all generations but across all types of businesses and professions. When you are defending a corporation, whether it be in the airline, food, medical, automotive or any other industry, the first questions jurors have are "Why wasn't it safe? How could they allow a product/service to be marketed to the public when it wasn't safe?" The same is true for a professional. Take, for example, a surgeon or anesthesiologist: "Why didn't they pay more attention to the patient's safety?" That "safety" could have been taking steps to prevent sepsis, monitoring a patient's progress more closely or being up on the latest medical techniques.

Transparency

"Transparency" is differently defined by the generations. To the older generations, transparency is about openness and honesty: "What you see is what you get." To younger generations, transparency is more about revealing the behind-the-scenes workings of everything from cryptocurrency to AI. Yet transparency comes down to the same common theme that is important to all jurors: "no secrets." As in "operating in such a way that it is easy for others to see what actions are performed."

Accountability

Accountability, in the broadest terms, is the willingness to accept responsibility for one's actions and their impact on others. Although accountability has always been important to jurors, it has become increasingly relevant in the face of the growing socio-political divide, prompting various conspiracy theories and suspicions of corporate and government motivations. It doesn't matter which side jurors are on, nor which generation they belong to, the great majority of jurors walk into the courtroom convinced that defendants, corporate or professional, lack accountability. A far smaller percentage believe the same of plaintiffs.

The "How" Commonalities

Tell a Story

Nothing beats the power of story when it comes to persuasiveness. Whether we are 23 or 83, stories access our emotions and make sense of life. Decisions are not made at the logical level, rather they are driven by our emotions and then backed up with whatever logic we have at hand. Too often, defense lawyers rely on "deny and defend," which fails to harness the enormous power of story. Plaintiff attorneys plunge deep into storytelling, sometimes ignoring facts or logic. No matter how annoying it is to the defense, this tactic can be successful because it appeals to our reptilian mind, touching on our primal emotions.

Plaintiffs, however, do not have the exclusivity on storytelling much less on emotion. Corporate defendants, professionals and CEOs all have a story to tell, an emotional one. They just don't ordinarily think in those terms.

It's your job as a defense attorney to help your clients find their story. The tale of how they and their business care about the public they serve, how that's exemplified in the way they dealt with the circumstances that led to the present lawsuit, and then the bigger picture: why they engage in their particular business, what it means to them and employees, not in dollars or lifestyle, but in terms of their values, hopes and vision. The story is what makes your client's actions understandable, and therefore in some way relatable to your jurors' lives. The story must be based on fact so that concerns of transparency and accountability are satisfied. Mistakes and errors are forgivable, hiding them is not.

Story is not to be told solely as a narrative, but rather as the theme of your defendant, woven into your opening, how you shape your direct and lead your cross of all witnesses, expert as well as lay, and how you present your evidence. The more you can condense the story into a memorable bullet, to be repeated throughout the trial, the better. Hollywood is brilliant at creating memorable story-bullets, and can serve as useful training ground for case purposes: "The Good, the Bad, the Ugly" gives you the story in a nutshell. "Mission Impossible" tells you everything you need to know. Most importantly, both examples have emotional resonance: "good," "bad," "ugly," and "impossible" are all words that evoke emotions. That is what makes them impactful story bullets.

Use Visuals

Older generations may not have grown up with the excess of visuals that are now commonplace, but they have certainly become accustomed to them. Grandparents communicate with their grandchildren across Facebook and Instagram and use FaceTime. Just because older generations do not spend nearly as much time on social media as do GenZers does not diminish the importance and power of visuals to them.

Science has repeatedly demonstrated the critical nature of visuals in supporting memory and enhancing comprehension. For example, research (Modern Psychological Studies, 2009) shows that visual learning produces greater memory recall than auditory learning. Other research shows that visuals (3M Meeting Network, 1997) have been found to improve learning by up to a whopping 400 percent. Use visuals throughout your case.

The visuals you select to illustrate or demonstrate your points must be chosen with keen attention to the emotions they are likely to trigger. Focus groups are invaluable in sorting out which visuals have what impact, but just keeping in mind

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Advising Risk Manager Clients: The Crucial Role of Dash Cameras in Combatting Vehicle Accident Fraud

Elvis Donny Desai, MSME, ACTAR
Sr. Forensic Engineer

In the dynamic landscape of accident reconstruction, where precision and accuracy are paramount, the integration of dash cameras has emerged as a revolutionary tool. As a Senior Accident Reconstruction Engineer, I have witnessed firsthand the transformative impact of dash cameras in unraveling the truth behind vehicular incidents, particularly in cases marred by the specter of fraud. In this article, I will delve into the intricate ways in which dash cameras become invaluable assets in my investigative toolkit, shedding light on their role as unflinching guardians against fraudulent activities in the realm of accident reconstruction. Join me as we explore the intersection of technology, justice, and the battle against deception on the road.

The Rise of Dash Cameras in Accident Reconstruction

In recent times, the prevalence of dash cameras has surged, emerging as a critical tool in accident reconstruction and proving instrumental in the investigation of vehicle accident fraud cases. This section explores the objective documentation provided by dash cameras, shedding light on their role in capturing accurate and unbiased footage of vehicular incidents.

Dash cameras function as impartial chroniclers, offering real-time documentation of events leading up to and following a vehicular accident. Their high-definition capabilities empower accident investigators to analyze crucial details such as speed, direction, and vehicle actions with unparalleled precision. This enhanced accuracy becomes a cornerstone for reconstructing accidents with meticulous detail, making it challenging for fraudsters to manipulate or distort the sequence of events.

The Unbiased Witness Perspective

In the realm of accident reconstruction, one of the most compelling attributes of dash cameras lies in their ability to provide an unbiased witness perspective. Unlike human witnesses, who may be influenced by emotions, limited viewpoints, or memory lapses, dash cameras act as impartial observers, capturing events with unswerving precision. The footage recorded by dash cameras becomes an objective account of the accident, offering a crystal-clear narrative devoid of subjective interpretations. This objectivity is a game-changer in the investigation process, especially when dealing with fraudulent claims. When individuals attempt to manipulate or distort the sequence of events to suit their agenda, the dash camera stands as an unwavering testament to the truth.

In legal proceedings, the unbiased nature of dash camera footage is a compelling factor. Courts and insurance investigators can rely on this visual evidence to establish the facts of the case with a high degree of certainty. The clarity and accuracy of the footage make it a persuasive tool in challenging or defending against fraudulent

Continued on page 16

claims, ensuring that justice is served based on an unadulterated account of the events. Furthermore, the mere knowledge that a dash camera is in operation acts as a powerful deterrent against fraudulent activities. The prospect of being recorded often dissuades individuals from attempting to stage accidents or falsify claims. The preventative role of dash cameras, therefore, extends beyond being mere observers; they actively contribute to reducing opportunistic fraud by creating a hostile environment for those seeking to exploit the system.

The significance of the unbiased witness perspective becomes even more pronounced in complex accident scenarios where multiple parties are involved. Dash cameras, installed in various vehicles, provide a comprehensive view of the incident from different angles. This multi-dimensional coverage enhances the accuracy of accident reconstruction, making it easier to piece together the puzzle of events leading to the collision. The collaboration of these perspectives creates a more robust and reliable narrative, leaving little room for manipulation or misinterpretation. Moreover, the impartiality of dash cameras is not limited to the events immediately preceding the collision. They continue to record the aftermath, documenting the reactions of individuals involved and any subsequent actions taken. This comprehensive coverage extends the investigative reach, helping authorities and insurance professionals understand the entire chain of events and make informed decisions.

In essence, the unbiased witness perspective provided by dash cameras acts as a safeguard against misinformation and deceit. It upholds the integrity of accident reconstruction by presenting an objective and unfiltered account of events. As technology continues to advance, the capabilities of dash cameras in capturing and preserving the truth will likely become even more sophisticated, solidifying their role as indispensable tools in combating fraudulent activities and ensuring justice prevails on the roads.

Dash Cameras as Guardians of Justice and Fiscal Responsibility

The implications of dash camera use extend far beyond the realm of accident investigation; they play a pivotal role in safeguarding justice and promoting fiscal responsibility within the insurance industry. Dash cameras, with their ability to provide accurate and unbiased evidence,

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transform into guardians of justice in legal proceedings. The footage they capture becomes a powerful tool in court, offering a visual narrative that often surpasses the persuasiveness of verbal testimony. Courts and legal professionals can rely on this evidence to establish the sequence of events with unparalleled clarity, helping to ensure that the truth prevails.

In addition to their legal significance, dash cameras act as fiscal guardians for insurance providers. By facilitating precise accident reconstruction and preventing fraudulent claims, these devices contribute to the reduction of overall insurance costs. Insurers can assess liability more accurately, make informed decisions, and ultimately arrive at fair settlements based on irrefutable evidence.

The fiscal impact extends beyond individual insurance providers to the broader insurance industry. As dash cameras become more commonplace, their collective influence contributes to a more transparent and accountable claims process. The accuracy of accident reconstruction made possible by dash camera footage leads to fairer settlements, reducing the financial burden on insurance companies and, consequently, on policyholders.

The role of dash cameras in fiscal responsibility is particularly crucial given the rising prevalence of fraudulent claims. Staged accidents, embellished narratives, and opportunistic fraud all contribute to inflated claim costs for insurers. Dash cameras act as a deterrent against such fraudulent activities, making individuals think twice before attempting to exploit the system. This preventative aspect helps in curbing the frequency of fraudulent claims, ultimately contributing to a more sustainable and cost-effective insurance landscape. Furthermore, the integration of dash cameras into the insurance claims process promotes transparency and accountability. When policyholders are aware that their claims are subject to objective and conclusive evidence, it fosters a sense of trust in the insurance system. This transparency not only benefits honest policyholders but also acts as a deterrent for those who might consider making false claims.

The fiscal impact of dash cameras also extends to societal levels. As insurance costs decrease due to more accurate assessments and reduced fraudulent activities, the burden on consumers is alleviated. Reduced insurance costs can result in lower premiums for honest drivers, making coverage more accessible and affordable for a broader segment of the population. As technology continues to evolve, the potential for dash cameras to further impact the fiscal landscape of the insurance industry is immense. Advancements in artificial intelligence and data analytics may enhance the capabilities of dash cameras, allowing for even more accurate assessments and quicker claims processing.

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Dash Cameras – *continued from page 17*

In conclusion, dash cameras play a multifaceted role in accident reconstruction, from providing objective documentation and an unbiased witness perspective to acting as deterrents against fraud. Their significance extends beyond the realm of investigation, impacting legal proceedings and contributing to fiscal responsibility in the insurance industry. As technology continues to advance, the integration of dash cameras in vehicles is poised to redefine the landscape of accident reconstruction and fraud prevention. V

Elvis Donny Desai

Mr. Desai is an Automotive Engineer and Senior Accident Reconstructionist with ACTAR accreditation and has worked in these fields since 2017. Mr. Desai has experience conducting complex 3-dimensional accident reconstruction. He is qualified to download and analyze all types of Event Data Recorders.

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Trying to Get It Right: Motions for Reconsideration, New Trial, and Other Do-Overs

Rebecca Powell
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Once a court has made the wrong decision, how do you get it fixed? The first thought might be to just wait for an appeal, seeking relief from a higher authority to reverse a problem created by a lower court. But the adverse order might not be immediately appealable, and appeals can be long, expensive, and time-consuming. Depending on the circumstances, why not go right to the source of the problem and ask the court to correct its own mistakes? That can be challenging, but it isn't impossible.

Deciding whether to file a motion for reconsideration, new trial, rehearing, or other attempt at a "do-over" is a difficult strategy determination. Procedural rules can vary significantly between jurisdictions, so always check the applicable codes of civil procedure for any localized traps for the unwary.

In the trial court, there are several ways to seek relief from an adverse ruling or judgment. In some situations, you need to first ask for relief directly from the trial court to preserve issues for appeal. In the appellate courts, rehearing, reconsideration, or modification from an intermediate appellate court are difficult remedies to secure, but there can be good reasons to give it a shot depending on the nuances of your particular case.

Motions for Reconsideration

The most immediate way to reverse an adverse interlocutory order in the trial court is to seek reconsideration from the same judge. Trial courts generally have the authority to correct themselves when an error has been made. The Supreme Court has "long recognized that a district court possesses inherent powers," including the power to "modify or rescind" orders it has already made. *Dietz v. Bouldin*, 579 U.S. 40, 45-46 (2016). Federal Rule of Civil Procedure 54(b) confirms this, providing that an order that resolves fewer than all the claims among all the parties "may be revised at any time" before final judgment.

