NEW STATUTES, NEW RULES, AND NEW CASES

WHAT EVERY BUSINESS LITIGATOR NEEDS TO KNOW IN 2019

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SIGNIFICANT STATUTES
Enacted in 2018

SIGNIFICANT RULES
Adopted in 2018

SIGNIFICANT CASES
Decided in 2018

SIGNIFICANT STATUTES
Enacted in 2018

ALTERNATIVE DISPUTE RESOLUTION

1. Arbitration Agreements – Enforcement – Court May Decline To Compel Arbitration Where Grounds Exist For Rescission.

Code Of Civil Procedure § 1281.2 – Section 1281.2 previously provided that, upon a showing of the existence of a written agreement to arbitrate, a court shall compel arbitration unless grounds exist for revocation of the agreement. The word "revocation" has been changed to "rescission." The legislative history for this section indicates that the change was made in response to Supreme Court authority that explained that the term "revocation" is a misnomer, because, technically speaking, contracts are rescinded, not revoked.

ATTORNEY PRACTICE

2. Attorney Client Privilege – Guardian Or Conservator With Conflict Of Interest Does Not Hold Privilege.

Evidence Code § 953 – Existing law provides that the holder of the attorney-client privilege includes a client's guardian or conservator. The amendment to Evidence Code § 953 clarifies that the guardian or conservator is not the holder of the client's privilege if the guardian or conservator has an actual or apparent conflict with the client.

3. Advising Clients – Attorneys Must Provide Clients With A Printed Disclosure Regarding Mediation Confidentiality.

Evidence Code §§ 1122, 1129 – As soon as reasonably possible before the client agrees to participate in a mediation, an attorney must provide his or her client with a printed disclosure form explaining mediation confidentiality. If the client is already engaged in mediation when the attorney commences the representation, the disclosure must be provided as soon as reasonably possible. The disclosure must be on a single page, in at least 12 point font, and be signed by both the attorney and the client. The disclosure must not be attached to any other document provided to the client. Acceptable language for the disclosure is included in Evidence Code § 1129. That section also specifies that an attorney's failure to supply the disclosure is not grounds for setting aside any agreement reached in mediation. Evidence Code § 1122 allows communications relating to this disclosure to be used in attorney disciplinary proceedings to determine whether or not the attorney complied with this requirement. The new requirement is not applicable in class or representative actions.

4. State Bar Reform.

Business & Professions Code §§ 30, 6001-6241, Civil Code § 55.32, Government Code § 9795, Insurance Code § 1872.95, Revenue and Taxation Code § 19280 – In a 92 page bill with 151 sections, the California Legislature has continued its comprehensive reforms of the State Bar Act. Highlights include the following:

- Business & Professions Code § 30 has been amended to provide that a licensing board, including the State Bar, shall not inquire into citizenship or immigration status for purposes of licensure, and shall not deny licensure based solely on citizenship or immigration status. (This provision was part of Senate Bill 695. The other provisions listed below were part of Assembly Bill 3249.)

- References in the State Bar Act to "members" and "dues" have been replaced with references to "licensees," and "fees."

- The State Bar's highest priority, the protection of the public, has been expanded to include support for greater access to and inclusion in the legal system.

- Language authorizing the State Bar to "aid in all matters that may advance the professional interests of the members of the State Bar" has been deleted.

- The Association carrying on the functions of the former sections of the State Bar will now be known as the "California Lawyers Association" (this will be a private, nonprofit corporation not funded through mandatory fees, and will not be considered a government entity for any purposes).

- References to the State Bar's disciplinary board or committee have been updated to refer to the State Bar Court.

- The authority to take various actions, including the initiation of disciplinary proceedings, which was formerly granted to the Board of Trustees, or a committee, has now been transferred to the "chief trial counsel" appointed for those purposes.

- The standards for attorney discipline in Business & Professions Code section 6007 and 6102 have been revised: under the prior language in section 6007, an attorney could be moved to involuntary inactive status upon "a finding that the attorney's conduct poses a substantial threat of harm to the interests of the attorney's clients or to the public." That finding required a showing of the following elements: (A) the attorney caused harm to clients or the public, (B) the harm likely to be suffered by the public if inactive status is not imposed outweighs the harm likely to be suffered by the attorney if inactive status is imposed, and (C) the State Bar has reasonably probability of prevailing in a disciplinary matter. Under the new standard, element (B) has been eliminated, and element (C) has been revised to require a reasonable probability that the attorney will be disbarred.

In addition, removal to inactive status is now required where an attorney is sentenced to incarceration for 90 days or more as a result of a criminal conviction.

Finally, under the previous version of section 6102, the Supreme Court was required to: (1) suspend an attorney after the conviction of a felony that involves moral turpitude, and (2) disbar the attorney if the felony offense includes the specific intent to deceive, defraud, steal, or make or suborn a false statement. The new amendment requires disbarment if either condition (1) or (2) occurs.

- The application deadlines for the July and February bar examinations have been moved from June 15th and January 15th to June 1st and July 1st, respectively.

- The State Bar's authorization to collect voluntary fees to fund the Conference of Delegates shall end on January 1, 2020.

- The Board of Trustees' authority to create local administrative committees has been repealed.

- Existing provisions require the State Auditor's Office to conduct audits. The 2019 audit shall be used in conjunction with setting new licensing fees for 2020.

- Any fines, penalties, forfeitures or other amounts imposed against licensees may be referred to the Franchise Tax Board for collection, and a licensee's social security number or federal employer identification number may be disclosed to a collections agency contracted with to collect funds owed under a public reproval on a licensee.

- The base license fee for active licensees remains $315, which amounts to $390 after including an additional $40 for the Client Security Fund, $25 for the disciplinary system, and $10 for the Lawyer Assistance Program.

CIVIL PROCEDURE

5. Anonymity Of Guardian Ad Litem.

Code of Civil Procedure § 372.5 – New section 372.5 allows a party's guardian ad litem to appear in an action under a pseudonym if the guardian establishes an overriding interest in preserving his or her anonymity.

6. Class Actions – Excess Settlement Funds To Be Distributed By Plaintiff's Attorney To Nonprofit Organizations.

Code Of Civil Procedure §§ 382.4, 384 – Prior law contained specific earmarks and percentage allocations designating the recipients of unclaimed funds from a class action settlement. Section 384 now specifies that a court shall direct such funds to be paid "to nonprofit organizations or

foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent," without any predetermined earmarks or allocations. Section 382.4 states that attorneys in class action lawsuits must disclose any connections they may have with third party settlement fund recipients that could reasonably create an appearance of impropriety.

7. Electronic Filing – Duplicate Payments.

Government Code § 6159 – In the event that a duplicate payment of filing fees is made by a party or by an electronic service provider forwarding fees on behalf of a party, the Court shall issue a refund to the entity that made the most recent payment.

8. Electronic Filing – Sanctions For Failure To Pay Fees Owed To Electronic Filing Service Provider.

Code of Civil Procedure § 411.20.5 – Under section 411.20.5, attorneys for represented parties may be sanctioned if they fail to pay fees owed to electronic filing service provider. If fees remain unpaid for five (5) days, the service provider may give notice to the clerk, who must then give notice to the attorney of record of the possibility of a sanction. If the attorney fails to pay within 20 days of such notice, the court may sanction the attorney.

9. Electronic Service – Party Serving Must Be Resident Or Employee In County Where Electronic Service Takes Place.

Code of Civil Procedure § 1013b – Section 1013b previously provided that the person executing a proof of electronic service must be a resident or employee in the county where the filing occurs. The section has been amended to specify that the person must be a resident or employee in the county where the electronic service occurs.

10. Motions For New Trial Or To Vacate A Judgment – Time For Court To Rule Has Been Increased From 60 To 75 Days.

Code of Civil Procedure §§ 660, 663a – Under prior law, a trial court was required to rule on a motion for a new trial or a motion to set aside and vacate a judgment within 60 days after service of notice of entry of judgment by the clerk or any party or, if no notice has been given, within 60 days after filing of the first notice of intention to move for a new trial or to set aside and vacate a judgment. The amendments to sections 660 and 663a extend this deadline to 75 days.

11. Service Of Papers At Party's Residence – Hours For Service Attempts Expanded To 8 AM Through 8 PM.

Code of Civil Procedure § 1011 – Under Code of Civil Procedure § 1011, any notices and other papers to be served on a party may be served on any person 18 or over at the party's residence and, if no such person can be found, the papers may be served by mail. Under the prior law, the

attempted service was required to be made between 8 am and 6 pm. The amendment specifies that the attempt must be made between 8 am and 8 pm.

12. Statutes Of Limitations – Sexual Assault – Ten Year Statute Of Limitations.

Code of Civil Procedure § 340.16 – The new statute of limitations for civil actions based on damages suffered as a result of sexual assault specifies that actions must be brought within the later of 10 years (formerly three years under the prior statute) following the last act or attempted act of sexual assault, or three years following the discovery of an injury or illness resulting from an act or attempted act. The change applies to assaults attempted or committed after the victim's 18th birthday.

13. Statutes Of Limitations – Statute Of Limitations Prohibits Filing Of Expired Claims Based On Written Contracts, Accounts Stated, Book Accounts, And Rescission Of A Written Contract.

Code of Civil Procedure § 337 – The four year statute of limitations in section 337, which is applicable to actions on written contracts, open book accounts, accounts stated, and rescission of written contracts, has been amended to specify that the statute now acts as a prohibition on the filing of an action, arbitration, or other proceeding, rather than simply as an affirmative defense (§ 337(d).) The bill does not provide any punishment or enforcement mechanism for violations of this prohibition. Section 337 also now states that the limitations period may only be extended under CCP § 360, which generally requires either an acknowledgement or promise in writing, or a payment on a promissory note that is not yet barred by the statute of limitations. These amendments were enacted as part of a bill that also requires debt collectors to give notice that a lawsuit cannot be commenced to enforce a debt when they attempt to collect a debt after expiration of the statute of limitations. (Civil Code § 1788.14.)

CORPORATIONS AND BUSINESS ENTITIES

14. Corporations – Directors – Nonprofit Corporations May Have Ex Officio Directors.

Corporations Code §§ 5220, 7220, 9220, 12360 – Under amendments to the Corporations code provisions regarding nonprofit public benefit corporations, nonprofit mutual benefit corporations, and cooperative corporations, the articles or bylaws of such corporate entities may specify that all or any portion of the directors may hold office *ex officio* by virtue of occupying a specified position within the corporation or outside the corporation. In such cases, the director's term shall correspond with the term of the position that gave rise to the *ex officio* directorship.

15. Corporations – Directors – A Publicly Held Corporation Must Have At Least One To Three Women On Its Board Of Directors.

Corporations Code § 301.3 – By the end of 2019, all publicly held corporations (foreign or domestic) that maintain their principal executive offices in California must have at least one woman on their board of directors. By the end of 2021, that number increases to two women if the board of directors has five members, and three women if the board of directors has six or more members. Violations are punishable by a fine of $100,000 for the initial violation, and $300,000 for each additional violation. Each director seat that is required to be held by a women, but is not, for at least a portion of a calendar year counts as a violation.

16. Corporations – Inspection Of Corporate Records – Shareholders May Request That Corporate Records Be Produced Electronically Or Via Mail.

Corporations Code § 1601 – Existing law requires a corporation's accounting books, records, minutes and other records to be made available for inspection by shareholders. Amendments to section 1601 allow shareholders to request production of these records either electronically or by mail, if the shareholder pays the reasonable costs for copying or converting the requested documents to electronic format. The amendments also allow corporations to maintain and produce true and correct copies of these records if the originals have been lost, destroyed, or are not normally physically located in California.

17. Corporations – Use Of Block Chain Technology To Keep Track Of Corporate Ownership.

Corporations Code §§ 204, 2603 – Amendments to the Corporations Code now allow corporations not listed on any securities exchanges to use block chain technology to keep track of their shareholders and any issuances or transfers of stock. (Block chain technology is a technology that allows the creation of a digital ledger of transactions, and is the foundation for crypto-currencies like Bitcoin.)

18. Dissolution – Entities Are Subject To Administrative Dissolution If Corporate Powers Are Suspended For Five Continuous Years.

Corporations Code §§ 2205.5, 17713.10.1, Revenue And Taxation Code §§ 23310, 23311 – New provisions in the Corporations Code state that a domestic corporation or limited liability company may be subject to administrative cancellations if the Franchise Tax Board suspends the entity's corporate powers for 60 consecutive months or more. The Secretary of State must provide 60 days' notice of a pending dissolution, and the entity is entitled to submit a written objection. If a written objection is filed, the entity shall have 90 days to pay any amounts owed, and satisfy any other obligations necessary for reinstatement. Changes to the Revenue and Taxation Code provide that, if the dissolution takes place, any qualified taxes, interest, and

penalties may be abated if the entity certifies that it was not doing business, has ceased doing business, and does not have any further assets, although this does not discharge liabilities to other parties. If the entity thereafter continues to do business or has any assets not previously disclosed, all of the abated taxes, interest, and penalties become immediately due and payable, along with a 50% penalty and additional interest.

COURTS

19. Court Reporters – Appointment Of Private Court Reporter Without Stipulation.

Government Code §§ 68086, 70044 – Under the prior version of section 70044, a private court reporter, who has not been pre-appointed as a pro tempore official reporter, could only be appointed as the court reporter in a contested matter upon the stipulation of all parties. In order to prevent one party from being given the right to veto preparation of a record of the proceedings, section 70044 has been amended to state that an appointment of a private reporter may be made pursuant to a stipulation of the parties, or pursuant to section 68086(d). Section 68068(d) states that the Judicial Council shall adopt rules to ensure that, when an official reporter is not available, a party can arrange for the presence of a certified shorthand reporter, and, at that party's request, the court shall appoint the shorthand reporter as the official reporter pro tempore, "unless there is good cause shown" to refuse the appointment. NOTE: The Judicial Council has not yet adopted rules conforming to these amendments, and the Orange County Superior Court's official policy on shorthand reporters still requires a stipulation to appoint a private reporter that has not been pre-approved to serve as a pro tempore official reporter.

20. Court Reporters – Prohibited Business Practice.

Business & Professions Code § 8050 – New section 8050 prohibits certain business practices by shorthand court reporters, including: (1) charging for transcripts that do not meet minimum format requirements, (2) charging fees other than those authorized by statute, (3) making a transcript available to one party before the other, or offering a service to one party and not the other, and (4) failing to promptly notify a party of a transcript request or expedite request made by another party. Violations are subject to a civil fine of up to $10,000 per violation.

21. Filing Fees – Temporary Fee Increases To Remain In Place.

Government Code §§ 70602.6, 70616, 70617, 70662 – Filing fees that would have otherwise expired on July 1, 2018 have been extended through July 1, 2023. These include: (1) a $40 supplemental filing fee for first papers, (2) a $1,000 complex case fee (which would otherwise have reverted to $550), (3) an $18,000 limitation on the total amount of complex case fees to be collected from all parties (which would otherwise have reverted to a $10,000 limitation), (4) a $60 uniform filing fee for motions, applications, and other papers requiring a hearing (which otherwise would have reverted to $40), and (5) the $40 filing fee for a request for special notice.

22. Riverside County – The Superior Court Has Been Allocated Two New Judgeships, And The Fourth Appellate District, Division Two Has One New Judgeship.

Government Code §§ 69104, 69592 – Amendments specify that: (1) the Superior Court in Riverside County shall have 53 (formerly 51) judges, and (2) the Fourth Appellate District, Division Two shall have 8 (formerly 7) judges.

23. States Of Emergency.

Government Code § 68115 – Minor adjustments have been made to the language of the statute dealing with the courts' ability to respond to states of emergency. References to "insurrection, pestilence, or other public calamity" have been replaced with references to "an act of terrorism, public unrest or calamity, epidemic, natural disaster, or other substantial risk to the health and welfare of court personnel or the public," along with similar non-controversial changes. Provisions allowing the transfer of cases to "adjacent" counties now allow transfer to any other county within either 100 miles of the original county's boundaries, or 100 miles within the outer boundary of any area declared to be in a state of emergency proclaimed by the Governor. The provision also now states that, during an emergency, the time to bring a case to trial under CCP §§ 583.310 and 583.320 may be tolled by "the fewest days necessary under the circumstances of the emergency, as determined by the Chairperson of the Judicial Counsel."

DISCOVERY

24. Deposition Notices – 12 Point Type

Code Of Civil Procedure § 2025.220 – Deposition notices must be prepared in at least 12 point type.

25. Motion To Compel – Court May Request A Concise Outline Of Disputes In Lieu Of Separate Statements (Effective 2020).

Code Of Civil Procedure §§ 2030.300, 2031.310, 2033.290 – Amendments to the Civil Discovery Act allow a court to replace the typical requirement of a separate statement accompanying a motion to compel discovery responses, with a requirement for a "concise outline of the discovery request and each response in dispute." This applies to motions to compel further responses to interrogatories, demands for inspection, and requests for admissions. Unfortunately, these amendments do not take effect until January 1, 2020.

EMPLOYMENT AND LABOR

26. Discrimination And Harassment – Prohibition Of Discrimination In Building And Construction Apprenticeship Programs.

Labor Code § 3073.9 – New section 3073.9 prohibits discrimination on the basis of race, religion, sex, disability, and other protected categories. Comprehensive requirements are imposed on such programs to prevent discrimination and harassment, including monitoring, reporting, orientation, training, record keeping, complaint resolution, and other requirements. Failure to comply can be enforced by a complaint to the Administrator of Apprenticeship, but does not create or serve as the basis for a new private right of action (nor does it limit any existing private right of action).

27. Discrimination And Harassment – Fair Employment And Housing Act Revisions.

Government Code §§ 12923, 12940, 12950.2, 12964.5, 12965 – Substantial revisions have been made to the Fair Employment and Housing Act. Some of the more significant changes include:

- New section 12923 contains a statement of legislative intent regarding the interpretation and application of harassment law, particularly with respect to the concept of a hostile work environment. The section states that a single incident of harassment is sufficient to create a hostile environment, and affirms the rejection of the "stray remarks" doctrine. The section endorses the discussion of the topic in some cases, while rejecting others, and closes by noting that harassment cases "are rarely appropriate for disposition on summary judgment."

- The prior version of section 12940(j) held employers responsible for third party acts of sexual harassment if the employer (or its representatives) knew or should have known of the harassment and failed to take corrective action. An amendment to that section deletes the word "sexual," thereby extending liability for third party actions to all prohibited forms of harassment.

- New provisions in section 12964.5 prohibit employers from conditioning a raise, bonus, or continued employment on an employee's execution of a release, non-disparagement agreement, or other agreement restricting the employee from disclosing information about unlawful acts in the workplace, including harassment. The section excludes settlement agreements reached in response to complaints filed under FEHA in court, before an administrative agency, in ADR, or in an employer's internal complaint process.

- Employers are authorized under section 12950.2 to provide employees with "bystander intervention training."

- Section 12965 now provides that, while prevailing parties may still be awarded discretionary attorney's fees and expert witness fees, a prevailing defendant may not be awarded fees and costs unless the action was frivolous when it was filed, or the plaintiff continued to litigate the case after it became frivolous. This prohibition of cost and fee awards for prevailing defendants applies notwithstanding the provisions of Code of Civil Procedure section 998.

28. Sexual Harassment Training – Threshold To Satisfy Training Requirements Reduced From 50 Employees To 5 Employees.

Government Code §§ 12950 & 12950.1 – Two major adjustments have been made to the requirements regarding employer provided sexual harassment training: (1) the threshold for requiring an employer to provide sexual harassment training has been reduced from 50 employees to five (5) employees, and (2) the requirement of providing supervisory employees with at least two hours of sexual harassment training has been supplemented with a requirement to provide all non-supervisory employees with at least one hour of sexual harassment training. The training must be completed by January 1, 2020, and each employee must be provided training once every two years. New employees must be provided training within six months of the employee assuming a position. Training of temporary or seasonal employees must take place within 30 calendar days or 100 hours of work, whichever occurs first. Group training, and training in smaller segments is allowed. Subdivision (k) of section 12950.1 directs the Department of Fair Employment and Housing to develop two online courses that will satisfy the training requirements for supervisory and non-supervisory employees, and to make those courses available on its website. The DFEH website indicates that the training courses should be available towards the end of 2019.

ENVIRONMENTAL

29. CEQA – Aesthetic Impacts Need Not Be Evaluated In Connection With Rehabilitation Of Certain Abandoned, Dilapidated, Or Vacant Structures.

Public Resources Code § 21081.3 – New section 21081.3 creates a new CEQA exception, specifying that the aesthetic impacts of a certain project shall not be considered significant environmental impacts if the project involves the refurbishment, conversion, repurposing, or replacement of an abandoned, dilapidated, or vacant building. To qualify for this exception, the project must be adjacent to certain qualified urban uses, must include the construction of housing, must not substantially exceed the height of the original building, and must not create a new source of substantial light or glare.

30. CEQA – Lead Agencies May Consider The Benefits And Negative Impacts Of Denying A Project.

Public Resource Code § 21082 – Section 21082 has been added to the Public Resources Code, and provides that a lead agency preparing an environmental review document under CEQA "may consider specific economic, legal, social, technological, or other benefits, including regionwide or statewide environmental benefits, of a proposed project and the negative impacts of denying the project."

31. The Plastic Straw Ban.

Public Resources Code §§ 42270, 42271 – Full-service restaurants are now prohibited from providing single use plastic straws to their customers, unless requested by the customer. A "full-service restaurant is one where the customer is escorted to a table, the customer's order is taken after the customer is seated, and the customers food, any associated items and the check are all delivered to the customer's table. Violations are punishable by fines of up to $25 per day, not to exceed $300 annually.

EVIDENCE

32. Sexual Assault Counselor-Victim Privilege.

Evidence Code § 1035.2 – The definitions applicable to the Evidence Code's privilege for sexual assault counselor-victim communications (Evid. Code § 1035.8) have been amended to explicitly state that a qualified counselor engaged in a program providing sexual assault counseling on the campus of a public or private institution of higher education qualifies as a "sexual assault counselor." The amendment is intended to clarify existing law.

GOVERNMENT

33. Public Records Act – Police Video And Audio Recordings.

Government Code § 6254 – New provisions in section 6254 specify when video or audio recordings of "critical incidents" may be withheld from public disclosure. "Critical incidents" are defined as incidents involving a peace or corrections officer's discharge of a firearm or use of force that results in great bodily injury or death. Recordings of such incidents may be withheld for 45 days, subject to extension if necessary to protect an ongoing investigation. They also may be withheld or redacted when the privacy interests of a subject in the recording outweigh the interest in public disclosure.

34. Taxpayer Standing To Challenge Illegal Expenditures Or Waste.

Code of Civil Procedure § 526a – Section 526a provides taxpayers with standing to challenge a local agency's illegal expenditures or waste. In response to a request for clarity in the concurring opinion in *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, the Legislature amended the

statute to clarify what taxes are sufficient to confer standing. The statute now lists the eligible taxes as income tax, sales and use tax or transaction and use tax paid to a retailer, property tax, including a property tax paid by a lessor to a landlord, and a business license tax. In addition, the section previously applied to any city, town, county, or city and county, but has now been expanded to also apply to a district, public authority, or any other political subdivision in the state.

35. Whistleblowers – Civil Liability For Interfering With Or Retaliating Against Legislative Whistleblowers.

Government Code §§ 9149.30-9149.36 – The new "Legislative Employee Whistleblower Protection Act" provides civil (and criminal) liability against legislators and legislative employees who interfere with, or retaliate against, a whistleblower making a "protected disclosure." Protected disclosures are defined as good faith communications that a legislator or a legislative employee is engaging in a violation of any law, including sexual harassment, or of a legislative code of conduct. Ordinary civil liability is imposed for interfering with a whistleblower, while punitive damages and attorney's fees are also allowed in cases of retaliation. Violations can also be punished by a fine of up to $10,000 and imprisonment in a county jail for up to a year.

36. Whistleblowers – Expansion Of Liability For Interfering With Or Retaliating Against Legislative Whistleblowers.

Government Code § 9149.32 – Before the ink was dry, the new "Legislative Employee Whistleblower Protection Act" was expanded to include liability against a person who is neither a member of the Legislature, nor a legislative employee, but whose behavior nevertheless affects a member or legislative employee, and who is engaged in a work related activity.

37. Whistleblowers – Prohibition Of Discriminatory Harassment Retaliation.

Government Code § 9149.38-9149.41 – The new "Legislative Discriminatory Harassment Retaliation Prevention Act" prohibits a house of the Legislature from discharging, or otherwise retaliating against a legislative employee or legislative advocate because that person opposed any practices forbidden under FEHA, or participated in any complaint relating to discriminatory harassment. A violation is subject to a fine not to exceed $10,000, but the act does not specifically authorize a private right of action.

MISCELLANEOUS

38. Bots – Use Of Automated Accounts In Connection With Advertising Or Politics Must Be Disclosed.

Business & Professions Code §§ 17940-17943 – The use of automated accounts (i.e. "bots") to post content meant to incentivize a purchase or sale of goods or services or to influence a vote in an election is unlawful, unless the use of the bot is disclosed. The new statutes do not specifically create or mention any new private right of action.

PRIVACY

39. California Consumer Privacy Act of 2018.

Civil Code §§ 1798.100-1798.198 – Commencing in 2020, the new Consumer Privacy Act will give a consumer the right to require certain companies to disclose the personal information collected about the consumer, where the information is collected, and who it is shared with, among other things. It also gives consumers rights to request deletion of personal information and to opt out of any sale of personal information. If a consumer opts out, the business is prohibited from retaliating against the consumer, including by charging a higher price, unless the higher price is reasonably related to the value provided by the consumer's data. The sale of personal information relating to consumers under 16 is prohibited unless affirmatively authorized. These provisions may be enforced by the Attorney General with civil penalties up to $7,500. In addition, consumers may bring individual or class claims if their data is subject to theft or unauthorized access due to a company's failure to maintain reasonable security measures. In such an action, a consumer may recover the greater of actual damages, or $100-750, along with injunctive relief, or other appropriate remedies the court deems proper. The Act only applies to companies: (a) with revenue over $25 million, (b) with personal information of 50,000 or more consumers, or (c) that earn more than half of their revenue from the sale of personal information.

