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Alameda-Contra Costa
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Data Privacy for Lawyers

See page 30



Alan Charles Dell'Ario

Certified Specialist, Appellate Law

State Bar of California, Board of Legal Specialization



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.

Fighting the Good Fight for Plaintiffs

Now in my 49th year, I continue to fight successfully for tort plaintiffs in the appellate courts. In connection with my trial lawyers, ACCTLA-member Todd Walburg and co-counsel Celine Cutter, I established the duty of public agencies to maintain their streets and roads free of dangerous conditions that would increase the risks of recreational cycling. Our client was grievously injured when her bike struck a large pothole, throwing her to the pavement. The defendant argued she had assumed the risk of its bad roads. (Williams v. County of Sonoma (2020) 55 Cal.App. 125.)

Former ACCTLA and CAOC president Micha Liberty and I have teamed to fight the cause of school children victimized on account of their disabilities. The Supreme Court of California granted our petition for review and will decide the issue of first impression whether the state Unruh Act applies to the 7 million public school children. The high court only grants about 55 of the 3,500+ petition it received each year.

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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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from the president



Jennifer Fiore

Welcome to the last edition of the 2023 *Verdict*. I'm pleased to report on another successful year for ACCTLA! From providing programs and tools for attorneys through practical and cutting-edge CLE and Verdict topics, to expanding diversity and inclusion efforts, ACCTLA continues to productively serve members and the legal community at large.

The Diversity Scholarship for law students, for example, grew with 50% more applicants and more than 50% in donations from when it started just two years ago. Not only is ACCTLA proud of providing financial assistance to the scholarship recipients, ACCTLA is honored to expose growing legal minds to members' practice areas that collectively pursue justice on, dare I say, the better side of the "v."

You'll have to attend the 2024 Judges' Night Gala on January 18, to find out who the impressive recipients are, and of course, honor the outstanding Alameda and Contra Costa County Judges of the Year. You'll also get to welcome incoming ACCTLA President, Casey Kaufman, whom I'm confident will effectively carry out association's mission.

I would like to thank the Executive Director, Mariana Harris, Board Members and Past Presidents for each of their efforts in making 2023 such a memorable and inspiring year. ACCTLA and I appreciate your contribution as well as that of all members who volunteer their time and skill to this great organization. I look forward to being a part of ACCTLA's continued growth in the future.

Sincerely,
Jennifer Fiore

— Jennifer Fiore is a trial attorney and shareholder with Fiore Achermann, where she focuses on catastrophic personal injury, wrongful death, public entity liability, sexual abuse, maritime and other torts. She can be reached at Jennifer@theFAfirm.com.

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- Since 1970 -

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1


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Winston W. Moody


Tiega-Noel Varlack

As we watch the seasons change, we take our time to reflect on the achievements and growth of ACCTLA over the past year. We would like to thank each and every one of you for your continued commitment to excellence in the legal profession.

Membership in ACCTLA signifies your dedication to staying at the forefront of our profession, fostering meaningful connections within the community, and contributing to the collective knowledge that drives us forward. As we transition into the holidays, we would like to take this opportunity to share some exciting updates:

Upcoming Events
Mark your calendars for Judges' Night on January 18, 2024 at the Scottish Rights Center. An opportunity to honor the distinguished members of our bench, you can mix and mingle with our members and friends.

Member Spotlights
We are proud to showcase the accomplishments of our members. If you have a recent achievement, publication, or noteworthy case result that you would like to share with the ACCTLA community, please contact us to be featured in our next Member Spotlight.

Committee Involvement
Your involvement in ACCTLA's committees is crucial to our success. Consider joining or becoming more active in a committee. This is an excellent opportunity to collaborate with fellow members and grow your network.

Legal Updates and Resources:
Stay informed with our regularly active listserv, appellate summaries, verdict recaps and legislative updates. We are committed to providing members with timely and relevant information.

Membership Renewal
As we approach 2024, we invite you to renew your membership for the upcoming year. Your continued support allows us to maintain the high standard of programs and services that ACCTLA is known for.

Thank you for being an integral part of ACCTLA. Your participation enriches our community and strengthens the collective knowledge of the legal profession. We look forward to the continued growth and success of ACCTLA in the coming months.

Wishing you a productive and inspiring holiday season. ◆

Would you like to be published?

Publication in **The Verdict** is excellent exposure. Our readers are most interested in issues surrounding plaintiffs' personal injury, family, appellate, criminal and/or business law.

If you're interested in submitting an article, please email it to:

Mariana Harris
Executive Director
acctriallawyers@gmail.com

Got News?

If you have any news you'd like to share, please email it to one of the following:

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— Member of the Year —

Jayme Walker



Theresa Li, ACCTLA Secretary, presented Jayme Walker her award.

ACCTLA was honored to recognize Jayme Walker as the 2023 Member of the Year at the annual picnic at Robert's Regional Park in Oakland.

Jayme is a dedicated member of ACCTLA's Executive Committee and continues to provide her support as an active Past President.

She was instrumental in expanding the diversity of the ACCTLA board and membership at large, as well as in the creation of the diversity scholarship. While President, she led ACCTLA through part of Covid with creative online programming to keep members engaged and focused on wellness.

Jayme has spent her career championing employee and victim's rights in areas from discrimination, civil rights, sexual abuse, and negligence.

She has also contributed significantly to the East Bay community through her advocacy efforts. In *Doe v. Berkeley Unified School District* in 2022, for example, her work shed a light on how Berkeley High School failed victims of peer sexual harassment and led to significant reforms with how the school deals with reports of peer sexual harassment.

Another example: in 2021, *Bauer v. City of Pleasanton PD,* a mentally ill man was restrained in a prone position, which caused him to asphyxiate. As part of the resolution, the family has a seat at the table with the Chief of Police to address reforms.

The Berkeley High and Pleasanton cases are just two recent examples of Jayme protecting the most vulnerable and making our communities safer.

Jennifer Fiore, ACCTLA President thanked Jayme for *"being such an inspiration as a leader and fierce advocate!"* And long-time member and past ACCTLA President, Gary Gwilliam, said after the presentation, *"Jayme is most deserving of this special recognition. During her presidency, she guided us through the difficult times of the Covid pandemic. With the courts closed, we all needed to pull together to meet these new and unusual challenges. Not only did she do a great job, but she did so while pregnant with her second child! She deserves all our congratulations."*

To learn more about the Alameda-Contra Costa Trial Lawyers Association, contact Executive Director Mariana Harris at ACCTrialLawyers@gmail.com, 925-257-4214 or visit us online at https://acctla.org/. ◆



Suizi Lin, Diane Rames, Jayme Walker, Mariana Harris and Winston Moody enjoying the ACCTLA annual picnic.presented Jayme Walker her award.

