the abtl REPORT

“DUTY TO DEFEND” Denials Require a Second Look

By Dominic Nesbitt

Article reprinted with permission - first published in Spring 2026 ABTL OC Report

Untold millions of dollars are left on the table by policyholders who fail to challenge wrongful coverage denials. This article aims to remind business litigators of their clients’ rights under any liability policy—be it a Directors & Officers, Professional Liability, Employers Practices Liability or Commercial General Liability policy—which includes a “duty to defend.”

A. The “Potential for Coverage” Standard

The California Supreme Court has made clear that a liability insurer owes a duty to defend unless an underlying lawsuit against its insured can “by no conceivable theory” raise a “single issue” within the policy coverage. See Montrose Chem. Corp. v. Superior Court, 6 Cal.4th 287, 300 (1993) quoting Gray v. Zurich Ins. Co., 65 Cal.2d 263, 276, fn. 15 (1966).

Importantly, the California Supreme Court has emphasized that the duty to defend turns on the potential for coverage raised by the “facts” alleged, and not on the formal causes of action pleaded in the complaint. See Scottsdale Ins. Co. v.

MV Transp., 36 Cal.4th 643, 654 (2005); see also Pension Trust Fund for Operating Engineers v. Federal Ins. Co., 307 F.3d 944, 951 (9th Cir. 2002) (explaining “remote facts buried within causes of action that may potentially give rise to coverage are sufficient to invoke the defense duty.”).

Even facts which are extrinsic to a complaint (e.g., facts in pre-suit communications, interrogatory responses, depositions, and expert reports) can trigger the duty to defend if known to the insurer. See Montrose, supra, at 296; see also American Guar. & Liab. Ins. Co. v. Vista Medical Supply, 699 F.Supp 787, 794 (N.D. Cal. 1988) (finding duty to defend premised on a declaration made by plaintiff in underlying action).

B. Application to Business Litigation

This broad “potential” for coverage standard is routinely applied by California’s courts to hold liability insurers in breach of their duty to defend insureds in business litigation. See, e.g., CNA Cas. of Cal. v. Seaboard Sur. Co., 176 Cal.App.3d 598, 608 (1986) (finding factual allegations in support of uncovered “antitrust” cause of action implicated potential coverage for piracy, unfair competition and idea misappropriation); Pension Trust Fund, supra, at 954 (concluding facts alleged in support of cause of action for “lender liability” could support a finding of coverage for breach of fiduciary duty); Hudson Ins. Co. v. Colony Ins. Co., 624 F.3d 1264, 1268 (9th Cir. 2010) (“It does not matter that the NFL complaint . . . never listed slogan

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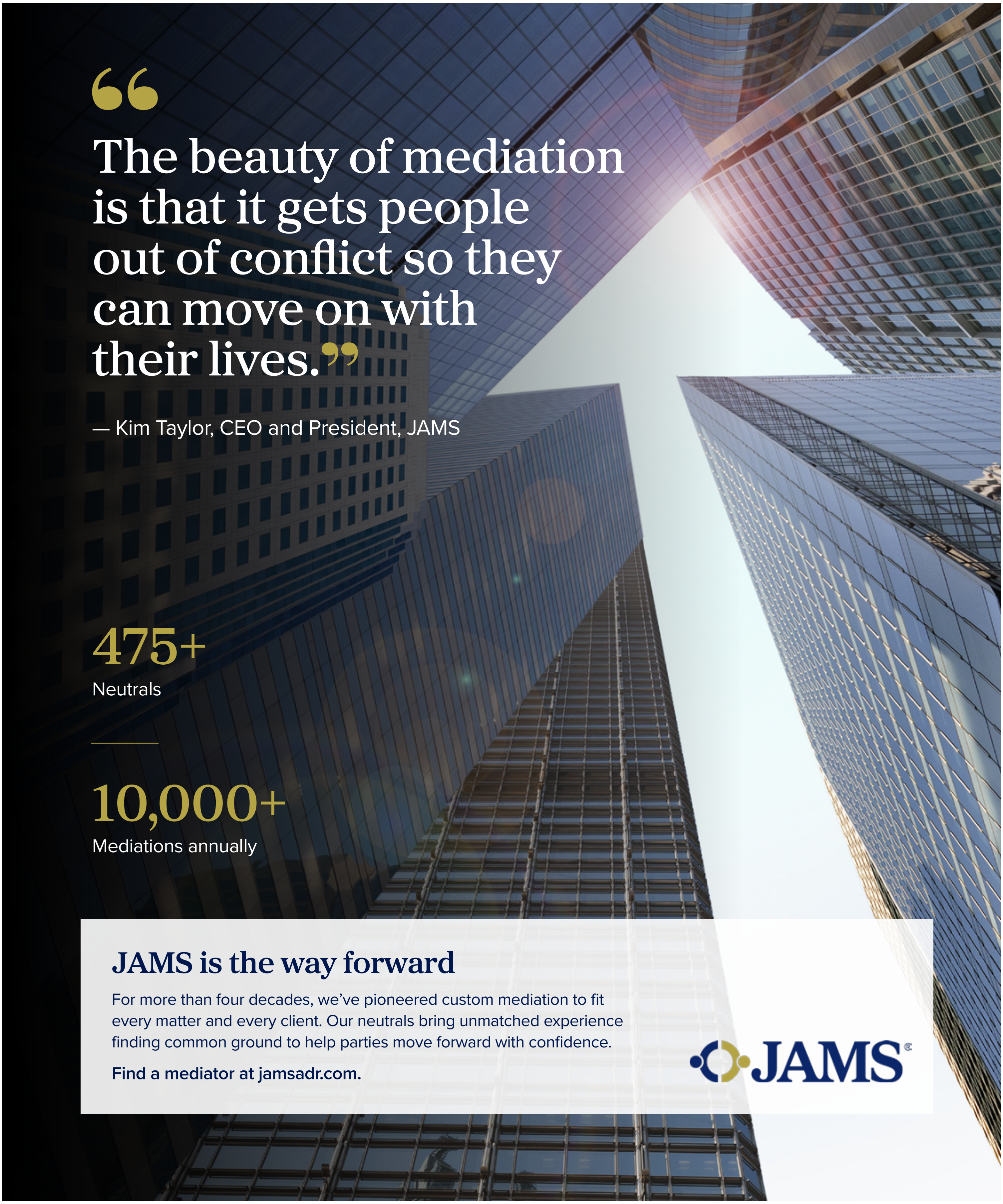

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PRESIDENT'S LETTER:

