

# ASSOCIATION OF BUSINESS TRIAL LAWYERS

# abt1

# REPORT

LOS ANGELES

SPRING 2017

## DO YOU KNOW HOW OLD SHE IS? A LOOK AT CALIFORNIA'S NEW AGE DISCRIMINATION LAW



Mayra Felix

In September 2016, California enacted Assembly Bill 1687 (“AB 1687”), which prohibits the publication of an actor’s age or birthdate. Although the law is well intended, it may have a dangerous side effect. This law could set a precedent for the suppression, censorship, or punishment of the publication of truthful information. AB 1687 is codified as California Civil Code section 1798.83.5 and came into effect on January 1, 2017. The law provides:

A commercial online entertainment employment service provider that enters into a contractual agreement to

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## THE PUBLICATION CONUNDRUM: TO PUBLISH OR NOT TO PUBLISH

Appellate justices, including Justice Ashmann-Gerst, frequently struggle with the question of whether to publish when they draft opinions resolving appeals, and their decision not to publish often frustrates practicing attorneys like Michael, Justice Ashmann-Gerst’s son, who has authored and argued approximately 20 appellate matters.



Hon. Judith Ashmann-Gerst

To best understand the tension between the views of justices as compared to those of practicing attorneys, we begin with the rules governing publication, keeping in mind that only about 9 percent of Court of Appeal majority opinions are published.



Michael Gerst

California Rules of Court, rule 8.1105(a) provides that all opinions of the California Supreme Court are published. The rules, however, are different for the Court of Appeal and the appellate division of the superior court. Appellate opinions are published only “if a majority of the rendering court certifies the opinion for publication.” (Cal. Rules of Court, rule 8.1105(b).) In deciding whether to certify an opinion for publication, the Court of Appeal or superior court appellate division must consider various standards, including whether the opinion: (1) “[e]stablishes a new rule of law”; (2) “[a]ppplies an existing rule of law to a set of facts significantly different from those stated in published opinions”; (3) “[m]odifies, explains, or criticizes with reasons given, an existing rule of law”; (4) “[a]dvances a new interpretation,

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# PRESIDENT'S REPORT



Nancy R. Thomas

Our program chairs have done an outstanding job of putting together stellar lunch and dinner programs this year. We started in the fall with a program focused on two high-profile privacy cases. Board member Bruce Broillet spoke about his team's victory in the Erin Andrews peeper trial. He was joined by

Kenneth Turkel, who took us through the strategy decisions that led to his victory in the case Hulk Hogan brought against Gawker. The program was part closing statement and part analysis, giving us a fascinating seat on the trial team for both cases.

In December, we heard from lawyer and well-known television writer Jonathan Shapiro. Judge Kozinski introduced Jonathan and, in turn, Jonathan showed a clip of Judge Kozinski's cameo in the cable television show Goliath. It was an entertaining discussion of how we can build storytelling into our cases. In our annual tradition, our Public Service Chairs Susan Leader of Akin Gump and Paul Salvaty of Hogan Lovells led the charge in raising money to purchase holiday toys for needy children. Thanks very much to ABTL members whose generosity made this possible.

Our January lunch program waded into front-page news, with a panel that discussed First Amendment issues. Gibson Dunn partner Ted Boutros, Davis Wright Tremaine partner Rochelle Wilcox, and University of Georgia law professor Sonja West took on presidential tweets, safe spaces, fake news, and other hot topics in First Amendment law.

In February, we were exceptionally honored to welcome Justice Anthony Kennedy to Los Angeles. Justice Kennedy spoke with eloquence and insight about civil discourse and the impact of technology. He also answered questions about his approach to constitutional interpretation, referencing everything from the famous chess match between the IBM Big Blue computer and Garry Kasparov to the Supreme Court's decision in *Obergefell v. Hodges*. It was a wonderful night for the over 750 attendees and for ABTL. Special thanks to Judge Kozinski and Judge Kuhl, who reached out separately to encourage Justice Kennedy to accept our invitation.

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ASSOCIATION OF BUSINESS TRIAL LAWYERS

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In March, we learned about the legal and ethical issues surrounding the legalization of marijuana in California. Ethics expert Jim Ham, lawyer Bryna Dahlin, and marijuana activist and author Ed Rosenthal gave us their perspectives on emerging issues.

