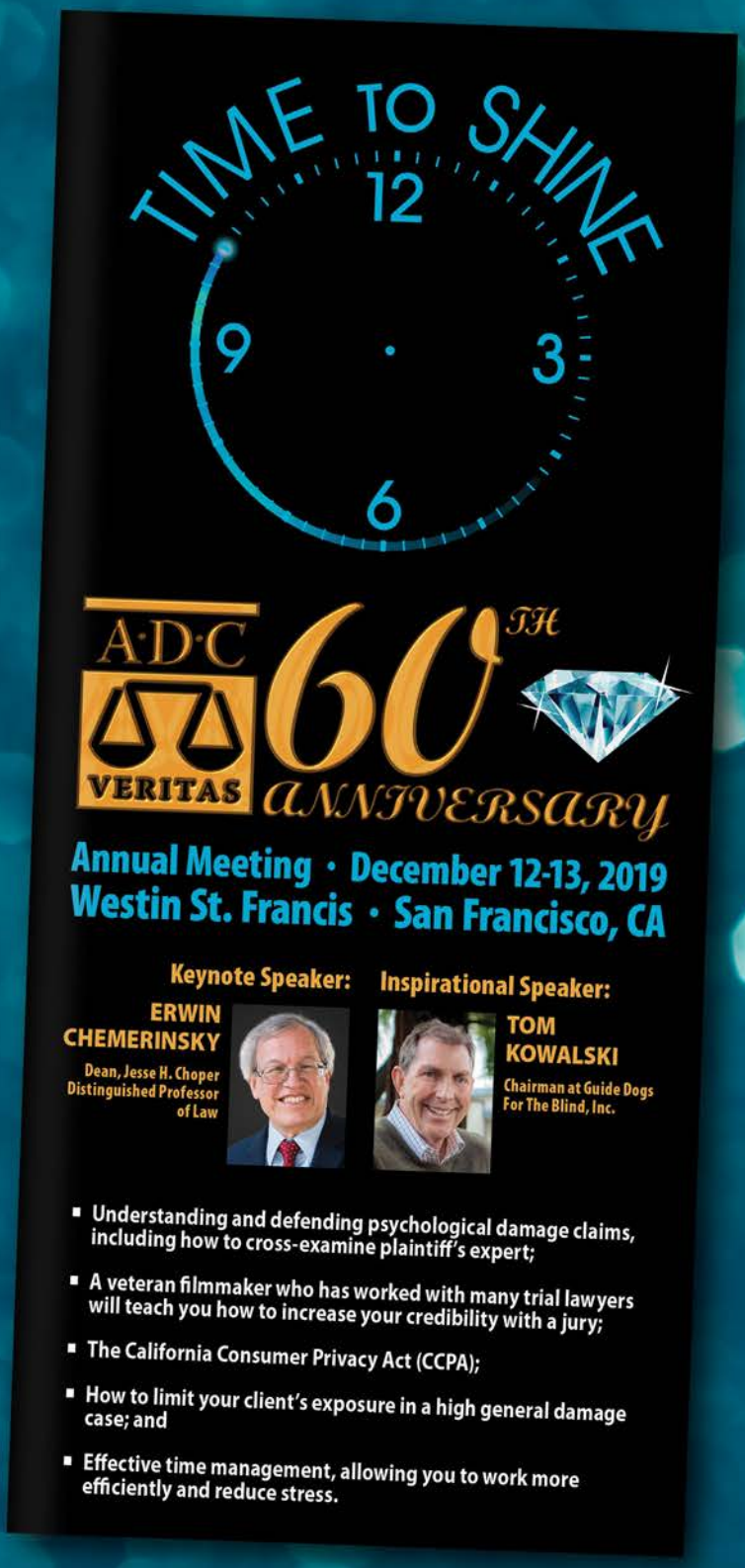
A·D·C VERITAS

DEFENSE COMMENT

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

Vol. 34, No. 3 / Fall 2019



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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:**

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Editor's Note: As a follow-up to David's prior President's Message entitled, "Summer Makes a Better Lawyer," David discusses his recent trip to Northern Greece.

David S. Rosenbaum
2019 President

Next Time, Visit Northern Greece

Instead of visiting Santorini, Mykonos, or even Athens, try a trip to northern Greece. Northern Greece adds a diversity of culture not seen in the more popular locations. Northern Greece, too, has wonderful food, the sea, and ancient history and sites. (Alexander the Great is from Northern Greece.) The best part is Northern Greece is surprisingly light on foreign visitors.

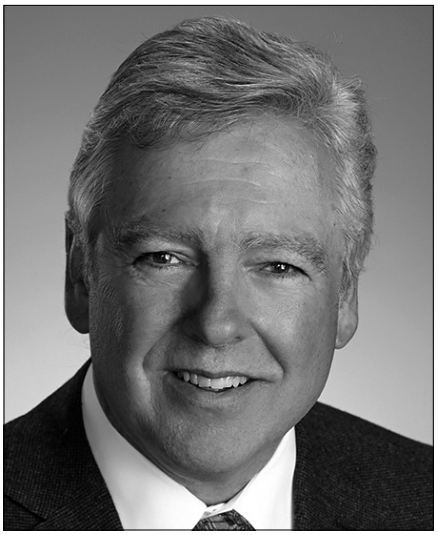
Food in Northern Greece will vary depending upon your locale. If you are visiting a mountain town, the meals will be about meat – lamb, goat, wild boar, pork, and sometimes venison. If you are visiting near the sea, the food is about the fish. My favorite is a plate of grilled sardines. Of course, there are other traditional side plates such as fried zucchini chips and the famous Greek salad of tomatoes, cucumbers, green peppers, red onions, and olives.

Since my family-in-law lives in northern Greece, our traditional point of entry is through Thessaloniki. Thessaloniki was a stopping point for trade between Constantinople and western Europe. The original *Egnatia Odos* ("state road"), that carried commerce in ancient times is still used today. Bustling trucks and automobiles continue daily passes from Istanbul to Thessaloniki.

Thessaloniki is built on a hill against the sea with a promenade along the entire front edge. It holds a renowned museum regarding Byzantine history. The White Tower of Thessaloniki is both a monument and a museum. The 112-foot tower provides views up and down the waterfront and to the castle at the top of the hill behind the city. Thessaloniki's oldest monument is the Rotunda. Built between 305-11 A.D., the building has served as a mausoleum, a church and a mosque. Everything you want to see in Thessaloniki is accessible by foot.

After travel recovery in Thessaloniki, a loop can be driven to see both sites and visit the sea. First, travel west to the city of Vergina (about 1.5 hours from Thessaloniki). *(See the map on page 31.)* In Vergina lies the royal burial cluster of King Phillip II, the father of Alexander the Great. His tomb was excavated and then a mound was put over the top, creating what is now a museum. The excavated items are on display inside the museum,

Continued on page 31



Michael D. Belote
California Advocates, Inc.

Painting With a Blue Brush

Recently the California Legislature concluded work for the 2019 legislative year, the first year of the current 2019-2020 two-year session. As of this writing, Governor Newsom now faces the unenviable task of wading through 600-700 bills to sign or veto, which must be completed under the state constitution by October 13. Bills not signed or vetoed become law automatically, but modernly no California governor utilizes this option.

At the macro level, we are beginning to see the impact of the ever-increasingly blue state of California politics. Both the Assembly and Senate have moved quite decisively beyond Democratic "supermajorities," to "mega-majorities" of effectively three-quarters in each house. Combined with a governor who is clearly to the left of his predecessor, we are seeing one-party dominance in Sacramento unlike anything we have experienced in our lifetimes. Further, this dominance could easily increase with the 2020 elections. In the state Senate, for example, there are four Republican members facing reelection in highly competitive districts next year, creating the possibility that the 29-11 Democrat to Republican balance could become decidedly more imbalanced.

As for 2019, despite claims by some that this was a quiet year legislatively, in fact quite the opposite interpretation is more accurate. For the second consecutive year, the California Legislature has passed landmark legislation which will have national (and even Presidential) implications. Last year the issue was privacy, embodied in the California Consumer Privacy Act (CCPA) through AB 375 and SB 1121. Implementation of the privacy package was delayed intentionally until January 1, 2020, in order to provide an opportunity for refinements and corrections to the very complex CCPA.

Of course, what the business community views as "refinements," privacy advocates tend to view as "corporate monoliths walking back on consumer protections." At the end of this legislative year, only minor modifications were sent to Governor Newsom, far short of the changes sought by business. The most important change is in AB 25 (Chau), awaiting action by the governor. (Editor's Note: Subsequent to the submission of this column, AB 25 was signed by Governor Newsom on October 11, 2019, effective on January 1, 2020). AB 25 clarifies that employees are not "consumers" for purposes of CCPA, eliminating the possibility, for example, that employees could demand deletion of their personnel files.

We certainly have not seen the end of the privacy debates, whether in Congress, other states, or even here in California. No doubt there will be bills introduced starting in January to make further CCPA changes, and incredibly, another initiative is being readied for signature gathering which would significantly expand the CCPA if qualified and approved on the November 2020 ballot.

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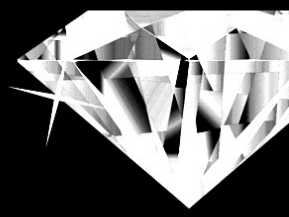
VERITAS

60TH ANNIVERSARY



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"Time to Shine"

ADC's 60th Annual Meeting

Christopher Johnson
ADC Second Vice-President

Where were you 60 years ago? Some of you might be old enough to remember. Sixty years ago, the music of Elvis Presley and Chubby Checker topped the charts. Ben Hur won the Oscar for Best Picture, and a gallon of gas cost around 29 cents. And no one had any idea what the words "iPhone" and "Super Bowl" meant.

No question about it – a lot has happened since 1960. But it's nice to know some things never change. Once again, the ADC will hold its Annual Meeting at the Westin St. Francis Hotel in San Francisco, this year on December 12 and 13, and you won't want to miss it!

The Annual Meeting will kick off with our "Don't Be Late For Court" program. **Presiding Judges from San Francisco, San Mateo and Santa Clara Superior Courts** will discuss the current judicial state of affairs affecting our civil defense practice.

Our keynote speaker this year is one of the nation's foremost experts on the First Amendment, **Erwin Chemerinsky**, the Dean of University of California, Berkeley, School of Law. Chemerinsky is a fascinating speaker who has authored numerous books on Constitutional Law. At the annual luncheon on Friday, Chemerinsky will

Continued on page 6

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Association of Defense Counsel of Northern California and Nevada

60TH Annual Meeting

Thursday, December 12, 2019

TIME	TRACK A	TRACK B
8:45 am – 9:00 am	Welcome and ADC Business Meeting	
9:00 am – 9:45 am **FIRST MORNING SESSION**	Don't Be Late for Court: State of the Courts Address	
9:45 am – 11:00 am **SECOND MORNING SESSION**	2019 – Year In Review	
11:00 am – 11:15 am	Break – Colonial and Italian Rooms	
11:15 am – 12:15 pm **THIRD MORNING SESSION**	Motorcycles, Mopeds, and Bikes, Oh My!	Damages In Gender Bias Litigation
12:15 noon – 1:30 pm	NextGen Luncheon (RSVP required)	
1:30 pm – 2:45 pm **FIRST AFTERNOON SESSION**	I Feel Your Pain (and Suffering)	CALGreen Construction and Risk Management Issues
2:45 pm – 3:00 pm	Break and Vendor Prizes – Colonial and Italian Rooms	
3:00 pm – 4:00 pm **SECOND AFTERNOON SESSION**	Lights, Camera, Action!	Essentials of Psych Reports and Exposing Red Flags
4:00 pm – 4:15 pm	Break – Colonial and Italian Rooms	
4:15 pm – 5:15 pm **THIRD AFTERNOON SESSION**	California Consumer Privacy Act – It IS Your Business!	Time Management For Lawyers
5:15 pm – 5:45 pm	Sub-law Specialty Section Meetings: • Toxic Torts • Construction	
5:30 pm – 7:30 pm	President's Reception	

Friday, December 13, 2019

TIME	
8:30 am – 9:15 am	Legislative Update
10:45 am – 11:00 am	Break
9:30 am – 10:45 am	Cyber-Risk & Cyber Insurance
10:45 am – 11:00 am	Break
11:00 am – 12:00 pm	Inspirational Speaker: Tom Kowalski (and Dynamo)
12:00 pm – 2:00 pm	Luncheon Keynote Speaker: Erwin Chemerinsky

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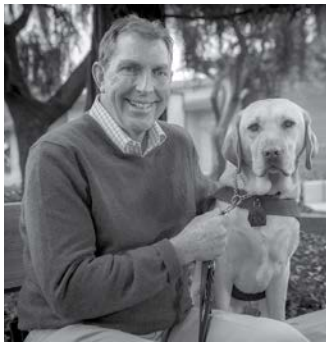
address, among other important topics, how our society's view of freedom of speech has been influenced by the cultural and political climate in our country. Make sure you're there!