ABTL San Diego, 2026

By Jon Brick

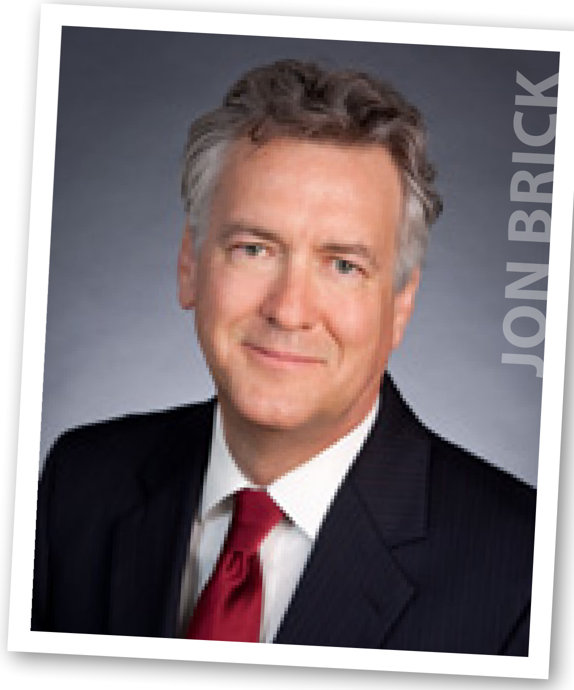
Believe if or not, we have reached the half-way point of 2026. We continue to add new members and are still hopeful of reaching our goal of 500 members. We can do it with your help: please, when you have a chance, talk to your colleagues about ABTL and let them know about our great programming, networking and collegiality.

Speaking of programs, our first dinner program, SCOTUS Review, provided an engaging discussion and was very well attended. By the time you read this we will have had our Q2 Program, SD Sports, which was a fascinating discussion on the state of college sports today – how the NCAA got to where it is and what the future may be.

Our Dinner Committee is working on final plans for the Q3 program, Developments in D&O Insurance and Class Action Securities Claims, set for August 13th. Be sure to watch for emails or check the website for other upcoming events, including the always-popular Judicial Mixer set for September 8th.

I want to again make special note that San Diego is hosting the Annual Seminar this year at the Park Hyatt Aviara Resort in Carlsbad, October 8-11. This year's program, Litigation in 2026: Effective Advocacy in the Age of AI, Fake News, and the Vanishing Attention Span, will feature top trial lawyers and jurists from around the State as well as non-attorney experts discussing the new, ever-changing litigation challenges faced by the Bar and the Bench. Early Bird Registration ends June 25th, and the hotel is filling fast, and will sell out, so please register for this great program.

Summer officially arrived on Father's Day, and the traditional June Gloom seems to have taken a bit of a break this year, at least for the most part. The Del Mar Fair–officially the San Diego County Fair–is underway and our schedules are even more complicated by kids being out of school and the seemingly daily Notices of Unavailability of Counsel from our colleagues taking vacations. If you are one of us who don't seem to have a vacation planned so far, just remember that we live where others come for vacation, and a cloudy day at the beach is still a day at the beach.



As always I want to thank all of our wonderful sponsors who make ABTL possible, and especially our Executive Director, Lori McElroy, for doing just about everything that needs to be done to keep our chapter going. And thanks to our Report Committee, Cheryl Dunn Soto, Brittany Salamin and Lori, for all of their work. **Articles are needed for the Q3 and Q4 Reports. Writing articles not only provides information to our members but is an excellent way to get published so please think about what you can contribute.**

Sincerely,

Jon Brick

Jon Brick is a partner at the Law Offices of Schulz Brick & Rogaski.

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ABTL San Diego's Q2 Networking Event and Dinner Program

SPORTS & THE LAW

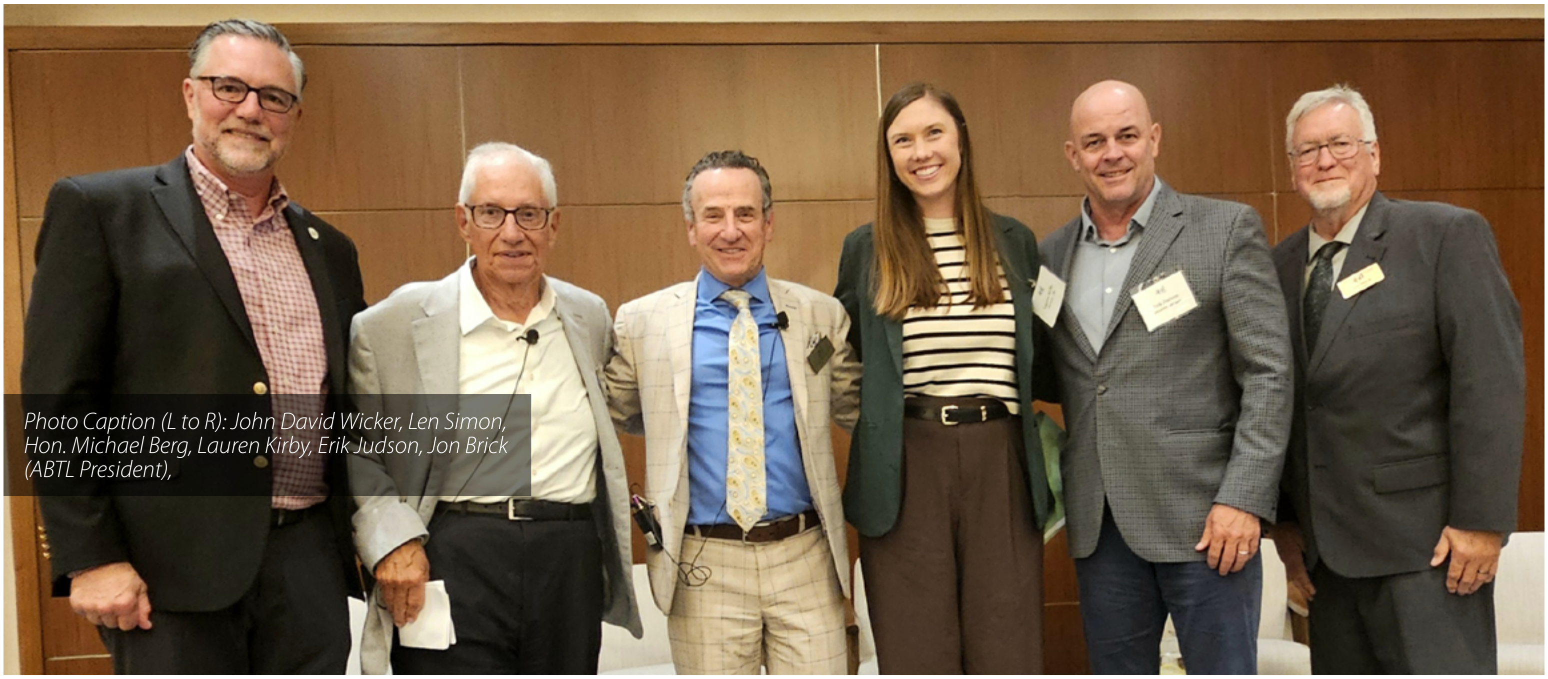
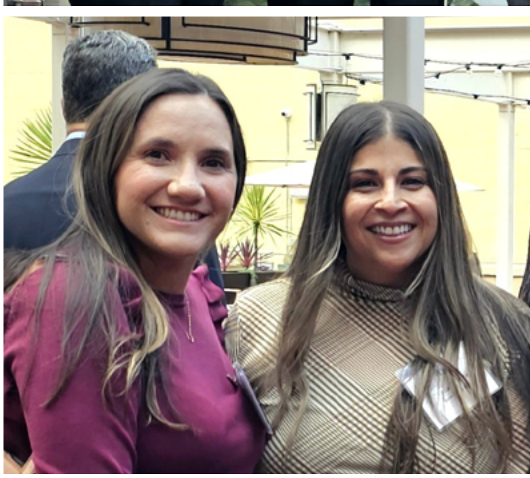
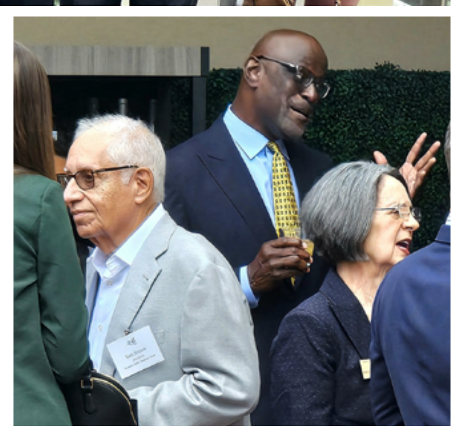