But remember that whether to reconsider a prior order is highly discretionary; a trial court generally doesn't have to revisit a decision it has already made. There are often strong policies weighing against reconsideration, even when your arguments are compelling. In ruling against you in the first place, the court presumably thought its original ruling was correct (or at the very least, that there was reasonable room for disagreement). The interests in predictability, finality, and moving litigation along mean that courts are generally reluctant to revisit rulings already made. This reluctance is amplified when the other side has a concrete, articulable argument that it would be prejudiced by reconsideration. For example, if some time has passed since the ruling, and the parties have relied on it when developing their case, a trial court may have reservations about backtracking. Make the decision about whether to even seek reconsideration carefully; if the answer to the substantive question is debatable and you have sufficiently preserved your record for appeal, you may be better off holding your fire.

If you do make a motion for reconsideration, do everything you can to make it clear that you are not just making the same motion again on a different day. Don't simply rebrief or reargue points that the court has already considered, analyzed, and rejected. Instead, reframe the argument to focus on why the court should take the time and resources to revisit a ruling it presumes to have been correct at the time it was made.

When you can, show that either the available facts or the applicable law have changed since the original ruling. Were the facts of the case undeveloped at the time of the first ruling, and if so has the picture changed enough to justify a different result? The goal here is to go beyond simply arguing that the court was wrong to rule against you in the first place, but rather that its prior ruling was based on inaccurate, incomplete, or outdated information, and the interests of justice require revisiting it.

The flip side of this consideration is that parties may have relied on an early ruling that has shaped the litigation. As a case proceeds, stability and predictability become more important. Highlight as much as you can why revisiting the earlier decision will not require significant delay or duplication of effort, either for the court or the parties.

In a similar vein, emphasize any ways in which the prior ruling has created negative unintended consequences, or impeded the efficient and orderly progress of the case to trial. If a ruling has created unforeseen headaches that the court didn't consider

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previously, it can help to show how a modification can solve problems going forward rather than creating them. Of course, if you can show that the trial court's first ruling was manifestly wrong, you can (professionally and tactfully) point out that self-correction even late in the game is much more efficient than perpetuating the error and eventually being reversed on appeal.

Motions for New Trial

Trial judges have significant power to order a new trial to prevent the miscarriage of justice. A new trial motion is committed to the trial court's sound discretion, and appellate review of decisions to grant or deny a new trial is circumscribed. Thus the moving party needs to not only convince the trial court that a new trial is warranted, but also that the trial court should want to grant that relief to ensure substantial justice.

Courts do not grant new trials unless the moving party can both identify an error and establish that the error was prejudicial. Federal Rule of Civil Procedure 61 provides that errors are not grounds for a new trial "unless justice requires otherwise," and the court must disregard "all errors and defects that do not affect any party's substantial rights." That's clear enough—when identifying an error, make explicit the connection between the error and the prejudice, and why justice requires a second trial.

Even a prejudicial error that affects your client's substantial rights is not always enough to secure a new trial if that error was not called to the court's attention during the trial. There are narrow exceptions to this rule, allowing new trials to correct fundamental errors that cause gross injustice, but this bar is so high that it's much better to avoid having to meet it. It is much safer to diligently object throughout the trial to all errors that you may want to raise in a new trial motion. Courts do not take kindly to hearing that they need to have a whole new trial to correct a problem that could have been fixed earlier, if only they had been alerted to the issue.

Petitions for Rehearing in the Appellate Courts

Unlike trial court rulings that are sometimes made on the fly and without the benefit of extensive briefing or legal research, appellate courts take significant time deciding cases and writing their opinions. That investment of time and effort makes it a lot harder to convince an appellate court, usually with limited judicial resources, to start again and grant rehearing. On the other hand, appellate decisions are often precedential and can affect development of the law, so there is an interest in getting it right for everyone. You need to develop a compelling argument why the appellate court's decision creates substantial problems in the relevant area of law, not simply that it is an ordinary opinion that happens to be wrong.

As with all species of do-overs, when seeking rehearing avoid simply reiterating the arguments you have already made in your appeal; it's just not persuasive to rehash arguments the court already considered but didn't buy. At the same time, however, appellate courts also prohibit litigants from raising new arguments in rehearing petitions. *United States v. Patzer*, 284 F.3d 1043, 1045 (9th Cir. 2002). This means you have a fine needle to thread; you need to explain why the opinion is problematically wrong and needs to be revisited—without raising new issues not previously considered and without just regurgitating the points you've already made.

Mistakes of Law

The most straightforward way to justify rehearing is to demonstrate that the court made a clear mistake of law. Ideally you would develop an argument that is more than merely explaining why the opinion came out the wrong way for your client, and demonstrates that the opinion cannot be

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squared with controlling authority. Even appellate courts can focus too heavily on a misreading of an out-of-context case, or fail to connect the dots that show its reasoning is contradicted by statute or precedent. Focus on those gaps as much as possible when seeking rehearing.

Misunderstanding of Facts

An appellate court will consider rehearing if you can show that it materially misunderstood the facts or issues raised in the case. Focus on the ways that factual errors drove the determination of the case; even if a fact section in an opinion gets some details wrong, the court won't reopen the appeal for rehearing unless it thinks those errors really made a difference. Even then, the court might stick to its decision and issue a corrected opinion. See *Electronic Frontier Found. v. Off. of the Director of Nat'l Intel.*, 639 F.3d 876, 878 (9th Cir. 2010).

Extraordinary Circumstances

There is a limited exception to the no-new-arguments rule. If you can show that "extraordinary circumstances" justify reconsideration of the opinion even on issues not previously raised by the parties, the court can exercise its discretion to do so. The most common use of this discretion occurs when the opinion is based on a ground that was not briefed or argued by the parties. In those cases, explain that the lack of briefing on that issue was inadvertent, and not something either party "deliberately chose, for reasons of strategy, not to assert" in earlier briefing. *Partenweederei, MS Belgrano v. Weigel*, 313 F.2d 423, 425 (9th Cir. 1962).

Another exceptional circumstance (and one where it makes sense that the arguments weren't raised earlier) is when new controlling authority is issued shortly before or after the court's decision. See *Cashman v. City of Cotati*, 415 F.3d 1027, 1028 (9th Cir. 2005) (Supreme Court opinion issued while petition for rehearing was pending required withdrawal of the prior opinion). Even if the intervening authority isn't determinative of the result, if it could reshape the arguments of the parties or the analysis of the court, rehearing may be appropriate. For example, in *United States v. Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984), the parties did not brief an Eighth Amendment issue that was "completely untenable" at the time of the original appeal, but then became "plausible" because of an intervening Supreme Court decision. The D.C. Circuit held that rehearing was appropriate to allow for consideration of the previously untenable argument. Id.

In a similar vein, a court of appeal may entertain rehearing if, shortly after its opinion was issued, a sister court issues a decision going the other way that creates a split of authority. Rehearing probably will not be granted if a split existed before the court issued its decision, even if the split recently became a little deeper—the court presumably considered the difference in approaches before reaching its holding.

Challenging the court's subject matter jurisdiction is another basis for rehearing, even if it wasn't raised in the first round of briefing, because subject matter jurisdiction is not waivable and can be raised at any time in the appeal process, including on petition for rehearing. See *Peckham v. Bd. of Trustees of Int'l Brotherhood and Allied Trades Union*, 724 F.2d 100 (10th Cir. 1983).

The court may also consider previously unbriefed issues when the impact on other cases is significant. The appellate court might be frustrated it is hearing these arguments for the first time on rehearing, but still may be motivated to correct the error. In *Escobar Ruiz v. I.N.S*, 813 F.2d 283,

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286 (9th Cir. 1987), for example, the Ninth Circuit, in granting rehearing, recognized that "numerous claims will be made in reliance on the opinion we issued," and that permitting an incorrect statutory interpretation to be locked in as controlling precedent was not supportable. It did the same thing in *Coe v. Thurman*, 922 F.2d 528, 533 n.1 (9th Cir. 1990), where the government's belatedly raised argument "would have profound implications for the conduct of numerous cases in the Ninth Circuit."

Pressure from Higher Courts

In some situations, a higher court can weigh in on lower court decisions without a full appeal, prompting the original court to reconsider its decision. This do-over method is a bit different from the others, because it involves intervention from another court.

In the federal system, the U.S. Supreme Court sometimes grants a petition for writ of certiorari and vacates the circuit court's judgment, but does not issue a reasoned opinion. Instead, it remands for further proceedings because of some legal development. Although the litigant may not have asked the Court of Appeals to redecide its own opinion, the Supreme Court's grant-vacate-and-remand effectively requires the intermediate court to rehear the case.

There may be state court procedures that also effectively trigger reconsideration without a full appeal. In California, for example, writs from interlocutory trial court orders are often summarily denied. But if the appellate court thinks that the petitioner has satisfied the prerequisites to writ review and has a shot at success, it may issue an "alternative writ," which triggers further briefing and sets in motion consideration of the substance of the challenge. At times, the appellate court will include in this alternative writ a summary of its reasoning, flagging very early in the writ process why it thinks the trial court order may have reached the wrong result. This "suggestive" alternative writ alone can be enough of a nudge to inspire the trial court to reverse itself, mooting the writ petition entirely.

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The mechanisms and strategy points in all do-overs vary depending on the context, but there are common threads:

- Be clear that a mistake was made, but be aware of your tone; no one likes hearing that they made an error.
- Highlight why the mistake you are challenging matters, rather than harping on immaterial errors.
- Don't just repeat what you have already argued; reframe the issues to explain why the court should want to fix its mistake.
- If you are giving the court information it has never heard before, be prepared to justify why it was not raised earlier.
- Show through tone and attitude that you are not being casual about the court's limited time and resources, but that your position deserves a second look.

With a well thought-out strategy and the right circumstances, you might get that second look and an efficient resolution for your client.

Rebecca Powel

Rebecca Powell is a California Certified Appellate Specialist and attorney at Horvitz & Levy LLP. She assists clients and trial teams with dispositive motions, serves as embedded appellate counsel during trials, and handles posttrial and appellate matters through briefing and oral argument.

RECENT CASES

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

An attorney advising conduct that constitutes discovery misuse can be liable for sanctions even if not counsel of record.

Masimo v. Vanderpool Law Firm (2024) 101 Cal.App.5th 902

Vanderpool represented the defendants in a fraud and misappropriation action. In response to plaintiff's discovery requests, Vanderpool served boilerplate, objections-only responses. Plaintiff moved to compel and defendants agreed to provide further responses. In the meantime, Vanderpool withdrew as counsel. When the further responses were provided, they contained mostly objections and no substantive responses. A discovery referee recommended plaintiff's motion to compel be granted and defendants and Vanderpool ordered to pay $10,000 in sanctions. The trial court adopted the referee's recommendation.

The Court of Appeal (Fourth Dist., Div. Three) affirmed the sanctions against Vanderpool. Vanderpool put "in motion" the need for plaintiff to file a motion to compel by providing inadequate responses, after representing to the discovery referee that defendants would produce Code-compliant responses. Vanderpool was not entitled to a "free pass" because it was no longer counsel of record when the motion to compel was filed and decided. And Vanderpool was "woefully uncivil" in sending condescending and insulting emails refusing to meet and confer.

ATTORNEY FEES AND COSTS

Trial court abused its discretion in apportioning attorney fees based solely on the percentage of causes of action won.

Applied Medical Distribution v. Jarrells (2024) 100 Cal.App.5th 556

Defendant downloaded proprietary information from his employer (Applied) to take with him to a new job with a competing company. Applied noticed suspicious downloading activity and hired a forensic investigator, who discovered that defendant had downloaded trade secret information. Applied sued defendant and his new employer for misappropriation of trade secrets, breach of contract, breach of fiduciary duty, and intentional interference with contractual relations. A jury found that defendant did steal trade secrets and breached his employment contract, but that Applied had not been harmed. The jury rejected Applied's other liability theories. In connection with posttrial motions, the trial court entered an injunction against defendant to prevent him from using the stolen information. Applied then moved for over $3 million in attorney fees and various costs, including expert fees, per the terms of the employment agreement. The trial court awarded only 25% of the claimed attorney fees, concluding that Applied had prevailed on only one of its four causes of action—by obtaining injunctive relief on its misappropriation of trade secret claim. The trial court did not award expert fees.