Our motivational speaker, **Tom Kowalski,** is another fabulous individual. Kowalski is on the Board of Directors of Guide Dogs For The Blind, located in San Rafael. Appearing with Kowalski is the best four-legged friend anyone could ever have, Dynamo. When you hear the compelling story of their journey together, you will be amazed. Don't miss it!

This year's Annual Meeting also will feature programs that will help you become a better defense lawyer, while also helping you fulfill your continuing legal education requirements. Here are just a few of the programs that will be presented.

LIGHTS, CAMERA, ACTION!

Every time you appear in court before a jury, you are on stage. Like an actor, you must develop your presence, demeanor and delivery to tell your client's story effectively. The same skills that help make a great actor also help you be a great trial lawyer. Veteran filmmaker, **Sean Kinney**, has worked with many lawyers on developing these skills. Kinney and his wife, **Christiane Cargill Kinney**, an entertainment lawyer, will present a program that will teach you how to develop these skills.

LIMITING YOUR CLIENT'S EXPOSURE IN THE HIGH GENERAL DAMAGE CASE

We all know that significant injuries can produce a high general damage award to a plaintiff for pain and suffering. But unlike economic damages, general damages cannot be calculated with mathematical precision.

Jury instructions don't give jurors much guidance either. Jurors are told to use their judgment and common sense to award a "reasonable amount." The role of the defense lawyer, during discovery and through trial, is therefore extremely important in helping the jury determine what is "reasonable" and what is not.

Bob Morgenstern, Don Carlson, and Denis Shanagher are three of the best defense trial lawyers in California. They will show

Continued on page 7

60TH Annual Meeting

you how to handle the high damage case, and how to limit your client's exposure. This program is a must for all defense litigators.

CALIFORNIA CONSUMER PRIVACY ACT

This timely program will explain the new law that goes into effect on January 1, 2020, which will fundamentally change how businesses handle personal information of California residents.

Regardless of the specific nature of your practice, *all* defense lawyers will benefit from hearing about the sweeping changes set forth in this new landmark law, which some have called the most expansive privacy legislation in the history of the United States. Attorneys **Alexandra Laks and Don Willenburg** will explain how this law affects your clients and your practice.

DEFENDING PSYCHOLOGICAL DAMAGE CLAIMS

One of the most challenging claims you will ever face as a defense lawyer is from the plaintiff who claims to have suffered extreme emotional distress or other mental injury as a result of your client's wrongful conduct. This could include claims arising out of alleged sexual abuse or harassment, or other employment law violations. Mental injuries, including PTSD, also can arise from severe physical injuries. These types of claims can produce significant, often unexpected, verdicts, especially when accompanied by aggravated liability.

How well you defend against such claims will depend in large part upon how effectively you cross-examine plaintiff's expert. **Ronald C. Heredia, Ph.D.** is the Chief Operating Officer at Westwood Evaluation & Treatment Center. Dr. Heredia will present a program that will teach you how to determine whether the plaintiff doctor's data warrants their conclusions. He will also help you identify common flaws often found in a psychological report, and provide you with a line of specific and direct questioning that can be used when cross-examining plaintiff's psychological expert.

MANAGE YOUR TIME

Abraham Lincoln once said, "A lawyer's time and advice are his stock in trade." Nothing could be more true. But the lawyer who wishes to maximize his or her efficiency, and reduce stress along the way, must learn how to effectively manage their time.

Cami McLaren practiced law for 16 years before becoming a performance coach. She is the author of **Coaching For Attorneys: Improving Productivity and Achieving Balance.** She will present a program that will show you how your approach to time and tasks affects your energy, and how your energy affects your ability to get things done well and timely.

In addition to the above, our legislative advocate in Sacramento, **Mike Belote**, will provide an update on legislative developments in California that will affect all of us and our clients.

And as always, our annual **Year In Review** program, led by Michael Brady, Robert Eisenberg and Ashley Meyers, will highlight major cases in 2019 that will help keep us up to date.

The **President's Reception** on Thursday evening will allow us to catch up with old friends and colleagues, and have some fun.

Please join us for a fun and informative event that will mark the beginning of the next 60 years of our fine organization. It's Time To Shine!

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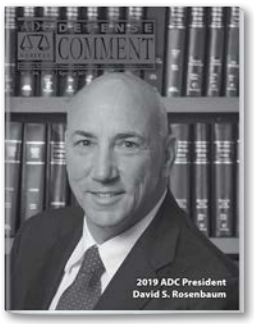
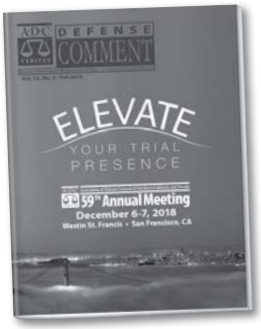




Do you have an article or trial success story to share with readers?

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

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

All submissions should be sent to *ellen@arabian-leelaw.com* and *jlifter@rallaw.com*.

Past President Highlight Featuring

STEVEN H. GURNEE,

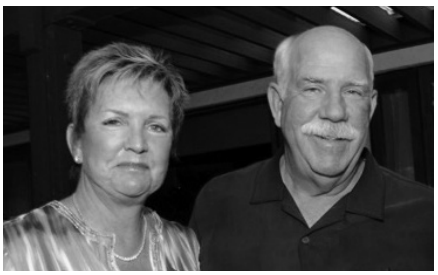
Managing Partner for Gurnee Mason Rushford Bonotto & Forestiere, LLP

Erin McGahey
Demler, Armstrong & Rowland, LLP

Steve Gurnee served as President of the Association of Defense Counsel of Northern California and Nevada in 1998. He is the founding partner of Gurnee Mason Rushford Bonotto & Forestiere, LLP, in Roseville. He formed his own law firm in 1996. In addition to his service to the ADC, Steve was a member of the Board of Directors of the California Defense Counsel, served as its President in 2004, and continues to serve as its senior advisor. A long-time member of the American Board of Trial Advocates (ABOTA), Steve was recognized in 2007 by the Sacramento Valley Chapter as its "Trial Lawyer of the Year," and is currently the Chapter's President Elect. Steve is a seasoned trial attorney with a penchant for flying his Cessna around the state and beyond, handling cases and trials for a variety of clients.

How long have you been practicing law?

I was admitted to the Bar in 1975, after graduating from Hastings College of the Law. I started with a small firm in San Mateo doing lots of different things: trusts and estates, divorces, drafting contracts, and handling litigation. It was there I had my first jury trial – I lost. In April 1977, my wife, Linda, was pregnant with our first child when we decided to move to Sacramento, where I joined a small defense firm then called Bolling, Pothoven, Walter, & Gawthrop, as their second associate. I became a partner in that firm in 1981 and



Linda and Steve

remained until 1993, when I joined the Ropers Majeski firm and opened their Sacramento office. In 1996, I opened my own firm and in 1998 moved our office to Roseville, where we have been ever since.

How long have you been a member of the ADC?

I'm trying to remember, but I think I joined in 1979 or 1980, shortly after I started at the Bolling firm. Everyone there was an ADC member, including former ADC President, Don Walter. I was elected to the ADC Board in 1989.

Was being a member of the ADC instrumental in becoming involved in the CDC?

Of course. The CDC is the very important political arm of our ADC and the Association of Southern California Defense Counsel (ASCDC), and supports the interest of the members of both associations on legislative issues that impact our practices. In 1997, while I was Vice President of the ADC, we searched for a new legislative advocate and were fortunate enough to find and hire Mike Belote of California Advocates, Inc. He has since been a godsend to our associations and the CDC, providing us with keen insight on the issues and a meaningful voice for all of us in dealing with the Legislature, the Governor's office and the courts. As a further benefit, we were introduced to Jennifer Blevins, the head of California Advocates Management Services (CAMS), who was then hired as our excellent Executive Director. I am proud to have played a significant role in both of those changes which have provided enormous benefits to our members.

What are some of the significant changes that you have seen in the practice of law during your career?

I've seen a number of changes over the nearly 44 years I've been in practice – has it really been that long? A few things stick out in my mind. I began as a typical defense lawyer defending insured individuals and companies at the request of insurers. In the process, we developed great, close and trusting relationships with the carriers and the claims personnel with whom we dealt. But over the years, that relationship

Continued on page 10

seems to have changed, becoming much more distant, less personal, regimented and, in some cases, even hostile, which is really too bad. The advent of audits and guidelines in the late '80's and early '90's further chilled the relationships. At the same time, the economics of trying cases also changed with increasingly burdensome (and expensive) discovery obligations, delays, etc. Today, it is very difficult for lawyers, particularly young ones, to get to trial and develop the kind of experience I was able to gain earlier in my career. That's why we have difficulty finding candidates who are eligible to join organizations like ABOTA.

I've also seen dramatic declines in civility among lawyers, which has certainly made the practice of law more stressful and less rewarding. I think a lot of that has to do with the demise of civility in society in general, but also the sheer number of lawyers currently licensed to practice in this state. I'm astounded to see new bar numbers now hitting 350,000, while mine is in the 66,000s. That's a very big change.

How has the electronic age of communication affected your practice?

I've lived through a lot of changes in my career. I started when we used carbon paper, then IBM mag cards, shorthand and cassette tape recorders for dictation. Then, along came fax machines and high-speed copiers, all of which increased the pace of life tremendously. I was the first in our firm to get a cell phone in 1983 and haven't been without one since. E-mail now dominates our communications and with it the pace of life. But I realized early on that the effective use of technology is vital to a small firm like ours (presently 12 lawyers) remaining competitive with larger firms. It allows us to handle complex, multi-party cases we might not otherwise be able to handle. To that end, I've become pretty techy so I'm OK with it. It does increase the pressure on us to respond immediately and thereby contributes to civility problems when attorneys send e-mail missiles without thinking about it, often saying things that they regret later. It is a great tool for getting a lot of things done quickly, but has its downside as well and should be used with caution.

What has changed or been lost that you'd like to see again?

I'd like to see civility return to the practice. Civility is a big deal in ABOTA and through our Civility Matters programs, we hope to try and turn that ship around. The other thing that seems to have been lost is the art of personal communications and camaraderie among our peers. With all the electronics (e-mail, texting, fax, etc.), and the press of business, there seems to be less personal contact and socializing with our fellow attorneys. I miss that.

What do you appreciate most about the ADC?

I most treasure the many relationships I have developed with other members

Continued on page 11

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Mediator / Arbitrator

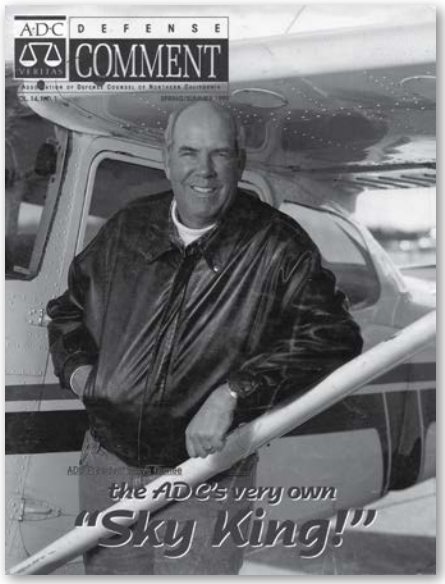
of both the ADC and the ASCDC. As a result of my involvement with this organization over the past 35+ years, I have friends all over the state as well as out of state. I recommend that every member, particularly those actively involved as officers or on the Board, get involved with our sister association in the south – go to their annual meeting, invite them to come to our annual meeting, and attend the joint meetings. It is a good way to connect and network and develop great business relationships. But one has to take advantage of it and actively participate.

Also, ADC's educational programs are excellent and the legislative advocacy is outstanding. It is amazing how successful we are on that front considering how little money CDC has to work with. I encourage everyone to continue to support and contribute to the CDC PAC. The return on investment is well worth it.

What are some of your fondest memories?

I have many fond memories of the ADC, but I would have to say the most memorable are the relationships that I've forged with others in the organization. I've made some really good friends over the years and enjoy catching up with them. One of my favorite activities these days is going to the "Has-Beens" lunch for ADC Past Presidents, which we hold at Sam's Grill every year during the Annual Meeting in San Francisco. The joint association trips we used to take to Hawaii each year, the joint Board meetings in La Quinta and Monterey, the regional meetings we had in Montana, Washington and Oregon, the monthly Board meetings in San Francisco with the after-dinner drink cart and cigars, and, of course, the Annual Meetings, particularly the one in 1996 (with 950 members and guests in attendance), when Colin Powell was our keynote speaker, also bring back great memories.

What are some of the things you enjoy doing when you're not litigating?



I'm still actively practicing law and trying cases. I keep busy now managing the firm and traveling around the state on cases. I've been a pilot for over 30 years and have my own plane (a Cessna 210) that I love to fly. It has proven very useful for business. I flew 60 roundtrips to Burbank for one class action case in Los Angeles. I also play golf (rather poorly), but use the plane to fly frequently to Monterey, the Bay Area, Palm Springs and our place in Sunriver, Oregon. I want to keep flying as long as I can. Linda and I love to travel and recently spent three weeks in Europe – part of it with fellow ADC/ASCDC/CDC Past Presidents Dan Quinn and Bob Harrison. Great times. We also spend a lot of time with our children (a son who is a great chef in Bend, Oregon and our daughter who is a great mom in Vancouver, Washington), and our six grandchildren they have blessed us with. All in all, life is very good.

