ASSOCIATION OF BUSINESS TRIAL LAWYERS

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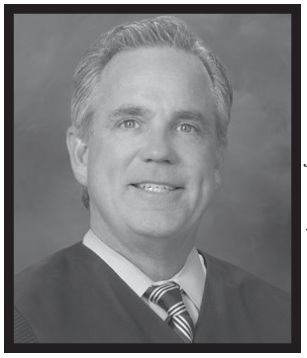
The Judicial Interview: The Honorable Thomas McConville

By Katie Beaudin



Editors' Note: Judge McConville was appointed by Governor Brown on February 27, 2018 after practicing in Orrick's Orange County office for 11 years. Prior to joining Orrick, Judge McConville spent 10 years as a federal prosecutor, including serving as deputy chief of the Orange County branch of the United States Attorney's Office for the Central District of California

Q: Any early influences leading to a career in law?

A: I can't point to any one thing that led me to the conclusion that my career would be in the law. But I do know that, even as a kid, I wanted to get into courtrooms and try cases. I think as a kid I equated solving mysteries with being a lawyer (even though Scooby and his crew weren't). That seemed like something really cool to do.

-Continued on page 4-

- IN THIS ISSUE -

Documents Reviewed Before Testimony: Protected Work-Product or Discoverable Refreshed-Recollection?

By David Sugden

"What documents did you review to prepare for your deposition?" It is among the most commonly asked questions at the outset of depositions. And yet, whether the answer is permissible or privileged turns on a thorough understanding of the attorney work-product doctrine and the evidentiary rules about documents used to refresh a witness' memory.

On the one hand, a lawyer's selection of documents for a client to review reflects that lawyer's opinion about what is or is not important. Indeed, since *Hickman v. Taylor*, 329 U.S. 495 (1947), courts have recognized the protection of information that displays an attorney's impressions or opinions. On the other hand, the rules of evidence provide that *any* writing used to refresh a witness' recollection (about which he or she testifies) should be produced.

So what happens when a witness looks at documents (or a group of documents) selected by his lawyer *but were used to* refresh his recollection before testifying? And what if the documents reviewed are otherwise protected by privilege? Can these competing principles—protecting the privacy of attorney preparation versus the identity of documents that refresh a witness' memory—be harmonized?

California Law: The Attorney Work-Product Doctrine and Evidence Code Section 771

Kerns Construction Co. v. Superior Court, 266 Cal. App. 2d 405 (1968) examined the interplay between Evidence Code sections 771 (refreshed memory) and the attorney work-product doctrine. California Evidence Code section 771, subdivision (a) provides that, "if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with re-

-Continued on page 5-

The President's Message
By Daniel A. Sasse

The mission of the Orange County Chapter of the Association of Business Trial Lawyers is to promote competence, ethics, professionalism, and civility in the legal profession and to encourage and facilitate communication between members of the Orange County bar and the County's federal and state judges on matters affecting business litigation and the civil justice system. Indeed, through ABTL, I have formed many great friendships with my Orange County colleagues as we have spent time together at the fantastic dinner programs, as well as at the Annual Seminars. This type of camaraderie is one of the reasons that Orange County is such an amazing place to practice law.

But nothing builds camaraderie, professionalism and civility better than when lawyers come together with our local judiciary to give back to our Orange County community. In May, the ABTL raised record setting funds for the Public Law Center as part of its annual fundraising effort and in June, 15 ABTL volunteers donated a day to Habitat for Humanity building homes and helping house those who are in need in Orange County. I am especially proud of this tremendous organization and all the contributions from of its members this summer, and you should all feel the same.

On May 23rd, we held our 19th annual Robert E. Palmer Wine Tasting Dinner for PLC. As probably everyone reading this knows, the Public Law Center is Orange County's pro bono law firm and provides access to justice for low-income and vulnerable residents of our community. While we are still tallying the final receipts and pledges, through your collective efforts, the Orange County chapter of ABTL has raised a record setting $57,350 for PLC. And since PLC is able to turn every $1 donation into about $8 of legal services for members of our community, we were able to effectively raise enough money to provide hundreds of thousands of dollars of free legal services to the most underprivileged members of Orange County. What a great way to spend an evening with friends and colleagues.

As if raising money for PLC was not reason enough to get together, our Wine Tasting Dinner also featured a discussion of the high-profile Waymo-Uber trial and the future of trade secrets law. The panel discussion was moderated by Sonali Maitra, Durie Tangri LLP and featured Arturo Gonzalez, Morrison & Foerster LLP lead trial lawyer

-Continued on page 9-

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The Art of Cross-Examination
By Gerald A. Klein

While direct examination is all about telling the story a party hopes to present, cross-examination is about tearing the other side's story apart. Confusing these two goals often leads to boring cross-examination and juror confusion. But by following the steps below, even a relatively inexperienced trial attorney can become a cross-examination superstar.

I. Establish Your Goal

In preparing cross-examination, the first step is understanding who your witness is, how she fits into the trial, and establishing a goal for cross-examination. Decide what you hope to achieve during the cross-examination. In the words of Yogi Berra, "if you don't know where you are going, you might wind up somewhere else."

A. The Goals of Cross-Examining a Party Witness

In almost every case, the most important cross-examination you will do will be of the opposing party. In many cases, your goal will be to undermine the character and veracity of the witness using the tools discussed below. But where the witness is telling the truth or is a sympathetic character, such as in the case of a seriously injured plaintiff not at fault in an accident, it may be best to keep cross-examination short or not cross-examine at all.

B. The Goals of Cross-Examining Third-Party Witnesses

Cross-examination of third-party witnesses can often be more critical than cross-examination of a party witness. For example, a third-party witness who has no ties to either side and testifies your client flew through the intersection against the red light may present the most devastating testimony in the case. In such circumstances, it will be essential to show the witness' testimony has defects.

Sometimes, defects can lie in an inability to perceive accurately. One of the classic examples of this type of cross-examination occurs in the lawyer movie, "*My Cousin Vinny.*" In one scene, the attorney played by Joe Pesci attacks the testimony of a sweet, elderly lady who claims to have seen Pesci's clients flee the scene of a *murder* by showing she cannot see well. In classic cross-examination style, Pesci stood in the back of the courtroom, holding up several fingers and asking the witness how many fingers he held up. She got the answer wrong. The obvious inference was she was not a reliable witness. In the second classic exam-

-Continued on page 9-

A Uniquely Californian Representative Action: Judicial Decisions Continue to Define and Refine the Parameters of PAGA Litigation
By Shane P. Criqui

1. Introduction

The Private Attorneys General Act (PAGA) took effect in 2004. Governor Gray Davis signed the bill into law shortly before his recall in 2003. In the years *since*, PAGA has proven to be even less popular with California employers than Mr. Davis was with California voters at the time of his recall. This article is intended to provide an overview of typical issues encountered in PAGA litigation from a defense perspective as well as an analysis of certain important concepts and recent case law.