The Court of Appeal (Third Dist., Div. Eight) reversed the fee award for redetermination. Although the jury did not award damages or disgorgement on the trade secret misappropriation

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claim, Applied was nonetheless the prevailing party on that claim because the jury found the improper acquisition of a trade secret and the trial court then awarded injunctive relief on that claim. Applied was therefore entitled to fees per the terms of the parties' contract, which specifically allowed for fees incurred to obtain equitable relief. However, the trial court should not have allocated the fees in a rote, mathematical way by awarding fees based on a ratio of the causes of action won to lost (one out of four). Rather, the court should have performed an "analysis of the extent to which the other three claims rested, in whole or in part, on the same core of underlying facts that formed the basis for the trade secret misappropriation cause of action." The trial court did not err in denying expert fees because in order to obtain expert witness fees under a contractual provision allowing for the recovery of "expenses," they must be pleaded and proven at trial, and cannot simply be claimed by posttrial motion. V

A trial court does not have discretion to deny a plaintiff who prevails on Labor Code claims reasonable fees and costs, even if the amount recovered proves the case could have been filed as a limited civil case.

Gramajo v. Joe's Pizza on Sunset (2024) 100 Cal.App.5th 1094

A pizza delivery driver sued his employer for failure to pay minimum wages and overtime. After four years of discovery, the case went to trial. Plaintiff sought $26,159, and the jury awarded only $7,600. Plaintiff then moved for $296,000 in attorney fees under Labor Code section 1194, subdivision (a) [providing that an employee who prevails on minimum wage and overtime claims "is entitled" to "reasonable attorney's fees"].) The trial court exercised its discretion under Code of Civil Procedure section 1033, subdivision (a) to deny fees on the ground that the case could have been filed as limited civil case.

The Court of Appeal (Second Dist., Div. Eight) reversed the denial of fees. Labor Code section 1194, subdivision (a) is mandatory. While Code of Civil Procedure section 1033, subdivision (a) provides that trial courts retain discretion not to award fees in unlimited civil cases that could have been filed as limited civil cases, that statute cannot be squared with Labor Code section 1194, subdivision (a). As the less specific statute, Code of Civil Procedure section 1033 must yield. A trial court does not have discretion to deny fees to a successful wage and hour plaintiff. But the trial court still has discretion to determine what fee amount would be "reasonable" under the circumstances.

See also *G.F. Galaxy v. Johnson* (2024) 100 Cal.App.5th 542 [Fourth Dist., Div. One] [Code of Civil Procedure section 685.040 does not include a "prevailing party" requirement, so a party need not have finished collecting a judgment to be entitled to seek costs for execution efforts]

CIVIL PROCEDURE

A separate statement filed in support of a summary judgment motion should list only those facts material to the claims and defenses in issue, not every background fact.

Beltran v. Hard Rock Hotel Licensing (Maximum Indemnity) (2023) 97 Cal.App.5th 865

Plaintiff sued her employer and related entities for sexual harassment, raising fifteen claims. Defendants moved for summary judgment. In support of their motions, they filed separate statements containing 600 paragraphs of "material" facts. Plaintiff responded, claiming many facts were in "dispute" without actually showing a conflict in the evidence. The trial court granted summary judgment.

The Court of Appeal (Fourth Dist., Div. Three) reversed the summary judgment on three of the claims. In so doing, the court emphasized that *"[t]he paragraphs in a separate statement should be limited to facts that address the elements of a cause of action or an affirmative defense."* Litigants can cite directly to the evidence supporting the nonmaterial background facts in their memoranda of points and authorities; they do not need to include those background facts in the separate statement—and they should not do so because it interferes with the utility of the separate statement. "Trial courts should not hesitate to deny summary judgment motions when the moving party fails to draft a compliant separate statement – and an inappropriate separate statement includes an overly long document that includes multiple nonmaterial facts in violation of the Rules of Court. Courts should also not hesitate to disregard attempts to game the system by the opposing party claiming facts are 'disputed' when the uncontroverted evidence clearly shows otherwise." V

California's peer review statute providing the procedure for denying medical staff privileges supplants the common law fair procedure doctrine.

Asiryan v. Medical Staff of Glendale Adventist Medical Center (2024) 100 Cal.App.5th 947

The plaintiff physician sued the defendant hospital for summarily suspending her medical staff privileges and misrepresenting to her the consequences of her suspension, which led her to resign all her privileges. She argued that the defendant violated her rights under the peer review statutes (Business & Professions Code sections 809 et seq.) and under the common law fair procedure doctrine. On summary judgment, the trial court ruled that the statutory peer review notice and hearing requirements were not triggered by plaintiff's summary suspension, and that the statutory peer review process supplanted the common law fair

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procedure doctrine, leaving no viable common law claim. That eliminated most of plaintiff's claims, except for her claims for misrepresentation and intentional infliction of emotional distress. On those claims, a jury found for the defendant.

The Court of Appeal (Second Dist., Div. One) affirmed. While a hospital's duty to provide procedural protections to a physician before denying staff privileges is grounded in the common law fair procedure doctrine, the peer review statutes were intended to comprehensively codify the common law and fully occupy the field. There is no common law right of fair procedure that can be raised in addition to the statute to claim broader rights than the statute provides.

See also *Boermeester v. Carry* (2024) 100 Cal.App.5th 383 [Second Dist., Div. Eight] [University's use of same person to investigate and adjudicate allegations against student before expelling him did not deny fair process]

See also *LaMarr v. Regents of the University of California* (2024) 101 Cal.App.5th 671 [Third Dist.] [Public employee who accepted transfer and demotion rather than risk termination was not entitled to a proceeding under *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194; she would have been entitled to such a proceeding only if she had actually faced discipline]

See also *Balakrishnan v. Regents of the University of California* (2024) 99 Cal.App.5th 513 [First Dist., Div. Five] [University had authority to discipline professor for off-campus, after hours sexual abuse of colleague and student] V

Trial courts are not required to grant relief from a jury trial waiver even if granting relief would not cause hardship to the other party or the court.

Tricoast Builders v. Fonnegra (2024) 15 Cal.5th 766

In this construction dispute, defendant demanded a jury trial but plaintiff never requested one, thus waiving its right to a jury trial. On the eve of trial, defendant announced it would waive jury. Plaintiff then requested a jury trial and offered to post jury fees. The trial court denied plaintiff relief from its jury trial waiver based on its failure to have timely posted jury fees and proceeded with a bench trial in which it found for defendant. A majority of a Court of Appeal panel (Second Dist., Div. Two) affirmed.

The California Supreme Court affirmed. A trial court is not required to grant relief from a jury trial waiver upon request even if granting relief would cause no hardship to the opposing party or the trial court. While the absence of hardship weighs in favor of granting relief, the trial court has discretion to consider if the timing and reasons for the request for relief also warrant such relief—although courts should also consider whether a last-minute, apparently tactical waiver by the side that initially demanded a jury trial counsels in favor of allowing the other side relief from its waiver so that it can present its case as it intended. Next, a litigant who raises the denial of relief from a jury trial waiver for the first time on appeal (rather than filing a writ petition) must show prejudice from denial; prejudice is not presumed. Here, because plantif did not demonstrate prejudice from having its case heard by the judge, reversal was not warranted. V

EVIDENCE

Documents developed to assist a company's counsel in performing an internal investigation were protected by the work product privilege even where the investigation was conducted to comply with public reporting requirements.

Southern California Edison v. Superior Court (21st Century Insurance) (2024) 102 Cal.App.5th 573

In this insurance subrogation action, property insurers who paid claims due to the Creek Fire were seeking to recoup the benefits paid out from Southern California Edison for starting the fire. The insurers sought discovery related to SoCalEd's internal investigation into the cause of the fire. SoCalEd claimed certain of these documents were privileged. The insurers argued that because the investigation was conducted to comply with public reporting requirements, the documents were not prepared in anticipation of litigation and were therefore not privileged. The trial court agreed and compelled production.

The Court of Appeal (Second Dist. Div. One) issued a writ of mandate directing the trial court to vacate its production order. "Even where the dominant purpose of an attorney directed internal investigation is to comply with a client's public reporting requirement, attorney work product generated in connection with gathering facts to assist counsel in advising the client on how to comply with that statutory or regulatory reporting requirement remains protected." Further, the protection extends to communications between non-legal personnel where those personnel are acting pursuant to directions from corporate counsel concerning the investigation. V

While the existence of complaints against an employee is a fact admissible to establish the employee's motivation to sue her employer, the substance of complaints about the employee's unrelated prior bad acts are inadmissible if unduly prejudicial.

Argueta v. Worldwide Flight Services (2023) 97 Cal.App.5th 822

Plaintiff sued defendant, her former employer, for sexual harassment and retaliation under the California Fair Employment and Housing Act (FEHA). Plaintiff alleged that she was sexually harassed by an employee and that defendant failed to prevent

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the harassment. While plaintiff was employed with defendant, several employees had lodged various complaints against her for bullying, harassment, discrimination, and retaliation. Plaintiff moved in limine to preclude the admission of the substance of these prior complaints. The trial court denied the motion and allowed defendant to admit the entire text of the complaints against plaintiff. The jury returned a verdict in favor of defendant and plaintiff moved for a new trial and JNOV. The trial court denied both motions.

The Court of Appeal (Second Dist., Div. Eight) reversed and remanded for a new trial. Admission of the substance of the prior complaints had little relevance to plaintiff's claims of sexual harassment and was highly prejudicial. While the existence of the prior complaints was admissible to show plaintiff's motive to sue, the substance of the complaints should have been excluded under Evidence Code section 352 given the "high potential for undue prejudice" compared to "the very minimal probative value" and the likely ineffectiveness of a limiting instruction. V

The absence of studies or information expressing an expert's precise conclusion is not a valid basis to exclude the expert's opinions.

Garner v. BNSF Railway (2024) 98 Cal.App.5th 660

Plaintiff sued his father's former employer alleging that his father's workplace exposure to toxic chemicals caused his father to develop lymphoma. The trial court granted defendant's motions in limine to exclude plaintiff's causation experts. The court found the experts relied on inadequate science linking the toxic chemicals to lymphoma and that there was, therefore, an unacceptable analytical gap between the data and the experts' opinions that plaintiff's father's cancer was caused by workplace toxin exposure. The trial court dismissed the case.

The Court of Appeal (Fourth Dist., Div. One) reversed. Applying a de novo standard of review because the motion in limine ruling effectively disposed of plaintiff's case, leading to dismissal, the appellate court held that there is no requirement that a causation expert rely on a specific study or other scientific publication expressing precisely the same conclusion the expert has reached. In many cases where the available scientific evidence is limited or inconclusive, there will inevitably be some analytical gap between the underlying data and the expert's opinion. That alone is not a basis to exclude the testimony. The trial court's gatekeeping role under *Sargon Enterprises v. University of Southern California* (2012) 55 Cal.4th 747 should not be construed so broadly that the gatekeeper effectively supplants both the expert's reasonable scientific judgment and the jury's role. V

TORTS

Res ipsa loquitur doctrine did not apply to personal injury claim arising out of broken shower.

Howard v. Accor Management US (2024) 101 Cal.App.5th 130

Plaintiff attempted to adjust her shower head while showering at a hotel. The shower head allegedly fell apart, causing plaintiff to fall and sustain injuries. She sued the hotel, alleging that the hotel was negligent in its maintenance of the shower head. The hotel moved for summary judgment, arguing that there was no evidence it had notice of any problem with the shower head. Plaintiff opposed with a declaration from Brad Avrit speculating that the housekeeper who serviced the room right before the shower must have damaged the shower head. The trial court sustained most of the hotel's objections to the Avrit declaration as speculative and improper opinion, and granted summary judgment.

The Court of Appeal (Second Dist., Div. Eight) affirmed. To establish the hotel's liability, plaintiff had to show the hotel was on notice of the problem with the shower head. Because plaintiff alleged the housekeeper damaged it but did not tell anyone, plaintiff failed to allege notice. The claim failed even on the theory that the housekeeper's knowledge would be imputed to the hotel, because there was no evidence the housekeeper–who was never deposed–did anything to the shower head. Plaintiff's attempt to bridge the evidentiary gap with Avrit's testimony failed because the trial court did not abuse its discretion in excluding his testimony as lacking foundation. Finally, plaintiff failed to show that this was the type of accident that could not occur without negligence, so there was no basis to apply res ipsa loquitur doctrine to excuse her failure to produce evidence about the cause of the accident. V

Primary assumption of risk barred claims by one surfer against another.

Olson v. Saville (2024) 98 Cal.App.5th 1066

Plaintiff collided with the defendant's board when the two were surfing. Plaintiff sued defendant, alleging defendant negligently failed to use a leash on his board. Defendant moved for summary judgment on the ground of primary assumption of risk. The trial court granted the motion.