40. Lodging And Common Carriers – Prohibition Of Unauthorized Disclosure Of Personal Information.

Civil Code § 53.5 – The operators of inns, motels, and other similar lodgings, as well as the operators of any private or charter bus transportation company are prohibited from disclosing guest or passenger records (defined as any records that identify individual guest or passengers) to any third parties. The statute provides exceptions for disclosures to law enforcement or to third-party service providers for the purpose of effectuating payment, disclosures required by other laws, and disclosures in response to court-issued subpoenas or orders. The section does not create or specifically mention any new private right of action.

REAL PROPERTY

41. Commercial Leases – Abandonment – Lessor May Serve Notice Of Belief Of Abandonment When Rent Has Gone Unpaid For As Little As Three Days.

Civil Code § 1951.35 – Prior law required all lessors to wait at least 14 days before giving a notice of belief of abandonment that, if left unrebutted, could result in termination of a lease. New section 1951.35 allows lessors of commercial property only to give such a notice when rent remains due and unpaid for at least the number of days required for the lessee to declare a rent default under the terms of the lease, but in no case less than three days. The notice of abandonment may only be given if the lessor reasonably believes that the lessee has abandoned the property. The notice may be served personally, by overnight courier, or by mail. The lessee has at least 15 days to contest the notice, pay the rent, or give notice of the lessee's intent not to abandon the property, and provide an address where the lessee can be served in an action for unlawful detainer.

42. Common Interest Developments – Notice Period For Proposed Rule Change Reduced From 30 Days To 28 Days.

Civil Code § 4360 – The board of a common interest development must give general notice of a proposed rule change prior to making the rule change. The notice period has been reduced from 30 days to 28 days.

43. Homeowner Bill Of Rights – Restoration.

Civil Code §§ 2920.5-2924.19 – The Homeowner Bill Of Rights, enacted in 2012 and expired on January 1, 2018, has largely been permanently reenacted. SB 818 restores a variety of consumer protection measures, including provisions preventing foreclosure proceedings from taking place while an application for a first lien mortgage modification is being processed or appealed (so-called "dual tracking"). Various other notification requirements are placed on foreclosing lenders, and civil liability is provided for violations, including treble damages and statutory penalties for willful violations.

44. Reverse Mortgages – Borrower's Heirs Not Entitled To Statutory Protections Applicable To Heirs Under Ordinary Mortgages.

Civil Code § 2920.7 – Civil Code section 2920.7 has certain protections for a borrower's successor in interest following the death of the borrower. Subdivision (k) now provides that the protections do not apply to a reverse mortgage.

45. Unlawful Detainer – Three Day Period To Respond To Notice To Cure And Five Day Period To Respond To Complaint Do Not Include Judicial Holidays.

Code of Civil Procedure §§ 1161, 1167 – Amendments to sections 1161 and 1167 specify that the three day period for a tenant to respond to a notice to cure a default, and the five day period for a tenant to respond to an unlawful detainer complaint, shall not include judicial holidays, including Saturdays and Sundays. This change becomes effective on September 1, 2019.

REMEDIES

46. Treble Civil Penalties For Sexual Exploitation Of Minors.

Civil Code § 3345.1 – New section 3345.1 allows a trier of fact to impose up to three times the statutorily authorized fine, civil penalty, or other penalty in any case that involves the commercial sexual exploitation of a minor. If a fine, civil penalty, or other penalty is not otherwise statutorily authorized, the trier of fact may impose a penalty of not less than $10,000 nor greater than $50,000, for each act of exploitation. Any penalty or treble penalty is to be paid to the victim.

SETTLEMENT AGREEMENTS

47. Confidentiality – Prohibition On Confidentiality Provisions That Prevent Disclosure Of Factual Information Relating To Sexual Assault, Harassment, Or Discrimination.

Code of Civil Procedure § 1002 – Code of Civil Procedure section 1001 already prohibits confidentiality provisions in settlement agreements, stipulations, or court orders that restrict the disclosure of factual information relating to an action that includes a claim for a felony sex crime, childhood sexual abuse, sexual exploitation of a minor, or certain categories of sexual assault. New section 1002 extends that prohibition to any actions or administrative complaints that involve any sexual assault not governed by section 1001, and any sexual harassment or discrimination in business relationships, employment, or housing. An exception allows provisions that shield the identity of the victim at the victim's request.

48. Confidentiality – Prohibition On Confidentiality Provisions That Prevent Testimony Regarding Criminal Conduct Or Sexual Harassment.

Civil Code § 1670.11 – Under new section 1670.11, any contract or settlement agreement that waives a party's right to testify in an administrative, legislative, or judicial proceeding pursuant to a court order, subpoena, or written request, regarding criminal conduct or alleged sexual

harassment allegedly committed by the other party or the other party's agents or employees is void and unenforceable.

TORTS

49. Construction Defect – Reporting Requirements For Judgments And Settlements Over $1,000,000 Relating To Multifamily Rental Housing.

Business & Professions Code §§ 7071.20, 7071.21, 7071.22 – Licensed contractors who are parties to a judgment or settlement exceeding $1,000,000 for construction defect or related claims (including negligence, breach of contract, fraud, and others) relating to a multi-family residential rental project are now required to report the judgment or settlement to the Contractors' State License Board. An insurer must also file a report within 30 days of paying any portion of a settlement or judgment qualifying under the criteria above. Any person providing a report under these sections shall not be deemed to have violated a confidential settlement agreement.

50. Discrimination – Armed Forces.

Military & Veterans Code § 394 – Existing provisions prohibiting various forms of discrimination against members of the military (including employment, lending, and entry to places of public entertainment) have been explicitly extended to members of the federal reserve components of the United States Armed Forces and to members of the State Military Reserve.

51. Privileges – Sexual Harassment Complaints And Former Employee Evaluation.

Civil Code § 47 – The list of privileged communications in Civil Code § 47(c) has been expanded to include complaints of sexual harassment made by an employee to an employer, and statements by a former employer regarding whether or not the former employer would rehire a former employee, and whether or not that decision is based on a determination that the former employee committed sexual harassment.

52. Sexual Harassment – Expansion Of Sexual Harassment Claims Outside Of Employment Relationships.

Civil Code § 51.9, Government Code §§ 12930, 12948 – Existing section 51.9 provides a private cause of action for sexual harassment where the plaintiff has an existing business, service, or professional relationship with the defendant. The cause of action has now been expanded to also include harassment where there is no existing relationship, but the defendant holds himself or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party. The statute has a non-exclusive list of the types of persons who may be subject to such claims, (such as a plaintiff's physician, attorney, landlord, or teacher). That list has been expanded to include elected officials, lobbyists,

directors and producers. In addition, the statute formerly required the plaintiff to show an inability to easily terminate the relationship. That requirement has been eliminated. Amendments to Government Code sections 12930 and 12948 give the Department of Fair Employment and Housing jurisdiction to receive, investigate, conciliate, mediate, and prosecute complaints under Civil Code section 51.9, and make it an unlawful practice under FEHA to "deny or to aid, incite, or conspire in the denial of the rights created by" section 51.9.

SIGNIFICANT RULES
Adopted in 2018

TITLE 2 - TRIAL COURT RULES

1. Electronic Service And Filing – Definitions

Rule 2.250 – The definitions relating to electronic service and filing have had minor revisions. The definitions of "Electronic service," "Electronic transmission," and "Electronic notification" now incorporate the definitions set forth in CCP § 1010.6, which were essentially identical to the former definitions in the rule. New definitions include "electronic filing manager," which is a service that acts as an intermediary between a court and an electronic filing service provider, and "self-represented" which has been defined to exclude self-represented attorneys. This means that self-represented attorneys will not be subject to the self-represented exceptions to mandatory electronic service and filing.

2. Consent To Electronic Service

Rule 2.251 – Subdivision (b), which defines the way in which parties may consent to electronic service, has been revised to eliminate the implied consent that arose when a party used electronic filing. Instead, new subdivision (b)(1)(C) specifies that a party consents to electronic service by agreeing to the terms of service agreement of an electronic filing service provider, if the agreement clearly states that it constitutes consent to receive electronic service. This will have limited impact to most Orange County Attorneys, because subdivision (c) still allows courts to require electronic service and acceptance of electronic service by local rule. Orange County local rule 352 requires electronic filing and service in all limited, unlimited, and complex civil cases.

3. Electronic Filing Managers

Rule 2.255(a) – Courts may now enter into contracts with an electronic filing manager to act as an intermediary between the court and electronic filing service providers.

4. Electronic Filing Accounts

Rule 2.255(f) – An electronic filing service provider may not require a filer to provide a credit card, debit card, or bank account in order to create an account. That information may be required in order to use electronic filing services, unless the services are within the scope of a fee waiver.

5. Electronic Signatures

Rule 2.257 – New subdivision (a) defines an electronic signature as "an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign a document or record created, generated, sent, communicated, received, or stored by electronic means. Subdivision (b) allows documents to be signed under penalty of perjury using an electronic signature.

6. Remote Access To Court Records

Rules 2.500-2.545 – The rules regulating access to the electronic records maintained by trial courts have been recast, with substantial new additions to govern remote access by "the public, parties, parties' attorneys, legal organizations, court-appointed persons, and government entities." The website for each trial court must include a link to information regarding who may access electronic records, and under what conditions they may do so. (Rule 2.500(b).) Several mostly intuitive new definitions of terms like "party," "person," and "government entity" have been added to the definition section (Rule 2.502). The new term "legal organization" refers to law firms, legal aid organizations, and public or private in-house legal offices. A new definition of "brief legal services" refers to legal assistance provided before becoming a party's attorney, or without becoming a party's attorney, such as giving advice, having a consultation, performing research, investigating case facts, drafting documents, or making limited third party contacts. The term "court record" has been amended to exclude data stored in a trial court's own case management system for management or tracking of cases, but generally includes all documents filed in a case, along with any orders or judgments.

6.1 Remote Access By The Public

Rule 2.503 – Revisions to Rule 2.503 generally retain the existing requirement, which states that trial courts that maintain electronic records must provide the public with remote and courthouse access to registers of actions, calendars, and indexes in all cases, and all court records in civil cases. The existing Rule 2.503 provided that public access to court records in certain proceedings (such as criminal, family law, and juvenile proceedings) must be provided at the courthouse, but remote access shall not be allowed. This rule has been amended to clarify that remote access in such proceedings may not be provided to the public (access by parties, attorneys, and other authorized persons are dealt with in Rules 2.515-2.528, as discussed below).

6.2 Remote Access By Parties, Attorneys, And Other Authorized Persons

Rules 2.515-2.522 – These new rules specify the terms and conditions under which records that are not publically available may be remotely accessed by parties, their attorneys, legal aid organizations, and other authorized persons (such as the staff at a party's law firm, legal aid providers, court appointees, and legal aid providers providing "brief legal services"). They also specify requirements for the court's remote access systems. Generally, a party or other authorized person should be provided with remote access to the same documents that person would be entitled to access at the courthouse. However, remote access is only available for documents that are already maintained electronically. Access is also subject to certain terms, including a prohibition on the distribution of court records for sale, a requirement of compliance with confidentiality laws, and any other terms and conditions imposed by the trial court. Violation of the terms is subject to sanctions and termination of access.

Rule 2.523 – The trial court's remote access system for parties, attorneys, and other authorized persons must have appropriate identity verification systems, which may be supplied by a vendor on a contract basis. Persons accessing records, and law firms or other legal organizations authorizing persons to access records, must provide the court with the information necessary to verify the user's identity.

Rules 2.524-2.526 – These new rules provide technical requirements for the trial court's remote access system for parties, attorneys, and other authorized persons. These systems must have secure access, encryption, and allow searches by case number or case caption, and the systems must ensure that a user may only access records that the user is permitted to access under the rules summarized above. If any user gains access to records he or she is not authorized to access, the user must report the unauthorized access to the court, destroy the document, and delete all browser history that identifies the record.

Rules 2.527-2.528 – These new rules require the trial court to impose other reasonable conditions necessary to preserve the integrity of its records and prevent unauthorized uses. They also provide that remote access is a privilege, not a right, and may be terminated by the court at any time and for any reason.

6.3 Remote Access By Government Entities

Rules 2.540-2.545 – New rules allow remote access by numerous government entities to certain categories of restricted court records. For instance, the Office of the Attorney General, district attorneys, and police departments may have remote access to electronic records in criminal and juvenile justice proceedings. The requirements, terms, and conditions for the Court's remote access system for government entities are generally similar to those specified for remote access by parties, attorneys, and other authorized persons.

7. Permanent Medical Excuse From Jury Duty

Rule 2.1009 – Persons with disabilities that preclude them from serving as jurors without disability-related accommodations may now apply for a permanent medical excuse from jury duty if their conditions are unlikely to resolve. The new rule specifies the procedures for applying for, granting, or denying such requests. The rule also provides that no eligible juror who can perform jury service with or without accommodations may be excluded solely due to their disability, and that any person who has received a permanent medical excuse may be reinstated to the potential juror rolls by filing a signed written request for the excuse to be withdrawn.

TITLE 3 - CIVIL RULES

8. Telephone Appearance Fees

Rule 3.670 – The fee for a telephonic appearance has been raised from $86 to $94.

TITLE 8 - APPELLATE RULES

9. Transmission Of Sealed And Confidential Records

Rule 8.45(d) – The rule relating to access to sealed and confidential records in the Court of Appeal has been amended to add a provision requiring that such records must be transmitted in a secure manner that preserves their confidentiality.

10. Conditionally Sealed Records In Appeals Challenging The Denial Of A Motion To Seal

Rule 8.46(e) – New subdivision (e) in Rule 8.46 states that where an appeal challenges a trial court's denial of a motion to seal a record, the record must be lodged as conditionally under seal, and must be maintained as conditionally under seal during the pendency of the appeal. When the decision on the appeal becomes final, the record must be returned to the filing party if it is in paper form, or must be permanently deleted if it is in electronic form.

11. Notice Required Prior To Unsealing A Sealed Record

Rule 8.46(f)(3) – Subdivision (f)(3) of Rule 8.46 requires a court to provide the parties with notice and an opportunity to oppose before unsealing a record on its own motion. A new addition to that rule requires that the notice state the reasons for unsealing the record.

TITLE 9 – LAW PRACTICE, ATTORNEYS AND JUDGES

12. Attorney Fingerprinting

Rule 9.9.5 – New Rule 9.9.5 requires the State Bar to enter into a contract with the California Department of Justice to obtain subsequent arrest notification services for active attorneys, and requires attorneys to be fingerprinted so that the State Bar may obtain criminal offender records and subsequent arrest notifications. If the State Bar is already receiving subsequent arrest notifications for any attorney, that attorney is deemed to have already satisfied the requirement. Any inactive attorneys must be fingerprinted before returning to active status. The rule specifies that the State Bar is to set an implementation schedule that requires all attorneys subject to fingerprinting to be fingerprinted by December 1, 2019. The State Bar's schedule imposes a $75/month penalty for attorneys who are not fingerprinted by May 1, 2019, which increases to $100/month if fingerprinting is not completed by August 1, 2019. Any attorney who is not fingerprinted by December 1, 2019, will be placed on involuntary inactive status. The rule requires attorneys to bear the costs of processing the fingerprints, but has accommodations for attorneys with demonstrable financial hardship, and attorneys who are physically unable to be fingerprinted due to disability, illness, accident, or other circumstances beyond their control.

TITLE 10 – JUDICIAL ADMINISTRATIVE RULES

13. Records Of Sexual Harassment Or Sexual Discrimination Settlements

Rule 10.500(f)(7) – Rule 10.500(f)(7) governs public access to judicial administrative records. Subdivision (f) contains exceptions to the public availability of such records, and subdivision (f)(7) exempts records relating to evaluations, complaints, or investigations regarding judges. A new amendment to that rule provides that this exemption does not apply to settlement agreements entered into on or after January 1, 2010, if public funds were spent to settle sexual harassment or sexual discrimination claims. If such settlement agreements are produced in response to a public request, the

names of any judicial officers may not be redacted, but the names of the complainants or witnesses may be redacted.

RULES OF PROFESSIONAL CONDUCT

NOTE: We typically do not cover the Rules of Professional Conduct in this presentation. However, this year, the Rules of Professional Conduct have undergone the first comprehensive revision in almost 30 years. The revisions bring the numbering of the Rules into line with the ABA's Model Rules, and replace the previous 46 rules with 69 new rules.

The current rules can be found on the State Bar's website at:
http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules

The State Bar also makes available the administrative history behind each of the new rules here:
http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Proposed-Rules-of-Professional-Conduct

Finally, a table cross-referencing the prior rules and the new rules can be found here:
http://www.calbar.ca.gov/Portals/0/documents/rules/Cross-Reference-Chart-Rules-of-Professional-Conduct.pdf

Due to the volume of the new rules, this summary will not attempt to catalog every change to the substance of the prior rules, but will only highlight some of the more important changes.

14. Attorney Competence

Rule 1.1 – Prior Rule 3-110, which prohibited attorneys from "intentionally, recklessly, or repeatedly" performing legal services without competence, has been renumbered and expanded to also bar a failure to act with competence due to "gross negligence." In addition, a provision has been added allowing an attorney to provide emergency legal advice outside an attorney's area of experience, if the advice is reasonably necessary and consultation of another lawyer is impractical.

15. Attorney Diligence

Rule 1.3 – Attorney diligence, which was formerly required as an aspect of attorney competence, has been given its own rule, which states that attorneys shall not "intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client."

16. Scope Of Representation

Rule 1.2 – New Rule 1.2, which has no counterpart in the prior rules, provides that attorneys shall generally abide by a client's decisions concerning the representation, including whether to settle, how to plead, whether to waive jury trial, and whether the client should testify. It also provides that a lawyer may limit the scope of a representation, if the limitation is reasonable, not prohibited by law, and consented to by the client.

17. Advising Or Assisting In A Violation Of Law – Conflicts Between State And Federal Law.

Rule 1.2.1 – Former Rule 3-210 allowed attorneys to advise the violation of a law, rule, or ruling that the attorney believes in good faith is invalid. The replacement rule, Rule 1.2.1, provides that a lawyer shall not advise or assist in "conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal." The new rule does allow an attorney to advise the client of the legal consequences of any proposed course of action, and to advise the client in seeking to determine the validity of any law, rule, or ruling. The comments to the rule explain that these provisions allow an attorney to assist a client in drafting, administering, interpreting, or complying with California laws, even if the client's actions might violate federal laws. However, if there is a conflict between California and federal law, the comment indicates that the lawyer must inform the client about the federal law, and may also be required to provide legal advice regarding the conflict. These new provisions were proposed in part to clarify an attorney's ability to advise dispensaries and other clients regarding marijuana laws.

18. Unconscionable Fees – New Factors

Rule 1.5 – Former Rule 4-200 set forth a list of eleven factors to consider in determining whether or not an attorney's fee is unconscionable (such as the amount involved and the result obtained, the novelty of the case, and the attorney's experience and reputation.). New Rule 1.5 retains these eleven factors and adds two additional factors: (1) whether the lawyer engaged in "fraud or overreaching" in negotiating or setting the fee; and (2) whether the lawyer has failed to disclose material facts.

19. Fee Sharing – Written

Rule 1.5.1 – In addition to the client consent required for fee sharing agreements under the previous rules, new Rule 1.5.1 requires attorneys to enter into a written agreement prior to splitting any fees and to make a written disclosure to the client before obtaining the client's consent. The written disclosure must state: (i) the fact that a division of fees will be made; (ii) the identity of the lawyers or law firms that are parties to the division; and (iii) the terms of the division.

20. Conflicts Of Interest – Current Clients

Rule 1.7 – The replacement for prior Rule 3-310(B) and (C) reformats the existing conflict of interest rules. The prior rule listed particular circumstances (such as the representation of multiple parties in the same action) that constitute a conflict requiring a client's informed consent. The new rule focuses on describing the general principles that create conflicts (such as when there is a significant risk that the lawyer's representation of a client might be limited by his responsibilities or relationships with others). The new rule also specifies that a waiver is only permitted if the attorney reasonably believes that the attorney will be able to competently and diligently represent the client, there is no law that bars the representation, and the conflict does not involve concurrent representation of two clients in a single action where one client is asserting claims against the other.

21. Payment Of Litigation Expenses For Indigent Clients

Rule 1.8.5 – The prior rule barring attorneys from paying a client's expenses contained an exception that allowed attorneys to advance litigation costs, where repayment was contingent on the outcome of the case. That exception is retained in the new rule, and a new exception has been added to allow payment of an indigent client's litigation costs, with no requirement of contingent repayment.

22. Sexual Relations With Clients – Blanket Prohibition

Rule 1.8.10 – Former Rule 3.120 allowed attorneys to have sexual relations with their current clients as long as the relations were not demanded as a condition of rendering legal services, there was no coercion, intimidation, or undue influence, and the relations did not cause the attorney to perform legal services incompetently. New Rule 1.8.10 simply prohibits attorneys from any sexual relations with current clients unless the attorney and client are married or registered domestic partners, or were engaged in a sexual relationship before the representation began. The new rule also specifies that where a violation of this rule is alleged by someone other than the client, no further investigation shall take place until the State Bar attempts to take the client's statement and considers the burden that an investigation will impose on the client.

23. Relations With Clients – Imputation Of Ethical Rules To Entire Law Firm

Rule 1.8.11 – New Rule 1.8.11 applies Rules 1.8.1 through 1.8.9 (relating to an attorney's relationship with a client) to all of the associates and partners of the attorney's law firm, regardless of whether or not they participate in the representation. This includes the rules relating to business relations with a client, use of client information, client gifts, payment of client expenses, compensation from more than one client, and contractual limitations of liability, but does not include the prohibition on sexual relations with a client.

24. Conflicts Of Interest – Successive Representations

Rule 1.9 – Former Rule 3-310(E) provided that an attorney may not represent a client adverse to a former client, where the attorney obtained confidential information relevant to the representation of the new client. In case law, courts have presumed that confidential information has been exchanged where there is a "substantial relationship" between the subject matter of the two representations. New Rule 1.9 codifies the "substantial relationship" concept, barring successive representation of adverse clients in a "substantially related matter." However, the comments to Rule 1.9 expand the substantial relationship concept to matters where there is a risk of violating *either* the duty of confidentiality or the limited duty of loyalty owed to the former client. The limited duty of loyalty to a former client is the duty to avoid doing "anything that will injuriously affect the former client in any matter in which the lawyer represented the former client."

25. Conflicts Of Interest – Imputation Of Conflicts To Entire Law Firm And Ethical Screening

Rule 1.10 – New Rule 1.10 incorporates common law principles that impute one attorney's conflicts of interest to the attorney's entire firm. The rule has two exceptions. The first applies where the

attorney's conflict is based on a personal interest that does not risk impairing the other attorney's representation of the client. The second applies where the conflict is based on a lawyer's association with a prior firm and: (1) the lawyer did not participate in the same or a substantially similar matter as the current representation, (2) the lawyer is screened from all participation in the matter, and does not receive any compensation from the matter, and (3) the former client is given written notice, including information about the screening procedures.

26. Conflicts Of Interest – Former Judges, Arbitrators, Mediators, Or Other Neutrals

Rule 1.11 – New Rule 1.11 sets forth conflict of interest rules the prohibit former judges, law clerks, staff attorneys, arbitrators, mediators, and other neutrals from representing any party in one of the matters they participated in while acting as a judge, law clerk, staff attorney, arbitrator, mediator, or other neutral. The rule also imputes this conflict to the lawyer's firm, but allows ethical screening if the prior participation in the case was not as a mediator or settlement judge. Finally, the rule also prohibits judges, arbitrators, and mediators from seeking employment from any lawyers or parties in any matter currently before them, but allows law clerks and staff attorneys to do so with the court's permission.

27. Representing Organizations – Internally "Reporting Up" Violations Of Law Is Now Required Rather Than Optional

Rule 1.13 – Former Rule 3-600 stated that, where an organization's attorney knows that an agent of the organization is acting in a way that is or may be a violation of law, or in a manner likely to result in substantial injury to the organization, the attorney may take such actions as appear to be in the organization's interest, which may include reporting the action to the next higher authority in the organization, up to the highest internal authority within the organization. New Rule 1.13 states that, where there is a violation of law, and it appears likely to result in substantial injury to the organization, the attorney must report the violation to higher internal authorities, unless the attorney reasonably believes that it is not necessary to do so in the best interests of the organization. Of course, under either rule, the attorney is precluded from revealing privileged information to those outside the organization.

28. Client Trust Accounts – Advance Fee Payments, Flat Fees And Retainers

Rule 1.15 – New Rule 1.15 is generally similar to former Rule 4-100 and requires funds received or held for the benefit of a client to be placed in a client trust account. The new rule, however, specifically provides that this includes any advances for fees (commonly called retainers). The rule does have an exception for flat fees paid in advance, if the client consents after receiving a written disclosure. In addition, a comment seems to indicate that "true" retainers (i.e. fees paid to reserve an attorney's availability for a specified period of time, but not paid on account of any legal services to be rendered) do not qualify as advance fees. Because the rule refers to funds "received or held," this rule applies to all such funds, even if they were received before the rule came into place.

29. Prospective Clients – Duties

Rule 1.18 – New Rule 1.18 largely codifies common law regarding the duties owed by attorneys who receive confidential information from prospective clients. This confirms that: (a) attorneys owe a duty of confidentiality to prospective clients even if they do not become clients, and (b) an attorney is precluded from representing adverse parties in a substantially related matter where the attorney received confidential information from a prospective client. The rule also specifies procedures whereby a law firm may screen an attorney who received no more information from the prospective client than necessary to determine whether or not to accept the representation.

30. Delay Tactics

Rule 3.2 – Rule 3.2 has no counterpart in the previous rules, and bars attorneys from using means that have no substantial purpose other than to delay proceedings or cause needless expense.

31. Candor Toward The Tribunal

Rule 3.3 – New Rule 3.3 adds a provision requiring candor toward the tribunal to the Rules of Professional Conduct. The rule mirrors ABA Rule 3.3, which has the same title. Of particular importance is (d), which provides that, in an ex parte proceeding where notice to the opposing party is not required or given and the opposing party is not present, the lawyer shall inform the court of all material facts known to the lawyer that will enable the court to make an informed decision, regardless of whether those facts are adverse to the position of the party seeking ex parte relief. In this context, "known" means actual knowledge of the fact in question.

