the abtl REPORT

What Pandemic? ABTL has never stopped serving its members.

By Daniel Gunning

I admittedly signed up to be ABTL membership co-chair in 2019 because I thought it would be an easy job. As a practical matter, ABTL sells itself – great networking, the ability to meet judges on a personal level, and informative CLE's, all at a great price. I wouldn't need to "sell" anything. Then came March 2020, and with it the pandemic, stay-at-home orders, court closures, and the world turned upside down. Needless to say, I became a bit panicked at the notion of increasing ABTL membership when what I once considered the best part of ABTL (the in-person events) was no longer a viable option.

My initial inclination was to hide and say, "See you in 2021." But at our first (virtual) board meeting, soon-to-be-chapter President Rebecca Fortune said, "There is no reason why membership should decline. We have the chance to increase visibility through virtual events. While other organizations are doing very little, ABTL can go full steam ahead, filling the void." Since I am not one to back down from a challenge, I said, "This is a great opportunity; let's do it!" (Although in my head I was thinking, "Rebecca, are you crazy?")

As always, Rebecca was right. Thanks to the leadership of Past President Alan Mansfield, ABTL never skipped a beat, and continued to offer all of the great benefits of ABTL, even if it had to do so virtually.

Our chapter (like so many of us) learned how to use Zoom and began planning virtual events primarily surrounding issues we all now faced in the midst of the pandemic. ABTL was the first to know about important updates from the courts. We hosted multiple updates from the San Diego Superior Court and U.S. District Court in the Southern District of California. We also hosted and co-sponsored numerous brown bag lunches with the judiciary, and even held a "virtual" judicial roundtable, much like prior in-person events. Not stopping there, we held MCLEs on mediations in a remote environment, employment considerations during the pandemic, and ethical considerations while practicing in this new environment.

We kicked off 2021 with a virtual evening program on the Legacy of Ruth Bader Ginsburg from the perspective of some of her former clerks. We also held a virtual evening program with newly appointed California Supreme Court Associate Justice Martin Jenkins. Once we could safely start holding in-person events, we began doing so with the Annual Charity Wine and Dine Event at Coasterra and the Annual Judicial Mixer at the U.S. District Court.

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Inside

PRESIDENT'S LETTER:

Growth Through Support: A Thank You to Our Sponsors

By Rebecca J. Fortune

When COVID-19 hit, every aspect of the San Diego legal community was impacted. For nearly all lawyers, focus understandably turned to how a client's goals could be… would be…achieved with office and courtroom doors shuttered. How were we to service our clients' interests when literal access to justice was being denied?

As the practical shock began to subside and new methods and processes materialized, for those of us in organizational leadership positions, attention necessarily turned to how a professional community built on in-person programming could function when public health orders prohibited face-to-face meetings. Was it even possible to provide ABTL's historically valuable educational and networking opportunities during a pandemic? Could ABTL SD deliver on its mission – on promises made to members and sponsors – during a state of emergency? Or, was it better to simply press pause and resume operations when the storm of COVID-19 passed?

As it turns out, not only can we function … we can grow. In the past eighteen months, ABTL SD has maintained its substantive and educational programing, strengthened its financial performance, and added nearly 100 new members. We created networking opportunities via rotating break-out rooms and increased the availability of MCLE and brown-bag luncheons by eliminating the need to travel for in-person events. And we reduced expense by moving to more efficient methods of communication and administration. While many deserve boundless gratitude for assuring our success during this very challenging time, a very sincere thank you must go out to our sponsors: ADR Services (platinum), Ankura (silver), Aptus Court Reporting (gold), CBIZ (silver), KROLL (platinum), JAMS (platinum), Judicate West (platinum) and Signature Resolution (platinum).

In late 2020, as infection rates increased and the prospect of in-person events became more and more remote, businesses, themselves struggling due to industry-wide shutdowns, must have been asking, "Where's the value?" "How are we to reach an audience confined to home offices?" "Why should we make a financial commitment to an organization with such an uncertain programming future?" When it was arguably a wise business decision to retain resources, ABTL SD's partners stepped up; both in their commitment to our organization, and also to the larger legal community.

