CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

BULLETIN

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RECENT EMPLOYMENT LAW DECISIONS

MAY 2021 RULINGS

CALIFORNIA COURTS OF APPEAL

BANNISTER v. MARINIDENCE OPCO, LLC

Arbitration Cannot Be Compelled If the Petitioner Cannot Prove by a Preponderance of the Evidence that the Nonmovant Signed the Agreement

TRIAL COURT IS TRIER OF FACT AS TO WHETHER CONTRACT WAS SIGNED

Where the nonmovant contends she did not sign the arbitration agreement, the trial court can weigh all evidence, including declarations, other documents, and oral testimony, to reach a final determination. Civil Code section 1633.9(a) governs authentication of electronic signatures. Section

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LEGISLATIVE UPDATE

By Mariko Yoshihara, CELA Legislative Counsel & Policy Director

Mid-Session Update on CELA-Backed Bills

We are now halfway through the 2021 legislative cycle and on track to send the Governor four of our six sponsored bills by the end of September. Two of our sponsored bills were held in the Assembly Appropriations Committee, but will still be eligible to move forward at the beginning of next year. See below for an update on our CELA-sponsored bills and other priority bills we are tracking.

Mariko Yoshihara

- SB 331 (Senator Leyva) – This will expand the prohibition on non-disclosure agreements ("NDA's") in settlement agreements involving sexual harassment, sexual assault, and sex discrimination to cover settlement agreements involving all forms of harassment or discrimination. This bill will also expand the prohibition on overly broad confidentiality and non-disparagement clauses in employment agreements to cover workers who are required to sign these types of clauses as part of a severance agreement. Status: This bill passed the Senate 29-8 and is now on the Assembly Floor awaiting a floor vote.

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LETTER FROM THE EDITOR

By Tracy Fehr, Esq.

Many Thanks To The Bulletin Guest Editors

Once again this month, the Bulletin has been made possible by CELA's much-appreciated volunteer guest editors.

Thank you to June guest editors Kyra Subbotin, Lenny Sansanowicz, Christa Riggins, Stephen Ilg, and Sarah Dawley. ◆

Tracy Fehr

DECISIONS (From Page 1)

1633.9(a) allows proof "in any manner" that shows the electronic signature was the act of the person at issue. Evidence a person affixed an electronic signature can include security procedures—such as a unique log-in and password—that prove which person affixed a signature.

ARBITRATION MOTION WAS DENIED IN LIGHT OF CONFLICTING EVIDENCE REGARDING WHETHER EMPLOYEE OPERATED COMPUTER WHICH AFFIXED E-SIGNATURE

Although movant Marinidence (the employer) provided evidence the nonmovant Ms. Bannister (the employee) completed an onboarding process that included the arbitration agreement, the employee submitted evidence that "she did not touch the computer during that process and never reviewed or signed any arbitration agreement." Ms. Bannister reported that an HR manager completed the forms and merely asked for certain information such as W-4 withholdings. The HR manager had access to Ms. Bannister's log-in credentials and other information; as such, it was unclear whether Ms. Bannister took any action to affix an electronic signature on any agreement or whether she even reviewed the document. The trial court held the employer did not satisfy its burden of proof. The Court of Appeal affirmed because the ruling was supported by "substantial evidence."

CELA INVOLVEMENT

Congratulations to CELA member Allison Ehlert of Ehlert Hicks LLP!

COA First District, Div. 5. Filed 4/30/21, publication ordered 5/21/21. 64 Cal.App.5th 541. Opinion by Justice Burns.
https://law.justia.com/cases/california/court-of-appeal/2021/a159815.html

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ALPER v. ROTELLA

Parties Who Believe Their Arbitrator Is Impaired Must Make A Timely Objection Or They Forfeit The Right To Thereafter Challenge The Arbitration Award on That Ground

CHALLENGES TO AN ARBITRATOR'S CAPACITY ARE CODIFIED, STRICTLY CONSTRUED, AND MUST BE TIMELY MADE OR THEY ARE FORFEITED

Judges can be disqualified due to an "impairment" if they are unable to properly perceive the evidence or control the conduct of a proceeding. CCP §170.1. The same rule applies to arbitrators, provided an objection to the arbitrator is made before the conclusion of the arbitration proceeding. Arbitrators

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likewise have a continuing obligation to disclose anything that might affect their ability to conduct the arbitration, though there is no formal disclosure procedure.

WHERE AN ARBITRATOR WAS OPENLY TAKING PAIN MEDICATION AND DISCUSSING HIS ALLEGED "IMPAIRMENT" THROUGHOUT A NINE DAY ARBITRATION, THE LOSING PARTY CANNOT THEREAFTER CHALLENGE AN ADVERSE AWARD, PARTICULARLY WHERE THE RECORD DISCLOSED THE ARBITRATOR PAID CAREFUL ATTENTION TO THE EVIDENCE AND ISSUED A COGENT 21 PAGE OPINION

The trial court properly affirmed an arbitration award after a nine-day arbitration hearing before retired federal court judge George Schiavelli.. The arbitrator had openly taken pain pills throughout the hearing and complained of pain resulting from injuries sustained in a prior car accident. The arbitration transcript revealed that the arbitrator had paid close attention throughout the nine-day hearing, had asked pertinent questions of the parties and witnesses, and had then issued a 21-page detailed award against the Alper partners. Alper sought to vacate the adverse award with evidence that the arbitrator had been taking various pain medications and had admitted the drugs were enough to "knock a horse out." Applying the "you snooze, you lose" rule (a term used in the published opinion), codified in CCP §1281.91(d), the appellate court held that Alper had 10 days from notice of the arbitrator's alleged impairment to challenge his fitness to serve. And while failure to disclose the incapacity might have otherwise provided a ground for vacating the award, it did not here because the parties had actual notice of the drug use. They could not use the arbitrator's failure to provide a formal written disclosure of his prior accident and need for pain medication as a means to invalidate the award after the fact.