Photo Caption (L to R): John David Wicker, Len Simon, Hon. Michael Berg, Lauren Kirby, Erik Judson, Jon Brick (ABTL President),





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Q2 Dinner - SPORTS & THE LAW

Photography by c.dobbs487@gmail.com

THANK YOU
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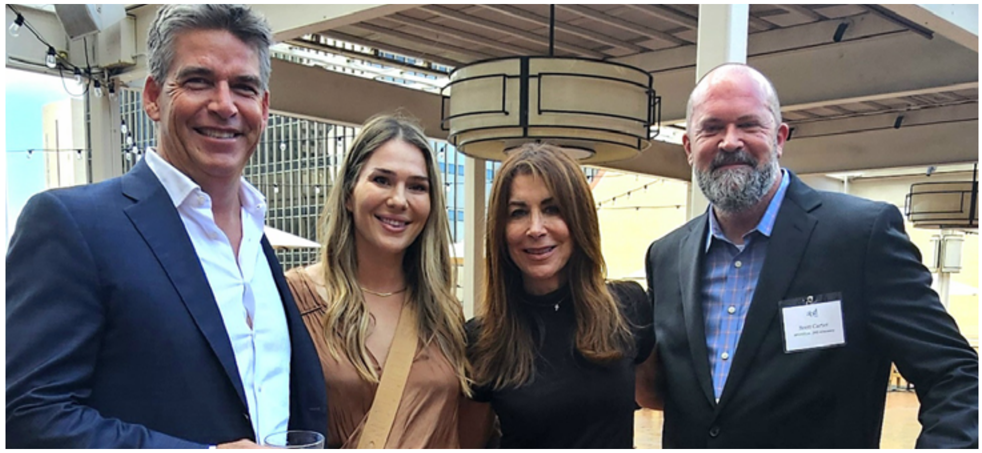

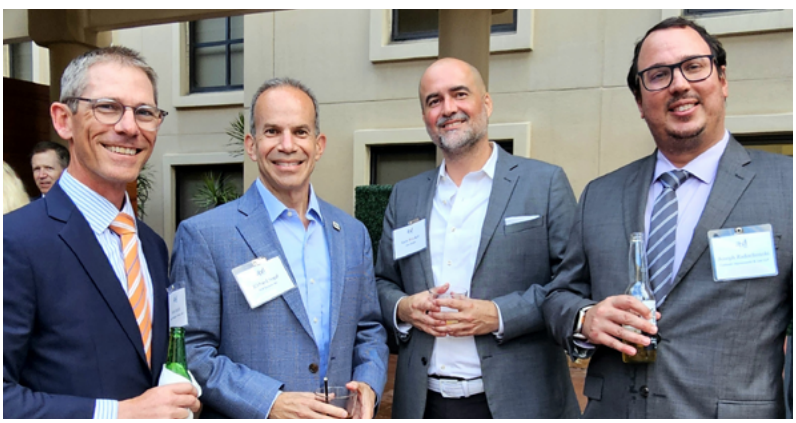

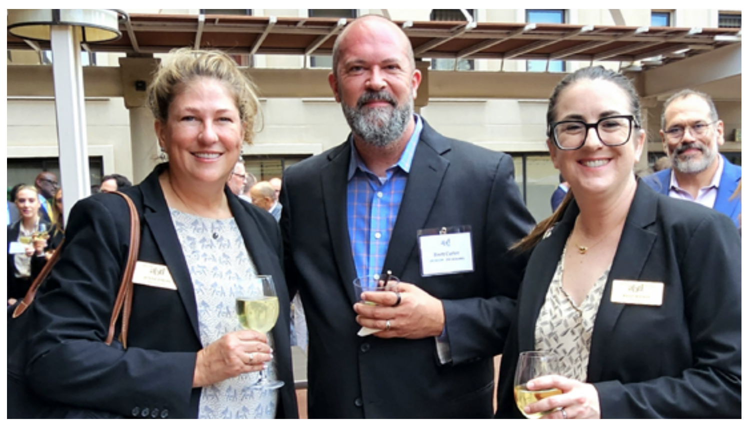

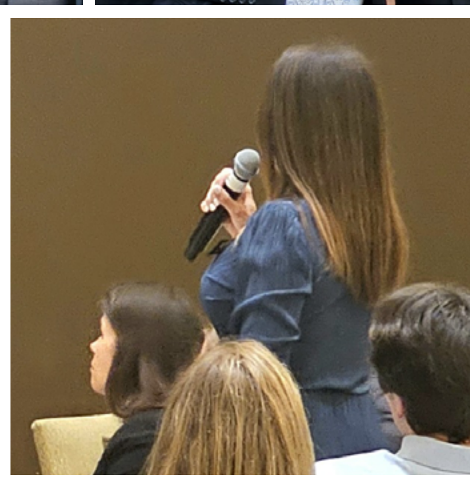

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infringement as a cause of action."); KM Strategic Management LLC v. American Cas. Co. of Reading PA, 156 F.Supp. 3d 1154, 1160-1161 (C.D. Cal. 2015) (finding a "particular paragraph" in the underlying complaint created potential coverage for defamation despite the absence of causes of action for slander or libel).

Evaluating whether the duty to defend is triggered requires a liability insurer to conduct a rigorous investigation, filtering every factual allegation through the policy's myriad coverage grants to identify any potential for covered liability. It is not surprising, particularly in complex business litigation, that insurers often get it wrong.

When a wrongful denial goes unchallenged, the insurer incurs no penalty whatsoever—to the contrary, it profits. Meanwhile, the policyholder is left without the insurance protection it paid for, at times with devastating consequences.

C. Statute of Limitations

The limitation period for breach of the duty to defend is four years. See Cal.

Code Civ. Proc. § 337. Recognizing the importance of the duty to defend, as well as its continuing nature, the California Supreme Court has held that this limitation period is subject to equitable tolling. See Lambert v. Commonwealth Land Title Ins. Co., 53 Cal.3d 1072, 1080 (1991). Specifically, even though the action against the insurer accrues upon the refusal to defend, the limitation period is tolled until resolution of the underlying action. Id.

