

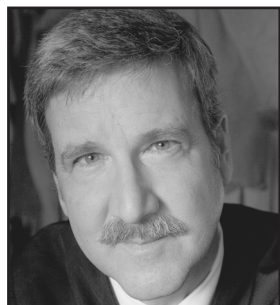
# abt REPORT

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## Consider Evidence



Judge Curtis E.A. Karnow

At the end of May 2021, the California Supreme Court decided *People v. Lemcke*, 11 Cal. 5th 644 (2021). It directs us to avoid (unless sought by the defense) a jury instruction which correlates a witness's certainty with the accuracy of her eyewitness identification. The result is noteworthy, but the reasoning is more important.

The court relied on empirical studies, not just legal precedent (although it cited cases from other jurisdictions too). The studies took first place. The court noted "the scientifically-documented lack of correlation between a witness's certainty in his or her identification . . . and the accuracy of that identification" (*id.* at 486), the "empirical research" (*id.* n.15), and "the large body of research conducted in this area" (*id.* at 486).

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## Looking Back — Yes, There Are Some Silver Linings to What We Have Been Through

About a month ago, my good friend and former colleague Judge Brian Walsh (Ret.) approached me about writing an article describing my experiences as a Civil Case Manager over the course of the past fifteen months and some takeaways that I could share as a civil judge trying to keep cases moving in the midst of all the restrictions and limitations we faced during the pandemic. Good friend that he was, it was hard to say no to Judge Walsh's "invitation," so I agreed. After reflecting on the events of the past year, I decided that I was going to try to focus on some of the unexpected good things that have happened amidst all the obstacles we faced.



Judge Peter H. Kirwan

As I told Judge Walsh, no one wants to hear any more tales of woe from the trial court judges. We have all heard enough about the log-jam of civil cases, the Court's depleted resources, pandemic-induced budget cuts to our courts, the unavailability of trial departments, the difficulty in obtaining timely hearing dates, and the ongoing delays in seeking justice through our court system. As we slowly are getting back to normal (whatever that means now), there are, however, some reasons to be optimistic.

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JEFF KICHAVEN

## *Online Mediation One Year In: Personal, Practical Reflections*



Jeff Kichaven

Come writers and critics  
Who prophesize with your pen  
And keep your eyes wide  
The chance won't come again  
And don't speak too soon  
For the wheel's still in spin  
And there's no tellin' who that it's namin'  
For the loser now will be later to win  
For the times, they are a-changin'  
... Bob Dylan, 1963

When ABTL asked me to prophesize with my pen about the future of mediation one year into the pandemic and lockdown, I was tempted to speak too soon. We've all learned so much. But the wheel's still in spin, and the times, they are still a-changin'. Change is happening faster than ever. I offer few answers here. In mediation generally, it's more important to ask the right questions. While I'm happy to share some views after a year of conducting remote mediations, you'll have to decide what fits you and your clients. That said, let's explore some important aspects of mediation to see what has happened and what changes may be coming.

### **How has the timing of mediation changed?**

The pressure is on to mediate sooner rather than later. This pressure has two sources. One is helpful -- the other, not so much.

The helpful push to mediate sooner is within the particular dispute – the client. With the economy picking up, clients feel pressure to get past old conflicts and make way for the new. They reach a point where a situation stops feeling less like a fresh wound and more like ancient history. That may come sooner as more deals, more commerce and more conflicts demand their energies. That's the time to mediate. That's the inflection point where clients may be apt to spend a little more or take a little less to get the other benefits of settlement – closure, elimination of risk and expense, and reclaiming mental real estate for new challenges.

Who is best positioned to tell when clients hit this point? You, their lawyer, in consultation with your clients. The right time to mediate always is more about the emotional state of the client than the factual or legal state of the record.

Then there's the less helpful kind of pressure. Pressure to mediate sooner coming from outside the dispute, from contracts and courts, isn't likely to set the stage for productive mediation. With courts ramped down in 2020, more of my mediations came from arbitrations. Many were before an arbitration even commenced, required by contracts as conditions to instituting the arbitration. Few settled. No surprise. When clients gird up to institute an arbitration or file a lawsuit, they're often freshly wounded. For so many, not enough has happened in terms of the costs, delays and frustrations of litigation to get them to consider the ancient history option seriously.

The same is true when courts order a mediation – it's generally too soon. Lawyers are sophisticated about mediation and know how to suggest it without seeming weak, just as they knew how to suggest unfacilitated settlement talks

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JOSEPH MAUCH

## On TRADEMARKS



Joseph Mauch

**I**t is a truism that the world is getting smaller and all business on the internet is global. Trademark owners large and small have known this truth for many years. As lawmakers around the world continue to adjust to this truth, trademark owners face changing and complicated laws and procedures that they must take into account to properly enforce and defend their trademarks.

Take, for example, the European Union's proposed Digital Services Act, commonly referred to as the "DSA." The DSA is a recent legislative proposal submitted to the European Parliament in December 2020. The expressed purpose of the DSA is to update the European Union's existing legal framework, adopted in the early days of the internet in 2000, relating to online content and commerce. In particular, the DSA is meant to address the proliferation of "illegal content" on the internet, maintaining the existing law that online platforms (*e.g.*, the YouTubes, Facebooks, and TikToks of the world) are not liable for such content unless they actually know it is illegal, but adding a new requirement that companies remove such content once they are made aware of it.

So far, so good, right? Everyone can get behind removing illegal content from the internet. The road to international trademark complications, however, is paved with good intentions.

The complications begin with the definition of "illegal content." In an effort to be broad and not interfere with the individual laws of European Union (EU) member states, the DSA defines "illegal content" to mean any information that is not in compliance with any law of any EU member state. Trademark infringement is not specifically referenced

but is almost certainly included. Thus, the DSA, for better or worse, places infringing trademarks and counterfeit products in the same category as cyberbullying and stolen personal information.

