NEW STATUTES, NEW RULES, AND NEW CASES

WHAT EVERY BUSINESS LITIGATOR NEEDS TO KNOW IN 2020

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SIGNIFICANT STATUTES
Enacted in 2019

SIGNIFICANT RULES
Adopted in 2019

SIGNIFICANT CASES
Decided in 2019

SIGNIFICANT STATUTES
Enacted in 2019

ALTERNATIVE DISPUTE RESOLUTION

1. Arbitration Agreements – Formation – Employers May Not Require Applicants To Waive Judicial Forums To Redress FEHA And Labor Code Violations.

Labor Code § 432.6; Government Code § 12953 – New Labor Code section 432.6 prohibits an employer from (1) requiring an applicant or employee to waive any right, forum, or procedure for a violation of FEHA or the Labor Code as a condition of employment; (2) retaliating against an applicant or employee for refusing to agree to such a waiver; or (3) requiring an applicant or employee to "opt out" of an agreement to such a waiver. Effectively, this prohibits employers from requiring employees to enter into arbitration agreements applicable to FEHA and Labor Code claims, and only allows such agreements when the employee voluntarily "opts in" to arbitration. The U.S. District Court for the Eastern District of California has preliminarily enjoined state officials from enforcing these new provisions on the grounds that they violate the Federal Arbitration Act by discriminating against arbitration agreements. *See Chamber of Commerce of the United States v. Becerra* (E.D. Cal. Jan. 31, 2020) 2020 U.S. Dist. LEXIS 21850, 2020 WL 605877.

2. Consumer And Employment Arbitrations – Drafting Party's Failure To Fully Pay Arbitration Fees Will Result In Waiver Of Right To Arbitrate, Mandatory Sanctions, And Possible Non-Monetary Sanctions.

Code of Civil Procedure §§ 1280, 1281.96, 1281.97, 1281.98, and 1281.99 – When the party who drafted an arbitration provision in an employment or consumer context is required by law to pay arbitration costs and fees, the new laws enacted by SB 707 declare that the failure to pay within 30 days of the due date is a material breach of the agreement. SB 707 also sets forth penalties for such a breach.

In the case of costs and fees required to initiate an arbitration, the drafting party's failure to pay within 30 days of the due date gives the consumer or employee the right to either (1) withdraw from arbitration and proceed in court, with the statute of limitations tolled from the commencement of arbitration; or (2) compel arbitration in which the drafting party shall pay the consumer or employee's reasonable attorney's fees and costs related to the arbitration.

In the case of costs and fees required to continue arbitration after it is commenced, the drafting party's failure to pay within 30 days of the due date gives the consumer or employee the right to either (1) withdraw from arbitration and proceed in court, with the statute of limitations tolled from the commencement of arbitration; (2) continue the arbitration if the service provider agrees to allow the arbitration to proceed despite the drafting party's failure to pay fees (if the provider

elects to do so, it may bring a collection action against the drafting party at the conclusion of the arbitration); (3) petition the court for an order compelling the drafting party to pay the fees; or (4) pay the drafting party's fees, continue the arbitration, and obtain an award of the fees at the conclusion of the arbitration, regardless of the determination on the merits.

If the consumer or employee elects to proceed in court, the court shall order mandatory sanctions in the amount of attorney's fees the other party incurs as a result of the failure to pay. The court may also award issue, evidentiary or terminating sanctions, and may find the drafting party in contempt of court. If the consumer or employee elects to continue in arbitration, the arbitrator shall award appropriate monetary or non-monetary sanctions.

APPELLATE PROCEDURE

3. Code Of Civil Procedure – Declaration Of Existing Law Regarding Money Judgments.

Code of Civil Procedure § 695.215 – New C.C.P. section 695.215 provides that payment in satisfaction of a money judgment—including payment of a severable portion of the money judgment, interest thereon, and associated costs—does not constitute a waiver of the right to appeal, except to the extent that the payment is the product of compromise or is coupled with an agreement not to appeal. In addition, payment in satisfaction of a severable portion of a money judgment, interest, and associated costs, does not constitute a waiver of the right to appeal other portions of the money judgment. This section is intended to be declaratory of existing law.

ATTORNEY PRACTICE

4. Admission To The State Bar – Mental Health Records Cannot Be Considered.

Business & Professions Code § 6060 – The staff of the State Bar or the members of the examining committee are prohibited from reviewing an applicant's mental health records when reviewing whether an applicant is of good moral character.

5. Attorney Arbitration – Time To Bring Cause Of Action For Attorney Misconduct Tolled By Arbitration.

Business & Professions Code § 6206; Code of Civil Procedure § 340.6 – Under the Mandatory Fee Arbitration Act (MFAA), arbitration of disputes over fees or costs is voluntary for clients and mandatory for attorneys if commenced by a client. While the MFAA does not apply to claims for malpractice or professional misconduct, amendments to the Bus. & Prof. Code and the C.C.P. now provide that claims based on attorney misconduct are tolled during the pendency of an arbitration under the MFAA. The tolling period runs from the date a request for

arbitration is filed until 30 days after receipt of notice of the award or notice of termination of the arbitration.

6. Attorney Regulation – State Bar Fees, Repeal Of Initiative Power, And Discipline Of Attorneys.

Business & Professions Code §§ 6001.2, 6025, 6052, 6077, 6101, 6140, 6140.03, 6140.9, 6141, 6141.1, 6141.3, 6230, 6032.1, 6022, 6026, 6076.5 – License fees for 2020 have increased to $438 for active licensees and $108 for inactive licensees (with an additional optional $50 fee to support nonprofit organizations that provide free legal services, and a $10 fee to provide substance abuse or a mental health treatment services for attorneys who cannot afford to pay). An active licensee who can show a total gross annual individual income from all sources of less than $60,478.35 presumptively qualifies for a waiver of 25% of the annual license fee.

Bus. & Prof. Code § 6076.5, which allowed attorneys to formulate new Rules of Professional Conduct by initiative, and to submit those rules to the Supreme Court for consideration upon a majority vote, has been repealed.

The existing provisions of Bus. & Prof. Code § 6077 authorizes disciplining of attorneys for violations of the Rules of Professional Conduct by issuing a public or private reproval or recommending a suspension of practice to the Supreme Court. The 2019 amendment of this statute transfers that authority from the State Bar Board of Trustees to the State Bar Court.

7. Continuing Legal Education – Attorneys And Court Employees Must Complete Bias Training.

Business and Professions Code § 6070.5; Government Code § 68088 – Beginning in 2022, attorneys must take MCLE training on implicit bias and bias-reducing strategies. The number of hours of such training is not specified, but the State Bar is directed to adopt relevant regulations. Also beginning in 2022, court staff who interact with the public on matters before the court must complete two hours of bias training every two years.

8. Debt Collection – Removes Exception For Attorneys And Clarifies Mortgages Are Debts.

Civil Code § 1788.2 – The Rosenthal Fair Debt Collections Practices Act prohibits debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts. An exemption provided to attorneys has now been deleted in response to complaints that banks and mortgage servicers were employing attorneys to avoid the requirements of the Act. In addition, the recent amendment codifies caselaw that construed “consumer debt” to include mortgage debt.

CIVIL PROCEDURE

9. Civil Procedure – Required Access Required To Gated Multifamily Dwellings To Serve A Subpoena.

Code of Civil Procedure § 415.21 – Existing law required security personnel to grant access to gated communities for lawful service of process or service of a subpoena. This law has been expanded to require access to "covered multifamily dwelling[s]," including apartments with three or more units, and condominium buildings with four or more units.

CONTRACTS

10. Contracts – Attorneys' Fees For Violation Of Holder Rule.

Civil Code § 1459.5 – Federal Trade Commission regulations require consumer credit contracts in connection with the sale or lease of goods or services to provide that holders of the contract are subject to the same claims or defenses that a consumer may have against the seller. This is known as the "Holder Rule," and it also provides that claims under the rule are limited to the amount paid by the consumer in the underlying transaction. Among other things, this rule allows consumers to file actions against financing companies when a seller of faulty goods goes out of business. The Third District Court of Appeal in *Lafferty v. Wells Fargo* (2018) 25 Cal.App.5th 398 held that the recovery of attorneys' fees in connection with a claim asserted against a lender under the Holder Rule is limited to the amount the consumer paid under the contract. The 2019 amendment specifies that a plaintiff who prevails against a defendant named in a cause of action under the Holder Rule may recover all attorneys' fees, costs, and expenses from that defendant to the same extent permissible had the plaintiff prevailed against the seller. This effectively removes the limitation placed on such recoveries in *Lafferty*.

CORPORATIONS AND BUSINESS ENTITIES

11. Business – Approval For Online Registration Of Fictitious Names.

Business & Professions Code § 17913 – County clerks may now accept online identification authentication for the filing of Fictitious Business Name Statements.

12. Business License Fee Exemptions – Veterans Exempt From Local Business License Fees.

Business & Professions Code § 16001.8 – New section 16001.8 provides that a California resident who is an honorably discharged or honorably relieved veteran of the Armed Forces of the United States need not pay any local business license fees if the veteran is the sole proprietor of the business.

COURTS

13. Court Fee Increase To Fund Attorneys For Low Income Litigants.

Government Code § 70626 – Certain court fees have been increased by $15 to fund programs to provide low income litigants with counsel in matters involving child custody. This includes fees for issuing writs for the enforcement of a judgment or order, issuing an abstract of judgment or certification of satisfaction of judgment, certifying copies of court records, and several other clerical fees.

14. Courthouses – Privilege From Civil Arrest.

Civil Code §§ 43.54, 177 – New Civil Code section 43.54 provides that a person attending a hearing or having other legal business is not subject to civil arrest in a courthouse, except pursuant to a valid judicial warrant. Amendments to section 177 provide that a judicial officer shall have the power to "prohibit activities that threaten access to state courthouses and court proceedings, and to prohibit interruption of judicial administration, including protecting the privilege from civil arrest at courthouses and court proceedings."

15. Remote Court Reporting Pilot Project in Santa Clara.

Government Code § 69959 – This code section authorizes the Santa Clara Superior Court to conduct a pilot project to study the potential use of remote court reporting for certain court proceedings, including child support and misdemeanor cases. It requires the use of court reporters with at least five years of courtroom experience. The presiding judge must appoint a committee to prepare a report for presentation to the Legislature on the results of the pilot project. It expires in January of 2022.

DISCOVERY

16. Civil Discovery Act – Depositions of Certain Dying Plaintiffs In Mesothelioma Or Silicosis-Related Actions.

Code of Civil Procedure § 2025.295 – This new provision limits the deposition of a plaintiff deponent to seven hours when: (1) the plaintiff suffers from mesothelioma or silicosis; (2) the action is for injury or illness resulting in such illness; and (3) a physician attests that such illness raises doubt as to the plaintiff's survival beyond six months. The trial court has discretion to grant an additional three hours if there are ten or more defendants, and seven hours if there are twenty or more defendants. Additional time may be granted only if the court finds that it is necessary in the interests of fairness and the health of the deponent is not endangered by the grant of additional time.

17. Civil Discovery Act – Documents Produced In Response To A Demand For Inspection Shall Be Identified With The Specific Request Number To Which The Documents Respond.

Code of Civil Procedure § 2031.280 – The Civil Discovery Act previously allowed responding parties to produce documents as they are kept in the usual course of business, or to organize and label documents to correspond with the categories in the demand. The recent amendment to section 2031.280 eliminates the option to produce documents as they are kept in the usual course of business and instead requires documents to "be identified with the specific request number to which the documents respond." The statute does not specify what should happen if a document responds to multiple requests. The sponsors were the Consumer Attorneys of California and California Defense Counsel, who claimed that the change would increase the efficiency of litigation.

18. Civil Discovery Act – Electronic Copies Of Admissions And Interrogatories.

Code of Civil Procedure §§ 2030.210, 2033.210 – Parties are now required to provide electronic copies of RFAs and special interrogatories and responses to RFAs and special interrogatories within three days of a request from the opposing party. The parties may agree on the format of the electronic copies, or, if no agreement is reached, the copies shall be provided in plain text format. The parties may also agree on a manner of delivery, or, if no agreement is reached, delivery shall be by email. The requirement does not apply if the discovery request or response was not prepared electronically. A responding party who has requested and received requests for admission or interrogatories in an electronic format shall include the text of the request or interrogatory immediately preceding the response.

19. Civil Discovery Act – Stipulated Discovery Disclosures And Sanctions.

Code of Civil Procedure §§ 2016.090, 2023.050 – Section 2016.090, modeled on FRCP Rule 26(a)(1), allows parties to stipulate to exchange initial disclosures of information that is commonly sought in discovery. The initial disclosures are to include the following:

> "(A) The names, addresses, telephone numbers, and email addresses of all persons likely to have discoverable information, along with the subjects of that information, that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.
>
> (B) A copy, or a description by category and location, of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.

(C) Any agreement under which an insurance company may be liable to satisfy, in whole or in part, a judgment entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(D) Any agreement under which a person, as defined in Section 175 of the Evidence Code, may be liable to satisfy, in whole or in part, a judgment entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Only those provisions of an agreement that are material to the terms of the insurance, indemnification, or reimbursement are required to be included in the initial disclosure. Material provisions include, but are not limited to, the identities of parties to the agreement and the nature and limits of the coverage."

If the parties stipulate to such initial disclosures, they are also obligated to update their disclosures in a timely manner in response to the discovery of additional responsive information or a court order.

Section 2023.050 requires courts to, upon motion, impose a $250 sanction on a party or attorney who failed to act in good faith in response to an inspection demand by not responding to a request, by failing to meet and confer, or by producing requested documents within a week before a motion to compel is to be heard. Courts may direct attorneys to report such sanctions to the State Bar. Unrepresented litigants are presumed to have acted in good faith in order to prevent represented parties from seeking to profit by imposing mandatory sanctions on non-lawyers.

DISCRIMINATION

20. Department of Fair Employment and Housing Is Authorized To Bring Federal Civil Rights Actions.

Government Code § 12930 – The amendment in AB 1820 authorizes the Department of Fair Employment and Housing to bring civil actions for violations of specified federal civil rights and antidiscrimination laws, including Title VII of the Civil Rights Act of 1964, the federal Americans with Disabilities Act, and the federal Fair Housing Act. The amendment overturns the U.S. District Court's decision in *Cheng v. WinCo Foods, LLC* (2014) US District LEXIS 81069, which held that the DFEH could not enforce federal civil rights laws because the California Legislature had not explicitly provided DFEH with authorization to file federal anti-discrimination suits.

21. Educational And Employment Discrimination – Protected Hairstyles Added to Prohibited Considerations.

Education Code § 212.1; Government Code § 12926 – The statutory definitions of race for the purpose of educational and employment discrimination law have been expanded to include traits

historically associated with race, such as hair texture and protective hairstyles, including, but not limited to, braids, locks, and twists.

22. Fair Housing – Veteran Or Military Status.

Government Code §§ 12920, 12921, 12927, 12930, 12931, 12955, 12955.8, 12956.1, and 12956.2 – California's Fair Housing laws have been amended to add veteran or military status as a protected category. In addition, the amendments bar discrimination based on the use of Veterans Affairs Supportive Housing vouchers to pay for housing.

EMPLOYMENT AND LABOR

23. Employee Classification – Workers Are Presumed To Be Employees.

Labor Code §§ 2750.3, 3351; Unemployment Insurance Code §§ 606.5, 621(AKA AB 5) -- At a high level, AB 5 codifies the California Supreme Court's 2018 decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903, which held that "for purposes of California wage orders, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees," most workers are employees, and the burden of proof for classifying workers as independent contractors falls on the hiring entity.

AB 5 states that for the purposes of Unemployment Insurance Code *and* wage orders, a person is an employee rather than an independent contractor unless the hiring entity shows each of the following factors (taken from the *Dynamex* decision):

> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The law exempts many professions, such as doctors, psychologists, dentists, podiatrists, insurance agents, stock brokers, lawyers, accountants, engineers, veterinarians, direct sellers, real estate agents, hairstylists and barbers, aestheticians, commercial fishermen, marketing professionals, travel agents, graphic designers, grant writers, fine artists, enrolled agents, payment processing agents, repossession agents, and human resources administrators. Photographers, photojournalists, freelance writers, and editors or newspaper cartoonists who

make 35 or fewer submissions a year are also exempt. An exemption also exists for some business-to-business activities.

If a person is specifically exempted from the definition of "employee," or if the above test cannot be applied, then the test in the California Supreme Court's decision in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 applies. Under the *Borello* test, the primary consideration is a hiring entity's right to control how a person works. *Borello* also considers other factors, such as the degree of skill required to perform the work, the method of payment, and the nature of the company's usual business. The multi-factor test in *Borello* thus provides hiring entities more room to show that the person is an independent contractor.

24. Employee Classification – Newspaper Carriers Exempt From AB5 For One Year.

Labor Code §§ 2750.3 – After the passage of AB 5, newspaper carriers were added to the list of exempted personnel.

25. Employers – Required Sexual Harassment Training

Government Code § 12950.1 – The deadline for employers with five or more employees to provide sexual harassment training to their supervisory and non-supervisory employees has been extended from January 1, 2020 to January 1, 2021, and refresher training must be provided once every two years thereafter. New nonsupervisory employees must be provided training within six months of hire, and new supervisory employees must be provided training within six months of assuming a supervisory position. An employer who has provided this training and education in 2019 is not required to provide it again until two years thereafter.

Employers may develop their own training programs, but existing law requires the DFEH to develop and post online courses that satisfy the requirements of this section. Information on the DFEH's website states that the courses should be available in "early 2020." As of the date of this summary, the courses are not yet available.

26. Employment – Employee's Right To Seek Penalties From Employer For Failure To Pay Wages.

Labor Code § 210 – Labor Code section 210 provides civil penalties for an employer's failure to pay employee wages. The penalties are $100 for the first violation, and $200 plus 25% of the amount wrongfully withheld for each subsequent violation, or for any willful violation. Previously, this penalty could be recovered by the Labor Commissioner, or by an employee under the Private Attorneys General Act ("PAGA"). However, an employee in a PAGA action only receives 25% of the penalty. The 2019 amendment to section 210 allows employees to directly recover the entire penalty in a civil action, but double recovery under section 210 and PAGA is prohibited. The legislative history notes that the Labor Commissioner recently issued

the largest fine under section 210 in state history—a nearly $12,000,000 fine against a Los Angeles construction company.

27. Employment – Lactation Laws.

Labor Code §§ 1030, 1031, 1033, 1034 – The rules requiring employers to provide lactation rooms for employees have been amended slightly to adjust the requirements for such rooms. In addition, employers must provide a sink with running water and a refrigerator suitable for storing milk near the lactating employee's workspace. An existing provision that allows employers to apply for an exemption upon a showing of hardship is now limited to employers with fewer than 50 employees. A provision requiring employers to provide a reasonable break period to allow for lactation has been amended to require such a break period each time the employee has the need to express milk. Finally, a provision prohibiting retaliation has been added to Labor Code section 1033.

28. Employment Discrimination – Statute Of Limitations To File Allegation With DFEH.

Government Code § 12960 – The amendments to section 12960(b) and (e) extend the deadline to file an allegation of unlawful workplace harassment, discrimination, or civil rights-related retaliation with DFEH from one year to three years and specify that the new deadline does not operate to revive lapsed claims.

29. Labor and Insurance – Live Organ Donations, Leave, and Insurance.

Education Code §§ 89519.5, 92611.5; Gov't Code § 19991.11; Insurance Code §§ 10110.8, 10233.8; Labor Code § 1510 – This law requires a private employer to grant an employee an additional 30-day unpaid leave of absence to donate an organ. The same applies for a state employee who has exhausted all sick leave. It also prohibits a life or disability insurance policy from declining or limiting coverage because a person has donated an organ, or from considering the status when determining a premium based solely and without any additional actuarial risks upon the status of that person as a living organ donor.

30. Settlement Agreements – An Agreement To Settle An Employment Dispute May Not Contain A Rehire Agreement Unless The Employee Has Engaged In Sexual Assault Or Sexual Harassment.

Code of Civil Procedure § 1002.5 – New C.C.P. section 1002.5 states that agreements to settle employment disputes may not contain provisions preventing the settling employee from obtaining future employment with the settling employer, unless the employer makes a good-faith determination that the employee committed sexual assault or sexual harassment. The section provides that it shall not require an employer to continue to employ or to rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person.

ENVIRONMENTAL

31. Fur Products – Prohibition On Sale And Purchase.

Fish and Game Code §§ 3039, 2023 – Effective January 2023, fur sales and production of fur products will be prohibited in California. Exempt categories include used furs and any activity expressly authorized by federal law.

32. Six-Ounce Hotel Bottles Prohibited.

Public Resources Code § 42372 – Hotels and other lodging establishments will be prohibited from providing guests with personal care products in plastic bottles holding less than six ounces, commencing January 2023 for hotels with more than fifty rooms and January 2024 for hotels with fewer than fifty rooms. Penalties are $500 for the first violation, and $2,000 for subsequent violations.

ESTATES AND TRUSTS

33. Estates and Trusts – At Death Transfers Of Real Property Between Spouses Are Exempt From Fiduciary Obligations.

Family Code § 721; Probate Code § 21385 – Existing law provides that when spouses enter into real property transactions with each other, they are bound by the general rules governing fiduciary relationships, imposing a duty of the highest good faith and fair dealing on each spouse. Certain transactions are exempt from this provision, and the 2019 amendment extends the exemption to include at-death transfers between spouses by will, revocable trust, beneficiary form, or other instruments from the above-described provisions and any presumptions of undue influence arising from those provisions. However, other statutory or common law presumptions of undue influence may still apply to these transfers.

34. Estates And Trusts – Gifts To Care Custodians Who Marry Their Dependents.

Probate Code §§ 21380, 21382, 21611 – Existing Probate Code section 21382 exempts a transferor's spouse and cohabitants from statutory presumptions of fraud or undue influence where the transferee is the drafter or transcriber of the transfer interest or is the care custodian of the transferor. Section 21611 also provides a share of a decedent's estate to a spouse, where the spouse is omitted from the decedent's estate planning documents, and those documents were all drafted before the marriage. The amendments to the Probate Code do two things: First, gifts to care custodians who marry their dependent adult within six months before the gift or the execution of a testamentary document are presumed to stem from undue influence, and are excluded from the exemption provided to spouses under section 21382. Second, care custodians who marry their dependent adult within six months before the dependent adult's death do not qualify to receive a share of the decedent's estate under section 21611.

EVIDENCE

35. Damage Calculations.

Civil Code § 3361 – New Civil Code section 3361 provides that "Estimations, measures, or calculations of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death shall not be reduced based on race, ethnicity, or gender." The legislative findings adopted with this new section provide that it shall not be construed to permit the reduction of damages based on other protected characteristics.

36. Expert Witness Nondisclosure Agreements – Engineers, Land Surveyors, Geologists, Geophysicists.

Business & Professions Code §§ 6789, 7874, 8790.5 – This new law prohibits a professional engineer, land surveyor, geologist, or geophysicist who is retained as an expert from entering into a nondisclosure agreement if the nondisclosure agreement prohibits the licensee from reporting a violation or potential violation of the Professional Engineers Act or the Professional Land Surveyors' Act, as applicable.

37. Evidence –Caseworker-Victim Privilege Expanded.

Evidence Code §§ 1038, 1038.1, 1038.2, 1038.3 – This law adds to the existing caseworker-victim privilege, now allowing a human trafficking victim's current caseworker to claim the privilege, even if that caseworker was not the victim's caseworker when the confidential communication was made. It also eliminates courts' ability to compel disclosure of an otherwise protected communication when the victim is either dead or is not the complaining witness in a criminal action against the human trafficker.

GOVERNMENT

38. Elections And Speech – No Deep Fakes Of Politicians Within 60 Days Of An Election.

Code of Civil Procedure § 35; Elections Code § 20010 – The existing "Truth in Political Advertising Act," which prohibits campaign materials that include a candidate's image superimposed on another photograph, is being repealed and replaced with new language. The new language prohibits "materially deceptive" audio or visual media from being distributed with malice within 60 days of an election, without a disclaimer indicating that the material has been manipulated. "Materially deceptive" means that the image, audio, or visual recording of a candidate's appearance, speech, or conduct has been altered so that it falsely appears to be authentic, and would cause a person to have a different understanding of the content than they would have if seeing an unaltered original version. A candidate who appears in materially deceptive content may seek a temporary restraining order, injunction, damages, and reasonable

attorney's fees. The law is scheduled to sunset in 2023, at which time the prior "Truth in Political Advertising Act" will be restored.