This tolling rule has also been applied to a claim that the insurer's wrongful denial breached its implied covenant of good faith and fair dealing. See McGranahan v. The Ins. Corp. of New York, 544 F.Supp.2d 1052, 1063 (E.D. Cal. 2008) (finding "that the two-year statute of limitations for [the insured's] claim for bad faith and fair dealing was equitably tolled until entry of final judgment").

D. Damages For Breach Of The Duty To Defend

The potential damages recoverable for breach of the duty to defend include the defense fees and costs incurred, "bad faith" damages, and punitive damages.

While beyond the scope of this article, the insured may also be able to recover from its insurer the amount of any settlement it reached or judgment it paid.

1. Defense Fees and Costs

Where an insurer breaches its duty to defend, "the proper measure of damages is the reasonable attorneys' fees and costs incurred by the insured in defense of the claim." Marie Y. v. General Star Indem. Co., 110 Cal.App.4th 928, 960-961 (2003). An insured should also be able to recover prejudgment interest at the annual rate of 10% from the date of each invoice. See Cal. Civ. Code § 3289(b); Tradewind Prods., Inc. v. Hartford Fire Ins. Co., 2009 WL 10710831, at *4 (C.D. Cal. Mar. 30, 2009) ("[P]laintiff is entitled to prejudgment interest from the dates it received invoices from its attorneys until defendants tendered payment.").

2. Tort ("Bad Faith") Damages

If bad faith is established, i.e., if the insurer's position is found to have been unreasonable, then in addition to its defense fees and costs, an insured may also be able to recover any "tort" damages it has suffered as a consequence of the insurer's breach. See Campbell v. Superior Court, 44 Cal.App.4th 1308, 1319-1320 (1996). Such damages may include the attorney's fees the insured incurred compelling its insurer to pay the benefits due under the policy. See Brandt v. Superior Court, 37 Cal. 3d 813, 817 (1985).

3. Punitive Damages

If it can be proven by clear and convincing evidence that the insurer, in denying a duty to defend, has been guilty of oppression, fraud, or malice, the insured may also be entitled to recover an award of punitive damages. See Cal. Civ. Code § 3294(a); Tibbs v. Great American Ins. Co., 755 F.2d 1370, 1375 (9th Cir. 1985) ("[T]here is sufficient evidence to support a finding that Great American refused to defend Tibbs in bad faith and is guilty of oppression, fraud, or malice.").

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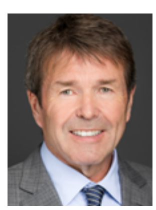
This article hopefully leaves business litigators with two key takeaways. First, in light of California's broad, policyholder-friendly "potential for coverage" standard, be skeptical of a liability insurer's assessment that it does not owe your client a duty to defend. And second, given the generous statute of limitations in California, your client may still have time—even long after the litigation has concluded—to challenge an insurer's wrongful refusal to defend and recover back the losses it incurred.



For more than three decades, Dominic Nesbitt's practice has focused exclusively on insurance recovery for commercial policyholders, with a particular emphasis on enforcing liability insurers' duties to defend and indemnify. A former chair of the San Diego County Bar Association's Insurance Section and a frequent author and speaker on insurance issues, Dominic previously co-founded Osborne & Nesbitt LLP and now serves as Of Counsel at Franklin Soto Leeds LLP. He holds an AV rating from Martindale Hubbell and has been recognized annually by Super Lawyers since 2007.

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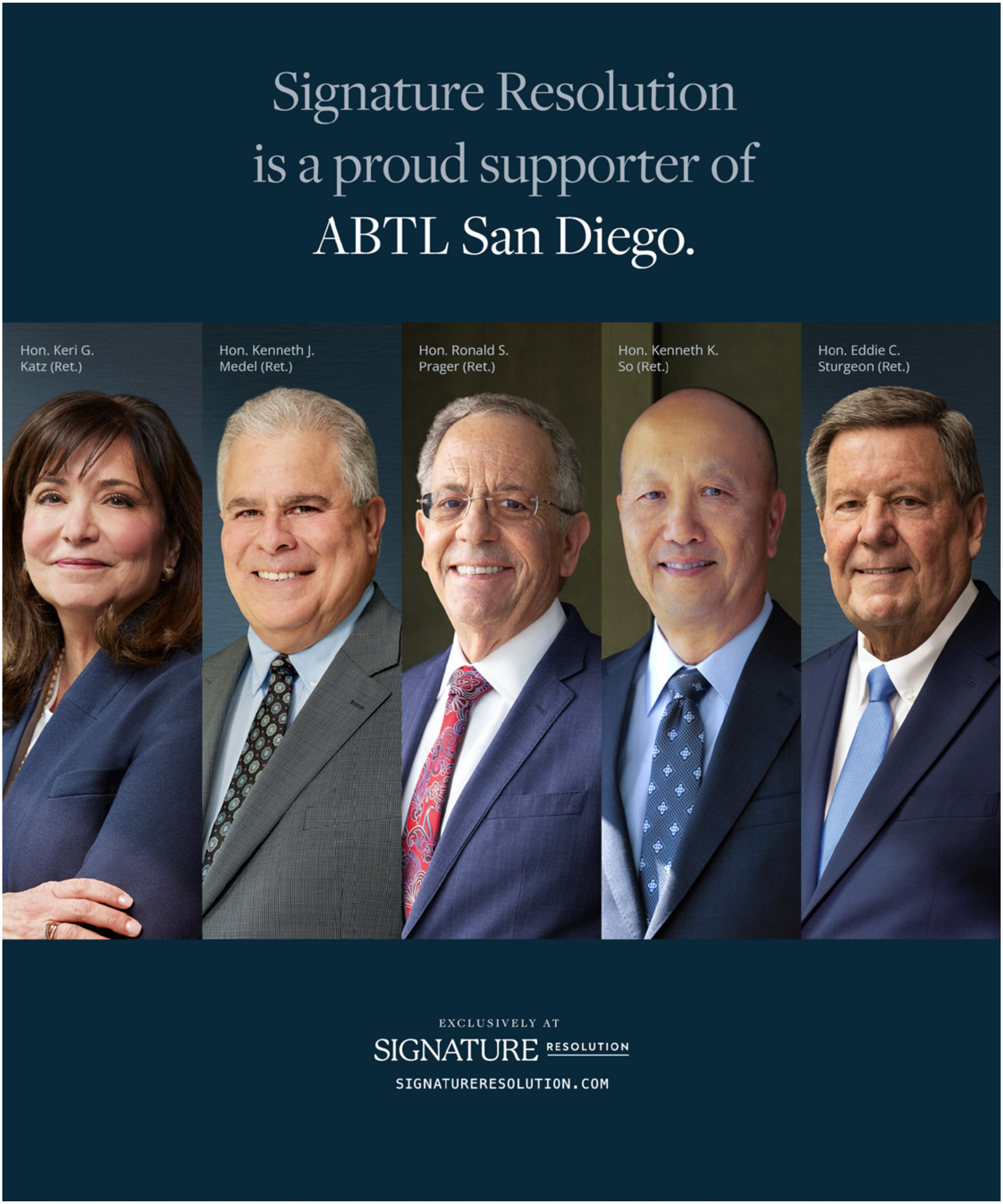