So what happens, under the DSA, when illegal content in the form of an infringing trademark is posted online? All online platforms of a certain size must provide notice and takedown procedures that facilitate notification to the platform of what the notifier considers to be illegal content. This is not much different from what happens now. Nearly all platforms already have such procedures, but the DSA seeks to harmonize these procedures, make them mandatory, and ensure the platforms remove the content if illegal. In the case of hate speech or pornography, the determination that content requires removal should be relatively simple and consistent. But what about when the content is a trademark that one party claims is infringing but the other claims is valid because they are the senior user in their country or because it is a fair use of the mark?

If the platform can't resolve the issue, then the DSA mandates an "out-of-court dispute settlement" proceeding (think ADR) by certified independent arbitrators. This ADR proceeding is where things could quickly get complicated for platforms, their users, and the arbitrator. The arbitrator will be required to apply the law of the member state where the platform is located but the claimant will be able to select the forum state. This means the arbitrator in each of 27 EU member states must quickly and efficiently research, understand, and apply the various trademark laws of the other 26 member states (as well as laws relating to other "illegal content"). This situation seems ripe for inconsistent results, forum shopping, and, given the right to further "judicial redress," inefficiency.

At this point, you may be wondering why any of this matters to your clients in the US, other than as an example of how one jurisdiction is trying to address these difficult issues. In fact, the DSA could matter a lot to your clients with trademarks (*i.e.*, all of them). Its purposefully broad language provides that "illegal content" accessible to users in the EU is subject to the takedown and ADR procedures described above, even if the content and the platform is owned by parties outside the EU. So if your client

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AMY BRIGGS

## On INSURANCE



Amy Briggs

Litigation strategies deployed to defend a lawsuit can have a profound impact on insurance coverage for your client. This is particularly true at the outset of litigation, when defense counsel might be considering various procedural and substantive defenses. Those decisions should

be made in consultation with the client, the brokers, and—if necessary—coverage counsel, with an eye towards the potentially available insurance coverage to ensure that both the defense and coverage are aligned.

Common strategy decisions might include filing a Notice of Related Cases under California Rule of Court 3.300 to involve a favorable judge that oversaw a prior, similar case. That rule provides that cases are related (even if the prior one is now dismissed) if, *inter alia*, they involve the “same or similar claims,” or arise from “substantially identically” transactions or events and require “substantially identical questions of law or fact.” Cal. R. Ct. 3.300.

Alternately, counsel might seek coordination with other cases for efficiency reasons. *See* Cal. Code Civ. Pro. § 404.1 (coordination may be appropriate when “common question of fact or law” predominate and are significant to the litigation). A petition for coordination should be accompanied by a declaration establishing “any other action known to the petitioner to be pending in a court of this state that shares a common question of fact or law with the included actions.” Cal. R. Ct. 3.521.

Or, counsel may want to seek to dismiss the complaint altogether arguing that the current claim

was released in a settlement involving a prior claim because the two claims were “related.” *See, e.g., RLI Ins. Co. v. ACE Am. Ins. Co.*, 2020 WL 1322955, at \*5 (N.D. Cal., Mar. 20, 2020).

These decisions have the potential to affect the outcome of a perennial dispute between insureds and their insurers: Whether multiple lawsuits arise out of “interrelated wrongful acts,” a defined term usually found in claims-made policies such as errors and omissions or directors and officers liability insurance. In the last several years alone, a number of California courts frequently have addressed coverage disputes over interrelated wrongful acts in a wide variety of circumstances. *See, e.g., Stem, Inc. v. Scottsdale Ins. Co.*, 2021 WL 1736823, at \*1 (N.D. Cal., May 3, 2021) (2013 lawsuit arising out of company’s Series B financing round related to 2010 employment lawsuit brought by company’s founder in 2010 but 2017 lawsuit over loan from board member not related); *Crosby Estate at Rancho Santa Fe Master Association v. Ironshore Spec. Ins. Co.*, 498 F. Supp. 3d 1242, 1258 (S.D. Cal. 2020) (2018 lawsuit against HOA for destruction and removal of speedbumps not related to 2015 lawsuit against HOA for failure to enforce speed limits and stop signs); *Pacific Coast Surgical Center, L.P. v. Scottsdale Ins. Co.*, 2019 WL 4390565, at \*6 (C.D. Cal., June 25, 2019) (lawsuits brought by different physicians arising out of non-compete clauses and filed during policy period were related to demand letter sent prior to policy period, and thus were not claims first made during policy); *D.R. Horton Los Angeles Holding Co., Inc. v. Certain Underwriters at Lloyd’s*, 2020 WL 7417409, at \*3 (Cal. Ct. App., Dec. 18, 2020) (2007 lawsuit by homeowners within development for slope movement related to 2003 lawsuit by property owners adjacent to project because both arose from contractual grading work on project, soils engineering performed for same developer, and negligent work alleged performed by same engineer resulting in same problem).

Interrelated wrongful acts (also called related wrongful acts) provisions can take various forms. On the one hand, they might operate to deem a later

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MARIE BAFUS

## On SECURITIES LITIGATION



Marie Bafus

A recent Delaware decision highlights the importance of ensuring the confidentiality of board communications with a company's outside directors, as well as the risk of privilege waiver when outside directors send and receive confidential board communications using the email accounts where they are employed. In litigation between WeWork and the SoftBank Group (SoftBank), the Delaware Court of Chancery held that SoftBank was required to produce otherwise privileged emails because two SoftBank representatives sent and received the communications from email accounts at a different company, thereby waiving the attorney-client privilege. The ruling is important because many companies have outside directors who routinely communicate about confidential board matters using their work email addresses, rather than company email addresses assigned to them as board members.