Faced with an absolute inability to bring opposing sides together to facilitate a mediated or arbitrated conclusion, our ADR sponsors (ADR Services, JAMS, Judicate West and Signature Resolution) reinvented themselves on virtual platforms, restoring litigants' pathways to resolution; thereby lessening the juggernaut of civil trials overburdening judicial calendars across the state. Similarly situated, Aptus, via software applications like "EDepoze 2.0" and "Aptus Capture", made remote depositions both feasible and more economical for attorneys and clients alike. Once limited by time and distance, out-of-state parties and even busy executives are now able to meaningfully participate in the discovery and dispute-resolution processes via vastly more efficient means. Indeed, though developed to address obstacles created by the pandemic, the successful implementation of remote discovery and ADR processes are sure to provide perpetual value – making our collective obligation to find resolve that much more attainable.

Other sponsors similarly met the challenge of serving a remote legal community. With lawyers and clients needing real-time remote access to their and documents and files, Ankura provided the necessary eDiscovery, cybersecurity, and data privacy solutions for our members and their clients. Forensic accountants CBIZ proved that they did not need to be "on site" to effectively and efficiently analyze financial records. And Kroll Settlement Administration found new and creative ways to use technology to support litigators in class action, mass tort, and regulatory proceedings. Each of these vendors effectively found new ways to help our members continue to provide the level of service and commitment that our clients deserve.

Simply put, ABTL SD's continued ability to meet our mission of promoting the highest ideals of competence, ethics, professionalism, and civility is not only dependent upon, but is bolstered by, our sponsor's current and future commitment. As evidenced by historically high attendance at nearly every 2021 event – including record-setting registrations for the upcoming Annual Seminar in Hawaii –we have shown that despite the new challenges, ABTL SD can and has both endured and thrived.

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To our sponsors, please accept my sincere gratitude for your continued support. On behalf of ABTL SD, I look forward to a long-lasting partnership. To our attorney members, please remember to show your appreciation where it matters … please reach out, and counsel other members of your team and staff to engage ADR Services, Ankura, Aptus Court Reporting, CBIZ, KROLL, JAMS, Judicate West and Signature Resolution whenever possible.

We – lawyers, judges and sponsors – all joined ABTL because each of us recognized the inherent value in being part of something bigger than ourselves. As we move from this time to the next, let's not forget our interdependence and the value each of us brings to the other. Let's always remember how much more we can achieve together … reminding me of an African proverb, "If you want to go fast, go alone. If you want to go far, go together."

Rebecca J. Fortune, ABTL President, is a Partner at Kimball, Tirey & St. John LLP Business Real Estate Group. Rebecca has devoted her practice to general civil litigation with an emphasis in real estate, business and probate litigation.

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ABTL HAS NEVER STOPPED SERVING IT'S MEMBERS | *Continued from cover*

With all of these wonderful programs, ABTL has managed to keep its core benefits intact – unparalleled opportunities to interact with members of the judiciary, wonderful networking opportunities with some of America's finest lawyers, and informative CLE's, all at a great price. The hard work of our chapter's committee chairs and executive board has made my job as membership co-chair that much easier. But let's continue to spread the word and get more of our friends and colleagues involved, because ABTL is truly an organization worth belonging to!

Daniel C. Gunning is a partner in Wilson Turner Kosmo's Employment Law Group.

Online Mediation One Year In: Personal, Practical Reflections

By Jeff Kitchaven — article reprinted with permission

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 set even before an arbitration 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 view the dispute as "ancient history."

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 before mediation was in 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 to do incentivize mediations? Do court-mandated "check the box" mediation requirements actually lead to a higher rate of settlement? As data and experience grow in the world of post-COVID mediations, attorneys and mediators should think carefully about the answers to these questions.

How has the selection of mediators changed?

Remote mediations have led to at least two significant 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 participant in California.

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ONLINE MEDIATION ONE YEAR IN | *Continued from page 7*

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 is 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 nearly. 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.

In my view, the key is a commitment to settlement-wherever-reasonably-possible, not attachment to settlement-at-any-and-all-costs. It leads to clear, strong choices 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?

With litigants and attorneys 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 5pm 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 faced by all remote 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 atten-

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ONLINE MEDIATION ONE YEAR IN | *Continued from page 7*

tion 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 distractions going forward in mediation, and in all other online meetings, is another frontier of our 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 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 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 B2B 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 thing 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 jk@jeffkichaven.com.