2. PAGA is a Representative Action—Not a Class Action

A PAGA action is a representative action, but not a class action. A single "aggrieved employee" can assert a PAGA action on behalf of herself and all other aggrieved employees without satisfying class certification requirements. An employee plaintiff suing under PAGA "does so as the proxy or agent of the state's labor law enforcement agencies." *Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009). "[T]he aggrieved employee acts as the proxy or agent of state labor law enforcement agencies, representing the same legal right and interest as those agencies, in a proceeding that is designed to protect the public, not to benefit private parties." *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal. 4th 993, 1003 (2009).

3. The PAGA Action Was Designed to Be Punitive

The nature of the *PAGA* statute is unabashedly punitive. PAGA actions seek to recover civil penalties, which, like punitive damages, are specifically intended to punish the wrongdoer and to deter future misconduct. For any portion of the Labor Code lacking a civil penalty, PAGA creates one.

Prior to PAGA, civil penalties could only be sought by the Labor and Workforce Development Agency (LWDA) or its departments. Post-PAGA, any "aggrieved employee" may sue *to* recover civil penalties against his or her employer as the "proxy or agent" of the *state's* labor law enforcement agencies. The effect is that employees can pur-

-Continued on page 11-

ABTL Members Get Their Hands Dirty For A Great Cause
By Roya Bagheri

On June 15, 2018, the ABTL successfully sponsored a Habitat for Humanity Build Day at a site in Fullerton, California. Fourteen volunteers, including attorneys, summer associates, and staff from Haynes and Boone and Crowell & Moring came together as one team to aid the Habitat crew in the final stages of their Fullerton build. With the two houses on the lot near completion, the volunteers got down and dirty to help with the landscaping and concrete paving in the front and back yards. Working in tandem with a professional concrete company, the ABTL teams dug trenches, buried piping, and leveled pathways to make way for the paving. The teams worked with jackhammers, shovels, pick axes, rakes, and wheelbarrows and learned all about the process of building forms and pouring concrete.

The teams also had the opportunity to tour the homes and learn about the deserving families that will soon build their futures in these homes. The site superintendent took great pride in explaining the environmental sustainability of the build. One of the previously completed homes on the site features a net-zero energy footprint, producing all of the energy that it consumes. Our volunteers left with sore muscles but uplifted hearts, and look forward to continuing to contribute to our local Orange County community.

♦ *Roya Bagheri is an associate in the Orange County office of Haynes and Boone, where she is a member of the firm's Litigation Practice Group.*

-Judicial Interview: Continued from page 1-

And then as I got older, I saw the courtroom dramas, which had a powerful lawyer pulling all the strings. But part of my becoming a lawyer was driven by the realization that becoming a lawyer could create different career paths. I'm not certain about the precise genesis of my legal career but am delighted with the path I chose.

Q: What do you like about being a judge?

A: Every day is something new. As you point out, I am brand new at the position. That means each day I learn something that I didn't know the day before, and that is exciting. My colleagues and the folks who work in the courthouse are incredible at helping me.

Q: Do you have any regrets about leaving the practice of law and becoming a judge?

A: No regrets, but I do miss seeing my former colleagues on a day to day basis. I worked with wonderful people, and I miss them.

Q: As one the newest members of the bench in Orange County, has there been any kind of initiation from your fellow judges?

A: I started roughly the same time as Judges Kate Knill and Cynthia Herrera. The three of us were given a two-week orientation, and much of that time was spent meeting our new colleagues, and learning the types of cases they handle. We visited each of the Orange County courthouses, and the welcome could not have been warmer. The whole experience was eye-opening. It made me even more excited about my new career.

Q: What makes a great trial lawyer?

A: I don't know how one becomes a great trial lawyer, but here are the things I've seen that I really like: (1) Focus. In other words, you don't need to make 50 different points during an examination. Or make the same single point over and over. (2) Listen. Really good trial lawyers will follow up on an answer (even if it isn't on their script). (3) Have fun. If you enjoy what you are doing, then jurors and judges will pick up on that, and stay engaged with you. If you are a miserable grump, that tends to have the opposite effect.

Q: Is there anything you did not learn until taking the bench that you wish you had known in private practice?

A: There's a whole bunch of things I didn't know, but I'm enjoying learning them now.

Q: What has surprised you most about being a judge?

-Continued on page 5-

-Judicial Interview: Continued from page 4-

A: The volume of cases being handled by the public defenders and district attorneys. It really is something.

Q: What experience as a business litigator translates to success as a judge presiding over a criminal court?

A: Well I don't want to presume that I know what it means to be a success as a judge. However, I think my experience as a business litigator and before that as an AUSA lets me empathize with the attorneys and clients, and what it is they are trying to do. In other words, I understand what it means to have a client, how witnesses can be challenging, and how events in the courtroom can impact the various relationships the lawyers have with people involved in their cases. So I try to conduct myself in the courtroom in a way that allows the attorneys to maintain good relationships with their clients, witnesses, and others involved in the litigation.

Q: What advice would you give to a young lawyer appearing before you for the first time?

A: If you don't know what you are doing, it's OK to ask for help.

Q: If you could have dinner with any person (living or dead), who would it be?

A: Abe Lincoln. I'd want to learn what made him go.

Q: How do you like to spend your free time?

A: With my beautiful wife Celestine and (when they are home) my two boys. We have a good time together.

♦ *Judge McConville was interviewed by Katie Beaudin, a litigation associate with Stradling Yocca Carlson & Rauth in Newport Beach, CA.*

-Documents Reviewed: Continued from page 1-

spect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken."

The plaintiff in *Kerns* allegedly suffered an injury from a gas explosion. Kerns Construction Company (Kerns) was sued along with other co-defendants. Kerns deposed a witness who worked for the gas company when the explosion occurred. *Kerns,* 266 Cal. App. 2d at 408. The witness testified to having prepared investigation and accident reports. *Id.* The witness further acknowledged that he had "no memory ... independent of the reports." *Id.* However, when the deposing attorney requested the reports' production, the gas company refused on the ground it would violate the attorney-client privilege and work-product doctrine. *Id.* at 408-09.