5th Annual BBQ & Potluck

— August 6, 2023 —

Roberts Regional Recreational Park, Oakland









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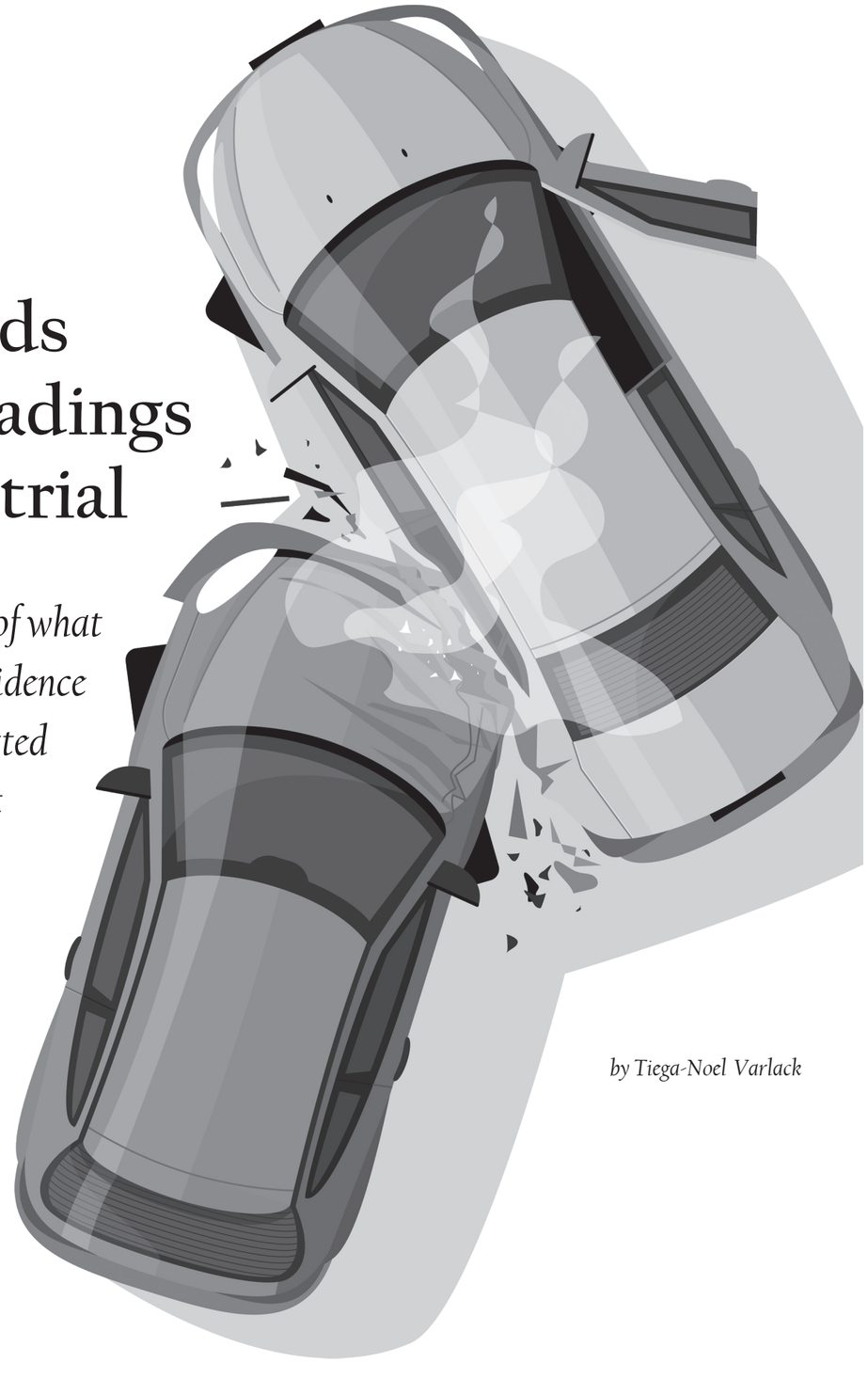
Visual aids from pleadings through trial

A brief overview of what demonstrative evidence you can get admitted and when to use it



by Tiega-Noel Varlack

The best trial attorneys are good storytellers. This piece of advice is something we often hear in our practice. But in addition to telling our clients' stories on paper and through our oral advocacy, as trial attorneys we should be using visual aids. Not just in trial, but in our pleadings, mediation briefs and presentations throughout the life of our cases.

In California, we have the right, subject to the court's discretion, to present visual evidence, which is usually referred to as demonstrative evidence, and can take the form of charts, graphics, blowup photos, and videos, to name a few examples. However, for federal practitioners, a newly proposed rule of evidence, Federal Rule of Evidence, Rule 107, would provide a black-letter rule for the use of visual evidence in court and would allow the trial court to keep out visual evidence if it is "outweighed by "the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time."

Text of proposed FRE Rule 107 provides:

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 107: *Illustrative Aids*

a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

b) Use in Jury Deliberations. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless: (1) all parties consent; or (2) the court, for good cause, orders otherwise.

c) Record. When practicable, an illustrative aid used at trial must be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

(Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure (September 2023).)

As originally drafted, the rule contained a notice requirement, but trial attorneys pushed back and argued that the notice requirement would take away the spontaneity of trial and result in gamesmanship and tipping off strategy plays to the defense. Yet, as a practical matter, the court's discretion to limit presentation of visual aids can prove problematic if you find yourself engaged in the heat of battle, even without a notice requirement. This article will give you practical advice on how to get your visual aid before the jury and judge in both state and federal courts.

But first, a refresher on evidence: "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact. (Evid. Code, §140.)

"Evidence" is anything "*offered to prove* the existence or nonexistence of a fact" –including "testimony, writings, material objects, or other things presented to the senses ..."

The statutory definition includes anything *offered* as proof, whether or not admissible. (Evid. Code, §140, Law Rev. Comm'n Comment.)

"PRESENTED TO THE SENSES"

The definition includes *anything* that can be seen, heard, touched, smelled, etc. by the trier of fact ... including:

- testimony
- writings
- material objects
- demonstrative evidence (charts, photos, models, etc.)
- audio/video recordings
- jury views
- scientific evidence
- opinion evidence; and
- depositions and discovery

(Rutter Group, California Practice Guide: Civil Trials and Evidence, Chapter 8A-A (A. Types of Evidence).) ▶

In California state court, visual evidence must meet three conditions to be admissible. First, we need relevancy (Evid. Code, §210.) Second, the witness must have personal knowledge/or it must accurately reflect an expert opinion. (Evid. Code, §§702, 801.) And lastly, it must not necessitate an undue consumption of time or create a substantial danger of undue prejudice, confusing the issues, or misleading the jury. (Evid. Code, § 352; *Endicott v. Nissan Motor Corp*. (1977) 73 Cal.App.3d 917, 930-931.)

Additionally, counsel will need to lay foundation as to the accuracy and purpose of the visual aid prior to offering it. More importantly, counsel may question a witness regarding demonstrative evidence, without offering it as evidence. (*People v. Cossey* (1950) 97 Cal.App.2d 101, 112.)

Illustrative aids or demonstratives are useful tools for storytelling: however, you need to consider your story in selecting your aid. For example, in a car accident case, a photo may be more suitable than the diagram on a police report to show area of impact.

You should also pay attention to design to make sure your fonts, colors and designs match your theme and are easy to understand. The last thing that you want to do is use an aid in a way that violates the law by confusing the jury, in either a state or federal court.

Practice timing

Organize the timing of your visual aids with your storytelling.

Engage the senses

Use visuals that engage multiple senses. Use images, sound, and even physical evidence to immerse the jury in the story. Under the newly proposed FRE 107 and California law, visual aids can be admitted into evidence and used during jury deliberations if the parties agree (federal) or if you have laid the proper foundation and overcome a 352 objection (state).

When preparing your case, it never hurts to review the jury instructions, and California has one on demonstrative evidence. The jury instruction reads:

5020. DEMONSTRATIVE EVIDENCE

During the trial, materials have been shown to you to [help explain testimony or other evidence in the case/[specify other purpose]]. [Some of these materials have been admitted into evidence, and you will be able to review them during your deliberations. Other materials have also been shown to you during the trial, but they have not been admitted into evidence.] You will not be able to review them during your deliberations because they are not themselves evidence or proof of any facts. You may, however, consider the testimony given in connection with those materials. (CACI 5020.)

When to use demonstrative evidence

Do not wait until trial to start using demonstratives. Gather demonstratives early on, such as photos, charts, organizational diagrams, and floor maps to name a few. The demonstratives can be included in your complaint, discovery responses and moving papers, where appropriate.

You can also rely on summaries in the form of visual evidence under the secondary evidence rule, which provides that the content of a writing may be proved by (1) an otherwise admissible original (Evid. Code, §1520), or (2) otherwise admissible secondary evidence. (Id., §1521, subd. (a).) However, to be "otherwise admissible," secondary evidence must be authenticated.

"Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is, or (b) the establishment of such facts by any other means provided by law." (§1400; *People v. Skiles* (2011) 51 Cal.4th 1178, 1187.) Practically speaking, if you want to use a summary as an aid, you should have your summarized documents pre-admitted or have a pocket brief reading explaining why they are admissible. ◆



— Tiega-Noel Varlack is the founder of Varlack Legal Services in Hayward. She handles a wide range of matters, including personal-injury litigation, business disputes, criminal defense and immigration matters. She can be reached at tiega@varlacklegal.com.

This article originally appeared in the October 2023 issue of The Advocate. Reprinted with permission.

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Thursday, January 18, 2024

5:30 p.m. check-in/Social time

Oakland Scottish Rite Center
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— The 2023 Guide to Social Media for Law Firms and Lawyers —

By Ann M. Kariuki, Jeena Jiampetti & Sophia Achermann

In our search for best practices and a guide to social media for law firms and lawyers, we came across an article written by Hootsuite, a social media management platform offering day-to-day social media management services including scheduling, posting, and tracking performance across all your social media networks from one dashboard.

In this article, Hootsuite addresses the following topics, which their research shows will help law firms bring in clients, boost credibility, and keep you up to date on your competitors:

- *How do lawyers and law firms benefit from social media?*
- *Best social media platforms for law firms and lawyers*
- *Social media marketing for law firms: 6 best practices*
- *Cheat sheet: 7 social media post ideas for lawyers and law firms*
- *FAQs about social media for lawyers*

(See full article at https://blog.hootsuite.com/social-media-for-law-firms/)

If your law firm is interested in engaging a social medial management platform or investing in these services, below is a link to an article discussing the top social media management platforms we found by Buffer.com. The article provides an in-depth analysis, and benefits and drawbacks, including costs and unique value of various key social media management companies servicing various industries.

(https://buffer.com/library/social-media-management-tools/#the-16-best-social-media-management-tools-for-small-to-medium-businesses)

How to connect your law firm's Social media with ACCTLA

The first step is to *create* a public social media account for your firm. The most widely used social media platforms in the professional landscape are LinkedIn, Facebook and Instagram. We are seeing an uptick of social media traffic via X (formerly Twitter), TikTok and Threads this year, and expect that trend to continue into the future, given the growing number of users on those platforms.

Once you have those accounts up and running, the best practices to expand your firm's social media reach are:

- *Post consistently about issues and events that are relevant to your firm and practice area. This can be an announcement about your firm, celebrating a victory, attaching an article or spreading legal news that would be interesting to the legal community and your client base.*
- *Remember to keep your posts frequent, fresh and relevant.*
- *Use visuals/graphic media as often as you can to engage the public.*
- *Consider using AI to draft your social media posts (e.g., ChatGPT), which can save you a lot of time and eliminate the need to DIY, ask a staff member or hire a social media content writer to assist you.*
- *Use the tag feature as often as you can with your posts, which allows others to share your post and build a wider audience.*
- *Be consistent in engaging with social media accounts that align with your law firm, e.g., ACCTLA or organizations of which you are a member. The more you like, tag, share and repost, the wider net you cast with visibility to your firm's page.*

How you can connect with ACCTLA via LinkedIn, Facebook and Instagram

LinkedIn

Upon Login and from the main "Home" page, in the "Search" box next to the LinkedIn icon on the top left corner of the page, type the words "ACCTLA" and hit enter. You should be sent to a page where you have the option of clicking "People" "Posts" and "more people". Under "Posts" you will find a link to ACCTLA, where you should have an option to click on the hyperlink that goes to our page, then click the blue tab "+Follow". Once connected and on ACCTLA's LinkedIn page, you will have an option to get notifications.

Alternatively, you can type this link or web address: https://www.linkedin.com/company/acctla/ and then click the blue tab "+Follow" and you will be connected to ACCTLA's LinkedIn page, where you can elect to get notifications.

Facebook

Once logged-in and in the "Home" page, in the "Search Facebook" box next to the Facebook icon on the top left corner of the page, type the words "ACCTLA" and hit enter. If no results, then try clicking on the icons below on "Groups" and then typing in the search box, "ACCTLA" and hit enter. The page will upload with the option to "Follow" by clicking into the gray box. Once you click "Follow" you will be linked with ACCTLA's Facebook page. You can then manage your notifications from us by clicking into the ACCTLA page when logged in under your "Groups" or by using the search functions.

Instagram

Once logged-in and on the "Home" page of your account, locate the magnifying glass icon. Type "acctriallawyers" in the search bar. Locate the acctriallawyers account in the search results. Click on the account, and once on the ACCTLA homepage, click the blue follow button. ACCTLA posts and stories will now appear in your Instagram feed. ◆



— Ann M. Kariuki has extensive experience participating in all phases of civil litigation, including discovery, mediation and trial.



— Jeena Jiampetti, a senior attorney at Springer Ayeni, represents people with short-term and long-term disability, medical, and life insurance benefit claims under ERISA.



—A Superlawyers Rising Star (2009-2021) and a Northern California Superlawyer (2022-2023), Sophia Achermann is a trial attorney and partner of San Francisco's Fiore Achermann.

Have you heard???

Did you know that ACCTLA is on social media? You didn't? ACCTLA has had social media accounts for a while, but I'm not sure you've noticed. We'd love to have everyone like/follow our social media accounts. Take a moment to like/follow us using the QR codes below. Here's how:

1. Open the camera app on your phone.
2. Focus the camera on the QR code by gently tapping the code.
3. Follow the instructions on the screen for each code to follow up on LinkedIn, Instagram and Facebook! What??

You say you don't have a social media account? You can reach out to the members noted below for help setting up your account!! Then you can like/follow us to hear what's going on with ACCTLA.

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Hon. Victoria Kolakowski



Interviewed by Michael C. Haley

I want to thank you, Judge Kolakowski, for doing this interview for ACCTLA. I would first like to ask you, who were your professional role models at the start of your legal career?

Thurgood Marshall. I actually had the good pleasure of meeting him at an ABA event before he passed. It was the first year they gave an award in his name, and I got to meet him. I always really appreciated him and his work promoting justice. It meant a lot to shake his hand.

What motivated you to become an attorney?

This sounds so almost naïve, but I wanted to change the world. I started out as a scientist and an engineer as an undergraduate, but I always thought that I might go to law school because I wanted to change the world. But then I wound up becoming a patent attorney. Not exactly the first thought for changing the world, but it does work when you're an engineer and scientist as well as an attorney. So, while I worked as a patent attorney, I did a lot of advocacy for the LGBT community on the side.

Could you tell our members about how you began your legal career?

I transitioned in my last semester in law school because I didn't want to start my career as "him." However, it made the start of my career really challenging because this was in the early '90s and just being out as LGBT was considered to be a bit much, let alone to be transgender. I started out as an intellectual property attorney with a firm and that did not work out. I then went into solo practice for a while, then I worked in-house as a patent attorney, and I later went in-house for a corporation and became its general counsel. It was hard just finding people who were willing to work with someone like me.

I then went to work for the State of California, first as a regulatory analyst and a utilities engineer with the California Public Utilities Commission, and then as assistant chief counsel for the California Electricity Oversight Board. One of the things that is nice about civil service is it is much more merit-based, and people don't worry as much about these other factors. What I found in private practice was that many attorneys didn't necessarily have a problem with me, but they told me they were worried that their clients might. Anything that could scare clients is something that for many people in practice is a big detriment. Now, how much of that's just projecting their own discomfort? I don't know. I suspect a good deal of it. But then again, it all depends. I've talked to attorneys who are out as transgender in many parts of the country who have had hard times with clients. This all made the beginning of my career very challenging, but I did what I could to get through.

I then went into government service because I knew it would be stable, based upon merit, and provide me with benefits. The benefits were particularly appealing to me because my parents had some very bad experiences with medical care as they had gotten older and left their own private employment early. I was enjoying my work and then I became an administrative law judge before I was a superior court judge. I like being a problem solver and I like being a person who looks at disputes to try to neutrally figure out what the rules and laws say and not be constrained by just what my client thinks. My client is the *law* and the *people* now.