COA Fourth District, Div. 3. Filed 5/5/21. 63 Cal.App.5th 1142. Unanimous Opinion By Justice Moore.
https://law.justia.com/cases/california/court-of-appeal/2021/g058088.html

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ARRIAGARAZO v. BMW OF NORTH AMERICA, LLC

Parties Who Wish To Avoid Entry of Judgment If Their 998 Offer Is Accepted Must Include Language Requiring The Offeree To Dismiss Their Case As A Condition Of Acceptance

ABSENT EXPRESS LANGUAGE REQUIRING THE PLAINTIFF TO DISMISS THEIR CLAIMS IN EXCHANGE FOR THE PROFFERED AMOUNT, CCP SECTION 998 OFFERS WILL RESULT IN THE ENTRY OF JUDGEMENT UPON ACCEPTANCE

CCP section 998 offers must be carefully drafted, taking into consideration the statutory language that lets the offeree accept and then petition the court for entry of judgment, thereby making a record of a judgment against the offeror, as well as the amount of the judgment. It is not sufficient to include language in the 998 asking for a release of claims upon acceptance of the 998; the offeror must include as a term that the acceptance of the 998 offer will require the offeree to file a request for dismissal (as opposed to seeking entry of judgment).

CCP SECTION 998 TERMS MUST BE EXPRESS AND CANNOT CONTRADICT THE PLAIN LANGUAGE OF THE STATUTE, NOR WILL A COURT IMPLY TERMS INTO THE OFFER BEFORE IT

The plaintiffs brought a wrongful death claim against BMW arising from the death of their son two years earlier. BMW made a CCP section 998 offer of $15,000, and the terms of the offer required the plaintiffs to release all claims against BMW but made no mention of dismissing those claims, something that came up after BMW learned that the plaintiffs were intending to file a notice of entry of judgment. BMW had earlier told the plaintiffs that it wanted the settlement to be confidential. After judgment was entered, BMW petitioned to vacate the judgment, arguing that the judgment did not represent the terms of the 998, which required the plaintiffs to release their claims and implied that a request for dismissal, not a judgment, should follow. The trial court granted BMW's petition, and the plaintiffs appealed. The Court of Appeal reversed, holding that the statutory terms of

(Cont'd on Page 4, **DECISIONS**)

section 998 require the entry of judgment unless the parties expressly state in the 998 itself that a request for dismissal is contemplated. It did not matter that BMW demanded a confidential settlement after the 998 was proffered and accepted, nor did it matter that BMW then agreed to waive the confidentiality requirement if the plaintiffs agreed to simply dismiss the case, as opposed to seeking entry of judgment.

COA Third District. Filed 4/30/21, publication ordered 5/26/21. 64 Cal.App.5th 742. Unanimous Opinion By Justice Krause.
https://law.justia.com/cases/california/court-of-appeal/2021/c090980.html

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GRABOWSKI v. KAISER FOUNDATION HEALTH PLAN, INC.

An Arbitrator's Undisclosed Ex Parte Communication With One Counsel Regarding the Competency and Ability of Another Counsel Can Establish the Presence of Bias Warranting the Vacating of an Arbitration Award

DURING A FIVE-DAY ARBITRATION HEARING, THE ARBITRATOR HAD AN EX PARTE COMMUNICATION WITH DEFENSE COUNSEL

Claimant, Joanna Grabowski, brought a pro per suit against Defendants, Kaiser Foundation Health Plan et al., for negligent failure to diagnose a large, benign ovarian tumor and resultant severe pain. During the five-day arbitration hearing before arbitrator Byron Berry, Claimant inadvertently left a recording device on during a break while she was outside the room. The device revealed a conversation between the arbitrator and defense counsel discussing Claimant's ineffectual self-representation, the difficulty of the case, and the arbitrator's laughter. After losing the arbitration, Claimant appealed on several grounds, one of which was the arbitrator's engagement in an improper ex parte communication during the arbitration hearing which evinced a bias against Claimant. Further, the ex parte communication was not disclosed to Claimant. The trial court ruled that, while unethical, the communication did not merit vacating the arbitration award. The Court of Appeal reversed.

UNDER THE REASONABLE PERSON STANDARD, AN UNDISCLOSED EX PARTE COMMUNICATION CAN RAISE A DOUBT THAT THE ARBITRATOR IS CAPABLE OF BEING IMPARTIAL

Section 1281.9 of the California Arbitration Act required a neutral arbitrator to disclose all matters that could cause a person to doubt that the arbitrator "would be able to be impartial." See also §170.1, subd. (a)(6)(A)(iii). "Bias or prejudice towards the lawyer in the proceeding may be grounds for disqualification." § 170.1, subd. (a)(6)(B). The standard for disclosures is facts that would cause a reasonable person to doubt the arbitrator's ability to be impartial. §1281.9 subd. (a). The standard does not require a party to establish that the arbitrator "actually was influenced by bias." *Haworth v. Superior Court*, (2010) 50 Cal. 4th 372, 384. Here, the conduct of the arbitrator demonstrated bias because the communication revealed to Defense Counsel that the arbitrator believed that Claimant was not an effective advocate, that the facts were extremely difficult and that the arbitrator felt comfortable commiserating with Defense Counsel. While an arbitrator's individual beliefs are not necessarily grounds for disqualification, the decision to share those beliefs with Defense Counsel were sufficient for a reasonable person to believe the arbitrator was not impartial. Notably, the Court rejected Defendant's assertion that Claimant need not show a "nexus" between the award and the "undue mean used to attain it."

COA Fourth District, Div. 1. Filed 4/19/21, publication ordered 5/10/2021. 64 Cal.App.5th 67. Opinion by Justice Guerrero.
https://law.justia.com/cases/california/court-of-appeal/2021/d076968.html

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NUNN v. JP MORGAN CHASE BANK

The Parties' Oral Consent in Open Court to Extend a Trial Date Beyond the Statutory Dismissal Date Can Constitute an Oral Agreement for the Purposes of CCP Section 583.330 Without an Explicit Discussion of the Statutory Dismissal Date

PLAINTIFFS HAD THREE YEARS FROM JULY 18, 2019 TO BRING THEIR CASE TO TRIAL UNDER CCP Section 583.320

Plaintiffs Gerald and Judith Nunn brought suit against Defendant JP Morgan Chase Bank, for wrongful foreclosure, quiet title, and negligence in August 2011. In 2013, the trial court granted Defendant's motion for summary judgment. In 2016, the Court of Appeal reversed, stating Plaintiffs had a valid cause of action. A remittitur was filed in the Superior Court on July 18, 2016. Under CCP section 583.320, a Plaintiff is required to bring a case to trial within three years of the filing of remittitur. Therefore, the plaintiffs had until July 18,

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2019 to bring their case to trial. On May 16, 2019, at a case management meeting where Defendant requested additional time before trial to file a summary judgment motion, the parties agreed to a new trial date of January 13, 2020. Then, on August 30, 2019, Defendant moved to dismiss pursuant to CCP §583.320. The superior court dismissed the action.

