

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

LOS ANGELES

SPRING 2022

WHAT'S NEXT FOR ABTL?



Justice Brian S. Currey

In September 2021, the California Civility Task Force released its initial report, “Beyond the Oath: Recommendations for Improving Civility.” The report sets forth four concrete, realistic, achievable, and powerful proposals to improve civility in California’s legal profession, and has already stimulated renewed interest in taming incivility in the

state. The Task Force is comprised of a diverse group of more than 40 distinguished lawyers and judges, including members from each ABTL chapter. I am honored to serve as Chair. This article summarizes the report, explains ABTL’s key role in the

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NEW JUDGE, NEW RULINGS?



Judge David J. Cowan

The judge assigned to hear a case often changes during protracted litigation. The first judge might retire or be reassigned to a different court division, or the first judge might be assigned to hear only pretrial matters before another judge takes over for trial. While one party might try to revisit old issues before fresh eyes, the other side might believe it should not have to go through the expense of relitigating issues on which it already prevailed. This article discusses how parties can assess whether their case presents that rare instance where a prior judge’s ruling might be amenable to further review by a successor judge overseeing the same action.



Eric S. Boorstin

A judge may always reconsider his or her own interim rulings.

The California Supreme Court has confirmed that a trial judge has the power to reconsider his or her own rulings regardless of whether the statutory requirements for a reconsideration motion have been met, and regardless of how the trial judge comes to understand that a prior ruling was mistaken. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105–1108 (*Le Francois*).) A party is not precluded from making a “suggestion” that the trial court sua sponte reconsider a prior ruling even in the absence of new facts or new law. (*Id.* at p. 1108.) The odds may be slim and the trial court need not rule on this suggestion because it is not a *motion*. But if the court is seriously considering reversing itself, the court should inform the parties, solicit briefing, and hold a hearing. (*Ibid.*)

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PRESIDENT'S MESSAGE



Manuel Cachán

It has been more than half a year since the last President's Message appeared in these pages, although you would be forgiven for thinking more time had passed. One COVID variant has been followed by another and still another. Masks have stayed on, come off, come back on, and then fallen off again. "Booster," "N-95," "viral load," and "positivity rate" are some of the obscure words and phrases we were forced to learn by dint of necessity. We have seen colleagues and friends fall ill, some seriously and worse. Perhaps we have even been sick ourselves.

I spent the better part of what we now call "Lockdown" out of Los Angeles, in a cramped one-bedroom apartment in lower Manhattan. Ambulance sirens were heard at all hours as the city reached its apogee of illness in the early months of the pandemic. Hospital emergency rooms were at capacity, filled with the sick and dying. New York Governor Cuomo had not yet fallen from grace, and his daily press conferences passed in the moment for both comfort and entertainment. None of us yet knew exactly where the danger lay. We still washed our groceries, just in case. The famously crowded streets of New York were crowded no longer, empty of pedestrians, cabs, and Ubers. Every evening at 7, just as dusk settled in, neighbors banged pots and pans at their open windows as a way of thanking hospital workers—since a simple hand shake was now out of bounds—and, indirectly, to be reminded of each other's existence. Once every few days, I would leave the house for supplies, always during the week to avoid crowds. My interactions with other human beings were limited: one person to speak with on most days, three on a special occasion. One Friday afternoon, I sat in a park with friends, six feet apart, drinking take-out spicy margaritas, seemingly the only good thing the pandemic had brought us. Even in the panic of the first few weeks, when the courts closed, no reopening date was dreamed of, and it seemed we might all be out of work soon, we thought more about the people who mattered to us and less about work than we had in years.

For an organization like ours whose central purpose is to manufacture conviviality, allowing legal adversaries to have fun with one another and thereby recognize each other's basic humanity, this is properly a year of celebration at our cautious rebirth. 2022 is when we will, one hopes finally or at least for the foreseeable future, see one another again in person (taking of course all due precautions), celebrate in person, debate in person, and shake hands again, if that custom hasn't gone forever out of style.

The ABTL, fundamentally a social organization, was made for a year like this when, to rob a phrase, it feels like if not the beginning of the end of COVID, then at least the end of the beginning. I am lucky to have 2022 as my opportunity to serve as your President. I encourage each of you to take advantage of the many opportunities ABTL gives us to come together, from our dinners to the Annual Retreat, after so long apart. Joke, laugh, converse, argue. We are blessed to have one another.

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EXPERTS: CAN'T LIVE WITH THEM, CAN'T LIVE WITHOUT THEM



Gary Wax

In recent years, jurors have come to expect experts to testify at trial even when their opinions are unnecessary. Thus, jurors may take note when litigants don't call an expert. This may impact what they think about a litigant's case.

Numerous legal scholars have written about the so-called "CSI Effect." The term was originally coined to describe what can happen to jurors who regularly watch crime investigation shows like *CSI: Crime Scene Investigation*, *Law & Order*, and *48 Hours*. These jurors may place an undue emphasis on expert testimony and expect to hear detailed expert opinions regarding every disputed fact—even in civil trials.

Under California law, an expert generally is permitted to offer an opinion if: (a) the subject is sufficiently beyond common experience such that the expert's opinion would assist the trier of fact; and (b) the opinion is based on matter of a type that reasonably may be relied upon by an expert in forming an opinion. (Evid. Code, § 801.)

Yet, litigants increasingly hire experts to opine on a wide range of topics that are within a layperson's common knowledge, making their opinions inadmissible—for example, whether a sidewalk crack was dangerous; whether a pedestrian walkway was adequately illuminated; whether someone was susceptible to a trip hazard; or whether a floor was slippery when wet. (In fact, certain experts are famously hired to give an opinion on all of these unrelated lay issues.) Perhaps litigants call these experts simply to satisfy jurors' desire to hear expert testimony.

Deciding whether to call an expert is not always easy. On one hand, if the defendant presents no expert to counter the plaintiff's, the defendant's case may appear weaker to a jury because it lacks apparent "expertise" on the plaintiff's side. On the other hand, counsel run the risk of turning a simple dispute into a costly, complex "battle of the experts."

"The correct rule on the necessity of expert testimony has been summarized by Bob Dylan: 'You don't need a weatherman to know

which way the wind blows.'" (*Jorgensen v. Beach 'N' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155, 163 & fn. 2, quoting "Subterranean Homesick Blues.")

But if a particular subject can be understood *only* by experts, expert opinion testimony is *required* to establish a prima facie case. (See *Huffman v. Lindquist* (1951) 37 Cal.2d 465, 473–475.) For instance, experts generally are required to establish the standard of care in malpractice and construction defect cases. Additionally, if establishing the fair market value of real property is an essential element of a plaintiff's case, Evidence Code section 813 *requires* the plaintiff to establish it through the testimony of either an owner of the property or an expert.

In other cases, expert opinions are *prohibited*. For instance, experts cannot opine on pure questions of law. Nor can they interpret contracts, statutes, ordinances, or safety regulations promulgated pursuant to statutes. "Each courtroom comes equipped with a "legal expert," called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards.'" (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1181, quoting *Burkhart v. Washington Metropolitan Area Transit Authority* (D.C. Cir. 1997) 112 F.3d 1207, 1213.)

