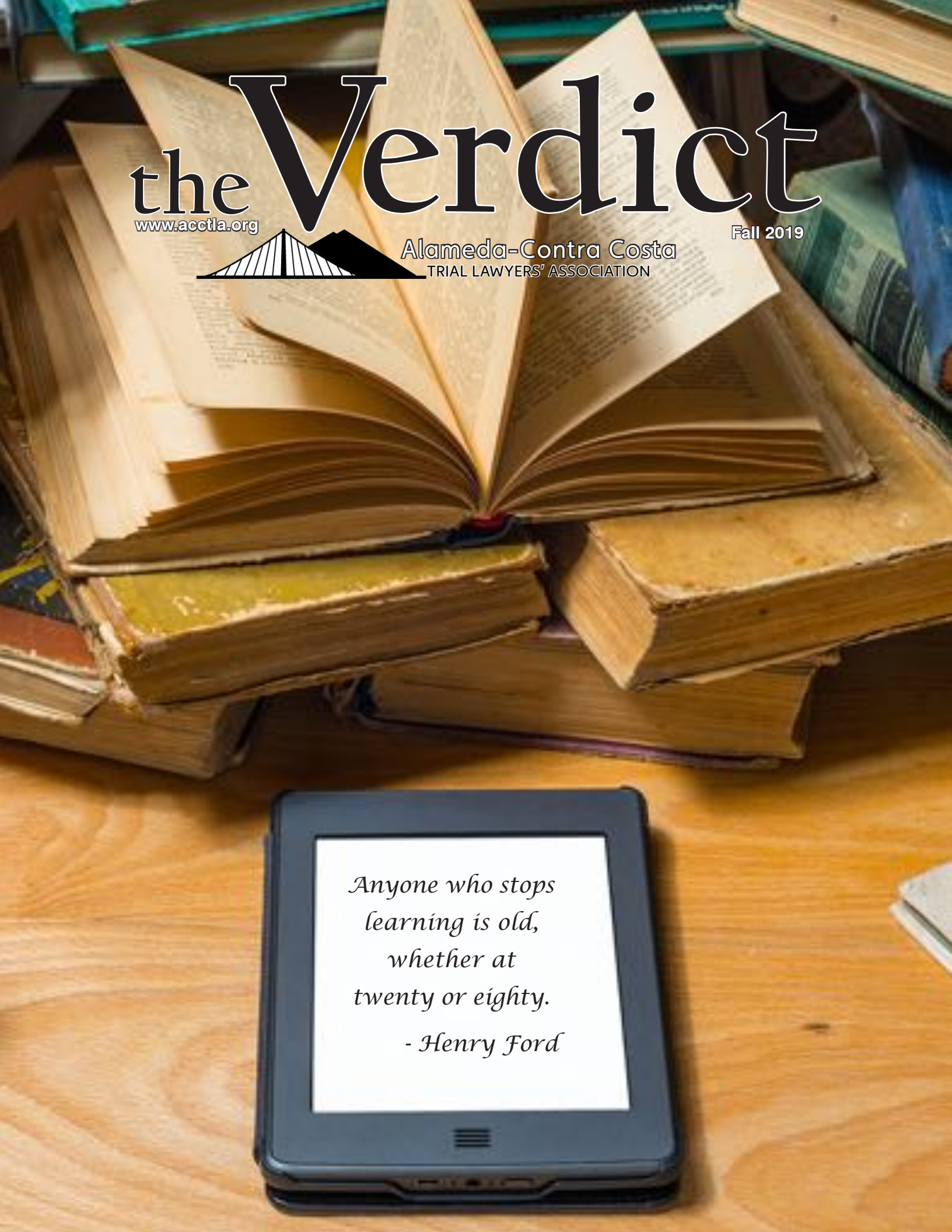
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learning is old,
whether at
twenty or eighty.
- Henry Ford

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ACCTLA reserves the right to edit articles and letters sent in for publication. All editorial material, including editorial comment, appearing herein represents the views of the respective authors and does not necessarily carry the endorsement of the ACCTLA or the Board of Directors. Likewise, the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement.

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from the editor



Teresa Li

The focus of this edition is learning... whether it is about reviewing new relevant legislations passed this year or understanding a novel aspect of discovery.

The issue will begin with an overview of relevant legislations that CAOC has helped pass this year. We are grateful to have CAOC, a statewide organization to watch out for our clients' interests. If you're not a member, it is a time to consider joining.

Next, Rick Simons' article on AB 218, passed on October 13, 2019, explains how the new law revives certain childhood sexual assault cases and broadens its definition. So next time you have an intake of a childhood sexual assault case, you may not have to turn it away due to a statute of limitations problem.

Has negotiating an ERISA lien been a headache for you? Cassie Springer Ayeni's article about the latest Ninth Circuit case, *Rudel v. Hawaii Management Alliance Association* reached on September 11, 2019, will teach us the latest trend on the interaction between federal ERISA law and state insurance law. Some have said that this case has a far more reaching effect than just Hawaii law and may be applicable to California law, which prohibits disability (medical) insurance's reach to uninsured/underinsured motorist claim settlements.

Do you practice employment law? Denise Top's article about the newest legislation AB 5 that reclassifies workers from independent contractors to employees in gig economy may be handy for you.

We hope that you enjoyed the Fall Cocktail Reception, honoring Contra Costa Trial Judge of the Year Edward G. Weil. Everyone is looking fabulous *(see the center spread of this issue)* and should be proud.

The next article affects us all. Jacquie Serna, CAOC's legislative counsel, explains the new State Bar's proposals to allow non-lawyers to own law firms and to practice law, and why it hurts consumers. If you feel strongly about it one way or the other, please be sure to let the State Bar know.

Have you been missing out on discovery of digital evidence? What do IP address, cell phone triangulation, and WhatsApp all mean to your case? Read Simon Varley's article on Digital Evidence Discovery. Your light bulb may just go off!

The issue will end with Dina Eisenberg's article on Next Level Inclusion — The Way Lawyers Act, Talk and Think. This is a continuation of our last issue's theme and reflects our ongoing commitment to diversity.

If you are interested in writing an article for *The Verdict* or having your verdict or settlement featured, please send an email to me (Teresa@LawOfficesOfTeresaLi.com) and/or Co-Editor Jennifer Fiore (Jennifer@theFAfirm.com). ◆

—Teresa Li is a trial attorney with Law Offices of Teresa Li, PC where she focuses on catastrophic personal injury cases. She has recovered over $13 million for injured parties. She has been selected by Super Lawyers Magazine as a Super Lawyers Rising Star from 2014-2019. She is native in Mandarin. On her free time, she enjoys practicing skating and, of course, teaching her four-year-old daughter about the world.

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from the president



Erika Jacobsen White

Dear Friends and Colleagues,

We began our year with a re-commitment to our shared values of diversity, professionalism, and education. As we start to bring the year to a close, I am reflecting on how far we have come, and I want to take a moment to recognize a few of the many people who worked so hard to achieve these goals.

I was privileged this year to work with a smart, hilarious, and dedicated Executive Committee — Shawn Tillis, Jayme Walker, Cat Cabalo, and Mike Gatto — as well as our ever-committed Executive Director, Mariana Harris. I cannot possibly put into words the sense of gratitude I feel not only for their time and commitment to ACCTLA, but for their friendship and support. Together we were able to achieve some major administrative goals for the organization this year that often go unnoticed. This includes revamping our budget, instituting greater organizational transparency, and updating some of our administrative systems. I am tremendously hopeful for the future of this organization as it is left in their capable hands.

Additionally, I want to thank Anoush Lancaster for her leadership as the Chair of the Diversity Committee for 2019. We started the year focused on ways to meaningfully implement a deeper commitment to belonging, diversity, and inclusion. To that end, we amended our bylaws to codify this commitment and put it front and center in all aspects of organizational administration. This amendment was not only unanimously adopted, but was also signed off on by our past presidents at the Past Presidents' Reception this summer. We also hosted our first board training on belonging, diversity and inclusion, which led to discussion and critical analysis on ways that we can elevate all of our members, create pipelines for diverse leadership, and rethink how we can make our events and programs places of belonging for all of our members. Further, we hosted an MCLE with practical advice on addressing issues of equity in our own practices. Anoush was recognized for her hard work as the recipient of the Minority Bar Coalition's Unity Award for ACCTLA.

I also want to give special thanks to Cassie Ayeni, who served as our Membership Committee Chair this year. Cassie's enthusiasm and energy was on display at every board meeting. Cassie challenged us to conceive of a strategic membership development plan that reflected the values of diversity, professionalism, and education that we had front and center this year. Cassie also worked behind the scenes in multiple capacities to improve and streamline our member services and member experience, not the least of which includes sponsoring a redesign and updating of our website by Youth Noise. I am deeply grateful for her commitment to ACCTLA this year.

Additionally, ACCTLA offered a robust MCLE program this year, providing our members with a number of opportunities to hone their skills and connect with their colleagues. This effort was led by our MCLE committee chairs, Mike Herman and Catherine Haley, who did a wonderful job putting together a program that reflected a range of topics to meet our members' needs. Mike and Catherine also served as leaders in supporting the redesign of our website. I am grateful for their hard work in pulling together so many excellent events.

Finding the connection points between our history as an organization and where we are going in the future was also an important theme to our work this year. The Past Presidents' event really highlighted the lifetime commitment to ACCTLA made by so many members of this organization. The shared wealth of knowledge that is held by this organization is second to none. I especially want to thank Rick Simons, Gary Gwilliam, Matthew Haley, Suizi Lin and Lyle Cavin, for their mentorship and guidance as I served as president this year. Through their tenacity as leaders and often eye-rolling sense of humor, we not only maintained a continuity organizationally that is critical to our overall success, but a commitment to mentorship that continues to grow future leaders of the trial bar.

