VENTURA COUNTY BAR ASSOCIATION Est. 1928

CITATIONS

MAY – TWO THOUSAND TWENTY ONE

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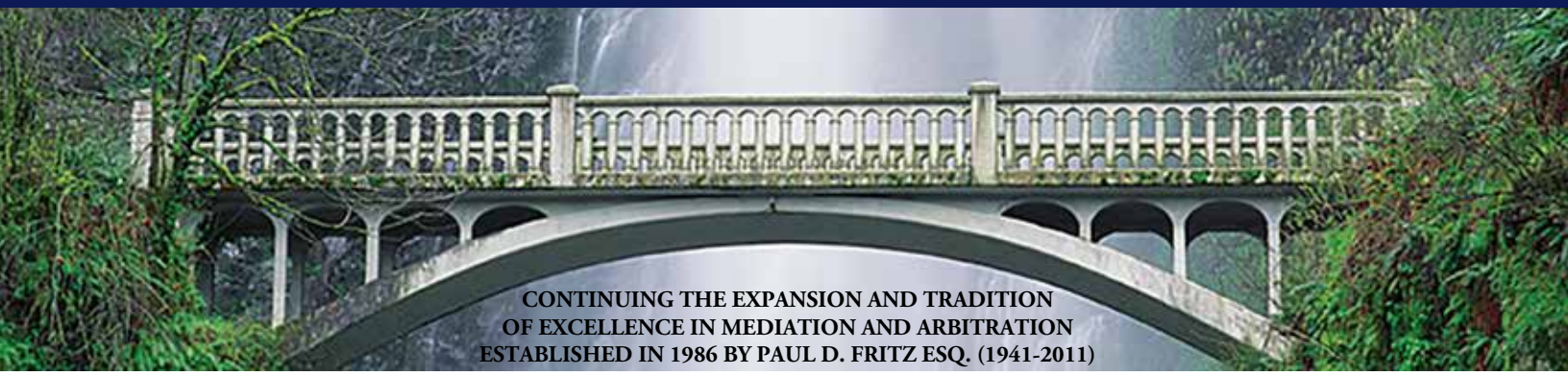

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PRESIDENT'S MESSAGE

by Marc D. Anderson

Where was I? Oh yes, sailing the remote Keeweenaw Peninsula of Lake Superior with my father after taking the July 1994 Bar Examination. Wonderful memories. The next year-and-a-half was a bit tougher for me.

When I returned to California, I couch-surfed with patient friends in west Los Angeles during those interminable months I was waiting for bar results. Time slowed to a crawl. My few possessions were in the trunk of my 1992 Pontiac Grand Am – my dad's former company car. Everyone I knew seemed to have it better than me, but it didn't take much. Having a job, a bed, and a consistent mailing address were all that was needed.

It was the first September in nineteen years that I wasn't sitting in a classroom. I felt untethered, out-of-place. With the help of my friend **Greg Johnson**, who was in his third year at Pepperdine, I found work as a law clerk with a sole practitioner in Brentwood.

Soon, my new girlfriend, Sallie Mae, began writing me monthly, reminding me of my financial obligations. She conveniently provided return envelopes to encourage me to keep up the correspondence. We were pen pals for years and years.

To ensure I passed the bar, I bought a new Honda Civic just three weeks before bar results were announced. I wasn't making the best decisions.

And, I wasn't sure I had passed the bar. Nothing from the exam stood out to give me doubt, but I didn't have the certainty some people did. I had done everything the exam prep people told me to do – attending classes in west Los Angeles, reviewing outlines, taking practice tests, spending hours studying at the Santa Monica library, and eating too many hot dogs from the cart right outside the library. I had two good study buddies from law school. We went to class together and got together outside of class to support each other. I didn't see many other people in those weeks between graduation and the bar examination. I was a hermit who could recite the seven intentional torts and their elements.

Finally, it was Friday, Nov. 18, 1994. The day had come! Bar results! Back then, you had to call the State Bar office, say your name, and a mysterious stranger on the other end of the line would either say, "that name appears on the pass list" or "that name does not appear on the pass list." If you didn't want the hassle of the phone call, you could just wait another five to seven days and get your result in the mail.

I chose to make the phone call. So did everyone else. I went to a friend's house in Calabasas, had a nice dinner, and, precisely at 6:00 p.m., I began dialing. So did everyone else. It was after 7:00 p.m. when I finally got through. "Marc Donald Anderson," I said. There was a pause and the rustling of paper. "That name appears on the pass list." Click. No chit chat or small talk. No "congratulations!" Just click. I didn't mind. I was ecstatic! I called my study partners who had also passed and then I called my parents who were full of congratulations.

The next day I went rock climbing in Joshua Tree National Monument with close friends who had also passed. We were young, happy, and full of hopes and dreams. It was a great weekend.

But things didn't change much in those months after I became a lawyer. I had essentially the same job with the sole practitioner in Brentwood. I was thankful for the work, but it wasn't where I wanted to be. I was having no luck finding a new job. Somebody stole my Honda. I went without a car for months before buying a 1972 VW Bus. I had stalled out.

Then, everything turned around. On the side, I was handling a family law matter for a friend. My opposing counsel was a law school classmate. She saw I was dissatisfied and stuck. She offered to connect me with an experienced lawyer in her Fegen Suite who was looking for an associate.

