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DEFENSE COMMENT

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

Vol. 33, No. 2 / Summer 2018

Campus Crime and Violence, and the Right to Safe Schools

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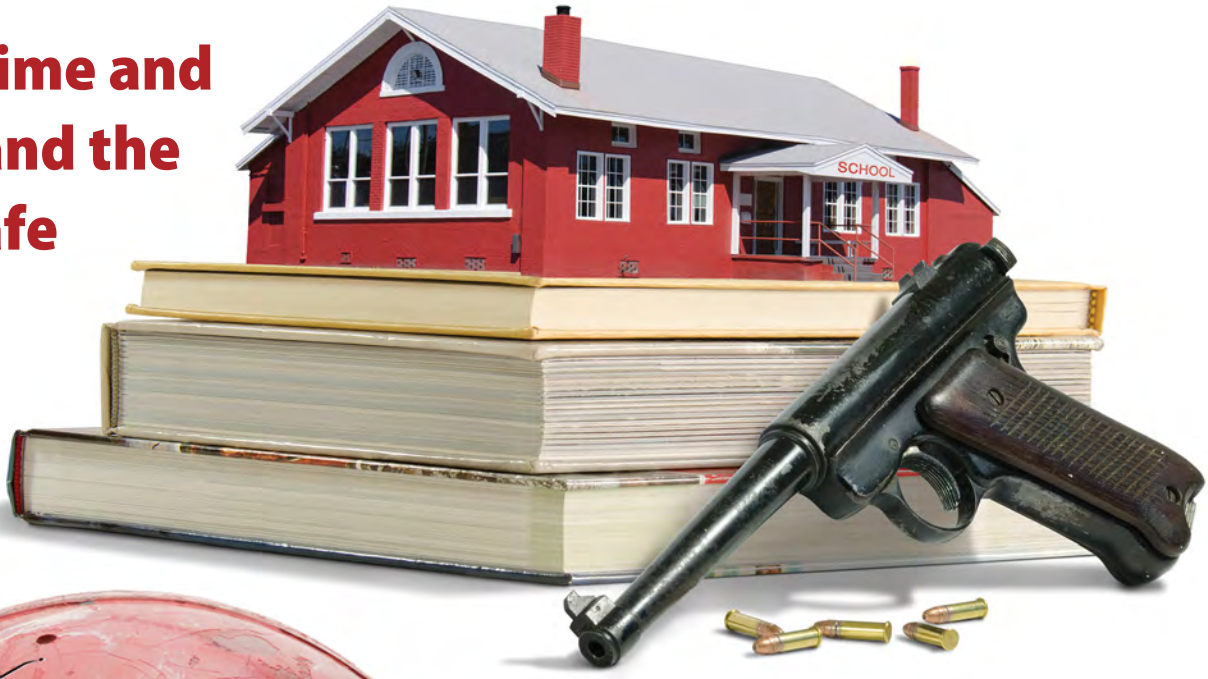

High School Football in California – Where is It Headed?

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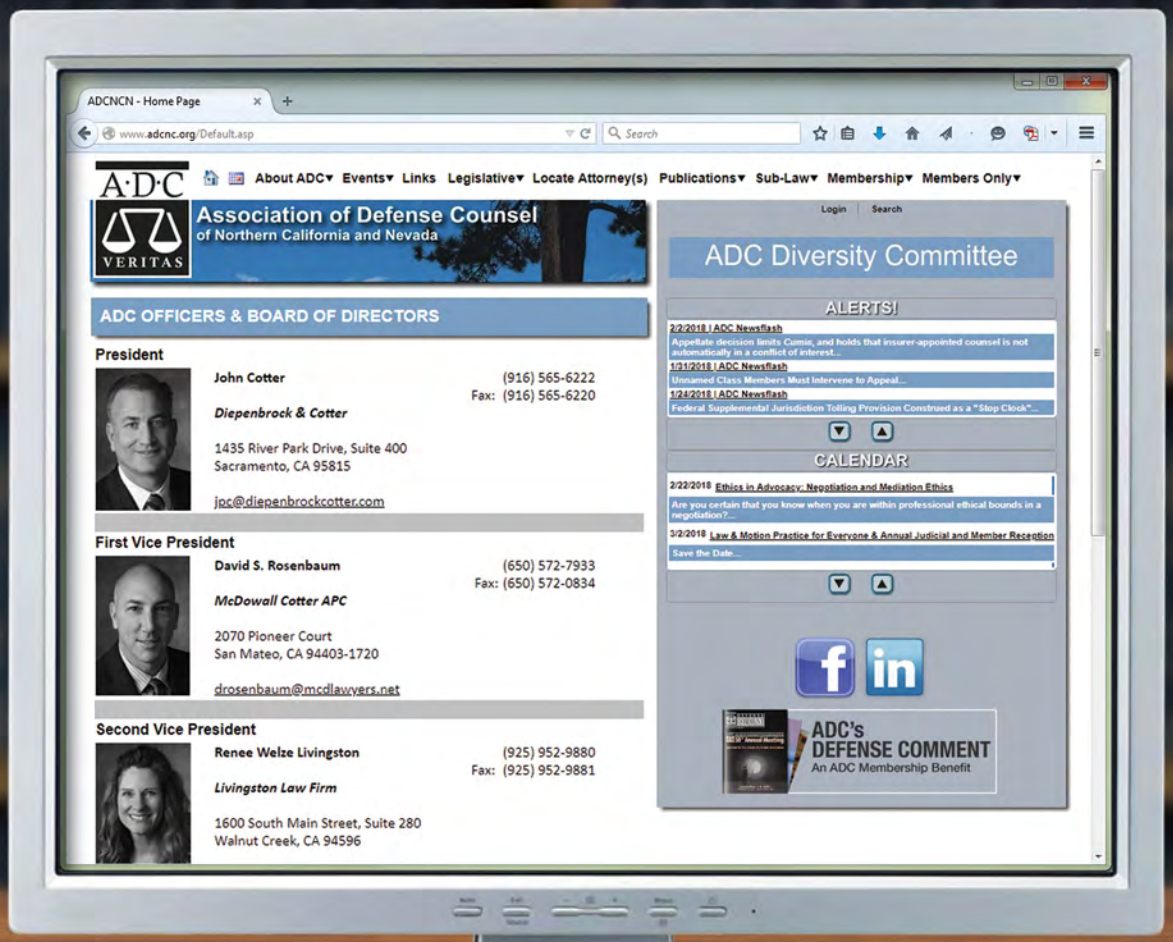

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A·D·C VERITAS

DEFENSE COMMENT

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

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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*.

John P. Cotter
2018 President

Practicing Law Is a Good Job

I am the very proud father of three beautiful and intelligent daughters who are also spectacularly good people. Each daughter is taking her own path and I am so lucky to be able to witness it.

My middle daughter, Annie, graduated from college this spring and will be entering law school this fall. Like my other daughters, I am very proud of her. During her discernment process, she worked for a police department and a district attorney's office and found she liked the profession. She did some work in my office and sat in on depositions with me from time to time. She always wants to know about my cases. Then, the questions came: "Dad, do you like being a lawyer?" ... "Would you do it again?" ... "Would you recommend it?"

It has been common for me to hear doctors telling their children not to become doctors because "things have changed," "it's just not worth it," and other discouraging comments. I have often heard lawyers say similar things, including the remark "good for them" on someone's departure from the profession. Or when someone is considering law school, "Why would you want to do that?" Yes, there are times when I momentarily felt the same, but when I stepped back, I realized that we (lawyers) do not have it so bad.

The stress of litigation can often bring one down. But it is all in the way you look at it. If you think it's bad, it will be. The opposite is true, too. If you tell yourself this is fun and rewarding, it will be. Remember, it is just work and is not physically dangerous like being in a war zone or living without food or shelter. If you take care of yourself, you can maintain your health. Yes, the work is stressful, but if you just put the time in and do the work, voila, the stress is gone. Thereafter, a sense of accomplishment is realized. If you procrastinate, you'll end up with a problem that hopefully can be solved. Just "getting it done" instead of thinking and worrying about it is always the best route.

A lawyer can reap a tremendous amount of personal satisfaction from resolving a tough legal problem or providing sound advice to a client. There is nothing more satisfying than concluding a great cross-examination and walking out of the courtroom with pride. It may only last for a day in trial until you get destroyed by the next witness, but it does feel good for the moment. A great deposition or opinion letter can give you the same great feeling that makes it all worthwhile. Even better, a defense verdict or a summary judgment being granted. We often forget these things and concentrate on the negative.

Practicing law gives you a certain amount of freedom that many occupations do not offer. Yes, our profession is calendar driven and we often cannot come and go as we please, but certainly there are times when we can just "take off." An out of town deposition can allow us to see some new part of the country. Same as attending a conference in a different

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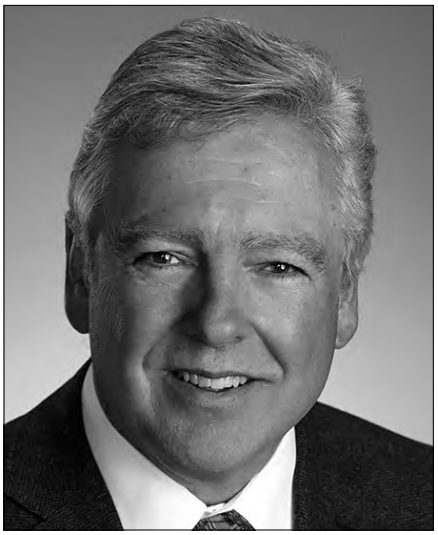

Michael D. Belote
California Advocates, Inc.

2018: Merging Policy and Politics

Every magazine has hard deadlines for submitting material, and *Defense Comment* is no exception. As this column is written, it is primary election day, and today's results will say a lot about the future of California. Like, for example, whether we still have a viable two-party system here in California.

Recently an announcement came out that political insiders had been expecting for some time: Republican party registration in California has slipped to third place, behind Democrats, and even behind persons registered as independents, officially known as "NPP," no party preference. It turns out that Democratic registration is mostly stagnant, so in terms of voters, our state is not getting more blue, but it is certainly becoming less red.

The legislature, however, is becoming more blue. Democrats slipped below the magical two-thirds supermajority threshold in the Assembly, as two Democrats resigned amidst sexual harassment allegations, and one resigned for health reasons. The result of the June and November elections, though, will mean that not only will Democrats recover their supermajority, but those who are elected are certain to be to the left of those that left.

Why does any of this matter, other than to political junkies? The answer is that the two-thirds supermajority allows Democrats to run the table legislatively, with the ability to raise taxes, place measures on the ballot, and override gubernatorial vetoes, all without Republican votes. The power of the supermajority was on display last year, when it was exercised to increase the gas tax (headed for a repeal vote on the November ballot) and to vastly increase recording fees in order to fund affordable housing.

Even when two-thirds votes are not legally required for passage of bills, the sheer dominance of Democrats makes it arithmetically far more difficult to kill majority-vote bills carried by Democrats. The point is, political dominance by Democrats matters. For one thing, it makes the governor far more critical. For nearly eight years, Governor Brown has governed from the pragmatic middle. But will his replacement move to the left? If the top two finishers for governor are Gavin Newsom and John Cox, can the Republican be competitive?

Alright said the exasperated judge, come to the point counselor! The point is that big issues will face the deep blue legislature and new governor, especially if California slides into recession. Then, the state's tax system will be front and center, with efforts to change Proposition 13, and of special interest to ADC, the proposal to expand the sales tax base to services.

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HIGH SCHOOL

Campus Crime and Violence, and the Right to Safe Schools

Justice George Nicholson
(Ret.)

It seems all too common these days to learn yet another school has been invaded by a well-armed, unimpeded, and "unexpected" gunman who wounds and murders several students and staff. Rational discourse on the ubiquity of unsafe schools all over our nation, especially our inner-cities, and what to do about it, is frequently obscured or ignored by the news media, too many academics, and far too many governmental officials and agencies at all levels, local, state, and federal. This is an endemic, decades old problem.

Why? Beyond the criminal acts themselves and the decline of common sense and common decency virtually everywhere, the primary or institutionalized cause of unsafe schools has long been obvious. There are too many cooks in the kitchen and no lead chef!