I also want to take a moment to give thanks to the editors of *The Verdict* this year: Jennifer Fiore and Teresa Li. Serving in this role requires tremendous time and energy, and they have done an excellent job with the sometimes daunting task of putting together a thoughtful, informative, and inclusive publication for our members. I cannot thank them enough for the hours of service they dedicated to making this happen.

Finally, I want to thank our members. You are the heart of ACCTLA. I am deeply humbled and grateful to have had the opportunity to serve you. This is an amazing community — one that exemplifies the kind of professionalism, integrity, and collegiality that is so often missing in today's world. Thank you for making ACCTLA my home this year, and for so many years. As we continue our work as trial lawyers during these tenuous times for our democracy, I call on each of you to hold fast to your support of an independent judiciary; to guide your work by the light of hope; and to center your work on the experience of all those who seek our help during the most difficult times in their lives. It has been an honor. ◆

— Erika Jacobsen White is the principal of Jacobsen White Law, where she represents employees, sexual assault victims and the injured. She has been designated as a Super Lawyers "Rising Star" every year since 2012. She believes in fight hard not only for results, but in empowering her clients through the judicial process.

Alameda-Contra Costa
TRIAL LAWYERS' ASSOCIATION

CALENDAR OF EVENTS

Thursday, December 5, 2019
Finish Up Your MCLE with ACCTLA
5:30pm · Scott's, Oakland
(see page 17 for further information)

Thursday, January 16, 2020
Judges' Night
Rotunda, Oakland
(see page 19 for further information)

Thursday, January 30, 2020
Tort & Trial
5:30pm check-in · Scott's, Oakland

Tuesday, March 31, 2020
Technology & Law Practice:
What's Out There and What You Need to Know!
Noon · 1999 Harrison Street, Oakland

Thursday, April 30, 2020
Spring Social
Sequoyah Country Club, Oakland

Sunday, July 19, 2020
Summer BBQ
Roberts Regional Park, Oakland

Thursday, August 13, 2020
Diversity Mixer
Somar, Oakland

Thursday, September 10, 2020
Fall Social
Lafayette Park Hotel

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CAOC LEGISLATION/PRIORITIES

by Nancy Peverini

SUCCESSES

CAOC has defeated every major tort reform bill that was introduced in 2019. The lobbying team carefully monitors legislative amendments daily to watch for tort reform attacks. CAOC defeated: fee limitations, class action bans, Private Attorney General Act (PAGA) limitations, anti-employment bills and a bill that would have stated that public entities could destroy audio and video recordings at any point, destroying important evidence.

SPONSORED LEGISLATION/PRIORITY ISSUES

Court Funding

Although the Governor had budgeted $327 million for court funding in his 2019 budget, CAOC worked diligently to increase and earmark funding specifically for crucial new judicial appointments. We are happy to announce success — 25 new judicial appointments! It is our number one goal to ensure that court rooms are available for you and your clients.

Protecting Victims of Sexual Harassment and Assault

• CAOC introduced AB 1510 (Reyes), a "revival" statute assisting potential time-lapsed claims for sexual assault victims, such as those victims of USC's Dr. Tyndall. AB 1510 has been signed by the Governor.

• CAOC, along with the CA Labor Federation, is sponsoring AB 51(Gonzalez), which prohibits forced arbitration of Fair Employment and Housing/Labor Code violations. Last year, CAOC's AB 3080 was vetoed by Governor Brown, but we anticipate a better response from the new Governor. AB 51 was signed by the Governor.

• CAOC, along with the California Employment Lawyers Association, has re-introduced AB 9 (Reyes) to increase the statute of limitations for Fair Employment and Housing Act (FEHA) claims from one to three years. AB 9 has been signed by the Governor.

• CAOC supported AB 218 (Gonzalez) to address the statute of limitations for victims of childhood sexual abuse. AB 218 has been signed by the Governor.

Race Based Damages

Our SB 41 (Hertzberg) prohibits the use of racial and gender-bias data in determining civil damage awards for personal injury or wrongful death actions, ensuring women and people of color are not deprived of fair compensation. SB 41 has been signed by the Governor.

Protecting Elders from Abandonment at Facilities

Senator Dodd is authoring CAOC legislation to clarify that abandonment is included in the Elder Abuse Act. This became a legal issue after seniors were abandoned in care facilities following the North Bay fires. SB 314 has been signed by the Governor.

Protecting Asbestos Victims

CAOC, along with the State Building Trades and Iron Workers Union, introduced SB 645 to protect plaintiffs who are dying from mesothelioma or silicosis from abusive depositions by limiting depositions to seven hours. SB 645 has been signed by the Governor.

Arbitration

In addition to our bill to prohibit forced arbitration of FEHA and Labor Code claims, CAOC is working with CELA on SB 707 (Wieckowski and Hertzberg) to address the increase in defendants refusing to pay arbitration-provider fees so that arbitration can commence and/or continue. The bill states that if the fees or costs required to continue the arbitration proceedings are not paid within 30 days of the due date, a respondent is in material breach of the arbitration agreement allowing them to go to court. SB 707 has been signed by the Governor.

Corralling the "Wild West" of Motorized Scooters

After our members prioritized this issue at the November legislative committee meeting, Assemblymember Muratsuchi introduced AB 1286, which prohibits "click and accept" waivers of liability and imposes minimum insurance requirements. AB 1286 is now a two-year bill, meaning it will be heard in January, but the Senate will be having hearings on this important issue in October.

Civil Procedure

Throughout this 2019 legislative session, CAOC has worked with the California Defense Counsel (CDC) to negotiate CAOC member proposals with the goal of adding as many as possible to SB 370 (Umberg). Our board ultimately voted that the trade-offs defense counsel wanted were not sufficient, so we moved forward with SB 370, our request for production proposal. This bill would eliminate the option to produce documents as they are kept in the usual course of business, thereby requiring all documents or category of documents produced in response to a demand for inspection, copying, testing, or sampling to be identified with the specific request number to which the documents respond. SB 370 has been signed by the Governor.

CHALLENGES

State Bar's ATILS Task Force

In July of this year, the State Bar's Task Force released its report on Access Through Innovation of Legal Services (ATILS), which included 16 possible options for changing the regulations governing the practice of law in California. Among the most controversial proposals are:

1. Allowing nonlawyers to practice law;

2. Permitting nonlawyers to own or have a financial interest in a law firm;

3. Permitting lawyers to share fees with nonlawyers under certain circumstances and amending the Rules of Professional Conduct and other statutes governing attorneys regarding advertising, solicitation and the duty to act competently; and

4. Allowing for the development of technology-driven solutions (i.e. the use of Artificial Intelligence) in the delivery of legal services/ practice of law.

The task force has since commenced a 60-day *public comment period*, asking to hear from members of the Bar like you. CAOC is working on a formal written comment, which we will circulate to other CAOC members, but please feel free to submit your own. The more the task force hears from us, the better.

At the end of the comment period, the Task Force will prepare a report setting forth its recommendations, which will be submitted to the Board of Trustees no later than December 31, 2019. About 95% of the proposals would require legislative and statutory changes and CAOC intends to be aggressively involved. In fact, our lobbyists have already started to meet with key legislators and staff, and CAOC President-Elect Micha Star Liberty testified at the State Bar Public Comment Hearing in August.

> "Among the most controversial proposals are allowing nonlawyers to practice law...

If adopted without our input, these proposals may have sweeping consequences, which could have a significant impact on consumers. Please contact Nancy Drabble or Jacquie Serna with any questions.

Dynamex

The employment issue of the year is addressing *Dynamex* (Employee/Independent Contractor Classification). CAOC is supporting AB 5 (Gonzalez), pending before the Governor, which will codify the decision of the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles (2018) 4 Cal.5th 903* and clarify its application.

Wildfire Liability

In light of the PG&E bankruptcy, wildfire liability has been at the legislative forefront in 2019. We are working daily to make sure the legal rights of victims are protected and supported. AB 1054 (Holden), signed by the Governor, will address fire safety and assist victims. Importantly, the legislation does not include changes to liability and CAOC defeated all PG&E attempts to limit liability.

Consumer Privacy

Consumer privacy has been a major fight this year in Sacramento and in DC. CAOC and privacy rights groups have successfully protected the landmark California Consumer Privacy Act, which includes a data breach private right of action.

GOING FORWARD

Insurance Issues

CAOC plans to introduce insurance legislation in 2020, and has activated a legislative and grass roots campaign this year to lay the groundwork. We conducted a survey of all CAOC members, and they prioritized an increase in the financial responsibility limits, which currently sit at 15/30/5, with California being at the bottom three in the United States. We are currently conducting outreach to various insurers, other states and consumer groups.

Legislative Proposals

All CAOC members can suggest legislative proposals for 2020 to CAOC, and all will be discussed at the CAOC November convention.

Thank you for your support of CAOC's legislative program. ◆



Survivors of Childhood Sexual Abuse Receive New Protections and Rights

AB 218 Becomes Law

Those professionals in the fields of mental health and law enforcement who work with adult survivors of childhood sexual abuse are all too familiar with the common ways these individuals live with their scars. Many delay reporting for reasons of guilt, shame, fear, ostracization, or embarrassment. This aspect of what is termed Child Sexual Abuse Accommodation leads many victims to keep their sexual assaults secret for years, and often decades.

