

**Q&A with the Honorable Richard Y. Lee**  
By Lynda K. Bui

[Editorial Note: Judge Lee was appointed to the Superior Court of Orange County in August 2010. He currently presides over unlimited civil matters and teaches trial advocacy at UC Irvine School of Law. He previously served as Supervising Judge of the West Justice Center and presided over appeals while on the Appellate Division of the Superior Court. Judge Lee has also previously presided over criminal matters, juvenile dependency matters, and juvenile delinquency matters. Prior to his appointment to the Superior Court, Judge Lee served for approximately ten years as a federal prosecutor at the U.S. Attorney's Office for the Central District of California. He was previously an associate at Paul, Hastings, Janofsky, & Walker LLP and a research attorney for the Honorable Paul Boland and the Honorable Alexander Williams III. He earned his law degree from USC Gould School of Law and his undergraduate degree from Stanford University.]

**Q: What drew you to the legal profession?**

A: I wanted to help people. Growing up, I thought I wanted to be a doctor. However, I really did not enjoy chemistry in high school, and could not stand the thought of taking organic chemistry in college.

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**California Court of Appeal Clarifies Requirements  
for Proposition 65 Liability**  
By Blake A. Dillion and David A. Grant

The California Court of Appeal recently provided much needed clarification regarding the application of Proposition 65, which prohibits businesses from knowingly and intentionally exposing individuals to certain chemicals without first providing a written warning. The court addressed many issues, based largely on statutory interpretation, that had previously been open questions. In *Lee v. Amazon.com, Inc.*, 76 Cal. App. 5th 200 (2022), *as modified on denial of reh'g* (Apr. 8, 2022), *review denied* (June 15, 2022), the court addressed four key questions: (1) whether constructive knowledge of hazardous chemicals and potential exposure is sufficient under the statute, or if actual knowledge is required; (2) what level of specificity is required in a Proposition 65 Notice of Violation, (3) whether actual exposure from an offending product is necessary, or if potential exposure is sufficient; and (4) whether internet retailers are immunized from liability for Proposition 65 violations under section 230 of the Communications Decency Act ("CDA").

**The Basic Framework of Proposition 65**

Proposition 65, which was adopted by voter initiative in 1986, and codified as California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code, § 25249.5 et seq.), generally requires that

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## President's Message By Matthew M. Sonne

As we near the end of Summer 2022, we pause to take stock of where we have been these last few months as an ABTL chapter and what remains ahead. This year continued to be a transition year as (hopefully) a post-pandemic organizational landscape takes shape. Although the ways we practice law have perhaps changed forever, ABTL's bedrock fundamentals of civility, professionalism, public service, and legal excellence have persevered.

On July 20, our chapter continued its proud tradition of supporting the Public Law Center with our Annual Wine Tasting Fund-raiser. As most of us know, The Public Law Center is the only legal services organization in Orange County that provides pro bono representation to the indigent. Our outdoor event at the MET in Costa Mesa was well attended by members of the judiciary, attorneys, and summer associates. We all enjoyed great conversation, wood-fired pizzas, and some fabulous homemade gelato! Not only were ticket sales strong, but the Board enthusiastically responded to the traditional "President's Challenge," which generated almost \$35,000 in additional donations for the PLC. What a tremendous achievement -- this is something we can all be proud of and take back to our firms with the sincere gratitude of PLC and ABTL.

Our Chapter will wrap up the last several months of 2022 on a busy note! September 14 brings us back to the familiar Westin grand ballroom where we have not convened in over 2.5 years! Our traditional cocktail hour and dinner will be followed by a program entitled "The Art of Persuasion: How to Persuade Like a Human Being, Not a Lawyer." Christopher W. Arledge (Partner, Ellis George Cipollone O'Brien Annaguey LLP) and Rachel Croskery-Roberts (Associate Dean and Professor of Lawyering Skills at the University of California, Irvine School of Law) will present this MCLE event you will not want to miss. Special thanks, of course, goes to our wine sponsor Judicate West.



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## Hitting the Pause Button: Stays Pending Appeal By Alana H. Rotter

*[Editorial Note: This is a reprinting of an article published in the Summer 2021 issue of the Los Angeles ABTL Report, with minor editorial updates.]*

When clients receive an adverse judgment, among the first questions they're likely to ask are, "How do we stay the judgment while we appeal?" and, "Do we need to post a bond?" This article provides some answers.



### Is a bond a prerequisite to appealing?

Posting a bond is *not* a prerequisite to appealing in California. The role of a bond is just to stay enforcement of a judgment while the appeal is pending, in situations where the stay is not automatic. The first step in answering whether a bond is necessary, therefore, is to determine whether the judgment is automatically stayed by filing a notice of appeal.

### Is the judgment automatically stayed?

The default rule is that perfecting an appeal (i.e., filing a timely notice of appeal) automatically stays all trial court proceedings on the order appealed from, including enforcement proceedings. (Code Civ. Proc., § 916.) But there are many exceptions to the default rule, requiring close analysis.

