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DEFENSE COMMENT

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

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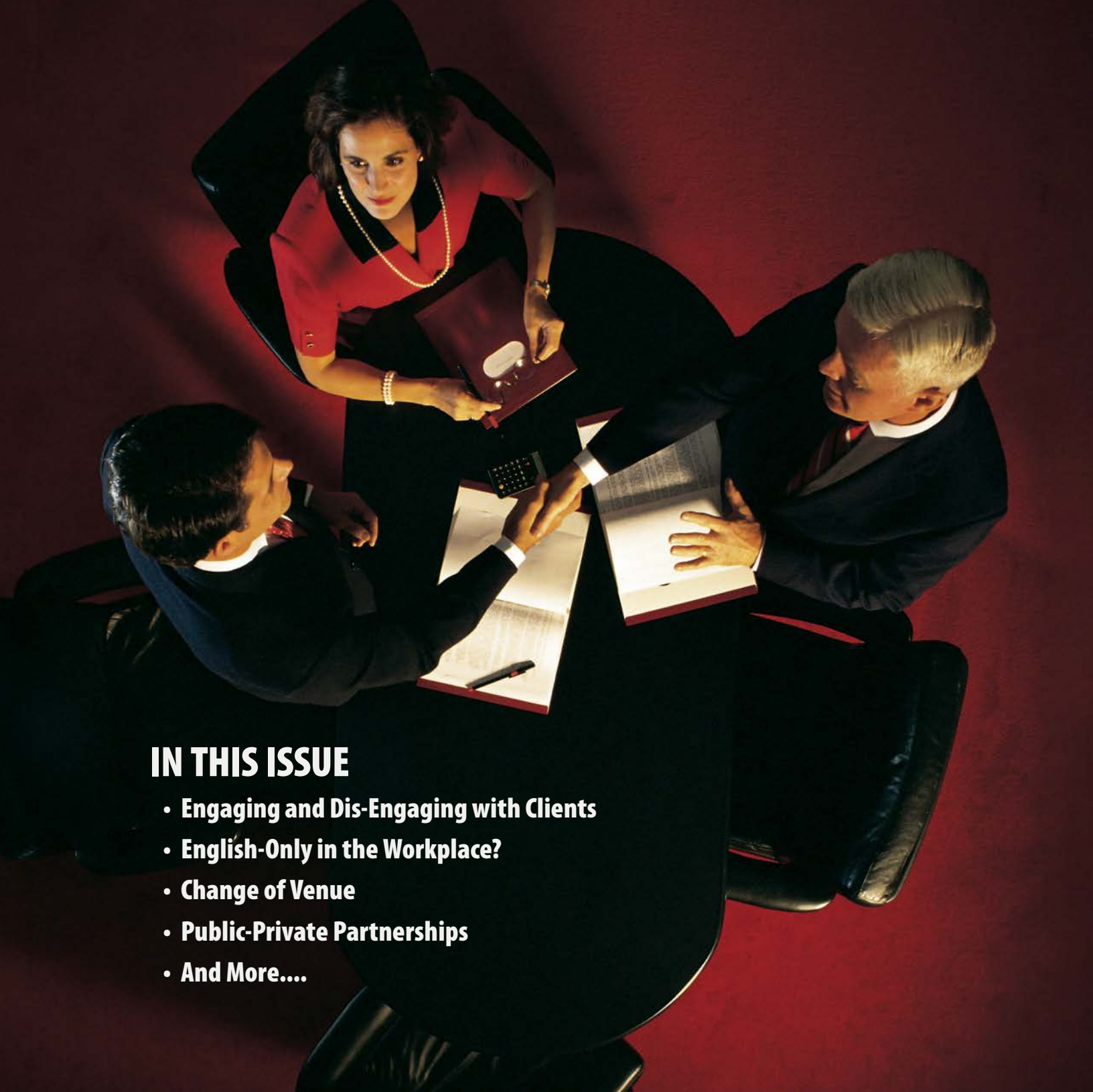