39. Income Taxes – No Deductions For Guilty College Admissions Scandal Participants.

Revenue and Taxation Code § 17275.4 – This law prohibits those found guilty in the recent college admissions scandal from deducting their payments as charitable contributions or business expenses.

40. Public Records Act – Photographing Records Permitted.

Government Code § 6253 – The California Public Records Act has been amended to provide that a member of the public inspecting records on premises may use their own devices, such as cell phones or cameras, to make copies of public records without charge. The manner of reproduction cannot cause damage to the documents, nor involve software access to the public agency's computer system. In addition, the agency may impose reasonable restrictions to protect the documents from damage and prevent unreasonable burdens on the agency's functions.

JUDGMENTS

41. Enforcement of Money Judgments – Time To Claim Or Object To Exemptions From Levy.

Code of Civil Procedure §§ 699.520, 699.540, 704.070, 703.520, 703.550, 704.220, 704.225, 704.230 – The time for a judgment debtor to claim an exemption from a judgment creditor's attempts to levy on property has been extended from 10 days after the date of the notice of levy to 15 days if the notice is personally served, or 20 days if the notice is served by mail. The time for a judgment creditor to oppose the exemption has been extended from 10 days to 15 days after service of the notice of claim of exemption.

JURIES AND JURY TRIALS

42. Jury – Felons May Serve On Juries After Their Sentences And Post-Sentence Supervision Are Ended.

Code of Civil Procedure § 203 – Existing law prohibited felons whose civil rights have not been restored from serving as members of a jury. In California, the full restoration of a felon's civil rights can only be done via a gubernatorial pardon. Amendments to C.C.P. section 203 eliminate the prohibition on felons serving on juries but prohibits jury service by persons incarcerated in jail or prison, felons on probation, parole, or other post-sentence supervision, and convicted sex offenders.

MISCELLANEOUS

43. Maintenance Of The Codes.

AB-991 – AB 991 is the annual bill making non-substantive corrections and updates to the codes. This year, many of the revisions eliminated gendered pronouns and replaced them with gender neutral language.

44. The Posse Comitatus Act Of 1872– Repealed.

Penal Code §§ 150, 1550 – The Posse Comitatus Act made it a misdemeanor for any able-bodied adult to refuse to aid and assist in making an arrest, or retaking into custody a person who has escaped from arrest upon the request of a police officer or a judge. The misdemeanor was punishable with a fine of up to $1,000. The Act now been repealed.

PRIVACY

45. Digital Technology – Use Of Computer Technology To Create Fake Sexually Explicit Content.

Civil Code § 1708.86 – Civil Code section 1708.86 creates a new cause of action against a person who creates or discloses sexually explicit audiovisual material that uses "digitization" to realistically depict: (a) one person's nude body parts as if they belonged to the plaintiff, (b) computer generated nude body parts as if they belonged to the plaintiff, or (c) the plaintiff engaging in sexually conduct in which the plaintiff did not engage. Those who create and disclose such content are liable if they know or have reason to know that the plaintiff did not consent to the creation or disclosure of the content. Those who only disclose such content are liable only if they have actual knowledge that the plaintiff did not consent to the creation of the content.

The statute has exemptions for law enforcement, reporting unlawful activity, matters of public importance, legal proceedings, and constitutionally protected speech.

The statute also establishes a three-year statute of limitations and provides for several remedies, including disgorgement of the defendant's monetary gain, actual economic and noneconomic damages, statutory damages of up to $150,000, punitive damages, attorneys' fees, and injunctive relief or other available relief.

REAL PROPERTY

46. Housing – Landlords Shall Not Refuse To Rent Because Of Housing Vouchers Paid Directly To Landlords.

Government Code § 12927, 12955 – This amendment prohibits landlords from discriminating against tenants who rely upon housing assistance paid directly to landlords, such as a Section 8 voucher.

47. Mortgage Trustees – Resignation and Appointment.

Civil Code § 2934a – This amendment allows a mortgage trustee to resign, sets forth procedures for a mortgage trustee to follow when resigning, and explains the effect of the resignation. It also requires the trust beneficiary to appoint a trustee if one is not designated in the deed, and to appoint a successor trustee upon the resignation, incapacity, disability, absence, or death of the prior trustee.

48. Rent Control – Rent Caps.

Civil Code §§ 1946.2, 1947.12, 1947.13 – This law caps annual rent increases at 5% plus the rate of inflation for much of the state's multifamily housing stock. It also requires landlords to show a "just cause" to evict tenants in place for 12 months or more.

49. Real Estate.

Business & Professions Code §§ 7195.7, 7196.1 – Home inspectors shall not opine on property value.

UNFAIR BUSINESS PRACTICES

50. Business Regulation – Regulation Of Amazon And Other Similar Marketplaces.

Civil Code § 1749.7 – Mainly targeting Amazon but sweeping in many other "marketplaces," this new law requires a marketplace to have plain and intelligible language terms and conditions regarding commercial relationships with their sellers. If a marketplace suspends or terminates a seller based on a violation of the terms or conditions, the marketplace must provide a written statement of reasons for that decision. The law defines marketplace as "a physical or electronic place, including, but not limited to, a store, booth, internet website, catalog, television or radio broadcast, or a dedicated sales software application" that has agreements with sellers. The new statute does not expressly state that it creates a new civil action, nor does it specify any penalties for violations.

TORTS

51. Child Sexual Abuse – Statute of Limitations, Treble Damages.

Code of Civil Procedure § 340.1, 1002; Government Code § 905 – These amendments expand the definition of childhood sexual abuse and rename it "childhood sexual assault." They increase the statute of limitations to the later of: (a) twenty-two years from the age of majority, or (b) five years from the date the plaintiff discovers or reasonably should have discovered that psychological injury was caused by the sexual assault (the prior statute of limitations was the later of eight years from the age of majority, or three years from the date of discovery). The amendments also allow for treble damages against certain defendants and revive time-lapsed claims in some cases. Finally, they remove the requirement that, in the context of the Government Claims Act, claims of childhood sexual abuse before 2009 must be presented to a governmental entity before suing.

52. Civil Rights – Equal Prize Money For Men and Women Required When Event Takes Place On Public Property.

Fish & Game Code § 2003; Public Resources Code §§ 5001.3, 6504, 30615; Streets & Highways Code § 682.7 – As a condition of receiving a lease or permit for a competition held on state property, competition organizers must offer equal prizes to male and female athletes if an event features men's and women's divisions.

53. Elder Abuse – Mandated Reporters.

Welfare & Institutions Code §§ 15633, 15633.5, 15640, 15655.5, and 15630.2 – Broker-dealers and investment advisers now are mandated reporters of suspected financial abuse of an elder or dependent adult. These reporters may notify a trusted third party and delay disbursements or transactions.

54. Sexual Assault – Statute Of Limitations For Claims Against Student Health Center Physicians.

Code of Civil Procedure § 340.16 – In response to recent allegations of decades-old sexual abuse by former USC physicians George Tyndall and Dennis Kelly, California has amended the sexual-assault statute of limitations to allow claims against physicians that occurred at a student health center between January 1, 1988, and January 1, 2017, and which seek more than $250,000. This amendment allows such claims to proceed if already pending in court or, if not filed by the effective date of this amendment, to be commenced by the end of 2020.

SIGNIFICANT RULES
Adopted in 2019

TITLE 1 - RULES APPLICABLE TO ALL COURTS

1. Court Services For Persons Of Limited English Proficiency

Rule 1.300 – New Rule 1.300 requires courts to adopt procedures to provide services to litigants of "limited English proficiency" i.e., persons who speak English "less than very well" and who, as a result, cannot understand or participate in a court proceeding. The rule aims to give limited English proficient litigants the same access to court programs, services, and professionals as persons who are proficient in English. Courts are required, to the extent feasible, to avoid ordering a limited English proficient litigant to a private program, service, or professional that is not language accessible. If a limited English proficient litigant cannot gain access to a private program, service, or professional within the time ordered by a court due to limitations in language service availability, that litigant may submit a newly developed Judicial Council court form (LA-400) to request an alternative order or extend the time for completion. Courts are encouraged to collaborate with each other and community partners to provide language services, and to use technology to share bilingual staff and court interpreters among courts.

TITLE 2 - TRIAL COURT RULES

2. Manner Of Manifesting Affirmative Consent To Electronic Service

Rule 2.251(b) – Subdivision (b)(1) defines how parties may consent to electronic service in cases where electronic service is not mandatory. Previously, the rule provided that a party manifests consent by either: (i) agreeing to an electronic filing service provider's terms of service, if those terms state that agreement constitutes consent to electronic service, or (ii) filing a Judicial Council Consent to Electronic Service form (form EFS-005-CV) with the court. Now, the rule provides that a party manifests consent by serving notice of consent to all other parties, and by taking one of the two actions listed above. This will have limited impact on most Orange County attorneys because subdivision (c)(3) still provides that where a party is required to file documents electronically, that person is also required to serve documents electronically, and accept service of documents electronically. Orange County Local Rule 352 requires electronic filing for represented parties in all limited, unlimited, and complex civil cases. Thus, under Rule 2.251(c)(3), all parties represented by an attorney are required to use and accept electronic service in civil cases pending in Orange County.

3. Methods Of Signing Electronically Submitted Documents

Rule 2.257(b), (c) – Subdivision (b) allows documents to be signed under penalty of perjury using an electronic signature. Subdivision (b)(1) now has special requirements for digital signatures where the declarant is not the electronic filer, requiring a signature to be unique to the declarant, capable of verification, under the sole control of the declarant, and linked to data in such a matter that if the data is changed, the electronic signature is invalidated. As an alternative

to a valid digital signature, the declarant may physically sign a printout of the document. In that case, the act of electronically filing the document is deemed to be a representation that the original signed document is available for inspection and copying by the court or any other party.

For documents that do not require a signature under penalty of perjury, subdivision (c)(1) has been revised to state that, by the mere act of filing, the document is deemed signed by the *person who filed it*, and no longer deems a document signed by the *party* that filed it. When a document not under penalty of perjury requires signatures of persons other than the filer, the document must either have an electronic signature meeting the same requirements as subdivision (b)(1), or the electronic filer must maintain an original, printed and signed document, which must be made available for inspection on request from a party or from the court.

4. Parties With Fee Waivers May Request That The Court Provide An Official Court Reporter Where One Is Otherwise Unavailable

Rule 2.956 – Existing subdivision (c) provides that a when an official court reporter is not provided by the court for a hearing or trial, a party may arrange for a certified shorthand reporter to record the proceedings. The rule has been amended to add that if a party has been granted a fee waiver, and the court is not electronically recording the proceeding, the party may request that the court provide an official reporter. This rule was amended to comply with *Jameson v. Desta* (2018) 5 Cal.5th 594, which was included in last year's summaries.

5. Reviews Of Court Interpreter Credentials

Rule 2.891 – The rule regarding review of court interpreter's performance, skills, and professional conduct has been recast to account for the *California Court Interpreter Credential Review Procedures*, which were adopted by the Judicial Council and became effective on January 1, 2020. The rule previously called for an informal biennial review of court interpreters. The rule no longer requires a review of every interpreter on a recurring basis, which is now left up to the court's collective bargaining agreements, personnel policies, rules, and procedures. The rule now establishes procedures for a credential review process to be performed after a request for a credential review is received alleging professional misconduct or malfeasance.

6. Transmission Of Acceptance Of Consent To Receive Electronic Service

Rule 2.255(c) – Electronic filing service providers and electronic filing managers must now transmit any acceptance of consent to receive electronic service to the court.

TITLE 3 – CIVIL RULES

7. A Fee Waiver Requires The Court To Waive Reporter's Fees Regardless Of Whether Or Not The Court Provides The Reporter.

Rule 3.55 – Rule 3.55 previously provided that a party with a fee waiver was entitled to a waiver of reporter's fees for attendance at hearings and trials if the reporter was provided by the court. The words "if the reporter is provided by the court" have been stricken. This is intended to require the court to provide a fee waiver recipient with the means to create an official record, either through an official reporter, or through other valid means. This rule was amended to comply with *Jameson v. Desta* (2018) 5 Cal.5th 594, which was included in last year's summaries.

8. Alternative Case Management Rules

Rule 3.720 – Rules 3.720-3.735 set forth case management rules, including rules for case management statements, case management conferences, setting trial dates, and assigning matters to a single judge for all or limited purposes. Rule 3.720 now permanently permits a court to adopt alternative local case management rules for civil case management. Previously, this flexibility was set to expire on January 1, 2020, and was only an emergency measure in response to the limited fiscal resources available to the courts. Any alternative procedures are now required to be in the court's local rules as opposed to on the court's website.

9. Format Of Discovery Motions – Outlines In Place Of Separate Statements

Rule 3.1345 – Courts may now authorize a party filing a discovery motion to submit a "concise outline of the discovery request and each response in dispute" in lieu of a separate statement. This new rule conforms to amendments to the Civil Discovery Act, which were covered in last year's summaries.

TITLE 8 - APPELLATE RULES

10. Cover Requirements Only Apply To Paper Filings.

Rule 8.40 – Rule 8.40 sets forth the format requirements for the covers of documents filed in the Court of Appeal. It has been amended to clarify that its provisions apply only to documents filed in paper form. The requirements for electronic documents are now set forth in the revised Rule 8.74, discussed below.

11. Format Rules For Electronic Documents

Rule 8.74(a) – Rule 8.74 has been revamped to specify detailed requirements for the formatting of electronic documents. This summary touches on the more substantive requirements of the

rule, and it is recommended that an attorney consults Rule 8.74 before filing electronically with the court:

Subdivision (a)(1) requires that all electronic documents be in text-searchable portable document format (PDF). If a document is only in paper form, it can be converted to PDF as a scanned image, but optical character recognition must be used where possible. If a document cannot practicably be converted to a text-searchable PDF (e.g., the document is handwritten, a photograph, or a graphic), the document may be converted to a non-text-searchable PDF file.

Subdivision (a)(2) requires that the pagination of every document must be continuous, starting with the cover page as page 1, so that the electronic page number of the PDF matches the printed page number on each page. The page number need not be shown on the first page, but the second page must then begin with page 2. Only Arabic numerals may be used.

Subdivision (a)(3) requires extensive electronic bookmarking, including bookmarks to each component of a brief (e.g., table of contents, table of authorities, verification, certificate of word count, etc.), bookmarks to the indexes for each electronic appendix, and bookmarks to exhibits or attachments, and exhibits or attachments within an exhibit or attachment. Bookmarks must provide either the text of the heading to which it is linked, or a description of the exhibit or attachment. In other words "Exhibit A" would not be an acceptable bookmark. Instead, a bookmark should say something like "Exhibit A, First Amended Complaint filed 8/12/17."

Subdivision (a)(4) requires filers to comply with existing rules regarding confidential information and filing under seal.

Subdivision (a)(5) limits an electronic files to 25 megabytes, and requires that any electronic document over that limit must be submitted in more than one file. Where a document is broken up into more than one file, the first file must contain an index stating the content of the files, and pagination must be consecutive across the files, including the cover page of each file.

If a document requires 10 or more files, or contains audio or video, or is otherwise not suitable for electronic filing, subdivision (a)(6) requires that the document be filed manually on a flash drive, DVD, or compact disc.

The cover page requirements for electronic documents are now in subdivision (a)(9).

Subdivision (b) contains requirements for documents filed in the reviewing court in the first instance, including font, spacing, and margin requirements. Fonts must be 13-points, including footnotes, and a proportionally spaced serif font must be used. Century Schoolbook is preferred. All capitals should NOT be used for emphasis. Lines must be 1.5 spaced and unnumbered. Margins must be 1.5 inches on the left and right, and 1 inch on the top and bottom. Paragraphs must be left aligned, not justified. Hyperlinks are encouraged but not required.

Subdivision (c) contains additional requirements for the cover pages of briefs and other particular documents.

Subdivision (d) states that Rule 8.74 prevails over other formatting rules.

12. Local Rules May Require Electronic Copies Of Paper Documents.

Rule 8.44 – Rule 8.44 has been amended to provide that when paper documents are permitted to be filed in the Court of Appeal, the Court may provide by local rule that an electronic copy shall be filed as well. Any such local rule must provide for an exception to avoid undue hardship to a party.

13. Mandatory Electronic Filing

Rule 8.71(a) – Subdivision (a) in Rule 8.71 provides that all documents must be electronically filed, with certain exceptions. The 2019 amendment removes any exceptions provided for in local rules, and adds exceptions provided for in the *Supreme Court Rules Regarding Electronic Filing*. An appellate court may still make exemptions from the electronic filing requirements by court order.

14. Responsibilities Of An Electronic Filer

Rule 8.72 – New Subdivision (b) requires electronic filers to take reasonable steps to ensure that filings do not contain computer code, including viruses, that would harm the court's electronic filing system. Compliance requires more than an absence of intent to harm, and a reasonable step would include using a commercial virus scanning program. Electronic filers must also furnish an electronic service address, and immediately notify the court and all parties of any changes to that address.

15. Length Of A Petition For Rehearing Or Answer To Petition For Rehearing

Rules 8.204, 8.268 – Rule 8.268 requires that a petition for rehearing and answer to a petition for rehearing comply with the length provisions in subdivision (c)(5) of Rule 8.204, which limits such documents produced on a computer to 7,000 words, including footnotes (the limit for a petition or answer produced on a typewriter is 25 pages). This limit is half the limit of an ordinary appellate brief.

16. Judicial Notice

Rule 8.252(a) – When filing a motion for judicial notice, the moving party must now attach the matter to be noticed, rather than serving and filing it separately.

TITLE 10 – JUDICIAL ADMINISTRATIVE RULES

17. Judicial Branch Policies On Workplace Conduct

Rule 10.351 – This new rule requires courts to adopt policies prohibiting harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification. Courts must also establish complaint reporting and response procedures for such conduct. Minimum requirements for policies include: (1) a prohibition against harassment, discrimination, retaliation, and inappropriate conduct based on protected classification, (2) a list of protected classifications under applicable law, (3) definitions and a non-exhaustive list of examples of prohibited conduct, (4), a clear prohibition of retaliation against anyone making a complaint or participating in an investigation, and (5) comprehensive complaint reporting, intake, investigatory, and follow-up processes. Detailed rules are also included for the complaint-reporting process, and the court's responsibilities upon receiving a complaint.

APPENDIX H – CIVIL PENALTY FOR VIOLATIONS OF PROP 65

18. Amount of Civil Penalty To Cure Alleged Violation Of Proposition 65 For Failure To Provide Certain Warnings

Appendix H – A party who receives notice of a Prop. 65 violation may avoid liability by correcting the violation and paying a civil penalty under Health & Safety Code § 25249.7. The civil penalty was originally set at $500, and the statute requires the Judicial Council to adjust the penalty quinquennially (once every five years) to track the California Consumer Price Index for All Urban Consumers. New Appendix H sets forth the formula to be used to calculate the adjusted penalty. Using that formula, the effective civil penalty as of April 1, 2019, is $565 per facility or premises where an alleged violation occurred.

SIGNIFICANT CASES
Decided in 2019

ALTERNATIVE DISPUTE RESOLUTION

1. Arbitrability – UCL Claims – Claims For Injunctive Relief Under Bus. & Prof Code 17200 That Would Not Benefit The General Public Are Arbitrable.

Clifford v. Quest Software Inc. (2019) 38 Cal.App.5th 745 [**Aronson**, O'Leary, Goethals] – In *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, the California Supreme Court held that Unfair Competition Law ("UCL") claims for restitution are arbitrable, but UCL claims for public injunctive relief cannot be arbitrated. In *Clifford*, the Plaintiff Employee sued his Employer for various wage and hour claims, in addition to alleging a UCL claim that sought injunctive relief under Bus. & Prof Code section 17200. The Employer then moved to compel arbitration pursuant to a contractual arbitration clause. The trial court ordered the wage and hour claims to arbitration, but denied arbitration of the UCL claim, citing *Cruz*. The Court of Appeal reversed the portion of the order denying arbitration on the UCL claim, noting that there is a controversy over whether or not *Cruz* is preempted by the Federal Arbitration Act. The Court did not have to resolve that question, however, because it held that private injunctive relief (unlike public injunctive relief) is arbitrable even under *Cruz*. Here, the Employee was the only express beneficiary of the injunctive relief sought, and the Employer's other employees were the only potential beneficiaries. Since the public at large did not stand to benefit from the injunctive relief, the rule in *Cruz* did not apply, and the UCL claim was subject to arbitration.

2. Arbitration Agreements – Formation – A Brokerage's Policy And Practice Of Initialing Arbitration Provisions Is Not Sufficient To Show An Agreement To Arbitrate Without Evidence That The Policy Was Adhered To.

Juen v. Alain Pinel Realtors, Inc. (2019) 32 Cal.App.5th 972 – Under Code of Civil Procedure section 1298(c), when parties want to provide for arbitration in listing agreements for the sale of real property (and many other real property-related agreements), the agreement must include a specific arbitration notice, which must be initialed by both parties to signal their consent to arbitration. The Agreement in this case contained such a notice, and was initialed by the Plaintiff, but the only copy initialed by the Defendant real estate brokers (if one ever existed) was lost. In support of their motion to compel arbitration, the Defendants submitted the declaration of a managing broker who explained that, under the brokerage's policies and practices, all listing agreements would have been presented to her, and that she would have initialed the arbitration provision on behalf of the brokerage. The Declarant further explained that the initialed copy would have been destroyed under the office's document retention policy. The trial court denied the motion to compel arbitration for lack of evidence that the Defendants initialed the provision and agreed to arbitration. The Court of Appeal affirmed, holding that, while the Defendants established that there was a policy to produce listing agreements for the declarant's review, and that she would have initialed the arbitration provision if she had seen it, there was no evidence that the policy was followed in this case. The Court held the policy and practice evidence may have sufficed if: (a) the Declarant had stated it was her habit to account

for and review every listing contract executed the listing agent in question to ensure that the Agreement in this case had been reviewed; or (b) the Defendants submitted a second declaration from the listing agent stating that she either presented the Declarant with Plaintiff's listing agreement, or that as a matter of habit she presented all listing agreements to Declarant during the relevant time period. Without such evidence, the Court of Appeal held that there was no showing that the Declarant reviewed and initialed the arbitration provision in this case.

3. Arbitration Agreements – Formation – An At-Will Employee Cannot Continue Working While Rejecting The Employer's Mandatory Arbitration Agreement Imposed As A Condition Of Continued Employment.

Diaz v. Sohnen Enterprises (2019) 34 Cal.App.5th 126 – Under existing law, where an at-will employee is notified that an agreement to arbitration is a condition of continued employment, that employee impliedly consents to the arbitration agreement for future disputes by continuing his or her employment. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223.) In *Diaz*, the Plaintiff employee was presented with an arbitration agreement on December 2, 2016, and was told that continued employment would indicate consent to arbitration. The Plaintiff, however, specifically indicated on December 14 that she did not agree to the arbitration agreement, and intended to continue her employment without it. When the Defendant employer moved to compel arbitration, the trial court held that there was no meeting of the minds, and thus no agreement to arbitrate. The Court of Appeal reversed, holding that an at-will employer is entitled to change the terms of employment by giving notice to the employee, and that continued employment conclusively demonstrates agreement to those terms. Notably, however, one dissenting justice argued that the existence of an implied contract was a matter of fact, and the evidence was not sufficient to allow reversal of the trial court's determination that there was no meeting of the minds sufficient to create a contract implied by the Plaintiff's continuation of employment. The dissenting justice noted that none of the cases compelling arbitration under similar circumstances involved employees who had expressly rejected the arbitration agreement.

4. Arbitration Agreements – Formation – A Husband Does Not Have Authority To Bind His Wife To An Arbitration Agreement Absent Additional Facts Establishing Agency.