The civil statute of limitations, Code of Civil Procedure 340.1, has long limited the time for child sexual assault survivors to bring civil actions against their molesters, as well as those institutions that have employed, supervised, and harbored these criminals — often with actual knowledge of the crimes and the devastating effects on the children. Sadly, revelations over the past two decades have demonstrated that the safety of children has all too frequently taken a back seat to protection of the perpetrators and their institutional enablers. Section 340.1 has now been amended to provide expansive rights to be heard through the enactment of AB 218. The new changes in the law were sponsored by Assemblymember Lorena Gonzalez (D-San Diego), passed by overwhelming bipartisan majorities in both houses of the Legislature, and signed by Governor Newsom on October 13.

> The civil statute of limitations . . . has long limited the time for child sexual assault survivors to bring civil actions against their molesters, as well as those institutions that have employed, supervised, and harbored these criminals . . .

The need for these amendments is two-fold. First, the old law limited survivors' time to age 26, well before many are ready to be publicly or privately identified as children who were sexually molested. Second, a prior one-year revival of claims for 2003 was simply insufficient to allow many victims to assert their rights. Some of the children, now adults, had moved out of state or otherwise were unaware of the 2003 window. Others were still deep in self-medication and substance abuse, an all too frequent complication suffered by children who were abused by adults. Still more did not yet realize that it was not their fault, and that the civil justice system could provide both compensation and healing by public exposure of the secrecy in cases where the institutions had knowledge of the perpetrator's propensity and failed to act. In 2003 many adults, then in their 30s and 40s, did not wish to have anyone in their work or family know about their past. Still others feared that facing their experience would deepen the post-traumatic stress disorder ("PTSD") and anxiety that already haunted their lives. Simply put, 2003 wasn't enough to either open the doors for many victims, or provide enough consequences to motivate institutions to stop the assaults of children in their care.

AB 218 provides six major changes in the civil statute of limitations. First, it extends the time for the commencement of certain actions for childhood sexual assault from the 26th birthday to the 40th. (Code Civ. Proc., §340.1(a).) Second, it lengthens the time for those victims who reasonably discover psychological injury occurring as an adult and caused by childhood sexual assault from three years post-discovery to five years. (*Id*.) The third significant change is to amend the Government Code to eliminate its section 910 claims filing requirement for specified child sexual assault claims against local public entities such as school districts or public youth programs. (Govt. Code §905(m).) The new law also creates a treble damages remedy for "cover-ups." (Code Civ. Proc. §340.1 (b).) The law also modifies the terminology of now former 340.1 from "child sexual abuse" to the more standard, broader, and more accurate term "childhood sexual assault."

> Perhaps most importantly for the many older survivors of these life changing sexual assaults, AB 218 creates a new window period for revival of lapsed childhood sexual assault claims.

Perhaps most importantly for the many older survivors of these life changing sexual assaults, AB 218 creates a new window period for revival of lapsed childhood sexual assault claims. The new revival commences on January 1, 2020, and expires on December 31, 2022, after three full years. (*Id.* at §340.1(q).) And it applies the new age limitation of 40 and the new discovery period of five years to all cases filed before January 1, 2020 that have not yet been adjudicated to finality.

AB 218 in its final form passed the Assembly 69-0, and the Senate 33-0. In this age of partisan divides, the enactment of this new law reminds us that there are some issues that remain fundamental for the survival of our society. Expanding civil rights to allow victims of childhood sexual assault to pull back the curtain on decades of institutional child molestation, and protect the children of the future from suffering the same horrors, is just such a compelling issue. Well done, California. ◆



— Rick Simons, of Furtado, Jaspovice & Simons, has specialized in child sexual assault cases since 2002, and has obtained historic verdicts against The Bishop of Oakland, The Salesian Society, and Jehovah's Witnesses. He is a Past President of CAOC, former SFTLA Trial Lawyer of the Year, 2005 CLAY Award winner, and from 2004-2006 served as Liaison Counsel for the plaintiffs in the coordinated clergy abuse cases known as "Clergy III."

ACCTLA would like to thank the following sponsors for making this year's events possible!

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by Cassie Springer Ayeni

Personal Injury Subrogation Claims Under ERISA: Hawaii Does the Work, and the Ninth Circuit Gets ERISA

Personal injury attorneys are often flummoxed by the inequity inherent in ERISA medical plan subrogation provisions. How is it, after all, that a personal injury plaintiff can lose a substantial chunk of her tort recovery merely because she had medical insurance as an employment benefit? Yet ERISA insurers have been free to incorporate many terms that favor insurance companies into the contracts that they draft and to which the employee is considered a party despite not having bargained the terms. In September of this year, however, the Ninth Circuit approved of Hawaii's legislative redress of this ERISA-sanctioned inequity in *Rudel v. Hawaii Management Alliance Association*, ___F.3d___, 2019 WL 4283633 (9th Cir. Sept. 11, 2019).

A typical ERISA subrogation claim often reads like this:

• Employee has health insurance through her employer, which makes that insurance governed by ERISA (The Employee Retirement Income Security Act of 1974).

• The health insurance policy contains a "subrogation" provision granting the insurer the right to be reimbursed for all medical bills in the event that an employee receives a personal injury recovery from a third party.

• Employee suffers a personal injury.

• Employee files a claim and recovers a sum as compensation for said injury, including for general damages and medical expenses.

• Health insurer invokes its subrogation provision and asserts a lien on the tort recovery or settlement.

• After paying attorneys' fees and the health insurer, employee is left with very little, if anything, of the tort recovery.

The facts in *Rudel* were no different. Mr. Rudel was hit by a car making an illegal left turn, and suffered numerous injuries including partial amputations of his leg and arm. *Rudel*, 2019 WL at *2. According to the health insurer, the medical bills totaled $400,779.70. Mr. Rudel received a personal injury settlement of $1.5 million. Doing the math, assuming that his attorneys' fees and costs were about $700,000, then Mr. Rudel would only receive about $400,000 from his $1.5 million recovery (about 26%), *even though he had health insurance*; in fact, his smaller recovery would be *because* he had health insurance.

Hawaii sought to right this inequity in 2000 when it passed HRS §431:13-103(a)(10), which provides in its insurance code that it is unfair competition and a deceptive act for an insurer to "refus[e] to provide or limit[] coverage available to an individual because the individual may have a third-party claim for recovery of damages;" the provision is to be read in conjunction with HRS §663-10, which allows for certain liens. The Supreme Court of Hawaii interpreted these statutes in 2017 to conclude that they limit rights ▶

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to "any claim of a lien" including "health insurance or benefits" only to "special damages," not general damages. *Yukumoto v. Tawarahara*, 140 Haw. 285, 295, 400 P.3d 486, 496 (2017). The Court held that "(1) a health insurer does not have equitable subrogation rights against a third-party tortfeasor in the context of personal insurance; (2) a health insurer's subrogation and reimbursement rights are limited by HRS §§663-10 and 431-13:103(a)(10); and (3) any contractual provision that conflicts with HRS §663-10 is invalid. We further hold that HRS §663-10 takes precedence over HMSA's contractual subrogation rights." *Id.* at 500.

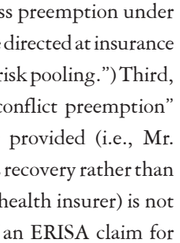
After the Hawaii Supreme Court interpreted the statutes to prevent health insurance subrogation of personal injury recoveries, the next frontier of challenges awaited: the argument that ERISA preempted Hawaii's anti-subrogation laws.

The Supreme Court has described ERISA as a "comprehensive and reticulated" statute with "a broad pre-emption provision declaring that the statute shall 'supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.'" *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 361 (1980); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985), *quoting* 29 U.S.C. §1144(a). This first layer of ERISA preemption is known as the "complete preemption" doctrine, meaning that the preemption power is so great that it converts certain state law claims into ERISA claims. *Fossen v. Blue Cross & Blue Shield of Montana, Inc.*, 660 F.3d 1102, 1107 (9th Cir. 2011). Additionally, if a state law conflicts with ERISA's limited remedial scheme, that state law is also preempted by ERISA, which is known as "conflict preemption." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004) ("any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted.")

However, ERISA contains a significant preemption carve-out for state laws that "regulate[] insurance, banking, or securities," commonly known as the "Savings Clause" of ERISA. 29 U.S.C. §1144(b)(2)(A). To determine if a state law regulates insurance, the court considers whether the regulation fits within the "business of insurance," whether it affects the policyholder's risk, whether the regulation is an integral part of the policy relationship between insurer and insured; and whether it is limited to insurance industry entities. For example, California's Notice Prejudice rule is saved from ERISA preemption because it regulates insurance as a matter of "common sense." *Unum Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 359 (1999). In *Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, Plan No. 625*, 856 F.3d 686, 693 (9th Cir. 2017), the Ninth Circuit determined that a California insurance regulation that prohibits the application of an "abuse of discretion" judicial standard of review is not preempted by ERISA because it regulates insurance.

In *Rudel*, the Ninth Circuit carefully analyzed the preemption challenges to Hawaii's anti-subrogation law. First, applying the "complete preemption" doctrine, the Court concluded that Mr. Rudel did have an ERISA claim that preempts his state law claims: he could have brought a claim under ERISA §1132(a)(1)(B) to clarify his right to future benefits under the medical plan due to his plan claiming he owed it $400,000. *Rudel*, 2019 WL 4283633, at *6. Second, the Court analyzed whether the "Savings Clause" saved Hawaii's anti-subrogation statutes from complete preemption; it held that they were saved because 1) the statutes were "specifically directed toward entities engaged in insurance," relying on legislative history to support its finding; and 2) the statutes affect risk pooling because they impact payments to plan members. *Id.* at *9 ("In sum, the district court correctly concluded that the Hawaii statutes are saved from express preemption under §514 because they are directed at insurance practices and impact risk pooling.") Third, the Court held no "conflict preemption" because the remedy provided (i.e., Mr. Rudel gets to keep his recovery rather than pay $400,000 to his health insurer) is not beyond the scope of an ERISA claim for benefits. *Id.* at *10. "The Hawaii statutes operate to define the scope of a benefit provided by the plan; they do not create additional remedies not permitted by ERISA." *Id.* at *11.