Jan Roughan, RN

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EDITORIAL: ARBITRATION
Once a Good Idea, Now a Very Bad One

John P. McGill
McGill Law Firm, APC

The ADC panel discussing arbitration at the May 2019 Walnut Creek meeting provided an excellent overview and discussion of the arbitration process, but the panelists did not discuss the significant disadvantages to the arbitration process and, to be sure, there are significant disadvantages to the process.

In practice, the benefits of arbitration, at least its purported benefits, are no longer realistic or true. Arbitration is not less expensive than trial, it is not any faster, and it is often far riskier than trial. In fact, arbitration, at least private works arbitration, is not a good alternative for resolving most contract disputes, especially smaller disputes, *smaller* being relative, both quantitatively and qualitatively.

The first thing to know about arbitration is the process is not cost efficient. The cost of an arbitrator is a cost the participants pay. This is true in both private works and public works arbitration. The cost can be spread out among the parties, but it is still a cost. The arbitrator's per diem fee is often quite generous (four and sometimes five figures), exclusive of expense. Arbitrators are typically very experienced judges and attorneys, and their fees reflect that experience, knowledge, reputation, and demand. Regardless, the costs are high notwithstanding any justification. Add to that the cost for the arbitration provider. Each service provider includes a fee for case handling and other case management activities over and above the cost of the arbitrator(s).

Parties don't pay for a trial judge.

As a practical matter, in small(er) disputes, the cost of the arbitration can sometimes exceed the amount at issue, which may be one way to incentivize the parties to talk sense and settlement. If there is an attorney's fees provision involved, the complications and considerations increase, although to be fair, the same can be said for court trial. Then again, why spend money on arbitration if the same potential result can be obtained for free?

Selecting an arbitrator is also a dicey proposition. Typically, the parties select from a list provided by the arbitration service, or perhaps they go off panel and consider other candidates. The list of potential neutrals will be whittled down and those in contention will (or should) provide information so all parties know with whom the arbitrator has worked in the past and any decisions they issued in order to assess potential conflicts. It is unlikely an arbitrator who has heard multiple cases for one party will be selected to hear the present case. In fact, the likely choice will be the arbitrator no one has used before, but whose ostensible experience makes them the least objectionable candidate, albeit not necessarily the first choice of any of the parties. In short, the parties roll the dice, hope for the best, and pick someone they think they can trust to get the job done fairly and properly.

In the trial context, each side can exercise one peremptory challenge of the assigned trial judge, but unless the assigned judge is notorious or has given a really bad decision to one of the parties, the determination of the judge who hears the case is usually left to the presiding judge.

Then there are the rules that will apply, and this is where it gets interesting. The arbitration providers each have their own rules, and these often vary depending on the amount in dispute. Sometimes you get full discovery, sometimes you get limited discovery, sometimes you get no discovery. Going into any hearing without the benefit of full discovery is not a good idea, but it can happen if the amount in dispute governs the discovery allowed.

Even more consequential, in arbitration the rules of evidence don't necessarily apply and/or can be ignored. Hearsay is permitted, documents don't necessarily need to be authenticated, and the arbitrator is allowed great discretion at the hearing to permit witnesses – experts and lay – to testify about anything and everything. In fact, in private arbitration the Code encourages the arbitrator to allow any and all testimony where a trial judge could or would refuse to allow that same testimony. The point is, an arbitrator does not have

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to apply the law or consider the facts in a way that is consistent with the cases or the statutes, or in the way you expected when you prepared your case.

And this is the great problem with private works arbitration: the arbitrator can make errors of law and can do so with impunity. It is not reversible error and it is not grounds for appeal if the arbitrator completely misunderstands or misapplies the law and reaches a completely erroneous conclusion and decision. The arbitrator can do all of that, and if you are the "losing" party and you go to court to vacate the decision because of those errors, your opponent will show up waving *Moncharsh v. Heilly & Blase* (1992) 3 Cal. 4th 1 at the judge and will insist that even if the arbitrator got the law wrong, the decision has to stand and cannot be vacated. To be sure, there are cases after *Moncharsh* that explain and limit that holding and the rather exuberant interpretations *Moncharsh* is often given (see *Bonshire v. Thompson* (1997) 52 Cal. App. 4th 803), but it is an uphill, nearly vertical, slog. Ask any appellate attorney what the likelihood of reversing a private arbitration award is and they will tell you: nearly impossible.

In order to make any arbitration award enforceable, you must petition the trial court to confirm the award. The trial court's review of a private works decision is constrained by *Moncharsh* and the Code of Civil Procedure. The court can only engage in a very limited review, not trial de novo, and, as a practical matter, courts are not likely to vacate an award except in truly unusual circumstances. If you want to appeal, you will be appealing the trial court's confirmation of the arbitration award, in light of the arbitration decision, in light of *Moncharsh,* and in light of the Code's restrictions on vacating an arbitration award. To say it is an uphill battle is to be generous.

The biggest problem with private works arbitration is the lack of a realistic right to appeal an arbitrator's wrong decision. As it is, an arbitrator in private arbitration has more authority than a judge. The arbitrator can ignore the law, ignore the facts, and reach a conclusion s/he wants to reach because that is what they believe should be the result notwithstanding the law, facts, and/or any combination of the two. A trial judge is not likely to do that, but if they did, the appellate court is there to correct the trial judge. Not so with an arbitrator. Given the statutes and the limited and inadequate bases for overruling a private arbitration award, an arbitrator is free to fashion any remedy desired for any reason at all and the aggrieved party has to live with the unfair result even when the same result handed down by a trial court would be reversed.

The practical consequences also present difficulties. Clients understand basic principles of fairness and equity, they expect the rules to apply the same to everyone, and they anticipate that if the judge or arbitrator makes a mistake, the mistake will be corrected so a fair result will follow. That is not what private arbitration requires, and explaining to a client why the result is what it is, despite being wrong as a matter of law, is not something an attorney can do or wants to do, especially when the attorney too may not understand the rationale for the decision.

In public contracting under the State Contract Act, arbitration is mandatory, but at least a trial court reviewing a decision has some ability to correct a wrong decision. CCP §1296 requires the court to review a decision for substantial evidence and errors of law. Presumably, if the arbitrator decided to ignore the law, the trial court would vacate the decision. Likewise, if the arbitrator ruled in a way that was arbitrary and capricious, there would not be substantial evidence to support the decision; so again, the trial judge could vacate the decision on that basis, too. The arbitrator in a public works dispute will not be able to base a decision on just any evidence, but will have to base it on substantial evidence, and they will have to apply the law correctly.

Arbitration might be the best resolution process for very large cases involving contracts in the hundreds of millions of dollars, but for the smaller dollar cases, there are many disadvantages which should be considered before including it in any contract. Contrary to earlier court justifications, arbitration is no longer a process the parties agree to use in order to quickly and cheaply resolve disputes. Arbitrations can and do take multiple days, multiple weeks, or even multiple months to resolve. The cost for just the arbitrator can run from $5000-$10,000+ per day per arbitrator. Discovery, if it is allowed, is just as costly in arbitration as in the trial court; motion practice is just as prevalent; attorneys are just as expensive; and preparation for an arbitration takes just as much time as for trial.

In short, arbitration is a crap shoot with a significant downside: often foolish rules and no effective appellate review. The inconsistent (bizarre) results that follow when the same decision from a trial court and an arbitrator are challenged on appeal, and the appeals court reverses the trial court for error but does not and cannot reverse the arbitrator for error, is not something that should be permitted, agreed to, encouraged, or accepted as a way of doing business. The law may be blind, but it should not be stupid too. Clients don't expect this, and attorneys should not encourage it by including or agreeing to arbitration provisions in contracts.

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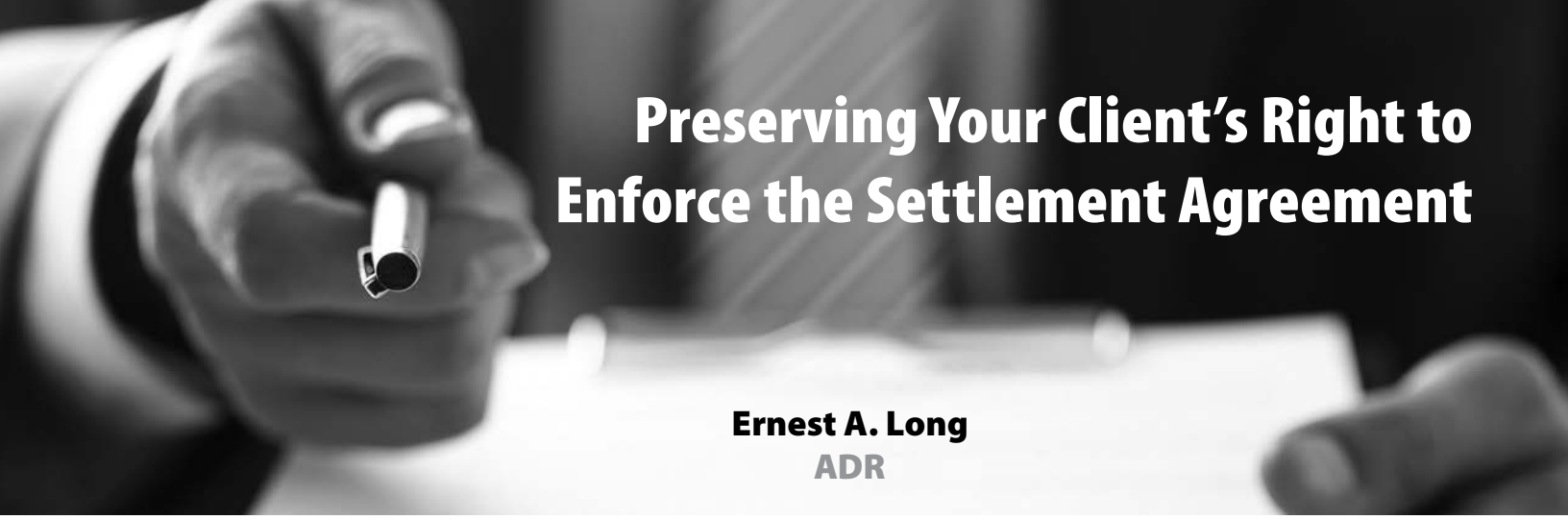

Preserving Your Client's Right to Enforce the Settlement Agreement

Ernest A. Long
ADR

The opposing party is threatening to ignore your settlement agreement. Payment is delayed or withheld for reasons that lead you to suspicion and doubt. After working for hours in that grinding mediation, imagine explaining to your client why the deal you both worked so hard to achieve is unenforceable despite the CCP section 664.6 language in your settlement agreement. Two recent appellate decisions highlight the potential danger awaiting counsel attempting to enforce written settlement agreements through law and motion.

All settlement agreements are contracts by nature, formed when two or more parties reach mutual consent upon acceptable terms. When the parties all agree upon the same thing in the same sense, the law will find they have created a binding agreement. As long as the offered proposal is sufficiently definite, or calls for definite terms upon acceptance, the contract can be described as reasonably certain. When there is a basis for determining the existence of a breach and for giving an appropriate remedy a contract is said to exist.

A settlement agreement typically will describe the amount to be paid, by whom and to whom. The recital will note the payment is in exchange for a release and request for dismissal of the suit, as well as the extinguishment of all claims. Cross-complaints are usually included in the dismissal as well. An indication that each side is bearing its own costs and fees is typically included. The time for payment may be noted. To the extent any liens or obligations have arisen as a result of the underlying subject of the lawsuit, the party receiving payment will usually note it is responsible and agrees to hold the settling party harmless upon payment.

The agreement may recite specific requirements particular to the case, such as confidentiality, non-disparagement, or any taxation issues related to the payment. Penalties for violation of the the agreement may be spelled out with reference to liquidated damages or other punishment, including attorney fees. Importantly, the parties should always include a reference to Code of Civil Procedure 664.6, allowing for enforcement of the settlement in the event one side fails to abide by the terms.

Enforcement language is necessary, regardless of the relationship of the parties. Just because litigants sign a settlement agreement doesn't mean they will live up to the terms. It is essential that the parties and counsel retain a legal basis upon which to act in the event of default or other failure by one party to a settlement. Provided that the parties themselves directly participate in the settlement and stipulate in writing or orally before the court to the settlement terms, the agreement will be subject to enforcement. The California Supreme Court has noted that the writing and party signature requirements to support the summary nature of the section 664.6 procedure minimize the possibility of conflicting interpretations of the settlement. (*Levy v. Superior Court* (1995) 10 Cal.4th 578).

Notably, an insured defendant does not need to sign the agreement, as long as the insurance representative does sign. As the Supreme Court stated in *Commercial Union Assurance Companies v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 919,"...where the insured is fully covered by primary insurance, the primary insurer is entitled to take control of the settlement negotiations and the insured is precluded from interfering therewith." In the event a client representative appears at the mediation by phone, steps should be taken to secure a scanned signature page from that individual to conclude the agreement.