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California Litigation and Appellate Practice Update: Civil Procedure, ADR, and Attorney Conduct

By Marisa Janine-Page

CIVIL PROCEDURE AND APPELLATE PRACTICE

Appeal Deadlines and Service of Notice

Wing Inflatables, Inc. v. Certain Underwriters at Lloyd's (First District, Division One), addressed an issue that can trap even experienced practitioners: determining when the time to appeal begins to run. On the same day the court denied a motion for fees and costs, the court clerk emailed the parties a file-endorsed copy of the order with the message, "Please see the attached Order Denying Plaintiffs Motion for Attorney's Fees." Wing filed its notice of appeal nearly four months later. The court held that the clerk's email, which merely attached a file-endorsed copy of the order, did not constitute a notice of entry sufficient to trigger the shortened 60-day deadline for filing an appeal. **Practice Tip:** Do not assume that every electronic communication from a court triggers the 60-day deadline to appeal. Carefully review the applicable rules regarding service and notice of entry before calculating deadlines.

Sanctions for Frivolous Appellate Filings

In N.D. v. Superior Court (Fourth District, Division Three), the Court of Appeal imposed $25,000 in sanctions against an attorney for filing a frivolous writ petition that included unsupported accusations directed at the trial judge. The decision serves as a reminder that appellate advocacy requires professionalism and factual support—particularly when challenging judicial conduct. **Practice Tip:** Preserve credibility with reviewing courts by ensuring that allegations against opposing counsel, parties, or judicial officers are firmly supported by the record and applicable legal authority.

The Five-Year Rule and Oral Stipulation Pitfalls

In Randolph v. Trustees of California State University (Third District), the Court of Appeal held that the plaintiff's employment discrimination, whistleblower retaliation, and termination-related claims were barred by California's five-year dismissal statute (extended six months due to COVID-19 emergency rule 10). Plaintiff argued defendants' failure to object to a trial date set beyond the statutory deadline constituted an oral stipulation extending the deadline, but the court rejected the theory, holding that a defendant's silence or lack of objection to a trial date set beyond the statutory deadline does not, standing alone, constitute an oral stipulation in the absence of a written agreement. **Practice Tip:** Never rely on a party's silence or failure to object as evidence of an oral agreement to continue trial or toll the five-year dismissal statute. Ensure that extensions of trial dates are memorialized through a written stipulation or expressly reflected in a court order to preserve the record and avoid an unintended dismissal.

Procedural Fairness

In Prato v. Gioia (Fourth District, Division Three), the Court of Appeal reversed a fee award after finding that opposing counsel knew plaintiffs' attorney had been placed on involuntary inactive status by the State Bar and failed to provide statutory notice before obtaining a dismissal. **Practice Tip:** Before seeking dispositive relief against an unrepresented party, verify compliance with all statutory notice requirements.

ANTI-SLAPP DEVELOPMENTS

Scope of Protected Activity

Several decisions continued to refine the boundaries of California's anti-SLAPP statute.

In Clapkin v. Levin (Second District, Division Seven), the court held that claims involving shareholder oppression and election-related disputes concerning the management and control of a closely held corporation did not arise from protected petitioning activity within the meaning of the anti-SLAPP statute. The decision reflects the courts' continued efforts to distinguish ordinary business disputes from conduct genuinely protected by constitutional petitioning rights. **Practice Tip:** Before filing an anti-SLAPP motion, carefully analyze whether the plaintiff's claims arise from protected activity itself rather than merely referencing protected conduct in the factual background.

Retaliation and Protected Activity

In Pechkis v. Trustees of the California State University (Third District), the court held that retaliation-related claims were not subject to anti-SLAPP protections merely because they included allegations involving protected communications. The gravamen of the action remained the alleged retaliatory conduct. **Practice Tip:** Anti-SLAPP motions remain difficult to sustain where employment retaliation claims are based on both protected and unprotected conduct. Analyze the

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elements of each cause of action carefully and identify whether the moving party can establish that the claim arises exclusively from protected activity.

Elemental Analysis and Anti-SLAPP

In Semaan v. Mosier (Fourth District, Division Three), two married, tenured physics professors sued the Trustees of the California State University, alleging that Chico State retaliated against them after reporting discrimination and harassment. The court rejected the "gravamen" test and applied an elemental analysis framework. The court affirmed the denial of the anti-SLAPP motion, holding that the Trustees failed to meet their burden of establishing that the challenged causes of action arose exclusively from protected conduct. **Practice Tip:** Analyze anti-SLAPP motions on an element-by-element basis rather than through a generalized "gravamen" lens. Moving parties bear the burden of showing that the challenged claims arise exclusively from protected activity.

ARBITRATION AND ADR

Arbitration Agreements and Unconscionability

California courts continue to scrutinize arbitration agreements while attempting to harmonize state law with the Federal Arbitration Act.

In Stoker v. Blue Origin, LLC (Second District, Division Three), a former employee asserted FEHA claims. The employer moved to compel arbitration, while the employee argued that the arbitration agreement was unenforceable under the federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA) and unconscionable. The trial court denied the motion based on the EFAA. On appeal, the court affirmed on unconscionability grounds without reaching the EFAA issue. The case illustrates the increasingly complex interplay between federal arbitration policy and statutory limitations on arbitration agreements. **Practice Tip:** When litigating motions to compel arbitration involving FEHA, sexual harassment, or sexual assault claims, analyze both unconscionability and potential EFAA applicability. Either issue may independently defeat enforcement of an arbitration agreement.

Transportation Worker Exemption

In Vela v. Harbor Rail Services of California, Inc. (Second District, Division One), the court addressed the scope of the transportation worker exemption to arbitration. The plaintiff worked as a railcar repairman employed by a third-party contractor to inspect and repair freight cars at an off-site train yard. The freight cars were decommissioned and returned to active service only after the repairs were completed. The court held that the plaintiff was neither a "railroad employee" nor a "transportation worker" within the meaning of the FAA. The decision contributes to the developing body of case law defining the scope of the transportation worker exemption to mandatory arbitration provisions. **Practice Tip:** When litigating the FAA transportation-worker exemption, focus on the worker's actual duties, employer relationship, and connection to interstate commerce.

Non-Signatories and Arbitration

In Toothman v. Redwood Toxicology Laboratory, Inc. (First District, Division Four), an employee who initially worked through a staffing agency and was later hired directly by the company sought to compel arbitration under an agreement he never signed. The court examined multiple theories supporting non-signatory enforcement, including affiliate status, third-party beneficiary status, and equitable estoppel, but rejected each. The court further concluded that the asserted claims fell outside the substantive scope of the arbitration agreement. **Practice Tip:** Do not assume a non-signatory may enforce an arbitration agreement merely because the dispute relates to the contractual relationship. Courts will independently examine both enforceability and scope.