The end result is that Mr. Rudel's insurer was forced to provide insurance for him and Mr. Rudel was entitled to keep his personal injury recovery. The lesson of *Rudel* is compelling: with legislative action, state insurance laws can redirect personal injury recoveries back to the persons injured, rather than to the pockets of insurance companies. *California, are you next?* ◆



— Cassie Springer Ayeni is an ERISA attorney, specializing in disability benefit claims under ERISA at her Oakland firm, Springer Ayeni, APLC (www.benefitslaw.com). She is the 2019-2022 Employee Co-Chair of the ABA's LEL-Employee Benefits Committee, has been repeatedly named a Top 50 Women and Top 100 Attorney in Super Lawyers Magazine, and is the Membership & Marketing Chair of ACCTLA.

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High-Five for AB 5!

by Denise K. Top

These days it's difficult to listen to the news, a podcast, or read a newspaper without hearing something about Uber, Lyft, and DoorDash litigation. But what's the answer? Are they employees or independent contractors? It can be confusing and hard to keep up with the class certifications, as well as to discern with all the settlements. Last month, Governor Newsom helped provide some clarity by signing AB 5: a landmark gig labor bill designed to help reduce worker misclassification as independent contractors, rather than employees.

THE RISE OF THE GIG LABOR ECONOMY

Gig work is generally thought of as short-term engagements, temporary contracts, and classic independent contracting type arrangements like babysitting, freelance writing, or handyman work. It is income-earning activity outside of traditional, long-term employer-employee relationships. App-based technology businesses have created a surge in gig work. Think driving and delivery gigs.

The rise of workers engaging in gig labor serves as a direct reflection of the changing and shifting US labor market. Almost everyone knows someone who has or does gig work. Next time you take a Lyft, ask the driver why he/she chose to drive. In my personal, social experiment, the overwhelming response has been because of the freedom and flexibility — specifically, being able to choose the hours they work and being able to do so seemingly at the last minute. For instance, I recently took a Lyft to the airport. My driver arrived and notified me he needed to make an urgent stop for gas. He apologized for the inconvenience and said it was embarrassing to be an out-of-gas driver, but he thought he was done for the day and was within blocks of his home, except he forgot to turn off his app and he received my ride request. Not wanting to leave me in a lurch, he turned around to pick me up hoping he would find a gas station on the way, which did not happen. *Lyft did not order him to pick me up; he could have canceled my ride, but instead chose to do it*. It turns out this Lyft driver owns several seasonal businesses and driving serves to regulate his income, allowing him to maintain and fund his other ventures.

As the middle-class has hallowed out, an increasing number of the workforce have turned to more creative, less conventional means of making money and improving quality of life. Long gone are the days where the majority of workers are seeking the classic employer-in-a-box situation. Why? One reason is because workers are tired of being exploited—working 50-plus hour weeks as exempt employees (i.e., with no overtime pay); employer vacation policies that don't accrue time off, but rather allow employees to take as much as they are able to while balancing the unachievable demands of their positions; less opportunities for advancement; or jobs that just don't pay. Workers have started a revolution of self-empowerment by opting for the flexibility offered by gig-type work and an increased ability to control their earning power, fiercely reclaiming the term "independent contractor." ▶

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Alice Buchanan is a shareholder with Hoge, Fenton, in San Jose, where she serves as the firm's General Counsel and chairs the firm's Business Litigation Practice Group. Alison focuses her practice on business litigation, professional liability, and legal ethics. She has tried numerous business litigation, legal malpractice defense, and other cases to verdict. Alison is a Certified Specialist in Legal Malpractice Law, as certified by the State Bar's Board of Legal Specialization. Alison is a member of the CLA's newly formed Ethics Committee. From 2011 to 2014, Alison served a three-year appointment to the California State Bar's Committee on Professional Responsibility and Conduct (COPRAC). In addition to her law-related endeavors, Alison proudly serves on the Board of Directors for the Humane Society Silicon Valley.



Lita Abella is a Senior Program Analyst at the State Bar of California. She conducts outreach and presents education programs for the Lawyer Assistance Program which assists law students, bar applicants, and attorneys with substance use and mental health issues. She promoted into this position after working as an investigator for over 5 years in the Office of Chief Trial Counsel where she investigated and assisted in the prosecution of attorneys for misconduct. Lita served with the LAPD for 20 years, breaking many glass ceilings as a female and minority. She received extensive training in both Substance Use Disorders and Mental Health and was a court-qualified narcotics expert during her years in law enforcement. Lita will be speaking about the signs and symptoms of substance use and mental health issues among attorneys. She will discuss how prevalent substance abuse use and mental health issues are among attorneys, how substance abuse and mental health issues impair an attorney's ability to perform legal services, the signs and symptoms of substance abuse, addiction, depression, anxiety and stress and provide information on the Lawyers Assistance Program and other resources.

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Hon. George Hernandez (Ret.) will speak about bias. Judge Hernandez has over 30 years of judicial expertise in the Alameda County Superior Court. He has served in every civil assignment, including terms as Presiding Judge, Master Calendar Judge, in Law and Motion, and in the court's Appellate Division. In his most recent assignment in Complex Litigation, he presided over countless bench trials and over 100 civil jury trials to verdict. Judge Hernandez was named as the Trial Judge of the Year by the ACCTLA, and honored with the Distinguished Service Award for Judicial Officer by the Alameda County Bar Association.



Karen Freedman, Esq will join Judge Hernandez on the subject of bias. has been a trial attorney for the past 30 years. She has tried cases in state and federal courts as well as appeared in state appellate court. She is well regarded by judges, mediators, special masters, the plaintiff's bar and the defense bar as trustworthy, hard-working and a strong advocate for her clients..

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THE TENSION HIGHLIGHTED BY GIG LABOR

Not only do individuals seeking more freedom and flexibility enjoy being independent contractors, but classifying workers in this way is good for businesses too. Independent contractor status provides businesses with a significant reduction in labor costs (some estimate as much as 30%), as they get to save money by bypassing minimum wage requirements and not offering paid sick days/family leave, insurance (workers' compensation, disability, unemployment) and healthcare benefits. This rapidly growing workforce shift from employee to independent contractor also undermines and disempowers unions because federal law restricts union membership to employees. As the employee work force shrinks, so does union membership.

In sum, a pro-business perspective would favor independent contractor status as a huge cost-saving measure; while, employee advocates point out the erosion of basic worker protections created by it. The tension caused by the uncertainty of the gig employment status (employee v. independent contractor) intensifies when considering the multibillion-dollar-app-based technology businesses where approximately 400,000 Californians perform gig work full or part-time. Should these workers get healthcare benefits? What about protections for on-the-job injuries? Should these companies have to pay into unemployment? Should they be required to pay minimum wage? From either a worker or business entity perspective, the fiscal impact is significant.

AB 5 DEFINES AN EMPLOYEE BY ADOPTION OF A THREE-PART TEST (THE ABC TEST)

AB 5 expands on the 2018 California Supreme Court ruling in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 905. It sets forth a three-part test classifying workers as employees if their job forms part of a company's core business; if the hiring entity directs how the work is done in connection with work performance; and if the worker has not established an independent trade/business. The test, called the ABC test, creates a presumption that a worker who performs services for money is an employee for purposes of wages and benefits under the wage orders, issued by the Industrial Welfare Commission (IWC). In other words, *Dynamex* made it crystal clear that Uber and Lyft drivers are employees, and not independent contractors.

The ABC test also meant that a solo practitioner who hired a contract attorney to help out in busy times became an employer subject to all of the obligations because the contract attorney was engaged in the firm's core business of the practice of law, even if working remotely and using his or her own computer equipment. A seemingly big victory for workers became a painful liability for small business owners.

Going beyond the *Dynamex* decision, AB 5 sets a pain threshold, providing relief for certain businesses the law deems exempt from the ABC test. The following is a *non-exhaustive* list of exempt occupations: attorneys, doctors, dentists, engineers, accountants, architects, graphic designers, fine artists, realtors, travel agents, human resource administrators, and grant writers. Moreover, the bill provides conditional exemption for other occupations. For example, barbers/cosmetologists are exempt if they set their own rates, are paid directly by clients, and schedule their own appointments. Exempt occupations are subject to the traditional 11-factor analysis set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 342, favoring a finding of independent contractor status. The occupations chosen for AB 5 exemption have been heavily criticized for political bias — i.e., as being represented by better lobbyists.

In addition to iterated exemptions, AB 5 provides city attorneys the authority to seek injunctions against employers in a concentrated effort to stop arbitration agreements required by most gig employers. Personally, as an employment attorney representing employees, I strongly believe anything that frustrates mandatory arbitration deserves a high five.

BY NO MEANS THE END OF THE STORY

To be sure, this is just the beginning. Reports indicate Lyft, Uber, and DoorDash have threatened to finance a $90 million ballot initiative in 2020 that would undercut AB 5, if they cannot reach a compromise with state leaders to maintain independent contractor status for their workers. In the meantime, labor leaders and organizers will be diligently working to expand protections under the National Labor Relations Act to allow gig workers the right to organize and collectively bargain for employment rights and benefits. The ever-changing gig economy environment will continue to raise important issues for traditional employers, as well as for entities providing non-traditional income-earning opportunities. As Bob Dylan would say, *"For the times they are a-changin.'"* And employers — no matter how defined — need to change too, if they want to attract and retain workers. ◆



— Denise K. Top is a trial attorney and the principal at Top Law, PC, a boutique firm specializing in employment and civil rights law. Her practice is dedicated to making the workplace work for everyone, providing zealous advocacy for employees in all aspects of employment law.