Inevitably, enforcement efforts don't always proceed smoothly. In late 2017, the First District Court of Appeal recited the section 664.6 language which includes the words: "If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." (*Sayta v. Chu* (2017) 17 Cal.App. 5th 960.) The parties in *Sayta*, by the terms of their written and signed settlement agreement, indicated their intention and agreement that the trial court retain jurisdiction to enforce the agreement in the event any party failed to comply with the terms. Unfortunately, neither counsel nor the parties actually presented such a request to the superior court, merely noting their intentions in the written agreement. Pursuant to their request, the case was later voluntarily dismissed.

The enforcement problem arose when Sayta, the tenant, discovered post-settlement, that Chu, the landlord, had allowed information regarding the settlement and the underlying claims regarding Sayta's tenancy to enter the public record such that Sayta's status as a renter was damaged. Such disclosure was outside the scope of the deal the parties had memorialized, and Sayta moved to enforce the settlement agreement, which included a liquidated damages provision.

By the time of counsel's motion to enforce, the matter was no longer a "pending action."

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As such, the trial court had lost subject matter jurisdiction, as it so ruled. Later, on appeal, the First District stated that in order to properly ask the court to retain jurisdiction, the request must be made (1) during the pendency of the case, not after the case has been dismissed in its entirety, (2) by the parties themselves, and (3) either in a writing signed by the parties or orally before the court. (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429.)

Settlement language in the written agreement purporting to vest the trial court with retained jurisdiction after the dismissal is meaningless. Jurisdiction cannot be conferred by consent, waiver or estoppel. Although section 664.6 provides a valuable tool in aid of enforcing settlement, "... it does not float in the ether to be drawn upon whenever a party seeks enforcement." (*Hagan Engineering, Inc. v. Mills* (2003) 115 Cal.App.4th 1004.) The court loses jurisdiction when the matter is voluntarily dismissed.

The point was recently emphasized again. In March of this year, the Second District Court of Appeal published *Mesa RHF Partners, L.P. v. City of Los Angeles* (2019) 33 Cal.App.5th 913. In that case, the City had previously created a business improvement district which resulted in various assessments to plaintiff developers. The agreement provided that the City of Los Angeles would make plaintiffs whole for any such assessments against their properties so long as they remained the owners. When the business districts expired by operation of statute, the City informed plaintiffs it would no longer be required to make reimbursement payments to them. Counsel for the developers then sought to enforce their previous settlement agreement pursuant to CCP section 664.6.

On plaintiffs' motion to enforce, the Second District Court of Appeal recited the language of *Wackeen v. Malis*, setting forth the requirements post settlement for the trial court to retain jurisdiction for enforcement purposes. For 664.6 jurisdiction, the request must (1) take place during the pendency of the action, (2) be made by the parties, (3) in a writing signed by the parties or orally before the court. The DCA clarified that the written request may not be made by the parties' attorneys of record, their spouses, or other such agents; it must be made by the parties themselves. Typically this is accomplished by stipulation or by actually including the language in the settlement agreement which is filed with the court along with a request by counsel referring to the parties' application for retention of subject matter jurisdiction.

Despite the parties' arguments and an "impassioned plea" the Justices indicated the parties:

> "...could have easily invoked section 664.6 by filing a stipulation and proposed order either attaching a copy of the settlement agreement and requesting that the trial court retain jurisdiction under section 664.6 or a stipulation and proposed order signed by the parties noting the settlement and requesting that the trial court retain jurisdiction under section 664.6. The process need not be complex." (*Mesa RHF Partners, L.P. v. City of Los Angeles* (2019) 33 Cal. App.5th 913.)

Plaintiffs in *Mesa* were unable to secure the enforcement they sought because the trial court never had been asked to retain jurisdiction over the settlement, despite the defendants' agreement that both sides would have appropriate rights and remedies under 664.6.

A motion requesting a court order of enforcement is rarely required to ensure compliance with a settlement agreement. When it is necessary, counsel must have taken the necessary steps to preserve jurisdiction. Whether by informal settlement, mediated agreement or formal resolution during a settlement conference or trial, there will always be a written memorialization of the deal. The parties will be required to sign that agreement to conclude the settlement. The Appellate Courts of California make it clear that this is the ideal time to also create a stipulated request to preserve jurisdiction pending compliance with the settlement agreement.

The parties can agree that the settlement agreement itself, recording their concurrence that the trial court will retain jurisdiction to enforce, is admissible in court during an enforcement proceeding. Or, they have the option of preparing a short, separate agreement specifically to provide for preservation of jurisdiction. As long as the document is made (1) during the pendency of the case, not after the case has been dismissed in its entirety, (2) by the parties themselves, and (3) either in a writing signed by the parties or orally before the court, and submitted to the court, subject matter jurisdiction will be retained and the court will have the power to rule on a later motion to enforce the agreement.

The Justices in *Mesa RHF Partners* made it clear that a different remedy to enforce the settlement agreement might be present in the form of a new lawsuit for breach of the settlement agreement, but the obvious and fairly protracted timetable for bringing such an action to successful conclusion relegates that option to a poor second choice. Taking the time to secure jurisdiction at the time the parties sign the settlement agreement will assure a smooth step to enforce if the case requires.

Whether drafting the agreement yourself, arriving at a bargain in mediation with the agreement drafted by the mediator, or settling a case in court on the record, counsel should always strive to ensure continuing jurisdiction to enforce the settlement remains vested with the trial court. The best practice is a direct request to the court asking that it retain jurisdiction to enforce, accompanied by a properly executed stipulation or agreement to that effect, signed by the parties, made well before counsel files a dismissal. Only then will you have the assurance that your hard fought deal will survive any misbehavior or malfeasance, preserving your agreement until all agreed settlement obligations are discharged.

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Mechanics Liens, Cut and Dried – Not So! Some Practical Considerations to Discuss with Your Clients

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Over the past five years, there has been a considerable increase in commercial construction. One can drive through almost any city in California and observe several active construction sites of all types – new construction, redevelopment and improvements to existing structures.

For lawyers practicing in the construction arena, this significant increase in construction activity has led to a correlating increase in construction-related disputes. Such disputes include delay claims, stop notices, mechanics liens, and quality of construction, among others. Naturally, the more construction activity, the more likely disputes will arise. Course of construction payment disputes frequently lead to the recordation of mechanics liens. The focus of this article is the reality of what happens after a mechanics lien is recorded. This article will not cover details about how and when to record mechanics liens. There are strict and specific statutory requirements as to the timeframes for recording mechanics liens that are important to understand which are outside the scope of this article.

Instead, this article addresses concerns you should discuss with your client when your client has not been paid in full for the work performed and/or materials provided and in deciding whether to pursue foreclosure of a mechanics lien. This article identifies circumstances that may warrant serious attempts at resolving the issues before a seemingly simple lien explodes into complex and lengthy litigation. Litigation in general in the construction world frequently takes years to resolve. Litigating a mechanics lien case can take just as long. Careful thought and an open dialogue with your client on how to pursue the mechanics lien may avoid more money out of your client's pocket by avoiding unnecessary and costly litigation.

In California, recording a mechanics lien is a Constitutional right afforded to licensed contractors (and certain others). (California Constitution, Article XIV, §3; *Connolly Development, Inc. v. Sup. Ct.* (1976) 17 Cal.3d 803, 808.) It is one of the sacred rights that a contractor has and, if pursued, should result in payment for the labor, supplies and materials provided for a particular project. However, prompt receipt of the overdue payment upon the recording of a mechanics lien is not a guaranteed result. While it would be nice for it to be this simple and effective, often there are added issues resulting in delay (sometimes significant) and even litigation. Many times, the recording of a lien causes a client a substantial amount of unanticipated frustration, time and expense.

In a construction project where there are several contractors, any interruption in the flow of money may result in several mechanics liens being recorded. A notable and current example of such a situation is in Sacramento, where almost $24 million in mechanic liens were recorded in connection with one of the downtown hotel projects near the Golden One Arena.

The only way to secure your client's mechanics lien rights is to timely record the lien and then file the action to foreclose it within 90 days. However, a common result of pursuing your client's Constitutional mechanics lien rights is a cross-complaint alleging claims your client was not paid for its work because the work was not performed per the plans and specifications for the project. Or, in more pedestrian terms, if your client pursues its lien rights, it will be sued for defective work. Specific theories in any cross-claim will likely include negligence, breach of contract, breach of implied warranty, and breach of express warranty, among others.

Although this is discouraging news to pass on to your client, a mechanics lien should always be recorded when appropriate because there is no better protection for your contractor/subcontractor client than a mechanics lien. Additionally, it is simple to record a mechanics lien. Your client does not even need a lawyer to record a mechanics lien. *(Sorry to our fellow lawyers....)*

If your client is involved in a substantial and/or high-value project with multiple prime contractors and subcontractors, the recording of your client's mechanics lien may trigger multiple liens being recorded in a domino-like fashion. A project with multiple liens immediately raises new questions and complexities as to how to proceed so that your client gets paid timely.

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One course of action is to proceed collectively with the group of lien holders. This approach means nothing more than the lien holder group retaining one lawyer against the owner/general contractor rather than each contractor/subcontractor retaining its own counsel. A joint approach can help limit the expenses involved. Joint agreements can be made for the pursuit of the money, including an expense sharing arrangement and an agreement for the distribution of collected funds. It is likely not every dollar owed will be paid by the owner of the project. Therefore, the contractors with competing liens, if they decide to proceed as a group, will have to decide in advance how to distribute the money that is eventually paid to satisfy and release the liens from the property. On that point alone, mechanics liens can cause contractors considerable heartaches/headaches. It is a strong weapon for contractors to ensure they get paid for their work. But, as stated, it is not always as easy or rewarding as the statutes make it sound.

This group approach appears to make sense on the surface, but the authors typically caution against joint agreements. Oftentimes, the economic and legal interests of the contractors/lien holders do not align. Furthermore, if one of the contractors has, in fact, not performed according to the plans and specifications, and its work has resulted in construction defects/damages, then you may not want your client to be disadvantaged by associating with that particular contractor in payment negotiations.

Another approach is to simply have your client proceed individually. Your client will have complete control over the proceeding and its lien rights, which avoids concerns/disputes related to other subcontractors involved in the lawsuit.

When your client proceeds on its own, the client should know the likelihood that – even if the owner accepted its work and there are no issues in connection with how its work was performed – your client still may not have a "walk in the park." The owner's end goal is to pay your client less than the full amount owed. This is especially true when there are a large number of lien holders on a single project. Also, it is not uncommon that the larger the number of individual claims, the longer the resolution of the claims will take.

Owners often will fight back against lien claims to avoid full payment. The owner may file its own action for construction defects and/or breach of contract. Your client will then have to defend that action, potentially at great expense for attorney fees, expert witnesses, and other litigation expenses related to defending the case.

Commencement of litigation against your client may also require tendering the matter to its insurance carrier(s) to defend against the owner's action. The insurance tender brings additional issues – including involvement by the carrier's retained lawyer to defend your client. While this certainly can be helpful, insurance carriers often do not have the same interests in resolution of the action as your client. The carrier may be more interested in settling the defense action to avoid expensive litigation, and your client may see that as compromising its mechanics lien rights or compromising its reputation. Even if your client strongly believes it performed quality work exactly per the plans and specifications, your client may be forced into a compromise. This can add a level of frustration that was not anticipated upon the recording of a mechanics lien.

When an insurance carrier is involved in the defense of an action, the carrier may require its own expert(s), in addition to any experts your client may be using in the action to enforce the mechanics lien. In our experience, the experts typically cooperate and work with one another, but, again, this adds a level of activity/angst not usually considered when the mechanics lien was recorded. This means additional time, effort, expense and tension for your client. This requires coordination between counsel foreclosing on the mechanics lien and counsel retained by the carrier to defend the construction defect/breach of contract action.

During this time, do not forget your client needs to take advantage of the increase in construction activity to grow its business and sustain the livelihood of the owners and employees. So, your client will have less personal time to participate/assist in the litigation. In our experience, our clients are more interested in bidding, planning and constructing projects than sitting in a conference room dealing with two (or more) sets of lawyers and experts.

This article is not intended to be a "how to," but rather an article that identifies various interests to be considered by your client as part of the process of recording and foreclosing on its mechanics lien. This is not written to discourage your client from recording a mechanics lien or to forfeit its lien rights. However, the simple act of recording a mechanics lien does not automatically mean your client will be immediately paid the amount it is due. Nor does it mean your client can avoid foreclosing on its lien. Rather, there is a distinct possibility the recording of a mechanics lien will mean more legal work and litigation for your client than it otherwise might desire. It is crucial to ensure your client understands its end goal after a thorough analysis of the benefits versus risks and consider an early compromise of the mechanics lien to avoid complex, costly and potentially lengthy litigation.

