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Spring, 2024
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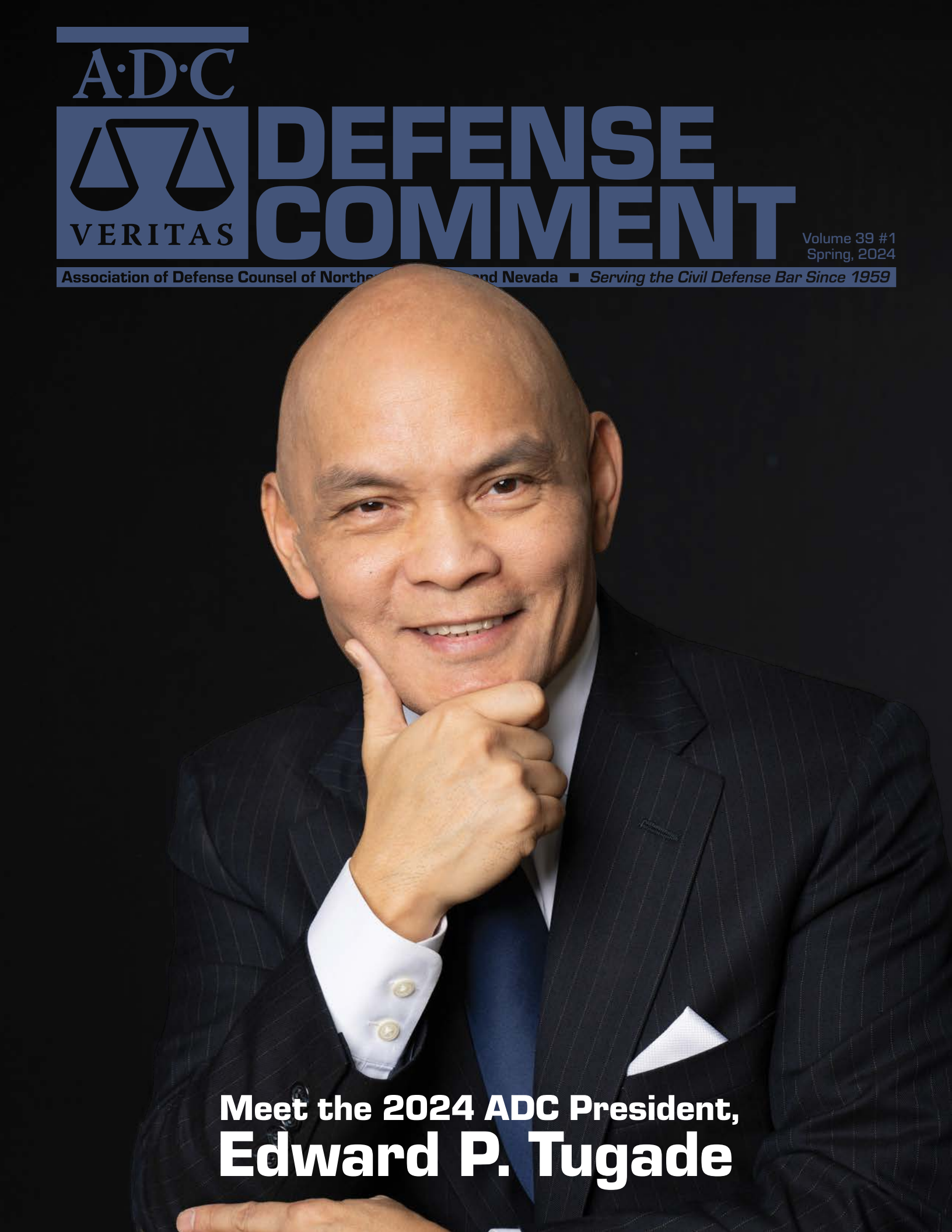

Meet the 2024 ADC President,
Edward P. Tugade

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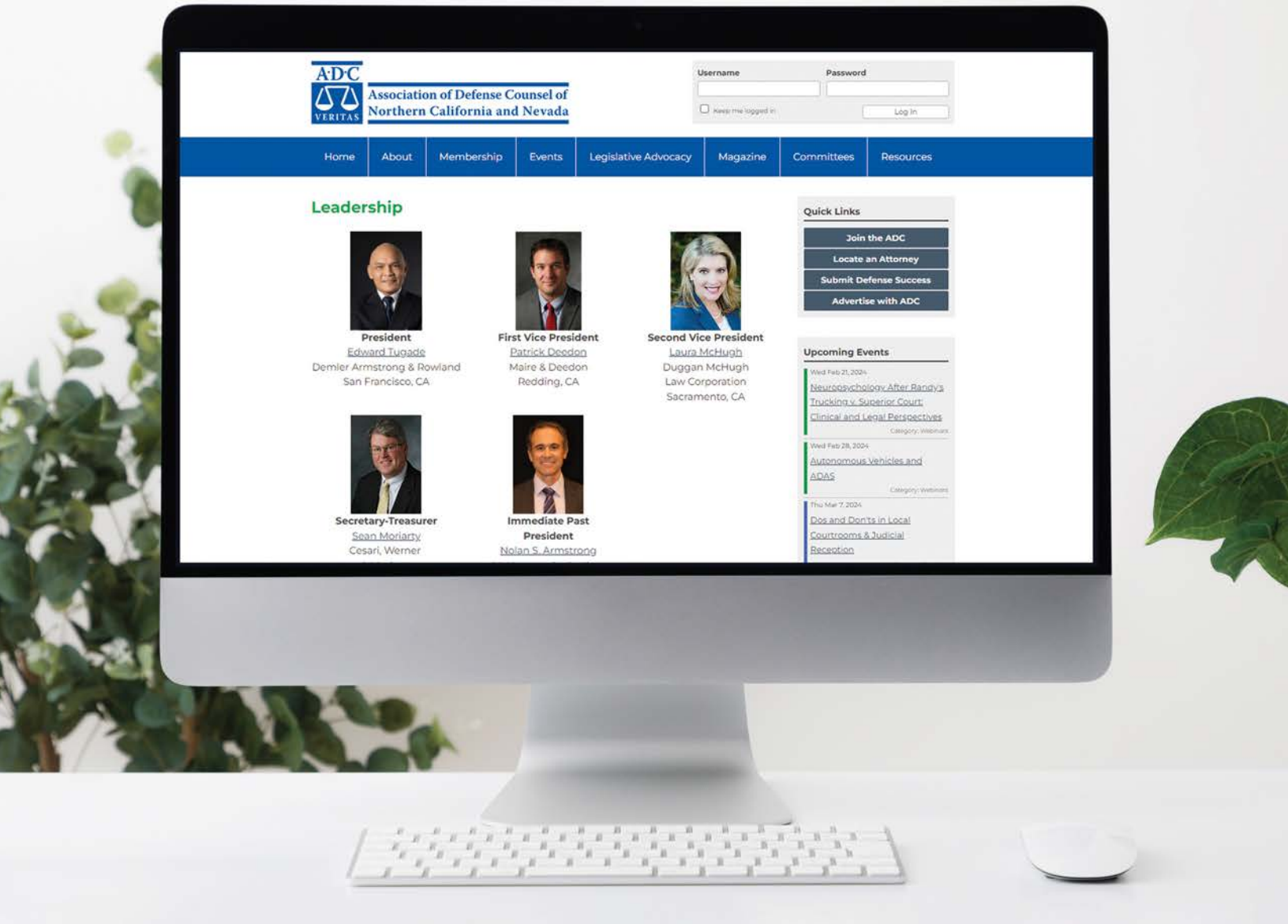

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PRESIDENT'S MESSAGE

EDWARD P. TUGADE
2024 President

Stay Engaged

It is my great honor and privilege to serve as your 65th President of the ADC along with our esteemed, well-qualified, and dedicated officers and board of directors. I am extremely thankful to our immediate past president, Nolan Armstrong, for his friendship and leadership. I am also extraordinarily appreciative of our outgoing board of directors, many of whom served the ADC faithfully for several years.

For me, the ADC has a legacy of exceeding excellence and the esteemed members of the ADC is what distinguishes our association from all the others. It is the home of renowned Past Presidents and the who's who of defense counsel. My priority is to preserve the legacy of the ADC with the help of the hardworking and diligent executive committee and board of directors as well as the ADC's members. As your President, I am committed to working with the board on education, diversity, communication, and I look forward to taking on the mantel of leading these amazing and talented professionals as we work shoulder-to-shoulder to advance the ADC's mission to support and promote its members.

As I look forward to the upcoming year, this is my message to you, our membership: **STAY ENGAGED!** Together, let's continue building on the future of the ADC by getting the word out on the benefits of membership. Share with the legal community how the ADC helps to network across multiple practice areas, which yields so many benefits like building your book of business and making lifetime friends along the way. Consider becoming more involved in the ADC by joining one of the multiple committees, contributing content to our magazine, website or social media platforms, helping plan a panel or social event, or participating as a speaker in our substantive programming. The ADC thrives when YOU are engaged – without YOU, there is no ADC!

The ADC Board of Directors has already begun working hard to bring our members an engaging year. Our goal is to have our members exchange ideas, gain insights into trends our clients are facing, and interface with their colleagues. To make this happen, the ADC's listserv will continue to be up and running for our colleagues to have "real time" discussions regarding experts, mediators, judges, the latest trends, the status of trials in the various jurisdictions, unique legal issues, and a whole array of other legal topics. Also, we will host several in-person seminars and conferences to foster discussion and collaboration on litigation trends, trial strategies, and expert issues. These get-togethers will be led by speakers of our membership regarding their experiences, strategies, and outcomes. The collaboration and cooperation in our organization can only give our membership exponential benefits. If you are interested in leading a discussion or would like to pose a topic of interest for discussion, please reach out to me or our leadership.

To further our year of engagement, we are full steam ahead on several new and exciting initiatives and events this year, and here are some already in the works:

- **Top Golf** We are thrilled to introduce this new event to our membership. The inaugural event is scheduled for May 9, 2024 in Roseville, CA. As you may already know, Top Golf is a fantastic event for all members and their families to enjoy, even if you've never picked up a golf club or haven't in years!

- **Affiliate Memberships** The ADC has officially launched an Affiliate Membership for which mediators, arbitrators and other neutrals are now eligible! Affiliate Members will have access of the core ADC benefits, including most importantly, the outstanding MCLE programs which ADC offers throughout the year. In addition, Affiliate Members will receive the same access and discounts for presentations and events as regular members, including

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CALIFORNIA DEFENSE COUNSEL REPORT

MICHAEL D. BELOTE
California Advocates, Inc.

How to Do Well in Sacramento

For lawyers trained in *stare decisis* and the evolution of case law, the suddenness (not to mention chaos) of the legislative process can be mystifying. Law schools typically devote little or no time to this branch of government. With some regularity, discussions with ADC members about a bill in Sacramento begin with "they did WHAT?"

In terms of suddenness, the California Legislature begins in the first week of January every year, concluding eight months later, with most bills becoming effective on January 1 of the following year. Even extremely impactful bills like SB 235 from last year, designed to import part of FRCP 26 into the California Code of Civil Procedure, became effective a mere 92 days after it was signed by Governor Newsom on September 30, 2023.

A couple of things are worth noting. First, approximately 2500 separate pieces of legislation are introduced each year in Sacramento, covering literally every possible issue of interest in our vast state. Every bill and every amendment are read for possible impact on defense practice, and every year at least a couple of hundred are relevant to civil defense lawyers. With rare exceptions, every claim on which an ADC member can defend a client is impacted by some bill. Perusing the list of bills through the ADC website will confirm the breadth of issues of potential interest to civil defense.

Second, there is only one organization operating in the Sacramento scene which is exclusively dedicated to defense practice. Every ADC member and those in our sister association in the South are automatically members of the California Defense Counsel, which is simply the political arm of the ADC and ASCDC. For decades, CDC has had a full-time presence approximately a nine-iron from the State Capitol. And while there are quality organizations representing business, insurers, plaintiff's lawyers, and the Bar generally, only CDC exists solely to represent the civil defense practice.

So, what elements make up a successful government relations program in Sacramento? No surprise, the monitoring and lobbying on bills is the crux of it. For the eight months the Assembly and Senate are in session, this requires daily diligence. Other than a few constraints imposed by the California Constitution, the legislature makes the rules, and it can waive them on one day's notice. Imagine a case where the *entire contents* of the complaint are stripped out and replaced with something completely new, with a hearing scheduled for next week, to get an idea of the shocking speed with which the legislature can act.

But bills are only a part of the mission. The vast labyrinth of regulations is monitored, thanks to a biweekly state publication called the "California Regulatory Notice Register." The Register relates to executive branch agencies, but probably the most important agency relevant to defense lawyers is the State Bar, located within the judicial branch. In recent years, the Bar has been active in considering proposals which literally could reshape the very practice of law, including one on paraprofessional licensing and another to establish a regulatory "sandbox" to test law practice innovations. These ideas are not going away, and CDC is involved.

Next is the CDC relationship with the Judicial Council of California. While most lawyers likely know little about the Judicial Council, this is the body created in the state constitution to establish policy for the state court system. Of particular importance: the Judicial Council adopts the statewide Rules of Court, and jury instructions which can win or lose a case and is chaired by the Chief Justice of California

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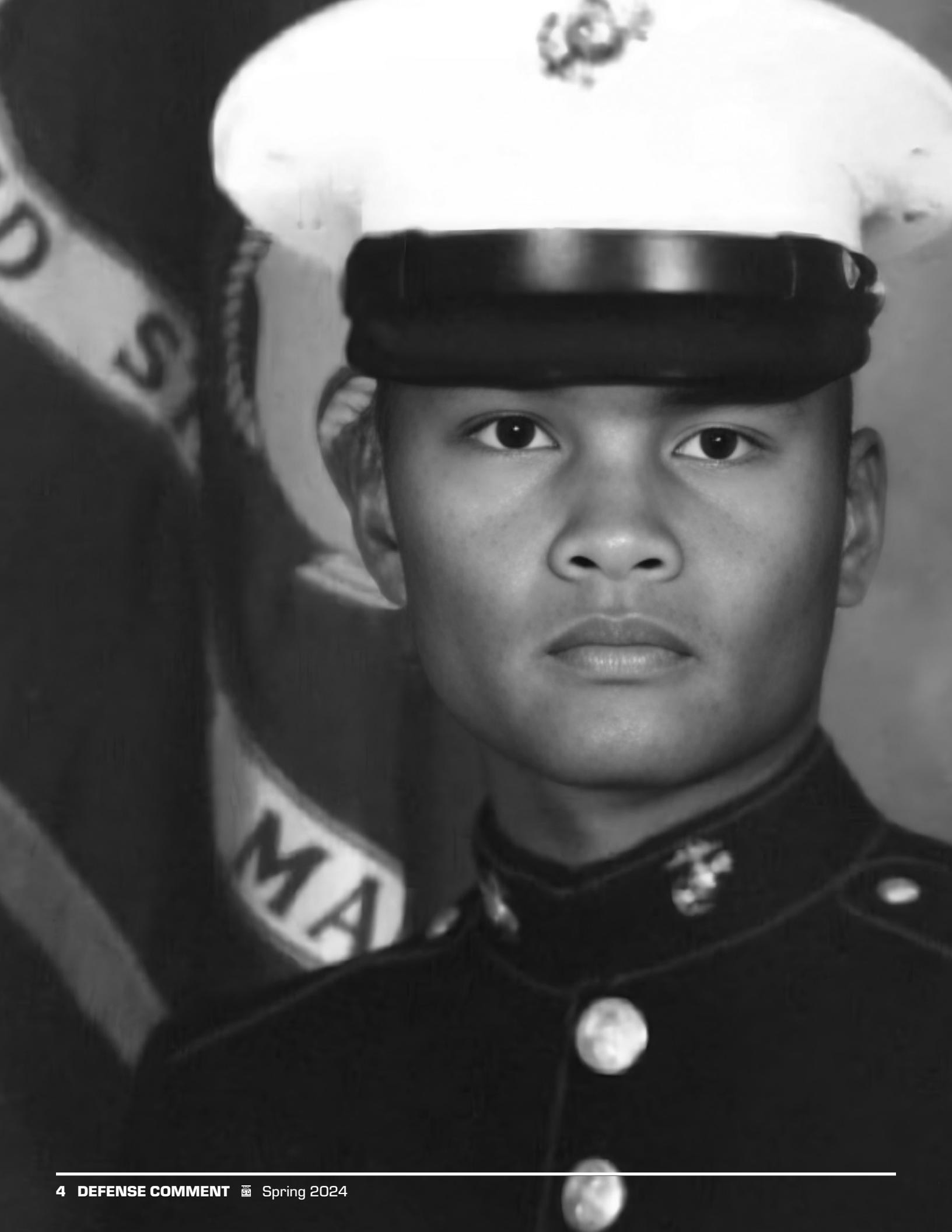

Meet the New President: Edward P. Tugade

Nolan S. Armstrong
McNamara, Ambacher, Wheeler, Hirsig & Gray LLP

Where did you grow up? Can you tell us a little bit about your childhood?