Same-Sex Harassment Under Title VII: Broadly Actionable Under Developing Jurisprudence

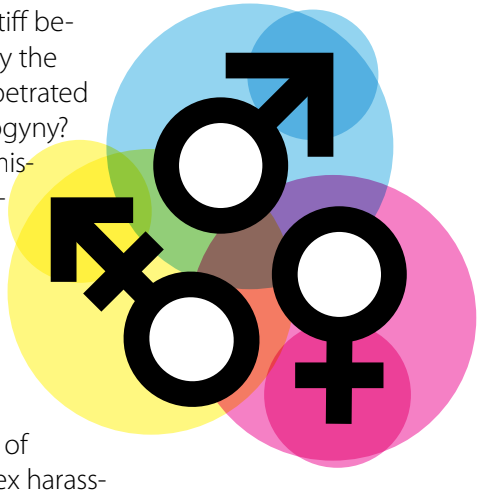
By Kristen O'Connor

A growing preponderance of judicial decisions have recalibrated and clarified federal sexual harassment protections over the course of the last two decades, including whether and to what extent workers are federally protected from harassment by persons of the same gender.

In a seminal 1998 opinion, the U.S. Supreme Court held in *Oncale v. Sundowner Offshore Services* that Title VII of the Civil Rights Act of 1964—i.e., the federal law that protects covered employees from discrimination "because of sex," among other protected classifications—proscribes and makes actionable same-sex sexual harassment. The Court further held that harassing conduct ***need not*** be motivated by sexual desire to support an inference of discrimination, and proffered three [theoretical] evidentiary routes that a same-sex discrimination plaintiff might pursue in order to prove Title VII discrimination on the basis of sex: 1) evidence of general hostility toward the presence of the plaintiff's gender in the workplace, 2) comparative evidence about how the alleged harasser treated members of both sexes, and 3) credible evidence that the harasser was homosexual.

This year, the Fourth Circuit joined a chorus of appellate courts holding that actionable same-sex harassment under Title VII is not strictly limited to the three scenarios offered in *Oncale*. *In Roberts v. Glenn Indus. Grp., Inc,* a male plaintiff alleged that he was subject to homophobic, derogatory, and sexually explicit comments at work. Citing the three evidentiary pathways identified in *Oncale*, the trial court granted summary judgment in favor of the employer-defendant because the employee-plaintiff worked in an all-male environment and no evidence suggested 1) that the alleged harasser was homosexual or 2) that there was general hostility toward men in the workplace. The Fourth Circuit reversed, reasoning that "[n]othing in *Oncale* indicates the Supreme Court intended the three examples it cited to be the only ways to prove that same-sex sexual harassment is sex-based discrimination." The Fourth Circuit cited the Supreme Court's 2020 decision in *Bostock v. Clayton County*—which held that a Title VII plaintiff may prove same-sex harassment where the plaintiff was perceived as not conforming to traditional gender stereotypes—as an example of an alternative evidentiary pathway available to Title VII plaintiffs.

A number of other circuit courts have reached comparable conclusions. *See, e.g., Rene v. MGM Grand Hotel, Inc.,* 305 F.3d 1061, 1066 (9th Cir. 2002) ("So long as the environment itself is hostile to the plaintiff because of [his] sex, why the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point."); *Bibby v. Phila. Coca Cola Bottling Co.,* 260 F.3d 257, 262–63, 264 (3d Cir. 2001) (recognizing a potential cause of action when same-sex harassment is based on failure to conform to sex stereotypes, and noting that "other ways in which to prove that harassment occurred because of sex may be available"); *E.E.O.C. v. Boh Bros. Constr. Co.,* 731 F.3d 444, 455–56 (5th Cir. 2013) (en banc) ("[E]very circuit to squarely consider the issue has held that the *Oncale* categories are illustrative, not exhaustive, in nature."); *Shepherd v. Slater Steels Corp.,* 168 F.3d 998, 1009 (7th Cir. 1999) (finding that *Oncale's* examples were illustrative, not exhaustive); *Pedroza v. Cintas Corp.,* 397 F.3d 1063, 1068 (8th Cir. 2005) (finding that *Oncale* set forth a non-exhaustive list including three possible evidentiary routes to show harassment was based on sex); *Medina v. Income Support Div.,* 413 F.3d 1131, 1135 (10th Cir. 2005) (same). See also *Vickers v. Fairfield Med. Ctr.,* 453 F.3d 757, 763–66 (6th Cir. 2006) (acknowledging the availability of another form of proof based on sex stereotyping).