AN ORAL AGREEMENT STIPULATING TO A TRIAL DATE BEYOND THE STATUTORY DISMISSAL DATE DOES NOT NEED TO EXPLICITLY REFERENCE THE DISMISSAL STATUTE

Under CCP §583.330 the parties may orally stipulate in open court, if entered in the minutes, to an extension of the statutory deadline for a case to proceed to trial. Case law regarding written stipulation permits parties to establish a later trial deadline without referring to the dismissal statute explicitly because a "stipulation to extend the time of trial beyond the [statutory] period necessarily waived the right to the dismissal of the action" under the statute. *Smith v. Bear Valley etc. Co.* (1945) 26 Cal.2d 590, 599. Following the case law regarding written stipulations, the Court of Appeal ruled that the parties' oral agreement extending a trial deadline beyond the statutory period without explicitly referring to the dismissal statute is sufficient under CCP §583.330. Here, the parties' explicit agreement to the January trial date constituted an implicit agreement to extend the statutory trial period. The Court relied heavily on the fact that Defendant explicitly requested the extension beyond the statutory dismissal date.

CORRECTIONS TO COURT MINUTES CAN BE MADE AT ANY TIME AND SHOULD BE MADE WHEN WARRANTED GIVEN THAT MINUTE ORDERS CANNOT BE ATTACKED COLLATERALLY ON APPEAL

The trial court minutes for the May 16, 2019 case management meeting stated that the parties "apprised" the Court that the matter was ready to be set for trial and trial was set. After the case was dismissed for failure to prosecute pursuant to CCP §583.320, Plaintiffs filed a motion to have the minutes reflect that the January 2020 trial date was set "by the agreement of the parties and to accommodate [Defendant's] request for a trial date sufficiently in the future to take deposition discovery and bring a motion for summary judgment." The court denied the motion on the grounds that it was untimely and procedurally improper. On appeal, the Court of Appeal found that corrections to court minutes may be made at any time. Additionally, the Court reasoned that any warranted correction "had to be made in the superior court because the veracity of a trial court's minutes cannot be collaterally attacked in the appellate court." Importantly, the question was not simply whether the minutes contained a clerical error, but also whether there were omissions in the record.

COA, First District, Div. 4. Filed 05/18/2021. 64 Cal.App.5th 346. Opinion by Justice Tucher.
https://law.justia.com/cases/california/court-of-appeal/2021/a160286.html

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RECK v. FCA US

Plaintiffs Pursuing Claims with One-Way Fee Shifting Should Not Have Attorney Fees Reduced Based on Rejected 998 Offer that Is Beaten by Settlement Amount

COURT ABUSED ITS DISCRETION IN DECLINING TO AWARD POST-OFFER FEES RECOVERABLE BY STATUTE WHERE SETTLEMENT EXCEEDED 998 OFFER

Plaintiff Reck sued regarding a defective vehicle pursuant to California's Song-Beverly Act, Civil Code section 1790 *et seq.* (aka the "Lemon Law"). She rejected a Civil Procedure section 998 settlement offer of $81,000 then settled mid-trial for $89,500. The trial court awarded fees but only for work performed before rejecting the 998 offer. "Specifically, the court found that the $8,500 difference between the rejected pre-trial April 2018 section 998 offer and the final settlement did not justify an award of attorney fees for any of the hours appellants' attorneys spent preparing for trial [i.e., after rejecting the 998 offer]."

In the context of civil rights or public interest litigation involving mandatory fee shifting statutes—like the Lemon Law at issue, it was an error of law for the trial court to reduce an attorney fee award on the basis of a plaintiff's failure to settle when the ultimate recovery exceeds the section 998 settlement offer.

POST-OFFER STATUTORY ATTORNEY FEES ARE NOT REDUCED BY REJECTED 998 OFFER WHERE PARTY OBTAINS A LARGER SETTLEMENT

Appellants recovered $8,500 more than the 998 offer, representing more than a 10 percent increase. Appellants' litigation also resulted in a multiplier added to their recovery of fees, with the trial court endorsing the view that FCA's willful failure to comply warranted the imposition of a civil penalty. Given these circumstances, counsel should be credited for any additional hours of time reasonably expended to achieve this superior result. Thus, in declining to award appellants any of the fees incurred in obtaining the final settlement, the court

(Cont'd on Page 6, **DECISIONS**)

abused its discretion by failing to base its award on "actual time expended" for hours that were "reasonably incurred."

COA First District, Div. 1. Filed May 24, 2021. 64 Cal.App.5th 682. Opinion by Justice Sanchez.
https://cases.justia.com/california/court-of-appeal/2021-a157966.pdf?ts=1621888536

SALAZAR v. SEE'S CANDY SHOPS, INC.

Court of Appeal Strains to Apply Werdegar Rebuttable Presumption; Class Certification Denied for Failure to Establish Common Proof

On February 25, 2021, the California Supreme Court, in an opinion written by Justice Goodwin Liu, *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, adopted the rebuttable presumption that Justice Kathryn Werdegar discussed in a concurring opinion in the seminal case, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 ("*Brinker*"), regarding noncompliant meal periods: "Employers…have an obligation both to relieve their employees for at least one meal period for shifts over five hours…*and* to record having done so…If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." *Brinker*, supra, 53 Cal.4th at 1052-53 (conc. Opn. of Werdegar, J.) (emphasis in original). In *Donohue*, Justice Liu found that if time records showed meal period violations, then a rebuttable presumption that the meal period obligation had not been met arose at summary judgment.