Most notably, the Code of Civil Procedure broadly recites that perfecting an appeal does not stay enforcement of an order or judgment for "[m]oney or the payment of money." (*Id.*, § 917.1, subd. (a)(1).) Staying enforcement of such orders or judgments requires posting a bond or taking other affirmative steps, as discussed below.

This money-judgment carveout to the automatic stay is not as all-encompassing as it first appears, though: Some orders and judgments directing the payment of money *are* automatically stayed on appeal.

For example, an award solely for attorney fees and costs pursuant to Code of Civil Procedure section 1021 is automatically stayed pending appeal. (*Id.*, § 917.1,

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## The YLD Update By Lauren Blaes, Casey McCracken, and Wesley Horton

On April 27, 2022, we hosted a brown bag lunch with Honorable Nathan Scott. The event focused on effective legal writing and civility. Judge Scott provided interactive training and guidance on critical areas of legal practice to young attorneys, including a simulated case management conference and an assessment of a written brief. The young attorneys in attendance walked away with invaluable guidance and insight. We are very grateful to Judge Scott for spending the afternoon with us.



Looking ahead through 2022, the YLD is excited to host a brown bag lunch with Honorable Richard Lee on October 4, 2022. Brown bag lunches are a unique opportunity to learn from members of the Orange County bench in a small setting and receive insight and advice that will help you grow as an attorney. We hope that you can make it as it will sure

to be a great program! YLD is also planning an additional event for this Fall regarding mediation and arbitration. Details about such event will be announced shortly.

The YLD Committee is looking forward to more exciting and educational programs throughout the year. We hope to see you at our events!



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While I was a human biology major in college, I wanted to consider alternatives to a medical career. Law came to mind since I had done the mock trial program here in Orange County during high school. I took the LSAT to see how I would do, and ultimately decided to pursue law. So, two things led to my legal career: my positive experience in the mock trial program and a healthy fear of organic chemistry.

**Q: What are some key experiences that prepared you for your role as a judge?**

A: One key experience was my job as a research attorney for two judges, Hon. Paul Boland and Hon. Alexander Williams III. I was dealing with law and motion calendars for both departments five days a week, as the sole attorney supporting the judges. I had the opportunity to do a lot of legal writing, which helped me develop a logical and analytical approach to legal issues. Another key experience was serving as a federal prosecutor. I had to exercise prosecutorial discretion appropriately and balance the needs of the community as well as the rights of victims. My client was the entire community, the people of the United States, the people in the Los Angeles area. This experience cemented my interest in continuing work as a public servant and attempting to make a real and positive impact on the community. Finally, my third key experience: being a father. Sitting in judgment of other people is difficult and uncomfortable. It is not a task one should take lightly or trivially. Being a parent shifted my perspective about what is important, not just within my family but also the community. I am more thoughtful and better able to see the impact court proceedings have on people. As a judge, I want to be right, but I don't want to be robotic. I aspire to be a thoughtful judge, and my role as a father helps ground me.

**Q: Did you face any challenges in your transition from lawyer to judge?**

A: Of course. The biggest challenge I faced was the shift in mentality. As an advocate, I was concerned about the outcome of the case. As a bench officer, I am not interested in the outcome of the case; my objective is to protect the integrity of the process. I am concerned about giving the litigants a fair process, an equal opportunity to be heard. In the first few trials I presided over, I had so many thoughts about what the advocates should be doing or saying, or who should win. I had to shift my mentality and focus on ensuring

a level playing field for both sides. Another challenge was adjusting to a new level of responsibility. An advocate does not bear the ultimate responsibility for an outcome, and the advocate may blame the ultimate decisionmaker—either the judge or jury got it right or wrong. As a judge, my decisions have direct consequences, so there are new dimensions and pressures. Of course, attorneys should make meritorious arguments just as much as decisions by bench officers should be meritorious, thoughtful, and grounded in the law. But the pressures are different. I don't have much stress about pleading deadlines or running late to court, for instance—the hearing can't start until I'm there. But I face different stresses. For instance, if I'm weighing a bail decision and deciding whether to give an individual the chance to rehabilitate, whose responsibility is it if the individual reoffends? These decisions have real tangible impacts on those people. The stakes are higher. An additional challenge I faced was adjusting to the state system after doing primarily federal work for ten years. I went from working with the FBI, CIA and counter-terrorism task forces to prosecute a handful of national cases to suddenly handling hundreds of matters involving DUI, petty theft, unlawful camping, and public intoxication.

**Q: How does your experience as a trial judge compare to your experience serving on the Appellate Division of the Superior Court?**

A: Trial court judges are under tremendous stress to make decisions in the moment. While I could suspend trial proceedings to conduct research, the attorneys and court users would be waiting on me. That's challenging to navigate. On the other hand, while on the Appellate Division, I had much more time to run down the issues. In each appeal, the record was relatively settled, and the briefs were already complete. I could dive into research as needed, so the pressure was not quite the same. Because of the volume of appeals, though, there was still some time pressure when preparing for oral argument and submitting opinions after oral argument. Furthermore, because we serve on the Appellate Division of the Superior Court in addition to our regular trial court duties, it was sometimes challenging to juggle both my trial court and appellate calendars.