Raised with three siblings in San Francisco by my parents, Tessie, a CPA Supervisor in San Francisco's City Hall, and Terry, a writer and owner of the first Asian-literature-focused bookstore in the country, I learned from my parents even as a kid the value of a tenacious work ethic, resilience, and grit. My childhood consisted of being the "CEO" of multiple newspaper routes and helping my dad at his bookstore. Of course, it wasn't all work and no play. I enjoyed skateboarding and biking up and down the infamous hills and neighborhoods of San Francisco, with my tag-along younger brother, Gerald, not far behind, while my twin sisters, Ruby and Michele, preferred to stay at home with our parents. Family time was also always of high importance. We often explored the redwoods and camped at Thousand Trails, enjoyed picnics at Golden Gate Park with fresh farmers market treats, frequented my #1 childhood spot for burgers at Joe's Cable Car, and spent countless hours playing at Ocean Beach with our dogs.

What brought you to law school?

I took the road less traveled to law school. While still on active duty in the U.S. Marine Corps, I entered the halls of the University of California Law San Francisco (formerly Hastings College of the Law). My assignment to a non-lawyer legal officer position gave me the opportunity to meet and work with one of my mentors, a judge advocate (military attorneys are called judge advocates or JAG) assigned to my unit. Having learned I'd wanted to be an attorney since I was a little tyke, he took me under his wing and groomed me to become a Marine Corps judge advocate, placing me on the path to my legal career. One of my largest challenges during law school was balancing my legal studies with the demands of my continued military service. Indeed, my journey taught me what John Maxwell always says, "Everything worthwhile in life is uphill."

What did you do after law school and what about your time in the military helped you become a successful defense trial attorney?

After law school, my military background and experience afforded me the opportunity to complete my military service by leading a legal department of the Judge Advocate General prior to entering private practice. I'm often asked whether my transition from the military to civilian life was difficult, and I realized it wasn't because the skills I developed in the military translated well into the practice of law. What I learned

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in the military was the ability to manage things under extreme pressures. Marines are trained not only to adapt and overcome, but also to be decisive – to relax, look around, and make a call. Just like "Semper Fidelis" is an inherent part of who Marines are and what we believe, the cornerstone tenets of discipline, attention-to-detail, teamwork, adaptability, and resilience instilled in Marines remain with me today.

What do you like about your areas of practice?

I value the diversity of my practice areas. Throughout my legal career, I made sure to get experience in several different areas to grow my skillset. I've found that immersing myself in diverse areas of law provides a unique set of challenges, complexities, and rewards. For example, I play a vital role in representing clients in toxic torts, general liability, products liability, and transportation cases by having to navigate the different legal frameworks, evidence, and testimonies to develop effective defense strategies. I believe this multidisciplinary approach has become a tremendous benefit to clients.

Tell us a little bit about your family

I am deeply committed to my family, my most valuable asset and the light of my life. I juggle the excitement of having two active, beautiful girls, Audrey (14) and Katherine (10) with my wife Anna.

Anna is a partner at Wactor Environmental Law Group, an environmental law firm focused on land acquisition, redevelopment, regulatory compliance and environmental litigation.

Audrey is a freshman in high school with a passion for journalism, photography and music combined with an uncanny penchant for math despite having two lawyers as parents. She is also a student athlete, wowing us with her stunts as a cheerleader, her leadership qualities as a swim coach, and her competitive drive as a swimmer.

As a social fifth grader, Katherine showcases her sporty side in volleyball, soccer and swim, and positive energy as the Student Council's Sports and Rec Director. Her exuberant personality and musical talent shine in her performances in various theatre and musical productions.

What's it like having two working defense attorneys in the family?

I've found it to be extremely helpful to have two legal minds in the family. We often exchange ideas and pick each other's brains on how to best tackle certain issues. This synergy and understanding of the dynamics and demands of the profession has enhanced our practice of the law and has contributed to our positive mindset when dealing with work-life balance.

What are the most memorable trips or experiences you've enjoyed together as a family?

We love to travel and try to do so whenever possible. We never grow tired of our annual trips to picturesque Yosemite filled with conversational hikes, frozen drinks by the pool, and smores around the fire pit.

We also have fond memories of fireworks over Disneyland and the beach in Oahu on the Fourth of July. Trekking through Europe, I recall my daughter Audrey impressing the locals by biting into a freshly picked lemon in Sorrento. Based on the gracious hospitality and beautiful scenery, we've had an affinity for the Amalfi Coast ever since. We have particularly enjoyed blending into the scenery and going on food adventures at the cafes, creperies, and gelaterias under the umbrellas of the quaint neighborhood of Bercy Village in Paris.

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Do you have any hobbies or other activities away from the office that you're passionate about?

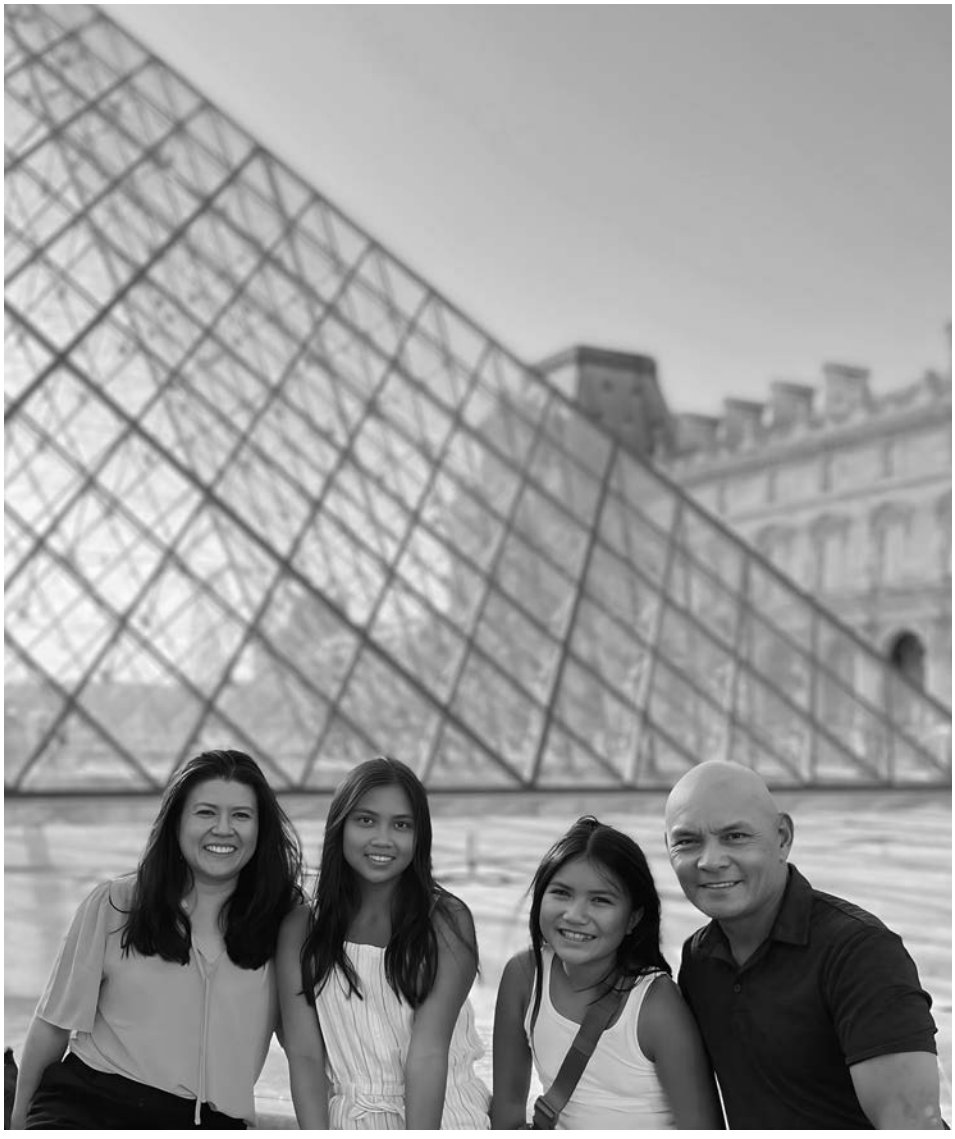
As a life-long 49er fan, my favorite pastime is sharing all things football and joining the roar of the crowd at Levi's Stadium with my family! When I am not shuttling my girls to swim meets, soccer games, volleyball tournaments, music lessons, and other extracurricular activities, I make it a point to go on a long run, bike ride, or hike as often as possible. Nothing beats the feeling of accomplishment I get when crossing the finish line of marathons, including my favorite, the Marine Corps Marathon in Washington, D.C.

What are the biggest changes you've seen in civil defense practice since you first started as a new attorney?

The single major change has been the impact of technology in the practice. Long gone are my many hours in the law library having to Shepardize citation after citation of multiple legal decisions for their precedential value. I first experienced the wonders of Westlaw and Lexis as research tools during my federal court clerkships, and I haven't looked back since. The proliferation of electronic information has led to an exponential increase in the volume of electronic evidence. Gone are the reams of paper from traditional discovery given the advent of emails, social media, and other digital communications, necessitating new approaches to managing and producing electronic evidence. Finally, the Covid pandemic changed the legal landscape, seemingly permanently. Depositions, court appearances, conferences, and mediations by Zoom are no longer the exception, but the norm. As civil defense practitioners, we must remain adaptable and informed to navigate the complexities of the ever-changing litigation environment brought on by the ever-evolving practice of law, and the ADC is here to help us do so.

What are your goals for the ADC in 2024?

I am committed to working with the Executive Committee and Board of Directors on education, diversity, communication, and to stay on point with the ADC's mission to support and promote its members. Our membership consists of some of the most highly respected members of the defense bar with an extraordinary platform to help shape the trajectory of our practice. I aim to have our members re-engage and stay engaged, to get the word out on the ADC's many benefits; how the ADC helps to grow its members' practice; how the ADC helps its members network across multiple practice areas; how the ADC provides opportunities to be recognized by being published or speaking at events; and how the ADC is a strong community built on camaraderie and longtime friendships. Finally, I want our members to leave the ADC's programs and events as better lawyers – more knowledgeable, better equipped to represent their clients, and ultimately serving to advance the law and make a positive difference in our profession.



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The 2023 ADC Annual Meeting Exceeds Expectations Again

Erin S. McGahey
Demler, Armstrong & Rowland, LLP

The 64th ADC Annual Meeting was held at the time-honored St. Francis Hotel in San Francisco December 7-8, 2023, offering diverse programs and entertaining speakers to live up to the theme of Exceeding Excellence. After conducting opening business, the program began with the entertaining and humorous insights of Jan McInnis, comedian, writer and speaker sharing her tips on how to use humor to diffuse conflict. For a profession that co-exists with conflict, her practical advice provided tips to communicate more effectively and be heard, while having a laugh along the way. Her presentation was relatable and timely given the divisiveness we see in our professional lives and you can check her out at *www.TheWorkLady.com*.

The ADC was privileged to have the participation of local superior court judges provide a State of the Courts Update with the Honorable Christopher Bowen (Contra Costa), Hon. Ann-Christine Massullo (San Francisco), Hon. Noel Wise (Alameda) and Hon. Timothy Volkmann (Santa Cruz) who discussed the state of legal proceedings in their respective jurisdictions. Topics included the pros and cons of conducting remote proceedings (the "pros" appear to win out), law and motion process nearly returns to pre-pandemic status while still contending with continued staff shortages, the success of IDC programs to relieve impacted dockets, and jury trends. Each shared their unique courtroom experiences but shared a common lament of the shortage of court reporters and hoped for some resolution, legislative or otherwise.

The traditional "Mike Brady Year in Review" presented a fast-paced rundown of important decisions issued in the appellate courts of California as told by Don Willenburg and Ashley Meyers, and in Nevada presented by Cody Oldham. The presentation covered more than 100 cases in subject matters relevant to defense practice, including torts, employment, public entity, SLAPP, insurance coverage and more. This program continues to serve as the perfect "Cliffs Notes" for those unable to keep up or subscribe to daily appellate briefs with the additional bonus of entertaining commentary from the presenters.

Outgoing President Nolan Armstrong gave his closing speech at the luncheon before passing the baton to Ed Tugade, followed by an impressive Marine Corps Color Guard in a full dress blues presentation

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to honor the service of our new ADC President. The President's Award for 2023 was awarded to Michon Spinelli for her dedication to the organization as a board member for 12 years and other contributions. Keynote Speaker, Former Chief Justice Tani Cantil-Sakauye, shared her experience as Chief Justice and chair of the Judicial Council, the policy making body for the judiciary, pulling back the curtain for a glimpse of how the judiciary conducts business.

The ADC Annual Meeting provided the three track options to offer a variety of education programs to its members, including litigation strategies, implementing diversity policies in the workplace, preserving the record for appeal, developments in TBI injury cases, and reporting requirements for Rule 8.3, aka "the Snitch Rule." Keeping relevant with the times, panelists discussed the availability and use of AI Technology in the legal practice as well as cautionary tales of IT security breaches.

Mike Belote's legislative update on Friday was an excellent presentation including his detailed report on SB235 and Senator Umber's efforts, PAGA reforms expected, the proposal to limit *all* contingency fees to 10% or 15% – which he humorously posited the passage of which would likely trigger World War III, the proposals to allow State Bar Membership without a Bar Exam, and the ongoing need for defense contributions to continue assisting the ADC to further the interests of justice, including the interests of the Defense Bar, in Sacramento.

Inspirational Speaker Michael Putnam shared his personal experience, challenges and growth to help motivate others to achieve success. He lives by his motto to "make a habit of going places not easily reached," to encourage changing one thing to make everything else easier, which will open the door to finding a balanced and more fulfilling life.

The finale wrapped up with trial stories of panelists Jim Brosnahan and plaintiff's trial counsel Christopher Wood of Dreyer Babich who braved the defense Bar, both of whom were magnanimous and hilarious in their trial stories and histories, as well as providing practical advice on effectively observing and persuading your audience for success in the courtroom.

Lastly, a hearty "well done" to Patrick Deedon, the Second Vice President and Meeting Chair, who organized a successful program. Many thanks to our loyal vendors and sponsors who helped make the Annual Meeting another success and to the vendors who generously donated to the Vendor Prize .giveaway, including an iPad, bottle of "Dom" and a dozen other prizes.. We look forward to seeing everyone again next year.

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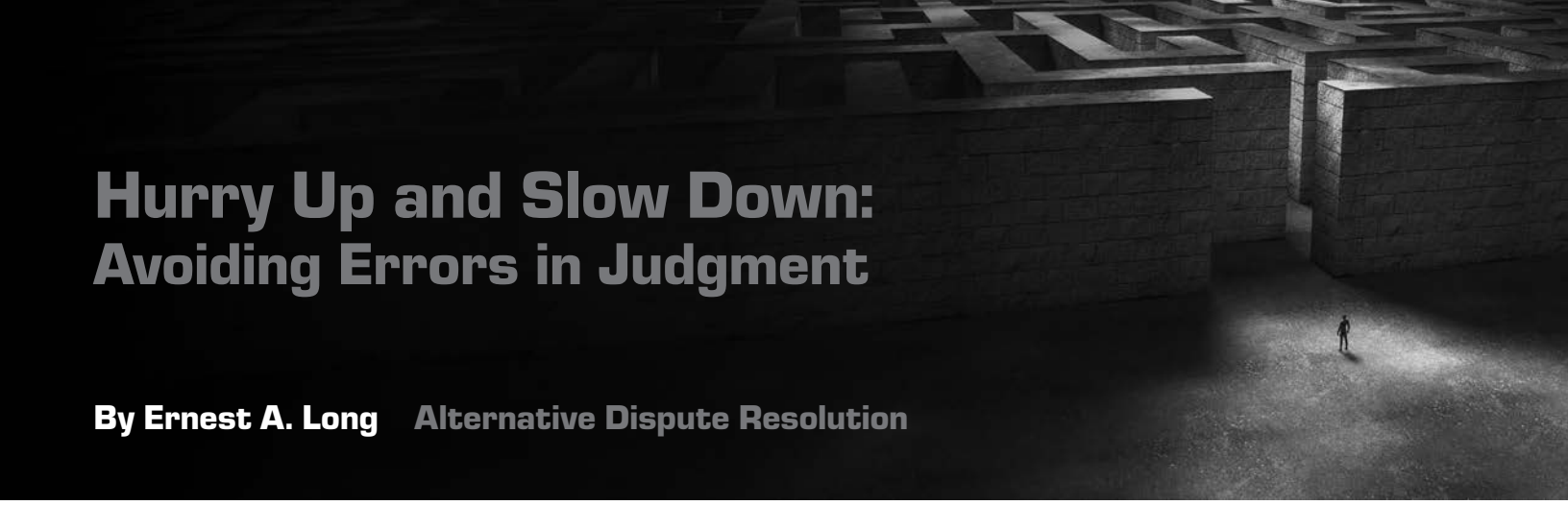

Hurry Up and Slow Down:
Avoiding Errors in Judgment

By Ernest A. Long **Alternative Dispute Resolution**

Poor judgment is an enduring source of work for lawyers. Clients, witnesses, lawyers, experts, even judges; no one is immune from mistakes. Because people are limited to interpreting information from their own viewpoint, human decision making and information processing is often biased and faulty. We take "shortcuts" and generate conclusions that are not completely accurate.

We are all conditioned by living in our society. Individuals are incessantly bombarded with information. We do not and cannot take the time to carefully evaluate each piece of information. People need to process information quickly to protect themselves from disadvantage or harm. It is adaptive for humans to rely on instinctive, automatic behavior that keeps them out of harm's way. We often go with our gut with a bias toward preferences or likes.