Salazar is the first post-*Donohue* case to address noncompliant meal periods, but at class certification. Plaintiff, a retail store employee, alleged she and others similarly situated did not receive second meal periods when they worked shifts of more than ten hours. Although Defendant had a policy requiring second meal periods for work shifts greater than ten hours, it also had a policy that its managers assigned meal and rest periods on a scheduling form, and the preprinted form did not include a column to note whether the employees had been scheduled a second meal break. The company's expert analyzed the time data from the Kronos time system and found 3,351 shifts greater than ten hours during the relevant period (approximately 0.3 percent of all work shifts) worked by 833 employees, and approximately 76% of all work shifts over 10 hours did not have a recorded second meal break. (The Court of Appeal also noted that about 43% of the 833 employees did take a recorded second meal period.)

The Court of Appeal affirmed the trial court's denial of class certification, finding substantial evidence supported the conclusion that the trial court did not abuse its discretion in holding the analysis required too much individualized inquiry and therefore Plaintiff could not establish that common questions of law or fact predominated. The Court of Appeal held that although "a high percentage of shifts over 10 hours included no second meal break," the trial court reasonably "inferred from the fact that many employees recorded a second meal break that 'at least some' employees were offered such a break." In addition to the statistical data, the Court found persuasive the declarations from Defendant's managers, even though the appellate court acknowledged the declarations "were general and did not explain the specific mechanism through which See's provided a second meal break." The appellate court found logical the trial court's inference that if at least 24% of the work shifts included a second recorded meal break, then it seemed "unlikely that such a high percentage of employees would have been able to take second meal breaks unilaterally without the support of their managers" and therefore Defendant had substantially complied with its obligation. In other words, both the trial court and the Court of Appeal placed greater weight on the 24% of employees who had recorded a second meal period than on the 76% of employees who had not.

Despite the acknowledged Werdegar rebuttable presumption in *Donohue* that arises merely from the employer's failure to record having provided all required meal periods, the Second District reiterated the reasonableness of the trial court's inference that a "significant number of employees" would need to testify at trial to determine whether Defendant consistently applied a practice of denying second meal periods. Though Plaintiff argued that she did not intend to introduce such testimony, the Court of Appeal found Defendant would be allowed to introduce the testimony simply "to rebut [Plaintiff's] claims," not Defendant's records, and therefore denial of class certification was proper.

The Court of Appeal further reasoned that Defendant's potential affirmative defense that the employees who did not record their second meal periods had waived such meal breaks was sufficient to preclude certification and elected not to disturb the trial court's discretion: "In deciding whether to certify a class, the trial court could not limit its focus only to Salazar's proof if doing so meant that See's would be precluded from presenting evidence supporting a potentially meritorious defense." As such, the appellate court affirmed the trial court's ruling that Plaintiff's trial plan was inadequate for having failed to adequately manage the potential individual issues that could arise from Defendant asserting its affirmative defenses.

(Cont'd on Page 7, **DECISIONS**)

COA, Second District, Division 2. Filed 4/26/21. 64 Cal. App.5th 85. Opinion by Presiding Justice Elwood Lui.
https://law.justia.com/cases/california/court-of-appeal/2021/b300778.html

SMITH v. BP LUBRICANTS USA INC.

Non-Employing Entities and Persons May Be Liable Under the FEHA For Aiding and Abetting Discrimination, Which Requires a Showing of Concerted Activity Between the Employing and Non-Employing Parties

Plaintiff Robert Smith's employer, Jiffy Lube, held a presentation for its employees about a new Castrol product. A Castrol employee led the presentation. Smith alleged that the Castrol employee made racist and offensive comments during the presentation, including stating that he would not want Smith's "banana hands" on his car and that he could not see Smith. Thereafter, Smith filed a lawsuit against Castrol, and its employee, for harassment under the Fair Employment and Housing Act (FEHA), for discrimination under the Unruh Act, and for intentional infliction of emotional distress (IIED). Castrol demurred, and the trial court sustained the demurrer without leave to amend.

The Court of Appeal affirmed the trial court's holding as to Smith's FEHA claim. In doing so, the Court of Appeal held that while individuals and entities who do not employ the plaintiff could be liable under the FEHA, there must be a showing that such persons aided and abetted workplace discrimination. The Court of Appeal explained that liability under FEHA for aiding and abetting required a showing of concerted activity between the employing and non-employing parties, which Smith had failed to establish.

The Court of Appeal reversed as to Smith's IIED and Unruh Act claims. On the IIED claim, the Court of Appeal held that reasonable minds may differ, and that rational jurors could find the comments extreme and outrageous. As to the Unruh Act claim, which is confined to discrimination against recipients of a business establishment's goods, services, or facilities, the Court found that Castrol could be liable because the purpose of the presentation was to promote Castrol's product.

COA Fourth District, Division 2. Filed 5/12/21. 64 Cal.App.5th 138. Opinion by Justice Codrington.
https://cases.justia.com/california/court-of-appeal/2021-e073174.pdf?ts=1620862530

SONOMA LAND TRUST v. THOMPSON

Attorney Fee Awards Need Not Be Reduced by Amounts Paid By an Insurance Policy. The Fact that a Case is Partially Contingent Does Not Eliminate Contingent Risk as a Factor in the Lodestar Calculation Noneconomic Damages

A family and their corporation (the Thompsons) owned land subject to a conservation easement (a voluntary agreement that permanently limits land use for environmental reasons) granted to The Sonoma Land Trust (Trust). The Thompsons violated the easement by, among other things, uprooting and killing mature oak trees, grading parts of the land, and bulldozing a new road.

The Trust filed a lawsuit seeking damages and injunctive relief under the terms of the easement. The trial court found the Thompsons liable for the harm to the property and awarded the Trust $575,899, of which $318,870 was for the cost of restoring the property. The trial court also awarded $2,961,264.28 in attorney fees and costs. The Thompsons appealed the trial court's award of attorney fees. The Court of Appeal affirmed the fee award.

On appeal, the Thompsons argued that because the Trust's insurance paid $500,000 in fees, the trial court was required to deduct that amount from the lodestar. The Court of Appeal disagreed, noting that the "trial court was not required to reduce the Thompsons' liability for attorney fees simply because the Trust had the foresight to purchase insurance." The Trust would not receive a double recovery because, under the insurance policy, it must reimburse the insurer for any damage award.