**Q: Do you have any law and motion pet peeves?**

A: I find it ineffective when a lawyer uses oral argument to oppose the court's tentative ruling. Oral advocacy is hard, and I appreciate how difficult it is for attorneys to walk into a hearing after reading an unfavor-

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able tentative and try to salvage victory. But it's not helpful when a lawyer prepares their argument as a rebuttal to the court's tentative ruling. The court is not an opponent. Instead of talking at the judge, the lawyer should have a genuine conversation with the judge, and try to help guide the judge to the right decision. At the end of the day, the lawyer is supposed to try to convince the judge; it's not the judge's job to convince the lawyer.

**Q: What made you want to pursue your current teaching role at UCI Law?**

A: I really enjoy teaching. I also teach judges statewide and am a faculty member for programs such as New Judge Orientation and Qualifying Ethics. I like investing in people and seeing their growth. I have been fortunate to teach Trial Advocacy at UCI since 2018. I get to share insights and views that I don't express as a judge, and I'm able to pass along advice on effective—and ineffective—lawyering. I also get to encourage students to reach the highest potential each of them has. While everyone can understand the basic dynamics of oral arguments, I want to help students grow into themselves and gain confidence as advocates.

**Q: What is your advice for young lawyers at the start of their career?**

A: First, join the ABTL. Second, find joy in what you do—whether in the construction of a case, the formulation of examinations, the creativity involved in legal writing, or fulfillment from practicing in a particular subject area. At the start of your career, there can be a lot of demands and expectations you're trying to meet, but it is important to find joy in your work. Finally, nurture your relationships—not just with peers, but also with mentors. It is incumbent on the young attorney to carry 90% of the workload in maintaining a mentor/mentee relationship. It can be fruitful and satisfying if you do so. Even if it's just dropping a note, trying to maintain your connections is important. As a son of two immigrants who didn't know the language when they came to this country, I was raised to focus on my academics and credentials. I was not taught the importance of building or maintaining connections. Looking back, I realize I was lucky to have mentors who were willing to carry more than 10% of the workload to maintain my relationship with them. I regret not doing more in those relationships. Whether within

your own firm or in local organizations, it's important to build bridges before you need them.

**Q: What makes a great trial lawyer?**

A: In my opinion, three things make you a great trial lawyer. First, a fundamental understanding of who you are as a speaker, as an advocate, as an attorney. It is critical that you're comfortable with your own speaking style and comfortable in your own skin. Second, situational awareness. For instance, you should not treat a cross-examination like a deposition. I see so many attorneys conduct discovery during cross-examination or quarrel with witnesses. A trial lawyer should consider: Is this helping the jury make decisions? How is this information being conveyed to the jury? Is the information too complicated? Do I have to slow down? Situational awareness greatly assists a trial lawyer. Third, absolute preparation and knowledge of the case. A trial lawyer should absolutely know fundamental things like your client's name and the facts of the case. The jury and I—and your client—expect that you have lived, breathed, and memorized your side of the case. When there are unforced errors, we lose confidence in the advocate. Ultimately, the trial lawyer is responsible for making a presentation to the jury. The trial lawyer is the master of ceremonies, the ringleader. When you make a presentation, that is your moment, and you should be prepared for it.

**Q: What do you enjoy doing when you are not working?**

A: I enjoy playing the ukulele—I keep one at my desk in chambers. I also like going to the movies, and I'm invested in being a father, which includes family trips to Disneyland.

♦ *Lynda K. Bui is a litigation associate in Orrick's Orange County office.*

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“[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual.” A knowing and intentional exposure is not actionable if the person (in this context, the seller of consumer products) first provides a written Proposition 65 warning, alerting the consumer to the chemical’s presence in the product. Private plaintiffs can sue for alleged Proposition 65 violations, but must first serve a Proposition 65 Notice of Violation (“Notice of Violation”) on the alleged violator and the California Attorney General at least 60 days before filing a lawsuit, in order to give the government the opportunity to pursue the action. If the Attorney General does not sue in that 60-day period, the private plaintiff may.

***Lee v. Amazon***

In *Lee*, a private plaintiff sought to hold Amazon.com Inc. accountable for offering on its Website, without proper Proposition 65 warnings, certain skin-lightening creams that contained mercury. Following a bench trial, the trial court sided with Amazon and held that: (1) the plaintiff failed to establish that Amazon had actual knowledge of hazardous chemicals and the potential for exposure; (2) the plaintiff’s Notice of Violation lacked sufficient specificity to establish knowledge; (3) the plaintiff failed to establish exposure because the plaintiff did not prove anyone actually used the offending product; and (4) Amazon was immune from liability for alleged violations of Proposition 65 under Section 230 of the CDA. The plaintiff, however, appealed the judgment in favor of Amazon and the California Court of Appeal reversed the judgment and remanded for further proceedings consistent with its opinion. In doing so, the *Lee* court addressed these issues for the first time. Amazon petitioned for review, but the Supreme Court of California denied review. The Supreme Court also denied a request to depublish the opinion, so it is citable authority for the four issues set forth below.

