A·D·C VERITAS

DEFENSE COMMENT

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

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2018 ADC President, John P. Cotter

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A·D·C VERITAS

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.***

The ADC Needs YOU in 2018!

John P. Cotter
2018 President

As your 2018 president, I will make sure that the Association of Defense Counsel of Northern California and Nevada (ADC) continues to provide the highest quality educational programs, magazine, networking and e-mail list serve resources available. As important, I want to invite each of you to participate in the ADC by attending events, networking, engaging in online discussions, writing articles and newsflashes and by simply being associated with the ADC.

The ADC is made up of the very best civil defense lawyers. By being a member, you add credibility and as one of the best, your participation makes the ADC great. It is only by having the best that we can provide the best product to our members. Other members, young and old, need your valuable advice and counsel on how to obtain the very best result for clients. So please, join in, work with the ADC and invite other lawyers to join. Share your knowledge and experience so that others can learn from you. New or highly experienced, all of us have something to offer and something to learn.

Starting this year, the ADC's email list serve system will interface with the Association of Southern California Defense Counsel (ASCDC) e-mail list serve system. This will allow defense lawyers throughout the state to exchange information. As a result, you will have resources up and down the state so you can meet your client's needs throughout California and Nevada. Practice in any county with the confidence of local knowledge and support. The expanded service further highlights the ADC's need for you to participate so that the very best information can be shared. You will find that the exposure and networking opportunities that come from your participation will greatly assist others as well as your practice and bottom line.

The ADC not only needs you on email list serve, but also needs you to write articles and "tidbits" for the ADC magazine, *Defense Comment*, an informative and entertaining publication that is provided to all members and every judge in California and Nevada. Share your knowledge, point of view and experience with the judiciary and other ADC members. Your offering to *Defense Comment* can be, but does not have to be, a law review article. The membership and judiciary are interested in hearing about your experiences. Fun and witty offerings are most welcome. *Defense Comment* offers its readers a powerful conduit to you, the source of high quality legal knowledge and experience.

And do not forget ADC seminars and the Annual Meeting. Members, panelists, industry representatives, litigation vendors, exhibitors, etc. need to see YOU at these events. None of us can just sit at our desks and take in everything electronically over the internet. The ADC membership and participants need you to be there in person. Why? Because your presence adds to the quality of the event and maximizes the educational and networking benefits. You

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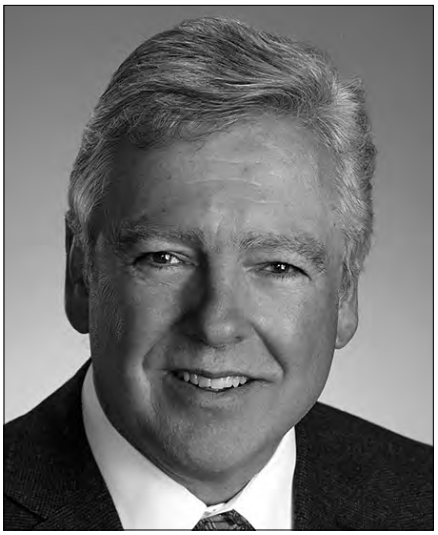

Michael D. Belote
California Advocates, Inc.

Big Issues On Tap for 2018

The California Legislature returned to Sacramento in January for the second year of the current 2017-2018 two-year session, and sure as death and taxes, another 2300 bills were introduced by the time of the February 16 deadline for introduction of new bills. It is safe to say that every major area of defense practice is represented by one bill or another, and there are other bills relating to civil procedure that will affect every ADC member, regardless of practice area.

But first, there are bills remaining alive from 2017 that deserve mention. The California Defense Counsel (the political arm of ADC and the sister organization in Southern California) has been particularly involved in SB 632 (Monning), which proposes a dramatic limitation on deposition length in asbestos mesothelioma cases. Under the terms of the bill, depositions of mesothelioma plaintiffs would be limited to seven hours, unless the defense can convince a judge that the plaintiff's health would not be jeopardized by more time. Even then, depositions would be limited to 14 hours, in the face of local court case management orders generally establishing a 20-hour limit.

In opposition, CDC has argued that the 30, 40, 50 or more defendants commonly named in asbestos actions simply will not have the opportunity to conduct meaningful depositions within the seven-hour limit. The ability to demonstrate in summary judgment that the defendant does not belong in the case will be put at risk. This will keep more defendants in cases where currently the multiplicity of defendants tends to be significantly reduced by the time of trial.

SB 632 has already passed the state Senate, and is awaiting action on the Assembly floor. This puts the bill just two short steps from the Governor's desk, so vigilance is critical.

In terms of new legislation of broad applicability, CDC is sponsoring AB 2651 (Kiley), which proposes a number of civil procedure modifications. These include a change in summary judgment timelines, shortening the notice period from 75 to 35 days, the deadline for oppositions from 14 to 20 days before the hearing, replies from 5 to 10 days from the hearing, and the hearing itself from 30 to 45 days from trial. The bill also changes deadlines for new trial and JNOV motions, relaxes the rules relating to the structure of separate statements, broadens the ability to bring summary adjudication motions, and provides greater sanctions when experts do not produce their files three days in advance of depositions as currently required.

Our friends with the Consumer Attorneys of California have introduced SB 1012 (Hertzberg), designed to enact a new "middle-tier" civil case type. At introduction,

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ASSOCIATION OF DEFENSE COUNSEL
OF NORTHERN CALIFORNIA AND NEVADA
Presented To
ENRIQUE MARINEZ, ESQ.
In Recognition And Appreciation
Of Your Dedicated Service
To This Association And The Legal Community
PRESIDENT
2017

Meet the President
John P. Cotter

Enrique Marinez
ADC Immediate Past President

As the ADC begins its 58th year of service to the civil defense bar, it is time for the ADC membership to get to know its new President John P. Cotter. John's vision for a continued strong and vibrant organization is fueled by his strong family ideals and incessant work ethic. The manner in which John approaches his legal work and his family is the same manner in which John will approach his ADC presidency. It is with great pleasure that I share John's "story."

John was born at St. Mary's Hospital in Long Beach, California in 1963 and grew up in Palos Verdes, California. John is the sixth of seven children born to Timothy "Ted" and Mary Rita Cotter. John's father, Ted, was born in Ireland and immigrated to the United States in 1947. Stymied by the lack of opportunity in Ireland at the time, Ted left Cork Harbor on the U.S.S. America bound for New York in 1948. His plan was to stop in New York and work his way to Los Angeles where his brother and uncle resided. While sailing to the United States, several unsuspecting American sailors invited Ted to join a card game, a decision the sailors ended up regretting. Having spent 10 years in the Garda Síochána (Gaelic for Irish police force) in Dublin, Ted was no stranger to card games. Ted won big in the card game and made some sailors very unhappy. With his winnings, Ted flew first class to Los Angeles instead of taking the train and working his way west. Los Angeles became the "base" for the future Cotter family. Ted's taste for adventure and willingness to take chances have been a constant inspiration to John.

John's father came to the U.S. seeking opportunity and found it. He met his wife Mary Rita Hegener at a party that had supposedly run out of ice for cocktails.

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Ted craftily asked Mary Rita to join him for a trip to the store to get ice and the rest was history. John's mother Mary Rita was the child of German immigrants. John's grandparents Johannes Paulus and Anna Hegener arrived at Ellis Island in 1914 with $172 to their name. They settled in Petoskey, Michigan, a small, northern Michigan town. John's German born uncles served proudly in the U.S. Army in Europe during World War II. John's uncle Norbert Hegener was awarded the Bronze Star for bravery under fire and rescuing wounded soldiers from a burning tank. John's mother Mary Rita was educated as a nurse and eventually obtained a Master's degree in nursing, something that was not too common for a woman in the late 1940's. John's mother was a smart, strong, independent woman who serves as a role model for John's three daughters.

John's parents successfully started and ran their own business to support their seven children. They built a home in Palos Verdes in 1962 to house their growing family. Their goal was to raise good, well-educated children. John's parents never wavered from this goal, devoting their entire lives to their children. Higher education was something on which John's parents placed a high priority. The enterprising and hardworking nature of John's parents formed a basis for how John leads his own life.

College and Law School

John graduated from Rolling Hills High School (now Peninsula High School) in 1981. He attended UCLA for two years, leaving when UCLA discontinued its business major. John finished his undergraduate education at Pepperdine University in Malibu, obtaining a Bachelor's of Science in Business Administration and Finance. After several years working in commercial real estate and shopping center development, John became interested in law. With the enthusiastic support of his parents, John started law school. Having always lived in Los Angeles, John decided to try something different and he accepted admission at the University of the Pacific, McGeorge School of Law in Sacramento, California.

John grew to be interested in law while working in commercial real estate. In law school, John thought he was destined for a career as a transactional lawyer. He never saw himself as a trial lawyer. John met his wife Mary in law school and the two started practicing law in San Francisco. John and Mary welcomed their first child Katie Claire in 1993 and moved back to Sacramento a year later.

Becoming a Defense Lawyer

John's first job began in 1992 with insurance defense firm Kincaid Gianunzio Caudle & Hubert in Walnut Creek. After a 30 day stint doing plaintiff personal injury work, John worked in a staff counsel position for Farmers Insurance for a year and a half. In 1995, John began to work for Diepenbrock & Costa. He became a partner in 1999. In the year 2000, John and Anthony "Tony" Diepenbrock formed Diepenbrock & Cotter LLP, where John continues today. John's partner Tony Diepenbrock is mostly retired but he is in the office weekly, often brain-storming cases and helping John with trial preparation and strategy.

Following the cue of his mentor Tony Diepenbrock, John's practice concentrates on defense litigation with an emphasis on defending heavy truck and equipment accidents, public entity defense, railroad, construction, premises liability, insurance coverage and bad faith and professional negligence. John is a member of the American Board of Trial Advocates (ABOTA), Trucking Industry Defense Association (TIDA), the National Association of Railroad Trial Counsel (NARTC) and several other professional organizations.

John's firm Diepenbrock & Cotter LLP currently has nine lawyers and handles cases throughout California. The firm's attorneys, legal assistants and bookkeeper have been instrumental in John's success and the success of the firm. John values his employees for their loyalty and good work.

While being a lawyer, let alone a trial lawyer, was not something John planned on as a young man, John has ended up loving the profession. The process of working through a dispute and the excitement of the courtroom have provided John with the satisfaction that everyone looks for in an occupation. Running his own firm makes his chosen occupation even more rewarding.

Like most parents, John's greatest joy in life is his children. Like his parents before him, John has placed a high value on his children's education. Katherine "Katie" Claire Cotter (age 24) obtained a Bachelor's degree in Psychology and English from Santa Clara University. Katie is now obtaining her Ph.D. in industrial-organizational psychology from Claremont Graduate University in Claremont, California. Katie will receive an interim Master's degree award this spring.

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John and Mary's second daughter Annie (age 21) is a senior at the George Washington University in Washington, D.C. To her parent's delight, Annie will be entering law school next year, although she has not decided where. John's love of a profession that has been good to him has caused him to be very encouraging of his daughter Annie's interest in law school.

Annie and John

Daughter Gracie (age 17) is a senior at Christian Brothers High School in Sacramento and will start college next year, likely on the east coast. During her four years of high school, Gracie has distinguished herself as a scholar and as an accomplished hunter jumper equestrian. Needless to say, John could not be more proud of his children, not only because of their academic accomplishments, but also because they have grown up to be truly good people.

Gracie and John

An Outdoorsman

Outside of the office, John spends much of his free time boating, snow skiing, attending horse shows, visiting his children and charitable activities. His enjoyment of boating and being out on the water seems to run in the family. John's father grew up with a love for the water and boats. The Cotter Family farm Lisaree near Skibbereen, County Cork, Ireland is situated on Roaring Water Bay near the Fastnet Rock. Ted Cotter learned to fish on his uncle Danny Cotter's fishing boat. After coming to the U.S., Ted was a US Coast Guard Power Squadron member in the 1950's, patrolling Los Angeles coastal waters for the "imminent" Cold War Russian invasion. On John's mother's side, John's uncle Joseph Hegener was an avid sailor and power boat enthusiast. From a young age, John was involved with boats and never misses an opportunity to trailer his own boat to any waterway he finds interesting. His trusty crew is usually daughters Annie and Gracie. Daughter Katie is a "land lover." John's favorite place to boat is Lake Tahoe.

In addition to being on the water, John loves trying to keep up with daughter Gracie skiing down black diamond runs in Lake Tahoe. John started skiing as a child at Mammoth Mountain in the Eastern Sierra. Ted and Mary Rita Cotter brought all seven of their children to Mammoth every year to ski since the early 1970's. John recalls the all-day lift ticket price being $11 in 1972!

As a competitive, hunter jumper equestrian, daughter Gracie and John spend a lot of time at horse shows throughout Northern California. Horseback riding seemed to be the right sport for Gracie and John feels her experience has given her self-confidence, determination and discipline, qualities that will serve her well as she enters her college years.

With his middle daughter Annie in school in Washington, D.C., John is frequently traveling to the U.S. capital to see his daughter. Daughter Katie has studied and lived abroad in Stockholm, Sweden where John has visited as well.

When not working, traveling, boating or skiing, John enjoys reading history, watching documentaries and the History Channel and going to museums. His favorite museums include the World War II Museum in New Orleans and the

Katie and John in Sweden

Smithsonian Institution museums in Washington, D.C.

A Hands-on Volunteer

Much of John's time is also spent performing service work with the Order of Malta. The Order of Malta is a 1,000 year old chivalrous order dedicated to care of the poor and sick without regard to race, religion or nationality. The Order assists local charities throughout the world and the United States with financial support and, most importantly, "hands on" service hours from its members. Service hours include serving meals, cooking and simply sitting and visiting with the sick and elderly. John has been a Knight since 2003, and serves on the Order's Board of Directors. For the past several years, John has served as the Lourdes Pilgrimage Director, an endeavor wherein the Order takes men, women and children suffering from life changing illnesses to Lourdes, France. All of John's immediate family members have come on this rewarding trip with him at various times in their lives.

John has been a member of the ADCNCN since the mid 1990's. He has served on the Board, subcommittees, given presentations and written articles. John highly enjoys meeting with his defense colleagues at Association functions to learn how to be a better lawyer and to just have fun.