EARLY ATTEMPTS TO PROVIDE SAFE SCHOOLS

The duty to provide safe schools is split between many local officials and agencies and no one is in charge of coordinating their efforts. This was identified as the key problem in California more than 30 years ago by the Fresno Interagency Task Force on Violence and Disruption in the Schools. That Task Force concluded: (1) Someone must be held accountable to carry out programs to reduce campus crime and violence; (2) Binding commitments relative to participating agencies must be obtained; and (3) Cooperation with the accountable someone is a necessity to achieve reductions in crime and violence in the schools.

At roughly the same time, the Los Angeles County Grand Jury's Education Committee called "for a teamwork approach to cope with vandalism and violence," concluding

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"every reasonable step must be taken ... to create a calm atmosphere where learning is the first priority."

Attorney General George Deukmejian tried to respond in 1980 when he filed a "Lawsuit to Restore Safety in the Schools," an action seeking declaratory relief in the Los Angeles Superior Court against: (1) the Los Angeles Unified School District, its Board and its members; (2) the City of Los Angeles, its mayor, its City Council and members, the chief of police and his department, and the city attorney and his office; and (3) the County of Los Angeles, its Board of Supervisors and members, its district attorney and his office, and its chief probation officer and his office.

Attorney General Deukmejian announces the opening of the School Safety Center in the California Department of Justice in 1981.

During a press conference before a huge audience of the national media, Deukmejian declared, "I have filed this 'Lawsuit to Restore Safety in the Schools,' in my capacity as the chief law officer of the state, and by the People of the State of California, to comprehensively attack the problem of violence in California's public schools. This lawsuit is a specific attempt to deal with the problem of school violence in the Los Angeles Unified School District and thereby establish legal principles which will then apply to all school districts in California. It will, if successful, promote the three key goals of responsibility, commitment and cooperation."

He expressed his hope that "our public schools can then become 'Islands of Safety,' as Los Angeles County Superior Court Judge David Kenyon proposed, in which students can pursue their learning and teachers can conduct their teaching without fear. Children are being compelled to attend schools which adults would never tolerate in their places of work. Adults can speak and act for themselves. This lawsuit speaks and acts for our children who cannot speak and act for themselves."

Deukmejian concluded, "I respectfully suggest that my office and I, the defendants named in the lawsuit, and the People of California must all vigorously work together to identify every means to reduce crime and violence in and about the schools, identify responsible people and agencies to get the job done, and that we accomplish this important task without delay."

Deputy Attorney General Robert E. Murphy, a very able lawyer, was assigned to prepare, file, and litigate the case. He worked the case diligently. At every step, the defense was determined to prevail in court rather than take the more cooperative approach proposed by Attorney General Deukmejian when he filed the lawsuit. In due course, the defense prevailed. What began as a trial court roar, ended in an appellate court whimper.

Deputy Attorney General Robert E. Murphy explains anticipated court proceedings and timelines that will be required to litigate the "Lawsuit to Restore Safety in the Schools."

That ended the matter. Or, did it?

Attorney General Deukmejian persisted, forming a California School Safety Center in the Department of Justice to try to work with the California State Department of Public Instruction, local school boards, the defendants named in the 1980 lawsuit and their counterparts in our state's other 57 counties.

PROPOSITION 8, THE VICTIMS' BILL OF RIGHTS

A voter initiative, Proposition 8, the Victims' Bill of Rights, became law when voters approved it in June 1982. More than two dozen parents of murdered children supported the initiative.

Success had not come easy. The initiative was unsuccessfully challenged by powerful forces in court, pre-election and post-election. (*Brosnahan v. Eu* (1982) 31 Cal.3d 1; *Brosnahan v. Brown* (1982) 32 Cal.3d 236; George Nicholson, "Victims' Rights, Remedies, and Resources: A Maturing Presence in American Jurisprudence," 23 Pacific Law Journal 815 (1992); Paul Pfingst, Gregory Thompson, and Kathleen M. Lewis, "'The Genie's Out of the Jar': The Development of Criminal Justice Policy in California," 33 McGeorge Law Review 717 (2002).)

Among its provisions, Proposition 8 added article I, section 28(c), to the California Constitution: "All students and staff of primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful."

As author of the provision, I was pleasantly surprised when a young law student, Kimberly Sawyer, analyzed it cogently in her student comment, "The Right to Safe Schools: A Newly Recognized Inalienable Right," 14 Pacific Law Journal 1309 (1983). She later became a very able appellate lawyer. It is still worth reading.

Colleges and universities were also having crime and violence problems on and about their campuses. I did not include them within the draft provision because of their threatened opposition. I soon regretted the omission.

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White House meeting held in Cabinet Room in 1985, dealing with providing safe schools everywhere in America, attended by President Ronald Reagan, Vice President George H.W. Bush, Attorney General Edwin Meese, III, and Secretary of Education Terrell Bell, along with law enforcement and education leaders from several states, including California.

The author is seated at the table just below and to the right of the painting of President Eisenhower above the fireplace with his arm crossed.

SAFE CAMPUSES FOR COLLEGE STUDENTS

During a Washington, D.C., conference held by the National Association of College and University Attorneys in the mid-1980s, the general counsel of a major university gave a distressing talk. He counseled his incoming university president not to order a campus and community crime and violence risk assessment because it could be used against the university in potential, future litigation should something bad happen which was noted as a risk but not rectified. Couching the risk assessment as his work product or within the attorney client privilege was no hedge, he said. The new president ordered the risk assessment and his attorney's predicted disclosure came true, purportedly burdening the university in subsequent litigation.

Elsewhere, at about the same time, Jeanne Clery, a 19-year-old Lehigh University student was raped and murdered in her campus residence hall. Her parents, Connie and Howard Clery, were outraged, as would be any parents. They vowed to do something. They sought help from a dear friend of mine, the nation's then leading crime victims' advocate, Frank Carrington of the Virginia Bar. Frank was a brilliant and dedicated legal scholar. He appeared many times before the United States Supreme Court as counsel for various law enforcement and crime victim amici.

It took the Clerys, with Frank's help, several years, but, in 1990, "The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act," or "Clery Act," became federal law. (20 U.S.C., sec. 1092(f), 34 C.F.R. 668.46; while still a relatively young man, Frank Carrington died in a residential fire at his home in Virginia Beach that Christmas, while helping a priest arrange a memorial Mass for Jeanne and her parents.)

The Clery Act requires colleges and universities participating in federal financial aid programs to keep and disclose information about crime and violence on and near their campuses. Duties to warn are part of this statutory and regulatory scheme. Most colleges and universities participate to some extent, so most are thus burdened. Compliance is monitored and enforced by the United States Department of Education.

More than a quarter century after it was adopted by California voters, Proposition 8, the Victims' Bill of Rights, got several upgrades in another voter initiative, Proposition 9, the Victims' Bill of Rights of 2008, Marsy's Law. Proposition 9 was named for Marsalee Nicholas, a University of California, Santa Barbara student who had been stalked and killed by her ex-boyfriend. Dr. Henry T. Nicholas, Marsy's brother, was crucial in successfully shepherding Proposition 9 through the November 2008 final election.

One of the revisions to Proposition 8 wrought by Proposition 9 was expansion of the constitutional right to safe schools. It was re-numbered and now reads:

> "[T]he People find and declare that the right to public safety extends to public and private primary, elementary, junior high, and senior high schools, and community college, California State University, University of California, and private college and university campuses, where students and staff have the right to be safe and secure in their persons." (Cal. Const., art. I, sec. 28, subd. (a)(7).)

> "All students and staff of public primary, elementary, junior high, and senior high schools, and community colleges, colleges, and universities have the inalienable right to attend campuses which are safe, secure and peaceful. (Id., sec 28, subd. (f)(1).)

Now, public and private K-12 schools are covered, as are public and private colleges and universities.

THE CALIFORNIA SUPREME COURT WEIGHS IN

Although unnecessary to deciding the case, the Supreme Court had occasion in March of this year to consider the new inalienable right to safe college and university campuses in *Regents of the University of California v. Superior Court of Los Angeles County; Katherine Rosen, Real Party in Interest*, (2018) 4 Cal.5th 607.

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ENFORCING THE LAW

Demonstrably, progress in lawmaking can be made when horrible crimes occur and the families of the victims resolve to change state and federal law in hopes of helping others, even though they themselves may be beyond mortal aid. Despite improvements to the law, including the advent of California's inalienable constitutional right to safe schools, colleges, and universities, and our nation's Clery Act, government officials at all levels, in too many jurisdictions, are not enforcing the law fully and faithfully or adequately protecting students and staff.

By some independent means, our leaders, our public officials, must be held visibly and regularly accountable. Andrew Pollack agrees. He is not a public official. He is a grieving father. His daughter, Meadow, was murdered along with 16 other students and staff last February during the rampage at Florida's Marjory Stoneman Douglas High School, allegedly by a gun-wielding, former student who was well-known to school and law enforcement officials, including the FBI, and apparently ignored by them.

While speaking directly to the President in the White House, barely a week after Meadow and the others were slain, Pollack, echoing Attorney General Deukmejian in 1980, exclaimed:

"I'm here because my daughter has no voice. She was murdered last week and she was taken from us. Shot nine times on the third floor. We as a country failed our children. This shouldn't happen. And we need to come together as a country and work on what is important. And that is protecting our children in the schools. That is the only thing that matters right now. Everyone has to come together and not think about different laws. We need to come together as a country, not as different parties, and figure out how we protect the schools."

More than 30 years ago, I attended another White House campus safety gathering with President Reagan. With the intervening campus carnage in mind, maybe this time, all of us, especially our elected and appointed leaders, will come together, not as angry parties driven by different agendas and diverging theories of government. Maybe, this time, we may finally figure out, together, what works to protect all our nation's school children and teachers, while transforming the campus at each public and private school, college, and university into an island of safety as suggested so long ago by Judge Kenyon and Attorney General Deukmejian. George Santayana wrote, "Those who cannot remember the past are condemned to repeat it." I urge everyone to remember these lessons of history.

Justice George Nicholson

Justice George Nicholson served the law for 55 years, as a senior trial deputy district attorney in Alameda County, executive director of the California District Attorneys Association, a senior assistant attorney general in the California Department of Justice, founding director and chief counsel of the National School Safety Center, and a trial judge and appellate justice for 31 years, before retiring in January 2018.

High School Football in California Where is it Headed?

J. Scott Donald
Spinelli, Donald & Nott

High school football participation has been under pressure for years, primarily due to concerns regarding the relatively high rate of injury to its athletes. However, because it has been a centerpiece of most high school athletic programs and due to the visibility of professional and college football, it has maintained its popularity. Nevertheless, things may be changing for those fans who idealize high school gridiron action as one of the last reflections of pure sport unfettered by the common perception that money, media and self rather than group interest have all but corrupted its higher levels. For those who remain fans, and even with a notably smaller television viewership for the NFL over the last two years, the sport remains the nation's most popular; nevertheless, the future of football at all levels including high school is uncertain.

THE IMPACT OF INCREASED COSTS

Nationally, factors impacting high school football include costs associated with maintaining a program, an increased emphasis on specialization in sport fostered by often unrealistic parents believing their child will obtain a sports scholarship if they only focus on one sport all year, and the increasing awareness of injury, including head injuries due to repeated collisions in practice and games. According to the Associate Director for the California Interscholastic Federation, Ron Noccetti, over the last five years, California has lost 20-25 high school football programs. In a state where there are currently 1,606 high schools fielding approximately 1,000 football programs, this number is not particularly alarming or significant. Noccetti also notes that over that same period of time the addition of new schools has not caused an overall drop in the number of programs. Finally, according to Noccetti, it is unclear whether concerns regarding health issues, costs, specialization in sport or a combination of these and other reasons led to the cancellation of those programs.

In recent years, California schools have been hit hard with state-wide budget cuts. Typically, when a school district loses money and is looking to balance its budget, one of the first programs to be sacrificed is its athletic program, in favor of educationally based programs. For decades, high school traditions and identities were often indelibly linked to its football teams, so the smaller sports, like gymnastics and water polo, were cut. According to Noccetti, school districts recognized that if they cut the football program they would lose those student football players who would transfer to other schools. Furthermore, football games attract fans and generate revenue. A football program is often the cornerstone for a school's athletic budget through gate receipts and concessions. Nevertheless, football is an expensive endeavor. According to Noccetti, a statewide census taken for all of the members of the statewide organization responsible for overseeing all high school sports, including football, teams fielded anywhere from 16-280 players. For those players, a school must provide both practice uniforms, home and away uniforms, pads and helmets. There are further significant costs associated with maintaining fields, providing practice equipment, coaching staff and transportation.