**1. Proposition 65 Requires Only Constructive Notice of Hazardous Chemicals and Potential Exposure**

Before the *Lee* decision, it was an open question whether the phrase “knowingly and intentionally” requires actual knowledge of the presence of hazardous chemicals and potential for exposure or whether con-

structive knowledge is sufficient. Based on the purpose underlying Proposition 65 and the plain meaning of its terms, the *Lee* court found that constructive knowledge alone is sufficient to trigger a seller’s Proposition 65 obligation.

Proposition 65 does not define “knowingly,” and neither Proposition 65 nor the relevant regulations define “intentionally” or “constructive knowledge.” *Lee*, 76 Cal. App. 5th at 228. In general, “[p]roof of actual knowledge focuses on what information a defendant must have been aware of, while proof of constructive knowledge rests on a defendant’s duty to discover information . . . .” “Constructive knowledge” means “knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person.” *Id.*

The critical question to the *Lee* court was “whether the electorate intended ‘knowingly and intentionally’ to mean solely actual knowledge or constructive knowledge as well.” *Id.* at 235.

The *Lee* court first looked to the public policy behind Proposition 65 and found that it militated in favor of an interpretation of the “knowingly and intentionally” requirement as including constructive knowledge. *Id.* at 236. Remedial statutes, like Proposition 65, are to be construed broadly so as to accomplish their protective purpose. *Id.* at 226. In other words, ambiguities in the statute should be resolved in favor of the persons for whose benefit the statute was enacted. And the preamble to the ballot measure proposed to voters made clear that “the measure was driven by voters’ desire for greater protection against hazardous chemicals, specifically including information about exposures, strict enforcement and deterrence of actions threatening public health and safety.” *Id.* Requiring actual knowledge, however, would significantly limit the reach of the statute and create incentives for businesses to deliberately avoid information alerting them to the presence of hazardous chemicals and potential exposure. *Id.* at 236-37.

Moreover, the *Lee* court found that the inclusion of the term “intentionally” in the phrase “knowing and intentionally,” does not modify “knowingly,” which would require a higher level of knowledge than “knowingly” would otherwise convey. *Id.* at 239. Giving significance to each word, as it must, the *Lee* court found it more reasonable to view “intentionally” as adding a concept of purpose as opposed to giving

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“knowingly” a different meaning. *Id.* The inclusion of “intentionally” was an insufficient basis to narrow the scope of Proposition 65 to require actual knowledge; constructive knowledge is sufficient.

**2. A Proposition 65 Notice of Violation Need Only Identify the Category of Product**

The *Lee* court also provided much-needed guidance on the specificity required in a Proposition 65 Notice of Violation. Proposition 65 requires that a pre-litigation Notice of Violation be served on the alleged violator identifying the allegedly offending product “with sufficient specificity” to inform the recipient of the nature of the items allegedly sold. The California Environmental Protection Agency’s Office of Environmental Health Hazard Assessment had previously offered guidance that it would be sufficient to identify the category of products at issue, such as “aerosol spray paint,” “car wax,” or “paint thinner.” *Id.* at 241. The *Lee* court relied on this guidance to conclude that the plaintiff’s notice—identifying the broad category of “skin-lightening creams”—was sufficiently specific, particularly given that it also identified, albeit under a different name, at least one allegedly offending product. *Id.* at 241-42.

**3. Proposition 65 Requires Only the Potential for Exposure**

The *Lee* court next addressed whether actual consumer product exposure, as opposed to potential exposure, was necessary to impose liability. The *Lee* court determined that Proposition 65 only requires potential exposure.

The Proposition 65 regulations define “expose” as meaning “to cause to ingest, inhale, contact via body surfaces or otherwise come into contact with a listed chemical,” and “consumer product exposure” is defined as “an exposure that results from a person’s acquisition, purchase, storage, consumption, or any reasonably foreseeable use of a consumer product, including consumption of a food.” *Id.* at 245. These definitions describe the sources from which exposure can result, but do not define what “exposure” actually consists of. Based on the ordinary meaning of the term, the court interpreted “expose,” as referring to “potential as well as realized exposure from a product being used in the intended manner—laying an individual open to a chemical hazard by an act which propels the product toward the individual.” 76 Cal. App.

5th at 248-49. Because “[t]hings happen according to the ordinary course of nature and the ordinary habits of life” (*id.* at 250 (citing Cal. Civ. Code § 3546)), the court saw no reason to infer that consumers who purchased the offending product did not use them. This broader interpretation was also consistent with Proposition 65’s protective purpose, which was to warn consumers about harmful chemicals and give consumers the ability to make informed choices about coming into contact with such chemicals. *Id.* at 247.