That is how I met and came to work for Ronald Goldman. My mentor. A lawyer's lawyer. Goldman had been practicing since 1963. He was a strong advocate with an encyclopedic knowledge of the law.

Goldman and his partner had represented Charles Manson family member Linda Kasabian in the Tate/LaBianca murders and had secured her immunity in exchange for her cooperation with the prosecution. He introduced me to Manson's lawyer, Irving Kanarek, on the steps of the Los Angeles Superior Court. Goldman was a pioneer of aviation law and had represented plaintiffs in airline crashes since 1969. As a favor he had represented Melvin Belli in a vet malpractice lawsuit involving the death of Melvin's dog – surely one of the first cases of its kind! He had several published appellate opinions on cutting-edge legal theories.

Goldman took me in and taught me how to be a lawyer. He taught me how to write, how to take a deposition, how to argue a motion and how to think like a lawyer. He was demanding, he had high expectations, and he pushed me, but he was also patient and understanding. He showed me the beauty and the power of the law.

Goldman is now the senior trial attorney for Baum, Hedlund, Aristei & Goldman in Los Angeles. He has been practicing law for nearly 60 years. Several years ago, I had the honor of inviting him to speak to the Ventura County Trial Lawyers Association. To this day, I order my martini, "Beefeater, up with a twist" because that's how Goldman did it.

I am the lawyer I am today because of Goldman. He was my mentor, but there are so many people who helped me at different points of my life. Just writing this article I remembered Karen and Jon, who got me through the bar exam; Johnson, who got me my first job; Curtis and Faith, who provided dinner and a phone and were ready to support me no matter the result; and Laurel who introduced me to Goldman.

Think of those people in your life who have helped you become who you are and reach out to them. Email me your memories of them or of your mentor; I would love to read them.

Marc D. Anderson *is a lawyer with Hiepler & Hiepler, APC, in Oxnard. He represents plaintiffs in personal injury and wrongful death cases.*

HAVE YOU HEARD?

A former mayor of Ojai, attorney **Paul Blatz,** passed away in late March. He is survived by his son **Ryan Blatz**, who will be taking over his father's law practice.

Valarie Grossman has returned to Ventura, where she will be practicing with Hathaway Perrett Webster Powers Chrisman & Gutierrez. Grossman and can be reached at 805-644-7111.

Next time you are in Winsted, Connecticut, be sure to visit the American Museum of Tort Law, founded by Ralph Nader. There is even a gift shop, featuring Nader's *Unsafe at any Speed*, as well as shirts, caps, and posters featuring cartoon renderings of the ruling in *Daubert v. Merrell Dow* and a couple of other cases.

Laura Withrow has opened her own law firm, Withrow Employment Law, in Thousand Oaks. Laura is available at 805-630-8825 or laura @ withrowemploymentlaw. com.

Stay at home orders paid off for Adee and Ferguson Case Orr Paterson partner **Corey Donaldson**, and big brother Ethan. They welcomed the newest member of their family, Connor Samuel, last month.

ALTERNATIVE DISPUTE RESOLUTION SECTION

On March 31, the Ventura County Bar Association's Alternative Dispute Resolution Section convened with chair **David Karen** moderating the program entitled "Virtual *IS* Reality" with guest speaker Floyd Siegal of Judicate West. Floyd has now mediated over 200 virtual matters via Zoom over the pandemic, sharing his insights and thoughts regarding the efficacy and certainty that Zoom is here to stay.

The program addressed some of the legal issues that have surfaced regarding settlement in the recent months, most notably the change made to Code of Civil Procedure section 664.6 allowing the court to enforce settlement terms where *just the attorney* signs off on settlement terms, even without the parties' signature. While the statute only applies to pending litigated matters in which the court already has jurisdiction, it now allows counsel the liberty of agreeing to enforceable settlement terms without the client's autograph.

Another notable discussion addressed the recently published Court of Appeal matter entitled *Mostafavi Law Group v. Larry Rabineau, APC* (2021)61 Cal. App. 5th 614 that case involved the enforceability of a Code of Civil Procedure section 998 offer of compromise that failed to include an acceptance clause as required by the statute. The 998 offer was made and the accepting plaintiff sought to have a judgment entered, but the offering defendant hadn't included the required acceptance language, objecting to the entry of judgment. The trial court agreed and the court of appeal affirmed, concluding no judgment could be entered if the offer didn't meet the statute's delineated prerequisites exactly.

Finally, the program touched on some of the Zoom related considerations to contemplate while mediating virtually. The takeaway? Zoom is here to stay.

DOCUMENTING FEE CLAIMS: HEED WHAT YOU KNOW

by Wendy Lascher

Time-keeping is a bother, but it matters, even if you are working for a flat or contingent fee.

When a grieving family fired their attorney after a month, the attorney refused to return the clients' case file, but demanded $308,000 in attorney fees. The attorney provided "no benefit" to the clients, yet the trial court granted him a $17,325 lien as "a discretionary act of grace" based on termination language in the fee agreement. (*Taylor v. County of Los Angeles* (2020) 50 Cal.App.5th 205, 207, 212.)

It is disturbing that an attorney who provided no benefit recovered anything at all, but what makes *Taylor* instructive is its commentary on documenting fee claims.