And in April, the Honorable André Birotte moderated a discussion with Bart Williams and Manuel Cachán of Proskauer about their victory in a high-profile trial for Johnson & Johnson after well-publicized plaintiffs' verdicts in three earlier cases. They shared insights on how to get ahead of press coverage of the earlier verdicts, working with witnesses, and dealing with challenging local rules.

On May 23rd, join us for a lunch program on settling class actions. We will be joined by the Honorable Jay Gandhi, the Honorable Philip Gutierrez, and experienced class action lawyers. These experts will discuss tactics

and tools for negotiating a class action settlement and obtaining court approval.

June will bring our annual Judicial Reception in which we honor our state and federal court judges. It's always a great chance to catch up with colleagues and judges in support of our mission to promote dialogue between the bench and the bar on business trial issues.

Thanks to Dinner Program Chairs Sascha Henry of Sheppard, Mullin, Richter & Hampton and Jeanne Irving of McCool Smith Hennigan, Dinner Program Vice Chair Manuel Cachán of Proskauer, and Lunch Program Co-Chairs Kevin Boyle of Panish, Shea & Boyle and Erin Ranahan of Winston & Strawn for continuing the ABTL tradition of exceptional programming.

We look forward to seeing you at the Biltmore for one of our upcoming programs!

## **Want to Get Published?**

### **Looking to Contribute An Article?**

**The ABTL Report is always looking for articles geared toward business trial lawyers.**

**If you are interested,  
please contact either of our Co-Editors  
Hon. Margaret Grignon (Ret.) / Grignon Law Firm LLP  
at [mgrignon@grignonlawfirm.com](mailto:mgrignon@grignonlawfirm.com) or  
John Querio / Horvitz & Levy LLP  
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“CALIFORNIA’S NEW AGE DISCRIMINATION LAW”... continued from Page 1

provide employment services to an individual for a subscription payment shall not, upon request by the subscriber. . . :

(1) Publish . . . the subscriber’s date of birth or age information in an online profile of the subscriber[;]

(2) Share the subscriber’s date of birth or age information with any Internet Web sites for the purpose of publication.

Cal. Civ. Code § 1798.83.5(b).

The law also requires that the service provider “shall, within five days, remove [the information] from public view.” *Id.* § 1798.83.5(c).

AB 1687 applies to several types of entertainment professionals, but is specifically aimed at protecting actors. The intended purpose of AB 1687 “is to ensure that information obtained on an Internet Web site regarding an individual’s age will not be used in furtherance of employment or age discrimination.” Cal. Civ. Code § 1798.83.5(a). The author of AB 1687, Assembly Majority Leader Ian Calderon, argues that the law is intended to protect lesser-known actors’ ages because their ages are not common knowledge like those of major actors. Additionally, proponents maintain that the law applies only in situations where the actor is a subscriber to a “commercial online entertainment employment service provider.” *Id.* § 1798.83.5(d)(1). Therefore, they contend that the law is narrow in scope.

IMDb is such a “commercial online entertainment employment service provider.” IMDb operates two websites. The first, IMDb.com, the site with which most people are familiar, provides a myriad of information about movies, television series, and actors or others involved in these productions. The second, IMDbPro, is a site containing actors’ personal information, from demographics to experience, contact, and management information. This site is subscription-based and intended for use by casting directors to find actors for their projects. Actors pay a subscription fee to have their profile on the site. AB 1687 requires IMDb to remove an actor’s age and birthdate from its sites if a subscribing actor so requests. However, it should be noted that subscribers have had the ability to remove their age information from IMDbPro.

Several concerns have arisen regarding the constitutionality of this law, particularly under the First Amendment. There are several tenable First Amendment arguments that IMDb, commentators, and experts have proffered in support of invalidating AB 1687. For example, AB 1687 is an impermissible content-based regulation or an improper regulation of commercial speech. IMDb has filed suit against the Attorney General seeking injunctive and declaratory relief. In its complaint, IMDb argued that AB 1687 is a content-based regulation because it singles out “date of birth and age information.” IMDb also argued that the law was not narrowly tailored because there were less extreme ways to prevent age discrimination than prohibiting the publication of birthdates and ages. IMDb further argued that the law was over-inclusive because it applied to all entertainment professionals, not just actors. Other entertainment professionals, like producers, are not as likely to suffer age discrimination as are actors. Additionally, the law is under-inclusive because birthdate and age information can be found everywhere on the internet. IMDb also made arguments under the Commerce Clause and Communications Decency Act.