32. Attorneys As Witnesses

Rule 3.7 – Former Rule 5-210 prohibited lawyers from acting as an advocate when they are expected to testify as a witness before a jury, unless either (a) the testimony related to an uncontested matter or the nature and value of legal services provided in the action, or (b) the attorney obtained the client's informed consent. New Rule 3.7 carries forward this prohibition, but expands it from jury trials to all trials. The new rule also clarifies that one attorney in a firm may act as an advocate in a matter, even though another attorney in the same firm is likely to be called as a witness.

33. Nonadjudicative Matters

Rule 3.9 – This new rule requires attorneys appearing before legislative or administrative hearings to disclose the fact that they are appearing in a representative capacity. A comment indicates that the rule does not require disclosure of the identity of the client.

34. Interactions With Unrepresented Parties

Rule 4.3 – This entirely new rule governs attorneys' interactions with unrepresented parties. In such interactions, an attorney may not state or imply that the attorney is disinterested, and if the attorney knows or reasonably should know the person incorrectly believes the attorney is disinterested, the attorney is required to correct that misunderstanding. In addition, if the unrepresented party has interests that conflict with the attorney's client, the attorney is prohibited from giving legal advice,

except that the attorney may advise the party to secure counsel. Finally, the rule prohibits the attorney from seeking to obtain privileged or confidential information that cannot be disclosed without violating a duty to another, or that the attorney is otherwise not entitled to receive.

35. Inadvertently Produced Materials

Rule 4.4 – This new rule incorporates the existing common law requirement that a lawyer who receives an inadvertently produced document must: (1) refrain from examining the document any more than necessary to determine that it is privileged, and (2) promptly notify the sender.

36. Subordinate Attorneys And Employees

Rules 5.1-5.3 – Rules 5.1 and 5.2 require managing attorneys to take reasonable steps to ensure that subordinate attorneys and non-attorney employees comply with the Rules of Professional Conduct, and provide that a managing attorney may be held responsible for a subordinate's violation of the rules, if the managing attorney orders or ratifies the subordinate's conduct, or fails to take reasonable action to avoid or mitigate the impact of the violation. Rule 5.2 requires subordinate attorneys to follow the Rules, despite any contrary instruction by managing attorneys, but also states that a subordinate attorney does not violate the Rules by following a supervising attorney's reasonable interpretation of an arguable question of professional duty.

37. Discrimination, Harassment, and Retaliation

Rule 8.4.1 – Previous Rule 2-400 prohibited discrimination in law firms, but did not allow disciplinary proceedings to take place until after a finding of unlawful discrimination is made by a court or other tribunal of competent jurisdiction. New Rule 8.4.1 expands the prohibition to include unlawful harassment and retaliation, and removes the requirement that a prior adjudication must take place before disciplinary proceedings can begin.

SIGNIFICANT CASES
Decided in 2018

ALTERNATIVE DISPUTE RESOLUTION

1. Arbitrability – Consent By Conduct – Party Consented To Arbitrator's Jurisdiction To Decide Arbitrability By Voluntarily Participating In Arbitration Proceeding.

Douglass v. Serenivision, Inc. (2018) 20 Cal.App.5th 376 – In *Douglass*, the Plaintiff challenged an arbitration award, claiming that the arbitrator did not have jurisdiction over the underlying dispute. The trial court held that the Plaintiff's challenge was untimely because it was filed more than 100 days after service of the award, and that the Plaintiff had consented to the arbitrator deciding the issue of jurisdiction, or "arbitrability." The Court of Appeal affirmed on both grounds, noting that the Plaintiff: (1) filed an answer in the arbitration that did not object to the arbitrator's power to decide jurisdiction, (2) told the arbitrator that he is "voluntarily submitting" to arbitration to avoid the cost of litigation, (3) appeared without objection at multiple prehearing conferences, (4) requested that the arbitrator require the Defendant to post a bond, and (5) purported to rescind his voluntary participation after the arbitrator refused to impose a bond. While the Court acknowledged that the Plaintiff could have validly conditioned his consent to arbitration, the Plaintiff's condition was never mentioned until months after he unconditionally answered the arbitration demand and participated in pre-hearing conferences. As such, his attempt to retroactively impose a condition was "too little, too late." Since the Plaintiff had consented to the arbitrator's power to decide the issue of arbitrability, the Court applied an "extremely narrow" standard of review to affirm the arbitrator's decision on jurisdiction and on the merits. The Court also affirmed the trial court's decision on timeliness, rejecting the Plaintiff's argument that a challenge to jurisdiction can be made at any time, because subject matter jurisdiction cannot be conferred by waiver or consent. The Court explained that while subject matter jurisdiction cannot be conferred on a court by waiver or consent, it can be conferred on an arbitrator by waiver or consent.

2. Arbitration Agreements – Enforceability – Arbitration Provision In Law Firm Partnership Agreement Is Unconscionable Where It Effectively Prohibits Informal Discovery, Limits Statutory Remedies, And Requires Partner To Pay Half The Arbitration Costs.

Ramos v. Superior Court (2018) 28 Cal.App.5th 1042 – In *Ramos*, the Defendant law firm moved to compel arbitration of claims for discrimination, retaliation, wrongful termination, and anti-fair-pay practices made by the Plaintiff partner of the firm. The Plaintiff opposed the motion, arguing she was an employee of the law firm as an "Income Partner," and therefore the Supreme Court's unconscionability analysis from *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 applied to determine the enforceability of the agreement. The trial court granted the Defendant's motion to compel arbitration, finding the Plaintiff was "in a partnership relationship," not an employment relationship for purposes of the motion. The Court of Appeal granted mandate relief, finding that it was unnecessary to resolve the question of whether the Plaintiff was an employee. The Court held *Armendariz* applied to the Plaintiff's

arbitration claims because the Defendant was in a superior bargaining position vis-à-vis the Plaintiff that was at least "akin" to that of an employer-employee relationship. There was no evidence in the record that the Plaintiff had an opportunity to negotiate the arbitration provision, which had been adopted by hundreds of capital partners before the Plaintiff joined the firm, and any modification of which required a vote of two-thirds of the capital partners. The Court further found that the arbitration provision was rendered unconscionable by terms requiring the Plaintiff to pay her own attorney fees, bear half of the costs of arbitration, and effectively prohibiting any informal discovery, by requiring the Plaintiff to keep "all aspects of the arbitration" secret. Requiring discrimination cases be kept secret unreasonably favors the employer to the detriment of employees seeking to enforce unwaivable statutory rights, and may discourage potential plaintiffs from filing discrimination cases. Because the Court could not cure the unconscionability by striking the unlawful clauses, and would instead have to reform the parties' agreement in order to enforce it, the Court found that the agreement was void as a matter of law.

3. Arbitration Agreements – Enforceability – State Or Federal Law – FAA's Exemption For Transportation Workers Applies Even If Employer Is Not In The Transportation Industry.

Muro v. Cornerstone Staffing Solutions (2018) 20 Cal.App.5th 784 – The Federal Arbitration Act has a statutory exemption that applies to employment agreements for transportation workers "engaged in" interstate commerce. In *Muro*, the Plaintiff employee claimed that this exemption applied to his contract for employment as a truck driver, and that under California law, the class action waiver in that contract was invalid. The Defendant employer argued that the exemption did not apply, because the Defendant was a staffing agency rather than a transportation company, and thus was not part of the "transportation industry." The trial court agreed with the Plaintiff and denied the Defendant's motion to compel arbitration, and the Court of Appeal affirmed. The Court of Appeal reasoned that the plain language of the statute exempts the employment contracts of transportation workers without mentioning whether or to what extent the employers' businesses must be devoted to the transportation industry. Because the Plaintiff's employment involved driving trucks across state lines, he was an employee engaged in interstate commerce, and his employment contract was exempt from the FAA. After deciding that California law, rather than the FAA, applied to the dispute, the Court of Appeal also held that the trial court did not abuse its discretion by finding the class action waiver to be unenforceable.

4. Arbitration Agreements – Enforceability – Third Parties – Arbitrator Cannot Issue Award Against Nonsignatories, Absent A Judicial Order Compelling Arbitration.

Benaroya v. Willis (2018) 23 Cal.App.5th 462 – In *Benaroya*, the Petitioner's production company, Benaroya Pictures, hired Bruce Willis to star in a motion picture. The contract contained an arbitration clause, so the Respondents, including Mr. Willis and his company, commenced arbitration proceedings against Benaroya Pictures after a dispute arose. The

Respondents then moved to amend their arbitration demand to name the Petitioner as an individual, even though he was not a party to the agreement, using an alter ego theory. The arbitrator granted the request, and ultimately awarded damages against both the Petitioner and his company. The trial court denied the Petitioner's request to vacate the award and granted the Respondents' request to confirm the award. The Court of Appeal reversed. The Court first recognized that although there is a policy in favor of arbitration, the right to pursue claims in a judicial forum is substantial. Thus, ordinarily, only a party that has agreed in writing to arbitration may be compelled to submit to arbitration proceedings. Although there are circumstances—including alter ego—where nonsignatories to an arbitration agreement can be compelled to arbitrate, the question of whether a nonsignatory is a party to an arbitration agreement is one that the trial court must decide in the first instance. Accordingly, by deciding that issue himself, the arbitrator exceeded his jurisdiction, and the award against Petitioner had to be reversed. The Court also distinguished the *Douglass* case (discussed in item 1 above), by noting that the Petitioner had repeatedly disputed the arbitrator's power to determine the alter ego issue, and never voluntarily submitted to the arbitrator's jurisdiction.

5. Arbitration Agreements – Enforceability – Waiver – Filing An Action To Enforce A Mechanics Lien Without Complying With CCP § 1281.5 Waives Right To Arbitrate Separate Construction Defect Action.

Von Becelaere Ventures, LLC v. Zenovic (2018) 24 Cal.App.5th 243 – In *Von Becelaere Ventures*, the Plaintiff sued the Defendant for construction defect claims, and the Defendant filed a separate action to enforce a mechanic's lien. The two actions were deemed related, and the Defendant moved to compel arbitration of the construction defect action, pursuant to an arbitration provision in the parties' construction contract. The trial court denied the motion, holding that the arbitration agreement was waived when the mechanic's lien action was filed without requesting a stay under CCP § 1281.5. The Court of Appeal affirmed. Section 1281.5 provides that a party bringing an action to enforce a mechanic's lien "does not thereby waive any right of arbitration the person may have pursuant to a written agreement to arbitrate, if" the party either alleges an intent to seek a stay and not to waive any right of arbitration, or files an application for stay at the time of filing the complaint. The Defendant argued that his failure to seek a stay only waived his right to arbitrate the mechanic's lien action, but not his right to arbitrate the separate construction defect action. The Court of Appeal pointed to the broad language of the statute, and concluded that failure to comply waived "any right to arbitration" under the construction contract, including the right to arbitrate construction disputes.

6. Arbitration Awards – Challenges – Inadmissibility Of Declarations By Arbitrators – Evidence Code § 703.5's Prohibition On Arbitrator Declarations Applies To Appraisers Selected By One Party, Not Just The Neutral Third Appraiser Selected By The Parties' Appraisers.

Khorsand v. Liberty Mutual Fire Insurance Co. (2018) 20 Cal.App.5th 1028 - Evidence Code § 703.5, bars the admission of declarations of arbitrators, except for very limited circumstances. In *Khorsand*, the parties each appointed one appraiser, who mutually appointed an umpire to resolve a damage dispute under an insurance policy. The Plaintiffs challenged the award in the trial court, and submitted a declaration from their appraiser in support of the challenge. The trial court admitted the declaration over the other side's objection, and the Court of Appeal reversed, holding that the appraisal was a type of arbitration, and the appraiser's declaration was subject to the prohibition in § 703.5. The Plaintiffs argued because the appraisers were selected by the parties, they were more like advocates than arbitrators, and that only the umpire played the role of an arbitrator. The Court of Appeal disagreed, reasoning that: (1) the statutory arbitration scheme uses the term "[n]eutral arbitrator" when it refers exclusively to an arbitrator not selected by one party, and (2) if the Legislature had intended to exclude party-selected arbitrators from the scope of § 703.5, it could have done so by using the term "neutral arbitrator" rather than the more expansive term "arbitrator."

7. Arbitration Awards – Challenges – Parties May Not Agree To Judicial Review Of Interim Awards.

Maplebear, Inc. v. Busick (2018) 26 Cal.App.5th 394 – CCP § 1283.4 states that an arbitration award "shall include a determination of all the questions submitted to the arbitrators," and § 1285 allows parties to file petitions to confirm, correct or vacate an award. Prior authority has read these provisions to preclude judicial review of interim arbitration awards. In *Maplebear*, the arbitrator granted a "Partial Final Award" holding that the Respondent was entitled by the arbitration agreement to pursue class-wide arbitration. The Claimant filed a petition to vacate that award, which the trial court denied for lack of subject matter jurisdiction. The Court of Appeal affirmed, noting that the trial court only has jurisdiction over awards that determine all of the questions submitted, and that piecemeal review of interim awards would contravene the public policy in favor of arbitration as an inexpensive means of dispute resolution. The Claimant argued that parties should be allowed to seek review of interim awards where their contract calls for expanded judicial review. The Court of Appeal disagreed, holding that subject matter jurisdiction cannot be conferred by consent. Thus, while parties may structure their arbitrations as they see fit, they may not alter the "statutory constraints that limit when and under what circumstances courts may review arbitrators' rulings."

8. Arbitration Awards – Challenges – Undue Means – Confidential Arbitration Brief Not Shown To Opposing Party Constituted "Undue Means" Under CCP § 1286.2.

Baker Marquart LLP v. Kantor (2018) 22 Cal.App.5th 729 – One of the limited statutory grounds for vacating an arbitration award is when the award is procured by "corruption, fraud or other undue means." (CCP § 1286.2(a)(1).) In *Baker Marquart*, the Petitioner law firm challenged an arbitration award in favor of the Respondent former client under § 1286.2. The Respondent's arbitration claim alleged that the Petitioners increased the percentage of their contingency fee, even though the firm did not complete 2 of 9 tasks that were required to qualify for the percentage increase. At the arbitration, the Arbitrators allowed the Respondent to submit a confidential arbitration brief, in which the Respondent argued that none of the 9 tasks were completed satisfactorily. When the Petitioner learned of the confidential brief at the hearing, the Arbitrators refused to allow the Petitioner to see it. The Arbitrators awarded a refund of the contested contingency fee increase to the Respondent, and the trial court denied the Petitioner's request to vacate the award. The Court of Appeal reversed, explaining that the confidential brief constituted an improper ex parte communication with the Arbitrators. Because the award was based on a failure to perform tasks addressed in the confidential brief, but not in the Respondent's original arbitration claim, the award was procured by undue means. Accordingly, the Court of Appeal ordered the trial court to vacate the award.

9. Arbitration Fees – Where Plaintiff Can No Longer Afford Arbitration, Defendant May Be Required To Pay Arbitration Fees Or Forgo Arbitration.

Weiler v. Marcus & Millichap Real Estate Investment Services, Inc. (2018) [Thompson, Bedsworth, Moore] 22 Cal.App.5th 970 **–** In *Weiler*, the Plaintiffs had sued the Defendants real estate brokerage firms in an underlying lawsuit that was sent to arbitration. Over the Plaintiffs' objections, the arbitration provider appointed three arbitrators, rather than one, at an hourly rate of $1,450.00. After about three years of arbitration proceedings, the Plaintiffs filed a declaratory relief action, contending that they could no longer afford to pay their share of the arbitration fees, and seeking an order that either (a) the Defendants shall pay the Plaintiffs' share of the costs of arbitration, or (b) the arbitration shall be terminated and the underlying action be remanded to superior court. The trial court viewed the claim as an "unconscionability" issue, and granted summary judgment against the Plaintiffs on the grounds that the arbitration agreement was not unconscionable *at the time it was made*. The Court of Appeal reversed, holding that the relief requested by the Plaintiffs is available upon a proper showing of inability to pay. The Court explained that the question was not one of unconscionability, but one of universal access to the justice system. Ensuring access to the justice system required an analysis of the Plaintiffs' present ability to pay, rather than unconscionability at the time of contracting. Because the Plaintiffs presented triable issues of material fact by submitting declarations detailing their financial situation, the Court reversed summary judgment and remanded the case to the trial court.

ANTI-SLAPP

10. First Prong – Allegations In Complaint – Defendant Bringing An Anti-SLAPP Motion May Rely On Complaint's Allegations, Even When The Defendants Deny Those Allegations.

Bel Air Internet, LLC v. Morales (2018) 20 Cal.App.5th 924 - The Plaintiff in *Bel Air Internet* sued for breach of contract and intentional interference with a contract, alleging that the Defendants, who were former employees, allegedly "advised, counseled, encouraged and sought to persuade" other employees to quit and file suit against the Plaintiff for employment law violations. The Defendants filed an anti-SLAPP motion, arguing that the alleged encouragement to sue constituted protected prelitigation activity, but also filed declarations claiming that they had not encouraged other employees to sue. The trial court denied the motion, concluding that there was no "good faith" intention to sue, and thus no protected activity under the first prong, because the Defendants' own declarations stated that the Defendants had not encouraged anyone to sue. The Court of Appeal reversed, holding that "when the complaint itself alleges protected activity, a moving party may rely on the plaintiff's allegations alone" to show that the complaint arises from a protected activity. The Court further explained that the purpose of the anti-SLAPP statute (to weed out meritless claims) would be frustrated if an anti-SLAPP motion could not be filed when a complaint's allegations of protected activity were untrue.

11. First Prong – Allegations In Complaint – Where Complaint Specifically Disclaims Reliance On Protected Acts, Defendant Cannot Prevail In First Prong By Showing That Its Only Acts Were Protected Activities.

Central Valley Hospitalists v. Dignity Health (2018) 19 Cal.App.5th 203 – In *Central Valley Hospitalists*, the Plaintiff hospitalist group sued the Defendant hospital operator, for various economic interference claims. The complaint specifically stated that it was not alleging wrongful acts relating to any peer review activities, but also failed to allege any other specific wrongful acts that could have constituted the alleged interference. In fact, a demurrer on that ground was sustained with leave to amend, and the complaint was ultimately dismissed. However, before the demurrer was granted, the Defendants filed an anti-SLAPP motion, and submitted evidence that "all of its actions with regard to [Plaintiff] and its physicians arise from peer reviews," (which the Defendant argued were protected activities). The trial court denied the anti-SLAPP motion, explaining that a defendant could not "satisfy its first prong burden by its own evidence of what it believes the plaintiff's claims are based on." The Court of Appeal enthusiastically agreed, stating that the Defendant "is very wrong," and quoting existing authority that "[i]f there are no acts alleged, there can be no showing that alleged acts arise from protected activity." The Court also included a lengthy discussion of possible sanctions against the Defendant for a frivolous appeal, invoking a holding from the late Justice Sills that the appeal "practically has the words 'brought for reasons of delay' virtually tattooed on its forehead."

Ultimately, the Court declined to issue sanctions, since the Plaintiff failed to brief the issue, but it appears that the Court of Appeal's patience with meritless anti-SLAPP motions is wearing thin.

12. First Prong – "Mixed" Causes Of Action – The Numbered Causes Of Action Set Out In A Complaint Do Not Determine What Claims May Be Stricken In An Anti-SLAPP Motion.

Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism (2018) 23 Cal.App.5th 28 [Fybel, O'Leary, Bedsworth] – In *Baral v. Schnitt* (2016) 1 Cal.5th 376 the California Supreme Court held that anti-SLAPP motions can be directed to specific allegations of a complaint, not just entire causes of action. The Court in *Newport Harbor Offices & Marina* (*NHOM*) demonstrated how that holding applies to a complaint that alleges numbered causes of action based on both protected and unprotected activity. The Defendant in that case sought to strike the Plaintiff's second and third causes of action for breach of contract and declaratory relief, as well as specific paragraphs that the Plaintiff claimed were based on protected activities. The Court first conducted a detailed paragraph by paragraph review of the allegations challenged in the anti-SLAPP motion. The Court then arrived at a list of objectionable paragraphs that both (a) alleged protected activities, and (b) formed the basis for a cause of action, rather than being merely incidental to a cause of action. The Court then held that because the anti-SLAPP motion sought to strike both entire causes of action, and (in the alternative) specific allegations, it was unnecessary to determine whether or not the gravamen of each cause of action was a protected activity, because "we understand *Baral* as directing us to strike just the allegations of protected activity and the 'claims' arising from them." In determining what "claim" to strike, the Court cited language from *Baral* indicating that neither the form of the complaint nor the primary right at stake is determinative. Accordingly, instead of relying on the separate numbered causes of action in the Complaint, the Court simply ordered that the claims arising from the list of objectionable paragraphs, as well as the paragraphs themselves, shall be stricken. The Court then explained that the remainder of the second and third causes of action were not to be stricken, since they were based in part on unprotected activities.

13. First Prong – In Determining Whether Claims Are Based On Protected Activity, The Basis For Each Defendant's Liability Must Be Analyzed Separately.

Area 51 Productions, Inc. v. City of Alameda (2018) 20 Cal.App.5th 581 – In *Area 51 Productions*, the Court of Appeal clarified that where a cause of action is based on the unprotected activity of one defendant, and the protected activity of other defendants, the cause of action is subject to an anti-SLAPP motion by those other defendants. The Plaintiff, an event planning company, claimed that the City of Alameda entered into an implied contract to license public facilities for several private events, and that the City then breached that contract by refusing to license the facilities. The Plaintiff sued the City, a realty company, and several individuals who allegedly participated in the refusal to lease the facilities. The Defendants filed an anti-SLAPP motion, which the trial court denied. The Court of Appeal affirmed the denial

with regard to the City, because the act that gave rise to the City's alleged liability (the refusal to license the facilities) was not, itself, a protected activity. With regard to the other defendants, however, the Court of Appeal reversed, holding that the basis for each party's liability must be analyzed separately. Unlike the City, the other Defendants were not being sued for the unprotected action of refusing to license the public facilities, since they had no contract to license the facilities. Instead, they were being sued for their communicative acts that precipitated the City's refusal to license the facilities. Unlike the City's refusal itself, these communicative acts were petitioning activities in connection with an official executive proceeding, which are expressly protected under CCP § 425.16(e)(2). The Court of Appeal also rejected the argument that the denial of the lease was not an "official proceeding," holding that "any form of deliberative executive decisionmaking" suffices as an official proceeding. Finally, the Court of Appeal also held that the Plaintiff's evidence failed as a matter of law to substantiate the Plaintiff's claims under the second prong.

14. Limited Civil – Anti-SLAPP Motions May Not Be Brought In Limited Civil Cases.

1550 Laurel Owner's Assn., Inc. v. Appellate Division of Superior Court (2018) 28 Cal.App.5th 1146 – Code of Civil Procedure § 92(d) provides that the only motions to strike allowed in limited civil actions are those brought on the ground that the damages or relief sought are not supported by the allegations of the complaint. In *1550 Laurel Owner's Assn.*, the trial court denied an anti-SLAPP motion on the grounds that such motions are motions to strike that are not authorized to be brought in limited civil cases. The Appellate Division of the Superior Court reversed, and the Court of Appeal issued a writ of mandate approving the trial court's original order. The Court noted that recent amendments imposing meet and confer requirements on ordinary motions to strike expressly exempted special motions to strike under the anti-SLAPP statute. This indicated that if the Legislature had intended to exclude anti-SLAPP motions from the restriction in section 92(d), it would have done so explicitly. Accordingly, the Court held that anti-SLAPP motions may not be brought in limited civil cases.

15. Second Prong – Disputed Representations That Michael Jackson Sang Tracks On An Album Were Not "Commercial Speech" And Received Full First Amendment Protection.

Serova v. Sony Music Entertainment (2018) 26 Cal.App.5th 759 – In *Serova*, the Plaintiff filed claims under the Unfair Competition Law ("UCL") and the Consumers Legal Remedies Act ("CLRA") against the producers of a posthumous Michael Jackson album. The Plaintiff claimed that the album cover and a promotional video falsely represented that Jackson sang all ten of the songs on the album, when three of the songs were allegedly *not* sang by Jackson. The trial court held that the Plaintiff had a likelihood of prevailing under the second prong of the anti-SLAPP statute, finding that the album cover and video were advertisements that constituted "commercial speech," for the purposes of the UCL and CLRA, and were likely to mislead the public. The Court of Appeals disagreed, holding that courts must consider three elements to determine

whether or not speech is commercial: "the speaker, the intended audience, and the content of the message." The Court held that the first two elements supported a finding that the speech was commercial, but that the third element showed that the speech was not the type of speech that could be regulated as commercial speech for two reasons. First, in most cases upholding commercial speech regulations, the speaker is making representations about its own business operations, of which it has personal knowledge and a superior ability to verify the truth. Here, the Court noted that the identity of the singer on the disputed songs was a matter of public interest and debate, and that the Defendants did not have personal knowledge of the singer's identity. Thus the basis for regulating commercial speech in other cases where the speaker has superior knowledge did not apply. Second, the Court noted that music enjoys full protection under the First Amendment, and that the representations at issue in the case directly related to the fully-protected contents of the album, and the historical significance of the disputed songs. Balancing all of these factors, the Court held that the album cover and promotional video were entitled to full protection under the First Amendment, and did not constitute commercial speech subject to regulation under the UCL and CLRA.

16. Second Prong – Divorce Exception To Litigation Privilege Applied To Statements Made In Defendant's Marital Dissolution Action; Trial Court's Grant Of Temporary Restraining Order Did Not Establish Absence Of Probable Cause Under Divorce Exception.

L.G. v. M.B. (2018) 25 Cal.App.5th 211 – In *L.G.*, the Defendant's former nanny sued for defamation, invasion of privacy, false light, and intentional infliction of emotional distress, based on a declaration filed by the Defendant in a marital dissolution action. Specifically, the Defendant filed an application for a restraining order against her ex-husband, in which she claimed that the Plaintiff had a sexual relationship with the ex-husband, became pregnant with his child, received large amounts of money, including money for an abortion, and took the Defendant's children to Europe at the ex-husband's instruction without the Defendant's permission. The analysis of the Defendant's anti-SLAPP motion was limited to the second prong, and the Defendant argued that the litigation privilege barred the Plaintiff's claims. The Court of Appeal disagreed, holding that the claims fell within the so-called "divorce proviso" of Civil Code § 47(b)(1), which creates an exception from the litigation privilege for allegations in a marital dissolution or legal separation regarding a person against whom no affirmative relief is sought. The Divorce Proviso itself is subject to an exception for material and relevant sworn statements, where the person making the statement has reasonable and probable cause. Amicus Curiae noted persuasive policy reasons for construing the exception narrowly to exclude declarations made in support of domestic violence restraining orders, but the Court held that these policy concerns must be addressed to the Legislature, and could not alter the plain language of the statute. The Court also held that the granting of the restraining order against the ex-husband did not establish the Defendant's probable cause as a matter of law, since the order could have been granted for reasons not relating to the allegations concerning the Plaintiff.