The Court of Appeal (Second Dist., Div. Six) affirmed. As the expert declarations showed, surfers commonly lose control of their boards and collide with other surfers. Surfers also regularly disregard the unofficial rules of etiquette for the sport such as by not using a leash. The risk of colliding with another surfer's

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board is an inherent risk of the sport. Defendant's failure to use a leash was not so reckless so as to increase the inherent risk. V

A UCL claim must be based on violation of a constitutional, statutory or regulatory provision, not merely "public policy."

Jackson v. Lara (2024) 100 Cal.App.5th 337

A bartender at a hotel refused to serve plaintiff because plaintiff appeared intoxicated. Claiming he was actually being excluded due to his race, plaintiff sought out the bartender's supervisor. The supervisor asked plaintiff to leave, and an altercation ensued. The supervisor pressed criminal charges against plaintiff. Plaintiff unsuccessfully moved for acquittal pretrial, but was ultimately acquitted. Plaintiff then sued the supervisor for malicious prosecution and violation of the unfair competition law (UCL), arguing that the bar excluded him for racist reasons and that the bar violated "public policy against consumers being subject to violence and unwarranted contact by employees at a business establishment." The trial court granted summary judgment for the defendant.

The Court of Appeal (Fourth Dist. Div One) affirmed. Plaintiff's malicious prosecution claim failed because the denial of his motion for acquittal in his criminal case established that defendant had probable cause to press charges (i.e., because of the interim adverse judgment rule). Plaintiff's UCL claim failed because plaintiff did not identify the legal basis for the public policy he claimed defendant violated. A UCL claim based on violation of public policy untethered to any underlying constitutional, statutory or regulatory provision fails as a matter of law. V

The *Kesner* rule limiting premises owner liability for take-home exposure to asbestos to household members does not apply to strict liability claims against product suppliers.

Williams v. J-M Manufacturing (2024) 102 Cal.App.5th 250

In this asbestos case, the plaintiff alleged he developed mesothelioma from take-home exposure to asbestos from cement pipe his brother enountered as a utility worker. The case went to trial against the cement pipe manufacturer. Citing *Kesner v. Superior Court* (2016) 1 Cal.5th 1132 [holding that employers and premises owners owe a duty of care to prevent take-home exposure only to the exposed person and his or her household members], defendant moved for directed verdict on the ground it could not be liable to the plaintiff because his brother was not his household member. The trial court denied the motion. The jury found for the plaintiff.

The Court of Appeal (First Dist., Div. Two) affirmed the judgment. *Kesner* involved an legal analysis of the scope of duty owed by premises owners sued under a negligence theory. The Supreme Court limited the scope of the duty to household members after balancing foreseeability and public policy factors. Strict liability claims, in contrast, do not have a duty element. Strict liability requires only proof of a defect and that the product was used in a reasonably foreseeable way. V

Lyft owes no common-law duty to run criminal background checks on passengers before they can be permitted to use the app.

Al Shikha v. Lyft (2024) 102 Cal.App.5th 14

A Lyft passenger attacked the driver. The driver sued Lyft, arguing that the passenger had a criminal history and Lyft had a duty to perform criminal background checks on passengers and either prevent them from using the rideshare platform, or inform drivers of their criminal history. Lyft moved for judgment on the pleadings, arguing that it owed no legal duty to conduct background checks on riders. The trial court agreed.

The Court of Appeal (Second Dist. Div, Three) affirmed. There is no legal duty to conduct criminal background checks on passengers seeking to use the Lyft platform, and it would be against public policy to recognize one. Conducting criminal background checks on all passengers would be highly burdensome on companies such as Lyft because it would not only need to obtain criminal history, but also analyze whether such history reflects a propensity toward random violence. Such a process would raise significant public policy problems regarding consumer privacy, would risk disproportionate exclusion of certain racial groups, and create unreasonable follow-on liability if it is alleged that a defendant failed to conduct a sufficiently searching inquiry or misjudged a passenger's record. V

A regional center owed no duty to protect a developmentally disabled person from a sexual assault by a vendor's employee absent actual knowledge of the employee's propensity to engage in such conduct.

A.L. v. Harbor Developmental Disabilities Foundation (2024) 102 Cal.App.5th 477

Harbor Developmental Disabilities Foundation is a state-funded, nonprofit regional center operating under the Lanterman Act. Under the Act, regional centers such as Harbor coordinate the delivery of services to developmentally disabled individuals (referred to as "consumers" under the Act) but do not provide those services directly. The employee of one of Harbor's transportation vendors raped a consumer the vendor was transporting to an education program. The consumer sued the employee, the vendor, and Harbor. With respect to Harbor, the consumer argued that regional centers are in a special relationship with consumers and therefore owe a broad duty to protect them from harm, similar

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to the duty owed by school districts to their minor students. Harbor argued that it owed no duty to prevent a sexual assault by a vendor's employee. The trial court agreed with Harbor and granted summary judgment.

The Court of Appeal (Second Dist., Div. Two) affirmed. Although regional centers are in a special relationship with consumers, the factors set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108 counsel against imposing a duty with respect to a vendor employee's sexual assault, except when the regional center has actual knowledge of the employee's criminal propensities. V

A written contract is not required to invoke the *Privette* doctrine.

CBRE v. Superior Court (Johnson) (2024) 102 Cal.App.5th 639

A property owner and its real estate agent (defendants) hired a general contractor to make improvements to a commercial property in anticipation of having a new tenant. The general contractor subcontracted the electrical work to plaintiff's employer. Plaintiff was injured when he touched a live wire on the premises. He sued defendants for premises liability. Defendants argued that they owed no duty to plaintiff under the doctrine of *Privette v. Superior Court* (1993) 5 Cal.4th 689. Plaintiff argued that *Privette* did not apply because at the time he was injured, the defendants had not actually executed any contract with the general contractor that would have delegated workplace safety to the contractor and subcontractors; rather, the general contractor had started work without a formal agreement because it had a history of working with defendants. Plaintiff also argued that the "retained control" exception to *Privette* applied, because defendants affirmatively instructed the general contractor to proceed without permits, which resulted in electrical issues not being identified prior to plaintiff's work. The trial court denied summary judgment and defendants sought a writ of mandate.

A majority of a panel of the Court of Appeal (Fourth Dist., Div. One) issued the writ. A formal contract is not required for a hirer to delegate safety to a contractor. Where, as here, defendants and the general contractor had a previous working relationship and an understanding that work would begin immediately even before formal agreements were executed, there could be no dispute that defendants had hired the contractor and implicitly delegated responsibility for workplace safety to the contractor and its subcontractors. Further, the "retained control" exception to *Privette* did not apply. Obtaining permits was not a part of the contracted work and it was not related to the injury. A dissenting justice would have held that there were triable issues on that last point. V

ANTI-SLAPP

California Rule of Court, rule 3.1322, governing motions to strike generally does not apply to special motions to strike under the anti-SLAPP law.

Miszkewycz v. County of Placer (2024) 99 Cal.App.5th 67

The plaintiff, a deputy district attorney, brought a whistleblower retaliation claim against the County, alleging that she was demoted and subject to a hostile work environment because she cooperated with an investigation into the wife of one of the members of the County's board of supervisors. The County filed a special motion to strike the lawsuit, arguing that the demotion was authorized by statute and therefore connected to an "official proceeding" and that the hostile work environment claim derived from the same facts. The trial court denied the motion on the ground the County's alleged activity was not protected, and that it could not strike portions of the complaint because the motion did not comply with California Rule of Court 3.1322(a), which requires motions to strike to specify exactly what language from a complaint is subject to being stricken.

The Court of Appeal (Third Dist.) affirmed the denial of the motion on the merits, but held that the trial court erred in applying California Rule of Court 3.1322(a) to the anti-SLAPP motions brought under Code of Civil Procedure section 425.16. Under *Baral v. Schnitt* (2016) 1 Cal.5th 376, allegations of protected conduct are subject to being stricken only where those allegations are offered in support of a claim for relief–not where they merely provide context for a claim for relief. "[F]ocusing on paragraph numbers and isolated allocations does not comport" with the analysis that must be done under *Baral*. As long as an anti-SLAPP motion adequately informs the trial court of the protected activity in issue (i.e., the act giving rise to the claim but that the defendant maintains is protected) and seeks to strike the claim for relief based on that protected activity, it is procedurally proper. V

INSURANCE

The actual or potential presence of the COVID-19 virus on business property generally does not trigger coverage for business losses under a commercial property insurance policy.

Another Planet Entertainment, LLC v. Vigilant Insurance Co. (2024) 15 Cal.5th 1106

An event promoter that suffered losses due to business shut-downs during the COVID-19 pandemic sought insurance coverage under several provisions of its commercial property insurance

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policy that required actual or imminent "direct physical loss or damage to property" as the trigger of coverage. The insurer denied coverage. The insured sued. The district court granted the insurer's motion to dismiss. On appeal, the Ninth Circuit certified the question whether "the actual or potential presence of the COVID-19 virus on an insured's premises constitute[s] 'direct physical loss or damage to property' for purposes of coverage under a commercial property insurance policy" to the California Supreme Court.

The California Supreme Court answered the question: "No." "[A]llegations of the actual or potential presence of COVID-19 on an insured's premises do not, without more, establish direct physical loss or damage to property within the meaning of a commercial property insurance policy. Under California law, direct physical loss or damage to property requires a distinct, demonstrable, physical alteration to property. The physical alteration need not be visible to the naked eye, nor must it be structural, but it must result in some injury to or impairment of the property as property." While it might be possible that an insured could allege direct physical loss or damage to property caused by the COVID-19 virus under the standard the court announced, factual allegations like those raised by the promoter—which "represent the most common allegations in support of pandemic-related property insurance coverage"—were insufficient. ■

By seeking *Brandt* fees, an insured impliedly waives its attorney-client privilege with respect to its coverage counsel's billing records and fee agreements.

Byers v. Superior Court of Contra Costa County (2024) 101 Cal. App.5th 1003

In this insurance bad faith action, plaintiffs sought attorney fees as damages under *Brandt v. Superior Court* (1985) 37 Cal.3d 813. The insurer demanded production of the fee agreements plaintiffs had with their counsel, as well as any attorney billing records and proofs of payment to the attorneys. Plaintiffs refused to produce any such documents, asserting they were privileged. The insurer moved to compel and the trial court granted the motion. The trial court's order allowed plaintiffs to redact attorney work product, but allowed the insurer to challenge any such redactions, which would then be reviewed by the court in camera. Plaintiffs filed a petition for writ of mandate.

The Court of Appeal (First Dist., Div. Five) issued an order to show cause and then affirmed the trial court's discovery order on the merits. Plaintiffs' "admission that they are seeking *Brandt* fees as an element of their damages is an implied waiver of the attorney–client privilege at least as to the attorney fees documents that the [plaintiffs] plan to rely upon to seek to prove the amount of fees they reasonably incurred to establish their right to benefits under [the] insurance policy." Plaintiffs "put at issue the attorney fees they incurred in an effort to seek coverage under their insurance policy, and disclosure of documents supporting their claim for such fees is necessary to fairly adjudicate the issue of damages." Because fees incurred to litigate bad faith are not recoverable under *Brandt*, plaintiffs could redact entries related to bad faith, but had to produce the evidence of their recoverable damages. Further, the trial court did not err in compelling production before trial where, as here, the insurer did not stipulate to a post-verdict court trial on *Brandt* fees. ■

ARBITRATION

Authority to make "health care decisions" for another under the Health Care Decisions Act does not include authority to enter into arbitration agreements.

Harrod v. Country Oaks Partners (2024) 15 Cal.5th 939

Using a power-of-attorney form patterned on and citing to the Health Care Decisions Law (Prob. Code §§4600 et seq.), plaintiff appointed his nephew as his "health care agent" for the purpose of making "health care decisions" in the event of his incompetency. After falling and injuring himself, plaintiff entered a skilled nursing facility. His nephew signed both the admission agreement and a separate arbitration agreement. While in the facility's care, plaintiff was further injured. He sued the facility in court, and disputed he was bound by the arbitration agreement because his nephew's authority to make "health care decisions" did not extend to agreeing to arbitrate disputes about the care received. The Court of Appeal (Second Dist., Div. Four) agreed with plaintiff that he was not bound to arbitrate.

The California Supreme Court affirmed. The Health Care Decisions Law defines "health care" as care or treatment relating to the patient's physical or mental health and identifies various decisions included within the definition of "health care decisions," all of which relate to who can provide medical care and the care they can provide. Dispute resolution is not included in the enumerated types of decisions and is too dissimilar from the specifically enumerated types of decisions to be considered a "health care decision."