On February 22, 2017, the United States District Court for the Northern District of California issued an order granting the preliminary injunction to stay enforcement of the law pending the outcome of the lawsuit. *IMDb.com, Inc. v. Becerra*, No. 16-cv-06535-VC, 2017 WL 772346 (N.D. Cal. Feb. 22, 2017). In determining IMDb’s likelihood of success, the court noted, “[I]t’s difficult to imagine how AB 1687 could not violate the First Amendment.” *Id.* at \*1. The court went on to say that AB 1687 “[i]s a restriction of non-commercial speech on the basis of content.” *Id.* Furthermore, the government could not meet its burden of showing that the restriction is “actually necessary” to serve a compelling government interest. *Id.* (quoting *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 799 (2011)). The court also noted that there are other, more effective means to combat age discrimination and that barring publication of ages on just one site is not the least restrictive means of accomplishing this goal. *Id.*

However, there is another argument that could have been used to defeat the law: AB 1687 prohibits the publication of

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truthful information—an actor’s age or birthdate—in violation of the First Amendment. AB 1687 directly contravenes decades-old United States Supreme Court precedent holding that states cannot punish the publication of truthful information that was lawfully obtained. Courts have held not that publication of truthful information is automatically protected by the Constitution, but that if information is lawfully obtained, then punishment can be imposed only if *the regulation meets strict scrutiny*. See *The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that “where a newspaper publishes truthful information [a rape victim’s name], which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order”); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102 (1979) (“state action to punish the publication of truthful information seldom can satisfy constitutional standards”); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (“Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.”); see also *Hogan v. Hearst Corp.*, 945 S.W.2d 246, 250 (Tex. App. 1997) (“Once information is made a matter of public record, the protection accorded freedom of speech and press by the First Amendment may prohibit recovery for injuries caused by any further disclosure of and publicity given such information.”). IMDb obtains ages and birthdates lawfully from IMDb users or the public record. Additionally, IMDb can obtain actors’ ages from other websites, which is yet another means of lawfully obtaining that information. Ages or birthdates can also be found on social media and other websites. So actors’ ages and birthdates are already a matter of public record, and IMDb lawfully obtains this information. Therefore, punishment or prohibition of IMDb or any other website for further publication is constitutionally impermissible.

Additionally, the under-inclusiveness of AB 1687 defeats any strict scrutiny justification. In *Florida Star*, Justice Scalia noted in his concurrence that, “[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Florida Star*, 491 U.S. at 541–42 (Scalia, J., concurring). AB 1687 is not accomplishing its ostensible goal

of protecting against age discrimination by prohibiting only IMDb from publishing age and birthdate information that is available elsewhere. If a casting director really wants to know an actor’s age, he or she can look elsewhere on the internet. There are surely more effective ways to combat age discrimination in Hollywood.

For example, in *Brown v. Entertainment Merchants Association*, the U.S. Supreme Court noted that a California law that prohibited the sale or rental of violent video games to minors had a legitimate end in addressing a serious social problem. 564 U.S. at 802. The Court noted, however, that the law was “wildly under-inclusive when judged against its asserted justification, which. . . alone [is] enough to defeat it. Under-inclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.” *Id.* at 805. Additionally, when such an end “affect[s] First Amendment rights [it] must be pursued by means that are neither seriously under-inclusive nor seriously over-inclusive.” *Id.*

Although the California legislature’s purpose in enacting AB 1687—combating age discrimination in Hollywood—is laudable, from a constitutional standpoint the law is both seriously under-inclusive (because it does not prohibit disclosure of actors’ ages and birthdates in all fora) and over-inclusive (because it includes all entertainment professionals and not just actors). Thus, AB 1687 was most likely doomed from the start because it suffers from numerous First Amendment problems that can be used to invalidate it. For now, at least one trial court has concluded that IMDb does not have to comply with the law and that actors’ ages and birthdates may still be disclosed on IMDb websites.