We know that our mind uses mental shortcuts to manage the complexities of daily life. As we automatically process choices, we are subject to mistakes which may lead to poor decisions. These mental shortcuts (called "heuristics") follow known patterns or bias. When we act intuitively, immediately, reactively, or automatically, we invite bias which may lead us to diverge from expressed intentions.

Bias can be described as a particular inclination or tendency in one direction. It fosters personal and sometimes unreasoned judgment because it operates as a force field, blocking information from coming in if it does not align with existing biases. It typically operates unconsciously, thereby leaving its influence hidden from our own introspection.

Behavioral psychology categorizes our thinking as intuitive or "fast" and deliberative or "slow." Fast thinking reflexively accomplishes most of the routine tasks of life automatically, i.e., driving home, identifying threats, recognizing friends. It is an unconscious (intuitive) process we can't turn off and don't realize we are doing. Decisions believed to be the result of deliberation often stem from educated guesses, rules of thumb, and pattern recognition. Automatically, effortlessly, and rapidly, fast thinking rushes to judgment with heuristics.

Slow thinking is deliberate and effortful. It is not automatic. It is used for intentional and mindful analysis of complex problems. Despite this high-level capability, however, the deliberative mind can be lazy and default to shortcuts offered by our intuitive brain. We want answers! Although heuristics are vital to our navigation of daily life and tasks, they can get in the way when a more deliberative, slow thinking process is required, such as analyzing a client's legal problems. Because we do not realize when an unconscious bias is acting upon us, we have a blind spot about our own objectivity.

Lawyers are continually processing information in a case, trying to distill complexity into a single narrative thread. We attempt to construct a story from which to make sense of known events and issues. As we do so, even with years of experience, we tend to rely on intuition (fast thinking) and neglect deliberation (slow thinking). So does opposing counsel. We trust our gut when we need a more thoughtful approach.

Lawyers are not always allowed sufficient time to deliberate. Time pressures are correlated with less accurate decisions. Intense emotions are linked to less systematic thinking. People are more likely to make mistakes when acting impulsively. Stress leads us to consider alternatives less methodically. When under duress, these conditions can cause us to rely on intuition to our detriment. Quick decisions, "from the gut" have a demonstrated record of greater error.

Heuristics are a feature of intuition, employed automatically and unconsciously to get us to an answer. It is easier to detect when others have failed to slow down and objectively evaluate than to introspectively identify our own resort to fast thinking. Learning to recognize how and when the intuitive brain might supersede the deliberative process, we will have a better chance to analyze when the client's imperfect judgment led them astray and steer them back in the right direction. Identifying a few key heuristics in this article may provide a filter for evaluating our own objectivity, reducing the blind spot that cloaks the unconscious bias at work.

Behavioral psychologist and Nobel laureate, Daniel Kahneman provides a window into the science of decision making and condenses decades of research in his book, *Thinking Fast and Slow* (2011, Farrar, Straus and Giroux, ISBN 9780374533557). Although human irrationality is Kahneman's great theme,

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much of his book focuses on unconscious errors of reasoning which distort our judgment of the world. He objectifies and labels common heuristic shortcuts, which is an effective way to identify everyday intuitive tendencies.

HEURISTICS AND THE DISTORTION OF JUDGMENT

We start any evaluative process with a mental model, a spontaneous impression of complex facts. As a product of intuition, this model is likely less nuanced and more coherent than the intricacy of actual reality. With this framework in place, new facts and evidence are viewed with a preference for achieving unity with the existing template. The initial mental model we form tends to narrow our focus when investigating a topic. Because we have achieved logic in a narrative form we may favor facts and evidence that are congruent with our model.

The natural desire for coherence can merge with the intuitive mental model to suppress divergent details and contradictions. As the intuitive mind constructs a rational story from the limited evidence at hand, our decision-making process may be satisfied with the illusion of simple elegance, overlooking, or ignoring the complexity of the issues. Information not fitting within the model is more easily dismissed or explained away. Facts that align are favored and adopted. We confidently conclude the new facts fit our theory or can be safely discarded.

Absent a deliberative effort, the tendency to quickly think with shortcuts and intuition can lead us astray. Here, we will review a few of the more prevalent heuristics and provide examples of many wrong turns these shortcuts present. Perhaps armed with this knowledge, we can make better case (and life) decisions.

SUBSTITUTION

Faced with a difficult or complex question, the intuitive mind will take shortcuts to avoid a tedious deliberation or a deeper evaluation. An example of this tendency is found in our reliance on uncomplicated narratives to explain the world. We tend to develop stories that have apparent explanatory power, and then overuse those few simple narratives to explain our complex, messy reality.

It is in our nature when confronted by a complex problem to find a simple answer. If we substitute a simple question for a more difficult inquiry, we also substitute a simple reaction in place of a more time-consuming thought process. The substitution bias quickly provides an apparently useful answer to a multifaceted question by answering a different, but much less complex question.

When asked by a client to predict how or when a case might conclude in the future, we tend to substitute the complex problem of considering many possible variables with the straightforward question of – "how do I feel about the case right now?" We have a huge bias to extrapolate current trends into the future, because it is a less demanding and relatively effortless question to answer in contrast to the demands of attempting to consider all the factors that can disrupt current trends and vary the case outcome. This dilution of the original problem produces an intuitive but flawed response to the question.

Substituting easy questions for hard ones is just part of a more general tendency toward oversimplification, allowing the intuitive mind to answer quickly. Our brain is fundamentally organized to prioritize efficiency, making quick judgments that are generally accurate. This can result in a tradeoff of more speed but less precision. Reducing problems to manageable analogies is not a bad strategy overall, as long as we don't confuse our simplistic analogies for reliable facts and can recognize when we've taken a misleading shortcut.

AVAILABILITY

The tendency to unconsciously resort to substitutions for quick answers can lead us intuitively to an available memory. It happens when we are asked to make a quick case evaluation. A client needs to know about the probable outcome of a current case, and the availability heuristic favors easily retrieved memory from a recent case or experience to render a forecast. We overestimate the likelihood of events or outcomes based on that which has greater "availability" in memory. Things we remember most clearly, the facts, players and timing from another memorable case or experience, are adopted in lieu of a formal analysis because they are available and easily accessed.

Kahneman and his fellow researchers concluded: "A person is said to employ the availability heuristic whenever they estimate probability by the ease with which instances or associations can be brought to mind." The ease of accessibility could be due to the fact that a specific piece of information is the most recent, or maybe because it is the most salient in memory. Instead of relying on factual data, our thought processes are influenced by the information that comes to mind quickly and easily.

An example of the availability shortcut might occur when we are posed the following question: "how common is an eclipse of the sun?" Pausing for a moment, it is obvious that this presents a complex determination. We would have to survey objective astronomical information in order to really answer, and perhaps even consider digging up historical data. This is

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too much work, so we intuitively substitute a far simpler question – how easy is it for me to think of an example of this phenomenon? If an example readily comes to mind, we conclude the phenomenon is common. If we can't think of an example, we conclude it is rare.

The availability shortcut is reasonable in many circumstances and is an indicator of familiarity. (I am only able to recall witnessing a few eclipse events in my life. They must be fairly rare!) Analogies often work by this mechanism. When asked a question about a complex case, the availability heuristic finds a parallel to a known prior case, and then answers the question by reference to that case. The problem isn't that we use analogies or heuristics to inform our decision making. That is perfectly reasonable and often effective. The problem comes from substituting our analogies and heuristics for analytical thinking about the multi-layered question we are confronting.

Failing to recognize when effortlessly available information doesn't match the current case complexities means that our judgment will sometimes be both wrong and unreliable. The risk of an error in judgment is greater when the task is more complicated, and the time allotted to make a decision is limited. If the client asks for a quick assessment, it may be the right moment to hurry up and slow down, explaining to the client that you will call back after a little contemplation.

OVERCONFIDENCE AND THE OPTIMISM BIAS

Decision makers must have the ability to reach conclusions on important questions. Arriving at an answer requires confidence, a trait shared by most lawyers. In the process of decision making, overconfidence is a trap. Frequently called upon for rapid and decisive judgments, it is not uncommon for lawyers to fall prey to intuition while favoring coherence with their case narrative.

Unfounded confidence causes us to overestimate the probability of a positive outcome and underestimate the risks of moving forward. Confidence is highly prized, and many would rather pretend to be knowledgeable or skilled than risk appearing inadequate. Because intelligence isn't the same thing as learning and developing a specific skill, smart people can be lulled by their own confidence into believing they are highly competent in a specialty area. When we lack the ability to accurately examine ourselves objectively, we are unable to recognize our lack of competence in a new or complex area.

The tendency to overconfidence may exist because gaining a small amount of knowledge in a field about which one was previously ignorant can make people feel as though they are suddenly virtual experts. Only after continuing to explore a topic will, they realize how extensive it is and how much they still have to master. Some individuals may seem highly competent due to their apparent confidence. They are often driven by a desire for status or the need to appear smarter than

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others around them. By acknowledging uncertainty and remaining open to other views we are able to resist the overconfident mind. In a profession where precision counts, intuition must acknowledge when deliberation is required.

Consistent with the tendency to overestimate the probability of a positive outcome is the optimism bias which causes an underestimation of the challenge. ("No problem, I've got this.") Overconfidence allows strategic thinkers to overestimate the probability of a positive outcome. If you cannot imagine you might be wrong, you will never force the deliberative mind to raise questions or re-evaluate the foundation of your theory. While an optimistic outlook can be healthy, decisions affecting a case should be founded upon objective facts. As usual, slow thinking wins the day.

ANCHORING

The anchoring bias occurs with our exposure to an initial piece of information that influences our perception of subsequent information. The initial contact can then affect our decision making and set the tone for how we process information that follows.

When the mental model or theory of the case becomes an anchor, the fast-thinking brain filters later acquired information within that framework. Anchors are great for strengthening the foundation of the intuitive mental model, but we may neglect to properly evaluate subsequent inconsistencies. Objectivity may erode. When anchored, our intuition may only notice and respond to facts which endorse the pre-existing model.

In a business setting, planning for future development can be led astray by anchoring. Most projects start with a projection of how executives believe the work will be realized. Market research, financial analysis, and professional judgment lead to the decision to proceed. Business plans tend to accentuate the positive, making the case for the project, and this can skew later reviews toward overoptimism. Leaders become anchored to original cost estimates and don't adjust for possible problems or delays. Over-optimistic forecasts have the greatest probability of disappointment.

Anchoring is a known factor in the residential real estate market. We anchor when we allow a number to randomly attract our attention while dealing with money or number-oriented issues. When we try to make estimates or predictions, we usually begin with an initial value or starting point and adjust from there as more facts become available. Anchoring bias limits our recognition of the necessary adjustments that are required, leading to biased results. Our tendency is toward the original anchor.

Data suggests that judges considering a criminal sentence may be anchored by a prosecutor asking for a very long sentence, so that the resulting ruling is much longer than average for the crime. A high demand for settlement in a civil case may tend to establish a higher range of value, even in

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the mind of the opposing party. A used car salesman may first show a highly priced less than average car to set an anchor for slightly lower priced cars to be shown next. Failing to recognize that your fast thinking brain is out ahead of you may lead to greater susceptibility to anchoring in any transaction. By challenging our own assumptions and taking a balanced view, we can avoid cognitive bias. The challenge is allowing a moment to slow down and think.

CONFIRMATION BIAS

People have an unconscious tendency to process information by looking for and interpreting data that "confirms" their existing beliefs, while setting aside what does not. This intuitive approach to information unintentionally affects our decision making, causing us to marginalize or overlook data that is inconsistent with our preconceptions and opinions.

Confirmation bias has been known since ancient times, and was described by the classical Greek historian Thucydides, in his text, *The History of the Peloponnesian War.* He wrote: "It is a habit of mankind to entrust to careless hope what they long for and to use sovereign reason to thrust aside what they do not want."

We are especially likely to filter information to support our own views when an issue is highly important or self-relevant. Once we develop a personal opinion about an issue, we have difficulty managing information in a normal, unbiased manner. Our tendency is to look for facts that support our beliefs. If people are emotionally distant from an issue, they are better able to rationally process and weigh new information, giving equal consideration to multiple viewpoints.

We are susceptible to the bias because it is an efficient way to process information. It allows us to rule out parts of the mountain of information and narrow our focus. People like to feel good about themselves and discovering that a belief they highly value may be wrong is disconcerting. They want to feel that they are intelligent and information that suggests they have erred reveals they have a blind spot or missed something important. In the absence of detached objectivity, confirmation bias promotes the unwitting dismissal of new facts that contradict their working opinions or model of reality.

Once a judge or individual juror forms an opinion, unconscious confirmation bias may interfere with their ability to process any volume of new, contrary information that emerges during a trial. Evaluating evidence takes time and energy, and the brain looks for shortcuts to make the process more efficient. The juror may selectively avoid all challenging or contradictory information. They may be more likely to remember information that is consistent with opinions they already hold. And this intuitive filtering will take place unconsciously, without intention.

Incorporating conflicting information, and forming new explanations or opinions takes time and effort, and staying on the path of least resistance is often the easy route. Being aware of confirmation bias is a significant hedge against allowing it to occur. If we can understand a potential tendency to give more weight to information that supports our existing beliefs our objectivity is strengthened. Since it is most likely to occur early in the decision-making process, it is helpful to diversify the sources of information brought to our decision process.

Engaging in debate or asking a colleague to play "devil's advocate" is an excellent way to reveal flaws in thinking. Searching for information that disconfirms our theory is at the heart and soul of scientific (and legal) research; the exact opposite of the confirmation bias.

THE HALO EFFECT

Perceptions of merit or worth can carry long lasting effects. We assume a graduate from a top university will be an excellent employee or a hard worker. Earning that diploma takes a lot of effort and is an impressive achievement. Encountering someone with such credentials may well leave you with a favorable impression, notwithstanding personality quirks or odd behavior. Nearly everything they do will be filtered through the "aura" of their prestigious alma mater. At work, their performance may be viewed as better than it actually is and supervisors may give them higher marks than they deserve in evaluations.

The halo effect can be difficult to counteract. Intuition can associate physical attractiveness or the recommendation of a trusted source with merit. In advertising, the reputation of a particular company may provide a boost to all of its products with consumers. Endorsement by a popular celebrity can launch a product, despite the fact it is no different than others in the marketplace.

If a witness is viewed favorably, we may tend to evaluate everything they say as credible and supportive. The halo effect may lead us to make assumptions and overlook or ignore small inconsistencies that, taken together, could ultimately undo their credibility. When judgment based on one feature of a person or thing affects the overall impression, an implicit, unconscious bias is at work. It is merely the product of mental efficiency, finding a shortcut to a conclusion.

Careful and deliberative evaluation of independent factors is the best remedy for this common error. As with most

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unconscious shortcuts, if we slow down, even briefly, we can consider and deliberate on the facts, rather than the intuitive heuristic answer.

HINDSIGHT BIAS

People have been saying, "I told you so," for as long as humans have been talking. We like to think the world is knowable and stable, and that we can predict what will happen next. When the future turns out differently because of unpredictable events, our reaction is often to say, "I knew it all along."

Hindsight bias is an unconscious cognitive tendency to overestimate our ability to predict outcomes, after the fact. People say something was forseen by them when it was not. Hindsight bias causes distortions of our memory of what we actually knew before the event occurred. When we think we "got it right" based on a false or distorted memory, we confidently entertain the notion that we can predict the outcome of future events. Stockbrokers, sporting event gamblers and any winner who attributes their success to skill while ignoring the role of luck are all victims of the bias.

In a shifting and unstable world, the idea that we knew it all along helps to restore coherence. As we come to believe we did in fact "know it," our faith in our own ability to predict expands and reassures us we understand the processes at work. Emboldened, our inclination is to make new predictions about future events which will likely prove false because we cannot factor in all of the unknown and unpredictable events that will act upon the outcome.

It is not uncommon for people to view the result of an unforeseen event after it occurs and believe they had a solid forecast. Once they look back to learn and understand the reasons and causes for the occurrence, the hindsight bias updates their memory of what they knew at the time.

In the early 2000's it was common for investors to say the tech bubble was going to burst. They had no idea when it was going to happen, and nearly everyone kept their investments in equities which continued to climb. After the market crashed, everyone could recite the problems the market faced and explain how they knew it was going to happen. Just like nearly everyone else, they sustained heavy losses. In the aftermath, many believed they understood why it happened. Hindsight bias overcame the reality they had lost nearly half their portfolio by not anticipating the precipitous drop. Telling themselves they knew the market would crash fails to address why they left their assets exposed to the severe downturn.

It is in the subsequent examination of why an enterprise failed that the shortcut is taken. Even though the last case ended poorly, because we tell ourselves we understand why, hindsight bias leads us to confidently and optimistically take the next one. Instead of acknowledging the future is uncertain, the intuitive brain prefers the stability of a predictable world in which we understand why things happen.

An essential part of making good decisions in our personal and professional lives is having realistic assessments of the future. If we fail to learn from our experience our forecasts are often misplaced and wrong. Since we don't reflect on the reason we missed the unanticipated factors in an outcome, we never understand why our past predictions might have been wrong. People have an unconscious tendency to process information and rely only on evidence that is consistent with their existing beliefs, setting aside what is not. This approach to information unintentionally causes us to minimize or overlook data available at the time of the decision that is inconsistent with our current beliefs and opinions about why we acted as we did. We miss the cues we failed to notice at the time, that led to the actual result, and have no insight about our miscues.