John's zest for life and the legal profession will only serve to enhance the ADC and its membership. He looks forward to leading the ADC to its continued prominence as the preeminent civil defense organization. Let's join the ride with him.

DEFENSE COMMENT

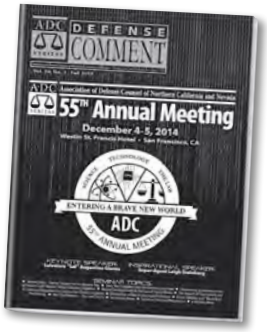
Accepts and Publishes Readers' Articles and Trial Success Stories

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

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

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

All submissions should be sent to *dlevy@smcgov.org* and *ellen@arabian-leelaw.com*.



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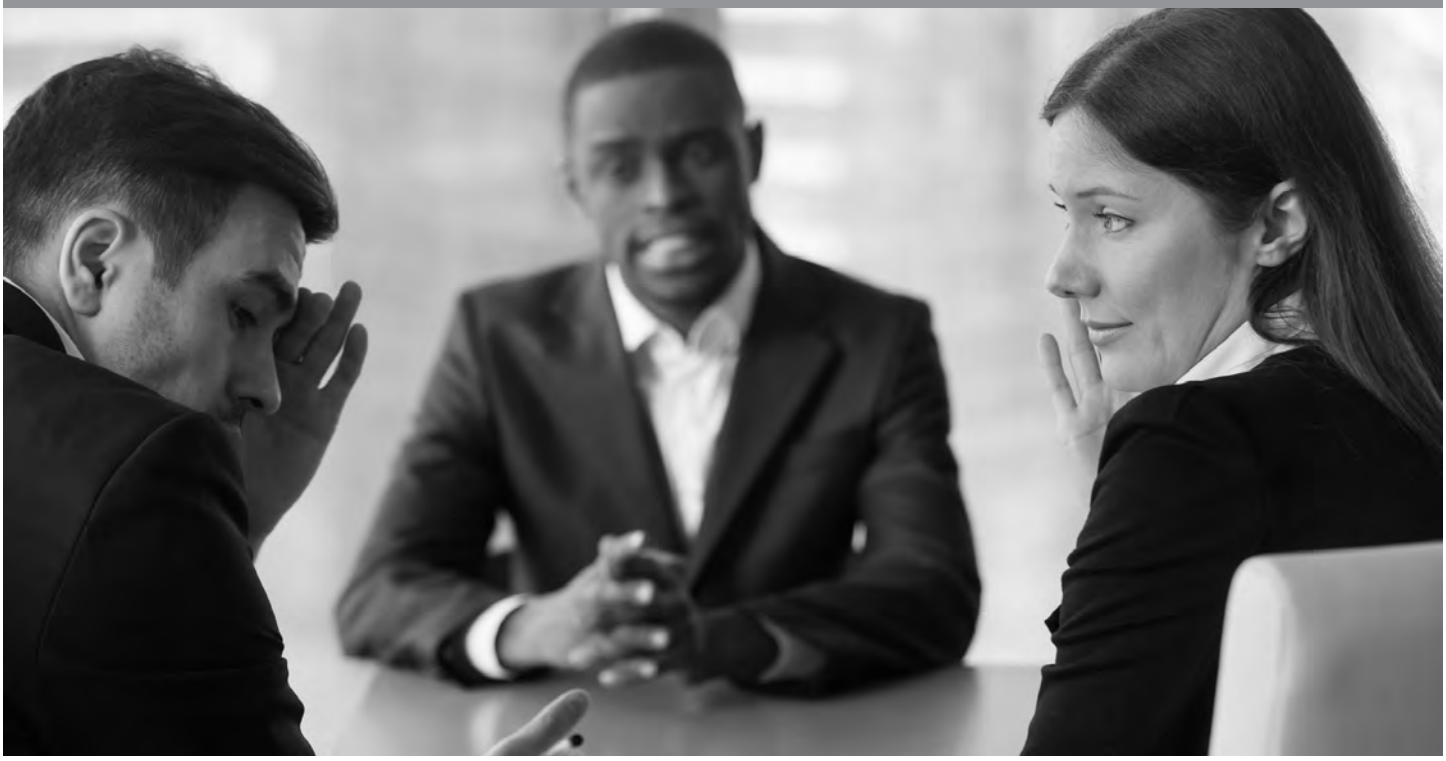

ABA's Anti-Discrimination Revised Model Rule 8.4 Hotly Contested

Karen Goodman
Goodman & Associates

In August, 2016 the American Bar Association House of Delegates approved Resolution 109 to amend Model Rules of Professional Conduct 8.4 to bring into the black letter of the Rules an anti-discrimination and anti-harassment provision. (ABA MR 8.4: *Misconduct*). In March 2017, the California Board of Trustees voted 7-6 (with President Jim Fox breaking a 6-6 deadlock) of sending proposed Rule 8.4.1 to the California Supreme Court.

THE NEW LANGUAGE OF MR 8.4(G)

Under the new Rule, it is professional misconduct for a lawyer to:

> "(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules."

California's proposed Rule 8.4.1 is modeled on the ABA Model Rule 8.4, in that a lawyer is subject to discipline for harassing or discriminating against clients and/or employees based upon a protected class or unlawfully retaliating against persons who complained about harassment or discrimination.

THE ABA STATES ITS PREVIOUS RULE DID NOT GO FAR ENOUGH

In stating the need for the Amendment, the ABA pointed out the inadequacy of the previous Model Rule of Professional Conduct 8.4, adopted by the ABA House of Delegates in August 1998. That Rule held that certain conduct may be considered "conduct prejudicial to the administration of justice" when a lawyer knowingly manifests prejudice against certain groups of persons "while in the course of representing a client *but only* when those words or conduct are also 'prejudicial to the administration of justice.'" (*Revised Resolution 109, 4.)*

The ABA's Report on Revised Resolution 109 states that the adoption of the new Rule puts lawyers on express notice that refraining from discrimination is a specific requirement, not merely a comment regarding the administration of justice, as it had been previously. "Changing the Comment to a black letter rule makes an important statement to our profession and the public that the profession does not tolerate prejudice, bias, discrimination and harassment." (*Id.*)

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Immediate past ABA President Paulette Brown, during public hearing on the proposed amendments to Rule 8.4 said, "Discrimination and harassment ... is, and unfortunately continues to be, a problem in our profession and in society. Existing steps have not been enough to end such discrimination and harassment." Prior to the ABA adoption of the new Rule, twenty-five states had already adopted anti-discrimination or anti-harassment provisions into their own rules of professional conduct, California included. (CRPC 2-400 prohibits a lawyer from "discriminating" in hiring employees or taking on clients).

EACH STATE DECIDES ITS OWN RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS

The ABA's Model Rules of Professional Conduct are not self-executing. Each state drafts and adopts its own rules of professional conduct for attorneys. Therefore, it is up to the discretion of each state to adopt, with or without amendments, any proposed ABA rule. California is in the middle of its second recent attempt to revise its ethical rules.

A number of states have voted against adopting the changes to the Model Rule, including Illinois, South Carolina, Nevada, Montana, and Pennsylvania.

ARGUMENTS IN OPPOSITION TO THE NEW RULE

The Disciplinary Board of the Supreme Court of Pennsylvania stated: " It is our opinion ... that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities."

Some opponents argue that the new rule is too vague, and enforcement would violate due process. Proponents of this argument point out that the ABA BLS Ethics Committee, the Litigation Section, and the Standing Committee on Professional Discipline all raised concerns over whether the Revised Resolution 109 was too vague to enforce.

However, the Revised Resolution was sponsored by the Standing Committee on Ethics and Professional Responsibility, and as revised, was supported by the Standing Committee on Professional Discipline, the Standing Committee on Client Protection, the Standing Committee on Professionalism, and the Center for Professional Responsibility Diversity Committee.

Other opponents raise First Amendment concerns. A joint resolution by the Montana state legislature "condemns the ABA's Model Rule 8.4(g) as a violation of Montanans' First Amendment Rights."

TAKEAWAY:

The new Model Rule seeks to discipline lawyers who *in the practice of law* harass or discriminate against anyone on the basis of "race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status."

Enactment and actual enforcement of Model Rule 8.4 may help promote the public's confidence in the legal profession.

Karen Goodman

Karen Goodman is the founding partner of Goodman & Associates in Sacramento, representing business owners and professionals in and out of the courtroom in matters pertaining to professional liability, real estate and employment. She is certified as a Legal Specialist in Legal Malpractice Law by the California Board of Legal Specialization and she obtained her undergraduate degree from the University of California at Davis, and her law degree from the University of San Francisco School of Law.

The Clean Water Rule: Agency Regulations in Flux Lead to Uncertain Jurisdiction Under the Clean Water Act

Melissa Malstrom
Bledsoe, Diestel, Treppa & Crane

INTRODUCTION

Imagine your client owns a property in coastal California. The land behind their home is occasionally, seasonally inundated with rainwater. About a mile from your client's property is a substantial waterway that empties into a coastal bay. Can your client fill the seasonally inundated land behind their home without fear of running afoul of the Clean Water Act? Imagine your client's intentions are to fill the area and construct a rental unit that would obstruct a nearby neighbor's view. Would that neighbor be able to challenge your client's construction under the Clean Water Act's citizen suit provision? Whether the Clean Water Act would restrict your client's actions currently has no easy answer.

In 2015, the Army Corps and EPA, cooperatively revised their waters of the United States definitional regulations in an attempt to clarify Clean Water Act jurisdiction, resulting in the regulation known as the "Clean Water Rule." What is defined as a water of the U.S. is a critical jurisdictional component of the Act. On February 28, 2017, the President signed an Executive Order directing the Army Corps of Engineers and EPA to review and revise or rescind that rule. The rule, and the resulting uncertainty surrounding it, can have significant implications for property owners and clients.

THE CLEAN WATER ACT

The federal legislation commonly referred to as the "Clean Water Act" (Act) was passed in 1972 with the ambitious goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. The Act prohibits the discharge of pollutants or fill into the nation's waters except as otherwise allowed in the Act, such as with an appropriate permit. 33 U.S.C. §§ 1311, 1344. Permitting can be complicated and costly.

In furtherance of the Act's ambitious goals, compliance monitoring and enforcement actions are conducted by federal agencies. The Environmental Protection Agency (EPA) and the Army Corps of Engineers (Army Corps) are the primary agencies tasked with enforcement. A violator may be subject to extensive civil penalties, up to $52,414 per violation. *See* 82 Fed. Reg. 3633 (January 12, 2017). A violator may also be on the hook for extensive remediation costs to mitigate or reverse any damage caused by their actions.

Section 505 of the Act permits any citizen to commence suit against an alleged violator of the Act, in the absence of agency action and after expiration of the waiting period following notice to the appropriate regulatory agency. 33 U.S.C. § 1365. If a so-called "citizen suit" is successful, the Court may award costs of litigation, including attorney and expert fees in addition to fines and remediation costs. 33 U.S.C. § 1365(d).

WATERS OF THE UNITED STATES

The Act prohibits discharges and fill into "navigable waters." 33 U.S.C. §§ 1311, 1344. Navigable waters are defined as the "waters of the United States." Agency regulations, including the Clean Water Rule, further define and delineate which waters are the "waters of the United States." Courts and agencies have determined that coastal waters, traditionally navigable rivers, and interstate waters are clearly within the purview of the Act and subject to federal jurisdiction. *See e.g.* 40 C.F.R. 230.3(s). What is unclear is whether other "waters" such as wetlands, headwaters of larger water bodies, or tributaries of other traditionally navigable waters, fall within federal jurisdiction under the Act. Regulation of wetlands and other water bodies situated near traditionally navigable waters are an integral piece of the dispute over the Clean Water Rule.

The Clean Water Rule was an attempt by the EPA and Army Corps to clarify the bounds of federal jurisdiction under the

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Act following a number of Supreme Court decisions that questioned the scope of the agencies' jurisdiction. In *Riverside Bayview Homes, Inc. v. United States*, the Supreme Court upheld Army Corps jurisdiction over wetlands adjacent to other waters of the United States, concluding that these wetlands could by regulated under the Act. 474 U.S. 121, 132-134 (1985). In 2001, the Court rejected the Army Corps' assertion of jurisdiction over isolated, intrastate wetlands that had no connection to a water of the United States, but that were used by interstate migratory birds. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*) 531 U.S. 159, 168 (2001). These decisions set the stage for the Court's decision in *Rapanos v. United States* (*Rapanos*), 547 U.S. 715 (2006).

Rapanos considered what constituted "adjacent wetlands" for purposes of the Clean Water Act and whether jurisdiction extended to a wetland that drained or abutted a non-navigable tributary connected to a navigable water downstream. The Court was unable to come to a majority decision, and issued a split 4-1-4 plurality decision. Justice Scalia, writing for a four-justice plurality, found that the Army Corps had overreached, determining that only those wetlands with a continuous surface connection to a water of the United States could be regulated under the Act. *Rapanos*, 547 U.S. at 742. Justice Kennedy, in a concurring opinion, stated that only those wetlands that have a "significant nexus" to traditionally navigable waters, meaning they "significantly affect the chemical, physical and biological integrity" of other navigable waters, may be regulated under the Act. *Rapanos*, 547 U.S. at 780. Justice Stevens' dissent argued that all wetlands that are adjacent to tributaries of navigable waters should be regulated under the Act in conformity with the Act's broad purpose. Justice Kennedy's "significant nexus" test is the narrowest ground of assent, and thus the controlling rule. *See e.g. N. California River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007).

Following *Rapanos*, the EPA and Army Corps issued joint guidance for making jurisdictional determinations under the Act. *See Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States* (Dec. 2, 2008) *www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.* These determinations are often made on a case by case basis, requiring the agency to carefully consider whether the requisite "significant nexus" is present. The uncertainty caused by these case by case determinations led the agencies to issue the Clean Water Rule, in an attempt to clarify these jurisdictional issues.