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## TRYING TO CREATE AN APPEALABLE JUDGMENT? TREAD CAREFULLY!



Alana Rotter

Parties face a dilemma after the trial court sustains a demurrer to a key cause of action, excludes a wide swath of evidence, or makes another ruling that substantially changes the litigation dynamic but leaves some causes of action intact. The ruling generally can't be appealed until there is a final judgment resolving the entire case. Yet, it may not be worth the cost of litigating the sliver of the case that is left in order to reach that final judgment.



Cynthia Tobisman

Lawyers' common instinct in this situation is to accelerate appealability by stipulating to dismiss the remaining claims. But a surprising number of lawyers don't realize that the Supreme Court has imposed restrictions on

what types of stipulated judgments are appealable—restrictions that can torpedo an intended appeal if the lawyers aren't careful.

We've seen it happen: Lawyers hammer out a stipulated dismissal, only to discover later that the resulting judgment is not sufficiently final to appeal. We outline below how to avoid this situation, and what to do if you're already in it.

### Background: The final judgment rule

The general rule is that an appeal lies only from a "judgment" that is "final." (Code Civ. Proc., § 904.1, subd. (a)(1); *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1101 (*Kurwa*)). A final judgment is one that completely disposes of all causes of action between two parties. (*Kurwa, supra*, 57 Cal.4th at p. 1101.)

The corollary is that most interim rulings are not immediately appealable. Although there are a few exceptions (see Code Civ. Proc., § 904.1, subd. (a)), the overwhelming majority of interim trial court rulings are not reviewable until the end of a case, as part of the appeal from the final judgment.

This framework leaves three options when the trial court issues a significant ruling that disposes of less than an entire

case: (1) seek discretionary appellate review via a writ petition; (2) litigate the rest of the case to a final judgment, and then appeal; or (3) voluntarily dismiss the remaining causes of action to hasten the entry of a final judgment, and then appeal.

Which option is the best fit varies from case to case. The steep odds facing writ petitions, and the cost of continuing to litigate, often lead parties to the voluntary dismissal path. But as the Supreme Court made clear a few years ago in *Kurwa v. Kislinger, supra*, 57 Cal.4th 1097, not just any voluntary dismissal will do. Familiarity with *Kurwa* is critical for any lawyer considering this path.

### *Kurwa v. Kislinger's* take on the final judgment rule

In *Kurwa*, the trial court dismissed several causes of action with prejudice but left other claims undecided. (*Kurwa, supra*, 57 Cal.4th at p. 1100.) Attempting to pave the way for an immediate appeal, the parties stipulated to voluntarily dismiss the remaining claim and cross-claim without prejudice and to waive the statute of limitations on them—essentially, holding the voluntarily-dismissed claims in abeyance pending appeal. (*Id.* at pp. 1101, 1106.) The trial court entered a judgment pursuant to the stipulation, and the plaintiff appealed. (*Id.* at p. 1101.)

The Supreme Court held that the trial court judgment was not "final" enough to appeal. (*Kurwa, supra*, 57 Cal.4th at p. 1100.) Although the parties dismissed all of their causes of action before the appeal, the judgment did not *completely* dispose of the dismissed causes of action, because the parties had agreed "to preserve the voluntarily dismissed counts for potential litigation upon conclusion of the appeal" by waiving the statute of limitations. (*Id.* at p. 1105.) The voluntarily-dismissed causes of action remained "'legally alive' in substance and effect," ready to spring back to life if the judgment were reversed. (*Ibid.*) *Kurwa* held that this revival mechanism prevented the judgment from becoming final.

Nonetheless, *Kurwa* said that the appealability analysis would have been different if the parties had voluntarily dismissed their claims without prejudice "unaccompanied by any agreement for future litigation," i.e., without waiving the statute of limitations. (*Kurwa, supra*, 57 Cal.4th at pp. 1105-1106.) Thus, a judgment is final for appellate purposes if the parties leave open "the very real risk that an applicable statute of limitations will run before [they are] in a position to renew

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“CREATE AN APPEALABLE JUDGEMENT”... continued from Page 6

the dismissed cause of action.” (*Id.* at p. 1106.) By contrast, a judgment does not “achiev[e] finality” when the parties try to have their cake and eat it too—such as by entering into tolling or waiver agreements to ensure that the dismissed claims can be revived after the appeal. (*Id.* at p. 1106.)