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The (Dystopian) Future of the Legal Profession

by Jacquie Serna

Sweeping changes to the practice of law are being proposed in California. Here is what you need to know about the State Bar's efforts to permit non-lawyers to practice law, own and manage law firms and split fees with attorneys. And how the Consumer Attorneys of California ("CAOC") will protect you and your clients.

The practice of law is at a potential turning point in California and the impact will be extreme on consumers and your practices. Consumer Attorneys of California will be at the forefront of ensuring no changes are made that harm either.

The majority of the proposals being considered by the State Bar's committee on Access Through Innovation of Legal Services ("ATILS") are deeply flawed and threaten to undermine the integrity of the legal profession.

Among the 16 proposed changes[1] to the practice of law are:

• Permitting non-lawyers to hold ownership interests in law firms.

• Allowing non-lawyers to provide specified legal services as an exemption to the unauthorized practice of law ("UPL"). (This would open the market to app-based artificial intelligence programs that dispense legal advice for a fee.)

• Amending the Rules of Professional Conduct to permit fee sharing with non-lawyers.

• Creating a new regulatory structure for non-lawyers or entities that are authorized to provide legal services (outside of the State Bar).

Here are just a few ways that allowing non-lawyers to provide legal advice could hurt consumers:

• App-based legal tech services may mistakenly assume injured people know their rights. Consumers do not know what liability arguments and damages they can and should claim. Just plugging in co-pays and out-of-pocket costs into a legal app also used by the insurance company, and then resolving the case could prompt consumers to waive rights to compensation of which they are not aware. "Resolution" is reached by data entry and not the full damages, including how the tortfeasor harmed their lives. The consumer loses, even if a "resolution" is reached.

• Essentially, this would chip away at the right to a jury trial. The only weapon the injured person has is the right to a jury trial. If a consumer uses this tech service or legal app before litigation to settle the case, the insurance company will know he or she is not intending to file a lawsuit and will undervalue the claim.

• Using these services also directly impede a hallmark of our civil justice system: the attorney-client relationship. How would we know that the duty of competence was met by the non-lawyer app in dispensing legal advice? Would artificial intelligence be programmed to provide the client with the "correct" or most cost-effective answer? As lawyers, we understand the law is nuanced and there is rarely a "correct" answer. Without providing the client pros and cons for each course of action, how would an app be able to advise a client what to do? Would it be required to obtain informed consent?

• Even if tech company apps have rules to follow as to confidentiality, how will this be regulated if the State Bar gives up that power to a different entity? How will they ensure consumers are not subject to forced arbitration waivers and caps on fees (like those that Uber currently imposes on consumers[2] who utilize their app)? How will we detect the improper use of a client's data?

Even the proposal to allow non-lawyers to hold equity positions in law firms could fundamentally affect how consumers are represented. Although many larger law firms currently have non-lawyer managers, those attorneys cannot ethically allow managers to direct what the lawyers do, and those managers cannot have any ownership interest or fee split. If the proposed rule comes into effect, we may see larger businesses and hedge funds buying law firms and making changes to the way those firms practice. Shareholder interests and quarterly earnings reports could dictate the practice of law, not the client's best interest.

Further, their proposals envision pre-litigation entities, including tech companies, offering legal services to quickly resolve cases before litigation ensues. Imagine UberLaw or Walmart Legal coming in to solve the access gap. We (should) know better as a society by now. Expecting tech and profit-driven corporations to step in and solve the problem with access to legal representation is foolhardy and dangerous.

Most importantly, nowhere in the 250-page ATILS report does it actually suggest *how* these proposals will fill the needs of clients that are currently underserved.

Before embarking on these deregulatory efforts, the State Bar should produce empirical evidence that "access to justice" will be significantly improved by the introduction of these proposals. We have yet to see any evidence of meaningful benefits to consumers through similar deregulatory efforts in other countries. In fact, we have heard reports to the contrary in the United Kingdom and Australia.

California is not the only state fighting to preserve the legal profession and we certainly won't be the last. We must know what is driving these deregulatory efforts (not just in California, but worldwide) to fully understand how our voices can be heard rather than dismissed as "protectionists." We understand that this is not a new issue[3] and has been hanging around for almost a decade, waiting for an opportunity to gain hold in our state.

When CAOC first learned of the proposals, we set out to talk to our trial lawyer friends who had fought and successfully thwarted similar efforts in other states. Our sisters and brothers in Ontario, Canada and Oregon fought off similar efforts in recent years and are teaching us how they did so. We are also reaching out to those states that are *currently* fighting the same fight (Arizona, Utah and Illinois).

If this seems personal, it's because it is. As attorneys, we are fiduciaries of the highest order. We maintain our duty to our clients, and help people in their most difficult, life-altering times. We are problem solvers, informed by experience, education and ethics. So yes, it is personal for us.

Ensuring access to justice is a goal we work towards everyday as contingency fee attorneys. But the majority of the State Bar proposals will simply allow large businesses, hedge funds, franchisors and holding companies seeking to undermine small existing law firms and the historic structure of contingency fee practices.

Over 1,000 comments were received by the State Bar during the public comment period, including formal written opposition from CAOC.[4] Together, our voices sent a strong message: the quest to improve access to justice should not leave us blind to corporations promising to help the indigent and poor. As a bar, we have a duty to our profession and the public to offer solutions to the access gap. We should be part of the conversation, rather than being seen as part of the problem.

There are many different solutions beyond profit-driven legal tech.

In California, the legal profession has embraced innovations in technology under the current regulatory system, while maintaining the ability to remain independent of corporate control. The paperless office, electronic communication with clients, websites with live chat features, free consultations and pro bono services are just a few examples of the advantages to the public that have flourished under the present system. Also, the contingency fee system provides access to justice for the average consumer regardless of ability to pay, significantly increasing access to justice for personal injury, insurance, wrongful death, employment and elder law issues.

The State Bar proposals do nothing to strengthen areas of the justice system that are severely underfunded. Perhaps the most pressing need of these individuals is greater access to pro bono attorneys, student loan forgiveness for those who work for non-profits, more court interpreter services and additional clerks that can help them navigate the court system.

It is our position that we do not have enough evidence to know how these sweeping proposals will affect the public and the future practice of law. We certainly have not seen valid evidence that the proposals will improve access to justice. It would be dangerous to implement these changes without fully understanding the impact.

Rest assured, CAOC has been and will continue to be aggressively involved in this issue and will represent the voices of contingency fee attorneys and the consumers we represent. We are standing up for you, your practice and the rights of your clients to receive fair and effective legal representation. Thank you for standing with us. ◆



— Jacquie Serna joined CAOC in 2011. As Legislative Counsel for CAOC, Jacquie has worked to enact key consumer protections for elder abuse victims, make hospitals safer by spearheading key patient safety measures and most recently, enacting legislation to ensure fair and just compensation for injured undocumented immigrants. Jacquie specializes in employment and consumer protections and has spent the past 5 years fighting the harmful effects of forced arbitration. Born and raised in Boyle Heights, Jacquie is a proud "Double Bruin," receiving her bachelor's degree (B.A. cum laude) and her law degree from UCLA School of Law.

[1] http://www.calbar.ca.gov/Portals/0/documents/publicComment/2019/List-of-Tentative-Recommendations-Memo-For-Public-Comment.pdf.

[2] https://www.uber.com/legal/terms/us.

[3] https://www.americanbar.org/groups/bar_services/resources/resourcepages/future.

[4] http://www.caoc.org/docDownload/1443352.

Digital Evidence Discovery

by Simon Varley

Digital evidence is now a large part of civil, family, and criminal law, and its importance is only going to increase as we all add online content and devices into our lives. This article will go through key points of discovery review, analysis, and proper collection of digital evidence and will also touch on the challenges of privacy concerns.

HOW CAN I MAKE SENSE OF DIGITAL EVIDENCE IN DISCOVERY?

Discovery that is sent to an attorney can be filled with technical details from digital forensic tools and sometimes very complex technical issues. An attorney can make use of a digital forensic expert for guidance in understanding the digital evidence referred to in the files.

A digital forensic expert can put together what data has been collected, how it was collected, and what conclusions may have already been drawn by opposing counsel. This information can be presented clearly for an attorney so that they understand what will likely be presented and what the steps were in their process.

For example, a criminal defense attorney has a case where there was inappropriate activity in an online chat. Discovery arrives from the District Attorney and is filled with subpoena responses and technical details. A forensic expert may interpret and distill the evidence to lay out the following chain of events to clarify how law enforcement came to knock on the client's door:

- Law enforcement subpoenas website used for chatting with a suspect's username.
- Chat website responds with email address used to register for that account.
- Law enforcement subpoenas email provider with the email address.
- Email provider responds with the IP address of the user logging into that mail account.
- The IP address is found to belong to a specific Internet Service Provider.
- Internet service provider responds to subpoena with subscriber's name that used that IP address.

If, in that example, the subscriber's name is the attorney's client, then it can initially look quite incriminating. We see many examples of conclusions being drawn from this kind of evidence; however, there are often important gaps in the chain of events.

In the above case, the IP address data only points to the home's Wi-Fi router. Anyone using the subscriber's router to access the chat website would have left the same evidence as being presented by the District Attorney. The missing steps in this case would be:

- What device connected to the router and went to the chat website?
- Who was using that device at the time of the incident?
- Was it collected by law enforcement?

These gaps are key and bring us on to the next section.

WHAT DATA SHOULD BE COLLECTED?