You mentioned that attorneys and firms at the start of your career indicated that they did not have any issue with you being transgender, but they instead expressed concern about how their clients may feel. Could you expand on that?

Well, yeah, but the question was, was that true or not? That's an easy excuse. I think a lot of people would project their fears onto their clients. I've heard similar arguments be made about all sorts of other reasons to exclude somebody, not just for being trans. Would the clients be happy with a woman? Would the clients be happy with a person of color? These are things that I've heard before — "I'm not sure how the clients will deal with it." I then wonder, "Well then why don't you try? Why don't you find out?"

Can you describe your experience as administrative law judge?

After leaving the California Electricity Oversight board, I managed to get a short-term position as administrative law judge at the Department of Insurance. Then I went and spent four years as an administrative law judge at the California Public Utilities Commission. I had done a lot of work on utility regulatory law and that was my specialty. While I was at the PUC, I did CEQA cases involving large transmission cases and big power lines that went through three or four counties to bring renewable energy from the deserts into the cities. My proceedings were addressing bigger energy policy issues. As an administrative law judge, my job was to propose

> "Would the clients be happy with a woman? Would the clients be happy with a person of color? These are things that I've heard before — "I'm not sure how the clients will deal with it."

decisions to the commission, but the commission members ultimately had to adopt the rulings. But I wanted to be in a position where I could have direct decision-making authority rather than just making proposed decisions. I wanted to do more in terms of impacting people's lives directly. Although these were big policy issues and I was dealing with billion-dollar projects, which were very important, I wanted to do things involving people's lives where they saw it, or it was tangible. That is why I became a superior court judge.

You were elected to your judicial seat in the superior court. Can you explain what the campaign process was like for you?

I ran for an open seat and there was no incumbent in that race. I actually ran for an open seat twice. The first time I ran, I got stomped, and the second time I ran, I won. It is a very long process and very arduous. Alameda County had a million-and-a-half people in it at that point and more than three quarters of a million registered voters. It goes all the way from Albany down to Fremont and over to Livermore. That's a lot of land, and that's a lot of people. Trying to reach that many people is really very hard. You have to run a political campaign because it's an election, but you can't promise anything other than "I'm going to be fair and impartial." I mean, that's what everybody's going to say. All you can do is talk about your background and hope that people think that your background shows that you're their kind of person or the people who know you say nice things about you and then they support you. But it's really challenging. There's no way to run a traditional campaign because it's just too big of a county.

It's also a very expensive process. One of the things that most people don't realize is that little 200-word ballot statement — the candidate has to pay for that. You probably want to hire a person who's an expert at running campaigns, or at least at writing those 200-word statements. I took out a loan on my car, which had been paid off, to get some extra cash for the campaign. If I had lost, my wife and I would be spending years paying that back from my failed election.

You also have to be very careful about what you say and do during the campaign because we're bound by a very strong ethical system that is contrary to the way everybody in politics works. The whole

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> You also have to be very careful about what you say and do during the campaign because we're bound by a very strong ethical system that is contrary to the way everybody in politics works. The whole election system seems to me to be about people puffing, but you can't do that as a judicial candidate.

election system seems to me to be about people puffing, but you can't do that as a judicial candidate. You can't mislead people about who you are, but your supporters sometimes say things that you can't control. It can be a very challenging process.

The only upside of running for a seat is that at the end, come the following January, one of the people who filed the papers is going to be a judge. That's the upside. The downside is you're going to spend tens — or even hundreds of thousands — of dollars to become a judge and you're going to have losers. I felt really bad for the people who ran against me, who were good people. I wrote letters of recommendation for both of the people that I ran against that in 2010 for them to get appointed. They were good people with fine careers, and it is just, it's hard.

Then, once you are elected, people are going to always look at you like, "Well, why couldn't you get appointed?" I don't want to say bias, but there are certainly people who assume that you haven't faced the same kind of vetting as if you had been appointed. I did it because I came from a non-traditional background, and I have been involved in politics for many years. That is why I did it.

I imagine that campaigning is hard on your spouse and family as well.

It was very hard on my spouse. One of the things that was very hard but very helpful for me was that my wife was willing to drive me around. During the early part of the campaign, you are going from event to event to event, and they can be anywhere in the county. You drive someplace and you have to get up and you have to make a two- or three-minute speech, and then you go on to the next one. When you go to these events, you see the same people who you're running against in every place you go — unless you don't. Then if you don't see them you think, "Where are they? If I'm here and they're not, what are they doing? Is there someplace I should be now?" At the end of it, my wife said, "I'm never doing something like this again because it was so challenging."

What assignments have you had as a superior court judge?

I've done a bunch of things. I spent several years doing criminal misdemeanor criminal assignments, including a year as the supervising judge of the collaborative courts, our diversion courts. That was a really positive experience. I liked working in that sort of an environment, where we could try to get people to come up with a solution that wasn't just incarceration. Sometimes incarceration, I think, is necessary, but a lot of times it can be disruptive and counterproductive.

I also had the good pleasure of doing a number of civil assignments over the years. I was in an open trial department where I did preference cases, both asbestos and unlawful detainers. And I had a direct civil calendar assignment for a year and a half. I've also handled collections and day-of-court settlements for both civil and family law.

Your current assignment is unlawful detainers. What is the current climate of that department?

What happened is for several years, we had a limited number of people being evicted and grounds for eviction were limited due to local moratoriums. Certain cases, such as foreclosure evictions and evictions for health and safety violations, went forward. But failure-to-pay cases couldn't proceed. Now we have this huge pent-up demand for landlords to have their cases heard and they want to get people out that they're frustrated with, even though they can't recover rent from before the moratorium expired. They still have balances, tens of thousands of dollars of rent that people owe to their landlords, and the landlords just don't want them around. They want to move on. But on the other hand, the tenants are very much not wanting to move. Some have been longtime tenants, and many of them are finding it difficult to move.

The number of cases being filed is something we have never seen before. This has created a great deal of pressure, and not just from the court's perspective. The high volume of matters the court is handling is resulting in normal small administrative problems here or there to have a greater impact than normal. It's not an easy situation.

Each of these circumstances is unique, and every one of them can be challenging. The lawyers are overworked and stressed out because they're trying to deal with far too many clients. The landlord attorneys have lots of clients that want to get tenants out and the tenant lawyers are all are trying to help as many people as possible.

This Wednesday, we're going to have over a hundred cases on for settlements in the morning. The truth is that almost ▶

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every case settles, even though we're talking about thousands of cases. That's amazing. But it's not easy and we've got a lot of attorneys on both sides of the bar trying to explain the realities of the situation to their clients. Moreover, we have tenant attorneys coming in to settle these cases who are meeting their clients for the first time that day, getting the papers that morning, and trying to settle them by the end of the day.

But if it weren't for the attorneys who practice here and their ability to work together to try to resolve cases, it would be a complete disaster. We call it a tsunami and the only reason we're managing it is because there's so many good lawyers who are working on this. They are doing an amazing job of dealing with an impossible situation and trying to get the best outcome. I also cannot express how much I appreciate my courtroom staff. They've been dealing with people constantly. Everybody wants everything yesterday and it's very frustrating because there's so much happening with so many cases getting filed.

When I leave this department in December, what I will miss the most are the people.

Do you have any advice for attorneys that appear in front of you?

With respect to my current assignment, collegiality and flexibility are important. This is a department where we're trying to settle things, and so this is not the place to come in with guns blazing because it is just not going to help. I always like it when people come in ready to settle, ready to try to roll up their sleeves and get things done, willing to talk to their clients, talk and try to see if there's a resolution that can come.

I also don't like it when people are not willing to take 'yes' for an answer. I know that sounds strange, but there are some people who insist upon arguing even after it's very clear they won. I remember one time I was talking to a public defender when I was doing misdemeanors. I said, "is there anything else you want to say before I grant your motion?" Then they start talking again and it was almost like that Wiley Coyote thing where they're talking and suddenly, they've realized, wait a minute, I should have stopped back there.