*In re We Work Litig.*, 2020 WL 7624636 (Del. Ch. Dec. 22, 2020)

In a lawsuit relating to SoftBank's failure to close a tender offer for WeWork shares, WeWork filed a motion to compel SoftBank to produce 89 emails that SoftBank had withheld or redacted on the grounds of attorney-client privilege. The emails were communicated using Sprint, Inc. email accounts. Although not a party to the litigation, Sprint was 84% owned by SoftBank and several Sprint employees played roles at both Sprint and SoftBank, including Sprint's Chairman and COO who served as SoftBank's representative on the WeWork board. These individuals received legal advice through their Sprint email accounts from SoftBank's lawyers regarding WeWork. SoftBank withheld the

communications at issue from production based on attorney-client privilege. WeWork moved to compel on the ground that communications that were sent to or from Sprint email addresses had no reasonable expectation of privacy, and therefore any attorney-client privilege associated with those communications had been waived.

Applying the test articulated in *In re Asia Global Crossing, Ltd.*, the court found that the employees did not have a reasonable expectation of privacy in communications sent or received through their Sprint email accounts. The *Asia Global* test focuses on the policies of the employer (here, Sprint) whose email is being utilized to send the non-work related communications and asks whether the employer: (1) maintains a policy banning personal or objectionable use, (2) monitors employee use of computers or emails, (3) grants third parties a right of access to computers or emails, and (4) notifies employees (or employees are aware) of its use and monitoring policies.

*First*, the court noted that the Sprint Code of Conduct explicitly stated that employees "should have *no expectation of privacy* in information" they sent, received, accessed, or stored on any of Sprint's computer systems or network, and that Sprint had the right to review workplace communications, including emails, at any time.

*Second*, the court found that SoftBank failed to provide evidence that Sprint did not monitor employee communications. Indeed, given that Sprint had expressly reserved the right to review employee communications, the court found that the absence of evidence of past or intermittent monitoring did nothing to undermine Sprint's rights to monitor.

*Third*, the court found that SoftBank did not produce any evidence that the relevant employees took "significant and meaningful steps to defeat access" by Sprint, "such as shifting to a webmail account or encrypting their communications," which the court emphasized were available to the employees in this case.

*Fourth*, the court found that, given their positions within Sprint, the employees were aware or should have been aware of Sprint's monitoring and use policy, and therefore had no reasonable expectation

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Of course, this isn't the first time high courts have relied on empirical research. One need only recall *Brown v. Board of Education's* reliance on empirical studies, 347 U.S. 483, 494, nn. 10-11 (1954), and the "Brandeis brief" alerting courts to practical research in an area, used first in *Muller v. Oregon*, 208 U.S. 412 (1908).

But this attention to empirical research is infrequent. Legal reasoning is built on precedent. It is almost always good enough to rely on case authority, including assumptions about how the world works dressed up as legal precedent. The legal system has this bias towards citation of past authority built in: it's how lawyers and judges do their work.

Appellate courts often make assumptions about how things work. Here is a sample from a 10-minute search of recent U.S. Supreme Court cases: *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020) (deciding that a prisoner probably won't experience pain at execution, based on conflicting declarations); *Trump v. Vance*, 140 S. Ct. 2412, 2416 (2020) ("[P]roperly tailored criminal subpoena will not normally hamper the performance of a President's constitutional duties. . . . [R]eceipt of a subpoena would not seem to categorically magnify the harm to the President's reputation."); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) ("It is hard to believe that admitting more than 10 people to a 1,000-seat church or 400-seat synagogue would create a more serious health risk than the many other activities that the State allows."); *Citizens United v. Federal Election Com'n.*, 558 U.S. 310, 360 (2010) ("The appearance of influence or access [created by corporate funding of candidates], furthermore, will not cause the electorate to lose faith in our democracy.").

One fast way to find decisions in which courts assume how things are is to search for the phrase "we are certain." So we have these: *U.S. v. Lewis*, 40 F.3d 1325, 1341-42 (1st Cir. 1994) ("we are certain that the prosecutor's race-neutral explanation negates any inference of purposeful discrimination"); *In re Madison Guaranty Savings & Loan*, 354 F.3d 900, 906 (D.C. Cir. 2004) ("we are certain" any other prosecutor would have handled investigation just as did independent counsel Kenneth Starr).

A routine use of courts' use of their knowledge of how things work comes in harmless error analysis. The basic rule is familiar: if the jury would have

decided the case the same way anyway, the error is harmless. This generally happens when there is, in the view of appellate judges, more than enough evidence—for example, "ample evidence" to support the verdict. *People v. Stutelberg*, 29 Cal. App. 5th 314, 321 (2018). On this basis, misconduct by lawyers and judges, wrong jury instructions, and errors in admitting evidence, may all be harmless if the appellate panel finds the same verdict would have been reached without the mistake. In criminal cases we ask if "beyond a reasonable doubt . . . the error did not contribute to the jury's verdict." *People v. Mil*, 53 Cal. 4th 400, 417 (2012).

But juries reach decisions for all sorts of reasons; where a judge might think an error was harmless, a juror might, as a matter of fact, have been swayed by it, not by the rest of the rest of the correctly admitted evidence.<sup>1</sup> A juror might have voted for a verdict only because of an erroneous instruction, and—even without good reason—would not have done so on the basis of the correct instruction. To say that the jury would have reached the same decision despite the error assumes the jury reasons like the judge. But litigants refuse to waive juries *all the time* precisely because they hope for a verdict which is entirely *different* from the one a judge would render. One should not engage "in speculation" in deciding if error was harmless, *In re Christopher L.*, 56 Cal. App. 5th 1172, 1177 (2020), but in a way it's always speculation, in the sense that we don't *actually* know what the jury would have done.<sup>2</sup> If we wanted the empirical truth we could ask the jury, but there isn't much appetite for remands for the purpose of digging up 12 jurors, years after the fact, to ask them.