See also *Haydon v. Elegance at Dublin* (2023) 97 Cal.App.5th 1280 [First Dist., Div. Three] [skilled nursing facility could not enforce arbitration agreement that was included within a lengthy admissions form and was signed by the elderly patient under temporal and financial "pressure"] ■

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The Federal Arbitration Act's exemption for "workers engaged in foreign and interstate commerce" applies to workers engaged in transportation, regardless whether their employer is a transportation company.

Bissonnette v. LePage Bakeries (2024) 601 U.S. 246

Two franchisees of a national baked goods company owned the right to distribute and market the baked goods in Connecticut. They brought a putative class action against the national company for wage and hour violations. The company moved to compel arbitration under an arbitration agreement in the distribution contract. The franchisees argued that they could not be compelled to arbitrate because section 1 of the FAA exempts employment-related claims brought by "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the scope of valid arbitration agreements. The district court compelled arbitration and the Second Circuit affirmed on the ground that the section 1 exemption applies only to workers for workers in the transportation industry and the franchisees were in the baked goods industry.

The United States Supreme Court reversed. There is no requirement that a plaintiff work for a company in the transportation industry to be exempt from the FAA under section 1. Whether the exemption applies depends on the nature of the workers' job for the company, not the nature of company's business. Here, the arbitration issue had to be reconsidered based on the nature of the franchisee's work for the national company and not resolved against the employees simply because the national company was in the baking rather than the transportation industry.

See also *Ortiz v. Randstad Inhouse Services* (9th Cir. 2024) 95 F.4th 1152 [employee of warehouse that received merchandise from international locations was an exempt worker under section 1 of the FAA even though his work participating in the transportation of goods was performed only in California] ▼

District courts must stay, not dismiss, a case pending arbitration.

Smith v. Spizzirri (2024) 601 U.S. 472

In this wage and hour class action filed in Arizona federal district court, plaintiffs' employer moved to compel arbitration and to dismiss the lawsuit. Plaintiffs conceded that their claims were subject to arbitration but argued the case should be stayed pending arbitration rather than dismissed. The district court ordered the case to arbitration and dismissed it without prejudice. The Ninth Circuit affirmed, following circuit precedent holding that district courts have discretion to dismiss rather than stay lawsuits after compelling them to arbitration.

The United States Supreme Court reversed. Section 3 of the FAA states that a district court "shall" "stay the trial of the action" pending arbitration. "Shall" is mandatory and does not leave room for discretion to dismiss the case instead. ▼

A plaintiff needs to specifically challenge the validity of a delegation clause to be entitled to have the court determine that issue, but need not make arguments unique to the validity of the delegation clause.

Bielski v. Coinbase (9th Cir. 2023) 87 F.4th 1003

A scammer took $31,000 from plaintiff's Coinbase cryptocurrency account. Plaintiff sought help recovering the funds from Coinbase and did not receive it. He sued Coinbase. Coinbase moved to compel arbitration under the terms of the plaintiff's user agreement, which contained a term delegating both liability and the threshold issue of arbitrability to the arbitrator. The district court found the agreement unconscionable and declined to compel arbitration.

The Ninth Circuit reversed. Plaintiff adequately challenged the enforceability of the delegation provision by specifically challenging it in the context of his more general arguments against the arbitration provision in its entirety. Plaintiff did not need to present unique arguments against the delegation provision to preserve his right to challenge the delegation provision in court. However, plaintiff's challenge failed on the merits because the delegation clause had low levels of procedural and substantive unconscionability and was therefore enforceable.

See also *Coinbase v. Suski* (2024) 602 U.S. 143 [Where the parties have competing contacts concerning the arbitrability of disputes, the court rather than the arbitrator must decide which contract governs] ▼

A clickwrap arbitration agreement can be rendered unenforceable if accompanied by specific notices on other topics.

Herzog v. Superior Court (Dexcom) (2024) 101 Cal.App.5th 1280

Diabetic patients who used defendant's glucose monitoring system, including a mobile phone app, agreed to the app's "terms of use." The "terms of use" hyperlinked to separate webpages, one of which contained an arbitration provision. In connection with clicking the acceptance to the "terms of use," defendant specifically notified the patients that by agreeing, they were authorizing the use of personal medical information. The patients later filed a products liability action against defendant alleging the system malfunctioned and caused them to suffer diabetic injuries. Defendant moved to compel arbitration and the trial court granted the motion. The patients sought a writ of mandate.

A majority of a Court of Appeal panel (Fourth Dist., Div. One) issued the writ and directed the trial court to vacate the order compelling arbitration. While clickwrap agreements are generally enforceable because they provide inquiry notice to the user that an arbitration agreement is included, defendant "undid whatever notice it might have provided of the contractual terms by explicitly

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telling the user that clicking the box constituted authorization for [defendant] to collect and store the user's sensitive, personal health information." A reasonable user installing and agreeing to use a medical application and being specifically notified that by "checking the box" she was agreeing to the collection of medical data would assume the agreement was limited to that topic and not investigate for inclusion of an arbitration provision.

See also *Baglione v. Health Net of California* (2023) 97 Cal.App.5th 882 [Second Dist., Div. Eight] [arbitration agreement that said it would not apply if the dispute was subject to ERISA was invalid under Health & Safety Code section 1363.1's requirement that an agreement to arbitrate be in "clear and understandable language" because an ordinary patient would not understand the scope of ERISA]

But see *Patrick v. Running Warehouse* (9th Cir. 2024) 93 F.4th 468 [purchasers from online retail company had to arbitrate data breach class action per terms of clickwrap agreement because they were on inquiry notice of the agreement and the agreement was substantively valid]

But see *Keebaugh v. Warner Bros. Entertainment* (9th Cir. 2024) 100 F.4th 1005 [same with respect to misrepresentation claims brought by online gamers]

CLASS ACTIONS

Trial courts may not strike PAGA claims as unmanageable.

Estrada v. Royalty Carpet Mills (2024) 15 Cal.5th 582

Plaintiff employees brought a Private Attorneys General Act (PAGA) representative claim against their employer for Labor Code violations, including meal period violations. The trial court certified a class and three relevant subclasses. After a bench trial, the trial court decertified two of the subclasses and dismissed the meal period portion of the PAGA claim on grounds that individualized issues made the claim unmanageable. The Court of Appeal (Fourth Dist., Div. Three) reversed. Declining to follow *Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal. App.5th 746, the court held that courts cannot dismiss a PAGA claim based on whether it is unmanageable.

The California Supreme Court affirmed the Court of Appeal. "[U]nlike with class actions, a court's authority to provide relief under PAGA is subject to specific statutory provisions that make it inappropriate to impose a manageability requirement on PAGA claims." The "structural differences between class actions and PAGA claims" support the finding that "importing the class action manageability requirement into the PAGA context would be improper because it would 'frustrate legitimate legislative policy.' " Allowing a court to strike PAGA claims "merely because they require individual determination" would deprive litigants of the remedy granted by the Legislature and would "defeat the purpose of the statute." While trial courts "may use a vast variety of tools to efficiently manage PAGA claims, given the structure and purpose of PAGA, striking such claims due to manageability concerns—even if those claims are complex or time-intensive—is not among the tools trial courts possess."

A plaintiff was not an adequate class representative where she had a stronger interest in settling her claims than other class members and did not demonstrate she had vigorously litigate the case.

Kim v. Allison (9th Cir. 2023) 87 F.4th 994

Plaintiff Kim brought a putative class action against Tinder alleging that Tinder's pricing model was age-discriminatory. Plaintiff and Tinder agreed to settle, but a plaintiff from another class action raising similar claims objected. The objector argued that plaintiff Kim was not an adequate class representative because plaintiff Kim's claims were subject to arbitration, and so her incentive to settle was different from the incentives of other class members whose claims were not subject to arbitration. The district court approved the settlement, reasoning that plaintiff's claims were typical of the class and she shared a common goal with the other class members of protecting consumer rights. The objector appealed.

The Ninth Circuit reversed. The district court confused "typicality" with "adequacy." While plaintiff Kim's claims were typical of the claims of the rest of the class, she was not an adequate representative because she had a conflict of interest with the other class members—an interest in settling to avoid arbitration under an agreement that was not applicable to many members of the class. Her claim was also potentially subject to Texas law, unlike the claims of many class members. Finally, she did not demonstrate she had vigorously advocated on behalf the class. She appeared not to have conducted any discovery or robustly opposed defendant's motion practice.

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CONSUMER PROTECTION

Restitution owed to a lemon law plaintiff is not reduced by the proceeds a buyer has received for trading in the vehicle where the plaintiff was forced to trade in the vehicle due to the manufacturer's failure to comply with Song-Beverly.

Niedermeier v. FCA USA (2024) 15 Cal.5th 792

In a Song-Beverly "lemon law" action, the jury awarded plaintiff the purchase price of the defective vehicle (reduced by a statutory offset based on mileage accrued before the first delivery for repair), plus incidental and consequential damages, and a civil penalty. Plaintiff had traded in the defective vehicle for a credit towards the purchase price of a new vehicle, and thus was unable to return the vehicle to the manufacturer as part of the restitution remedy. The trial court denied defendant's motion to reduce plaintiff's damages by the amount of the trade-in credit she received. The Court of Appeal (Second Dist., Div. One) reversed, holding that restitution as defined by Song-Beverly does not include amounts a plaintiff already recovered by trading a vehicle in. Otherwise, a plaintiff would be "in a better position than had she never purchased the vehicle." Few buyers would return a defective vehicle to the manufacturer if they were permitted instead to trade in a defective vehicle in exchange for a reduced price for a new vehicle and receive a full refund from the manufacturer.

The Supreme Court reversed the Court of Appeal. Restitution a manufacturer owes to the buyer of a lemon vehicle is not reduced by proceeds a buyer has received when trading in or selling the vehicle. That rule applies "at least where, as here, a consumer has been forced to trade in or sell a defective vehicle due to the manufacturer's failure to comply with the [Song-Beverly] Act." ▼

LABOR AND EMPLOYMENT

Time employees spend going through mandatory security checks and mandatorily staying on the employer's premises during meals qualifies as compensable time.

Huerta v. CSI Electrical Contractors (2024) 15 Cal.5th 908

Defendant required its employees to have their badges scanned and vehicles searched when arriving and departing work. Because of long lines to get through these security checks, the process took up to 30 minutes. After the security checks, the employees then had to drive an additional 10–15 minutes to reach the parking lots. The employees were required to comply with mandatory employer rules during the drive. Once at work, per the terms of the employees' collective bargaining agreement, the employees were required to remain on the employer's premises during their meal breaks. Plaintiffs brought a wage and hour class action seeking compensation for their time spent going through security and during meals. After class certification was granted, defendant successfully moved for summary judgment. Plaintiffs appealed to the Ninth Circuit, which asked the California Supreme Court to answer whether the employees were entitled to compensation for the security checks, extra drive time, and meal periods.

The California Supreme Court held that the employees were entitled to compensation. "[W]hen the employee is required to spend time on his employer's premises awaiting and undergoing an employer-mandated exit security procedure that includes the employer's visual inspection of the employee's vehicle, the time is compensable as 'hours worked.' " Further, while the employer's imposition of ordinary workplace rules on employees during their drive to the worksite in a personal vehicle does not create the requisite level of employer control to render the time "hours worked," the drive time is compensable as "employer-mandated travel" because the security gate marks the " 'first location' where the employee's presence is required for an employment related reason.' " Finally, even if a collective bargaining agreement provides for "unpaid meal breaks," an employee must be paid at least a minimum wage when the employer prohibits the employee from leaving its premises and thus "prohibits the employee from engaging in otherwise feasible personal activities." ▼

Good faith precludes penalty awards for wage statement errors.

Naranjo v. Spectrum Security Services (2024) 13 Cal.5th 93

Defendant suspended and later fired plaintiff, a security guard, for leaving his post to take a meal break in violation of defendant's policy that required him to remain on duty during all meal breaks. Plaintiff brought a putative class action alleging, among other things, that defendant owed its employees premium pay for on duty meal breaks and violated Labor Code section 226 by failing to report the premium pay on its employees' wage statements. Plaintiff sought statutory penalties, which require a showing that the defendant's failure to report the premium pay was "knowing or intentional." Defendant disputed its liability for the penalties, arguing that it had a good faith basis for believing it did not owe premium pay for the on duty meal periods. The Court of Appeal (Second Dist., Div. Two) agreed with the defendant and held that defendant's conduct was not knowing or intentional as required to support statutory penalties.