Valentine v. Plum Healthcare Group, LLC (2019) 37 Cal.App.5th 1076 [**Thompson**, Ikola, Aronson] – In Valentine, a patient was admitted to the Defendant's nursing facility after an injury. The patient's husband signed an arbitration agreement along with the admission documents. The patient ultimately died from sepsis at the Defendants' facility, and the patient's husband and children (the "Plaintiffs") sued for wrongful death. The Defendants filed a motion to compel arbitration, which the trial court denied, holding that the Decedent's husband "did not sign those agreements as [the decedent's] representative or agent in an attempt to bind [the decedent]." Accordingly, while the husband himself was bound by the arbitration agreement, the

decedent's children were not, and the trial court denied arbitration of both the husband and the children's claims, in order to avoid the possibility of conflicting rulings. (C.C.P. § 1281.2(c).) The Court of Appeal affirmed. The Court explained that the mere fact that the husband was married to the Decedent did not give him actual or ostensible authority to sign the arbitration agreements on her behalf, nor did the fact that he was listed as her emergency contact. The Court noted that there was no other conduct by the Decedent that would reasonably have led the Defendant to believe that the Decedent's husband was acting as her agent. While the Defendants argued that the Decedent had a contractual right to cancel the arbitration agreement within 30 days, the Court explained that her failure to do so did not amount to ratification, because there was no evidence the Decedent even knew the agreements existed or that her husband had signed them. Accordingly, the Decedent was not bound by the arbitration agreement, and her children's claims for wrongful death were not subject to arbitration. As such, the Court held the trial court was within its discretion under section 1281.2 to deny the defendants' petition to compel arbitration in order to prevent conflicting rulings on common issues of law or fact.

5. Arbitration Agreements – Standing To Enforce – Attorney Does Not Have Standing To Compel Arbitration As A Representative Plaintiff, But Arbitrator May Substitute The Clients As The Real Parties In The Arbitration.

Cohen v. TNP 2008 Participating Notes Program, LLC (2019) 31 Cal.App.5th 840 – In *Cohen*, an Attorney asserted claims in a representative capacity on behalf of his Clients, after his Clients and his firm's Retirement Plan invested in two ill-fated real estate Investment Companies. The Attorney and the two of the Defendants (an Officer and a Parent Company of the Investment Companies) were not signatories to the arbitration agreements. After the Investment Companies (who were signatories) agreed to arbitrate, the Attorney and the Retirement Plan filed a petition to compel the Officer and Parent Company to arbitrate, which the trial court granted. During the arbitration, the arbitrator granted a motion for leave to amend the claim to add the Clients as claimants, and entered an award against the Defendants. The trial court confirmed the award, and the Defendants appealed. The Court of Appeal held that even if the Attorney was acting as an attorney-in-fact for his Clients, he did not have standing to bring a "representative petition" to compel arbitration. The Court also held that the Officer Defendant could not be compelled to arbitrate based solely on his status as an agent of the Investment Companies. Nevertheless, the Court found that (1) it was not error to compel the Parent Company to arbitrate claims arising from the first of the two Investment Companies, since the Retirement Plan did have standing against that entity, and had made a sufficient showing to bind the Parent Company to the arbitration agreement, and (2) the arbitrator did not exceed his authority by substituting the Attorney's Clients as the real parties in interest in the arbitration as to the entities that were properly before the arbitrator (i.e. the two Investment Companies who had agreed to arbitrate, and the Parent Company with regard to claims arising from the first Investment Company). The Court reasoned that the arbitration agreement called for AAA rules and procedures, which explicitly allow the arbitrator to approve amendments to claims after the proceedings commence.

Accordingly, the arbitrator's award was affirmed, but only against the parties properly in arbitration.

6. Arbitration Agreements – Unconscionability – Association's Agreement Is Adhesive Where Members Have Ability To Vote On Standard Terms, But No Ability To Negotiate Different Terms, And Agreement Is Substantively Unconscionable When It Limits Arbitration To Claims Brought Against, But Not By, The Association.

Bakersfield College v. California Community College Athletic Assn. (2019) 41 Cal.App.5th 753 – The plaintiff in this case is a community college (the "College") that signed an agreement (the "Agreement") to be bound by the constitution and bylaws of the defendant athletic association (the "Association") as a condition on participating in an intercollegiate football league. The Association's bylaws contained an arbitration provision that required the College to resolve any sanctions and penalty disputes by binding arbitration. The Association issued sanctions against the College for providing certain services to their football players that were not available to other students. After the College's appeal was denied by the Association's appeal board, the College filed a petition for writ of mandate and a complaint. The Association argued the College had failed to exhaust its remedies in arbitration, while the College argued the arbitration provision was unconscionable and void. The trial court ultimately ruled in favor of the Association, holding that although the provision was procedurally unconscionable, that procedural unconscionability was minimal, since member colleges could propose and vote on amendments to the bylaws. The trial court also severed a one-sided attorney's fee provision, but otherwise upheld the arbitration agreement. The Court of Appeal reversed. The Court rejected the notion that the procedural unconscionability was mitigated by the right to vote on amendments to the bylaws, since procedural unconscionability refers to the bargaining positions of the parties at the time an agreement is entered into – not after the fact. Further, the Court held the Agreement lacked mutuality because it only applied to penalty disputes brought by member colleges, and not claims that the Association might bring against the members. Based on this lack of mutuality, and other unfair provisions, the Court of Appeal held that the arbitration agreement was unconscionable, and could not be enforced.

7. Arbitration Awards – Challenges – An Erroneous Refusal To Award Prevailing Party Attorney's Fees Did Not Exceed The Arbitrator's Authority.

Cohen v. TNP 2008 Participating Notes Program, LLC (2019) 31 Cal.App.5th 840 – In the same case discussed in Case # 5, above, the parties' agreement called for an award of attorney's fees to the prevailing party. As noted above, the case involved claims by an Attorney's Client and his firm's Retirement Plan against the two Investment Companies. While the parties' agreement contained a mandatory attorney's fee provision, the arbitrator did not award attorney's fees to the Clients, because those fees were advanced by the Retirement Plan, who did not prevail in the arbitration. The trial court confirmed the arbitrator's refusal to award fees, and also refused to award the Client's fees incurred in the trial court to confirm the award. The Court

of Appeal affirmed the refusal to award fees incurred in arbitration, but reversed the refusal to award fees incurred in the trial court. The Court explained that an arbitrator does not exceed his authority by erroneously deciding an issue within the scope of the arbitration. In doing so, the Court parted with *DiMarco v. Chaney* (1995) 31 Cal.App.4th 1809, where the court held an arbitrator exceeded his authority by refusing to award attorney's fees to the prevailing party, despite a provision of the arbitration agreement stating "the prevailing party shall be entitled to reasonable attorney's fees and costs." The Court explained that subsequent Supreme Court authority called *DiMarco* into question, and dictated that an arbitrator only exceeds his authority by refusing to award prevailing party attorney's fees if the arbitration agreement explicitly and unambiguously precludes the arbitrator's authority to do so. Although the Court upheld the arbitrator's denial of fees in the arbitration proceeding, the Court reversed the trial court's order denying attorney's fees to the prevailing party in the post-arbitration trial court proceedings. The Court determined that the agreements contained a mandatory attorney's fee provision, and that the Attorney's retirement plan and his Clients were prevailing parties in the post-arbitration proceedings, because they successfully defeated a petition to vacate the award and successfully confirmed the monetary awards in favor of the Clients. The fact that the arbitrator denied attorney's fees incurred in arbitration did not give the trial court discretion to deny attorney's fees for trial court proceedings.

8. Mediation Fees – Voluntary Mediation Costs Are Not Automatically Disallowed As Recoverable Costs Of Suit Under C.C.P. § 1033.5.

Berkeley Cement, Inc. v. Regents of University of California (2019) 30 Cal.App.5th 1133 – In *Berkeley Cement*, the parties engaged in an unsuccessful voluntary mediation before the action was eventually resolved in a jury trial. The trial court awarded the Prevailing Party costs under Code of Civil Procedure section 1033.5, including the costs of the voluntary mediation. Mediation costs are not specifically listed as either allowed or disallowed costs in Section 1033.5, and thus they are allowed if they are necessary to the conduct of the action, but not if they are merely convenient or beneficial. The Non-Prevailing Party appealed the award of mediation costs, arguing that they were not reasonably necessary, because the mediation was voluntary, rather than court-ordered. The Court of Appeals affirmed the award of costs, explaining that, under Code of Civil Procedure section 1775.5, the trial court may not order mediation in cases where the damages sought exceed $50,000. Thus, if mediation costs were only recoverable for court-ordered mediations, a mediation would be considered "necessary" only in cases worth less than $50,000, and would never be considered necessary in cases exceeding $50,000. The Court rejected such an arbitrary categorical rule, and held instead that "the question whether mediation fees should be awarded as costs in a particular matter must be determined based on the facts and circumstances of the particular action." Because the Non-Prevailing Party failed to contend that the Trial Court erred in assessing the facts and circumstances of the case, the Court of Appeal held that there had been no reversible error.

ANTI-SLAPP

9. First Prong – A Confidential Commercial Report Evaluating A Company's Business Practices Is Not Protected Under The Anti-SLAPP Statute.

FilmOn.com Inc. v. DoubleVerify Inc. (2019) 7 Cal.5th 133 – The anti-SLAPP statute's catch-all provision, subdivision (e)(4), protects conduct "in furtherance of" free speech or the right of petition "in connection with" a public issue, if it furthers the public conversation. In this case, the Plaintiff published entertainment content online. The Plaintiff sued the Defendant for defamation based on a confidential report the Defendant sold to advertisers, which identified the Plaintiff's website as a source of adult and copyright-infringing content. The Defendant filed an anti-SLAPP motion, arguing that the report concerned an issue of public importance, since the public has an interest in knowing about adult and copyright-infringing internet content. The trial court agreed and granted the motion, and the Court of Appeal affirmed. The Supreme Court reversed. It held that while the Defendant's report concerned a matter of public interest, it was issued privately to paying clients and did not contribute to any public debate, so it did not qualify for anti-SLAPP protection. In essence, the Court explained, context matters. In evaluating a claim that speech relates to a public interest, trial courts must consider the location, audience, purpose, and timing of that speech. Since the Defendant's report was confidential and did not contribute to in any way to the public debate about adult content or copyright-infringing content, it was not protected, and the anti-SLAPP motion should have been denied.

10. First Prong – Employment Discrimination Claim Is Subject To The Anti-SLAPP Statute If The Act Of Firing Is An Exercise Of Free Speech Rights In Connection With A Matter Of Public Interest.

Symmonds v. Mahoney (2019) 31 Cal.App.5th 1096 – In *Symmonds*, the Defendants Edward Mahoney (aka "Eddie Money") fired his drummer (Glenn Symmonds), allegedly based on his age, disability, and medical condition. Symmonds suffered from back problems and chemo therapy/cancer-related urinary incontinence. Symmonds claimed that while he was still a member of Money's band, Money publicly humiliated Symmonds, mid concert, for his chemotherapy and his use of adult diapers, and eventually replaced him with a younger, and allegedly less skilled drummer. Money filed an anti-SLAPP motion, arguing that his selection of a drummer for public performances is protected free speech activity. The trial court denied the motion, relying on *Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, 836 ("*Wilson I*") for the proposition that the gravamen of an employment discrimination case is discrimination, not the particular manifestation of that discrimination (i.e. the firing of the employee). The Court of Appeal disagreed and reversed. The Court explained that: (a) Money's selection of musicians to accompany him is an act in furtherance of his free speech, and (b) in analyzing the first prong of the anti-SLAPP statute, the relevant factor in an employment discrimination case is the adverse employment action taken against the plaintiff, and *not* the discriminatory motive for that action. Because Symmonds's firing was a protected activity, the Court remanded the case to the

trial court to determine whether Symmonds demonstrated a probability of prevailing on the merits under the second prong of the anti-SLAPP statute. The California Supreme Court agreed with the analysis in *Symmonds* when it reversed *Wilson I* in *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 889, fn. 7 (*see* the next item, below).

11. First Prong – Employment Discrimination – Terminating A Journalist Based On Allegations Of Plagiarism Is A Protected Activity.

Wilson v. Cable News Network Inc. (2019) 7 Cal.5th 871 – In *Wilson*, the Plaintiff wrote and produced news stories for CNN covering matters of public importance. CNN fired the Plaintiff based on alleged plagiarism, and repeated the allegation to the Plaintiff's prospective employers. The Plaintiff filed claims for discrimination, retaliation, and defamation. CNN filed an anti-SLAPP motion, reasoning that its personnel decisions are acts in furtherance of its right to determine who should speak on its behalf on matters of public interest. The trial court agreed and granted the motion, but the Court of Appeal reversed, holding that CNN could not establish the first prong of the anti-SLAPP statute. The Court of Appeal reasoned that the termination would not be unlawful but for a discriminatory or retaliatory motive, and thus it is this motive, rather than the act of firing, that is the gravamen of the claim. The California Supreme Court reversed, explaining that under the first step of the anti-SLAPP analysis, "it is the defendant's acts that matter," not the motives behind those acts. Holding otherwise would effectively immunize discrimination and retaliation claims from the anti-SLAPP statute, when no such immunity appears in the text of the statute. The Court went on to disagree with CNN's broad claim that all of its hiring and firing decisions are protected aspects of its free speech rights. Nevertheless, the Court did agree that the specific decision to fire the Plaintiff qualified for anti-SLAPP protection, because the termination was based on an allegation of plagiarism, and "editorial integrity and credibility are core objectives of editorial control and thus merit protection under the free press clauses." Accordingly, the Court held that it was error to deny the anti-SLAPP motion as to the discrimination and retaliation claims. With regard to the defamation claims, however, the Court held that private communications regarding a single incident of plagiarism do not rise to the level of protected speech on an issue of public importance. Accordingly, CNN's communications to the Plaintiff's prospective employers were not protected, and the anti-SLAPP motion should have been denied as to the defamation claim.

12. First Prong – Indemnity Claims – A Cross-Complaint For Indemnity Arises From Protected Activity.

Long Beach Unified School Dist. v. Margaret Williams, LLC (2019) 43 Cal.App.5th 87 – The Plaintiff contractor sued the Defendant School District for arsenic poisoning incurred during a construction job for the district, and for terminating her in retaliation for her attempts to convince the School District to remedy safety violations. The School District filed a cross-complaint, alleging that the Plaintiff was obligated under her contract to indemnify and defend the School District against her own claims. The Plaintiff filed an anti-SLAPP motion, which the trial court

granted. The Court of Appeal affirmed. The Court held that: (1) the cross-claim for indemnity and defense "arose from" the filing of the Plaintiff's complaint (an obviously protected activity), because "but for" that complaint, there would be nothing to indemnify or defend, and (2) even if the cross-complaint arose from the refusal to defend and indemnify, rather than the filing of the complaint, it still arose from protected activity. The Court explained that the refusal to fund a litigation opponent's defense is, itself, an act in furtherance of the Plaintiff's petitioning activity. In addition, the subject matter of the action was an issue of public importance—the presence of an environmental hazard at a public school construction site. Accordingly, the refusal to defend and indemnify was itself a protected activity under the catch-all provision in subdivision (e)(4) of C.C.P. § 425.16, which applies to "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." The Court also held that the School District could not establish a probability of prevailing, because the indemnity provision would be unconscionable unless it were construed to exclude claims brought by the contractor herself.

13. First Prong – Indemnity Claims – A Cross-Complaint For Indemnity *Does Not* Arise From Protected Activity.

C.W. Howe Partners Inc. v. Mooradian (2019) 43 Cal.App.5th 688 – The Plaintiffs in *C.W. Howe Partners* sued their civil engineer, architects, general contractor, and others for claims arising from the reconstruction of their home, including claims related to Expanded Polystyrene (EPS) insulation. The civil engineer and his firm filed a cross-complaint for express and equitable indemnity. These Cross-Complainants essentially argued that the Plaintiffs agreed to indemnify them for any damages caused by the Plaintiff's architect and contractor, and that the Plaintiffs, along with their architect and contractor, were the ones who selected the EPS insulation. The Plaintiffs filed an anti-SLAPP motion, which the trial court denied. The Court of Appeal affirmed. The Plaintiffs argued that the cross-claims arose from their protected activity in filing the complaint, but the Court of Appeal disagreed. The Court explained that there is a distinction between the allegedly wrongful act that gives rise to the claim, and other actions that may lead to that wrongful act, or provide evidence of that wrongful act. The Court then held that the allegedly wrongful act giving rise to the express indemnity claim was not the filing of the lawsuit, but was the Plaintiff's failure and refusal to indemnify, defend, and hold the Cross-Complainants harmless as required by their contract. Similarly, the wrongful act from which the equitable indemnity claim arose was the decision that the Plaintiffs or their representatives made to use the EPS panels. Since neither of these underlying wrongful acts were protected activities, the Court of Appeal held that the trial court properly denied the anti-SLAPP motion. For a similar holding, see ***Wong v. Wong*** (2019) 43 Cal.App.5th 358.

NOTE: The Court distinguished the *Long Beach Unified School Dist. v. Margaret Williams, LLC*, discussed in Case # 12 above, noting that the court in that case held that a refusal to fund the defense of one's opponent in litigation is conduct in furtherance of petitioning activity, and that the underlying action in that case was a matter of public importance, i.e. allegations of

hazardous substances at school construction sites. This meant that the refusal to fund the defense was a protected activity section 425.16, subdivision (e)(4), which applies to "any other conduct in furtherance of the exercise of the constitutional right of petition […] in connection with a public issue." In this case, the underlying action was not a matter of public importance, but a mere private dispute, so subdivision (e)(4) did not apply, and refusing to fund the defense was not a protected activity.

14. First Prong – Petitioning Activity – The Anti-SLAPP Statute Does Not "Swallow A Person's Every Contact With Government."

Rand Resources, LLC v. City of Carson (2019) 6 Cal.5th 610 – The anti-SLAPP statute protects both speech made in connection with official proceedings, and speech or petitioning activities in connection with issues of public importance. In *Rand Resources*, the Defendant City of Carson hired the Plaintiff as its exclusive agent to negotiate to bring an NFL team to the city. Before the exclusive agency agreement expired, the City replaced the Plaintiff with another negotiator. The Plaintiff sued the City for, *inter alia*, fraud and tortious breach of contract (based on fraudulent concealment of the breach), and sued the new negotiator for fraud and intentional interference. The trial court granted an anti-SLAPP motion, which the Court of Appeal reversed. The Supreme Court reversed in part and affirmed in part. First, with regard to claims for fraud and the fraudulent concealment of the City's breach, the Court held that the fraudulent statements were not made in connection with any government proceeding that was pending at the time they were made. In addition, the statements related only to the identity of the City's negotiator, which was not, itself, an issue of public importance. Instead, it merely had a tenuous connection with an actual issue of public importance (i.e., the negotiations with the NFL). Accordingly, these claims were not subject to the anti-SLAPP statute. Next the Court turned to the intentional interference claims, which were based on statements made to the NFL in negotiations over bringing a team to the City, and negotiations with the City regarding the then-pending renewal of the Plaintiff's exclusive agreement. The Court found that the statements to the NFL did relate directly to the issue of public importance, and the statements to the City did relate to a pending government proceeding. Accordingly, the interference claims were subject to the anti-SLAPP statute. The Court remanded the case for a determination of whether the Plaintiff could establish a probability of prevailing on the interference claims.

15. Sanctions – Where Complaint Was Based On Private Statements Concerning The Obstruction Of The View From Plaintiff's Home, Anti-SLAPP Motion Is Frivolous And Subject To Sanctions.

Workman v. Colichman (2019) 33 Cal.App.5th 1039 – Like the Supreme Court in *FilmOn* (Case # 9, above), the Court of Appeal in this case addressed an anti-SLAPP motion brought against claims that were based on private communications. However, in this case, the private communications were also about a private matter—specifically, the Defendant's allegedly false statements to the Plaintiff's real estate agent that the Defendants intended to build an addition

that would impair the Plaintiff's view. The Plaintiff sued for interference with their attempts to sell their home, and the Defendants filed an anti-SLAPP motion. The trial court denied the motion, and granted attorney's fees for a frivolous motion against the Defendants. Because the Plaintiff's view could never be considered a public issue by any reasonable attorney, the Court of Appeal not only affirmed the trial court's sanctions, it granted further sanctions for a frivolous appeal, including $35,985.00 for the Plaintiff's fees on appeal, and $8,500.00 for the Court's costs in processing the appeal.

16. Second Prong – Admissible Evidence – Criminal Pleas And Grand Jury Testimony Are Equivalent To Affidavits.

Sweetwater Union High School Dist. v. Gilbane Building Co. (2019) 6 Cal.5th 931 – In this case, the Plaintiff school district sued the Defendant contractors to disgorge profits and cancel contracts after a number of individuals were convicted of bribery in connection with awarding the contracts. The Defendants filed an anti-SLAPP motion, arguing that the bribery (consisting in part of campaign contributions) was protected political expression. To establish a probability of prevailing to defeat the motion, the Plaintiff relied on grand jury testimony and criminal plea forms from the criminal trial, which contained written factual narratives attested to under penalty of perjury. The Defendants objected that this evidence could not be considered under the anti-SLAPP statute, which states that the court shall consider "the pleadings, and supporting and opposing affidavits." The trial court overruled the evidentiary objection and denied the anti-SLAPP motion, and the Court of Appeal and California Supreme Court affirmed. The Supreme Court held that a sworn declaration under penalty of perjury has the same effect as an affidavit under Code Civ. Proc § 2015.5. The plea forms qualified as declarations since they were signed under penalty of perjury. While transcripts of grand jury testimony are not declarations, they are functionally equivalent, as long as the transcript is properly authenticated, since they contain testimony given under oath. Accordingly, the Supreme Court held that the trial court properly relied on this evidence in denying the anti-SLAPP motion.

APPELLATE PROCEDURE

17. Appealability – Post-Judgment Orders – In Proceedings To Enforce A Prior Judgment, Discovery And Other Preliminary Orders Are Not Appealable.

In re Marriage of Tim & Wong (2019) 32 Cal.App.5th 1049 [**O'Leary**, Bedsworth, Goethals] – In this case, a decedent's first wife sought relief against the decedent's second wife to compel payment of a portion of the decedent's estate, pursuant to a 1996 martial settlement agreement that was entered as a judgment in a family court action. The first wife sought this relief under the original family court case number. The second wife appealed rulings relating to preliminary injunctive relief and discovery matters, as well as the order joining her in the proceeding to enforce the family law judgment. The trial court stayed all proceedings pending the resolution of the appeals. The Court of Appeal concluded that only the preliminary injunction related orders

were appealable under 904.1(a)(6), which explicitly allows appeals from orders granting or denying injunctions. The remaining orders were post-judgment orders, and thus arguably appealable under the plain language of Code of Civil Procedure section 904.1(a)(2). However, the Court of Appeal clarified that section 904.1(a)(2) has been limited by case law, requiring an order to pass three additional tests before becoming appealable: (a) the issue must be different from the issues decided in the judgment; (b) the order must affect the judgment or relate to its enforcement; and (c) the order must not be "preliminary to a later judgment." The Court of Appeal held that all of the orders in this case were preliminary to a later determination—i.e. the determination of the first wife's claim to the funds from the decedent's estate. Accordingly, (aside from the injunction-related orders), the orders were all non-appealable. Moreover, because appeals relating to preliminary injunctions do not stay the merits of a case, it was error for the trial court to issue a stay of all proceedings pending resolution of the appeal.

18. Appealability – Denial Of A Petition To Compel A Mandatory Fee Arbitration Is Not Appealable.

Levinson Arshonsky & Kurtz LLP v. Kim (2019) 35 Cal.App.5th 896 – In *Levinson*, the Plaintiff law firm defeated a motion to compel an arbitration under the Mandatory Fee Arbitration Act ("MFAA"), because the Defendant client failed to request the fee arbitration within 30 days of receipt of statutory notice of the Plaintiff's claim. The Defendant then appealed the trial court's denial of the motion to compel arbitration, and the Court of Appeal dismissed the appeal. While the California Arbitration Act ("CAA") provides for a direct appeal from the denial of a motion to compel arbitration, mandatory fee arbitrations come under the MFAA, which is a separate statutory regime from the CAA, and the Court held that "the procedures for one cannot be substituted for, or added on to, the procedures for the other." Because the MFAA does not expressly authorize an appeal from the denial of a petition to compel a MFAA arbitration, the Court lacked jurisdiction to consider the Defendant's appeal.

19. Appealability – The Denial Of A Motion To Vacate A Nonappealable Judgment Is Appealable, When The Motion To Vacate Is Authorized Under Code of Civil Procedure § 473.