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DEFENSE COMMENT

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

FEATURES

DEPARTMENTS

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

Enrique Marinez
2017 President

Mental Health and Wellness: An Important First Step

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

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

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

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

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

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

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

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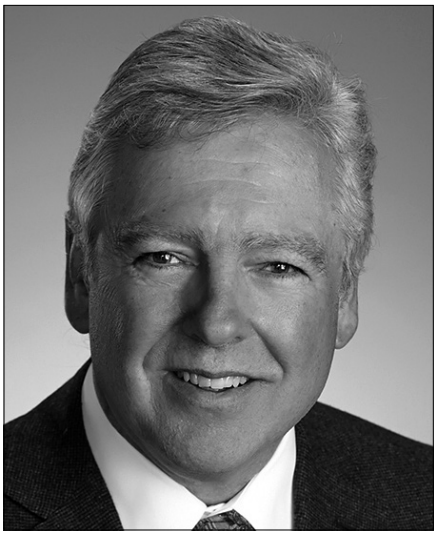

Michael D. Belote
California Advocates, Inc.

Name Your Practice Area- Legislation Affects You!

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

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

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

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

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

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

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EXIT

Withdrawing from Representation? Be Careful About What You Disclose

John C. Hentschel
Livingston Law Firm

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

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

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

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

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

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

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

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

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

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the confidences in making a Motion to Withdraw.

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

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

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

John C. Hentschel

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

ENDNOTES

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

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

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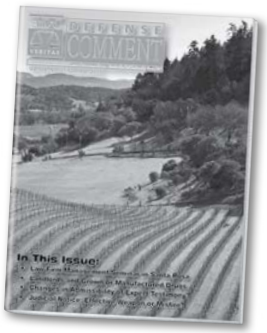

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The Viability of Language Restrictive Policies in the Workplace

Amber Eklof
Gordon Rees Scully Mansukhani, LLP

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

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

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

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

POLICIES THAT SERVE BUSINESS NEEDS

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

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

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

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

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

NARROWLY TAILORED

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

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

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

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

REPERCUSSIONS OF NON-COMPLIANT POLICIES

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

WHAT EFFECT WILL SUCH POLICIES HAVE MOVING FORWARD?

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

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

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

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

Amber Eklof

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

ENDNOTES

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

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

3 29 C.F.R. § 1606.7(a).

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

5 29 C.F.R. § 1606.7(a).

6 29 C.F.R. § 1606.7.

7 29 C.F.R. § 1606.7(c).

8 Cal. Gov. Code, § 12951(a).

9 EEOC Guidelines § V.C.3.d.

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

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

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

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

14 *Id.* at 1305-1306.

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

16 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

THE HISTORY OF P3 PROJECTS

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

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

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

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THE BENEFITS OF P3 PROJECTS

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

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

Major benefits to the public include:

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

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

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

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

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

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

A potentially long term revenue stream.

REQUIREMENTS FOR P3 PROJECTS IN CALIFORNIA

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

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

Continued on page 14

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

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

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

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

Jessica Clouse

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

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

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

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

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

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

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

THE BASICS

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

A. Inconvenience

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

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

B. Promoting the Ends of Justice

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

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

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

GATHERING THE EVIDENCE

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

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

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

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

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

TIMING

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

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

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

AND ONE MORE THING...

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

SO NOW WHAT?