Over the last decade, the California Supreme Court has significantly limited the admissibility of expert testimony. In particular, the Court has instructed trial courts to act as a gatekeeper by excluding expert opinions that are based on unsupportable underlying materials or speculation (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*)), and it has limited litigants' efforts to use experts to sneak in inadmissible hearsay regarding case-specific facts (*People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*)). Perhaps the Court did so in response to the CSI Effect. Or, perhaps it did so in response to experts' increasing use of junk science and speculation to support their opinions.

Whatever the reason, because experts can either be a useful litigation tool or a damaging obstacle, trial counsel should familiarize themselves with the rules governing the admissibility of expert testimony to either effectively employ or combat expert opinions. If an expert is central to a litigant's case, counsel can utilize multiple tools to guide the court's rulings.

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YOUR CLIENT HAS USED FAR MORE SPACE THAN PERMITTED UNDER A LEASE FOR OVER A DECADE, DOES THE CONTINUOUS ACCRUAL DOCTRINE APPLY OR IS THE CLAIM TIME BARRED?



David Graeler



Maya Hamouie

the tenant accrue? In providing answers to these questions, this article examines (1) the applicability of the continuous accrual doctrine to situations involving tenant encroachments; and (2) whether a trespass claim may be sustained in lieu of a contract action.

The Continuous Accrual Doctrine

A cause of action generally accrues, and the statute of limitations begins to run, when the wrongful act is complete, or when the wrongful result occurs and the consequent liability arises. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 387.) In other words, it accrues when the substantive claim's last essential element occurs—the three essential elements being wrongdoing, harm, and causation. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.) The “last element” accrual rule is subject to many exceptions, including the continuous accrual doctrine. (*Ibid.*) Under the continuous accrual doctrine, each breach of a recurring obligation is independently actionable,

and the statute of limitations runs from each breach of such obligation. (*NBCUniversal Media, LLC v. Superior Court* (2014) 225 Cal.App.4th 1222, 1237, fn. 10 (*NBCUniversal Media*)).) Where a series of wrongs or injuries may be viewed as each triggering its own limitations period, a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period. (*Aryeh*, at p. 1192.) Thus, a plaintiff may pursue actionable wrongs for which the statute of limitations has not yet expired even if earlier wrongs would be barred. (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 395.)

The common thread among cases applying the continuous accrual doctrine is a series of recurring, allegedly wrongful acts by the defendant, each of which can be analyzed separately as distinct claims. (*Luke v. Sonoma County* (2019) 43 Cal.App.5th 301, 306.) In *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375 (*Armstrong Petroleum*), the Court of Appeal noted that “[w]here a contract is divisible and, thus, breaches of its severable parts give rise to separate causes of action, the statute of limitations will generally begin to run at the time of each breach; in other words, each cause of action for breach of a divisible part may accrue at a different time for purposes of determining whether an action is timely under the applicable statute of limitations.” (*Id.* at pp. 1388-1389, quoting 15 Williston on Contracts (4th ed. 2000) § 45:20, p. 356.) Typical examples of severable contracts include installment contracts, periodic rental payments, and “contracts calling for periodic, pension-like payments on an obligation with no final and fixed amount.” (*Boon Rawd Trading Int'l Co. v. Paleewong Trading Co., Inc.* (N.D.Cal. 2010) 688 F.Supp.2d 940, 951, quoting *Armstrong Petroleum*, at p. 1388.)

In *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, the Court of Appeal concluded that a commercial landlord's 1993 suit for payment of back rent going back to 1982 was not time barred; rather, the periodic monthly payments owed were a recurring obligation, with a new limitations period arising for each, and the landlord could seek disputed amounts for the duration of the limitations period preceding suit. (*Id.* at p. 1344.) Similarly, *Gilkyson v. Disney Enterprises, Inc.* (2016) 244 Cal.App.4th 1336 (*Gilkyson*), held that the four-year limitations period for breach of a written

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PRIVILEGE AND CONFIDENTIALITY ISSUES WITH ONLINE TRANSLATORS



Alyssa Mahatme



Ryan Malloy

Free online translators allow lawyers to bridge a language gap with just a few clicks. While retaining a professional translation service and obtaining a professional translation can take weeks, online translators can translate text instantaneously. This can be useful for communicating with a foreign client or reviewing discovery documents written in a foreign language. Online translations are especially handy for less common languages for which it is difficult to find a translator. Some courts have even admitted translations from online translators into evidence or relied on online translators in rendering opinions. *See, e.g., Butler v. Fed. Express Corp.*, No. 19-3477, 2020 WL

7647396, at *2 n. 2 (D.S.C. Nov. 9, 2020) (admitting translation from Google Translate into evidence where opposing party did not object); *Super Express USA Publ'g Corp. v. Spring Publ'g Corp.*, No. 13-cv-2814, 2017 WL 1274058, at *7 n.9 (E.D.N.Y. Mar. 24, 2017) (relying on Google Translate in rendering opinion).

But the use of online translators raises concerns, the most obvious being admissibility. For example, a translation from an online translator would likely be found inadmissible in California state courts, which have a rule requiring that translations be “certified under oath by a qualified interpreter.” Cal. R. Ct. 3.1110(g). Other courts have found online translations to be inadmissible due to insufficient reliability. *See, e.g., Novelty Textile, Inc. v. Windsor Fashions, Inc.*, No. CV 12–05602, 2013 WL 1164065, at *3 (C.D. Cal. Mar. 20, 2013).

A less obvious but potentially serious concern is confidentiality. As discussed below, a court could deem the use of an online translator to be a nonconfidential disclosure of information to a third party, potentially waiving attorney-client privilege, undermining trade-secret protection, or breaching a confidentiality provision.

Online Translators

Online translators are free machine translation services. They have translation capabilities for dozens of languages. In addition to translating typed text, some translators can translate handwritten text and text extracted from images, videos, webpages, and documents. Some online translators can also transcribe in near real time as someone is speaking.

There are four different kinds of machine translation technologies: statistical, rule-based, hybrid, and neural. Statistical machine translation generates translations based on statistical models that are created by analyzing volumes of bilingual text. Rule-based machine translation conducts an analysis of the source and target languages and relies on grammatical rules to generate a translated sentence. Hybrid machine translation uses both statistical and rules-based technologies. Neural machine translation, the newest kind, develops neural network-like models to predict the likelihood of a sequence of words in a sentence.

Some online translators appear to retain information submitted for translation to improve future translations, which creates uncertainty as to whether such information can be considered confidential.