It is important to note that the Supreme Court’s decision was not the end of the *Kurwa* saga. On remand, the plaintiff moved to rescind or set aside the dismissal stipulation. The trial court denied the motion, and the Court of Appeal and Supreme Court declined writ review. The plaintiff then moved to amend his complaint to add a cause of action for rescission of the stipulation. Again, the trial court denied the motion, and again, the Court of Appeal and Supreme Court declined writ review.

Trying yet another tack, the plaintiff dismissed his sole remaining claim with prejudice and appealed. The Court of Appeal held that the judgment still was not appealable. It reasoned that the parties’ original stipulation also waived the statute of limitations on a voluntarily-dismissed cross-claim, and that the dismissed-but-revivable cross-claim prevented the judgment from becoming final. The Supreme Court granted review in 2016 (*Kurwa v. Kislinger*, No. S234617), and the case is currently being briefed. While the parties in *Kurwa* remain in limbo, much can be learned from their plight—including what to do to create appealability, and what not to do.

#### What works under *Kurwa*

Under *Kurwa* and its progeny, parties can use the following dismiss-and-appeal strategies to advance appealability:

- Voluntarily dismiss all remaining claims between the parties without prejudice, *without waiving or tolling the statute of limitations*, and without any other agreement that would revive the claims in the event of an appellate remand. (*Kurwa*, *supra*, 57 Cal.4th at p. 1105; *Lamar Central Outdoor, LLC v. California Dept. of Transportation* (2013) 221 Cal.App.4th 810 [judgment appealable where there was no “saving language” in the parties’ stipulation to “facilitate potential future litigation”].)

- Stipulate to a judgment under which the plaintiff takes nothing on its claims, but which provides that (1) the plaintiff preserves its right to appeal as to the crucial interim adverse ruling, and (2) the defendant will pay the plaintiff a liquidated

amount if the appellate court reverses that interim ruling. (*Hensley v. San Diego Gas & Electric Company* (2017) 7 Cal.App.5th 1337.) A judgment along these lines is considered appealable because it leaves nothing open for further determination—the appeal will end the matter, regardless of how it comes out.

- Without voluntarily dismissing any claims, pursue immediate appellate review via a petition for a writ of mandate.

#### What to do if you’re already in a *Kurwa* pickle

There are several possible fixes if you’re involved in a case where claims have already been dismissed in a way that, under *Kurwa*, fails to create an appealable judgment:

- Stipulate on the record that the voluntary dismissal was unconditional—that is, without prejudice, and without any waiver or tolling of the statute of limitations.

- If the trial court dismissed claims pursuant to a stipulation that included a statute of limitations waiver, ask the trial court to eliminate the waiver as an exercise of its inherent power to correct orders. (See *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1108 [courts have inherent power to correct erroneous interim orders].)

- Seek an order rescinding a stipulated dismissal-with-limitations-waiver on the ground of mutual mistake (i.e., the parties’ mistaken belief that the resulting judgment would be appealable) and/or that a stipulation condition (i.e., an appealable judgment) is impossible. (Civ. Code, §§ 1441, 1689, subs. (b)(1), (b)(4).)

- Petition for relief under Code of Civil Procedure section 473, subdivision (b), which allows the court to relieve a party from the consequences of an action resulting from “mistake, inadvertence, surprise, or excusable neglect.” Dismissing claims based on the mistaken assumption that the result would be an appealable judgment arguably meets this standard—particularly if neither the court nor counsel knew about the *Kurwa* rule.

No matter at what stage their cases are in the trial court, all attorneys should be aware of the complicated rules governing appealability, including *Kurwa*’s tweaks to the final judgment rule.

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clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule”; (5) “[a]ddresses or creates an apparent conflict in the law”; (6) “[i]nvolves a legal issue of continuing public interest”; (7) “[m]akes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law”; (8) “[i]nvolves a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision”; or (9) “[i]s accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.” (Cal. Rules of Court, rule 8.1105(c).)

Justice Ashmann-Gerst explains that appellate court justices keep these rules in mind when deciding whether to publish a particular opinion. And, the decision whether to publish a particular opinion is not made by a justice in isolation. In Division Two, when conferencing before oral argument, the justices discuss whether to publish a particular opinion. Other factors, such as the pressure of workload, do not influence the decision.