The *Kerns* Court agreed the reports were protectable under the attorney-client privilege and work-product doctrine. But when the witness relied on them to provide deposition testimony, it presented a "conflict between a liberal interpretation required under our own rules of discovery and the liberal construction in favor of the exercise of the attorney-client privilege." *Id.* at 412. The Court decided that any privileges were waived once the witness relied on them to provide testimony:

> The witness had his reports, which he had previously prepared, in his possession at the time he testified and, additionally, made reference to them in order to answer questions propounded to him on the cross-examination. Having no independent memory from which he could answer the questions; having had the papers and documents produced by Gas Co.'s attorney for the benefit and use of the witness; having used them to give the testimony he did give, *it would be unconscionable to prevent the adverse party from seeing and obtaining copies of them*. We conclude there was a waiver of any privilege which may have existed.

Id. at 410 (emphasis added).

With respect to the work-product privilege, the Court explained "the privilege rested with the attorney and was waived by the attorney when he produced the reports to the witness upon which to premise his testimony. The attorney cannot reveal his work product, allow a witness to testify therefrom and then claim work product privilege to prevent the opposing party from viewing the document from which he testified." *Id*. at 411.

-Continued on page 6-

-Documents Reviewed: Continued from page 5-

Following *Kerns*, the decision of *Sullivan v. Superior Court*, 29 Cal. App. 3d 64 (1972) examined whether *any document* used to refresh a witness' testimony must be produced pursuant to Section 771. The plaintiff in *Sullivan* had an initial interview with her lawyer, which her lawyer tape recorded. *Id.* at 67. The lawyer's secretary then transcribed the interview, and the plaintiff testified at deposition that she reviewed the transcription to refresh her memory. *Id*. Defense counsel requested the transcription be produced, and the plaintiff's counsel objected on ground that it was protected by the attorney-client privilege. *Id.* at 67-68.

The *Sullivan* Court distinguished itself from *Kerns* in a couple ways. First, the witness in *Kerns* testified from the reports without objection. *Id.* at 72. In *Sullivan*, the plaintiff's counsel raised the objection immediately. *Id.* Second, and more importantly, the *Sullivan* Court distinguished a client-interview *transcription* from the "writings" identified in Section 771:

> The various statutes may be harmonized by holding that the word "writing" in section 771 was never intended to mean a transcription of a client's original discussion with her attorney concerning an accident as to which she is employing his legal services.

Id.

The *Sullivan* Court reasoned this was a material distinction: "[H]ad the client refreshed her memory by *listening to a replaying of the tape* instead of reading its transcription, no claim could be made that she had waived the confidential relationship between her and her counsel. Nor could such a claim be made if her attorney had *told her* what she had told him originally or even *read to her his notes* of the interview." *Id.* (italics added).

International Ins. Co. v. Montrose Chemical Corp., 231 Cal. App. 3d 1367 (1991) examined the required foundation to trigger a document production under Section 771. *Montrose* was an insurance indemnification dispute related to hazardous waste at various Montrose locations. During the deposition of a former claims adjuster, the witness testified that he reviewed various documents prior to his deposition. The witness explained that "after his review, he had a 'fresher recollection of what had taken place' than he had prior to the session." *Id.* at 1372. The witness further "explained that, without all of the documents in front of him, he could not recall which ones actually refreshed his recollection and which did not, and that 'anything [he] looked at probably gave [him] some benefit of refreshing [his] recollection.'" *Id.*

Montrose cited Section 771 and moved to compel the production of documents reviewed by the witness. International refused and argued that Section 771 "'does not authorize wholesale demands for every document a witness might have seen' and, therefore, inspection is justified only when the examining attorney establishes which 'particular writing' the witness has used to refresh his recollection on a 'particular subject' included in the witness' testimony." *Id.* The *Montrose* Court held that this "is not the law in California." Once the witness testified that anything he looked at probably gave him some benefit, Section 771 was triggered:

> Under the plain language of Evidence Code section 771, [the witness] used the documents to refresh his memory with regard to his testimony concerning International's payment of his attorney's fees and International therefore became obligated to produce them. No further "foundation" was required and, in this context, there was no need (and there was no way) to establish which of several documents actually refreshed [the witness'] memory on a particular point.

Id. at 1372-73.

Federal Law: The Attorney Work-Product Doctrine and Rule 612

Federal Rule of Evidence 612 provides in relevant part:

> [W]hen a witness uses a writing to refresh [his] memory ... (2) before testifying, if the court decides that justice requires ... (b) ... an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce into evidence any portion that relates to the witness' testimony.

Among the issues that federal courts have struggled with is the level of foundation required to trigger Rule 612. In *Sporck v. Peil*, F.2d 312 (3rd Cir. 1985), for example, the Third Circuit identified a three-step foundational requirement. *Sporck* was a securities fraud case where the defendant-petitioner Charles Sporck and others were accused of artificially inflating the value of certain stocks. *Id.* at 313.

Prior to Sporck's deposition, his lawyers showed him various documents. While none of the documents contained attorney work-product themselves, his lawyers contended that "the selected documents represented, as a group, counsel's legal opinion as to the evidence relevant both to the allegations in the case and the possible legal defenses." *Id.* The Court held that revealing the documents as a group would reveal the defense counsel's mental impressions and thus constituted attorney work product. *Id.*

The Court next analyzed whether Rule 612 compelled their production. The Court determined that three conditions

-Continued on page 7-

-Documents Reviewed: Continued from page 6-

must be met to trigger Rule 612: (1) a witness must use the writing to refresh his memory, (2) the witness must use the writing for the purpose of testifying, and (3) the court must determine that production is necessary in the interests of justice. *Id.* at 317.

Turning to the facts of the case, the Court determined that the deposing attorney failed to establish the first two conditions: "[The lawyer] failed to establish either [1] that petitioner relied on any documents in giving his testimony, or [2] that those documents influenced his testimony. Without first eliciting the testimony, there existed no basis for asking [Mr. Sporck] the source of that testimony." *Id.* at 318 (*citing Bercow v. Kidder, Peabody & Co.*, 39 F.R.D. 357 (S.D.N.Y. 1965)).

Sporck's three-condition test has been applied beyond the Third Circuit. In *Nutramax Laboratories, Inc. v. Twin Laboratories, Inc.*, 183 F.R.D. 458 (D. Md. 1998), the district court in Maryland provided an expanded discussion of its application. *Nutramax* was a patent infringement lawsuit where the start date of product sales was at issue. To test the accuracy of certain plaintiff witnesses, defense counsel asked whether they reviewed any documents to help refresh their memories as to when certain sales began. *Id.* at 460. Although the witnesses acknowledged that documents had been reviewed with the plaintiff's lawyers, they were instructed not to answer any questions designed to discover the documents' identity. *Id.*

In a lengthy ruling, the district court endorsed *Sporck's* three-condition test to trigger Rule 612. *Nutramax*, 183 F.R.D. at 468. If the first two foundational elements are met, "it may safely may be concluded that the documents have been put to a testimonial use...." *Id.* If the documents reviewed would otherwise be protected by the attorney work-product doctrine, *Nutramax* held that Rule 612 "requires the court to apply a balancing test designed to weigh the policies underlying the work-product doctrine against the need for disclosure to promote effective cross-examination and impeachment." *Id.* (*citing James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 145 (D. Del. 1982)). When applying this balancing test, the *Nutramax* court identified nine non-exhaustive factors to be considered:

(1) "The status of the witness.... There is a greater need to know what materials were reviewed by expert and designee witnesses in preparation for deposition since the substance of their testimony may be based on sources beyond their personal knowledge."