The Clean Water Rule defines what waters are regulated under the Act. It was an attempt to provide certainty regarding what waters were covered under the Act, while protecting tributaries and downstream waters. Case-specific analysis was limited under the rule, to provide further clarity for stakeholders. The rule was issued in response to requests for further jurisdictional clarity. In crafting the rule, the EPA and Army Corps held hundreds of meetings, reviewed over one

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million public comments, and reviewed over 1,200 peer-reviewed, published scientific studies. *See* EPA, *What the Clean Water Rule Does*, *https://archive.epa.gov/epa/cleanwaterrule/what-clean-water-rule-does.html.*

After the rule's implementation in 2015, it was challenged in a number of federal district courts across the country. The Sixth Circuit issued a nationwide stay of the rule in 2015, pending the outcome of litigation. At that time, the agencies returned to using the prior regulations and applicable case law to determine jurisdictional issues on a case by case basis. The Sixth Circuit stay has remained in place and certiorari was granted by the U.S. Supreme Court. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 137 S. Ct. 811, 196 L. Ed. 2d 595 (2017). The case was heard on October 11, 2017.

THE PRESIDENT'S EXECUTIVE ORDER AND RESULTING AGENCY ACTIONS

The President's February 2017 Executive Order directed the Army Corps of Engineers and EPA to review the Clean Water Rule and issue a proposed rule rescinding or revising the rule. Exec. Order No. 13778 *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule*, 82 Fed. Reg. 12497 (Feb. 28, 2017). The Order directs the agencies to consider interpreting the term "navigable waters" in a manner consistent with Justice Scalia's opinion in *Rapanos*.

In accordance with the Order, the agencies' published a proposed rule on June 27, 2017. The proposed rule is the same rule that existed prior to promulgation of the Clean Water Rule, and that has been in effect since the nationwide stay of the Clean Water Rule was issued. *See* Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (proposed June 27, 2017). The agencies intend to proceed to codify a revised rule following notice and comment rulemaking procedures. *See* EPA, U.S. Army Move to Rescind 2015 "Waters of the U.S" *www.epa.gov/newsreleases/epa-us-army-move-rescind-2015-waters-us* (June 27, 2017).

On November 22, 2017, the EPA and Army Corps published a proposed rule that would stay implementation of the Clean Water Rule for two years, regardless of the outcome of the current litigation. The regulation would add an "applicability date" to the Clean Water Rule to two years after the date of a final rule. *See* 82 Fed. Reg. 55542 (Nov. 22, 2017) The proposed rule would result in continuance of the pre-Clean Water Rule regime, maintaining the legal status quo until the Clean Water Rule can be rescinded or revised in accordance with the President's Executive Order. The agencies are currently reviewing the public comments received for this proposal.

UNCERTAINTY FOR CLIENTS

The Act and the Clean Water rule can be significant for property owners. For instance, application of certain pesticides or fertilizers can implicate the Act, potentially subjecting property owners to enforcement actions and civil penalties, as well as remediation costs, for dispersing chemicals on their own property. 33 U.S.C. § 1311. The Act also prevents unauthorized fill in certain wetlands. 33 U.S.C. § 1344. Given the uncertainty of the jurisdictional rules, it is difficult to know whether the Act would apply in certain instances.

Typically, a jurisdictional determination is made by the appropriate regulating agency; a state agency who administers the Clean Water Act on behalf of the EPA (such as the State Water Resources Control Board in California), the EPA itself, or the Army Corps. However, in citizen suit actions against private landowners, the Plaintiff must demonstrate jurisdiction without the benefit of agency expertise. Given the current ambiguity regarding jurisdiction, defendant property owners are forced to challenge jurisdiction without the aid of clear and specific guidelines.

While the agencies' current proposal may provide some certainty because it maintains the status quo, the need for continued case by case determinations provides little clarity for property owners faced with Clean Water Act suits or enforcement actions. It may be years before the agencies issue a new final rule to replace and revise the 2015 Clean Water Rule.

Melissa Maltrom

Ms. Malstrom is an associate at Bledsoe, Diestel, Treppa & Crane in San Francisco. Ms. Malstrom received her Bachelor's Degree from George Washington University in Washington, D.C. and her Juris Doctor degree from the University of Washington School of Law.

California Appellate Court Breaks New Ground Under CCP § 1038 While Reiterating Need to Follow Appellate Briefing Rules

Andrew T. Caulfield[1]
Caulfield Law Firm

INTRODUCTION

As evidenced by a recent appellate court decision in *Ponte v. County of Calaveras* (2017) 14 Cal.App.5th 551 (writ denied Oct. 18, 2017) ("*Ponte*"), California Code of Civil Procedure section 1038 remains a powerful statutory weapon available to public entities to combat frivolous lawsuits. In *Ponte*, the plaintiff's five-year long, relentless pursuit of a six-figure payout from the County resulted, instead, in a judgment in excess of six figures in favor of the County. The appellate court broke new ground under section 1038 in this landslide repair case, and reiterated the consequences of failing to follow appellate briefing rules in the process.

Section 1038 allows a public entity to recover its reasonable attorney and expert witness fees expended to defend an action where the trial court finds that the plaintiff lacked *either* reasonable cause, *or* good faith, in the filing and maintaining of a lawsuit against a public entity.[2] *Ponte* is the first published decision from California's Third District Court of Appeal to address section 1038 since 1996, and the first appellate decision of any kind applying that statute to public contracting requirements and promissory estoppel.

FACTUAL AND PROCEDURAL BACKGROUND IN *PONTE*

The plaintiff in *Ponte* was an unlicensed contractor who sued the County to recover more than $150,000 for labor and materials relating to his purported repair of a landslide on a slope located at the intersection of a County road and a private driveway. Plaintiff asserted that the County impliedly entered into a contract with him to perform the repair work based on a conversation the plaintiff claimed to have overheard from several feet away between a County employee and a geotechnical engineer hired by the owner of the private driveway.

Plaintiff asserted various causes of action, including breach of contract and promissory estoppel. Before any responsive pleading was due, defense counsel began a series of meet and confer efforts demanding that the plaintiff dismiss the lawsuit, but those efforts were ignored. The trial court granted the County summary judgment on all causes of action on the basis that the plaintiff failed to satisfy local ordinances mandating that contracts with the County be in writing and approved by the Board of Supervisors, among other prerequisites. The trial court also held that promissory estoppel could not be used by a litigant to bypass those contracting requirements.[3] Thereafter, the trial court awarded the County $65,000 in reasonable attorneys' fees pursuant to section 1038 in addition to its prevailing party costs.

The Court of Appeal affirmed both the grant of summary judgment and award of attorneys' fees to the County under section 1038, and ordered that the County be awarded its reasonable attorneys' fees on appeal. The plaintiff then filed a petition for review by the California Supreme Court, which was summarily denied on October 18, 2017. In December 2017, the trial court awarded the County the entirety of its additional $36,676 in attorneys' fees and costs to defend against the years-long appeal and subsequent petition for review.

THE DECISION BY THE THIRD DISTRICT COURT OF APPEAL

By the time the case reached the oral argument stage in the Court of Appeal, only the promissory estoppel claim remained. As to that cause of action, the Court held: "Promissory estoppel cannot be asserted against a public entity to bypass rules that require contracts to be in writing

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or be put out for bids, rules which reflect a public policy to preclude oral contracts or other exposures to liability, including claims of promissory estoppel." *Ponte, supra*, 14 Cal.App.5th at 556.

The Court first noted that the California Supreme Court, in *Long Beach v. Mansell* (1970) 3 Cal.3d 462, 495, n.30, left open a "narrow window for the application of promissory estoppel against public entities," where the facts *"go beyond the ordinary principles of estoppel*." However, as noted in *Long Beach*, *"each case must be examined carefully and rigidly to be sure that a precedent is not established through which, by favoritism or otherwise, the public interest may be mulcted, or public policy defeated*." *Ponte*, at 557. Finding that this was not an "exceptional case," the Court of Appeal held: "[a]llowing promissory estoppel in this case would undermine ordinances setting rules for public contracts, which in part is to preclude oral contract claims." *Id*.

The Court of Appeal then explained that section 1038 "provides public entities a statutory remedy akin to a malicious prosecution action – which is not available to a public entity because of the First Amendment right to petition the government – so that the public fisc is not saddled with unreasonable litigation costs." *Ponte,* at 558-559 (citations omitted).

Citing to large portions of its last published decision in *Hall v. Regents of University of California* (1996) 43 Cal.App.4th 1580, the *Ponte* Court reiterated that the defendant must negate either good faith or reasonable cause to prevail under section 1038. *Ponte*, at 559. However, it affirmed the trial court's finding that Ponte's claims were not "brought or maintained in both subjective *and* objective good faith." *Id*. at 553 (italics in original).

The good faith analysis involves a factual inquiry into plaintiff's subjective state of mind – i.e., did he or she believe the action was valid? What was his or her intent or purpose in pursing it? Because the inquiry as to good faith is factual, the question on appeal is whether the evidence was sufficient to sustain the trial court's finding. Under the words of the statute, "good faith" is linked to a belief in a justifiable controversy under the facts and law. *Id*. at 559.

On the other hand, the "reasonable cause" analysis is determined objectively and as a matter of law on the basis of the facts known to the plaintiff when he or she filed or maintained the action. Once what the plaintiff (or his or her attorney) knew has been determined, or found to be undisputed, it is for the court to decide "[w]hether any reasonable attorney would have thought the claim tenable." This analysis is subject to de novo review on appeal.

The plaintiff argued that because he was purportedly out $150,000, his attempt to collect from the County was not "bad faith," but instead, normal behavior motivated by a hope to get paid. The Court of Appeal held that, while that desire may show the plaintiff's subjective desire to be paid, it did not establish an objectively reasonable basis for this lawsuit, such that any reasonable attorney would have thought the claim tenable. *Id*. at 560.

The Court also rejected Ponte's argument for the application of an emergency exception to government contracting rules: "[a]bsent a declared emergency, and some statute or ordinance authorizing work in such circumstances absent compliance with normal public contracting procedures, no reasonable attorney would believe there was a tenable basis for this lawsuit, which, as we have explained, is based only a purported oral agreement between Ponte and a County employee." *Id*. The appellate court concluded by affirming the trial court's decision that "no reasonable attorney would have thought the claims made were legally tenable." *Id*. at 560.

ADDITIONAL TAKEAWAYS FROM *PONTE*

1. Although Not Statutorily Required, Don't Forget to Meet and Confer!

Ponte demonstrates that courts will look to early, and possibly repeated, notices to plaintiff's counsel that the lawsuit lacks merit, as pertinent to the analysis under section 1038 of whether any "reasonable attorney would have thought the claim tenable." Although the statute contains no meet and confer requirement, the appellate panel asked detailed questions at oral argument relating to the defense counsel's multiple meet and confer efforts. The first paragraph of the decision reflects

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the importance of these efforts: "Ponte disregarded opportunities to abandon his claims after the County provided him with pertinent legal authority demonstrating that his claims lacked merit." *Id*. at 553.

2. Filing a Demurrer May Have an Impact on the Section 1038 Analysis

In this case, the County filed three separate demurrers, each of which were sustained with leave to amend, but without any discussion by the trial court. In his appellate reply brief, the plaintiff attempted to use the County's decision not to demur to the Third Amended Complaint as a basis to establish his reasonable belief in the merits of the action. The Court of Appeal rejected this argument as well, finding that even if they were to consider this belated argument, the Court "fail[ed] to see how the County's failure to demur yet again somehow made Ponte's claim objectively reasonable."

Section 1038 fees cannot be recovered based upon a judgment obtained after a successful demurrer. Consequently, counsel hoping to recover defense fees and costs will need to determine whether to file a demurrer, and risk an adverse decision that could preclude a later award under section 1038, or to file an answer followed by summary judgment (after which the statute's language allows defense costs to be recovered). However, if an untenable claim can be gleaned from the face of the complaint alone, defense counsel may need to be prepared to explain why no demurrer had been filed at the outset of the case.

3. Follow Appellate Procedural Rules

The *Ponte* Court did not hide its distain for the appellant's failure to follow procedural rules, beginning its background discussion by noting "with disapproval the paucity of pertinent record citations throughout Ponte's opening brief," which placed an "unfair burden" on the appellate court. *Id*. at 554, n.1. After noting that a certain portion of Ponte's brief was "devoid of record citations and any discussion of the appropriate standard of review," the court held that "Ponte has not fulfilled his duty to make a coherent legal argument, supported by record citations, demonstrating error." *Id*. at 555.

The Court reiterated that it disregards new claims raised or suggested in the reply brief, and rejects arguments "not fairly embraced by the heading" in the appellate brief. *Id*., at 554-555, & n.1. The decision also underscores the need for clear, separate arguments in the brief. The Court described one section of Ponte's brief as "12 pages of disjointed contentions, with no clear identification of where one ends and one begins." *Id*. at 555.

Most importantly, the Court could have passed on the merits of the appeal regarding the award of fees under section 1038, given its finding that Ponte's "procedural failure" to provide any record citations or legal authority in the portion of his opening brief addressing section 1038 "forfeit[ed] his claim of error regarding the award of fees." *Id*. at 558.