Potential Privilege Waiver from Disclosures to Online Translators

Attorney-client privilege protects confidential communications between a client and lawyer that were made for the purpose of obtaining legal advice. The Supreme Court has noted the importance of the privilege in facilitating “full and frank” discussions between attorneys and clients to ensure effective representation. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Voluntary disclosure of privileged documents to third parties generally destroys the privilege. *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126–27 (9th Cir. 2012). There is an exception to the third-party waiver rule when a third party is employed to assist an attorney in providing legal advice. *Cavallaro v. United States*, 284 F.3d 236, 247 (1st Cir. 2002); *see also United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (stating that communication with such third parties must be made

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**THE NINTH CIRCUIT COURT OF APPEALS
THREATENS TO ERODE CALIFORNIA’S
UNIVERSAL TRUTH – THAT AMBIGUITIES
IN POLICY LANGUAGE ARE RESOLVED IN
FAVOR OF COVERAGE**



Steven Knott

When the Ninth Circuit decided *Universal Cable Productions, LLC v. Atlantic Specialty Insurance Company* (9th Cir. 2019) 929 F.3d 1143 (*Universal*), at center stage was its interpretation of the war exclusion in plaintiffs’ insurance policy, to which the court assigned a technical meaning rather than its plain and ordinary meaning. (*Id.* at p. 1156 [holding that “‘war’ has a special meaning in the insurance industry requiring hostilities between de jure and de facto governments”].) To date, legal commentators and courts have avoided shining any spotlight on either the rules of interpretation that the Ninth Circuit utilized in interpreting the policy’s war exclusion, and on the sweeping ramifications that the court’s analysis could have on well-established California policy-interpretation jurisprudence in the future.



Matt Brady



Lisseth Ochoa-Chavarria

For over five decades, the contra proferentem rule governing a court’s interpretation of ambiguous policy language under California law has been settled: “Any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer.” (*Crane v. State Farm Fire & Cas. Co.* (1971) 5 Cal.3d 112, 115.) That is because policy language is generally drafted by insurers, who receive hefty premiums from insureds in exchange for coverage. (*Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 321.)

In line with that well-established rule, the California Supreme Court in *AIU Insurance Co. v. Superior Court* (1990) 51 Cal.3d 807, 822 (*AIU*) required ambiguous policy language to be interpreted in favor of coverage, *unless* an insurer can overcome that presumption by proving:

1. The policyholder is sophisticated and has bargaining power;
2. The policyholder negotiated the specific provision at issue; and
3. The policyholder drafted or jointly drafted the specific provision at issue.

(*Id.* at p. 823 [“It follows, however, that where the policyholder does *not* suffer from lack of legal sophistication or a relative lack of bargaining power, and where it is clear that an insurance policy was actually negotiated and jointly drafted, we need not go so far in protecting the insured from ambiguous or highly technical drafting.”].)

Under *AIU*, for insurers to overcome the presumption in favor of coverage they must prove all three of these elements; proving sophistication and negotiation, alone, is insufficient. (51 Cal.3d at p. 823.) California appellate courts agree: “[W]e depart from the normal rule of interpretation, that ambiguities are interpreted in favor of coverage, only where there is ‘evidence that the provision in question was **jointly drafted**; merely showing that policy terms were negotiated, and that the insured had legal sophistication and substantial relative bargaining power, is not enough.’” (*Martin Marietta Corp. v. Insurance Co. of North America* (1995) 40 Cal. App.4th 1113, 1134, emphasis added; *ibid.* [refusing to depart from the normal rule of interpretation because the insured was “not the author of the coverage provision, which is standard form language adopted by the insurance industry”]; cf. *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 434-435, 438 [holding the rule of construction against insurers did not apply because the specific provisions at issue were **jointly negotiated and drafted**].)

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YOUNG LAWYERS DIVISION UPDATE



Christina Maria Assi



Robert Glassman



Nalani Crisologo

The ABTL's Young Lawyers Division is excitedly planning for the year ahead. In 2022, the YLD will continue its focus on presenting exciting and informative programming, as well as providing opportunities for younger lawyers to interact with the judiciary, network with fellow young lawyers, and deepen connections with the broader legal community. We will also be organizing a community-impact project to join the YLD members together in service to the broader Los Angeles community and continuing the tradition of planning brown bag lunches with members of the judiciary.

Be sure to keep an eye on the ABTL Report and your email inboxes for updates about upcoming YLD events. And if you are interested in helping plan YLD events, please reach out to YLD co-chairs Christina Assi and Robert Glassman or YLD vice-chair Nalani Crisologo about getting involved.

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formation of the Task Force, and suggests ways ABTL chapters can help ensure the proposals are adopted in the coming year.

The Task Force is a joint project of the California Judges Association (CJA) and the California Lawyers Association (CLA), in cooperation with the State Bar of California.

The initial Task Force report is a quick read (15 pages) with many interesting appendices. It can be accessed at the California Judges Association website: caljudges.org/civility.

The Task Force's Four Key Proposals

1. Mandate one hour of attorney MCLE devoted to civility training, to be included in the total number of MCLE hours currently required. Approved civility MCLE programs should both highlight the connection between bias and incivility, and urge lawyers to eliminate bias-driven incivility.
2. Provide optional training to judges on the need to model civility, curtail attorney incivility inside and outside the courtroom, and explain the tools available to them to do so.
3. Enact meaningful changes to State Bar disciplinary rules, prohibiting repeated incivility and clarifying that civility is not inconsistent with zealous representation; and
4. Require all lawyers, not just those who took the attorney admission oath after the 2014 rule change, to affirm or reaffirm during the annual license renewal process that: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

Civility MCLE

In furtherance of the first proposal, the Task Force is asking the State Bar Board of Trustees to mandate one hour of civility MCLE training (without increasing total MCLE hours). We are also requesting the State Bar to require at least part of each approved course be devoted to making the profession more

welcoming to underrepresented groups by addressing the link between incivility and bias.

Specifically, we are asking the State Bar Board of Trustees to amend State Bar Rule 2.72 (which contains MCLE requirements) to require, as a part of the existing total MCLE hours required, one hour of civility training. For most lawyers, a total of twenty-five hours is required during each MCLE compliance period. Of the required hours, at least four must be devoted to legal ethics, at least one must deal with recognition and elimination of bias in the legal profession, and at least one must address substance abuse or other mental or physical issues that impair a lawyer's ability to provide competent legal service. Our proposal would not increase the total number of hours required. Instead, it would require that at least one of the existing required hours be devoted to civility. Any change in the rules would require approval by the California Supreme Court.

The goal is to promote courtesy, integrity, and professionalism in the bar. We believe mandatory MCLE civility programs could and should educate attorneys about the economic and human costs of incivility; provide lawyers with reasons and tools to change their own behavior if they are uncivil; teach lawyers how to help those who are uncivil change their behavior; help lawyers deal with stress and dissatisfaction caused by toxic uncivil behavior; and reduce bias-driven incivility.

The Task Force believes mandating civility education would spur the creation of excellent new programming on the topic by California MCLE providers, including ABTL. Our initial report includes resources to aid in the effort. For example, Appendix 3 is a list of California cases dealing with civility and a summary of key cases. Appendix 4 contains a table and memorandum identifying and describing individuals who have expertise in workplace incivility generally (i.e., not limited to the legal profession). It also includes a list of individuals who have written or spoken about incivility. MCLE providers could recruit some of these individuals to assist in developing new programming. Appendix 5 describes referral and dispute resolution techniques previously employed in other jurisdictions to resolve disputes among lawyers, and in private and public organizations to resolve disputes among employees. Although we are not currently recommending California adopt such a program, the idea warrants further study and could be fodder for an MCLE program.