Due to increased concerns regarding head injuries, the sophistication and therefore the costs of football helmets have increased. In the past, high school athletic programs saved money by reconditioning football helmets until they were beyond repair. That practice has been significantly curtailed by a determination from the National Athletic Equipment Reconditioning Association (NAERA), an association of athletic equipment reconditioners with the stated mission to increase awareness and acceptance of high quality athletic equipment reconditioning and recertification. Beginning March 9, 2011, the NAERA announced that it would no longer accept helmets that were more than ten years old for reconditioning. A 10 year old helmet, no matter its condition, must now be replaced with a new one.

THE IMPACT OF EARLY SPECIALIZATION IN A SINGLE SPORT

The three-way athlete, a boy or girl who engages in a different sport for his or her school during each of the three high

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school sport seasons, is becoming as rare as a dinosaur. Increasingly, youth are encouraged to select one sport, often years before entering high school, and focus all of their energy towards the grail that is the college athletic scholarship. From a statistical standpoint, the percentage of athletes who make a high school varsity team and then obtain any form of a college athletic scholarship is low, less than 2 percent. This point is mostly lost on millions of parents nationwide who end up spending the equivalent of a four year college education on their young athlete's club sport, which can involve high enrollment fees, dues, and travel expenses.

A majority of the sports available at the high school level offer youth programs outside of high school athletics through such organizations as the American Athletic Union (AAU) and others for almost all sports. In fact, for some sports such as volleyball, soccer and baseball, it is often the club teams that get the most attention from college recruiters. This is in large part due to the cost effectiveness afforded college recruiters who can visit a tournament with literally thousands of athletes in a given sport at one venue over a long weekend. When juxtaposed to a visit to a single high school contest involving two teams and less than 100 athletes, it is easy to see why that choice is made.

While baseball, basketball, soccer, volleyball, water polo, lacrosse and many other sports are often played year round, in California football remains a one season sport. There are no club programs and for reasons discussed below were they to exist, full contact would not be allowed. Thus, by the time a 9th grader decides to go out for the football team, that decision has already been made due to years of commitment and dollars spent by parents and often football loses out.

Of course the most discussed pressure on football these days relates to health concerns. Any "Baby Boomer" who has paid even a little attention to the sport of football is aware that orthopedic injuries, particularly those involving knees, are extremely common and to many, surprisingly, an accepted liability. If one thinks back to their own high school and college experiences, it is hard to visualize the sideline that did not include at least two or three massive young men on crutches. There probably is not a movie made about the sport of football since the 1980's that did not employ the cliché of having the star athlete rendered a four-legged cheerleader due to an injured leg.

THE IMPACT OF CONCUSSIONS

Over the last five years, orthopedic injuries have taken such a backseat to concerns related to concussion related head injuries that one loses some perspective about how truly devastating the orthopedic injuries themselves can be. This is, however, understandable given the seriousness, permanence and often devastating impact concussions, and particularly repeated concussions, can have on an athlete.

A series of suicides involving ex-collegiate and NFL football players culminating with the suicide of Hall of Fame Linebacker Junior Seau in 2012 led to litigation and a public outcry to address the perceived cause of those athletes' premature deaths, mainly Chronic Traumatic Encephalopathy (CTE). CTE is believed to be caused by repeated blows to the head over time. While CTE had been connected with boxing in the past, it has only been associated with football players and other participants in contact sports in the last decade. Symptoms associated with CTE include memory problems and profound behavioral changes. Currently, there is no way to diagnose CTE in a living person. Therefore, all studies associated with the diagnosis have relied upon deceased former football players. A new study from the Journal of American Medical Association found evidence of CTE in the brains of 110 out of 111 NFL players, 48 of 53 college players and 3 out of 14 high school players. All players' brains were submitted to the study by their family members. Evidence of memory problems, concussions sustained and behavioral changes while the players were still alive were also provided by family.

While CTE is the extreme end of the concussion spectrum, it is commonly accepted by medical personnel that any concussion is harmful and the more concussions one endures in the course of a lifetime the more potential long term problems may be posed. Due to the media attention paid to the tragic deaths of former NFL stars and its attendant litigation, state legislatures began to respond with proposals for new rules for the safety of high school athletes. To that end, in 2011 the California legislature passed a

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new law intended to establish a protocol for the prevention and management of concussions. Education Code § 49475 requires that before a student can try out, practice or compete in any high school athletic program, including interscholastic, intramural, other sport or recreation program such as cheer, dance and marching band, that both the student and parent must review and execute a concussion and head injury information sheet. In the event that a student athlete is suspected of sustaining a concussion or head injury during an athletic activity, including practice, the student shall immediately be removed from the activity and will be unable to resume any participation in the activity until evaluated by a licensed health care provider who has been trained in concussion management, and has received a full medical clearance to resume participation in the activity.

Since the enactment of Education Code § 49475, California has brought forth further legislation geared specifically to football and concussion. This includes significantly limiting the amount of contact players may be exposed to during a school year. Starting with the 2015 football season, high school coaches were not allowed to conduct more than two full contact practices per week during the pre-season and regular season. Full contact practices are now limited to 90 minutes in a single day. Gone are the days where coaches would have their players in pads after the typical 2-3 weeks of summer conditioning. Once the pads were on, players would be involved in full contact practices five days a week. Some of those practices might exceed two hours. In addition, players might participate in summer camps where again they would be exposed to full contact drills and scrimmages.

WHAT SOLUTIONS SHOULD WE PURSUE?

Clearly, no reasonable person can argue that decreasing collisions involving one's head, and particularly when those heads belong to our daughters and sons is anything but wise. Some might argue that the restrictions on full contact practicing in football exposes athletes to other injuries because they are not getting enough full contact practice to adequately prepare themselves for the realities of full contact contests. As a result, some coaches believe that there will be an increase in orthopedic injuries due to a lack of full contact conditioning. Should we expect further legislation that will put further pressure on high school football? Arguably, current proposed legislation that would restrict youth football to anyone under the age of 12 will have some impact due to the possibility that those athletes that would have played pee wee football at the under 12 age level will choose other sports like soccer. However, the most likely impact on football appears to be just that parents are becoming more educated by the media and by their schools who are mandated to provide parents with educational material regarding concussion. This should at least lead to more conversations at the dinner table about what sport their youth takes up in the fall.

As one who has played and coached high school athletics and has raised high school athletes, I have seen a marked change between my own experience and that of my children primarily due to issues related to sports specialization. I suspect that that pressure will continue and, coupled with concerns with respect to health, it will not surprise me that some further contraction is likely for high school football.

J. Scott Donald

Scott Donald is a shareholder at Spinelli, Donald & Nott, where he specializes in defense of construction, real estate and business cases. He received his Bachelor's Degree from University of California, Davis, and his Juris Doctorate from California Western School of Law. Scott is a member of the ADCNCN Board of Directors.

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The Case for Co-Mediations

John M. Drath
Charles F. Hawkins
ADR Services, Inc.

In large and complex cases, attorneys often retain other lawyers, as either co-counsel or consultants, to address or assist with specific issues. Insurers, while defending a case under a reservation of rights, routinely engage coverage counsel and, in trial; second chairs are commonplace. Yet, when it comes to mediation, the common practice is to select a sole mediator who is expected to address and be conversant with all the issues, regardless of the complexity of the case or the number of parties involved.

Unfortunately, many of such matters cannot be resolved in a single session. We submit that in the proper case the use of two mediators may prove more efficient, more effective and, probably, less costly. Last year, we were selected to conduct separate, but simultaneous mediations, a first for both of us. The case settled, and all parties expressed high satisfaction with the process.

In our case, there was an indemnity agreement between the two defendants, and one of the insurers had filed a Declaratory Judgment action in federal court based on a policy exclusion not present in the other policies. There were the usual disputes over obligations to defend, primary versus excess coverage and contribution. Our case involved a serious job site injury, with two separate, but jointly owned and separately insured defendants. The injury case had its own issues: liability, comparative fault, employer negligence, liens and future economic damages. Seven rooms were needed to accommodate the interested representatives and parties.

The parties wanted to go to mediation, but instead of picking just one mediator, they asked that Charles Hawkins deal with the injury case while John Drath work on the coverage side. Beyond that, we had no other instructions – it was up to us to develop a game plan. We each received extensive briefs on our respective areas of responsibility.

Based on pre-mediation calls, the challenge was thought to be getting offers to the plaintiff without first getting an agreement on the coverage issues. We were able to get past that issue early in the session, and so we spent the balance of the day teamed up working the personal injury side and dealing with collateral coverage issues which kept popping up. When agreements were reached at the end of the day, we each dealt with the separate documentation of our respective areas of responsibility.

We found that we worked together well and the process became an intuitive, and collaborative, experience. We spent time with one group, and then quickly compared notes and adjusted our strategy before going to the next group. We had different but entirely compatible styles and approaches and we alternated taking the lead, depending on which room we were in and which of us had the best rapport with that group. In the rare instances that we had differing reads on a room, we would go back and get clarification before moving on. Our objective was to give the parties the benefit of two heads, and we think we succeeded. We doubt that a single mediator would have been able to resolve the case at the initial mediation.

Of course, there are other, more conventional methods of mediating this type of case. One is to conduct a separate mediation with just the insurers or a defense only mediation. The problem with that approach is that the percentage that an insurer is willing to contribute often changes as the negotiations with the plaintiff progress. Asking a carrier to make an early commitment to a percentage in the abstract rarely works and frequently creates an insurmountable challenge to a successful coverage mediation.

Another conventional approach is to engage a single mediator to deal with all parties and all issues in one mediation. While commonly done in large and complex cases, it is frequently not successful. As an example, when coverage disputes are involved, the mediator needs to have both an understanding of the coverage issues and credibility with the carriers, and at the same time be well versed in the underlying case issues. Finding mediators with good skill sets in both those areas is not easy.

Continued on page 13

With two mediators, the process can keep moving on all fronts.

Also, the sheer weight of numbers can have a profound effect on the chances of reaching a resolution in large and significant cases. We have both been asked to mediate cases which have complex issues and so many parties that the physical limitations placed on the mediator made a resolution difficult if not impossible. Recently, there was a mediation with 14 parties, only one of which was the plaintiff. While this is an extreme example, it is not unusual for us to have cases with 6 to 8 parties with few of them having common interests.

In these circumstances, simply meeting everyone takes considerable time and inevitably after an hour or two, the parties start grumbling that the mediator has not talked to them recently. Multiple mediators are a tremendous advantage in these situations. Introductions progress with increased alacrity and as negotiations progress the mediators can sustain the momentum of the mediation. Let's be realistic: Everyone coming to a mediation must have reasonable access to the mediator. Sitting around drinking coffee while one mediator makes the rounds of all the rooms is rightfully perceived as a waste of everyone's time.

Today, co-mediations are the exception, not the norm, even in high value, complex cases. Based on our experience, we think the question ought to be: When is co-mediation not advantageous? Two professionals working together will see and hear more than they might working alone, have deeper resources for overcoming an impasse, and be better equipped to develop a successful strategy for resolving the case in one session. In the case that we mediated together, we frequently went into different rooms and then got together to discuss what we had learned and accomplished. The efficiencies of the process became readily apparent.

Obviously, the cost of using dual mediators initially results in twice the cost of one mediator, but in reality, the cost of mediation is small compared to court costs, expert fees and attorney fees. Most experienced litigators, claims representatives and sophisticated parties understand that mediation costs are usually the best dollars spent on a large, complex case. Also, a case that would typically take multiple sessions can be resolved in one setting, so the cost considerations disappear.

One other upside to the co-mediation concept lies in the selection process. We have all seen parties waste days if not weeks rejecting each other's proposed mediators in an effort to find one satisfactory to all parties. And that is just in a two-party case. A useful analogy is the use of "party" arbitrators in a three-person arbitration. Each side is selecting someone whom they believe will understand and appreciate their perspective on the case. That same strategy can be applied to the mediator selection process: Let the parties each pick a mediator who is in its comfort zone and let the mediators team up.