There are other examples of courts assuming how things work, such as the notion that parties read, or reasonably should be held to have read, lengthy complicated online contracts (which I have noted elsewhere<sup>3</sup>), as well as the perhaps tenuous notion that, as our jury instructions suggest,<sup>4</sup> lawyers, judges and arbitrators can tell if people are telling the truth by watching them.<sup>5</sup>

I complete this short tour with a few notes from a recent book by Daniel Kahneman and his colleagues, *Noise* (2021). Readers may know the Nobel prize winner from his earlier book, *Thinking, Fast and Slow* (2011). In *Noise*, the authors discuss a series of experimental results which show many of our judgments are not only biased but, at least as concerning, are "noisy" in the sense that the judgments aren't based on relevant facts and so vary

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for no good reason. I have picked some that pertain to the factual assumptions many of us make about our legal system. (Page numbers from *Noise* are in parentheses.)

- Pattern evidence such as fingerprint evidence is inconsistent: experts disagree and indeed the very same experts make inconsistent findings on the same prints (7, 245 ff);<sup>6</sup>
- Criminal sentencing is frequently influenced by patently extraneous factors such as time of day, how recently a meal was consumed (13 ff; 72 ff), stress, fatigue, and the weather (89);
- The mechanisms of jury deliberations likely only work if jurors each first decide and only then talk to each other, not the other way around (99, 272);<sup>7</sup> requiring unanimity can force wrong decisions (103); deliberating juries increase the risk of noise (random influences on the verdict), not lessen it (104), and can lead to more extreme positions (105);
- Models of judgments, such as simplified algorithms trained on human data, outperform the human judges on which the algorithms are based (119 ff., 143), for example, bail decisions (128-133) (algorithms may still be biased, however (335));
- Traditionally phrased burdens of proof such as “beyond a reasonable doubt” and “clear and convincing” are so vague that they encourage noise, *i.e.*, unwarranted variability in decision making (189);
- Punitive damages are often entirely arbitrary (190 ff., esp. 198);
- Experts with professional qualifications trained to certain norms, who excel at creating coherent stories but where opinions are not subject to verification (*i.e.* where there is no “reality feedback” as there is with *e.g.* weather forecasting) may have no good claim to accuracy (227-28, 369).<sup>8</sup>

The point is not so much that Kahneman is right or wrong—or indeed that any of the cases cited above are right or wrong—but that there is *evidence* on these issues which we rarely, if ever, consider.

I finish with two examples where appellate judges, perhaps frustrated with the record and hoping to avoid assumptions, actually conducted their own experiments—with uncertain effect.

In the first case, Judge Posner was confronted with plaintiffs’ contention that they took a long time to doff and don work clothes at a poultry processing plant. Plaintiffs wanted compensation for that time. Posner and his clerks went out and bought the clothing. They conducted an experiment in chambers—it actually took very little time to change clothes, they found.<sup>9</sup> Not everyone was amused. The dissenting chief judge wrote, “I am startled, to say the least, to think that an appellate court would resolve such a dispute based on a post-argument experiment conducted in chambers by a judge.”<sup>10</sup>

In the second case, at argument Chief Justice John Roberts wondered whether it was really possible to tear a dollar bill while grabbing it. “‘It tears easily if you go like this,’ Roberts says to . . . the lawyer for petitioner . . . motioning as if to tear a bill in half.<sup>11</sup> ‘But if you’re really tugging on it . . . it requires a lot of force, more than you might think.’” This experiment found its way into the dissenting opinion in which the Chief Justice joined: “The thief who loosens an already loose grasp or (assuming the angle is right) tears the side of a \$5 bill has hardly used any force at all.”<sup>12</sup>

In the past, there may have been more of this reliance on assumptions about the world outside the confines of the record; perhaps the result of a shift from formalism towards pragmatism. A welcome movement. Posner’s pragmatic precursor, Justice Cardozo, thought he knew how the world worked, and built a jurisprudence on it.<sup>13</sup> And Justice Frankfurter, who succeeded to Cardozo’s seat on the Court, said, “there comes a point where this Court should not be ignorant as judges of what we know as” people. *Watts v. State of Ind.*, 338 U.S. 49, 52 (1949).

## *Looking Back — Yes, There Are Some Silver Linings to What We Have Been Through*

In preparing to write this article, one of the first things I did was reach out to my colleagues on the civil bench for feedback. When I told them I was going to focus on the positive takeaways from this past year, I was met with some “healthy” cynicism. One colleague responded: “Well that will be a very short article.” Another response: “Good luck with that.” While this article will not attempt to sugarcoat all of the problems and challenges we have faced over the past fifteen months, there were some silver linings that appeared around the storm clouds of the pandemic challenges we managed in a way that allows some reason to be cautiously optimistic moving forward. While the glass may not be half-full yet, it isn’t entirely empty.

**The Integration of Virtual Platforms Into the Courtroom.** Many courts, like ours in Santa Clara County, have integrated e-filing as a standard practice over the past few years. Most of us will admit, however, that virtual platforms like Zoom, CourtCall Video, MS Teams, Webex, BlueJeans, etc., were not on the Court’s radar as the pandemic hit. In most of our courtrooms, the concept of a virtual appearance was limited to audio appearances through CourtCall. If someone asked me fifteen months ago what “Zoom” was, I would have confidently responded that it was the sound a car makes while passing another car. Fast forward to the present and virtual appearances have become part of our daily practice.