**4. Section 230 of the Federal CDA Does Not Insulate Amazon from Prop 65 Liability**

Finally, the *Lee* court addressed whether section 230 of the CDA provided Amazon with immunity for the alleged Proposition 65 violation. In relevant part, section 230 states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider[;]” and that “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(c)(1) and (c)(3). Immunity under this law extends to (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.” *Lee*, 76 Cal. App. 5th at 251. “Congress enacted section 230 for two basic policy reasons: to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.” *Id.* at 252 (internal quotation omitted).

The plaintiff’s theory of liability, however, did not seek to hold Amazon liable for information provided (or not provided) by another information content provider, but for its own independent obligations under Proposition 65. *Id.* at 252. The *Lee* court agreed, concluding that Proposition 65 is not inconsistent with the CDA because imposing liability on Amazon for failing to comply with its own, independent obligations under Proposition 65, does not require treating Amazon as the publisher or speaker of third-party sellers’ content. *Id.* at 260. The *Lee* court noted that the Supreme Court of California has observed, “not all legal duties owed by Internet intermediaries necessarily treat them as the publishers of third-party content, even when these obligations are in some way associated with their publi-

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cation of this material.” *Id.* at 255-56 (quoting *Hassell v. Bird*, 5 Cal. 5th 522, 542 (2018)).

“Nothing in the text or purposes of the CDA suggests it should be interpreted to insulate Amazon from responsibilities under Proposition 65 that would apply to a brick-and-mortar purveyor of the same product.” *Id.* at 259. The claims here did not require Amazon to modify or remove third-party content; they required Amazon to provide a warning where Amazon’s own conduct made it subject to Proposition 65.

**Conclusion: Key Takeaways from *Lee***

The *Lee* opinion was issued by the First Appellate District. Assuming other appellate districts do not issue opinions disagreeing with *Lee*, there are many important takeaways from *Lee*, applicable not just to online retailers, but to all manufacturers, producers, packagers, importers, suppliers, distributors, and retail sellers of an allegedly offending product. First, any company engaged in such behavior potentially can be liable for Proposition 65 violations even without actual knowledge—constructive knowledge is sufficient for liability to attach. Second, a Proposition 65 Notice of Violation need not identify particular alleged offending products by the specific product—identifying the category of the alleged offending products is sufficient for liability to potentially attach. Third, a Proposition 65 plaintiff need not prove actual exposure—it is enough that the allegedly offending product contains the offending substance and would be used for its intended purpose, which would expose the consumer to the listed chemical. Fourth, online resellers cannot rely on the CDA to argue they are immune from their obligation to provide Proposition 65 Notices as they are not merely publishers of the content of other information providers. All of this means that each business that moves a product covered by Proposition 65 down the chain of distribution to the ultimate consumer should take care to inform themselves of the chemical compositions, and intended uses, of the products they sell, manufacture, produce, package, import, or otherwise distribute to ensure Proposition 65 compliance.

**[SIDE BAR] The *Lee* Opinion is a Master Class on Statutory Interpretation**

Throughout the 82-page opinion, the *Lee* court went to great length to ground its ruling in fundamental canons of statutory construction. It is important to understand how these canons led the court to the above answers. The discussion below is not an exhaustive list

of the canons employed by the *Lee* court, but are illustrative of the varying ways the court approached the task at hand.

**Remedial Statutes:** Remedial statutes that are designed to protect the public are to be construed broadly so as to accomplish that protective purpose. *Lee*, 76 Cal. App. 5th at 226. In other words, ambiguities in the statute should be resolved in favor of the persons for whose benefit the statute was enacted. This was, in part, why the court held that “knowingly and intentionally” necessarily included constructive knowledge because an alternate conclusion would significantly limit the reach of the statute. *Id.* at 236-37.

**Plain Meaning:** Where the language of the statute is plain, courts need only enforce the statute according to its terms. *Lee*, 76 Cal. App. 5th at 232-33. The *Lee* court rejected Amazon’s attempt to place itself outside the reach of Proposition 65, because the phrase “person in the course of doing business” is “broadly worded and not limited to parties in the chain of distribution of a product or whose status is defined in the regulations.” *Id.* at 233.

**Deference to Administrative Interpretation:** Because administrative agencies are given the power to adopt regulations to effectuate their statutory purpose (provided that the regulations are not in conflict with the plain meaning of the applicable statutes), courts defer to the agency’s technical skill and expertise in interpreting statutes. *Id.* at 229-30. As the Supreme Court of the United States stated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), agency interpretations “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* at 140. The *Lee* court looked to the agency initially responsible for implementing Proposition 65, the California Environmental Protection Agency’s Office of Environmental Health Hazard Assessment (“OEHHA”), and its response to comments and requests for guidance related to similar regulations. The court also deferred to the OEHHA’s interpretation when addressing the sufficiency of the Notice of Violation. *Id.* at 241-42.

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Presumption Against Retroactivity: Statutes and regulations do not operate retrospectively absent the legislature's clear intent to the contrary. Where statutes and regulations merely "clarify" existing law, they do operate retroactively. *Id.* at 233-34. Here, the court declined to apply a 2016 regulation, which lessened the Proposition 65 disclosure requirements on retail sellers, because the complexity and plain meaning of the regulation made it impossible to view the regulation as merely clarifying existing law. *Id.* at 234. Moreover, the regulation called for a two-year safe harbor period that is clearly inconsistent with an intent that the new regulation apply retroactively. *Id.* at 234-35.