(2) "The nature of the issue in dispute. Whether a witness is testifying generally about the transactions which are the subject of the litigation, or more precisely about a subset of facts which relate to a case dispositive issue ... may affect the need to know what materials were reviewed to prepare for deposition."

(3) "When the events took place.... The greater the passage of time since the events about which the witness will testify, the more likely that the witness needed to refresh his or her recollection to prepare for testimony."

(4) "When then the documents were reviewed.... The nearer the review of documents to the date of the deposition may affect whether the court concludes that the purpose was to prepare for testimony."

(5) "The number of documents reviewed.... If an attorney has culled through thousands of documents to identify a population of several hundred which are most relevant to the litigation, and the witness reviews these documents to prepare for the deposition, a court may be less inclined to order the production of such work product than if the witness reviewed a single document, or very few documents, selected by the attorney which relate to a critical issue in the case."

(6) "Whether the witness prepared the document(s) reviewed. If the witness prepared the document(s) reviewed in preparation for the deposition, particularly if they were prepared in the ordinary course of the events underlying the dispute, and not in anticipation of litigation, there may be a greater need for disclosure than if the witness reviewed the documents."

(7) "Whether the documents reviewed contain, in whole or part, 'pure' attorney work product, such as discussion of case strategy, theories or mental impressions, which would require redaction or favor nondisclosure."

(8) "Whether the documents reviewed previously have been disclosed to the party taking the deposition, as part of a Fed. R. Civ. P. 34 document production, or otherwise. It may be argued that, if the deposition attorney already has received the documents during the litigation, there is no reason to order their production a second time ... [However,] [f]inding the critical documents in a population of thousands may be like looking for a needle in a haystack, even with the aid of modern technology."

(9) "Whether there are credible concerns regarding manipulation, concealment or destruction of evidence. If the court believes that there may have been inappropriate conduct affecting either testimonial or documentary evidence in the case, and the documents demanded under Rule 612 relate to these concerns, then disclosure may be required."

Id. at 469-70.

Not all federal courts have endorsed *Sporck* or *Nutramax.* For example, in *Frazier v. Ford Motor Co.*, 2008 WL

-Continued on page 8-

-Documents Reviewed: Continued from page 7-

11342570 (W.D. Ark.), the plaintiff served a deposition notice pursuant to Federal Rule of Civil Procedure 30(b)(6) to depose the Ford witness (or witnesses) with knowledge of its "roll sensing technology." *Id.* at *2. The deposition notice included a request for the production of documents "reviewed or relied upon by each witness[es] and or designated corporate representative in preparation for the deposition or to refresh their recollection on the topic chosen." *Id.*

Ford objected on the ground that "many of these documents have already been produced and that the specific documents reviewed and relied by each corporate witness prior to his or her deposition may be protected by the attorney work-product doctrine...." *Id.* at *2. Ford relied on *Sporck* and *Nutramax*, but the court found their reasoning "unpersuasive" because it "assume[d] that the revelatory nature of the sought-after information is, in itself, sufficient to cloak the information with the heightened protection of opinion work-product." *Id*. at *3 (*citing In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1018 (1st Cir. 1988)). The trial court, accordingly, ordered Ford to produce the requested documents as long as the documents *themselves* were not protected by an applicable privilege. *Id.*

In a holding similar to *Frazier*, the court in *In Re Pradaxa Products Litigation*, 2013 WL1776433 (S.D. Ill) considered the attorney work-product doctrine's application when the attorney *voluntarily* discloses that all documents reviewed by a witness were selected by counsel. In *Pradaxa*, the plaintiffs requested a "list of all documents reviewed" by various witnesses prior to their depositions. *Id.* at *1. The defendants filed a motion for a protective order and, in their motion, "*voluntarily* disclosed that all of the documents reviewed by the company witnesses will have been selected by counsel." *Id.* (italics in original). The trial court thus framed the issue as follows: "[W]hether counsel can manufacture a zone of privacy by gratuitously disclosing that the requested documents have or will be selected by counsel." *Id.*

To answer this question, the *Pradaxa* court examined the *Sporck* decision where counsel had *likewise* volunteered the fact that all of the documents reviewed by the witness were selected by counsel. *Id., citing Sporck* 759 F. 2d at 314. And while the *Spork* majority did not attach any significance to the fact that the witness' lawyer had voluntarily disclosed the work-product information, the dissent was certainly troubled by this:

> To permit this volunteered information to provide a necessary link to attorney's thought processes, as the majority has done, is to permit the petitioner to cloak the non-work product aspects of the information sought with work product protection. Certainly an attorney cannot cloak a document under the mantle of work product by simply reviewing it. It is difficult to see how an attorney or his witness may insulate the discoverable fact that the witness reviewed a particular document by volunteering that the attorney selected the document for deposition preparation purposes.

Id. at *2 (*citing Sporck*, 759 F. 2d at 319-20 (dissent)).

The *Pradaxa* court agreed the attorney work-product doctrine protects an attorney's selection and compilation of records in preparation for a deposition. "Disclosure of such material could reveal an attorney's thought processes and therefore should be afforded work-product protection." *Id.* at *3. The *consequence* of this rule is that "[o]pposing counsel ... should not be permitted to inquire as to which, if any, of the documents a witness reviewed were selected by his or her counsel." *Id.* However, this does not mean that an attorney "can manufacture a zone of privacy by voluntarily offering information regarding who selected the documents reviewed by a witness." *Id.* Accordingly, the court ruled that "[e]ither party should be allowed to know what documents a witness reviewed prior to a deposition for purposes of efficacy. Neither side [however] will be permitted to ask which, if any, of the documents reviewed were selected by counsel." *Id.* With respect to the fact that the defendant's counsel voluntarily disclosed their attorney work-product, "they brought such a consequence on themselves." *Id.*

Conclusion

For such a standard deposition question, the law is both complex and varied among the courts. Where else can practitioners find cases where asserting the attorney work-product doctrine constitutes its simultaneous waiver? Understanding these cases and rules can help practitioners compel the documents they want while protecting the documents they guard.