Many of us have conducted law and motion calendars, settlement conferences, case management conferences and even trials using a virtual platform. Scheduling meetings seems to be easier when we have the option of doing it virtually. While I will admit that I would prefer the litigants be physically present in my courtroom, that has not always been an option the past year. As judges, we have been forced out of our comfort zone and have had to adjust how we manage our calendars. The result is that not only have we adjusted, but many of us have found virtual hearings to be a valuable tool if circumstances prevent

someone from coming to court.

While it took our court quite some time to integrate virtual hearings into our daily routines, I am happy to say that we have adjusted and I think it will stick. For many who are unable to travel or appear in person, the inclusion of a virtual option increases access to our courts and helps keep the cases moving. A colleague indicated that when she did a recent virtual swearing in of a new admittee to the bar, the family who lived in Iran were able to attend virtually. There are many similar stories where lawyers, litigants, or witnesses are unable or unavailable to travel and virtual platforms allow us to keep the cases moving.

**Teamwork and Collaboration Between the Bench and Bar.** As the pandemic eases, it is difficult to quantify the volume of the logjam we face with our civil calendars and we are left figuring out how to put a dent in the backlog of cases. I have heard many disturbing statistics, including that only half the amount of cases were resolved between March through August of last year than the year before (2019). How we make progress in addressing this backlog is a joint problem for the courts, the lawyers, the litigants and the public we serve.

In Santa Clara County, there has been an ongoing collaboration between the local bar association and the bench to address the problem and there is a sense of “we are in this together.” Collaboration and creativity have resulted in several options for keeping the docket of cases moving and avoiding lengthy delays in case disposition.

**Early Mandatory Settlement Conferences.** One such option that our court has adopted is an early mandatory settlement conference (MSC). Historically, MSC’s in Santa Clara County were held the Wednesday before the assigned trial date in the hopes that the parties would take advantage of settlement opportunities before an impending trial. At the suggestion of several experienced local trial lawyers who agreed to volunteer their time as pro tems, we now are setting MSC’s much earlier and requiring (per local rules) all representatives with authority to attend. The results have generally been positive and it is just one example of an ongoing collaboration between our bench and bar association.



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**Informal Discovery Conferences.** Another example of successful bench and bar collaboration is the Informal Discovery Conference (IDC). With the assistance of local attorneys, we offer the litigants an opportunity to resolve any discovery disputes early in the case and without the necessity of formal motion practice. Traditionally, law and motion judges and court calendars are too often inundated with discovery motions which are very time consuming. The IDC program has been a breath of fresh air as it gives the parties an opportunity to meet with the judge or pro tem and work out discovery disputes without waiting months for a hearing date.

**Cooperation Amongst Counsel.** I do not think I speak alone when I say that I have seen an uptick in cooperation amongst opposing counsel in moving their cases forward. My own observation is that attorneys seem less likely to fight about minor issues given all the other challenges caused by the pandemic. While not always the case, counsel seem to be working together to conduct virtual depositions, court hearings and alternative dispute resolution, understanding that traditional litigation through the courts will likely be delayed. Frankly, it is refreshing to see and let's hope it continues post-pandemic. Cooperating in using resources outside the court not only helps the court, it promotes good will and leads to resolution of cases.

**Remote Work has Become Normalized.** Another positive takeaway is that remote work for practitioners and judicial officers and court staff has been normalized. While many of us are eager to return to the courtroom we remember in pre-pandemic times, the pandemic did not allow us to work in group settings or at the office and we all had to adjust to working remotely. In Santa Clara County, our ability to work remotely was very limited before the pandemic. Shortly after the initial stay at home orders were issued, we realized that we had to set up a system where court staff and judges could access their work remotely and our IT staff went to work and made it happen. While it did not happen overnight and without some glitches, within weeks of the initial

shut-down, judges were processing defaults, signing orders, reviewing pleadings, and conducting hearings remotely. Again, it will not replace being back in the courtroom, but our newfound ability to work remotely will increase the court's efficiency and allow judges and court staff to stay on top of their case load. In addition, the ability of lawyers and litigants to appear remotely increases access to justice for those who are unable to travel.

**Courts Have had to be Flexible.** We have all learned that we have to be flexible as we navigate through these uncharted waters. Courts have had to adopt rules, issue general orders, implement emergency orders, redefine judicial assignments, and work cooperatively with counsel to keep the cases moving. In my experience, I think we are more flexible and receptive regarding input from counsel on how to most efficiently manage a case. As judges, we have had to adjust from what we are used to, and our increased flexibility as a result of adapting to the obstacles we have faced represents positive change. Moving forward, lawyers will be well-served to approach their judge early with ideas on the most efficient and effective way to litigate their case. I believe most judges are open-minded and will work with the lawyers to keep the case moving.

**Patience and Kindness.** Everyone is frustrated by the delays and backlogs that have occurred in the civil courts over the past fifteen months. Lawyers and their clients are frustrated that their cases are not progressing and that the availability of trial departments is limited. We all know that trial dates help settle cases and so when there is a delay in getting a trial date, the prospects of settlement become less likely. For the record, judges and court staff are frustrated as well. At the end of the day, we are here to serve the public; but, our ability to serve the public in the manner we would like has been hog-tied by all of the restrictions and limitations. As frustrating as all of this is, I have found a level of patience and kindness has emanated. In some respects, we have all been forced to be patient but we have also learned that we can be. This has been a learning experience for everyone. Patience, empathy and kindness, as I have seen it in my courtroom, will help get us through these difficult times. As we press ahead, we will need to keep this in mind as the backlogs will not disappear overnight.

## *Online Mediation One Year In: Personal, Practical Reflections*

before mediation was the vogue. If a court has to suggest it, it probably means the lawyers haven't yet concluded the time is ripe. True, courts are under tremendous pressure to deal with backlogs. But mediations are more likely to succeed when people come of their own free will.