PROFESSIONAL RESPONSIBILITY AND ARTIFICIAL INTELLIGENCE

Artificial Intelligence continued its rapid integration into legal practice during the past year, but California appellate courts made clear that technology does not diminish an attorney's professional obligations. Several decisions serve as cautionary reminders that lawyers remain responsible for the accuracy of every filing submitted to a court.

Artificial Intelligence and the Duty of Competence

In Noland v. Land of the Free, L.P. (Second District, Division Three), the Court of Appeal affirmed $10,000 in sanctions against an attorney who filed an appellate brief containing fictitious authorities generated through artificial intelligence and referred the matter to the State Bar. The decision reflects the judiciary's increasing willingness to impose meaningful consequences when attorneys fail to verify citations and legal authorities before submitting briefs with the court. **Practice Tip:** Artificial intelligence may assist legal research and drafting, but it cannot replace independent verification. Every citation, quotation, and legal proposition should be reviewed against the original source before submission.

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Similarly, in People v. Alvarez (Fourth District, Division One), the Court of Appeal imposed original sanctions against an attorney who relied on artificial intelligence-generated authorities that included nonexistent quotations, a fabricated case, and citations to cases that did not support the propositions for which they were offered. The court emphasized that attorneys have a continuing duty to ensure the accuracy of representations made to the court, regardless of the technology used to generate them. **Practice Tip:** Before filing any pleading or brief prepared with the assistance of artificial intelligence, verify that every cited authority exists, every quotation is accurate, and every cited case actually supports the proposition for which it is offered.

Who is the Client?

In *De Meo v. Cooley LLP* (Fourth District, Division One), a minority owner of a limited liability company asserted fiduciary duty and fraudulent concealment claims against a law firm that represented the LLC and its majority owner in connection with a transaction. The Court of Appeal affirmed summary judgment in favor of the law firm, concluding that no actual or implied attorney-client relationship existed between the minority owner and the firm's attorneys. The decision reinforces the principle that representation of a business entity does not automatically create an attorney-client relationship with each individual owner, member, or shareholder. **Practice Tip:** Clearly identify the client at the outset of the representation. In later malpractice or fiduciary-duty litigation, carefully analyze whether an actual or implied attorney-client relationship existed.

Professional Judgment

Professional responsibility concerns were not limited to artificial intelligence. In County of Los Angeles v. Quinn Emanuel Urquhart & Sullivan, LLP (Second District, Division Eight), the Court of Appeal affirmed the denial of more than $1.7 million in attorney fees arising from a highly unusual dispute over legal services purportedly performed on behalf of Los Angeles County. The court affirmed the denial of fees based on the lack of contracting authority and failure to timely assert compulsory cross-claims, highlighting the consequences that may follow when counsel proceeds without securing the necessary authority or preserving related claims. **Practice Tip:** Significant consequences may follow when counsel proceeds without proper authority or fails to preserve procedural rights.

ATTORNEYS' FEES AND COSTS

Reasonableness of Fee Awards

In Tidrick v. FCA US LLC (Fourth District, Division Three), a Song-Beverly Consumer Warranty Act action, the appellate court reviewed a substantial reduction of a prevailing party's attorney fee request and concluded that the reduction was excessive. The court reversed and remanded, directing the trial court to properly apply any substantial negative multiplier to a presumptively reasonable lodestar and explain its reasoning as well as the "shock the conscience" standard governing fee reductions. **Practice Tip:** Fee motions should include detailed billing support and evidence connecting the work performed to successful claims. A thorough record remains the best protection against arbitrary reductions.

Prevailing Party Analysis

In Lampkin v. County of Los Angeles (Second District, Division Four), the court addressed the relationship between retaliation claims, the same-decision affirmative defense, and prevailing-party status. Although the plaintiff established whistleblower retaliation, the employer proved its same-decision defense. The court concluded that the employer's successful affirmative defense left the plaintiff with no relief and in the absence of any relief the employer prevailed for purposes of attorney fees. **Practice Tip:** Success on individual issues does not necessarily translate into prevailing party status. Evaluate fee exposure throughout litigation under the governing statutory framework.

TRENDS AND CONCLUSION

The past year's developments reveal a common theme: California courts continue to demand precision from litigants and counsel alike. Whether calculating appellate deadlines, preserving claims against dismissal, evaluating anti-SLAPP protections, enforcing arbitration agreements, or navigating professional obligations, courts increasingly expect attorneys to exercise diligence, professionalism, and sound judgment. Notably, several published decisions addressed attorneys' reliance on artificial intelligence-generated authorities, signaling increased judicial scrutiny of AI-assisted filings and reinforcing that technological innovation does not diminish counsel's ethical responsibilities. For trial and appellate practitioners alike, these decisions offer valuable guidance for avoiding procedural pitfalls and effectively advocating for clients in an evolving legal landscape.

Ms. Janine-Page is a Certified Appellate Law Specialist and the Founder of MJP Appeals and Litigation.

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12 Ways to Help You "Win" at Your Next Mediation

By Bill VanDeWeghe, Esq.

Whether you're representing a plaintiff, defendant, business owner or insurer, thoughtful preparation can significantly increase the likelihood of a successful outcome. The following checklist highlights 12 practical ways to get the most out of your next mediation.

1. If you need their money or approval, then get decision-makers involved early in the process.

Insurance carriers

- If you expect insurance carriers to participate in the settlement process, then:
  - Give plenty of notice so that internal timelines can be met and procedures can be followed
  - Provide detailed information
  - Make sure that the carrier is not surprised by the strategy or tactics you plan to use at the mediation session

Board members, owners, family members and financial partners

- Have they been informed about possible outcomes, risks, costs, and goals for the mediation? If the dispute poses a significant risk (existential?), then you should take steps to avoid surprises.
- Do they feel differently about risks than the executive, family member or general counsel who has been your primary point of contact?

A missing or uninformed decision-maker can delay or derail settlement efforts.

2. Talk about money with your client

What has been spent?

- Any cost/benefit/risk analysis should start with reviewing what has been spent. A sometimes painful, but necessary, discussion.

What is the range of possible outcomes?

- Are there any similar cases? Are there any verdicts or judgments that could help guide the client's expectations?
- Consider all the possibilities, including:
  - Is a Sec. 998 offer pending? Should one be made?
  - Is there any risk of being required to pay the other side's attorneys' fees and costs?
  - Is there any risk of punitive damages or claims that won't be covered by an insurance carrier?
  - Are there any liens that must be satisfied?
  - Could a bad outcome lead to the need for bankruptcy protection?
  - Are there any tax liabilities that need to be considered?

How much will be spent going forward?

- Can the client really afford a full-blown legal battle? Strong emotions shouldn't trump practical limitations.

Be ready to cut a check.

- If a case does not settle at the mediation, the client may be required to immediately cut a large check as a deposit for anticipated litigation costs. This can be a difficult discussion.