♦*David Sugden is a trial lawyer and shareholder at Call & Jensen in Newport Beach.*

-President's Message: Continued from page 2-

for Uber, Professor Eric Goldman, Santa Clara University School of Law, and Sarag Jeong, senior writer for "The Verge." The audience learned a few lessons, heard a few war stories, and was left to speculate on what would have been, if the parties had not settled during the trial.

Of course, ABTL could not accomplish its important mission without the members of the Orange County judiciary making important contributions. On July 25th ABTL hosted its Second Annual Judicial Mixer. This event was completely free to attend for ABTL members, and funded solely through generous donations from Crowell & Moring, LLP, Jones Day, Rutan & Tucker LLP, Stradling Yocca Carlson & Rauth, LLP, Stephens Friedland LLP and Umberg/Zipser LLP. Our Orange County judicial officers were out in force connecting with ABTL members. 18 members of our local judiciary participated in the event and, thanks to their leadership, this event was a tremendous success.

Looking ahead to the fall, in addition to our September 12th dinner program, we've got the highlight of our year—the Annual Seminar. This year's event will take place on October 10-14 at the Wailea Beach Resort in Maui, Hawaii. The theme is "#thisis2018: When #metoo Becomes A Business Dispute." This theme is particularly timely, as it seems hardly a week goes by without this topic being in the news or a new, high-profile case finding its way into the courtroom or the boardroom.

I hope all of you had a fantastic and fulfilling summer, and I look forward to seeing you at the upcoming ABTL events.

♦*Daniel A. Sasse is a partner at Crowell & Moring, and is the 2018 ABTL Orange County Chapter President.*

Despite the firm's intimidating name, Payne & Fears was nothing but warm and fuzzy when its attorneys and staff donated these teddy bears for the OC Superior Court's adoption program, which provides a stuffed animal to children when their adoption is finalized. The Court experienced a shortage of stuffed animals this year, and Payne & Fears responded generously! Be on the lookout for ABTL's annual stuffed animal donation drive this holiday season.

-Cross-Examination: Continued from page 3-

ple of cross-examination, Pesci discredited another eyewitness who claimed to have seen Pesci's clients flee the scene of the crime. In that instance, Pesci took a photograph of the crime scene through the window in the witness' house. Through concise questions, Pesci was able to show that the window was obscured by dirt and the point of view was obstructed by bushes and trees. This method of discrediting the third-party witness' credibility is the most effective way to do so. Trying to show a neutral third-party witness is lying will almost always fail.

But sometimes, third-party witnesses are not entirely neutral. Sometimes, they may have a close connection to one of the parties. Sometimes, they have a personal or social agenda that may slant testimony. But be careful with these types of attacks. If a jury does not see relevance to the points you are making, it may attribute the cross-examination to desperation and the credibility of the witness will only increase.

C. Experts

Many attorneys are afraid of cross-examining experts extensively. They believe (sometimes correctly, sometimes not) that the expert knows more about the subject matter than the attorney. They believe they are walking into the expert's world instead of recognizing the expert has walked into theirs. The art of cross-examining an expert can be the subject of an entire article by itself. However, there are certain fundamentals you should apply in every expert cross-examination.

First, look closely at the expert's credentials. Even experts with impressive credentials often extend themselves further than their area of expertise. For example, a world famous orthopedist may know next to nothing about anesthesiology.

Second, read the report carefully if there is one. It is amazing how many times experts make mistakes in their reports. Focus on not only what the expert put into the report, but what the expert left out. Juries will seriously discredit experts who make mistakes or omit important facts.

Third, ask questions to get an opposing expert to agree with your expert to as many important points as possible. Doing so builds up credibility of your expert.

II. The Tools of Cross-Examination

After determining the goals of cross-examination, the attorney's next step is to take advantage of the tools in the cross-examination tool chest.

A. Prepare Thoroughly

The most important tool of cross-examination is thorough preparation. Television attorneys may cross-examine the witness, making up cross-examination as they go, but that approach generally leads to disaster in a real courtroom. Great

-Continued on page 10-

-Cross-Examination: Continued from page 9-

cross-examination always starts with thorough preparation. This will include a comprehensive review of the witness' website, social media, documents, and the testimony of other witnesses. But the most important cross-examination tool will be the witness' prior deposition. Knowing what the witness said and being ready to impeach the witness at a moment's notice is the key to effective cross-examination.

B. Use "Hit and Run" Guerrilla Tactics

Cross-examination is not the time to allow a party to retell her story. Yet, so many attorneys take the witness through her story a second time, point by point hoping to catch a discrepancy. Effective cross-examiners know the point they want to make, make it quickly, and then move on to another subject giving the witness no opportunity to explain or reconcile an inconsistent or obviously false statement. For most attorneys, it makes sense to have the cross-examination outlined in detail with specific references to pages and lines of deposition testimony if the inconsistent answer is given. By proceeding in this fashion, the attorney either gets the response he was expecting or is immediately ready to read impeaching testimony from the deposition.

Part of the preparation includes identifying the precise order of cross-examination. Bring out the worst points first when the jury is most attentive and looking closely at whether the witness is to be believed or not.

C. Keep It Short

As with many things in life, less is more. Many good attorneys believe that effective cross-examination requires droning on for hours, not recognizing jurors have shut down and started looking forward to lunch. Effective cross-examination is rapid, to the point, and consists of repeated "boots to the head" in succession. Bogging down on one point or another favors the witness. It is a rare cross-examination that will go more than two hours, even in a complicated case. But in most cases, effective cross-examination will take less than an hour. If you cannot make your point in that amount of time, you never will. So, keep it short.

D. Never Ask a Question If You Do Not Know What the Answer Will Be.

In civil cases, the bulk of the costs goes to discovery. Cross-examination is the time to take advantage of all that work and expense. By the time discovery is done, an attorney should know everything there is to know about the case. There is no excuse for risking unanticipated answers in response to questions. An unanticipated, devastating answer in response to cross-examination will leave the courtroom in an uncomfortable silence screaming out disaster for your case.

The one exception to this rule against asking a question where you do not know what the answer will be is where there is no good answer. For example, asking the doctor whether he knew he left the scalpel in the patient at the time he closed the incision can lead to only: (1) no, it was a mistake; or (2) yes, I left it in to help the next surgeon save time, so that a scalpel would already be available. In such circumstances there is no happy response for the witness and nothing to lose by asking a question.

By asking questions where the answer is known, either the witness will testify in accordance with her deposition, or you will impeach her immediately.