To anticipate and avoid hindsight bias, we can ponder the two or three different outcomes that could have been predicted before the event occurred. This will help remind us how difficult and unpredictable the decision really was at the time. Even more helpful is to locate a written record, diary or electronic correspondence discussing the factors that were actually considered when a decision was being made. Much as we might like to say we predicted an outcome, our judgment about taking future steps will be more solidly based on an accurate understanding of past failures.

CULTIVATING A SLOW THINKING BRAIN

Understanding that bias exists in everyone and cannot always be anticipated or avoided does not cure our tendency.

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SUMMARY OF SELECTED CALIFORNIA SUPREME COURT AND APPELLATE CASES

Editor's Note: As always, remember to carefully check the subsequent history of any case summarized as the reported decisions may have been depublished or have had review granted.

DON WILLENBURG
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PAGA claims may not be stricken on the ground that they are unmanageable

Estrada v. Royalty Carpet Mills, Inc. (2024)
__Cal.5th __, 2024 WL 188863

The employer argued, and at least one Court of Appeal held, (1) that courts possess the inherent power to manage cases, and (2) just as class actions may be stricken if a trial court rules that they are unmanageable, the same should be true of PAGA representative claims. The Supreme Court rejected both arguments.

We now conclude that trial courts lack inherent authority to strike PAGA claims on manageability grounds. In reaching this conclusion, we emphasize that trial courts do not generally possess a broad inherent authority to dismiss claims. Nor is it appropriate for trial courts to strike PAGA claims by employing class action manageability requirements. And, while trial courts may use a vast variety of tools to efficiently manage PAGA claims, given the structure and purpose of PAGA, striking such claims due to manageability concerns – even if those claims are complex or time-intensive – is not among the tools trial courts possess.

The court, therefore, disapproved *Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal.App.5th 746, 766–767, which had concluded that trial courts possess such inherent authority.

The court took a limited view of "inherent power" generally, particularly as to whether it could be employed in the name of "judicial economy," and found that it paled in comparison to the remedial purposes of PAGA.

Contrary to Royalty's claim that all courts have *broad* inherent powers to dismiss claims on judicial economy grounds ... trial courts possess only a *narrow* inherent authority to dismiss claims based on limited circumstances undisputedly not present in this case (e.g., cases involving a failure to prosecute, frivolous claims, or egregious misconduct).

The employer's class action analogy got blown out of the water by the unanimous opinion. "[C]lass claims differ significantly from PAGA claims in ways that make it inappropriate to impose a class action-based manageability requirement on PAGA actions. [¶] First, manageability bears upon questions of superiority and the predominance of common issues, requirements unique to the class action context." For example, "there is no requirement that a plaintiff establish predominance of common issues to state a PAGA claim." "[W]hile a manageability determination in the class action context is part of the consideration of the costs and benefits of class adjudication as opposed to other methods for resolving the controversy [citation] to apply a separate manageability

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requirement in the PAGA context apart from a consideration of any other factors that might favor representative litigation would be to apply the manageability criterion in a way it does not apply in the class action context."

"Second, unlike class claims, PAGA claims are effectively administrative enforcement actions, and imposing a manageability requirement would impede the effectiveness of such actions. 'Hurdles that impede the effective prosecution of representative PAGA actions undermine the Legislature's objectives.'" "[A]pplying a manageability requirement in such a unidirectional fashion in the PAGA context could predictably lead to 'the dismissal of many PAGA cases' [citation] in contravention of the Legislature's intent to have the statute maximize the enforcement of labor laws."

The decision does list various other tools "to help efficiently adjudicate PAGA cases, including affirmative defenses to alleged PAGA violations."

Ruling in criminal trial that officer had conducted illegal search and lied about it was not collateral estoppel in later administrative challenge by the officer to his termination

Cruz v. City of Merced (2023) 95 Cal.App.5th 453

The City Manager terminated Cruz from the police force for alleged false statements about a search.

At the criminal trial arising from the search, the court "found Cruz's testimony to not be credible," that contrary to his representations, he'd searched a bag prior to getting consent, and so it dismissed charges against one defendant.

Based on the misstatements and the illegality of the search, the personnel board recommended that the officer be demoted without backpay instead of terminated. The City Manager nevertheless terminated him.

When the officer challenged his termination in court, the trial court ruled that collateral estoppel precluded "relitigation of the criminal court's findings regarding the legality of the search or relitigation of the criminal court's findings as to whether Officer Cruz's testimony presented in the criminal matter was or was not credible."

The Court of Appeal reversed. One of the requirements for privity is that "the party against whom preclusion is sought must be in privity with the party to the former proceeding." The Court of Appeal ruled there was no privity. "Cruz, who was challenging his termination from city employment in a mandamus action, did not have a community of interest with the district attorney, who was prosecuting two criminal defendants. The present action implicates Cruz's personal interests (i.e., employment), which were not at all 'at stake in the suppression hearing.'" Further, Cruz did not control what arguments were made by the district attorney.

The case was remanded to the trial court to determine, in its independent judgment, whether the surviving charges were insufficient to support termination.

SLAPP motion denied where complaint was based on city's failure to provide adequate notice of action, not anything said at meeting

Mary's Kitchen v. City of Orange (2023 4th Dist. Div. 3) 96 Cal.App.5th 1009

SLAPP depends on the specific act that is the basis for the complained-of harm. An anti-SLAPP motion will not be granted if protected activity is merely incidental to the claim.

"Plaintiff Mary's Kitchen provides homeless services in the City of Orange. Prior to the filing of this lawsuit, the city manager for the City terminated Mary's Kitchen's license, citing safety concerns. Subsequently, the city council held an executive (i.e., closed) session to discuss potential unspecified litigation. Afterward, the city attorney exited the meeting and declared that the council had "unanimously confirmed" the termination of Mary's Kitchen's license.... The Brown Act requires that any contemplated action or topic of discussion be posted in an agenda at least 72 hours prior to the meeting. (Gov. Code, § 54954.2, subd. (a)(1).) The meeting agenda did not mention anything about Mary's Kitchen's license." So, Mary's Kitchen sued for violation of the Brown Act.

The City filed an anti-SLAPP motion, "arguing that because the agenda described the meeting as discussing legal matters, the complaint/petition arose out of protected activity. The City takes the position that no action was taken at the meeting, and that the unanimous approval described in the minutes simply reflects inaction – i.e., that the city council chose to do nothing to override the city manager's decision to terminate the license. The [trial] court denied the motion, concluding the complaint targeted the City's failure to provide adequate notice of the confirmation of the license termination rather than anything that was said at the meeting." The Court of Appeal agreed, and "further conclude[d] that the 'unanimous confirm[ation]' is evidence of an action: ratification."

The decision contains much discussion and several authorities on distinguishing unprotected actions from protected speech, particularly in public entity cases.

RECENT CASES

Sidewalk misalignment less than one inch is trivial as a matter of law

Miller v. Pacific Gas & Electric Co. (2023 1st Dist. Div. 3) 97 Cal.App.5th 1161

Plaintiff tripped on a metal plate on a sidewalk covering an underground utility vault. There was a vertical misalignment of less than one inch. The trial court granted summary judgment pursuant to the trivial defect doctrine, and the Court of Appeal affirmed.

Defendants made a prima facie showing of trivial defect: "(1) the size, nature, and quality of the defect – a vertical misalignment of less than one inch with no broken pieces or jagged edges on the metal plate or surrounding sidewalk; (2) visibility – although the accident occurred at nighttime the area was illuminated with artificial lighting from multiple sources and there was no debris or material on the metal plate or surrounding sidewalk that concealed the defect; and (3) lack of prior incidents." Plaintiff contended that "the vertical misalignment cannot be deemed trivial as a matter of law because City guidelines require repair of sidewalk height differentials one-half inch or greater and the City inspector ordered repairs of the misalignment." The Court of Appeal disagreed, because there was no evidence that that standard for repair "has been accepted as the proper standard in California for safe sidewalks." "[W]e see no evidence from which a reasonable trier of fact could find the trivial sidewalk defect posed a substantial risk of injury to a foreseeable pedestrian exercising due care."

Whistleblower retaliation claims may involve reckless or negligent, not necessarily willful, conduct for insurance purposes, like disparate impact claims

City of Whittier v. Everest National Insurance Company (2023 2d Dist. Div. 1) 97 Cal.App.5th 895

Insurance Code section 533 provides that an insurer is not liable for the willful act of the insured. The trial court ruled that this precluded coverage for whistleblower retaliation claims under Labor Code section 1102.

The Court of Appeal reversed. "[L]iability under Labor Code section 1102.5, subdivision (c) does not require proof of bad faith, malice, or punitive intent on the part of the employer. To prove the employer's intent to retaliate, a plaintiff need only show that the protected activity – for example, the employee's refusal to participate in unlawful activity – was a "contributing factor" to the adverse employment action. [Citations.] This means an employer can be held liable for an adverse employment action against an employee who refuses to participate in an unlawful activity even if the employer honestly believes the activity is lawful and acts not to punish, but to mitigate the harm to the employer's business from what it believes is an insubordinate employee."

"Doctrinally, the employer's conduct in our scenario is closer to negligence than intentional misconduct. The employer intends the act – the adverse employment action – but not the consequence – a violation of the employee's rights under Labor Code section 1102.5, rights that do not become clear until a court has decided the legality of the conduct in which the employee refused to participate."

"Our scenario shares characteristics with disparate impact discrimination, a workplace tort courts have deemed 'unintentional' and not subject to the indemnity prohibition of section 533."

Litigation privilege does not bar claims against debt collectors

Moten v. Transworld Systems Inc. (2023 4th Dist. Div. 2) __ Cal.App.5th __, 2023 WL 9103620

Plaintiff filed class action against debt collector on student loan, alleging that the debt collector did not own the rights to enforce the loan and that the debt collector filed multiple suits to collect loans based on false documents. The trial court granted the debt collector's anti-SLAPP motion, ruling that attaching false documents to complaints was protected activity, and that claims based on the false documents were barred by the litigation privilege. The Court of Appeal reversed and remanded.

Plaintiff filed suit under Robbins-Rosenthal Fair Debt Collection Practices Act (Civ. Code, § 1788 et seq.) and the Federal Fair Debt Collection Practices Act, which bar debt collectors from using fraudulent statements. The Court of Appeal agreed that attaching false documents to complaints was protected activity. The Court of Appeal held, however, that the litigation privilege does not apply to Rosenthal Act claims. "To bar, at the pleading stage, Moten's allegations that Transworld fabricated evidence in order to collect on the debt would undermine the gravamen of the Rosenthal Act."

The Court of Appeal remanded to the trial court to reconsider the second prong. The Court of Appeal also left the door open for the court to consider whether Moten's case fell within the "public interest" exception to SLAPP (Code Civ. Proc., § 425.17).

One-year SOL for healthcare provider negligence barred claim stemming from ambulance crash, even though plaintiff was not in the ambulance, but rear-ended by it in traffic

Gutierrez v. Tostado (2023 6th Dist.) 97 Cal.App.5th 786

Motorist was injured in a collision when an EMT (Tostado) was transporting a patient for care. The trial court granted summary judgment, ruling that plaintiff's claims were time-barred by MICRA's one-year statute of limitations. The Court of Appeal affirmed. "[B]ecause Tostado was transporting a patient at the time of the accident, he was rendering professional services," so the MICRA SOL applied.

MICRA defines professional negligence as "a negligent act or omission to act by a health care provider in the rendering of professional services." (§ 340.5, subd. (2).) Plaintiff argued that ordinary negligence applied, because the injury did not result from violation of a professional duty. The Court of Appeal disagreed; defendant was rendering professional services by driving the ambulance, and MICRA's purpose to reduce insurance costs would be better served by applying MICRA. (Accord: *Lopez v. American Medical Response West* (2023) 89 Cal.App.5th 336, 342 [MICRA applied to claims of both patient being transported and son also in ambulance].)

SLAPP exception for matters under review in official proceeding does not apply if statements made after proceeding is over

Doe v. Ledor (2023 1st Dist. Div. 4) 97 Cal.App.5th 731

Mean Girls comes to the court! A high schooler broke off a relationship. Friends of the dumped began a smear campaign, including writing to Dartmouth, which had accepted him, and asserting that he had cheated in a high school election by hacking classmates' email accounts and making it appear that they voted for him. Dartmouth rescinded. The student sued, and the defendantstudent brought an anti-SLAPP motion. Plaintiff opposed the motion, arguing: "(1) Gina's statements in the Dartmouth emails did not qualify for protection under section 425.16(e)(2) because any official proceedings conducted by BHS had long concluded when Gina sent her emails; (2) Gina's statements did not further a matter of public interest; (3) the statements were collateral and incidental to her larger scheme of misconduct; (4) Gina's conduct was illegal as a matter of law; and (5) plaintiff's claims had minimal merit."

The Court of Appeal rejected the suggestion that the statements were protected by subdivision (e)(2) re: matters under review in an official proceeding. "The goal of protecting petitioning activity and participation in official proceedings to seek government redress is not thwarted by recognizing that the statute does not extend to the circumstances here, where Gina's statements were made more than a year after the termination of any official BHS disciplinary proceeding."

Premises line rule bars tort claims against employer

Jones v. Regents of the University of California (2023 4th Dist. Div. 3) 97 Cal.App.5th 502

A university employee and her husband sued the university after she was injured riding her bike (home from work) on university grounds, claiming dangerous condition of public property (Gov. Code, § 835). The Superior Court granted summary judgment on the ground that the worker's comp "exclusivity rule barred Jones's claim because her injuries occurred within the course of her employment as a matter of law based on the premises line rule." The Court of Appeal affirmed.

Application to set aside default under 473(b) denied because it was unaccompanied by a proposed responsive pleading

Jimenez v. Chavez (2023 4th Dist. Div. 2) 97 Cal.App.5th 50

Male cohabitant challenged default in a case re: a residence the two had shared, pleading attorney fault under Code of Civil Procedure section 473, subd. (b). The trial court denied the motion on the ground that it was more than 182 days after the default judgment was entered. The Court of Appeal ruled that "the six-month limitations period of the mandatory and discretionary relief provisions of section 473(b) is either 182 days or six calendar months, whichever period is longer." The motion was filed within 6 calendar months, so the Court of Appeal rejected the trial court's ruling on that ground.

"Nonetheless, we affirm the order denying the motion. The motion was not "in proper form" (§ 473(b)) because it was unaccompanied by a proposed responsive pleading. The court was required to deny the motion on this ground." "The phrase 'in proper form' encompasses the mandate, expressly included in the discretionary relief provision (§ 473(b)), that the motion be 'accompanied by a copy of the answer or other pleading proposed to be filed.'"

Don't blow your appeal from oral statement of decision!

Z.V. v. Cheryl W. (2023 1st Dist. Div. 3) 97 Cal.App.5th 448

In an ugly family visitation case, the losing party blew the appeal deadline despite multiple attempts to set things right. Traps for the unwary aplenty. Lots of paper does not necessarily protect you.

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RECENT CASES

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Statement of decision issued orally on April 5th. Reduced to written Findings and Orders on June 15th. Losing party files motions to vacate or seek a new trial on May 12th and 27th and June 27th. Trial court issues a written denial on September 9th, filed three days later. On September 15th, the losing party files a notice of appeal identifying the June 15th judgment.

Too late, under both CRC 8.104 (60 days from judgment) and 8.108 (time extended by 30 days for specified post-trial motions). If, as in this case, trial is concluded in less than one day or 8 hours, the statement of decision may be made orally. (Code Civ. Proc., § 632.) Plus, the losing party waived a written statement. Thus, the appealable judgment was April 5th, more than 60 days before the September 15th notice of appeal.

While CRC 8.108 extends the time to appeal to 90 days, it does so from after "the first notice of intention to move-or motion-is filed." Here, the first motion was filed May 12th – more than 90 days before the September 15th notice of appeal.

No malicious prosecution liability for questionable calls where it could not be said that no reasonable lawyer would have advanced the claims

Green Tree Headlands LLC v. Crawford (2023 1st. Dist. Div. 4) 97 Cal.App.5th 1242

A trustee who was sued for malicious prosecution filed an anti-SLAPP motion. The trial court denied the motion, finding that the trustee had no possibility of prevailing. The Court of Appeal reversed.

"Without question, the legal judgments *this* attorney ... made were flawed on multiple levels, but that does not mean he lacked probable cause to bring suit, since, objectively, on this set of alleged facts, we cannot conclude no reasonable lawyer would have advanced the claims and theories he put forth." "Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win."

The result is even more remarkable because the trustee's attorney "was caught red-handed attempting to use and rely upon a forged document." The court found that was not relevant in these circumstances.

The decision also involves an extended discussion of the differences between a license and an easement. You'll have to read it yourself to get that.

Malicious prosecution subject to one-year SOL for claims against attorneys, not general two-year SOL for personal injury claims {ADC requested publication}

Escamilla v. Vannucci (2023 1st Dist. Div. 1) 97 Cal.App.5th 175

Plaintiff, Escamilla, filed a malicious prosecution action against defendant Vannucci, the attorney for the opposing parties in prior litigation. The trial court granted Vannucci's anti-SLAPP motion to strike the claim, finding that Escamilla's malicious prosecution claim was barred by the one-year statute of limitations for "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services." (Code Civ. Proc., § 340.6, subd. (a).)