We are not aware of any data or studies comparing the effectiveness of single versus co-mediators in complex or high value cases. Intuition and logic suggest that co-mediations can be superior in terms of both cost-effectiveness and overall satisfaction with the process. Give it a try, and you may become a convert!

John M. Drath

Charles Hawkins

John M. Drath and Charles Hawkins are very experienced neutrals affiliated with ADR Services. John received his undergraduate degree from the University of Washington and his law degree from the University of San Francisco School of Law. John is a past President of ADCNCN. Charlie acted primarily as plaintiff's counsel prior to turning to mediation. He received his Bachelor's degree from Stanford University and his law degree from UCLA School of Law.

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Before I Close the Door … Lessons Learned

David L. Winter
Bates Winter & Mistretta

On October 15, 1979, the day I began as a lawyer, Jimmy Carter was president. This year I will complete my 39th year practicing law. Along the way, I learned a number of lessons from co-workers, co-counsel, or in seminars. Even a few lessons from opposing counsel. I also trained dozens of new attorneys both informally through day-to-day practice and formally in a one year program initiated by my first law firm. Before I walk out the door for the last time, here are my top 20 lessons for litigators.

1) When you start your practice as an attorney, you are given one small scoop of integrity. Don't waste it, because it cannot be replenished.

2) The law is a living organism. You must follow the changing law.

3) Distinguish your skills from the crowd. Whether you become the ultimate expert in a narrow area of the law, or a litigator capable of trying cases in multiple factual and legal scenarios, you will be more noticed if you are a zebra, not merely a horse.

4) Always assume your opposing counsel is smarter, works harder, and is more prepared. By challenging yourself to keep up, that will rarely be the case.

5) Absent a long history with opposing counsel, it is essentially impossible to settle cases if your first offer is close to the reasonable range of settlement. The demand will not be, and you will have nowhere to go. Negotiations are a process.

6) If you are winning in oral argument, shut your mouth. Don't let your own comment "snatch defeat from the jaws of victory."

7) Protect your client from abusive examination. In deposition it is inappropriate to ask a party a contention interrogatory, as that requires applying the facts to the law. Keep the focus on what your client saw, heard, said or did. *Rifkin v. Superior Court* (1994) 22 Cal.App.4th 1225. A similar, and potentially far more damaging, situation arises at trial when a witness is asked about a denial of a request for admission. Although an admission establishes a fact or legal conclusion, a denial is not a fact, and a party should not be questioned about denials of requests for admission. *Gonsalves v. Li* (2015) 232 Cal.App.4th 1406, 1415-16. The denial is a legal decision. Don't let counsel attack the character of your client with improper questions.

8) Know the rules of evidence. No information, testimony, or document is of any value at trial unless it is admissible evidence.

9) A trial lawyer is a storyteller. Be a good one. Establish a theme that runs through your case. Develop the characters, provide the setting. Make smooth transitions to guide the jury. Create the drama to keep the jury following your story.

10) No day in trial is as good as you think, nor as bad as you fear. As plaintiff's case comes in, it can seem as though nothing could be going worse. Keep your focus, and present your case as clearly as you can. Your case has merit too; it just takes a while to get your chance to show it.

11) Make your witnesses interesting. Let the jury know enough backstory so

Continued on page 15

they would be excited to talk with the witness outside the courtroom. If your orthopedic expert has worked with the US Olympic team or was selected by the NFL teams and players to evaluate injury claims, your more interesting witness will bear more fruit.

12) Control the courtroom when you can. Set the pace – because the jury will love the attorney who is prepared, focused and organized. Set the tone – use the volume and tenor of your voice to keep things interesting. Do not make a juror's day any harder.

13) Just as Pavlov conditioned a dog to salivate by ringing a bell, you can condition a dishonest witness to agree with your question. Arrange your cross examination to include several times when you can use prior testimony to impeach the witness. This works best if you leave the deposition transcript where you have to reach for it, or walk back to get it each time. Ultimately, you can ask a leading question, and condition a response, simply by starting to walk towards the deposition transcript before the witness answers. The dishonest witness, fearful of being caught again changing a response, will agree with your question.

14) Not all facts are created equally.

15) The adage to never ask a question in court that you do not know the answer to is not an absolute. In some questions, no answer can hurt you. Use this option judiciously.

16) There might be an exception to this rule, but never call a witness a liar. Show the jury the witness is biased, could not have seen what he or she claims to have seen, or is mistaken in memory or perception. Calling a witness a liar will likely create animosity with some jurors. Leading the jurors to their own conclusion preserves your integrity and the integrity of your case.

17) Listening is an art. Use it to your advantage.

18) Script a way in *and a way out* of cross-examination, a series of questions which you can absolutely establish. Between those points, you can be more creative and spontaneous, but if you get into trouble, pause, then go to your exit questions. It appears you have complete control.

19) Learn how to create, copy, fax, email, mail, and serve any document. The best written brief is of no value if you cannot get it out of the office.

21) Take responsibility individually; share credit collectively.

Bonus tip: if by chance, after the first day of the annual defense counsel meeting, you find yourself in a nightclub and someone asks to have their picture taken with you – because they believe you are a senator – do it. It will make that person's day, and it's a very cool – but strange – memory. (Another good reason to attend the Annual Meeting on December 6-7 in San Francisco! – Ed.)

David L. Winter

David Winter is a partner in Bates, Winter & Mistretta in Sacramento and has tried a variety of cases over his career. He received his Bachelor's Degree from Miami University of Ohio, and his law degree from McGeorge School of Law. He has been a regular contributor to this magazine over the past several years.

Save the Date: ADC 59th Annual Meeting
December 6-7, 2018
Westin St. Francis Hotel, San Francisco

ADC members will not want to miss the **59th Annual Meeting** being held once again at the historic Westin St. Francis on Union Square, December 6-7, 2018. In addition to the always popular and informative "Year in Review," highlights for this year's program include:

- The Reptile has slithered its way into the courtroom in virtually every type of civil case, from medical malpractice and other professional negligence matters, to commercial trucking, retail and hospitality and product liability – taking credit for billions of dollars in jury verdicts across the country by manipulating themes of community and danger. Nationally-recognized Reptile experts Bill Kanasky, Jr., Ph.D. and Alyssa Parker, Ph.D. of Courtroom Sciences, Inc. will team with skilled defense and appellate counsel to lead a multi-part workshop that takes a deeper dive into recognizing and combating Reptile tactics during deposition, jury selection, witness examination, opening statement and closing argument.

- If you have ever felt the crushing blow of having your writ petition summarily denied by the Court of Appeal, you are likely in good company. While there are certainly many factors that go into whether to petition the court for interlocutory review, knowing how to present your case to maximize your chance of review is an art form. We are pleased to welcome Justice Ignazio "Nace" Ruvolo, recently retired from the First District Court of Appeal and now with JAMS, and Susan Horst, Esq. of California Appellate Law Group, to our esteemed panel. Ms. Horst was the writ attorney for the First District Court of Appeal for 31 years before joining California Appellate Law Group, where she now devotes her professional time to consulting on writ petitions in the appellate courts, as well as trial court work in anticipation of writ relief. Together, she and Justice Ruvolo bring more than a half century of writ experience and will share their insights on how to best position your writ for success.

- In June 2016, Led Zeppelin guitarist Jimmy Page and singer Robert Plant won a highly publicized six-day trial in United States District Court in Los Angeles when a jury found they did not lift a guitar riff for "Stairway to Heaven" from a little-known, late 1960s rock song called "Taurus" by Los Angeles-based band Spirit. Attorney Peter J. Anderson of Santa Monica, together with Helene Freeman of New York, led the winning trial team. *The Rolling Stone* described Anderson's cross-examination of one Spirit band member as "ruthless" causing the witness to recant a significant part of his testimony that undercut the copyright infringement claim. Prepare to be educated and entertained as we hear how both cutting edge music technology and razor-sharp trial skills carried the day for Page and Plant.

- And many other presentations, covering a variety of practice areas, including your own!

In addition, this year we plan to launch a NextGen event exclusively for our young lawyers where they can network and connect. This is a vital part of ADC's vision for the future of our organization and it requires buy-in and support by our long-time members and their firms. Stay tuned for more details!

Finally, we will celebrate in customary style with friends and colleagues at the President's Reception on Thursday evening where we will toast the holidays and another year of success in our civil defense practice.

We look forward to seeing you there!

Ask a Senior Partner

Don Willenburg
Gordon Rees Scully Mansukhani, LLP

EDITOR'S NOTE:

Young attorneys often have questions that they may feel uncomfortable directly asking their senior partners. No need for embarrassment; ADC *Defense Comment* poses these questions to our distinguished panel of experienced lawyers. The answers to the question below were prepared by Don Willenburg of Gordon Rees Scully Mansukhani, LLP in Oakland. Don is the leader of the firm's appellate practice. He received his Bachelor of Arts degree from Loyola University of Chicago, and his Juris Doctor degree from Stanford University. Don has been a long-time member of the ADCNCN Board of Directors, and chair of the Amicus Committee. Submit your questions for future articles to *rplotz@mitchelllawfirm.com,* and your anonymity will be preserved. The answers and opinions of Mr. Willenburg are his own, and do not necessarily reflect the official opinions of ADCNCN or the editors.

Q How many hours should I work?

A Let me answer that question with a question. How good a lawyer do you want to be?

No, I am not saying that you are only as good as the number of hours billed, or that all lawyers who bill more hours are (and in that measure) more effective advocates, successful attorneys, or happier people. We all know that is not true, and the counter-examples are legion.

But I am saying that every hour worked, or spent, on legal activities (like the ADC!) makes you a better lawyer.

You are spending time with legal issues, with statutes and rules and regulations and court interpretations, with client expectations and hopes and frustrations. That is the stuff in which we traffic. Unless, and even if, you are a born genius, spending time in this space cannot but help.

Performance improves with practice. This is true in athletics. It is true in drama. It is true in dance. It is true in music. If you have a magic elixir that makes law different, do share! (Or dance or music, for that matter. I always wanted to ... But I digress.)

Google Malcolm Gladwell's 10,000 Hour Rule and the lively debate that followed. His point was that it takes a lot of time to be good at something, and that even genius may require a lot of work to uncover itself. "1% inspiration and 99% perspiration," said Thomas Edison.

Lest this sound like "drudge in the salt mines and don't complain, this is why you make the medium bucks," let me also point out that the more time you spend the more interesting and potentially useful things you will find. One (almost uniformly unbillable) thing I regularly do is review the new appellate decisions listed every day on *www.courts.ca.gov.* There's a grand parade of humanity and issues on parade every day. Sometimes a case right on an issue you are facing, other times some stray bit of evidentiary law or statutory construction usable elsewhere. You do not have to do that, but then you will be that much less likely to be able to say, "Your Honor, just this week a case came down...:"

And if it is your 52nd opposition to a motion for trial preference from a dying plaintiff, or 53rd response to a motion to compel discovery, you may either see the unique angle to this particular one that would have escaped your eye 25-50 cycles ago, or sense that this is one where you already know the answer and do not have to reinvent the wheel.

Little Leaguers aren't as good as Madison Bumgarner. Madison Bumgarner wasn't as good when he was a Little Leaguer. Maria Tallchief left Oklahoma for Los Angeles and then New York to train, train, train. Practice may not always make perfect, but it almost always makes better.

There are other things to do in life – I do them and you should do them too: concerts, kid events, politics, fitness, the arts. We should also choose to welcome hours worked as time spent getting better at our very worthwhile profession.

A·D·C
VERITAS

AROUND THE ADC

Bench-Bar Committee

DID YOU KNOW you have a voice with the Presiding Judge in San Francisco? Four times a year, your ADC Bench Bar/Judicial Liaison Committee co-chairs, along with members of the plaintiffs' bar (San Francisco Trial Lawyers Association), meet with the Presiding Judge to discuss the manner in which the Court's business is conducted. We are eager to hear from all members who have *any* **suggestions on how to improve your practice at the San Francisco Superior Court. Please take advantage of this great opportunity to be heard by contacting co-chairs, Don Willenburg at** *dwillenburg@grsm.com* **or Chris Johnson** at *chris.johnson@marmorlaw.com.*

Golf Tournament

The annual golf tournament is set for the afternoon of September 21, 2018 at Silverado Resort & Spa in the Napa Valley. For the non-golfers in our group, the ADC has also organized a wine tasting event at renowned Napa Valley wineries which runs concurrently with the golf tournament. Bring your partners, associates, employees, clients, spouses, significant others, friends, or anyone who enjoys golf or wine (or both)! Details for the golf tournament and wine tasting can be found in the brochure circulated to the membership or at www.adcnc.org. Sign up soon as there is limited availability for both the golf tournament and wine tasting event. We hope to see you in Napa Valley!