Although the Evidence Code does not bar lawyers from testifying about their services from personal knowledge, "contemporaneous time records are the best evidence of lawyers' hourly work. They are not indispensable, but **they eclipse other proofs**. Lawyers know this better than anyone. They might heed what they know." (*Taylor, supra*, 50 Cal.App.5th at 212-213, emphasis added.)

Whether evidence "is admissible is different than whether it is good." (*Taylor, supra*, 50 Cal.App.5th at p. 213.) Admissible evidence is subject to risks of insincerity (witness bias), impaired perception, memory defects, and faulty narration (just not a good witness). Attorneys testifying about how much time they spent "can be prone to bias when their own paychecks are at stake." (*Id.* at pp. 213-214.) "Wise lawyers keep accurate time records" because, "unless you kept detailed contemporaneous records according to some reliable method, common experience will lead observers to regard your tardy and self-serving six-minute claims as largely fictional." (*Id.* at p. 214.)

People paying legal bills "are entitled to care about accuracy. At hundreds of dollars an hour, minutes here and minutes there add up. Accuracy is a professional virtue and a systemic concern. The public is entitled to confidence the justice system is just as careful about getting legal bills right as it is about getting everything else right." (50 Cal.App.5th at p. 214.)

Wendy Lascher *is a partner at the Ventura office of Ferguson Case Orr Paterson, LLP. She is a State Bar-certified specialist in appellate law, and co-editor of CITATIONS.*

SOCIAL MEDIA, CANCEL CULTURE AND THE FIRST AMENDMENT

by Mari K. Rockenstein

The great deplatforming of January 2021 will likely be remembered as the turning point in the battle for control over digital speech. Within days of the attack on the Capitol, former President Donald Trump was banned or suspended by Twitter, Facebook, Instagram, Snapchat, Twitch and YouTube. Stripe stopped processing payments for his campaign's website. Reddit banned the r/ DonaldTrump subreddit and Discord removed the server connected to the pro-Trump group TheDonald. win. Shopify also took down the online stores for both for the Trump campaign and the Trump Organization.

Many of Trump's most ardent followers met a similar fate. After banning Trump from its platform, Twitter suspended more than 70,000 accounts associated with QAnon and the Capitol attacks. After his ban on Twitter, many assumed that Trump would simply pivot to Parler, the social network mainly catering to Trump supporters, but Parler went dark when both Apple and Google removed the app from their stores and Amazon Web Services declared that it would no longer host it on its cloud computing services.

Banning or suspending, also known as deplatforming, is not unprecedented, but the increasing rise of the practice has led conservatives to lambast "cancel culture." The implications of deplatforming for free speech, however, have worried advocates on both sides of the issue. Social media critics have argued unsuccessfully for years that internet sites violate their First Amendment rights, Section 230 of the Communications Decency Act and anti-discrimination laws when site owners ban or suspend them from social media websites.

The U.S. Supreme Court has repeatedly ruled that a private entity, such as Facebook or Twitter, is only subject to the First Amendment when it functions as a state actor and performs a traditional exclusive public function. As recently as 2019, the court analyzed whether a private operator of a public access channel functioned as a state actor and was subject to the First Amendment.

In *Manhattan Community Access Corporation v. Halleck* (2019), 139 S. Ct. 1921, the government handed over a public access cable channel to a private entity to operate. Writing for the majority, Justice Brett Kavanaugh stated that providing a forum for public speech is not an activity exclusive to governmental entities; therefore, a private entity does not transform into a state actor under the First Amendment just because it provides a forum for public discussion. After all, Kavanaugh argued, private property owners and private lessees often open their property for speech, grocery stores put up community bulletin boards and comedy clubs host open mic nights.

Justice Brett Kavanaugh stated that providing a forum for public speech is not an activity exclusive to governmental entities; therefore, a private entity does not transform into a state actor under the First Amendment just because it provides a forum for public discussion.

Another challenge to private entity censorship is whether federal law requires social media companies to be neutral in moderating content on their sites. CDA section 230 protects websites and web users from third-party content published on their sites. It also provides protection from liability for moderating content, including deleting posts or banning an individual for violating its terms and conditions. Many federal lawmakers claim that this immunity only applies to neutral public forums while others argue there is nothing in section 230 requiring a website to be neutral or public to obtain the benefits of the statute. In January 2020, then-presidential candidate Joe Biden called for section 230 to be revoked in its entirety, thus it will most likely be modified but how and when remains to be seen.

As Congress, the executive branch, and the Department of Justice debate deplatforming in the United States, world leaders from across the globe have condemned Twitter's suspension of Trump's account.

Although some welcomed the move, many — even critics of the former president — blasted the action as politically motivated and an infringement on free speech. A spokesman for German Chancellor Angela Merkel has stated that Twitter's decision to preemptively ban an elected president (rather than continue to flag specific problematic tweets as inaccurate) is "problematic" based on the "fundamental importance" of freedom of opinion. Her comments are echoed by a representative of the French government, Clement Beaune, who warned that "a digital oligarchy" constitutes a threat to democracy.