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The amended MCLE rule should specify that some portion of civility training must be devoted to addressing the link between incivility and bias. If our profession is serious about increasing diversity and embracing justice, it must reduce incivility directed at attorneys who come from underrepresented groups. The initial report has already spurred development of programming in this area; much more is needed.

Additional Civility Training for Judges

The Task Force believes judges can and should play a critical role in improving courtesy, integrity, and professionalism among lawyers. Judges can, and often do, serve as civility role models. These judges set the stage for improved civility by making clear that civility and professionalism are expected norms both inside and outside the courtroom. If given the tools to do so, judges can significantly improve civility in the profession. Thus, the Task Force's second proposal is to increase civility training for judges.

Specifically, the Task Force asks California's Chief Justice, as head of the Judicial Council, to ask the Center for Judicial Education and Research Advisory Committee (CJER) to develop and promote educational programs specifically designed to inform judges about the need both to model civility and to require civility and professionalism both in and out of the courtroom.

One of the Task Force's co-sponsoring organizations, CJA, is another major provider of judicial education. It has embraced the Task Force's proposals, and the organization has already begun to add additional civility programming for judges. In addition, Task Force members Judge Wendy Chang and Judge Stuart Rice developed a civility training program for judges. It is in the process of being beta tested and refined. A group of Los Angeles County Superior Court civil litigation judges recently participated in the course and gave it high marks.

Changes to State Bar Disciplinary Rules

The Task Force proposal likely to generate the most attention and controversy is a request to the State Bar Board of Trustees to devise and recommend to the California Supreme Court

revisions to the Rules of Professional Conduct clarifying that repeated incivility constitutes professional misconduct and that civility is consistent with zealous advocacy.

The Task Force's report contains some proposed language, but makes clear that the proposal is just a starting point for further discussion. The Task Force anticipates the State Bar rulemaking bodies will take public input, consider alternative language, and craft rule revisions that best serve the public in the profession.

The Task Force recognizes that making incivility a breach of the rules of professional conduct may be controversial in some circles, and that lawyers will have legitimate concerns that must be addressed during the rulemaking process. For example, both the First Amendment and common sense will require some clarity about what conduct is and is not prohibited. For example, in *United States v. Wunsch* (9th Cir. 1996) 84 F.3d 1110, the Ninth Circuit concluded California Business & Professions Code §6068(f)'s admonition that lawyers should abstain from "offensive personality" was void for vagueness. The court appeared to have no problem, however, with prohibiting "conduct unbecoming a member of the bar." I am confident rules can be drafted to give attorneys sufficient notice of what conduct violates the rule. The rule should not ensnare lawyers for a single misstep, nor should we permit a rule to be "weaponized" by litigation adversaries. The goal is to reduce unprofessional behavior and increase civility, not to add to unseemly conduct.

Finally, the Task Force suggests the State Bar develop a diversion program for first-time offenders to avoid disciplinary proceedings by completing a civility mentorship program. Ideally, judges could also refer uncivil attorneys to that program in lieu of monetary sanctions for incivility.

Civility Affirmation

In 2014, the California Supreme Court—at the recommendation of the State Bar Board of Trustees—adopted what is now California Rules of Court, rule 9.7. The rule requires anyone admitted to practice law after its effective date to swear or affirm, "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity." The Task Force's final proposal would require the rest of the profession to take the same aspirational civility pledge. A potential mechanism for

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contract (Code Civ. Proc., § 337(a)) was subject to continuous accrual as to a songwriter's heirs' claim against a publisher who failed to pay royalties for home video sales of movies featuring the songwriter's songs. (*Gilkyson*, at pp. 1342-1347.) Accordingly, the royalty contract in that case, which provided for ongoing royalties based on revenues, was a divisible contract with each breach of the royalty right separately actionable and subject to its own limitations period. (*Ibid.*)

These types of claims are distinguishable from those that involve "a single breach or other wrong which has a continuous impact." (*Armstrong Petroleum, supra*, 116 Cal.App.4th at p. 1389.) For instance, in *Boon Rawd Trading Int'l Co. v. Paleewong Trading Co.*, *supra*, 688 F.Supp.2d 940, the defendant allegedly first breached an importation agreement's exclusivity requirement outside the limitations period, but continued to breach the exclusivity requirement during the limitations period. (*Id.* at pp. 947-948.) The court refused to apply the continuous accrual doctrine because the plaintiff did not allege facts regarding "a periodic procedure for the performance of [the parties] respective obligations," and because the allegations indicated a single breach, which had never ceased and "which has continuing impact," rather than a series of periodic breaches. (*Id.* at pp. 951-952.) Similarly, the court in *NBCUniversal Media, supra*, addressed whether continuous accrual might apply where NBCUniversal allegedly breached a contract by misappropriating ideas for a television series. (225 Cal.App.4th at pp. 1226, 1237, fn. 10.) The court found that each broadcast of a new episode did not constitute a new breach, but rather additional harm from a single breach, thereby precluding application of the continuous accrual doctrine. (*Id.* at p. 1237, fn. 10.)

In a more recent case, a landlord alleged that a wireless telecommunications-carrier lessee breached the lease by using significantly more space on the property for its equipment—i.e., antennas and cable trays—than the lease permitted. The alleged breach had commenced over a decade before the landlord filed its lawsuit, and there was evidence that the landlord knew of the alleged breach when it occurred. When the telecommunications-carrier lessee invoked the four-year limitations period for breach of a written contract, the landlord argued that its claim may proceed because there was continuous accrual. In response, the

carrier pointed out that its purported contract breach related to the lease provision defining the "Premises," which limited the amount of space it could use. Because that breach allegedly occurred in 2008, over a decade earlier, and had not changed or ceased since, it constituted a single breach rather than a recurring breach that might have enabled the landlord to assert the continuing breach doctrine. When the landlord then argued that the telecommunications-carrier tenant had failed to pay sufficient rent for the excess space, the carrier asserted that it did not breach the rent provision in the lease because the lease called for a specific sum that it had always timely paid.

Although the landlord in this case did not assert a trespass claim against the telecommunications-carrier tenant, most likely such a claim would have been unsuccessful for similar reasons.

Continuing Versus Permanent Trespass

A trespass may be continuing or permanent. (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1219-1222.) A permanent trespass is "an intrusion on property under circumstances that indicate an intention that the trespass shall be permanent." (*Starrh and Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal. App.4th 583, 592 (*Starrh*)). The wrong is completed at the time of entry and the statute of limitations begins to run at the time of entry. (*Ibid.*)

In contrast, a continuing trespass as "an intrusion under circumstances that indicate the trespass may be discontinued or abated Continuing trespasses are essentially a series of successive injuries, and the statute of limitations begins anew with each injury. In order to recover for all harm inflicted by a continuing trespass, the plaintiff is required to bring periodic successive actions." (*Starrh, supra*, 153 Cal.App.4th at p. 592.) The classic example of a "continuing trespass" is "an ongoing or repeated disturbance . . . caused by noise, vibration or foul odor." (*Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, 869.)