Because the litigation privilege did not apply, the Court affirmed the trial court's denial of the anti-SLAPP motion.

17. Tactical Use Of Anti-SLAPP Motions.

Yeager v. Holt (2018) 23 Cal.App.5th 450 – In *Yeager*, famed test pilot Charles "Chuck" Yeager and his wife Victoria sued their former attorneys for malpractice and related claims, including misappropriation of General Yeager's name on the Defendants' website. The Defendants had briefly represented the Yeagers in previous matters and successfully sued Victoria for attorney fees. The Defendants filed an anti-SLAPP motion, claiming that the Yeagers' lawsuit was simply retribution for the prior attorney's fee suit. The trial court denied the motion, and the Defendants appealed, resulting in a stay in the trial court. The Court of Appeal affirmed, noting that California courts have frequently held that a typical attorney malpractice suit is not subject to an anti-SLAPP motion. The Court also held that General Yeager's fame does not transform the commercial use of his name into an issue of public interest. The Court noted the potential for abuse of the anti-SLAPP statute by defendants seeking "a very cheap hiatus in the proceedings" during appeal, and concluded that "filing an anti-SLAPP motion was not an effective way to litigate [the case]." Despite allusions to the impropriety of the anti-SLAPP motion and the appeal, the Court stopped shy of suggesting or imposing sanctions.

APPELLATE PROCEDURE

18. Appealability – Postjudgment Discovery Orders – Postjudgment Order Compelling Third Party Discovery Is Appealable.

Finance Holding Co., LLC v. The American Institute of Certified Tax Coaches, Inc. (2018) 29 Cal.App.5th 663 – In *Finance Holding Co.*, the Fourth District, Division One, addressed the appealability of post-judgment discovery orders against third party witnesses. The California Supreme Court has held that, in order for a postjudgment order to be appealable, "the challenged order must be a final determination of the rights of the parties and not be appealable as part of later proceedings." The Court in *Finance Holding Co*. recognized conflicting Court of Appeal decisions on the issue of post-judgment discovery orders against third parties, and considered the policy reasons for designating such orders as non-appealable (for example, preventing delay or the concealment of assets that could take place during an appeal). Nevertheless, the Court held that such policy considerations are for the legislature, and that under the Supreme Court's formulation, post-judgment discovery orders are appealable, because they are the "final determination of the rights" of those third parties, and leave nothing to be done but to comply. On the merits of the appeal, the Court of Appeal reversed the discovery order, which required the production of documents relating to assets not owned by the judgment debtor, which were outside the scope of permissible post-judgment discovery.

19. Mootness – Misjoinder Cured During Appeal Moots Misjoinder Issue, But Does Not Moot Challenge To Order Granting Demurrer Without Leave To Amend.

Jensen v. The Home Depot, Inc. (2018) 24 Cal.App.5th 92 – In *Jensen*, two former employees of Home Depot sued for disability discrimination based on two unrelated events. The Defendant demurred based on misjoinder. The Defendant's first demurrer was granted with leave to amend, and the second was granted without leave to amend, because the Plaintiffs failed to demonstrate how the complaint could be amended to cure the misjoinder. The Plaintiffs appealed, arguing that the trial court erred by dismissing the complaint without leave to amend, rather than severing the claims. During the appeal, one Plaintiff settled and dismissed her claims, thereby curing the misjoinder. The Defendant moved to dismiss the appeal based on mootness. The Court of Appeal denied the motion to dismiss, and reversed the order denying leave to amend. The Court held that the dismissal of one Plaintiff rendered the misjoinder issue moot, but that the remaining Plaintiff's challenge to the dismissal without leave to amend was not moot. The Court explained that the trial court did not err in its initial ruling, because no amendment to cure the misjoinder was proposed in the trial court. However, the Court also explained that when a demurrer is granted without leave to amend, an amendment can be proposed for the first time on appeal. Since the dismissal of one Plaintiff cured the misjoinder, the Court reversed the order denying leave to amend, and directed the trial court to deem the operative complaint to be amended by the dismissal.

ATTORNEY'S FEES

20. Contractual Attorneys' Fees – A Party Obtaining A Judgment Greater Than Its Settlement Offer Is Not Necessarily The Prevailing Party.

Marina Pacifica Homeowners Assn. v. Southern Cal. Financial Corp. (2018) 20 Cal.App.5th 191 – In *Marina Pacifica Homeowners Assn.*, the Defendant condo developer asserted the right to $97 million in assignment fees (based on a 10% calculation) from the members of the Plaintiff homeowners association, who claimed that the Defendant had breached the parties' agreement, and that the alleged fee was invalid. The trial court found that the Defendant had breached the agreement by charging an inflated fee, but also declared that the Defendant developer was owed a reduced $39 million fee (based on a 4% calculation). The trial court then declared that neither party was the prevailing party for the purposes of awarding contractual attorney's fees. The Court of Appeal affirmed. Under *Hsu v. Abbara* (1995) 9 Cal.4th 863, where neither party achieves an unqualified victory on its contract claims, the trial court has discretion to find that neither party prevailed, after comparing the relief obtained with the parties' demands "and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." The Defendant argued that its settlement communications with the Plaintiffs established that its claim for a 10% fee was merely "defensive," and that it's actual litigation objective was to recover the reduced 4% fee (those communications included an offer to settle for a 1.5% fee). The Plaintiff reasoned that since its recovery exceeded the amount of its

settlement offer, it necessarily prevailed in its litigation objections. The Court of Appeal rejected that argument, and held that the settlement communications were not "pleadings, trial briefs, opening statements or similar sources" required to be considered under *Hsu*. The Court explained that the objectives in settlement are "utterly unlike litigation objectives stated in court proceedings to obtain a legal decision." Because the Defendant failed in obtaining the $97 million it sought in the actual court proceedings, the trial court acted within its discretion in finding that neither party prevailed.

21. Contractual Fees – Defendant Who Prevailed On Alter Ego Theory Entitled To Attorney's Fees From Otherwise Prevailing Plaintiff.

Burkhalter Kessler Clement & George LLP v. Hamilton (2018) 19 Cal.App.5th 38 [Moore, O'Leary, Aronson] – In *BKCG*, the Plaintiff subleased part of its office to one of the Defendants, a law firm. The Plaintiff then sued the law firm for breach of the sublease and named its managing partner in the lawsuit under an alter ego theory. The partner successfully demurred and was granted a dismissal with prejudice. Afterward, the trial court granted the Plaintiff's motion for summary judgment against the law firm on the breach of contract. The Plaintiff and the managing partner then both moved for attorney fees as a prevailing party on the breach of contract claim under Civil Code § 1717. The trial court granted the Plaintiff's motion against the law firm but denied the partner's motion against the Plaintiff. The partner appealed, and the Court of Appeal reversed. The Court explained that the trial court should have separately assessed whether the Plaintiff prevailed against the firm and whether it prevailed against the partner. Because the partner secured a dismissal with prejudice, she was a prevailing party entitled to her attorney's fees, even though the Plaintiff prevailed against the law firm. The Court noted that its decision may have tactical implications for attorneys considering whether to allege alter ego in an initial complaint, or seek to amend a judgment to add an alter ego after the fact.

22. Contractual Attorney's Fees – Provision In Deed Of Trust Allowing Lender To Add Attorney's Fees To Secured Debt Is Not A Prevailing Party Fee Provision Under Civil Code § 1717.

Hart v. Clear Recon Corp (2019) 27 Cal. App. 5th 322 – Plaintiff Sara Hart and her son Guy Hart asserted an interest in a house adverse to her other son, Don Hart. Don Hart took out (and defaulted on) a loan on the house, and the lender, Defendant Nationstar Mortgage LLC, initiated foreclosure proceedings. The Plaintiffs Sara and Guy were not parties to the loan, and sued the Defendant lender for a preliminary injunction and declaratory relief. The Defendant prevailed, and sought attorney's fees under a provision in the deed of trust allowing the Defendant to incur attorney's fees and add them to the secured debt. The trial court granted attorney's fees, and the Court of Appeal reversed, holding that by its own terms, the provision only allowed attorney's fees to be added to the loan (to which Plaintiffs Sara and Guy were not parties), but did not authorize an award of fees to a prevailing party in court. Accordingly, there was no contractual

authorization for an award of attorney's fees against the Plaintiffs. (*See also* ***Chacker v. JPMorgan Chase Bank, N.A.*** (2018) 27 Cal.App.5th 351, where attorney's fees under a similar trust deed were added to the balance of the loan, rather than awarded to the lender's assignee, even though the assignee who incurred the fees had since assigned the loan to another.)

23. Lodestar Attorney's Fees – Negative Multiplier May Not Be Applied To Tie Attorney's Fee Award To Proportion Of Modest Damages Award.

Warren v. Kia Motors America, Inc. (2018) 30 Cal.App.5th 24 – In *Warren*, the jury awarded the Plaintiff $17,455.57 in damages pursuant to the Song-Beverly Consumer Warranty Act, and $115,848.24 in attorney fees. The Plaintiff had requested $526,582.29 in attorney fees ($351,055.26 in lodestar fees, times a multiplier of 1.5). The trial court agreed with the lodestar amount, but applied a negative multiplier of 33%, in order to make the fees "roughly proportionate" to the much smaller damage award. The Court of Appeal reversed. The Court held that it is an abuse of discretion to tie an attorney fee award to the amount of the prevailing plaintiff's damages, because that would frustrate one of the purposes of attorney's fee provisions—to encourage lawyers to take cases that involve substantial expenditures of time, but involve relatively small damages. However, the Court of Appeal also found that there were legitimate case-specific grounds that might justify a negative multiplier, such as excess time spent by multiple attorneys on a non-complex case. Accordingly, the Court of Appeal remanded the case to the trial court for recalculation of an appropriate fee award.

24. Private Attorney General Fees – Action Challenging Zoning Variances For A "Super Target" Project Conferred A Significant Public Benefit By Enforcing Zoning Laws, Even Though The Laws Were Then Amended.

La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles (2018) 22 Cal.App.5th 1149 – Successful plaintiffs in public interest litigation may recover private attorney general fees under CCP § 1021.5, where an action confers a significant benefit on the public. In *La Mirada*, the Plaintiffs sought a writ of mandate against the Defendant City of Los Angeles and real party in interest Target, for violations of CEQA and the city's municipal code. Specifically, the Defendant challenged approvals for a "Super Target," which included variances from the City's zoning laws. The trial court granted the municipal code petition, but while an appeal was pending, the Defendant simply amended its zoning laws to allow the "Super Target." The appeal was then dismissed as moot, leaving the judgment intact. A second lawsuit was filed to challenge the new zoning laws, and was still pending when the Plaintiffs sought attorneys' fees under § 1021. The trial court granted attorney's fees, and Target appealed, claiming that the Plaintiffs were not successful, and had not conferred a significant benefit on the public, because the project may ultimately be approved following resolution of the second lawsuit. The Court of Appeal rejected both arguments. First, the court noted that the success element is broad and pragmatic, and that the Plaintiff's achieved their objective when the trial court vacated and set aside the approvals challenged in the writ petition. The Court then explained that whether a

lawsuit convers a significant benefit on the public is determined by both the significance of the benefit, and the size of the class receiving the benefit. The extend of the benefit must be "substantial," but need not be "great." Here, the Court held that the public benefit was the fact that the City had been required to adhere to the legal requirements for granting zoning variances. The Court noted that the Supreme Court has recognized the importance of "preserving the integrity" of a local zoning plan, supporting the trial court's assessment of this benefit as significant. In addition, the Court held that the benefit flowed to "all residents of the City," who benefit when the City is held "to the letter and spirit of the municipal code." Accordingly, the Court affirmed the trial court's award of attorney's fees.

25. Private Attorney General Fees – Financial Interest – Preservation Of Plaintiff's Property Value Does Not Preclude A Private Attorney General Fee Award In A CEQA Case.

Heron Bay Homeowners Association v. City of San Leandro (2018) 19 Cal.App.5th 376 – Private attorney general fees under CCP § 1021.5 are generally recoverable in actions benefitting the public interest only if the Plaintiff lacks a direct financial interest in the litigation, or the costs of the litigation are out of proportion with that financial interest. In *Heron Bay Homeowners Assoc.*, the Plaintiff homeowners association sued under CEQA to require the City of San Leandro to prepare an environmental impact report ("EIR") for a wind turbine project. After prevailing on the merits, the Plaintiff was awarded 50% of its litigation fees as private attorney general fees. The Defendant appealed the fee award, arguing that the turbine would have been visible from the homes of the Plaintiff's members, and that those members therefore had a direct financial interest in preserving their views and property values. The Court of Appeal affirmed the fee award, holding that the member's financial interest in the litigation was both speculative and indirect, because: (1) there was insufficient evidence of the amount of any threatened decline in property values, and (2) City might still approve the project after preparing an EIR, which was all that the lawsuit required. Accordingly, that interest did not disqualify the Plaintiff from seeking fees under § 1021.5.

26. Public Records Act – CPRA's Attorney's Fee Provisions Do Not Apply In A Mandamus Action To Prevent Disclosure Of Records.

National Conference of Black Mayors v. Chico Community Publishing, Inc. (2018) 25 Cal.App.5th 570 – In *NCBM*, a Sacramento newspaper submitted a Public Records Act request to the City of Sacramento as part of an investigation of former Mayor Kevin Johnson and his connection with the National Conference of Black Mayors. The National Conference and Johnson, in his capacity as its former president, then filed a petition for a writ of mandate to prevent the City from disclosing allegedly privileged e-mails. The City did not oppose the petition, but the newspaper did. After the parties negotiated and the trial court held an in camera review, many of the e-mails were disclosed. The newspaper then sought attorney fees from Johnson under the Public Records Act. The trial court denied the motion. The Court of Appeal

affirmed. Johnson argued that the Public Records Act provides for reasonable attorney fees to a plaintiff who prevails on claims under the Act, and that opposing the mandamus action was the "functional equivalent" of bringing an action to compel disclosure under the Act. The Court of Appeals rejected this argument, explaining that the Public Records Act only authorizes actions to compel disclosure, and does not authorize actions by public agencies or others to prevent disclosures. Accordingly, the mandamus action fell outside of the scope of the Public Records Act, and the prevailing party was not entitled to attorney's fees.

27. Statutory Fees – CCP § 1028.5 – Complexity Of Law Does Not Excuse State Agency's Ignorance Of Law Or Allow It To Avoid Paying Attorney's Fees.

***Al-Shaikh v. State Dept. of Health Care Services* (2018)** 21 Cal.App.5th 918 – Code of Civil Procedure section 1028.5 allows qualifying small businesses to recover litigation expenses up to $7,500 in a civil action against a state regulatory agency, if the court finds that the regulatory agency's position was without substantial justification. In *Al-Shaikh*, the defendant California Department of Health Care Services ("DHCS") claimed that the Plaintiff's fee arrangement with the medical billing service he used was unlawful under Medicaid regulations incorporated into state law. However, the DHCS was unable to cite a single case or regulatory decision in support of its decision. The Plaintiff cited an official publication of the federal Office of the Inspector General that expressly stated that the fee arrangement does not violate federal law. After the superior court took the matter under submission, DHCS approved the Plaintiff's application and urged the superior court to deny the Plaintiff's writ petition as moot. The superior court dismissed the petition without prejudice to the Plaintiff's seeking costs and statutory attorney fees. The superior court denied the Plaintiff's subsequent motion for fees under CCP § 1028.5, accepting DHCS's position that federally funded health care is a complicated business. The Court of Appeal reversed and remanded with directions to award the Plaintiff the full amount of fees recoverable under CCP § 1028.5. The Court concluded that the DHCS acted without substantial justification in refusing the Plaintiff's application, holding that a state agency has an obligation to be knowledgeable about the law it is charged with implementing. The applicable regulatory law was not unclear or in dispute, because the official publication cited by the Plaintiff has been on the books for more than a decade, and it has never been questioned by any regulatory body or court.

ATTORNEY PRACTICE

28. Attorney Liability To Clients – Causation – Malpractice Causation Standard Does Not Apply To Fraud and Intentional Breach Of Fiduciary Claims.

Knutson v. Foster (2018) 25 Cal.App.5th 1075 [Fybel, Moore, Aronson] – In *Knutson*, the Plaintiff was an internationally ranked swimmer, who hired the Defendant attorney to negotiate a potential dispute with USA Swimming. Among a host of other disloyal conduct, the Defendant failed to disclose to the Plaintiff the fact that he had close relationships with leaders at USA

Swimming, and without informing the Plaintiff, he told USA Swimming's representatives that he did not want the matter to escalate, and would not get involved in actual litigation. Ultimately, the Plaintiff entered into a highly unfavorable settlement, which led to her exit from the world of swimming. When the Plaintiff discovered the Defendant's conflict of interest, she sued for fraud and breach of fiduciary duty. The jury found in her favor and awarded her $617,810. The trial court then granted a new trial, ruling that the Plaintiff did not prove she would have obtained a better result absent the Defendant's conduct. The Court of Appeal reversed. The Court first explained that although the causation element in negligent malpractice cases asks whether a plaintiff would have obtained a more favorable result, intentional torts only require that the conduct be a "substantial factor" in bringing harm to the plaintiff. Because the Plaintiff's claims were for fraudulent concealment and intentional breach of fiduciary duty, the court erred by requiring a showing that a better result would have occurred "but for" the Defendant's misconduct. The Court further found that the Plaintiff had presented enough evidence to support a finding that the Defendant's fraud and breach of fiduciary duty were a "substantial factor" in the harm suffered by the Plaintiff. Accordingly, the Court reversed, restoring the jury verdict in the Plaintiff's favor.

29. Attorney Liability To Third Parties – Signing "Approved As To Form And Content" Does Not Subject Attorney To Liability Under Settlement Agreement's Confidentiality Provision.

Monster Energy Co. v. Schechter (2018) 26 Cal.App.5th 54 – In *Monster Energy Co.*, the Plaintiff sued its former opposing counsel for claims related to breach of a settlement agreement. The Defendant Attorneys previously represented clients who sued Plaintiff, and later settled their claims. The settlement agreement contained a confidentiality provision in which "Plaintiffs and their counsel" agreed to keep the terms and contents of the agreement confidential. The Defendant Attorneys signed the agreement on a signature block that stated "Approved as to form and content." In an interview for a legal news source, the Defendants referred to the settled case. When the Plaintiff sued, the Defendants brought an anti-SLAPP motion. The trial court found that the Defendants agreed to be bound by the settlement agreement, and held that the Plaintiff established a probability of prevailing. Accordingly, the trial court denied the anti-SLAPP motion in part. The Court of Appeal reversed. First, the Court held that the clients did not have authority to bind the Defendants to the agreement, even though the agreement contained provisions stating that "Plaintiff and their counsel" agree to the terms. Furthermore, because the Defendant Attorneys signed under a block stating "[a]pproved as to form and content," the Court construed the signature to be a "professional thumbs up" that the document is in proper form and embodies the parties' settlement, and not an agreement that the attorneys would be bound under the settlement themselves. Accordingly, the Court held that the Plaintiff did not have a probability of prevailing, and reversed the denial of the anti-SLAPP motion.

30. Dissolution – Dissolved Law Firms Have No Property Interest In Pending Legal Matters Formerly Handled On Hourly Basis.

Heller Ehrman LLP v. Davis Wright Tremaine LLP (2018) 4 Cal.5th 467 – The United States Court of Appeals for the Ninth Circuit asked the California Supreme Court whether a dissolved law firm retains a property interest in legal matters handled on an hourly basis that are in progress, but not completed, at the time of dissolution. The Supreme Court held that a dissolved law firm has no property interest in hourly legal matters, and therefore, no property interest in the profits generated by its former partners' work on hourly fee matters that were pending at the time of the firm's dissolution. The relationship between the dissolved law firm and a client could end at any time by the client's choice. As such, the mere possibility of unearned, prospective fees cannot constitute a property interest. To the extent the dissolved law firm has a claim to work a former partner might perform after a firm's dissolution, it is limited to work fitting the narrow category of winding up activities. Those activities include work necessary for preserving legal matters so they can be transferred to new counsel of the client's choice or to the client itself, effectuating such a transfer, or collecting on work done pretransfer. The Court noted that *Jewel v. Boxer* (1984) 156 Cal.App.3d 171 applied earlier Supreme Court precedents to require former partners to account to the dissolved partnership for profits earned under contingency fee arrangements, but the Court declined to address whether or not its conclusions would apply to a profits earned in a contingency fee matter.

31. Disqualification – Disqualification Was Automatic When An Attorney Simultaneously Represented One Client In A Related Action And Another Client In The Instant Action And Clients Had Adverse Interests.

Bridgepoint Construction Services, Inc. v. Newton (2018) 26 Cal.App.5th 966 – In *Bridgepoint*, an attorney, Klein, was retained to represent a construction company (Bridgepoint), its minority shareholder (Salter), and his business partner (Ram), in an action to recover $2 million owed by a developer (Vista) for construction services. Bridgepoint's majority shareholder successfully disqualified Klein from representing Bridgepoint and Salter, due to indemnity and other claims the two had against each other. However, Klein remained as Bridgepoint's attorney in a related action in Arizona. Klein then filed a cross-complaint on behalf of Ram against the minority shareholder and Vista, alleging that Ram had advanced a part of the $2 million for the project to Vista, and seeking return of that potion of the money. Bridgepoint and the majority shareholder moved to disqualify Klein, the trial court granted the motion, and the Court of Appeal affirmed. First, the Court explained that disqualification was mandatory due to the concurrent representation of Bridgepoint and Ram in separate but related actions, because Bridgepoint and Ram had an existing conflict, since were both seeking damages from the same $2 million pool. Next the Court held that it was reasonable for the trial court to conclude that Klein had obtained confidential information from Bridgepoint before he was disqualified from representing Bridgepoint in the California action. That furnished alternate grounds for disqualification based on the successive representations in the California action. Finally, the Court noted that there is a

substantial relationship between the subject matter of Klein's former representation of Bridgepoint, and his current representation of Ram. The Court concluded that these conflicts provided multiple independent grounds for disqualification, and the trial court would have abused its discretion had it failed to disqualify Klein.

32. Disqualification – Disqualification Not Mandatory Where Attorney Improperly Obtained Privileged Information Not Related To The Action.

City of San Diego v. Superior Court (2018) 30 Cal.App.5th 457 – *In City of San Diego*, the Plaintiff sued the Defendant City for various employment claims. While the suit was pending, the Plaintiff's attorney represented another client in a separate action against the City. An investigator for the City interviewed the Plaintiff, who was still a City employee, about a leak of a report regarding that separate action, and one of the City's attorneys attended as an observer. During the interview, the investigator and the City's attorney asked questions about communications the Plaintiff had with her attorney regarding the leaked report. Although the Plaintiff objected under the attorney-client privilege, she eventually disclosed the communications due to fear of insubordination. When her attorney learned of the interview, he moved to disqualify the City's attorneys. The trial court granted the motion, and the Court of Appeal reversed. While the City's attorneys clearly violated the attorney-client privilege and Rules of Professional Conduct by forcing the Plaintiff to disclose privileged communications and talking to her without obtaining her attorney's consent, disqualification is only proper when there is "a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court" and that there is a "reasonable probability counsel" obtained information likely to be advantageous to the City. Reviewing the transcript of the interview, the Court recognized that all the questions related to the leaked report about the separate action. Thus, there was no genuine likelihood the violations would affect the Plaintiff's employment claims. Accordingly, the Court issued a writ of mandate directing the trial court to vacate its disqualification order.

33. Disqualification –Disqualification Of An Entire Firm Is Not Mandatory Where A Law Firm Hires An Attorney That Represented A Client's Adversary, But That Attorney Then Leaves The Firm.

California Self-Insurers' Security Fund v. Superior Court (2018) 19 Cal.App.5th 1065 [Moore, O'Leary, Ikola] – In an action seeking reimbursement of workers' compensation claims paid by the California Self-Insurers' Security Fund (the "Fund"), the trial court disqualified a law firm representing the Fund (the "Challenged Firm"), concluding that an attorney hired by the Challenged Firm had previously personally represented some of the Defendants in the same pending action. The trial court concluded that when an attorney switches sides, vicarious disqualification of the attorney's new firm is automatic under a bright-line rule set forth in *Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, and no amount of ethical screening can save the representation. The Court of Appeal granted a petition for writ of

mandate, holding that automatic disqualification of the entire firm under such circumstances is an open question that has not been squarely addressed by the Supreme Court. The Court considered the matter, and concluded that a rebuttable presumption of disqualification was the better rule, at least under the facts of the case before it. The relevant facts were that the attorney no longer worked at the Challenged Firm, that he was only employed there for a very brief period of approximately five weeks, and he worked in a different office at the firm from the attorneys who were actively involved in the instant matter. The firm took steps to isolate the attorney from the case, and there was evidence before the court that no confidential information was shared. Further, at the advanced stage of the case, the Fund would have been substantially prejudiced if it had to hire new counsel and bring them up to speed. The Court of Appeal directed the trial court to perform an analysis regarding whether confidential information was transmitted to the attorneys working on the matter at the firm. The issue before the Court was not an issue of loyalty, since none of the current attorneys at the law firm representing the Fund owed a duty of loyalty to the moving parties or other real parties in interest. The question was whether the attorney's tenure at the firm endangered the duty of confidentiality he owed to the defendants; if it did, disqualification was required. If it did not, then the trial court had to exercise its discretion to determine whether other reasons compelled disqualification.

Several months later, Justices Bedsworth, Aronson and Goethals reached a similar conclusion, under similar facts, in ***Fluidmaster, Inc. v. Fireman's Fund Ins. Co.*** (2018) 25 Cal.App.5th 545.

34. Engagement Agreements – Disclosures – Failure To Disclose Known Conflict Of Interest Will Void Client Engagement Agreement, Including Any Arbitration Clause, But Law Firm Can Still Obtain Quantum Meruit.

Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc. (2018) 6 Cal.5th 59 – In *Sheppard Mullin*, the Plaintiff law firm filed an arbitration against the Defendant former client, seeking unpaid fees. The fees were incurred in a qui tam action brought against the Defendant by several public entities. The Plaintiff also represented one of the public entities in an unrelated matter, but failed to disclose that to the Defendant prior to commencing the engagement. The Defendant objected in the arbitration that the entire engagement agreement, including the arbitration provision, was void, due to the Plaintiff's failure to obtain informed written consent to the existing actual conflict. The arbitrators disagreed, awarding Plaintiff over $1 million in fees, and the Superior Court confirmed the award. The Court of Appeal reversed, holding that the entire contract was void, and that the Plaintiff's ethical violation precluded any fee award whatsoever. The Supreme Court agreed that the Plaintiff's failure to disclose the conflict meant that any conflict waiver in the engagement agreement was not informed, rendering the entire agreement illegal and void. However, the Court also held that where an attorney's ethical breach is not willful or egregious, and the client's damages are not so extensive as to justify a forfeiture of all fees, the trial court retains discretion to grant quantum meruit fees.

Because the issues of willfulness and egregiousness had not yet been determined, the Court remanded the case for further proceedings in the trial court.

35. Malpractice – Failure To Disclose Malpractice Under Rule 3-400(B) Does Not Justify Rescission Of Settlement Agreement In Fee Dispute.

Property California SCJLW One Corp. v. Leamy (2018) 25 Cal.App.5th 1155 -- The Plaintiff, an assignee of a law firm (the "Firm"), sued Defendants to enforce a settlement of a fee dispute. The trial court granted the Plaintiff's motion for summary judgment for breach of contract, and the Defendant appealed, arguing that the settlement agreement was subject to rescission, because at the time of the settlement, the Firm failed to disclose facts regarding the Firm's potential legal malpractice, in violation of Rules of Prof. Conduct, rule 3-400(B). The Court of Appeal held that (a) even if there was a violation of Rule 3-400, that was a matter within the purview of the State Bar, not a court presiding over a fee dispute, and (b) as the trial court ruled, it would make no sense to argue that the law firm concealed the possibility of legal malpractice when the Firm accepted less than half of the fees billed in exchange for a release of legal malpractice claims. Accordingly, the Court of Appeal refused to order rescission, and the judgment in favor of the Plaintiff was affirmed.

CIVIL PROCEDURE

36. Choice Of Law – The "Internal Affairs Doctrine" Does Not Automatically Override A Contractual Choice Of Law Provision.

Colaco v. Cavetec SA (2018) 25 Cal.App.5th 1172 [Justices Aronson, O'Leary, and Moore] – The internal affairs doctrine generally provides that disputes regarding the internal affairs of a corporation should be governed by the law of only one state, typically the state of incorporation. *Colaco* involved cross-claims for breach of an employment agreement and breach of fiduciary duties by the Defendant, a Delaware corporation, against the Plaintiff, the Defendant's former president. The trial court applied California law to the dispute, and the Plaintiff appealed, arguing that the "internal affairs doctrine" was a bright line rule that required the application of Delaware law. The Court of Appeal disagreed, noting that the Plaintiff's employment agreement specified that California law shall govern the parties' rights and liabilities. The Court explained that California has a strong public policy in favor of enforcing reasonable choice of law provisions, unless the party opposing enforcement shows that another state has a materially greater interest in the particular issues involved in the dispute. While the internal affairs doctrine must be considered in weighing the state's interests, case law has established that it does not automatically overrule a contractual choice of law provision. Here, the Court held that the Defendant showed that there was a reasonable basis for selecting California law, since the Plaintiff worked in Orange County, and the Plaintiff failed to identify any fundamental Delaware policy relating to any particular issue in the litigation that could override California's interest in

enforcing the choice of law provision. Accordingly, the Court upheld the application of California law to the dispute.

37. Continuance – Trial Court Abused Discretion By Denying Request For A Continuance, Where Main Expert Witness Was Unavailable On Eve Of Trial For Medical Reasons.

Padda v. Superior Court (2018) 25 Cal.App.5th 25 – *Padda* involved claims for breach of employment contracts and related claims and cross claims between the Real Parties, a medical corporation, and the Petitioner physicians, who were former employees. Each side designated practicing physicians as expert witnesses because the case involved complex medical and business practice issues. The case was litigated for four years, with four trial continuances. Ten days before trial, the Petitioners' expert was diagnosed with a ruptured hemorrhagic cyst that affected his kidney and pancreas, and precluded his testimony for at least six weeks. There was no deposition testimony for the Petitioners to use at trial because the expert's deposition was scheduled the same week the condition was discovered. The Petitioners immediately filed an *ex parte* application to continue trial, which the Real Parties opposed, citing the impacts that a schedule change would have on their experts' patients. The trial court denied the application, holding, instead, that trial would commence as scheduled, with an indefinite time allowed after commencement of trial for the Petitioners to retain and prepare a new expert. The Court of Appeal reversed. The Court first noted that it is generally an abuse of discretion to deny a continuance "due to the absence of a properly called and subpoenaed witness." While the Court recognized the potential burden on the witnesses' patients, it noted that the trial court's alternative would create uncertainty that would actually increase the scheduling burdens on the patients, and would create an additional burden on the trial and the sitting jurors. The Court then concluded that having to replace an expert under such circumstances would be an "untenable burden and a distraction," and issued a writ directing the trial court to vacate its denial and enter a new order granting the request for a continuance.

38. Continuance – Trial Court Abused Its Discretion By Not Continuing A Summary Judgment Motion, Where Counsel's Failure To Timely File An Opposition Was Not Excusable, But Was Also Not Willful.

Levingston v. Kaiser Foundation Health Plan, Inc. (2018) 26 Cal.App.5th 309 – In *Levingston*, the Plaintiff sued Defendants for wrongful termination. After the Defendant had moved for summary judgment and the Plaintiff had filed her opposition, the trial court disqualified the Plaintiff's counsel, struck the Plaintiff's opposition, and ordered the opposition sealed. New counsel for the Plaintiff failed to file a new opposition by the new deadline. After receiving a notice of non-opposition, the new counsel sought relief under CCP § 473(b) or a continuance of the hearing under the summary judgment statute (§ 437c(b)(2)) sufficient to allow filing of a new opposition. The new counsel claimed that the client and prior counsel did not inform the new counsel that the opposition had been stricken, due to fear of violating the order placing the

opposition under seal. The trial court did not find this excuse to be credible because any reasonable counsel would have looked for the opposition papers in preparation for the hearing, and would have then discovered that the papers were stricken and placed under seal. Accordingly, the trial court found there was no excusable neglect, and denied the new counsel's request for a continuance or relief from default. The Plaintiff did not challenge the finding that there was no excusable neglect justifying relief under § 473(b), and the Court of Appeal held that the statutory requirements for a continuance under § 437c(b)(2) were not met, since the request was not filed by the due date for the opposition. Nevertheless, the Court held that under the trial court's general discretion to grant continuances, it is an abuse of discretion to impose what amounts to a terminating sanction for a procedural error, unless the error is willful, or "preceded by a history of abuse of pretrial procedures." Because the error in this case was not willful or preceded by any history of abuse, the Court of Appeal reversed the order denying the continuance.

39. Court Reporter Fee Waiver – Superior Court Must Provide Official Court Reporter At Trial For Indigent Plaintiffs.

Jameson v. Desta (2018) 5 Cal.5th 594 – In *Jameson*, an indigent Plaintiff sued his doctor for negligence. Before trial, the trial court informed the parties that San Diego Superior Court's new policy was not to provide official court reporters in civil matters, even for parties with fee waivers. The trial moved forward without a court reporter, and the trial court granted the Defendant's motion for nonsuit at the close of the Plaintiff's opening statement. The Plaintiff appealed, and the Court of Appeal affirmed on the basis that the Plaintiff's arguments could not be evaluated in the absence of an official reporter's transcript. The Supreme Court granted review, holding that the San Diego Superior Court's policy was invalid, because it placed indigent litigants at a disadvantage with respect to the right of appeal, compared to those litigants who can afford to pay for a private shorthand reporter. Accordingly, the Court held that, where any court adopts a policy "under which official court reporters are not made available in civil cases but parties who can afford to pay for a private court reporter are permitted to do so," the court must include an exception that allows fee waiver recipients the ability to obtain a verbatim transcript. The Court acknowledged the financial concerns expressed in amicus briefs filed by several Superior Courts, but noted that, where an official reporter is provided for an indigent party, the court retains the ability to charge the non-indigent parties a pro-rata share of the reporter's cost.

40. Default Judgment – A Default Judgment That Exceeds The Damages Sought In A Complaint Is Void, And Must Be Vacated Even Years After Default Is Entered.

Airs Aromatics, LLC v. CBL Data Recovery Technologies, Inc. (2018) 23 Cal.App.5th 1013 – In *Airs Aromatics, LLC,* the Plaintiff sued the Defendant for breach of contract, seeking "damages in an amount to be proven at trial, but estimated to exceed $25,000.00." The Defendant then answered and participated in a settlement conference where the Plaintiff

demanded $5 million. The parties then stipulated for the Defendant to withdraw its answer and allow the Plaintiff to obtain a default. The Plaintiff obtained a default judgment in the amount of $3,016,802.90. Over four years later, the Defendant filed a motion to set aside the default judgment under CCP §§ 473(d), 580(a), and 585(c), because the trial court entered a judgment awarding damages greater than the amount sought in the complaint. The trial court: (1) found that the Defendant received adequate notice of the damages sought through the settlement conference, (2) held that the default judgment was voidable, not void, and (3) denied the motion. The Court of Appeal reversed. First, the Court stated that, under the clear language of §§ 580(a) and 585(c), a default judgment cannot exceed the damages demanded in the complaint. Thus, any inquiry concerning whether a defendant was on adequate notice from other sources is irrelevant. On appeal, the Plaintiff also contended that the Defendant's motion to set aside the default judgment was untimely, because a motion to set aside a voidable judgment must be brought within six months of entry of default. The Court of Appeal rejected this argument, because default judgments that exceed the amount sought in a complaint are void, not merely voidable. Lastly, the Plaintiff argued that, even if the judgment were void, a trial court has discretion under § 437(d) to decide whether or not to set aside a void judgment. Although the Court recognized that some cases have language suggesting that courts have discretion to set aside a void judgment, the actual holdings in those cases were that the judgments were not void, and that, therefore, the trial courts did not have discretion to set them aside. Further, the Court questioned whether a trial court has such discretion when a default judgment exceeds the amount demanded in the complaint, because it would conflict with § 580(a)'s strict mandatory language. In any event, the Court explained that because the trial court's reasoning (i.e. that the judgment was merely voidable and not void) was legally incorrect, the trial court abused its discretion. Accordingly, the Court vacated the award and remanded, allowing the Plaintiff to prove-up the $25,000 sought in the complaint or amend its complaint to seek more damages.

41. Five-Year Rule – Where A District Court Remands A Case To State Court, An Appeal From The Remand Order Does Not Stay The Five Year Period For Bringing An Action To Trial.

Martinez v. Landry's Restaurants, Inc. (2018) 26 Cal.App.5th 783 – In *Martinez,* employees of Joe's Crab Shack brought wage and hour claims in state court. There were discovery disputes, as well as an unsuccessful motion to certify a class and a removal to federal court. The federal district court remanded the case to state court, and the Ninth Circuit allowed an appeal of that remand order. The remand appeal took 169 days before the remand order was affirmed. The plaintiffs argued that it was impossible, impracticable or futile to bring the action to trial during the discovery disputes and during the time the remand order was on appeal, and that the five year rule under CCP §§ 583.310 and 583.360, should, therefore, be tolled during those periods. The trial court disagreed and dismissed the action for failure to bring the matter to trial within five years, and the Court of Appeal affirmed. The Court noted that, in general, delays in conducting discovery are a normal part of litigation, and do not excuse compliance with the five-year rule.

The Court also explained that, while a remand petition immediately divests the state court of jurisdiction, that jurisdiction is restored upon the issuance of a remand order. Unless a stay of the remand order is issued, an appeal of the remand order does not affect the state court's jurisdiction. Accordingly, the Plaintiffs could have pursued the state court action while the remand order was on appeal, and the five-year rule was not tolled during that time.

42. Five-Year Rule – Trial Court Abused Discretion By Setting Trial For The Same Day As The Class-Certification Motion In Order To Avoid Expiration Of The Five-Year Period.

Warner Bros. Entertainment Inc. v. Superior Court (2018) 29 Cal.App.5th 243 – *Warner Bros.* involved a putative class action over the calculation of home video royalties. Near the outset of the case, the trial court issued a 43-day stay of discovery and pleadings, ordering the parties to prepare a joint initial status conference report during that time. Years later, the Defendants field a motion under CCP § 583.310, to dismiss the case based on the Plaintiff's failure to commence trial within five years. The trial court held that the 43 day stay amounted to a stay of all proceedings, thereby tolling the five-year period under § 583.340(b), and set trial to commence on the same day the Plaintiffs' class certification motion was to be heard, one week before the five year period would expire with the 43-day extension. The Court of Appeal reversed, first holding that a partial stay at the early stage of an action to focus on case management issues constituted was not a complete stay and did not toll the five-year period. Even if it did, however, the Court held that "a class action must be dismissed under the five-year statute if the class issues are not decided with enough time for notice to the class and a minimally reasonable period for class members to exercise their options before trial begins." Setting trial for the same date as the class certification motion obviously did not provide a "minimally reasonable period" for class notice. The Court distinguished cases that allowed a "pro forma" commencement of trial, followed by an immediate postponement in order to avoid unjust results (such as where the failure to bring a case to trial was due to unavailability of courtrooms or counsel), noting that such a procedure could not be employed where, as here, the Plaintiff had been delinquent, and the case was never, at any time, ready for trial.

43. Forum Non Conveniens – Where Dispute Had No Connection To California, Trial Court Had Discretion To Decline Jurisdiction, Despite Mandatory Forum Selection Clause.

Quanta Computer Inc. v. Japan Communications Inc. (2018) 21 Cal.App.5th 438 – *Quanta Computer Inc.* was a contract dispute between the Plaintiff Taiwanese company, and the Defendant Japanese company, relating to the manufacture of cell phones in Taiwan for storage and sale in Japan. All the negotiations occurred in Taiwan or Japan, and none of the individuals involved lived in California. Nevertheless, in order to provide a "neutral forum," the contract contained a mandatory forum selection clause, requiring any disputes to be resolved in California. After the Plaintiff filed suit in California, the Defendant filed its own suit in Japan.

That same day, the Defendant moved to dismiss or stay the case for forum non conveniens. The trial court granted the Defendant's motion. The Court of Appeal affirmed. The Court first held that, because the Defendant agreed to the mandatory forum selection clause, it was in no position to challenge the clause as unreasonable under traditional forum non conveniens considerations. Nevertheless, the Court also held that the trial court had discretion to decline jurisdiction on its own motion. Here, there were suitable alternate forums—Japan, China, Taiwan, or Singapore—to hear the suit, and there was no logical connection between the contract dispute and California, such that California had no public interest in hearing the case. In light of the burden the case would put on the California court system, the trial court acted within its discretion by declining jurisdiction despite the forum selection clause. Accordingly, the Court affirmed.

44. Leave To Amend – Right To Amend Once Without Leave Of Court Under CCP § 472 Only Applies To Original Complaint, Not Amended Versions Filed After A Demurrer Is Granted With Leave To Amend.

Hedwall v. PCMV, LLC (2018) 22 Cal.App.5th 564 – Plaintiff PCMV, LLC filed a complaint against Defendant and Cross-Complainant Hedwall, who cross-complained against Plaintiff and two others. One of the non-plaintiff Cross-Defendants demurred to Hedwall's cross-complaint, which the court granted with leave to amend. Hedwall then filed the First Amended Cross-Complaint, to which all three Cross-Defendants demurred. While those demurrers were pending, Hedwall filed the Second Amended Cross-Complaint ("SACC") without leave of the trial court. The trial court struck the SACC on its own motion. Hedwall appealed, claiming that it had the unilateral right to amend under CCP § 472. The Court of Appeal examined the statutory language and held that the right to amend "once" without leave of court under § 472 only applies to the original complaint, not amended versions filed after a demurrer is granted with leave to amend.

45. Relief From Default – Failure To Oppose Demurrer And File Amended Complaint Was Functional Equivalent To Default, Warranting Mandatory Relief.

Pagnini v. Union Bank, N.A. (2018) 28 Cal.App.5th 298 – In *Pagnini*, the Plaintiff sued the Defendants for claims related to wrongful foreclosure. When the Defendants demurred, the Plaintiff did not file an opposition, and did not seek to amend his complaint. After the trial court sustained the demurrer without leave to amend and entered judgment against the Plaintiff, the Plaintiff moved for relief under § 473(b) and submitted a declaration from his counsel. The declaration stated that counsel attempted to file an amended complaint before the demurrer hearing under CCP § 472, but was not aware that § 472 had been amended to require that an amended complaint filed after a demurrer must be filed within the time for filing an opposition to the demurrer. Because he was not aware of this amendment, the Plaintiff's attorney unsuccessfully attempted to file the amended complaint after the opposition was due. The trial court denied relief from the failure to file the amended complaint, and the Court of Appeal reversed. The Court first noted that § 473(b)(2) provides relief for default judgments or

dismissals resulting from an attorney's mistake, inadvertence, surprise, or neglect. The Court then recognized that, typically, relief will only be granted in the case of dismissals that are equivalent to defaults, and courts will not provide relief for dismissals resulting from situations like failure to timely serve a complaint or failure to file an amended complaint after a demurrer was sustained with leave to amend. But the Court noted that it is common practice to treat failure to respond to a dismissal motion on the same footing as a default. The Court then distinguished instances where plaintiffs were denied relief after failing to file an amended complaint by noting that those plaintiffs actually appeared and opposed the demurrers before failing to file. Thus, the Court concluded that the Plaintiff essentially defaulted by failing to oppose the demurrer. Accordingly, the Court reversed.

46. Res Judicata – Issue Preclusion/Collateral Estoppel – An Issue Properly Challenged On Appeal Has No Preclusive Effect If Not Decided In The Court Of Appeal's Opinion.

Samara v. Matar (2018) 5 Cal.5th 322 – In *Samara*, the Plaintiff sued two Defendants, both dentists, for professional malpractice, arguing that one botched a dental-implant procedure and the other was vicariously liable for that mistake. The Defendant who performed the procedure moved for summary judgment, which the trial court granted on two separate grounds: statute of limitations and lack of causation. The Plaintiff appealed the judgment, admitting the untimeliness of her suit but requesting a reversal of the trial court's causation finding to protect her other claim. The Court of Appeal affirmed on statute of limitations grounds only, but did not address the trial court's causation finding. The second Defendant moved for summary judgment around the time of the appeal, arguing preclusion based on the trial court's finding of lack of causation. The trial court granted the motion, the Court of Appeal reversed, and the Supreme Court granted review. The Supreme Court affirmed the Court of Appeal's decision and overturned *People v. Skidmore* (1865) 27 Cal. 287, holding "a ground reached by the trial court and properly challenged on appeal, but not embraced by the appellate court's decision, should not be . . . afford[ed] preclusive effect."

47. Res Judicata – Judgment In Favor Of Plaintiffs Challenging Development Project Barred A Subsequent Challenge To That Project Based Grounds That Were Raised, But Not Pursued, In The First Action.

Atwell v. City of Rohnert Park (2018) 27 Cal.App.5th 692 – In *Atwell*, the Defendant City approved the expansion of a Walmart to include a grocery component. The Sierra Club and a local conservation group filed a writ petition challenging the initial approval based on CEQA violations, and inconsistency with the City's general plan. The petition was granted based on the CEQA violations, and the City was ordered to conduct further environmental review, but the plaintiffs in the initial action did not pursue the general plan issue. After the additional environmental review was complete, the City re-approved the project, and two new individual Plaintiffs filed their own writ petition, claiming that the project was inconsistent with the City's

general plan. The trial court granted judgment on the pleadings, ruling that res judicata barred the second action. The Court of Appeal affirmed. While the general plan issue was not litigated in the first action, the Court held that res judicata bars all issues that could have been litigated, even if they were not litigated, so long as the causes of action are identical. While the second case was based on a new approval, the Court held that the cause of action in the second case was identical to the first, because nothing in the new approval changed with regard to the issue of general plan consistency. The Court also held that, while the Plaintiffs in the second action had no relationship with the plaintiffs in the initial action, "when an alleged harm impacts the public rather than a specific entity, the privity analysis must focus on the 'community of interest' rather than the relationship between the parties." Because both actions were based on and sought to vindicate the same public rights, the Court held that the parties were in privity for purposes of res judicata. Accordingly, the Court held that all the elements of res judicata were satisfied, and affirmed the Judgment dismissing the case.

48. Right to Jury Trial – Action Seeking Civil Penalties Intended To Punish Is Subject To Right To Jury Trial On Liability, But Not The Amount Of Penalties.

Nationwide Biweekly Administration, Inc. v. Superior Court (2018) 24 Cal.App.5th 438 – The People sought civil penalties against Defendants, under the Unfair Competition Law ("UCL") and False Advertising Law ("FAL") set forth in Business and Professions Code sections 17200 and 27500. After the People successfully moved to strike Defendant's jury demand, Defendant filed a writ seeking review. The Court of Appeal granted the writ petition in part. After an exhaustive review of cases concerning the right to trial by jury, the Court of Appeal concluded that government actions seeking civil penalties intended to punish individuals, as opposed to those intended to extract compensation or restore the status quo, are akin to the 18th-century "action in debt," which was tried by jury under the common law. Accordingly, a party in such action retains the right to trial by jury today. Nevertheless, the Court also followed US Supreme Court authority holding that the fixing of the amount of such a penalty is not one of the "fundamental elements" of the institution of jury trial, and thus the right to trial by jury only extends to the issue of liability for, and not the amount of, civil penalties—the amount of any statutory penalties is committed to the discretion of the trial court.

49. Standing – Homeowners Association's Standing To Sue For Damage To Common Areas Includes Suits Against Public Entities.

Sierra Palms Homeowners Association v. Metro Gold Line Foothill Extension Construction Authority (2018) 19 Cal.App.5th 1127 – Civil Code § 5980 states that a homeowners' association has standing to sue for damage to common areas or damage to separate interests arising from damage to common areas. In *Sierra Palms Homeowners Association*, the Plaintiff association filed an inverse condemnation claim against the Defendant public entity, based on damages to a common boundary wall that were incurred during construction of a railway line, and damage to its members' quiet enjoyment of their property. The trial court granted a

demurrer without leave to amend, holding that the Plaintiff did not have standing to sue for inverse condemnation of the common areas, since the common areas were owned in fractional shares by the individual homeowners, rather than being owned by the Plaintiff association. The Court of Appeal held that the Plaintiff should have been given leave to amend to properly allege standing under § 5980, which confers standing without regard to whether or not the Plaintiff owns the common areas. The Court rejected the Defendant's argument that § 5980 applies only to claims against private defendants, holding that the statutory language does not distinguish in any way between public or private defendants.

50. Service Of Summons – International Service – Foreign Defendant Not Properly Served With Complaint Under Hague Service Convention When Served By Federal Express and E-Mail.

Inversiones Papaluchi S.A.S. v. Superior Court (2018) 20 Cal.App.5th 1055 - The Petitioners, Colombian entities, were named as cross-defendants in two separate cross-complaints in a wrongful death action. The Petitioners filed a motion to quash on the grounds that one of the cross-complaints was untimely, and the other cross-complaint was served by Federal Express and e-mail, which did not comply with the service statutes. The trial court denied the motion. The Court of Appeal reversed, holding that, under the Hague Service Convention, service by mail is permissible where (1) the receiving state does not object to service by mail, and (2) service by mail is otherwise permissible by law. The nation of Colombia does not object to service by mail. However, under California law, the second requirement was not satisfied. CCP § 415.30 requires a notice of acknowledgement for service by mail, which was not provided in this case. Further, CCP § 415.40 permits service by mail with a return receipt, but the Cross-Complainants did not request it. As such, service by mail was not permissible by law. Further, the e-mail service was improper under the Hague Service Convention because the Cross-Complainants failed to file an acknowledgement of receipt of the e-mail, which is required under Colombian law. Finally, the other cross-complaint was served more than three years after the complaint was filed, so it was time-barred. As such, the cross-complaints were not properly served.

51. Service Of Summons – International Service – Parties May Not Contract Around The Hague Service Convention.

Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd. (2018) 24 Cal.App.5th 115 – In *Rockefeller*, the Plaintiff sought to confirm an arbitration award entered against the Defendant, a Chinese company, that had not appeared at the arbitration. The Plaintiff served a summons on the Defendant via Federal Express, pursuant to the notice provisions of the parties' MOU. The Defendant did not respond, and the arbitration award was confirmed in the amount of $414,601,200. The Defendant then appeared and moved to set aside the judgment and quash service. The trial court denied the motion, and the Court of Appeal reversed. The Court first explained that the Hague Service Convention is a multinational treaty

that provides for service on a "central authority" to effect service on citizens of foreign countries. While Article 10 allows for direct service on foreign citizens, "[p]rovided the State of destination does not object," China did object to Article 10. Accordingly, direct service via Federal Express was not effective under the Hague Service Convention. The Plaintiff argued that the parties were allowed to "contract around" the requirements of the Convention, but the Court of Appeal disagreed, holding that the Convention allows "each contracting state—not the citizens of those states—to determine how service shall be effected." The Court also noted that allowing direct service would contravene Chinese law, which states that "no foreign agency or individual may serve documents … within the territory of the People's Republic of China" without proper government consent. Accordingly, the Court of Appeal reversed the judgment, and ordered the trial court to vacate the petition to confirm, and quash service of the summons.

52. Statute Of Limitations – 30 Day Statute Of Limitations To Challenge City's Hotel Assessment Did Not Violate Due Process.