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AROUND THE ADC

Golf Tournament

Thank you to all of the members and friends of the ADC who joined us for our annual golf tournament at Silverado Resort on Friday, September 20, 2019. Our loyal sponsors helped make sure that all of the participants felt like "winners." Next year we will be moving back to the North Course at Silverado, one week after it hosts the PGA Tour Safeway Open. We hope to see you there!

Wine-tasting

Bragg Vineyards hosted an enthusiastic group of ADC non-golfers for lunch, vertical tasting of Cabernet Sauvignon and a tour of wine-making operations. Since the berries were still on the vines, guests tested for brix and ripeness. The weather was beautiful, the conversation lively, and the wine out of this world!

The Lawyer's Lawyer

William A. Muñoz
Murphy Pearson Bradley & Feeney

Business Transactions with Clients – a Trap for the Unwary Practitioner

The Lawyer's Lawyer is turning its attention to a situation that most of you have probably not considered in your practice, but have unknowingly participated in – business transactions with a client. The significance of this is that not recognizing when you are involved in a business transaction with a client, you have set yourself up for a breach of fiduciary duty claim and potentially an inquiry, or worse, a Notice of Disciplinary Charges, from the State Bar. This article will explore what constitutes a business transaction with a client and what you must do as the ethically responsible practitioner to satisfy your fiduciary duty and comply with the California Rules of Professional Conduct.

WHAT CONSTITUTES A BUSINESS TRANSACTION WITH A CLIENT?

California Rules of Professional Conduct, rule 1.8.1 deals with business transactions with a client and what a lawyer must do if he or she wishes to engage in a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client. (*See also* Prob. Code § 16004; *Ramirez v. Sturdevant* (1994) 21 Cal. App.4th 904, 917 [holding Probate Code section 16004 applies to the fiduciary relationship between attorney and client].) Unfortunately, the Rule itself does not define what exactly is a business transaction that would implicate this rule. Nor do the comments to the Rule necessarily help. The California Supreme Court in *Fletcher v. Davis* (2004) 33 Cal.4th 61, did however, address the issue of what constitutes a pecuniary interest adverse to a client and defined it as "when the lawyer possesses a legal right to significantly impair or prejudice the client's rights or interests without court action." (*Id.* at 68; *see also* Rule Prof. Cond., rule 1.8.1, cmt. 1.)

Although Rule 1.8.1 does not define what transactions constitute business transactions with a client, some are clearly obvious. For example, the following are business transactions with a client: forming a partnership with a client to invest in real estate (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1144); an oral joint venture agreement with a client to purchase real property (*BGJ Associates, LLC v. Wilson* (2004) 113 Cal.App.4th 1217, 1225-1226); borrowing money from a client (*In re Matter of Johnson* (1995) 3 Cal. State Bar Ct. Rptr. 233, 242); purchasing a promissory note secured by a first deed of trust that was the subject of litigation that attorney handled for client where client had promissory note on the same property secured by a second deed of trust (*Ames v. State Bar* (1973) 8 Cal.3d 910, 918-920); confession of judgment to secure legal fees (*In re Matter of Lane* (1994) 2 Cal. State Bar Ct. Rptr. 735, 745); and obtaining a deed of trust from the client to secure legal fees (*Hawk v. State Bar* (1988) 45 Cal.3d 589, 598-601).

Conversely, the case law and/or ethics opinions have identified some not so obvious transactions as business transactions with clients subject to Rule 1.8.1. For instance: when an attorney who is also a real estate broker sells a house to a client (Cal. Eth. Op. 1995-141 *4); when an investment advisor, who is also an attorney, provides incidental legal services to his or her investment clients (*Ibid.*); when a lawyer receives a referral fee from a third party for referring the client to the third party for non-legal services (Cal. Eth. Op. 1999-154 *6); or when the lawyer places a charging lien to secure attorneys' fees on the client's claim based upon an hourly fee agreement (*Fletcher, supra,* 33 Cal.4th at 71-72).

The examples in the preceding paragraph, with exception of the last one, involve the concept of the lawyer acting in a dual role providing legal and non-legal services to a client, which can be the subject of its own article. Suffice it to say that we as lawyers do not get the luxury of taking off our lawyer hats when it comes to clients, even if we are providing non-legal services to the client, provided there is an existing attorney-client relationship, or the non-legal services arose from the fruits of the lawyer's legal representation. (*See, e.g., In re Matter of Allen* (2010) 5 Cal. State Bar Ct. Rptr. 198; *Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 372.) Thus, we always have to be mindful of any dealings with clients.

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So, what constitutes a "business transaction" with a client for purposes of Rule 1.8.1 is clear as mud. In discussing Rule 3-300, the predecessor to Rule 1.8.1, the Supreme Court in *Fletcher, supra,* stated' "[a]lthough it is difficult to anticipate with precision the myriad of transactions that may arise between an attorney and a client, an attorney generally, 'must avoid circumstances where it is reasonably foreseeable that his acquisition may be detrimental, i.e., adverse, to the interests of his client.'" (*Fletcher, supra,* 33 Cal.4th at 62 quoting *Ames v. State Bar* (1973) 8 Cal.3d 910, 920.)

For those of us who are traditional defense lawyers, there is no recovery or settlement, typically, for which to place a lien on the client's recovery. Thus, we generally do not have to worry about Rule 1.8.1. in our practice. That is typically left to plaintiff lawyers. However, the case law is clear that a charging lien on the recovery of the client's claim in a case involving a contingency, or hybrid contingency, fee agreement is not subject to Rule 1.8.1. (*See Plummer v. Day/Eisenberg* (2010) 184 Cal. App.4th 38, 48-50.) That is not the case where there is an attorney lien asserted based upon an hourly fee agreement. So, for those of us who are not the traditional insurance defense lawyers and take on other cases where we are paid on an hourly fee basis, we need to be mindful of Rule 1.8.1 if we seek to assert a lien as part of our legal services agreement.

WHAT DO WE HAVE TO DO IF WE HAVE A BUSINESS TRANSACTION OR PECUNIARY INTEREST THAT IMPLICATES RULE 1.8.1 IN ORDER TO COMPLY WITH THE RULES OF PROFESSIONAL CONDUCT?

The first rule of thumb is to err on the side of caution. If you are unsure whether the transaction you are involved in with a client implicates Rule 1.8.1, govern yourself as if Rule 1.8.1 applies. You will thank yourself later should things go south. Alright Lawyer's Lawyer, I am going to take your advice. So what do I need to do?

Preliminarily, you as the practitioner should be thinking about, "what would I need to prove if the client sued me for breach of fiduciary duty based upon a transaction that I was involved in with the client?" In this regard, you must overcome the presumption that there was insufficient consideration and undue influence. (*Fair, supra,* 195 Cal.App.4th at 1152; *Lewin v. Anselmo* (1997) 56 Cal.App.4th 694, 701 [holding that a transaction between attorney and client during the representation is presumed to violate the attorney's fiduciary duty and to have been entered into without sufficient consideration and under undue influence].)

Thus, to overcome this presumption, Rule 1.81. requires: (1) the lawyer fully explain and fully disclose the terms and conditions of the transaction; (2) the terms and conditions of the transaction must be fair and reasonable to the client; (3) the client must consent in writing to the terms and conditions of the transaction; and (4) the client must be advised, and given a reasonable opportunity, to obtain the advice of independent counsel regarding the transaction. (Rules Prof. Cond., rule 1.8.1(a)-(c).)

Using a charging lien on an hourly fee agreement as an example, the lawyer would need to explain to the client what a lien means, what happens once there is a settlement or judgment to which the lien would attach, and what would happen in the event the client did not honor the lien, or there was a dispute about the attorney's fees and costs owed. On this latter point, the lawyer would need to explain that asserting the lien could hold up distribution of any settlement/judgment to the client until the issue of the lien was resolved. Of course, if there was a portion of the attorney's fees and costs that were not in dispute, the lawyer could not hold up that portion of the settlement/judgment. (*See* Rule Prof. Cond., rule 1.15(c)(2).)

Regarding the fairness and reasonableness of the terms of the lien, set forth the reason for the lien. Typically, a lien is asserted in order to ensure payment of any outstanding attorney's fees and costs in the

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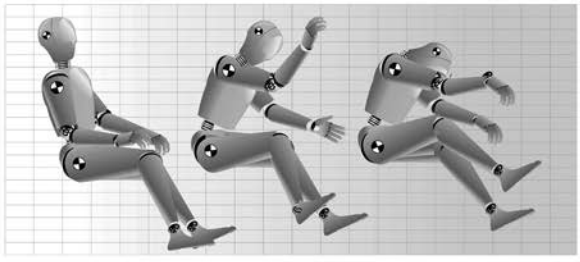

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event the client gets behind in payments. There is nothing inherently unfair about this as the lawyer is entitled to be paid. Moreover, reiterate to the client that asserting a lien does not allow the lawyer to simply take the money. Rather, there needs to be a judicial determination whether the fees and costs are owed in the event of a dispute. In the attorney-client context, this means that the lawyer must comply with the Mandatory Fee Arbitration statutes set forth in the State Bar Act in the event of any fee dispute. (*See* Bus. & Prof. Code § 6200 *et seq.*) This explains to the client that there are remedies available to him or her in the event of a dispute.

In advising the client to seek the advice of independent counsel, it is important that the lawyer give the client reasonable time to seek this advice. Presenting the aforementioned disclosure to the client regarding the terms and conditions of the lien, or transaction, requesting that he or she sign it that same day will not suffice and is probably a per se violation. Rather, send the letter setting forth the terms and conditions of the lien, or transaction, to the client and give the client at least two weeks to obtain this advice. Be careful about referring the client to a specific lawyer who you are friendly with or have a professional relationship with as it would require disclosure of the relationship (see Rule Prof. Cond., Rule 1.7(c)) and could suggest that the advice will not truly be independent. Rather, it is better practice not to refer the client to a specific lawyer. Additionally, include a provision in this disclosure that the client was given the opportunity to seek the advice of independent counsel and voluntarily chose to waive this right. If the client chooses not to seek the advice of independent counsel and signs the disclosure, they cannot be heard to complain later.

Lastly, and most important, do not proceed with any proposed transaction without obtaining the client's signature on the disclosures and consent to the terms and conditions of the transaction. Otherwise, the efforts to comply with Rule 1.8.1 will be for naught. All of the disclosures in the world and referrals to independent counsel are meaningless for purposes of Rule 1.8.1 without the client's written consent. So be diligent. If the client pushes back on executing the disclosure and consent, you as the lawyer should seriously consider not proceeding as that is a clear red flag of things to come, particularly if the transaction does not work out or there is a breakdown with the attorney-client relationship.

CONCLUSION

Transactions with clients are not per se impermissible. However, as the lawyer, you should understand that you are in fact involved in a transaction with a client in the first instance and then govern yourself according to Rule 1.8.1. The time it takes to do what you need to do to comply with Rule 1.8.1 is de minimis when considering what could happen if you do not. As Benjamin Franklin said, "An ounce of prevention is worth a pound of cure." Good luck and until next time!

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.

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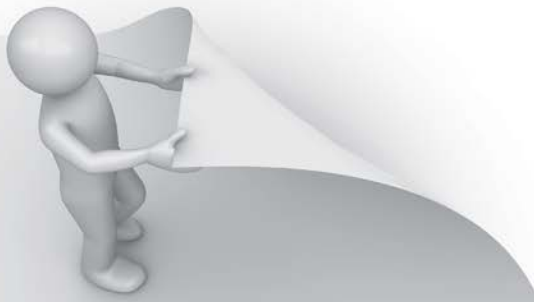
ADC Amicus Corner



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, and sometimes the Legislature or other bodies as well. 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 of decisions involving important defense issues.

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

REQUESTS FOR PUBLICATION OF UNPUBLISHED DECISIONS

Your Amicus Committee successfully sought publication of two decisions:

1. ***People v. Pierce*** (July 11, 2019, No. F074602) __ Cal.App.5th __, 2019 Cal. App. LEXIS 712. We won publication of this decision making insurance fraud easier to prove. Penal Code section 550, subdivision (a)(5) makes it unlawful to "[k]nowingly prepare, make, or subscribe any writing, with the intent to present or use it, or allow it to be presented, in support of any false or fraudulent claim." *Pierce* ruled that this subdivision "is the only portion of section 550, subdivision (a) that specifically relates to the preparation of documents," and it does not require proof that the defendant actually submitted a fraudulent insurance claim. *Pierce* also quashed overbroad discovery requests seeking information about insurers' internal procedures for evaluating claims.

2. ***Williams v. Fremont Corners, Inc.*** (June 24, 2019) 37 Cal.App.5th 654 limited the scope of a landlord's duty to protect against criminal acts on the premises (here, a bar). The decision identified three areas as to which premises owners have no duty: "(1) a failure to inquire about criminal activities reported to the police; (2) a failure to establish a policy or procedure to require tenants to report occurrences of criminal activities to [the landlord]; and (3) a failure to review security camera footage." Good news for property owners.

The Committee was not successful in seeking publication of two other decisions.