Jackson v. Kaiser Foundation Hospitals, Inc. (2019) 32 Cal.App.5th 166 – In *Jackson* the Plaintiff appealed the denial of her motion to vacate her own voluntary dismissal. The motion was made under Code of Civil Procedure section 473(b), on the grounds that the dismissal was filed due to attorney mistake or neglect. The Defendant challenged the appealability of the trial court's order, reasoning that a voluntary dismissal is a nonappealable judgment, and thus the denial of a motion to vacate such a judgment is, itself, not appealable. The Court of Appeal disagreed, and held that the order was appealable under an exception that allows appeals of orders denying motions to vacate nonappealable judgments, in cases where the law makes express provision for such a motion. Since C.C.P. § 473 contemplates motions to vacate, an order denying a 473 motion is appealable even when the motion is directed to a nonappealable

order. In a separate holding, the Court affirmed the denial of the motion to vacate, on the grounds that mandatory relief from a voluntary dismissal is not available under 473(b) (*See* Civil Procedure—Relief From Default, Case # 53, below.)

20. Appealability – Order Denying Motion For Judicial Reference Is Not Appealable, Even When It Is Made In Connection With An Order Denying Arbitration.

J.H. Boyd Enterprises, Inc. v. Boyd (2019) 39 Cal.App.5th 802 – Appealability is a matter of statute, and there is no statutory authority for appellate review of an order denying a judicial reference. In *J.H. Boyd Enterprises*, the Defendants moved to compel arbitration or a judicial reference under a contractual provision that provided for arbitration in most cases, and judicial reference in all other cases. The trial court held that the arbitration provision did not apply, and denied the motion for a judicial reference, due to the risk of rulings that could conflict with an already pending probate proceeding. The Defendants appealed. The Court of Appeal granted a motion to dismiss the portion of the appeal relating to the judicial reference. The Defendants pointed out that C.C.P. § 1294.2 allows appeal of "any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects" an order denying a motion to compel arbitration, and argued that the ruling on judicial reference was simply the "flip side" of the order denying arbitration. The Court of Appeal rejected this argument, distinguishing this case from a case where a motion staying a pending arbitration was held to be the "flip side" of an order denying a motion to compel arbitration. The Court reasoned that, unlike the order staying arbitration, the order refusing a judicial reference was completely independent of arbitration, and did not involve any party's right to arbitration. Accordingly, there was no statutory basis for an appeal from the denial of a judicial reference, and the appeal was dismissed. (The Court also affirmed the holding on the motion to compel arbitration in an unpublished portion of the opinion.)

21. Appellate Briefs – Failure To Use Headings And Support Claims With Citations To The Record And Legal Authorities Forfeits An Appellant's Arguments.

United Grand Corp. v. Malibu Hillbillies, LLC (2019) 36 Cal.App.5th 142 – The trial court in this Action sanctioned the Plaintiff and his attorneys for "dozens" of actions amounting to pervasive misconduct, by striking the Plaintiff's claim for costs and attorney's fees, and entering judgment against the Defendant for the amount the Defendant had already deposited in court. The Plaintiff appealed, arguing that the trial court's ruling was "gibberish" and "legal nonsense." This argument, and the Plaintiff's appellate brief as a whole, was not well taken. In addition to chastising the Plaintiff's counsel for this lack of civility, the Court of Appeal found that the majority of the Plaintiff's arguments were forfeited because: (1) the Plaintiff failed to provide appropriate headings for each of the arguments made in the brief, and in many instances failed to make any coherent argument at all, and (2) the Plaintiff failed to support its arguments with citations to the record and applicable legal authorities. The balance of the Plaintiff's arguments were rejected as meritless, and the Court awarded costs on appeal to the defendant.

22. Appellate Sanctions – Appellant And Attorney Sanctioned For Selectively And Misleadingly Quoting The Court's Prior Opinion.

J.B.B. Investment Partners Ltd. v. Fair (2019) 37 Cal.App.5th 1 – Shortly after the complaint was filed in this case, the Defendant, a licensed attorney, agreed no less than six times to a full settlement in both e-mails and voicemail messages. In a prior appeal, the Court of Appeal held that the settlement could not be enforced under C.C.P. § 664.6, due to the failure to satisfy that statute's signature requirement. Accordingly, the Plaintiffs amended their complaint to state a claim for breach of the settlement agreement and moved for summary judgment. The trial court granted summary judgment in favor of the Plaintiffs based on the settlement agreement, finding that while the settlement could not be enforced under section 664.6, it was still enforceable as an ordinary contract. The Court of Appeal not only affirmed, but sanctioned the Defendant $44,654.64 for a frivolous appeal. The Court noted that: (1) the Defendant had acted without justification in denying an agreement that he had repeatedly affirmed, (2) the Defendant and his attorney had engaged in other misconduct during the litigation, and (3) the Defendant's appellate brief was plainly meritless and based on selective and misleading quotations that misconstrued the holding in the Court's prior opinion regarding C.C.P. § 664.6.

23. Proceedings On Remand – Where Appellate Court Reversed An Order Striking A Jury Demand As To Legal Claims, Trial Court Could Still Find That Bench Trial Of Equitable Claims Eliminated The Need For A Jury Trial.

Rincon EV Realty LLC v. CP III Rincon Towers, Inc. (2019) 43 Cal.App.5th 988 – In this case, the Plaintiffs asserted both legal and equitable claims. The Plaintiff's equitable claim for unfair competition under Bus. & Prof. Code § 17200 incorporated the primary allegations of the legal claims. The trial court held a bench trial and ruled in favor of the Defendants on all claims. In an earlier appeal, the Court of Appeal reversed the judgment on the legal claims, holding that the trial court had erroneously struck the Plaintiff's jury demand as to those claims. However, the Court also affirmed the judgment on the equitable claims, including unfair competition. On remand, the Defendants filed a motion for summary judgment, contending that the trial court's findings on the unfair competition claim were "binding on, and dispositive of, [the] plaintiffs' remaining legal claims." The trial court agreed and granted the motion. The Plaintiffs appealed, arguing that the Court of Appeal's ruling in the prior appeal affirmed their right to a jury trial on their legal claims, and required the trial court to retry every issue of fact necessary to resolve those claims, even if they had been resolved in the bench trial on the equitable claims. The Court of Appeal disagreed and affirmed the trial court's decision. The Court explained that in its prior decision it merely reversed the order striking the Plaintiff's jury demand, and it expressly declined to decide whether or not the Plaintiff would be entitled to a jury trial in light of the factual findings made in connection with the equitable claims. Under well-established law, those findings were binding on the trial court in any subsequent trial on the legal claims, and, in this case, they eliminated any triable issues of fact. Accordingly, the trial court did not violate the remand instructions or otherwise err in granting summary judgment.

ATTORNEY'S FEES

24. Amount Of Fees – Lodestar Method – Failure To Accept A 998 Offer Is Not Grounds For Departing From The Lodestar Method Where The Plaintiff Eventually Obtains A More Favorable Outcome.

Hanna v. Mercedes-Benz USA, LLC (2019) 36 Cal.App.5th 493 – In *Hanna*, the Plaintiff rejected a series of 998 offers commencing in January of 2016, but accepted a more favorable 998 offer in January of 2017. The final offer allowed an award of statutory attorney's fees in an amount to be determined by the Court, under Civil Code section 1794(d) (the Song-Beverly Consumer Warranty Act). The Defendant argued that the original 998 offer from January 2016 provided all of the relief that the Plaintiff was entitled to receive under the statute, and thus her fee award should be cut off as of that date. The trial court relied on a clause in the Plaintiff's contingency fee agreement, which provided that, if successful, the Plaintiff's attorneys would be entitled to their hourly rate, plus 40% of all damages in excess of the Plaintiff's actual damages. The trial court reasoned that the fees spent after January 2016 were attributable to obtaining damages in excess of the Plaintiff's actual damages, and so Plaintiff should recover hourly fees up to January 2016, and 40% of the excess damages in lieu of additional hourly fees after that date. The Court of Appeal reversed, holding that an award of attorney's fees under the Song-Beverly Consumer Warranty Act may only be based on the lodestar method, which starts with a reasonable hourly rate multiplied by the hours reasonably spent, and allows for certain upwards and downwards adjustments to that amount. The Court rejected the notion that a reduction or departure from the lodestar method was justified by either (a) Plaintiff's refusal to accept the January 2016 offer, or (b) the terms of the Plaintiff's contingency fee agreement.

25. Contractual Attorney's Fee – Prevailing Party Is The Party Who Prevails In The Action As A Whole, Not A Discreet Part Such As An Appeal.

de la Carriere v. Greene (2019) 39 Cal.App.5th 270 – The Plaintiff in *de la Carriere* challenged the validity of a note and trust deed. The Defendant, who held the note, succeeded on his cross-complaint to enforce the note. Both appealed. While the appeal was pending, the Defendant acknowledged full satisfaction of the judgment and then voluntarily dismissed his appeal. Around the same time, the Plaintiff prevailed on a motion to expunge the lis pendens, based on the full payment of the note. The Plaintiff then filed a motion in the trial court for an award of contractual attorney's fees for prevailing on the appeal and the post-judgment motion to expunge. The trial court granted the motion, and the Court of Appeal reversed. The Court reasoned that C.C.P. § 1717 provides that "the party prevailing on the contract shall be the party who recovered a greater relief *in the action on the contract*," and therefore the prevailing party is the party who prevails in the action as a whole, not isolated parts of the action. Here, the Plaintiff's subsequent success on appeal and in the post-judgment motion did not change the fact that the Defendant had received a net judgment of about $150,000. Since the Plaintiff recovered

the greater amount in the action on the contract, he remained the prevailing party overall, and the sole party entitled to attorneys' fees under C.C.P. § 1717.

26. Contractual Attorney's Fees – Where Attorney's Fees Incurred In A Breach Of Contract Claim Are Inextricably Intertwined With A Wage And Hour Claim, Labor Code Section 218.5(a) Prohibits Fee Award To The Prevailing Employer.

Dane-Elec Corp., USA v. Bodokh (2019) 35 Cal.App.5th 761 [**Fybel**, Ikola, Thompson] – In *Dane-Elec Corp.*, an Employer sued a former Employee to recover on a promissory note. The Employee then filed a cross-complaint, seeking recovery of unpaid wages. The trial court found in favor of the Employer on both claims, and granted the Employer's motion for a contractual award of attorney fees incurred in enforcing the promissory note. The award included some fees that were "inextricably intertwined" with defense of the Employee's wage claim. The Employee appealed, and the Court of Appeal reversed the fee award. The Court noted that Labor Code section 218.5(a) prohibits attorney fee awards against an employee in an action for nonpayment of wages or benefits, unless the employee has acted in bad faith. Where, as here, a wage claim is "inextricably intertwined" with a contract claim, the specific statutory provision prohibiting a fee award to a prevailing defendant controls over general statutes governing contract-based attorney fees. Accordingly, the Court reversed the award, and remanded with directions to the trial court to award only those fees that could be allocated solely to the Employer's promissory note claim.

27. Unreasonable Fee Requests – Trial Court May Deny An Unreasonable Fee Request Altogether, And May Evaluate The Degree Of Success Obtained By Comparing The Damage Awarded With The Plaintiff's Pretrial 998 Offers.

Guillory v. Hill (2019) 36 Cal.App.5th 802 [**Aronson**, Bedsworth, Goethals]– Twelve Plaintiffs sued for violation of their civil rights when they were arrested following a massive Halloween party and a raid by 100 SWAT officers investigating illegal gaming. After several other claims and defendants were eliminated through settlement and summary adjudication, the Plaintiffs were left with a single claim under 42 U.S.C. § 1983 against a single Defendant. The Plaintiffs served 998 offers before trial seeking $1 million in damages, but were awarded only $5,335 at trial. The Plaintiffs then moved for statutory attorney's fees under section 1988, originally seeking $3.8 million in attorney fees, which they later reduced to $2.4 million. The trial court found this request to be grossly excessive and to include duplicative, confusing, unnecessary and otherwise improper billing entries, as well as fees related to claims and defendants who had been dismissed. Based on the unreasonable amount requested and the defects in the fee motion, the trial court denied fees altogether. The Court of Appeal affirmed, noting that "a fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." The Court explained that the most critical factor in evaluating the reasonableness of a fee request is the degree of success obtained by the plaintiff in comparison with the relief sought. Here, the Plaintiffs argued that their degree of success could not be based on the modest damage award, because they never sought a specific sum in their

complaint. The Court rejected this argument, holding that the degree of success obtained could be evaluated by comparing the damage award to the pretrial 998 offers, and that focusing only on the complaint would elevate form over substance. The Court also agreed with the trial court's assessment of the flaws in the fee motion, including, among other things, unreasonable and improper billing entries. Given the nominal amount of damages received, the large amount of fees sought, and the unreasonable nature of the fee motion, the trial court did not abuse its discretion by denying fees altogether.

ATTORNEY PRACTICE

28. Attorney-Client Privilege – Waiver – Revealing That A Communication Did Not Occur Would Not Necessarily Result In The Waiver Of The Attorney-Client Privilege.

Dickinson v. Cosby (2019) 37 Cal.App.5th 1138 – Janice Dickinson ("Dickinson") sued Bill Cosby ("Cosby") for defamation and related claims after Cosby called her a liar for alleging that he drugged and raped her in 1982. In her first amended complaint ("FAC"), Dickinson sought to hold Cosby liable for two additional press releases issued by his attorney, Martin Singer ("Singer"). Cosby filed an anti-SLAPP motion, arguing that there was no evidence that he approved the press-releases. Dickinson responded with Singer's own testimony that his general practice is to confirm the veracity of any press releases with his clients before they are issued. The trial court denied the anti-SLAPP motion, finding that this provided sufficient evidence that Cosby was responsible for the press release. The Court of Appeal affirmed. Cosby argued on appeal that it was improper to admit the evidence of Singer's general practice, because it would require Cosby to waive the attorney-client privilege to defend himself. The Court of Appeal disagreed, holding that Cosby could potentially produce evidence that Singer *did not* seek or obtain his approval for the press release. The Court reasoned that the attorney-client privilege protects communications, and thus the disclosure that a communication did *not* occur would not necessarily result in the waiver of the privilege.

29. Attorney Discipline – Calling A Judge A Succubus And Making Unfounded Accusations Of Judicial Misconduct May Result In Referral To The State Bar.

Martinez v. O'Hara (2019) 32 Cal.App.5th 853 [**Fybel**, Ikola, Thompson] – After losing a fee motion in a sexual harassment case, the Plaintiff's Attorney filed a notice of appeal, stating that "[t]he ruling's succubustic adoption of the defense position, and resulting validation of the defendant's pseudohermaphroditic misconduct, prompt one to entertain reverse peristalsis unto its four corners." The Attorney also repeatedly suggested, without any evidentiary basis, that the Trial Court attempted to thwart service of the signed judgment in an effort to evade appellate review, and accused the female judicial officer of intentionally refusing to follow the law. The Court of Appeals, viewing use of the term "succubistic" as a demonstration of gender bias, and referring to Bus. & Prof. Code sec. 6068, found Plaintiff's attorney's actions to be grounds for

attorney discipline and/or contempt. The Court then held that the Attorney's unsupported accusations that the judge intentionally failed to follow the law or attempted to thwart service were also reportable misconduct. As such, the Court of Appeals reported the Plaintiff's Attorney to the State Bar of California. The Court also noted that it was publishing the opinion to "make the point that gender bias by an attorney appearing before us will not be tolerated, period." In an article about the incident, the Attorney appeared relatively unrepentant, claiming that the judge "drew first blood" by accusing him of fabricating fee entries, and stating that "[i]t is not reasonable to assume a self-respecting lawyer will stand for being unfairly accused and morally impugned and not fight back." The closest to attrition reported in the article was the Attorney's statement that "[w]ere I to be given the opportunity to rewrite that sentence, the criticism would have been more strictly academic in nature." https://abovethelaw.com/2019/03/attorney-in-hot-water-after-referring-to-a-judge-as-a-succubus/

30. Attorney Liability To Third Parties – Signing "Approved As To Form And Content" May Subject Attorney To Liability Under Settlement Agreement's Confidentiality Provision.

Monster Energy Company v. Schechter (2019) 7 Cal.5th 781 – In 2018, the Court of Appeal in *Monster Energy Co. v. Schechter* (2018) 26 Cal.App.5th 54 held that an attorney's signature on a settlement agreement under the words "APPROVED AS TO FORM AND CONTENT" did not subject the attorney to liability for breach of the settlement agreement's confidentiality provision. Based on that holding, the Court found that the Plaintiff could not establish a probability of prevailing, and ordered the trial court to grant the Defendant Attorney's anti-SLAPP motion. In 2019, the California Supreme Court reversed, holding that the mere use of those words does not preclude, as a matter of law, a finding that the attorney intended to be bound by the agreement's terms. The Supreme Court agreed that, in most cases, "approved as to form and content" only means that the attorney is approving the document for his or her client's signature, and is not intending to be personally bound by the agreement. However, if the agreement contains terms that specifically purport to bind the attorney, a reasonable trier of fact could conclude that an attorney who approved as to form and content did agree to be bound by those terms. Here, the settlement agreement at issue contained a confidentiality provision that expressly purported to apply to both the parties and their attorneys. Accordingly, the Court held that the claim against the Attorney for breach of that provision possessed at least the minimal merit necessary to survive an anti-SLAPP motion.

31. Attorney Referral Services – Website That Connects Potential Clients With Attorneys Is An Unlicensed Referral Service In Violation Of Bus. & Prof. Code § 6155.

Jackson v. LegalMatch.com (2019) 42 Cal.App.5th 760 – LegalMatch.com ("LegalMatch") is an online company that connects potential clients with attorneys who have purchased a LegalMatch subscription. Potential clients enter information about their case on the LegalMatch

website, along with a geographical area and legal category, and LegalMatch sends that information to its subscribing attorneys in the selected area and category. Attorneys can then contact the clients if they choose. LegalMatch sued the Defendant Attorney for failure to pay his subscription fee. The Defendant then cross-complained, asserting that LegalMatch is an uncertified lawyer referral service in violation of Business and Professions Code section 6155, rendering the contract illegal and unenforceable. The trial court found that LegalMatch does not engage in referral activity, because LegalMatch does not evaluate any of the information provided by potential clients or exercise any legal judgment, but simply forwards any information entered by clients to all subscribing lawyers. The Court of Appeal reversed, noting that Business and Professions Code section 6155 requires registration for businesses that operate for the purpose of "referring potential clients to attorneys," and that the plain meaning of the term "referring" is nothing more that the act of "sending or directing to another for information, service, consideration, or decision." Under this definition, it was irrelevant whether or not LegalMatch also evaluated the client information or exercised legal discretion. Because LegalMatch operated for the purpose of sending client information to attorneys for consideration, it was an unlicensed attorney referral service. The Court of Appeal remanded the matter for the trial court to determine whether the Defendant attorney was barred from asserting section 6155 under the doctrine of unclean hands.

32. Conspiring With Clients – Civ. Code § 1714.10 Must Be Asserted In First Appearance, But Common Law Also Restricts Conspiracy Claims Against Attorneys.

Farmers & Merchants Trust Co. v. Vanetik (2019) 33 Cal.App.5th 638 [**Fybel**, Bedsworth, Thompson] – Civil Code section 1714.10 establishes an anti-SLAPP-like procedure for claims against attorneys for conspiring with their clients in an attempt to contest or compromise a claim or dispute. However, instead of allowing a special motion to strike like the anti-SLAPP statute, section 1714.10 requires a party filing such a claim to establish a probability of prevailing before the claim can even be filed. In this case, the Defendant attorneys were sued, along with their clients, for fraud in connection with the sale of securities. After a jury found the attorneys liable for fraud, the trial court granted a JNOV exonerating the attorneys under section 1714.10. The Court of Appeal held that section 1714.10 was inapplicable for two reasons: First, the Plaintiff's claims did not arise from any attempt to contest or compromise a claim or dispute. Second, section 1714.10 must be asserted in the attorney's first appearance, or it is waived. Nevertheless, the Court of Appeal affirmed the JNOV on common law grounds, holding that an attorney may be held liable for conspiring with his or her client to commit actual fraud only if the attorney owes a duty to the third party, or the attorney's actions go beyond the his or her role as an attorney acting on behalf of his or her client. Here, the Defendant attorneys made no misrepresentations, and the Plaintiff failed to explain how the attorneys' role created any legal duty to the Plaintiff in connection with the clients' fraud. Thus, the attorney could not be liable

for conspiring with the clients, and it was proper for the trial court to grant the attorney's JNOV motion.

33. Disqualification – Confidential Information – A Lawyer Who Obtains Confidential Information During Prior Non-Legal Employment With A Party Is Disqualified From Adverse Representation Against That Party.

O'Gara Coach Company, LLC v. Joseph Ra (2019) 30 Cal.App.5th 1115 – In *O'Gara Coach Company*, one cross-defendant and cross-complainant (the "Employer") moved to disqualify the Attorney of an opposing cross-complainant and cross-defendant (the "Employee"). The Attorney never represented the Employer, but had acted as its president and chief operations officer before he became licensed as an attorney. The Employer argued that, during his former employment, the Attorney directly interacted with outside counsel, and had, as a result, learned the Employer's confidential information pertaining directly to the current dispute with the Employee. The trial court denied the motion to disqualify, finding that there was no attorney-client relationship between the Attorney and the Employer, and that the Attorney's access to confidential information before he became an attorney was not enough to support disqualification. The Court of Appeal reversed the Trial Court's ruling, noting that the Attorney possessed confidential information protected by the Employer's attorney-client privilege relating to the current lawsuit. While the Court agreed that there was no attorney-client relationship between the Employer and the Attorney, the Court held that none was necessary to support a prophylactic disqualification to protect a client's confidential information. To support this holding, the Court cited several cases where attorneys were disqualified after obtaining confidential information either through improper means, or from a party's former non-attorney personnel, such as paralegals or expert witnesses.

34. Disqualification – Confidential Information – A Lawyer Who Obtains Confidential Information During Prior Non-Legal Employment With A Party Is <u>Not</u> Disqualified From Adverse Representation, Where The Confidential Information Does Not Relate To The Current Dispute.

Wu v. O'Gara Coach Co., LLC (2019) 38 Cal.App.5th 1069 – *Wu* involves the same Employer and same Attorney involved in *O'Gara Coach Company, LLC v. Joseph Ra*, Case # 33 above. As in the prior case, the Employer moved to disqualify the Attorney from representing another former Employee, because the Attorney had obtained confidential information during his tenure as a non-attorney executive. The only difference in the fact pattern is that, in this case, there was no evidence that the confidential information held by the Attorney had any relation to the current dispute. The Court of Appeal held that this difference was dispositive, and that the Attorney could not be disqualified absent a showing that the confidential information he possessed related to the current dispute. Because no such showing was made, the Court reversed the order disqualifying the Attorney.

35. Disqualification – Conflicts Of Authority – Attorney May Not Represent Partnership Without Majority Agreement.

Jarvis v. Jarvis (2019) 33 Cal.App.5th 113 –In *Jarvis*, two brothers were equal partners in a Partnership that owned a parcel of land. One brother (the "Plaintiff Brother") sued the Partnership and the other brother (the "Defendant Brother") to partition the parcel by sale. The Defendant Brother hired an attorney to represent the Partnership, paid the attorney's fees, and directed the attorney's actions. The Plaintiff Brother moved to disqualify the attorney, arguing that the attorney lacked authority to represent the Partnership from a majority of the general partners. The trial court granted the motion, and the Court of Appeal affirmed. The Court of Appeal clarified that, because the attorney represented the partnership, and not either of the brothers, this was not a conflict of interest case. Instead, it was a conflict of authority case. The Court noted that Under Rule of Professional Conduct 1.13, an attorney is required to act at the client's direction, and cannot take over decision making for the client. Here, since neither the partnership agreement nor partnership law identified who had the right to appoint and direct the attorney, the attorney was forced to make litigation decisions on behalf of the partnership. Accordingly, the Court of Appeal held that disqualification was warranted to protect the administration of justice, because: (a) there was a legitimate risk that the attorney would favor the interests of the Defendant Brother who hired him over the Partnership's interest, and (b) the attorney had violated Rule 1.13 by claiming that he could act in the Partnership's interests without direction from either of the brothers. Finally, the Court noted that, on remand, the trial court had discretion to craft a remedy to break the deadlock in the Partnership, such as the appointment of a receiver.

36. Disqualification – Contacting Represented Parties – A Plaintiff's Attorney In A Sexual Harassment Case Did Not Violate Rule of Prof. Cond. 4.2(b) By Contacting Another Potential Victim Employed By The Defendant.