What attorneys may not realize is that Justice Ashmann-Gerst, her colleagues, and their staff attorneys put the same amount of research and time into an unpublished opinion as into a published opinion. Thus, even though unpublished opinions cannot be cited in motions or briefs to judges, she strongly encourages lawyers to rely upon them as a research tool. In fact, that is exactly what her staff attorneys do when they are working up an appeal. Division Two, for example, strives to be consistent in its approach to the legal issues it confronts. The best way to ensure consistency is to review prior opinions, both published and unpublished. Unpublished opinions from the last 60 days are available online at: <http://www.courts.ca.gov/opinions-nonpub.htm>. After 60 days, these opinions remain available through a case information search at: <http://appellatecases.courtinfo.ca.gov/index.html>.

Michael notes that not having published opinions can be frustrating. After all, the California Rules of Court prohibit a party from relying on or citing to an unpublished opinion. (See Cal. Rules of Court, rule 8.1115(a) [“an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action”].) And,

it may be a violation of professional ethics, subjecting an attorney to discipline, if he or she knowingly cites as authority a decision that is not citable. (See Bus. & Prof. Code, § 6068, subd. (d); Rules Prof. Conduct, rule 5-200(B), (C) & (D).)

As Michael points out, there are many issues that may seem either minor or unimportant to the appellate court. However, in practice, trial courts may have differing interpretations on seemingly straightforward issues, such as statutory interpretation. He speculates that the law may seem obvious to the Court of Appeal, so that there is no reason to publish. Yet when trying to advocate a position to the trial court, there is a paucity of authority upon which to rely.

The publication issue also arises when lawyers file a petition for review in the California Supreme Court. For the fiscal year 2015, only 4 percent of such petitions were granted. And, that percentage was likely even less for petitions seeking review of unpublished decisions. Because of this disparity, litigants may seek publication of Court of Appeal opinions to increase the chances for the granting of Supreme Court review.

Justice Ashmann-Gerst posits that the most recent amendment to the rule on citation to Court of Appeal decisions is helpful to Michael and other lawyers looking for more published legal authority. Before July 1, 2016, published cases were superseded by a grant of review. Thus, when the California Supreme Court agreed to review a Court of Appeal opinion, this action superseded the lower court’s opinion, which automatically became not citable. That opinion did not appear in a California appellate bound volume. (See former Cal. Rules of Court, rule 8.1105(e)(1) [“Unless otherwise ordered under (2), an opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing”].) As of July 1, 2016, however, the California Rules of Court were amended to remove the absolute bar on citing to Court of Appeal decisions under review by the California Supreme Court. (Cal. Rules of Court, rule 8.1105(e)(1)(B) [“Grant of review by the Supreme Court of a decision by the Court of Appeal does not affect the appellate court’s certification of the opinion for full or partial publication . . . , but any such Court of Appeal opinion, whether officially published in hard copy or electronically, must be accompanied by a prominent notation advising that review by the Supreme Court has been granted”].)

And, Justice Ashmann-Gerst would remind Michael and all lawyers that the California Rules of Court do not preclude an

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## ALL JAMMED UP: AN OVERVIEW OF THE JAMS STREAMLINED RULES



*Catherine Thompson*

Proponents of arbitration have long extolled the simplicity, speed, and relatively low cost of arbitrating a claim, as opposed to litigating it through the court system. But critics of arbitration have pointed out that today's arbitrations are just as bloated as any case tried before a judge. The speed and efficiency that were key selling points for the arbitration process have given way to long delays, high discovery costs, and expensive motion practice.

Enter the "fast track arbitration" approach, which both JAMS and AAA have formally recognized by providing separate sets of rules: AAA's Expedited Procedures within its Commercial Rules, and JAMS' Streamlined Rules and Expedited Rules within its Comprehensive Arbitration Rules and Procedures. A closer look at the JAMS Streamlined Rules, and their application, provides insight into the differences, benefits, and drawbacks of these rules.

The JAMS Streamlined Rules automatically apply in any arbitration involving claims of \$250,000 or less, not including interest and fees. However, the Streamlined Rules may also govern when the parties agree to their use at the time of arbitration. (JAMS Rule 1(a).) Of course, parties may also mandate use of the Streamlined Rules in their arbitration clauses.