ENDNOTES

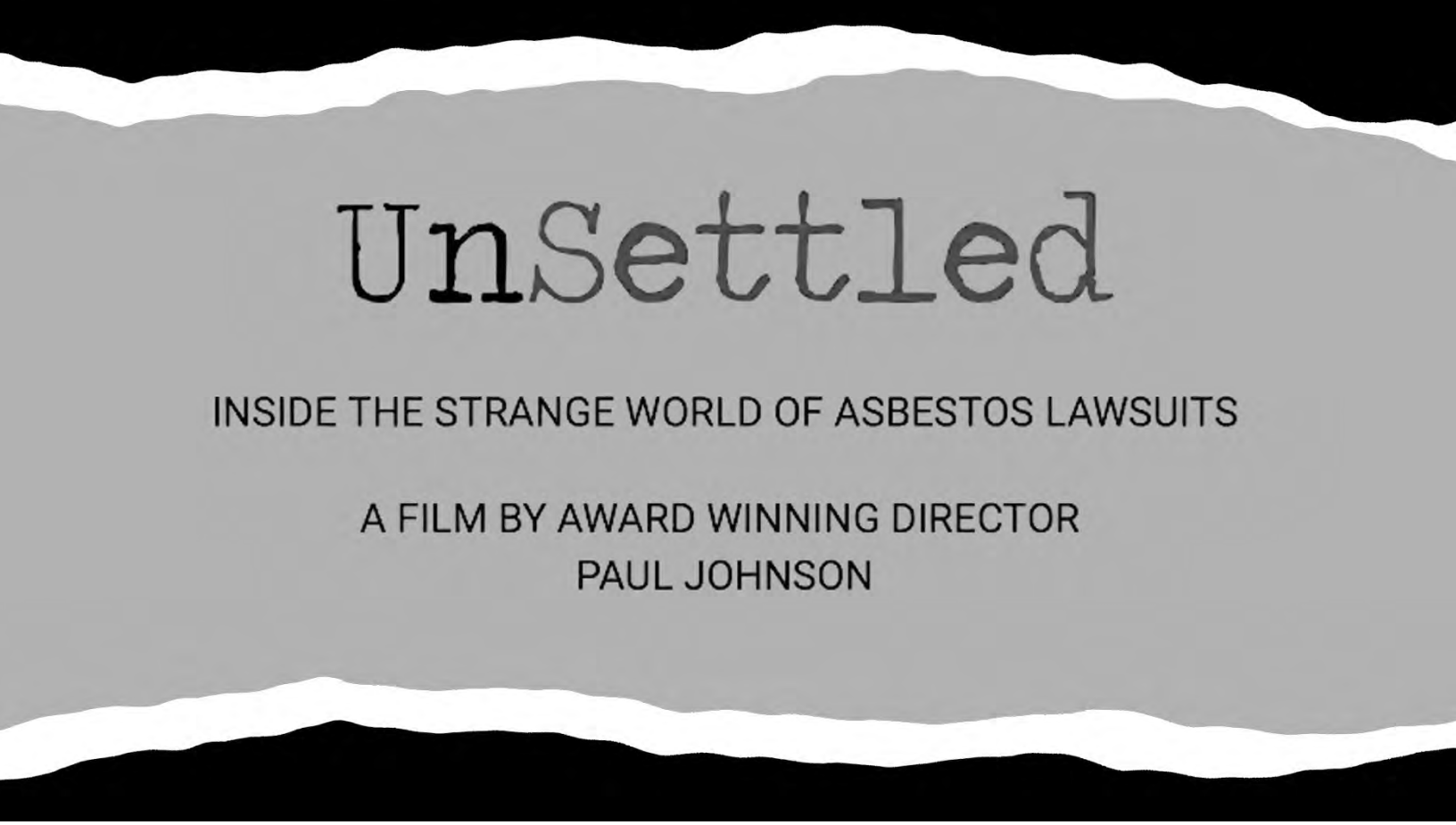
1 The author defended the trial court action, briefed and argued the subsequent appeal, and opposed the petition for review to the California Supreme Court.

2 CCP § 1038; *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 853, & n.1.

3 The County also moved for summary judgment on the basis that the action was barred under California's Contractors State License Law, Business & Professions Code §§ 7000, *et seq*. because the plaintiff was an unlicensed contractor. Neither the trial nor the appellate court reached this issue.

Andrew T. Caulfield

Andrew Caulfield is the managing attorney of the Caulfield Law Firm in El Dorado Hills. Mr. Caulfield received his Bachelor's degree from the University of Oregon, and his J.D. degree from the University of California at Davis. He specializes in the representation of public entities in state and federal courts.



Coming Soon to a Home Theater Near You

Erin McGahey, Sinunu Bruni

Filmmaker Paul Johnson's film, *Unsettled: Inside the Strange World of Asbestos Lawsuits*, offers a glimpse into the world of asbestos litigation and the fraud being perpetrated by a few unscrupulous plaintiffs' firms. What begins as one defendant's story of injustice evolves to a broader examination of the abuse and fraud that has become systemic to asbestos litigation nationwide over the last 20 years. Johnson does not simply present a story of unprincipled practices by one plaintiffs' firm against a particular defendant; the film pulls back the curtain and delves deeper into a myriad of problems that plague asbestos litigation.

The film begins with the story of Lampe Dodge, a car dealership located in Visalia, California, that is sued in an asbestos lawsuit brought by the family of a man who allegedly died of an asbestos-related disease. The claimed exposure was to automotive friction materials purchased from various dealerships located in Visalia in the 1990s. We learn that not only had Lampe Dodge never been sued in asbestos litigation before, but that it did not exist at the time of the alleged exposure.[1] Michael J. Lampe, defense counsel for Lampe Dodge and brother to the owner, agrees to represent the company, confident that once plaintiffs' counsel recognized that the business had no liability that would be the end of it. Such was not the case. Rather, years of lengthy and costly litigation ensued in what Michael Lampe describes as a "shakedown."

New to the "world of asbestos litigation," Michael Lampe shares his communications with opposing counsel as part of his efforts to get his client dismissed. The response he received is troubling to say the least. Unwilling to settle, the case was litigated for nearly 2 years before Lampe Dodge was eventually offered a dismissal, and only after plaintiffs' firm was advised that they would be the subject of a malicious prosecution lawsuit. The overdue offer of dismissal was rejected so that Lampe Dodge could pursue an action for malicious prosecution for suing Lampe Dodge in bad faith.[2] The plaintiffs' firm, interestingly, is not mentioned by name in the film. While many of the scandalous details of the inner workings of the firm are exposed, the identity of the plaintiffs' firm is really of no significance as the investigation spreads beyond transgressions that occur in this particular instance.

PERPETRATING A FRAUD ON THE COURTS

In addition to Michael Lampe, the film includes interviews with lawyers who have been actively involved in asbestos litigation on both sides of the fence, as well as commentary from social advocates and educators who have followed such litigation since massive filings began in the mid-1980s. It was then that plaintiffs' law firms began to file a large number of claims to shape the industry we think of today. The claims typically involved

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shipyard workers or workers in other industrial settings, and were aimed almost exclusively at large product manufacturers that have long since declared bankruptcy (i.e., Johns Mansville, W.R. Grace, and Owens-Corning). Now, many of the defendants that were once considered peripheral have found themselves to be targets in this litigation. There are also those defendants, like Lampe Dodge, who never had anything to do with asbestos products that will find themselves the subject of asbestos litigation.

The film explores the history of questionable conduct by plaintiffs' firms across the country that can be described anywhere from conceivably overzealous to categorically fraudulent. One account is presented by Julie Lyons of the *Dallas Observer.* In 1998, Lyons broke the story regarding the Terrell memo, a "guideline" developed by an asbestos plaintiffs' firm that was distributed to their clients to prepare them for deposition. "Prepare" is a loaded word and in this context is synonymous with coaching. The memo suggests the correct manner in which questions are to be answered, not only with respect to the client's alleged illness but also regarding the "facts" of how they were exposed, with little to no regard for whether it was true.

"DOUBLE DIPPING," ANOTHER QUESTIONABLE PRACTICE

Professor Lester Brickman, an outspoken critic of the abusive practices by plaintiffs' firms in asbestos, discusses in the film the practice of "double-dipping." There are two arenas available to compensate claimants in asbestos litigation: 1) lawsuits against the still-solvent companies, and 2) settlements from bankruptcy trusts. Today there are approximately 60 bankruptcy trusts with billions of dollars available to compensate claimants, with applicants often eligible to collect from many more than one trust. Plaintiffs will file a lawsuit in court alleging exposures against a number of solvent defendants, deny exposures to the bankrupt entities, and collect large settlements from those defendants in the tort system. The same plaintiffs will then file claims with the bankruptcy trusts seeking recovery for the exposures they previously denied in the lawsuit. U.S. Bankruptcy Judge George Hodges criticized this practice in his 2014 *Garlock* decision, wherein he found that plaintiffs' firms had been manipulating the evidence of exposure to asbestos to inflate the settlements received from the Garlock trust fund.

The lack of transparency between the two compensation systems has no doubt denied defendants access to all of the facts and impaired their ability to fully and effectively defend the lawsuits brought against them. The double-dipping scam is one that has received extensive criticism in legal and scholarly publications and is the basis for a fair number of RICO lawsuits against some plaintiffs' firms. It continues to be a topic of legislative reform at both the state and federal level. It is a complex issue that can only be touched upon briefly in the film, but just enough is revealed about the controversy to make one shake their head.

Another troubling issue raised in the film is learning where the settlement monies go. The lingering question raised by the filmmaker is: are the plaintiffs' firms taking too much money? After the costs and attorney fees are recovered by plaintiffs' counsel, it is shocking how little compensation actually goes to the injured plaintiffs. For some, this may be the most unsettling issue of all.

The film is self-described as a "true life legal thriller," opening with ominous music reminiscent of a horror flick with dramatic narration. A John Grisham novel it is not so be prepared to temper your expectations. Nonetheless, setting aside the initial theatrics, this is definitely a compelling film and a must-see for anyone who cares about maintaining and protecting the integrity of our justice system. The film is currently being shown in limited venues but is targeted to be available on Amazon in the Spring of 2018. In the meantime, you can watch the trailer at *http://www.unsettledthemovie.com/.*

ENDNOTES

1 Lampe Dodge did not begin business until 2005 and had purchased assets only and no liabilities from the prior dealership.

2 Another 22 months elapsed before the case went to trial where the court denies plaintiffs' request to amend the complaint for equally unmeritorious allegations of successor liability. The matter is ultimately dismissed.

Erin S. McGahey

Erin McGahey is a partner at the Sinunu Bruni firm in San Francisco, and she specializes in defense of toxic tort cases. Erin received her B.A. degree from University of California, Santa Barbara, and her law degree from the Benjamin N. Cardoza School of Law in New York City.

Meet the New ADC Board Members

MICHELE C. KIRRANE

Michele C. Kirrane is a partner in LeClairRyan's San Francisco office. She has developed a broad litigation practice, with a focus on commercial, products liability and catastrophic loss actions. Michele has significant experience defending manufacturers of industrial machinery, appliances, power tools, household products and various component parts, in matters typically involving fires and explosions. She also advises clients on business litigation, public entity liability, professional liability and premises liability matters. Michele handles large exposure matters in state and federal courts, from intake through trial. She is also a graduate of the International Association of Defense Counsel's Trial Academy at Stanford University.

Michele grew up in Pennsylvania and obtained her undergraduate degree from Syracuse University. She then attended West Virginia University College of Law where she served on the Moot Court Board and competed on the National Moot Court Team. She has resided in California since 1999.

In addition to being a member of ADC, Michele is also active with Defense Research Institute (Women in the Law and Products Liability Committees).

Outside the practice of law, Michele is the proud mother of twin sons (age 6). She and her husband reside in Pacifica. She enjoys traveling, reading and spending time with her family.

SEAN MORIARTY

Sean Moriarty is a member of Cesari, Werner & Moriarty, a Bay Area based defense firm in practice since 1965. Sean graduated from St. Cecilia's grammar school (Irish) of SF in 1986, St. Ignatius high school (Wildcats) of SF in 1990, UCLA (Bruins) in 1994, and University of San Francisco (Dons) School of Law in 1997. Sean handles a variety of civil defense cases, including automobile, premises liability and other matters on behalf of both individuals and business.

Continued on page 20

Sean and wife Tara, also a UCLA Bruin, have three children, Reilly (12), Shalinde (10), and Carrick (7) currently attending St. Cecilia's.

Sean and fellow firm members Stephen Dahm, Andrew Werner, Ian Fraser-Thomson, and father Dennis Moriarty are all ADC members. Ian was past board member of ADC circa 2007. Dennis was past president of ADC in 1997. Ian, Sean, and Dennis are members of San Francisco Chapter of ABOTA with Sean's father being past president of ABOTA in 2001, and CA trial lawyer of the year in 2011.

WAKAKO T. URITANI

Wakako Uritani is a partner at Lorber, Greenfield & Polito LLP in the San Francisco office. She grew up in the Bay Area and is a graduate of Castilleja School in Palo Alto. She earned her undergraduate degree at Scripps College followed by a Juris Doctorate from Santa Clara University School of Law. Over the course of her 16-year career as a defense litigator, her practice has focused on complex litigation matters, including: construction defect, personal injury, premises liability, products liability and professional liability cases. She specializes in the representation of builders in construction defect claims involving condominiums, high rise commercial buildings, apartment, public works, retirement centers and single family homes. She assists clients in navigating intricate issues of risk management and contract interpretation, and excels in dispute resolution.

Wakako loves the San Francisco Giants, her favorite dog is the Havanese and she is excited to serve as Co-Chair of the Construction Substantive Law Section with Jill Lifter and Steve McDonald, and to serve the ADC Board, members and its mission.

TINA YIM

Tina Yim is a partner at Imai, Tadlock, Keeney & Cordery, LLP in San Francisco, California. She graduated from University of Washington and was awarded her Juris Doctor degree from the University of San Francisco School of Law. She has over 10 years of experience in litigation and trial experience in insurance defense litigation, primarily in the field of toxic torts. Additionally, she has litigated landlord/tenant cases for non-profit agencies in San Francisco. Tina has volunteered as a coach for Lowell High School in the San Francisco High School Mock Trial program and now serves as a committee member for that program. She is the chair for the Toxic Torts Substantive Law Section.

In her spare time, Tina enjoys baking (she has two stand mixers!) and raising her two rescue dogs.

A·D·C
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Do you have an idea for a change in the law which might be sponsored by the California Defense Counsel? Most of the 3,000 bills introduced each year come from those affected by the Codes, exactly like you. In order to consider your idea, we need:

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In Memoriam: Patrick A. Long

February 14, 1943 ~ January 11, 2018

Pat Long, former President of our sister organization, the Association of Southern California Defense Counsel, former president of the Defense Research Institute, and longtime outstanding defense attorney, ABOTA member and mediator, columnist for ASCDC *Verdict*, and all-around wonderful person, passed away on January 11, 2018. He regularly attended events in Northern California, and was extremely supportive of our organization. I always enjoyed chatting with him, and as you can see from some comments from ADCNCN members, he will be sorely missed. We extend our condolences to his wife, Casey, and his family and friends (the latter category undoubtedly numbering in the thousands.)

— David A. Levy, Redwood City, ADCNCN Board member, Co-Editor-in-Chief of *ADC Defense Comment*.

Pat was a wonderful colleague, always with an interesting thought or insight, and always appeared upbeat. He was a terrific role model, not only for the defense bar, but to the profession.

— David Daniels, Roseville, former ADCNCN President

Pat Long was the Damon Runyon and the Herb Caen of the California legal scene; always in touch with the fun side of life, food, fun places to go, wine, stories of trials and interesting legal events; I loved his column and always read it first! What I shall really miss is Pat beside me at the piano singing Danny Boy; we sing this for you this week; you are irreplaceable!