Questions arise: Are there circumstances under which early mediations are more or less likely to succeed? What if anything should courts do to catalyze settlements beyond their essential function to move cases expeditiously toward a firm trial date?

### **How has the selection of mediators changed?**

There are at least two possible changes in the way lawyers select mediators. One has to do with geography, the other with skill sets.

One aspect of online mediation that excites many mediators is the ability to serve clients everywhere. No longer are lawyers limited by geography in selecting mediators. Mediators around the world are as available as the mediator around the corner. In my own practice, many cases involve lawyers from across the country, and I'm the only one in California.

This area, too, gives rise to questions. Are lawyers now searching for mediators differently? Does it depend on whether the area of law tends to be federal or otherwise nationwide, as might be the case with Intellectual Property or Insurance Coverage cases? What about situations where the law may be more local, as might be the case with Real Property or Employment cases?

Another question asks whether some mediation skills or styles are more or less valuable online. By comparison, some actors transitioned well from silent films to talkies (Greta Garbo). Others did not (Theda Bara). Will some mediators become Gretas, others Thedas, in our new tech

world?

Some just won't adapt. I've heard from lawyers that a few established mediators still have not mastered, for example, how to move participants into and out of breakout rooms with ease. They'll likely become Thedas.

The more interesting dimension of the question relates to mediator skills and styles. In what I have long called the "judicial style" of mediation, the mediator reads the briefs, decides roughly where the case should shake out and uses mediation to drive people to the mediator's desired outcome. This style can go beyond evaluative to coercive, a kind of arbitration without much due process. Up to now, some mediators have succeeded in the marketplace this way. (Note, my terminology describes styles, not individuals or their backgrounds.)

In the online environment, will this style continue to play well? Mediators who practice this way may become Thedas. This style may involve a physical dimension that is difficult to employ online. Raised voices and strong (sometimes vulgar) words are harder to muster and easier to endure when the speakers and listeners are in the comfort of home, families and pets nearby. When frustrations run high, tempers run short. People threaten to leave, and mediators have been known to stand between them and the elevator. But you can't stand between someone's finger and the "leave meeting" button on a screen.

By contrast, mediators who practice in the "professional style" may prove to be the Gretas. In what I call the "professional style," the mediator manages a series of conversations between participants designed to make clear to clients what their choices are and the trade-offs each choice entails -- typically, pay more/take less to get it done. Clients in consultation with their lawyers then choose their best option.

It's commitment to settlement-whenever-reasonably-possible, not attachment to settlement-at-any-and-all-costs. It leads to clear, strong choices

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in a calm, informed environment. Clients should be happy with the deals they make. That's what makes the deals worth making. That's the kind of decision- and deal-making the "professional style" promotes.

### **How does physical separation affect the mediation?**

As noted, with people in their homes, dramatic behaviors seem less likely to succeed. What are other impacts of physical separation? Some are logistical, some technological.

Logistically, many mediations involve people in different time zones, particularly when insurance companies or other large organizations are involved. And increased multi-tasking opportunities can make people either more relaxed or more unfocused, or both. Are these changes for better or for worse?

The time-zone challenge has pluses and minuses. On one hand, when people don't have to travel, we can schedule mediations on shorter notice. In addition, we can get greater participation from the "Real Decision Maker." In the past, the RDM was often a disembodied voice on the phone at 5 or later Pacific Time, hearing about the events of the day for the first time, and then asked for permission to pay more or take less. Those late-day conversations were often unpleasant. Now, we can get intermittent participation from the RDM during the day and by video. When late, tough decisions must be made, the RDM is more up to speed, the conversations go better and more cases settle.

On the minus side, when people are sprinkled hither and yon, somebody has to get up early and somebody has to stay up late. Sleep-deprived or drowsy participants don't make it easier to negotiate. They certainly don't make it easier to

document deals with the precision they deserve. And mealtimes seem to roll throughout the day. Breakfast in California can coincide with lunch in New York and dinner in London. More commonly, somebody is hungry at any given moment, and hungry people generally don't negotiate at their best. They must have time to eat. Not everybody plans meals and snacks in advance, though. This can slow the mediation. How we learn to accommodate time-zone differences is another challenge we face in many online mediations.

On the technology side, let's face it, people are multitasking. Partial attention is ubiquitous. We can stare at our screens for only so long. Of course, partial attention was the norm when we mediated in person, too. People would glimpse at their phones, tablets and laptops. Their thoughts would wander. As more people brought more devices to more mediations, they could more easily let other matters occupy their attention when we mediators were not working with them. This is not all bad. It could keep clients from having paranoid thoughts during interregna.

With more technological distractions and comfort-of-home distractions, some people are more relaxed and better able to make sound decisions. Others lose focus. How we balance these going forward in mediation, and in all other online meetings, is another frontier of shared adventure.

### **How has technology changed the quality of communication?**

Three facets of the online platforms have had a subtle effect on the quality of our communication.

These three facets are (1) the inability to talk over each other, since the online platforms will accept only one voice at a time; (2) the "share screen" function, which focuses attention on a document rather than a face, while shrinking faces to postage-stamp size; and (3) the ability of each individual to turn off the camera and simply listen.

These three facets enhance civility. People have to wait their turn to talk. In online mediations, I hear "after you!" said far more often

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than I ever did when we mediated in person. The shared view of a document tends to focus people more on the message and less on the messenger. For clients particularly, the ability to turn off their cameras protects them from showing the sorts of emotional reactions that can antagonize other speakers.

Layer these on top of the relaxation of the home environment, and we get an unexpected benefit: A greater ability for direct communication between the sides and more Joint Sessions -- and less emphasis on caucus-only mediation and shuttle diplomacy.