The Thompsons also argued that the trial court abused its discretion by applying a 1.4 multiplier for contingent risk because the case was only partially contingent. Again, the Court of Appeal disagreed, holding that "the fact that a case is partially contingent does not eliminate contingent risk as a factor."

COA First District, Div. 5. Filed 4/30/21. 63 Cal.App.5th 978. Opinion by Justice Burns.
https://cases.justia.com/california/court-of-appeal/2021-a159139.pdf?ts=1619820078

(Cont'd on Page 8, **DECISIONS**)

TOWNER v. COUNTY OF VENTURA

Motion To Strike Under Anti-SLAPP Statute (CCP 425.16) Fails If Defendant's Underlying Conduct Was Criminal

ANTI-SLAPP STATUTE DID NOT PROTECT COUNTY WHERE IT HAD DISCLOSED IN COURT FILINGS THE CONFIDENTIAL PERSONNEL RECORDS OF POLICE OFFICER, SINCE STATE LAW PROVIDED SUCH WILLFUL DISCLOSURE WAS A MISDEMEANOR

CCP 425.16 provides that a defendant may move to strike claims brought against it if it can show that the claim arises out of defendant's "protected activity." Court filings are generally considered protected activity, but the disclosure (as part of a writ petition) of statutorily-protected, confidential police personnel records fell outside CCP 425.16's protection because it was willful and therefore a misdemeanor.

THE FILING OF PAPERS IN A JUDICIAL ACTION IS GENERALLY CONSIDERED "PROTECTED CONDUCT" WITHIN THE MEANING OF CCP 425.16, UNLESS THE FILING OTHERWISE AMOUNTS TO A CRIME

Towner, a Ventura County DA Investigator, testified in an administrative action involving a co-worker. Thereafter, he was terminated based on his alleged dishonest testimony in that action. He sought reinstatement and the County ultimately filed a writ petition to block the Commission from reviewing Towner's request for reinstatement. As part of its (unsuccessful) writ, the County filed Towner's confidential personnel records. After the Commission reinstated Towner, he filed suit, alleging, among other things, that the County had violated his statutory rights by disclosing his confidential personnel records, in violation of Government Code 3300 (commonly referred to as the Police Officer's Bill of Rights). The County brought a successful anti-SLAPP motion, claiming its writ papers were absolutely privileged and such filings could not subject it to civil liability. The appellate court reversed, noting that while the filing of court papers is usually protected conduct, the County's underlying conduct – willful filing of confidential policy personnel records – was itself a misdemeanor and therefore the County's conduct was not protected by CCP 425.16.

COA Second Dist., Div. 7. Filed 4/28/21. 63 Cal.App.5th 761. Unanimous Opinion by Feuer.
https://law.justia.com/cases/california/court-of-appeal/2021/b306283.html

USHER v. WHITE

Individual Owner Is Not Liable for Labor Code Violations Under Labor Code Section 558.1 Unless the Owner Contributed to or Was Personally Involved in the Violations

SECTION 558.1 MAY HOLD OWNERS AND OTHERS LIABLE FOR COMPANY'S EMPLOYMENT VIOLATIONS

Employees sued entity employers and subsequently added individual defendants based on Labor Code section 558.1. Under Section 558.1, "an owner, director, officer, or managing agent" of an employer may be directly liable if that person, on behalf of the employer, "violates, or causes to be violated" certain wage and hour laws.

INDIVIDUAL DEFENDANT SHOULD ONLY BE LIABLE IF SHE WAS INVOLVED IN, OR CONTRIBUTED TO, THE LABOR CODE VIOLATIONS

No Court of Appeal opinion had addressed the circumstances wherein an "owner, director, officer, or managing agent" of an employer may be held liable under Section 558.1. The Court of Appeal interpreted the words "violates, or causes to be violated" as consistent with their ordinary meaning, to impose liability on an "owner" if the owner has personal involvement in the enumerated violations in section 558.1, or, absent personal involvement, has sufficient participation in the activities of the employer such that the "owner" may be deemed to have contributed to, and thus have "cause[d]" such violations. Contributing to the violations could be shown, for example, by proof of a supervisory role over those responsible for the alleged wage and hour violations.

The undisputed evidence showed that Defendant White: (1) never participated in a discussion regarding the classification of service technicians; (2) did not draft or edit the independent contractor agreements; and (3) was not a signatory to any such agreements.

The trial court granted summary judgment for individual defendant Ms. White, concluding as a matter of law she was not liable under Section 558.1 because she did not participate in the decision to classify plaintiffs as independent contractors. Accordingly, Ms. White did not "cause" any violation of the enumerated sections of the Labor Code.

Because the material facts were undisputed, it was appropriate for the trial court to decide as a matter of law that Ms. White was not liable under Section 558.1 because she

(Cont'd on Page 9, **DECISIONS**)

was not personally involved in the misclassification decision that underscored all claims at issue. Accordingly, the summary judgment order was affirmed.

CELA INVOLVEMENT

Congratulations to CELA member Jeffrey L. Hogue of Hogue & Belong!

COA Fourth District, Div. 1. Filed May 28, 2021. 2021 WL 2173167. Opinion by Justice Benke.
https://cases.justia.com/california/court-of-appeal/2021-d077133.pdf?ts=1622221395

VERCELES v. LA UNIFIED SCHOOL DISTRICT

Motion To Strike Under Anti-SLAPP Statute (CCP 425.16) Fails

THE EXISTENCE OF AN "OFFICIAL PROCEEDING" DOES NOT NECESSARILY TRANSFORM ANY CLAIM RELATED TO THAT PROCEEDING INTO AN ACTION FALLING WITHIN THE AMBIT OF THE ANTI-SLAPP STATUTE

CCP 425.16 provides that a defendant may move to strike claims brought against it if it can show that the claim arises out of defendant's "protected activity," including the conduct of an official proceeding. But the fact that an official investigation occurred as a result of plaintiff's alleged conduct does not automatically result in defendant's subsequent conduct being shielded under the anti-SLAPP statute.