Basic Training

Are there secrets to a winning defense? Do you try a bench case differently than a jury trial? Do mandatory settlement conferences matter? Join us in September and October for the annual Basic Training sessions put on by top defense attorneys in California! Learn the ins and outs from start to finish of bringing a case through trial, including the pitfalls to avoid and how to create a winning strategy. Live sessions will be in San Francisco, and you can attend by webinar, if you prefer, too. Details to follow on the ADC List serve.

Diversity

At last December's Annual Meeting, your ADC presented sessions on Empowering Men and Women to candidly discuss the significant and current issues affecting equality in the legal profession. Look for further discussions and presentations on this complex issue.

Did You Know?

The Honorable Judge Frances Muñoz was appointed in 1978 by Governor Jerry Brown as the first Mexican-American female judge in California.

AROUND THE ADC

Sacramento Law & Motion Seminar

ADC President John Cotter, Judge Ben Davidian (Sac. Sup. Ct.), Judge Michael Virga (Ret.), and ADC Board member David Levy

Justice Art Scotland and seminar attendees

Former ADC President Steve Gurnee with Judge Michael Virga (Ret.)

Walnut Creek Construction Seminar

ADCNCN President John Cotter, board members and attendees take time for camaraderie after the seminar.

Michelle Sherry with Litigation Services, one of our awesome sponsors, and ADCNC board member Don Willenburg smile for the camera.

ADCNC board member Maria Quintero and speaker Ralph Woodard enjoying the reception following the conference. Special thanks to Ralph for his steadfast support!

Toxic Torts Seminar

At this year's 2018 Toxic Torts Seminar, cancer continued to be a hot topic, this time, focusing on the role of genetics in BAP-1 cases, as well as defending cancers not originating in the lung. The Seminar also discussed recent cases and legislative developments impacting the defense's ability to defend their clients.

The plaintiffs' bar has long argued that asbestos is the only known cause of mesothelioma. However, with our evolving knowledge of genetics and its role in causing or preventing tumors, there may now be a genetic defense in certain mesothelioma cases - BAP-1 (BRCA1-associated protein-1). Frank Berfield (*Dentons*) discussed how mutations of this tumor suppressor gene have been implicated in the development of spontaneous ovarian, lung, and breast cancers, including mesotheliomas. These recent discoveries certainly impact the defense of particular cases involving younger plaintiffs with little to no apparent exposure history.

Another topic of exploration involved other cancers, focusing on renal carcinoma. This panel was joined by several medical doctors, Dr. Malcolm Karlinsky and Dr. David Galbraith. Both doctors, along with Jim Sinunu (*Sinunu Bruni*) and Jocelyn Soriano (*Archer Norris*), engaged in a lively discussion regarding the defense perspective on evaluating cases involving renal diseases and cancers. The panel also shared particular criticisms of epidemiological studies frequently relied upon by plaintiffs.

The Seminar also featured a discussion by Mike Belote (*California Advocates, Inc.*) of upcoming legislation directly impacting defendants. Certain bills, such as SB 632, would serve to severely impede defendants' ability to conduct a meaningful deposition in mesothelioma cases. Other legislative efforts include the continuing fight for transparency in bankruptcy trust submissions, and SB 993, the proposed sales tax on services.

Finally, the Seminar tackled recent case law and its effect on the defense. On the heels of the recent decision of *People v. Sanchez* (2016) 63 Cal. 4th 665, Don Willenburg (*Gordon Rees Scully Mansukhani*) discussed the potential exclusion of opinions of expert witnesses which relate case specific hearsay. While the *Sanchez* decision could be viewed as an offensive tool to exclude plaintiff's experts, an unwary defendant could face the same expert issues if the proper preparations have not been made in the case. The defense was also presented with recent troublesome decisions regarding preference cases and motion for summary judgment rulings by Ed Tugade (*Demler Armstrong & Rowland*).

The Lawyer's Lawyer

William A. Muñoz
Murphy Pearson Bradley & Feeney

Disengagement Letters – Ending the Relationship

This is the fifth 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. In this edition of the Lawyer's Lawyer, we are going to talk about ending the relationship with the client once you have completed the tasks agreed upon. Well, I have finished what I agreed to do for the client; isn't that all that I, as the lawyer, need to do to end the relationship? Yes and no.

OVERVIEW

If you have read prior Lawyer's Lawyer columns, you memorialized the commencement of the attorney-client relationship with a written legal services agreement. Thus, it does not take much guesswork to understand that the disengagement letter is the means by which you memorialize the termination of the attorney-client relationship. The Business and Professions Code require the former, but not the latter. (Bus. & Prof. Code §§ 614-6148.)

Generally speaking, an attorney's representation of a client ordinarily ends when the client discharges the attorney or consents to a withdrawal, the court consents to the attorney's withdrawal, or upon completion of the tasks for which the client retained the attorney. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 887-888.) Absent actual notice that the representation has concluded, some courts have held that an attorney-client relationship exists only as long as "there are clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney" and the relationship "is marked with trust and confidence." (*See Shapero v. Fliegel* (1987) 191 Cal.App.3d 842, 848.) Other courts have held that "[c]ontinuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship." (*Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488, 1498.)

When speaking of litigation matters, it is easy to define the end point of the attorney-client relationship. For instance, a client asks you to represent them in a personal injury matter. Your written legal services agreement states that it covers the anticipated litigation through trial and expressly excludes any appeals absent a separate, written legal services agreement. In this scenario, the litigation is completed by way of settlement or trial because the task that you as the lawyer were asked to perform has been completed. In this instance, a disengagement letter may not be necessary because there is a definite end.

Alternatively, the client can terminate the attorney-client relationship and new counsel takes over before the litigation has concluded. This is accomplished by either a Substitution of Attorney or a motion to be relieved as counsel. Under either scenario, there is evidence the attorney-client relationship is over.

But, what if you are representing your client in a transactional matter? Is ending the relationship any different than a litigated matter? Not necessarily because it would depend on what you agreed to do for the client. Whether it is preparing a contract or negotiating a purchase or sale, there is also an endpoint. However, unlike litigated matters, you do not prepare Substitutions of Attorney or motions to be relieved as counsel if the client decides to go with another lawyer. Additionally, there may also be incidental matters related to the contract or deal that you negotiated that may require your involvement that demonstrate the task that you agreed to has not yet been completed. Absent a letter ending the relationship, there may not be any hard evidence demonstrating when the attorney-client relationship ended.

WHY DISENGAGEMENT LETTERS?

So what is the point of a disengagement letter if the litigated matter that I represented the client in is over or the transactional matter concluded? More importantly, why would attorneys prepare such a letter when they are not required to do so? I mean, we lawyers are busy and have better things to do, right? Of course we are all busy and the last thing that we need to do is another task for which we

Continued on page 22

probably cannot bill. However, there are three very important reasons why you as the lawyer want to have disengagement letters for your files.

STATUTE OF LIMITATIONS

What is The Lawyer's Lawyer column without malpractice avoidance advice? Perhaps the single most important reason for preparing a disengagement letter is to definitively terminate the attorney-client relationship to start the statute of limitations running on any claim arising out of the provision of legal services. There are four subparts to Code of Civil Procedure section 340.6 that provide tolling of the statute of limitations: (1) the client has not discovered the facts giving rise to the claim; (2) the client has not sustained actual injury; (3) the attorney actively conceals the facts giving rise to the malpractice claim from the client; or (4) the attorney continues to represent the client in the same subject matter giving rise to the malpractice claim. (Code Civ. Proc. § 340.6(a)(1)-(4).) This latter provision is where disengagement letters are critical.

For example, in *Gonzalez v. Kalu* (2006) 140 Cal.App.4th 21, plaintiff sued her lawyer for malpractice contending that the lawyer failed to timely file a sexual harassment lawsuit against her employer. Plaintiff hired the lawyer on June 2, 2000 to prosecute the sexual harassment lawsuit. On July 31, 2000, the lawyer obtained a right to sue letter. Plaintiff contended that lawyer stated he would file suit upon receipt of the right-to-sue letter. However, plaintiff claimed she did not hear from lawyer again until June 2003 when she went to his office to pick up her file for another, unrelated matter with her employer. At that time, she learned that the sexual harassment lawsuit had not been filed.

Lawyer defended the malpractice claim contending that it was time-barred. He contended that in December 2000, he orally advised plaintiff that he would not file the sexual harassment lawsuit and that plaintiff agreed to drop the lawsuit if a settlement was not forthcoming. The trial court granted lawyer's motion for summary judgment finding that the claim was time-barred. On appeal, the Second District reversed finding that there was a triable issue of material fact as to whether the lawyer continued to represent the plaintiff regarding the sexual harassment claim given the absence of any communication between the two for over two years.

Another good example is *Laclette v. Galindo* (2010) 184 Cal.App.4th 919. In that case, the lawyer represented the plaintiff in an underlying real estate litigation matter where the plaintiff was being sued by the buyer of real property. After the jury returned a verdict against plaintiff and before the punitive damages phase of the trial, the

matter settled on January 25, 2005 for $175,000 payable in monthly installments of $3,750. Additionally, the court retained jurisdiction over the settlement until paid in full. On February 9, 2007, plaintiff filed the malpractice claim against Galindo contending that he had a conflict of interest in representing her and her broker in the underlying matter. The trial court granted Galindo's motion for summary judgment on statute of limitations grounds finding that the failure to formally withdraw or the court's retention of jurisdiction over the settlement did not amount to continuous representation.

On appeal, the Court reversed finding that the case was not one where the client consented to termination of the relationship or the Court granted a motion to withdraw as counsel. The Court held the lack of communication between Galindo and plaintiff was not dispositive as the evidence of the trial court retaining jurisdiction over the settlement while payments were being made and the fact that Galindo remained as counsel of record demonstrated that the representation had been fulfilled or that the agreed upon tasks had been completed. In other words, objectively viewing the representation from the client's perspective, the Court could not say as a matter of law that plaintiff could not reasonably expect Galindo to represent her in the event of issues arising concerning the performance of the settlement.

Had the lawyer in *Gonzalez* sent a disengagement letter stating that he was ending the relationship and would not pursue the litigation after initial settlement discussions failed and before the time ran on plaintiff's sexual harassment claim, the result in *Gonzalez* would have been different. By the same token, while plaintiff still had to make settlement payments, the litigation in *Laclette* was over. There was nothing preventing the lawyer from disengaging once the settlement had been reached. He should have substituted out of the case or moved to withdraw. Even in the absence of a substitution of attorney or motion to withdraw, a disengagement letter to the plaintiff after settlement had been reached would have provided objective evidence that the relationship was, in fact, over, which very well may have changed the result in *Laclette*. (*See Flake v. Neumiller & Beardslee* (2017) 9 Cal. App.5th 223, 230-231 (failure to formally withdraw as counsel, standing alone, will not toll the statute of limitations.)

Disengagement letters are essential for purposes of starting the statute of limitations, particularly if the attorney-client relationship was strained. Do not rely upon the lack of communication or the fact that the matter for which you were representing the clients had concluded to denote the end of the attorney-client relationship. Document it with a disengagement letter so there can be no dispute.

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AN OPPORTUNITY TO REVIEW YOUR PERFORMANCE

Aside from the statute of limitations issue, sending a disengagement letter is an opportunity for you as the lawyer to receive feedback from your client. Asking the client for feedback on your performance in the disengagement letter allows you to develop further as a lawyer by providing insight into the good and bad things that the client picked up on during the representation. This is particularly true of institutional clients who routinely send you work because it lets the client know that you value the relationship and want to continue improving the services that you provide.

Of course, no one likes to receive negative criticism of their performance and many lawyers may be unwilling to ask the client to review their performance. However, if you are not willing to be open to criticism or suggestions, then you cannot grow as a lawyer and are doing a disservice to your current and potential future clients. Be open and add the request of your client to review your performance in the disengagement letter.