Rule Against Surplusage/Whole-Text: If possible, courts are to give significance to every word and avoid a construction that renders some words surplusage. *Id.* at 238. As discussed above, Amazon argued that the inclusion of "intentionally" in the phrase "knowingly and intentionally," imposed a higher standard of knowledge, but the court disagreed. *Id.* The court found it more reasonable that "intentionally" added a concept of purpose as opposed to giving "knowingly" a different meaning, and that its inclusion was an insufficient basis to narrow the scope of Proposition 65 to require actual knowledge.

Common Sense: "Things happen according to the ordinary course of nature and the ordinary habits of life." *Id.* at 244-45 (*quoting* Cal. Civ. Code § 3546). The court employed this maxim, along with the plain meaning and remedial statute canons, to conclude that the plaintiff did not have to show actual use of the offending product because it is the ordinary course of nature and habits of life for consumers to use the products they purchase for their intended purpose.

Avoidance of Absurd Results/Unintended Consequences: Another maxim of statutory interpretation is that courts strive to avoid absurd results, such as where unlawful conduct is magically made lawful. *See id.* at 258-59. Employing this maxim, the court rejected an expansive reading of Section 230 that would have given Amazon a competitive advantage over brick-and-mortar stores by insulating Amazon from responsibilities under Proposition 65, a result that was surely unintended by Congress in enacting the CDA. *Id.*

Presumption Against Federal Preemption: The strong presumption against federal preemption "applies not only to the existence, but also to the ex-

tent, of federal preemption." *Lee*, 76 Cal. App. 5th at 260. Courts should, therefore, "narrowly interpret the scope of Congress's intended invalidation of state law whenever possible." *Id.* Based on this canon, and many of the canons discussed above, the *Lee* court concluded that Proposition 65 is not inconsistent with the CDA and Section 230 did not immunize Amazon from liability.

The *Lee* court used these, and many other, canons throughout its analysis to reach and then support its conclusions. If a case involves issues of statutory construction, a firm grasp on the available methods for statutory and regulatory interpretation is key to effective advocacy.

♦*Blake A. Dillion is an associate in the Labor and Employment and the Insurance Coverage Groups at Payne & Fears LLP and David A. Grant is a business litigator at Payne & Fears LLP.*

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**-President's Message: Continued from page 2-**

Shortly after our September dinner event, we will convene on September 22-25 for the 48<sup>th</sup> Annual Seminar at the Rancho Bernardo Inn in San Diego! This year's Annual Seminar is aptly entitled "Back to Basics: Fundamentals of Trial Practice in a New Era" and will showcase top jurists and practitioners from up and down the state. The planning committee has worked tirelessly this last year to bring us this fantastic seminar, and let's all be sure to thank our chapter's representatives to that committee Vikki Vander Woude and Alex Ruiz for their many hours of work on our behalf.

Finally, on November 30, we will finish out the year hearing from Attorney Camille Vasquez and Dr. Shannon Curry as they present on the Johnny Depp trial. We are grateful to our Speaker Chair Amy Laurendeau for all of her work in securing such a great lineup. This will be a fantastic way to conclude our 2022 programming and to lead us into 2023 when we will be the host Chapter for the ABTL's 49<sup>th</sup> Annual Seminar in Hawaii! Stay tuned for more details.

In the meantime, I hope to see you all at the Rancho Bernardo Inn in September. Thank you all for your continued support of ABTL-OC.

♦*Matt Sonne is a partner in the Labor/Employment Group of Sheppard Mullin Richter & Hampton LLP.*

***-Stays Pending Appeal: Continued from page 3-***

subd. (d); Ziello v. Superior Court (1999) 75 Cal.App.4th 651, 654–655.) An award of prevailing party attorney fees under the Davis-Stirling Common Interest Development Act (Civ. Code, § 1350 et seq.) falls into this category. (Chapala Management Corp. v. Stanton (2010) 186 Cal.App.4th 1532, 1546.)

On the other hand, an award of attorney fees to a defendant who prevails on an anti-SLAPP motion is *not* automatically stayed. (Dowling v. Zimmerman (2001) 85 Cal.App.4th 1400, 1431–1432.) Likewise, an appeal does not automatically stay a Code of Civil Procedure section 998 cost award—except that it does, as to amounts that would otherwise have been awarded as routine costs. (Code Civ. Proc., § 917.1, subd. (a)(2).)

And, public entities and officers benefit from the automatic stay even as to money judgments. No bond is required to stay enforcement of a judgment against the State of California, state agencies, departments, or officers in an official capacity, against counties, cities, districts, or their officers in an official capacity, or the United States or its agencies or officers. (Id., § 995.220.) Trial courts also have discretion to dispense with bond requirements “when the appellant is an executor, administrator, trustee, guardian, conservator or other person acting in another’s right.” (Id., § 919.)