A streamlined arbitration begins the same as any other JAMS arbitration—with a demand letter filed by the claimant (arbitration-speak for the plaintiff). Once the respondent (arbitration-speak for the defendant) responds to the demand, however, the Streamlined Rules begin to diverge from the Comprehensive Rules. While the Comprehensive Rules provide for a preliminary conference during which the arbitrator addresses procedural matters, deals with discovery, and may ask the parties to summarize their positions, an arbitration

controlled by the Streamlined Rules will not include a preliminary conference unless the parties request it. (JAMS Rule 6(a).)

In fact, the arbitrator need not be involved in discovery at all in a streamlined arbitration. Under JAMS Streamlined Rule 13(a), the only discovery contemplated is a "voluntary and informal" exchange of all relevant, non-privileged documents and information (including electronically stored information) within 14 days after all pleadings have been received. The parties also must exchange lists of all individuals with knowledge about the dispute and all experts who may be relied upon during the arbitration. While the parties must supplement their disclosures as they become aware of additional documents or witnesses, no further discovery is automatically allowed under the Streamlined Rules. If the parties want any more discovery, they must request it from the arbitrator, who will base a decision on "the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness." (JAMS Rule 13(a).) Additionally, an arbitrator will not consider any documents or witnesses that were not previously identified. (JAMS Rule 13(b).)

While dispositive motions (essentially motions for summary judgment or adjudication) are explicitly allowed by JAMS Comprehensive Rule 16(h), the Streamlined Rules are silent on this issue. It thus behooves any attorney in a streamlined arbitration who wants to bring a dispositive motion to raise that question with the arbitrator, rather than assuming that the arbitrator will allow such a motion.

Oddly, the JAMS Streamlined Rules do not provide a timeline for the hearing (compare this to the JAMS Expedited Rules, which require a hearing to begin within 60 days after the end of discovery). This is particularly strange because many arbitrators have full schedules. For example, an arbitrator recently told parties to a streamlined arbitration that he was available for the hearing in either three months or a year. Without deadlines, arbitrator schedules may undermine the

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*“ALL JAMMED UP”...continued from Page 9*

rationale for a streamlined arbitration.

Thus, while the JAMS Streamlined Rules help in expediting discovery (absent a party requesting further discovery than is contemplated by the rules), they don't provide explicit limitations on dispositive motions or require a speedy resolution of the conflict by mandating a hearing by a certain deadline. This seems like an oversight, particularly when compared to AAA's Expedited Procedures, which provide for no discovery at all and require the case to proceed to hearing within a month of the arbitrator's appointment. (AAA Rule E-7.)

Crucially, however, the Streamlined Rules allow the parties to agree to any procedures not included in the Rules, so long as those procedures “are consistent with the law and JAMS policies.” (JAMS Rule 2(a).) Some JAMS arbitrators allow parties who have elected to use the Streamlined Rules to submit a joint case management plan that lays out discovery plans, briefing schedules, and deadlines. Thus, parties could agree to briefing schedules for any and all dispositive motions, while requesting a hearing by a certain date. In addition, the parties can agree up front to allow no discovery beyond the initial exchange of documents to circumvent any potentially costly discovery requests down the road.

The JAMS Streamlined Rules provide a good framework to help return arbitrations to faster, less expensive, and simpler proceedings. However, the rules do not address all of the issues that could drive up costs in an arbitration. For this reason, parties should evaluate their goals and needs before committing to an arbitration governed by the Streamlined Rules, either in their arbitration agreements or at the time an arbitration commences. Because goals and needs may be more apparent at the commencement of the arbitration, parties should consider carefully whether it is to their advantage to include the JAMS Streamlined Rules in their agreements.

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*“THE PUBLICATION CONUNDRUM”...continued from Page 8*

attorney from citing to all unpublished decisions. Significantly, California Rules of Court, rule 8.1115(a) does not prohibit citation to unpublished federal cases or unpublished opinions from a court of another state. Moreover, litigants have properly referenced unpublished opinions not as authority or precedent to persuade the court on the merits of an issue, but as evidence of some external fact, such as to advise the court of an issue in a pending case. And, “[a]n unpublished opinion may be cited or relied on:” (1) “[w]hen the opinion is relevant under the doctrines of law of the case, res judicata or collateral estoppel,” or (2) “[w]hen the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.” (Cal. Rules of Court, rule 8.1115(b).)