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

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

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

CONCLUSION

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

Craig A. Livingston

Crystal L. Van Der Putten

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ENDNOTES

1 All statutory references are to California state statutes.

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

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

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

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

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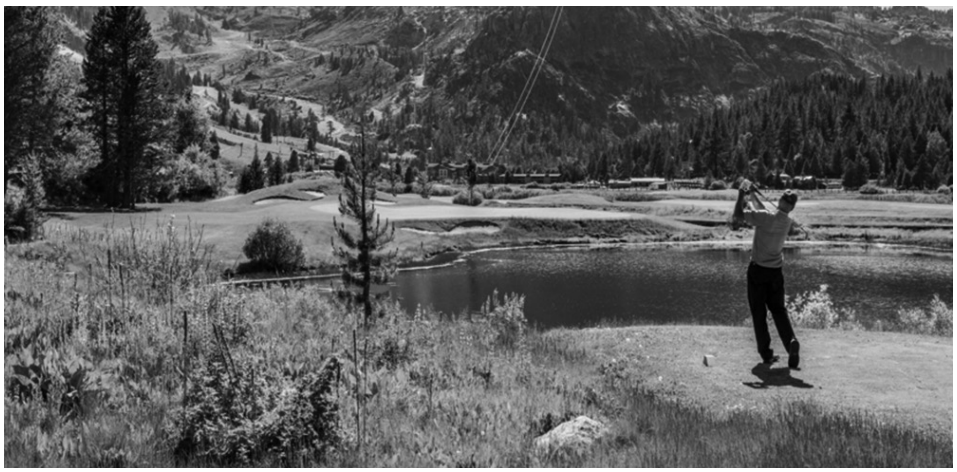

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Can't Spell Truth Without Ruth:

NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG

Don Willenburg
Gordon Rees Scully Mansukhani, LLP

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

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

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

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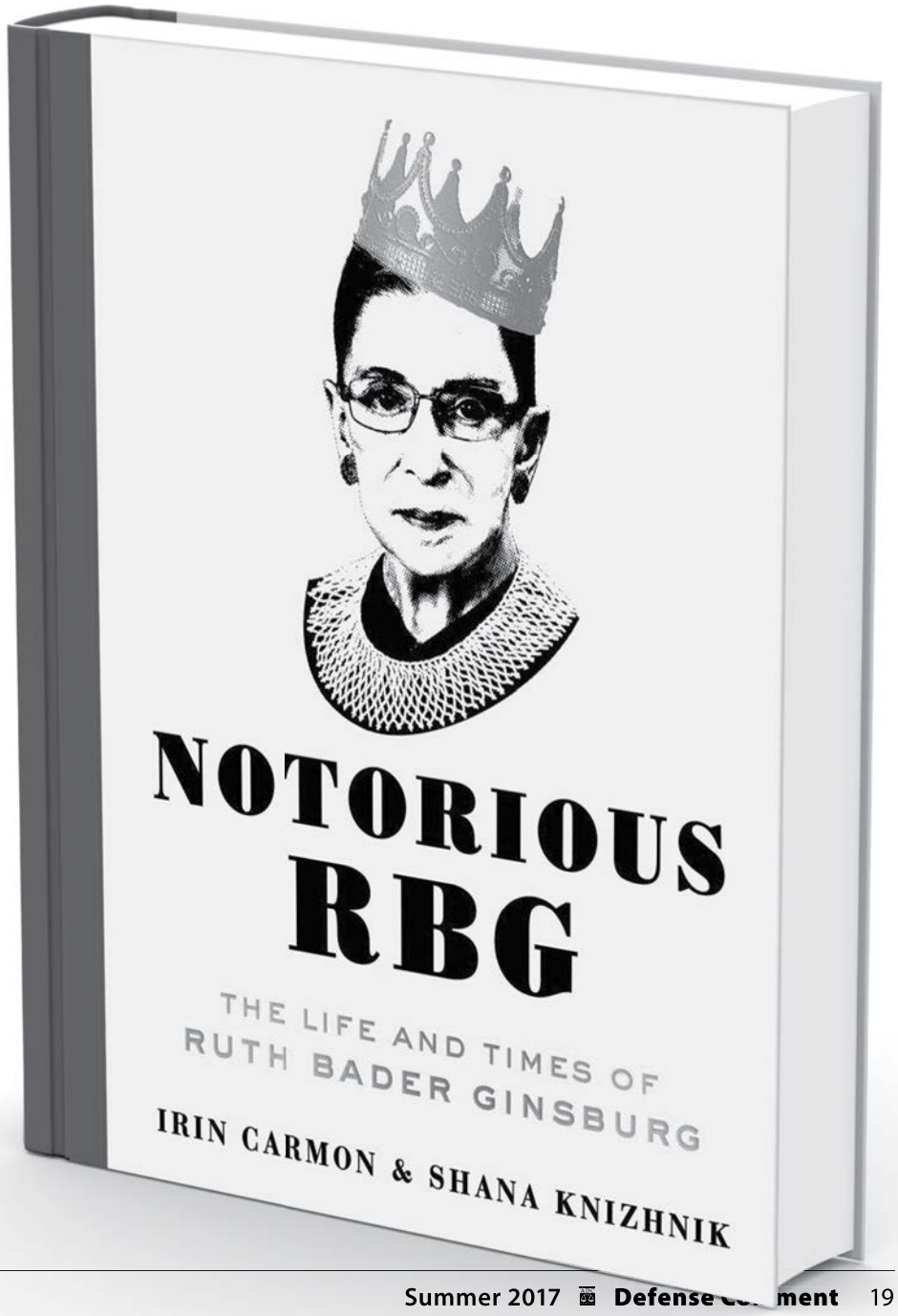