AN ANTI-SLAPP MOTION WILL ONLY BE GRANTED WHERE THE PLAINTIFF'S CLAIMS DIRECTLY AROSE FROM DEFENDANT'S CONDUCT IN THE OFFICIAL PROCEEDING ITSELF, NOT CONDUCT OCCURRING PRIOR TO, OUTSIDE, OR INDEPENDENT OF THAT PROCEEDING

Verceles, a long-time LAUSD teacher, was placed on a three-year suspension after he was accused of physically abusing a student. Defendant LAUSD undertook an internal investigation, and Verceles filed a DFEH complaint. Upon completion of the investigation, LAUSD fired Verceles. He sued, claiming age and race discrimination and retaliation for filing a DFEH complaint. Among other things, his complaint alleged that LAUSD's investigation was inadequate. LAUSD filed an anti-SLAPP motion, claiming that its investigation was an "official proceeding" within the meaning of CCP 425.16, and because its decision to fire Verceles arose out of and as a result of its investigation, Verceles' claim should be dismissed. The trial court agreed. Under CCP 425.16, Verceles then had the burden of showing probability of success on his claims to defeat LAUSD's motion, the requisite second prong of analysis under CCP 425.16. The trial court found he could not carry that burden and granted the anti-SLAPP motion. The appellate court reversed, finding that the mere fact that an official proceeding (here, the LAUSD investigation) occurred before Verceles was fired did not mean that Verceles' claims arose from that investigation. The underlying claims focused on alleged systemic racism and ageism within LAUSD, not the investigation itself.

COA Second Dist., Div. 7. Filed 4/19/21, certified for publication 4/29/21. 63 Cal.App.5th 776. Unanimous Opinion by Justice Feuer.
https://law.justia.com/cases/california/court-of-appeal/2021/b303182.html

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NINTH CIRCUIT

MAGADIA v. WAL-MART ASSOCIATES, INC.

Ninth Circuit Holds PAGA Plaintiffs Lack Article III Standing if They Have Not Personally Suffered All Labor Code Violations Alleged in the PAGA Claim; Companies May Adjust Overtime Pay Retroactively Without Violating California's Wage Statement Requirements

Plaintiff filed a wage and hour class action with a PAGA representative claim (the Labor Code Private Attorneys General Act of 2004, or "PAGA") in state court and Defendant removed the case to federal court. The district court certified classes corresponding to the three non-PAGA claims: wage statement violations for failure to provide proper pay rate information; wage statement violations for failure to provide the pay period dates on final paychecks; and failure to pay adequate compensation for failing to provide required meal periods. Specifically, Plaintiff alleged that while Defendant adjusted its "regular rate of pay" (as articulated in California Labor Code section 510(a)) for the purposes of calculating overtime premium wages (which is well-settled law), Defendant failed to similarly calculate the "regular rate of compensation" (as provided in California Labor Code section 226.7(a)) for the purposes of calculating meal period premium wages owed for meal period violations. Plaintiff further alleged derivative wage statement violations, in that neither rate appeared on the wage statements from the pay periods in which the compensation was earned.

After granting Plaintiff partial summary judgment on the wage statement claims and holding a bench trial, the district court decertified the meal period class, finding Plaintiff had not suffered any meal break violation and therefore lacked standing. Nevertheless, the district court allowed the PAGA

(Cont'd on Page 10, **DECISIONS**)

penalties for all alleged Labor Code violations to proceed and awarded nearly $102 million in statutory and civil penalties. On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed Plaintiff lacked standing to bring the meal period claim and found that although Plaintiff had standing to bring the two wage statement claims (and therefore the classes were properly certified), Defendant had not violated California law, and therefore vacated the award.

The Ninth Circuit first spent a considerable amount of the opinion analyzing whether PAGA is a qui tam action before concluding that, while it shares several features with traditional qui tam actions, it is not a full-throated qui tam action, and therefore Plaintiff lacked standing to bring a PAGA claim for Defendant's alleged meal period violations since he had not personally suffered that harm. This holding contradicts clear California authority on this issue, including from the California Supreme Court. The Ninth Circuit remanded the PAGA meal period claim back to the district court with instructions to remand that claim to state court. The Ninth Circuit declined to decide whether Defendant had violated Section 226.7(c).

The Ninth Circuit next turned to the wage statement claims. As to the "regular rate of pay" issue, Defendant's compensation method was to pay an overtime adjustment on a quarterly basis by reviewing the prior six pay periods and calculating an average overtime pay rate based on the hours worked during those pay periods, then retroactively apply that differential in the form of a non-discretionary adjustment. The Ninth Circuit examined the relevant language of Labor Code section 226(a): "An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee… an accurate itemized statement in writing showing…(2) total hours worked by the employees, except [for exemptions]…and (9) all applicable hourly rates in effect during the pay period." Relying on an unpublished California appellate decision (and the unpublished portion of a published California decision), the Ninth Circuit held that Defendant's quarterly averaging of employee overtime compensation did not constitute an "applicable hourly rate[] in effect during the pay period" because the adjustment payment neither reflected the hours worked during the pay period in which the adjustment was paid (since Plaintiff had worked the hours over a period of six previous pay periods) nor did the adjusted rate reflect the hourly rate in effect during the pay period in which the company paid the adjustment. (The Court gave the example that in one quarterly payment, Defendant listed Plaintiff's hourly rate as $0.20 per hour, "Yet there was no pay period in which Magadia ever worked at an hourly rate of $.20," which meant he worked zero hours at the hourly rate stated on the wage statement.) The Ninth Circuit thus held Defendant complied with Section 226(a).

Regarding the second wage statement claim, that Defendant violated Section 226(a)(6) ("the inclusive dates of the period for which the employee is paid") by not providing the wage statement together with the final payment when Plaintiff was terminated in the middle of a pay period, the Ninth Circuit relied on existing California law, *Canales v. Wells Fargo Bank, N.A.* (2018) 23 Cal.App.5th 1262, 1271-72, in holding that Defendant properly elected to furnish the wage statement at the later of Section 226(a)'s requirement that an employer provide a wage statement "semimonthly or at the time of each payment of wages." Nothing in Section 226(a) requires an employer to provide a wage statement simultaneously with final payment of wages.