These decisions reflect an important sea change in the growing body of modern Title VII jurisprudence, one that expands and considers the litany of factual and legal circumstances that might give rise to discrimination "because of sex" under federal law. Put simply, there are many different factual scenarios that could implicate the protections of Title VII, including the scenario in which employees are forced to work in a hostile work environment or suffer discrimination and/or harassment by members of their own gender.

Kristen O'Connor is an associate in the San Diego office of Johnson Fistel and concentrates her practice on employment and complex securities litigation. Ms. O'Connor has particular expertise representing a diverse clientele in federal and state actions for sexual harassment and discrimination.

ABTL's Eleventh Annual Judicial Mixer Recap

By Dzvinka McKie

On September 14, 2021, the Judicial Advisory Board and the Leadership Development Committee hosted the ABTL's Eleventh Annual Judicial Mixer – live and in-person! The event was held outdoors on the patio outside the Jury Assembly Room at the James M. Carter and Judith N. Keep United States Courthouse. The Judicial Mixer was well attended, with over thirty-seven state and federal judges in attendance, proving yet again that this event is one of the most popular ABTL events.

The attendees enjoyed perfect San Diego weather, a beautiful downtown setting, and delicious food and drinks. Attending attorneys also played a "Get to Know Your Judges" bingo game, during which they were provided a bingo card filled with anonymous "fun facts" about the attending judges, and asked to match the facts to the judges who provided them. The facts showcased the judges' amazing backgrounds, interests, experiences, and accomplishments. Examples of "fun facts" included participating in two Olympic events, attending medical school, embarking on the first American expedition to Mount Shishapangma in Tibet, racing cars in certified NHRA drag races, having an identical twin, working as a newspaper delivery person in Belgium, meeting Michael Jackson at his house, having a relative who was on the FBI's most wanted list, and being an amateur magician (and a member in good standing of the International Brotherhood of Magicians). After more than a year of virtual events, the attendees cherished an opportunity to meet face-to-face and mingle with each other in an informal setting.

Many thanks to the Judicial Advisory Board, the Leadership Development Committee, the United States District Court for the Sothern District of California, ABTL's sponsors, and all ABTL members and judges who attended this event and made it a success! Special thanks to Hon. Lorna A. Alksne, Hon. Jill L. Burkhardt, Hon. Michael S. Berg, Marissa Marxen, Bill Keith, Vivian Adame, and Lori McElroy. We are already looking forward to our next annual Judicial Mixer and hope to see all of you there!

Dzvinka McKie is a Career Judicial Law Clerk for Hon. Michael S. Berg, United States Magistrate Judge of the United States District Court for the Southern District of California. Dzvinka is also a member of ABTL's Leadership Development Committee.

L to R: Hon. Jinsook Ohta , Hon. Randa Trapp (Ret.), Hon. Linda Lopez

L to R: Marissa Marxen, Vivian Adame, Ivana Torres, Dzvinka Mckie

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Fun Judicial BINGO Facts

1. I was once a newspaper delivery person in Belgium.
2. I have a relative who was on the FBI's most wanted list.
3. Raced cars in certified NHRA drag races.
4. I grew up speaking Slovak since my mom was originally from Czechoslovakia.
5. I shave with a straight razor
6. I went to all Women's College
7. I'm an amateur magician and a member in good-standing of the International Brotherhood of Magicians
8. My dog's name is Cordell Hull. I'm a native of Nashville, TN, and Cordell Hull was a TN senator, the longest-serving secretary of state, and a founder of the UN.
9. I had a summer job at the Playboy Hotel and Casino in Atlantic City NJ
10. Member of first American expedition to Mt Shishapangma(26,000 feet) in Tibet.
11. Participated in 2 Olympic events
12. I have completed my online Italian lesson every day for the last 1193 days (as of 9/1/2021) and still cannot hold a conversation with someone in Italian.
13. I met Michael Jackson at his house.
14. My family coordinates Halloween costumes.
15. I was Miss Bo Peep for the Kern County Fair in 1964.
16. Once co-piloted a small plane
17. Made international news several years ago with a classic "message in a bottle" story
18. Played JV Basketball for USC.
19. Seen the Rolling Stones in concert with the same friends over the past for 40 years.
20. Got married in Italy
21. I attended medical school.
22. I am an identical twin. Or if you want something more offbeat, I (and Judge Kelety) are big fans of the comic strip Mary Worth.
23. An avid tennis player and fan, this judge had a front row seat at this year's US Open.
24. Played in the same weekly pick up soccer game for over 15 years.