Doe v. Superior Court (2019) 36 Cal.App.5th 199 – The Plaintiff filed sexual harassment and sexual assault claims against the Defendant College and three of its employees. The Plaintiff's attorney then noticed the deposition of another employee, "Andrea P.," who allegedly reported similar sexual harassment to Defendant. The Defendant's counsel informed Plaintiff's counsel that he was attempting to secure counsel for Andrea P., and that this would take a couple weeks. The Plaintiff's counsel then contacted Andrea P. directly, and agreed to represent her himself. Once the Defendant's counsel learned that the Plaintiff's counsel was representing Andrea P., the Defendant moved to disqualify Plaintiff's counsel. The trial court granted the motion to disqualify, and the Court of Appeal reversed. The Court noted that while the Defendant's counsel had offered to obtain representation for Andrea P., there was no evidence that she ever accepted that representation. Moreover, Rule of Professional Conduct section 4.2(b)(2), only prohibits contact with a represented party's current employees "if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability." Here,

the Plaintiff's counsel contacted Andrea P. to discuss evidence that she reported other alleged acts of sexual harassment to the Defendant. This would have shown that the Defendant had notice of such acts. The Defendant's liability, if any, would be based on its response to the Andrea P.'s reports, not the reports themselves, so her testimony would not bind or be imputed to the Defendant. For this reason, Rule 4.2 did not bar the Plaintiff's attorney from contacting Andrea P., and it was error to disqualify him.

37. Disqualification – Ethical Wall – Undated Evidence Of An Ethical Wall That Was Generated After The Ethical Wall Was Allegedly Put In Place Does Not Prevent A Firm's Disqualification.

National Grange of Order of Patrons of Husbandry v. California Guild (2019) 38 Cal.App.5th 706 – This case is a consolidation of multiple related cases, including a 2012 action and a 2016 action. In the 2012 Action, the Ellis Law Group represented one of the Defendants, and hired an Associate who had worked on the case for the Plaintiff. Despite screening attempts, that Associate's name ended up being listed as the Defendant's attorney of record on litigation documents. As a result, the Plaintiff moved to disqualify the Ellis Law Group, and the trial court granted the motion. In the 2016 case, the Ellis Law Group also represented a Defendant in a related case. Accordingly, a motion to disqualify the Ellis Law Groups was filed and granted in that case as well. The Court of Appeal upheld the disqualification orders in both cases. With regard to the 2012 case, the Court held that, because the Associate had worked on the same 2012 case for the Plaintiff: (a) there was a conclusive presumption that he obtained confidential information concerning the case, and had to be disqualified from representing the Defendant, and (b) the entire Ellis Law Group had to be disqualified as well, despite any attempts to create an ethical wall. With regard to the 2016 case, the Court held that the case was substantially related to the 2012 case, so that the Associate was still presumed to have relevant confidential information. However, because the Associate did not work for the opposing party on the 2016 case itself, the Court considered whether the Ellis Law Group's ethical wall was sufficient. The Ellis Law Group submitted a memo and affidavits to demonstrate compliance with the ethical wall, but the Court of Appeal found that this evidence was insufficient, because it was undated, and was generated sometime after the wall was initially put in place. In addition, the Court noted that, despite the ethical wall, mistakes were made, and the Associate was listed as attorney of record in the 2012 case. Based on these facts, the Court held that the trial court did not abuse its discretion by finding the ethical wall to be ineffective and ordering the disqualification of the entire Ellis Law Group.

38. Engagement Agreements – Attorney's Failure To Sign Contingency Fee Agreement Makes The Agreement Voidable At The Client's Option.

O&C Creditors Group, LLC v. Stephens & Stephens XII, LLC (2019) 42 Cal.App.5th 546 – Business & Professions Code section 6147 requires a contingency fee agreement to be signed by both the attorney and the client, and provides that a failure to comply renders the agreement

voidable at the client's option. *O&C Creditors Group* is a cautionary tale of what happens when this requirement is not met. In this case, an attorney died after representing a client in an insurance coverage case. The attorney's creditors took assignment of the attorney's claims for unpaid fees, and filed an attorney's lien in the coverage case. The insurer then settled the underlying coverage case, and paid the client without regard for the attorney's lien. The creditors then filed causes of action against the insurer and its attorneys for violating the lien. The trial court granted an anti-SLAPP motion in favor of the insurer and its attorneys, and the Court of Appeal affirmed. Since the creditor's claims arose from the settlement of the coverage action, they were based on protected activity. Turning to the second prong of the anti-SLAPP statute, the Court held that the creditors could not establish a probability of prevailing, because the attorney had failed to sign and return a copy of his engagement agreement, as required by Bus. & Prof. Code section 6147. This led to the client electing to terminate the agreement. An attorney's lien can only be created by contract, so in the absence of a valid engagement agreement, the insurer and its attorneys could not be liable for violating any lien.

39. Implied Representation – Attorneys Representing An LLC Do Not Impliedly Represent Individual Member Whose Only Interactions With The Attorneys Are Adversarial.

Sprengel v. Zbylut (2019) 40 Cal.App.5th 1028 – In *Sprengel*, the Plaintiff wrote a book about dealing with chemotherapy side effects, and established an LLC with another individual to publish and market the book. When a dispute arose over management of the LLC, the Plaintiff claimed sole ownership of the copyright to the book, and sued the LLC for copyright infringement. The other member of the LLC hired the Defendant Attorneys to advise and defend the LLC. After the copyright lawsuit was resolved, the Plaintiff filed a malpractice action against the Defendant Attorneys, alleging that by accepting representation of the LLC, they had impliedly agreed to represent her personally, and violated their professional duties by rendering legal advice to the LLC that was adverse to her interests. The Defendants filed motions for summary judgment, arguing that their representation of the LLC did not create an attorney-client relationship with the Plaintiff in her individual capacity. The trial court granted summary judgment for the Defendants, and the Court of Appeal affirmed. The Court explained that, when assessing the existence of an implied attorney-client relationship between a corporate attorney and the entity's individual members, the key inquiry is whether the totality of circumstances implies an agreement that the corporate attorney will not act adversely to the individual shareholder's interests with respect to the issues in dispute. Here, the circumstances obviously did not indicate such an agreement, because the Plaintiff's only interactions with the Defendants were adversarial from the beginning. As such, the Defendants did not have an implied attorney-client relationship with the Plaintiff in her individual capacity.

40. Malpractice – Statute of Limitations – When An Attorney Obtains A Void Default Judgment Due To Formal Error, The Client Suffers Actual Injury (*At The Latest*) When The Error Is Discovered And The Value Of The Judgment Is Diminished.

Sharon v. Porter (2019) 41 Cal.App.5th 1 [**Moore**, O'Leary, Aronson] – In 2008, the Attorney Defendant secured a default judgment for the Plaintiff. Six years later, the Plaintiff attempted to enforce the judgment against the judgment creditor. In October of 2015, the judgment creditor wrote the Plaintiff's new attorney, arguing that the judgment was void due to the Defendant's failure to allege the amount of damages in the complaint. In November of 2015, the Plaintiff's new attorney informed the Plaintiff that this was correct, and the judgment was void. In September of 2016, the judgment debtor filed a motion to vacate the default judgment, which was granted in October of 2016. In May of 2017, the Plaintiff then sued the Defendant for malpractice. This was more than one year after the Plaintiff's new attorney informed the Plaintiff that the judgment was void, but less than one year after the judgment debtor filed the motion to vacate. The trial court held that the one-year statute of limitation for legal malpractice did not bar the action, because it was tolled until "actual injury" occurred in September of 2016, when the Plaintiff incurred fees to oppose the judgment debtor's motion. The Court of Appeal reversed, holding that: (a) the default judgment was void and of no legal effect even before it was formally vacated, (b) the value of the judgment had been "sufficiently diminished" so as to constitute an actual injury by at least November of 2015, when the Plaintiff was informed that the judgment was void, and (c) the Plaintiff was on notice of the facts constituting the Defendant's malpractice no later than October of 2015, when the judgment debtor first argued that the judgement was void. Because the malpractice action was filed more than one year after both actual injury and notice of the facts constituting the claim, it was barred by the statute of limitations. The Court acknowledged that this put the Plaintiff in the "awkward" position of having to sue for malpractice before the default judgment was actually vacated, but held that this did not justify any additional tolling.

41. Mandatory Fee Arbitration – Service Of An Arbitration Award Under The MFAA Is Not Extended By Mailing.

Soni v. SimpleLayers, Inc. (2019) 42 Cal.App.5th 1071 – Under the Mandatory Fee Arbitration Act ("MFAA"), an attorney or client may obtain a trial de novo following a mandatory fee arbitration, by filing a civil action in the Superior Court. The action must be filed within thirty (30) days after service of the arbitration award. If it is not, the award becomes final and binding. In *Soni*, the Attorney in a fee arbitration was awarded $2.50, and filed an action for a trial de novo thirty-three (33) days after the award was placed in the mail. The Client argued that the action was untimely, and sought confirmation of the $2.50 award. The trial court held that the action was timely, due to the five-day extension for mailing under C.C.P. § 1013. The trial court then awarded the Attorney $2,890, plus $79,898 in prevailing party attorney's fees. The Court of Appeal reversed, noting that under Rule 45(a) of Los Angeles County Bar Association, and Rule 3.513 of the State Bar Rules of Procedure for Fee Arbitrations and the Enforcement of Awards,

service is complete upon deposit in the mail, and the time to take any action "shall not be extended by reason of service by mail." Because the 5-day extension does not apply, the Attorney's action was untimely. The Court of Appeal reversed the trial court's $82,788 award, and ordered the trial court to confirm the arbitrator's $2.50 award.

Note: pursuant to OCBA Rule 33, "… service is completed at the time of deposit. The time for performance of any act will commence on the date service is completed and will not be extended for reason of service by mail." As such, the holding in this case would be the same under the OCBA rules.

42. Professional Misconduct – Duty Of Candor – Attorneys Must Disclose Authorities Known To Be Directly Adverse To The Position Of The Client.

Davis v. TWC Dealer Group, Inc. (2019) 41 Cal.App.5th 662 – In *Davis*, the Court of Appeal had no trouble finding an arbitration agreement to be both procedurally and substantively unconscionable—after all, the California Supreme Court and another Division of the Court of Appeal had both already found an almost identical contract to be unconscionable in *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, and *OTO, L.L.C. v. Kho* (2017) 14 Cal.App.5th 691. The Court of Appeal criticized the Defendant's counsel for arguing on appeal that the agreement had only a "minimal degree of procedural unconscionability," despite the facts that: (a) the Court of Appeal held that the virtually identical agreement in that case had an "extraordinarily high" level of procedural unconscionability, and (b) the Supreme Court held that the document is "a paragon of prolixity," which is "visually impenetrable" and "challenge[s] the limits of legibility." Making matters worse, the Defendant's counsel also represented the Plaintiffs who were trying to enforce the arbitration agreement in *OTO*, but failed to inform the Court of Appeal when the Supreme Court's decision was issued. Prior to oral arguments, the Court sent a letter requesting that the Defendant's counsel be prepared to explain why the Defendant did not do so. The attorney who appeared had no explanation other than his belief that the case was "different." The Court noted that new Rule of Professional Conduct 3.3 states that "A lawyer shall not […] (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client." The Court then held that it is "hard to imagine a more obvious violation" of Rule 3.3. Despite this, no sanctions were issued against the Defendant's counsel.

43. Professional Misconduct – Duty Of Civility – C.C.P. Section 583.130 Enshrines The Ethical Requirement Of Reasonable Notice To Opposing Counsel Before Default Is Taken, And E-mail Notice Is Not Sufficient.

Lasalle v. Vogel (2019) 36 Cal.App.5th 127 [**Bedsworth**, Moore, Ikola] – The *Lasalle* case will likely be cited for years as authority for the proposition that an attorney's obligation to practice law with civility is not simply a matter of ethics, but one with true legal significance. Courts have long recognized that attorneys have an ethical duty to warn opposing counsel before taking a party's default. In *Lasalle*, the Court bemoaned the widespread lack of civility and cooperation

plaguing our profession, and then cited C.C.P. § 583.130 as enshrining the ethical duty of civility and cooperation into a statutory policy with legal effect. Section 583.130 states that: "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action ***but that all parties shall cooperate in bringing the action to trial or other disposition***." The Court held that the Plaintiff's attorney in *Lasalle* fell short of "cooperating" in bringing the action to trial when, 35 days after service of the complaint, the Plaintiff's attorney sent a warning via mail and email, threatening to request entry of default unless the Defendant filed a responsive pleading by the very next day (a Friday). The Plaintiff's attorney then requested entry of default the following Monday, ultimately resulting in entry of a $1 million default judgment. The Court of Appeal reversed the denial of the Defendant's request for discretionary relief from default under C.C.P. § 473(b). To be sure, the Court listed numerous other factors that favored relief from default. By far the pre-eminent factor, however, was the manner in which the Defendant was warned about the impending default, and the unreasonable time-limit given for a response. The Court found that e-mail is a "lousy medium with which to warn opposing counsel that a default is about to be taken," due to factors such as the ease with which an e-mail may be misaddressed, overfull inboxes, and the "arcane vagaries of spam filters." The Court instead favored the telephone as orders of magnitude more certain. The Court also found that the letter mailed on a Thursday was obviously not likely to be received in time to prepare and file a response by Friday. In light of these and other factors, the Court reversed the default judgment, and left the bar with a must read exposition on the lawyer's duty of civility.

44. Professional Misconduct – Statute Of Limitations – The One Year Statute Of Limitations For Professional Misconduct Applies To Malicious Prosecution Claims Against Attorneys.

Connelly v. Bornstein (2019) 33 Cal.App.5th 783 – In *Connelly*, the Plaintiff tenant sued the Defendant (his landlord's attorney) for malicious prosecution, almost two years after the landlord voluntarily dismissed an unlawful detainer action filed by the Defendant. The Defendant argued that the one-year statute of limitation in C.C.P. § 340.6(a) barred the malicious prosecution claim. The trial court agreed, and granted judgment on the pleadings. The Court of Appeal affirmed that the one-year statute of limitations applies to malicious prosecution claims against attorneys. In so ruling, the Court agreed with pre-existing case law after considering the impact of a subsequent Supreme Court decision in *Lee v. Hanley* (2015) 61 Cal.4th 1225. In *Lee*, the Court held that section 340.6(a) does not apply to all claims against attorneys, but only those that "necessarily depend on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation." Here, the Court of Appeal noted that clients in a malicious prosecution case can rely on an advice of counsel defense, whereas attorneys are professionally obligated to competently assess the tenability of a claim before asserting it. Accordingly, an attorney's liability in a malicious prosecution case is different than a clients, and arises out of "a professional obligation as opposed to some generally applicable nonprofessional obligation," (i.e. the obligation to competently assess the claim). As such, a

malicious prosecution claim against an attorney is subject to the one-year statute of limitations for professional misconduct by an attorney.

CIVIL PROCEDURE

45. Delay In Prosecution – Case Not Subject To Discretionary Dismissal For Delay Less Than Five Years Where: (A) Counsel Indicated that Case Would Be Ready For Trial As Scheduled, And (B) Trial Was Still One Month Away.

Corrinet v. Bardy (2019) 35 Cal.App.5th 69 – Under C.C.P. § 583.420, a trial court has discretion to dismiss a case for delay in prosecution when the case is not brought to trial in three years. In *Corrinet*, a case almost five years old had been delayed by the plaintiff's illness and ultimately unsuccessful efforts to schedule a mediation. In addition, the Plaintiff's counsel had a stroke shortly before trial. As a result, the Plaintiff requested a waiver of the five-year rule and a continuance of the trial date. The Defendants filed a motion to dismiss for delay of prosecution, even though a trial date was already set within the five-year rule, and the Plaintiff indicated that he would be ready for trial if a continuance was not granted. The trial court found that the plaintiff "did virtually nothing to prosecute this case," and granted the motion to dismiss for delay. The Court of Appeal reversed, holding that the trial court's factual finding regarding the Plaintiff's lack of action was not supported by the evidence, which showed that the plaintiff propounded and responded to discovery, paid jury fees, disclosed his expert witnesses, and retained lawyers. The Court held that the most important factor, however, was that a trial date had already been set, and the Plaintiff represented that he would be ready for trial. The Court explained that, absent a showing that the Plaintiff's claim was stale, dismissing the case under these circumstances would not expedite the administration of justice, and, therefore, constituted an abuse of discretion.

46. Five-Year Rule – Once A Defendant Files A Motion To Dismiss Under C.C.P. § 583.360 For Failure To Bring The Action To Trial Within Five Years, The Plaintiff May No Longer Voluntarily Dismiss Without Prejudice.

Cole v. Hammond (2019) 37 Cal.App.5th 912 – In *Cole*, the Plaintiff sued the Defendants for unpaid rent. Soon after the action was filed, the Defendants began paying their rent to the Plaintiff on a going forward basis, and the case languished for several years. The Defendants then brought a motion to dismiss based on the Plaintiff's failure to bring the matter to trial within five years. The Plaintiff filed an opposition, claiming the five-year period had been tolled. At the hearing on the motion, the Plaintiff orally requested to voluntarily dismiss the case without prejudice. The trial court granted the voluntary dismissal, and the Court of Appeal reversed. The Court explained that, while an action can be voluntarily dismissed without prejudice when a summary judgment motion or similar dispositive motion has been filed but not decided, that rule does not apply where a dismissal is inevitable due to a "procedural dereliction" by the plaintiff. Dismissals under § 583.360 are mandatory, and thus are inevitable when the statutory conditions

are satisfied. Here, the Plaintiff's argument that the five year rule was tolled was meritless. Accordingly, a dismissal under the five year rule was inevitable, and the Plaintiff's right to voluntarily dismiss was cut off when the motion was filed. The practical effect of this case is limited, however, by the holding in *Fierro v. Landry's Restaurant Inc.* (2019) 32 Cal.App.5th 276 (Case # 64, below), in which the Court held that a dismissal under § 583.360 does not bar a subsequent lawsuit on the same cause of action.

47. Five-Year Rule – Impracticability Exception – Where Plaintiffs Could Have Obtained Default Judgment Within Five Years, Other Extenuating Circumstances Still Justified Exception To The Five-Year Rule.

Alpha Media Resort Investment Cases (2019) 39 Cal.App.5th 1121 – In a complex consolidated real estate fraud case with 24 defendants and 230 plaintiffs, one Defendant filed a motion to dismiss for failure to bring the case to trial within five years, as required by C.C.P. § 583.310. The motion was denied, and the Defendant appealed after judgment was entered against him. The Court of Appeal affirmed, holding that numerous extenuating circumstances (including the complexity of the case, the Plaintiffs' diligence, and the Defendant's lack of diligence) justified the trial court's finding that the impracticability exception to the five-year rule applied. The Defendant argued that the impracticability exception could not apply because the Plaintiffs could have obtained a default judgment against him within five years. In fact, the Defendant did not answer the complaints in any of the consolidated actions for years after they had been filed, and the Plaintiffs had never obtained a default. Nevertheless, the Court of Appeal rejected this argument, noting that impracticality is a fact-specific inquiry that must be based on a consideration of all the relevant facts, and that the trial court is in the best position to make that factual determination. Given the facts in favor of impracticality, the mere failure to obtain a default judgment did not warrant overturning the trial court's factual finding.

48. Forum Selection Clause – Forum Selection Clause With A Pre-Dispute Waiver Of Jury Trial Is Unenforceable Where Selected Forum Would Enforce The Waiver.

Handoush v. Lease Finance Group, LLC (2019) 41 Cal.App.5th 729 – Typically, California law favors forum selection clauses, and the party opposing such a clause has the burden of showing why it should not be enforced. However, under established caselaw, if a claim is based on an unwaivable statutory right, the burden is reversed, and the party enforcing the forum selection clause must show that litigating in the selected forum would not adversely affect the other party's statutory rights. In *Handoush*, the Plaintiff's claims were not based on unwaivable statutory rights, but the forum selection clause contained a pre-dispute waiver of the right to trial by jury, which is generally unenforceable under the California Constitution and C.C.P. § 631. The Court of Appeal analogized this situation to those where a claim itself is based on an unwaivable right, and held that the possible impact on the constitutional right to trial by jury shifted the burden to the Defendant who was seeking to enforce a forum selection clause. Because the clause called for litigation in New York, and New York law does not prohibit pre-

dispute waivers of the right to trial by jury, the Defendant could not show that litigating in New York would not diminish the Plaintiff's right to a trial by jury under California law. For this reason, the Court of Appeal found that the forum selection clause was unenforceable.

49. Litigation Privilege – Judgment Debtor's Interference With Attorney's Rights In Client's Judgment Is Not Protected By Litigation Privilege.

Mancini & Associates v. Schwetz (2019) 39 Cal.App.5th 656 – In *Mancini & Associates*, the Plaintiff law firm won an employment lawsuit on behalf of its client. Under the terms of its engagement agreement, the firm had a lien on the judgment, and was entitled to receive 50% of the $68,000 damage award, plus almost $150,000 in cost and fee awards. Seven years after trial, the client rekindled her friendship with the Defendant, her former employer, and signed a settlement agreement that included a release of the entire judgment, including the cost and fee award. The Plaintiff law firm then sued the Defendant employer for intentional interference with the Plaintiff's retainer agreement. The trial court ruled in favor of Plaintiff, awarding it over $400,000. The Defendant appealed, contending that the Plaintiff's claims were precluded by the litigation privilege in Civil Code § 47. The Court of Appeal rejected this argument, holding that, while the execution of the settlement agreement was communicative, it was part of a course of noncommunicative conduct intended to interfere with the Plaintiff's rights. Because the litigation privilege applies only to communicative conduct, and not noncommunicative conduct, the Court affirmed the award in the Plaintiff's favor.

50. Litigation Privilege – Litigation Privilege Does Not Apply To Pre-Litigation Communications Where Litigation Is Not "Imminent."

Strawn v. Morris, Polich & Purdy, LLP (2019) 30 Cal.App.5th 1087 – In *Strawn*, the Plaintiff insureds where charged with, but not convicted of, arson in connection with a fire that was the subject of an insurance claim. During the insurer's investigation of the claim, the Plaintiffs' accountants inadvertently produced tax returns to the insurer's attorney, despite the Plaintiffs' assertion of privilege over the returns. The Plaintiffs sued the insurer's Attorneys for invasion of privacy for forwarding the inadvertently produced documents to the insurer and its forensic experts investigating the arson allegation. The Attorneys demurred, claiming that transmission of the tax returns was a privileged litigation communication relating to the lawsuit that was certain to occur if the claim was denied. The trial court granted the demurrer, and the Court of Appeal reversed, holding that prelitigation conduct is protected by the litigation privilege only when: (1) there is "actual verbalization" of the possibility of a lawsuit, (2) there is a "serious and good faith" proposal of litigation, and (3) the contemplated litigation is "imminent." Here, the mere suspicion of arson did not preordain that the claim would be denied, and the Plaintiffs' retention of an attorney did not necessarily reflect contemplation of litigation rather than a desire for assistance in the insurance claim process. Accordingly, the complaint raised a factual question as to whether or not there was a serious contemplation of imminent litigation, and thus the order granting the demurrer on the basis of the litigation privilege was in error.

51. Personal Jurisdiction – Purposeful Availment – Acting As Guardian Ad Litem For Another Party Is Not Purposeful Availment Of California Law.

Jensen v. Jensen (2019) 31 Cal.App.5th 682 – The Plaintiff in the underlying elder abuse action sued one of her daughters to partition a home that the two owned as joint tenants. The Plaintiff's other daughter, who lives in Utah, applied to be appointed the Plaintiff's Guardian Ad Litem in the lawsuit. After the application was granted, the Defendant then filed a cross-complaint against the other daughter (the "Cross-Defendant"), for intentional interference for prospective economic advantage. The Cross-Defendant filed a motion to quash service of summons on the ground that California lacked personal jurisdiction over her, and the trial court granted that motion. The Court of Appeal affirmed, holding that, because the Cross-Defendant's only contacts in California were related to the litigation and were undertaken in her representative capacity, she did not "purposefully and voluntarily" direct activities toward California. Because there was no purposeful availment of the laws of the state of California, the Court held that the state may not exercise personal jurisdiction over the Cross-Defendant.

52. Personal Jurisdiction – Specific Jurisdiction Requires A "Substantial Nexus," But Not Actual Causation, Between The Parties' Contacts With California And The Subject Matter Of The Lawsuit.