Mediation works best when decisions are grounded in economic reality—not just legal positions or strong emotions.

3. Discuss the delays and uncertainties that will follow if a settlement is not reached.

It is important to maintain a realistic view of what happens if the case doesn't settle.

- Months or years of delay just getting to trial, then appealing a verdict or ruling
- An outcome determined by a third party (judge, jury, or arbitrator)

Mediation provides control. Litigation surrenders that control to others.

4. How does the possibility of continuing or ending litigation affect the business?

Discuss how the dispute could have an impact on the following:

- Investors
- Plans to go public
- Potential acquisitions or the sale of a company
- Public relations or reputation
- The potential to create an unfavorable precedent
- The distraction, expense, lost time and stress that litigation can impose on owners and key executives, particularly in smaller organizations

In some cases, these factors outweigh legal outcomes in driving resolution.

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5. Have a solid understanding of the other side's position.

- What "ballpark" is the other side playing in?
- Are settlement expectations wildly misaligned?
- Are there fundamentally different views of the facts that need to be reconciled?

Knowing what to expect can avoid unnecessary impasses early in the process.

6. Discovery: *Formal discovery is focused on what you need in the courtroom; mediation is focused on resolution.*

- If your opponent has raised a challenging argument, or hints at damaging evidence, the mediation session can provide an opportunity to informally obtain information that would otherwise require months of expensive, formal discovery.
- Arm the mediator with the arguments and evidence that you want the other side to consider.
- Don't hold out for "perfect information" when sufficient information exists to support a settlement.
- "Smoking guns" are sometimes most effective when revealed during a mediation. If they will help to settle the case, use them.
- Experts: Before investing the money, evaluate whether they are needed to clarify, question or substantiate important issues that are critical to settlement discussions.
- Are you managing expectations properly?
  - Have you provided enough information to the other side to support your client's damages claims?
  - Are you appropriately discounting your damages based on the liability arguments you will face at trial or arbitration?

The most productive mediations often involve the informal exchange of information, saving a lot of time and expense for the parties.

7. Given potential costs and risks, be clear on overall goals.

- What does success look like?
- What is acceptable?
- What is off the table?

Without clarity on goals, even productive discussions can stall.

8. Use mediation briefs strategically.

- A clear, concise brief will help to frame the issues and set expectations.
- Consider whether **two versions** are appropriate:
  - One for the opposing party
  - One for the mediator, with additional sensitive/confidential information

A strong brief can accelerate progress before the mediation even begins.

9. Give the mediator a heads-up

Make sure that the mediator is aware of any unique considerations that could affect the mediation:

- Behavioral issues
- Personality dynamics
- Emotional or sensitive topics
- Financial or business limitations
- Concerns involving the case, opposing counsel or the client
- Challenges in the client's assessment of litigation risks and potential outcomes

The mediation will be more productive if the mediator knows what to expect and how to best communicate with the parties.

10. Be ready with creative alternatives.

Not all disputes are resolved through a payment. Consider:

- Alternative deal structures and business solutions (e.g., teaming, licensing, payments over time, etc.)
- If there will be any ongoing relationships

Often, the best outcomes come from expanding the options—not narrowing them.

11. Be ready with a draft settlement agreement.

It can be difficult after a long day of mediation discussions to start editing a settlement agreement. Both parties will save a lot of time and money if you prepare beforehand and are ready with an agreement that just requires some minor tweaks.

This is especially important if there are any unique considerations or terms that need to be taken into account to resolve the dispute.

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12 Ways to Help You "Win" at Your Next Mediation | *continued from page 13*

12. Treat mediation as trial preparation.

Being well prepared for mediation can strengthen your trial or arbitration posture. It can:

- Clarify themes
- Test arguments
- Reveal strengths and weaknesses

Even if the case does not settle, the process can add value.

Final thoughts

Mediation is an important strategic opportunity. The parties who get the most out of it:

- Prepare thoughtfully
- Align internally and have the difficult discussions with the client before the session begins
- Engage realistically
- Remain open to both legal and business solutions

The parties who achieve the best outcomes are typically those who arrive prepared—not only with a strong understanding of the legal issues, but also with a realistic assessment of the business, financial and personal considerations at stake.

When approached thoughtfully, mediation can do more than resolve a dispute. It can help parties avoid unnecessary costs, preserve important relationships and reach resolutions that better reflect their business objectives, financial realities and long-term interests.

Bill VanDeWeghe is a Mediator with JAMS and a long time ABTL San Diego Supporter and Sponsor

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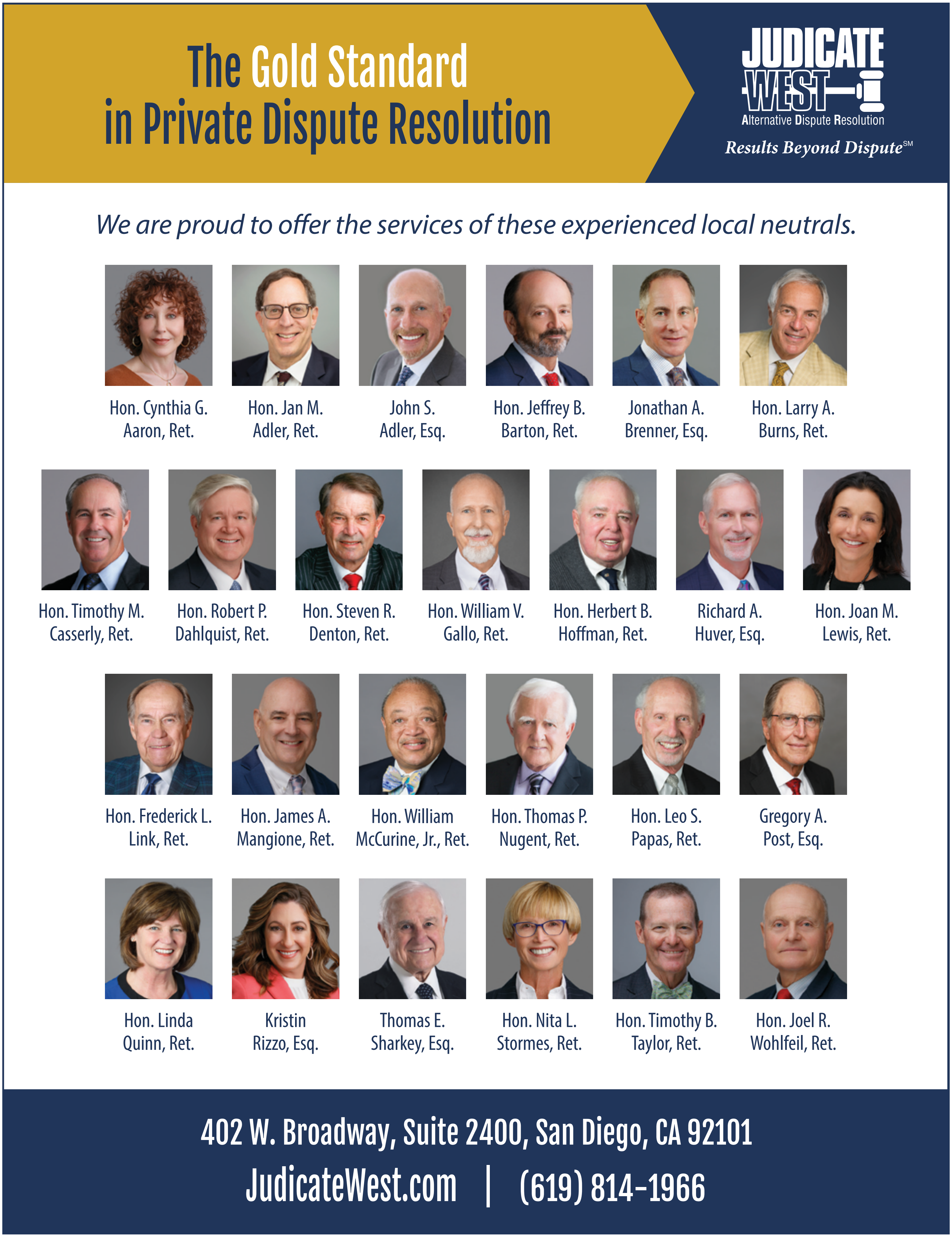