— Mike Brady, Redwood City, former ADCNCN President

My heart is saddened by this loss. Pat was a friend and mentor - and, with his wife - music aficionado, whom I have been fortunate to spend time with the last 29 years. Our times at ADC were wonderful, but perhaps I always remember his mentoring in the medical malpractice defense arena most fondly - and the concert we saw at the Stagecoach (Harry Connick, Jr.!) Rest well, dear friend and colleague. You are one of the greats.

— Seana Thomas, Santa Barbara

Pat was a great guy. I remember him years ago on the deck of a bouncing Maui fishing boat, with that grin of his. Sorry to lose him.

— Jack Angaran, Reno, Nevada

I am heartbroken. Pat was just the sweetest, nicest man. Always made me smile. One of a kind – in the best possible way.

—Jeane Struck, San Francisco

Pat was such a nice man; he always had kind words and was a real gentleman.

— Linda Lynch, Burlingame, former ADCNCN President

For the past 35 plus years, Pat Long and his wife Casey, were regulars at the ADC annual meeting, with Pat dispensing collegiality, self-effacing wit, charm and wisdom. I always looked forward to his visit, and missed him greatly this last December. While serving first as president of the South, and then of DRI, he continued to entertain us with his regular column in the *Verdict* magazine – he was a great writer. One of my favorite memories was when Casey surprised him with a car he had always wanted – a vintage Nash Metropolitan. Seeing Pat, not a small man by any measure, wedging into the driver's seat and beaming ear to ear, was a picture I will never forget. The North has lost a great friend.

— John Drath, San Francisco, former ADCNCN President

AROUND THE ADC

dri The Voice of the Defense Bar™

Glenn Holley, who is a member of the board of the ADCNCN, is also continuing his term as the DRI Representative for the State of California. The Defense Research Institute (DRI) is the organization representing defense lawyers on a national level and complements the benefits provided to the members of the local organizations, like The Association of Defense Counsel. If you would like further information about DRI, have a legal issue to research, or are wondering what's happening in another state, feel free to contact Glenn, or go to the DRI web site, *www.dri.org.*

Risk Management for Lawyers

ADC Members attended a very timely presentation on Risk Management; David Brandon, legal malpractice defense attorney from Los Angeles, and Sean Ginty, an attorney based in Chicago who is the CNA Risk Control Director for that company's legal insurance program, spoke about risks inherent in managing data, outsourcing legal work and the expanding task of recognizing and managing potential conflicts in San Jose this past November.

What do Reptiles, Rock and Roll and (W)rit Petitions have in common? They are all subjects that will be presented at the **ADC Annual Meeting** by 1) two nationally recognized experts who will be leading hands on training on how to diffuse the Reptile at deposition, during jury selection and at trial; 2) the legal team that successfully defended claims of plagiarism brought against Led Zepplin's Jimmy Page and Robert Plant in the Stairway to Heaven trial; and 3) a recently retired First District Court of Appeal Justice and former long-time Court of Appeal writ attorney. This, and much more, is coming your way at this year's annual meeting at the **Westin St. Francis** on **December 6-7**. Put it in your calendar now and plan on bringing your associates as there will be programming and networking opportunities exclusively for our NextGen attorneys.

In Memoriam:

ADCNCN notes the passing of past ADC President, **David Freitas** from San Rafael, and long-time members, **Peter Labrador** from San Mateo, **Larry Langley** from Scottsdale, AZ / San Francisco, and **Lois Lindstrom** from Concord.

The Lawyer's Lawyer

William A. Muñoz
Murphy Pearson Bradley & Feeney

Conflict Waivers – Why Do We Need Them?

This is the fourth 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. Previous articles talked about the initial client contact and whether to accept the client, the importance of memorializing the representation once you agree to accept the client's case, and billing practices. Let's now shift gears to the topic that we as lawyers (except for me and those who practice in the area of legal malpractice) do not want to deal with and often overlook or ignore – the dreaded conflict waiver. We are going to talk about why you need them and what should be included in the conflict waiver for it to be enforceable in the event of a challenge.

So let's start with the "why." Why do we need conflict waivers? The answer is straightforward and twofold. First, the California Rules of Professional Conduct require them in certain circumstances. Those circumstances are set forth in Rules of Professional Conduct, rules 3-300 and 3-310. Rule 3-300 requires informed written consent when the attorney has a pecuniary interest in a matter being handled on behalf of the client. The most common example of a Rule 3-300 situation requiring a conflict waiver and informed written consent is when the attorney secures his fees with a charging lien under an hourly fee agreement with a client. (*See Fletcher v. Davis* (2004) 33 Cal.4th 61, 71-72; *but see Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 49-50 (Rule 3-300 not implicated for lien created to secure contingency fee agreement.)

Rule 3-310 is implicated in a number of different ways. However, the most common scenario implicating Rule 3-310 is joint representation – where you as the lawyer are representing multiple plaintiffs or defendants in the same matter. (*See* Rules Prof. Cond., rule 3-310(c)(1).) For example, you are retained to represent the offending lawyer and his or her law firm in a legal malpractice action. Or, you are retained to represent an employer and the alleged harassing employee in a sexual harassment case. While your clients in these types of cases are generally aligned in terms of defending against the claims asserted, you cannot simply agree to represent them and be on your merry way.

Secondly, the reason you need conflict waivers is inherent in the first reason. If you do not comply with the Rules of Professional Conduct, you may be subject to disciplinary action. Furthermore, failing to provide a conflict waiver will set you up for a breach of fiduciary duty claim should the relationship go south at some point in time and you end up in a dispute with your former clients. Lastly, failure to obtain a conflict waiver could result in your disqualification in pending litigation.

So now that you understand why you need conflict waivers, you need to know what must be contained in the conflict waiver for it to be enforceable. Preliminarily, when you are required to have a conflict waiver, do not include it in your legal services agreement. The conflict waiver should be a standalone document so there is no question that the client understands what it is, as opposed to trying to bury it within the legal services agreement where the likelihood of the client reading it is very low. Moreover, if you include the conflict waiver in the legal services agreement and the waiver is ultimately determined to be unenforceable, you run the risk of the entire fee agreement being found unenforceable. Granted, if the conflict waiver is unenforceable, whether your legal services agreement is enforceable may be a moot point as a breach of fiduciary duty claim may be grounds to disgorge any fees earned from inception of the conflict. (*See Clark v. Milsap* (1926) 197 Cal. 765, 785.)

Additionally, do not be complacent and simply use the firm's template conflict waiver to meet your fiduciary obligation. Each case is different and may present different consequences that need to be disclosed. Thus, your conflict waivers should be tailored to address the facts of your case.

As for the content of the conflict waiver, there are four essential elements. First, the attorney should identify the facts of the given case and reason for requesting a conflict waiver citing to the particular Rules of Professional Conduct that are applicable under the facts of the case. For example, the attorney has been asked to

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represent multiple defendants in a litigation matter. In the conflict waiver, the attorney should state that he has been asked to represent Defendants A, B and C in the *Smith v. Jones* litigation and that Rule of Professional Conduct, Rule 3-310(C)(1) requires that the attorney obtain informed written consent of each prospective client before representation can begin.

Second, the attorney should advise the prospective clients what informed written consent means. This is expressly set forth in Rule 3-310(A)(1)-(3) and typically should be cited verbatim so there is no misunderstanding. Generally speaking, this requires the attorney to provide the prospective clients with all reasonably foreseeable consequences (i.e., potential conflicts) that could arise in the litigation. It is worth noting that this is not a one-time disclosure. The duty to disclose potential or actual conflicts is an ongoing obligation of the attorney. Should circumstances develop that an unforeseen potential conflict arises during the representation, another conflict waiver is necessary.

By way of example in the joint representation context, the clients should be advised regarding the implications of Evidence Code section 962. Under Evidence Code section 962, while the attorney-client privilege would protect communications between the defendants and counsel in the subject litigation, it would not protect the communications between any one of the defendants and counsel in the event of a future dispute between the defendants. Thus, the potential conflict is that if such a dispute arose, the attorney would have a conflict and could not represent one of the defendants against the other.

As another example, the jointly represented defendants may not agree on litigation or settlement strategy. Some may want to fight the claims because they are frivolous while others understand the business side, recognizing that the claims may be frivolous, but it is not worth the headache of litigation to prove it; and thus, resolution is the more preferred route. This should be disclosed to each of the prospective clients.

Lastly, another example is if intentional conduct is alleged giving rise to potential punitive damages. Depending on the nature of the relationship between the respective clients (i.e., employer-employee, attorney-law firm), the potential conflict that could arise in this context is respondeat superior liability. In the employer-employee context, if the alleged harasser employee is non-management, then the only way the employer is liable for punitive damages for the conduct of the employee is if the employer knew of the conduct and ratified it. Thus, the potential conflict is the fact that the employer will disclaim any knowledge in order to protect itself from punitive damage exposure. This must be disclosed to each client, but in reality, the best practices in this scenario would be to have separate counsel for employer and employee.

The list can go on and on, but you should have the gist of what reasonably foreseeable consequences should be disclosed. So once you have set forth the facts of the particular case at issue and applicable Rules of Professional Conduct, as well as the potential consequences of the representation set forth in your conflict waiver, you should be ready to go, right? Unfortunately, no.

There are two additional and very essential items needed in the conflict waiver. After providing the facts and potential adverse consequences that could arise in the representation, you must advise the clients that they have the opportunity to seek the advice of independent counsel to review the waiver to determine whether they should sign it. Include at the end of this particular paragraph a line for the client to initial indicating that the client has had the opportunity to seek the advice of independent counsel and has waived his or her right to do so. Make sure the client understands this and signs it!

Secondly, you need the actual waiver for the client to execute. The waiver is straightforward and should contain words to the effect:

> I have read Law Firm's January 1, 2018 letter regarding the potential conflicts of interests that may arise from the joint representation of A, B and C in the matter entitled *Smith v. A, et al.*, Sacramento County Superior Court, Case Number 12-CV-34567.
>
> I understand the disclosures set out in Law Firm's January 1, 2018 letter. I acknowledge having been advised to seek and obtain legal advice from independent counsel of my choosing, and have had the opportunity to do so. Having been so advised, I hereby agree to waive any potential conflict of interest and further agree to Law Firm's continued and future representation of A, B and C.

Do not have the client execute the conflict waiver in your office. Send it to the client and give the client an opportunity to review it and seek the advice of independent counsel, asking that the client return the executed waiver within a reasonable period of time. If you have not received the executed waiver within two weeks, follow up with the status and continue to do so until your client either provides you with the executed waiver or tells you that they will not execute it. If the latter situation arises, immediately terminate the relationship in writing citing the lack of executed waiver because you cannot continue to represent that client under Rule 3-310.

While most attorneys find them inconvenient and unnecessary because the clients will never sue them if things do not work out (wishful thinking!), conflict waivers are a necessary evil in the practice of law. The Rules of Professional Conduct require them and the small amount of time spent actually preparing them is well worth it down the road. Good luck!

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.

ADC Amicus Corner

By Don Willenburg
Gordon Rees Scully Mansukhani, 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 edition of *Defense Comment,* the committee's activities have included being on the winning side of two unanimous California Supreme Court decisions.

1 ***McMillin Albany LLC v. Superior Court*** **(Jan. 18, 2018, Case No. S229762), – Cal.5th –: Right to Repair Act applies to common law construction defect claims.**

Jill Lifter of your ADC-NCN amicus committee authored an amicus brief supporting victorious defense interests in the construction industry.

Prologue: *Aas v. Superior Court* (2000) 24 Cal.4th 627 famously ruled "that the economic loss rule bars homeowners suing in negligence for construction defects from recovering damages where there is no showing of actual property damage or personal injury." In response, the Legislature enacted the Right to Repair Act, which "establishes a prelitigation dispute resolution process that affords builders notice of alleged construction defects and the opportunity to cure such defects, while granting homeowners the right to sue for deficiencies even in the absence of property damage or personal injury."

In *McMillin Albany*, the court unanimously held that the Act's prelitigation notice and cure procedures apply broadly, including to "a common law action alleging construction defects resulting in both economic loss and property damage."

2 ***Vasilenko v. Grace Family Church*** **(2017) 3 Cal.5th 1077: no private duty to provide safe crosswalks on public streets.**

Plaintiff went to a church event. The church had an overflow parking lot across a busy street, along a stretch that lacked a marked crosswalk or traffic signal. Plaintiff jaywalked, at night and in the rain, and the predictable happened – he was hit by a car and sued the church. The Court of Appeal ruled that plaintiff has a cause of action against the church. The Supreme Court reversed, finding that where the church did nothing to increase the risk of crossing the street, it could not be liable. We and the ASCDC filed an amicus brief in support of the defense in this case and participated in a mock argument to help the defense advocates prepare.

3 ***James River Insurance Co. v. Superior Court,*** **Case No. B285302: "common interest" protection among litigants.**

The writ petition in this case presented an important question about the attorney-client privilege and work product doctrine in the context of the common interest doctrine – that is, where protected information is shared with third parties to further the parties' mutual interests. The ADC-NCN took the unusual step of requesting that a Court of Appeal decide a writ petition on the merits, without taking a position on which side the ruling should favor. Roughly 90% of all petitions are denied without comment. A month after the ADC-NCN's letter, the parties settled, so the Court of Appeal denied the petition as moot.

4 ***Greystone Homes, Inc. v. Superior Court,*** **Case No. A153068: statute of limitations for construction defect claims**

This case addresses the distinction between statutes of repose and statutes of limitation and the continued applicability of the three and four year statutes of limitation contained in Code of Civil Procedure sections 337 and 338 to residential construction defect claims subject to The Right to Repair Act. This time, the ADC-NCN requested both that the Court determine the issue on the merits, and that the court determine that those statutes of limitation apply to Title 7 latent defect claims. The case remains pending at press time.

5 ***Chino Valley Unified School Dist. v. Superior Court,*** **Case No. S246463: plaintiff counsel surreptitiously sent expert to interview defense employees**

We will be supporting the petition for review to help prevent egregious plaintiff counsel shenanigans. The Court of Appeal let stand, without ruling on the merits of a writ petition challenging, an order denying a defense motion to exclude plaintiff's expert witness. The first "issue presented" in the petition explains: "In a student's personal injury lawsuit against his school

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district, is it a violation of Rule 2-100 of the Rules of Professional Conduct for the student's non-percipient, retained expert witness on the question of damages to gain access to the student's school within the defendant school district without the knowledge or consent of district counsel and to conduct both unsupervised observations of the student in class and private interviews with his teachers and staff?"