Conservatives, LGBQT+, and African-American Groups Alike Challenge Google/YouTube's Moderation of Uploaded Content

In addition to deplatforming, speech rights are at issue in a recent spate of cases challenging YouTube and its parent company Google's practice of moderating content on its site, claiming that the practice unfairly restricts marginalized groups' content. YouTube offers an optional opt-in setting called "Restricted Mode." Many libraries, universities and other public institutions, as well as a small percentage of YouTube users (presumably parents) screen out content flagged as age-restricted or "potentially adult" by opting in to Restricted Mode. YouTube additionally uses automated software to identify content as inappropriate for advertising, resulting in what critics deem "demonetization," arguably a form of censorship. YouTube says it does this pursuant to its terms of service with content providers in order to ensure that ads do not appear alongside videos with content that certain audiences might find objectionable.

This article was previously published in The Los Angeles Daily Journal.

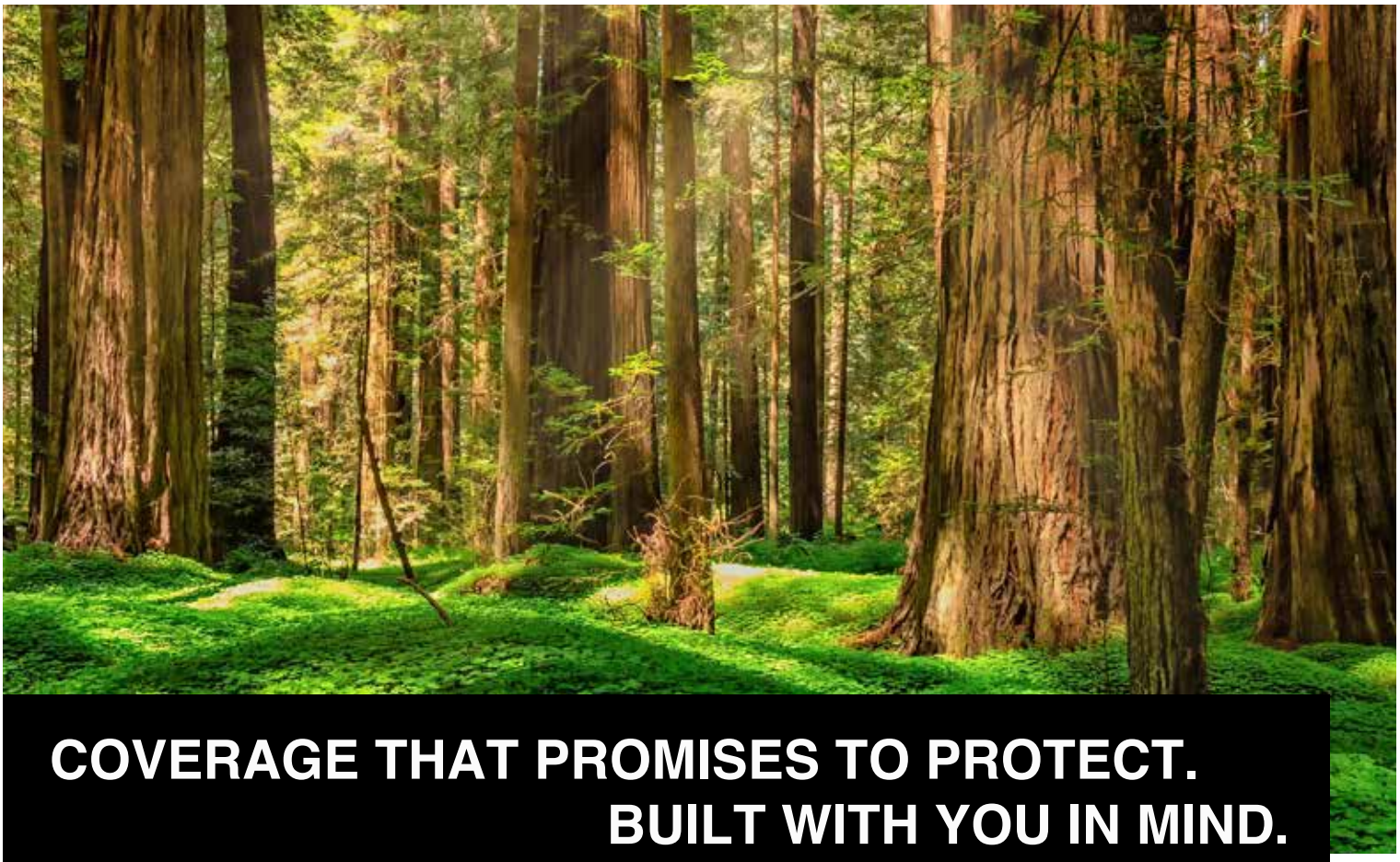
In 2020, the 9th U.S. Circuit Court of Appeals affirmed dismissal of a lawsuit brought by a conservative media company in *PragerU v. Google* (9th Cir. 2020) 951 F. 3d 991. PragerU alleged that YouTube's classification of some of its videos as "Restricted Content" and its demonetization of some of its videos constituted an attempt to silence conservative viewpoints and perspectives on public issues. An example of a restricted/demonetized video was one with the title, "Why Isn't Communism as Hated as Nazism?" PragerU argued that YouTube is a state actor because it performs a public function and sought to enjoin YouTube to declassify their videos as "Restricted Content." The court, however, ruled that while Google and YouTube might host speech, their platforms are private and not subject to the same First Amendment and civil rights constraints as a state actor.