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Judge Todd W. Robinson: Practical Insights on Civil Motion Practice and Trial Advocacy

By Jared Paulson and Camille Savedra

United States District Judge Todd W. Robinson of the United States District Court for the Southern District of California brings a practical, experience-driven perspective to the bench, shaped by nearly three decades as a federal prosecutor. During ABTL's Judicial Brown Bag Event on May 7, 2026, Judge Robinson shared candid insights on civil motion practice, trial management, and courtroom presentation, offering attorneys practical guidance that can improve both advocacy and judicial efficiency.

From Federal Prosecutor to District Judge

Judge Robinson's legal journey began as a federal prosecutor with the United States Department of Justice in Washington, D.C. where he spent five years in the Narcotic and Dangerous Drug Section, handling cases throughout the country. In 1998, he joined the United States Attorney's Office for the Southern District of California in San Diego. In the aftermath of September 11, 2001, Judge Robinson briefly left the U.S. Attorney's Office to work as an Operations Officer for the Central Intelligence Agency before returning to federal prosecution in 2005. He remained with the office until his confirmation as District Judge. Over the course of his 27-year career as a prosecutor, he tried approximately forty felony jury trials to verdict. That trial experience now informs his approach to managing cases and evaluating advocacy from the bench.

Transitioning from Criminal to Civil Cases

Transitioning from criminal prosecution to presiding over civil matters required an adjustment. One of the most notable differences, Judge Robinson explained, is the court's ability to manage time. While criminal proceedings often allow less flexibility, civil cases give judges greater control over how trial time is allocated.

Judge Robinson has embraced that flexibility. By setting reasonable, but firm, time limits for presentations and witness examinations, he has found that attorneys almost always complete their cases within the allotted time. The result is a more focused presentation of evidence and a more efficient trial process, something both jurors and attorneys have come to appreciate.

Judge Robinson also noted that civil trials, particularly those involving intellectual property or other technical subject matter, present a different kind of challenge: educating the jury. Unlike many criminal cases, which often center on relatively straightforward factual disputes, civil cases can require jurors to grasp complicated concepts before they can even begin to evaluate the evidence. Judge Robinson emphasized that this places a "tremendous burden" on attorneys. Clear, organized, and accessible presentations are essential. Lawyers must ensure that jurors understand both the governing legal standards and the underlying facts so they can reach a reasoned decision based on the evidence.

Chambers Rules: Shaped by Experience

Like many judges, Judge Robinson initially developed his chambers rules by drawing on his colleagues' practices and his own experience. Over time, those procedures have been shaped and refined through practical experience. He recalled one trial in which the parties stipulated to the admission of a large volume of documents. The result was "binder after binder" of materials going back to the jury—many of which had never been meaningfully discussed in open court. Recognizing that this was unfair and potentially confusing for jurors, Judge Robinson adjusted his approach and amended his chambers rules. Now, if a document "doesn't see the light of day" before the jury, it does not accompany them into deliberations.

Civil Motion Practice: Every Motion Gets a Hearing

Judge Robinson takes an engaged approach to motion practice. Rather than routinely deciding motions on the papers, Judge Robinson generally sets all civil motions for hearing. This practice, he explained, serves multiple purposes. It requires him to fully engage with the issues, reinforces the principle that litigants deserve to be heard, and provides a degree of predictability that is often missing when motions are taken under submission.

To further that predictability, Judge Robinson aims to issue rulings within two weeks of a hearing. That commitment helps keep cases moving and provides attorneys with greater clarity as they plan next steps.

Civil Brief Writing: Concision, Precision, and Professionalism

When it comes to written advocacy, Judge Robinson values clarity and precision. He encourages attorneys to focus on the key issues and rely on the most authoritative precedent, particularly decisions from the Supreme Court and the Ninth Circuit. Overloading briefs with excessive citations, he noted, often weakens rather than strengthens an argument.

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Judge Todd Robinson... | continued from page 16

Equally important is professionalism. Judge Robinson cautioned against personal attacks and unnecessary hostility between counsel. Such tactics serve no purpose and can detract from the merits of the case. Effective advocacy, he emphasized, requires both zealous representation and professional respect.

Oral Argument: Know Your Weaknesses

In motion hearings, Judge Robinson expects attorneys to be prepared for focused and probing questions. While some advocates rely heavily on slide presentations, which can be helpful, he explained that his hearings are typically driven by specific legal concerns he has already identified.

The most effective attorneys, in his view, are those who understand not only the strengths of their position but also their weaknesses. Those weaknesses are often where the court's questions will be directed, and an attorney's ability to address them candidly and confidently can make a meaningful difference.

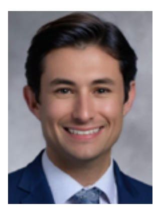
Courtroom Presence and Advocacy Style

Judge Robinson closed with a practical reminder that how an attorney carries themselves in the courtroom can be just as important as what they say. Drawing on his early experience in the Eastern District of Virginia, he noted that while some courts once required attorneys to remain close to the podium, his approach is more flexible, but not without limits.

What matters, he emphasized, is intentionality. Aimless pacing or wandering the courtroom, which he compared to a "track meet," can distract jurors and undercut an attorney's credibility. In contrast, purposeful movement and thoughtful positioning can reinforce key arguments and help guide the jury's attention.

He also encouraged attorneys to stand when addressing the court and jury. Even in a less formal courtroom, standing conveys confidence, presence, and respect for the proceeding. Judge Robinson observed that there is a "legitimate school of thought" that, when an attorney is speaking, it is effectively the lawyer's courtroom. The judge, in his words, is simply "calling balls and strikes."

With that perspective in mind, courtroom presence becomes a strategic choice. Whether standing or seated, still or in motion, attorneys should be deliberate in how they present themselves, ensuring that every aspect of their advocacy advances, rather than detracts from, their client's case.



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