ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

Volume MMXIX No. 1 *April 2019*

A Judicial Perspective on San Diego's Updated Civility Guidelines

By Judge Katherine Bacal

Judge Katherine Bacal

After the County Bar adopted a Code of Conduct, the San Diego Superior Court incorporated the Code into its Local Rules. It's reasonable to assume the Court will do the same with the Bar's new Attorney Civility and Practice Guidelines. Why do civility rules need to be written down? Shouldn't attorneys treat each other with decency and respect without being told to do so? Many attorneys -- including most who practice in San Diego -- strive to be civil, professional, and courteous.

However, and unfortunately, almost everyone has dealt with an attorney who seemed to enjoy making opposing counsel's life miserable. Will the new Civility Guidelines make dealing with such attorneys easier and better? Probably not. Those attorneys will continue to do whatever they believe they can get away with while staying just on the right side of the disciplinary line. Or, the bad actors go over the line and the State Bar steps in. Another set of attorney conduct rules or guidelines, whether or not incorporated into the Court's rules, won't ensure compliance with the California Rules of Professional Conduct, nor will they make nasty people nice.

On the other hand, there are expectations stated in the Bar's new Guidelines that might not be a matter of mere common sense. Attorneys who would say that they comport themselves with a high degree of civility might be surprised to learn that certain of their actions violate the Guidelines.

Indeed, the Guidelines are violated on a regular basis by otherwise civil attorneys. For example, the Bar expects attorneys to refrain from proposing a stipulation in the presence of the court unless the other parties previously agreed to it. (§ II-G.) Many times, attorneys at ex parte hearings suggest resolving the dispute between the parties by a stipulation. Most of the time counsel are truly just trying to come up with an amicable resolution. Sometimes, though, counsel try to demonstrate to the court how reasonable they are (in contrast to unreasonable opposing counsel). The other side has not had the chance to contemplate the new proposal. Would the court think an attorney is being obstreperous if they don't agree to the proposed stipu-

(continued on page 5)

Inside

SAVE THESE DATES | *May Dinner | sidebars | Judicial Mixer* ..... *p. 2*

President's Letter | *Randy Grossman* ..... *p. 3*

Recent Changes to the Federal Rules of Civil Procedure
By Courtney Baird and Christopher Champine. ..... *p. 6*

The New Rules of Professional Conduct, Rule #1: READ THEM | *By Mark Mazzarella* ..... *p. 8*

Multi-State Employers Beware: FCRA Disclosures Must Be On a Single Document and May Not Include State, Local, or Other Extraneous Disclosures
By Daniel Gunning and Mark Rein ..... *p. 13*

California Case Summaries | *By Monty A. McIntyre* ..... *p. 14*

The California Consumer Privacy Act of 2018 - What Litigators Need To Know | *Jae Park.* ..... *p. 16*

SAVE the DATE

Wednesday, May 29 @ 5:00 p.m.
the Westin San Diego Gaslamp
910 Broadway Cir, San Diego, CA 92101

An Evening with the United States Attorney Robert S. Brewer, Jr.

Presented by: abtl SD

SAVE the DATES

sidebar is an associates networking happy hour *(cash bar)* for ABTL members. Come to this MONTHLY EVENT, have a great time, get to know colleagues, referral sources, and the ABTL community.

abtl sidebar

TUESDAYS

April 23 @ 5:30 pm
–The Local–

May 28 @ 5:30 pm
–Carruth Wine Cellars–

June 25 @ 5:30 pm
–Currant–

MORE TO COME

SAVE the DATE

TENTH ANNUAL
Judicial Mixer

The Judicial Advisory Board and Leadership Development Committee are proud to host this special event

WHEN	Tuesday July 9th, 2019 5:00 until 7:00 pm
WHERE	Federal Court Jury Lounge 333 West Broadway, SD

ASSOCIATION OF BUSINESS abtl TRIAL LAWYERS SAN DIEGO

President's Letter

By Randy Grossman

I am honored to serve as the ABTL San Diego President for 2019, and pleased to report that we are off to a great start providing programs and pursuing initiatives that are aligned with our mission to "promote the highest ideals of the legal profession — competence, ethics, professionalism and civility."

On January 9, 2019, we held our annual Board Dinner to welcome new members and thank colleagues who termed off the board. On January 26, 2019, ABTL held its bi-annual Trial Skills seminar where several talented junior lawyers showcased their advocacy skills in a mock trial before an esteemed group of senior litigators and judges. Congratulations to our co-chairs Frank Johnson, Andrea Myers, and David Lichtenstein for planning a successful seminar.

We held our first dinner program of the year on February 19, 2019. The hard work of Program chairs Paul Reynolds and Rich Segal helped us pack a full house at the Westin San Diego. We enjoyed fascinating war stories about the high-profile Waymo v. Uber trial. In addition, our Leadership Development Committee successfully completed its first MCLE lunch on March 4, 2019, entitled "Surprise! Handling the Unexpected Before Trial."

Under the leadership of Retired Judge Victor Bianchini, we formed a committee to identify trial opportunities for junior lawyers at local prosecutor offices. The committee already met with the City Attorney to discuss the program and plans to meet with other agencies soon. And our membership committee, with leadership from our former president, Michelle Burton, and our Judicial Advisory Board Chair, Judge Randa Trapp, started an outreach program to recruit attorneys and judges in Riverside County to join our chapter.