MARKETING OPPORTUNITY

The third reason to send a disengagement letter is that it is a golden opportunity for you to market yourself or your firm for future business. Certainly, if the relationship was strained, putting a plug in the disengagement letter to assist the client in any future legal needs may not yield much work. However, that is generally not the case. For private clients, you may have discussed over the course of representation what areas of practice that you or your firm handle. In the disengagement letter, take the opportunity to reiterate these practice areas to the client in the event they, or someone they know, has a need in the future in one of these areas. If the client is satisfied with your services, he or she will more likely than not refer future matters or clients to you.

Similarly, for those lawyers who have institutional clients, such as insurance companies, they have chosen you for certain lines of business – general liability, professional liability, EPLI, etc. While you may be doing all of the company's general liability work, the disengagement letter lets you market to the insurance company that you and or your firm handle other lines of business that the company insures. The disengagement letter provides the invitation to follow up with the company to develop these other lines of business, and/or to get introductions to others in the company who handle these lines.

The disengagement letter is a quick, inexpensive and painless way to market yourself and can open the door to future business.

CONCLUSION

The disengagement letter is an essential component in the practice of law that is often overlooked by practitioners. However, the ramifications of not doing one can be the difference between a successful motion for summary judgment on statute of limitations grounds in the unfortunate event your client sues you or a guaranteed trial because there are triable issues of material fact. Assuming no other viable defenses to the malpractice claim, the lack of a disengagement letter can be very expensive.

Failing to provide the client with a disengagement letter ending the relationship on the particular matter for which you were retained is an opportunity missed. It can be a meaningful tool for client feedback and business development. Do not waste this opportunity to protect yourself, better yourself as a lawyer, and to develop future work.

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.

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

We reserve the right to edit letters chosen for publication.

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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 briefs, letters supporting Supreme Court review, and letters supporting publication or depublication on cases involving important defense issues.

Here is some of the committee's activity since the last issue of *Defense Comment:*

1 We successfully sought publication of *Timed Out LLC v. 13359 Corp.* (2018) ___Cal.App.5th___ . The issue was whether a commonly-used phrase in defense settlement offers under Code of Civil Procedure section 998, "exclusive of reasonable costs and attorney fees, if any," was ambiguous, or whether it unambiguously "made clear that the settlement amount did not include attorney fees and costs."

2 The committee successfully sought publication of *Big Oak Flat-Groveland USD v. The Superior Court of Tuolumne County* 2018) ___Cal.App.5th___. The case involved the interplay of Government Code sections 905(m) and 935 with Code of Civil Procedure section 340.1, "a question of first impression," and a detailed analysis of the childhood sexual abuse statutes, the government claim presentation requirements, and statutory interpretation. The opinion affirms the public policy behind prompt notice of claims, and that local public entity procedures for section 905-exempted claims are authoritative and binding.

3 The committee successfully sought publication of *Sakai v. Massco Investments, LLC* (2018) 20 Cal. App.5th 1178. The question in *Sakai*:

Whether a gas station owner who allowed a taco truck to operate on his premises owed a duty to the plaintiff to prevent the injury caused by another vehicle's driver exiting the parking lot at an excessive speed after a confrontation.

Our amicus letter in support explained four reasons for publication. First, the decision helps demonstrate the proper application of the *Rowland* factors by rejecting overbroad concepts of "foreseeability." Second, in addressing the injury's foreseeability, *Sakai* focuses on a *Rowland* factor that few published decisions address – the "closeness of the connection between the defendant's conduct and the injury suffered." Third, the decision also importantly explains the type of evidence needed to establish the requisite foreseeability, including evidence of prior similar incidents. Fourth, the decision is also important because it confirms that courts can and should grant summary judgment on no-duty grounds even where a plaintiff contends the defendant landowner could have employed greater safety measures

4 The committee supported a "grant and transfer" petition for Supreme Court review in *Tighe v. Chino Valley School District*, No. S246463. "The petition raises the important question whether rule 2-100 prohibits an attorney from secretly obtaining admissions relevant to elements of the plaintiff's case other than liability, such as damages." 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 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?" Unfortunately, the petition was denied.

5 Your amicus committee took an unusual approach to *Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203. The committee, disagreeing with our ASCDC compatriots, assessed that the decision was correct on the merits: there is no SLAPP violation for claims acts on which a complaint expressly disavows that it is proceeding. (Ordinarily defense lawyers want to confine a plaintiff's case to the four corners of the complaint, and reject unpleaded theories.) But

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the decision also took potshots at the defense lawyers involved, misconceiving the proper role of appellate counsel. So the committee chair authored an article published in the Daily Journal addressing just that aspect ("Extensions and civility are not bad faith, DJ 2/7/18) in the hope that the Supreme Court and its research attorneys would read it in connection with the petition for review and requests for depublication. The ADCNCN did not expressly support either.

6 The committee sought publication of *Buckley v. The W Hollywood Hotel.*, (B281742, Mar. 28, 2018). At issue in the Opinion was whether a hotel – an inn-keeper – owes a duty to conduct "welfare checks" on its guests when third parties demand. The Opinion holds that there is no such duty. Publication of this no-duty holding would be especially important in light of other recent published authority imposing liability on those who conduct "welfare checks." (*O'Malley v. Hospitality Staffing Solutions* (2018) 20 Cal.App.5th 21, see next item.)

7 The committee filed a letter in support of California Supreme Court review of *O'Malley v. Hospitality Staffing Solutions* (2018) 20 Cal.App.5th 21. That opinion greatly expands the potential liability of anyone who, out of common courtesy, agrees to check to see if someone is in their residence because they have not been reachable by phone. The opinion cedes to the jury the determination whether the undertaking should have included a thorough search of the entire residence to ensure she was not medically incapacitated even where, as here, the individual who agrees to go check was not made aware of any medical concern, and was a maintenance worker who "had never before been asked to do a welfare check of a guest in a room."

8 The committee filed a successful publication request in *Novak v. Continental Tire North America*, (Mar. 20, 2018, *A149494, A150751, A150752*) which awarded the defense summary judgment in this scenario: "Plaintiff alleges defendants failed to warn about the dangers of rubber degradation in old tires, which led to a tire blowout in 2005 that injured her father. Plaintiff further alleges that those injuries impaired his mobility, necessitated his use of a motorized scooter with limited maneuverability, and led to his death in 2011 after his scooter was struck by a vehicle in a crosswalk." Just the kind of overreaching that defense lawyers need to nip in the bud. The decision reaffirmed the importance of *Palsgraf* and analysis of proximate cause as separate from the question of duty and its interaction with the concept of superseding cause, and is the first California decision to analyze the limit of section 460 of the Restatement Second of Torts: "If the negligent actor is liable for an injury which impairs the physical condition of another's body, the actor is also liable for harm sustained in a subsequent accident which would not have occurred had the other's condition not been impaired, and which is a normal consequence of such impairment."

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@grsm.com;* Patrick Deedon at *pdeedon@maire-law.com;* Jill Lifter at *jlifter@rallaw.com;* Sam Jubelirer at *samuel.jubelirer@dentons.com.*

Don is Chair of the Amicus Committee of ADCNCN, and chair of the appellate department at Gordon Rees Scully Mansukhani, LLP in Oakland.

Don Willenburg

SUBSTANTIVE LAW SECTION REPORTS

Are you interested in writing an article? Joining one or more substantive law sections? 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 sections and contact information for co-chairs in box below) and let them know how you would like to participate.

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BUSINESS LITIGATION

William A. Coggshal | *Co-chair*
Michele C. Kirrane | *Co-chair*

Autonomous Vehicle Regulations in California

The advancement of autonomous vehicle technology has resulted in increased litigation. California is one of the first states to recognize this emerging issue and enact regulations for the testing and deployment of driverless cars. Pursuant to California Vehicle Code Section 38750 et seq., the California Department of Motor Vehicles ("DMV") approved autonomous vehicle regulations that became effective on April 2, 2018.

The new regulations now allow manufacturers to test vehicles on public roads without safety drivers. The DMV also outlined the permitting process that includes three permit options: testing with a safety driver, driverless testing and deployment.

Although California is allowing companies to deploy and test driverless cars, there are numerous requirements. A "communication link" is required between the testing vehicle and remote operators in order to transmit information in the event of a collision. All remote operators must complete a training program. The vehicle must also be equipped with a data recorder and be able to defend itself against cyberattacks.

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CONSTRUCTION

Jill J. Lifter | *Co-chair*
Wakako Uritani | *Co-chair*

The construction substantive law committee started the year with the annual Construction Conference in Walnut Creek, held on April 13. The conference was a success, attended by nearly 80 attorneys, special masters, claims professionals, and expert consultants. This year, the panel discussions included bodily injury claims in an effort to broaden the scope of the committee and include those who handle all types of construction-related claims, rather than the narrower focus on construction defect claims as in years past.

The three education panels were 1) "Wrap-up Update"; 2) "Title 7: Functionality Standards Independent of Damage and Other Headaches"; and 3) "Indemnity and Additional Insured issues: Where are We Now?" It was a unique opportunity to hear from industry leaders in claims, litigation and forensic investigation on how they adjust and defend their claims in the face of coverage issues raised by policy language of wrap-up insurance programs, lack of resultant damage associated with violations of certain functionality standards, and risk transfer challenges since the amendments to the Civil Code governing indemnification provisions in construction contracts.

There is a very recent development to bring to your attention. Senate Bill No. 1326, introduced on February 16, 2018, is pending and it proposes to amend Civil Code §2782 once more. If passed, it would clarify that the indemnity provisions are unenforceable if the liability purported to be imposed is caused, in whole or in part, by the active negligence of the owner or its employees. The bill would also make unenforceable, except as specified, provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract with the owner of privately owned real property to be improved as to which the owner is not acting as contractor or supplier of materials or equipment to the work, that purport to require a contractor or subcontractor to indemnify the owner for death or bodily injury to persons, or for injury to property, other than that caused by the negligence of the contractor or subcontractor.

If you did not attend the seminar, all is not lost! You will have the opportunity to purchase the webinar version and download both the program materials and the PowerPoint presentations that accompanied the panel discussions. Please visit the ADCNCN website for details.

Thank you to all of the members who help make our organization a success by submitting ideas, attending, and speaking at our conferences, as well as to those communicating to us areas of interest for future seminars. Over the years, the ADCNCN Construction Conference has addressed current issues facing the defense bar and has provided useful practice tips and tools for its members. We do this best with your feedback. Please let us know what topics you would like to see addressed and whether you would like to be a panelist. If you know of any cases or new legislation that affects our practice, please bring them to our attention or, better yet, please prepare a short summary that can be used as a Newsflash. Your help in preparing Newsflashes to keep our membership apprised of recent and relevant decisions affecting our practice group is essential and appreciated!

EMPLOYMENT

Marie A. Trimble Holvick | *Chair*

The Employment Law Committee is hosting its first annual seminar on Friday, June 15th from 12-4 pm at Gordon Rees Scully Mansukhani, LLP in San Francisco. The seminar will include a networking lunch sponsored by U.S. Legal, as well as three 1-hour CLE sessions. We have a fantastic line-up of speakers who will cover workplace investigations, wage and hour issues, and sexual harassment in the #MeToo era. We hope you will attend!

In the meantime, we have been closely tracking several employment developments. Be sure to advise your clients about the Department of Labor's new tip pooling regulations. Under the Obama Administration and in the years prior, the DOL consistently took the position that employees who do not provide direct service to the customer are not allowed to participate in a tip pool. However, in December 2017, the DOL published a proposed amendment to the Fair Labor Standards Act. This amendment allowed back-of-the-house workers to share in tip pools earned by front-of-the-house workers, if the restaurant chose to implement this type of arrangement. On March 23, 2018, President Trump signed the omnibus congressional spending bill, which included a revised version of the FLSA amendment. The revised law provides that tips can be redistributed to non-tipped workers only if the employer pays its employee the regular minimum wage in its jurisdiction – not the lower federal minimum wage for tipped workers. To be clear, this is not an issue in California as tip credits are forbidden under California law. The final version of the bill also confirms that employers – including managers or supervisors – cannot keep any portion of the tips earned by their workers. Of note, neither the bill nor the FLSA define "supervisors" and "managers," which may present some uncertainty in future enforcement.

LANDOWNER LIABILITY

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

The Court of Appeal affirmed the San Francisco Superior Court's ruling that the state's Fair Employment and Housing Act (FEHA) does not preempt San Francisco Police Code §3394, which outlaws discrimination based on a tenant's participation in the Section 8 Program.