Sometimes the Court of Appeal may be unaware of the significance to the litigants of an issue before it and/or of the need for clarity in a certain area of the law. For this reason, under California Rules of Court, rule 8.1120(a), any party or other interested person may request by letter that the Court of Appeal certify an opinion for publication. The request must be made within 20 days after the opinion is filed. (Cal. Rules of Court, rule 8.1120(a)(3).) It must state the person's interest and the reason why the opinion meets a standard for publication. (Cal. Rules of Court, rule 8.1120(a)(2).) To be persuasive, Justice Ashmann-Gerst encourages the author to cite policy reasons as well.

Filing a request for publication does not guarantee that a helpful opinion will be published. Michael filed such a petition with the Court of Appeal in a case that dealt with an issue of statutory interpretation. Specifically, the case involved the California Homeowner's Bill of Rights, about which little had been published. After receiving several e-mails from other interested counsel, he did request publication. Even though he previously had received inconsistent results from trial courts, the request was denied.

Justice Ashmann-Gerst and Michael note that the publication conversation continues to perplex both the courts and attorneys. Sustained dialogue between the bench and bar ensures that the publication rules are applied so as to maximize the law's clarity for all.

*Hon. Judith Ashmann-Gerst is an Associate Justice of the California Court of Appeal, Second Appellate District, Division Two. Michael Gerst is an associate with the law firm of Sheppard Mullin Richter & Hampton LLP, in Century City.*

## YLD UPDATE



*Jeff Atteberry*

The Young Lawyers Division of the ABTL has had a successful few months since our last update. On March 2, 2017, the Honorable André Birotte hosted a brown bag lunch for YLD members. During the course of this well-received event, Judge Birotte offered advice to YLD members as they begin and advance in their careers as legal advocates. The conversation was lively, informative, and guided by Judge Birotte's observations from his own career. The YLD is grateful for Judge Birotte's generous and enthusiastic support of our YLD members, and it looks forward to more exciting brown bag lunches in the future.



*Rachel Feldman*

The opportunities to meet with our member judges continued on April 17, 2017, when White & Case hosted the YLD's annual judicial mixer. This year, the mixer included a wine tasting, hosted by celebrity sommelier



*Ben Williams*

Helen Johannesen, who oversees the beverage program at many of Los Angeles' hottest restaurants, including Jon & Vinney's, Animal, and Trois Mec. In between sips of wine from across the globe, YLD members chatted with judges from across the various local jurisdictions. The event attracted enthusiastic interest and received rave reviews from everyone who attended. "I really appreciated the

chance to meet some of our local judges at this event," said Jeffrey Atteberry. "The tasting itself was enjoyable and informative, and really gave the event a relaxed yet lively quality." Judges in attendance were André Birotte, Robert Broadbelt, Daniel Buckley, Richard Burdge, Lee Edmon, Elizabeth Feffer, Philip Gutierrez, Samantha Jessner, Ann Jones, Marc Marmaro, Mark Mooney, Beverly Reid O'Connell, Laura Seigle, Michael Stern, and Mary Strobel.

The YLD greatly appreciates the participation of all the judges, whose attendance made the event a great success.

Finally, over 15 YLD members have volunteered to conduct interviews of our member judges for the judicial profile project. In the coming month, these volunteers will personally meet with their assigned judges and interview them about their backgrounds, their courtroom rules, and their preferences. The interview process provides a truly unique opportunity for YLD members to meet and get to know the local judiciary. When completed, the results of the interviews will be made available exclusively to ABTL members.

For any questions about the YLD, or if you have any ideas about events or programming you'd like to see from YLD, please contact:

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## \* \* CALLING YOUNG LAWYERS \* \*

***The ABTL Young Lawyers Division (YLD)  
 is Looking for New Members (practicing 10 years or less)  
 to Participate in the Planning of Young Lawyer Division Events.***

***If you are interested, please contact***

***[abtl@abtl.org](mailto:abtl@abtl.org)***

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