We have outstanding programs planned for 2019. Our second board meeting and dinner program is scheduled for May 29, 2019, and will feature San Diego's new United States Attorney, Robert S. Brewer, Jr. The 10th Annual Judicial Mixer is scheduled for July 9, 2019, and our annual fundraiser and dinner program will be held in September. Please visit our website to learn more about our full calendar of events.

Finally, I would like to acknowledge and thank our sponsors, our board, officers Alan Mansfield (Vice President), Rebecca Fortune (Treasurer) the Hon. Lorna Alksne (Secretary), and Lori McElroy (Executive Director) for their service and support. I am grateful to serve the San Diego ABTL chapter and look forward to spending time with as many of you as possible during 2019.

Randy Grossman

JUDICATE WEST
THE GOLD STANDARD
IN COMMERCIAL DISPUTE RESOLUTION

Commercial disputes demand resolutions that get all parties back to their business, and our experienced neutrals know how to deliver. Our arbitrators take a firm, fair, and expeditious approach guided by our unique Commercial Arbitration and Appellate Rules. Our mediators are renowned for adding value to settlement negotiations by helping the parties craft effective, durable, and innovative solutions.


Hon. Jan M. Adler (Ret.)


N. Denise Asher, Esq.


Hon. Victor E. Bianchini (Ret.)


Jonathan A. Brenner, Esq.


Hon. Steven R. Denton (Ret.)


Hon. Christine K. Goldsmith (Ret.)


Hon. Herbert B. Hoffman (Ret.)


Jeffrey A. Joseph, Esq.


Robert J. Kaplan, Esq.


Hon. Joan M. Lewis (Ret.)


Hon. William McCurine, Jr. (Ret.)


Hon. David B. Moon, Jr. (Ret.)


Hon. Thomas P. Nugent (Ret.)


Hon. Leo S. Papas (Ret.)


Gregory A. Post, Esq.


Hon. Ronald S. Prager (Ret.)


Hon. Joel M. Pressman (Ret.)


Hon. Linda Quinn (Ret.)


Thomas E. Sharkey, Esq.


Maureen Summers, Esq.

WWW.JUDICATEWEST.COM
(619) 814-1966

JUDICATE WEST
Alternative Dispute Resolution

Results Beyond Dispute℠

DOWNTOWN LOS ANGELES | SACRAMENTO | SAN DIEGO | SAN FRANCISCO | SANTA ANA | WEST LOS ANGELES

ABTL's Commitment to Trial Advocacy

(continued from cover)

lation? While the proposed resolution may be reasonable, it could also have unintended consequences (at least for the party on whom it was sprung). A better, more civil solution is to tell the court that there may be a way to work the matter out, and ask to speak to the other side outside the presence of the court. Better still, confer with counsel before your matter is called. (See Comment #41.)

In addition to reading the Guidelines, I'd also suggest reading the Comments. Some may be helpful and even surprising. For example, many attorneys don't know how to properly address a judge in court. It's "the Court." (See Comment #18.) Not "Dude" (as I was once called). Similarly, although not specifically stated in the Comments, jurors are not "you guys." "Ladies and gentlemen of the jury" works just fine.

I think I speak for all my colleagues when I say nothing makes us happier than parties working things out between themselves. But if you can't, the next best thing is to litigate civilly, with integrity and professionalism. Read the new Attorney Civility and Practice Guidelines. Share them with your colleagues. Consider specifically agreeing with opposing counsel to follow them. And thank you for making San Diego the best place to practice law.

This article first appeared in the San Diego Lawyer magazine. It is reprinted with the permission of the San Diego County Bar Association.

Recent Changes to the Federal Rules of Civil Procedure

By Courtney Baird and Christopher Champine, Duane Morris LLP

On December 1, 2018, substantive amendments to the Federal Rules of Civil Procedure took effect. These amendments do not fundamentally alter the litigation process, but they reflect the legal community's growing reliance on technology and align the Federal Rules of Civil Procedure ("FRCP") with modern legal practices. The most impactful changes eliminate the certificate of service requirement for e-filings, require electronic filing and service for parties represented by counsel, update the class action rule, and extend the automatic stay after entry of judgment.

FRCP 5: Electronic Filing, Service, and Signatures

Several tech-friendly amendments were made to FRCP 5. Section (d)(1) no longer requires a certificate of service for service using a court's e-filing system. However, for documents filed but not served using the e-file system, a certificate of service must still be provided. Amended Rule 5 also eliminates the requirement to obtain consent from an opposing party for electronic service, so long as the serving party uses the court's e-filing system to serve registered system users. The Advisory Committee Note also provides that electronic service can be made through other means with the consent of the person served.

Section (d)(1) of amended Rule 5 also mandates electronic filing of court materials by persons represented by counsel. Exceptions can be made for good cause or where local rules require non-electronic filing. Amended FRCP 5(d)(1) also gives courts permission to allow pro se litigants to use electronic filing. The Committee Note, however, expresses concern that relying too heavily on electronic filing might make it difficult for pro se litigants to access the court, and that orders requiring pro se litigants to file electronically should be made carefully.