The California Supreme Court affirmed. An employer does not "knowingly and intentionally" fail to comply with Labor Code section 226 when it has a reasonable, good-faith belief that its wage statements were statutory-compliant. "[A]n employer's objectively reasonable, good faith belief that it has provided employees with adequate wage statements precludes an award of penalties under section 226." ▼

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Title VII of the Civil Rights Act bars employers from discriminating in decisions such as lateral transfers, without requiring employees to show that the discriminatory decision caused "significant" harm.

Muldrow v. City of St. Louis, Missouri (2024) 601 U.S. 346

Plaintiff, a police sergeant, sued her employer under Title VII of the Civil Rights Act, claiming that she was involuntarily transferred from one job to another because she is a woman and that the reason behind her transfer was to replace her with a male officer. Although her rank and pay did not change after the transfer, she did lose some responsibilities and perks associated with her former position. Defendant successfully moved for summary judgment in the district court on the ground that plaintiff could not prevail without showing that the transfer affected the conditions of her employment and caused her a "materially significant disadvantage," and that plaintiff could not show a "significant" disadvantage. The Eighth Circuit affirmed.

The United States Supreme Court reversed. Title VII requires that plaintiff show only that the transfer brought "some harm" or "some disadvantageous change" in an identifiable term or condition of employment. "Although an employee must show some harm from a forced transfer to prevail in a Title VII suit, she need not show that the injury satisfies a significance test." While an employee claiming a discriminatory transfer must offer some evidence supporting the alleged harm, the employee need not show that the harm was significant.

But see *Ververka v. Department of Veterans Affairs (*2024) 102 Cal.App.5th 162 [First Dist., Div. One] [Once an employee has shown a protected disclosure was a contributing factor in an adverse employment action, but the employer then shows the same adverse action would have been taken for non-retaliatory reasons, the employee is barred from all relief under Lab. Code, §§ 1102.5 and 1102.6]. V

CALIFORNIA SUPREME COURT PENDING CASES

Addressing whether a product manufacturer can be liable for negligence if it withholds sale of a safer product.

Gilead Tenofovir Cases (2024) 98 Cal.App.5th 911, review granted, Case No. S283862

Gilead developed and sold a drug to treat HIV. The drug contained risks of kidney damage, but the FDA approved the drug and it was sold with warnings. Gilead later developed an alternative drug that reduced the risk of adverse kidney side-effects. Various users of the drug sued, alleging that while the original drug was not defective, Gilead was nonetheless negligent in not bringing the safer alternative to market in an attempt to maximize profits from the first drug. Gilead moved for summary judgment on the ground that it could not be liable for selling a product plaintiffs agreed was not defective. The trial court denied summary judgment, and Gilead filed a writ petition. The Court of Appeal (First Dist., Div. Four) issued an order to show cause and then denied the petition on the merits. '"[T]he legal duty of a manufacturer to exercise reasonable care can, in appropriate circumstances, extends beyond the duty not to market a defective product," and can be breached by the manufacturer's continued selling of a product that it knows could be made more safely.

The Supreme Court granted review of the following issue: "Does a drug manufacturer have a duty of reasonable care to users of a drug it is currently selling, which is not alleged to be defective, when making decisions about the commercialization of an allegedly safer, and at least equally effective, alternative drug?" V

Addressing whether MICRA applies to injury to ambulance passenger.

Gutierrez v. Tostado (2023) 97 Cal.App.5th 786, review granted, Case No. S283128

Plaintiff was rear-ended by an ambulance driven by an emergency medical technician who was transporting a patient between medical facilities. Plaintiff sued the driver and his employer for negligence. Defendants moved for summary judgment on the ground that plaintiff's claims were barred by the one-year statute of limitations in the Medical Injury Compensation Reform Act (MICRA). The trial court granted the motion. A majority of the Court of Appeal (Sixth Dist.) affirmed, holding that the MICRA limitations period barred plaintiff's negligence claim because "transporting a patient in an ambulance qualifies as the provision of medical care . . . [and] driving the ambulance is an integral part of that care." The fact that plaintiff was a third party not receiving medical care was irrelevant because MICRA is not limited to lawsuits by patients or recipients of medical services.

The California Supreme Court granted review of the following issue: "Does the one-year statute of limitations in the Medical Injury Compensation Reform Act (MICRA; Code Civ. Proc., § 340.5) apply to a personal injury claim alleging that the plaintiff's vehicle was struck by a negligently driven ambulance?" V

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Addressing whether waiver of liability bars cyclist's personal injury claims.

Whitehead v. City of Oakland (2024) 99 Cal.App.5th 775, review granted, Case No. S284303

While training for the AIDS LifeCycle fundraiser in Oakland, the plaintiff cyclist hit a pothole and suffered injuries. Plaintiff sued Oakland, alleging that it failed to maintain and repair the road and that the location of the accident was in a dangerous condition because of the pothole. Oakland maintained it had no liability because plaintiff had signed a waiver and release of liability before participating in the training. Plaintiff responded that the release was void under *Tunkl v. Regents of University of Cal.* (1963) 60 Cal.2d 92 because it affected a matter of public interest. The trial court concluded that the release was enforceable and that it barred plaintiff's claims. The Court of Appeal (First Dist. Div. Three) affirmed. Whether a release affects the public interest—and is thus unenforceable—depends on the nature of the activity or transaction for which the release was given (here, cycling), not on the alleged cause of the injury (the City's maintenance of the road). The release was enforceable because the cycling ride was a "nonessential sports activity" that did not affect the public interest.

The California Supreme Court granted review to address whether "a liability release agreement between a bicyclist and the organizer of a recreational bicycle ride extend[s] to the alleged negligent maintenance of a public road by a municipality named in the agreement but not a party to it?"

Addressing forfeiture of the right to arbitrate for failure to pay arbitration fees.

Hohenshelt v. Superior Court (Golden State Foods) (2024) 99 Cal. App.5th 1319, review granted, case No. S284498

Plaintiff brought employment claims against defendant. Defendant successfully moved to compel arbitration. Under Code of Civil Procedure section 1281.98, if arbitration fees are not paid within 30 days of their due date, the employer waives its right to compel arbitration. Defendant here did not pay the arbitration fees within 30 days of being invoiced, but the arbitrator sent a letter extending the deadline for payment. Defendant paid by the arbitrator's deadline. Plaintiff nonetheless filed a motion to lift the stay pending arbitration. The trial court denied the motion and plaintiff sought a writ of mandate. A majority of the Court of Appeal (Second Dist., Div. Eight) issued the writ, holding that the statute allows the due date for fees to be extended by agreement of the parties but not the arbitrator, and so the defendant waived its right to arbitrate by not paying the fees within the timeline set forth in section 1281.98. The majority also rejected defendant's argument that section 1281.98 is preempted by the Federal Arbitration Act.

The Supreme Court granted review to address the following issue: "Does the Federal Arbitration Act (9 U.S.C. § 1 et seq.) preempt state statutes prescribing the procedures for paying arbitration fees and providing for forfeiture of the right to arbitrate if timely payment is not made by the party who drafted the arbitration agreement and who is required to pay such fees?"

See also *Suarez v. Superior Court* (Rudolph & Sletten) (2024) 99 Cal.App.5th 32 [Fourth Dist., Div. One] [Employer waived its right to arbitrate by not paying fees within 30 days; two-day extension of time for electronic service did not apply to responding to invoice to pay arbitration fees]

See also *Reynosa v. Superior Court* (Advanced Transportation Services) (2024) 101 Cal.App.5th 967 [Fifth Dist.] [Employer waived its right to arbitrate by twice failing to timely pay arbitration fees]

But see *Hernandez v. Sohnen Enterprises* (2024) 102 Cal.App.5th 222 [Second Dist., Div. Five] [Arbitration agreement governed by the Federal Arbitration Act was not subject to section 1281.98's rule that failure to pay arbitration fees within 30 days waives the right to arbitration and would be preempted by the FAA in any event.]

Addressing the statute of limitations for malicious prosecution claims against attorneys.

Escamilla v. Vannucci (2023) 97 Cal.App.5th 175, review granted, Case No. S282866

One year and eleven months after a jury found in favor of Escamilla for false imprisonment and other claims, Escamilla brought a malicious prosecution against the attorney who represented the underlying plaintiffs. The attorney filed an anti-SLAPP motion, arguing that his activity was protected and in any event, Escamilla could not prevail because his claim was barred by the one-year statute of limitations in Code of Civil Procedure section 340.6 [providing for a one-year statute of limitations for actions against an attorney for a wrongful act or omission]. The trial court agreed with the attorney that Escamilla's action was time-barred. Escamilla appealed, arguing that his claims against the attorney were governed by Code of Civil Procedure section 335.1 [providing for a two-year statute of limitations for actions for injury to an individual]. The Court of Appeal (First Dist., Div. One) affirmed the trial court.

The Supreme Court granted review of the following issue: "What statute of limitations applies to a malicious prosecution action brought against an attorney when the claim does not arise from an attorney-client relationship?"

Steven M. Sepassi, Esq.

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The ASCDC Women's Tea, Brunch, & Mimosa Event

The Association of Southern California Defense Counsel (ASCDC) hosted its first Women's Tea, Brunch & Mimosas Event on the last Friday of June.

The event featured an inspiring panel of four exceptionally accomplished female defense attorneys. The gathering, held in an elegant and bright setting, boasted a delightful array of tea, mimosas, and a delectable brunch spread. The event promoted camaraderie, mentorship, and professional growth among women in the legal field. In addition, the brunch provided an excellent opportunity for networking by creating a collective space to learn from all of the female attorneys present.

The panel discussion, the highlight of the event, featured Alice Chen Smith, Lindy F. Bradley, Laura Hummasti, and Alexis Morgenstern.

Each panelist offered practical advice and shared lessons learned from their impressive legal careers. The panelists emphasized the importance of resilience, patience, civility, community involvement, and building a supportive network. The attorneys also discussed navigating the challenges unique to women in the defense field and encouraged all attorneys to pursue leadership roles while advocating for themselves within their respective firms.

Continued on page 27

A special thank you goes to Mary R. Fersch and the entire Schonbuch Hallissy Team for hosting the event in their beautiful, brand new office in Brentwood. Their warm hospitality created a warm and welcoming atmosphere making it a memorable occasion for everyone involved.

The event was a huge success, with the 40+ attendees expressing their enthusiasm and gratitude for the valuable insights shared and connections made. Attendees stated that they cannot wait for the next event, eagerly anticipating more opportunities to learn from and support one another. The positive feedback highlighted the significance of such gatherings in strengthening the community of female defense attorneys in Southern California. **In addition, the event underscored ASCDC's commitment to empowering female attorneys and fostering an inclusive and supportive professional environment**. With the bar set high, the anticipation for future events is palpable, promising even more impactful and enriching experiences for the attendees. V

the power of visuals will help you discern and use those most beneficial to your case.

As with story bullets, visuals are not to be used solely in your opening, or with the occasional expert. Use visuals as best you can throughout your case. Bear in mind that 3-D models, animated re-creations, and to-scale actual models are also visuals. Graphs and bar charts are helpful but don't count as emotionally triggering. Although a pie chart is a more useful visual than a graph because it is more visually memorable, it doesn't particularly trigger a vivid emotional response. The more your "facts and figures" can be demonstrated in a significantly emotionally triggering way, the better. A good graphics team can be of great help.

Keep It Simple

Lawyers, in particular defense attorneys, are fond of overwrought, rarefied vocabulary. Jurors are not. A trial is not the place to demonstrate the astounding vocabulary you've acquired in far too many hours of legal study. The problem is that often, attorneys don't even realize how arcane their language is. Take the word "arcane." It's a prime example of a word that is never to be used in front of a jury since most won't have a clue what it means, and others, your GenZers for example, will think you are referring to "Arcane," an animated action-adventure series. That's why it is critical to speak a language all your jurors will understand.

Trying to win over GenZers with whatever buzzwords or acronyms are currently trending is useless. They will see the attempt for what it is, a manipulative ploy. Secondly, the non-GenZers will be annoyed at you for using "pop language" they can't understand. Pandering to your older jurors with outdated expressions from the 1940s or 1950s will alienate the younger ones. Neither approach is valuable or necessary.

The best rule of thumb is to keep your vocabulary as simple as possible and to speak in short sentences. Each sentence should convey just one thought. Don't ramble on and on to include half a dozen or more thoughts. Focus groups are excellent forums for finding out if your language, vocabulary and delivery are accessible to all. Since you invariably will need to use certain technical terms, that are unfamiliar to most jurors, define those terms in the simplest language possible. Jurors' life experiences are different from your client's. Faced with a word or concept they don't understand, jurors will simply ignore it, or dismiss it as unimportant, rather than try to figure it out.