Myriad other exceptions to the automatic stay rule appear at Code of Civil Procedure sections 917.15–917.5. Among other things, a judgment directing the assignment or delivery of personal property or real property is not stayed pending appeal unless the defendant posts an undertaking in a sum to be determined by the trial court. (Id., §§ 917.2, 917.4.) The same is true as to an order appointing a receiver. (Id., § 917.5.)

If the judgment or order at issue directs the performance of more than one type of act not subject to the automatic stay—for example, if it requires the defendant to pay money and return property—obtaining a stay requires complying with the requirements of “each” applicable section. (Id., § 917.6.) Section 917.6 has not been meaningfully discussed in a published decision, making it questionable whether a multipronged judgment could be *partially* stayed by compliance with only one of the applicable stay sections.

There are also nonstatutory stay rules. For example, under California common law, a prohibitory injunction is not stayed pending appeal, while a mandatory injunction is stayed. (Daly v. San Bernardino County Board of Supervisors (2021) 11 Cal.5th 1030, 1040–1041.)

**What are options for obtaining a stay?**

The most common way to obtain a stay is to post a bond from an admitted surety insurer. Under such a bond, if the appealed judgment is affirmed or the appeal dismissed, and the appellant fails to pay it within 30 days of the remittitur, the judgment can be enforced against the person or company that issued the bond. (Code Civ. Proc., § 917.1.)

A bond issued by an admitted surety insurer must be for 1.5 times the amount of the judgment. (Ibid.) The judgment amount for these purposes includes any cost award (which, in turn, includes contractual or statutory attorney fees). (Ibid.) If the costs and fee amounts have not been determined yet, they can be handled later through a separate bond.

A sophisticated bond broker will be able to walk your client through the mechanics of obtaining and posting a bond from an admitted insurer, including what collateral is necessary.

But a bond from an admitted surety insurer is far from the only way to obtain a stay. There are multiple other possible paths, depending on the specifics of the case. They include:

*Temporary stay by trial court.* The trial court has discretion to stay enforcement of a judgment until 10 days beyond the last date on which a notice of appeal could be filed. (Id., § 918.) This temporary stay can avoid the need for a bond while postjudgment motions are pending, since timely postjudgment motions extend the deadline to file a notice of appeal. Even if postjudgment motions aren’t being filed, this short stay provides time to arrange for a bond or other option for a more permanent stay.

Courts routinely grant Code of Civil Procedure section 918 stays, unless the judgment creditor can show prejudice.

***-Continued on page 11-***

**-Stays Pending Appeal: Continued from page 10-**

*Stipulation.* Consider asking the plaintiff to stipulate to a stay without a bond, or with a bond in an amount less than that required by statute. The Code of Civil Procedure expressly allows such stipulations. (*Id.*, § 995.230.)

Many plaintiffs would refuse, but if the defendant is a large company with more than sufficient assets to pay the judgment, there may be room to negotiate. For example, plaintiffs may be willing to forego a bond in exchange for defendant paying them a portion of what a bond premium would cost (money that the defendant would have to spend either way).

Assuming the defendant is sufficiently creditworthy, plaintiffs have an incentive to cooperate because bond premiums, the cost of obtaining a letter of credit as collateral, fees and interest incurred to borrow funds to provide security for a bond, and fees and interest expenses to borrow funds to deposit in lieu of an undertaking are all recoverable costs on appeal unless the court determines that the bond was unnecessary. (*Cal. Rules of Court, rule 8.278(d)(1)(F).*) Indeed, under the California rule's federal analog, Federal Rule of Appellate Procedure 39, the United States Supreme Court recently affirmed a \$2.2 million cost award reflecting the prevailing appellants' costs to obtain an appeal bond. (*City of San Antonio, Texas v. Hotels.com, L.P.* (2021) 539 U.S. 1628.)

Moreover, if the plaintiff declines to stipulate, that fact can be helpful in its own right. When a defendant prevails on appeal and seeks its bond premiums as a recoverable cost, a plaintiff that refused to stipulate to a stay will be hard-pressed to object on the ground that the bond was unnecessary.

*Bond by personal sureties.* As an alternative to an admitted surety insurer, personal sureties can bond a judgment. (See Code Civ. Proc., § 995.510.) There are several differences when personal sureties are involved. A personal surety bond must be *twice* the amount of the judgment (as compared to 1.5 times for an admitted surety insurer bond). (*Id.*, § 917.1.) And, the bond must be executed by *two* sureties, not just one. (*Id.*, § 995.310.) Personal sureties must be California residents and own real property in California or be "householders" in the state. (*Id.*, § 995.510.) Court officers and members of the bar are not eligible, nor can the debtor be his or her own surety. (*Ibid.*)

If two sureties sign the bond, each must have a net

worth of at least the amount of the bond in real or personal property situated in California, excluding judgment-proof property. (*Ibid.*) If the bond is executed by more than two sureties and exceeds \$10,000, any one surety's worth may be less than the amount of the bond, so long as the sureties' aggregate worth is at least twice the amount of the bond. (*Ibid.*)

Personal sureties must provide affidavits of qualification, and the respondent may object to a bond if the affidavits are deficient (*id.*, § 995.520), potentially subjecting the sureties to discovery. And as with an admitted insurer bond, personal sureties become liable if the judgment is affirmed on appeal and the appellant fails to pay upon receipt of the remittitur.