Finally, amended FRCP 5(d)(3)(C) includes a national signature provision for e-filings. Using an electronic signature requires filing through a person's e-filing account, together with that person's name on a signature block. Amended Rule 5 does not go into detail as to what information the signature block must contain.

FRCP 23: Class Actions

Major changes were made to FRCP 23, which controls the procedure for litigating class actions. The new rule amends the methods of notice to (b)(3) class members to include "electronic means, or other appropriate means." This important change allows notice to be given by sending an email or, possibly, even a text message to class members. This is especially convenient when limited contact information is available for class members. The Advisory Committee Note recognizes many practitioners are already using new technologies to give effective notice.

Amended Rule 23(c)(2)(B) continues to call for providing class members with the best notice practicable, but gives no preference for any one method. Using any means of communicating or even a combination of different means of communicating is sufficient, so long as those means ensure reliable notice.

Amended Rule 23(e) now requires additional information to determine whether to give notice of the proposed settlement to the class. If the court is able to both approve the proposal under Rule 23(e)(2) and certify the class, the court can direct notice to all class members who would be bound by the settlement. Amendments to subsection (e) also expand the "fair, reasonable, and adequate" standard applicable to class settlements by providing factors for courts to consider when evaluating proposed settlement agreements, including the type of benefits the settlement will confer, plans for unclaimed funds, the existence of other pending or anticipated litigation, and anticipated attorneys' fees.

Subsection (e) now also requires specificity when objecting to a settlement agreement and court approval for payment in connection with foregoing or withdrawing a challenge to a proposed settlement. This should reduce the delays to class relief that occur when objections are

made for illegitimate reasons. Lastly, amended FRCP 23(e) states that a court's decision to send notice of a proposed settlement to the class under FRCP 23(e)(1) is not appealable.

FRCP 62 and 65.1: Stay After Judgment

Amendments were made to FRCP 62 and FRCP 65.1 that clarify and streamline timing issues. Amended Rule 62 extends the automatic stay after entry of judgment from 14 to 30 days. The Advisory Committee noted the "apparent gap" between the expiration of the automatic stay after judgment and the time for filing appeals. The 30-day stay should coincide with the time to file most appeals. However, Rule 62 now permits the court to dissolve the automatic stay by court order and allows a party to obtain a stay "by providing a bond or other security." Amended Rule 65.1 conforms to the changes made to Rule 62.

Conclusion

The FRCP amendments, while far from groundbreaking, should be applauded for aligning the Rules with the realities of modern legal practice. The amended FRCP reflects the vital role technology plays in most lawyers' day-to-day lives, and will save their clients time and money by reducing delays in litigation and settlements.

This article first appeared in the San Diego Lawyer magazine. It is reprinted with the permission of the San Diego County Bar Association.

The New Rules of Professional Conduct, Rule #1: *READ THEM*

By Mark Mazzarella

When I set out to write an article about California's revised Rules of Professional Conduct ("the Rules") my goal was to discuss the changes, or at least the substantial ones, sufficiently that someone who read the article at least would know enough to spot issues that deserved further investigation. After I spent enough time with the revised Rules to have a sense that I could write a meaningful article, I realized my goal was far too ambitious. My revised goal is to tell you enough about the new Rules that I will motivate you (that is "scare you") into reading them for yourself. Anything less would be a disservice to the reader. Even well-intentioned lawyers with busy schedules and hard deadlines tend to put tasks like reading the new Rules on the back burner, sometimes forever. My advice is "don't."

The last major revision to the Rules was in 1992. The most recent, with sixty-nine (69) new and revised Rules, went into effect November 1, 2018. A lot was changed. Even the way the Rules are numbered was changed. The old Rules used numbers and dashes, like 3-310. The new Rules use numbers and dots, like 1.7, similar to the ABA's Model Rules. The Rules Revision Commission consisted of 19 voting lawyers and judges and 5 non-voting advisors. Their assignment was to recommend changes which addressed developments in the law since the old Rules were approved, and eliminated unnecessary differences between the California Rules and the ABA's Model Rules, which are used by a preponderance of the states. The Commission did that, and more.

Many of the "new" Rules have previously existed within the State Bar Act, codified at Business & Profession's Code Section 6000 et. seq. or elsewhere within the California Codes. Now, however, in addition to any other penalty for their violation, a lawyer is subject to Bar discipline.

For example, Rule 1.8.3 now makes it unethical for lawyers to draft wills or financial instruments which contain substantial gifts to the lawyer or her family unless the lawyer has complied with Probate Code Section 21374, et. seq. which invalidates such gifts unless certain actions are taken. Rule 8.4.1 retains the previous prohibition against discrimination and retaliation in representing or terminating the representation of a client. But it now also makes it unethical to discriminate in connection with hiring, training or compensation decisions, which acts already are prohibited by a number of state and federal statutes and regulations. Rule 8.4.1 expands upon Rule 2-400 by including discrimination based on medical condition, genetic information, marital status, veteran status, ***"or any other category of discrimination prohibited by applicable law whether the category is actual or perceived."*** A review of the Comments to Rule 8.4.1 should motivate any prudent lawyer to take a close look at his firm's personal policies and procedures. Rule 3-110 "Failing to Act Competently," did not mention supervision of subordinates, although the requirement to subordinates is addressed in the Business & Professions Code. However new Rules 5.1 through 5.3 now expressly makes supervision an ethical requirement. Furthermore, lawyers now have the ethical obligation to make reasonable efforts to make sure those they supervise comply with the new Rules. Rule 8.4.1 and Rules 5.1 through 5.3 now combine to create an ethical duty on the part of all lawyers in a firm to "advocate corrective action to address known harassing or discriminatory conduct" even by the non-attorney employees of the firm, whether or not the purported offender is a subordinate.