Understand the common attributes of your jurors and then use storytelling and visuals to convey your case in an emotional and compelling way. The results will be a jury that better relates to your client's position and will increase the likelihood of a successful case outcome. V

Noelle C. Nelson, Ph.D. Noelle C. Nelson, Ph.D., is a trial consultant who provides trial/jury strategy, witness preparation and focus groups for attorneys. Her published books include "A Winning Case" (Prentice Hall) and "Connecting With Your Client" (American Bar Association). Reach her at www.dr.noellenelson.com, noelle@noellenelson.com.

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for their unwavering friendship and support
and to the members of ASCDC for placing their
trust and confidence in me these past 15 years

FLOYD J. SIEGAL
fjs@fjsmediation.com

What About 2025 – *continued*

from page 5

All in all, Governor Newsom signed 1017 separate pieces of legislation for 2024, and dozens have potential impact on specific areas of defense practice. As per usual, a number of the bills relate to employment, but essentially every area of practice is covered by one or more bills. All of the bills are available for review through the ASCDC website.

For 2025, coming out of the general elections, the dust is still settling before we know "the rest of the story". We do know, however, that Democrats will maintain at least the two-thirds supermajority they now enjoy in the Assembly and Senate. We also can confidently speculate that California policymakers, from the governor to both houses of the legislature, will position themselves as leaders of the resistance, passing bills and crafting regulations demonstrating that California is a long way geographically and politically from the Trump White House. Expect to read a lot more about this as 2025 unfolds. V

2024 in Pictures

ADC-ASCDC Joint Board Meeting: Benefitting One Warm Coat Charity

Hall of Fame Dinner

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2024 in Pictures

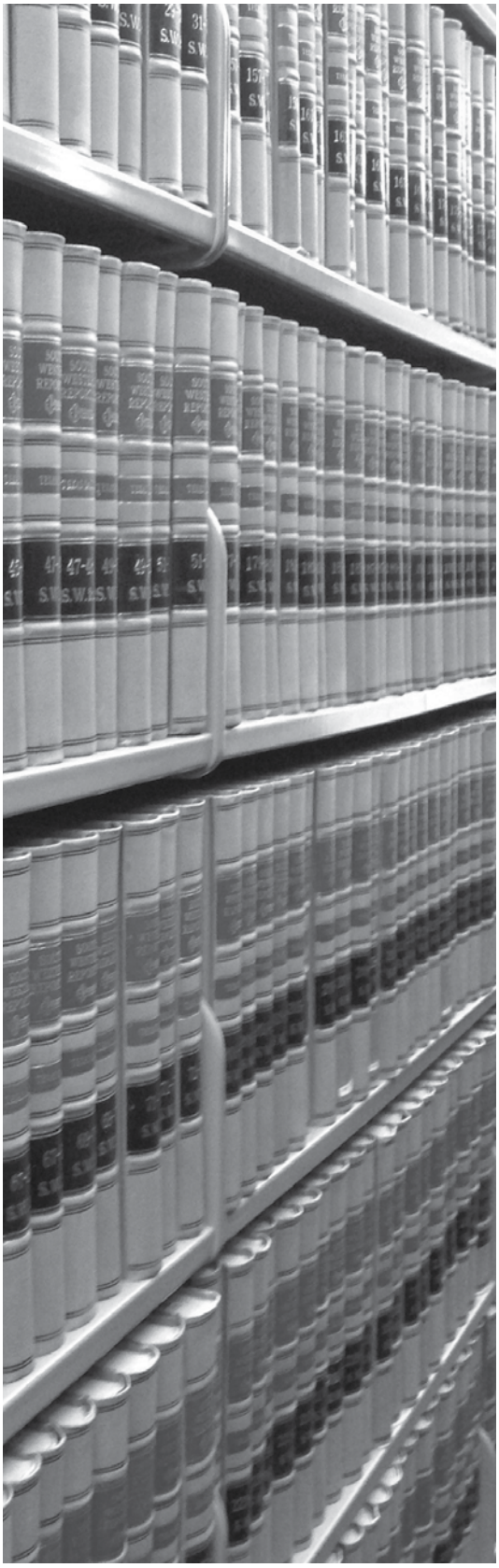
ADC and ASCDC Joint Board Meeting

2024 in Pictures

Langston Gala

ADC Annual Seminar and Womens Brunch

ASCDC 2024 Webinars



The Use and Importance of Still and Video Imagery in Crash Reconstruction.

On March 14, 2024

Dial Engineering presented a webinar on The Use and Importance of Still and Video Imagery in Crash Reconstruction. This presentation featured an overview of the importance of and challenge in obtaining useful imagery, and will present the power of such imagery via real-world examples.

For more information contact:
Eric Deyerl | Dial Engineering | *edeyerl@dialeng.com*

21st Century Forensic Technology in the Courtroom

On April 25, 2024

3d-Forensic presented a webinar on 21st Century Forensic Technology in the Courtroom . The presentation focused on the applications and advantages of the highest level of forensic technology. Case topics included 3D laser scanning, laser-based photogrammetry, forensic animation, OIS reconstruction, nighttime visibility, and how to defend against faulty uses of forensic technology.

For more information contact:
Jason C. Fries | 3d-Forensic | *jason@3d-forensic.com*

Spinal Cord Stimulation

On June 6, 2024

Litili presented a webinar on Spinal Cord Stimulation and pain management treatment options. The discussion included technical aspects of pain management, Gate Control Theory, indicates of SCS, potential benefits of spinal cord stimulation and pain management and chronic pain treatment options.

For more information contact:
Yoyo Loi | Litili | *yoyo@litiligroup.com*

ASCDC 2024 Webinars

How to Properly Rebut a Plaintiff Life Care Plan

On July 25, 2024

Sutton Pierce presented a webinar on How to Properly Rebut a Plaintiff Life Care Plan. This presentation addressed the proper way to rebut a plaintiff life care plan. The discussion also addressed required information, analysis of plaintiff life care plan, and the importance of communication with the defense attorney. Different categories of foundation, what requires a physician's input and what is within the expertise of the life care planner in general were also discussed.

For more information contact:
Sutton Pierce | *park@suttonpierce.com*

Microaggressions - What are They and Why do They Matter?

On August 15, 2024

Oppenheimer Investigations Group, LLP discussed Microaggressions, discussing what they are and why they matter. This webinar was an exploration of how microaggressions, though small and unintentional, can have an oversized impact on those who experience them. This webinar taught what makes microagressions so harmful and how to have a constructive dialogue about them when they occur.

For More Information contact:
Vida Thomas, Esq. | Oppenheimer Investigations Group, LLP | *vida@oiglaw.com*

Intro to Advanced Driver Assistant Systems: Protecting Your Blind Spots in Litigating ADAS Claims

On August 29, 2024

A SCDC Board Member, Heather Mills and Hannah Lee presented an Intro to Advanced Driver Assistant Systems: Protecting Your Blind Spots in Litigating ADAS Claims. The webinar covered a new focus by plaintiffs in automotive product liability and lemon law cases based on Advanced Driver Assistance Systems (ADAS), including features such as LKA (lane keeping assist), LDW (lane departure warning), AEB (automatic emergency braking) and the like. This webinar discussed the technology behind ADAS and strategies for defending against these claims.

For more information contact:
Heather Mills, Esq. | Skane Mills | *hmills@skanemills.com*
Hannah Lee, Esq. | Spencer Fane | *hlee@spencerfane.com*

ASCDC 2024 Webinars

Forensic Investigation of Commercial Vehicle Collisions

On September 19, 2024

YA Engineering Services presented a webinar on Forensic Investigation of Commercial Vehicle Collisions. The course focused on commercial vehicles, including forensic investigation of commercial vehicle collisions and covered accident reconstruction aspects about commercial vehicles in helping determining liability, reducing damages, and protecting clients. The course offered common terms, definitions, and techniques for exploring material related to commercial vehicles and accident scenes and how to preserve evidence. The webinar also discussed what other experts commonly work in conjunction with Accident Reconstruction experts, and when should they be utilized. Finally, there was a discussion about on-board GPS trackers, cameras, emerging technologies, and event data recorders or "black boxes" and the type of data retrievable, its uses, and the current vehicle coverage. The course offered several case studies involving commercial vehicles, data analysis, and computer simulation.

For more information contact:
Vadim Perlovskiy | YA Engineering Services | *Vadim.perlovskiy@yaeservices.com*

Best Practices for Efficient Handling and Resolution of Landlord Tenant Matters

On September 26, 2024

Nolan Armstrong, Esq., former ADC President and current mediator at Signature Resolution gave a webinar on Best Practices for Efficient Handling and Resolution of Landlord Tenant Matters. This webinar provided valuable practice tips from panelists on both sides of the aisle in landlord-tenant issues in California. There was a specific focus on rent/eviction-control in the greater Los Angeles area, where the volume of landlord-tenant litigation has exploded over the past decade. This presentation discussed the benefits of communication, cooperation in discovery, and other aspects of efficient handling of complex cases typically litigated under the backdrop of substantial attorney's fees exposure and insurance coverage issues. The presentation also offered effective settlement and mediation strategies.

For more information contact:
Nolan Armstrong, Esq. | Signature Resolution | *awaathiq@signatureresolution.com*
Jacqueline Ravenscroft, Esq. | Tobener Ravenscroft Law | *jravenscroft@tobenerlaw.com*

ASCDC 2024 Webinars

Reconstruction of High-Speed Collisions: Essential Techniques for California Attorneys

On October 10, 2024

Rimkus provided a webinar on Reconstruction of High-Speed Collisions: Essential Techniques for California Attorneys. This comprehensive webinar covered crucial aspects of accident reconstruction. The discussion included updated methodologies in accident reconstruction, including electronic data retrieval (EDR) and analysis. The differences between passenger and commercial vehicle accident reconstruction, driver and vehicle factors in high-speed collisions, evidence gathering techniques and their legal implications, vehicle component analysis and its relevance to potential product liability issues and effective presentation of complex technical information in court. The course directly benefitted California attorneys by enhancing their ability to evaluate expert testimony, challenge or support accident reconstruction findings, and effectively handle cases involving complex accident reconstructions.

For more information contact:
Sydney Allen, MS., ACTAR | Rimkus | *sydney.allen@rimkus.com*

Plaintiff Has Fallen and Can't Get Up: Litigating Cases Under the Elder Abuse Act

On October 31, 2024

Attorneys Colin Harrison, Esq., and Stephen Ahern, Esq., of Wilson Getty provided a webinar entitled: "Plaintiff Has Fallen and Can't Get Up: Litigating Cases Under the Elder Abuse Act." This presentation provided useful insights into and tools for defending cases against long-term care providers, including claims of elder neglect and violations of patients' rights.

For more information contact:
Colin Harrison, Esq. | Wilson Getty | *charrison@wilsongetty.com*
Stephen Ahern, Esq. | Wilson Getty | *saherne@wilsongetty.com*

The Cost Shifting Mechanism of the Code of Civil Procedure – CCP 998

On November 7, 2024

Attorney David Wasson, Esq., of Wasson Lawyers, presented a webinar entitled, "The Cost Shifting Mechanism of the Code of Civil Procedure – CCP 998." The program discussed California Code of Civil Procedure section 998. The course reviewed and examined its origins, purpose, and the ways in which the cost-shifting mechanism has worked to violate the rights of defendants. The webinar explored the current debate and discussed the merits of changing the current law governing the cost-shifting mechanism of the statute.

For more information contact:
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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 these recent amicus VICTORIES

The Amicus Committee participated in or successfully sought publication of the following cases:

TriCoast Builders, Inc. v. Fonnegra (2024) 15 Cal.5th 766: The California Supreme Court issued a favorable opinion after it 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? The court answered the first question yes and the second question no, consistent with ASCDC's position. Steven Fleischman and Andrea Russi from Horvitz & Levy submitted an amicus brief on the merits.

Whitehead v. City of Oakland (2024) 99 Cal.App.5th 775, review granted: The Court of Appeal in San Francisco issued an originally unpublished decision affirming the granting of summary judgment in a case where the plaintiff was injured while training for a charity fundraising bicycle race. The court held that the release signed by the plaintiff was valid and that the defendant's failure to repair a pothole was ordinary negligence, not gross negligence. Steven Fleischman and Nicolas Sonnenburg from Horvitz & Levy submitted a successful publication request.

Note that the California Supreme Court subsequently granted review in May 2024 to address this issue: Does a liability release agreement between a bicyclist and the organizer of a recreational bicycle ride extend to the alleged negligent maintenance of a public road by a municipality named in the agreement but not a party to it? Review is pending, case no. S284303.