In *Field-Escandon v. Demann* (1988) 204 Cal.App.3d 228, the plaintiff argued that because a sewer pipe that was buried on his property years before he had acquired the land could be

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removed at any time, it constituted a continuing trespass. (*Id.* at p. 233.) The Court of Appeal disagreed, and affirmed the trial court's summary judgment in defendants' favor, finding that the trespass was permanent. (*Id.* at p. 234.) It held that the plaintiff's claim was time-barred because the pipe's impact on the property did not vary or increase over time. (*Ibid.*) *Spar v. Pacific Bell* (1991) 235 Cal.App.3d 1480 adopted *Field-Escandon's* reasoning, and took it one step further by holding that the voluntary removal of a nuisance—namely, underground telephone lines buried under the plaintiffs' property by defendant Pacific Bell 25 years before the lawsuit—did not in and of itself render erroneous the trial court's judgment that the telephone facilities were a permanent nuisance. (*Id.* at pp. 1486-1487.) The facilities had the "overwhelming characteristics of a permanent nuisance or trespass": (1) they were intentionally placed to provide service to the public indefinitely (for at least 100 years); (2) considerable effort and heavy equipment would be required to install and remove the facilities, which were 10 feet underground; and (3) the defendant, as a public entity, might have been able to keep the facilities on the property by paying plaintiff just compensation. (*Id.* at p. 1486.)

Had the plaintiff landlord in the recent telecommunications-carrier case discussed above sued the carrier for trespass—alleging impermissible use of space on the property via antennas and cable trays since 2008—a court would most likely consider the intrusion to be a permanent trespass and, thus, barred by the three-year limitations period for trespass to property (Code Civ. Proc., § 338). This is because the defendant telecommunications-carrier intentionally placed its equipment to provide a service to its subscribers *indefinitely*: It would be operable for many decades (at least 30 years and possibly longer under the lease). Furthermore, installing and removing the antennas and cable trays would require considerable effort and heavy equipment. Finally, the landlord was on notice the telecommunications-carrier's purported trespass since 2008 when the parties signed an amendment to the lease agreement, which showed the location of the carrier's existing facilities. Since the permanent trespass "erected" in 2008, the statute of limitations period for the landlord to bring a trespass claim against the carrier ran in 2011.

Understanding the nuances of the continuous accrual doctrine and what constitutes a continuing trespass versus a permanent trespass, while not complicated concepts, may make or break a real estate case involving an alleged use of excess space. The key is to understand when the original breach occurred, when it was known or knowable to the landlord, and whether it may be subject to the continuous accrual doctrine or constitute a continuing trespass.

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New Judge, New Rulings...continued from Page 1

Although *Le Francois* examined an action that had been transferred to a new judge, the Court expressly declined to opine on the circumstances under which one judge may revisit a ruling of another judge because the parties did not raise the issue. (*Le Francois*, *supra*, 35 Cal.4th at p. 1097, fn. 2.)

California authorities limit a second judge’s ability to reconsider a first judge’s rulings, but recognize some circumstances permitting reconsideration.

One of the leading authorities to discuss the issue left open by *Le Francois* is *In re Marriage of Oliverez* (2015) 238 Cal. App.4th 1242 (*Oliverez*). *Oliverez* collected authorities holding that, generally, one trial judge may not reconsider or overrule an interlocutory ruling of another trial judge. (*Id.* at p. 1248.) The court noted at least three “narrow exceptions to this general rule”: (1) where the judge who made the initial ruling is “unavailable”; (2) “when the facts have changed or when the judge has considered further evidence and law”; and (3) if the first ruling was based on “inadvertence, mistake, or fraud.” (*Id.* at pp. 1248–1249.) “Mere disagreement” with the prior judge’s ruling is not enough to overturn it. (*Id.* at p. 1249.)

Applying the above principles, *Oliverez* overturned a second trial judge’s order who had reconsidered the first judge’s order declining to enforce a marital settlement agreement. (238 Cal. App.4th at p. 1249.) Notably, the Court of Appeal did not discuss which of the two trial judges perceived the merits correctly because that wasn’t necessary to conclude that the second trial judge had overstepped his authority when he disagreed with the first trial judge’s order.

In addition to the circumstances permitting reconsideration identified in *Oliverez*, certain statutes or rules may also permit reconsideration of particular matters. (See *People v. Konow* (2004) 32 Cal.4th 995, 1019 [interpreting Code of Civil Procedure section 657 to allow a second judge to reconsider first judge’s ruling in connection with a new trial motion]; Cal. Rules of Court, rule 3.300(h)(1)(D) and Super. Ct. L.A. County Local Rules, rule 3.3(f)(3) [allowing second judge to find cases related after another judge has made an order not to deem cases related].)

Some policy considerations favor limited authority for a second judge to reconsider a first judge’s ruling.

There is a material difference between a judge reconsidering his or her own order and a judge reconsidering a colleague’s order. A judge revisiting her own order can more efficiently and reliably determine whether reconsideration is warranted

because she knows what was in her own mind when she made the original decision. But it is much less clear whether the first judge would agree with a second judge that circumstances warrant reconsideration. A person’s recognizing his or her *own* mistake is an occurrence inherently limited to rare and especially compelling circumstances. But a person’s belief that someone *else* made a mistake can be difficult to distinguish from a mere disagreement on a judgment call.

The limitations on a second judge’s reconsideration power serve to promote judicial economy and restrict forum shopping. The aim is to dissuade parties from seeking relief from “another and another judge until finally they found one who would grant what they are seeking” because “[s]uch a procedure would instantly breed lack of confidence in the integrity of the courts.” (*In re Alberto* (2002) 102 Cal.App.4th 421, 427 (*Alberto*)). In most circumstances, parties should be able to rely on the judicial resolution of contested issues remaining fixed throughout trial court proceedings.

The limitations also reinforce the structure of the California court system and preserve the appellate courts’ function. “For one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court.” (*Alberto, supra*, 102 Cal.App.4th at p. 427.) A superior court is a single court and one member “cannot sit in review on the actions of another member of that same court.” (*Id.* at pp. 427–428.)

Other policy considerations favor broader authority for a second judge’s reconsideration of a first judge’s ruling.

While California courts generally prioritize the policies favoring limited authority for reconsideration by a successor judge, federal courts allow the second judge broader authority on the ground that “the power of each judge of a multi-judge court is equal and coextensive.” (*Castner v. First National Bank of Anchorage* (9th Cir. 1960) 278 F.2d 376, 380.) A second federal district court judge is “generally” expected not to overrule a predecessor judge “because of the ‘principles of comity and uniformity [which] . . . preserve the orderly functioning of the judicial process,’ ” but a second federal district court judge has the *power* to overrule a first and the only limitation is the second judge’s “proper exercise of judicial discretion.” (*Fairbank v. Wunderman Cato Johnson* (9th Cir. 2000) 212 F.3d 528, 530.)

Although the structure of the California and federal court systems is not identical, the policies favoring reconsideration recognized in the federal courts also apply to California courts.