6 ***Ochoa v. Ford Motor Co.,*** **Case No. B287367; unexplained denial of "confidential" designation to technical specs and other documents.**

We will shortly support the writ petition in this case. Defendant produced thousands of pages of documents, which had been ruled and treated as confidential in other, related litigation. In this case, however, the trial judge ruled, without explanation, that the documents were not entitled to that protection.

7 ***Frost v. Eco Dive Center*****, Case No. B279482: strengthen standard for "gross" negligence, and enforce liability waiver.**

We will be writing a letter urging publication of this case. An advanced scuba student lied about his physical condition, died during a night dive class in rough waters, and his widow asserted "gross negligence" to try to avoid the standard-form liability waiver, which under the law precludes claims for ordinary negligence but which does not for gross negligence.

The decision has multiple benefits to defense interests. It relies on facts showing *some* care was taken to hold that there was no triable issue as to "gross negligence," "want of even scant care" or "an extreme departure from the ordinary standard of conduct." The decision rejects plaintiff's reliance on a scuba safety standard because "too vague." The decision took special note of the fact that it was an advanced class, affecting the risks to which instructors could be expected to expose students. Finally and more generally, the decision supports the issuance of a writ for the mistaken denial of summary judgment – not novel, but a welcome recognition of a weapon in the defense arsenal.

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 is Chair of the Amicus Committee of ADCNCN, and chair of the appellate department at the Gordon Rees firm in San Francisco.

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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CONSTRUCTION

Jill J. Lifter | *Co-chair*
Steven E. McDonald | *Co-chair*
Wakako Uritani | *Co-chair*

Jennifer Wilhelmi-Diaz has made a career change and is now working in-house at a construction company, so she is no longer co-chair of this committee. A big "Thank You!" to Jennifer for her years of service! We congratulate her, wish her the best, and will sorely miss her contribution.

The committee welcomes Steve McDonald, who has been an active participant and an essential contributor to countless seminars for many years, and Wakako Uritani, who has been an enthusiastic supporter of all that we do, to positions of leadership. They will provide invaluable support and assistance in keeping us on track with meeting the needs of our members. Please contact any of us with your thoughts and suggestions as to how the committee can be of service. We welcome your active participation. We all look forward to seeing you at our annual seminar back at the Walnut Creek Marriott on April 13th!

As previously reported, the 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 Courts of Appeal, 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

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for defective conditions that resulted in physical damage to the home? And now we have the answer in *McMillin Albany LLC v. Superior Court* (Jan. 18, 2018, Case No. S229762), – Cal.5th–: a resounding *YES*! The Court found that the legislative history and the text of the [Right to Repair] Act "reflect a clear and unequivocal intent to supplant common law negligence and strict product liability actions with a statutory claim under the Act."

Notwithstanding that the present case did not involve the emergency action scenario, the Court also expressly disapproved *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove LLC*, *supra*, 219 Cal.App.4th 98, and *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, to the extent they are inconsistent with the views expressed in its opinion. Although the facts in *McMillin* did not present the "emergency" situation which led to the Court of Appeal's holding that common law claims for property damage caused by construction defects were not barred by the Act in *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove LLC* (2013) 219 Cal.App.4th 98, the homeowners argued that the pre-litigation procedures could not rationally be applied in such a situation and from there inferred that the Act and its procedures were not intended to extend to defects which resulted in actual damages. The Court disagreed. The opinion notes that the Act imposes on homeowners a general duty to act reasonably in order to mitigate losses and the builder remains liable for "damages due to the untimely or inadequate response ... to the homeowner's claim," citing Civil Code Section 945.5(b). Thus, availing itself of the full time limit to respond may subject the builder for liability if such a response is untimely or inadequate and a homeowner may not be prejudiced by acting immediately if such immediate action is necessary to mitigate damages.

The ADCNCN submitted an *amicus* brief in support of McMillin's position in conjunction with the ASCDC last year. Please be sure to contact the construction and amicus committees if you have a case presenting an appellate issue of general interest to the defense and would like to enlist the ADCNCN's assistance by submission of an amicus letter or brief.

We encourage members of the construction substantive law committee to submit Newsflashes as pertinent cases and statutes come to your attention. Let's work together to stay informed about the latest developments!

EMPLOYMENT

William A Muñoz | *Co-Chair*
Marie A. Trimble Holvick | *Co-Chair*

The California legislature has been active in the employment law arena. Highlights include new laws on immigration compliance, parental leave, and requests for criminal history and salary history.

With respect to immigration, AB 450 was enacted in response to concerns over raids by federal Immigration and Customs Enforcement agents ("ICE"). AB 450 prohibits employers from voluntarily consenting to the search of private spaces, such as breakrooms, kitchens, and offices. AB 450 also prohibits the voluntary production of I-9 forms absent a court order and Notice of Inspection. Violation of AB 450 can result in hefty fines for employers

The new Parental Leave Act requires employers with 20 or more employees to provide 12 workweeks of unpaid, job-protected leave for the purpose of bonding with a new child. San Francisco took this measure one step further, and instituted the Paid Parental Leave Ordinance. Effective January 1, 2018, all San Francisco employers with 20 or more employees are now required to provide supplemental compensation for a 6-week leave period.

Lastly, two new laws require employers to update their job applications. First, AB 168 now prohibits employers from asking for or considering an applicant's prior salary or benefits. AB 1008, known as "Ban the Box," prohibits employers with 5 or more employees from asking for criminal conviction history prior to a conditional offer of employment.

The Employment Committee is actively planning an employment seminar for June 15. We welcome your ideas for presentation topics and speakers. We encourage participation from Committee members. If you are interested in assisting with seminar planning, please contact Marie Holvick *(mholvick@grsm.com)* or Bill Muñoz *(wmunoz@mpbf.com).*

INSURANCE

Sean Moriarty | *Co-Chair*
Don Willenburg | *Co-Chair*

Several members (Cynthia Lawrence, Dean Pappas, Blaine Smith, Glenn Kenna, Ryan Keller and Glenn Holley) met at the breakout session at the ADC's annual meeting in December. The group discussed the potential of reaching out to other ADC members that may be interested in insurance issues and how best to go about it. Ryan is looking into apps such as "telegram" that would act as a "community" for discussion with likeminded members. This would basically be an e-mail group/ system to share information.

The group also discussed the potential for seminars, brown bags, a presence at the annual meeting and maybe basic training. One of the topics would be "A to Z Insurance" i.e. insurance coverage for litigators. Another hot topic is coverage in construction defect and additional insureds. There will also be newsworthy events should the Restatement be finalized in May as expected.

If you have ideas or interest in topics you'd like to see covered – or speak on yourself! – please contact either of your sub law committee chairs, Don Willenburg at *dwillenburg@grsm.com* or Sean Moriarty at *smoriarty@cwmlaw.com.*

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LANDOWNER LIABILITY

Ryan T. Plotz | *Co-Chair*
Jeffrey V. Ta | *Co-Chair*

As of January 1, 2018, a number of new laws took effect that affect landowners in the rental housing market. AB 291, also referred to as the Immigrant Tenant Protection Act, bars landlords from disclosing information about tenants' immigration or citizenship status if the intent is to influence them to vacate a dwelling, and bars landlords from harassing or discriminating against tenants based on their immigration status or perceived immigration status. The law imposes civil penalties against a landlord who violates the Immigrant Tenant Protection Act.

Under AB 646, a landlord with actual knowledge that the property is in a flood hazard area will have to disclose this information to prospective tenants. Property owners with actual knowledge include those notified by government agency, as well as owners required to carry flood insurance for their property. The disclosure in the rental agreement is required by July 1, 2018.

Finally, and as most of you know, Provisions of Proposition 64 regarding the lawful sale and subsequent taxation of recreation marijuana in California went into effect on January 1, 2018. Legalizing the sale of marijuana for recreational use does not impede a property owner's ability to ban the smoking of marijuana on the property. In fact, Prop 64 expressly allows owners of private property the ability to ban the smoking of marijuana on their property. However, Landlords who choose to prohibit marijuana smoking should expect to continue to face issues with tenants claiming the need to smoke marijuana for medicinal purposes, which raises disability related accommodations issues.

The Landowner Liability Section welcomes all input from ADCNCN members regarding their interest in the above topics, as well as other topics of current interest. Please contact Chair Jeffrey Ta with questions and/or ideas for future legal updates or seminar topic ideas.

LITIGATION AND BUSINESS LITIGATION

James J. Arendt | *Co-Chair*
William L. Cogshall | *Co-Chair*
Michelle Kirrane | *Co-Chair*
Michael Pintar | *Co-Chair*

DRAFTING ARBITRATION PROVISIONS; GET WITH THE TIMES!

With a new year upon us, the Business Litigation and Litigation sections thought the time is right to spread the word about arbitration provisions in commercial contracts. While lawyers[1] always attempt to keep on top of the latest cases and statutes involving their respective practices, some practitioners fail to advise their corporate clients on revising outdated arbitration provisions in contracts. Many businesses continue to use old, antiquated arbitration provisions, often taken from examples from arbitration service providers.

Lawyers continue to write articles, hold seminars and advise clients as to the pros and cons of binding arbitration as a tool for alternative dispute resolution. While fashionable for a time, many practitioners and their clients are forgoing arbitration and instead electing traditional avenues of resolution through the court system. The complaints about arbitration are often the same: 1) does not actually save money; 2) is not necessarily more expedient; 3) no right to appeal; 4) arbitrator may not follow the law; and 5) arbitrator may "split the baby." While the fifth item may not be resolved by way of the appropriate crafting of contractual arbitration language, the other common complaints can be resolved with a little insight into the status of the law and contractual arbitration provisions.

The statutory provisions governing arbitration utilizing California law can be found at *Code of Civil Procedure* §1280 *et seq.* (aka The Arbitration Act). *The Arbitration Act* at §1286.2 sets forth the grounds for vacating an arbitrator's award. Those grounds are extremely limited: 1) the award was procured by corruption, fraud or other undue means; 2) there was corruption in any of the arbitrators; 3) the rights of the party were substantially prejudiced by misconduct of neutral arbitrator; 4) the arbitrators exceeded their powers; 5) parties were substantially prejudiced by the refusal to postpone the hearing; or 6) the arbitrator failed to disclose grounds for disqualification. In other words, good luck having an arbitration award vacated even if the arbitrator failed to follow the law.

Since 2008 businesses have had recourse for a wayward arbitration award. The California Supreme Court decision in *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal. 4th 1334, is the first place a lawyer advising businesses on updating arbitration provisions should look. In *Cable Connection,* the Supreme Court was presented with two questions: (1) may the parties structure their agreement to allow for judicial review of legal error in the arbitration award; and (2) is class-wide arbitration available under an agreement that is silent on the matter? Traditionally, the courts have been reluctant to overturn, or even review for that matter, an arbitrator's decision. *The Arbitration Act* provides that arbitration provisions are "valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."

The *Cable Connection* decision, however, allows parties to a contract to allow for judicial review of an arbitrator's award that is consistent with the terms of the arbitration provision. Given this reality, lawyers should advise clients to incorporate additional language into their arbitration provisions consistent with the court's ruling in *Cable Connection*. By doing so, it will lessen the chance that the arbitrator will step beyond established California law. In the event the arbitrator does take it upon themselves to still forgo following the law, either party can seek judicial review.

The contract at-issue in *Cable Connection*, provides useful guidance for potential language to include in an arbitration

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provision. In addition to the standard arbitration provision language, the following could be added:

> "The arbitrator[s] shall apply California substantive law to the proceedings, except to the extent Federal substantive law would apply to any claim. The arbitrator[s] shall prepare in writing and provide to the parties an award including actual findings and the reasons on which their decision is based. The arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error."

As trusted advisors to our clients, get with the times and not fall back on the use of regurgitated arbitration provision language. Your clients will thank you!

ENDNOTES

1 TRIVIA: What is the difference between a "lawyer" and an "attorney"? (Tip: there is one: look at the code.)

MEDICAL MALPRACTICE AND HEALTHCARE

Glenn M. Holley | *Co-chair*
D. Marc Lyde | *Co-chair*

In *Stewart v. Superior Court,* 16 Cal. App.5th 87 (2017), the Court of Appeal considered whether care provided to a patient over the objection of his appointed health care agent constitutes elder abuse. Plaintiff's decedent, Anthony Carter, was a 78-year-old man with multiple medical problems. He had previously appointed Maxine Stewart, his longtime companion and a registered nurse, as his agent for health care decisions under a durable power of attorney. This designation had been in place for over 10 years.

In February, 2012, Carter was admitted to the hospital with multiple medical problems. He was experiencing confusion and unable to meaningfully participate in the medical decision-making process. As his condition declined, he began to manifest cardiac arrhythmias, prompting his physicians to recommend placement of a pacemaker. Stewart refused to consent to this procedure, arguing that the arrhythmia was due to a pre-existing condition, sleep apnea. She requested a second opinion, but this was not provided.

The hospital held an ethics committee meeting to which Stewart was not invited. The committee determined that Stewart's designation as Carter's agent for healthcare decisions could be voided because she was unreasonably failing to authorize lifesaving measures as provided by the durable power of attorney. Over Stewart's continued objections, the pacemaker was implanted without her knowledge. However, Carter suffered a cardiac arrest later that day. The pacemaker was removed two days later and it was determined that it had not been implanted correctly. Carter, who experienced hypoxic brain damage during the cardiac arrest, ultimately died in an acute care nursing facility.

Stewart, as Carter's representative, brought suit against the hospital and physicians involved under a number of theories, including one for Elder Abuse (Welfare & Institutions Code §15610.57). The hospital defended the action by filing a Motion for Summary Adjudication on the Elder Abuse claims, and other causes of action. The hospital contended that the ethics committee meeting regarding Stewart's agency for healthcare decisions for Carter did not rise to the level of reckless conduct required to maintain an Elder Abuse claim. The trial court granted the motion as to the Elder Abuse claim. Stewart appealed.