E. Use Impeachment Effectively

Many attorneys believe that if one point of impeachment is good, then many points of impeachment must be better. Not so. While impeachment can be devastating, not all impeachments are created equally. For example, showing a recent video of the plaintiff throwing large cords of wood into a truck after he claims he can no longer lift anything heavier than a Kleenex, is a devastating impeachment. That type of impeachment can end your case. In contrast, where a witness testified at deposition a meeting took place on Tuesday when it actually took place on Wednesday, and the date was inconsequential, jurors will be scratching their heads at what point you are trying to make. Impeach witnesses only on important testimony points.

F. Only Use Leading Questions and Never Ask "Why?"

Effective cross-examination is like taking a small dog for a walk on a short leash: the witness goes only where you want the witness to go. By doing this, you control the direction of cross-examination, the tenor of cross-examination, and the time of cross-examination. You should ask only leading questions that give you "Yes" or "No" answers, or short responses where you have an immediate impeachment item in your tool chest. By proceeding this way, you will walk the witness through weaknesses and inconsistencies in her testimony, and give the witness no opportunity to explain them.

In contrast, allowing for open-ended responses slows down the cross-examination pace, and can lead to disastrous results – especially when asking the dreaded "Why" question. Some very good attorneys may disagree with this premise. They are wrong. Too many cases have been lost where attorneys have blundered into a why question the witness hit out of the park. Do not make that mistake.

-Continued on page 11-

-Cross-Examination: Continued from page 10-

III. Conclusion

While most cases are probably won and lost on the quality of your direct examination, cross-examination is an attorney's best tool to weaken the other side's case. In a competition of two competing stories, hard-hitting cross-examination can often turn the tide.

Effective cross-examination starts with thorough planning and preparation and requires having impeachment ready for immediate use in response to leading questions. Remember to keep your questions clear, concise, and short. If you follow these easy-to-use guidelines, you are going to have effective cross-examination.

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-PAGA: Continued from page 3-

sue civil penalties for all Labor Code violations, from the significant (e.g., failure to pay minimum wage) to the less significant (e.g., failure to include the name and address of the employer on the paystub).

PAGA settlements require court approval, and 75% of any civil penalties recovered must be paid to the LWDA, with only 25% of the recovered funds going to aggrieved employees. In addition, the LWDA must be given notice of the settlement, presumably so that—as the real party in interest—it can object or appeal if it feels the amount of the civil penalties is insufficient.

The default civil penalty where the Labor Code does not expressly provide for one is $100 for each aggrieved employee per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation. The PAGA statute of limitations is one year. Accordingly, an employer with a bi-monthly payroll facing a PAGA claim alleging three underlying Labor Code violations affecting 1,000 aggrieved employees could be looking at potential civil penalties of $14,100,000 ($4,700 x 3 x 1,000). However, there is case law holding that the initial violation of $100 applies to each pay period until the employer has been notified that it is violating a Labor Code provision. *See Robinson v. Open Top Sight Seeing S.F., LLC*, No. 14-cv-00852-PJH, 2018 WL 895572, at *19 (N.D. Cal. Feb. 14, 2018); *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209 (2008). Nonetheless, in the example above this calculation would still result in substantial civil penalties of $7,200,000 ($2,400 x 3 x 1000).

Yet, empirically, PAGA awards in exceedingly large amounts are rare. *See*, *e.g., Hernandez v. Best Buy Stores, LP*, No. 13-cv-2587 JM (KSC), 2017 WL 2445438, at *2 (S.D. Cal. June 6, 2017) (collecting cases approving exceedingly small PAGA settlements). This is due in part to the fact that the PAGA statute expressly provides that "a court may award a lesser amount than the maximum civil penalty . . . if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Cal. Lab. Code § 2699(e)(2). Smaller PAGA settlement amounts may also be due to the fact that PAGA actions present significant hurdles for trial, including the issue of manageability, which is discussed below.

Defense lawyers advising clients on total exposure vis-à-vis PAGA claims face substantial uncertainty given that the total possible PAGA civil penalties may be shockingly high yet the actual PAGA penalties awarded by a court or approved in a PAGA settlement may be far less.

4. Plaintiffs Often File "PAGA-Only" Actions to Circumvent Employee Arbitration Agreements

One wrinkle unique to PAGA is how the statute interacts with valid employee arbitration agreements. While employers may require employees to sign arbitration provisions (including those containing class action waivers), employers may not require employees to waive the right to assert PAGA claims. This was the seminal holding of *Iskanian v. CLS Transportation Los Angeles, LLC*: "an employee's right to bring a PAGA action is unwaivable." *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 383 (2014). Therefore, if an individual employee has signed an arbitration agreement and later sues his or her employer asserting both individual and PAGA claims, the employer can compel arbitration of the individual claims but not the PAGA claims, which are generally stayed pending arbitration.

As a work-around to this scenario, plaintiffs' lawyers often file "PAGA only" actions asserting no individual claims at all. Alternatively, a plaintiff will file a putative class action asserting various violations of the Labor Code, and, upon being presented with the arbitration agreement that the class plaintiff signed, will file an amended complaint asserting a "PAGA only" claim. The "PAGA only" claim cannot be stayed pending arbitration because there are no individual claims to arbitrate. Instead, the employee gets to stay in court and litigate her PAGA claim on behalf of herself and all other aggrieved employees.

A recent commentary suggests that the United States Supreme Court's decision regarding Section 16 of the Fair Labor Standards Act in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), may provide significant ammunition for overturning *Iskanian* and allowing voluntary contractual PAGA waivers to be upheld, at least when challenged under the FAA in federal courts. *See* Edward F. Donohue III, *An Epic Shad-*

-Continued on page 12-

-PAGA: Continued from page 11-

ow Over PAGA, L.A. Daily J., July 13, 2018, https://www.dailyjournal.com/mcle/314. That issue will need to be litigated and likely will not be resolved for some time. For now, *Iskanian* is still the law of the land.

5. The Right to Discovery in a PAGA Action is Broad.

Recent case law clarifies that the right to PAGA discovery is broad and does not require proof of alleged violations. In *Williams v. Superior Court*, 3 Cal. 5th 531 (2017), the plaintiff brought a PAGA-only action against Marshalls department store based on purported meal and rest break violations and sought the contact information of every other purportedly aggrieved employee in the state of California. The employer resisted, Williams filed a motion to compel, and the trial court granted the motion only as to the store where Williams worked, not as to all of the employer's stores in the state.

The Court of Appeal denied writ relief to Williams, but the California Supreme Court reversed and granted statewide discovery (as to 130 stores statewide). The California Supreme Court reasoned that discovery in PAGA cases should be as broad as discovery in class actions, and that while proof of a uniform companywide policy that violated the Labor Code may help establish "manageability" of a PAGA case with respect to trial, it was not necessary for a PAGA plaintiff to prove such a companywide policy existed in order to conduct broad statewide discovery.