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Allowing the second judge broad discretion to reconsider may better allow him to “conscientiously carry out his judicial function in a case over which he is presiding.” (*Castner, supra*, 278 F.2d at p. 380) A judge’s role may be impaired if he “permits what he believes to be a prior erroneous ruling to control the case.” (*Ibid.*) For example, if the first judge sustains a hearsay objection to exclude key evidence at the summary judgment stage, the second judge trying the case might feel he is inappropriately making an order that is erroneous if he cannot follow his own understanding of the hearsay rule to determine whether the evidence should be admitted at trial.

An approach that broadly restricts reconsideration may be in tension with the principle that a trial court generally retains the inherent power to modify its rulings until there is a final judgment and an appeal. (See *Le Francois, supra*, 35 Cal.4th at p. 1107; Code Civ. Proc., § 916, subd. (a).) Restricting a second judge’s ability to make decisions based on a predecessor trial judge’s rulings can be seen as unduly elevating the first judge’s rulings to the status of a judgment, when those same decisions would have been modifiable interim rulings had the assigned judge remained unchanged.

Allowing the second judge some amount of discretion may also avoid “futile and expensive” proceedings. (*Castner, supra*, 278 F.2d at p. 380.) “‘Forcing the parties to proceed where there is recognized error in the case would result in an enormous waste of the court’s and the parties’ resources.’” (*Le Francois, supra*, 35 Cal.4th at p. 1107.) As Justice Frankfurter said, “‘[w]isdom too often never comes, and so one ought not to reject it merely because it comes late.’” (*People v. Riva* (2003) 112 Cal.App.4th 981, 991 (*Riva*), quoting *Henslee v. Union Planters Bank* (1949) 335 U.S. 595, 600.)

Concluding thoughts and suggestions

The conflicting policy considerations outlined above suggest that a second judge will need to view the scope of her reconsideration power through the prism of the particular circumstances of each request. *Oliveres* described those circumstances that may provide openings for a litigant to raise an old issue with the new judge as “narrow”—namely, when the first judge is unavailable; when the facts have changed; when the judge has considered further evidence and law; or when the first ruling was based on inadvertence or mistake. The second judge may be appropriately reluctant to revisit a previously determined issue and therefore adopt a restrictive view of her power to do so.

Here are some factors a litigant may consider before suggesting a new judge reconsider a prior judge’s rulings:

- Can you explain why the first judge is unavailable to reconsider his or her own ruling?
- Can you provide good reasons why the second judge both has the ability to reconsider a predecessor’s ruling and should want to do so?
- Did the first judge express concerns or uncertainty about the initial ruling? (See *Riva, supra*, 112 Cal.App.4th at p. 993 [noting first judge’s statements that she might reconsider the matter herself].)
- Are you asking for reconsideration of a legal question that might be reviewed de novo on appeal and therefore might be more likely to garner a fresh look by the second judge, rather than a discretionary ruling that would be reviewed deferentially?
- Is there sufficiently changed context (e.g., new evidence or law to consider) that might warrant reconsideration or even support an argument that the current question is different from the already-decided one?
- Can you make an argument to revisit an old ruling that is so compelling even the judge who made the initial ruling would have changed course?
- Will you lose credibility with the second judge by asking him or her to revisit long-decided issues and disagree with a colleague?

In sum, you should not expect a blank slate if the judge changes mid-case, but you need not necessarily consider old rulings set in stone as a categorical matter.

The Honorable David J. Cowan is Supervising Judge of the Los Angeles County Superior Court Civil Division.

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Sargon—The Trial Judge Is “The Gatekeeper”

Sargon instructs trial courts to act as a “gatekeeper” to exclude expert opinions based on assumptions that lack any evidentiary support. That means when an expert refers to studies and other information as the underlying support for his or her opinion—and the opponent objects that the expert’s opinion is unsupported or speculative—trial courts *must* hold a hearing outside the jury’s presence to ensure there is some reasonable support for the underlying evidence. This is now commonly known as a “gatekeeper hearing.”

In this hearing, the court must conduct a “circumscribed inquiry” to determine whether, as a matter of logic, the expert’s underlying source material “adequately support[s] the conclusion that the expert’s general theory or technique is valid.” (*Sargon, supra*, 55 Cal.4th at p. 772.) *Sargon* holds that expert opinion testimony is inadmissible when it is: “(1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative.” (*Id.* at pp. 771–772.)

“[I]t certainly doesn’t aid the jury in understanding an issue if all an expert says is that it’s possible. That doesn’t meet the standard for expert opinion.” (*Waller v. FCA US LLC* (2020) 48 Cal.App.5th 888, 895 [applying *Sargon*].) “[P]ossibilities are irrelevant, because anything is possible.” (*Ibid.*) And “circular reasoning is not a basis for an admissible expert opinion.” (*Id.* at p. 896.)

Although *Sargon* did not change California law on the admissibility of expert testimony, it has become an important weapon in halting experts’ attempts to proffer unsupported, speculative expert opinions.

Trial judges often refuse litigants’ initial requests for gatekeeper hearings, instead preferring to either judge the testimony in context or even let juries decide whether the underlying support for the opinion is credible. So, litigants sometimes need to remind trial courts about their gatekeeper duty under *Sargon*. (See *Long Beach Memorial Medical Center v. Kaiser Foundation Health Plan, Inc.* (2021) 71 Cal.App.5th 323, 346 [“*Sargon* requires” courts to act “as a gatekeeper to ensure that the trier of fact is not presented with expert testimony based on logically unsupported methodologies”].) *Sargon* itself calls trial courts’ gatekeeping duty “substantial.” (55 Cal.4th at p. 769.)

When filing a motion in limine seeking to exclude an expert’s speculative opinion, litigants should ask, alternatively, for the court to hold a gatekeeper hearing outside the jury’s presence under Evidence Code sections 402 and 802 and *Sargon* to determine whether the expert’s opinions are supported by facts or just speculation and conjecture. “[T]he courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it.” (*Rosen v. Ciba-Geigy Corp.* (7th Cir. 1996) 78 F.3d 316, 319 [Posner, C. J.].)

Sanchez—The Rule Against Repeating Case-Specific Hearsay

Under Evidence Code section 802, experts are permitted to describe the reasons and matter upon which their ultimate opinions are based.

Before *People v. Sanchez, supra*, 63 Cal.4th 665, courts interpreted section 802 broadly, permitting experts to repeat out-of-court hearsay statements if they were part of the “reasons” and “matter” relied on in forming the expert opinion, subject to limiting instructions and the trial court’s discretion. (*Id.* at pp. 678–679.) But litigants regularly employed experts as conduits for bringing hearsay before the jury, and the supposed safeguards that courts imposed were suspect:

- Limiting instructions: “The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.” (*Krulewitch v. U.S.* (1949) 336 U.S. 440, 453 [69 S.Ct. 716, 93 L.Ed. 790] (conc. opn. of Jackson, J.).)
- Trial court’s discretion to prevent experts from repeating “unreliable” hearsay: The abuse of discretion standard of review is not much of a safeguard because courts will reverse only if “the trial court exceeded the bounds of reason.” (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 349.)