Under SF Police Code §3394, property owners and real estate agents are prohibited from refusing to accept federal, state or local housing subsidies as a form of rental payment, or to indicate in rental

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advertisements that housing subsidies will not be accepted as payment. On the other hand, FEHA does not prevent a landlord from discriminating against or excluding Section 8 tenants simply because the landlord prefers not to participate in the program.

In *City and County of San Francisco v. Chuck M. Post* (April 11, 2018, A149136) ___Cal.App.4th ___[2018 WL1737212], appellant Chuck Post, acting as agent for the property owner), sought tenants for efficiency apartments. Between May 2013 and May 2014, he posted advertisements for these units, each advertisement stating that the landlord would not accept Section 8 vouchers.

In 2015, the City and County of San Francisco and the People of the State of California filed a complaint against Appellants alleging that Post's actions violated the ordinance that forbids discrimination based on source of income. The complaint also alleged violations of California Business and Professions Code § 17200 and of a prior injunction prohibiting the property owner from employing unfair business practices. Appellants demurred on the ground that FEHA preempts the source of income provision in the ordinance, but the trial court overruled the demurrer.

The People then moved for a preliminary injunction to prevent Appellants from continuing to discriminate against participants in the Section 8 Program. The trial court granted the Preliminary injunction, and this appeal followed.

The Court of Appeal affirmed the trial court's decision. The court held that the challenged ordinance was not preempted by implication or by contradiction, and remains fully in force.

The Landowner Liability Sub-Law Section welcomes all input from ADCNCN's members regarding their interest in the above topics, as well as other topics of current interest.

MEDICAL MALPRACTICE AND HEALTHCARE

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

On an increasingly regular basis, we are seeing attempts by plaintiffs to allege punitive damages in medical malpractice actions. Often, without a sufficient factual basis, plaintiffs allege that medical records have been altered, a battery has occurred, or that a medical provider was fraudulent. These types of claims may allow for punitive damages. However, such allegations should pass procedural tests before the pleading may properly include a claim for punitive damages. If the facts are not currently present, the plaintiff should be required to amend the pleading at a later time to include the discovered facts. This is not always so obvious to a Law and Motion judge.

Code of Civil Procedure§ 425.13 sets forth the procedural requirements in advance of asserting punitive damages against a medical provider. Specifically, §425.13(a), reads:

> (a) In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim....

The language of §425.13 comes from a 1988 amendment in which the Legislature attempted to tighten the overbroad language of the original statute; it no longer would allow an individual, who happens to be a medical provider, to trigger the §425.13 protections in a case unrelated to the provision of medical services. Instead, the additional protection is in place only when the case arises out of the professional negligence of the medical provider acting in his or her capacity as a practitioner.

In an effort to provide clarification for the lower courts on the application of §425.13, the Supreme Court, in *Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, attempted to define the phrase "arising out of," as used in the statute, and determine whether an intentional tort, as opposed to negligent conduct, could arise out of professional negligence. The Court concluded, for an action to arise out of the professional negligence of a health care provider, "the injury for which damages are sought [must be] directly related to the professional services provided by the health care provider."

To determine whether an intentional tort may find its "origination, growth or flow from" the professional negligence, the court turned to the legislative intent of §425.13. According to the *Central Pathology* court, the Legislature was "concerned that unsubstantiated claims for punitive damages were being included in complaints against health care providers." (Id. at 189.) The court recognized in a medical malpractice context, there may be considerable overlap of intentional and negligent causes of action because acts supporting a negligence cause of action might also support a cause of action for an intentional tort. (Id. at 251.)

The court explained, "Identifying a cause of action as an 'intentional tort' as opposed to 'negligence' does not itself remove the claim from the requirements of Section 425.13." (Id. at 192.) Instead, it must be determined whether each injury is directly related to the manner in which professional services were provided. (Ibid.)

Despite the clarification provided by the Supreme Court, there have been numerous medical negligence lawsuits in which fraud is alleged, the fraudulent conduct arises out of the relationship between the patient and medical provider and the provision of medical services, and punitive damages

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are asserted, without first seeking leave to amend the complaint. This requires a physician defendant to file a motion to strike the punitive damages pursuant to §425.13.

Despite the *Central Pathology* decision, which held the fraud cause of action in that case triggered § 425.13 protections, some trial courts often deny the physicians' motions to strike on the grounds the fraudulent conduct is somehow separate and distinct from the medical negligence, as the alleged fraudulent acts performed were not such as a medical practitioner ordinarily would be expected to perform in his or her capacity as a healthcare provider. (See *Davis v. Superior Court* (1994) 27 Cal. App.4th 623, 628-29.)

Such a distinction would limit the application of §425.13 to only the provision of medical services, thereby allowing only medical negligence to trigger the protections. In other words, such a decision ignores the statutory language "arises out of," and the *Central Pathology* holding, which specifically concluded intentional torts may trigger the application of §425.13. Such a decision would further allow plaintiffs to circumvent the statute by alleging an intentional tort such as fraud. It is important in such a circumstance to request a hearing on the denial of the motion to strike, with a court reporter, in preparation of appeal, should such be necessary so as to preserve the full protections for healthcare defendants as intended by the Legislature in drafting § 425.13.

The denial of a defendant physician's motion to strike has been successfully taken up on appeal in cases involving allegations of alteration of medical records, lying to a patient about laboratory test results, worker's compensation fraud, sexual battery, and sexual assault. (See *Davis*, supra, 27 Cal.App.4th 623; *United Western Medical Centers v. Superior Court* (1996) 42 Cal.App.4th 500; and *Cooper v. Superior Court* (1997) 56 Cal.App.4th 744.) In keeping with the Legislature's intent to protect physician defendants from spurious punitive damages claims, it is imperative the protections of § 425.13 be upheld and appropriately applied.

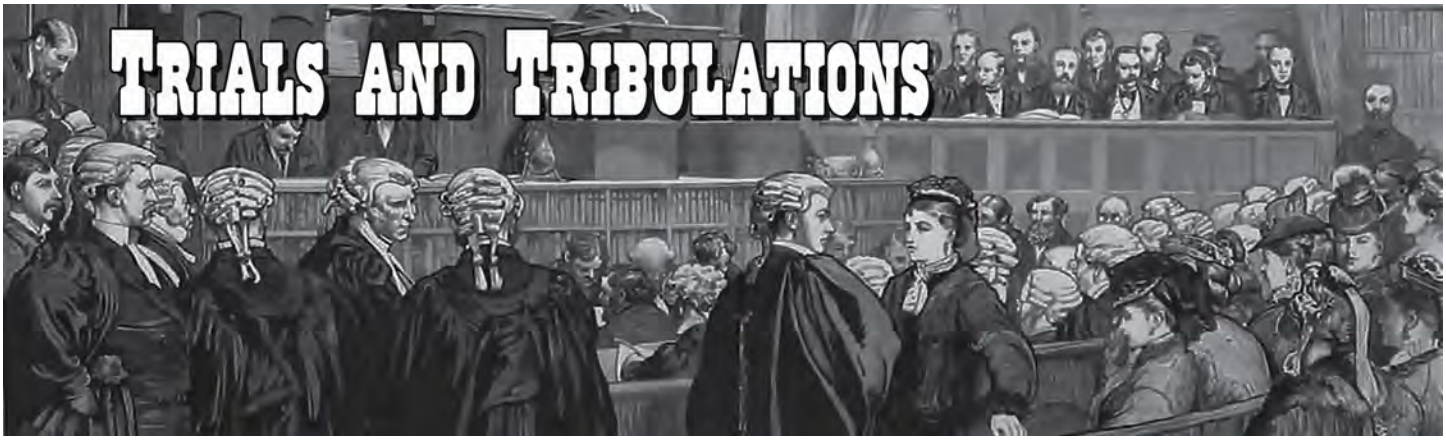
PUBLIC ENTITY

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

The Public Entity Subcommittee remains steadfast in support of our public entity clients. In conjunction with our Amicus Committee, we assisted in preparation of a publication letter request in the matter of *Big Oak Flat-Groveland USD v. Superior Court* (2018) 21 Cal.App.5th 403. The Appellate Court agreed, and the case was published! The case is important for public entity sector defendants with respect to proper application of the claim presentation requirements of the Government Code and the interplay between sections 905(m) and 935. Section 935 of the Government Code permits entities to enact local claim procedures for claims that otherwise would be exempted by section 905. This decision provides clear authority that local claim procedures pursuant to section 935 are authoritative and binding. The decision also provides a clear analysis of statutory interpretation.

Several other published cases are important to our public entity members as well. For instance, *Regents of the University of California* (March 22, 2018) held that universities have a special relationship with their students to protect them from foreseeable harm. *Arvizu v. City of Pasadena* (February 27, 2018) analyzed the immunity of Government Code section 831.4(b) and found that it extends to claims arising from the design of a trail, including lack of handrailing. The immunity provision of Government Code section 830.6 was analyzed in *Rodriguez v. Dept. of Transportation* (March 28, 2018) wherein the exercise of discretionary authority was proper with respect to a design that did not contain particular safety features. Additionally, the United States Supreme Court, in *Kisela v. Hughes* (April 2, 2018), overturned the Ninth Circuit and found that a police office was entitled to qualified immunity. The *Kisela* decision reaffirmed the high court's precedent in affording qualified immunity to law enforcement in excessive force cases, reaffirming the principles of *White v. Pauly*.

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. There are many benefits to being a member of ADCNCN and the subcommittee groups. Please take advantage!



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*

Steven H. Gurnee of Gurnee, Mason & Forestiere in Roseville received a defense verdict for his client, SCI California Funeral Services, Inc., in Orange County Superior Court, the Hon. David T. McEachen presiding. Non-suit was granted as to fraud claims.

Eleven plaintiffs were the surviving siblings of the decedent, who came to Fairhaven Memorial Park to make funeral and burial arrangements for their brother. Plaintiff Maydale Benton was in charge and told Fairhaven's funeral counselor that he was the beneficiary of a $15,000 life insurance policy the decedent had from his job. He also claimed to have a durable power of attorney for healthcare allowing him to make all funeral arrangements per Health & Safety Code section 7100. Plaintiffs requested and Maydale contracted for full funeral services including embalming, a visitation and a full funeral service in defendant's chapel to be followed by interment in defendant's cemetery. The contract clearly stated that no interment would occur without advance payment in full. Maydale proposed to use the life policy proceeds to pay for the nearly $14,000 of services requested. Maydale signed a claim form attesting to his status as the policy beneficiary as well as an assignment of its proceeds to Fairhaven. Fairhaven engaged in numerous contacts with the insurer seeking to confirm its acceptance of the assignment. On the morning of the funeral, the insurer still had not confirmed coverage and with the service about to begin, Fairhaven offered to proceed with the funeral in the chapel if roughly half the contract price were first paid with the expectation the insurer would confirm coverage by the time the burial was to occur. Plaintiffs then collected and paid $7,050 and the funeral went forward, after which decedent's casket was taken into the cemetery where a committal service was performed. Meanwhile, the insurer indicated to Fairhaven there were problems with Maydale's assignment and his claim to be the policy beneficiary such that it would not confirm coverage that day. As plaintiffs claimed they did not have money to pay the balance owed, Fairhaven opted per its contract and published policies to stop the interment, return decedent's casket to safe storage and wait for either the insurer to approve payment or Maydale to pay the balance. The next day, the insurer concluded Maydale was not the beneficiary, that his assignment of the policy proceeds was invalid and that the proceeds would be paid to the decedent's five children all of whom refused to contribute anything to the cost of their father's funeral. One month later, plaintiffs paid the balance owed and the decedent was then promptly interred. On the first day of testimony, several plaintiffs were voluntarily dismissed.

The remaining plaintiffs claimed they suffered severe emotional distress as a result of Fairhaven's refusal to proceed with the burial, and asserted causes of action for fraud, breach of contract, breach of the good faith covenant, negligence and intentional infliction of emotional distress. Defendant contended that it had been misled by Maydale Benton and the other plaintiffs as to Maydale's authority and status as policy beneficiary, that it was well within its contractual rights to refuse to inter the decedent's remains until it received full payment for its services and that plaintiffs were negligent in failing to read the contract and other documents Maydale signed. Maydale admitted he did not know how to read but never made that known to Fairhaven.