Jayone Foods, Inc. v. Aekyung Industrial Co. Ltd. (2019) 31 Cal.App.5th 543 – To establish personal jurisdiction with regard to a specific lawsuit, courts evaluate three factors: (1) the party's purposeful availment of the benefits of the forum, (2) the existence of a relationship between the controversy and the party's contacts with the form, and (3) considerations of "fair play and substantial justice." In *Jayone Foods*, a Korean chemical Manufacturer was sued by the Cross-Complainant, a California Distributor, in a wrongful death action. The Action alleged that the Manufacturer's humidifier cleaning agent was responsible for the decedent's lung problems and eventual death. The Manufacturer filed a motion to quash service of summons for lack of personal jurisdiction. While the Manufacturer purposefully availed itself of the benefits of doing business in California by shipping two orders of the product (3,600 bottles) to the Distributor in California, the trial court found that there was no showing that the particular bottles of cleaner used by the decedent were those shipped by the Manufacturer to the Distributor, and thus granted the motion to quash. The Court of Appeal reversed, holding that the second prong of the specific jurisdiction inquiry does not require a showing that the party's contacts in California are either a proximate or but for cause of the plaintiff's injury. Instead, the second prong merely requires a showing of a "substantial nexus" between a defendant's contacts with the state and the plaintiff's claims. Here, the Court found that the Distributor satisfied that prong by showing that, within the time period covering the decedent's use of the product, the Manufacturer sold 3,600 bottles of the product to the distributor, who sold 600 bottles to the store from which the decedent purchased the product. The Court held that this provided a sufficient nexus between the Manufacturer's California contacts and the lawsuit to justify personal jurisdiction over the Manufacturer, even if the particular bottles used by the decedent might have come from a

different source. As such, the Court of Appeal ordered the trial court to deny the Manufacturer's motion to quash service of summons.

53. Relief From Default – C.C.P. § 473(b) – Mandatory Relief Based On Attorney Mistake Or Neglect Is Not Available In Cases Of Voluntary Dismissal.

Jackson v. Kaiser Foundation Hospitals, Inc. (2019) 32 Cal.App.5th 166 – In *Jackson*, the Plaintiff's attorney incorrectly advised the Plaintiff to dismiss her pending suit without prejudice, based on his mistaken belief that she could re-file before the statute of limitations ran out. When the Plaintiff learned that the statute of limitations had already expired, she filed a motion seeking mandatory relief from the dismissal under Code of Civil Procedure § 473(b), based on Horowitz's affidavit of attorney fault. The trial court denied the Plaintiff's motion, and the Court of Appeal affirmed, finding that while discretionary relief from a voluntary dismissal can be sought under Code of Civil Procedure § 473(a), the mandatory relief provision in § 473(b) is only intended to reach dismissals that are procedurally equivalent to a default. As such, the Court concluded that relief was not available to the Plaintiff because she voluntarily dismissed her case, which is not equivalent to a default.

54. Relief From Default – Defendants Who Knew Of And Participated In Action Are Not Entitled To Discretionary Relief From Default.

McClain v. Kissler (2019) 39 Cal.App.5th 399 – In *McClain*, an Attorney Defendant ran a medical marijuana collective (the "Collective"). The Plaintiffs sued the Attorney and the Collective for failing to pay for marijuana growing services. The Defendants failed to answer but appeared at a case management conference six months later, during which the trial court expressly told the Defendants to file an answer, and instructed the Plaintiff to request entry of default no later than 30 days after the hearing. The Plaintiffs waited two weeks, then requested entry of default, which the Court granted. The Defendants filed a motion for relief from default under § 473(b) on the basis of excusable mistake and neglect, and the Collective sought mandatory relief based on the Attorney Defendant's declaration of fault. The trial court denied the Defendants' requests for relief, and the Court of Appeal affirmed. The Court explained that discretionary relief under section 473 is only available for "excusable" neglect. The Court held that the trial court did not abuse its discretion in determining that the Defendants' neglect was not excusable, since the Defendants knew of and participated in the Action. The Court further explained that the Association was not entitled to mandatory relief based on the mistake of an attorney, because the trial court found that the Collective and the Attorney Defendant were "one and the same," such that the Attorney's mistake was also the Collective's mistake. Accordingly, the order denying relief from default was affirmed.

55. Res Judicata – CEQA – Where EIR Is Successfully Challenged And Then Revised, Res Judicata Bars Challenges To The Revised EIR That Could Have Been Brought Against The First EIR.

Ione Valley Land, Air, & Water Defense Alliance, LLC v. County of Amador (2019) 33 Cal.App.5th 165 – In a prior action, the Plaintiff filed a petition challenging a 2012 EIR that was certified by the Defendant County of Amador, based on seven alleged deficiencies. The trial Court granted the prior petition as to traffic impacts that were insufficiently analyzed in the 2012 EIR, but denied the prior petition as to all other issues. The Defendant certified a revised 2014 EIR with additional analysis of traffic impacts, which the Plaintiff challenged in a new petition. The new petition raised eight deficiencies, some of which were raised in the original petition, and some of which were new. The trial court denied the second petition, and the Court of Appeal affirmed. With regard to all issues except traffic impacts, the Court of Appeal held that the challenges were barred by res judicata, because they were, or could have been, resolved in the original petition. The Plaintiff argued that res judicata does not apply because the 2012 EIR was vacated, and the certification of a new EIR allowed a challenge to all elements of the new EIR. The Court rejected this argument, holding that the decertification of the original EIR "does not alter the fact that the sufficiency of a component of the EIR has been litigated and resolved." Thus, the Plaintiff could not challenge any aspect of the EIR except for the analysis of traffic impacts, which was revised as a result of the first petition. In an unpublished portion of the decision, the Court of Appeal upheld the trial court's adjudication of the traffic impacts, and thus the Court affirmed the judgment denying the second petition.

56. Sanctions – C.C.P. § 128.5 Sanctions – Sanctionable Conduct By An Attorney Under Code Of Civil Procedure Section 128.5 Requires Court To Make A Finding Of Subjective Bad Faith, As Opposed To Objective Unreasonableness.

In re Marriage of Sahafzadeh-Taeb & Taeb (2019) 39 Cal.App.5th 124 – Code of Civil Procedure § 128.7 allows sanctions based on the filing of a "pleading, petition, written notice of motion, or other similar paper," and has been interpreted to apply to papers that are "objectively unreasonable." Section 128.5 is not limited to pleadings or papers, but instead allows courts to impose sanctions for any "actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." In a prior case, *San Diegans for Open Government v. City of San Diego* (2016) 247 Cal.App.4th 1306, the Court of Appeal held that the standard for determining whether an "action or tactic" is sanctionable under § 128.5 is the same as under § 128.7—i.e. whether or not the action or tactic is "objectively unreasonable." In the present case, the Court of Appeal wrote to emphasize that *San Diegans* was no longer good law, because § 128.5 was amended to make it clear that sanctions under that section required a finding of subjective bad faith, not merely objective unreasonableness. Despite this more exacting standard, the Court of Appeal upheld an award of sanctions against the Appellant Attorney who made a false statement of readiness for trial, failed to inform the trial court of a calendar conflict until the day of trial, and sent another attorney to specially appear the first day of trial without

being prepared to even present a request for a continuance. Based on these facts, the Court of Appeal upheld the sanctions even though no express finding of subjective bad faith was made by the trial court, because the facts would have supported such a finding, and thus it had to be implied in support of the trial court's order.

57. Sanctions – C.C.P. § 128.7 – New Attorney Could Not Be Sanctioned For Frivolous Complaint Filed By Predecessor.

Primo Hospitality Group, Inc. v. Haney (2019) 37 Cal.App.5th 165 – Code of Civil Procedure § 128.7 allows a party to file a motion for sanctions against an opposing party or attorney for the filing of a meritless pleading. The motion must be served at least 21 days before it is filed to allow a safe harbor period for the voluntary withdrawal of the pleading. In *Primo Hospitality Group*, the Defendant served a § 128.7 motion that alleged that the complaint lacked merit, causing the Plaintiffs' first attorney to withdraw. The Plaintiffs then retained a new attorney, Marc Libarle, who filed a declaration stating that he represented the Plaintiffs, but would be unable to attend an upcoming hearing. The Defendants then served Libarle with the § 128.7 motion (but did not immediately file it). After service of the § 128.7 motion, Libarle filed a formal substitution of counsel form, and opposed the Defendant's summary judgment motion. Months after the § 128.7 motion was served, it was finally filed, and the trial court granted $16,000 in sanctions against Libarle. The Court of Appeal reversed, holding that, at the time the § 128.7 motion was initially served on Libarle, he had done nothing to present the Plaintiff's claims to the Court, and thus could not be held liable for filing the frivolous complaint. While his later actions in opposing summary judgment may have qualified for sanctions, the motion was served before that opposition was filed, and thus it did provide notice of the specific conduct by Libarle that violated the statute, nor did it provide the requisite safe harbor period to withdraw or correct the offending pleadings. For that reason, the sanctions could not stand.

58. Sham Pleading Doctrine – Where New Counsel Or Legal Research Uncovers Error In Complaint, The Sham Pleading Doctrine Does Not Prevent Correction Of That Error.

JPMorgan Chase Bank N.A. v. Ward (2019) 33 Cal.App.5th 678 – Civil Code § 3415 allows a party interested in a lost document or instrument to file an action to establish the document's existence or compel the execution of a replacement. In this case, the Plaintiff lender sued to compel the Defendant family trustee to issue a new trust deed so that the Plaintiff could foreclose on property owned by the family trust. The Plaintiff's initial complaint stated that the original trust deed was mistakenly signed by the trustee in his individual capacity, rather than as trustee of the family trust, because the signature line did not state that he was signing as trustee. Accordingly, the Plaintiff asked for the new deed to be executed in the trustee's representative capacity. The Defendant demurred, arguing that any relief based on fraud or mistake was barred by the four year statute of limitations. The Plaintiff retained new counsel, who argued that they could amend the complaint to omit the allegation of mistake, and to seek enforcement of the

original trust deed as it was written. Their theory was that a deed executed by a trustee is enforceable against the trust that owns the property subject to the deed, even if the trustee does not specifically state that he is signing in his capacity as a trustee. The Defendant argued that the sham pleading doctrine barred the Plaintiff from amending his complaint to omit the fatal allegation of mistake. The trial court agreed with the Defendant and granted the demurrer without leave to amend. The Court of Appeal disagreed, explaining that the sham pleading doctrine is meant to apply in circumstances where a change in factual allegations impugns trustworthiness, but is not intended to bar parties from correcting honest mistakes. Here, the Court held that "new counsel and further legal research presumably revealed the fallacy of the assumption that [the trustee]'s signature had to specify that he signed as trustee in the name of the Trust." Accordingly, the Plaintiff should have been allowed to amend its complaint to omit the allegation of mistake. The Court then held that the claim under § 3415 to replace the trust deed as written ran from the trustee's refusal to execute a replacement, and was, therefore, timely.

59. Standing – Associational Standing – An Association Lacks Associational Standing To Pursue Claims On Behalf Of Its Members Where The Claims Require Individualized Proof Relating To Each Member.

United Farmers Agents Assn., Inc. v. Farmers Group, Inc. (2019) 32 Cal.App.5th 478 – The Plaintiff association represented insurance agents, and sued a group of insurers for claims that: (1) the Defendants' contracts contained an unconscionable no-cause termination clause contrary to oral representations to the insurance agents; (2) the Defendants impermissibly terminated contracts based on office location and claim performance; and (3) the Defendants impermissibly used customer information. The trial court held that the Plaintiff lacked associational standing to pursue these claims on behalf of its members under *Hunt v. Washington Apple Advertising Comm'n* (1977) 432 U.S. 333, 343, which held that an association may sue on behalf of its members when: (a) its members would otherwise have standing to sue; (b) the claim is germane to the organization's purpose; and (c) the participation of individual members in the lawsuit is not required. The Court of Appeal affirmed in part and denied in part, finding that the trial court construed the third *Hunt* factor too restrictively by holding that standing is absent whenever any participation in the action by the members is required. Instead, the Court of Appeal explained that the third factor only bars associational standing if "extensive" member participation or individualized proof related to each member. Applying this standard, the Court of Appeal held that the Plaintiff had standing to pursue the claims relating to office location and claim performance, since the Plaintiff sought a declaration that all of the members' contracts prohibited termination on these bases. This meant that no individual proof was necessary on that issue, satisfying the third *Hunt* factor. Turning to the other claims, the Court noted that the Defendants had not made oral representations to all agents, and had not impermissibly used all agents' customer information. Accordingly, these claims would require individualized proof relating to

specific members, and the Association could not satisfy the third *Hunt* factor to establish associational standing.

60. Statute of Limitations – Amendment To Identify Doe Defendants Does Not "Relate Back" To The Filing Date Of The Complaint, When Defendants' Names Could Be Ascertained From Available Documents.

San Diego Navy Broadway Complex Coalition v. California Coastal Com. (2019) 40 Cal.App.5th 563 – The Plaintiff in this case filed a mandate petition against the California Coastal Commission and the San Diego Port District, challenging approvals relating to the expansion of the San Diego Convention Center. The Plaintiff also included unnamed individuals who participated in development of the project as Doe Defendants. Over a year later, the Developers of the project intervened, and the Plaintiff amended its petition to identify the Developers as the Doe Defendants. The Developers argued that they were indispensable parties, and that the statute of limitations against them had run. The trial court agreed that the Developers were indispensable, but found that the Plaintiff was genuinely ignorant of their identities, and thus the amendment naming the Developers as Does related back to the date of filing of the original petition. The Court of Appeal reversed, finding that multiple public documents in the Plaintiff's possession identified the Developers as the project applicants. As such, the Court held equitable tolling was improper and that dismissal due to the statute of limitations was required. While the trial court focused on the fact that the Coastal Commission had admitted an allegation in the Petition that the Port was the proponent of the project, the Court of Appeal noted that the Port itself denied that allegation. Moreover, the Court held that the admission could not establish that the Plaintiff was actually ignorant of the Developers' role in light of the substantial documentary evidence. Because the Plaintiffs were aware of the Developers' identity and role, the doe amendment did not relate back to the filing of the original petition, and the statute of limitations defense was found to be meritorious.

61. Venue – Federal Forum Selection Clause Is Enforceable After Expiration Of Time To Remove.

Korman v. Princess Cruise Lines, Ltd. (2019) 32 Cal.App.5th 206 – The Plaintiff's cruise passenger contract contained a forum selection clause requiring claims to be adjudicated in federal court in Los Angeles, except in cases where the federal courts lack subject matter jurisdiction. The Plaintiff was injured on the cruise and sued in Los Angeles Superior Court. After the 30-day deadline to remove the case to federal court had expired, the Defendant filed a forum non conveniens motion, based on the forum selection clause. The Plaintiff argued that the federal courts had lost jurisdiction since the Defendant failed to remove the case before the statutory deadline, and that this allowed the case to be heard in superior court under the exception to the forum selection clause. The trial court granted the motion and dismissed the case. The Court of Appeal affirmed, holding that the deadline to remove a case to federal court (28 U.S.C. § 1446) is merely procedural, and does not strip the federal court of subject matter

jurisdiction (the federal court had subject matter jurisdiction because the case was a maritime matter). The Court also noted that a forum non conveniens motion was the appropriate vehicle to enforce the mandatory forum selection clause, and that such clauses are generally enforceable in absence of a specific showing of unfairness or unreasonableness. Because no showing of unfairness or unreasonableness was made, the Court affirmed dismissal of the state court action.

CIVIL RIGHTS

62. Discrimination Claims By Student Athletes – *McDonnell Douglass* Burden-Shifting Framework Applies To Title VII And Unruh Act Claims Brought By College Athletes.

Mackey v. Board of Trustees of California State University (2019) 31 Cal.App.5th 640 – In *Mackey*, freshman basketball players at CSU San Marcos sued their coach and the CSU Board of Trustees of for race discrimination under Title VII of the Civil Rights Act of 1964 and the Unruh Civil Rights Act. They alleged that the coach excluded them from practices and games, generally singled them out for harsher treatment based on their race, and retaliated against them for complaining about the discrimination. The trial court granted summary adjudication in favor of Defendant, concluding that Plaintiffs could not show a triable issue on the merits, and the Court of Appeal reversed as to the Title VII and Unruh Act claims. The Court of Appeal explained that, although coaches are different from ordinary employers, the *McDonnell Douglas* framework applies in evaluating race discrimination claims brought by college athletes. Applying that framework in the context of summary judgment, the Court held that the Defendants failed to show that there was no of triable issue as to whether the Plaintiffs suffered a materially adverse action, or that there were circumstances suggesting a racially discriminatory motive. Accordingly, it was error to dismiss the Title VII and Unruh Act Claims.

CLASS ACTIONS

63. Standing – Curing Claims Brought By Representative Plaintiffs – Defendant May Not Eliminate Class Action By "Picking Off" Named Plaintiffs With Special Treatment.

Timlick v. National Enterprise Systems, Inc. (2019) 35 Cal.App.5th 674 – The "pick off exception" prevents dismissal of a putative class action where the defendant "picks off" the named plaintiffs by voluntarily providing them the relief sought, and then arguing that the plaintiffs are no longer members of the aggrieved class. *Timlick* involved a putative class action which alleged that the Defendant debt collector failed to use the required type size in debt collection notices. The Defendant cured its type-size violation by providing a properly-sized notice to the named Plaintiff, but not the rest of the class. The Plaintiff then filed a motion for summary judgment, which the trial court granted with prejudice. The Court of Appeal affirmed the holding that the Defendant's cure provided an affirmative defense to the named Plaintiff's

claim, but reversed the dismissal of the entire putative class action. The Defendant argued that it did not "pick off" the named Plaintiff, but had prevailed on the merits of an affirmative defense. The Court of Appeal rejected this argument, explaining that the two relevant factors for determining if the exception applies are: (i) whether the defendant's actions are voluntary, and (ii) whether relief is provided to the plaintiff alone. Here, both of those factors favored application of the exception, so the Court held that it was error to dismiss the claim without providing notice to the class and without allowing the Plaintiff to amend her complaint, redefine the putative class, or locate a suitable class representative.

64. Statute Of Limitations – Tolling – The Statute Of Limitations Is Tolled As To An Individual Claim During A Prior Class Action, But That Tolling Does Not Apply To Class Claims.

Fierro v. Landry's Restaurant Inc. (2019) 32 Cal.App.5th 276 – Employees of Landry's Restaurant brought a prior class action that was eventually dismissed. Another employee, the Plaintiff in *Fierro*, then sued Landry's for violations of labor laws and wage orders, asserting both individual and class claims. Landry's demurred, arguing that each cause of action was barred by the applicable statute of limitations. The trial court overruled the demurrer as to Plaintiff's individual claims, concluding that the statute of limitations did not appear affirmatively on the face of the complaint. The trial court sustained the demurrer without leave to amend as to the class claims. The Court of Appeal's original decision was vacated by the California Supreme Court, with directions to reconsider in light of *China Agritech, Inc. v. Resh* (2018) 584 U.S. __ [138 S.Ct. 1800]. In *China Agritech*, the US Supreme Court applied federal law, and held that a prior class action tolls the statute of limitation as to individual claims by putative class plaintiffs until class certification is denied, but that this tolling does not apply to class claims that may be asserted in later actions. The Court of Appeal agreed that the federal rule set forth in *China Agritech* should apply in California as well. Nevertheless, the Court found that the record did not demonstrate that all of the class's claims were untimely, and thus it was not clear that tolling was even necessary. Accordingly, the Court reversed the order sustaining the demurrer, after noting that further proceedings may show that the class claims are time-barred.

NOTE: The Defendant also argued that the prior action was dismissed for failure to bring the action to trial within 5 years under C.C.P. § 583.360. The Court of Appeal held that this argument was not supported by the record, but that even if it was, a dismissal under 583.360 is not a judgment on the merits, and does not bar a subsequent lawsuit on the same cause of action.

CONTRACTS

65. Contractual Limitations Of Liability – Termination Of Underlying Contract Terminates Contractual Limitation Of Liability.

Gietzen v. Covenant RE Management, Inc. (2019) 40 Cal.App.5th 331 – In *Gietzen*, the Plaintiff restaurant operator sued its Landlord and obtained a $2 million judgment for breach of the lease. The lease contained a provision that limited the Landlord's liability to the amount of the Landlord's interest in the property, and required the Plaintiff to look solely to that interest to satisfy any liability. Following entry of judgment, the Plaintiff moved to add the Landlord's General Partner as a party to the judgment under Corp. Code § 15904.04(a), which provides that, "[A]ll general partners are liable jointly and severally for all obligations of the limited partnership." The trial court denied the motion, holding that the General Partner was a third-party beneficiary of the limitation of liability, and thus the Plaintiff could not pursue the General Partner to satisfy the judgment. The Court of Appeal reversed, because after judgment was entered, the Landlord's lender foreclosed on the property, and the lease was assigned to the lender as a result of that foreclosure. This assignment extinguished all of the Landlord's rights under the lease, including the limitation of liability. Because a third-party beneficiary can hold no greater rights than the promisee, the General Partner's rights under the limitation of liability were extinguished as well. The Court of Appeal distinguished a case which noted that an attornment clause survived foreclosure, because the clause in that case specifically dealt with the parties' obligations in the event of a foreclosure. Accordingly, the limitation of liability would likely have remained in effect if the contract included specific language stating that the limitation survives foreclosure or termination.

66. E-Signatures – Reliance On E-Signature Requires Evidence As To How The E-Signature Was Verified.

Fabian v. Renovate America, Inc. (2019) 42 Cal.App.5th 1062 – In *Fabian*, the Defendant attempted to prove that the Plaintiff, Rosa Fabian, placed a valid e-signature on a contract containing an arbitration clause. To support this argument, the Defendant submitted a copy of the contract with the Plaintiff's initials, the words "DocuSigned by: Rosa Fabian," and a 15 digit alphanumerical code. The Defendant also submitted a declaration from an employee that "summarily asserted" that the Defendant entered into the contract, without stating that the Defendant signed the contract, or providing any information about who presented the Defendant with the contract, or where, how, or when the contract was e-signed. The supporting declaration also failed to provide any information regarding DocuSign or the electronic signature process. The Plaintiff denied signing the document, and the trial court held that the Defendant did not satisfy its burden of establishing the authenticity of the Plaintiff's signature. The Court of Appeal agreed, noting that once the Plaintiff denied the authenticity of her signature, the burden shifted to the Defendant to prove that the signature was genuine. The Court distinguished *Newton v. Am. Debt Servs* (N.D. Cal. 2012) 854 F.Supp.2d 712, where a "DocuSigned"

document was properly authenticated, by noting that the document in that case was accompanied by a declaration explaining how the e-signature was verified. Because that information was not provided in this case, the Defendant failed to meet its burden, and the Plaintiff was not bound by the arbitration agreement.

67. Indemnity Agreements – Duty To Defend – Showing That The Indemnitor Did Not Cause Injury Only Extinguishes Duty To Defend Prospectively, Not Retroactively.

Centex Homes v. R-Help Construction Co. (2019) 32 Cal.App.5th 1230 – A Plaintiff brought negligence claims against a Developer and a Subcontractor after he fell into a utility box. The Plaintiff alleged that the Subcontractor installed and then abandoned the box, and that the Developer was liable on an agency theory. When the Subcontractor failed to respond to the Developer's tender of defense under their indemnity agreement, the Developer filed a cross-complaint for indemnity against the Subcontractor and settled the Plaintiff's claims. The Superior Court then held a jury-trial as to whether or not the Subcontractor owed a duty to defend. The jury found that no duty existed because the information available at the time of the tender eliminated any reasonable potential for liability based on the Subcontractor's actions. The Court of Appeal reversed, holding that the Plaintiff's mere allegation that the Subcontractor's acts caused his injury gave rise to the duty to defend as a matter of law. While that duty could be extinguished upon a showing of undisputed evidence that there was no possibility of liability, the evidence on liability in this case was disputed. Moreover, even if there was a showing of no possibility of liability, that would only extinguish the duty to defend *prospectively*, but it would not eliminate the duty to defend retroactively. Accordingly, the Court of Appeal held that the trial court should have instructed the jury that the Subcontractor had a duty to defend and breached that duty, and limited the jury trial to the issue of damages.

68. Non-Competition Agreements – The Per Se Ban On Contractual Non-Competition Clauses Applies Only In The Employment Context; Outside That Context, A Rule Of Reason Applies.