What do you consider to be your greatest accomplishment in your legal career?

If you would have asked me three or four years ago what my greatest accomplishment would be, I would've said becoming a judge. Now my answer is helping us get through the eviction tsunami, helping us to deal with the challenge that we're facing here in our county, helping get us from the moratorium time to the point where we're back here as a court in a meaningful way, in a way that minimizes disruptions, and maximizes our ability to provide justice and access to the system here in Alameda County. We faced an apparently impossible situation and we're going to get through it. To the extent that I started out earlier saying I wanted to make a difference, I feel like I have by helping to get us to this point. I'm going to look back with pride on this time.

What has been the greatest accomplishment in your personal life?

When I was a kid, there were three things that I wanted out of life. I wanted to be a woman and I think I've achieved that goal. The second one was for someone who loves me. My parents had been in love with each other from the time that they were 16 years old, and they spent their entire lives together until my father passed. I wanted to be in a relationship with somebody that I love and that loves me. I've been in a relationship like that now for a long, long time. The third one was I wanted to be in a position of public office where I could make a change and make the world better. I think I've achieved that too. I've achieved the great things out of my life that I wanted to going in.

What do you like to do for fun?

I'm a genealogist, so family history is very important to me. I am the former president of the California Genealogical Society and I have a good deal of expertise in genetic genealogy. Genealogy is what I do for fun, other than playing computer games and watching a lot of television and movies. I'm a big science fiction and fantasy nerd.

I have also done a lot of work speaking about LGBT and trans legal issues around the world with various organizations. I also teach a course at USF law school on equality and religious freedom — it's on the spring schedule. As part of that course, I look at the intersection between these two very important legal approaches and how they're coming into conflict with one another. These are my passion projects. ◆



— Michael C. Haley, an Attorney at Haley Law Offices, focuses on personal injury, medical malpractice, and civil rights litigation. Michael is a graduate of the University of San Francisco School of Law and Saint Mary's College of California.

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Diversity Scholarship Recipient Update

by Winston Moody

***Mara Aldajani** is a 2022 Diversity Scholarship recipient. She is a certified law student currently studying at McGeorge School of Law.*

What motivated you to study law?
Law affected my life in more than one way. I was a child immigrant and could not adjust my status well into my 20s. When I finally did, the relief I felt made me want to study the laws that limited and controlled my life for so long. I came to understand its importance and strived to study it. It intrigued me. Furthermore, the challenge of studying law sparked my intent to appreciate it. The intricacies of understanding law and how it affects numerous aspects of our lives intrigued me. Once the idea was planted in my head, I just went for it, not really comprehending what I was getting myself into. Fortunately, I genuinely enjoy the path I have chosen and sometimes I have been forlorn by the limited number of classes I'm allowed to take every semester. I want to study everything from the drama in family law to the complexities of tax law, and everything in between.

What are your short-term and long-term plans and goals for your career?
For the short term, I want to pass the bar and find a job in a tax law related field. In the long term, I wish to work for the government, where I will achieve a life-work balance. I would also like to work part time in legal clinics that offer pro bono services to give back to the community.

What does it mean to you to be a Diversity Scholarship recipient?
It means a lot to me that diversity is celebrated and accepted. I really appreciate the openness of my law school to diverse students and the offers of scholarships geared towards diverse students. I went into law school not completely comprehending the time, energy, and all the costs involved in attaining my JD. Finding support in whichever way is much appreciated.

How has being a Diversity Scholarship recipient impacted you?
Obviously, it helped me out financially but, more importantly, it gave me confidence that I'm accomplished and not an imposter. I think a lot of diverse students feel left out and feel out of place in law schools. Having a scholarship to show for my hard work gave me a confidence boost when I went from barely passing my midterms first semester to achieving my first 'A' second semester.

What would you like ACCTLA members to know about diversity in law school and the legal profession?
I think today law schools are more aware of the importance of having a diverse student body and different methods of addressing issues law students face from minority backgrounds. For example, most law students from minority backgrounds do not know how to manage their student loan portfolio or how to decide how much to borrow with an understanding of the long-term financial implication of law school debt. Offering seminars on simple financial comprehension helps with imparting crucial financial knowledge and alleviates anxiety when going into debt not knowing what awaits after graduation. It is still a work in progress providing support to law students and specifically diverse students who are first generation lawyers. I think the more growth in support, the more growth there will be in the legal profession in that great future lawyers, who would not have had the chance in the past, now do, and the law profession will be better because of it.

***Meredith Huang** is a 2023 Diversity Scholarship recipient. She is currently a law fellow at Phillips Black, a non-profit, public interest law practice that represents individuals sentenced to death and life in prison.*

What motivated you to study law?
I attended a summer camp for kids interested in pre-law. The organizers taught us about the inequities of the criminal legal system through the lens of wrongful convictions. They invited a speaker who had been wrongfully convicted and imprisoned for most of their life, along with their lawyer who specialized in wrongful conviction cases. Plainly apparent was that the criminal legal system is cruel, and it makes us crueler.

What are your short-term and long-term plans and goals for your career?
The reason I wanted to be a lawyer in the first place was to work in criminal defense, and that remains true. For as long as I have the privilege of working in the legal field, I hope to work in indigent defense.

What does it mean to you to be a Diversity Scholarship recipient, and how has receiving the Diversity Scholarship impacted you?
It is a real honor to be among ACCTLA's Diversity Scholarship recipients. In addition to the scholarship support, attending the Gala was particularly meaningful to me. Meeting fellow scholarship recipients, ▶

Diversity Scholarship Fundraiser



Matt Haley, Mariana Harris & Tiega Varlack


Judge Charles Smiley, Sofia Achermann, Shalanda Herring, Mariana Harris & Justice Terence Bruiniers (Ret.)

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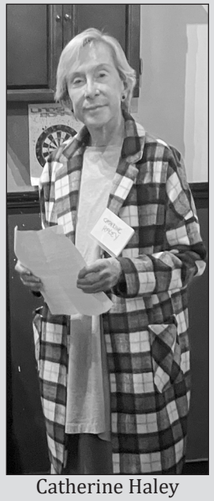
Catherine Haley


Doug Brooker & Jennifer Fiore

hearing the speakers' stories of their professional paths, and feeling welcomed into a community of attorneys helped make the often-intimidating legal world feel happily smaller.

What would you like ACCTLA members to know about diversity in law school and the legal profession?
There is no question that racism pervades our criminal legal system. Diversity within the legal profession does not solve that. But it is a necessary step towards broader racial equity and our goals of constructing fairer, restorative systems. And for those working in indigent defense, being a lawyer is a way to stand by people and communities, disproportionately those of color, who are harmed by the criminal legal system; to challenge over-policing and mass incarceration; and to work in the public interest.

***Jacob Kim** received the Diversity Scholarship in 2023. He attends the Santa Clara University School of Law.*

What motivated you to study law?
I wanted to study law to have an impact on my community and those around me. I am the first person in my family to attend law school and I am lucky to have the amazing support and mentors over the last few years. I have a lot of family members in law enforcement and I thought going to law school would allow me to be involved in the community in a more influential way.

What are your short-term and long-term plans and goals for your career?
I plan to remain in family law after law school. I find joy in helping individuals while they go through one of the most financial/emotional times in their lives.

How has being a Diversity Scholarship recipient impacted you?
Receiving the scholarship allowed me to work at a non-profit focused on low-income individuals. Since I do not have a lot of family members in the legal field, I was able to gain more experience without the fear of financial hardship. Diversity scholarships help support law students to find what they want in the legal field without worrying about finances.