One of her early cases, *Frontiero v. Richardson*, involved an Air Force lieutenant whose husband had been denied the same housing, medical, and dental benefits as the wives of male officers. The U.S. Supreme Court is a famously "hot" bench, and lawyers frequently have trouble getting out a full sentence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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Don Willenburg

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

AROUND THE ADC

Ethics in Advocacy

Patrick Deedon
ADCNCN Board Member

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

Annual Golf Tournament

J. Scott Donald
ADCNCN Board Member

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

Jury Psychology Seminar & Judicial Reception

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

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

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

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

AROUND THE ADC

Diversity Report

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

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

What Is DRI? Can It Help You?

Glenn M. Holley
ADCNCN Board Member

dri The Voice of the Defense Bar™

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

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

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

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

Toxic Torts 2017

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

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

EDITOR'S NOTE:

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

Q What if I make a mistake?

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

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

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

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

Q How do I keep with up with new law?

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

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

The Lawyer's Lawyer

William A. Muñoz
Murphy Pearson Bradley & Feeney

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

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

THE LEGAL SERVICES AGREEMENT – IN GENERAL

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

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

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

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

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

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

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

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

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is simple – scope of duty and statute of limitations.

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

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

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

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

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

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

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

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

Continued on page 26

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

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

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

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

THE TAKEAWAY

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

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

Until next time!

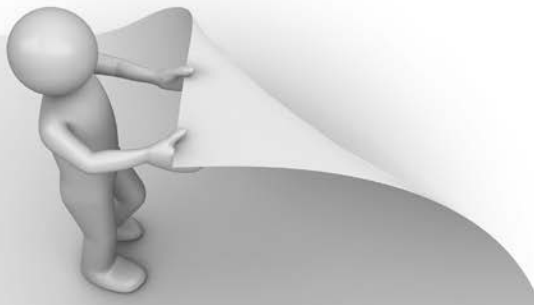
ENDNOTES

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

William A. Muñoz

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

ADC Amicus Corner



By Don Willenburg
Gordon & Rees LLP

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

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

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

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

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

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

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

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

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

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

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

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

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

Continued on page 28

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

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

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

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

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

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

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

Don Willenburg

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

Defense Verdicts

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

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

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

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

DEFENSE COMMENT

E-mail the details of your verdict to:

adcncn@camgmt.com

A·D·C VERITAS

DO YOU AGREE OR DISAGREE?

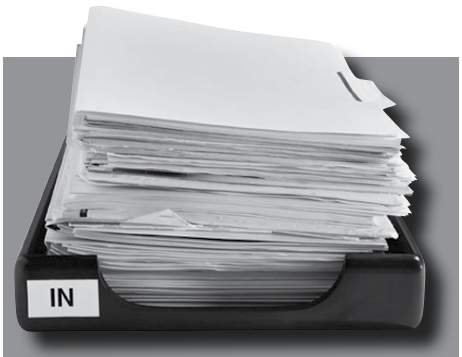
... with the author of an article that you've read in *Comment?*

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

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

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

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



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

We reserve the right to edit letters chosen for publication.