Ninth Circuit. Filed 5/28/21. -- F.3d --, 2021 WL 2176584.
Opinion by Circuit Judge Patrick J. Bumatay.
https://law.justia.com/cases/federal/appellate-courts/ca9/19-16184/19-16184-2021-05-28.html

- AB 1041 (Wicks) – This bill will expand the definition of "family member" for purposes of paid sick leave and family and medical leave under the California Family Rights Act, to allow workers to take time off to care for a "designated person." Status: This bill passed the Assembly 52-16 and is now in the Senate Appropriations Committee.
- AB 1119 (Wicks) – This bill will prohibit discrimination against employees based on their family responsibilities and will ensure working families have access to reasonable accommodations to deal with school and care closures. Specifically, this bill will add "family responsibilities" to the list of protected categories under the Fair Employment and Housing Act (FEHA) and will also provide employees with caregiving responsibilities with the right to reasonable accommodations to deal with school or care closures under FEHA. Status: This bill was held in the Assembly Appropriations Committee and is now a 2-year bill. The bill will be eligible to move forward next year.
- AB 95 (Low) – This bill will require employers with 25 or more employees to grant an employee 10 business days of unpaid bereavement leave upon the death of a family member. Employers with fewer than 25 employees will be required to grant 3 business days of bereavement leave. Status: This bill was held in the Assembly Appropriations Committee and is now a 2-year bill. The bill will be eligible to move forward next year.
- SB 321 (Durazo) – This bill will remove the unjust exclusion of domestic workers from California's health and safety laws. Status: This bill passed the Senate 30-10 and is now in the Assembly Appropriations Committee.
- SB 762 (Senator Wieckowski) – This bill will strengthen recently enacted legislation (sponsored by CELA) that established that an employer is in breach of the arbitration agreement (and waives its right to compel or proceed in arbitration) if they do not pay their arbitration fees within 30 days of the due date. To ensure compliance, this bill will require the arbitration provider to send both parties a copy of the invoice with the due date as soon as all filing requirements necessary to initiate an arbitration are met by the parties. This statement must include the full amount owed and the date when that payment is due. Additionally, should an extension of a due date for payment for continued arbitration be sought, the new due date must be agreed to by all parties. Status: This bill passed the Senate unanimously and is now on the Assembly Floor awaiting a floor vote.

Other Key Labor and Employment Bills

For a complete list of bills we are tracking, please visit www.cela.org/legislation.

SB 774 (Hertzberg D) Lawyer-client privilege: Department of Fair Employment and Housing. Summary: Would specify that the lawyer-client privilege applies to confidential communications between a lawyer of the Department of Fair Employment and Housing and a person who files a complaint with the department or another person on whose behalf a complaint is filed. The bill would state that these provisions are declarative of existing law and apply retroactively.

SB 665 (Umberg D) Employment policy: voluntary veterans' preference. Summary: This bill would enact the Voluntary Veterans' Preference Employment Policy Act to authorize a private employer to establish and maintain a written veterans' preference employment policy, to be applied uniformly to hiring decisions, to give a voluntary preference for hiring or retaining a veteran over another qualified applicant or employee. The bill would require a private employer with a veterans' preference employment policy to annually report to the Department of Fair Employment and Housing the number of veterans hired or retained under the preference policy and any demographic information about those veterans that the employer is already required to report, as specified.

AB 1576 (Committee on Judiciary) Superior court: lactation rooms. Summary: This bill would require the superior court to allow an attorney or other officer of the superior court access to a lactation room, or another location, as specified, that is provided to court employees with priority to court employees.

AB 286 (Gonzalez, Lorena D) Food delivery: purchase prices and tips. Summary: The bill would make it unlawful for a food delivery platform to retain any portion of amounts designated as a tip or gratuity. The bill would require a food delivery platform to pay any tip or gratuity for a delivery order, in its entirety, to the person delivering the food or beverage, and to pay any tip or gratuity for a pickup order, in its entirety, to the food facility.

LEGISLATIVE UPDATE (From Page 11)

AB 701 (Gonzalez, Lorena D) Warehouse distribution centers. Summary: This bill, among other things, would require specified employers to provide to each employee, defined as a nonexempt employee who works at a warehouse distribution center, upon hire, with a written description of each quota to which the employee is subject, including the quantified number of tasks to be performed, or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota. Establishes a rebuttable presumption of unlawful retaliation if an employer discriminates, retaliates or takes any adverse action against an employee, within 90 days of the employee requesting information or making a complaint related to a quota.

AB 1003 (Gonzalez, Lorena D) Wage theft: grand theft. Summary: This bill would make the intentional theft of wages including gratuities, in an amount greater than $950 from any one employee, or $2,350 in the aggregate from 2 or more employees, by an employer in any consecutive 12-month period punishable as grand theft. The bill would authorize wages, gratuities, benefits, or other compensation that are the subject of a prosecution under these provisions to be recovered in a civil action by the employee or the Labor Commissioner. This bill would specify that, for the purposes of these provisions, independent contractors are included within the meaning of employee and hiring entities of independent contractors are included within the meaning of employer.

SB 62 (Durazo D) Employment: garment manufacturing. Summary: The bill would prohibit any employee engaged in the performance of garment manufacturing to be paid by the piece or unit, or by the piece rate, except as specified. The bill would impose statutory damages of $200 against a garment manufacturer or contractor, payable to the employee, for each pay period in which the employee is paid by the piece rate.

SB 646 (Hertzberg D) Labor Code Private Attorneys General Act (PAGA): janitorial employees. Summary: This bill would except from the PAGA a janitorial employee, as defined, with respect to work performed under a valid collective bargaining agreement in effect any time before July 1, 2024, that contains certain provisions, including, among others, a grievance and binding arbitration procedure to redress violations that authorizes the arbitrator to award otherwise available remedies. The bill would authorize the exception until the collective bargaining agreement expires or until July 1, 2024, whichever is earlier, and would repeal the bill's provisions on July 1, 2024. ◆

NEW! CELA EMERITUS MEMBERSHIP

CELA is excited to introduce a new membership level – Emeritus – a membership to honor our long-standing, active and dedicated members who are leaving the practice of law. Emeritus members are invited to stay connected to the CELA Vibe, a spirit of camaraderie, selfless offers of assistance, respect for divergent views and a commitment to ensuring that CELA members have robust resources to muster the force to fight as a community for the rights of workers throughout California. We encourage retirees to continue to contribute their knowledge and volunteerism to CELA. Emeritus Membership is available to those who have retired from the practice of law and who plan to maintain an inactive status with the State Bar.