Some of the new Rules have incorporated concepts developed over the years by the trial and appellate courts regarding unacceptable negotiation and litigation tactics. For example, Chapter 3 of the new Rules contains prohibitions against engaging in conduct which has no substantial purpose. Any conduct the only purpose of which is to increase cost and delay is now sanctionable not only by the Court, but also by the Bar. New Rule 5.1 now prohibits lawyers from charging unconscionable fees. Fees may be considered unconscionable if the attorney has failed to disclose material facts to the client, fraudulently mislead the client, or ***"intentionally overreached when negotiating a fee."*** It is easy to envision circumstances when clients who want to avoid paying a large contingency fee in a successful case will argue intentional overreaching in hind sight.

Some of the new Rules address issues which most of probably thought were not even in question. For example, Rule 1.8.7 requires a client's informed written consent before a lawyer can enter a plea of guilty or nolo contendere. I should hope so. Rule 1.15 requires advance attorney fee deposits to be deposited into a client trust account, not just advance costs. I thought that was the rule already. Rule 1.8.10 makes some changes to the Rule prohibiting sex with a client. For most of us the subtle distinctions between the old and new Rules will not be a big issue.

Some of the new Rules create as many questions as they answer. For example, Rule 1.18 states that attorneys owe "prospective clients" the duty of confidentiality, even when no attorney/client relationship ensues. But if a client has consulted an attorney and revealed confidential information with an expectation of privacy, hasn't the attorney/client relationship been established under existing case law? In that case, the client isn't "prospective." We can anticipate some interesting litigation arising out of this rule change.

Most important, some of the New Rules are just plain scary. New Rule 1.7 is on the top of my list of "The Rules that are most likely to be litigated." Rule 1.7 pertains to conflicts of interest, and replaces Rule 3-310. Under the old Rules, nothing got lawyers into more trouble than not identifying and dealing with conflicts soon enough and well enough. Rule 1.7 is certain to bring about even more litigation.

At first blush Rule 1.7 seems essentially the same as Rule 3-310. But they are not at all the same. Rule 1.7 is much broader. Rule 3-310 provided a list of conflicts of interest. While the language was not without ambiguity, it was easy under most circumstances to tell if you had a conflict that fell within one of the enumerated categories. Rule 1.7 adopts the Model Rules approach. As explained in footnote 4 to Rule 1.7, even if there is no direct conflict, there is a conflict that requires informed written consent ***"if there is a significant risk that the lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal."***

It is a safe bet that any plaintiff's malpractice attorney worth his or her salt will be able to fashion an argument in every case that the client's previous lawyer's "other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal,' in some material way kept the lawyer from recommending and carrying out the course of action which the plaintiff's attorney, with the benefit of hindsight, says should have been taken. Here are just a few illustrations of what might fall into that category.

- The lawyer was going through a divorce
- The lawyer got sick
- The lawyer had a rule that weekends were "family time"
- The lawyer was the managing partner of her firm or had personal investments that were a priority
- The lawyer was not able to work the long trial days he did in his youth

(continued on page 10)

The New Rules of Professional Conduct...

(continued from page 9)

You get the point. Most of us have other responsibilities, interests, or relationships, whether legal, business, financial, professional or personal, which keep us from doing everything we would do for clients if not constrained by the facts of life. An objective reading of Rule 1.7 would seem to call for us to get a waiver of conflict due to the constraints of the human condition. Do we now need to "confess" to our clients all of the factors in our lives which might distract us from the practice of law? Do we need a conflict waiver if our love life is distracting us from our work? How about if we have young children who take up more of our time and attention than is optimal in a law practice? Or, do we need to disclose if we, or our wife, is pregnant? After all, all those sleepless nights are bound to take the edge off.

I have only touched upon a few illustrative sections of the new Rules in this article. Hopefully, they have been enough to make you appreciate the importance of reading the Rules thoroughly. There is bound to be a lot of litigation over the next few years concerning the new Rules. If you want to represent the parties in that litigation, and not be one of them, I encourage you to download or print out a copy of the new Rules right now, and commit to reading them before another week passes.

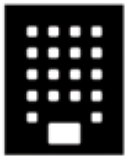
The new and old Rules, as well as the Rules Revision Commission's Comments, can be found at ***http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct***

SIGNATURE
RESOLUTION

Experience. Commitment. Results.

Highest Level of Legal Expertise

Most Accomplished and Unrivaled Neutrals



Professional State-of-the-Art Facilities

SIGNATURERESOLUTION.COM

633 W. 5th Street, Suite 1000
Los Angeles, CA 90071 | 213.410.5187

Multi-State Employers Beware: FCRA Disclosures Must Be On a Single Document and May Not Include State, Local, or Other Extraneous Disclosures

By Daniel Gunning and Mark Rein, Wilson Turner Kosmo LLP

The Fair Credit Reporting Act (FCRA), originally enacted in 1970, was one of the first federal laws aimed at securing information privacy in the computer age. As credit checks and employment background checks became the norm, FCRA sought to protect consumer privacy by requiring, among things, disclosures regarding what information is being collected and how it is being used.