Reid v. City of San Diego (2018) 24 Cal.App.5th 343 – In *Reid*, the Defendant City of San Diego had levied assessments in 2007 on certain hotels that operated within the City. Most of the hotels subject to the assessments passed the assessment onto their guests. When the assessment was renewed in December 2012, a non-profit taxpayer organization challenged the assessment as an unconstitutional tax. In 2016, the assessment was amended, and, as amended, it did not apply to the organization's members, mooting the organizations claims. Then, a new action was filed by Plaintiffs, in their capacity as hotel guests who paid the allegedly unconstitutional tax. The trial court sustained a demurrer on the grounds that the Plaintiffs failed to bring the action within 30 days as required by the 30-day statutes of limitations specified in the City's municipal code. The Plaintiffs appealed, claiming that the 30-day limitations period violated due process. The Court of Appeal denied that argument, explaining that a statute of limitations is consistent with due process if it provides a reasonable time to bring an action. The Court then noted that the non-profit taxpayer organization timely brought suit within thirty days in the prior action. Further, the Court recognized that what constitutes a reasonable time is a question ordinarily left to the Legislature. Because the ordinance mirrored that of a California statutory scheme and California law contains many 30-day statutes of limitations (for example, 30-days to challenge certain administrative decisions of the Fair Employment and Housing Commission or 30-days to contest certain governmental actions under CEQA), the limitations period here was reasonable. Accordingly, the Court affirmed the dismissal on statute of limitations grounds.

53. Service Of Summons – Publication – $1.9 Million Default Judgment Reversed Where Service By Publication Was Made In The Wrong Newspaper.

Calvert v. Al Binali (2018) 29 Cal.App.5th 954, 959 – In *Calvert*, the Plaintiff doctor sued a former patient for posting an allegedly defamatory review online. After unsuccessful service attempts, the Plaintiff obtained leave of court to serve summons by publication in the Orange County Register. The Plaintiff submitted the summons to the Register for publication, but the

Register published the summons in its subsidiary paper, the Laguna News-Post, instead. The Plaintiff obtained a default judgment in the amount of $1,940,506. The Court of Appeal reversed the judgment, holding that it was void on its face for failing to comply with the publication order. The Court of Appeal rejected the Defendant's argument that it was the Register that published the notice in the wrong paper, noting that the Register's actions did not relieve the Defendant of his duty to comply with the Court's order. The Court also rejected the argument that Defendant was required to show that she would have received actual notice if the summons had been published in the correct paper, noting that the service and judgment are void and a nullity, regardless of any prejudice.

54. Statute of Limitations – Injury Due To Failure To Procure Adequate Insurance Did Not Occur, And Statute Of Limitations Did Not Begin To Accrue, Until Inadequate Insurance Proceeds Were Paid.

Lederer v. Gursey Schneider LLP (2018) 22 Cal.App.5th 508 – In *Lederer*, the Plaintiffs retained the Defendants to purchase uninsured/underinsured driver insurance with policy limits of $5 million. The Defendants, however, purchased policies with limits of only $1.5 million. When one of the Plaintiffs was permanently disabled in a car accident in 2010, the Plaintiffs discovered the discrepancy. After the other driver settled in 2012 for his own policy limits of only $15,000, the Plaintiffs' insurance company tendered payment of the $1.5 million in underinsured driver coverage. In 2013, the Plaintiffs sued, alleging accounting malpractice and other claims. The trial court granted the summary judgment as to accounting malpractice, ruling that the two-year statute of limitations under CCP § 339 began to run when Plaintiffs discovered the discrepancy in 2010, and thus had expired when the action was filed in 2013. The Court of Appeal reversed, holding that the Plaintiff's cause of action did not accrue until 2012, when the Plaintiff actually received the reduced insurance payout. The Court explained that, while the Defendant's negligence was discovered after the accident in 2010, a cause of action does not accrue and trigger the statute of limitations until that cause of action is complete with all of its elements. Because malpractice requires actual damages, the Court concluded that the Plaintiffs' cause of action did not accrue until they suffered actual damages by receiving diminished insurance benefits. Further, because relevant insurance laws did not entitle the Plaintiffs to underinsured driver benefits until they settled with the other driver's insurance company—which did not occur until 2012—the cause of action could not have accrued before then. Although the Plaintiffs spent money on attorney's fees and medical bills, those fees stemmed from the accident and the litigation with the other driver, not the Defendants' breach. Thus, the Plaintiffs timely field their action in 2013, and the Court of Appeal reversed.

55. Summary Judgment – Plaintiff May Not Attack Motion For Summary Judgment Solely By Offering Evidence Attacking Credibility Of Defendant's Witnesses.

Ayon v. Esquire Deposition Solutions, LLC (2018) 27 Cal.App.5th 487 [Ikola, Bedsworth, Thompson] – In *Ayon*, the Plaintiff sued the Defendants employer and its employee for personal

injury claims. Specifically, the employee was using her work cellphone to talk with a co-worker when she hit the Plaintiff while driving home from work. Alleging that the employee was using her work cellphone to talk with the co-worker about scheduling, the Plaintiff argued the employer was liable under respondeat superior. The employer moved for summary judgment, offering the employee and co-worker's deposition testimony that they were talking about personal matters because the two were friends. The employer also offered evidence that the employee rarely made after-hour work calls. The Plaintiff countered with cell phone records showing that during the six months before the accident, the employee and co-worker had not made one phone call between each other. The trial court granted the employer's motion for summary judgment, ruling there was no triable issue of material of fact as to respondeat superior. The Court of Appeal affirmed. Although the Court recognized that the cell phone records were strong evidence discrediting the testimony that the calls were personal in nature, the Court held that CCP § 437c(e) codifies the principle that "disbelief of a witness's statement is not proof that the opposite is true." The Court explained that, under 437c(e), summary judgment cannot be denied on grounds of credibility unless the only proof of a material fact offered in support of the motion is an affidavit or declaration made by the sole witness, or if the material fact is an individual's state of mind. The Court then stated that the exception did not apply because the employer offered deposition testimony, not affidavits. Further, the material fact did not concern either witness's state of mind. Thus, the cell phone records alone could not defeat the testimony and evidence offered by the employer. Accordingly, the Court affirmed.

56. Trial Preference – Preference Request From Litigant Over 70 Does Not Require A Physician's Declaration, Or A Showing Of Imminent Death Or Incapacity.

Fox v. Superior Court, 21 Cal.App.5th 529 – Code of Civil Procedure section 36(a) grants mandatory trial preference to any party over 70 if the party has a substantial interest in the action, and the party's health is such that a preference is necessary to prevent prejudicing that interest. Section 36(d), on the other hand, allows discretionary trial preference where any party shows "by clear and convincing medical documentation" that the party has an illness that raises substantial medical doubt as to whether the party will survive beyond six months. In *Fox*, the Plaintiff requested a trial preference, based on her attorney's declaration that she had stage four lung cancer, and her chemotherapy was causing worsening side effects, including impaired ability to focus and communicate. The trial court denied the Plaintiff's request for trial preference, and the Court of Appeal granted Plaintiff's writ petition, holding that the trial court had applied the wrong standard based on the Defendants' argument that Plaintiff was required to submit a physician's declaration, or show that "death or incapacity" might deprive Plaintiff of the opportunity to have her case tried. The Court held that these requirements would be relevant to a request under section 36(d), but that the more liberal standard under CCP section 36(a) does not require a physician's declaration, nor does it require a showing of imminent death or incapacity, or a balancing of interests. Under the facts of the case, the Court held that the Plaintiff's entitlement to relief under section 36(a) is "obvious."

57. Venue – Forum Selection Clause Designating Delaware As The Appropriate Venue Was Properly Enforced, Where Indispensable Party Consented To Jurisdiction In Delaware In Special Demurrer To Complaint.

Bushansky v. Soon-Shiong (2018) 23 Cal.App.5th 1000 –*Bushansky* was a shareholder's derivative action. The company's certificate of incorporation contained a forum selection clause generally designating Delaware as the forum for derivative actions. The clause, however, specified that any indispensable parties must consent to jurisdiction in Delaware for the clause to take effect. One of the Defendants was an accounting firm with offices in California, but no connection to Delaware. The accounting firm expressly consented to jurisdiction in Delaware in a demurrer that was filed concurrently with a request to dismiss the action based on *forum non conveniens* and the forum selection clause. The trial court granted the motion to dismiss, and the Court of Appeal affirmed. The Court held that the consent to jurisdiction requirement was a condition precedent to enforcement of the forum selection clause, but noted that the clause did not specify a time by which consent must be given. Accordingly, the Court held that a reasonable time limit must be implied, and that the accounting firm had satisfied the condition precedent in a reasonable time by providing consent in its demurrer, filed less than two months after commencement of the action. Accordingly, dismissal of the derivative action based on the forum selection clause was affirmed.

58. Venue – Failure To File Timely Motion To Transfer Does Not Necessarily Waive Right To Challenge Venue.

Walt Disney Parks & Resorts U.S., Inc. v. Superior Court (2018) 21 Cal.App.5th 872 – Code of Civil Procedure § 396b(a) requires a trial court to transfer a case filed in an improper venue if the defendant files a motion to transfer at the same time that he or she answers, demurs, or moves to strike. Section 397 states that a trial court may transfer venue where the court designated in the complaint is not the proper court, but does not state a deadline for a motion to transfer. In *Walt Disney Parks & Resorts*, the Court of Appeal addressed these two sections, holding that the failure to file a timely motion under § 396b does not necessarily waive the right to challenge venue, based on existing Supreme Court authority that the waiver of that right is a question of fact. (*Citing Lyons v. Brunswick-Balke etc. Co.* (1942) 20 Cal.2d 579, 582.) The Plaintiffs in *Walt Disney Parks & Resorts* filed their claims in Los Angeles County, despite venue selection clauses in their annual passes, which specified Orange County as the proper venue. The Defendant Disney, answered, and the next day removed the action to federal court. It was only after remand to state court that Disney filed a motion to transfer venue. The Court of Appeal held that there were no facts that could support a finding of waiver because, by immediately removing the case to federal court, and making a motion to transfer shortly after remand, Disney demonstrated its assertion that venue was not proper in Los Angeles.

CIVIL RIGHTS

59. Civil Rights – Unruh Act Prohibits Age-Based Price Difference Based On Market Research Showing That Adults Over 30 Years Earn More Money Than Adults Under 30.

Candelore v. Tinder, Inc. (2018) 19 Cal.App.5th 1138 – The Unruh Civil Rights Act prohibits private discrimination based on a list of protected characteristics (which does not explicitly include age), but that list is illustrative, not exclusive. In *Candelore*, the Plaintiff brought an Unruh Act claim against the dating app Tinder, because the Defendant charged its under-30 customers $9.99 for Tinder Plus, but charged the over-30 customers $19.99. The Defendant demurred, arguing that its market research provided a rational basis for the price difference, because younger users had less financial capacity to pay for premium services. The trial court sustained the demurrer, concluding that there is "no basis in the published decisions applying the Unruh Act to age-based pricing differentials." The Court of Appeal reversed, holding that age is a personal characteristic that is covered by the Act's prohibition on arbitrary discrimination, and that the use of age-based pricing based on generalized market studies is arbitrary when applied to individuals, since at least some older individuals earn less than some younger individuals. The court relied upon *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, for the principle that the "individual nature" of rights under the Unruh Act prohibits discrimination based on even a "true" generalization about a class of people. The court distinguished cases upholding discounts for children and seniors, because such discounts are justified by public policy evidenced in specific legislative enactments. The court also disagreed with another case that held that price discounts for 18- to 29-year-olds was acceptable, because that case conflicted with *Marina Point*. Accordingly, the trial court's sustaining of the demurrer was erroneous.

CONTRACTS

60. Excuse of Performance – Violation Of Independent Covenant Does Not Excuse Performance Of Obligations Under Other Independent Covenants.

Colaco v. Cavetec SA (2018) 25 Cal.App.5th 1172 [Justices Aronson, O'Leary, and Moore] – In the *Colaco* case discussed in item 36, above, the Plaintiff company sold substantially all of its assets to the Defendant company, and sued when the Defendant failed to pay the final $2 million earn out under the Asset Purchase Agreement. The Defendant filed a cross-claim alleging that the Plaintiff failed to forward $1,313,000 in customer payments as required by the Agreement. The jury awarded the Defendant $1,313,000, with no offset for the missing $2 million earn out payment owed to the Plaintiff. The Plaintiff appealed, and the Court of Appeal reversed. The Defendant argued that the Plaintiff's own breach of contract relating to the customer payments excused performance of the Agreement's earn out provision. The Court of Appeal noted that nothing in the Agreement conditioned the payment of the earn out on performance of the customer payment forwarding provisions, and performance of the obligations were to be made at

different times. Accordingly, the obligations were independent of one another, and the breach of one would not excuse the breach of the other. Moreover, the jury's award essentially excused the Defendant's obligation to pay the earn out due to the Plaintiff's breach, and then awarded damages based on that very same breach, conferring an impermissible windfall on the Defendants. Because the facts relating to the earn out payment were undisputed, the Court reversed the judgment, and ordered the Plaintiff's $2,000,000 claim to be offset by the Defendant's $1,313,000 cross-claim, for a net judgment of $687,000 in favor of the Plaintiff.

CORPORATIONS & BUSINESS ENTITIES

61. Involuntary Dissolution – Action For Involuntary Dissolution Could Not Be Dismissed After Majority Shareholders Invoked Statutory Buyout Procedure.

Ontiveros v. Constable (2018) 27 Cal.App.5th 259 – In *Ontiveros*, the Plaintiff minority shareholder sued Defendants majority shareholders and the corporation, seeking involuntary dissolution of the corporation. The Defendants filed a motion to stay the case and proceed with a statutory buyout under Corporations Code section 2000, which applies only in involuntary dissolution actions. After the trial court granted the stay, and commenced the appraisal process, the Plaintiff moved to dismiss his involuntary dissolution action in order to avoid a buyout of his shares. The trial court lifted the stay, dismissed the Plaintiff's action, and found that, without the Plaintiff's action, there was no further basis for proceeding with the appraisal and buyout. The Court of Appeal reversed, holding that the commencement of the statutory buyout procedure "supplanted" the involuntary dissolution action, and that, once the motion to commence the buyout procedure was granted, Plaintiff could no longer dismiss his action. The trial court had likened the buyout procedure to trial, and noted that under CCP § 581(e), a plaintiff could voluntarily dismiss its claims with prejudice after commencement of trial. The Court of Appeal, disagreed, holding that §581(e) does not apply, because the buyout procedure is a "special proceeding," and bears none of the attributes of a trial. Accordingly, the Court of Appeal reversed the dismissal and ordered the trial court to reinstate the buyout procedure.

62. Superseding Partnership With Corporation – Party Asserting Continued Existence Of Partnership Bears Burden Of Proof That Corporation Formed By The Partners Was Not Intended To Replace Partnership.

Eng v. Brown (2018) 21 Cal.App.5th 675 – In *Eng*, the Plaintiff and Defendants agreed to join forces and buy a restaurant, using a to-be-determined entity. Eventually, the parties formed a corporation that purchased the restaurant. The Plaintiff later sued the Defendants for breach of fiduciary duty. The Plaintiff alleged that the parties had initially formed a partnership, and had agreed that the partnership would survive the formation of the corporation. Accordingly, the Plaintiff asserted fiduciary duties arising from the partnership, but not from the corporation. The Defendants argued that, if a partnership was formed, it was superseded by the formation of the corporation, and thus the partnership terminated, and no fiduciary duties were owed under the

partnership. The Defendants prevailed on that defense (referred to in the opinion as "supersession") in the trial court. The Plaintiff appealed, arguing that the supersession defense required the Defendants to prove not only that the partnership was incorporated, but that the parties intended to terminate the partnership when they formed the corporation. The Court of Appeal rejected this argument, holding that, under the doctrine of supersession, a partnership ceases to exist if it is incorporated or reorganized into another entity, unless the partner opposing supersession proves that the parties intended to continue the partnership. Thus, although the Plaintiff could rebut a supersession defense by proving there was an intent to continue the partnership, that burden was on him and not on the Defendants. Because there was a factual dispute as to whether or not the parties intended to continue the partnership, the trial court properly rejected the Plaintiff's motion for a directed verdict, and there was sufficient evidence for the jury to find that the corporation superseded the partnership. Accordingly, the Court affirmed the judgment.

DAMAGES

63. Tax Neutralization Awards – Courts May Gross Up Back-Pay Awards To Offset Additional Tax Liability Cause By Lump-Sum Awards.

Economy v. Sutter East Bay Hospitals (2019) ___Cal.App.5th___ (A150211, A150738, A150962) – Most legal judgments are taxable. But because lump-sum awards may push a prevailing plaintiff into a higher tax bracket, expanded tax liability may effectively deny a plaintiff full relief. Some courts have moved to offset this additional tax liability by awarding "tax neutralization" awards. In *Economy*, the Plaintiff sued the Defendant for wrongful termination. After a bench trial, the trial court awarded the Plaintiff $3,867,122 in damages, including $650,910 for the excess tax liability that the Plaintiff would incur as a result of receiving his back pay in a single tax year, rather than distributed over multiple tax years. The Court of Appeal affirmed. Although the Court recognized that there is no California authority on the concept of tax neutralization, the concept has been endorsed by many federal courts. Further, the Court agreed with the trial court's assessment that compensating a plaintiff for additional tax liability is consistent with Civil Code § 3333, which provides that the measure of damages in cases like this is "the amount which will compensate for all the detriment proximately caused" by the wrongful conduct. The Court acknowledged that a tax neutralization award for future lost wages would be speculative given the uncertainty of future tax rates and other factors, but held that this is not necessarily true for back-pay. Here, the Plaintiff's expert calculated: (1) the taxes the Plaintiff would have paid if he was not terminated and had continued to earn income through trial, (2) the taxes he would have to pay on the lump-sum, and (3) the amount needed to offset the additional tax liability. Thus, the expert laid sufficient foundation to justify the probability and reasonableness of the tax neutralization amount, and the Court of Appeal affirmed the award.

DISCOVERY

64. Depositions – The Head Of A Government Agency Is Generally Not Subject To Deposition.

Contractors' State License Bd. v. Superior Court (2017) 23 Cal.App.5th 125 – After the Contractor's State License Board (Board) initiated disciplinary proceedings against an electrical contractor, the contractor commenced an action for declaratory relief. The contractor then noticed the deposition of the Board's registrar of contracts, i.e. the Board's secretary and CEO. Specifically, the contractor sought to depose the registrar on the definitions of certain Labor Code terms. The trial court denied the board's motion for a protective order to prevent the deposition. The Court of Appeal granted writ relief, holding that a head of a government agency like the registrar is not subject to deposition and no exception applied. The Court first explained that "agency heads and other top governmental executives" are not subject to deposition. Because the registrar was the Board's secretary and CEO, he constituted an agency head. The Court then recognized that an exception applies when the official "has direct personal factual information pertaining to material issues in the action" and "the information to be gained from the deposition is not available through any other source." The contractor, however, sought to depose the registrar on legal definitions and not factual questions. Even if the questions were factual, the Court noted that the contractor could obtain the information through Board publications and other agency documents. Accordingly, the trial court erred by not granting the protective order, and the Court issued writ relief.

65. Privileges – Due Diligence Report Prepared By Attorney-Retained Forensic Expert Is Not Subject To Attorney-Client Privilege Or Attorney Work Product Protection.

Uber Technologies, Inc. v. Google LLC (2018) 27 Cal.App.5th 953 – In *Uber Technologies*, two former Google employees started a self-driving vehicle company, Ottomotto ("Otto"). Otto was then acquired by Uber, and during the due diligence period, Uber and Otto's outside counsel hired a non-attorney forensic expert (the "Forensic Expert") to conduct an investigation into any trade secret infringement or other "bad acts" of the two former employees. After the acquisition, Google commenced arbitration proceedings against the former employees, and issued a deposition subpoena to Uber, seeking all documents relating to the investigation of the employees, including the expert's report. Uber objected on privilege grounds, but the arbitration panel overruled the objections and ordered the documents to be produced. The trial court then granted a petition by Uber challenging this ruling, finding that the documents were privileged. The Court of Appeal reversed. The Court explained that the investigation-related documents could not be attorney-client privileged because the Forensic Expert was hired jointly by Uber and Otto, whose interests were adverse at the time, and the Expert was given explicit instructions that no attorney-client communications between Otto, its employees, and its attorneys were to be disclosed in the report to Uber. Moreover, the investigation-related documents were not entitled to absolute protection under the attorney work product doctrine because the Forensic Expert was

not an attorney, and the report expressly stated that the Expert's services were "non-legal." The material was also not subject to limited work product protection, because Google established that the denial of the materials would unfairly prejudice Google's preparation of its claims.

66. Motions To Compel – Timeliness – Failure To Serve Supporting Papers With Motion To Compel Rendered Motion Untimely.

Weinstein v. Blumberg (2018) 25 Cal.App.5th 316 – In *Weinstein*, the Defendant filed and served a notice of motion and motion to compel further responses to a deposition notice on the last day to file such a motion under CCP § 2025.480(b). The supporting papers for the motion were not attached. Instead, the notice stated that the papers would be served 16 days before the hearing, pursuant to CCP § 1005(b). The hearing was set over two months out, and the Defendant filed and served the supporting papers only 15 days before the hearing. This was 51 days after the notice of motion and motion was filed and served. The trial court found that the filing 15 days before the hearing (rather than 16) did not prejudice the Plaintiffs, and granted discovery sanctions against the Plaintiff's attorneys. The Plaintiff's attorneys appealed, arguing that supporting papers were filed long after the deadline for a motion to compel. Defendant argued that: (1) CCP § 2025.480(b) only requires that the motion be made within 60 days of the completion of the record of the deposition, and that the motion was made when the notice of motion was filed, and (2) under CCP § 1005, the supporting papers themselves were only due 16 days before the hearing. The Court of Appeal agreed with the Plaintiff's attorneys, reasoning that, under CCP § 1010, the notice of motion must specify any supporting papers, and "[i]f any such paper has not previously been served upon the party to be notified and was not filed by him, a copy of such paper must accompany the notice." Because the supporting papers did not accompany the notice, the motion was not properly made within the 60-day time limit of CCP § 2025.480(b). Thus, the Court of Appeal reversed the discovery sanctions order.

67. Privileges – Privilege Log Ordered By Trial Court Would Violate The Deliberative Process Privilege.

Labor & Workforce Development Agency v. Superior Court (2018) 19 Cal.App.5th 12 – In *Labor & Workforce Development Agency*, the Requesting Parties filed an action seeking records relating to 2015 Assembly Bill 1513 ("AB 1513") from its drafter, the California Labor & Workforce Development Agency (the "Agency"). The records were requested under the California Public Records Act ("CPRA"), and some were withheld on the grounds of privilege. The trial court ordered the Agency to prepare a privilege log or "index" that was required to state the identity of the author of each document, the recipient (if any), the general subject matter of the document, and the nature of the exemption claimed. On appeal, the Agency argued that the privilege log would violate the deliberative process privilege, by requiring the Agency to reveal the identities of third parties whose input was sought on a confidential basis during the process of drafting AB 1513. The Court of Appeal agreed, noting that, under California Supreme Court authority, the purpose of the deliberative process privilege is to prevent disclosures that "would

expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." Because the Agency would likely have received less candid input and may not have heard the viewpoints of some constituents in the absence of confidentiality, the identity of the third parties who provided input to the Agency was protected by the privilege.

68. Sanctions – Requests For Admission – Cost Of Proof Sanctions – Expert Opinion Gave A Party Reasonable Ground To Believe It Would Prevail On The Matter, Thus An Award For Costs Of Proof Was An Abuse Of Discretion

Orange County Water Dist. v. The Arnold Engineering Co. (2018) 31 Cal.App.5th 96 – In *Arnold Engineering*, the Orange County Water District ("OCWD") brought an action against the Arnold Engineering Company ("Arnold") and others, to recover expenses for remediating volatile organic compounds ("VOC") released into the groundwater. Arnold served a series of RFAs on the OCWD, asking it to admit that Arnold did not release several different types of VOCs to the soil and groundwater, all of which the OCWD denied. After a bench trial, the trial court found that Arnold was not responsible for any VOC contamination, and that the District's expert testimony to the contrary was unreliable. Arnold then requested cost of proof sanctions under CCP § 2033.420(a), based on the District's denial of Arnold's RFAs. The trial court granted Arnold an award of approximately $615,000 for costs of proof, and the Court of Appeal reversed. Arnold argued that the trial court's findings on the merits, including its criticisms of the District's expert witness, were sufficient to support the award of cost of proof sanctions. The Court of Appeal disagreed, holding that the relevant issue is not whether Arnold prevailed on the merits, it is whether the District had a reasonable good faith belief it would prevail. As to seven out of the ten RFAs, the Court found that while there were faults in the testimony of the District's expert witness, that testimony "was not revealed to be sham, inadmissible, or wholly without foundation." In addition, the Court held that other evidence supported the District's denials and "[v]iewing the evidence as a whole, it is clear that the District had a reasonable ground to believe it would prevail." Accordingly, the Court reversed the cost of proof sanctions as to seven of the RFAs. However, because the District's expert did not provide testimony supporting the denial of the other three RFAs, the Court remanded the matter to the trial court, to calculate the fees attributable solely to proving that Arnold did not release the VOCs at issue in those particular VOCs.

69. Sanctions – Sanctions Under CCP § 1008 Must Comply With The Safe Harbor Provision Of § 128.7(c).

Moofly Productions v. Favila (2018) 24 Cal.App.5th 993 – Where a party files a motion for reconsideration that does not comply with CCP § 1008, the failure to comply "may be punished as a contempt and with sanctions as allowed by Section 128.7." In *Moofly*, the Plaintiff filed an improperly labelled motion for reconsideration without citing any new facts, circumstances, or law to justify relief under § 1008. The trial court denied the motion, and set an OSC regarding

sanctions, which it then granted. After the OSC was issued, the Plaintiff attempted to withdraw the motion, but the trial court held the motion could not be withdrawn after it was already denied. The Court of Appeal reversed, because the trial court failed to comply with the safe harbor provision in CCP § 128.7(c), which gives a party a 21-day period within which a sanctionable motion may be withdrawn before sanctions can issue. The Defendant argued that the safe harbor provision did not apply, because the sanctions are allowed under 1008 "as a contempt," and there is no safe harbor provision in contempt proceedings. The Court of Appeal held that § 1008(d) allows *either* monetary sanctions under 128.7, *or* contempt as alternative remedies, and that each remedy carries its own separate substantive and procedural requirements. Because the requirements for monetary sanctions under 128.7 were not met, the Court reversed the order imposing those sanctions.

70. Sanctions – Terminating Sanctions Ordered When Litigant Refuses To Produce Documents After Court Issues Tentative Ruling And Last Chance To Produce.