Escamilla, a professional bounty hunter, argued that § 340.6 applied only to claims by clients against attorneys, so that the proper SOL was therefore, two years for personal injury under § 335.1.

The Court of Appeal rejected these arguments and affirmed. "We agree with [prior decisions] that subdivision (a) of section 340.6 applies to malicious prosecution claims against attorneys who performed professional services in the underlying litigation." Section 340.6 goes "beyond legal malpractice claims to include any claim that 'necessarily depend[s] on proof' that an attorney violated a professional obligation, which includes the obligations 'embodied in' the Rules of Professional Conduct [citation omitted]), and that is the case with malicious prosecution claims against attorneys who performed professional services in the underlying litigation." "[T]he plain language of section 340.6 does not confine the limitations period to claims by clients or former clients. The statute of limitations applies when 'the plaintiff' – not the client – discovers a wrongful act 'arising in the performance of professional services."

Water on a driveway is an open and obvious danger that does not create duty to warn

Nicoletti v. Kest (2023 2d Dist. Div. 8) 97 Cal.App.5th 140

"We conclude that [defendant apartment complex owner] owed no duty to warn Nicoletti [a 13-year resident] of a water current [on a rainy day] that openly and obviously interfered with one of three building entrances." Plaintiff argued that "that the dangerous condition caused by the lateral force of rainwater was not open and obvious. As such, Dolphin had a duty to warn of the dangerous condition. We disagree."

"Nicoletti does not dispute that she observed that there was water running down the driveway. Nicoletti instead attempts to distinguish Sanchez because in that case, the water was standing.

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(See *Sanchez*, supra, 47 Cal.App.4th at p. 1470 ....) However, running water on a surface is arguably a more obvious danger than standing water. Not only does the water current make the surface slippery, but also a reasonable person would observe that running water could create a force that would cause someone to fall over. Further, '[i]t is a matter of common knowledge among children and adults that wet concrete is slippery and that, when on a slanting incline' such as a driveway, 'it does not provide a safe footing.' (*Betts v. City and County of San Francisco* (1952) 108 Cal.App.2d 701, 703 [ ].) Accordingly, the dangerous condition was open and obvious to Nicoletti, and Dolphin had no duty to warn."

The Court of Appeal also rejected plaintiff's "necessity" argument, both because it was not raised at the trial court and because there were other entrances she could have used.

Bar owes no duty to call police when security breaks up a fight, or to prevent another fight an hour later and a block away

Glynn v. Orange Circle Lounge Inc. (2023 4th Dist. Div. 3) 95 Cal.App.5th 1289

Decedent and his friends got into a bar fight. "The fight was broken up by security and the two groups were escorted outside. Another brief altercation may have ensued outside, but was quickly stopped by security, after which the two groups left and went their separate ways." About an hour later, after visiting another bar, "in the parking lot of another business, they encountered their assailants from the ... fight again." Decedent was stabbed and killed.

So of course, the parents sue the bar owner. Summary judgment for the defense, and the Court of Appeal affirmed. The court weighed the familiar *Rowland* factors, and found as follows:

The third factor ... weighs against finding a duty. Defendants' conduct is quite significantly removed from Nicholas's death by physical distance, time, and the tenuous logic of the causal connection plaintiffs draw between defendants' conduct and Nicholas's death. Plaintiffs argue defendants should have called the police, but it is not at all clear that this would have made any difference in the ultimate outcome.

The fourth factor, moral blameworthiness of the conduct, also weighs against finding a duty. Plaintiffs point out that defendants failed to comply with their safety plan, which specified that police should be called under these circumstances. However, we do not ordinarily define either moral blame or a legal duty by reference to defendants' own internal policy. The lack of a call to 911 when the parties had been separated and had peaceably gone their separate ways is not the sort of conduct to which moral blame ordinarily attaches. One wonders what plaintiffs would have expected defendants to report to the police dispatcher in this instance.

The fifth factor, the policy of preventing future harm, weighs only weakly in favor of finding a duty. Calling the police after the parties left the bar would likely not have prevented Nicholas's subsequent death. More broadly, calling the police after every bar fight might marginally reduce the frequency and severity of injuries resulting from subsequent altercations, but it seems unlikely to eliminate them. The police cannot and will not arrest or indefinitely detain every person involved in a bar fight, and certainly will not follow participants in bar fights around, in hopes of preventing a future fight.

The sixth factor, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, weighs substantially against imposing a duty. If every bar is required to call the police for every altercation taking place on their premises, on pain of liability attaching for subsequent fights happening much later, away from the premises they own or control, police resources would be stretched thin and the ability of the police to respond to other calls would suffer. Many, perhaps even most, of these calls will be unnecessary. By the time the police arrive, most of these situations will have been calmed by bar security, with the parties either eager to leave or having already left.

... A bar's duty arising out of its special relationship with its patrons extends to protecting patrons from "imminent or 'ongoing' criminal conduct," but not further. [Citation.] When patrons safely and peaceably leave the bar, as Nicholas, J.D., and the assailants did, the bar's special relationship with them terminates, and the duty it owes to them ends.

While the decision is very specific to the duties of barkeepers, it is also a fine example of common-sense limits on duty.

Employer MSJ affirmed where employee did not rebut legitimate basis for termination; general pro-diversity policy does not lead to inference of bias against white males; appellate review of MSJ evidentiary determinations is abuse of discretion

Martin v. Board of Trustees, CSU (2023 2d Dist. Div. 8) 97 Cal.App.5th 149

After multiple (not all substantiated) claims of sexual harassment and hostile work environment, CSU terminated employee Martin. "In its letter declining to rehire Martin, CSU stated the basis for terminating Martin was that his 'conduct negatively impacted [his] ability to lead [his] team within Marketing and Communications.

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[He was] no longer able to exercise discretion and clear managerial judgment and decision-making.'"

CSU established a legitimate basis for the termination, which Martin failed to rebut ... CSU's legitimate basis for the termination includes the results of various investigations." Martin did not rebut this because (a) he pointed to no shifting rationales for termination; (b) he did not show "contradictions or incoherencies in CSU's proffered reason."

"Martin sought to admit the following evidence: 'Since 2011, 14 complaints alleging violations of CSU Executive Order 1096 have been sustained against male employees, resulting in 10 terminations; only one has been sustained against a female employee, and CSU did not terminate her.' While the trial court excluded this evidence as irrelevant because E&D was not involved in terminating Martin, we need not decide whether the trial court abused its discretion in its ruling because the evidence Martin seeks to admit fails to create a dispute of fact." As to his termination, for reasons including that it did not disclose the total number of complaints and therefore "does not meet the more exacting standard required to raise an inference of discrimination in a disparate treatment case."

"CSU has articulated a general commitment to diversity and uses images of diverse individuals in public materials. Martin argues that this diversity is evidence of pretext against him." The Court of Appeal said that this "general evidence" did not provide "sufficient insight into the motivations of" the individuals who terminated him.

Re: evidence, the court noted that there is a split of authority on evidentiary objections in connection with a MSJ. "The Sixth District Court of Appeal, and to a more limited degree the First District Court of Appeal, have held that some or all written evidentiary objections should be reviewed de novo. (*Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1450–1451 ...; *Strobel v. Johnson & Johnson* (2021) 70 Cal.App.5th 796, 816–817 ....) We agree with the majority of courts which have held that the abuse of discretion standard applies."

Incivility of FEHA plaintiff counsel justifies reducing lodestar. {ADC requested publication}

Snoeck v. ExakTime Innovations, Inc. (2023 2d Dist. Div. 3) 96 Cal.App.5th 908

After-hours nastygrams, assertions that defense counsel was "duping" the court, and more. The Court of Appeal said fees could be reduced, not as punishment per se, but "the trial court was entitled to consider whether that [lodestar] sum should be reduced to a reasonable figure under the applicable equitable principles." The decision also rejects the argument "that the trial court had no authority to reduce the lodestar based on incivility unless the incivility caused an increase in specific costs." Here's the nub of this decision:

> Litigation by its nature is contentious; the parties are in court because they do not agree. One side's frustration with the other side's legal theory is understandable. Certainly, attorneys must advocate for their clients' positions, point out the flaws in opposing counsel's argument, and express disagreement with the court. But Snoeck's counsel's frustration did not give him a license to personally attack defense counsel and belittle the trial court. Smith's incivility does not reflect persuasive advocacy. A reasonable attorney would not believe that communicating with opposing counsel in such a way would "bring them around," so to speak. Nor does antagonizing the trial court help further one's client's cause. In short, Smith's beratement of opposing counsel and belittling of the trial court were unnecessary to advocate zealously on Snoeck's behalf.

Sanctions proper where purpose of subpoena was to conduct "an expeditionary search for unidentified financial misconduct."

Tedesco v. White (2023 4th Dist. Div. 3) 96 Cal.App.5th 1090

The Court of Appeal upheld a $6,000 sanction award where the trial court found that "one or more of the requirements of the subpoena was oppressive," that "the subpoena was a misuse of discovery," and that "the subpoena should be quashed because it was overly broad and constituted an unreasonable intrusion on the privacy rights of Wilson's conservatee, Tedesco."

"The court's award of sanctions was based on findings that the subpoena was oppressive and a misuse of discovery. Wear's opening brief fails to rebut either charge; indeed, it confirms the latter one." Why? Because she admitted her goal "was to obtain and examine all of Tedesco's financial records, for the specific purpose of conducting an expeditionary search for unidentified financial misconduct."

Notably, appellant's counsel tried to use the sanctions order to attack the underlying order quashing the subpoena, which the Court of Appeal had previously ruled was unappealable. Appellant submitted a 9,000-page appendix on appeal. None of that, nor counsel's disparagement of the prior panel, went over well.

Where arbitrator's credibility finding was based on party's use of an interpreter, award vacated; no forfeiture despite not raising the issue to the trial court

FCM Investments, LLC v. Grove Pham, LLC (2023 4th Dist. Div. 1) 96 Cal.App.5th 545

An arbitrator ruled that a seller was in breach of a cancelled real estate deal. "In the arbitrator's view, defendant Phuong Pham lacked credibility because she used an interpreter during the arbitration proceedings. Reasoning that she had been in the country for decades, engaged in sophisticated business transactions, and previously functioned in some undisclosed capacity as an interpreter, the arbitrator felt that her use of an interpreter at the arbitration was a tactical ploy to seem less sophisticated." The Court of Appeal ruled that "the arbitrator's credibility finding rested on unacceptable misconceptions about English proficiency and language acquisition. These misconceptions, in turn, give rise to a reasonable impression of possible bias on the part of the arbitrator requiring reversal of the judgment and vacating the arbitration award." Thus, although the trial court entered judgment for the buyer confirming the arbitration award, the Court of Appeal reversed.

The buyer argued that the seller had forfeited the argument by not raising it at the trial court, only on appeal. The Court of Appeal recognized that generally that was the rule, but not here. "There are two broad exceptions to the forfeiture rule, and both apply here. First, the rule does not apply to a question of law that can be decided 'from facts which are not only uncontroverted in the record, but which could not be altered by the presentation of additional evidence.' ... A second exception to the forfeiture rule applies to 'matters involving the public interest or the due administration of justice.'"

Defendant that denied a request for admission that medical records were admissible was subject to attorney fee award when plaintiff won a motion in limine that the records were admissible

Vargas v. Gallizzi (2023 2d Dist. Div. 7) 96 Cal.App.5th 362

Plaintiffs propounded requests for admissions that medical records produced were authentic and constituted business records; a timeline of treatment; and that the accident caused "at least some" harm to plaintiff. Defendant denied the RFAs. At a pretrial hearing on MILs, the trial court ruled that "any sealed subpoena records received will be considered as business records. The admissibility of said records is deferred to the time of trial." "Ultimately the medical records ... were admitted into evidence at trial except for approximately 10 pages the court ruled contained hearsay within hearsay."

Plaintiffs filed a motion for attorney fees pursuant to C.C.P. § 2033.420 for having to prove RFAs that the defense denied. The trial court denied the motion on the grounds that it had ruled the records admissible before trial had commenced, so the plaintiffs "had not been 'required to prove, and did not prove, the authenticity of the records at trial, but only prepared to do so.'"

The Court of Appeal reversed. "Code of Civil Procedure section 2033.420, subdivision (a), provides expenses shall be awarded if the party requesting the admission 'thereafter proves the genuineness of that document or the truth of that matter.' The statute contains no requirement the proof be made 'at trial'."

"The trial court additionally erred by finding [plaintiffs] were precluded from receiving cost-of-proof expenses because [defendant] Gallizzi had not disputed the medical records' status as business records at trial. Given the pretrial ruling on that issue, of course, Gallizzi could reasonably have concluded that continuing to contest the business records designation would have been futile."

Notably, the judgment was for just over $15,000. An award for post-998 costs of $28,547 was affirmed. The attorney fee motion sought over $350,000. The Court of Appeal remanded for the trial court "to determine the amount to which [plaintiffs] are entitled for proving the medical records were business records." Defense hardballing ended up boomeranging.

Must give 21-day safe harbor notice before filing motions for attorney fees on frivolous anti-SLAPP motions

Zarate v. McDaniel (2023 2d Dist. Div. 3) 97 Cal.App.5th 484

Plaintiffs defeated a defense anti-SLAPP motion. The trial court found that the motion was frivolous and awarded sanctions.

The Court of Appeal reversed. "The court should have denied plaintiffs' attorney fees motions because they failed to provide McDaniel a 21-day safe harbor notice before filing their attorney fees motions." The statute allowing costs and fees (Code Civ. Proc., 425.16, subd. (c)) states that they may be awarded "pursuant to Section 128.5," which, therefore, incorporates the 21-day safe harbor. "Importantly, plaintiffs don't contend that it would have been impractical for them to provide McDaniel safe harbor notice before filing their attorney fees motions. Indeed, plaintiffs' motions were not complex and include less than a single page of analysis explaining why McDaniel's anti-SLAPP motion was frivolous. Nor do plaintiffs contend that McDaniel could not have withdrawn or corrected his anti-SLAPP motion had they provided him timely notice of their attorney fees motions under section 128.5, subdivision (f)."

RECENT CASES

Limits *Sargon*; expert witnesses may extrapolate from whatever data is available, and opine even if there are few studies directly on point

Garner v. BNSF Railway Co. (2024 4th Dist. Div. 1)
__ Cal.App.5th __, 2024 WL 45102

Did diesel exhaust cause plaintiff's non-Hodgkins lymphoma? Some experts relied on data showing diesel could cause cancer, but there was no study that specified "any particular cite of tumor formation." Others "could not give an opinion regarding the dose necessary to cause" the disease. "[T]he trial court granted BNSF's motions in limine to exclude Gary's three causation experts from trial, finding that the science the experts relied on was inadequate and there was too great an analytical gap between the data and their opinions."

The Court of Appeal reversed. *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal. 4th 747 does not require that a causation expert "rely on a specific study or other scientific publication expressing precisely the same conclusion at which the expert witness has arrived." Here, "few studies of the potential link between diesel exhaust and non-Hodgkin's lymphoma have been conducted. The first several victims of a new toxic tort should not be barred from having their day in court simply because the medical literature, which will eventually show the connection between the victims' condition and the toxic substance, has not yet been completed." Further, "[i]n many cases where the available scientific evidence is limited or inconclusive, there will inevitably be some analytical gap between the underlying data and the expert's ultimate causation opinion. As a result, it is permissible to reach a conclusion on causation without studies which show a causal link." *Sargon* should not be construed so broadly as "to second-guess the judgment of a qualified expert who provided a reasonable scientific explanation for his conclusions and used an accepted methodology based on the available data, even if the data itself is inconclusive." "That would be at odds with *Sargon*'s emphasis on the limited role of the evidentiary gatekeeper," and "effectively supplant[ ] both the expert's reasonable scientific judgment and the jury's role."

Treating M.D. who was also published researcher was qualified to opine that mold caused injury, when based on differential diagnosis and review of studies

Brancati v. Cachuma Village, LLC (2023 2d Dist. Div. 6)
96 Cal.App.5th 499

The Court of Appeal reversed the trial court's ruling that plaintiff's expert witness was not qualified to opine that mold in her residence caused her respiratory problems.

While recognizing that trial courts "have a substantial gatekeeping responsibility," the decision found that did not justify exclusion of the expert. "In determining evidence of causation, the court applies a substantial factor standard. 'The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.'"

"Medical doctors are experts who are in the best position to determine the nature of illnesses experienced by patients." Although couched as "qualification," most of the opinion was not really about qualification so much as whether his substantive opinions passed muster. "The trial court ruled Simon was not qualified to make a diagnosis of mold as the cause of her illnesses. But Simon's opinion was based on facts, not on a 'leap of logic or conjecture.'" "Leap of logic" relates to the expert's opinion testimony, not the expert's qualifications.