Once discovery has been reviewed, it can be used as a guide along with the other details of the case as to how the other side will present their case and what their narrative may be. It is then up to the attorney to think about their own narrative and key points, and consult with the digital forensic expert as to what additional evidence can be found.

WHAT CAN DIGITAL EVIDENCE SHOW?

Communications

Digital devices have many different forms of text-based communications. These vary from the basic SMS message to the latest chat applications being released almost daily. With forensic collection of a cell phone, an expert can produce the messages for the attorney to search and review. This production can also include deleted messages and conversations that the expert was able to recover. The digital forensic expert should attempt recovery of deleted messages using techniques to search the raw code and not rely solely on the forensic tools to recover the data. The messages should be presented clearly for use in court and show the definitive timestamps associated with each message. ▶





Some chat applications such as WhatsApp state that they have 'End to End Encryption' that implies that collecting this data is difficult. This is not the case; however, as the encryption only prevents interception of the data, and the messages are saved on the cell phone without encryption.

Snapchat is a chat application where messages and media can be sent and then disappear after a stated time. Unfortunately, this application has gone to great lengths to prevent traces being left on the cell phone after they are viewed and disappear. Data is also deleted from the Snap Inc. servers so legal requests are unlikely to provide useful evidence. The only data we have historically been able to use is the Snapchat contacts that can be recovered. The list of contact usernames or 'handles' can be used to show that two parties possibly knew each other. In addition to that, there have been times where the user has either screenshot manually to preserve the photos or messages they have received, or they have downloaded specific applications designed to automatically save shared photos or videos.

Activity and Frame of Mind

Social media data can show not only what a person was doing at a specific time (e.g. looking at posts, posting photos etc.) but also can be used to show a relationship between two people. Whether the attorney wants to show that two people hated, loved, or even just knew each other, social media is a good place to start.

For information about what a person was doing over a certain timeframe, the cell phone can hold key evidence. Parties of the case will likely have been carrying and using a cell phone during key timeframes and the data can be forensically collected and analyzed to show what activity occurred. In cases of vehicular accidents or injuries at work, just confirmation of the use of the cell phone itself may be enough. But activity can be broken down into detail even to a point where it can show frame of mind during that timeframe. For example, a person who is in fear of his life is unlikely to download a mobile video game at that time or send a sweet message to someone with laughing emojis.

The expert can produce the cell phone activity in chronological order as a timeline. A good example of this kind of analysis being used effectively is in the case against Tony Scott Cercy. In this sexual assault case, the defendant had stated under oath that he was asleep during the key timeframe. Digital forensic experts examined his cell phone and found that the activity within the timeframe contradicted his testimony — he must have been awake.

Location — on phone

Proving that a person was somewhere or wasn't somewhere can be a key part of many cases and digital data can provide useful evidence in this regard. A cell phone can store location information within its navigation apps data showing routes and journeys along with the timing of those trips. Image or video files on the cell phone can also store location information in what is called 'metadata.' This is data about the image or video that is embedded in the file such as the time it was created, what type of camera was used and, in some cases, longitude and latitude coordinates.

In addition to navigation and metadata, another source of location information can be found in Wi-Fi network data stored on the phone. This should contain details of Wi-Fi networks that the cell phone has been connected to, along with a last connected timestamp.

Location — in Cloud

Online sources of data can also show location information such as Google's Timeline feature.

Location — Cell Site Data

Cell site data is commonly collected and used for location evidence and a digital forensic expert can help map these locations that the cell network has provided. The location data comes in two key forms. The first being GPS data that's collected by the provider consisting of a longitude, latitude coordinate and a degree of accuracy as to that location. ▶

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For example:

Connection Date	Connection Time (GMT)	Longitude	Latitude	Location Accuracy
2019-08-14	00:44:13	-121.271678	38.768428	Likely better than 100 meters

The second form is based on cell phone activity such as sending or receiving a call or SMS message. This will show which section of which cell tower was used to process that activity.

This second form of data is always provided with the caveat that it is not to be used for location purposes. This is put on this data because sporadically due to high traffic the cell network can use other tower sectors to process a call or SMS message. It can be argued that although one single data point cannot be relied on, a mapping of multiple points over a short time span can be used with a high degree of surety. Many factors come into play with cell tower location evidence, necessitating expert review before accepting conclusions.

HOW SHOULD EVIDENCE BE COLLECTED?

Digital evidence is extremely volatile and can be corrupted or lost very easily. It is of the utmost importance that evidence is secured, collected, and preserved at the earliest possibility. In addition to the danger of it being lost before collection, improper collection may result in inadmissibility and even inadvertent destruction of key data. As we mentioned before in the section covering location data, files have information embedded in them called metadata. This data also stores the dates and times of creation, access, and modification. This can provide key evidence in cases and non-forensic collection can change this data damaging the evidence.

Special tools and training are needed to collect computer and cell phone data in such a way as to preserve the integrity of any evidence in that data. Trained professionals should create what is called a "forensic image" of the computer or server. This forensic image is an exact copy of the data on those devices and can be used for analysis and accepted as "best evidence" in court.

Cell phone data is collected via a digital forensic extraction. This can be a technical process that collects the data from the phone to the computer. There is a large amount of information that the cell phone stores but does not display which is key to collect and why cell phone screenshots should not be used.

We recently testified to challenge a video that was submitted of someone browsing an iPhone's chat conversation and showing in the video the contact name and number that was being chatted to. This video was offered to prove inappropriate conduct by one of the chat participants. In order to challenge this evidence, we produced a demonstrative video illustrating that it was possible to fake a chat conversation on a similar iPhone. The image below contains some screenshots of the fake chat we produced.

The previously mentioned case highlights an issue in terms of how evidence is collected and presented in court. As in the video of the conversation shows, screenshots of digital data, videos showing browsing either of websites or cell phone evidence are far from ideal. These can be at best unverifiable and at worst manipulated to show incorrect activity or data.

In a Washington case *State v. Kolanowski*, 394 P.3d 1011 (2017), the defense intended to include digital evidence that showed that the alleged victim had Facebook activity during the crime which contradicted sworn testimony. Unfortunately, the defense used a screenshot that the State successfully argued lacked foundation. Metadata that could have been obtained during the collection was not obtained and the evidence was ruled inadmissible. This is the trend of courts recently when it comes to digital evidence.

It is important to know that many of the social media websites have specific computer code that allows trained specialists to download public data along with metadata to reinforce its integrity. Digital forensic experts can use these codes or "APIs" as they are called to extract entire public profiles and preserve them for use in a case.



HOW CAN WE OVERCOME CELLPHONE PRIVACY CONCERNS?

In order to retrieve all the relevant data from the cell phone, including recovery of deleted data, a digital forensic expert must collect all possible data from the phone. They cannot select what data types to extract prior to the extraction without severely limiting the results. This can cause a flurry of objections from opposing counsel regarding irrelevant items, personal medical data, and privileged attorney communications. In order to mitigate the objections and navigate this issue, one method that's proved consistently successful is to use specific protocols that act as a "Triangle Agreement."

The Triangle Agreement is a document signed by the forensic team, the attorneys requesting the cell phone and opposing counsel. Its function is to ensure that only the forensic team sees the entirety of the cell phone data and below is the breakdown of the steps involved:

- The forensic team performs the best possible extraction of data from the cell phone.
- This data is not reviewed until both sets of attorneys agree on search stipulations.
- Agreement is reached on what data is deemed relevant (e.g. searches for terms, specific timeframes, or specific data types such as communications).
- The forensic team uses the agreed upon search stipulations to filter and export relevant data from the cell phone extraction.
- The results are sent to opposing counsel for review.
- This review is given an agreed upon timeframe (e.g. two weeks).
- Opposing counsel send back comments on items that classify as privilege or irrelevant.
- The forensic team will remove those items before sending the remaining results to the requesting attorneys.

WHAT SHOULD WE TAKE AWAY

- Experts can help start your case, not just write reports, and use them to help you better understand your position with the evidence. Digital devices' capabilities and limitations change almost daily.
- When you receive discovery with digital evidence, look for assumptions and conclusions. These are common and can be covering big gaps in the opposing narrative, such as what device was being used and which person was using it at the time.
- Cell phone evidence contains a lot of behavioral data. You need to look at what was happening around an incident, not just specifics. Timelines of activity are the best way to understand the relevant data.
- Devices are no longer self-contained. Look at iCloud backups, Google backups, Garmin online data and NEST smart home devices.
- Finally "don't grab the murder weapon." We've all seen TV dramas where the bystander finds the knife by the body and picks it up in disbelief. If you do find evidence on a device or online, think of it as DNA or fingerprint evidence, collect it forensically and make sure that its evidential integrity is preserved. ◆



— For nearly 20 years, Simon Varley, of Simon Varley Digital Evidence Ventures, has provided digital forensics and security services to governments, corporations, and law firms. He received a Bachelor of Science degree with honors in Electronics from the University of Central Lancashire in England before moving into safety and security analysis for the UK Ministry of Defense. His expertise in cell phone forensics is at the highest levels, having received multiple certifications and advanced training in that area. Simon has been approved as an expert by several courts and is a regular presenter to industry and legal professionals on digital forensics and e-discovery.