1. ***Nahabedian v. Smith*** (May 31, 2019, G055815) Plaintiff Nahabedian could not prove that the alleged dangerous condition, a too-low guardrail, caused her to fall and injure herself. Because plaintiff had a history of sleepwalking, drug abuse, and mental illness, and she could not recall the incident where she fell off the balcony, it was just as probable she may have jumped or climbed over the railing. The decision rejected negligence per se. The case would have been useful precedent for other cases where plaintiff does not remember, or otherwise has a thin causation case.

2. ***Stevens v. Azusa Pacific University*** (May 29, 2019, B286355) found no liability for a college cheerleader's injuries. Although prior cases addressed cheerleading injuries, *Stevens* was different in that it looked at a series of events over a period of months. Based on the timeline of events that led up to plaintiff's final injury, the court ruled that the defendant did not exert control to increase "the risk of injury inherent in cheerleading by failing to stop or restrict plaintiff's participation beyond the ways in which it was indisputably already halted and limited."

UPCOMING CALIFORNIA SUPREME COURT ACTIVITY

The Committee will be submitting a letter in support of California Supreme Court review of ***Swanson v. County of Riverside*** (June 17, 2019) 36 Cal.App.5th 361. Plaintiffs sued when an individual was released from a "section 5150" hold, went home, and bludgeoned three people to death with a baseball bat. The County filed an anti-SLAPP motion, because the procedure for releasing individuals is an official proceeding involving protected speech. The trial court denied the County's anti-SLAPP motion, and the Court of Appeal affirmed. The Committee will advance the defense position that it is important to determine whether activities involving such holds under the Landerman-Petris-Short Act, and perhaps other similar proceedings, are protected by the anti-SLAPP law.

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

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Amicus Corner

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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.

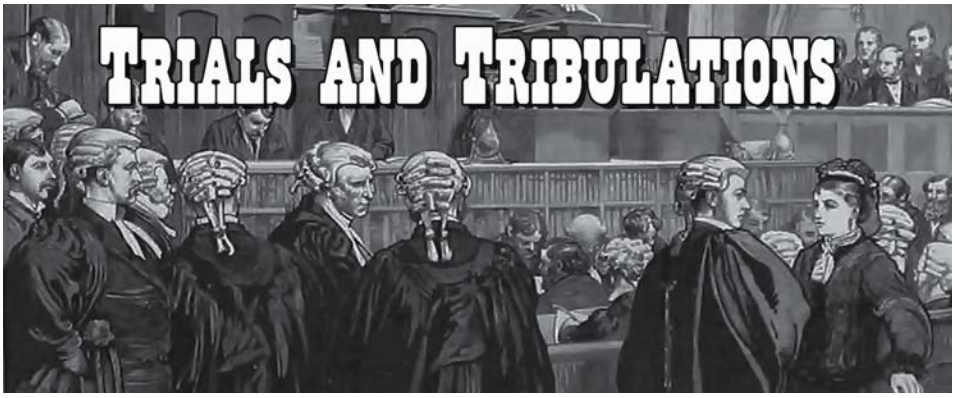
6. Help moot court advocates in advance of oral argument.

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;* Jim Ostertag at *jostertag@lclaw.com;* Bina Ghanaat at *bghannat@lclaw.com;* Alexandra Carraher at *alexandria.carraher@rmkb.com;* Nicole Whatley at *nw@pollara.com;* Christopher D. Hu at *chu@horvitzlevy.com;* Adam W. Hofmann at *AHofmann@hansonbridgett.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



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*

Jason M. Murphy of Farmer Case & Fedor, obtained a favorable trial result in the matter of *5521 LJ Blvd LLC v. Jason McKenna*, wherein Plaintiff asserted substantial claims with regard to breaches of fiduciary duty and negligence. Plaintiff claimed that during a multi-million-dollar transaction in 2014 in La Jolla, the Defendant did not follow through on multiple tasks, failed to evaluate the best use of the property, did not properly evaluate potential income, and overstated the price of the property. After the purchase, Plaintiff was unable to rent the property for several years and alleged they had to incur over $500,000 worth of expenses to repair and update the property to make it habitable. In addition, Plaintiff claimed damages for several years of lost rents.

After a seven-day jury trial before Judge Pollack in San Diego County Superior Court, the jury awarded only $15,000 to the Plaintiff. Plaintiff had asked the jury to award in excess of $1,400,000. The defense had issued a previous 998 offer of $510,000.

Ian A. Fraser-Thomson and **Steve L. Dahm** of Cesari Werner & Moriarty, located in Daly City, successfully defensed an insurance bad faith claim in a 4-week trial in Madera County Superior Court. The defense was able to obtain critical impeachment testimony from key witnesses. However, the trial judge declined to grant the defense motion for nonsuit and/or directed verdict on the punitive damages cause of action, thus waiting for the jury's verdict was a nail-biter. The defense verdict resulted in a $50,000 cost bill for collection.

Marissa Vandersluys of Bates Winter & Associates, LLP, in Roseville, obtained a favorable verdict for her client in Sacramento County Superior Court, Hon. Russell L. Hom presiding. Plaintiff claimed that Defendant, distracted from the malfunction of an ignition interlock device in his vehicle, rear-ended Plaintiff's vehicle, pushing her into the vehicle in front of her, while stopped on a highway. Plaintiff alleged that Defendant's distraction impaired his ability to drive in a safe manner and caused the accident. Liability for the accident was admitted by the Defendant at trial, but he disputed the nature and extent of Plaintiff's injuries.

Plaintiff alleged that she suffered from minor soft tissue cervical injuries, increased depression, and post-traumatic stress. Plaintiff also alleged that the accident required three months of conservative treatment, physical therapy that was terminated after three appointments, a slight increase in dosage to anti-depressant medication, and the use of an emotional support animal.

Plaintiff asked the jury to award approximately $1.2 million at trial. The defense pretrial 998 offer was $20,000. The jury awarded $15,880 after approximately five hours of deliberation. The jury determined that Plaintiff was not entitled to an award for future medical expenses nor future pain and suffering.

Edward P. Tugade and **Kelley T. Mahoney** of Demler, Armstrong & Rowland, LLP's San Francisco office successfully secured an outright dismissal of their client, a small,

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family-owned manufacturer and distributor of wood products based out of Wisconsin, who had been sued in a Proposition 65 enforcement action in California. Plaintiff alleged their client had failed to provide adequate warnings to California consumers related to "wood dust" contained in one of its products, pursuant to California Health & Safety Code section 25249.6. Under California Health & Safety Code section 25249.7, a private citizen may bring an action in the "public interest" to enjoin the distribution of a product in California that does not contain adequate warnings regarding certain chemicals, including "wood dust," listed on the Proposition 65 list. If an entity is found to have violated California Health & Safety Code section 25249.6, it may be subject to civil penalties of up to $2,500 a day for each violation, in addition to Plaintiff's attorneys' fees and costs for the suit.

The defense successfully argued that their client, a Wisconsin corporation whose business operations are limited exclusively to the Midwest, is not subject to personal jurisdiction in California, as it was never registered or qualified to do business in California, was never owned, operated, leased, maintained, or otherwise possessed, occupied, or controlled any offices, manufacturing facilities, or distribution operations in California, has no employees or agents in California, has never advertised or marketed its products in California or to potential customers in California, and has never manufactured, sold, supplied, shipped, or distributed its products in, into, or through California. Further, Defendant pointed out, absent any deliberate, purposeful, or voluntary act of her client directed to California or a resident of California, the mere fact that Defendant's product may have ultimately ended up in California was insufficient to subject it to personal jurisdiction in California. Ultimately, Plaintiff agreed and dismissed the Wisconsin based Defendant.

Marty Ambacher of McNamara, Ney, Beatty, Slattery, Borges & Ambacher, LLP, and **Peter Glaessner** and **Steve Werth** of Allen, Glaessner, Hazelwood & Werth, LLP, received a defense verdict in a binding AAA arbitration of FEHA and common law employment claims brought by the former City Manager of the City of Milpitas. Glaessner and Werth defended the City and Ambacher defended the Mayor, Richard Tran.

The former City Manager alleged that he was the target of age harassing comments about his plans to retire, by the newly-elected Mayor, starting in December 2016. He also claimed that he verbally reported sex and age harassment directed at other City employees, but never followed the City's established procedures for reporting age-harassing remarks directed at him. The City demonstrated that the City Manager never reported remarks made to him for almost four months. Once reported (April 2017), the City promptly hired an independent investigator.

Before the City was made aware of the City Manager's age-harassment complaint, the City Manager hired a law firm to investigate Plaintiff's claims. Plaintiff's attorneys were the first to report his complaints, and then the City's finance department discovered Plaintiff's use of a City-issued credit card to pay for his own legal expenses. Plaintiff also attempted to get approval of a $30,000 requisition for further funding of his legal expenses, which was rejected by the City's finance department. The press learned of his misuse of public funds, and publicly exposed his actions.

In response, the City Manager furiously backpedaled, first suggesting that he hired the law firm to investigate possible sexual harassment by the Mayor against female employees. However, the law firm issued a letter on behalf of the City Manager making a $1 million settlement demand in April 2017. No evidence was presented that the law firm did any investigation, and the law firm would have had a conflict of interest concurrently representing the City Manager on his age harassment claim while acting on behalf of the City in conducting a sexual harassment investigation.

The City Manager also was asked by the City Attorney informally about the credit card charge from the law firm. The City Manager initially replied that this charge had already been repaid – a false statement at the time. (He later repaid the City for the credit card charges.) He attempted to retrieve original documents from the finance department providing the paper trail to his approval of the law firm's charges as a City expense.

The City Manager also was angered by the press reporting. He began a campaign to harass and discredit those City employees he suspected of leaking the story to the press. His conduct reached the point that by May 2017, the Council had received multiple reports of tense confrontations with several City employees, and issued a stay away order for the City Manager not to physically enter the finance department. Yet within one business day of receiving the stay away order, the City Manager made three separate visits to the finance department to coerce an employee to write an email that would distance him from having approved the City's credit card policies.

Once it was discovered that he ignored the "stay away" order, the City Manager was placed on administrative leave for insubordination (disregarding the stay away order). Meanwhile, a separate outside investigator was hired to investigate the City Manager's suspected misuse of City money to finance his own legal claims. As a result of the findings of that investigation, the City issued a notice of intended discipline to the City Manager, indicating it was considering terminating him and scheduling a Skelly hearing. The City Manager resigned/retired on the eve of the Skelly hearing, claiming he could not get a fair hearing. At the arbitration, the City Council members testified they would have considered any exculpatory evidence the City Manager was prepared to present, and that they had not made up their minds about the Skelly hearing in advance.

The arbitrator (Martin Dodd, AAA) rejected all of the employment claims. The arbitrator found that the City Manager was not forced to resign, that the City afforded him a Skelly hearing, and only when he knew he was at potential risk of termination did Plaintiff decide to resign. As to the age harassment claims, the arbitrator noted that age was not the focal point for the comments and age was not the primary or motivating factor in these comments; rather, the comments were expressing frustration that the City Manager could be terminated only for cause and was able to block or frustrate the Mayor's campaign promises. In rejecting the City Manager's claims that the Mayor orchestrated a campaign to terminate him, the arbitrator noted that the Mayor was one

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of five elected councilmembers, and that the City could not remove an *elected* council member. The arbitrator found the Mayor was not a supervisor under FEHA because the City Council as a governing body, not any individual council member had the authority to hire, fire and direct him.

Member and Amicus Committee chair **Don Willenburg** of Gordon Rees Scully Mansukhani, LLP won a Court of Appeal affirmance (*Deutsch v. City of Calistoga* (June 17, 2019 A152236) (unpub.)) of a Napa County Superior Court summary judgment (Hon. Diane M. Price presiding) won by member and former President **John Cotter** of Diepenbrock & Cotter, LLP. The case involved a nasty traffic accident by an off-duty police officer, and thus the going and coming rule. Willenburg and Cotter represented the employer. Plaintiffs' chief argument on appeal was that the employer was not allowed to rely on deposition transcripts of the officer involved, or anyone other than an adverse party. Those transcripts conclusively demonstrated that the officer was off duty. Plaintiffs cited Code of Civil Procedure section 2025.620, which relates to the use of depositions "[a]t the trial or any other hearing in the action" and does contain an "adverse party" restriction. Willenburg and Cotter pointed out that there was no such restriction in the summary judgment statute, and that it would be a bad idea to so restrict depo transcripts on summary judgment for any number of other reasons. The Court of Appeal agreed.

Jason M. Murphy of Farmer Case & Fedor fully defensed multiple quiet title and fraud claims for the owner of commercial real estate in San Mateo County Superior Court (Hon. Nancy Fineman presiding). The matter involved a multi-million-dollar apartment complex, owned by Murphy's client, the property owner since 2008. A dispute arose in 2014 concerning the ownership rights to that property, including fraud allegations and multiple quiet title claims to the property. Following the trial, judgment was entered in favor of the defense on all of the Plaintiffs' causes of action. Moreover, Murphy was successful in obtaining quiet title in favor of the client on the cross complaint. The litigation had been ongoing for several years, including numerous intervenors, lis pendens filings, appeals and ultimately trial.