J.W. v. Watchtower Bible & Tract Society of New York, Inc. (2018) 29 Cal.App.5th 1142, 1169 – The Defendant governing body of the Jehovah's Witness Church refused to produce documents responsive to a request relating to a 1997 letter to its congregations, seeking information about known child molesters in the Church. When the trial court issued an order compelling production, the Defendant filed a motion to set aside the order, arguing that it violated the minister-penitent privilege. When that motion was denied, the Defendant filed a writ petition in the Court of Appeal, and a petition for review in the Supreme Court, both of which were unsuccessful. On remand, the Defendant continued to refuse to produce the documents. The Plaintiff brought a motion for terminating sanctions, in response to which, the Defendant continued to argue that the documents were privileged and not relevant to the action. On the day of the hearing, the Court issued a tentative ruling, indicating that the Defendant's answer would be stricken if the Defendant did not begin producing documents within four days. When the Defendant continued to refuse to produce the documents, the trial court struck the Defendant's answer, and issued a $4,016,152.39 default judgment following a prove-up hearing. The Court of Appeal affirmed, holding that the trial court did not abuse its discretion by determining that lesser sanctions would be insufficient, since tentative ruling allowing a four-day grace period before granting terminating sanctions was not effective in compelling the Defendant to begin producing documents.

71. Subpoenas – Stored Communication Act Prohibits Production Of Non-Public Social Media Posts On Facebook, Instagram, And Twitter.

Facebook v. Superior Court (2018) 4 Cal.5th 1245 – In an underlying murder prosecution, Defendants served subpoenas on Facebook, Instagram, and Twitter, to obtain the Defendants' public and private posts and messages, including any deleted posts or messages. The Court of Appeal ordered the trial court to quash the subpoenas, and the Supreme Court reversed. The Supreme Court explained that the Stored Communications Act or "SCA" (18 U.S.C. § 2701 *et*

seq.) prohibits the production of private communications held by providers of electronic communications services, but contains an exception where the service provider has the "lawful consent of the originator or an addressee or intended recipient." The Court held that social media posts could qualify for protection under the SCA, if they were not configured to be viewable by the public (i.e. if they were restricted to the user's friends or other specific users, even if the restricted group is a "large group" of people), but that the "lawful consent" exception applies to posts configured to be viewable by the public. The Court declined to address how these rules would apply to posts that were initially configured as public, but were then deleted or reconfigured to be viewable only by a restricted group, because the factual record was not developed enough. Accordingly, the Court directed the trial court to reconsider the motion to quash the subpoena and conduct further proceedings consistent with the opinion.

EMPLOYMENT

72. Ministerial Exception – The First Amendment's Ministerial Exception Does Not Automatically Apply To Breach Of Contract Claims.

Sumner v. Simpson University (2018) 27 Cal.App.5th 577 – The ministerial exception is a constitutionally compelled exception to employment related claims, which ensures that religious institutions will have the right to decide matters affecting the employment of its ministers, free from the scrutiny by civil courts. In *Sumner*, there was no dispute that the Plaintiff, the former dean of a seminary group, qualified as a ministerial employee. Accordingly, the trial court granted summary judgment of the Plaintiff's claims for breach of his employment contract and related torts, on the grounds that the claims were barred by the ministerial exception. The Court of Appeal reversed in part and affirmed in part, holding that plaintiff's tort claims were precluded because they would excessively entangle the court in religious matters. But the same was not true for her contract claims, the Court held that such claims are not automatically prohibited if they would not require the judiciary to resolve a religious controversy. Here, the Court noted that the Defendants claimed that the Plaintiff was terminated for insubordination, not for any religious reasons. Accordingly the breach of contract claim would not involve entanglement with any religious doctrine, and the Court held that the claim was not barred.

EVIDENCE

73. Expert Witnesses – Qualification As An Expert Does Not Require Formal Education Or Certification.

ABM Industries Overtime Cases (2017) 19 Cal.App.5th 277 – In *ABM Industries Overtime Cases*, the Plaintiffs, current and former employees filed a lawsuit against the Defendant facility services company, alleging that the Defendant violated labor laws. The trial court refused to qualify the Plaintiffs' expert, who had professional experience in database management and analysis, but who did not provide evidence of formal training or degrees. The Court of Appeal

reversed and remanded, holding that qualification as an expert witness does not require formal education or certification, and that once a showing has been made that the expert has knowledge that is likely to assist the jury, the degree of the expert's knowledge goes more to weight than admissibility. Here, the expert's declaration indicated that he had "extensive experience" in database management and analysis, including statements that he held leadership positions in two database companies which serviced the "largest banks, military contractors, and publicly held telecommunications carriers"; that his company handled typical transaction loads of approximately one million records per day on "average" databases it maintained; and that he had previously provided payroll and timekeeping database analysis in numerous wage and hour class action cases in California. Moreover, the Defendant did not challenge the veracity of any of the expert's qualifications as set forth in his declaration, nor did it contest any of the factual findings made by the expert in his analysis. Under these circumstances, the Plaintiffs' evidence supporting the expert's qualifications showed that he had "sufficient skill or experience" in the field of database management and analysis such that his declarations should have been considered by the trial court.

74. Hearsay – Witness's Testimony Concerning Contents Of Invoices Was Based On Hearsay, There Was No Foundation To Establish An Exception, And No Authentication Of Invoices.

Hart v. Keenan Properties, Inc. (2018) 29 Cal.App.5th 203 – In *Hart*, the Plaintiff, a former pipe cutter, alleged that the Defendant supplied asbestos-concrete pipes that caused the Plaintiff's mesothelioma. At trial, the only evidence that the Defendant supplied the pipes was testimony by the Plaintiff's foreman that whenever he accepted shipments of pipes, he signed invoices that contained the Defendant's seal. The jury found that the Defendant supplied the asbestos. The Court of Appeal reversed. The Court first cited existing case law holding that invoices are inadmissible hearsay unless offered to corroborate a witness's testimony. In addition, the invoices themselves were not available to be admitted at trial, and the foreman had no independent knowledge of who supplied the pipes. Accordingly, the foreman's testimony was unquestionably based on hearsay. In addition, it was offered for the truth of the matter set forth in the hearsay invoices—i.e. that the Defendant supplied the pipes. Moreover, the Court held that the party admission exception did not apply, because the foreman was not an employee of the Defendant. Finally, the Court held that even if an exception to the hearsay rule applied, the invoices had to be authenticated, and neither the foreman nor any other witness had information that could authenticate the invoices. Without the foreman's testimony, there was no evidence that the Defendant supplied asbestos products that could have caused the Plaintiff's mesothelioma. Accordingly, the Court reversed.

75. Impeachment – A Denial Of A Request For Admission Is A Legal Position, Not A Statement Of Fact, And Is Not Admissible In Evidence.

Victaulic Company v. American Home Assurance Company (2018) 20 Cal.App.5th 948 – The Plaintiff manufacturer sued the Defendants insurers for bad faith failure to cover several underlying product liability claims. The trial centered on the testimony of a claims handler who verified the Defendants' answers to the Plaintiff's requests for admissions. The Defendants denied a series of RFAs seeking admissions that the claims at issue presented a potential for coverage under one or more of the insurance policies. At trial, the witness testified that she determined that there was a potential for coverage when she handled the initial claim files, yet admitted that she verified the answers denying the potential coverage RFAs. She was then repeatedly accused by the trial court and the Plaintiff's attorney of perjury, and the jury unsurprisingly found for the Plaintiff. The Court of Appeal reversed. The Court agreed with Massachusetts and California authority holding that a denial of an RFA is a legal position, not a statement of fact, and explained that California's discovery statutes do not provide for the admission of RFA denials at trial. CCP § 2033.410 provides that admissions have binding effect, but contains no such provision for denials, because a denial only indicates that a party is not willing to concede the issue. Accordingly, it was error for the court to admit the RFA denials at trial. The Court of Appeal also held that the trial court committed misconduct by aggressively questioning the witness and accusing her of perjury, as explained in item 82, below.

76. Privilege – Fifth Amendment – Error To Allow Blanket Assertion Of Privilege After Partial Waiver And To Require Invocation Of Privilege In The Jury's Presence.

Victaulic Company v. American Home Assurance Company (2018) 20 Cal.App.5th 948 – In the bad faith action referred to in item 75, above, a claims handler testified she had concluded that a potential for coverage existed in the underlying products liability action, yet also verified RFA responses in the current action, in which the Defendant denied the existence of a potential for coverage. The trial judge concluded that this amounted to an admission of perjury and halted questioning to allow the witness to retain private counsel to, decide whether or not to invoke the Fifth Amendment privilege. The next day, outside of the presence of the jury, the witness indicated her intent to invoke the privilege in response to any further questioning. The trial judge required the witness to assert the privilege in front of the jury and then dismissed the witness without allowing further examination by either party. The jury found for the Plaintiff, and the Court of Appeal reversed. The Court first explained that a person claiming the Fifth Amendment privilege must do so with particular reference to the specific questions asked, particularly after offering partial testimony. Thus, the trial court's allowance of a blanket claim of privilege was erroneous. The Court then explained that this was prejudicial because although the Plaintiff was able to examine the witness, the Defendants were precluded from doing so after the witness exercised the privilege. Lastly, the Court recognized that requiring a witness to exercise the privilege on the stand in front of the jury invited the jury to make an improper inference in violation of Evidence Code § 913. Instead, the court should have ruled on the

objections outside the presence of the jury. These and other errors discussed in items 75 and 76 required reversal and retrial.

GOVERNMENT

77. Public Records Act – Public Agency May Recover Costs To Acquire And Utilize Special Computer Program To Extract Exempt Material From CPRA Response.

National Lawyers Guild v. City of Hayward (2018) 27 Cal.App.5th 937 – In *National Lawyers Guild*, a nonprofit organization served California Public Records Act ("CPRA") requests on a city, seeking documents that related to a demonstration. The city produced over six hours of police body camera videos relating to the demonstration, which had been redacted to exclude material exempt from disclosure on privacy or security grounds. This required the use of specialized third party software with audio/video editing capabilities. The city sent the organization an invoice for $2,939.58, for the costs incurred in copying the videos for production, which the organization paid under protest. The organization thereafter sought mandate relief in the form of a refund for its payment of $2,939.58, and release of additional video for no more than the direct costs of production. The trial court granted the petition and issued a writ directing the city and its chief of police to refund the organization. The Court of Appeal reversed the judgment. After review of the language of the statute, the legislative history, and policy considerations, the Court held that costs allowable under Gov. Code, § 6253.9(b)(2) include a city's expenses incurred to construct a copy of police body camera video recordings for disclosure purposes, including the cost of special computer services and programming used to extract exempt material from these recordings in order to produce a copy thereof. Based on a review of the legislative history for § 6253.9(b)(2), the Court concluded that lawmakers were aware the cost of redacting exempt information from electronic records would in many cases exceed the cost of redacting such information from paper records. For this reason, lawmakers drafted § 6253.9(b) to expand the circumstances under which a public agency could be reimbursed by a CPRA requester to include, among others, the circumstance present in this case wherein the agency must incur costs to acquire and utilize special computer programming to extract exempt material from otherwise disclosable electronic public records.

78. Constitutional Challenges – Judicial Council, Not The State, Is The Proper Defendant In Challenge To Constitutionality Of Statute Requiring Payment Of Jury Fee.

Templo v. State of California (2018) 24 Cal.App.5th 730 – In *Templo*, the Plaintiffs named the State of California as the defendant in a declaratory relief claim challenging the $150 jury fee under CCP § 631 as an unconstitutional tax. The State moved for a judgment on the pleadings and argued that the Plaintiff failed to state a cause of action because the Judicial Council is the proper defendant—not the State. The trial court granted the State's motion, and the Court of Appeal affirmed. The Court first explained that in actions challenging the constitutionality of a

state statute, the state agency or officers with the "direct institutional interest" in defending the statute are the proper defendants. The Court then examined the statutes establishing and governing the Judicial Council, including statutes giving the Council responsibility for managing the judicial branch and providing for "the representation, defense, and indemnification" of actions affecting the judicial branch. Based on these statutes, the Court concluded that the Judicial Council is the proper defendant with the institutional interest in defending CCP § 631. The Court recognized that Section 3 of Article XIII A states that the "*State* bears the burden of proving by a preponderance of the evidence that a levy, charge other exaction is not a tax," but this section only affected the burden of proof in challenges to a charge and does not decide who is a proper party. Accordingly, the Court affirmed the motion granting judgment on the pleadings in favor of the State.

INJUNCTIVE RELIEF

79. Injunctive Relief Against Non-Parties – Federal Immunity For Interactive Computer Service Providers Under 47 U.S.C. § 230 Precludes Takedown Orders Or Other Injunctive Relief.

Hassell v. Bird (2018) 5 Cal.5th 522 – In an case that split the California Supreme Court, the Plaintiff attorney sought to enforce an injunction issued against a disgruntled former client by obtaining an order requiring Yelp to take down a defamatory review. Yelp was not a party to the action, but once the trial court found the review to be defamatory, it ordered the client, and "anyone acting on her behalf" to remove the review. The trial court specifically named Yelp in the order, and required Yelp to remove any reviews posted by the client. Yelp moved to vacate the judgment and order and appealed the denial all the way to the Supreme Court. A plurality of three justices held that the federal Communications Decency Act provides immunity to interactive computer service providers for any liability arising from user-posted content. The plurality held that this immunity extends to injunctive relief, and precludes courts from issuing an order to remove content that treats a service provider as if it is a publisher or speaker of a user's content. Accordingly, the order against Yelp had to be vacated. A fourth justice concurred in the result, but on the grounds that the trial court lacked jurisdiction to order a non-party to the litigation to remove the review without first providing the non-party to its own day in court. The concurring justice also indicated that he agreed with the plurality's conclusion that the Communications Decency Act applied to the injunction in this case, but he declined to endorse the plurality's view that the Act applies to any injunctions requiring service providers to take down user-published content. Three dissenting justices disagreed with both the immunity argument and the notion that the trial court lacked jurisdiction to order a non-party to take down a user's content that had already been adjudicated to be defamatory.

INSURANCE

80. Insurance Policies – Interpretation – Rare Wine Collector Who Purchased Counterfeit Wine As A Result of Fraud Did Not Suffer Property Loss Under Insurance Policy.

Doyle v. Fireman's Fund Ins. Co. (2018) 21 Cal.App.5th 33 [Moore, O'Leary, Fybel]– In *Doyle*, the Plaintiff sued the Defendant insurance company for breach of contract. Specifically, the Plaintiff was a rare wine collector who insured his wine collection against "loss or damage" by purchasing a "Valuable Possessions" policy from the Defendant. After discovering that the wine he bought was counterfeited by his wine dealer, the Plaintiff filed a claim and sought reimbursement from the Defendant under the policy. When the Defendant denied coverage, the Plaintiff sued. The trial court sustained the Defendant's demurrer, and the Court of Appeal affirmed. The Court, analyzing the express terms of the policy, explained that the policy only covered damage to the subject property, *i.e.* the counterfeit wine itself. Because the counterfeit wine itself was not harmed, the Plaintiff only suffered damages to his finances or his unrealized expectations regarding the value of the wine. Thus, the Plaintiff did not suffer a loss that was covered by his insurance policy and failed to state a cause of action for breach of contract. Accordingly, the Court affirmed the trial court order granting the Defendant's demurrer.

JUDGES

81. Mandatory Disqualification of Judge – Disqualification For Contributions Of $1,500 Or More Only Applies To Contributions By A Single Attorney, Not Multiple Attorneys In A Single Firm.

Eith v. Ketelhut (2018) 31 Cal.App.5th 1 – In *Eith*, the Court held that the operation of a vineyard did not violate the prohibition against business or commercial activity in an HOA's CC&Rs, where winemaking and bottling occurred offsite, and the vineyard did not detract from the residential character of the neighborhood. More interesting than the holding on the merits, however, is the holding that the trial judge was not disqualified when he received, and failed to disclose, $2,600.00 in campaign donations from the attorneys for the Defendant, and was admonished by the Commission on Judicial Performance for his failure to comply with disclosure requirements. The Court of Appeal explained that under Code of Civil Procedure section 170.1, a judge is subject to mandatory disqualification if he or she "received a contribution in excess of one thousand five hundred dollars ($1500) from a party or lawyer in the proceeding." Relying on an advisory opinion by the California Supreme Court Committee on Judicial Ethics Opinions, the Court held that this mandatory disqualification provision is only triggered when any <u>one individual attorney</u> contributes more than $1,500. Where there are multiple small contributions from a single firm that exceed $1,500 in the aggregate, the Court held that a discretionary disqualification rule "sufficiently ensures the public trust." The Court then held that the circumstances of this case did not establish that "[a] person aware of the facts

might reasonably entertain a doubt that [the trial judge] would be able to be impartial." Accordingly, the Plaintiffs failed to show that the judge should have been disqualified prior to trial.

82. Misconduct – Aggressive Questioning During Trial

Victaulic Company v. American Home Assurance Company (2018) 20 Cal.App.5th 948 – In the bad faith action referred to in item 75, above, a claims handler testified she had concluded that a potential for coverage existed in the underlying products liability action, yet also verified RFA responses, in which the Defendant denied the existence of a potential for coverage. In response to this testimony, the trial court began to aggressively question the witness, essentially accusing her of perjury: "what you're telling me is that you signed this under penalty of perjury, and you knew it was false? […] So you knew that the underlying facts were that it was true that there was a potential for coverage, and yet you write in your verification that you declare under penalty of perjury that the foregoing responses are true and correct?" After the witness attempted to deny the accusation of perjury and explained that the RFA responses were legal positions, not assertions of fact, the judge responded "I understand now. The facts don't matter. Is that what you're telling me?" The trial court then suspended the proceedings and requested the attorneys to see him in chambers. The Defendant objected to the court's questioning and requested a mistrial. The trial court denied the mistrial and instructed the jury that he had not intended to express that he believes or disbelieves any witness. The Court of Appeal reversed the judgment, holding that the trial court's questioning was openly hostile to the witness and clearly indicated that the court did not believe her. This could not be cured with a mere two-sentence instruction to the jury. While a trial court is entitled to question a witness, it is misconduct to do so in a way that leaves an impression that a witness's testimony is not believed by the court. Based on this misconduct, and the other errors noted in items 75 and 76, above, the judgment was reversed.

JUDGMENTS

83. Res Judicata – Federal Common Law Controls The Preclusive Effect Of A Federal Judgment.

Guerrero v. California Department of Corrections & Rehabilitation (2018) 28 Cal.App.5th 1091 – In *Guerrero,* the Plaintiff asserted various state and federal civil rights claims in a prior federal lawsuit. The state claims were dismissed due to the Eleventh Amendment, which restricts Plaintiffs from asserting claims against state governments in federal courts. The Plaintiff refiled those claims in state court while the federal lawsuit was still pending. The Plaintiff then prevailed on the remaining federal claims in the federal action, and the state court action was dismissed based on res judicata. The Court of Appeal reversed, holding that the trial court should have applied federal common law to determine the res judicata effect of the federal court judgment on a claim subject to federal question jurisdiction. Both state and federal cases

recognize an exception to res judicata where a cause of action brought in a second lawsuit could not have been asserted in the first lawsuit, due to limitations on the first court's subject matter jurisdiction. A 1997 California case, however, recognized an exception to that exception, where a plaintiff voluntarily chooses to pursue his claims in a court that will only hear some of his claims, rather than in a court with jurisdiction over all of the claims. (*Acuña v. Regents of University of California* (1997) 56 Cal.App.4th 639; *Mattson v. City of Costa Mesa* (1980) 106 Cal.App.3d 441.) The Court of Appeal in *Guerrero* cast doubt on the validity of the rule in *Acuña* and *Mattson*, but held that it was inapplicable in any event, since federal law controls the res judicata effect of a federal judgment, and the rule in *Acuña* and *Mattson* has no foundation in federal law.

84. Satisfaction – Payment By Third-Party Did Not Satisfy Judgment Where Payment Was Not For Judgment Debtor's Benefit.

Tikosky v. Yehuda (2018) 19 Cal.App.5th 1224 – After the Plaintiff received a judgment against the Defendant, the Plaintiff successfully moved to have the Defendant's real property sold to satisfy the Plaintiff's judgment lien. A third-party title insurer for other liens on the real property then paid the Plaintiff the full amount of the judgment lien in order to protect the other liens by preventing foreclosure of the property. Thereafter, the Defendant moved to compel the Plaintiff to acknowledge partial satisfaction of the judgment based on the title insurer's payment. The trial court denied the motion, concluding that the payment was made to protect the third party insurer's own interests by avoiding foreclosure and was not made with the intent to satisfy the Plaintiff's judgment. The Court of Appeal affirmed, holding that a third-party payment that is neither intended to be nor did serve as compensation for a judgment does not satisfy that judgment. The court rejected the Defendant's argument that a plaintiff should only be compensated once, because the case that the Defendant relied upon related to payments by joint tortfeasors, not payments by a third party. Permitting the third-party's payment to offset the Defendant's judgment would allow to the Defendant to escape liability. Accordingly, the Court of Appeal held that the insurer's payment did not satisfy the judgment.

JURIES AND JURY TRIALS

85. Mistrial – Request For Trial Court Decision On Specific Performance Claim Following Mistrial Waived Errors Relating To The Mistrial.

Tierney v. Javaid (2018) 24 Cal.App.5th 99 – In *Tierney*, the Plaintiffs sued the Defendants for specific performance, among other claims. A mistrial on the specific performance claim was declared when the jury was only able to answer three out of six questions on the special verdict form, and the parties were unable to agree on a new form to clarify the issues. The Plaintiffs then requested that the trial judge issue his own statement of decision concerning the specific performance claim, rather than setting the case for another jury trial. The trial court ruled in favor of the Defendants, and the Plaintiffs appealed, arguing that the trial court erred by (1)

refusing to correct the special verdict form, (2) failing to clarify the jury's confusion about a special instruction, and (3) needlessly granting a mistrial. The Court of Appeal affirmed, holding that the Plaintiffs waived these arguments by seeking a decision by the trial judge, rather than another jury trial. The Court explained that it could not reconstitute the original jury to complete deliberations, it could only order a new trial before a new jury. The Plaintiffs could have received that remedy in the trial court, but waived that right by seeking a court trial instead. The Court held that a litigant "is not entitled to a rotation of juries and jurists until he achieves the outcome he desires." Accordingly, the Court held that by waiving the right to a new jury trial, the Plaintiffs waived any claim of error arising from the mistrial, and the Court affirmed the judgment of the trial court.

86. Voir Dire – Mini Opening Statements – Trial Court Did Not Abuse Discretion By Denying Mini Opening Statements Where Prospective Jurors Could Be Prejudiced.

Alcazar v. Los Angeles Unified School Dist. (2018) 29 Cal.App.5th 86 – As of the time of trial in this action, Code of Civil Procedure § 222.5 stated that trial judges "should allow a brief opening statement by counsel for each party" prior to questioning in voir dire. The trial judge allowed counsel to make opening statements before questioning the first panel of prospective jurors. After one of the prospective jurors indicated that he could not be impartial due to the detailed facts he heard during the mini-opening statements, the trial judge refused to allow mini-opening statements before subsequent panels of prospective jurors. The Court of Appeal noted that § 222.5 does not expressly require mini opening statements, and also provides that the scope of questioning during voir dire "shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion." Because the trial judge's decision was supported by: (a) his independent observations of the first day of voir dire, and (b) the prejudicial effect of the opening statements testified to by one prospective juror, the decision was not beyond the bounds of reason, and thus was not an abuse of the trial court's discretion to control voir dire. After trial in this action, § 222.5 was amended to make some advisory provisions mandatory, including a provision that trial judges "shall" allow a brief opening statement. The Court held that the revision did not apply retroactively, so it is uncertain how this case would be decided under the current statute.

87. Voir Dire – Equivocal Indications Of Bias Or Prejudice Do Not Require Dismissal For Cause.

Alcazar v. Los Angeles Unified School Dist. (2018) 29 Cal.App.5th 86 – The Plaintiff schoolchild in *Alcazar* sued the Defendant school district after falling from a tree branch on school property. During mini-opening statements, prospective jurors heard that the child was told not to swing on the branch, but continued to do so anyway. After losing the case, the Plaintiff appealed, arguing that the trial court erred by refusing to disqualify two of the prospective jurors for cause. The first juror made equivocal statements in response to questioning by counsel, telling the Plaintiff's counsel that "I just don't think the school should be

held responsible for the kid's actions," "No… I wouldn't be fair," the Plaintiff's damage claim was "very excessive," and that she "probably can't be fair." When Defendant's counsel asked if she could be fair, she said, "I'll try, yes." She also stated that she would listen to the evidence, follow the law as instructed and make a decision. The second juror initially stated that he did not have strong feelings that would make it hard for him to keep an open mind, but also stated that it was the Plaintiff's "own responsibility because they already know about the rules." When the Plaintiff's counsel tried to explore this statement, the second juror stated that he could not keep an open mind because he was nervous. The trial court denied causes for challenge as to both jurors, and the Court of Appeal affirmed. The Court of Appeal noted that challenges for cause are reviewed for abuse of discretion, and "[W]here equivocal or conflicting responses are elicited regarding a prospective juror's ability to [apply the law], the trial court's determination as to his true state of mind is binding on an appellate court." The Court then held that neither juror expressed an "unalterable preference" in favor of the Defendant, and that, therefore, the trial court did not abuse its discretion by denying the challenges for cause.

PUNITIVE DAMAGES

88. Punitive Damages – Evidence Of Net Worth Not Required For Punitive Damages If Liable Party Fails To Provide Documentation In Response To A Timely Request.

Morgan v. Davidson (2018) 29 Cal.App.5th 540 – The Plaintiff sued the Defendant for battery and prevailed at trial. The judgment included punitive damages. The Defendant appealed, arguing that the punitive damages award should be reversed because there was no evidence of the Defendant's financial condition. The Court of Appeal affirmed. The Plaintiff served the Defendant with notices to produce financial documents at the hearing pursuant to Code of Civil Procedure section 1987(b). The Defendant failed to comply with those timely notices, and the Court of Appeal held that the Defendant's failure to respond to discovery regarding financial condition relieved the Plaintiff of his obligation to demonstrate financial condition during the punitive damages portion of the trial.

89. Punitive Damages – Evidence That Company Should Have Had Better Policies Not Sufficient To Create Issue of Material Fact As To Punitive Damages.