To submit your application, visit the CELA website (scroll to the bottom of the page for Emeritus membership).
Emeritus Members certify:

- They have retired from the active practice of law;
- They no longer maintain an active California State Bar or other bar license;
- They are not engaged in legal or quasi-legal employment or activity for compensation;
- They were not under discipline by any state bar at the time active status ended;
- They maintained and satisfied the criteria for CELA Regular Membership continuously for a minimum of 10 years prior to retirement;
- They are not members or participants in, or otherwise affiliated with, any defense-related organization;
- They will notify CELA within 14 days of any change in eligibility.

Emeritus Members can participate in CELA to the same extent as Regular Members with the exception that they may not serve on the Executive Board and shall not be entitled to vote on any committee matter. Listserv access is subject to the member executing CELA's listserv agreement and adhering to listserv protocol. Emeritus Members are entitled to attend CELA conferences and programs at discounted rates.

If you have any questions, please feel free to reach out to us: info@cela.org.

CELA MARKETPLACE

The "CELA Marketplace" is a new way for our attorney members to find the goods & services they need for success. Primarily, it is a business directory on our website featuring companies that see a mutual value in connecting with our members.
From language interpreters to judge analytics to financial services, we have been enrolling businesses to join the Marketplace – and will continue to do so.

The Marketplace program is the result of a strategic planning process over the course of two years involving the CELA Board, staff, and membership looking at our needs and our path forward.

Please visit cela.org/marketplace today! If you would like to refer a contact of yours to join the Marketplace, please share that link.

CELA MEMBER CASE VICTORIES

If you would like to include a recent victory in our listserv news and in the annual "CELA Victories!" presentations at the CELA Conference, please submit it here:

https://forms.gle/pUnBKfV3eHDPTx96A

SPECIAL REQUEST FOR MENTOR COMMITTEE MEMBERS

HELP US CARRY ON ONE OF CELA'S GREAT TRADITIONS: MENTORSHIP.
THE CELA MENTOR COMMITTEE IS RECRUITING NEW COMMITTEE MEMBERS.

Our committee work has grown significantly over the years. Our mentorship matching has generated hundreds of great connections between CELA stalwarts and newcomers as well as law students. The organization is very proud of this tradition and grateful for all the time and effort our Mentor volunteers have given to help continue CELA's central mission of raising the confidence and competence of practitioners who dedicate their lives to vindicating civil rights in the workplace.

We are particularly looking for new committee members in Northern California (although we welcome more Southern California members to join as well) who can help match mentees and mentors, recruit mentors and develop opportunities for mentors and mentees to commiserate. The committee meets the first Thursday of every month at 10:00am. We are looking for members of all experience levels to join the committee.

This is a great opportunity for those of you who want to be more involved in CELA and help new members connect with our more experienced members.

For more information....

If you have any questions, feel free to reach out to us. If you are interested in joining the committee, please contact Alexandra Menna at alexandra@cela.org

Alireza Alivandivafa, Co-Chair (aalivandi@gmail.com)
Mythily Sivarajah, Co-Chair (mythily@wmlayers.com)

If you are interested in volunteering to be a mentor or in being matched with a more experienced CELA member mentor, contact us at info@cela.org.

➢ WE NEED PRACTICE ARTICLES ➢

The CELA Bulletin is distributed to judges and attorneys statewide.
We are looking for scholarly articles on practice matters important to the plaintiff's bar.
It is a great way to get your name out there!
Your article should keep its audience in mind, and promote CELA's mission of advancing the rights of workers.

If you have something you'd like to submit to the Bulletin, please get it to me at tfehr@amfllp.com
We will give preference to articles that haven't been published elsewhere.

COMING EVENTS

July 9, 10 & 23, 24, 2021
7TH ANNUAL *VIRTUAL* TRIAL COLLEGE

Register Now:
www.cela.org

Webinar
JURY CONSULTANT ROUNDTABLE
Presented by CELA's Women's Committee

Exact Date TBD (August 2021)

Webinar
ADVOCATING FOR OUR ESSENTIAL WORKFORCE
Presented by CELA's Immigrant Employee Rights Committee

Exact Date TBD (August 2021)

October 27, 28, 29 & November 4, 5, 2021
CELA 34th ANNUAL *VIRTUAL* EMPLOYMENT LAW CONFERENCE

Registration coming soon!

2020 ANNUAL CELA *VIRTUAL* CONFERENCE
Recordings now available on the CELA website
Register for access to the recordings, materials, and CLE
www.cela.org

SAVE THE DATE

September 29, 2023 - September 30, 2023
CELA 36th ANNUAL EMPLOYMENT LAW CONFERENCE
Hilton San Francisco, San Francisco, CA
(skills seminar on Thursday, September 28)

NOW AVAILABLE ON-DEMAND

17th ANNUAL WAGE & HOUR SEMINAR - A 4-PART WEBINAR SERIES

CELA has wrapped up its 17th Annual Virtual Wage & Seminar series. If you missed any of this high-quality 4-part series, each webinar is now available On Demand for CLE credit. Click on the links below for details:

Annual Advanced Wage & Hour Update 2021
(2.0 hours General CLE Credit)
Emerging Wage & Hour Rights in the Era of COVID
(1.5 hours General CLE Credit)
Health and Safety in the Era of COVID for Wage & Hour Lawyer
(1.5 hours General CLE Credit)
Distress Call: How to Evaluate Claims of Financial Distress by Defendants in Wage-and-Hour Cases
(1.5 hours General CLE Credit)

Some quotes from attendees:

"A good timely seminar for practitioners as the landscape keeps changing and it remains unclear what courts will do in interpeting covid regulations, FEHA disability claims, etc."

"Great panel! Very informative and the presenters all really knew their stuff."

"This was one of the best panels I have seen recently. Just wonderful! Thank you so much. "

"One of the best webinars/seminars I've attended."

CELA THANKS ITS WEBINAR SPONSORS:

ADR Services, Inc. | Casetext | Class Action Plaintiff Finder | ADR Office of Michelle A. Reinglass | Judicate West | Klibanow Dispute Resolution | Lemke Mediation | Ratinoff Dispute Resolution | Simpluris | Steve Pearl Mediation