I've long advocated for more direct communication and Joint Sessions. While some find Joint Sessions unfashionable, I have never stopped using them. Not in every case, but often. When I talk with other mediators, I sometimes think I have more Joint Sessions than the rest of them combined. But they work -- and they often work better online.

In 2015, I set forth my views on Joint Sessions at length on Law360, "The Future of Mediation: Joint Session 2.0," <https://www.law360.com/articles/697163/the-future-of-mediation-joint-session-2-0>. Let me summarize by saying you run risks when you rely on a caucus-only mediator to do your work for you. A mediator might misstate your position or leave something out. A mediator is not as able to answer questions about your case as you are. And a mediator might filter your messages through an undetected lens of bias against you.

To be effective, Joint Sessions must be planned. They're not "plenary sessions," designed to set an agenda. They're narrow and focused, limited to the agendas you create with the mediator through briefing and calls before the mediation day. The agenda consists of the issues which can then be

discussed with clients in caucuses, issues which, once framed and joined, are likely to impact clients' thinking about settlement.

These kinds of Joint Sessions are more likely to be effective online. People can't talk over each other. They can focus on the documents so often at the center of business to business cases. They can even turn off their cameras if they feel themselves reacting strongly. In my experience, they work.

### **What will the future hold?**

Who can say?

Two things, though, do seem certain. One is that precise predictions will almost certainly be wrong. Situations are too complex. When the pandemic and lockdown started, could anyone have predicted precisely where we are now?

The second is that we will never go back to precisely the way things were before. The times are always a'changin! It's hard to imagine insurance companies and other big organizations routinely flying executives from the east coast to attend mediations in California. And if one side is participating remotely, it's hard to see the other side participating in person where the mediator can use physicality to exert influence -- standing between you and the elevator when you want to leave is just one example.

I won't prophesize further with my pen. But I do look forward to working together with my brothers and sisters in the litigation community, your clients, and the community of mediators, to write the future together.

*Jeff Kichaven is a mediator for all California, born in L.A. and educated at Berkeley. He has been a member of ABTL for 40 years, and served on the Board of Governors from 1986-88. For the past four years, he has been "Ranked in Chambers" on the national list of top mediators. His practice focuses principally on Insurance Coverage, Intellectual Property, and Professional Liability cases. He welcomes dialogue at [jke@jeffkichaven.com](mailto:jke@jeffkichaven.com).*





## On Insurance

lawsuit to have been made at an earlier time. Claims-made insurance policies are triggered by the date a claim is first made against the insured. Where multiple claims, even when made years apart, arise out of interrelated wrongful acts, however, these policies may treat them as a single claim made at the time the first claim arising out of such interrelated wrongful acts was first made against the insured. *See XL Specialty Ins. Co. v. Perry*, 2012 WL 3095331, at \*5 (C.D. Cal., June 27, 2012) (class actions, FDIC litigation, bankruptcy and SEC proceedings “related” to earlier class action securities lawsuit reported during prior policy period and therefore deemed made at that time). A typical provision might define an interrelated wrongful act as “more than one Wrongful Act which have as a common nexus any fact, circumstance, situation, event or transaction or series of facts, circumstances, situations, events or transactions.” *See, e.g., Feldman v. Illinois Union Ins. Co.*, 198 Cal. App. 4th 1495, 1502 (2011).

Alternately, the policy might contain an exclusion for a claim alleging interrelated wrongful acts that were also contained in any claim reported during an earlier policy period. *See Pfizer Inc. v. Arch Ins. Co.*, 2019 WL 3306043 (Superior Ct. Del., July 23, 2019).

The practical effect of these clauses and exclusions, if applicable, is that the insured may have to look to an earlier policy for coverage. Sometimes, that can be a positive outcome for the client. If the policies have high self-insured retentions, for example, and the claims are deemed to be a single claim because they arise out of interrelated wrongful acts, the insured client may only need to satisfy a single self-insured retention instead of multiple retentions. On the other hand, the client may not have carried enough limits of insurance in the earlier period. Alternately, those limits, even if sufficient at the time, may have been exhausted by earlier claims. *See, e.g., Financial Management Advisors, LLC v. American Intern. Specialty Lines Ins. Co.*, 506 F.3d 922, 925 (9th

Cir. 2007) (later lawsuit not related to earlier lawsuit in prior policy period where earlier litigation had exhausted available limits). Accordingly, the insured client may want to take the position that the current case is not related to prior litigation.

And this is where defense counsel comes in. If counsel has made a record that the current case is “related to” a prior proceeding—whether by filing a Notice of Related Cases, seeking to coordinate or consolidate litigation, or advancing certain legal arguments—it will be much harder for the insured to argue that those claims do not involve interrelated wrongful acts. *See, e.g., MJC Supply v. Scottsdale Ins. Co.*, 2019 WL 2372279, at \*13-14 (C.D. Cal., June 4, 2019) (finding two lawsuits related and that insureds “even recognized as much when they argued that the State Action should be stayed pending resolution of the Federal Action because the two are substantially similar.”). Courts have the discretion to treat statements made by the insured’s counsel in underlying litigation as binding on the insured. *See, e.g., American Title Ins. Co. v. Laclew Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (“[f]actual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them...” ). Alternately, the client may want its counsel to take such a position because doing so could be helpful on the coverage front.

Defense counsel is uniquely situated to understand whether his or her litigation strategy might potentially impact the insured client and to raise the issue before a problem with coverage is created.

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## Consider Evidence

Perhaps, because disjointed from our own, we see old assumptions for what they are. But we do it too, and we should be careful: there may be evidence on the matter.

<sup>1</sup> Jurors can accept or reject any evidence, even very strong evidence. *People v. Swaim*, No. D064117, 2014 WL 7463172, at \*8 (Dec. 31, 2014) (unpub.) (“jury ... could accept or reject any testimony,” citing CALCRIM 216). See CACI 107.