The Appellate Court found that there were triable issues of fact as to whether the hospital's conduct was actionable under the Elder Abuse statute. Since Carter depended upon the hospital to meet his basic medical needs, the Court held that a trier of fact could find that the hospital had a custodial relationship that could support a neglect claim. The Court further concluded the basic right of personal autonomy extends to the right of determining whether to refuse medical treatment. The Court was also concerned that the conduct of the ethics committee meeting without notice to or attendance by Carter's chosen representative constituted denial of fundamental due process. The Court concluded that Stewart's opposition to the pacemaker implantation was rational and that the hospital's decision to proceed over her objection could rise above professional negligence to the level for elder abuse.

Another area of interest involves the interplay between the collateral source rule and Medicare. In a typical lawsuit, the collateral source rule makes inadmissible any evidence that a plaintiff's medical bills were paid by medical insurance or by workers' compensation. However in California, collateral source evidence is statutorily admissible in medical malpractice matters.

Pursuant to Civil Code §3333.1(b), when evidence of a collateral source payment is introduced, the collateral source is precluded from recouping its payment. However, a collateral source payment that comes from federal funds is not governed by §3333.1 if federal legislation expressly authorizes the dispersing agency to recover the payment from the plaintiff's recovery. (*Brown v. Stewart* (1982) 129 Cal.App.3d 331, 340; see also 42 U.S.C. § 1396(a)(25).) Understandably, the application of the collateral source in California impacts an insurance provider's ability to recover payments made for medical treatment in certain lawsuits, and has a unique impact on Medicare coverage.

Medicare coverage is divided into different components, or parts:

- Part A, which generally covers hospital care;
- Part B, which covers both medical necessities and preventive care (services provided by doctors and other healthcare providers);
- Part C, or the Medicare Advantage Plans (MAPs), in which Part A and Part B coverage is provided by private health insurance companies for Medicare-eligible patients; and
- Part D, in which coverage for outpatient prescription drugs is provided by private insurance

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companies contracted with the government.

Since coverage under Medicare Parts C and D is provided by private health insurance companies, those insurance companies may or may not be able to recoup their payments, depending on whether the collateral source rule applies.

In 2013, the Court of Appeals for the Ninth Circuit decided *Parra v. Pacificare of Arizona, Inc.*, decedent Manuel Parra was injured and subsequently died after he was hit by a car while walking in a parking lot. ((9th Cir. 2013) 715 F.3d 1146.) Decedent had a MAP provided by PacifiCare of Arizona, Inc. which paid $136,630.90 in medical bills incurred as a result of the accident.

The driver was insured by GEICO with a $500,000 policy limit. Decedent's surviving wife and children brought a wrongful death action. The parties settled for the policy limits; however, PacifiCare claimed a right of recovery for benefits it paid under decedent's policy. As a result, GEICO held $136,630.90 in trust and paid the rest to survivors.

The wife and children sued PacifiCare in Arizona seeking reimbursement of its $136,630.90 payment. PacifiCare counter-complained, claiming it had a right to reimbursement under the Medicare Act. The District Court granted the motion for summary judgment finding PacifiCare had no private right of action under the Medicare Act or the Medicare Secondary Payer Act (MSP). PacifiCare appealed.

The issue before the Ninth Circuit was whether a private MAP, or secondary, provider could sue a plan participant's survivors to recover medical expenses it paid from the proceeds of a primary insurance policy. The *Parra* court discussed the evolution of the Medicare Act. The Court noted in 1980, Congress added the MSP to the Medicare Act in an effort to shift costs from Medicare to the appropriate private sources of payment. The MSP made Medicare insurance secondary to any "primary plan" obligated to pay a Medicare recipient's medical expenses, including a third-party tortfeasor's automobile insurance, and thus entitled to reimbursement. (42 U.S.C. §1395y(b)(2)(A) & (B)(ii).) In 1986, the Medicare Act was further amended to include a private cause of action for Medicare beneficiaries and healthcare providers to recover medical expenses from primary plans. (42 U.S.C. § 1395y(b)(3)(A)).

In affirming the District Court's decision, the Court of Appeals held although the MSP provides a private right of action for Part A and B plans, the law did not provide MAPs and Part D plans the same right. (See 42 U.S.C. § 1395y(b)(3)(A).) The Court further held even though the MSP allowed a MAP to charge a primary plan for conditional payments made on behalf of a plan participant, it did not grant the MAP a private right to recover those payments. Finally, the Court held a private MAP cannot sue a plan participant's survivors for reimbursement for medical expenses out of the proceeds of an automobile insurance policy.

In summary, a collateral source payment made by a private Part C provider in California is not recoverable against a plaintiff's award. Moreover, there may still be a question whether a private Part C plan is considered an admissible collateral source in California medical malpractice lawsuits.

At last December's Annual ADCNCN meeting, a panel discussion on Medical Professional Liability Litigation – The Physician's Perspective enjoyed excellent attendance and featued a lively discussion with panelists and attendees concerning aspects of medical litigation from the doctor's viewpoint. Topics under consideration for the 2018 Annual meeting include: medical malpractice litigation from the viewpoint of the physician expert consultant; direct & cross-examination of medical expert witnesses; the use of technology at trial in medical professional liability cases; and electronic medical records – use in discovery and at trial

We are also in touch with the DRI Medical Liability and Healthcare Committee, so we are familiar with what issues are being discussed on a national level. However, we always appreciate input from the ADCNCN membership. Please let us know if there are particular issues that you feel we should address. (D. Marc Lyde *(marc.lyde@gmail.com)* and Glenn M. Holley *(gm@szs.com.)*

PUBLIC ENTITY

James J. Arendt | *Co-chair*
Patrick Deedon | *Co-chair*

It looks like Supreme Court Justice Clarence Thomas may not be a "given" for qualified immunity. In a concurring opinion in *Ziglar v. Abbasi,* 137 S.Ct. 1843, 1870 (2017), Justice Thomas expressed concerns about what he considered SCOTUS's overreach of the qualified immunity doctrine, stating that Congress should be involved, not the Courts.

Justice Thomas referenced the Civil Rights Act of 1871, which makes no mention of defenses or immunities. However, the Supreme Court has read the Act with an eye towards the general principals of tort immunities because certain immunities were so well established in 1871 that if Congress wanted them abolished, it would have done so. Immunity was only available under the Act if it was historically given to the official in a similar situation at common law. For example, "the Court has concluded that legislators and judges are absolutely immune from liability under [42 U.S.C] §1983 for their official acts because that immunity was well established at common law in 1871."

Justice Thomas criticized use of the "clearly established" standard: "We have not attempted to locate that standard in the common law as it existed in 1871, however, and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine." *Id*. at p.1871. The "clearly established" standard is designed to protect the balance between vindication of constitutional rights and government officials' effective performance of their duties. Justice Thomas wrote that the

Continued on page 32

Constitution assigns this kind of balancing to Congress, not the Courts.

"Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case we should reconsider our qualified immunity jurisprudence." *Id*. at p. 1872.

Given that the Ninth Circuit is already quite stringent on applying qualified immunity, this may give the additional authority to support their position.

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 some other format. Please feel free to contact either Jim Arendt at *james@walaw-fresno.com,* or Patrick Deedon at *pdeedon@maire-law.com* with your ideas. 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

Tina Yim | *Chair*

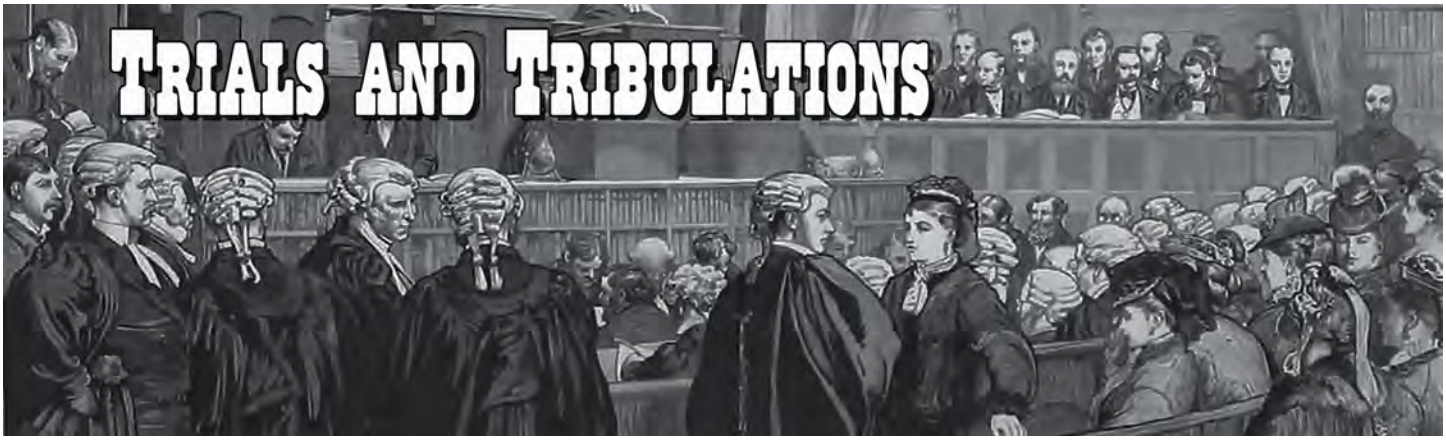
What's trending for 2018? Renal cancer. If you were to ask people what type of cancer they associate with asbestos exposure, the first ones that come to mind are probably mesothelioma or lung cancer, and to a lesser extent, colon, peritoneal, or even, esophageal cancer. However, the recent verdict in *Silva vs. General Electric Company, et al.,* in San Francisco, adds renal cancer to that list.

Silva was a former welder/maintenance mechanic with a history of various other cancers, and he developed colon/ renal cancer. At trial, the defendants were a premises owner and a contractor. The jury eventually found only the premises defendant liable (for a minor percent), awarding $2.8 million dollars to Mr. Silva. However, when it came to assessing fault, while the premises defendant was assessed approximately 2.5% fault, Plaintiff was found to be 77.6% at fault. Ultimately, after set-offs, the net judgment was under $100,000, exclusive of costs.

What can we take from this case? First, the issue of causation was a hotly contested issue. Defendants attacked Plaintiff's causation expert, epidemiologist Dr. Allan H. Smith, while Plaintiff's counsel attacked defendants' nephrology expert, Malcolm Karlinsky, M.D. The crux of Plaintiff's cross examination of Dr. Karlinsky was that he lacked an epidemiology background to be able to provide causation opinions. Thus, Plaintiff attempted to downplay Dr. Karlinsky's long standing career as a nephrologist who actually treated patients with various renal conditions during his 30+ year career. No defense epidemiologist testified at trial.

This leads to the second important issue – the defense focus on Plaintiff's failure to take precautions at work and his myriad health conditions, including obesity and hypertension (well-established risk factors for renal cell carcinoma). During deliberation, the jury asked for read-backs of testimony pertaining to his work history, suggesting that the jury took into account his failure to wear a mask on the job. Ultimately, repeatedly driving home the point that Plaintiff's disease was caused by his own lifestyle choices and work practices undoubtedly led to the assessment of substantial fault to Plaintiff. In future renal cancer cases, it may be important for the defense to focus on the plaintiff's work history, as well as the presence of medical risk factors.

Although the ultimate net verdict was not a clear cut victory for the plaintiff bar, it still suggests a multi-million dollar baseline award for an alleged asbestos-related renal cancer case. A peek at a blog of another plaintiff firm's website featured an article about an Italian study which allegedly links asbestos to renal cancer. Thus, plaintiff firms have already viewed renal cancer as another avenue to file lawsuits. Hence, it will be up to the defense to take a proactive approach to litigating these cases.



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
Co-Editor-in-Chief, *Defense Comment*

Vanessa Spear, from the State of California DOT, Legal Division, received a jury verdict for the defense in Alameda County. State attorneys re-tried a wrongful death auto accident case after a motion for new trial was granted and upheld on appeal. The second victory was even sweeter than the first after major discovery battles and multiple motions for sanctions, including terminating sanctions, had been endured. Plaintiffs' trial estimate of two months was rejected by the court with a firm warning to finish the trial in three weeks. Plaintiffs called many State employees hoping to get bad testimony, which did not happen.

The jury saw evidence of a horrendous accident on I-80 in San Leandro, where a tire blow-out led to the out-of-control car's impact with a big rig, which then lost control and crashed through the median barrier to be struck by oncoming vehicles. The driver of the first car that set off the chain of events, amazingly, was unhurt and he decided to take a video with his phone of the truck driver burning to death at the accident scene. The judge allowed the jury to see a still photo of the conflagration. Plaintiffs argued that Caltrans should have had a median barrier that would have redirected the truck. A 9-3 verdict of "no dangerous condition of public property" was rendered. The Honorable Ronni MacLaren presided.

David Depolo of Donnelly Nelson Depolo Murray & Efremsky, located in Walnut Creek, obtained a defense jury verdict in San Francisco County, in a medical malpractice action. Plaintiff alleged negligence in the management of her dental condition, including the performance of orthagnathic surgery involving a LeFort I three-piece procedure and a Bilateral Sagital Split Osteotomy for maxillary retrognathism and mandibular prognathism. After a 12-day trial the jury rendered a 12-0 verdict in favor of the Regents of UC. The Honorable Charles Haines presided.

David Depolo of Donnelly Nelson Depolo Murray & Efremsky, located in Walnut Creek, obtained a case dismissal after 3-day trial in San Francisco County. Plaintiff alleged Battery and Intentional Infliction of Emotional Distress arising out of twin fetal demise following Selective Fetoscopic Laser Photocoagulation procedures to treat Twin-Twin Transfusion Syndrome as part of a NIH Trial in 2003. After three days of what was expected to be a 6-week trial, the Judge dismissed the case ruling that alleged tolling provisions were inapplicable to plaintiff's claims and the action barred by the applicable Statute of Limitations. Of note, the demand to settle was $12M raised to $15M the week before trial. The case involved more than 75,000 pages of records, more than 30 depositions, approximately 30 motions in limine and more than 30 discovery motions over 2.5 years of litigation. The Honorable Suzanne Bolanos presided.