Sanchez “expressly changed the law.” (*People v. Perez* (2020) 9 Cal.5th 1, 9.) Post-*Sanchez*, an expert “may still rely on hearsay in forming an opinion, and may tell the jury *in general terms*” that he or she did so, but the expert cannot relate “case-specific facts”

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asserted in hearsay statements as true unless they are independently proven by competent evidence or are covered by a hearsay exception. (*Sanchez, supra*, 63 Cal.4th at pp. 685–686, original italics.)

The distinction between case-specific facts and background information is crucial—the former may be excluded as hearsay under the *Sanchez* rule, the latter may not. “Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.” (*Sanchez, supra*, 63 Cal.4th at p. 676.) Whereas, background information refers to the general, non-case-specific knowledge that experts learn by virtue of being experts in a specialized area. (*Ibid.*)

The California Supreme Court Clarifies The *Sanchez* Rule

In two recent cases, the California Supreme Court discussed *Sanchez* in detail and clarified its holding.

First came *People v. Veamatahau* (2020) 9 Cal.5th 16. It emphasized that “the relevant hearsay analysis under *Sanchez* is whether the expert is relating general or case-specific out-of-court statements. The focus of the inquiry is on the information conveyed by the expert’s testimony, not how the expert came to learn of such information. Thus, regardless of whether an expert testified to certain facts based on composite knowledge ‘acquired from sources too numerous to distinguish and quantify’ or if the expert simply looked up the facts in a specific reference as part of his or her duties in a particular case, the facts remain the same. The background or case-specific character of the information does not change because of the source from which an expert acquired his or her knowledge.” (*Id.* at p. 30.)

Then *People v. Valencia* (2021) 11 Cal.5th 818 further expounded upon both *Sanchez* and *Veamatahau* in explaining the difference between general background information and case-specific facts: “Hallmarks of background facts are that they are generally accepted by experts in their field of expertise, and that they will usually be applicable to all similar cases. Permitting experts to relate background hearsay information is analytically based on the safeguard of reliability. A level of reliability is provided when an expert lays foundation as to facts grounded in his or her expertise and generally accepted in that field.” (*Id.* at p. 836.)

While *Veamatahau* illustrates the latitude experts are still given post-*Sanchez* to testify to background information relied upon in the formation of their opinions, *Valencia* shows how the *Sanchez* rule barring case-specific hearsay places limits on that practice.

Both *Sargon* And *Sanchez* Apply During Summary Judgment Proceedings

Even more recently, in *Strobel v. Johnson & Johnson* (2021) 70 Cal.App.5th 796 (*Strobel*), the Court of Appeal for the First District addressed the *Sargon* and *Sanchez* limiting rules in the context of a summary judgment.

In *Strobel*, plaintiffs sued Johnson & Johnson (J&J) for products liability, negligence, and fraud, alleging that continuous exposure to asbestos in J&J’s Baby Powder was a substantial contributing cause of the plaintiff husband’s mesothelioma and the wife’s loss of consortium.

J&J moved for summary judgment. The trial court sustained J&J’s hearsay objections to much of plaintiffs’ proffered expert testimony under *Sanchez* and granted J&J’s motion, concluding that plaintiffs failed to present evidence creating a triable issue of legal causation.

Plaintiffs appealed. Applying the *Sanchez* rule, *Strobel* held that the trial court correctly excluded one of plaintiffs’ expert’s opinions as case-specific hearsay to the extent that he related the specifics of another expert’s testing data and results. But that did not end the court’s inquiry. Even without the case-specific facts from the first expert, the Court of Appeal was satisfied that a second plaintiff’s expert had formulated his opinions based upon principles generally accepted in his area of expertise and that he applied those principles upon a proper evidentiary foundation.

The Court of Appeal also held that the second expert’s testimony did not violate *Sargon* because there was no “analytical gap between the data and the opinion [he] proffered” that was too large to be admissible. (*Strobel, supra*, 70 Cal.App.5th at p. 826; see *San Francisco Print Media Co. v. The Hearst Corp.* (2020) 44 Cal.App.5th 952, 962 [courts may apply *Sargon*’s “analytical gap” analysis in connection with motions for summary judgment and adjudication].)

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doing so would be to require lawyers to acknowledge the pledge during the annual dues renewal process.

What More Can ABTL Do?

The Task Force grew out of an ABTL joint board meeting in 2019. More than 100 prominent lawyers and judges from each of California's ABTL chapters spent several hours addressing incivility and possible responses to it in a wide-ranging discussion I moderated. After the discussion, a number of participants discussed possible next steps. On behalf of the group, I approached Alan Steinbrecher, then Chair of the State Bar Board of Trustees, to inquire about the matter. His response was to designate me as Chair of what became the Task Force.

So, ABTL has a strong stake in ensuring the success of the Task Force's proposals. All California ABTL chapters have already endorsed the Task Force's recommendations. ABTL can further those recommendations in several ways. First, chapters can develop first-rate MCLE civility programming, being careful to address bias-driven incivility. It would be useful to video record the programs so they can be made available to other lawyers. Second, ABTL chapters and their members should engage in the State Bar rulemaking process, commenting on and supporting efforts to brand incivility as professional misconduct, while ensuring any rule ultimately adopted comports with the First Amendment and is something business trial lawyers will thrive under. Third, ABTL chapters and members similarly should engage in any public comment period relating to the civility pledge. Finally, ABTL should continue its long tradition of modeling and promoting civility and professional conduct among lawyers.

Justice Brian S. Currey is an Associate Justice on the California Court of Appeal, Second Appellate District, Division 4.

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Accordingly, the Court of Appeal reversed. Although it agreed that the case-specific hearsay from the first expert was inadmissible and the other experts could not rely on it, that was not enough to warrant summary judgment in light of plaintiffs' other admissible expert testimony. (*Strobel, supra*, 70 Cal.App.5th at pp. 810, 821–823.)

Remember To Preserve And Reraise Your *Sanchez and Sargon Objections*

Sargon, Sanchez, and their progeny provide strong ammunition against junky or prepaid expert opinions or those attempting to bring in damaging hearsay. But they can't help you if you don't object. Even the most obvious *Sargon* and *Sanchez* violations will not matter—and the arguments will be forfeited on appeal—if you don't make a clear record of your objections to the experts' impermissible testimony. (See, e.g., *David v. Hernandez* (2017) 13 Cal.App.5th 692, 704 [“Appellant forfeited the *Sanchez* hearsay argument because he never made a hearsay objection”].)

And, even if your motion in limine is unsuccessful in excluding an expert's opinion, don't forget to reraise the same objections when the expert testifies. Since you will already have teed up the issue in your pretrial motion, your contemporaneous objection, when viewed later in the context of the trial testimony, might be better received by the trial court and sustained.

It's important to keep the CSI Effect in mind when you're deciding whether to have experts testify at trial to support your client's case. Many jurors are hoping to see experts testify so they can feel like CSI investigators. But that doesn't mean you need to call one. Sometimes your best move is to try to persuade the trial judge to exclude the other side's expert or significantly limit his or her opinion. A detailed motion in limine targeted at a specific expert can be a useful tool for limiting a major part of the other side's case before trial or, at a minimum, educating the court so that it is more receptive to your contemporaneous trial objection to the expert's testimony.