SUBSTANTIVE LAW SECTION REPORTS

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

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BUSINESS LITIGATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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CONSTRUCTION

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

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

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

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

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

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

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

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

INSURANCE

Glenn M. Holley | *Chair*

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

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

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

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

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

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

WILL A POST-ACCIDENT CASH DEPOSIT BEAT PROP 213?

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

1. The Plaintiff's Argument

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

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

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

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

2. What Is Wrong

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

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

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

LANDOWNER LIABILITY

Jeffrey Ta | *Chair*

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

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

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

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

MEDICAL MALPRACTICE AND HEALTHCARE

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

DECEMBER 2017 ADCNC ANNUAL MEETING SEMINAR

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

OPINION TESTIMONY BY TREATING PHYSICIANS

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

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

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

PUBLIC ENTITY

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

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

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

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

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

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

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

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

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

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

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

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

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

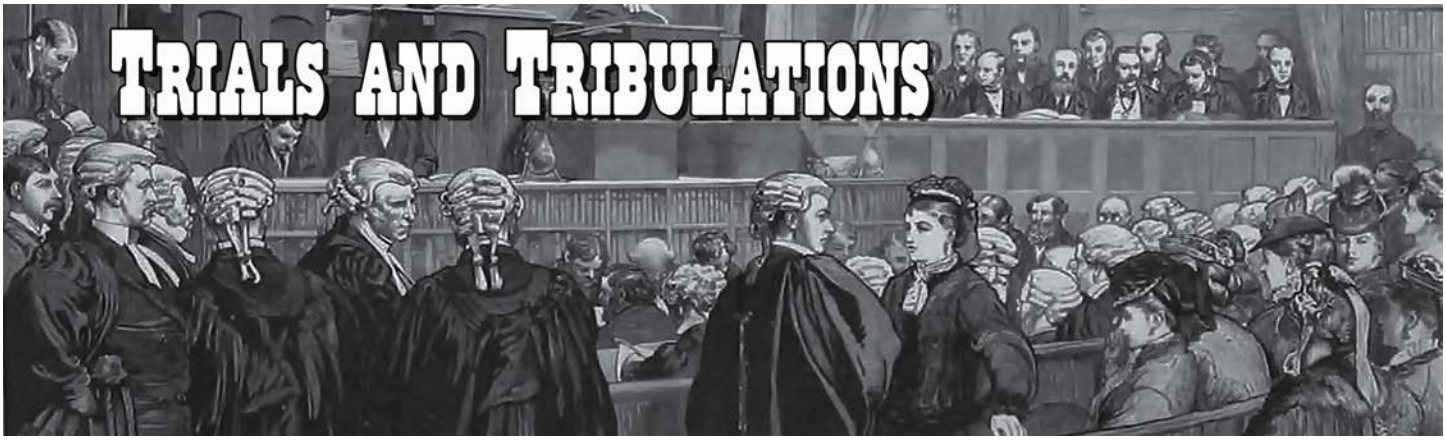
As always, please let us know of any public entity topics you would like addressed either in a Newsflash, Defense Comment magazine, at the annual meeting, or another format. We will also endeavor to keep you updated on any significant updates in public entity law. There are many benefits to being a member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

TOXIC TORTS

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Continued on page 37

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

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

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

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

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

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

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

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

President's Message – *continued from page 2*

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

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

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

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

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

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

San Francisco Suicide Prevention: 415-781-0500

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

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

Alameda County Crisis Support Services: 800-309-2131

Contra Costa County Crisis Center: 800-273-TALK

California Youth Crisis Line: 800-843-5200

The Other Bar: 800-222-0767

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

Sacramento Mental Health Crisis Center – 916-732-3637

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

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

CDC Report

– *continued from page 3*

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

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

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

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

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

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

Association of Defense Counsel of Northern California & Nevada

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(new rev. 07/16)

welcome, new members

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

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Referred By: Clayton Hall

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2017
Calendar of Events
Save the Dates!

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

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