In the employment context, FCRA requires employers to follow specific procedures before using third-party credit reports and criminal background checks to screen job applicants or employees. Specifically, employers must obtain written permission from the consumer after providing a written disclosure explaining what information is being obtained and how that information may be used. Before making an adverse employment decision (i.e. not selecting the applicant for hire), the employer must give the consumer a copy of the report and an opportunity to dispute the information contained within the report. And after the decision becomes final, the employer must also comply with certain notice requirements. If the employer fails to follow these procedures, the employer may be subject to penalties, and perhaps more significantly, the prevailing consumer's attorneys' fees and costs.

Once thought of as the easiest requirement, the disclosure obligation has gotten many employers in class-action trouble because of its specificity and its overlap with corresponding state laws. For example, FRCA requires employers to provide a "clear and conspicuous" disclosure "in a document that consists solely of the disclosure." Several states have similar disclosure requirements, such as California's Investigative Consumer Reporting Agencies Act (ICRAA).

For administrative ease and uniformity, many multi-state employers have been using a single disclosure to comply with both FCRA and every state's requirements. But that practice must now come to an end. In a recent Ninth Circuit decision, *Gilberg v. California Check Cashing Stores, LLC* 913 F.3d 1169 (9th Cir. 2019), the appellate court struck down an employer's practice of providing applicants with a disclosure form that contained not only a FCRA disclosure, but also a variety of other state mandated disclosures—including for applicants in New York, Main, Oregon, Washington, California, Minnesota, and Oklahoma. The court concluded the disclosure violated both FCRA and ICRAA because the disclosure requirements in each statute mean what they say: each disclosure must be in a document that consists "solely" of the disclosure. Thus, neither FCRA nor ICRAA permit employers to combine their respective disclosures together, regardless of how "closely related" they may seem.

The Ninth Circuit also provided definitions for the terms "clear" and "conspicuous" for purposes of FCRA and ICRAA. The court held that "clear" means "readily understandable," and "conspicuous" means "readily noticeable to the consumer." Applying these definitions, the court held that the employer's disclosure was conspicuous, but not clear. The court noted the headings on the disclosure were capitalized, bolded, and underlined, so it met the statute's "conspicuous" requirement—even after noting the font on the front was "inadvisably" small and cramped. But the court held that combining state and federal disclosures, including state disclosures that were not applicable to the applicant, was confusing and therefore violated the "clear" test.

The take-away from this decision is straightforward: employers operating in multiple states should provide separate disclosures for each state. Employers should also make sure that each disclosure is clearly captioned and free from typos and other confusing language.

California Case Summaries ADR™ February 2019

By Monty A. McIntyre, ADR Services, Inc.

CALIFORNIA SUPREME COURT

Civil Procedure

Sweetwater Union High School Dist. v. Gilbane Bldg. Co. (2019) _ Cal.5th _ , 2019 WL 962324: The California Supreme Court affirmed the Court of Appeal's decision that affirmed the trial court's denial of defendants' anti-SLAPP motion to strike under Code of Civil Procedure section 425.16. In the second stage of an anti-SLAPP hearing, when determining a plaintiff's probability of success, a court may consider statements that are the equivalent of affidavits and declarations because they were made under oath or penalty of perjury in California. In this case, change of plea forms, factual narratives, and excerpts from grand jury testimony satisfied this requirement. A court may consider affidavits, declarations, and their equivalents only if it is reasonably possible the proffered evidence set out in those statements will be admissible at trial. Conversely, if the evidence relied upon cannot be admitted at trial, because it is categorically barred or undisputed factual circumstances show inadmissibility, the court may not consider it in the face of an objection. If an evidentiary objection is made, the plaintiff may attempt to cure the asserted defect or demonstrate the defect is curable. (February 28, 2019.)

Employment

Goonewardene v. ADP, LLC (2019) _ Cal.5th _ , 2019 WL 470963: The California Supreme Court reversed the Court of Appeal decision that had allowed an employee to bring causes of action for unpaid wages against a payroll company for the employer for breach of the payroll company's contract with the employer under the third party beneficiary doctrine, negligence, and negligent misrepresentation. The California Supreme Court ruled that an employee may not be viewed as a third party beneficiary who may maintain an action against the payroll company for an alleged breach of the contract between the employer and the payroll company with regard to the payment of wages. Moreover, an employee who alleges that he or she has not been paid wages that are due cannot maintain tort causes of action for negligence and negligent misrepresentation against a payroll company. (February 7, 2019.)