Answer Key

1. *Hon. Jill Burkhardt*
2. *Hon. Mitch Dembin*
3. *Hon. Roger Benitez*
4. *Hon Carolyn Caietti*
5. *Hon. Michael Smyth*
6. *Hon. Lorna Alksne*
7. *Hon. Michael Berg*
8. *Hon. Allison Goddard*
9. *Hon. Michael Groch*
10. *Hon. Margaret McKeown*
11. *Hon. Rachel Cano*
12. *Hon. Cathy Bencivengo*
13. *Hon. Polly Shamoon*
14. *Hon. Enrique Camarena*
15. *Hon. Eugenia Eyherabide*
16. *Hon. Marcella Mclaughlin*
17. *Hon. Timothy Taylor*
18. *Hon. Randa Trapp*
19. *Hon. Dwayne Moring*
20. *Hon. Michelle Ialeggio*
21. *Hon. Judy Bae*
22. *Hon. Robert Longstreth*
23. *Hon. Daniel Butcher*
24. *Hon. Katy Bacal*

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California Case Summaries: Monthly™

AUGUST 2021

By Monty A. McIntyre,
Mediator, Arbitrator & Referee at ADR Services, Inc.

Insurance

McHugh v. Protective Life Ins. Co. (2021) _ Cal.5th _ , 2021 WL 3853061: The California Supreme Court reversed the Court of Appeal, which had affirmed a judgment for defendant, following a jury trial, concluding that Insurance Code sections 10113.71 and 10113.72 did not apply retroactively to plaintiff's term life insurance policy, which had been terminated by defendant to failure to pay the premium. The California Supreme Court held that sections 10113.71 and 10113.72 apply to all life insurance policies in force as of January 1, 2013 — regardless of when those policies had originally been issued. The case was remanded for proceedings consistent with the opinion. (August 30, 2021.)

Torts

Gonzalez v. Mathis (2021) _ Cal.5th _ , 2021 WL 3671594: The California Supreme Court reversed the decision of the Court of Appeal. Declining to create a third exception to the rule in Privette v. Superior Court (1993) 5 Cal.4th 689, the California Supreme Court ruled that unless a landowner retains control over any part of the contractor's work and negligently exercises that retained control in a manner that affirmatively contributes to the injury (Hooker v. Department of Transportation (2002) 27 Cal.4th 198, 202), a landowner will not be liable to an independent contractor or its workers for an injury resulting from a known hazard on the premises. (August 19, 2021.)

CALIFORNIA COURTS OF APPEAL

Appeals

Reddish v. Westamerica Bank (2021) _ Cal.App.5th _ , 2021 WL 3827308: The Court of Appeal dismissed defendant's appeal of the trial court's order requiring that defendant and the plaintiffs should share equally the costs of taking 30 plaintiff depositions in a certified class action alleging Labor Code and wage and hour violations. Defendant appealed the trial court's order claiming it was appealable under the collateral order doctrine. The Court of Appeal rejected defendant's argument, ruling that because the outcome remained uncertain, the matter had not been finally determined for purposes of the collateral order doctrine. (C.A. 1st, August 27, 2021.)

Arbitration

Herrera v. Doctors Medical Center of Modesto (2021) _ Cal.App.5th _ , 2021 WL 3417591: The Court of Appeal affirmed the trial court's order denying a petition to compel arbitration in an action by former employees to recover civil penalties under the Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et al.). Pursuant to *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, PAGA representative claims for civil penalties are not subject to arbitration under a predispute arbitration agreement. *(Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1234.) The PAGA claims alleged in the former employees' complaint were owned by the state and were pursued by the former employees as the state's agent or proxy. *(ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 185.) The arbitration agreements in question were not enforceable as to the PAGA claims because the state was not a party to, and did not ratify, any of those agreements. Also, after the former employees became representatives of the state, they did not agree to arbitrate the PAGA claims. (C.A. 5th, August 5, 2021.)