Two other pending cases raise similar challenges. In *Divino Group LLC v. Google LLC,* 5:19-cv-04749 (N.D. Cal.), LGBTQ+ content creators filed a class action against YouTube and Google, claiming that the defendants' Restricted Mode discriminates against them by labeling their videos as shocking and sexually explicit. The *Divino* plaintiffs accused Google/YouTube of having a bias against those in the LGBTQ+ community who create and post video content or to whom the content is targeted.

Divino has been stayed pending the same court's ruling on a motion to dismiss a related class action, *Newman v Google,* 5:20-cv-04011 (N.D. Cal.). Newman was brought by African-American content creators, viewers and consumers who challenge Google's moderation of uploaded content, and who allege, like the plaintiffs in *PragerU* and *Divino*, that Google and YouTube excludes and/or wrongly demonetizes their videos either because of their membership in a protected class or alternatively, does so capriciously and arbitrarily. At issue are not only claims brought under the state and federal constitutions, but also alleged violations of the Lanham Act, California's Unruh Act, California's Unfair Competition Law, and breach of YouTube's terms of service. Finally, the Newman plaintiffs argue that section 230 is unconstitutional under the First and 14th Amendments; the United States has not yet determined whether it will intervene.

In the wake of these challenges, YouTube has acknowledged that Restricted Mode is "not perfect," and advises that it is seeking to address the concerns raised by plaintiffs, including declassifying some videos so that they are not excluded by viewers who opt-in to Restricted Mode.

Mari K. Rockenstein *is a faculty member in the MVS School of Business & Economics at California State University Channel Islands. She is a frequent commentator on legal issues for radio and television and is of counsel to the Camarillo-based law firm of Panda Kroll, Esq. & Associates.*



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NEED TO KNOW: VCBA FEE ARBITRATIONS

by Michael Christiano

One of 28 California county bar associations offering fee arbitration, Ventura County Bar Association's Attorney Client Relations Committee (the "Committee") receives and processes filings by both clients and attorneys over legal fees. VCBA assigns an arbitrator to hear clients' objections to the legal fees they have been charged or they have paid. Given this function, the Committee is sometimes referred to as the "Fee Arbitration Committee" or the "Mandatory Fee Arbitration [MFA] Program."

The demand for fee dispute services during COVID year 2020 was large enough that VCBA had to curtail the program during the last quarter to clear up a backlog of already-filed cases awaiting resolution. We gratefully thank our colleagues in the legal community who came forward to help with this housekeeping effort.

VCBA reopened the fee arbitration program as of March 18.

When is fee arbitration required?

Business and Professions Code section 6200, subdivision (c) makes fee arbitration voluntary for a client, unless the parties have previously agreed in writing to submit their fee disputes to arbitration. Fee arbitration is mandatory for an attorney if commenced by a client. An attorney may not sue a client for fees without first giving the client "Notice of Client's Right to Arbitration" using a State Bar approved form.

What kinds of disputes does the Committee resolve?

The Committee deals only with disputes that are really over fees. Typical disputes arbitrated by the Committee include:

• Claims that the fees charged or billed were unfair or excessive;

• Claims that the attorney did not perform as client instructed, making all fees void;

• Claims the client should not have to pay because the results were unfavorable and the attorney did not perform the work properly;

Not every client dispute comes within the Committee's scope. For example, the Committee recently returned filings to clients complaining about distribution of fees per court order. By statute, fee arbitration does not apply to "claims for affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct," but malpractice and misconduct evidence is admissible to the extent it bears on the reasonableness of the fees charged. (Bus. and Prof. Code, §§ 6200, subd. (b)(2), 6203, subd. (a).)

How the program works

Rules of procedure and arbitration forms are available through this link on the VCBA website: *https://tinyurl.com/x9kfzns5*.

When a demand for arbitration is filed, VCBA staffer Nadia Avila arranges arbitrators and panel participants, maintains the file, corresponds with each party and arbitrator, collects fees and maintains statistics and a calendar of arbitrations scheduled.

Where the amount in dispute is $10,000 or less, the case will be heard by a single arbitrator. Three-arbitrator panels, consisting of two attorneys and a trained non-attorney volunteer from the community, are convened for disputes involving more than $10,000.

Clients are asked to collect and review every invoice from the attorney, note objections to specific items in writing, and send their objections to VCBA and to the attorney. The arbitrator(s) convene a hearing where the parties may present exhibits and testimony. Due to COVID-19 distancing requirements, our arbitrations are presently conducted over Zoom.

Arbitration awards are in writing. VCBA serves them on the client and attorney. The arbitrator will rule on the reasonableness of the fees being disputed, based on the terms of the fee agreement, contract law, the State Bar's Rules of Professional Conduct, and the Business and Professions Code. The arbitrator(s) will recalculate the fees according to the evidence and determine if fees must be paid by the client or forgiven by the attorney.

A fee arbitration award is not binding unless all parties agree in writing after the fee dispute arises but before taking evidence at the hearing. Business and Professions Code section 6204 provides that either party may request trial de novo within 30 days after service of a non-binding award unless the party has willfully failed to appear at the hearing.