<sup>2</sup> Note that the underlying state constitutional provision identifies the issue as whether the verdict on appeal represents a “miscarriage of justice.” Cal. Const. art. VI, §13. This does not necessarily require a test that seems to forecast the verdict absent the error.

<sup>3</sup> Curtis E.A. Karnow, *The Internet and Contract Formation*, 18 Berkeley Bus. L. J. 135 (2021).

<sup>4</sup> E.g., CACI 107 (c), 5003 (c).

<sup>5</sup> C. Cameron, *Virtually the Same?*, The Daily Journal April 15, 2021, at 5, citing e.g., M. Gladwell, *Blink* at 21, 201-06 (2006).

<sup>6</sup> I summarize similar observations in my *California Expert Witnesses* § 2.1, [https://works.bepress.com/curtis\\_karnow/39/](https://works.bepress.com/curtis_karnow/39/).

<sup>7</sup> Compare, e.g., CACI 100, 5009 (instructing juries to not decide until after they discuss with other jurors).

<sup>8</sup> Courts routinely endow such experts with decisive authority (re: admissibility) even when the studies on which they rely may not alone support the opinion. E.g., *Cooper v. Takeda Pharm. Am., Inc.*, 239 Cal. App. 4th 555, 564 (2015); *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1233 (9th Cir. 2017).

<sup>9</sup> *Mitchell v. JCG Indus., Inc.*, 745 F.3d 837, 842 (7th Cir. 2014) (Posner, J.), discussed at *Mitchell v. JCG Indus., Inc.*, 753 F.3d 695, 703 (7th Cir. 2014) (Posner, J., concurring in denying petition for en banc rehearing). This and other instances are discussed in the wonderful article with a title I might have borrowed. Linda Greenhouse, *Opinion, How Judges Know What They Know*, N.Y. Times, March 29, 2018, <https://www.nytimes.com/2018/03/29/opinion/supreme-court-judges-decisions.html>.

<sup>10</sup> *Mitchell v. JCG Indus., Inc.*, 745 F.3d 837, 849 (7th Cir. 2014) (Wood, J., dissenting).

<sup>11</sup> <https://www.scotusblog.com/2018/10/a-view-from-the-courtroom-justice-kavanaugh-takes-the-bench/>.

<sup>12</sup> *Stokeling v. United States*, 139 S. Ct. 544, 558 (2019) (Sotomayor, J., dissenting).

<sup>13</sup> E.g., *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 104-05 (1934) (Cardozo, J., describing “the facts of life”).

Judge Curtis Karnow has served on his court’s complex litigation panel and as Presiding Judge of the Appellate Division. He is the author or contributing author of 16 books on legal issues including his *Litigation In Practice* and current co-authorship of the Rutter Guide, *Civil Procedure Before Trial*. He is a member of the Supreme Court’s Committee on Judicial Ethics Opinions.

## Looking Back — Yes, There Are Some Silver Linings to What We Have Been Through

**Final Words.** So, we should keep in mind that there actually have been some positive takeaways and some reasons to be optimistic. As Winston Churchill once said: “A pessimist sees the difficulty in every opportunity while an optimist sees the opportunity in every difficulty.” Focusing on the opportunities created by all the difficulty we have been through will benefit everyone as we move forward.

Judge Peter H. Kirwan serves on the Board of Governors of the ABTL Northern California Chapter. Currently, he is a Civil Case Manager on the Santa Clara County Superior Court. During his 15 years on the Superior Court, Judge Kirwan also has served as the Supervising Judge of the Court’s Civil Division and as has presided over its Complex Civil Litigation Department.



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## On Securities Litigation

of privacy in communications sent or received on Sprint email.

### What this Means for Securities Litigation

In the wake of the *WeWork* decision, there will likely be an increase in litigants seeking discovery of the communication practices of outside directors. We can also anticipate additional scrutiny of privilege logs in an effort to defeat privilege claims over outside director communications that are sent, received, accessed, or stored on non-private third party email accounts. Courts will likely see a corresponding uptick in discovery disputes relating to such communications.

### What Companies Can Do to Protect Privileged Communications

Companies should carefully examine the communication practices of their outside directors. In instances where the outside director uses a work email account to send or receive board communications, companies should examine the email monitoring and use policy applicable to that email account to determine whether the policy provides the outside director a reasonable expectation of privacy in connection with that email account.

In cases where the governing policy does not create a reasonable expectation of privacy, companies should consider the following additional mitigation efforts:

- Provide outside directors with company email addresses and direct them to only use such email addresses for communications regarding board matters;
- Transmit the substance of communications through board portals, and only use email to alert directors about the posting of new communications on the board portal; and
- In circumstances where outside directors must communicate substantive information outside of a board portal or company-

provided email account, the company should ask directors to use personal email accounts or other confidential mediums that are not subject to third-party monitoring.

In the wake of the *WeWork* decision, there will likely be an increase in litigants seeking discovery of the communication practices of outside directors.

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## On Trademarks

in California discovers counterfeit goods being sold on a website available in the EU, your client could initiate the DSA's takedown and ADR procedures to stop that infringement, in a EU country of your client's choosing. On the other hand, your client in California might be determined to have infringed a German company's trademark by an arbitrator in Poland applying Irish law.

What's the upshot of all this? In one sense, it is all prospective since the DSA is only draft legislation. But the DSA is likely to result in some new legal procedures that affect trademark owners outside the EU. It behooves you to at least know these procedures exist so that your clients can use them to their advantage and not be taken advantage of. And even if the DSA never comes to fruition, as the world gets smaller, there will another similar law in another jurisdiction not far behind it.

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