David Depolo of Donnelly Nelson Depolo Murray & Efremsky, located in Walnut Creek, obtained another defense jury verdict in San Francisco County. Plaintiffs alleged negligence in the management and surgical treatment of achalasia. Plaintiff underwent a surgical procedure to bypass her esophagus using a 30cm segment of her large bowel. Plaintiffs contended that the surgical graft was put in "upside down" resulting in projectile vomiting and the need for revision surgery. After a 12-day trial, the jury returned a 12-0 verdict in favor of the defense. The Honorable James Robertson presided.

Michael F. Ball, of McCormick Barstow LLP in Fresno, received a favorable jury verdict in Fresno County Superior Court in a negligence/breach of fiduciary duty case. Plaintiff was a cosmetic surgery patient of Dr. Enraquita Lopez in 2013 and claimed that she sustained damages as a result of "before" and "after" breast photographs of Plaintiff being posted on Aesthetic Laser Center's (ALC's) webpage in a manner that contained her real name, which allowed them to be seen by anyone performing a "Google Images" search of her or her photography business. Plaintiff sued Defendants on the following causes of action: Public Disclosure of Private Facts, Appropriation of Name or Likeness, General Negligence, Negligent Infliction of Emotional Distress, Breach of Fiduciary Duty and Medical Malpractice.

More specifically, Plaintiff alleged that in July 2013, Plaintiff met Michael Moritz through the online dating website/app called OKCupid. During the course of Plaintiff's dating communications with Mr. Moritz, she told him about her photography business and encouraged him to visit her website to see her photographs. On August 16, 2013, Plaintiff was in the middle of an

Continued on page 34

OKCupid chat with Mr. Moritz when he told her that she should "Google" search her own name. When she asked him why, he told her that he performed a "Google" search of her name that resulted in some pictures of her that she might not want other people to see. She then immediately performed a "Google" search of her full name. The "Google" search resulted in Plaintiff's naked before and after photos appearing alongside other various photos of her and the photos of her photography work.

Plaintiff testified that she began experiencing anxiety attacks and lost a lot of sleep over the incident, and that she felt like her reputation had been ruined and her privacy had been violated. She began seeking mental health treatment and counseling with an LMFT. Plaintiff was diagnosed with an anxiety disorder, depression, and an adjustment disorder stemming from the publication of her breast photos. Plaintiff had 134 visits with her therapist before being released in 2017.

Defendants admitted that the photos, which Plaintiff consented to be posted anonymously on the ALC website, unintentionally and unknowingly were indeed searchable using the patient's name for an unknown number of days on the internet. Defendants contended that they uploaded the photographs of Plaintiff consistent with how they had been trained by their web design company and believed that the photos would be completely anonymous. Defendants further contended that Plaintiff exaggerated her reaction, and that her lengthy course of therapy was due to many life factors and not just the publication of the photos.

Plaintiff's counsel asked the jury to award $300,000. The jury was out 2 hours after an 8-day trial, ending on August 7, 2017, with a Plaintiff Verdict 10-2 on General Negligence and Breach of Fiduciary Duty. The jury awarded $4,000 past wage loss and $14,000 past mental suffering/emotional distress, and assigned 65% fault to Defendants and 35% fault to non-party web designer, for a net Judgment in favor of Plaintiff of $13,100.

Defendants filed a Memorandum of Costs in the sum of $22,714 on September 14, 2017, due to their unaccepted CCP 998 Offer. Plaintiff filed an Acknowledgment of Full Satisfaction of Judgment, in exchange for a withdrawal of Defendants' Memorandum of Costs and a waiver of costs, i.e., *neither side ended up paying any money to the other side.* The Honorable Mark W. Snauffer presided.

Mark Velasquez, of the Mark Velasquez Law Firm: Hunt Jeppson Griffin LLP, located in Roseville, received a defense verdict after a ten-day jury trial in Merced County in a dangerous condition of public property case. While visiting the cemetery, Plaintiff tripped on some grass and fell into the family headstone knocking it over onto his wife who was kneeling behind it. His wife suffered severe injuries to her leg, and wrist. Plaintiff alleged the headstone was loose at the time of the accident, and that the cemetery should have known about it. After one hour of deliberation, the jury unanimously found that the headstone was not a dangerous condition. The Honorable Brian L McCabe presided.

Paul R. Baleria of Low McKinley Baleria & Salenko, LLP and **Thomas J. Doyle** Schuering Zimmerman & Doyle in Sacramento obtained defense verdicts for their respective physician clients in a medical malpractice case in Sacramento County, wherein the Plaintiff claimed that the physicians did not respond to symptoms of DVT after allegedly negligent tendon repair surgery. Plaintiff was told the risks of surgery, including the possibility that blood clots may develop, after which Plaintiff provided his informed written consent to have the operation performed. Intraoperatively, it was noted that there was a greater than 50% tear of the peroneus brevis tendon with significant synovitis. There was also synovitis noted within the peroneus longus tendon. Due to the severity of Plaintiff's injury and his obesity, the physician exercised his judgment to perform a subtalar joint arthrodesis (fusion) procedure in addition to repair of the tendons. This had been discussed with plaintiff at the pre-operative appointment and was ultimately performed in order to maximize Plaintiff's stability in the left foot and ankle. There were no intraoperative complications, and Plaintiff was discharged home following the outpatient procedure. Postoperatively, Plaintiff developed deep venous thrombosis (DVT) in his left lower extremity and a pulmonary embolism. He was admitted to the hospital, where the diagnosis was made and he received anticoagulation treatment. His condition improved and he was discharged home six days later.

Plaintiff contended that the subtalar joint arthrodesis aspect of the surgery was unnecessary and below the standard of care. He also contended that the defendants were negligent in the post-operative care provided to him as they allegedly did not respond to his telephone calls and claimed reports of symptoms consistent with DVT. Plaintiff further asserted that he was harmed when he developed a pulmonary embolism, which requires ongoing anticoagulation in the form of Coumadin medication.

The medical chart only documented a single telephone call by Plaintiff after surgery, at which time he requested a refill of his pain medication only. There were no complaints of DVT symptoms documented in that note. In addition, Plaintiff's own expert testified that he was not able to say, to a reasonable degree of medical probability, that Plaintiff was harmed by undergoing the subtalar joint arthrodesis. The jury rendered at 12-0 defense verdict as to each defendant after a 9-day jury trial. The Honorable David DeAlba presided.

President's Message

– continued from page 2

have no idea how many people respect you and want to see or meet you. You can also meet those you respect or bury the hatchet with those with whom you are in conflict!

Lastly, do not forget California Defense Counsel. California Defense Counsel (CDC) is the political arm of the Association of Defense Counsel of Northern California and Nevada and the Association of Defense Counsel of Southern California. The CDC and its PAC are in critical need of your support. There are constant legislative challenges to state substantive and procedural law which directly affect your ability to make a living and be a successful defense lawyer.

Tired of poorly written jury instructions that preclude you from having the jury correctly instructed on the law? How would you like the number of interrogatories you ask in a multi-million dollar case to be limited to 35 unless you obtain a court order? Are you ready to start sending the state regular sales tax payments on legal fees? Yes, the California legislature is considering a sales tax on legal bills and services. Are your clients going to pay those taxes? These are but a few examples of the issues before the legislature. The CDC needs your voice and financial support to have a say on these very important issues that are very close to home for all of you. The CDC cannot protect your interests and those of your clients without you. Make sure that every lawyer in your firm belongs to the ADC and seek out other defense lawyers to join ADC. Your plaintiff attorney opponents are doing this for their own organization, and you should do it for yours.

The ADC Board of Directors, CDC Legislative Advocate Mike Belote and Executive Director Jennifer Blevins (and her professional staff) are working tirelessly to bring you the best resources possible, but your participation will make it even better. The coming year is going to be a great one and I look forward to serving as your president. Please call me or e-mail me with questions, feedback and/or suggestions.

CDC Report

– continued from page 3

the bill increases the limited case jurisdictional limit from $25,000 to $50,000, by the longer-term intention is to codify the recommendation of the Judicial Council's "Futures Commission" to create a middle-tier case type between $50,000 and $250,000.

Read in context, there are positives and negatives for defense practice in the Futures Commission recommendations. But consistent with the old adage that the "devil is in the details," the creation of a new tier with attendant changes in discovery limits, etc., must be approached thoughtfully and with due process for litigants in mind.

CDC is engaged in a productive dialogue with the Consumer Attorneys, judges and others on the middle-tier proposal, which would impact virtually every ADC member. Updates on this critical issue will be forthcoming.

All told, CDC is presently monitoring almost 200 bills in the current session, again, covering every major area of practice. Please watch this column and communications from the ADC for details of these bills.

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.

A·D·C VERITAS

Defense Verdicts

Paul Baleria
Low McKinley Baleria & Salenko, LLP
Tom Doyle
Schuering Zimmerman & Doyle, LLP

- *Aaron Hiatt v. Roy Rubin, M.D. Inc. and Phong Le, DPM*

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

welcome, new members

Since October 2018, 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.

David Benton
Peel Garcia LLP
Fresno
YOUNG LAWYER MEMBER

Tanner Brink
Buchman Provine Brothers Smith LLP
Walnut Creek
REGULAR MEMBER
Referred By: Nolan Armstrong

Pamela B. Bumatay
Lorber, Greenfield & Polito, LLP
San Francisco
REGULAR MEMBER

Amelia F. Burroughs
Janssen Malloy LLP
Eureka
REGULAR MEMBER

Brian Colton
Wagner & Isert-Kott
Concord
ASSOCIATE MEMBER
Referred By: Jill Lifter

Jenn Crittondon
Maranga Morgenstern
San Francisco
REGULAR MEMBER
Referred By: Chris Johnson

Kevin Dehoff
Angelo, Kilday & Kilduff
Sacramento
REGULAR MEMBER

John C. Dorame
Mokri, Vanis & Jones, LLP
Sacramento
REGULAR MEMBER

Mahmoud Fadli
*McDowall * Cotter APC*
San Mateo
REGULAR MEMBER
Referred By: David Rosenbaum

Caroline B. Fawley
Law Offices of Adrienne D. Cohen
San Rafael
YOUNG LAWYER MEMBER

Brandon J. Finn
The Costa Law Firm
Gold River
REGULAR MEMBER

Clayton T. Graham
Jacobsen & McElroy PC
Sacramento
REGULAR MEMBER
Referred By: Karen Jacobsen

Allison Hernandez
Gordon Rees Scully Mansukhani, LLP
San Francisco
YOUNG LAWYER MEMBER
Referred By: Marie Trimble Holvick

Allison Hyatt
Freeman Mathis & Gary, LLP
Roseville
REGULAR MEMBER
Referred By: David Daniels

William E. Jemmott
Raffalow, Bretoi & Adams
Oakland
REGULAR MEMBER

Curtis E. Jimerson
Riggio, Mordaunt & Kelly
Stockton
REGULAR MEMBER
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Nicholas Leonard
Low McKinley Baleria & Salenko
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REGULAR MEMBER

Rachel Leonard
Tate & Associates
Berkeley
REGULAR MEMBER
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Joanne Madden
LeClair Ryan
San Francisco
REGULAR MEMBER
Referred By: Randy HIcks

Kellie M. Murphy
Johnson Schachter & Lewis, APLC
Sacramento
REGULAR MEMBER
Referred By: Luther Lewis

Christopher Nguyen
*McDowall * Cotter APC*
San Mateo
YOUNG LAWYER MEMBER
Referred By: David Rosenbaum

Alan Packer
Newmeyer & Dillion LLP
Walnut Creek
REGULAR MEMBER
Referred By: Jill Lifter

Desiree Papendick
Maire & Deedon
Redding
YOUNG LAWYER MEMBER
Referred By: Patrick Deedon

Taylor J. Pohle
Lombardi, Loper & Conant, LLP
Oakland
YOUNG LAWYER MEMBER
Referred By: Matthew Conant

William L. Portello
Bickmore & Associates
Sacramento
REGULAR MEMBER

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McNamara, Ney, Beatty, Slattery, Borges & Ambacher LLP
Pleasant Hill
REGULAR MEMBER

Dominic Signorotti
Buchman Provine Brothers Smith LLP
Walnut Creek
REGULAR MEMBER

Daniel C. Taylor
Jacobsen & McElroy PC
Sacramento
REGULAR MEMBER
Referred By: Karen Jacobsen

Edward P. Tugade
Demler, Armstrong & Rowland, LLP
San Francisco
REGULAR MEMBER

Wakako Uritani
Lorber, Greenfield & Polito, LLP
San Francisco
REGULAR MEMBER
Referred By: Jill Lifter

Melissa M. Whitehead
Freeman Mathis & Gary, LLP
Roseville
REGULAR MEMBER
Referred By: David Daniels

George W. Wolff
Wolff Law Office
San Francisco
REGULAR MEMBER

Rhonda Woo
Howard Rome Martin & Ridley LLP
San Mateo
REGULAR MEMBER
Referred By: Shawn Ridley

Veronika J. Zappelli
Law Offices of Adrienne D. Cohen
San Rafael
REGULAR MEMBER

A·D·C VERITAS

Association of Defense Counsel of Northern California and Nevada

58TH Annual Meeting

DECEMBER 7-8, 2017

2018 ADCNCN Board of Directors

2017 ADC President, Enrique Marinez, receives the gavel plaque from incoming president, John Cotter

Outging ADC President, Enrique Marinez, presents Jill Lifter with the 2018 ADC President's Award

Vocalist Fred Ross performs the National Anthem

World Series Champion, Jeremy Affeldt, Annual Meeting Keynote Speaker

Cara Hale Alter, Inspirational Speaker

For more Annual Meeting photos, visit the website: *www.adcncn.org.*

Association of Defense Counsel
of Northern California and Nevada
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Sacramento, CA 95833
www.adcnc.org

2018

Calendar of Events

Save the Dates!

April 13, 2018	**Construction Defect Seminar**	Marriott, *Walnut Creek, CA*
May, 2018	**Toxic Tort Seminar Series**	*San Francisco, CA*
June 15, 2018	**Employment Seminar**	*San Francisco* or *Oakland, CA*
August 10-11, 2018	**Education Seminar TBD**	Resort at Squaw Creek, *Olympic Valley, CA*
September-October, 2018	**Basic Training Series**	TBD
September 21, 2018	**25TH Annual Golf Tournament**	Silverado, *Napa, CA*
December 6-7, 2018	**59TH Annual Meeting**	Westin St. Francisco, *San Francisco, CA*

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