CALIFORNIA COURTS OF APPEAL

Arbitration

Correia v. NB Baker Electric, Inc. (2019) _ Cal. App.5th _ , 2019 WL 910979: The Court of Appeal affirmed the trial court's order granting a petition to compel arbitration of all causes of action in a wage and hour case, except the Private Attorney General Act of 2004 (PAGA; Labor Code, section 2699 et seq.) claim, and staying the PAGA claim until the conclusion of the arbitration. The trial court acted within its discretion in considering plaintiffs' response to the arbitration petition even though plaintiffs filed the response after the statutory deadline. The California Supreme Court decision of *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (Iskanian), which held unenforceable agreements to waive the right to bring PAGA representative actions in any forum, remains binding on California courts. The recent decision of the United States Supreme Court, in *Epic Systems Corp. v. Lewis* (2018) __ U.S. __ [138 S.Ct. 1612] *(Epic)*, does not change this result. While *Epic* reaffirmed the broad preemptive scope of the Federal Arbitration Act, it did not address the specific issues before the *Iskanian* court involving a claim for civil penalties brought on behalf of the government and the enforceability of an agreement barring a PAGA representative action in any forum. The trial court also properly declined to compel arbitration of the PAGA claim and stayed that issue until after the arbitration. (C.A. 4th, February 25, 2019.)

Civil Procedure

Sunrise Financial, LLC v. Super. Ct. (2019) _ Cal. App.5th _ , 2019 WL 476095: The Court of Appeal denied a writ petition challenging the trial court's denial of a Code of Civil Procedure section 170.6 challenge by several defendants to the trial judge on the basis that it was untimely filed. The Court of Appeal ruled that the trial court properly found defendants' section 170.6 challenge was untimely because it was filed more than 15 days after they made an appearance in the action by filing an opposition to a Code of Civil Procedure section 403

(continued from page 10)

transfer/consolidation motion in the judge's department. While the section 170.6 time deadlines were not written with section 403 transfer motions in mind, this conclusion best effectuates the legislative intent when viewing the specific words of the statute and the statutory purpose and objectives. (C.A. 4th, February 7, 2019.)

Elder Abuse

Darrin v. Miller (2019) _ Cal.App.5th _ , 2019 WL 337088: The Court of Appeal reversed the trial court's order denying a petition for a restraining order under Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act; Welfare & Institutions Code, section 15600 et seq.). The trial court erred in denying the petition because the restraining order was requested against a neighbor. The Court of Appeal ruled that the plain language of the Elder Abuse Act authorizes a trial court to issue a restraining order against any individual who has engaged in abusive conduct, as defined by statute, toward a person age 65 or older regardless of the relationship between the alleged abuser and victim. (Welfare & Institutions Code, sections 15610.07(a)(1) and 15657.03.) (C.A. 1st, filed January 28, 2019, published February 21, 2019.)

I now offer a new product called ***California Case Summaries: Civil Update 2018 Q1™***. It has my short, organized summaries of every California civil case published in the first quarter of 2018, with the official case citations.

For ADR Services, Inc. scheduling,
contact my case manager Christopher Schuster
Phone: (619) 233-1323.
Email: christopher@adrservices.com

Monty A. McIntyre, Esq. is a Mediator, Arbitrator & Referee at ADR Services, Inc.

Web: montymcintyre.com/mcintyre
Email: monty@montymcintyre.com
Cell: (619) 990-4312.

The California Consumer Privacy Act of 2018 - What Litigators Need To Know

By Jae Park

The California Consumer Privacy Act of 2018 (CCPA), signed into law on June 28, 2018, introduces a sweeping new privacy regime that imposes significant changes to how businesses collect, store, sell and process consumer "personal information" of California residents. It also introduces significant penalties and the potential for an expansive private right of action. Because the CCPA goes into effect January 1, 2020, it's important for all litigators to understand the key provisions of the CCPA and how the environment around data security and privacy litigation in California is about to undergo a radical change.

KEY DEFINITIONS

Key to understanding the CCPA are the definitions of "business," "consumer," and "personal information" because the CCPA governs how "businesses" collect, store, and use "consumer" "personal information."

"Business"

The CCPA defines "business" as: (1) any for-profit entity; (2) that does business in California; (3) collects or directs to be collected consumer personal information, or determines the purposes and means of processing consumer personal information; and (4) satisfies any of three thresholds:

- Annual gross revenue in excess of $25 million;
- Annually buys, receives, sells or shares the personal information of 50,000 or more California residents; or
- Derives 50 percent or more of annual revenues from selling consumer personal information.[1]

The CCPA also defines "business" as any for-profit entity that controls or is controlled by a business, as defined above, and that "shares common branding with the business." [2]

"Consumer"

The CCPA defines "consumer" as any natural person who is a California resident, however identified, including by any unique identifier.[3] This definition is therefore broader than a "consumer" in the traditional sense (i.e., someone that has purchased a product) and would include employees of a business, individuals who enter into commercial transactions with other businesses, and non-consumers of a particular business.

"Personal information"

"Personal information" is defined as information that "identifies, relates to, describes, is capable of being associated with or could reasonably be linked, directly or indirectly, with a particular consumer or household." The term "household"[4] is not defined. In addition, the CCPA lists express categories that are considered personal information under the statute, including real name, biometric information, email address, social security number, and account information, as well as IP address, "commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies," geolocation data, "internet or other electronic network activity information," and information regarding a consumer's interaction with" a website, application, or advertisement, and "inferences drawn from any of the information identified" above "to create a profile about a consumer reflecting the consumer's preferences...."[5] Personal information does not include publicly available information.[6] This new and expansive definition of personal information is significant for litigators because it would include information routinely gathered (e.g., cookie placement information, website traffic, browsing history, etc.) that are currently not generally considered personal information. Thus, the regulatory enforcement and private right of action could target businesses unwittingly collecting "personal information" without complying with the CCPA.