Robert H. Zimmerman and **Kat Todd** of Schuering Zimmerman & Doyle, LLP in Sacramento, obtained a defense verdict for a neurologist who cared for a critically ill patient admitted to an ICU. The patient developed diffuse cerebral edema which lead to a catastrophic brain herniation. Life support was eventually withdrawn. Her surviving spouse and two minor children pursued a wrongful death action against the hospital and three of the involved specialists. Ultimately, all other defendants were dismissed for a waiver of costs. Decedent was born with a congenital brain malformation with caused hydrocephalus. As a result, a ventriculoperitoneal shunt was placed shortly after birth. Decedent was 32 years of age when she presented to the hospital for a headache, sensation of pressure in her head as well as nausea and vomiting. She suffered a seizure in the Emergency Department. She was admitted to the ICU and diagnosed with severe sepsis, congestive heart failure, cardiomyopathy and pulmonary edema. Her shunt was evaluated early in the admission and found to be functioning and determined not to be the source of any infection. Plaintiffs contended that the neurologist failed to consider that the shunt may be intermittently malfunctioning and that he failed to order a brain MRI, in addition to the multiple head CT scans obtained during the hospitalization. Plaintiffs originally demanded $999,999.99 to settle the case with the neurologist; 10 months before trial, the demand dropped to $249,999.99. The neurologist offered to waive costs. After a six-day trial, the jury returned with a defense verdict for the neurologist, finding no negligence. Plaintiffs agreed to waive any appellate rights in exchange for a waiver of costs.

Robert Zimmerman and **Easton Broome** of Schuering Zimmerman & Doyle, LLP, and **Richard Linkert** and **Sarah Woolston** of Matheny Sears Linkert & Jaime, LLP, both firms located in Sacramento, received a verdict against their client, Elk Grove Unified School District, for $1.135 million in the Sacramento County Superior Court, Hon. Kevin R. Culhane presiding. However, as Plaintiffs asked for $45 million, the result was nothing short of a defense victory. Plaintiffs, three females in third grade, alleged that they were inappropriately touched by an assistant at Prairie Elementary School, from June 2015 to July 2016. Plaintiffs Moe and Roe alleged most of the touching occurred in their classroom with their teacher present. Doe contended that the majority of the alleged touching occurred on the playground during the after-school program. The touching was allegedly reported to a Prairie yard supervisor numerous times in June/July 2016. As the yard supervisor failed to report the allegations to authorities, the touching continued until the yard supervisor ultimately reported the allegations to the district and the assistant was placed on leave. The district admitted liability for the yard supervisor's failure to report. Plaintiffs alleged the teacher, the after-school program supervisor, and Prairie's principal negligently supervised the assistant.

After a 12-day jury trial, the jury rendered a verdict for Plaintiffs. The jury found the principal negligently supervised the assistant during the day and after-school program. After apportioning fault 30% to the assistant and 70% to the District, Plaintiffs were awarded $1.135 million, which was approximately 2.5% of the amount requested.

In a bifurcated trial, **Andrew T. Caulfield** of Caulfield Law Firm located in El Dorado Hills received a special jury verdict in favor of Defendant El Dorado County, in El Dorado County Superior Court (Hon. Dylan Sullivan presiding). The sole issue tried to the jury was whether Plaintiff presented a Government Tort Claim to the County before filing her lawsuit. In her case in chief, Plaintiff presented evidence by way of testimony from a registered process server who testified that he personally delivered a claim on behalf of Plaintiff before she filed suit. After cross-examination of the process server and testimony from multiple County employees, the jury returned a special verdict finding that Plaintiff failed to present a claim before she filed suit. The jury's verdict resulted in an immediate, stipulated directed verdict in favor of the County on four of Plaintiff's five causes of action, which required that a claim first be presented before filing suit. The remaining cause of action for inverse condemnation (which does not require that a claim first be presented to the public entity) will be tried in June 2020.

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

Michele Kirrane | *Chair*

Proposed Litigation Extending Statute of Limitations for Childhood Sexual Assault

Following a recent trend in other states, the California Legislature will likely pass a law that extends the statute of limitations for childhood sexual assault. This new law will have a significant impact on schools, churches, and their insurers.

Civil Code Section 340.1
Code of Civil Procedure, section 340.1, which was enacted in 1986, governs the period in which a plaintiff must bring a claim based on childhood sexual abuse. The existing statute of limitations for childhood sexual assault requires an action be filed within 8 years of the date that a plaintiff reaches majority or within three years of the date plaintiff discovers the injury, whichever date is later.

Section 340.1 further provides that a plaintiff must file a claim by the age of 26 unless the plaintiff qualifies for a one-year revival exception for claims against third parties. This narrow exception applies to a third party defendant who "knew or had reason to know or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent." Code Civ. Proc. §340.1 (b)(2). The one-year revival window was opened in 2003 for any claim that fell under the exception that had already lapsed. Code Civ. Proc. §340.1 (c).

Continued on page 28

Proposed AB 218
In January 2019, the Legislature proposed Assembly Bill 218, which expands the current statute of limitations for childhood sexual assault. On July 2, 2019, the bill passed through the State Legislature and is now headed to the Governor's desk.

First, AB 218 extends the statute of limitations from age 26 to age 40, and the period for delayed reasonable discovery from 3 to 5 years.

Second, the bill provides a 3-year revival window for previously time-barred claims.

Lastly, this bill allows for the recovery of treble damages in cases where an attempt was made to cover up the sexual assault.

If you are interested in joining the Business Litigation Committee or have suggestions for future articles, please contact Michele Kirrane (*mkirrane@fmglaw.com*).

CONSTRUCTION

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

The construction substantive law committee invites all its members to the Annual Meeting on December 12 and 13, 2019, celebrating the ADC's 60th Anniversary! For this momentous occasion, we are presenting a timely discussion of green building related issues. Climate change and the effects of global warming have increased interest in sustainable and green building as buildings account for 39% of the generation of greenhouse gases in the US. California is leading the nation in the effort to reduce these emissions. Please join us to hear our panel discuss the roles of the state, enforcement agencies, architects, and builders in the application of green standards and address risk management issues involved with these measures.

Senate Bill No. 326 was signed by the Governor August 30, 2019 and amends Section 6150 of the Civil Code – the Davis-Stirling Common Interest Development Act – which governs the management and operation of common interest developments. In response to the Branches Neighborhood decision in 2018, legislation was introduced by the plaintiffs' bar to limit the decision's impact on ongoing and future construction defect litigation. The bill provides that a board has the authority to commence legal proceedings against a declarant, developer, or builder of a common interest development. The bill, with certain exceptions, prohibits an association's governing documents from limiting a board's authority to commence legal proceedings against a declarant, developer, or builder of a common interest development. The bill makes these provisions applicable to governing documents, irrespective of when they were recorded, and to claims initiated before its effective date, except if those claims have been resolved through an executed settlement, a final arbitration decision, or a final judicial decision on the merits. Unfortunately for the defense bar, HOA boards can now commence litigation without the vote of the HOA's members.

We have received enormous support from committee members and we are thankful for their support in developing educational materials for the benefit of ADC members, which you see in many ways throughout the year, including practice pointers, conferences, newsflashes, webinars, and magazine articles. We want to especially thank our subcommittee leaders **Matt Constantino, Alan Packer, Steve McDonald, Lindy Scoffield,** and **Bob Sims,** who spearheaded this year's Annual Construction Seminar at the Walnut Creek Marriott, submission of comments to the Judicial Council's Advisory Committee regarding jury instructions on the Right to Repair Act, and wrote articles for ADC's premier magazine, *Defense Comment.* We encourage our members to take the lead in putting together and presenting a webinar on a current topic. If you are interested, please contact the co-chairs at *jlifter@rallaw.com* or *wuritani@lorberlaw.com.*

Please bring any recently published cases or new legislation that affects our practice to our attention, particularly by preparing a proposed Newsflash for publication to our members.

EMPLOYMENT

Laura McHugh | *Chair*

Labor and Employment lawyers – join our committee while we still have openings! This is a great opportunity for you to put your leadership skills into action and to help our fellow ADC members stay abreast of latest developments in our practice areas. Please contact Laura McHugh at (916) 550-5309 or *laura@duggan-law.com* for more information.

Legislative Update: The Governor signed AB 5 (Gonzalez) which addresses the issues raised in the controversial California Supreme Court decision issued last year in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903. In *Dynamex*, the high court rejected the 30-year old *Borello* test, which considered numerous factors to determine whether a worker qualifies as an independent contractor, and instead adopted a simplified three-part "ABC" test. *Dynamex* significantly changed the rules governing independent contractor status, making it harder for companies to classify workers as independent contractors, and has forced many California businesses to fundamentally change their business models. The new law, Labor Code § 2750.3, et seq., incorporates the "ABC" test set forth in *Dynamex,* but also includes exemptions for certain professions and business-to-business relationships.

INSURANCE

Sean Moriarty | *Chair*

S.B. No. 508 – Casualty and Property Insurance – Disclosure, 2019 Cal. Legis. Serv. Ch. 151 (S.B. 508) (WEST)

Existing law sets forth the disclosure requirements when issuing a residential property insurance policy, which include providing a copy of the California Residential Property Disclosure describing types of coverage, a copy of the California Residential Property Insurance Bill of Rights, and a copy of the insurance policy

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with an explanation of how policy limits were established to the insured when issuing a residential property insurance policy. Existing law provides an exception for a tenant's policy, an individually owned mobile home policy, a renter's policy, and an individually owned condominium unit policy if said policy does not cover dwelling structure. This bill requires an insurer, on and after July 1, 2020, to provide copies of the California Residential Property Insurance Bill of Rights to the insured of a policy for a tenant, renter, or condominium unit. For policies covering mobile homes providing dwelling structure coverage, a copy of the California Residential Property Insurance Disclosure and California Residential Property Insurance Bill of Rights would be expressly required to be provided to the insured. Statutes affected by S.B. 508 are California insurance Codes §§ 10101, 10103.5, and 10104.

CALIFORNIA INSURANCE LAW UPDATE:

Jozefowicz v. Allstate Ins. Co. **(2019) 35 Cal.App.5th 829**

Insured homeowner, Stanley Jozefowicz, brought an action against his insurer, Allstate Insurance Co., arising out of Allstate's direct payment to a contractor renovating fire damage to Jozefowicz's mobile home. After a fire caused significant damage to portions of Jozefowicz's mobile home, he hired Sunny Hills Restoration to perform cleanup, repairs, and remediation of the mobile home. Jozefowicz and Sunny Hills entered into a written contract which expressly stated, "Sunny Hills Restoration is hereby appointed as my representative in fact to endorse and deposit in its account any Insurance Company checks or drafts relating to this Proposal and Work Authorization … I direct that Allstate Insurance include the name of Sunny Hills Restoration on any checks or drafts relating to this Proposal and work Authorization." Allstate issued a check for $20,943.97, made payable to both Jozefowicz and Sunny Hills, and sent it directly to Sunny Hills. Sunny Hills deposited the check into its own bank account. Subsequently, Jozefowicz and Sunny Hills had a dispute over the scope and quality of work and Jozefowicz filed suit against both Sunny Hills and Allstate. After Allstate was granted summary judgment, Jozefowicz appealed. The Fourth District Court of Appeal affirmed the lower court's ruling that by entering into a contract with the contractor, appointing the contractor as his representative and directing Allstate to include the contractor's name on all checks relating to the fire repair project, Jozefowicz created an agency with the contractor. The court held that Sunny Hills explicitly created an agency with Jozefowicz and that said agency was coupled with an interest to provide security for Sunny Hills to be paid for its work. Accordingly, Sunny Hills was validly acting as the representative, or agent, of Jozefowicz by depositing the check from Allstate.

Mazik v. Geico General Ins. Co. **(2019) 35 Cal.App.5th 455.**

Insured motorist, Michael Mazik, filed a bad faith action against GEICO General Insurance alleging breach of insurance contract by unreasonably delaying payment on an underinsured motorist policy. A jury found GEICO unreasonably delayed in paying policyholder Mazik, the policy limits of $50,000. The jury awarded compensatory damages of $313,508 and punitive damages of $4 million, later reduced to $1 million. GEICO appealed the punitive damages award. The court held GEICO's managing agent ratified conduct warranting punitive damages and disregarded information showing the insured had a painful, permanent injury by relying on selective portions of medical records supporting GEICO's position that Mazik had fully recovered. The Court also ruled the reduced punitive damages award was within the constitutionally permitted range in view of the degree of reprehensibility of GEICO's conduct.

LANDOWNER LIABILITY

Ashley N. Meyers | *Chair*

The Landowner Liability Sub-Committee is looking for members! If you are interested in being a committee member please call Ashley Meyers at (925) 734-0990 or send an e-mail to *ameyers@clappmoroney.com.* We are looking for a few members who can take charge of webinars, CLE events and preparing articles for publication.

Mark your calendars for the following upcoming "Wednesday Lunch & Learn" webinars:

9/18 – The Ins and Outs of the SF and Oakland Rent Control Ordinances presented by Keith Reyen of Oium Reyen & Pryor and Matthew Williams and Ashley Meyers of Clapp Moroney Vucinich Beeman + Scheley.