***Antonio Reza** received the Diversity Scholarship in 2023. He graduated from the Santa Clara University School of Law and passed the July 2023 California Bar Exam.*

What motivated you to study law?
I was motivated to study the law for a few reasons. I had seen first-hand how my family, community, and myself had been directly impacted by the system. I saw how the legal system needs some work and I had the audacity to set out and try to be one of the people to make a positive change. Additionally, I choose to study the law because the law is, as I would like to call it, the "rules of the game." When you know the rules of the game you can't be taken advantage of. Again, I have seen people get taken advantage of simply because they didn't know the law, didn't know how to get free legal help, or legal help was simply financially out of their reach. In the end, the overarching reason behind my motivation was to help people.

Where are you now in your legal education/career?
I just passed the bar exam!!! I am working at a small law firm in Burlingame, Goethals Legal, doing both criminal and civil.

What are your short-term and long-term plans and goals for your career?
Both a long and short-term goal of mine is to live a life of righteous fights. Long term, I want to give back to my community and potentially teach.

What does it mean to you to be a Diversity Scholarship recipient?
It means a lot to me. It shows me that people in the legal field actually care. There are many negative stereotypes in the legal industry about what a lawyer acts like, how they think, or who they are. A diversity scholarship proves those stereotypes wrong.

How has being a Diversity Scholarship recipient impacted you?
It impacted me immensely. I come from a humble background. During my time in college as well as in law school, I did not have a full-time job. Therefore, when taking time to study for the bar, it financially helped me. The bar exam cost just under $1,000 and the middle package that I bought for bar prep was $3,600. That $5,000 covered those fees and it truly helped.

What would you like ACCTLA members to know about diversity in law school and the legal profession?
I think that diversity in the legal profession is important. Our nation is diverse. Our clients are diverse. We should have a legal institution that reflects the population that we serve.

***Jaime Ruiz** received the received the Diversity Scholarship in 2022 and 2023.*

Hello, I'm Jaime Ruiz, and my journey into the realm of law is deeply personal and profoundly meaningful. As a first-generation graduate from University of the Pacific McGeorge School of Law, my path has been shaped by unyielding determination and a resolute belief in the transformative power of legal practice. My decision to pursue law was ignited by its profound ability to shape societal norms, standing not just as a profession but as a platform to champion justice, equality, and diversity. As part of a minority group, I'm driven by the desire to infuse much-needed diversity into the legal arena, recognizing the pivotal role of representation.

At my current role in a personal injury law firm, it's more than a job — it's a commitment to amplifying the voices of those who've endured various injuries. Advocating ceaselessly for plaintiffs, I ensure they attain equitable access to justice. This role resonates deeply with my core values, empowering me to effect substantial change in people's lives when they're most in need.

Looking ahead, I'm deeply passionate about forging connections with fellow minority law students. I recall the invaluable guidance from mentors at the onset of my legal journey. My aspiration is to pay this forward, extending a supportive hand to those navigating similar challenges, offering guidance, encouragement, and mentorship. My focus lies particularly in civil litigation, an arena where I foresee making a significant impact by advocating for justice on a broader scale.

In contemplating my future, I envision two equally compelling paths. One involves establishing my own law firm — a space crafted around principles of fairness, inclusivity, and client-centered advocacy. The alternative path entails collaboration with like-minded individuals, becoming a partner where shared values propel our collective influence within the legal landscape. As a scholar recognized by the ACCTLA, I was humbled by the acknowledgment received from its members. This recognition not only facilitated connections during the annual diversity scholarship meeting but also alleviated the substantial financial burden that accompanies law school — assisting with expenses such as books, meals and essentials. It's vital for ACCTLA members to comprehend that diversity in law school and the legal profession isn't just an option; it's a necessity.

As I embark on the next phase of this journey, I carry with me a fervent determination to pave the way for a legal profession that mirrors our society. It's not just a path I tread but a legacy I aim to leave — a legacy where diversity isn't a mere checkbox but an intrinsic and celebrated aspect of legal excellence. ◆

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Data Privacy for Lawyers

by Tiega-Noel Varlack

As a small business owner and attorney, I am charged with the duty of protecting my clients not only from cyber-attacks, but also from waiving privilege, attorney client work product protection and not running afoul of confidentiality rules.[1] However, it is not enough that I remain abreast of the law of client privacy, I have to make sure my staff, vendors and any contractors that I supervise know the law too.[2]

Hopefully, after reading this article you, too, will have a better grasp on your obligations as an attorney and supervisor, whether you run a law firm, litigation team, or fly solo.

But first, here's a refresher on some of the rules that an attorney must follow in collecting, storing, and disseminating client data:

ABA Model Rule 1.1:
Competence

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[3]

This requires lawyers to keep abreast of changes in technology and the risks associated with it.

Overview of Privacy Laws

As attorneys, we are aware of basic privacy laws that come up in our practice such as attorney-client privilege, HIPAA, GDPR (for my EU practitioners), or state and federal laws that protect client data such as the Graham Leech Bliley Act. However, most lawyers do not know how the Electronic Communications Privacy Act of 1986 affects their practice.[4]

The ECPA, when it passed, restricted government access to information on phones and this included electronic data. A lot has changed since 1986, and client data has become more complex. And to remind you what electronic data is, it is loosely defined as any transfer of signals of any nature.[5]

As an attorney charged with sharing client information to advocate and protect their position, the ECPA prohibits your intercepting others' data without their permission but it also prohibits you from assisting unauthorized parties in gaining access to your client's data. To avoid either scenario, it is best to be proactive.

Indeed, ABA Model Rule 1.15 Safekeeping Property provides that "(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property."[6] This requires lawyers to safely keep client property, including electronic communications.[7]

And the duty doesn't end when your representation stops. Attorneys hold a continuing ethical obligation to former clients. The rule of safekeeping emphasizes and restricts attorneys from using or revealing information related to the representation. This relates to technology as well.

In fact, the duty to safeguard confidential client information is a continuing one. Likewise, lawyers may not use confidential client information "if there is a reasonable prospect that doing so will adversely affect a material interest of the client" or the client so instructs.[8] It also requires that the lawyer "take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure" by the lawyer's subordinates.[9]

Law firms attract hackers because they contain sensitive information by virtue of the trade. Cyber-attacks are costly with the average cost of a data breach reaching $4.23 million in 2021.[10] This is why it is so important to protect your firm and your clients through careful email drafting.

First, before you start your client relationship, get permission to send your client electronic communications. Sit down and write a policy or hire someone competent to do so. This is an example of a little going a long way. Once you have your client sign off on an electronic communications consent form, your duty to protect hasn't ended. The next step is to make sure when you email your client you do the following:

• Don't email your client when you are distracted. This will increase the likelihood of your email being sent to the wrong person. Many of my clients have similar names, and with the stroke of a keyboard, you can inadvertently send client communications to the wrong person.

Be wary of cc'ing your client on emails to opposing counsel. It is far too easy for either side to hit 'reply all' thereby potentially waiving privilege and potentially your work product protections. The better practice is to forward both your client and staff emails that you have already sent so the only person they can reply to is you!

• You also want to avoid sending very sensitive information in an unencrypted email. Although most states don't require it, it is better to encrypt sensitive information and even the model rules embrace it.[11] Further, be sure to send the password in a separate email after you confirm your client's receipt of the information.

• Texting while driving isn't only illegal in most states, it also increases the risk of you again releasing client data to the wrong number. The safer bet is to not text while distracted or just pick up the phone and use the speaker function.

If you follow these simple tips, you are a step closer to upholding your ethical duties, but you must never forget your duty to supervise.

What this means as a practical matter is that you are responsible for the attorneys you manage, your staff, and outside contractors.[12] You must not only ensure that they follow ethical rules and laws to protect client privacy in how to disseminate information but you must also make sure that they have safe storing practices as well. This especially applies to outside vendors that you may hire to review medical records and financial data.