Attorneys

Amjadi v. Brown (2021) _ Cal.App.5th _ , 2021 WL 3855831: The Court of Appeal reversed the trial court's judgment of dismissal entered after plaintiff's attorney agreed to a settlement for $150,000 with defendant over plaintiff's objection, and the trial court's later order denying plaintiff's motion to vacate the judgment in her action for personal injuries arising from from a car accident. The settlement was entered by plaintiff's attorney pursuant to a provision in the attorney's contingent fee agreement, which allegedly granted the attorney the right to accept settlement offers on the client's behalf in the attorney's "sole discretion," so long as the attorney believed in good faith that the settlement offer was reasonable and in the client's best interest. The Court of Appeal concluded that such a provision violates the Rules of Professional Conduct and is void to the extent it purports to grant an attorney the right to accept a settlement over the client's objection. The Court of Appeal held the settlement was void and reversed the judgment. It also referred plaintiff's former attorneys to the State Bar for potential discipline, as required by law and by Canon 3D(2) of the Code of Judicial Ethics. (C.A. 4th, August 30, 2021.)

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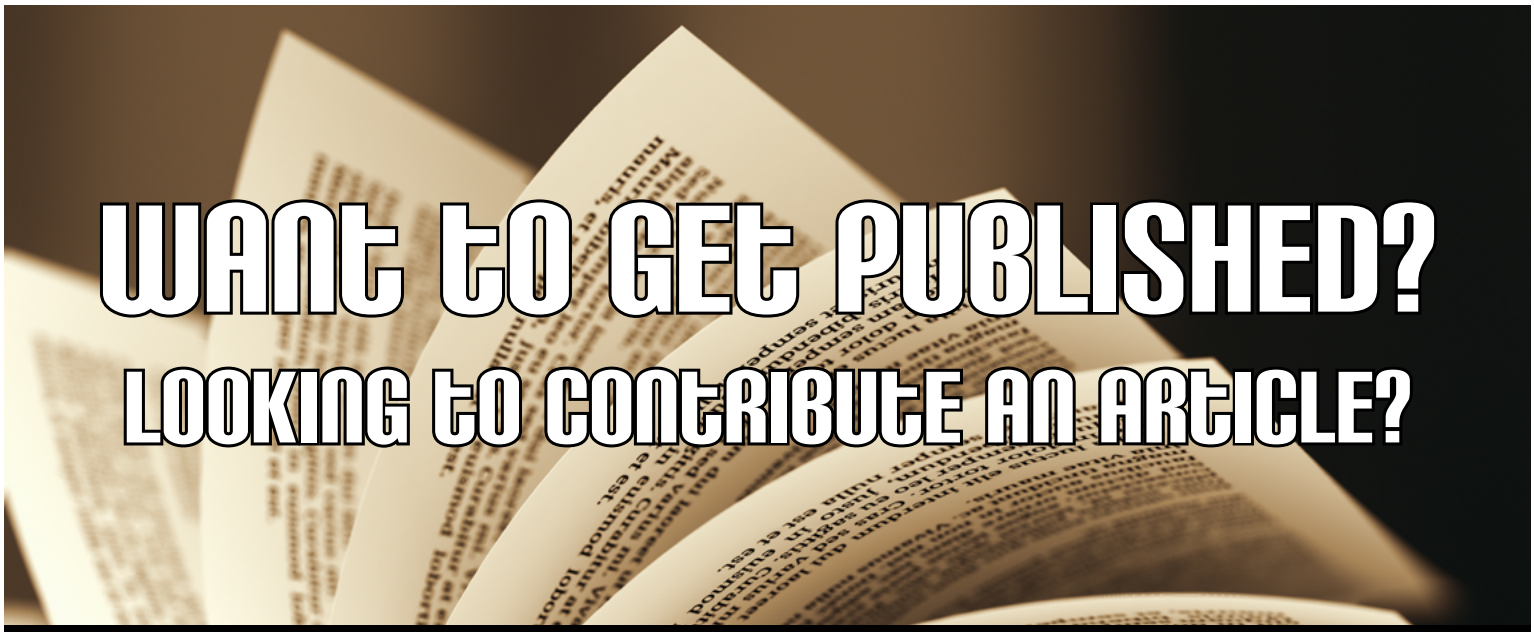

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