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Privilege and Confidentiality..continued from Page 5

in confidence and for the purpose of obtaining legal advice from the attorney). This exception is narrow, however, and applies only if the third party's contributions are "nearly indispensable" or serve a specialized purpose in facilitating attorney-client communications to render legal advice. *Cavallaro*, 284 F.3d at 249 (citation omitted).

While maintaining confidentiality is a fundamental requirement for attorney-client privilege, it is unclear whether the use of online translators provided by third parties is consistent with that requirement. Popular online translators have Terms of Service stating that the service providers have rights to all of the information that users enter. Common provisions include the rights to use, copy, store, reproduce, modify, publish, publicly perform, publicly display, create derivative works of, and distribute translated content, as well as the right to sublicense such rights to suppliers and subcontractors.

While these Terms of Service state what service providers *can* do with disclosed information, not necessarily what they ordinarily do, there is still reason to be wary. For example, in *In re Asia Global Crossing*, the U.S. Bankruptcy Court for the Southern District of New York indicated that privilege may be destroyed when a third party has the right to monitor electronic communications between attorney and client, even if the third party does not actively or consistently monitor them. *In re Asia Glob. Crossing, Ltd.*, 322 B.R. 247, 258–59 (Bankr. S.D.N.Y. 2005). At issue was whether emails were confidential and privileged when an employee used his employer's email system to communicate with his personal attorney. *Id.* at 256. To assess that issue, the court considered four factors that generally measure an employee's expectation of privacy: "(1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or emails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?" *Id.* at 257 (footnote omitted).

While courts have not yet addressed whether confidentiality and privilege are maintained upon the provision of privileged information to a third-party service provider for online translation, the *In re Asia Global Crossing* factors provide reason for concern. If the service provider's Terms of Service clearly state that it has access and rights to translated information,

and these terms are clear to users, a court could conclude that there has been a breach of confidentiality. If the confidential information was privileged, a court could find that privilege was waived.

Other Potential Concerns Regarding Loss of Confidentiality

Concerns regarding potential breaches of confidentiality by the use of online translators extend beyond attorney-client privilege. For example, the Supreme Court has held that disclosure of a trade secret to others extinguishes a property right in the trade secret. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (stating that once an individual "discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished"); *see also* 18 U.S.C. § 1839(3)(A) (requiring "reasonable measures to keep such information secret" to maintain trade secret protection). Courts could conclude that using an online translator for trade-secret information abrogates a property right in the trade secrets.

Additionally, courts and administrative bodies frequently enter protective orders requiring a party's lawyers to maintain the confidentiality of information produced by the opposing party. The submission of confidential information to a third-party online translator could be seen as a violation of the protective order's terms, potentially subjecting a party to sanctions.

Conclusion

Until courts issue opinions holding that confidentiality and privilege are maintained for information disclosed to online translators, it would be prudent for lawyers to limit their use of online translators to nonconfidential information. For translations of confidential information, attorneys should exercise caution and consider using a professional translation service subject to a nondisclosure agreement.

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Universal quoted the rule that “[u]nder the doctrine of contra proferentem, any ambiguity in an exclusion is generally construed against the insurer and in favor of the insured” (929 F.3d at p. 1151), but then it proceeded to misapply that rule by ignoring the factual basis underlying holdings reached by the California courts on which it relied.

Departing from over thirty years of settled California law, *Universal* refused to construe the insurance policy’s ambiguous war exclusion in favor of coverage because the policyholder, *Universal*, had “offered” the exclusion. (929 F.3d at p. 1153.) Pointing to *Fireman’s Funds Ins. Co. v. Fibreboard Corp* and *Garcia v. Truck Ins. Exchange*, the Ninth Circuit created a new rule, which is substantially less burdensome on insurers than the rule established by the California Supreme Court in *AIU*: *Universal* held that the presumption in favor of coverage does not apply where there is evidence that the insured proposed or negotiated the policy language at issue, even where the provision was form policy language drafted by insurers. (*Id.* at pp. 1151-1152, citing *Fireman’s Funds Ins. Co. v. Fibreboard Corp.* (1986) 182 Cal.App.3d 462, 467 & *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 438.) But, *Fireman’s Funds* and *Garcia* do not support *Universal*’s holding and departure from *AIU*, because in both cases the evidence clearly established that the policyholders actually ***drafted*** the provisions at issue rather than simply proposing language from standard insurance forms. (*Fireman’s Funds*, at p. 468 & fn. 2 [holding there was evidence the insured drafted the provision at issue where the insured’s risk manager testified that he took it upon himself, on his own initiative, to draft the exclusion at issue]; *Garcia*, at pp. 434-435 [discussing the insured’s decision to add the specific provision at issue to address potential exposure to malpractice liability for volunteer staff physicians providing educational services].)

Universal’s outlier holding—i.e., declining to construe policy language against the insurer when the language was offered by the insured—ignores that the exclusions at issue were from a *standard* insurance industry form. (929 F.3d at pp. 1152-1153.) *Universal* misconstrues—and in fact ignores—California law applying the standard set forth in *AIU*, and thus, threatens to erode the protections that the California Supreme Court sought to create for policyholders.

Compounding this error, the Ninth Circuit’s holding ignores the California Fourth Appellate District’s decision in *Coca Cola Bottling Co. v. Columbia Casualty Ins. Co.* (1992) 11 Cal.App.4th 1176, which had strikingly similar facts. There, the insurer attempted to overcome the presumption in *AIU* by arguing the policyholder “had enough negotiating power to put its insurers in the somewhat unusual position of accepting or rejecting policy language ***proposed***” by the policyholder. (*Id.* at p. 1185, emphasis added.) Applying *AIU*, *Coca Cola Bottling* held that “an insured’s bargaining position is important and will alter the usual rules of policy interpretation, but only if it can be demonstrated the insured’s bargaining power was brought to bear in ***creating*** the particular language in dispute.” (*Id.* at p. 1186, emphasis added.) Because the only evidence before the Court of Appeal was that the specific provision was almost identical to language in other policies, the court refused to depart from the normal policy-interpretation rule favoring coverage, even where the evidence clearly showed that the policyholder “proposed”—or, using *Universal*’s language, “offered”—the language to the insurer. (*Id.* at pp. 1185-1187.) The Ninth Circuit’s failure to consider *Coca Cola Bottling*’s strikingly similar facts and holding inevitably contributed to its misapplication of California law.

Thus, far more pressing than its analysis of war exclusions is the Ninth Circuit’s failure to apply well-established California law in its interpretation of ambiguities in an insurance policy. Although contrary to California law, insurers will no doubt point to *Universal* in an attempt to escape the protections that the California Supreme Court sought to create for policyholders in *AIU*. As an outlier with no binding authority in California state courts, however, *Universal* is anything but “universal” and instead stands athwart the reasoned majority led by the California Supreme Court’s decision in *AIU*.

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