NEW RIGHTS AND OBLIGATIONS

The CCPA grants covered consumers the right to request, up to two times per year, that businesses disclose the categories and specific pieces of personal information collected, sold, or disclosed about the consumer dating back 12 months[7] by submitting a "verifiable consumer request".[8] The AG is developing implementing regulations defining the contours of the verifiable consumer request process. In addition, consumers will also have the right to "opt-out" from a sale of their personal information from a business to a third-party.[9] Businesses will need to notify consumers of their right to opt-out, and notify consumers if their personal information has been sold to any third party.[10] "Sell" is defined broadly to include selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating a consumer's personal information by the business to another business or third party for monetary or "other valuable consideration."[11] Consumers also have the right to request that a business delete personal information it has collected from the consumer.[12]

Covered businesses will have a stand-alone obligation to disclose the categories of personal information collected about consumers, and the purposes for such collection and use, at or before the point of collection.[13] This includes disclosing the right of disclosure in any online privacy policy or California-specific description of consumer rights[14] and designating methods for submitting a request for personal information.[15] Businesses must also provide a the consumer multiple opportunities to opt out, including through "clear and conspicuous" link on their homepage and in the privacy policy and/or California rights page that directs the consumer to a website that allows the consumer to opt-out.[16] The CCPA also provides training requirements for businesses and restrictions on when a business can contact the consumer.[17]

EXEMPTIONS

The CCPA contains important exemptions for businesses already collecting covered information under the Confidentiality of Medical Information Act (CMIA), Health Insurance Portability and Availability Act of 1996 (HIPAA), Fair Credit Reporting Act (FCRA), Gramm-Leach-Bliley Act (GLBA) and Driver's Privacy Protection Act of 1994 (DPPA). However, that these exemptions may only be partial because the definition of personal information under the CCPA is, in most cases, broader than the definition of covered information in the statutes listed above. Thus, a business could be collecting the broad array of personal information under the CCPA, but only a small subset of that information is covered under the statutes listed above.

REGULATIONS, ENFORCEMENT AND PRIVATE RIGHT OF ACTION

In addition to directing the AG to "solicit broad public participation" and adopt implementing regulations on or before July 1, 2020,[18] covering the categories of personal information, the definition of unique identifiers, the methods of submitting requests,[19] exemptions, opt-out requests, monetary threshold for coverage, business notification requirements, and verifiable consumer requests, the CCPA empowers the AG to enforce all provisions of the CCPA, subject to a 30 day safe harbor. Violations may result in injunctive relief or civil penalties in an amount of no more than $2,500 per violation or $7,500 for each intentional violation.[20]

Also, CCPA provides a private right of action when there is unauthorized access and exfiltration, theft or disclosure of a consumer's nonencrypted or nonredacted personal information resulting from the business's violation of the duty to implement and maintain reasonable security procedures.[21] Available remedies include injunctive relief and statutory damages not less than $100 and not greater than $750 per consumer per incident or actual damages, whichever is higher.[22] Like the AG enforcement, the private right of action is generally subject to a 30 day safe harbor provision.[23] Significantly, there is a current proposal to expand the private right of action to the entire statute and remove the 30 day safe harbor provision.

(continued on page 18)

The California Consumer Privacy Act of 2018...

(continued from page 17)

KEY TAKEAWAYS

Although the CCPA will likely change before now and January 1, 2020, the broad definitions of "business, "consumer" and "personal information" coupled with new obligations and the enforcement and the private right of action provisions will no doubt spur privacy and consumer litigation under the CCPA.

Covered businesses should begin compliance efforts now, including segregating their data, identifying the data that fit the definition of consumer personal information, rather than relying on the 30-day safe harbor period after receiving a "notice of violation" or "notice to cure" from the AG.

Moreover, consumers will be entitled to bring an action if a business fails to maintain "reasonable security procedures and practices appropriate to the nature of the information to protect the personal information stored." These broad undefined terms will likely result in litigation which will require a close analysis of many factors, such as the business's nature, industry, size, etc. to determine whether the business maintained "reasonable" security procedures and practices. It would be prudent for businesses to conduct a gap assessment and/or risk analysis on cybersecurity controls/programs currently in place and enhance them where necessary.

FOOTNOTES

1 Id. at § 1798.140(c)(1)(A)-(C).
2 Id. at § 1798.140(c)(2).
3 Id. at § 1798.140(g).
4 Id. at § 1798.140(o)(1).
5 Id. at § 1798.140(o)(1)(A)-(K).
6 Id. at § 1798.140(o)(2).
7 Id. at § 1798.140(a), (c).
8 Id. at §§ 1798.100(c); 1798.140(y).
9 Id. at § 1798.120(a).
10 Id. at § 1798.120(b).
11 Id. at § 1798.140(t)(1).
12 Id. at §1798.105(a), (c).
13 Id. at § 1798.100(b).
14 Id. at §1798.130(a)(5)(A).
15 Id. at § 1798.130(1).
16 Id. at § 1798.135.(a)(2)(A)-(B).
17 Id. at § 1798.135(a)(3)-(4).
18 Id. at § 1798.185(a).
19 Id. at § 1798.185(a)(4)-(7).
20 Id. at § 1798.155(b).
21 Id. at § 1798.150(a)(1).
22 Id. at § 1798.150(a)(2).
23 Id. at § 1798.150(a)(2), (b).