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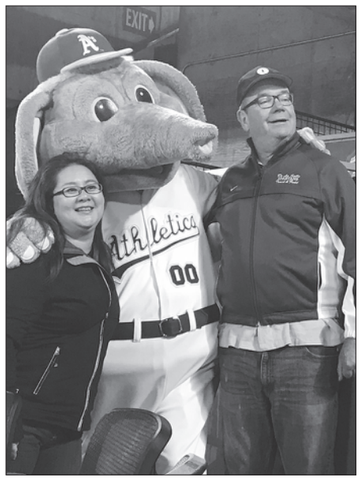



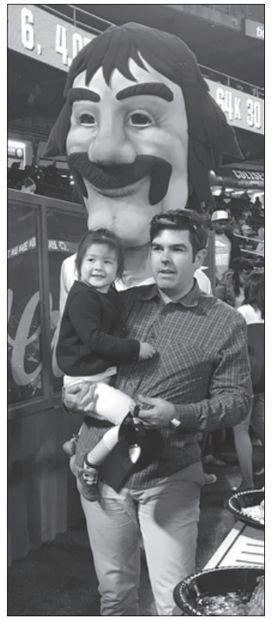

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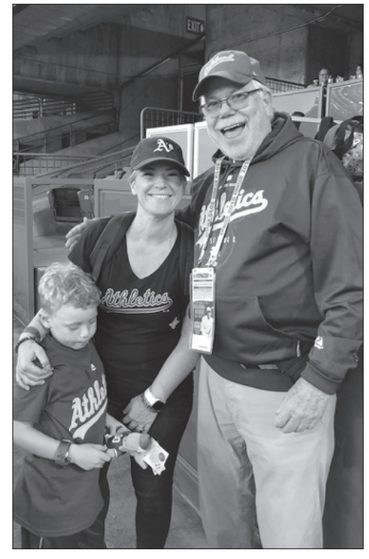




— Next Level Inclusion —

The Way Lawyers Act, Talk and Think

by Dina Eisenberg

As we strive to make today's law firms more diverse and inclusive, I wonder if there are still new levels of inclusion to find?

Typical conversations about diversity focus on aspects like gender, race, sexual orientation, ethnicity, and age. Eighty-five percent of lawyers are white men. Thirty-six percent of lawyers are women. But what about everyone else?

Lawyers of color are still underrepresented in the profession and the partner's table. Lawyers with disabilities are even more underrepresented. Sadly, this isn't news. The profession has been trying for 30 years to remove the barriers to success and become more diverse and inclusive.

While we struggle with the big ideas in diversity, I believe we can make progress on the inclusion front by looking at other types of diversity.

It's time that we expanded the notion of diversity and inclusion to embrace the next level.

Diversity: the art of thinking independently together.
Malcolm Forbes

HIDDEN DIVERSITY

Law firms tend to be fairly homogeneous places. Employees tend to think and act in the same way. *("Please act like a lawyer.")* That model worked for a long time. However, times have changed and so have legal consumers.

Legal consumers now have more choices about how to solve a legal problem than ever before. They want technology. They expect personal attention. They want texts. Consumers are in the driver's seat for a change, and now it's lawyers who need a road map to figure out clients.

To successfully adapt to the changes in the legal marketplace, you need lawyers who act differently, communicate differently and think differently.

Smart lawyers will embrace different types of intelligence and knowledge to properly serve legal clients. Thankfully, that doesn't have to be complicated or difficult to do.

ACT DIFFERENTLY

Look for lawyers who act differently. A lawyer's job is to solve legal problems. There are 1.3 million lawyers in the US and my bet is that 98% of them like to win their case. Lawyers like to compete. Olivia Pope didn't call us "gladiators" for nothing.

We need lawyers who are experienced using a variety of conflict management styles.

The happiest lawyers learn to master all five styles. You have the peace of mind that comes with knowing that whatever style opposing counsel or clients present you are ready. You have a tool belt of other styles to use. You'll never be bothered again.

By the way, all conflict styles are useful when matched to the right situation. Can you see yourself in these styles? Look for your natural conflict style and your work style.

- *Competing — My way or the highway.*
- *Avoiding — What problem?*
- *Accommodating — Today for you, tomorrow for me.*
- *Compromising — Small loss and we both win.*
- *Collaborating — How can this work for us both?*

Looking at your own law firm, do you have lawyers who can use the whole tool belt of problem-solving techniques with clients and with other staff members? Do you have paralegals and attorneys who are good at collaborating and avoiding conflict?

Every firm needs that person who possesses the high emotional intelligence, self-awareness and social awareness needed to diffuse a tricky situation and keep things moving. Think Donna from *Suits*. This person is the grease and the glue that holds your firm together.

When you only have a hammer, you're looking to nail every problem. Hire paralegals and associates who are conflict-competent, adaptable communicators and curious in your law firm inclusive to clients and the new employees.

COMMUNICATE DIFFERENTLY

Lawyers need to talk differently. We use our words every day to persuade and control. Most of our clients would probably say, *"I didn't get a word he was talking about,"* because sometimes lawyers forget the purpose of talking and who we are talking to. Gone are the days when using a $.50 word is the way to demonstrate your competence or intelligence.

Today's legal consumer wants to be a partner in solving their legal issues. They Google. They have questions and expect you to communicate in a way that they prefer and can understand. You want to match the communication style that your client or staff is using. What are the four communication styles?

The classic approach defined the styles as assertive, passive-aggressive, aggressive and passive. But, the modern approach is easier to understand and manage in the workplace. The modern definition of the communication styles is: analytical, intuitive, functional, and personal.

Let's examine the styles to see if you can identify yourself or your colleagues.

Analytical — Dragnet Talkers

Analytical communicators are interested in data, facts, and specificity.

Pre-frame your conversations to give the meeting purpose, then give an analytical the precise details to get her full attention. ▶

Intuitive — Blue Sky Talkers

Intuitive communicators like to talk above the overview or get the big picture first before zeroing in on a topic. Blue sky communicators are great at pulling disparate pieces of information to find unique solutions. Think Melanie Griffith in Working Girl. Trask & Radio!

Intuitives do best in high-level conversation that is less detailed. Connect through their vision of the situation. Focus on one detail at a time.

Functional — Get 'er Done Talkers

Functional communicators adore a good process. They love step-by-step instructions and thinking things through. Functional communicators ensure there is always a system for doing things. Think Olivia Pope. That girl loved a good plan!

Give functionals the step by step with a lot of details. They tend to avoid making on-the-spot decisions, so make room for that.

Personal — It's You and Me Talkers

Personal communicators seem to have the best of all worlds. They appreciate data and process, but also want to have caring relationships with their co-workers.

Connect with personals first before attempting to get down to business. They need to touch base with you emotionally first. They are great observers.

Understanding the different communication styles saves a lot of frustration. You realize that people aren't trying to make you mad. They are processing information and communicating in their own style. An assessment like DISC (personal assessment tool) will help you determine the styles that dominate in your office.

THINK DIFFERENTLY

Is autism a superpower? That question is posed in the *Harvard Business Review* article by Robert D. Austin and Gary P. Pisano, *Neurodiversity as a Competitive Advantage.*

For those who may not know, Greta Thunberg is a 16-year-old climate change advocate who believes that her autism is her superpower, which allows her to address the problem of climate change with extreme focus. She raises the question about a different type of diversity: neurodiversity.

Neurodiversity is a concept that revolves around the idea that neurological differences like autism, ADHD and dyslexia should be recognized and celebrated. They are not abnormalities that need to be cured. But rather abilities, such as extreme focus or creativity, that benefit the world; the same as being mathematically inclined or having an eidetic memory.

We have neurodiverse lawyers in the workplace. Or at least on TV law. Remember Ally McBeal, with her theme song and dancing baby? I bet you know an eccentric lawyer or two, right? Because neurodiverse people are wired differently and think differently about problems and solutions. Different ideas lead to better solutions. Obvious, but this is a reminder.

According to the ABA Lawyer Well-Being Report, 28% of lawyers suffer from depression while 21% of lawyers live with anxiety. The profession is filled with lawyers who currently have neurological differences, but don't have an effective way to share their stories or to ask for accommodations.

As our profession redefines itself and the practice of law, we require people who think differently.

BRING MORE INCLUSION TO YOUR FIRM

Inclusion is something we can do right now, not aspire to achieve. Begin to be mindful of diversity and inclusion as you go through your daily life.

My interest in diversity started as a freshman at Hofstra University, one of the few fully-accessible universities at the time. I was blessed to see and experience what it's like to live as differently-abled. People are people.