Again, although "[a] lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has

undertaken reasonable efforts to prevent inadvertent or unauthorized access."[13] The "lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security."[14]

Attorneys also "must conduct periodic reviews and regularly monitor existing practices to determine if the client information is adequately secured and protected."[15]

Further, if a data breach occurs, the attorney has "a duty to notify clients of the data breach under Model Rule 1.4 in sufficient detail to keep clients 'reasonably informed' and with an explanation 'to the extent necessary to permit the client to make informed decisions regarding the representation.'"[16]

Lawyers have a duty to train junior lawyers, staff and contractors on the requirements of confidentiality.[17] This means, lawyers must take the time out to train first on confidentiality and have everyone that they supervise, including administrators, sign a confidentiality agreement. That way, from the outset, the lawyer has explained in writing what the expectations for safeguarding information comprise.[18] Secondly, the lawyer must train on attorney client privilege and work product. But these training courses must be vigorous and contain real-world examples that non-lawyers can understand because those are the people who will be taking in your client's data and sharing it.

Not only should real-world examples of what breaches of our duties look like be taught, the lawyer also needs to go over consequences for non-compliance. The attorney must also make sure staff knows who the client is. Often times well-meaning family members and friends want to be a part of the intake process and meetings but staff must be reminded of how their participation effects confidentiality. This training must be ongoing.[19]

In addition to that, attorneys should adopt and share the firm's data use policy to avoid staff using information in the wrong way; and this applies to information gained both in and out of the office, especially on company cell phones. Lastly ongoing security assessment can assist you in making sure that you are always protecting privacy. There is an old saying that knowledge is nine tenths of the law. ◆

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[1] ABA Model Rule 1.6.

[2] *See id.*

[3] ABA Model Rule 1.1.

[4] 18 U.S.C.A. §2510 (West).

[5] The Honorable Thomas D. Horne, *Electronic Data: A Commentary on the Law in Virginia in 2007*, 42 U. Rich. L. Rev. 355, 356–57 (2007). "Electronic data includes information stored in electronic form that can be produced or restored through the application of programs or software specifically designed to input, store, transmit, interpret, and reproduce information or data in either electronic or print media."

[6] ABA Model Rule 1.15.

[7] *Id.*

[8] ABA Op. 477R (2017).

[9] At least one state bar is providing its members discounted encryption software. "Reasonable efforts" to Protect Client Information from Security Risks, Wyoming Ethics Help Blog (Nov. 29, 2018), https://www.wyomingbar.org/reasonable-efforts-protect-client-information-cybersecurity-risks/.

[10] *See generally* §28:54. Use of e-mail, Prof. Resp. Crim. Def. Prac. §28:54 (4th ed.)

[11] §28:54. Use of e-mail, Prof. Resp. Crim. Def. Prac. §28:54 (4th ed.) («However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.»).

[12] ABA Model Rules, 5.1, 5.2, and 5.3.

[13] §28:54. Use of e-mail, Prof. Resp. Crim. Def. Prac. §28:54 (4th ed.).

[14] §28:54. Use of e-mail, Prof. Resp. Crim. Def. Prac. §28:54 (4th ed.).

[15] *Id.*

[16] *Id.*; ABA Op. 95-398 (a law firm may allow a computer maintenance company or other computer service provider access to client files but must make reasonable efforts to ensure that the contractor will not disclose the contents of files).

[17] RPC 5.1; Restatement Third, The Law Governing Lawyers §60, Comment d (2000).

[18] §28:57. Duty to train subordinates on protecting confidentiality, Prof. Resp. Crim. Def. Prac. §28:57 (4th ed.)

[19] Rule 5.3: Responsibilities Regarding Nonlawyer Assistants.

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SB 365 Signed!

A Consumer Victory Over a Top Chamber "Kill" Bill

by Saveena Takhar
Consumer Attorneys of California Senior Legislative Counsel

Consumer Attorneys of California is thrilled to report that our co-sponsored bill Senate Bill 365 (Wiener) was signed by Gov. Newsom over strong objections by the business community. SB 365, effective January 1, 2024, will prevent powerful corporations from delaying and denying justice for workers and consumers in cases where a court rules either that a company's arbitration agreement is invalid or that a signed agreement does not exist. CAOC joined with co-sponsors California Attorney General Rob Bonta and the California Employment Lawyers Association to get this highly contested bill across the finish line. Current law allows corporate defendants to stay the worker's or consumer's case by simply filing an appeal. SB 365 instead grants the judge discretion to determine whether such a case can move forward if a company files an appeal, instead of automatically staying the case in all instances.

When a court rules that a company's arbitration agreement with a victim is invalid, or that a signed agreement does not exist, too often the corporation will file a frivolous appeal to delay the victim's case — sometimes for years on end. Existing law gives the defendant corporation the right to an interlocutory appeal when a court denies the defendant's petition to compel a case to private arbitration. (CCP §1294(a).) Powerful corporations routinely exercise this right, regardless of the merits of the case, in order to obtain the automatic stay while the appeal is heard – during which time important documents disappear, key witnesses move away and witnesses' memories fade.

> The California Chamber of Commerce fiercely opposed SB 365 and named this bill a "job killer," which places it on the list of their top kill bills for the year.

SB 365 amends Code of Civil Procedure §1294 to establish that an appeal of a court›s decision denying a corporation›s motion to compel arbitration will not automatically stay the consumer›s or worker›s court proceedings in the trial court while the appeal is pending, allowing the judge discretion to determine if the case can move forward while the appeal is being considered.

The California Chamber of Commerce fiercely opposed SB 365 and named this bill a "job killer," which places it on the list of their top kill bills for the year. This "job killer" title carries weight in Sacramento among moderate Democrats, as the Chamber strategically uses this title to stop important legislation from moving forward. In 2023, the Chamber identified 19 job killers, and only 7 of those 19 made it to the Governor. Three were signed into law and four were vetoed. SB 365 was one of the three bills that were enacted into law despite the Chamber's best efforts to prevent their passage.

In late June, the Supreme Court of the United States came down with a pro-arbitration decision in *Coinbase v. Bielski* resolving a split in federal law on this very issue: whether an appeal of a denied motion to compel arbitration stays the underlying case. In a 5-4 decision, SCOTUS sided in favor of arbitration, finding that an appeal does automatically stay the case. Conservative Justice Brett Kavanaugh wrote the ruling and specifically cautioned about the risk of allowing trial courts to proceed while the arbitration question plays out on appeal, saying such a scenario could cause the benefits of arbitration, such as efficiency and cost savings, to be "irretrievably lost — even if the court of appeals later concluded that the case actually had belonged in arbitration all along." Liberal Justice Ketanji Brown Jackson, in the dissenting opinion, said the ruling invented a new rule "perpetually favoring" the party seeking arbitration. ▶

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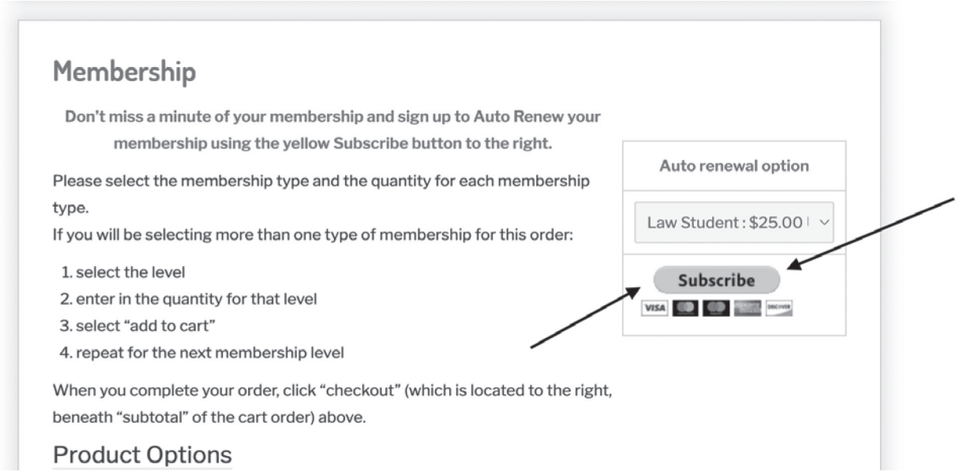