10/30 – Defense Tactics in Negligent Security Cases presented by Adrianne Duncan of Clapp Moroney Vucinich Beeman + Scheley.

PUBLIC ENTITY

James J. Arendt | *Co-Chair*
Patrick L. Deedon | *Co-Chair*

Paying the Piper.

No defense counsel enjoys losing cases. But, rumor has it, sometimes it does occur. What's next for the public entity when judgment is entered against it? Luckily, public entities have more tools in their toolbox in paying judgments than most.

For starters, under California law, the legal rate of interest for a tort judgment against a public entity is 7% as opposed to 10% for a non-public entity defendant. *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342. This case resolved the split of authority as to whether 7% or 10% was the proper judgment interest rate for a public entity.

Continued on page 30

So why 7%? Because Government Code § 970.1 was held to provide an exception to Code of Civil Procedure § 685.010, which is where the normal 10% interest rate on a judgment is set forth. However, Government Code § 970.1 does not state the interest rate for a tort judgment against a public entity.

Thus, we turn to the California Constitution, Article XV, Section 1(2), which states:

> ... The rate of interest upon a judgment rendered in any court of this State shall be set by the Legislature at not more than 10 percent per annum. Such rate may be variable and based upon interest rates charged by federal agencies or economic indicators, or both.

In the absence of the setting of such rate by the Legislature, the rate of interest on any judgment rendered in any court of the State shall be 7 percent per annum. (Emphasis added.)

Therefore, the "default rate" for a California judgment is 7% unless the legislature sets a different rate. The California Legislature has not set a different rate for tort judgments against a public entity, so the 7% stands.

When must the public entity pay? As always, the public entity and the plaintiff that wants the money now can cut a voluntary settlement deal regarding the judgment amount and set their own terms.

Perhaps the particularly patient plaintiff plans to procure positively every probable penny persistently from the poor public? In that case, a public entity shall pay any judgment in the fiscal year that the judgment is entered if it has funds available. *Govt. Code* § 970.4. Great, pay immediately if you have the money. But if you don't, Government Code § 970.5 states to pay it the next fiscal year.

Government Code § 970.8 requires public entities to provide sufficient funds to pay all judgments within the fiscal year. Once again, great if the public entity can allocate the funds to do so. But what does a local public entity do if it's a whopper of a judgment? Set up a payment plan.

Government Code § 970.6 allows a public entity to adopt an ordinance or resolution declaring an unreasonable hardship will result unless the judgment is paid in installments. The public entity then moves the court for the payment plan. After a hearing on the issue, the court will allow the local public entity to pay the judgment in up to 10 equal installments. *Ibid.*

In short, while no one enjoys paying out judgment money, the local public entity has special tools to employ to soften the blow.

As always, please let us know of any public entity topics you would like addressed either in a Newsflash, Defense Comment magazine, at the annual meeting, or some other format. Please feel free to contact either Jim Arendt at *james@walaw-fresno.com,* or Patrick Deedon at *pdeedon@maire-law.com* if you have any ideas. We will also endeavor to keep you updated on any significant updates in public entity law. There are many benefits to being a member of ADCNCN and the subcommittee groups. Please take advantage!

TOXIC TORTS

Edward Tugade | *Co-Chair*
Laura Przetak | *Co-Chair*

Asbestos Talc Litigation – The Verdicts Get Bigger

The Toxic Torts Committee presented a Wednesday webinar on the hot topic, "Alternative Causes of Mesothelioma," featuring Dr. Ania Urban, Supervising Health Scientist at Cardno ChemRisk.

Malignant mesotheliomas are aggressive tumors that have been primarily associated with the widespread use of asbestos. Occupational exposures to asbestos in the 20th century have largely been the focus of asbestos litigation matters. The hazards of inhaling high concentrations of asbestos dust for many years have long been recognized, and considerable research has been conducted focusing on the characteristics of different asbestos fiber types and their potential to induce mesothelioma at various doses. However, there is considerably less that is known about non-asbestos risk factors of mesothelioma, and to what extent those risk factors may play a role in disease causation. A variety of alternative, non-asbestos causes of mesothelioma have been proposed. They include exposure to radiation, genetic mutations, chronic pleural inflammation, or environmental exposures to other mineral fibers, to name a few. While there is more scientific evidence to support some of these as potential causes of mesothelioma than others, there is increasing information available about these potential non-asbestos causes of mesothelioma and they continue to be discussed and debated, particularly in the context of asbestos litigation.

Committee Leadership

Co-Chair: **Edward Tugade**
Demler, Armstrong & Rowland LLP

Co-Chair: **Laura Przetak**
Spanos|Przetak LLP

Webinars: **Diego Wu Win**
Gordon Rees Scully Mansukhani

Communications: **Erin McGahey**
Demler, Armstrong & Rowland LLP

We are looking for a few good leaders. Contact Edward Tugade for details (*tug@darlaw.com*).

TRANSPORTATION

Jeffrey E. Levine | *Chair*

If you have any suggestions or thoughts about future transportation events please send Jeff Levine an e-mail at *jlevine@mathenysears.com.*

and include chests, gold jewelry, ivory, and a magnificent golden wreath of 313 oak leaves and 68 acorns. This can be a short and sweet stop, an hour at most. It appeals not only to adults, but to children who can fantasize about warriors, kings and queens.

Continuing west and then south, you can travel to one of the most spectacular geologic phenomena in the world. Enormous columns of rock, composed of a mixture of sandstone and conglomerate, rise precipitously from the ground. Atop these pinnacles sit six monasteries – there used to be approximately 24 monasteries. Most of us have seen Meteora in the movie, "For Your Eyes Only."

Meteora was a 400-year refuge from Ottoman persecution. It was one of the only places where Greek culture survived, particularly a safe place to speak the native language. If you drive into the valley of Meteora as the sun rises, you can hear the echo of the bells at the monasteries calling the monks to morning liturgy. One day is enough, and then proceed to the beaches of Pelion.

When I took my first Greek language class, the very first sentence we learned was "John goes to the sea." Okay, so I'm paying Stanford University continuing education to teach me about Greek language and culture and this is the best they can offer? However, as I have come to understand, "the sea" [thálassa] is the heart and soul of Greek culture. Greece's 8,100 miles of coastline (the US has 12,000 miles by comparison) provides access to 77° buoyant water as clear as Lake Tahoe – the Aegean Sea.

Pelion (legendary as the home of the centaurs) is a mountainous peninsula with a bay on the west side and the open Aegean to its east. For ages, Pelion's shores have been known for their incredible beauty. Using the Internet, I found a couple of nice, newer, pensione style hotels to stay. In Pelion, we do not sightsee; we go to the sea. Every nook and cranny of the coastline has a picturesque beach. Our favorite is Agii Saranta, which is known for its very long white shoreline. The beach of Milopotamos is a must see. In addition to incredibly clear waters, there is Milopotamos – a rock tower you can climb up and jump 15 to 20 feet into the sea. The kids will do multiple repeats.

After Pelion it is time to return to Thessaloniki. Roughly halfway through the trip is the town of Litochoro, which sits at the base of Mount Olympus, home to Zeus, Athena, and other gods. There is one road that goes up towards the mountain at the end of which is a taverna. Since this is a mountain taverna, it has good meat, and more home-cooked food like pasticcio and moussaka. You can see into the cavernous valley that makes up Mount Olympus's crown and you can see out to the Aegean. This is a great place to stretch your legs, get a good meal, and finish the return trip to Thessaloniki.

This is just but one trip where Thessaloniki can be a great home base. Other highlights of Northern Greece include the beaches of Halkidiki, the caves of Alistrati, the ancient site of Philippi and the island of Thasos.

Kalo taxidi (Have a nice trip!)

David S. Rosenbaum

The second bombshell issue relates to the *Dynamex* independent contractor decision from 2017. Governor Newsom recently signed AB 5 (Gonzalez), which both codifies *Dynamex* and creates exemptions for specific occupational groups, for whom classification standards will revert to Borello. The bill also contains a "business to business" exemption, which requires adherence to very specific requirements.

Dynamex and AB 5 are generating debates about potential impacts on a virtually endless number of occupations, and like privacy, the issue is quickly going national, even finding its way into the Presidential debates. Many groups not already exempt pursuant to AB 5 will be seeking exemptions starting in January, and the Assembly and Senate will be legislating in this area for a very long time. Very substantial industries have not yet achieved resolution, such as trucking. And the biggest issues, of course, revolve around the gig economy where well-known companies are simultaneously working to negotiate a "third path" between traditional employment and independent contractor classifications, and readying an initiative for next year.

The blue brush analogy continues with bills unrelated to privacy and *Dynamex*. As of this writing, over 30 bills await gubernatorial action in the employment area, for example. These include AB 51, prohibiting arbitration agreements as a condition of employment; AB 749, prohibiting "no re-hire" provisions in severance agreements if the departing employee has filed an employment-related complaint; SB 218, allowing certain local government entities to enforce state employment statutes; SB 142, expanding upon legislation from last year on lactation accommodation, and many more. (Editor's Note: Subsequent to the submission of this column, AB 51, AB 749 and SB 142 were signed by Governor Newsom, effective on January 1, 2020. SB 218 was vetoed by Governor Newsom on October 12, 2019.)

Already passed and signed into law was SB 645, significantly shortening the permissible length of depositions in mesothelioma and silicosis cases. The California Defense Counsel was among a very small number of organizations negotiating the bill. While some improvements to the bill were achieved, members practicing in this area will certainly want to be familiar with the specifics of SB 645, effective on January 1, 2020.

With all of the focus on a small number of extremely high-profile issues, it is easy to forget that the legislature and governor add roughly 1000 new laws to the California Codes every year. CDC followed nearly 150 bills for 2019, covering every possible area of practice, plus bills amending the laws on civil procedure generally. CDC efforts result in dozens of amendments to bills every year. Members are urged to attend the ADC Annual Meeting in December to obtain more information on key bills.

CALIFORNIA DEFENSE COUNSEL

California Defense Counsel Advocate Mike Belote Honored Again!

Capitol Weekly is a publication that covers California's government and politics. Its Annual Top 100 List ranks California's top unelected political power players, and our advocate, Mike Belote, was ranked #57! *Capitol Weekly's* Top 100 recognizes individuals who devote their professional lives to fighting for – or against – issues of state politics and policy, including lobbyists, bureaucrats, activists, trade group leaders, Capitol staffers and journalists. Here is the excerpt pertaining to Mike:

"57. Mike Belote

Mike Belote is the President of California Advocates, Inc., one of California's first contract lobbying firms and one of its most respected. The firm represents blue chip companies like Apple, Delta Airlines, Equifax, Coca-Cola, Monsanto, NRG and more, and dozens of associations in diverse areas such as real estate, health care, law, agriculture and others. They also have a sizable presence in water – always a critical factor in California. A second division of the firm constitutes one of Sacramento's largest association management operations. Belote's philanthropic activities have supported Volunteers of America, the Public Legal Services Society at McGeorge School of Law, and My Sister's House, an organization focused on domestic violence and trafficking in the Asian Pacific Islander community. The latter bestowed Mike with its 2017 "Civic Hero of Hope" award, presented to him by California's Chief Justice, Tani Cantil-Sakauye. Full disclosure: Belote serves on the board of Open California, publisher of Capitol Weekly."

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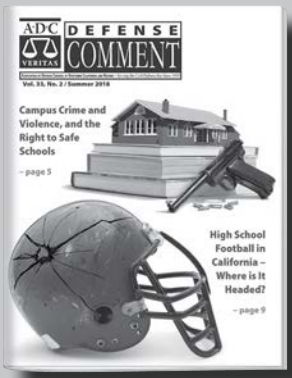

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welcome, new members

Since July 2019, the following attorneys have been accepted for membership in the ADC. The Association thanks our many members for referring these applicants and for encouraging more firm members to join.

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Ryan & Lifter
San Ramon
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Referred By: Jill Lifter

Charles Bolcom
Cooper & Scully, P.C.
San Francisco
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Thomas Borbely
Borbely & Associates
Walnut Creek
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Matthew P. Bunting
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Referred By: Paul Baleria

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Jennifer E. Duggan
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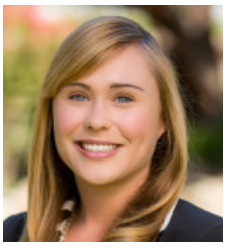

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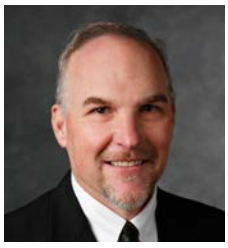

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2019

Calendar of Events

Save the Dates!

November 20, 2019	**#MeToo Litigation Update**	*Webinar*
December 12-13, 2019	**60TH Annual Meeting**	Westin St. Francisco, *San Francisco, CA*
January 24, 2020	***Howell:* Still Under Attack Nine Years Later**	*[TBD]*
September 25, 2020	**27TH Annual Golf Tournament**	Silverado Resort, *Napa Valley, CA*

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