*Deposit.* Defendants can forego a bond entirely, and avoid bond premiums, by depositing money with the court instead. (*Id.*, § 995.710.) The deposit must be at least equal to the amount that would be required for an admitted surety bond; it may be made in cash or statutorily specified securities. (*Ibid.*) The court must hold cash in an interest-bearing account and pay interest on demand. (*Id.*, §§ 995.710, 995.740.)

*Supersedeas.* In an extreme case, to preserve the status quo where the defendant is unable to post the requisite bond or deposit, the Court of Appeal has power to stay enforcement of the judgment without a bond via a writ of supersedeas.

For example, in *Davis v. Custom Component Switches, Inc.* (1970) 13 Cal.App.3d 21, 26–27, the appellate court stayed enforcement of a judgment where the respondent was pursuing a writ of execution that would force a sale of a business's assets and leave the appellants with no meaningful recovery if they prevailed on appeal, and where the appellants could not afford a bond. Similarly, in *Estate of Murphy* (1971) 16 Cal.App.3d 564, 568–569, the court stayed distribution of trust assets where "the task of recovering the property and redistributing it would be enormous" if the property were distributed and appellants later prevailed on appeal, and as to some of the appellants, the undertaking fixed by the trial court "may be prohibitive."

The appellate court can also use its supersedeas power to stay enforcement of a prohibitory injunction or otherwise freeze events that could impact the efficacy of an appeal. (Code Civ. Proc., § 923 [noting a reviewing court's power to "stay proceedings during

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***-Stays Pending Appeal: Continued from page 11-***

the pendency of an appeal or to issue a writ of supersedeas,” to “preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction”]; see, e.g., *Advanced Real Estate Services, Inc. v. Superior Court* (2011) 196 Cal.App.4th 338, 341 [staying a planned sale of the Orange County Fairgrounds].)

A petition for a writ of supersedeas must be filed in the Court of Appeal, *after filing the notice of appeal*, and must show (a) that the appellant would suffer irreparable harm absent a stay, and (b) that the appeal raises substantial questions on which the appellant’s position has merit. Such petitions are rarely granted, but on the right facts, are worth considering.

**When does the stay need to be in place?**

Absent a stay, a California state court judgment is enforceable upon entry. (Code Civ. Proc., § 683.010.)

That makes it prudent to ask the plaintiff to stipulate to stay enforcement (at least temporarily), or to ask the trial court for a temporary stay under Code of Civil Procedure section 918, *before judgment is entered*. Otherwise, there is a risk that the plaintiff will begin enforcement procedures before the defendant posts a bond or otherwise arranges for a more permanent stay.

If the plaintiff won’t stipulate to a stay, it is also prudent to have your client start talking to a bond broker when the jury renders its verdict or the court issues its ruling, rather than waiting for entry of judgment. It can take some time to get a bond in place.

Counsel should also be aware of a wrinkle in stay timing in cases where there will be postjudgment motions. For judgments that would be automatically stayed by filing an appeal, it may be tempting to file the notice of appeal immediately to trigger the stay.

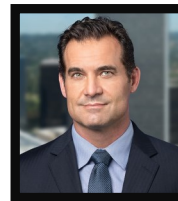
But there is case law holding that a notice of appeal divests the trial court of jurisdiction to rule on motions for judgment notwithstanding the verdict, motions to vacate the judgment, and motions for reconsideration. (See *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 50–51; *Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.* (1996) 43 Cal.App.4th 630, 641; *Weisenburg v. Molina* (1976) 58 Cal.App.3d 478, 486, abrogated on another ground by *Adams v. Murakami* (1991) 54 Cal.3d 105,

111; but see *Foggy v. Ralph F. Clark & Associates, Inc.* (1987) 192 Cal.App.3d 1204, 1212–1213 [disagreeing with *Weisenburg*, and holding that appeal does not divest court of jurisdiction to rule on JNOV motion].) A temporary stipulated or section 918 stay is a good alternative to filing a hasty appeal and potentially depriving the trial court of jurisdiction to rule on postjudgment motions.

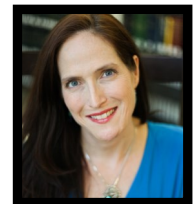
♦ *Alana H. Rotter is a partner at Greines, Martin, Stein & Richland LLP.*

September 14, 2022  
Dinner & Program

**The Art of Persuasion:**  
How to Persuade Like a  
Human Being, Not a Lawyer



**Christopher W. Arledge**  
Ellis George  
Cipollone O'Brien  
Annaguey LLP  
Partner



**Rachel Croskery-Roberts**  
University of California,  
Irvine School of Law  
Associate Dean and  
Professor of Lawyering  
Skills

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**6:00 p.m.** Cocktails  
**7:00 p.m.** Dinner and Program  
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