Preserving and presenting evidence

Perhaps understandably, clients often fail to present sufficient evidence to determine the accuracy or credibility of their complaints. A client should offer the fee agreement as well as all of the attorney's invoices, paid or not.

On the other hand, perhaps because clients sometimes do a sloppy job of presentation, attorneys too often take a laissez faire attitude rather than adequately advocating for themselves and offering specific evidence of all the work they did. At the arbitration hearing the attorney will be required to defend each of the objections, stating how or where the objection is wrong. Too often an attorney will demonstrate a negative attitude and simply take a stance without a defense.

If I were in your shoes, I would bring to the hearing every item I had written, talked about, and filed for a specific month, and attach all to that monthly invoice. More is better than none. At a minimum, attorneys should offer invoices showing the date the work was performed, initials of the staff member who performed the work, hourly rate, and time consumed, even in cases with flat fee or contingent fee agreements. *(On the importance of attorney time-keeping records, see "Documenting Fee Claims: Heed What You Know," page 5)*

More often than not, when the attorney takes a positive and proactive role in demonstrating the effort they expended on the client's behalf, it's an eye-opener for the client.

Fees and volunteers help alleviate the cost

Keeping the parties informed and arranging for and organizing arbitrators has been costly and time consuming for VCBA staff and for local attorneys who act as fee arbitrators.

Using trained community volunteers as arbitrators has eased some of the strain.

The dollar costs are partly absorbed by the VCBA budget; filing fees also help. Current fees are:

• $50 for disputes up to and including $500.

• $75 for disputes over $500 and up to and including $1,000.

• $100 for disputes over $1,000 and up to and including $5,000.

• $250 for disputes over $5,000 and up to and including $10,000.

• $750 for disputes over $10,000.

The fee waiver in effect before March 18 has been terminated; filing fees may no longer be waived.

Volunteer arbitrators much needed

The list of trained arbitration participants has fallen significantly from past years. Whether the filing requires a panel or a sole arbitrator, VCBA needs more volunteers to fill those positions. Business and Professions Code section 6200, subdivision (f) provides fee arbitrators and the bar association "the same immunity which attaches in judicial proceedings."

Michael Christiano *chairs VCBA's Attorney-Client Relations Committee. After an Army career, he practiced family law for 22 years before retiring, serving as a judge pro tem during his last five years of practice. Christiano is VCBA's default arbitrator when no others are available.*

VCBA VOLUNTEER ARBITRATORS

Andrew Covner
Andy Viets
Brent Rosenbaum
Eva Goldfield
Gilbert Good
Jean Getchell
Jeff Rishwain
Matthew Haffner
Michael Christiano
Michael McQueen
Randy Andell
Ricarda Bennett
Vivien Cienfuegos

CITING REVIEW-GRANTED CASES

Effective April 21, 2021, by administrative order of the Supreme Court, the comment to rule 8.1115 has been amended. The notice posted on the Supreme Court's web page states:

In the future, when the court grants review of a published Court of Appeal decision, that decision's treatment of any issue that is the subject of a split of authority among the Courts of Appeal will retain limited precedential status during review—allowing a superior court to choose to follow the review-granted decision's approach to the issue. The order also clarifies that when the court grants review of a published Court of Appeal decision, then "vacates" the decision below and transfers the cause back to the Court of Appeal for reconsideration, the Court of Appeal's decision will be rendered either "depublished" or "not citable," unless the Supreme Court orders otherwise.

Here is the notice, which includes a link to the rule: *https://www.courts.ca.gov/supremecourt.htm*

You can view the mocked-up version of the rule here: *https://www.courts.ca.gov/documents/2021-04-21-rules-effective-2021-04-21.pdf*

THE PASSING OF TWO FAMILY LAW FRIENDS: JUDITH RHODES AND PAUL BLATZ

by Gregory W. Herring

Sadly, April saw two of our accomplished family law friends pass.

Ventura County Superior Court Commissioner **Judith Dahlman Rhodes** was an amazing woman of tremendous and meaningful professional accomplishment. I met her when she was an associate of AAML Fellow, **Bobette Fleischman**. Under Fleischman's tutelage, Judy gained her Legal Specialization in Family Law from the Board of Legal Specialization of the State Bar of California shortly after I gained mine in 2004. Judy later broke off and created her own office in east Ventura County.

We often found ourselves on the opposite sides of cases, but we always worked respectfully in relation to each other, and toward our respective clients' best interests. I always appreciated her positive outlook and easy smile. I called her "my sister," explaining that her bright, generous, and open manner reminded me of my awesome sister's. She readily accepted that (and my hugs).

Our professional relationship deepened shortly after I founded Herring Law Group. After my prior co-representation of Paul Anka in an initial round of family law litigation, she helped Anka hold his and his child's gains going forward. When the case flared again in 2016, she and Anka called me back in. With HLG attorney **Ruston Imming** at my side, we fought and won an intense custody battle against certain "controversial but excellent" Los Angeles litigators. Imming and I provided our extensive trial experience, but it was Judy's unmatched patience and ability to direct Anka toward his amazing closing testimony that pushed our team to victory.

In 2018, Judy achieved her long-held goal of becoming a Family Law Commissioner. Of course I attended her swearing-in ceremony, and of course I was there in court on her first day officially in robes. When she saw me in the courtroom that morning, she called me to the bench for a private conversation. At my inquiry, she confessed her nervousness, but she then proceeded to take charge of the courtroom – of course she "did great!"