Audish v. Macias (2024) 102 Cal. App.5th 740: The Court of Appeal in San Diego held in an originally unpublished opinion that defendants may introduce into evidence Medicare reimbursement rates to prove the reasonable value of medical services, and that does not violate the collateral source rule: "Indeed, multiple courts have concluded, under similar circumstances, that it is permissible—or even necessary—for a trial court to admit evidence concerning a tort plaintiff's future eligibility for health insurance and the anticipated amounts the insurer would be expected to pay for the patient's future medical needs, evidence that is relevant to the reasonable value of future medical care." Ted Xanders at Greines, Martin, Stein & Richland wrote the successful publication request.

Tornia v. CSAA Insurance Exchange (2023) 98 Cal.App.5th 974 . The Court of Appeal in San Francisco held in an originally unpublished decision that the trial court should have granted the defendant insurer's motion to compel arbitration of a UM/UIM dispute under Insurance Code section 11580.2, which requires arbitration to determine the amount of damages. The case summarizes why these issues have to be arbitrated before the plaintiff can pursue a bad faith claim. Jim Weizel from Demler Armstrong & Rowland submitted the successful publication request.

Howard v. Accor Management US, Inc. (2024) 101 Cal.App.5th 130: In an originally unpublished opinion the Court of Appeal in Los Angeles affirmed the granting of summary judgment in a premises liability case involving an allegedly defective shower wand in a hotel room. In doing so, the court affirmed the trial court's exclusion of Brad Avrit's testimony as speculative and also rejected plaintiff's res ipsa loquitor arguments. David Hackett and Katarina Rusinas from Greines, Martin, Stein & Richland submitted the successful publication request.

San Antonio Regional Hospital v. Superior Court (2024) 102 Cal.App.5th 346: The trial court ruled that plaintiff's expert, a nurse, could offer a standard of care opinion regarding medical care provided by ER physicians and denied summary judgment on that basis. The Court of Appeal disagreed and issued writ relief in an originally unpublished decision directing the trial court to grant the motion. Dave Pruett at Kelly, Trotter & Franzen and Jim Weixel at Demler, Armstrong & Rowland submitted a successful joint publication request with ADC.

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 Court of Appeal in an unpublished opinion affirmed summary judgment in this employment, discrimination and harassment case. The Supreme Court granted review in this employment case to address this issue:

Continued on page 43

"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 case was argued on May 22, 2024, so an opinion will be filed by the end of August 2024. Brad Pauley and Eric Boorstin from Horvitz & Levy submitted an amicus brief on the merits.

2) ***Escamilla v. Vannucci*** (S282866) : The Court of Appeal held in an originally unpublished that the statute of limitations for legal malpractice claims (Code Civ. Proc., § 340.6) also applies to malicious prosecution claims brought against attorneys. There is an ongoing split of authority on this issue. Steven Fleischman and Nicolas Sonnenburg from Horvitz & Levy submitted a publication request that was granted.

   In January 2024, the Supreme Court granted review to address this issue: What statute of limitations applies to a malicious prosecution action brought against an attorney when the claim does not arise from an attorney-client relationship? Harry Chamberlain from Buchalter submitted an amicus brief on the merits and the case remains pending.

3) ***Greener v. Phelps***, Fourth Appellate District, Div. One, D082588. This appeal, pending in San Diego, involves a $46 million personal-injury verdict where the plaintiff was injured while training with a Brazilian ju-jitsu coach at a ju-jitsu gym. The defendants contend on appeal that the trial court applied the wrong jury instructions regarding the "primary assumption of risk" doctrine. Susan Beck and David Pruett will be submitting an amicus brief supporting the defendants.

4) ***Gramajo v. Joe's Pizza on Sunset, Inc.*** (2024) 100 Cal.App.5th 1094: The Court of Appeal in Los Angeles held in an unfavorable published opinion that a plaintiff attorney in a wage and hour dispute was entitled to recover attorney fees in a case where the final recovery was just $7,659.93. The court reached that ruling notwithstanding: (1) Code of Civil Procedure section 1033, subdivision (a), which gives trial courts discretion to reduce or deny a fee request when the plaintiff recovers less than $25,000 (now $35,000); and (2) Chavez v. City of Los Angeles (2010) 47 Cal.4th 970, where the California Supreme Court held that section 1033(a) applies to FEHA claims. Steven Fleischman, John Taylor, and Shane McKenzie from Horvitz & Levy submitted a depublication request.

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

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

1. *Amicus curiae* briefs on the merits in cases pending in appellate courts.
2. Letters in support of petitions for review or requests for depublication to the California Supreme Court.
3. Letters requesting publication of favorable unpublished California Court of Appeal decisions.

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

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

Steve S. Fleischman (Co-Chair of the Committee)
Horvitz & Levy – 818-995-0800
sfleischman@HorvitzLevy.com

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Greines, Martin, Stein & Richland LLP – 310-859-7811
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Thompson & Colegate – 951-682-5550

Harry Chamberlain
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Elizabeth L. Kolar, Esq., Jeanne L. Tollison, Esq.
Kolar & Associates
Falsafi v.. House of Imports, Inc. and AutoNation, Inc.

Ben Howard, Esq.
Neil Dymott Hudson APLC
Jordan v. Darryl Morris, DDS et al.

Joshua Traver, Esq.
Cole Pedroza LLP
Williams-Moss v. Loma Linda University

Kimberly Byrge, Esq
Alice Chen Smith, Esq.
Yoka | Smith, LLP
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Jeffrey Walker, Esq.
Walker Law Group
Lazarov v. Shaulov

John R. MacRill, III, Esq
Davis, Grass, Goldstein & Finlay
Sara Flores and Desiree Ortiz v. Jackson Fu, M.D. and Antelope Valley Hospital, MC024069

Robert McKenna, Esq.
Kjar McKenna & Stockalper
Anderson v. Torres, et al.

Michelle An, Esq.
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Garza v. Fitness International, LLC, Shelden Balatico

Sylvia Aceves, Esq.
Office of County Counsel
Ravera v. County of San Diego and David Carter Beakel
Kelly v. County of San Diego and James Steinmeyer

Alice Chen Smith, Esq. & Andrew Figueras, Esq.
Yoka | Smith LLP
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Kim Schumann, Esq.
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Davis v. Skurka, et.al.

Chris Basil, Esq. and Bernadette Castillo-Brouses, Esq.
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Cisneros v. Alexander Arjomand

Jeffrey Cabot Myers, Esq.
Kirk & Myers - Liberty Mutual Group, Inc.
Maki v. Wong, et. al.

Bernadette Brouses, Esq. and Geronimo Perez, Esq.
Schonbuch Hallissy LLP
Mercado, et al. v. Imperial Roofing, Inc., et al.

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Strattan v. Cedar Corporation dba McDonald's

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Carolina Beverage Corp. et al. v. Fiji Water Co. LLC (2024) 102 Cal.App.5th 977

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Meri Nacharyan, Esq.
Yoka | Smith
Rodriguez v. Slauson Distribution Center, et al.

Christopher Wesierski, Esq.
Wesierski & Zurek
Rosenberg, Kjellin v. California Automobile Insurance Company

Michael D. Sargent, Esq.
Harvey "Chip" Wimer, Esq.
Graves & King, LLP
Leon v. County of San Bernardino

Chris Basil, Esq.
Mark R. Israel, Esq.
Schonbuch Hallissy LLP
Easy Financial, LLC v. American Modern Property and Casualty Insurance Company

Jeffrey Soll, Esq.
Jason Benkner, Esq.
Poole Shaffery
Azam v. Stone, et. al.

Pancy Lin, Esq.
Courtney Hylton, Esq.
Hylton & Associates
Ponce v. Orange County Department of Education

Lindy F. Bradley, Esq.
Kathryn Canale, Esq.
Bradley, Gmelich & Wellerstein LLP
Crawford v. Costco Wholesale Corporation, et al.

Wayne W. Watten. Esq.
Hall Griffin
Robbins v. Shaff

Lenore Kelly, Esq.
Collinson, Daehnke, Inlow & Greco
Jones v. Los Angeles County, Los Angeles County Sheriff's Department et. al.

Juan Carlos Delgado, Esq.
Win Doan, Esq.
Ford, Walker Haggerty & Behar
Jenkins v. Stiles

Jason P. Tortorici, Esq.
Schilleci & Tortorici PC
Loya v. Alliance United Insurance Company and Adriana's Insurance Services, Inc.

Arthur J. Chapman, Esq.
Chelsea Zwart, Esq.
Chapman Glucksman
Adamo v. Parr

John C. Kelly & Patrick J. Goethals
Kelly, Trotter & Franzen
Ambartsumyan v. Torrance Memorial Medical Center

Webinars: Our webinar committee, spearheaded by Lindy Bradley and Bron D'Angelo, continued to put on numerous informative educational webinars throughout the year.

A special shout out and total appreciation for all of the committees and subcommittees that work tireless on speciality issues an areas of practice. These folks volunteer a tremendous amount of their time to all of us.

Looking forward, on February 6, 2025, we will be holding our first Inaguration Dinner where the ASCDC gavel will be passed to President Elect Lisa Collinson, our new Secretary/Treasurer will be installed, and awards will be given to members for their contributions to the organization. Stay tuned for more details on the Listserv.

We are actively planning our 64th Annual Seminar for March 27 and 28, 2025. Again, stay tuned.

I would encourage eveyone to submit their "Defense Wins" via the ASCDC website for publication on our social media and email blasts. This is a great way to recognize each other for solid defense work.

Lastly, I strongly encourage all members to contribute to the California Defense Counsel, the political action committee representing the ADC and ASCDC. Our lobbyist, Mike Belote, and his team at California Advocates, Inc. have their fingers on the pulse of Sacramento and have all our respective backs as to legislation with positive, and negative, impacts on our practices.

Cheers to a more positive and prosperous 2025!

ASCDC

Association of Southern California Defense Counsel

MEMBERSHIP APPLICATION

Membership Categories

- ☐ **REGULAR MEMBER ($375)** – Limited to persons independently engaged in civil defense practice who have been in practice for more than five (5) years. This category allows for full voting privileges.
- ☐ **AFFILIATE MEMBER ($375)** – Limited to those individuals engaged in the full time or part-time practice of mediation or arbitration. Membership as an "Affiliate Member" shall allow for limited membership privileges. This category allows for no voting privileges or the right to hold office.
- ☐ **ASSOCIATE MEMBER ($275)** – Employee of a public entity, insurance company or other corporation.
- ☐ **YOUNG LAWYER MEMBER ($225)** – Limited to attorneys engaged in independent practice who have been in practice for five (5) years or less. This category allows for full voting privileges.
- ☐ **LAW STUDENT MEMBER ($25)** – Limited to those individuals registered as a full time or evening student pursuing a J.D. degree. Law student membership shall expire six months after graduation. This category allows for no voting privileges.
- ☐ **DUAL MEMBER ($100)** – Limited to those members in good standing of the Association of Defense Counsel of Northern California and Nevada (ADC). Membership as a "Dual Member" shall allow for full membership privileges, except the right to vote or hold office.

New members receive a complimentary half-day education seminar & complimentary attendance at the Annual Judicial and New Member Reception in December during their first year of membership.

Information

Name: _____ Bar #:_____

Firm / Law School (if applying as a student): _____

Address:_____

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

Phone: _____ E-Mail:_____

Gender: _____ Ethnicity:_____

Are you now devoting primarily (i.e., at least 75%) of your time to defense practice in civil litigation?
☐ Yes ☐ No ☐ Student

If a full-time employee of an insurance company, corporation or public entity, please provide the name of your employer and your title or position: _____

Sponsor Member: _____ Firm:_____

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

☐ Appellate	☐ Business Litigation	☐ Construction Law	☐ Employment Law
☐ General/Premises Liability	☐ Insurance Law & Litigation	☐ Intellectual Property	☐ Managing Partner
☐ Medical Malpractice	☐ Personal Liability	☐ Products Liability	☐ Professional Liability
☐ Public Entity	☐ Transportation	☐ Toxic Torts	

If elected to membership, I agree to abide by the Bylaws of this Association

Signature of Applicant: _____ Date:_____

Contributions or gifts (including membership dues) to ASCDC are not tax deductible as charitable contributions. Pursuant to the Federal Reconciliation Act of 1993, association members may not deduct as ordinary and necessary business expenses, that portion of association dues dedicated to direct lobbying activities. Based upon the calculation required by law, 15% of the dues payment only should be treated as nondeductible by ASCDC members. Check with your tax advisor for tax credit/deduction information.

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