Quidel Corp. v. Superior Court (2019) 39 Cal.App.5th 530 – In this case involving two sophisticated biotechnology companies, one company developed an assay to detect a certain compound in a blood sample, and one company developed a laboratory analyzer that could run the assay and manufacturing capability to produce the assay. The Parties' agreement called for the Plaintiff to manufacture assays exclusively for the Defendant, and called for the Defendant to purchase the assays exclusively from the Plaintiff. The Plaintiff sued for a declaration that the non-competition clause was invalid under Bus. & Prof. Code § 16600, which prohibits "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The trial court granted summary adjudication in favor of the Plaintiff, relying on *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937 for the proposition that § 16600 voids every contract that restrains someone from engaging in lawful business. The Court of Appeal reversed, noting that *Edwards* was decided in the employment context, and

holding that while § 16600 does establish a per se rule against non-competition clauses in employment agreements, in other contexts it calls for an evaluation of the reasonableness of the restraint on trade. The court emphasized that the per se rule in the employment context is based on the right of citizens to engage in the employment of their choosing. Where that right is not implicated, a noncompetition provision may be held valid if it "does not negatively affect the public interests, is designed to protect the parties in their dealings, and does not attempt to establish a monopoly." In this case, the Court held that there were triable issues of fact as to whether or not the agreement met these criteria, and, accordingly, the Court reversed the order granting summary adjudication.

69. Statute Of Frauds – Plaintiff's Complete Performance Of Contract Not Relating To The Making Of A Will Takes The Contract Out Of The Statute Of Frauds.

Zakk v. Diesel (2019) 33 Cal.App.5th 431 – A producer for Vin Diesel's production company sued Diesel and others for breach of a contract not in writing, alleging that he was owed a commission for a sequel of the xXx movie franchise. The Defendants demurred, arguing that the alleged contract was subject to the statute of frauds because it could not be performed in one year. The Plaintiff argued that he had completely performed his obligations, taking the contract out of the statute of frauds. The trial court granted the Defendants' demurrer, and held that the Plaintiff's full performance was insufficient to take the contract out of the statute of frauds without additional facts that could establish estoppel. The Court of Appeal reversed. The Court explained that while some authorities had required facts sufficient to establish estoppel in order to avoid application of the statute of frauds, those cases involved the making of a will or devising of property in a will. Estoppel must be shown in addition to full performance in such cases, because the deceased is unavailable to testify on his own behalf, raising a real concern that the plaintiff will fabricate testimony. Outside the context of oral contracts relating to wills, however, both parties can testify, and a plaintiff who has fully performed is not required to establish estoppel to avoid the statute of frauds. Applied here, the Plaintiff's allegation that he fully performed all his obligations under the alleged contract was sufficient to take the contract out of the statute of frauds, and the Court of Appeal reversed the order granting the Defendants' demurrer.

70. Time Is Of The Essence Provision – "Time Is Of The Essence" Provision May Not Require Strict Compliance If: (A) There Is Substantial Performance, And (B) Requiring Strict Compliance Would Cause A Forfeiture.

Magic Carpet Ride LLC v. Rugger Investment Group, L.L.C. (2019) 41 Cal.App.5th 357 [**Fybel**, Aronson, Thompson] – The Defendant agreed to sell an aircraft to the Plaintiff, and agreed that $90,000 from the purchase price would be held in escrow for 90 days to allow the Defendant to obtain the release of a mechanic's lien. If the release was placed in escrow within the 90-day limit, the $90,000 was to be released to the Defendant, and if not, it was to be released to the Plaintiff. The Defendant placed the lien release in escrow 8 days late, and refused

to allow the $90,000 to be released to the Plaintiff. The Plaintiff sued and obtained summary judgment on his claim that the Defendant was in breach and owed $90,000 for refusing to release the holdback from escrow. The Court of Appeal reversed, holding that the Plaintiff's deposit of the lien release 8 days late constituted substantial compliance with the contract, because the Plaintiff acted in good faith, and any harm to the Defendant could be compensated in delay damages. The Court further explained that while the contract had a provision stating that "time is of the essence," such provisions have not been enforced in real estate contracts where they would cause a forfeiture. The Court held that there was no reason not to apply the same rule outside the real estate context. Here, requiring strict performance with the 90-day deadline would have resulted in the Defendant's forfeiture of $90,000 of the purchase price for the aircraft. Accordingly, the Court declined to strictly apply the 90-day deadline and reversed the summary judgment in favor of the Plaintiff.

CORPORATIONS & BUSINESS ENTITIES

71. Internal Affairs Doctrine – California's Statutory Dissolution And Buyout Procedures Do Not Apply To Foreign LLC and Limited Partnerships.

Boschetti v. Pacific Bay Investments Inc. (2019) 32 Cal.App.5th 1059 – California Corporations Code §§ 15908.02 and 17707.03 allow parties in an action to dissolve a California LLC or Limited Partnership to avoid dissolution by requesting to buyout the parties who initiated the dissolution proceeding. In *Boschetti*, the Court of Appeal held that this statutory buyout procedure does not apply to foreign business entities. The Court of Appeal explained that under the internal affairs doctrine, matters concerning the internal affairs of a business entity are governed by the law of the state under which the entity was organized. The Court noted numerous authorities holding that the internal affairs doctrine applies to dissolution actions. The Plaintiff argued that the authorities on dissolution did not apply, because his claim sought a buyout to *avoid* a dissolution. The Court of Appeal disagreed, noting that the statutory buyout proceeding is not a separate cause of action, but a procedure that can be used in a dissolution action. Moreover, the Court held that there was no reason to conclude that California has interest in applying its laws pertaining to dissolution and buyout to foreign LP's and LLC's.

72. Nonprofit Derivative Actions – Where A Non-Profit Director Is Removed After Filing Suit Against Another Director For Self-Dealing, The Removal Does Not Deprive The Director Of Standing.

Summers v. Colette (2019) 34 Cal.App.5th 361 – In *Summers*, the Plaintiff was a director of a nonprofit public health corporation, who sued the nonprofit and another director, alleging self-dealing and breach of fiduciary duties. After the action was filed, the Defendant director orchestrated a board meeting and vote to remove the Plaintiff from the board of directors. In turn, both Defendants demurred, arguing that the Plaintiff no longer had standing. Corporations Code §§ 5233(c), 5142(a), and 5223(a) allow the director of a nonprofit to bring an action to

remedy self-dealing or a breach of trust by a fellow director, or to remove a fellow director. The statutes do not state whether or not the plaintiff must remain a director in order to maintain standing. The trial court granted the demurrers, and the Court of Appeal reversed. The Court noted that the applicable statute relating to for-profit corporations requires a shareholder to own stock to "institute or maintain" a derivative action, which the Supreme Court has interpreted to require continuous ownership throughout the lawsuit. The Court then explained that the statutes applicable to nonprofits only require that a plaintiff be a director to "bring" an action. The Court reasoned that imposing a continuous directorship requirement would be inconsistent with that language and would deprive the public of responsible individuals willing to enforce the laws governing nonprofits. Accordingly, since the Plaintiff was a director at the time she commenced the Action, the Court held that she had standing to pursue her claims, and reversed the trial court orders granting the Defendants' demurrers.

DISCOVERY

73. Requests For Admission – Costs Of Proof – A Party Seeking To Avoid Paying Costs Of Proof For Denying An RFA Has The Burden Of Proving That It Had A Reasonable Basis For Believing It Would Prevail At Trial On The Subject Of The RFA.

Samsky v. State Farm Mutual Automobile Ins. Co. (2019) 37 Cal.App.5th 517 – Code of Civil Procedure § 2033.420, subdivision (a) provides that if a party fails to admit a request for admission of the truthfulness of a matter, and the propounding party prevails in proving the truthfulness of that matter at trial, the propounding party may seek reasonable expenses incurred in making that proof. Subdivision (b) provides that the trial court shall award such expenses, unless one of four exceptions applies, including an exception that applies where the party denying the RFA has "reasonable ground to believe that that party would prevail on the matter." In *Samsky*, the Plaintiff propounded RFAs, which the Defendant denied. After prevailing in arbitration, the Plaintiff sought costs of proof for the matters set forth in the RFAs. The cost of proof motion was decided by the trial court, who denied the motion after holding that the Plaintiff bore the burden of showing that there were no reasonable grounds for the Defendant to believe that it would prevail on the RFAs in the arbitration. The Court of Appeal reversed, holding that under the rules of statutory construction, the party attempting to invoke a statutory exception to a general rule bears the burden of proving the applicability of the exception. Here, subdivision (b) provides statutory exceptions to the general rule that a party denying RFAs is liable for costs of proof if the propounding party ultimately prevails on the subject matter of those RFAs. Accordingly, the party attempting to invoke the exceptions in subdivision (b) bears the burden of proving that the exceptions apply. In this case, that meant the Defendant bore the burden of proving that it had a reasonable basis to believe it would prevail on the subject matter of the Plaintiff's RFAs. Because the Defendant failed to meet that burden, the Court of Appeal

reversed the order denying cost of proof sanctions, and remanded the matter for determination of the amount of the sanctions.

74. Sanctions – Where Discovery Was Served By Mail In An Envelope Lacking Postage, Service Was Ineffective, And Propounding Party's Attorney Was Sanctioned For Bringing A Motion To Compel, Despite Opposing Party's Failure To Meet And Confer.

Dalessandro v. Mitchell (2019) 43 Cal.App.5th 1088 – In *Dalessandro*, the Plaintiff's attorney attempted to serve document demands by mail. However, the envelope containing the discovery was placed in the mail without postage (the opinion does not mention whether or not the Defendants received the discovery, but it seems likely that they did, because they were able to somehow show that the envelope lacked postage). The Defendants failed to respond to the discovery, and the Plaintiff moved to compel. The trial court held that the lack of postage rendered service by mail ineffective under C.C.P. § 684.120, which requires documents to be placed in the mail "postage paid." The trial court further found that the proof of service and the attorney's declaration in support of the motion to compel were false. Accordingly, the trial court denied the motion to compel, and sanctioned the Plaintiff's attorney $3,456.70. The Plaintiff's counsel appealed the sanctions order, and the Court of Appeal affirmed. The Plaintiff's counsel argued that the Defendants were not entitled to sanctions, because they failed to meet and confer and alert him to the lack of postage. The Court rejected that argument, holding that nothing in the Discovery Act "requires a party to meet and confer with the opposing party to alert him to defects in his discovery requests, particularly when they were not validly served."

EMPLOYMENT

75. Ministerial Exception – Teachers Who Taught Religious Principles, But Who Were Not Required To Have Any Religious Education Are Not Ministerial Employees.

Su v. Stephen S. Wise Temple (2019) 32 Cal.App.5th 1159 – The ministerial exception is rooted in constitutional protection of freedom of religion, and precludes the application of certain employment laws to the employment relationships between religious institutions and their ministers. In *Su*, the Labor Commissioner sued the Defendant synagogue for wage and hour violations on behalf of preschool teachers employed there. The trial court granted summary judgment in favor of Defendant, concluding the Commissioner's claims were barred by the ministerial exception. The Court of Appeal reversed. In light of the following factors, the Court concluded that the teachers could not be considered ministers: (a) nothing in the record suggests the Defendant held out its pre-school teachers as ministers; (b) the Defendant does not require its teachers to have any formal religious education or training; and (c) there is no evidence that the pre-school teachers held themselves out as ministers. Despite the fact that the Defendant's preschool teachers did in fact teach their students religion, these other relevant circumstances prevented application of the ministerial exception. Those factual circumstances differentiated

the pre-school teachers' roles from other employees of the Defendant who were, in contrast, central to the religious institution's mission, and to whom the ministerial exception would have applied. The United States Supreme Court turned down certiorari in *Su*, but has recently taken up review of two similar 9th Circuit cases: *Biel v. St. James Sch.* (9th Cir. 2018) 911 F.3d 603, and *Morrissey-Berru v. Our Lady of Guadalupe Sch*. (9th Cir. 2019) 769 F.App'x 460.

EVIDENCE

76. Evidentiary Objections – Court Of Appeal Refuses To Evaluate Opposing Party's Evidentiary Objections, Where 197 Objections Were Asserted Without Describing Why They Were Critical To The Motion For Summary Adjudication.

Cohen v. Kabbalah Centre Internat., Inc. (2019) 35 Cal.App.5th 13 **–** In *Cohen*, the Plaintiff donated about $500,000 to the Defendant to purchase a building for a spirituality program for children, which never occurred. The trial court granted summary adjudication on the merits of a fraud claim, because the Defendant intended to purchase the building at the time the donation was solicited, but failed after good faith efforts. The Plaintiff appealed, and argued, in part, that its evidentiary objections should have been granted. The Court of Appeal essentially refused to consider the objections, after noting that the Plaintiff submitted 197 written objections in the trial court, and listed scores of those objections in her opening brief, without explaining why they were critical to resolution of the summary judgment motion. The Court only specifically addressed one objection, which was to the boilerplate statement in one declaration that "if called as a witness, I could and would testify competently to such facts under oath." The Plaintiff objected that the statement that the testimony would be competent was a conclusion of law. The Court of Appeal noted that this objection was frivolous, and even if granted would accomplish nothing. The Court held that "objecting to every single thing with no display of professional judgment or restraint is an abusive practice." The Court then stated that it would not reward that practice, and declined to evaluate the merits of any of the other objections.

77. Expert Witnesses – Disclosures – Rebuttal Experts Need Not Be Disclosed During Initial Simultaneous Exchange Of Experts.

Du-All Safety, LLC v. Superior Court (2019) 34 Cal.App.5th 485 – The Plaintiff fell from a bridge at his place of employment and suffered injuries. The Defendant served its expert witness disclosure list identifying two experts—a health and safety consultant and a structural engineer—that it expected to call at trial. The Plaintiff also served an expert witness disclosure list naming two of the same type of experts as well as five experts on other topics that he expected to call at trial. The Defendant then served a supplemental expert witness disclosure, listing five experts to rebut the Plaintiff's experts on the five other topics. The trial court granted the Plaintiff's motion to strike the Defendant's five rebuttal experts, finding that the Defendant should have expected the need for rebuttal testimony on those five topics. The trial court implied that a party must not only initially disclose every expert witness it expects to call at trial, but also every expert witness

it anticipates using to rebut the experts the other side might hire. The Court of Appeal reversed. The Court first determined that the Defendant had timely designated five rebuttal experts in the same fields as the Plaintiffs' initially designated experts. The appellate court then held that the Defendant's five supplemental experts were just that, experts designated not to support the Defendant's case, but to rebut the Plaintiff's experts. As a result, the appellate court held that the Defendant had complied with the express language of the expert designation statutes and that the trial court should not have excluded them.

78. Expert Witnesses – Expert Opinion Is Unnecessary To Establish Real-Estate Agent's Duty To Inform Sellers Of Facts That Negatively Affect Home Value.

Ryan v. Real Estate of the Pacific, Inc. (2019) 32 Cal.App.5th 637 – Plaintiffs contracted with Defendants real-estate agent and agency to sell their home. The Plaintiffs' next-door neighbor informed the Defendants of remodeling plans that would take years to accomplish, move their home within five feet of the Plaintiffs' home, and block Plaintiffs' ocean view. The Defendants sold the Plaintiffs' home without informing the Plaintiffs or the buyers. At arbitration, the buyers rescinded the purchase and received $1 million in attorney's fees. The Plaintiffs, in turn, sued the Defendants for failing to disclose the neighbor's plans. The trial court granted the Defendants' summary judgment because the Plaintiffs offered no expert testimony of a real-estate agent's standard of care. The Court of Appeal reversed, holding that a layman would know that a real-estate agent's fiduciary duties include the duty to share material information that affects the value of the property being sold. Thus, the Plaintiffs could proceed with their lawsuit.

79. Hearsay – Out Of Court Statements Regarding Real Property Boundaries – The Hearsay Rule Does Not Bar A Property Owner's Statements Regarding His Property Boundaries If The Owner Is Not Available To Testify.

McDermott Ranch, LLC v. Connolly Ranch, Inc. (2019) 43 Cal.App.5th 549 – Evidence Code § 1323 provides that out of court statements regarding real property boundaries are not prohibited by the hearsay rule, if the declarant is unavailable to testify as a witness, and the circumstances of the statement do not indicate a lack of trustworthiness. In *McDermott Ranch*, the Plaintiff and the Defendant were neighboring ranch owners with a dispute over their property line. The Defendant offered into evidence the out of court statements of a witness's deceased father that a 1958 land swap was intended to draw the property line at the location of an existing fence. The trial court credited this testimony, and ruled in favor of the Defendant in a bench trial. The Plaintiff appealed, arguing that the father's out of court statements were untrustworthy, since he had an interest in the land at the time the statements were made, and placing the property line at the fence location would have favored that interest. The Court of Appeal affirmed, holding that the mere fact that a declarant has an interest in the property is not a per se indicator of untrustworthiness under Evidence Code § 1323. Instead, the declarant's ownership interest is a factor to consider in determining a statement's trustworthiness. However,

that determination is in the sound discretion of the trial court, and in this case, there was no abuse of discretion in determining that the deceased father's out of court statements were trustworthy.

GOVERNMENT

80. Exhaustion Of Administrative Remedies – Filing A Petition For Writ Of Mandate Before Exhausting Administrative Remedies Does Not Waive The Plaintiff's Right To Continue Participating In The Administrative Process.

Stafford v. Attending Staff Assn. of LAC + USC Medical Center (2019) 41 Cal.App.5th 629 – The Plaintiff in *Stafford* was an anesthesiologist whose clinical privileges at a medical center were revoked by the Defendant staff association. The Plaintiff commenced, but did not finish, an administrative appeal process before filing an earlier lawsuit that was voluntarily dismissed. The Defendant then contended that the Plaintiff had abandoned the administrative appeal by filing the earlier lawsuit, and failed to proceed to decide the appeal. The Plaintiff then filed a writ of mandate to compel the Defendant to finish the administrative appeal process, which the trial court granted. The Court of Appeal affirmed, holding that the initiation of the earlier lawsuit did not amount to a per se waiver of the right to continue prosecuting the administrative appeal. The Defendant argued that the exhaustion of administrative remedies doctrine barred the Plaintiff from obtaining any further administrative relief, but the Court of Appeal held that there was no authority to support this position. Instead, the Court held that the exhaustion doctrine only bars judicial relief where the plaintiff has failed to exhaust administrative remedies. Whether a plaintiff who brings a premature lawsuit has waived his right to continue the administrative process depends on the plaintiff's intent. Here, there was substantial evidence to support the trial court's finding that the Plaintiff did not intend to waive his right to complete the administrative appeal. Accordingly, the Court affirmed the order requiring the Defendant to resolve the administrative appeal.

81. Financial Conflicts Of Interest – Standing – Only Parties To A Contract In Violation Of Gov. Code § 1092 Have Standing To Challenge That Contract Under Gov. Code § 1092.

San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego (2019) 8 Cal.5th 733 – Government Code § 1090 forbids a public officer or employee from having a financial interest in a contract made by the officer or employee on behalf of a public entity. Section 1092 allows "any party" other than the interested officer to file an action to void such a contract. In *San Diegans for Open Government*, a citizens' taxpayer organization, sued to invalidate contracts for the refinancing of Petco Park. The Plaintiff alleged that at least one member of the City's financing team had a financial interest in the contracts. The Defendants argued that the Plaintiff lacked standing to bring a claim under § 1092, and the trial court agreed. The Court of Appeal reversed, giving a broad construction to the word "party" in § 1092. The Supreme Court of California reversed the Court of Appeal, holding that "party" in

§ 1092 refers to a party to the contract. Because the Plaintiff here was not a party to the refinancing contracts, it lacked standing to void the contracts under § 1092. In explaining its decision, the Court focused first on the plain language of the statute, which states that "Every contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party." The Court explained that the most natural reading of this language indicates that the words "any party" refers back to the contract at issue. The Court then explained that policy concerns do not override this plain language, because there are a variety of avenues for enforcing the substantive provisions of § 1090, including criminal prosecution by the Attorney General, and administrative enforcement by the Fair Political Practices Commission. Finally, the Court noted that taxpayers may have standing to challenge government contracts affected by financial conflicts of interest under C.C.P. § 526a.

82. Public Records – Right To Access Records Does Not Establish Constructive Possession For Purposes Of The Public Records Act.

Anderson-Barker v. Superior Court (2019) 31 Cal.App.5th 528 – Plaintiff sought electronically stored data about vehicles that private towing companies had impounded at the direction of the Los Angeles Police Department. Defendant city argued the CPRA was inapplicable because the requested data was not in its possession, while the Plaintiff argued that the Defendant did have possession because it had a contractual right to access the data held by the towing companies. The trial court agreed with the Defendant and denied the Plaintiff's petition to compel disclosure. The Court of Appeal affirmed, holding that the mere ability to access data was not enough to constitute "possession." Instead, possession required a right to "control" the data, which the Court held is defined as "the power or authority to manage, direct, or oversee" the records. Here, because the Defendant had no power to direct what information is saved in the data, and no authority to modify the data in any way, the Defendant did not have control of the data, and thus the data was not in the Defendant's possession for purposes of the CPRA. The Court of Appeal also distinguished the Supreme Court's holding in *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 623 (e-mails on an employee's private e-mail accounts can be public records), on the grounds that it addressed the question of what constitutes a public record, but did not address the separate issue of what records are in an agency's possession.

JUDGES

83. Peremptory Challenge – Opposing A Motion To Transfer And Consolidate A Case Triggers The 15-Day Time Limit To Disqualify A Judge Under C.C.P. § 170.6.

Sunrise Financial, LLC v. Superior Court (2019) 32 Cal.App.5th 114 – In Sunrise, the "Sunrise Defendants" were existing defendants in a San Bernardino action, but had not yet appeared in a related San Diego action brought by the same Plaintiff. When the Plaintiff moved to transfer the San Bernardino action and consolidate it with the San Diego action, the Sunrise Defendants filed an opposition as "specially appearing defendants" in the San Diego action. The judge in the San

Diego Action granted the motion to transfer, and the Sunrise Defendant promptly filed a 170.6 challenge. The trial court denied Plaintiff's challenge as untimely, as it was filed more than 15 days after the Sunrise Defendants' opposition to the motion to transfer. The Court of Appeal affirmed, finding that the opposition to the motion to transfer and consolidate constituted a general appearance (despite the intent that it function as a special appearance), because it recognized the San Diego trial court's jurisdiction to exercise authority over the Sunrise Defendants and the San Bernardino action. As a result, the Sunrise Defendants should have filed their challenge within 15 days of the opposition motion, not the trial court's order granting the motion to transfer and consolidate the San Diego and San Bernardino actions.

JUDGMENTS

84. Enforcement – Post-Judgment Enforcement Costs – Judgment Is Not Satisfied For Purposes Of Barring Post-Judgment Enforcement Costs Until Judgment Creditor Has Been Paid.

Wertheim LLC v. Currency Corp. (2019) 35 Cal.App.5th 1124 – In *Wertheim*, the Defendant appealed a money judgment, and submitted an appeal bond to stay enforcement pending appeal. After the appeal was denied, the bond issuer deposited the amount of the bond in court for distribution. The Defendant disputed the amount to be distributed to the Plaintiff, and two more appeals took place before the amount due was finally determined. Before the funds from the appellate bond were distributed, but long after they were deposited, the Plaintiff moved for costs of enforcement, which must be sought before the judgment is "satisfied." The trial court denied the motion, finding that the judgment was satisfied when the bond funds were deposited with the court. The Court of Appeal reversed, holding that while C.C.P. § 685.030 specifies that a deposit satisfies a judgment, that section only applies to determine when post-judgment interest ceases to accrue. In order to determine when a motion for enforcement costs must be filed, a judgment is satisfied when the judgment creditor actually receives the funds.

85. Enforcement – Third Party Subpoena Duces Tecum – Third Party May Be Subpoenaed To Appear At Examination Of Debtor, Rather Than Just At An Examination Of The Third Party Witness Himself.

Shrewsbury Management, Inc. v. Superior Court (2019) 32 Cal.App.5th 1213 – The judgment enforcement provisions of the C.C.P., specifically, § 708.130(a), allow judgment creditors to require third party witnesses to appear and testify "in an examination proceeding under this article." The C.C.P. specifies two types of judgment enforcement examinations: examinations of the debtor, under § 708.110, and examinations of third parties under § 708.120. In *Shrewsbury Management* the Judgment Creditor filed a motion to request a third party subpoena duces tecum, seeking bank records for use in a debtor's examination under § 708.110. The trial court denied the motion for the subpoena, holding that a subpoena may only be issued to a third party in connection with an examination of that third party under § 708.120, and cannot be issued in

connection with an examination of the debtor under 708.110. The distinction is important because the permissible scope of a debtor examination under § 708.110 is much broader than the scope of a third party examination under § 708.120. The Court of Appeal reversed, holding that nothing in § 708.120 states that it is the only procedure available to examine a third party, and § 708.130 explicitly states the contrary, by allowing third party witnesses to appear in "an examination proceeding under this article." The Court further held that when a third party subpoena is issued in connection with a debtor examination rather than a third party examination, the permissible scope of the subpoena is the broader scope permitted under § 708.110, rather than the more restricted scope permitted under § 708.120. The Court then remanded the matter for reconsideration of relevance objections to the requested subpoena.