The Court of Appeal first approved the expert's use of differential diagnosis to rule out alternative causes of a diagnosed illness. Differential diagnosis "does not require doctors to eliminate all hypothetical causes before making a diagnosis." This expert conducted such a robust analysis that it's hard to see how the trial court excluded him (good job defense counsel on that round!) The more general ruling is this: "Simon prepared a medication plan for Brancati, and, as a treating doctor, he was in the *best position* to determine the cause of her illness and to exclude other potential causes." (Italics in original.) That may be true as to specific causation, but it ought not be the case for general causation. Otherwise, an expert could exclude a number of causes and then say "it was caused by little green men from outer space."

Second, the Court of Appeal approved the expert's reliance on a "methodology generally recognized in the scientific community" and "on epidemiological studies to show a statistical link between exposure to the substance and the cause of the illness." "A medical expert may also rely on published scientific studies showing odds ratios (OR) of 2.0 or more that show a causal effect between exposure to a substance and illness symptoms." Further, this expert had published articles on "aeroirritants," and his theories found support in other published literature. "Scientific researchers may opine on the scientific acceptance of their theories and the epidemiological factors and studies they relied on to reach their conclusions." So not only can the expert essentially "self-validate," the expert does not have to show all that much. "General acceptance 'does not require unanimity, a consensus of opinion, or even majority support by the scientific community.'" (quoting *People v. Leahy* (1994) 8 Cal.4th 587, 601.)

The decision cited many other court decisions accepting that mold can have health risks. While that seems unexceptionable in the specific context of mold, query whether a court should assess the admissibility of expert testimony based on what other courts have decided on the ultimate scientific issue. The decision also cited decisions from out of state for many expert-related propositions, which is a little unusual but less objectionable.

Pollution exclusion did not block coverage for COVID-19 claims, but pathogen exclusion blocked coverage under excess policies

JRK Property Holdings, Inc. v. Colony Ins. Co.
(2023 2d Dist. Div. 7) 96 Cal.App.5th 1

The pollution exclusion is limited to less than its terms assert.

"Insurers contend the Policies' pollution exclusion bars coverage for JRK's losses because it covers the dispersal and migration of pollutants and contaminants, which terms are specifically defined to include a virus. We agree with JRK that the pollution exclusion does not apply here because a reasonable interpretation of the exclusion is that it applies only to traditional sources of environmental pollution."

"The Supreme Court in *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 639-640 ... held that the historical background of the pollution exclusion shows its inclusion in insurance policies was intended to address only traditional sources of environmental pollution. We reject Insurers' argument that inclusion of the term "virus" in the definition of a contaminant transforms an exclusion that applies to "pollution" (and typically environmental pollution) into one that encompasses the spread of a virus due to the normal human activities of breathing and touching surfaces."

The "pathogen exclusions" in the excess policies, however, did not use the terms "pollution," so the court applied the language of the exclusions as written.

"There is no reference in the RSUI or Evanston virus exclusions to pollution. Rather, RSUI's exclusion applied to losses or damage caused by "the discharge, dispersal ... or application of any pathogenic or poisonous biological or chemical materials." And the Evanston exclusion applied to losses or damage caused by the "[p]resence, growth, proliferation, or spread of any 'organic pathogens,' " defining "organic pathogen" to include a "virus." Although RSUI's exclusion uses the four traditional discharge terms of art from MacKinnon, it does not follow that use of those terms without any reference to pollution limits the exclusion to environmental pollution. And the Evanston virus exclusion uses neither the pollution nor dispersal language."

COVID coverage granted under coverage provisions but denied by exclusions

San Jose Sharks, LLC v. Superior Court of Santa Clara County (Factory Mutual Ins. Co.) (2023 6th Dist.)
__ Cal.App.5th __, 2023 WL 8827509

Insured sought coverage for COVID-19-related losses. The trial court struck most of the theories, and the Court of Appeal essentially affirmed. While the presence of COVID-19 in their properties constituted "physical loss or damage" within the meaning of their policies, the business-interruption and civil-authority provisions of the policies unambiguously excluded physical loss or damage in the form of viral contamination. In fact, the existence of the exclusion helped persuade the court that COVID-19 was "loss or damage" under the policies.

Policy ambiguous as to whether policies for terms longer than 12 months had separate annual periods to determine aggregate

Pep Boys Manny Moe & Jack of California v. Old Republic Insurance Company (2023 1st Dist. Div. 4)
__ Cal.App.5th __, 2023 WL 8947123

The trial court ruled against the insured. The Court of Appeal reversed as to two of three insurers. "We agree with Pep Boys that the language of their policies with Old Republic and Fireman's Fund, which were for terms longer than 12 months, dictates that the policies contained two separate annual periods for the purposes of the annual aggregate limits of liability. But we agree with the trial court that the American Excess policy, which had different language, had only one period for purposes of that policy's annual aggregate limits."

"Both parties ask us to apply "annual period" to terms more than or less than a year: 17 months, in Old Republic's view, or five months, under Pep Boys' approach. As a textual matter, neither reading accords with the literal meaning of "annual," and neither is more reasonable than the other." Thus, the court looked to extrinsic evidence, though it could presumably have just interpreted the ambiguity against the insurer. "According to the letter from its broker to Old Republic's representative, Pep Boys wanted a 17-month policy because it wanted to align the expiration of its insurance policies with its fiscal year. Nowhere is there any suggestion in the letter that Pep Boys wanted to reduce the costs for its insurance or make any changes to the level of its coverage. Pep Boys' desire merely to extend its insurance, rather than reduce its scope or expense, together with the fact that Pep Boys paid a prorated premium, suggests it intended to receive the same level of coverage as it had been, rather than diluting it."

SUMMARY OF SELECTED NEVADA SUPREME COURT CASES

Editor's Note: As always, remember to carefully check the subsequent history of any case summarized as the reported decisions may have been depublished or have had review granted.

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CIVIL PROCEDURE – Service of Process

Sabater v. Razmy, 139 Nev. Adv. Op. 50 (Nov. 22, 2023)

In *Sabater*, the plaintiff filed a lawsuit against the defendant for injuries arising from a car accident but failed to effectuate service within the 120-day time limit. The plaintiff untimely served the defendant with the complaint. The defendant moved to quash the service of the summons and complaint as untimely. The plaintiff then moved to retroactively extend the time for service, arguing at the hearing that service was untimely because of a calendaring issue and high turnover at her counsel's firm. The district court ultimately denied the plaintiff's motion for lack of good cause and dismissed the case.

The Supreme Court upheld the district court's ruling. The Court explained that a party must request an extension of time for service within 120 days of filing. If not made within the service period, the party must show good cause for why the request is *late* before demonstrating good cause for the *extension* itself. The plaintiff did not argue that there was good cause for failure to timely request the extension, only good cause for the extension itself.

MEDICAL MALPRACTICE – Use of Consent Forms

Taylor v. Brill, 139 Nev. Adv. Op. 56 (Dec. 21, 2023)

In Taylor, the Nevada Supreme Court considered whether (i) a defendant in a medical malpractice action may present evidence of a plaintiff's informed consent when no "lack of consent" argument is raised, and (ii) whether a plaintiff must use expert testimony to show that billing amounts and medical damages are reasonable and customary.[1] Here, the plaintiff had a hysteroscopy performed by the defendant. The plaintiff's uterus and bowel were perforated during the procedure, which necessitated an emergency surgery to remove contamination and to correct the perforation. Subsequently, the plaintiff filed a medical malpractice lawsuit, and, at trial, the jury later ruled in favor of the defendant.

During the trial, the district court permitted the defendant to introduce evidence of the plaintiff's knowledge of the procedure's risks through witness testimony, hospital

1 The Nevada Supreme Court also decided issues regarding insurance payments and closing arguments not discussed in this summary.

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discharge instructions, and associated paperwork, despite informed consent being unchallenged. The Supreme Court ruled that the defendant's expert testimony was admissible as it could also be used to establish the applicable standard of care and breach; however, the lay witness testimony and hospital literature were inappropriate as they were unsuitable for this purpose.

As for the plaintiff's damages, the plaintiff sought special damages for the (medical) special damages related to her emergency treatment and had the burden of demonstrating that the bills were reasonable and necessary. The trial court excluded most of the plaintiff's evidence, including medical bills, testimony from industry witnesses about the bills, and testimony from the plaintiff herself – who had medical billing experience. The Supreme Court ruled that this evidence was admissible and was improperly excluded.

PREMISES LIABILITY – Recreational Use

Dodgson-Field v. City of Henderson, 140 Nev. Adv. Op. 3 (Jan. 25, 2024)

In Dodgson-Field, the plaintiff slipped while assisting her child on the slide at Vivaldi Park in Henderson, Nevada. The plaintiff subsequently fractured her leg in multiple places. She premised her theory of liability on the fact that the defendant was liable because the employees did not bevel the edge of the slide and caused a steep drop off as opposed to a gentle slope to the ground. The district court found that the defendant was immune from suit under Nevada's recreational use statute, NRS 41.510, and granted its motion for summary judgment.

The Supreme Court clarified that the recreational use statute provides that "an owner of any estate or interest in any premises, or a lessee or an occupant of any premises, owes no duty to keep the premises safe for entry or use by others for participating in any recreational activity...." For the statute to apply, "(1) respondents must be the owners, lessees, or occupants of the premises where [the injury took place]; (2) the land where [the injury took place] must be the type of land the legislature intended NRS 41.510 to cover, and (3) [the injured party] must have been engaged in the type of activity the legislature intended NRS 41.510 to cover."

Here, the parties did not dispute that the defendant owned the land. As to the second element, the Supreme Court ruled that there is no limitation on the type of land appropriate for protection per statutory amendments. The Court further explained that it considered walking and assisting a child as a "recreational activity" as it is similar enough to "picnicking, hiking, riding a bicycle, and crossing over public land" to fall within statutory protection. Last, the Court determined that, given the defendant's maintenance procedure, including daily inspections, and the lack of evidence showing any prior accidents related to the unbeveled surface, the defendant did not willfully or maliciously fail to guard against the dangerous condition. Thus, the district court's order was affirmed.

Deliberative and thoughtful reflection is not always available due to the constraints of time and place. Stress, distraction, and fatigue can present hurdles to careful thinking. As we hurry through our day, we often allow our intuition to run the show, and occasionally, we pay a price. Sometimes it is best to hurry up and slow down. There are strategies to encourage slow, deliberate thinking, many of which are outlined in the recent book, "*Noise*." (Daniel Kahneman, Olivier Sibony and Cass Sunstein (2021, William Collins, ISBN 978-0-00-830899-5)).

Giving ourselves permission to slow down is the key. Allowing ample time to improve accuracy in making complex decisions should be our rule. Granting sufficient time will improve accuracy in making complex, subjective, multifaceted decisions. Remind yourself to be careful, instead of jumping to conclusions or relying on intuition. If we can recognize when we are in a mixed emotional state, stressed or cognitively depleted, we can delay important decisions until we have returned to our baseline.

Accuracy can be increased by providing more time for tasks that are open to bias. The ability and willingness to be careful and alert is required. We may even want to give ourselves an instruction to slow down and take care. For important decisions you regularly make, use a checklist to help guide decision making. Explicitly noticing the potential for bias is the best way to counter it. Are you saying "no" in a negotiation process because it is the easiest way to reach a quick conclusion? Remind yourself to be careful instead of jumping to decisions. Deliberation should come before decisiveness.

For important decisions, examining the issue with an "outside view" should identify an appropriate reference class or group of similar cases for the topic being studied. If the problem at hand can be put in a larger category and becomes part of a reference class, it allows for comparisons and categorizations, paving the way for a statistical (objective) analysis. Rather than rely on one previous case as a likely roadmap, think about five or ten similar cases that you or your firm have handled. The comparisons will provide objective data from a class of cases that will encourage an objective, outside view.

When the decision maker is able to consider average results from a reference class, statistical outcomes can provide a basis upon which to make a meaningful decision or prediction for a new case. A purposeful and objective analysis brought to your case will encourage the slow thinking brain to make adjustments as new information is brought to light, instead of the fast-thinking brain's intuitive discounting of new facts not supportive of the initial mental model.

Another deliberative practice to encourage slow thinking is to decompose complex problems into smaller questions or independent steps before reaching a conclusion. Decomposition requires creating several smaller questions Kahneman labels "mediating assessments" that can be individually and independently evaluated apart from the whole. The process begins with the assessment and identification of the complex issues of the case, followed by a subsequent evaluation using a grading or rating standard based on percentages. Appraising each mediating assessment independently will trigger the conscious reflection of the slow thinking brain.

Each assessment answers just one question after the problem is decomposed from the whole. Once the separate assessments are scored the decision makers can ask how each answer argues for or against the question. In a group, each assessor should be careful to refrain from general comments about the overall issue and avoid summary narratives or comprehensive conclusions.

Consider the best practices for your decision process and design guardrails to avoid bias. Absent structure and consideration in the decision-making process, our judgment will yield less predictive value than it should. As discussed above, if we hurry and fail to allocate sufficient time and mental resources to the evaluation, there are various cognitive tendencies that will naturally and automatically come into play. By welcoming contradictions, and committing to updating, reconsidering, and constantly improving our decision-making process, cognitive errors from reliance on intuition and mental shortcuts can be minimized and better decisions will follow.

Understanding that fast, intuitive thinking combines a sense of cognitive ease with illusions of truth, we can begin to resist gut decisions for important questions and avoid the errors that may follow. We can pause to look more deeply at the facts and evidence. Slow, deliberative thinking is occasionally tedious, but typically yields the best results. It is likely your clients and your practice will benefit from the extra effort.

Jan Roughan
BSN, RN, PHN, CRRN/ABSNC, CNLCP®, CCM

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- Mini / Cost Projections (Mediation/Settlement Conference)
- Critique Opposing LCP

EXPERT TESTIMONY

- Trial
- Arbitration
- Mediation/Settlement Conference

MEDICAL RECORDS

- Review/Chronology

IME

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LIFE CARE PLANNING

The Ethical and Professional Dilemma for Expert Neurologists after the Randy's Trucking Decision

Jonathan Varnica
Vogl Meredith Burke & Streza LLP and
Brandon Wright
Lewis Brisbois Bisgaard & Smith

INTRODUCTION:

In 2023, the California Fifth District handed down a landmark decision in *Randy's Trucking, Inc. v. Superior Court* (2023) 91 Cal.App.5th 818, a ruling that has sent shockwaves through the defense bar, particularly in the realm of traumatic brain injury (TBI) claims. The Court found a customary protective order is sufficient to protect the disclosure of neurological testing information conducted during a neurological Independent Medical Exam (IME). At first blush, the result seems tame. The process of disclosing IME reports, and describing what happened at an IME, including mental exams, is standard procedure and codified. (*See* Code of Civil Procedure § 2032.610.) However, TBI claims are not broken bones. Testing the breadth of a TBI claim is a different animal that is presenting Courts with new conundrums.

Neurological testing is a sensitive process. Neurologists require a certain level of confidentiality for their tests to determine the veracity of the mental injury. If a patient is apprised of how their claimed TBI will be tested, it could impinge the results of the examination. Put cynically, knowing the neurological test beforehand makes it easier for a plaintiff to fake a TBI. If a plaintiff's counsel is permitted access to a particular neurologist's test, that counsel could conceivably coach their next client who sees that neurologist, which in turn, negatively impacts the reliability of the underlying IME.

Which brings us to *Randy's Trucking*, where the defendants sought to limit the disclosure of their expert neurologists testing information to the opposing neurologist only, and prohibit access for the plaintiff's counsel. Ultimately, the Court sided with plaintiff, allowing plaintiff's counsel access to the neurological testing information subject to a protective order.

THE SURGE IN TRAUMATIC BRAIN INJURY CLAIMS IN CALIFORNIA

Over the past two decades, you have likely seen a noticeable increase in traumatic brain injury claims. Several factors contribute to this trend, including heightened awareness of TBIs, advancements in medical technology allowing for more accurate diagnoses, and an increased understanding of the long-term consequences of such injuries.

Data supports the conclusion that TBI claims are increasing. A 2018 study that looked at ten-year trends in traumatic brain injury reports to hospitals found a noticeable increase. (Hsia RY, Markowitz AJ, Lin F, et al. Ten-year trends in traumatic brain injury: a retrospective cohort study of California emergency department and hospital revisits and readmissions.) The study analyzed non-public patient-level data from California's Office of Statewide Health Planning and Development for years 2005 to 2014. The analysis found a 57.7% increase in the number of TBI Emergency Department visits, representing a 40.5% increase in TBI visit rates over the ten-year period. In addition to the data, societal changes, such as an increased focus on safety and a growing acknowledgment of the potential severity of concussions, have led to a rise in TBI claims.

UNDERSTANDING TRAUMATIC BRAIN INJURY DIAGNOSIS

A crucial aspect of TBI litigation is the accurate diagnosis of these injuries. Neurologists play a pivotal role in this process, employing a variety of diagnostic tools and techniques to assess the extent of brain damage. The most common methods include neuroimaging, such as CT scans and MRIs, clinical evaluations, and cognitive testing. It was cognitive testing that was the crux of the *Randy's Trucking* decision.

Cognitive testing can take many forms, but typically it involves asking the patient to draw pictures, recall words, and repeat sentences. A common example of a cognitive test is the Montreal Cognitive Assessment (MoCa) where as part of the test patients are asked to draw a clock with the hours and hands showing the current time. Cognitive testing can take many forms, but each maintains the goal of making an accurate TBI diagnosis. A crucial part of making an accurate diagnosis, though, is testing a patient who is ignorant of what they will be asked to do in the test. Otherwise, a patient could potentially feign a TBI.