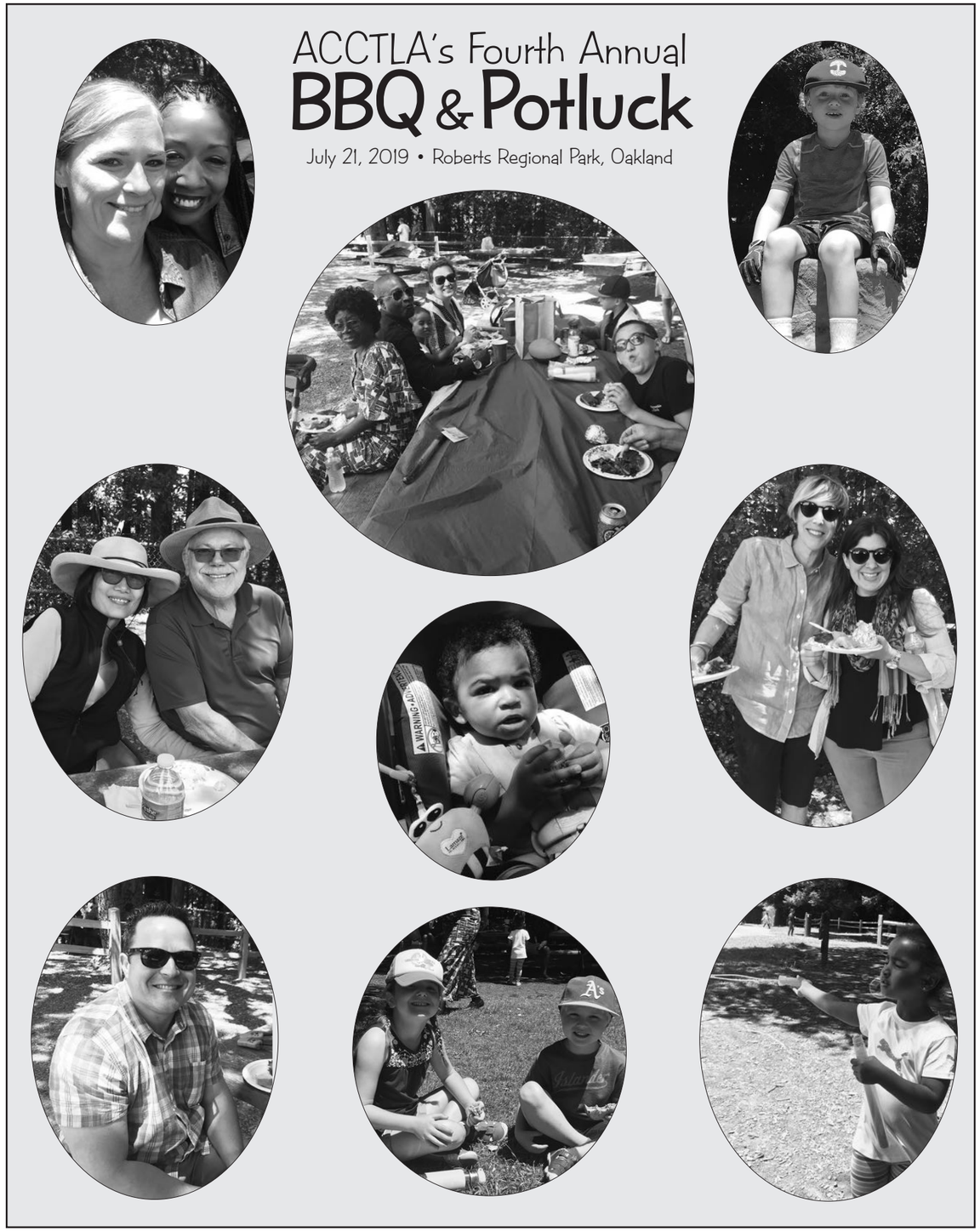
What can you do to improve your diversity and inclusion?

- *Create your own diversity and inclusion statement. Be aspirational. Who do you want your law firm to welcome as staff and as clients?*
- *Make it possible for your staff to ask for accommodations if necessary.*
- *Help your paralegals and assistants learn faster by asking how they like to learn — hands-on, video, audio, or written.*
- *Provide several ways for people to offer their opinions or thoughts by asking in email as well as in-person meetings.*
- *Be open to saying you don't know and asking when you meet someone with neurodiversity.*

What does all this talk about inclusion mean for you? You have the ability right now to impact diversity and inclusion in the profession by making changes in your law firm. Educate yourself. Replace defensiveness with gratitude. Envision the good to come from seeing the value in every person. ◆



— Dina Eisenberg is a lawyer and award-winning entrepreneur turned Staff and Leadership Consultant. She helps small law firms and solo practitioners to grow and become sustainable and profitable by teaching lawyers how to onboard and train their paralegals properly. To learn more about her signature program, Train Your Perfect Paralegal, coaching or speaking, visit http://Outsource Easier.com.



MEMBER news

DEFECTIVE PEDESTRIAN CROSSWALK LIGHT – $2,650,000 SETTLEMENT OCTOBER 2019

Two Chinese nationals, 54 years old and 59 years old at the time, were hit at a nine-lane crosswalk by a vehicle travelling at 45 mph in Stockton. The police officer found plaintiffs to be at fault for jaywalking. The driver was uninsured and is judgment proof. Plaintiffs contend the pedestrian walk light was too short, violating the Caltrans standard and the city's own standard. City of Stockton contends plaintiffs walked against the light based on two witnesses' statements. Plaintiffs suffered traumatic brain injury, fractures to arm, legs, and facial bones, and have post-traumatic stress disorder. The case settled at mediation.

Plaintiffs' Attorney
Teresa Li
Law Offices Teresa Li, PC

SLIP AND FALL – $3,500,000 SETTLEMENT AUGUST 2019

Client claimed that a company negligently used Pledge on the floor, which is what caused her to slip and fall. Client sustained injuries to her lumbar spine and left hip as a result of the subject incident. Company denied liability and made a zero offer at mediation. Company then made a $1.5 million offer at the pre-trial settlement conference. Company then increased its offer to $3.5 million after the first trial witness gave testimony. Thirty depositions were completed in the case, including 11 experts. Heinrich Law, PC is unable to provide more details due to a confidentiality agreement.

Plaintiff's Attorneys
Marjorie Heinrich and Ethan Wimert
Heinrich Law, PC

FAILURE TO MAINTAIN APARTMENT SMOKE ALARMS – $1,000,000 SETTLEMENT MAY 2019

A San Francisco store owner living with his family from Yemen in an apartment above his store died along with his daughter in a night time fire. The San Francisco fire inspectors determined that the family misused the electrical extension cords that caused the fire. The smoke alarms in the apartment failed to warn family members before thick smoke filled the apartment. The landlord blamed the decedent for disconnecting and failing to maintain the apartment smoke alarms. However, since 2014, landlords cannot make tenants responsible for testing or maintaining smoke alarms. Plaintiffs proved the landlord failed to take responsibility to maintain the smoke alarms, thereby preventing the tenants enough time to wake up and safely get out of the apartment.

Plaintiffs' Attorneys
R. Lewis Van Bois and Thomas C. Knowles
Van Blois Law

FAILURE TO INSTALL SPEED SIGNS AND TRAFFIC SIGNAL – $1,400,000 SETTLEMENT APRIL 2019

A collision occurred at the intersection of State Route 108 and State Route 120 in Tuolumne County. Two young children were properly restrained in the back seat of a Toyota Camry when a big rig tractor trailer collided with the back of the Toyota, which had made a left turn from State Route 108 onto State Route 120. The CHP report found the driver of the Toyota, the plaintiffs' mother, at fault for failing to yield the right of way to the big rig.

The plaintiffs alleged that the intersection was a dangerous condition for failure to install speed advisory signs on State ▶

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Route 120 and that a traffic signal was warranted due to the large number of accidents. Plaintiffs alleged that the big rig was exceeding the speed limit and contributed to the collision. Injuries to the children included multiple fractures and one child had a brain injury. Both children made good recoveries from their injuries.

Plaintiffs' Attorney
R. Lewis Van Bois
Van Blois Law

AVERY V. MCKEE, VINCULUMS SERVICES LLC $814,043.20 VERDICT

Santa Clara County
Hon. Paul R. Bernal

On April 15, 2015, Charlette Avery was driving her Ford Focus in the city of Campbell when defendant Braddon McKee made a right turn from the far left lane right into Ms. Avery's vehicle. There was only moderate damage to the vehicles. Ms. Avery suffered an immediate knee injury and had delayed onset of low back pain and neck pain. Ultimately, she had a knee surgery in December of 2015, a cervical fusion in January of 2017 and a lumbar fusion in March of this year. Defendant admitted liability, but denied causation and claimed Ms. Avery's spinal injuries were preexisting. Defendant hired a biomechanical expert, Kirsten White, who testified the crash was low impact and could not have caused any structural damage to plaintiff's body. Defense neurosurgeon, Bruce McCormack, testified surgeries were not caused by the crash. Plaintiff's experts were Dr. Alex Barchuk (physical medicine/rehab), Dr. Paul Berg (psychologist), Dr. Jeffrey Coe (spine surgeon), Karen Aznavoorian (life care planner) and Phil Allman (economist). Jury returned a verdict of $814,043.20. Past medical: $54,043.20; future medical: $150,000; past lost earnings: $35,000; future lost earnings: $100,000; past non-economic loss: $350,000; and future noneconomic loss: $125,000. Defense 998 just before trial was $450,000.

Plaintiff's Attorneys
Jayme L. Walker
Gwilliam Ivary Chiosso, Cavalli & Brewer
Jeff Atterbury
Habbas & Associates

Defense Attorneys
Jose Montalvo
Law Offices of John Biard
Tim Lucas
Thomas Lucas

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Cassie Springer Ayeni has handled plaintiff-side ERISA litigation, claims, and appeals since 2002, with a focus on disability employee benefits. She has been recognized on the *Northern California Super Lawyers* Top 100 and Top 50 Women lists. She was named a "Top 40 under 40" *Daily Journal* attorney in 2014, and a *Recorder* Top 50 Attorney "On The Fast Track" in 2012. She is proud to serve on the ACCTLA Board.



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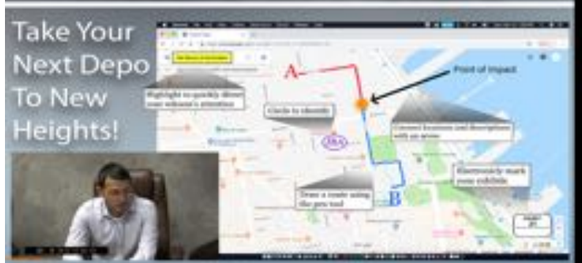

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Charles Dell'Ario has been representing individuals and small businesses in the California and federal courts since 1974. Beginning in 1997, Mr. Dell'Ario has specialized in appellate matters and has participated in over 250 appeals in the California Courts of Appeal, Supreme Court of California, Ninth U.S. Circuit Court of Appeals and the United States Supreme Court.

2019 California Lawyer "Attorney of the Year"

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The Daily Journal selected my work in Regents of U.C. v. Superior Court (Rosen) 4 Cal.5th 607 and 29 Cal.App.5th 890 which established the duty of all California colleges and universities to use reasonable care to protect students from foreseeable violence in curricular activities. These decisions affect all 3.5 million college students and their families.


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