Only shortly thereafter, Judy became afflicted with a particularly devastating form of ALS, Bulbar Palsy. HLG is proud to have joined many in our family law community who donated toward her experimental treatment. Hopefully others will still benefit from the related research. Consistent with Judy's commitment to children in distress, her family has asked that donations be made in her honor to CASA (Court Appointed Special Advocates for children), which recruits, screens, trains, and supports volunteers to advocate for the best interests of abused and neglected children in courtrooms and communities (*casaofventuracounty.org*).

Former Ojai Mayor, civic leader, and attorney **Paul Blatz** passed the day after Judy. Paul and I both came to Ojai with our respective families in the early 1990's. While I joined one of the then-two "big firms in the county," he established his own in town. He became Ojai's "go to" lawyer for all sorts of work.

He was a class act in court -- always with a smile and a kind word.

A favorite memory is of him tooling around Ojai in one of his Corvettes – he loved those things! His surviving wife, Michaelle, is in my wife's book club. His son, **Ryan Blatz**, succeeded him on the Ojai City Council. Ryan is an outstanding attorney in his own right, and helped vanquish Golden State Water Company in major class action litigation a few years ago.

Ventura County Superior Court will be noticeably dimmer absent the bright lights that were Judy Rhodes and Paul Blatz. They are in our thoughts, and we wish their respective families strength and resilience going forward.

***Gregory Herring**, a California State Bar Certified Specialist in Family Law, is also a Fellow of the American Academy of Matrimonial Lawyers and of the International Academy of Family Lawyers. He routinely handles and consults regarding complex business, property, income, custody/parenting and other issues in the family law environment. gherring@theherringlawgroup.com; 805-983-6452.*

Cancel culture and civility codes: grounds for wrongful termination?

By Panda Kroll

California employers should be cognizant that their codes of conduct create an "ideological echo chamber" that runs afoul of statutory prohibitions against interfering with employees' off-duty political activities, even where the activity promotes unpopular or controversial causes.

See, for example, *Snyder v. Alight Solutions. Snyder* is an interesting labor complaint (with a cyber-harassment angle) filed in the Central District of California on Jan. 26, 2021, 20 days after the plaintiff attended the march on the Capitol. The complaint alleges wrongful termination in violation of Labor Code Sections 1101 and 1102 and violation of California's Tom Bane Civil Rights Act.

In her $10 million lawsuit, Snyder alleges that she had been employed in California as a software engineer by an Illinois company, Alight Solutions, for over 20 years when Alight terminated her because of her off-duty participation in the infamous rally. Of note, she expressly denies in her complaint that she entered the Capitol, that she participated in any rioting, or violated any laws. Snyder alleges that she was fired within 48 hours of her registering a complaint to Alight's human resource office that she was the victim of cyber-bullying after selfies that she posted to her Facebook page showing her posing with a member of the Capitol Police and placing her at the Capitol on the fateful day became the catalyst for a "vicious attack" against her on the social media site.

An exhibit to the complaint shows that Snyder's selfies and the related heated exchange were apparently reproduced by another poster with a tag directing to Alight's Facebook page. The Alight post was captioned, "Alight employee storming the capital (sic)."

Snyder alleges that Alight summarily fired her without a formal investigation because Alight "adopted a version of the events in Washington, D.C., which had been advanced by a particular cancel culture media outlet. Defendant was willing to employ persons of different races, creeds, colors, genders, and sexual preferences, so long as they conformed their ideas and expression of their ideas to a narrowly focused, but unwritten agenda, established by Defendant. Plaintiff received no protection by Defendant from the cyberbullies." It is beyond the scope of this article to dig into the controversial practice of "Doxxing," which has been described as "stitch[ing] together the digital scraps of someone's life to publicly accuse them of committing a crime." See "Doxxing insurrectionists: Capitol riot divides online extremism researchers," Protocol (Jan. 16, 2021), available at *https:// www.protocol.com/doxxing-capitol-rioters.*

I am more interested in the unintended consequences of workplace civility codes, which can run afoul of the Labor code.

Workplace Civility Codes: Political Correctness Gone Awry?

Some of you may recall the dispute between a Google engineer, James Damore, who filed a complaint with the National Labor Relations Board after he was terminated in 2017 for violating Google's code of conduct. Damore had internally circulated a memo titled "Google's Ideological Echo Chamber," opposing Goggle's diversity efforts. Damore withdrew his complaint after the NLRB opined that "[w]here an employee's conduct significantly disrupts work processes, creates a hostile work environment, or constitutes racial or sexual discrimination or harassment, the Board has found it unprotected even if it involves concerted activities regarding working conditions." Undeterred, in 2018, Damore filed a 12-count class action complaint against Google in Santa Clara County Superior Court seeking inter alia to enjoin Google from violating Labor Code Sections 1101 and 1102 "by discriminating, harassing, and retaliating against individuals with conservative political views." The complaint additionally asserted subclasses including Gender (males) and Race (Caucasian or Asian) who asserted hostile workplace discrimination at Google. In May 2020, the case was dismissed, citing an undisclosed "agreement."