Association of Business Trial Lawyers – San Diego

2019 Officers and Board Members

OFFICERS

President – Randy Grossman
Vice President – Alan Mansfield
Treasurer – Rebecca J. Fortune
Secretary – Hon. Lorna Alksne

BOARD OF GOVERNORS

Christian Andreu-von Euw
Karen L. Alexander
Hon. Katherine A. Bacal
Wendy Behan
Hon. Roger Benitez
Hon. Michael Berg
Hon. Victor Bianchini (Ret.)
Jon S. Brick
Gary Brucker
Hon. Jill Burkhardt
Hon. Larry A. Burns
Michelle L. Burton
Ryan C. Caplan
Shawn T. Cobb
Hon. Karen S. Crawford
Hon. Robert P. Dahlquist
Hon. William S. Dato
Hon. Mitchell D. Dembin
Hon. Steven R. Denton (Ret.)
Jenny L. Dixon
K Elizabeth Dunn
Hon. Kevin A. Enright
Elizabeth A. French
Dave Fox
Hon. Irma E. Gonzalez (Ret.)
Daniel C. Gunning
Hon. Judith F. Hayes
Jillian Hayes
Hon. William Q. Hayes
Valentine S. Hoy
Hon. Marilyn L. Huff
Conor Hulburt
Rachel Jensen
Frank J. Johnson
Randy K. Jones
Noah A. Katsell
William P. Keith
Hon. Christopher Latham
Hon. Joan M. Lewis
David H. Lichtenstein
Hon. Linda Lopez
Luis E. Lorenzana
Douglas M. Lytle
Robert G. Marasco
Deborah Martin
Kimbery A. McDonnell
Hon. Kenneth J. Medel
Andrea N. Myers
Hon. Laura H. Parsky
Hollis Peterson
Hon. Ronald S. Prager
Adam Powell
Hon. Linda Quinn (Ret.)
Marty B. Ready
Paul A. Reynolds
Mary Robberson
Hon. Janis L. Sammartino
Hon. Andrew Schopler
Richard M. Segal
Andrew B. Serwin
Logan D. Smith
Hon. Michael T. Smyth
David R. Stickney
Hon. Ed Sturgeon
Hon. Timothy B Taylor
Hon. Randa Trapp
Colin L. Ward
Hon. Joel R. Wohlfeil
Summer J. Wynn

JUDICIAL ADVISORY BOARD

Hon. Randa Trapp – Chair
Hon. Cynthia G. Aaron
Hon. Cynthia Bashant
Hon. Anthony J. Battaglia
Hon. Jill Burkhardt
Hon. Larry Burns
Hon. Patricia Yim Cowett (Ret.)
Hon. Karen Crawford
Hon. Gonzalo P. Curiel
Hon. Robert P. Dahlquist
Hon. Mitchell D. Dembin
Hon. Kevin A. Enright
Hon. Judith Hayes
Hon. Herbert B. Hoffman (Ret.)
Hon. Richard D. Huffman
Hon. Frederic L. Link
Hon. Barbara L. Major
Hon. William H. McAdam
Hon. Leo S. Papas (Ret.)
Hon. Nita Stormes
Hon. Eddie C. Sturgeon
Hon. Timothy B. Taylor

PAST PRESIDENTS

Hon. Jan M. Adler
Peter H. Benzian
Charles V. Berwanger
Michelle Burton
Michael L. Duckor
Brian A. Foster
Edward M. Gergosian
Richard D. Gluck
Hon. J. Richard Haden (Ret.)
Hon. Maureen F. Hallahan
Marisa Janine-Page
Frederick W. Kosmo
Jack Leer
Mark C. Mazzarella
Hon. M. Margaret McKeown
Anna F. Roppo
Alan Schulman
Hon. Ronald L. Styn
Howard F. Susman
Paul A. Tyrell
Claudette G. Wilson
Robin A. Wofford
Meryl L. Young
Mark C. Zebrowski

ANNUAL SEMINAR CO-CHAIRS

Dan Gunning | Andrea Myers

JUDICIAL ADVISORY BOARD CHAIR

Hon. Randa Trapp

MEMBERSHIP CO-CHAIRS

Gary Brucker | Dave Fox

COMMUNITY OUT-REACH CO-CHAIRS

Jenny Dixon | Ann Wilson

DINNER PROGRAM CO-CHAIRS

Paul Reynolds | Rich Segal

LEADERSHIP DEVELOPMENT CO-CHAIRS

Jessica Kondrick | Nicholas Ferraro

MOCK TRIAL CO-CHAIRS

Marisa Janine-Page | Frank Johnson

SPONSOR RELATIONS CO-CHAIRS

Boris Zelkind | David Lichtenstein

CIVILITY CO-CHAIRS

Michelle Burton | Robert Shaughnessy

ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO
abtl

8030 La Mesa Blvd., #127
La Mesa, CA 91942

PRSRT STD
U.S. POSTAGE
PAID
PERMIT 2325
SAN DIEGO, CA