86. Enforcement – When A Motion For New Trial On Punitive Damages Is Granted After Judgment Is Entered, The Judgment Is Vacated, And Cannot Be Enforced, Even As To Compensatory Damages That Are Not Subject To New Trial.

Newstart Real Estate Investment LLC v. Huang (2019) 37 Cal.App.5th 159 – A jury awarded the Plaintiff compensatory and punitive damages in its action against the Defendant. After entry of judgment, the Defendant successfully moved for a partial new trial on the issue of punitive damages. Before the new trial on punitive damages was heard, the Plaintiff obtained a writ of execution for the entire judgment amount, levied on bank accounts held by the Defendant's wife and son, and attempted to secure witnesses and documents for a debtor's examination. In three separate orders, the trial court vacated each of the Plaintiff's attempts to enforce the judgment, explaining that no final enforceable judgment existed, since a partial new trial was granted. The Plaintiff appealed, and the Court of Appeal affirmed. On appeal, the Plaintiff cited cases indicating that a retrial of punitive damages does not require a retrial of compensatory damages. Based on these cases, the Plaintiff argued that the judgment remained enforceable at least as to the compensatory damage sum. The Court of Appeal held that the absence of a retrial on compensatory damages is beside the point, because there is only one final judgment, and until that one final judgment is entered there is nothing to enforce.

87. Fraudulent Transfer – The Litigation Privilege Does Not Bar A Fraudulent Transfer Claim Where A Debtor's Brother Obtained A Sham Judgment And Levied On The Debtor's Assets.

Chen v. Berenjian (2019) 33 Cal.App.5th 811 [**Fybel**, O'Leary, Moore] – The Plaintiff obtained two money judgments against a Judgment Debtor. The Judgment Debtor enlisted his brother in a scheme whereby the Judgment Debtor would allow a default judgment to be entered in his brother's favor for $199,900.00, and the brother would receive or levy on the Judgment Debtor's assets to prevent enforcement of the Plaintiff's judgments. The Plaintiff sued both the Judgment Debtor and his brother for fraudulent transfer under the Uniform Voidable Transactions Act ("UVTA"), Civil Code § 3439. The trial court sustained a demurrer to the fraudulent transfer claim, based on the litigation privilege. The Court of Appeal reversed, holding that the litigation

privilege only protects acts that are communicative, and the gravamen of a fraudulent transfer claim is the noncommunicative act of transferring assets. The Court distinguished *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, which held that an abuse of process claim was barred by the litigation privilege, by explaining that the key is to determine "whether the injury allegedly resulted from an act that was communicative in its essential nature." In *Rusheen*, the act that caused injury in the plaintiff's abuse of process claim was the procurement of a judgment based on perjured declarations, which is essentially communicative. Here, in contrast, the act that caused the Plaintiff's injury was the transfer of assets to the Judgment Debtor's brother, by means of levying on the sham judgment. The Court held that levying on property is a taking or physical act, not a communicative one. While the filing of the brother's sham complaint was communicative, it was not the gravamen of the Plaintiff's fraudulent transfer claim. Accordingly, that claim was not barred by the litigation privilege.

JURIES AND JURY TRIALS

88. Juror Misconduct – Where Juror Injects An Opinion Explicitly Based On Specialized Information Not In Evidence At Trial, Prejudice Is Presumed, And New Trial Should Be Granted If Presumption Is Not Rebutted.

Nodal v. CalWest Rain, Inc. (2019) 37 Cal.App.5th 607 – The Plaintiff vineyard foreman was injured when a valve assembly blew off a vineyard irrigation pipe and hit him. The Plaintiff sued the Defendant, who designed and installed the irrigation system. During jury deliberations, one juror vouched for the Defendant's system based on his expertise as a pipefitter and farmer, and his understanding of the industry standard, and said that anything that happened after the system was put together and tested was the vineyard's responsibility. The jury returned a 9-3 special verdict for the Defendant, and the Plaintiff moved for a new trial based on juror misconduct. The Plaintiff's motion was supported by declarations that the juror's statements may have influenced the votes of four other jurors. The trial court denied the motion, after finding that the juror's statements did constitute misconduct, but that the misconduct did not prejudice the Plaintiff. The Court of Appeal reversed, holding that the juror misconduct raised a presumption of prejudice, because jurors are not allowed to discuss facts or defense theories that are not in evidence, and the juror's statement was inconsistent with the jury instructions. The Defendant failed to rebut this presumption, so a new trial should have been granted. Thus, the Court reversed and remanded the case for new trial.

89. Right To Jury Trial – Plaintiffs Seeking Noncompensatory Nominal Statutory Damages Have A Right To A Jury Trial Where Damages Serve As A Penalty.

Brown v. Mortensen (2019) 30 Cal.App.5th 931 – In *Brown*, the Plaintiffs, who were patients of a dentist, sued the Defendant, who owned a collection agency employed by the dentist, after confidential medical information was disclosed to credit reporting agencies in violation of the Confidentiality of Medical Information Act ("CMIA"). The Plaintiffs sought noncompensatory

statutory damages of $1,000 per person, which did not require a showing that the Plaintiffs suffered or were threatened with actual harm. The trial court ruled that the Plaintiffs' claims were equitable, and thus the Plaintiffs were not entitled to a trial by jury. The trial court entered judgment for the Defendant after a bench trial. The Court of Appeal reversed and remanded for a jury trial, holding that actions to recover a penalty were available at common law before the adoption of the California Constitution in 1850, in an action dubbed a "writ of debt." Because a jury trial was a matter of right in the common law action of debt, it was retained as a matter of right when the California Constitution was adopted. Here, the Court held that while the statute was silent as to the reason for the statutory damages, such damages generally serve as penalties to discourage noncompliance. Accordingly, the Plaintiffs were entitled to a trial by jury in their action to recover a penalty, and the trial court's judgment was reversed.

REAL ESTATE, ENVIRONMENT, AND LAND USE

90. Receivers – Power To Issue First Priority Liens – Receiver's Issuance Of A First Priority Lien Did Not Prejudice Existing Trust Deed Holder, Where A Nuisance In Need Of Remediation Had Already Rendered The Trust Deed Worthless.

City of Sierra Madre v. SunTrust Mortgage, Inc. (2019) 32 Cal.App.5th 648 – In *City of Sierra Madre*, the Defendant Homeowners engaged in significant unpermitted renovation and new construction at their home. The Defendant Lender held a trust deed to the home as security for a $276,000 mortgage loan. The Plaintiff City sued for nuisance, and obtained the appointment of a receiver to take possession of the home and remediate the unpermitted construction. The receiver determined that rehabilitating the home would require a new $250,000 loan, and that no lender would fund the loan unless they were given a "super-priority" lien on the home superior to the Defendant Lender's trust deed. The trial court authorized the receiver to obtain the loan and issue a receiver's certificate for a first priority lien if the Defendant Lender refused to fund the remediation itself. The Defendant Lender appealed, arguing that the trial court's action inequitably deprived it of the value of its security and essentially required it to fund the cost of remediating the homeowner's nuisance. The Court of Appeal affirmed, holding that C.C.P. § 568 grants court-appointed receivers extensive powers to "do such acts respecting the property as the court may authorize." Under existing authority, this included the granting of first priority liens. In response to the Defendant Lender's equitable arguments, the Court responded that the Lender's security was not rendered worthless by the lien, because it had already been rendered worthless by the Defendant Homeowner's creation of a nuisance so costly that it exceeded the value of the unimproved land. Thus the creation of a super-priority lien to remedy that nuisance did not prejudice the Lender, and the Lender had no equitable right to benefit from remediation of the property without bearing any of the cost of that remediation.

91. Wrongful Foreclosure – Claims Against Trustee – Trustee's Duties Limited To Those Defined By Statute And Trust Deed.

Citrus El Dorado, LLC v. Chicago Title Co. (2019) 32 Cal.App.5th 943 – In *Citrus El Dorado*, the Plaintiff developer sued the Defendant trustee, who conducted a non-judicial foreclosure of the Plaintiff's residential housing project. The Plaintiff alleged that: (a) the Defendant failed to verify that the loan servicer who initiated the foreclosure held a valid assignment of the loan or authority to sign a substitute trustee form, and (b) improperly conducted the trustee's sale. The Defendant filed a demurrer, which the trial court granted. The Court of Appeal affirmed. The Court held that a trustee's duties are limited to those established by the trust deed and the governing statute, and that neither created any duty to verify the assignment of the loan, or the authority of the party filing a change of trustee form. Moreover, the Court held that the claim of improprieties in the trustee's sale was not adequately supported by factual allegations. Specifically, the Plaintiff claimed that the sale was essentially a private sale that gave the property to the loan servicer "for free," based on factual allegations that the sale was not conducted on the initially noticed date, and that the property was sold to the loan servicer for a credit bid. The Court held that these allegations, standing alone, did not overcome the presumption from the trust deed that the sale was properly conducted, because there was no factual allegation that the postponement of the sale was not performed in accordance with statutory notice procedures, or that the loan servicer's credit bid was fraudulent or in any other way improper. The Court also held that other minor irregularities in the trustee's notice of sale, such as an incorrect address and phone number for the loan servicer, were insufficient to state a valid claim against the trustee, because the errors caused no prejudice to the Plaintiff. Based on the foregoing, the Court upheld the dismissal of the Plaintiff's claims with prejudice.

REMEDIES

92. Lost Profits – Calculating 10 Years Of Lost Profits Based On 21 Weeks Of Sales Data Was Not Impermissibly Speculative.

Rescission – Guarantor Can Sue For Rescission Of Guaranty Based On Fraud, Even If Contracting Party Sues For Damages For Fraud.

Orozco v. WPV San Jose, LLC (2019) 36 Cal.App.5th 375 – In *Orozco*, the Plaintiff LLC negotiated a lease to open a hot dog restaurant with the Defendant shopping center owner. During negotiations, the Defendant made false representations that it was not negotiating with any competing businesses to fill the remaining two vacancies at the center. When the Plaintiff's restaurant opened, it was successful for about six months, until a competing hot dog restaurant opened two doors down reducing sales to the point that the Plaintiff's restaurant failed and closed. The Plaintiff sued for fraud. At trial, the jury found the Defendant guilty of misrepresentation and concealment, and awarded lost profits of $676,967, based on expert testimony that used 21 weeks of sales data from before the competing restaurant opened, and

extrapolated the profit the Plaintiff would have earned over the ten year lease. The Defendant appealed the lost profit award, arguing that it was speculative because: (a) the Plaintiff's restaurant was an unestablished business without enough of a track record, and (b) the Plaintiff did not present evidence of the experience of similar businesses. The Court of Appeal disagreed and affirmed the lost profit award, explaining that the Plaintiff was an established business, and that its track record, while short, constituted substantial evidence on which a lost profit award could be based. The Court also explained that while evidence of other similar businesses *may* be offered to support a lost profit analysis, it is not required even in the case of unestablished businesses where there is other substantial evidence supporting lost profits.

In addition to the Plaintiff LLC's damage claim for fraud, the owner of the LLC also sued to rescind a guaranty he executed along with the LLC's lease. After the jury trial on damages, the trial court held that the Plaintiff LLC could not obtain both rescission and damages, and that the lease and the guaranty could not be treated separately. Accordingly, the trial court warned that if the LLC elected to receive damages, the Plaintiff owner could not obtain an inconsistent remedy of rescission. Because the LLC elected to recover damages, the trial court denied the Plaintiff owner's claim for rescission of the guaranty, despite a stipulation by the parties that the requirements of proof for rescission had been satisfied in the jury trial. The Court of Appeal reversed, holding that there was no authority to support the trial court's decision that the LLC and owner could not pursue distinct remedies. To the contrary, the Court held that where two legally distinct entities suffer harm from a single course of action by the Defendant, they are entitled to pursue and receive separate remedies. Accordingly, the damages awarded to the LLC did not preclude rescission of the owner's guaranty.

93. Punitive Damages – A Trial Court May Not Reduce An Award Of Punitive Damages On A Motion For JNOV, But Instead Must Employ The Remittitur Processes Of C.C.P. § 662.5.

ENA North Beach, Inc. v. 524 Union Street (2019) 43 Cal.App.5th 195 – In *ENA North Beach*, a jury awarded the Plaintiff lessees $91,692.50 in actual damages, and $916,925 in punitive damages against one of the Defendant lessors, based on the Defendant's misrepresentations and failures to disclose facts regarding problems with a conditional use permit. Following the jury verdict, the Defendant filed a motion for JNOV and for new trial. The trial court denied the motion for new trial but granted the motion for JNOV and reduced the punitive damages award against to $131,500. The Court of Appeal reversed, and held that where, as here, evidence supports a plaintiff's entitlement to punitive damages but the amount of the award is unreasonable, the court cannot reduce the amount of damages on a motion for JNOV. Instead, the trial court's authority is limited to either: (a) ordering a new trial, or (b) conditionally granting a new trial unless the plaintiff consents to a reduction in the amount of punitive damages under C.C.P. § 662.5. The Court explained that the only possible exception is if the award exceeds the constitutional maximum for punitive damages, and the trial court reduces the award to the constitutional maximum. The Court held that this exception did not apply in this

case, because the trial court expressly found that the reduced award is "well within 'due process' limits." Nevertheless, at oral argument, counsel for the Plaintiff indicated that the Plaintiff would accept the trial court's reduction if the Court of Appeal found the original award to be excessive. Because the award was 10 times the amount of actual damages, and 35% of the Defendant's net worth, the Court found that the original award was excessive, and affirmed the trial court's reduction.

94. Punitive Damages – Defendant Is Estopped From Arguing That Plaintiffs Failed To Produce Evidence Of His Financial Condition, Where Defendant Fails To Produce Financial Documents Or Appear At The Punitive Damage Phase Of Trial.

Garcia v. Myllyla (2019) 40 Cal.App.5th 990 – In *Garcia*, the Plaintiff tenants sued the Defendant landlord, and served the Defendant with a notice to appear at trial with documents relating to his financial condition, pursuant to C.C.P. § 1987. The Defendant appeared at trial, where the Plaintiffs prevailed on liability and compensatory damages. The Defendant then failed to appear or produce financial documents at the punitive damage phase of trial. The jury then awarded $95,000 in punitive damages to each Plaintiff. The Defendant appealed, arguing that the Plaintiffs failed to produce evidence of his financial condition. The Court of Appeal affirmed the trial court's holding that the Defendant was estopped from making this argument, due to his failure to either object or produce documents and appear to testify at the trial on punitive damages. The Defendant argued that he was not required to respond, because the § 1987 notice was not given with the requisite notice period. The Court rejected this argument because: (1) § 1987 has a specific objection procedure, and if the Defendant had an objection to the timeframe set forth in the notice, he could have raised that objection in compliance with that procedure, and (2) even if the Defendant could object simply by refusing to appear at trial, that is not what happened—instead, the Defendant appeared at the liability phase of trial, and then unilaterally absented himself from the punitive damages phase, thereby waiving his right to complain about the lack of evidence of his financial condition.

95. Treble Damages And Attorney's Fees – Penal Code § 496 Applies To Fraud Claims Arising From Preexisting Business Relationships.

Switzer v. Wood (2019) 35 Cal.App.5th 116 – In 2013, the Fourth Appellate District, Division Three, held that Penal Code § 496—which provides for mandatory treble damages and attorney's fee awards where a defendant receives or withholds property acquired by theft—applies to defendants who obtain property by fraud, since fraud is a species of theft. (*Bell v. Feibush* (2013) 212 Cal.App.4th 1041.) In *Switzer*, the 5th Appellate District agreed. The Cross-Complainant in that case was a non-managing member of an LLC, who alleged fraud and other claims against the Cross-Defendant, who was the managing member of the LLC. The jury found that the Cross-Defendant obtained the Cross-Complainant's property by theft, and concealed or withheld it. Nevertheless, the trial court decided not to award treble damages, finding that the legislature could not have intended to apply the treble damage remedy to business disputes where

there is a preexisting business relationship, and the ordinary fraud and breach of contract remedies are available. The Court of Appeal reversed, holding that, under the plain language of the statute, there is no exception for preexisting business relationships, and applying the statute to such relationships would not lead to absurdity. Accordingly, this case reinforces the availability of treble damages and attorney's fees in ordinary business disputes where one party obtains property by theft (including fraud), or withholds or conceals property obtained by theft.

SETTLEMENT AND OFFERS TO COMPROMISE

96. C.C.P. § 664.6 – Entry Of Settlement Agreement As Judgment – A Court May Not Modify A Settlement Agreement Under § 664.6 Due To One Party's Failure To Comply.

Machado v. Myers (2019) 39 Cal.App.5th 779 – In *Machado*, warring neighbors entered into a settlement agreement on the record, whereby the Defendants would relocate an air conditioner and security cameras near the Plaintiff's property, and agree to other terms, in exchange for a license agreement to use a portion of the Plaintiff's property. The parties agreed that the settlement would be enforceable under C.C.P. § 664.6. When the Defendants failed to move the air conditioner and security cameras, the Plaintiffs moved for an order enforcing the settlement, and requested that the settlement be modified to omit the license requirement and other terms, claiming that they were excused from performing those terms due to the Defendant's breaches. The trial court granted the Plaintiff's motion, and entered the settlement as a judgment, omitting the license requirement and other provisions. The Court of Appeal reversed, holding that the trial court's jurisdiction to enter judgment under § 664.6 is limited. While the trial court may resolve disputes over the meaning of a settlement agreement's terms, a trial court cannot omit undisputed terms or otherwise modify the settlement agreement. Furthermore, while the trial court may also resolve disputes over compliance with the settlement, such disputes relate to the *enforcement* of the judgment once entered, and do not affect the terms of the judgment the trial court is empowered to enter.

97. C.C.P. § 664.6 – Requests For Dismissal Signed Only By Attorneys Are Insufficient To Allow The Court To Retain Jurisdiction Under C.C.P. § 664.6.

Mesa RHF Partners, L.P. v. City of Los Angeles (2019) 33 Cal.App.5th 913 – In *Mesa RHF Partners*, several Plaintiffs settled with the Defendant City of Los Angeles, and each settlement agreement called for the Court to retain jurisdiction pursuant to C.C.P. § 664.6 to enforce the settlement. Counsel for the Plaintiffs then filed Judicial Council forms requesting dismissal, inserting the following language: "Court shall retain jurisdiction to enforce settlement per C.C.P. § 664.6." Several years later, the Plaintiffs sought to enforce the settlements in motions under § 664.6. The trial court denied the motions on the merits. The Court of Appeal affirmed, but did not reach the merits. Instead, the Court noted that § 664.6 requires that the parties themselves, not their counsel, request retention of jurisdiction. Here, the requests for dismissal via Judicial

Council form were not signed by the Plaintiffs themselves, nor were copies of the settlement agreements containing the 664.6 language attached to the dismissal request. Because the parties themselves did not request retention of jurisdiction as required under C.C.P. § 664.6, the Court of Appeal held that the trial court lacked jurisdiction to enforce the terms of the settlements.

98. C.C.P. § 998 Offers – 998 Offer Including Fees "As Allowed By Law" Does Not Authorize Fee Award Under Statute That Requires A Specific Finding Of Liability.

Linton v. County of Contra Costa (2019) 31 Cal.App.5th 628 – The Plaintiff sued the Defendant under the California Disabled Persons Act (the "DPA") and the Unruh Civil Rights Act (the "Unruh Act"). The Defendant accepted a judicial council form 998 offer, which provided for judgment in the amount of $250,001, plus costs and "attorney's fees allowed by law as determined by the court." The Plaintiff then moved for attorney's fees, and the Defendant opposed, arguing that the DPA and Unruh Act both require a finding of liability to support an award of attorney's fees. The trial court agreed, and denied Plaintiff's attorney's fees request because the 998 offer included no finding of liability, and the settlement operated as a bar to reopening the controversy to make a new finding. The Court of Appeal affirmed, holding that, because the statutes at issue require a specific finding of liability, attorney's fees could not automatically be awarded to the prevailing party without such a finding. The Court also explained that the acceptance of a 998 offer does not create a presumption of liability, because such a presumption would undermine the purpose of § 998 to encourage settlement. The Plaintiff also argued that she could obtain contractual attorney's fees under the 998 offer, because it provided for fees "allowed by law," and she understood that her designation as a prevailing party would entitle her to fees. The Court rejected that argument, holding that the phrase "allowed by law" was not ambiguous, and there was no evidence that the Defense shared her mistaken understanding of law. In closing, the Court of Appeal noted that litigants should "proceed with caution when using Judicial Council form CIV-090 to make a § 998 offer."

99. C.C.P. § 998 Offers – A 998 Offer May Be Ineffective If Made Before The Offeree Has Sufficient Information To Evaluate The Offer.

Licudine v. Cedars-Sinai Medical Center (2019) 30 Cal.App.5th 918 – In a medical malpractice lawsuit, Plaintiff mailed her 998 offer to the Defendant hospital five days after the Defendant had filed its answer and served a demand for written discovery and for a statement of damages. The Defendant objected to the offer, arguing that it was too soon to determine whether the offer was reasonable, because the Defendant had not had a chance to fully investigate the Plaintiff's claims. The Defendant did not accept the 998 offer, and the Plaintiff's recovery at trial exceeded the value of the offer. After trial, the trial court granted the Defendant's motion to strike the Plaintiff's prejudgment interest request, after it determined that the 998 offer was premature. The Court of Appeal affirmed, noting that the Plaintiff made her offer just 19 days after serving the Defendant with her 3 page "bare bones" complaint, and that the Defendant had very little information available to it on the issues of liability and the amount of damages. While the

Defendant did have the Plaintiff's medical file, and some limited discovery responses, the Court of Appeal held that this was not sufficient information to evaluate the Plaintiff's offer. Accordingly, the order striking the request for prejudgment interest was affirmed.

TORTS

100. Intentional Interference/Intentional Inducement Of Breach – An Initial Breach Of A Confidentiality Agreement Does Not Immunize A Third Party From Intentional Interference Claims For Inducing Additional Subsequent Breaches.

Jenni Rivera Enterprises., LLC v. Latin World Entertainment Holdings, Inc. (2019) 36 Cal.App.5th 766 – The former manager of Jenni Rivera (a deceased celebrity) breached a nondisclosure agreement by writing an unauthorized memoir and agreeing to provide it to broadcast television network Univision, and to assist Univision in producing a series about the celebrity's life. When the company formed to manage the celebrity's assets ("JRE") learned of the series, it sent a cease and desist letter, informing Univision and the series' producers of the non-disclosure agreement. Despite the cease and desist letter, Univision and the producers finished and aired the series with further help from the former manager. JRE sued Univision and the producers for intentional interference with contract and intentional inducement of breach of contract, based on their actions after receiving notice of the non-disclosure agreement. The trial court denied the producer's anti-SLAPP motion because JRE demonstrated a likelihood of prevailing. The Court of Appeal affirmed, holding that the manager's initial breach of the non-disclosure agreement, which occurred before the Defendants were on notice of that agreement, did not immunize the producers from liability for inducing further breaches. The Court recognized that no California authorities have held that an interference claim could be based on successive breaches of a contract that has continuing obligations, but agreed with a federal case that recognized such a claim.

The Defendant producers also argued that their conduct after learning of the nondisclosure agreement could not have caused harm to JRE, because the manager had already disclosed the confidential information. The Court of Appeal rejected this argument, explaining that while the manager had already disclosed information to the producers when they learned of the non-disclosure agreement, their subsequent conduct caused further harm by causing the manager to disclose that information to a much larger television audience. Accordingly, the Court of Appeal found that JRE's claims against the producers had enough merit to survive their anti-SLAPP motion.

NOTE: While JRE's claims against the producers survived, its claims against Univision were struck, because the Court found that the First Amendment protects a broadcaster's "truthful account of a newsworthy event about a public figure," at least where the information was obtained by a journalist using "routine reporting techniques." Here, Univision did not know about the non-disclosure agreement before entering into the agreement with the manager to

obtain the unauthorized biography. While its subsequent actions, like those of the producers, may have contributed to a breach of contract, the Court held that they were "not sufficiently "wrongful" or "unlawful" to overcome the First Amendment newsgathering and broadcast privileges." The producers did not assert a First Amendment defense in their motion.