As an aside, Damore's attorney, Harmeet Dhillon, previously filed a lawsuit against UC Berkeley for violating the free speech rights of the campus' chapter of College Republicans after the school cancelled a talk by controversial speakers Ann Coulter and David Horowitz over security concerns. The settlement required the university to pay $70,000 in attorney fees and reconsider policies that promoted a "heckler's veto."

Employees' Right to Engage in Off-Duty, Non-Violent Political Activity and Affiliation

Labor Code Section 1101 prohibits an employer from making, adopting or enforcing a rule or policy that: (1) forbids or prevents an employee from engaging in politics or becoming a candidate for public office; or (2) "tends to control or direct" his political activities or affiliations. Similarly, Section 1102 prohibits an employer from threatening to fire an employee to "coerce or influence" him into adopting or following (or not adopting or follow) any particular "course or line of political action or activity." In short, an employee has a fundamental right to engage in "political activity" without interference or retaliation from his employer. Labor Code Section 98.6(a) prohibits anyone from discharging an employee or discriminating, retaliating or taking any adverse action against any employee or applicant for employment because the employee or applicant engaged in any political activity, or even if the employee did not actually engage in such an activity, but the employer believes the employee did so. Based on the use of the "*tends* to control or direct" language, an employer's interference with an employee's off-duty political activity or affiliation may be indirect and yet still be actionable. Section 1101 survived a constitutionality challenge in *Lockheed Aircraft Corp. v. Superior Court of Los Angeles County*, 28 Cal. 2d 481 (1946). The court found that the statute was neither an arbitrary or unreasonable limitation on the right to contract nor unconstitutionally uncertain or ambiguous.

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Later, in *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979), 24 Cal. 3d 45, prior to sexual orientation being included as a protected category under California's Fair Employment and Housing Act, class plaintiffs claimed that the defendant refused to hire them because they were gay, and that such conduct violated sections 1101 and 1102. The defendant argued unsuccessfully that no partisan activity was at issue: "The term 'political activity' connotes the espousal of a candidate or a *cause*, and some degree of action to promote the acceptance thereof by other persons." (emphasis in original).

There are carve outs, however: Labor Code section 98.6(c) generally permits employers to require applicants to sign a "contract" (presumably, an employee handbook could constitute such a contract) forbidding conduct that: (1) "directly conflicts" with the employer's "essential enterprise-related interests"; and (2) "materially and substantially disrupts" the employer's operations. "Essential enterprise-related interests" is not defined. Nonetheless, an employer could argue that section 98.6(c) permits adverse employment actions against employees who affiliate with controversial, if not extremist, groups to the extent that such groups promote views that can be interpreted as inconsistent with the "enterprise" of the employer.

As a remedy for a section 1101/1102 violation, section 98.6 entitles an employee to reinstatement, reimbursement for any wages and benefits, and a civil penalty of up to $10,000 per violation. An employee can file a common law cause of action for retaliation in violation of public policy and seek pain and suffering and punitive damages. Whether or not a fee right attaches to a section 1101/1102 claim, however, is unclear. That lack of clarity may explain why Snyder's counsel included a Bane Act claim, which expressly provides for attorney fees, in addition to compensatory damages, civil penalties of up to $25,000, treble and punitive damages, and injunctive relief. The Bane Act (Civ. Code, § 51.7) broadly provides that all persons have the right to be free from violence and intimidation by threat of violence based on, among other things, race, religion, ancestry, national origin, political affiliation, or sex. Bane Act claims are more commonly understood to provide a civil remedy for hate crimes. It remains to be seen whether a termination, without more, is sufficient "intimidation" to constitute a Bane Act claim. (It would not be surprising if Snyder adds a Private Attorneys General Act claim, though that statute has its own challenges.)

In summary, most of us are familiar with wrongful termination lawsuits that cite garden-variety protections afforded to certain individuals pursuant to FEHA: race, religion, color, national origin, ancestry, physical and mental disability, medical condition, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status. In 2012, discrimination on the basis of a person's genetic information was added to the list. While FEHA does not offer protections to members of political parties, employers may be surprised to learn that employees who affiliate with controversial causes on their own time — including conservative causes such as the march on the Capitol — may be engaging in protected conduct to the extent the activity constitutes non-violent political activity, and does not "directly conflict" with the employer's "essential enterprise-related interests" or "materially and substantially disrupt" the employer's operations.

Panda Kroll *is founder of Panda Kroll, Esq. & Associates where she represents both employers and employees in labor disputes. To learn about her practice, visit her website at http://pandakrollesq.com.*

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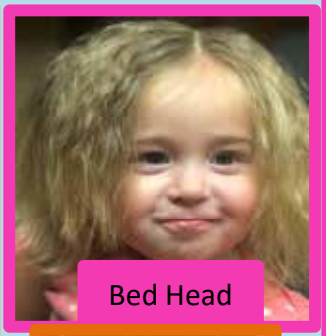
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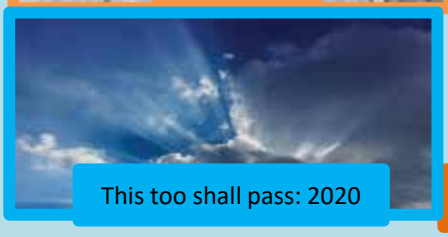
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