RANDY'S TRUCKING, INC. V. SUPERIOR COURT: A SYNOPSIS

The *Randy's Trucking* case involved a dispute over liability for a traumatic brain injury sustained in a trucking accident. The plaintiff was riding in a school bus

Continued on page 22

that was rear-ended by a truck owned by defendant. The plaintiff claimed a TBI, and so defendants requested an IME with a neurologist. However, the parties could not agree on a protective order to cover the IME.

The parties could not agree on who would have access to the neurological test material conducted during the IME. Defendants wanted a protective order to limit disclosure of the IME neurological testing information to plaintiff's retained neurologist only. Defendants' position came from their chosen neurologist who refused to disclose her testing information outside of the neurological profession because it would compromise the security of the tests, potentially violate copyright protections of the tests, and cause her to violate her professional and ethical duties. Plaintiff protested, arguing that counsel needs to have access to the testing information in order to prepare for trial.

The Trial Court agreed with plaintiff, holding that the protective order covering the testing information should permit disclosure to plaintiff's counsel. As a result, defendants' neurologist recused herself, saying that she could not comply with the Trial Court's order. Defendants then filed a motion for reconsideration. In support of their motion, defendants contacted two other neurologists who also said they could not comply with the Trial Court's order. Defendants attached declarations from the two neurologists to the motion, but the motion was nevertheless denied. Defendants appealed by way of a writ of mandamus.

On appeal, defendants argued that a protective order is insufficient to protect test security because (1) the transfer of testing materials to plaintiff's counsel is an ethical and professional violation even with a protective order; (2) protective orders do not erase knowledge that an attorney may acquire concerning the test, which can be used to educate future clients about the test; and (3) the harm caused by a single violation of the protective order, whether intentional or inadvertent, outweighs the necessity of providing the testing materials to a non-psychologist. The Court considered each argument, and rejected each in turn.

The Fifth District Court of Appeal found that the neurological testing information can be disclosed to plaintiff's counsel subject to a protective order. While balancing the concerns for test security against disclosure, the Court found in favor of disclosure contemplated in sections 2032.530 and 2032.610. While testing material is not specifically listed in the Code, there is no statutory authority precluding the disclosure of testing materials. As such, the Court found in favor of transparency of TBI examinations.

The Court also considered an amicus brief from the American Academy of Clinical Neuropsychology (AACN), which voiced concerns that neurologists may adjust their tests to avoid written examinations. Such adjustments may ultimately impact the efficacy of the tests in the legal setting. Furthermore, a single violation of the protective order may result in widespread digital access to cognitive test materials. The AACN invited the Court to issue a bright-line rule requiring expert-to-expert only exchanges of neurological testing materials. The Court decided against adopting such a rule, noting that if it adopted the expert-to-expert rule advocated by the AACN, then a plaintiff who chose not to retain an expert neurologist would be foreclosed from accessing the testing information for cross-examination.

The Court rebuffed defendants' concern that defendants would be hard-pressed to find a neurologist willing to provide their testing material to a plaintiff's counsel. While the defendants found two additional neurologists who declared they could not comply with the Trial Court's order to transmit testing material to counsel, the Court was wary that "additional canvassing" of the neurological field would be futile.

CONCLUSION:

A protective order allowing disclosure of neurological testing material to counsel is a sufficient shield for copyright, ethical, and professional concerns with disclosing neurological testing material. According to the Court, if a defendant is having trouble finding an expert neurologist prepared to comply with such an order, then you as defense counsel simply need to keep looking. The Court opined that if a bright-line expert-to-expert rule is to be adopted, it would be better for the Legislature to convey such a rule, which brings us to how Nevada is handling this issue.

NEVADA'S DEVELOPMENT(S):

The Plaintiffs' Bar in Nevada has been attempting to erode the Defense Bar's ability to defend against TBI claim(s) for years. Recently, the Plaintiffs' Bar scored a significant legislative "win" with the passage of AB 224. AB 224 significantly limits neuropsychological Independent Medial Exams (IME) by permitting *"any observer of choice present throughout the examination, including, without limitation, the person's attorney, provider of health care or any other person..."* This observer may also take notes and *"...make an audio, stenographic or video recording of the examination..."* which may include neuropsychological proprietary testing. Beyond the obvious concerns of observing/recording proprietary testing, the observer's attendance threatens to invalidate the neuropsychological testing. AB 224's result has prejudiced the Defense Bar ability to defend TBI cases by essentially eliminating their ability to retain a neuropsychological expert. Most neuropsychological experts have refused to accept Defense Counsel's assignment since this Bill's passage. While we are hopeful the Nevada Supreme Court will reverse ...it will take time for the issue to work its way through Nevada's Courts.

A·D·C VERITAS **DEFENSE COMMENT**

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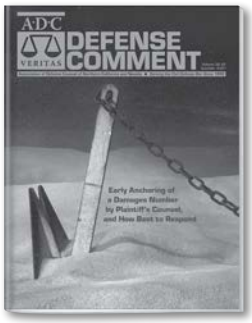
Please include any digital photos or art that you would like to accompany your article or submission. All articles must be submitted in "final" form, proofed and cite checked. Trial success submissions should be short and limited to less than ten (10) sentences.

All submissions should be sent to *MConstantino@clappmoroney.com* and *ots@darlaw.com.*



Reasonable Accommodations for Service Animals in Rentals and HOAs

Xenia Tashlitsky Sullivan Hill

As the saying goes, "A man's home is his castle" – but an HOA can restrict the number of sharks in his moat. What happens, however, when an apartment or condominium resident needs an animal at home for assistance with mental or physical disabilities? Although it is a fact-specific question whether a landlord or HOA must allow a person to keep a service or emotional support animal as a reasonable accommodation, the courts often uphold the rights of persons with disabilities to keep such animals at home. That said, the landlord or HOA is within its rights to ask for documentation the animal is in fact a service or emotional support animal, and keeping the animal as an accommodation is related to the disabilities. The HOA is also within its rights to require the accommodation be reasonable, such as ensuring the animal is trained and does not pose a danger to others.

Laws on reasonable accommodations for physical and mental disabilities apply in the housing context. Unlawful housing discrimination under the Fair Employment and Housing Act ("FEHA") includes the "refusal to make reasonable accommodations in rules, policies, practices, or services when those accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling." Cal. Gov't. Code § 12927(c)(1). Under California Government Code section 12955.3, a "disability" includes "any physical or mental disability as defined in Section 12926." In turn, a "mental disability" includes "any mental or psychological disorder or condition ... that limits a major life activity" (Cal. Gov't Code § 12926(j)(1)) – meaning that it "makes the achievement of the major life activity difficult." Cal. Gov't Code § 12926(j)(1)(B). "Major life activities" must "be broadly construed" and includes "physical, mental, and social activities and working." Cal. Gov't Code § 12926(j)(1)(C).

To show discrimination based on a refusal to provide a reasonable accommodation in the housing context, a plaintiff must prove he "(1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this accommodation." *Auburn Woods I Homeowners Assn. v. Fair Emp. & Hous. Com.*, 121 Cal. App. 4th 1578, 1592 (2004) (citing Cal. Gov't Code § 12927(c); *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1147 (9th Cir. 2003); *Janush v. Charities Hous. Dev. Corp.*, 169 F.Supp.2d 1133, 1135 (N.D. Cal. 2000)). The question of whether a landlord or HOA must reasonably accommodate a person with disabilities by letting him keep a service animal is "fact-specific and requires a case-by-case determination." *Auburn Woods*, 121 Cal. App.4th at 1593.

A number of courts have found that a landlord or HOA must reasonably accommodate a person with disabilities by making an exception to a "no pets" rule for a service or emotional support animal. For example, in *Patlan*, the court held that a landlord could not refuse to rent an apartment to a former police officer who kept a dog as an emotional support animal to help with her PTSD and depression. *Dep't of Fair Emp. & Hous. v. Patlan*, No. E069793, 2019 WL 3955868, at *6 (Cal. Ct. App. Aug. 22, 2019). Regarding evidence the dog was in fact an emotional support animal, the court held that the former police officer "was not required to have in hand a formal diagnosis of her disability or letter designating her dog to be an emotional support animal to fall within FEHA's protections." *Id.* at *4. Rather, it was the landlord's duty to ask for additional information if he had questions about her request to keep an emotional support animal at home as a reasonable accommodation for her disabilities. *Id.* (citing *Auburn Woods*, 121 Cal.App.4th at 1598).

Likewise, in *Auburn Woods*, the court upheld the Fair Employment and Housing Commission's determination that an HOA discriminated against residents when it did not allow them to keep a dog as an accommodation for their depression and other disabilities. *Auburn Woods*, 121 Cal. App.4th at 1593. Once the residents notified the HOA of their disabilities and their need for a dog, it was the HOA's responsibility to ask for documentation of their conditions before refusing an accommodation. *Id.* The court did not find it dispositive that the CC&Rs prohibited residents from keeping dogs (but did allow cats and other animals). *Id.* The court explained the question of whether an exception to a "no pets" rule for a service or emotional support animal is a reasonable accommodation is fact-specific, but courts in other forums often uphold the rights of persons with disabilities to keep service and emotional support animals at home. *Id.* at 1593-95.

Given the above examples, a landlord or HOA facing a request for an accommodation

Continued on page 26

related to a service or emotional support animal should be wary of simply denying the request. Instead, the landlord or HOA should open a dialogue with the resident regarding the accommodation as part of the interactive process. A waiver of a no-pets rule to allow a resident to keep a support animal at home may, "under the right circumstances," constitute a reasonable accommodation. *Auburn Woods*, 121 Cal. App.4th at 1593. "If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue." *Id.* at 1598 (quoting *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996), as amended (Aug. 26, 1996)).

And while state law protects the rights of persons with disabilities to keep service animals at home, it also allows the HOA to "reasonably regulate" their presence. Cal. Civ. Code § 54.1(b)(6)(B). For example, if a resident requested not only to keep a service animal, but to allow the service animal off-leash in the common areas, the question would be whether the leash rule is a reasonable regulation for this service animal given the tasks it needs to perform. Moreover, there may be circumstances, such as the animal being dangerous in some manner or untrained, in which allowing a person with disabilities to keep a service or emotional support animal may not be a reasonable accommodation.

In *Roberts v. Veterans Vill. Enterprises, Inc.*, No. 17CV524-LAB (MDD), 2017 WL 1063477, at *5-6 (S.D. Cal. Mar. 20, 2017), a veteran with PTSD and mobility problems challenged the decision of a home for disabled veterans refusing to let him keep his service dog on the property. The court denied the veteran's request for a temporary restraining order, reasoning an accommodation may not be reasonable if the dog is aggressive or out of control, exhibiting such behavior as "nipping, charging, and barking at strangers." *Id.* at *5. The length of time the person with disabilities has had the dog "also plays a factor," and the dog may not be uniquely qualified as a service animal if the person with disabilities has only had the particular dog for a few months. *Id.* at *6. Evidence of the dog's behavior can include notes, emails, and incident reports from witnesses. *See id.* at *2-4.

Thus, in an action against a landlord or HOA alleging failure to allow a resident to keep a service or emotional support animal at home as a reasonable accommodation for the resident's disabilities in violation of the FEHA, relevant facts may include:

Whether the landlord or HOA denied the request outright or asked for additional information or documentation and opened a dialogue on the request. For example, the landlord or HOA may ask for information to show the resident meets the statutory definition of a person with disabilities, to understand the nature of the accommodation, and to demonstrate the relationship between the disabilities and the accommodation. It is generally not advisable to ask for specific information related to the disabilities – only information showing the resident has disabilities needing accommodation.

Whether the resident responded to the request for information and participated in the dialogue in good faith. For example, the resident may provide a statement from a medical professional that he has disabilities, that he needs help with some tasks, and that a service animal can assist with those tasks. Purely by way of illustration, the resident can offer documentation showing he has mobility issues, and the service animal can fetch items and quickly run for help.

Whether the animal posed a danger to the community. For example, the resident may provide details on the animal's training and certification as a service animal, its history of safe and appropriate behavior under various conditions, and that the resident can control the animal using a leash, voice, signals, or other methods. If the landlord or HOA believes the animal is dangerous, it may offer notes, emails, and incident reports from (ideally contemporaneous) witnesses.

How the landlord or HOA treated the resident while the issue was pending. It is obviously inadvisable to discriminate or retaliate against a resident for requesting an accommodation or bringing an action for failure to accommodate. Landlords and HOAs should also be careful about denying the accommodation for an indefinite period while the case is in review. (An example may include sending a letter to the effect that, "The Board will review your request for an accommodation upon receipt of your documentation. Until that time, you are expected to abide by all HOA rules.") The cases above do not appear to answer the question of whether (or for how long) it is reasonable for a landlord or HOA to impose a waiting period before a person with disabilities can bring a service animal home. However, if the landlord or HOA does not provide a length of time for the review, or provides a period that is excessive, the resident could argue it is unreasonable for him to be denied a reasonable accommodation indefinitely. If the resident is unable to comply with the request to abide by all HOA rules for such time due to his disabilities, he may have an argument that the request is contrary to law.

A6 – Letter Supporting Publication – *Tornai v CSAA* A167666 (EF)

The Amicus Committee, as well as our counterparts in the Association of Southern California Defense Counsel (which joined in our request), felt this opinion was an excellent candidate for publication in light of the recent trend of plaintiffs' counsel – most particularly, counsel in this case – filing bad faith actions before the extent of damages incurred by the insured had been adjudicated through mandatory UIM arbitration. Since there can be no bad faith claim if there are no further benefits due under a UIM endorsement, it would be premature to allow a bad faith claim to proceed until after the UIM claim had been arbitrated. Tornai provides trial courts with another example of this principle, and (it is hoped) more support for staying bad faith actions grounded on UIM claims while the latter can be arbitrated.

January 4, 2024

Presiding Justice James Richman
Justice Marla Miller
Justice Michael Markman
(by designation) California Court of Appeal
First Appellate District State of California
350 McAllister Street San Francisco, CA 94102

Re: Request for publication of decision in *Tornai v. CSAA Ins. Exch.* (December 18, 2023, Case No. A167666)

Honorable Justices,

Pursuant to Rules 8.1105 and 8.1120 of the California Rules of Court, the Association of Defense Counsel of Northern California and Nevada ("ADC-NCN") and the Association of Southern California Defense Counsel ("ASCDC") (together, the "Associations") write jointly to urge the Court to publish its decision in this case.

Interest of the Requesting Organizations

ADC-NCN numbers approximately 700 attorneys primarily engaged in the defense of civil actions. Members represent civil defendants of all stripes, including businesses, individuals, HOAs, schools and municipalities and other public entities. Many of these clients are insurers who, with increasing frequency, encounter situations identical or similar to that presented in *Tornai*. Members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally, including issues related to insurance bad faith actions and the arbitration requirements in underinsured motorist ("UIM") claims. ADC- NCN's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California.

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,100 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. The ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, the ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

Although ASCDC and ADC-NCN are separate organizations, they have some common members and coordinate from time to time on matters of shared interest, such as this letter. Together and separately, they have appeared as *amicus curiae* in many cases before both the California Supreme Court and Courts of Appeal across the state to express the interests of their members and their members' clients, a broad cross-section of California businesses and organizations.

No party has paid for or drafted this letter.

Why the Court should order publication

In *Tornai* the Court encountered a situation which has become common in recent years: a plaintiff suing his or her auto insurance carrier for allegedly negotiating a UIM (or uninsured motorist) claim in bad faith. What typically happens, as here, is that the plaintiff regards the insurer's offer on the UIM claim as "lowballing," and immediately files a bad faith and breach of contract action without attempting to adjudicate the liability of and damages caused by the other driver – the substantive merits of the UIM claim – through arbitration as required by statute. (Ins. Code, § 11580.2.)

Continued on page 28

Plaintiffs typically make two arguments in such actions. First, the plaintiff alleges that the bad faith action does not involve a dispute over the benefits due under the UIM coverage, and thus the arbitration requirements do not apply. Second, the plaintiff alleges that the insurer, by acting in bad faith in adjusting the UIM claim (the "lowballing" argument), has forfeited its right to compel arbitration. These allegations are made as a "backstop" against the insurer's expected petition to compel arbitration of the UIM claim and stay the civil action.

Almost three years ago, this Court held that plaintiffs cannot avoid arbitration with such tactics. In *McIsaac v. Foremost Ins. Co. Grand Rapids, Mich.* (2021) 64 Cal.App.5th 418, a complaint against an insurer for bad faith also alleged breach of the contract for failure to pay the proper UIM benefits. The insurer filed a petition to compel arbitration and stay the action, which the trial court denied. This Court reversed, explaining, at pp. 424-425, that where the civil action turns on a dispute over the amount owed, the dispute is still subject to arbitration.

This case correctly followed *McIsaac*. However, the Court's opinion here merits publication under several factors:

- The decision "[i]nvolves a legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105(c)(6).) Although this Court's opinion in *McIsaac* was authoritative, it was only one case. Since then, insurance bad faith plaintiffs have continued to ignore its holding, contending that a mere allegation of bad faith in the adjustment of a claim vitiates the UIM arbitration clause in every auto policy and nullifies the requirements of section 11580.2.[1]

- The decision "[m]akes a significant contribution to legal literature by reviewing ... the development of a common law rule" (Cal. Rules of Court, rule 8.1105(c)(7)), by extending the holding in *McIsaac* to present and future cases in which plaintiffs have challenged the arbitration requirement applicable to UIM claims on the same bases as those found unmeritorious in that decision.