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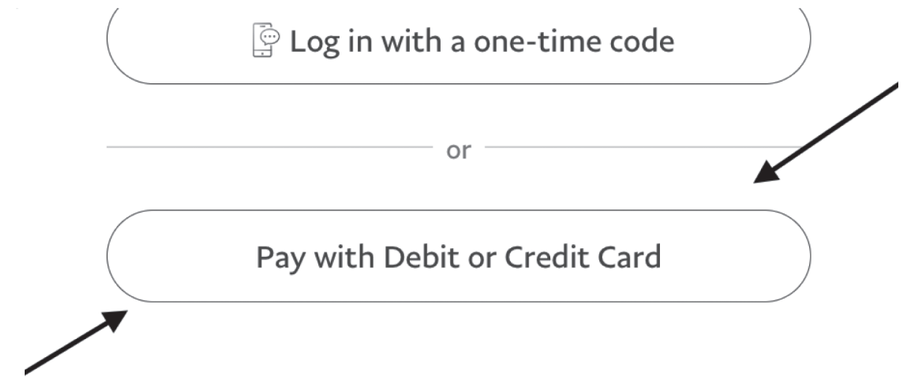

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Mariana Harris
Executive Director

Despite this negative development in the federal law, we continued our efforts on SB 365, as now that justice will unfortunately be delayed on the federal level, it is that much more important that California acts to curb abuses in state courts. Further, *Coinbase* decided an issue of federal civil procedure, not applicable in California courts. The law has long held that states can have their own distinct procedural laws regarding arbitration in their state courts. In fact, California enacted the California Arbitration Act in 1961 to do just that, and that law has not been preempted by the Federal Arbitration Act.

The Chamber's efforts to stop SB 365 included heavy lobbying on the Assembly floor during the last few weeks of session. As we worked with author Senator Scott Wiener and our co-sponsors to confirm votes in favor of SB 365, the Chamber attempted to peel off supporters by targeting moderate Democrats. The Chamber argued that this bill discriminates against arbitration by requiring a corporation to continue in court while an appeal is pending (even though consumers must continue in arbitration and can only file an appeal regarding the proper venue when the arbitration concludes). At the 11th hour, there were even arguments that the bill should have been limited to the most egregious of circumstances when no arbitration agreement was ever signed, gutting protections for all other cases where agreements were invalid for other reasons. These suggestions were never presented as amendments at any point in the legislative process. Requests for written proposals were declined.

Our CAOC team worked to counter these arguments, urging the passage of the bill and highlighting how the current process prevents justice. For example, workers seeking justice from Tesla's racial discrimination faced five years of delay, women whose eggs and embryos were destroyed due to a tank failure could not recover and continue to pursue their fertility treatments, elders who were neglected or abused cannot receive the care they need, and even our state enforcement attorneys like the Attorney General and city attorneys are delayed by these same tactics.

Ultimately, the Assembly voted to pass the bill with 47 votes in favor, 22 no votes and 11 abstaining. Of the 62 Democrats, 5 voted no and 10 abstained. In addition to the strong authorship of Senator Wiener, we thank Assemblymember Diane Papan for helping secure passage by serving as the Assembly bill jockey. We also thank attorneys in the legislature who spoke in favor of the bill, such as Assemblymembers Matt Haney, Damon Connolly, Ash Kalra and Pilar Schiavo, by emphasizing the importance of this legislation and dispelling the counter-arguments. CAOC President Greg Rizio, Past President Niall McCarthy and Board Member Sarah London were key to the success of SB 365. Lastly, Gov. Newsom's signature on SB 365 allowed us to finally cross the finish line and enact this important legislation into law. ◆

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— Calendar of Events —

Thursday, January 18, 2024
Judges' Night Gala
Scottish Rite Center, Oakland

Wednesday, January 24
Tort & Trial
Zoom

Thursday, May 16
Spring Social
Trader Vic's, Emeryville

Thursday, October 3
Fall Social
Lafayette Park Hotel

If you have any questions, or would like to sign up for any of these events, please contact Mariana Harris at ACCTrialLawyers@gmail.com.

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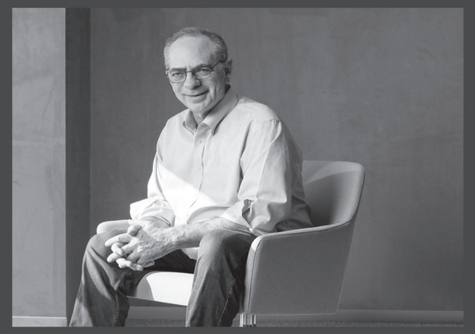

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MEMBER news

John Doe v. Tracy Unified School District, et al.
Settlement: $17,500,000

On April 21, 2021, an 18-year-old Tracy High School boy was allowed to wrestle in a wrestling meet against another high school, although he had suffered a head injury two days earlier in the school wrestling practice. He was absent from school the next two days. Two days after the practice injury, he was allowed to wrestle in a school-sponsored match with another high school. In the wrestling match, his head was slammed to the mat, causing him to subsequently lose consciousness. The plaintiff contended the school did not adhere to state law and school policies for concussion protocol and allowed him to wrestle when he was ineligible and had a previous concussion. There was a delay in calling 911 for an ambulance, which the plaintiff contended caused further brain damage.

Plaintiff's attorneys contended that the school district was liable for negligent supervision of the school's wrestling coaches and for failure to follow mandatory concussion-related laws for schools. The school district contended there was no concussion in the earlier wrestling practice and that the claim was barred by the assumption of the risk doctrine.

The high school student suffered a large left intraparenchymal hemorrhage (IPH) with brain compression and underwent a left hemicraniectomy and evacuation of the IPH. He was unable to communicate for months and recently has been able to communicate with difficulty. With increased therapy, he is slowly improving but will never make a full recovery.

Plaintiff's Attorneys
R. Lewis Van Blois
Darren Van Blois

Thelwell v. AmGuard Insurance Company
Arbitration Award: $996,677

On November 25, 2019, the plaintiff was working as a roadway striper on Nelson Avenue in Concord with his brother. They had closed one lane of the four-lane roadway with signs and cones. After completion of the work, the plaintiff was in the process of removing cones when he was struck by a car traveling approximately 40 mph. The plaintiff was thrown up on the hood, cracking the windshield and thrown to the grass on the side of the road. The plaintiff was diagnosed with a blunt head injury with left side pain and abrasions. The driver had a minimum insurance policy of $15,000, which was paid.

The plaintiff had an insurance policy with coverage of $1 million with AmGuard Insurance. An underinsurance claim was made and the insurance company delayed responding to the demand for arbitration. The plaintiff provided medical records and made a policy limits demand. The insurance company contended that the plaintiff did not suffer a traumatic brain injury and was not severely injured and made a good recovery. Initial offers were well under $100,000. After multiple requests, the insurance company lawyers agreed to the appointment of Retired Judge Bonnie Sabraw as the neutral arbitrator.

A one-day arbitration was held on March 21, 2023. The insurance company lawyers Lewis, Brisbois, Bisgaard & Smith contended that the plaintiff made no effort to obtain treatment for his alleged concussion and that he had made an excellent overall recovery. He underwent neuropsychological testing by the defense clinical psychologist Dr. David Pingitore, who opined that he had not suffered a TBI injury. The defense medical experts testified that the plaintiff had made an excellent recovery. The plaintiff's treating physicians and plaintiff's medical experts, Dr. Randall C. Epperson and Dr. Jonathan Mueller, opined that the plaintiff suffered a TBI with post-concussive headaches, depression, PTSD and memory and attention deficits.

A one-day long arbitration occurred and closing arbitration briefs were requested by the arbitrator. The plaintiff requested an award of the full insurance policy limits. The defense lawyers requested an award of $150,000.

The final arbitration award was for total damages of $996,677 less the $15,000 paid by the driver's minimum insurance policy.

Plaintiff's Attorney
R. Lewis Van Blois ◆

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