Accordingly, after *Williams*, discovery in a PAGA case is not contingent upon a plaintiff establishing a uniform companywide policy at the outset of litigation. The California Supreme Court did suggest, however, that such a uniform policy might be used to prove "manageability" of a PAGA action for trial, which implies that the absence of such a uniform policy might suggest "unmanageability" for trial.

6. The Question of Manageability: How Do You Try A PAGA Case?

Because PAGA is a representative action but not a class action, it is generally accepted that PAGA plaintiffs do not have to meet class certification requirements, although a minority of federal courts have decided otherwise. *See Zayers v. Kiewit Infrastructure West Co.,* No. 16-CV-06405 PSG (PJW), 2017 WL 7058141, at *7 (C.D. Cal. Nov. 9, 2017) (discussing relevant cases and observing that "the majority of federal courts have determined that class certification under Rule 23 is not required to maintain a cause of action under PAGA."). However, even if we accept that PAGA cases do not need to meet class certification requirements, concepts derived from class action certification requirements may be relevant to a PAGA action. Specifically, while there is no express manageability requirement in the PAGA statute, many courts have granted motions to strike or dismiss PAGA actions based on a showing that the PAGA action would require individualized inquiries that predominate over common questions such that trial would be unmanageable.

In *Ortiz v. CVS Caremark Corp*., No. C-12-05859 EDL, 2014 WL 1117614 (N.D. Cal. Mar. 18, 2014), the court held that a PAGA claim was unmanageable where the plaintiffs alleged uncompensated off-the-clock work, noting that individual assessments would be necessary and that the plaintiffs would have to rebut a presumption that the individual employees were not working off-the-clock due to the defendants having kept detailed records of employees clocking in and clocking out. In *Brown v. American Airlines, Inc.,* No. CV-10-8431-AG (PJWx), 2015 WL 6735217 (C.D. Cal. Oct. 5, 2015), the court struck the plaintiff's PAGA claims regarding unpaid overtime wages due to unmanageability issues but allowed the plaintiff's PAGA claims regarding wage statements to go forward. Similarly, in *Zhang v. Amgen, Inc.,* No. 56-2012-00420162-CU-OE-VTA, 2015 WL 5752562 (Cal. Super. Ct. Aug. 13, 2015), a California Superior Court judge granted a motion to deny representative status to a PAGA plaintiff where the plaintiff's work duties varied significantly compared to the other aggrieved employees and the trial court questioned its own ability "to effectively manage a case involving more than 350 plaintiffs."

Other cases have analyzed the issue of manageability but decided that, while individualized inquiries may be necessary in some instances, the "[d]efendant has not shown that those inquires would be so unmanageable as to justify striking Plaintiff's PAGA claims." *Valadez v. CSX Intermodal Terminals, Inc.*, 298 F. Supp. 3d 1254, 1270 (N.D. Cal. 2018). Still other cases have held that any type of manageability requirement is "inconsistent with PAGA's purpose and statutory scheme." *Zayers*, 2017 WL 7058141, at *7; *see also Zackaria v. Wal-Mart*, 142 F. Supp. 3d 949, 958–59 (C.D. Cal. 2015) (rejecting manageability requirement as inconsistent with PAGA's purpose and statutory scheme).

At present, there is no uniform practice regarding the application of a manageability requirement to PAGA claims. Accordingly, defense counsel should raise the issue of manageability by motion if the facts of the particular case support doing so, and may succeed in striking or dismissing some or all of the PAGA claims in appropriate circumstances.

7. The Res Judicata and Collateral Estoppel Effect of a PAGA Judgment Is Important.

In 2009, the California Supreme Court in *Arias* provided helpful guidance on the application of res judicata and collateral estoppel to PAGA judgments. The Supreme Court considered the effect of a PAGA case which had

-Continued on page 13-

-PAGA: Continued from page 12-

either been won or lost at trial by the plaintiff:

> Therefore, if an employee plaintiff prevails in an action under the act for civil penalties by proving that the employer has committed a Labor Code violation, the defendant employer will be bound by the resulting judgment. Nonparty employees may then, by invoking collateral estoppel, use the judgment against the employer to obtain remedies other than civil penalties for the same Labor Code violations. If the employer had prevailed, however, the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties.

Arias, 46 Cal. 4th at 987.

Accordingly, employers in whose favor a PAGA judgment is entered get the benefit of res judicata and/or collateral estoppel as to future representative actions for civil penalties brought by absent employees covering the same PAGA period. However, those individual employees may still assert and potentially recover on their individual claims.

8. Judgments Entered By a Stipulation for Settlement Should Also Be Entitled to the Same Res Judicata and/or Collateral Estoppel Effect

Arias does not expressly discuss PAGA judgments that result from stipulations for settlement. However, there is no reason that a PAGA judgment entered by a stipulation for settlement should not also have a res judicata or collateral estoppel effect which benefits the employer (and which limits nonparty aggrieved employees to bringing individual, but not representative, actions covering the same PAGA time period). Indeed, a judgment entered by stipulation of the parties prior to trial has the same res judicata effect as a judgment after a trial. *See Victa v. Merle Norman Cosmetics, Inc.,* 19 Cal. App. 4th 454 (1993) ("The first element required for res judicata in California is a final judgment on the merits. Although the judgment in the EEOC case was rendered by consent and stipulation, it so qualifies."); *Eichman v. Fotomat Corp.,* 147 Cal. App. 3d 1170, 1177 (1983) ("The Eichmans' final contention, the judgment in the first action is not res judicata because it followed a settlement rather than a trial, is absurd . . . . [A] judgment following a settlement bars future actions to the same extent as a judgment entered after a full trial.") (citation omitted); 1 Schwing, *Cal. Affirmative Defenses*, § 14:14 (2d. ed. 2018) ("Like a judgment entered after trial, a judgment entered by stipulation of the parties will be res judicata in respect to a second action on the settled cause of action.").

Moreover, the California Supreme Court has used exceptionally broad language when describing the res judicata and collateral estoppel effect of a PAGA judgment. *Williams v. Superior Court*, 3 Cal. 5th 531, 548 (2017) ("[A]bsent fellow employees will be bound by the outcome of any PAGA action . . . ."); *Iskanian*, 59 Cal. 4th at 380 ("Because collateral estoppel applies not only against a party to the prior action in which the issue was determined, but also against those for whom the party acted as an agent or proxy, a judgment in an employee's action under the act binds not only that employee but also the state labor law enforcement agencies."); *Arias,* 46 Cal. 4th at 985 (a PAGA judgment "is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding").