Butte Fire Cases (2018) 24 Cal.App.5th 1150 – Plaintiffs sued Defendant utility company in connection with a devastating wildfire that swept through Calaveras and Amador Counties. Defendant moved for summary adjudication of Plaintiff's punitive damages claim, which the trial court denied. The Defendant petitioned for writ relief. The Court of Appeal issued the writ, concluding that no triable issues of fact supported the Plaintiffs' punitive damages claim. The Court found that the Plaintiff's evidence that the Defendant's policies failed to prevent the fire, without more, did not raise triable issues as to malice. "Although the Plaintiff need not produce a 'smoking gun,' they must nevertheless present evidence that 'permits a clear and convincing inference that within the corporate hierarchy authorized persons acted despicably in willful and

conscious disregard of the rights or safety of other.'" In this case, the Plaintiff failed to produce any such evidence, and thus was not entitled to a punitive damage award.

REAL ESTATE, ENVIRONMENT, AND LAND USE

90. Adverse Possession – An Interest In Land That Deprives The Owner Of All Use Can Be Acquired By Adverse Possession, But Not As A Prescriptive Easement.

***Hansen v. Sandridge Partners,* L.P.** (2018) 22 Cal.App.5th 1020 – In *Hansen*, the Plaintiff farmer planted crops on a portion of their neighbor's land for 30 years or more. In 2012, the Plaintiffs planted the land with pistachio trees, and that same year, the land was sold by its owner to the Defendant. After failing to negotiate a lot line adjustment, the Plaintiff sued to quiet title to a prescriptive easement or equitable easement to allow Plaintiff to continue farming the pistachio trees. The easement sought by Plaintiff would have prohibited the defendant from using or occupying that particular land. The trial court denied the prescriptive easement, but granted an equitable easement that required the Plaintiff to pay for the land. The Court of Appeal reversed the equitable easement because the Plaintiff was negligent in planting the pistachio trees, precluding equitable relief. The Court affirmed denial of the prescriptive easement, explaining that by seeking to prohibit any use of the land by the Defendants, the Plaintiff was seeking the equivalent of an estate, rather than an easement. That relief required a finding of adverse possession, a more difficult standard than a prescriptive easement, because, *inter alia*, it requires payment of assessed taxes over the previous five years. Because the Plaintiff had not paid the taxes on the disputed land, the trial court correctly denied adverse possession.

91. Adverse Possession – To Establish Adverse Possession, Property Tax Payments Must Be Made "Continuously" Through The Statutory Period Of Possession.

McLear-Gary v. Scott (2018) 25 Cal.App.5th 145 – In *McLear-Gary*, the Plaintiff sued the Defendants to quiet title to her claimed easement. The Defendants claimed that the easement was extinguished through adverse possession. To establish adverse possession, the Defendants were required to show that they "timely" paid the relevant property taxes. Four years' worth of property taxes had been delinquent for one of the parcels, but were paid in one lump sum. The Defendants' argued that the "timely" payment requirement meant only that the payments must be made at some point during the statutory time period of adverse possession. The Court of Appeal disagreed and held instead that the requirement of "timely" payments means that payments must be made "continuously throughout" the statutory period of adverse possession. Accordingly, the Court of Appeal held that the Defendants lump sum payment at the end of the period of possession was not sufficient to establish adverse possession.

92. CEQA – Where Ministerial Action Takes Place Outside Of CEQA, No Environmental Review Of The Completed Work Is Required.

Bottini v. City of San Diego (2018) 27 Cal.App.5th 281 – In *Bottini*, the Petitioner demolished a 19th century cottage on his property after the Neighborhood Code Compliance Division ("Code Compliance") of the City of San Diego declared the structure a nuisance, and authorized its demolition. When the Petitioner applied for a coastal permit to construct a single family residence in its place, the City Council declared that the cottage was historic, its demolition was part of the project, and that the potential impact to historic resources justified full environmental review, despite the ordinary CEQA exemption for single family homes. The Petitioner sought a writ of mandate to set aside the City's determination, which the trial court granted. The Court of Appeal affirmed, holding that: (1) once a nuisance determination was made, the City's authorization of demolition was a ministerial act, that did not require CEQA review, and (2) once an act takes place outside of the requirements of CEQA, no environmental review of that act is required. The City argued that the Petitioner himself "cajoled" Code Compliance into issuing the nuisance declaration based on a "faux emergency." The Court of Appeal rejected that argument, noting that a CEQA action is not the proper forum to assert a retroactive collateral challenge to the validity of a nuisance determination.

SETTLEMENT AND OFFERS TO COMPROMISE

93. CCP § 998 Offers – Fair Employment And Housing Actions – Defendants May Not Recover Fees Or Costs Under § 998 In Nonfrivolous FEHA Actions.

Huerta v. Kava Holdings, Inc. (2018) 29 Cal. App. 5th 74 – Government Code § 12965(b) provides trial courts with discretion to award prevailing party attorney's fees and costs in Fair Employment and Housing Act ("FEHA") actions, but provides that a prevailing defendant may only recover fees and costs if the action was unreasonable, frivolous, meritless, or vexatious. In *Huerta*, the Defendant in a FEHA action served the Plaintiff with a § 998 offer that the Plaintiff rejected. After trial, the jury entered judgment in the Defendant's favor. The trial court found that the Plaintiff's action was nonfrivolous. Accordingly, it denied the Defendant's request for fees and costs under § 12965(b), but awarded the Defendant costs and expert witness fees under § 998. The Court of Appeal noted that an amendment to § 12965(b) effective January 1, 2019, expressly states that the bar on fee and cost awards to a defendant in non-frivolous actions applies "notwithstanding" section 998. The Court then held that the rule is the same for actions preceding the effective date of the amendment. The Court first explained that a prevailing party is entitled as a matter of right to costs under CCP § 1032 and that courts have recognized that § 12965(b) is an exception to CCP § 1032. The Court then explained that because § 998 operates as an adjustment to awards under § 1032, § 12965(b) necessarily overrides § 998 as well. Accordingly, the Court reversed the award of costs and expert witness fees because the Plaintiff's action was found to be nonfrivolous.

94. CCP § 998 Offers – Joint, Unallocated 998 Offer By Multiple Plaintiffs Was Not Invalid Where The Combined Judgment Exceeded The Joint Offer.

Gonzalez v. Lew (2018) 20 Cal.App.5th 155 – In *Gonzalez*, a woman and a child died in a house fire. The decedents' respective heirs sued the owners of the house for wrongful death. The Plaintiffs made a joint 998 offer to settle both of the wrongful death claims for $1.5 million. The Defendants rejected the offer, and the Plaintiffs were awarded a combined total of $2.5 million after trial. The Defendants moved to tax Plaintiffs' costs, arguing that the 998 offer was invalid because it did not allocate the offer between the Plaintiffs. The trial court denied the motion, and the Court of Appeal affirmed. Prior courts have invalidated settlement offers made *to* multiple parties where the offers are conditional on all parties' acceptance because such offers could impose enhanced costs on reasonable parties who desired to settle, simply because their co-parties unreasonably refused to settle. The Court in *Gonzalez* split with other authorities expanding that ruling to offers *by* multiple plaintiffs, explaining that where multiple plaintiffs all voluntarily agree to settle a claim for a single sum, there is no risk that one of them would be forced to incur costs due to a co-plaintiff's refusal to settle. The Court acknowledged that where the combined judgment does not exceed the entire amount of the joint offer, it would be impossible to determine that an individual plaintiff obtained a greater award than he would have received under the settlement. However, the Court explained that this does not render the offer invalid *ab initio* because in some instances, the combined amount of the judgment will be greater than the joint offer, justifying an award of costs. The Court further explained that imposing enhanced costs under such circumstances was not unfair to the Defendants, because they could have evaluated the risk of rejecting the joint offer by evaluating their exposure to each of the Plaintiffs, adding those amounts together and comparing the sum to the amount of the joint offer.

95. CCP § 998 Offers – Offers That Are "Exclusive Of" Attorney's Fees And Costs Allow The Accepting Party To Seek Such Fees And Costs In Addition To The Offered Sum.

Timed Out LLC v. 13359 Corp. (2018) 21 Cal.App.5th 933 – In *Timed Out*, the Defendant made an offer pursuant to CCP § 998 to pay a "total sum" of $12,500, "exclusive of reasonable costs and attorney[] fees, if any," to settle the Plaintiff's statutory and common law misappropriation claims. The Plaintiff was awarded $4,483 on its misappropriation claims "exclusive of any costs [or] attorneys' fees that may be set by noticed [m]otion." The question was whether the Defendant's 998 offer must be evaluated against the $4,483 damage award or the $4,483 damage award plus the Plaintiff's pre-offer costs and fees (the Plaintiff's statutory claims provided for a mandatory attorney's fee award to the prevailing party). The trial court held that the words "exclusive of reasonable costs and attorney[] fees, if any," meant that the Plaintiff would have been free to move for an award of pre-offer fees and costs if it had accepted the 998 offer and, therefore, the pre-offer fees and costs had to be excluded when comparing the Plaintiff's recovery to the amount of the offer. Because the Plaintiff's recovery did not exceed the amount of the Defendant's settlement offer, the trial court limited the Plaintiff's cost and fee award to his

pre-offer costs and fees under § 998(c)(1) and awarded post-offer costs and fees to the Defendant. The Court of Appeal agreed, citing the usual and ordinary meaning of the term "exclusive of" in a § 998 offer. The Court also explained that the words "if any" in the offer could not be construed as a waiver of the Plaintiff's right to seek fees following acceptance of the 998 offer, as any waiver of fees in a 998 offer must be express.

96. Code Of Civil Procedure § 998 – Offers That Are Silent On Pre Offer Costs And Fees Allow The Accepting Party To Seek Such Fees And Costs In Addition To The Offered Sum.

Martinez v. Eatlite One, Inc. (2018) 27 Cal.App.5th 1181 [Ikola, Aronson, Fybel] – In *Martinez,* a jury found in favor of the Plaintiff employee and against the Defendant employer on all of her claims and awarded her $11,490. The Defendant had made a § 998 offer in the amount of $12,001, which was silent as to pre-offer costs and attorney fees. The trial court added the Plaintiff's pre-offer costs and fees to the jury's award, compared that amount to the § 998 offer, and determined that Plaintiff obtained a more favorable judgment for purposes of the post-offer cost and fee recovery. The Court of Appeal reversed, holding that because the Defendant's § 998 offer was silent on costs, the Defendant would have been liable for the pre-offer costs if the offer had been accepted. Accordingly, the amount of pre-offer costs and fees should have been added to both the 998 offer and the judgment, in order to compare the two amounts. Because the pre-offer costs in the offer and the judgment cancelled each other out, the Defendant's offer of $12,001 exceeded the Plaintiff's recovery of $11,490. Accordingly, the Defendant was entitled to post offer costs under § 998, and the Court of Appeal reversed.

97. Code Of Civil Procedure § 998 – The Terms Of An Ambiguous Offer To Compromise May Be Clarified By Represented Parties In Subsequent Correspondence.

Prince v. Invensure Ins. Brokers, Inc. (2018) 23 Cal.App.5th 614 [Moore, Thompson, Goethals] – In *Prince,* the Plaintiff accountant sued his former firm, and the Defendant former firm filed a cross-complaint against Plaintiff and his new firm. The Plaintiff obtained a judgment of $647,706.48 against the Defendant, and the Defendant took nothing on its cross-complaint. The Plaintiff had made two § 998 offers, offering to have judgment entered in his favor and against the "defendant" for $400,000 and later offering to have judgment entered for $500,000 "on the First Amended Complaint only." As to the first offer to compromise, the Plaintiff's counsel clarified in e-mail correspondence that the offer was "to dispose of the entire action." Neither offer was accepted nor mentioned the cross-claim against Plaintiff's new firm. The trial court granted a motion to tax the Plaintiff's costs, reasoning that the first 998 offer was ambiguous as to which claims it addressed, and the second offer related only to the Plaintiff's claims, not the cross-claim. Accordingly, the trial court held that the Plaintiff could recover § 998 expert witness fees for an expert whose testimony was limited to the complaint, but could not recover for experts whose testimony related to the cross-complaint. The Court of Appeal

reversed, holding that where two sophisticated parties are represented by counsel, allowing an offer to compromise to be clarified in writing after the offer was made serves the purposes of § 998. Because the e-mail from Plaintiff's counsel clarified that the first offer applied to all claims and cross-claims, the Defendant knew exactly what the Plaintiff was offering. Because there were numerous other issues raised by the Defendant regarding particular expert fees, the Court remanded the matter to the trial court for further consideration of the precise amount of the expert fee award.

SUMMARY JUDGMENT AND SUMMARY ADJUDICATION

98. Causation – Summary Judgment Affirmed Where Defendant Demonstrated That Causation Of Fire Could Not Be Proven, And Plaintiff Provided No Evidence To Rebut.

Leyva v. Garcia (2018) 20 Cal.App.5th 1095 - The Plaintiffs in *Leyva* sued their landlord for negligence and premises liability after their apartment caught fire due to a natural gas wall heater. The Defendant filed a motion for summary judgment, arguing that causation could not be established. In support of the motion, the Defendant submitted expert deposition testimony from the fire chief and a fire investigator. Both experts testified that: (a) the fire was caused either by a malfunction of the heater or the placement of combustible items too close to the heater, and (b) there was not enough evidence to tell which of these caused of the fire. The Plaintiffs opposed the motion by arguing that the Defendant did not satisfy his burden of negating causation, but the Plaintiffs did not submit any evidence to support a causation finding. The trial court granted summary judgment, and the Court of Appeal affirmed, noting that: (a) to prevail on causation, the Plaintiffs must submit evidence that rises beyond the level of mere speculation, and (b) the Defendant's initial burden on a motion for summary judgment was only to negate causation in a "prima facie" fashion. In other words, with evidence sufficient to support the Defendant's position if the evidence is left uncontradicted. The deposition testimony submitted by the Defendant showed that causation was a matter of speculation, which met the Defendant's prima facie burden. Because the Plaintiff submitted no contradictory evidence, summary judgment was appropriate.

99. Summary Judgment – Trial Court Properly Considered Facts Raised In Opposition But Omitted In Moving Papers To Grant Summary Judgment.

Castillo v. Glenair, Inc. (2018) 23 Cal.App.5th 262 – In *Castillo*, after the Plaintiffs sued and settled with their staffing company, the Plaintiffs brought the same employment claims against the company where they were staffed. The Defendant moved for summary judgment, arguing that the settlement was res judicata that barred the action here. The Plaintiffs' opposition included facts that, were not included in the Defendant's moving papers, that demonstrated privity between the Defendant and the staffing company. The trial court, considering those additional facts, granted the Defendant's motion. The Court of Appeal affirmed. On appeal, the

Plaintiffs argued the trial court erred by considering the additional facts including in the opposition because they were not in the Defendant's motion and separate statement. The Court stated, however, CCP § 437 gives a trial court the discretion to deny summary judgment if the moving party fails to comply with the separate statement requirement. Accordingly, the Court held that the so-called "Golden Rule" of summary judgment ("if it is not set forth in the separate statement, it does not exist") is a permissive rule for trial courts, not a mandatory one. Moreover, § 437 states that a trial court "shall consider all of the evidence set forth in the papers" and shall grant summary judgment "if all the papers submitted show there is no triable issue." Thus, the trial court properly considered the additional facts set forth in the opposition, and it properly granted summary judgment because those facts showed that there was no triable issue as to privity and that the Defendant was entitled to judgment as a matter of law. Accordingly, the Court of Appeal affirmed.

TORTS

100. Comparative Fault – Civil Code § 1431.2 Mandates Comparative Fault Apportionment Even For Intentional Torts.

B.B. v. County of Los Angeles (2018) 25 Cal.App.5th 115 – In *B.B.*, the Plaintiffs sued the Defendants County and its deputies for battery, among other claims. The jury found in favor of the Plaintiffs but attributed 40 percent of fault to the decedent, 20 percent to one deputy, 20 percent to another deputy, and the remaining 20 percent to other deputies. But the trial court, relying on *Thomas v. Duggins Construction Co., Inc.* (2006) 139 Cal.App.4th 1105, did not apportion damages by comparative fault under Civil Code § 1431.2, instead making one deputy liable for all noneconomic damages. The Court of Appeal reversed, declining to follow *Thomas*. The Court first explained that § 1431.2 provides that under principles of comparative fault, "a defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion of that defendant's percent of fault." Further, § 1431.2 applies in any action for personal injury, property damage, or wrongful death. *Thomas*, however, held that § 1431.2 does not apply to intentional torts because it was well settled when the statute was adopted that an intentional tortfeasor was not entitled to contribution from any other tortfeasors. Further, *Thomas* also relied on policy considerations against allowing intentional tortfeasors to shift responsibility for their own conduct. The Court here disagreed relying on *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593. In *DaFonte*, the California Supreme Court stated that § 1431.2 applies in every case to shield every defendant from joint liability for noneconomic damages not attributable to their own comparative fault. Further, *DaFonte* stated that § 1431.2 contains "no ambiguity which would permit resort to . . . extrinsic constructional aid." Thus, the Court here disagreed with *Thomas's* reliance on law concerning contribution and other policy considerations. Holding that that the damages should have been apportioned to each deputy's comparative fault under § 1431.2, the Court reversed.

101. Construction Defects – The Right To Repair Act Applies To Claims Involving Property Damage In Addition To Economic Loss.

McMillin Albany LLC v. Superior Court (2018) 4 Cal.5th 241 – The Supreme Court's holding in *Aas v. Superior Court* (2000) 24 Cal.4th 627, 632 barred negligence claims for construction defects that cause only economic loss, but no property damage. In response, the Legislature enacted the Right to Repair Act, which gave plaintiffs a statutory cause of action for construction defects, even when there is economic loss only. The Act applies to defects in individual residential units and requires plaintiffs to follow certain prelitigation procedures to allow defendants notice and an opportunity to voluntarily correct the defects. In *McMillin Albany*, the Plaintiff asserted contract, strict liability, and negligence claims for both economic loss and property damage, but did not comply with the Right to Repair Act's prelitigation procedures. The Court held that the prelitigation requirements of the Right to Repair Act are not limited to plaintiffs who suffered economic loss only (like the plaintiff in *Aas*), but also apply to plaintiffs who suffer property damage in addition to economic loss. Although the Right to Repair Act was passed in response to *Aas*, the text of the act states that "[e]xcept as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed." While Section 944 does not include personal injury damages, it does include property damage and economic loss. In addition, while breach of contract and fraud claims are excluded from the Right to Repair Act, strict liability and negligence claims are not. Accordingly, the Court held that the Plaintiff's negligence and strict liability claims were subject to the Right to Repair Act, even though the Plaintiff suffered property damage in addition to economic loss.

102. Consumer Legal Remedies Act – Omission Of Fact That Was Contrary To Representations Made By Defendant Was Actionable Under Consumer Legal Remedies Act.

Gutierrez v. Carmax Auto Superstores California (2018) 19 Cal.App.5th 1234 - The Plaintiff car buyer filed suit against the Defendant car dealership for a failure to disclose a defect in a car's safety feature that was subject to a recall, despite stating that the car passed a 125-point safety check. Among other causes of action, the Plaintiff asserted a claim under the Consumer Legal Remedies Act (Civ. Code § 1750 et seq.), which prohibits "representing" certain facts. The Defendant demurred, asserting in part that no misrepresentation was asserted, and the trial court sustained the demurrer without leave to amend. The Court of Appeal reversed, holding that an omission is actionable under the CLRA if the omitted fact is "(1) contrary to a material representation actually made by the defendant or (2) is a fact the defendant was obliged to disclose." Because the Defendant represented that the car passed a safety check, the omission of an existing recall was a material omission. The Court further held there is no independent duty to disclose safety concerns by a retail seller of automobiles; however, there are certain cases where that disclosure is necessary, such as the instant case where some disclosures were made.

103. Conversion – Depositor May Bring Conversion Claim Against His Or Her Bank For Transferring Money Based On A Forged Instrument.

Fong v. East West Bank (2018) 19 Cal.App.5th 224 – In *Fong*, the Plaintiff sued his bank, an investment company formed by some of his family friends and several others for conversion, among other claims. The Plaintiff had assisted the investment company in obtaining loans. Upon receiving written instructions apparently bearing the Plaintiff's signature, the Defendant bank closed several of the Plaintiff's accounts and applied the proceeds to the loans. The Plaintiff claimed that one of the Defendant forged his signature and that his funds were, therefore, converted. The Defendant bank filed a summary judgment motion arguing that, as a matter of law, a bank cannot be liable for converting its depositors' funds. The trial court granted summary judgment, and the Court of Appeal reversed. After examining the authorities cited by the bank, the Court held that there was no per se rule preventing a bank from being held liable for converting its depositors' funds. The Court then concluded that the Plaintiff's declaration that the signatures were not his established a triable issue of fact as to whether or not the use of the funds to pay off the loans was authorized. Accordingly, summary judgment for the Defendant bank was reversed.

104. Intentional Interference With Contractual Relations – A Third Party Who Is Interested In, But Not A Party To, A Contract Is Not Immune From An Intentional Interference Claim.

Redfearn v. Trader Joe's Company (2018) 20 Cal.App.5th 989 – Under California law, a party to a contract cannot be liable in tort for a conspiracy to interfere with its own contract. In *Redfearn*, the Plaintiff food broker acted as an intermediary between the Defendant, Trader Joe's Company, and two food producers. After the Trader Joe's allegedly encouraged the food producers to stop working with the Plaintiff and instead sell its food directly to Trader Joe's, the food companies did, in fact, terminate the contracts with the Plaintiff. The Plaintiff sued Trader Joe's for intentional interference with contractual relations. The trial court sustained the Defendant's demurrer, concluding that the Trader Joe's was not a "stranger" to the Plaintiff's contracts with the food suppliers because the contracts depended on Trader Joe's to purchase the food products. The Court of Appeal reversed, holding that "a nonparty to a contract that contemplates the nonparty's performance, by that fact alone, is not immune from liability for contract interference." The Court distinguished a prior decision that indicated that the term "stranger" should be broadly construed. Instead, the court, relying on *Popescu v. Apple Inc.* (2016) 1 Cal.App.5th 39, concluded that a third party's interest in the performance or nonperformance of a contract does not immunize that third party from liability for interference. Because the Defendant was not a party to the contract or an agent to a party, it was a stranger to the contract. Accordingly, the demurrer was improperly sustained.

105. Litigation Privilege – The Litigation Privilege Applies To Fraudulent Misrepresentation And Concealment In Probate Proceedings.

Herterich v. Peltner (2018) 20 Cal.App.5th 1132 – *Herterich* stands for the not so remarkable proposition that the litigation privilege applies to statements made in court, even if those statements are false and fraudulent. The case is significant for the Plaintiff's creative—but ultimately unsuccessful—attempts to get around that rule. The Plaintiff, the son of a decedent, filed a fraud suit against the Defendants, the executor and his executor's attorney, regarding statements the Defendants made in the decedent's probate proceeding. The trial court granted summary judgment for both of the Defendants on grounds not relating to the litigation privilege, but the Court of Appeal requested supplemental briefing on that issue. The Plaintiff raised a litany of arguments in search of an exception to the privilege, including arguments that: (a) the executor waived the litigation privilege by accepting his duties under the Probate Code, (b) the Defendants breached affirmative duties to disclose material facts, (c) the Probate Code's provisions against fraud by executors overrule the privilege, and (d) the Defendants committed extrinsic fraud. Ultimately, the Court of Appeal rejected each of these arguments and affirmed, holding that the litigation privilege applies even to false and misleading communications in furtherance of litigation.

106. Malicious Prosecution – Action Required That The Plaintiff Have A Favorable Termination Of All Causes Of Action In Underlying Suit.

Lane v. Bell (2018) 20 Cal.App.5th 61 – The Plaintiffs filed a malicious prosecution suit against the Defendant based upon an underlying real property lawsuit, in which the Defendant partially prevailed on one claim, but not others. A malicious prosecution plaintiff must prove "(1) the plaintiff in the underlying action pursued a claim with subjective malice, (2) the claim was brought without objective probable cause, and (3) the underlying action was terminated on the merits in favor of the defendant." The Defendant moved for summary judgment, arguing that a line of cases based on *Crowley v. Katleman* (1994) 8 Cal.4th 666 held that the favorable termination element is only satisfied when the plaintiff prevailed on every cause of action in the underlying litigation. The Plaintiffs opposed, arguing that another line of cases based on *Albertson v. Raboff* (1956) 46 Cal.2d 375 permits a malicious prosecution suit where the Plaintiffs were successful on some causes of action, but not other severable causes of action. The trial court granted the motion, holding that the *Crowley* line of cases is binding. The Court of Appeal affirmed, holding that a malicious prosecution plaintiff must be successful on the entirety of the underlying action. The Court of Appeal noted that both lines of cases evolved from California Supreme Court cases, but it held that the *Crowley* line of cases was later in time and correct. Permitting a malicious prosecution action for partial success would make the third element of the cause of action superfluous. The Court stated that without further guidance from the California Supreme Court regarding this disagreement, it was required to follow the *Crowley* line of cases. Accordingly, summary judgment was proper.

107. Quasi-Contract/Unjust Enrichment – Recipient Of Money Who Had Reason To Inquire As To The Source Of Co-Defendant's Funds May Be Liable Under Quasi-Contract.

Welborne v. Ryman-Carroll Foundation (2018) 22 Cal.App.5th 719 – The Plaintiff sued her investment advisor for stealing approximately $500,000 from her investment account to pay off his debts. The Plaintiff also sued the entity that who received the funds based on quasi-contract, an equitable doctrine arising out of the principle of unjust enrichment. The Defendant entity moved for summary judgment, asserting an innocent transferee defense based on the undisputed facts that the Defendant did not know or ask where the funds came from, and did not tell the advisor to take the funds from Plaintiff. The Plaintiff opposed with a prima facie showing that the Defendant was aware of sufficient facts (such as the advisor's inability to make loan payments, and his theft of $630,000 from Defendant itself) to put Defendant on notice and create a duty to inquire about the source of the funds. The trial court granted summary judgment, and the Court of Appeal reversed. The Court held that the Plaintiff's evidence was sufficient to create an issue of fact as to whether Defendant had a duty to inquire about the source of the advisor's funds. If it had such a duty and failed to exercise it, it was not an innocent transferee. Accordingly, summary judgment was reversed.