- The decision "reaffirms a principle of law not applied in a recently reported decision." (Cal. Rules of Court, rule 8.1105(c)(8).) It has now been almost three years since *McIsaac* was decided, yet the same issues are surfacing even more frequently. The Court's publication of its opinion in *Tornai* will reaffirm the holding of *McIsaac* and will give litigants, counsel, and judges additional direction in the prosecution of bad faith actions under similar circumstances.

For these reasons, the Associations respectfully request that this Court order publication of its opinion in *Tornai*.

Respectfully submitted,

By:

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8950 Cal Center Drive, Suite 250
Sacramento, CA 95826

For ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA and ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

1 It is worth noting that undersigned counsel and his firm have had several cases involving the same issues – some of which were brought by the same counsel as in *Tornai*, and one of those having been presided over by the same trial judge – in which the same arguments were made. This repeating pattern calls out for the Court's guidance through published case law.

PROOF OF SERVICE
Tornai v. CSAA Insurance Exchange
(No. A167666)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 101 Montgomery Street, Suite 1800, San Francisco, CA 94104; email *bon@darlaw.com*. On the date below, I served the within document(s):

LETTER REQUESTING PUBLICATION

VIA E-SERVICE (TrueFiling) on the recipients designated on the electronic service list generated by the TrueFiling system.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 4, 2024 at San Francisco, California.

/s/ *Michelle Bonilla*
Michelle Bonilla

Amicus Corner

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 thereby provides excellent opportunities for members, like you and the smart colleagues in your office, to get involved in decisions involving important defense issues across a broad range of our practice.

Ordinarily, the committee's major activities are (a) requesting publication of defense-friendly unpublished decisions, (b) supporting petitions for review by the California Supreme Court, and (c) authoring amicus briefs.

Since the last issue of *Defense Comment*, your Amicus Committee requested publication of several decisions favorable to the defense.

The Committee successfully requested publication of two decisions:

1 *Snoeck v. ExakTime Innovations, Inc.* (2023) 96 Cal.App.5th 908, which reduced plaintiff counsel's FEHA attorney fee award for uncivil behavior. "Snoeck's counsel's frustration did not give him a license to personally attack defense counsel and belittle the trial court. Smith's incivility does not reflect persuasive advocacy. A reasonable attorney would not believe that communicating with opposing counsel in such a way would "bring them around," so to speak. Nor does antagonizing the trial court help further one's client's cause. In short, Smith's beratement of opposing counsel and belittling of the trial court were unnecessary to advocate zealously on Snoeck's behalf."

Notably, the *Daily Journal* quoted our amicus letter in one of its articles on the case, and in the print edition had an enlarged version of the quote in a text box.

2 *Tornai v. CSAA Ins. Exch.* (2023) __ Cal. App.5th __ , 2023 WL 9189931, which reaffirmed that suits regarding amounts paid under uninsured motorist coverage are subject to mandatory statutory arbitration, and that adding a bad faith claim does not change that equation.

One other request had not been ruled on as of January 29. *Stani v. Shamrock Foods, Inc.* held that a landowner has no duty to prevent an injury on a public roadway when it neither created the injury-causing condition nor did anything to obscure or magnify an obvious danger on the public street. If published, the decision could be useful precedent both for that general proposition and to defeat the specific claim here: that failure to provide onsite parking made a landowner liable for injuries on nearby public streets. The decision applies and expands on *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, where we filed an amicus brief in support of the successful defense position.

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

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

1 Requests for publication or depublication of court of appeal decisions.

2 Amicus brief on the merits at the court of appeal.

3 An amicus letter supporting a petition for California Supreme Court review.

4 Amicus brief on the merits at the Supreme Court.

5 Share oral argument time, with court approval.

6 Help moot court advocates in advance of oral argument.

7 Take advantage of other opportunities for amicus influence on courts, as illustrated by the letters supporting rehearing and merits review of this past summer.

In many cases, the ADC works jointly with our Southern California colleagues, the Association of Southern California Defense Counsel. 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
dwillenburg@gordonrees.com

Patrick Deedon
pdeedon@maire-law.com

Alexandria Carraher
alexandria.carraher@ropers.com

James V. Weixel
jvw@darlaw.com

Molly A. Gilardi
MGilardi@TysonMendes.com

Mark Wilson
mark.wilson@manningkass.com

Trials and Tribulations

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

Demler Armstrong & Rowland, LLP Successfully Defends Appeal of Summary Judgment for Insurer in Bad-Faith Action. On November 27, 2023, a three-justice panel of the First Appellate District affirmed the San Francisco Superior Court's order granting summary judgment for Fire Insurance Exchange ("FIE") in a first-party bad-faith action. The insured had asserted claims for breach of two insurance contracts and bad-faith denial of policy benefits on a first-party water loss in a four-unit apartment building she owned. The Superior Court granted summary judgment for FIE on grounds that the insured failed to submit to an examination under oath ("EUO") on request. On appeal, the panel unanimously affirmed, rejecting the insured's arguments that issues of facts existed as to whether (1) the EUO requests were unreasonable and made in bad faith, (2) FIE was estopped from raising, or waived, the EUO condition, and (3) the insured never refused to submit to the EUO. The court of appeal observed that there were unanswered questions necessary to determine whether coverage existed and the extent of the loss, and therefore it was reasonable to request an EUO to explore these matters. The court further refused to consider the estoppel and waiver arguments as they were not raised in the trial court below Finally, the court held that the new contention on appeal – that the insured did not refuse to submit to an EUO – was directly contradicted by her position in the lower court during summary judgment. The Court of Appeal also affirmed the Superior Court's denial of the insured's request for reconsideration of an order refusing to reopen discovery, pointing out that the reconsideration request was untimely, and in any event, the denial of the motion to reopen discovery was within the trial court's discretion as the insured had ample time to conduct discovery but had not been diligent in pursuing it. Finally, the court of appeal upheld the trial court's imposition of issue sanctions dismissing the insured's claim for punitive damages, holding that, since summary judgment was proper, the issue of punitive damages became moot.

The case was handled at both the trial and appellate level by **Randy A. Moss** and **Lisa L. Pan**. *Snyder v. Fire Insurance Exchange*, First Dist. Ct. Appeal Case #A165392.

Defense Verdicts

John Brydon, Esq.
Demler Armstrong & Rowland
Snyder v. Fire Insurance Exchange

Sandra Brislin, Esq.
Ostin and Kothary
Taylor v Capoocia

Patrick Deedon, Esq.
Maire & Deedon
Saldana v. City of Redding

Kat Todd, Esq.
Schuering Zimmerman & Doyle, LLP
Amelia Burroughs, Esq.
Burroughs Legal
Nichols v. Erik Jansson, M.D.

Arthur Casey
Ford, Walker, Haggerty & Behar
Kidwell v Evans

Bobby Sims
Sims Lawrence & Broghammer
Robin Bebout v. Central Valley Regional Center, California Mentor et. al.

Amelia Burroughs
Burroughs Legal
Alison Nichols v. Erik Jansson, M.D.

Ian Scharg
Schuering Zimmerman & Doyle, LLP
McAfee v. Adventist Health Rideout

Jonathan Varnica
Vogl Meredith Burke & Streza LLP
Proud Thai Massage, LLC, et al. v. Best Seller Ltd., et al.

Edward Tugade
Demler, Armstrong & Rowland, LLP
Appeal of Summary Judgment for Fire Insurance Exchange ("FIE")

the Judicial Seminar in Sacramento, Summer Session in Tahoe, Annual Golf Tournament, and the Annual Meeting, which is always the highlight of the ADC annual calendar.

- **Highlight our current leaders so our members know who to reach out to with questions or concerns** You will find an increased level of this – primarily by giving our involved members some additional ways to highlight their involvement in different ADC activities and committees.

- **Engage with other defense bar organizations** Having our leadership meet with leadership from the other organizations, including our long-standing relationship with the Association of Southern California Defense Counsel (ASCDC), is geared toward opening to door to discussions as to how we can create better synergy between our organizations, and ultimately, develop the collaboration and camaraderie between our organizations.

- **Spotlight on Law Firms and Individual Members to expand our reach for continued engagement by our members** We have already launched our Defense Success announcements to all ADC members. The ability for our members to share their victories, both in and outside of court, is an invaluable benefit to our members. We are also launching profiles to highlight the many excellent work and accomplishments of our member law firms and individual members. I am optimistic our multi-pronged approach and focus on member firms and individual members will only help to broadcast our stellar membership and bring aboard many more. I also hope to roll out surveys so we can directly hear from our members what you all would like to see. Contact us to find out how you or your firm can be in the spotlight.

Of course, we will continue to offer programming and events we all look forward to each year, including:

- **Weekly Webinars** Our weekly CLE webinars exploded in popularity during the pandemic and I'm happy to announce they will continue this year. These webinars consist of many engaging and compelling speakers on a range of interesting topics. These speakers are brought to us through our very own members interested in presenting hot-topics as well from the support of some generous sponsors! Contact us to find out how you can join the webinar series of outstanding speakers.

- **Dos and Don'ts In Local Courtrooms and Judicial Reception** The ADC's very first in-person seminar of the year is on March 7, 2024 at the Sutter Club in Sacramento, CA. Judges from the County of Sacramento, County of San Joaquin, and County of Placer will be there to present on the State of the Sacramento County Superior Courts, and provide a Dos and Don'ts all practitioners will be interested to learn from. Be sure to join us!

- **Basic Training Program** This ever-popular program will prepare our new lawyers the fundamental skills necessary to effectively defend our clients. The new lawyers will learn how to take and defend our clients at deposition and in court, how to evaluate experts, decipher insurance policies, what to expect at mediations, prepare effective written discovery, just to name a few. All taught by stellar and experienced ADC members!

- **Summer Session in Beautiful Lake Tahoe** Be sure to attend this annual must attend event in beautiful Everline Resort & Spa in Lake Tahoe during the weekend of August 1 through 4, 2024. Soak up summertime fun with a getaway to the mountains, all while you earn CLE credits and connect with your colleagues. This is also a fantastic way to spend time with your family and friends, hiking through the trails, swimming in the pools or at the lake, and enjoy camaraderie with your fellow ADC colleagues.

- **Construction Defect Seminar** Construction defect claims are typically complex from causation, legal and insurance coverage perspectives, which makes them particularly difficult to assess, investigate and settle. Come learn about cutting edge issues from top construction lawyers, mediators, judges, and industry professionals.

- **Toxic Torts Seminar** Always a blockbuster hit among our members. Held in San Francisco, the seminar covers the on-going evolution of the toxic torts practice post-pandemic, the deconstruction of experts, recent legislative developments, and the latest appellate decisions affecting this area of the law.

- **Annual Meeting – Save the Date for December 5-6, 2024** This is the ADC's premier event of the year. Held annually at the historic and picturesque Westin St. Francis on San Francisco's Union Square, it promises to meet all your education needs and expectations.

PLEASE RENEW YOUR MEMBERSHIP. We have an amazing year planned and we want YOU to be a part of it! Please complete and return the enclosed Membership Form or do so via the web at *www.adcnc.org*. As Mike Belote always preaches, the membership is the lifeblood of the ADC. None of this would be possible without all of you, the membership. You are the reason we do what we do, and we could not support our members without your trust in the ADC leadership, the California Defense Counsel, your collaboration, your belief in our mission, and your optimism about the future of our proud organization.

Thank you for your continued support of and involvement with the ADC. You are key to the success of our activities and plans for 2024. I encourage you to stay engaged, working together to advance the educational programs and activities that are the heartbeat of this organization. If you know of colleagues who share in your interest in the work the ADC is doing for you, we encourage you to invite them to become a member.

As we increase our engagement with our extraordinary community of professionals, I want to hear from you. If you have any ideas for ways to move this organization forward or feedback to improve upon our processes, please email me at *tug@darlaw.com*. **Cheers to a fantastic 2024!**

whose Supreme Court regulates the State Bar.

Finally, there is the political side of CDC. Every two years all 80 Assembly seats are on the ballot, along with half of the 40 state Senate seats. With term limits, there is a constant game of musical chairs occurring in Sacramento. CDC-PAC exists to support those candidates and elected officials who will listen to the defense practice perspective. The system actually is far cleaner than the average voter might assume, but candidates still need money to get their messages out, and while CDC will never have the financial resources of the plaintiff's bar, not to mention the CalChamber, insurers, labor and others, the PAC is an important element of an overall successful government relations program.

The next issue of *Defense Comment* will take a look at issues pending in Sacramento for 2024. Like it or not, the list changes, every day.

DEFENSE COMMENT wants to hear from you. Please send articles by e-mail to Matt Constantino at *MConstantino@clappmoroney.com*, or George Otstott at *ots@darlaw.com*. We reserve the right to edit content chosen for publication.

MEMBERSHIP APPLICATION

Association of Defense Counsel of Northern California and Nevada

Membership

Membership in the Association of Defense Counsel of Northern California and Nevada is open by application and approval of the Board of Directors to all members in good standing with the State Bar of California or Nevada. A significant portion of your practice must be devoted to the defense of civil litigation.

Membership Categories

Annual dues for ADC membership are based on your type of defense practice (staff counsel or independent counsel) and, for independent counsel, the length of time in practice and the number of ADC members in your firm. The following are the base fees:

☐ **REGULAR MEMBER ($395)** – Independent Counsel in practice for more than five years.
☐ **AFFILIATE MEMBER ($395)** – Full-time or part-time mediation or arbitration; no voting; not able to hold office.
☐ **ASSOCIATE MEMBER ($325)** – All staff counsel (including public entity, corporate or house counsel).
☐ **YOUNG LAWYER MEMBER ($225)** – In practice zero to five years.
☐ **LAW STUDENT MEMBER ($25)** – Currently enrolled in law school.
☐ **DUAL MEMBER ($100)** – Current member in good standing of the Association of Southern California Defense Counsel.

Information

Name:_____ Firm: _____

Address: _____

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

Phone: _____ Ethnicity: _____

E-mail: _____ Website: _____

Law School:_____ Year of Bar Admission:_____ Bar #: _____

Years w/Firm:_____ Years Practicing Civil Defense Litigation: _____ Gender: _____

Are you currently engaged in the private practice of law? ☐ Yes ☐ No

Do you devote a significant portion of your practice to the defense of civil litigation? ☐ Yes ☐ No

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

☐ Business Litigation ☐ Construction Law ☐ Employment Law ☐ Insurance Law & Litigation
☐ Landowner Liability ☐ Litigation ☐ Medical Malpractice ☐ Public Entity ☐ Toxic Torts ☐ Transportation

I was referred by:

Name:_____ Firm: _____

Signature of Applicant:_____ Date: _____

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

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Return completed form & payment by mail or fax to: **Association of Defense Counsel • 2520 Venture Oaks Way, Suite 150 • Sacramento, CA 95833 • (916) 924-7323 – fax**

For more information, contact us at: (916) 239-4060 – phone • *info@adcnc.org* • *www.adcnc.org*

WELCOME NEW MEMBERS

Since November 2023, 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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Rankin, Shuey, Mintz, Lampasona & Harper
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Hayes Scott Bonino Ellingson & Guslani LLP
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KRISTOPHER GRANT
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Roseville
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ROBYN SUSAN HOSMER
Schneider, Holtz & Hosmer
Sacramento
ASSOCIATE MEMBER

DAVINA RAYLEEN HURT
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REGULAR MEMBER

OSCAR GENE JIMENEZ
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TIMOTHY KUHLS
Phillips, Spallas & Angstadt LLP
Las Vegas
REGULAR MEMBER

MORGAN KUPPENBENDER
Schuering Zimmerman & Doyle, LLP
Sacramento
LAW STUDENT MEMBER

JOE LITTLE
Caulfield Law Firm
El Dorado Hills
REGULAR MEMBER

DANIEL ROBERTS MAYER
McNamara, Ambacher, Wheeler, Hirsig & Gray, LLP
Fairfield
REGULAR MEMBER

JORDAN MCCROSKEY
Gurnee Mason Rushford Bonotto & Forestiere, LLP
Roseville
YOUNG LAWYER MEMBER

JOSEPH JONATHAN MINIOZA
Tyson & Mendes
Novato
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ALEXANDRA NICOLE NOYES
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Fresno
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Freeman Mathis & Gary
Roseville
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Tyson & Mendes
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CHASE TURNBULL
Hayes Scott Bonino Ellingson & Guslani, LLP
Redwood City
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2024

Calendar of Events

Save the Dates!

April 19, 2024	**Construction Seminar**	Pleasanton DoubleTree
June, 2024	**Toxic Torts Seminar**	TBD, San Francisco
August 2-3, 2024	**Summer Session**	Everline Resort & Spa, Olympic Valley, CA
September-October, 2024	**Basic Training Seminar**	(virtual)
October 4-5, 2024	**ADC/ASCDC Joint Board Meeting**	Monterey Plaza Hotel
December 4, 2024	**ADC President's Dinner**	Westin St. Francis, San Francisco
December 5-6, 2024	**65TH Annual Meeting**	Westin St. Francis, San Francisco

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