Accordingly, if an employer has settled a PAGA action, it should be protected from a second PAGA action by a different aggrieved employee covering the same PAGA period. This is true even if a second PAGA action asserts slightly different Labor Code violations than the first, since res judicata applies to all matters "which were raised or could have been raised, on matters litigated or litigable." *Shine v. Williams-Sonoma, Inc.,* 23 Cal. App. 5th 1970, 2018 WL 2411008, at *2 (2018) (internal quotation marks omitted) (*quoting Villacres v. ABM Indus., Inc.,* 189 Cal. App. 4th 562, 576 (2010)).

9. A PAGA Plaintiff Who Settles Her Individual Claims Is No Longer an "Aggrieved Employee"

A plaintiff who has settled her individual claims is no longer an "aggrieved employee" for the purposes of PAGA. *Kim v. Reins Int'l Cal., Inc.*, 18 Cal. App. 5th 1052 (2017). In *Kim*, an employee brought a class action against his former employer alleging individual and class claims for wage and hour violations and seeking civil penalties under PAGA. The employer successfully moved to compel arbitration of the individual claims. The plaintiff accepted a settlement offer for his individual claims in arbitration and those claims were dismissed. The plaintiff then tried to litigate his PAGA claims in court but the defendant moved for summary adjudication, arguing that plaintiff was no longer an "aggrieved employee" for PAGA purposes once he settled his underlying claims. The Court of Appeal relied on the legislative history of PAGA (as well as a dash of common sense) in affirming the trial court decision:

> The legislative history makes clear that the PAGA was not intended to allow an action to be prosecuted by any person who did not have a grievance against his or her employer for Labor Code violations. Here, [the plaintiff] initially asserted that he had been harmed by Reins's alleged violations of the Labor Code. But by accepting the settlement and dismissing his individual claims against [the company] with

-Continued on page 14-

-PAGA: Continued from page 13-

> prejudice, [the plaintiff] essentially acknowledged that he no longer maintained any viable Labor Code-based claims against [the company]. As a result, following the dismissal with prejudice [plaintiff] no longer met the definition of an "aggrieved employee" under PAGA.

Kim, 18 Cal. App. 5th at 4.

Kim has potentially broad application to the settlement strategy of both defendants and plaintiffs in PAGA cases. On March 28, 2018, review was granted by the California Supreme Court.

10. It Is Now More Difficult To Defend PAGA Actions Based On Wage Statement Violations.

Lastly, a recent case from the California Court of Appeal for the First District, *Lopez v. Friant & Associates, LLC*, 15 Cal. App. 5th 773 (2017), dealt with the applicability of certain defenses when civil penalties are sought for wage statement violations. In *Lopez*, a plaintiff filed a complaint asserting a single cause of action for civil penalties under PAGA. This "PAGA only" action was premised on the fact that the company failed to include the last four digits of employees' social security numbers on their paystubs in violation of Labor Code section 226, subdivision (a)(7). The company moved for summary judgment, arguing that the plaintiff did not suffer an injury resulting from a "knowing and intentional" violation of Section 226. The trial court granted summary judgment for the company. The Court of Appeal reversed, holding that:

> Because section 226(e)(1) sets forth the elements of a private cause of action for damages and statutory penalties, its requirement that a plaintiff demonstrate "injury" resulting from a "knowing and intentional" violation of section 226(a) is not applicable to a PAGA claim for recovery of civil penalties.

Id. at 784.

According to the holding in *Lopez*, an employer-defendant in a "PAGA only" action for violation of section 226(a) cannot take advantage of the same defenses that the employer would have if the employee had brought individual claims for statutory penalties under section 226(e)(1). While these defenses to a claim for statutory penalties had already been watered-down by the 2013 amendments to Labor Code section 226, the *Lopez* decision makes them completely unavailable with respect to PAGA claims under section 226(a).

In a more recent case from the California Court of Appeal for the Third District, *Raines v. Coastal Pacific Food Distributors, Inc.,* 23 Cal. App. 5th 667 (2018), a plaintiff sued his employer for disability discrimination and also asserted PAGA claims for failure to provide accurate wage statements under Labor Code section 226. *Raines* confirmed the holding in *Lopez* that the "injury" and "knowing and intentional" requirements for a section 226(e) claim "do not apply to a PAGA claim for a violation of section 226(a)." *Id*. at 679.

However, *Raines* complicated the PAGA analysis regarding section 226 claims even further. Prior to *Raines*, many California federal district courts had held that Labor Code section 2699(f)(2) (providing for $100 for each aggrieved employee per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation) stated the correct civil penalty for PAGA claims asserting section 226 violations. However, *Raines* held that Labor Code section 226.3 (providing for a civil penalty of $250 per employee per violation in an initial citation and $1,000 per employee for each violation in a subsequent citation) actually "sets out a civil penalty for *all* violations of Labor Code section 226." *Id.* at 675. That is, the catch all penalty provision of PAGA does not apply to wage statement violations, the specific penalty in section 226.3 applies.

The *Raines* court reasoned that section 226.3 must apply to *all* wage statement violations (not just those for which a wage statement was not provided at all) because the "LWDA would not be prohibited from seeking civil penalties for a grossly inadequate wage statement simply because the employer did provide a statement." *Id*. In so holding, *Raines* relied on the recent District Court case *Culley v. Lincare, Inc.,* 236 F. Supp. 3d 1184 (E.D. Cal. 2017), which had held without explanation that "§ 226.3 sets out a civil penalty for *all* violations of § 226." *Id.* at 1194. It is yet to be seen if the California Supreme Court or other Courts of Appeal will follow the reasoning of *Raines*.

11. Summary

While not as uniquely Californian as the Bear Flag, the Hollywood sign, or Angels baseball, the PAGA action has its own place in the California lexicon, at least among employers and employment lawyers. The parameters of PAGA will no doubt continue to be defined and refined by judicial decisions in the coming years, and employment law practitioners will need to stay on top of these continuing developments.

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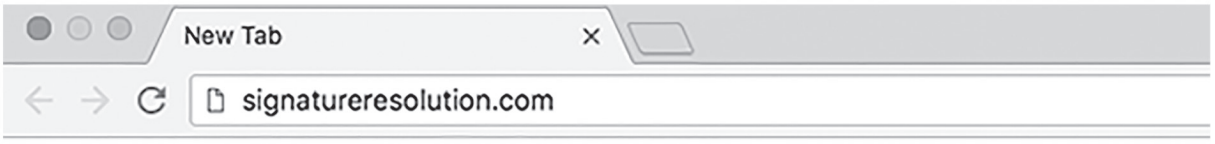

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