After a 10-day jury trial and 2.5 hours of deliberation, the jury returned with a defense verdict.

Mary Talmachoff of Bates, Winter & Mistretta, LLP, in Roseville, obtained a favorable verdict for her client in Sacramento County Superior Court, Hon. Alan G. Perkins presiding. Plaintiff claimed that defendant consumed Percocet, Adderall, Ambien and Prozac within 24 hours before an accident and was wearing twice the prescribed amount of transdermal Fentanyl when he rear-ended a vehicle that was pushed into plaintiff's vehicle while stopped at an intersection. Plaintiff alleged that defendant's consumption of several opioid medications impaired his ability to drive and caused the accident. Liability for the accident was admitted by the defendant at trial, but he denied consuming all of the medication alleged by plaintiff prior to the accident, denied any impairment from the medication and disputed the nature and extent of plaintiff's injuries.

Plaintiff alleged that he suffered an aggravation of a pre-existing health condition of ankylosing spondylitis (rheumatological condition) in his neck,

Continued on page 31

upper and lower back which caused increased symptoms requiring chiropractic treatment. Plaintiff also alleged that the accident made his previously asymptomatic left hip joint become symptomatic which ultimately necessitated a left hip replacement. Plaintiff also claimed that he would require a future hip revision surgery since he was only 45 years old at the time when he underwent the left hip replacement.

Plaintiff asked the jury to award approximately $662,000 at trial and a symbolic $1.00 in punitive damages against defendant. The defense pretrial 998 offer was $20,000. The jury awarded $9,917.85 after approximately three hours of deliberation. The jury determined that defendant's consumption of opioid medications did not justify an award of punitive damages.

David A. Levy, Adam Ely and Kristina Paszek of the San Mateo County Counsel's Office successfully defended an appeal in the Ninth Circuit Court of Appeals, in a case involving the death of an 18-year old woman. Summary Judgment had been granted in favor of the San Mateo County Sheriff's Office, and a Deputy Sheriff, who responded to a call involving a potentially dangerous mentally ill woman. When he arrived on scene, the woman tried to stab him with a steak knife; he retreated approximately 160 feet, but the woman continued to yell and threaten him. She refused the Deputy's command to stop, and when she was about 20 feet away, he fired a single, fatal shot. The Federal Civil Rights Act claim was dismissed by the District Court on the ground that the Deputy acted in reasonable self-defense (reported in the Summer 2016 issue of this magazine), and the Appellate Court affirmed. The family filed a separate state action in San Mateo Superior Court, and summary judgment was granted in July 2017; that matter is currently pending in the California Court of Appeal, First Appellate District.

Sharon L. Hightower and Nathaniel Lucey of Ericksen Arbuthnot in San Jose received a defense verdict in the United States District Court, Central District, the Hon. R. Gary Klausner presiding. The case involved claims for false and misleading advertising in violation of the Lanham Act codified as 15 U.S.C. §1125(a) and California Business & Professions Code sections 17200 and 17500. Plaintiff, a large manufacturer of medical scrubs, sued Vestagen Technologies, a small startup manufacturer of scrubs that contained a fluid barrier and an antimicrobial agent designed to help prevent the spread of bacteria. Vestagen, through separate counsel, filed a cross-claim against Strategic with similar claims for misleading and false advertising, breach of contract, and misappropriation of trade secrets.

Plaintiff claimed millions in damages and sought restitution and disgorgement of profits from the smaller company. Vestagen sought restitution of their damages and disgorgement of the profits gained by Strategic.

After four days, the court dismissed the cross-claim for insufficient evidence to present the issue to the jury. The jury deliberated on the primary case for less than two hours and returned a unanimous verdict in favor of Vestagen. The verdict and dismissal of the cross claim are now on appeal with the Ninth Circuit.

Edward Huguenin and **Robert Kahn**, (assisted by James Bothwell and Michael Laidlaw) of Hall Huguenin of Roseville, began a series of arbitrations against a well-known plaintiffs' firm relating to alleged construction defects in multiple homes. The cases started as a single, complex construction defect matter that the firm successfully compelled to home-by-home arbitration with AAA, and with separate arbitrators presiding over each of the cases. The cases concerned a variety of asserted SB 800 violations with primary focus on the builder's alleged failure to provide adequate protection against corrosion of the post-tensioned foundation cable ends, anchorage and hardware. The dollar value for the asserted damages ranged from $40,000 to $75,000 per home. Each 2 to 4-day arbitration was tried over the course of 6 consecutive months (many occurring on a weekly basis). In each of the following exemplar cases, the firm defensed the claimants' single largest dollar item and their main geotechnical and PT corrosion claims:

- Complete defense verdict/award on behalf of the builder (award in the amount of $0 against asserted damages in the amount of $58,226). Further, the firm obtained an award of costs in favor of the Builder in the sum of $43,203.13.

- Defense verdict/award on behalf of the builder in the amount of the defense cost to repair ($278.00) (asserted damages in the amount of $41,511).

- Defense verdict/award on behalf of the builder with respect to the post-tensioned cable corrosion/geotechnical claim, while also beating the defense's C.C.P. § 998 offer as to all issues (award in the amount of $5,578 against asserted damages of $42,547).

- Defense verdict/award on behalf of the builder with regard to the post-tensioned cable corrosion and all geotechnical claims while also beating the defense's C.C.P. § 998 offer as to all issues (award for statutory violations in the amount of $7,173 against asserted damages by Claimants in the amount of $68,000).

- Defense verdict/award on behalf of the builder with regard to the post-tensioned cable corrosion/geotechnical claims while also beating the defense's C.C.P. § 998 offer as to all issues (award in the amount of $6,188 against asserted damages of $52,132). Likewise, obtained a cost award on behalf of the builder against claimants.

- Defense verdict/award on behalf of the builder with respect to the post-tensioned cable corrosion/geotechnical claims while also beating the defense's C.C.P. § 998 offer as to all issues (award in the amount of $8,848 against asserted damages of $54,756).

- Defense verdict/award on behalf of the builder with respect to the post-tensioned cable corrosion/geotechnical claims while also beating the defense's C.C.P. § 998 offer as to all issues (award in the amount of $2,582 against asserted damages of $50,739).

Continued on page 32

Trials & Tribulations

– *continued from page 31*

Karen Goodman and Addy Tang of Goodman & Associates in Sacramento successfully obtained a unanimous defense verdict in Placer County, after a six-day jury trial, in an age discrimination case. Goodman & Associates was hired by Defendant Housing Alternatives shortly before the discovery cut-off and well after the matter was set for trial. The case involved a property manager who was terminated for performance issues after 17½ days of employment. The defense successfully demonstrated that the client's records documented that the plaintiff had a number of performance issues during her short tenure and that age was not a factor.

President's Message

– *continued from page 2*

city or simply not going back to the office after a deposition!

As lawyers, we often find ourselves needing to work on weekends and evenings. But is all that really so bad? Look at it a different way. If you are that busy, you are doing something right. You are in demand because your clients and/or boss are giving you lots of work. They need you. Being a busy lawyer tends to indicate you are doing things right. That is a good thing.

While most of us depend on corporations and institutions for our livelihood, the entities for whom we work are composed of real people. Take the time to get to know those people and help them achieve success by solving their legal problems. Not only will you reap a tremendous amount of satisfaction, you will also help your practice. They will remember you.

I have been very fortunate to have great clients and to employ the finest group of attorneys and staff one could want. So, yes, I told my daughter to go to law school and in my heart, I meant it.

JPC

CDC Report

– *continued from page 3*

The services tax issue is presently pending in SB 993 (Hertzberg). The idea may be politically difficult to pass this year, as a two-thirds vote is required, and Governor Brown has expressed considerable skepticism. But the bill is no crackpot proposal; it is a fully fleshed-out, dense document that exhibits considerable thought.

The California Defense Counsel (the political arm of ADC and your sister organization in the South) opposes SB 993, because we believe that the bill would encourage insurers and others to bring legal services in-house to avoid the tax consequence. More broadly, businesses argue that the proposal necessarily benefits large entities which can employ service providers that small businesses would have to contract for.

Lieutenant Governor Newsom has expressed support for the services tax concept. So even if SB 993 is unsuccessful this year, which is likely, the issue is most assuredly not going away.

So, the consequences of today's primary election are big. Does a Republican finish in the top-two for governor? For attorney general? Does Senator Josh Newman get recalled in Orange County? Does Senator Tony Mendoza, who resigned facing sexual harassment allegations, make the top-two *to get his own seat back?* Do Santa Clara County voters recall Superior Court Judge Aaron Persky, because of his sentence in a notorious rape case?

Democracy, and the legislative process which depends upon it, are messy. Beyond all of this, the final 10 weeks of the legislative session will involve dozens of issues of interest to defense practitioners. Such issues as arbitration in employment, potential creation of a "middle-tier" of civil cases, mass torts including asbestos, lead paint and even privacy and data breaches, will be decided before the legislature adjourns for the year at midnight August 31.

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

THERE OUGHT TO BE A LAW

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:

- **The Code Section involved;**
- **A statement of the problem with existing law;**
- **A brief statement explaining how your suggestion solves the problem.**

Any background information you can provide will also be helpful: case citations, law review articles, statistics, etc.

Please send your ideas and info to:
Jennifer Blevins, Executive Director
ADCNCN
2520 Venture Oaks Way, Suite 150
Sacramento, CA 95833

welcome, new members

Since March 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.

Angela Allard
Jones & Dyer
Sacramento
YOUNG LAWYER MEMBER

Tracey A. Amundson
Maire & Deedon
Redding
YOUNG LAWYER MEMBER
Referred By: Patrick Deedon

Alexandria Carraher
Ropers Majeski Kohn & Bentley
Redwood City
YOUNG LAWYER MEMBER
Referred by: Enrique Marinez

Scott D. Cote
Diepenbrock & Cotter, LLP
Sacramento
REGULAR MEMBER
Referred By: John Cotter

Benjamin A. Davies
Diepenbrock & Cotter, LLP
Sacramento
REGULAR MEMBER
Referred By: John Cotter

Anthony C. Diepenbrock
Diepenbrock & Cotter, LLP
Sacramento
REGULAR MEMBER
Referred By: John Cotter

Lynn Garcia
Spinelli, Donald & Nott
Sacramento
REGULAR MEMBER

Christine Garske
Van De Poel, Levy, Arneal & Serot
Walnut Creek
REGULAR MEMBER

Alexander Golovets
Law Offices of Alexander Golovets
San Pablo
YOUNG LAWYER MEMBER
Referred by: Jill Lifter

Miles Holden
Hanson Bridgett LLP
San Francisco
REGULAR MEMBER

Austin L. Houvener
Toschi, Sidran, Collins & Doyle APC
Pleasanton
YOUNG LAWYER MEMBER
Referred By: Steven Toschi

Kevin Lee
Van De Poel, Levy, Arneal & Serot
Walnut Creek
YOUNG LAWYER MEMBER

Marcus Lee
Lewis Brisbois
San Francisco
REGULAR MEMBER

Evan McLean
Spinelli, Donald & Nott
Sacramento
YOUNG LAWYER MEMBER
Referred By: Scott Donald

Lisa Omoto (added onsite)
Van De Poel, Levy, Arneal & Serot
Walnut Creek
YOUNG LAWYER MEMBER

John C. Padrick
Diepenbrock & Cotter, LLP
Sacramento
REGULAR MEMBER
Referred By: John Cotter

Carlos K. Poza (added onsite)
Manning Gross + Massenburg
Walnut Creek
REGULAR MEMBER
Referred by: Jill Lifter

Kurt T. Putnam
Walsworth Franklin Bevins & McCall
San Francisco
REGULAR MEMBER

Nathan Scheg
Ironhorse Law Group PC
Walnut Creek
REGULAR MEMBER
Referred By: Jill Lifter

Nicole I. Whatley
Low McKinley Baleria & Salenko
Sacramento
YOUNG LAWYER MEMBER
Referred By: Donna Low

Stephen B. Welch (added onsite)
Archer Norris
Walnut Creek
REGULAR MEMBER

Sara J. Woods
Ericksen Arbuthnot
Fresno
REGULAR MEMBER
Referred By: David Frankenberger

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2018

Calendar of Events

Save the Dates!

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.