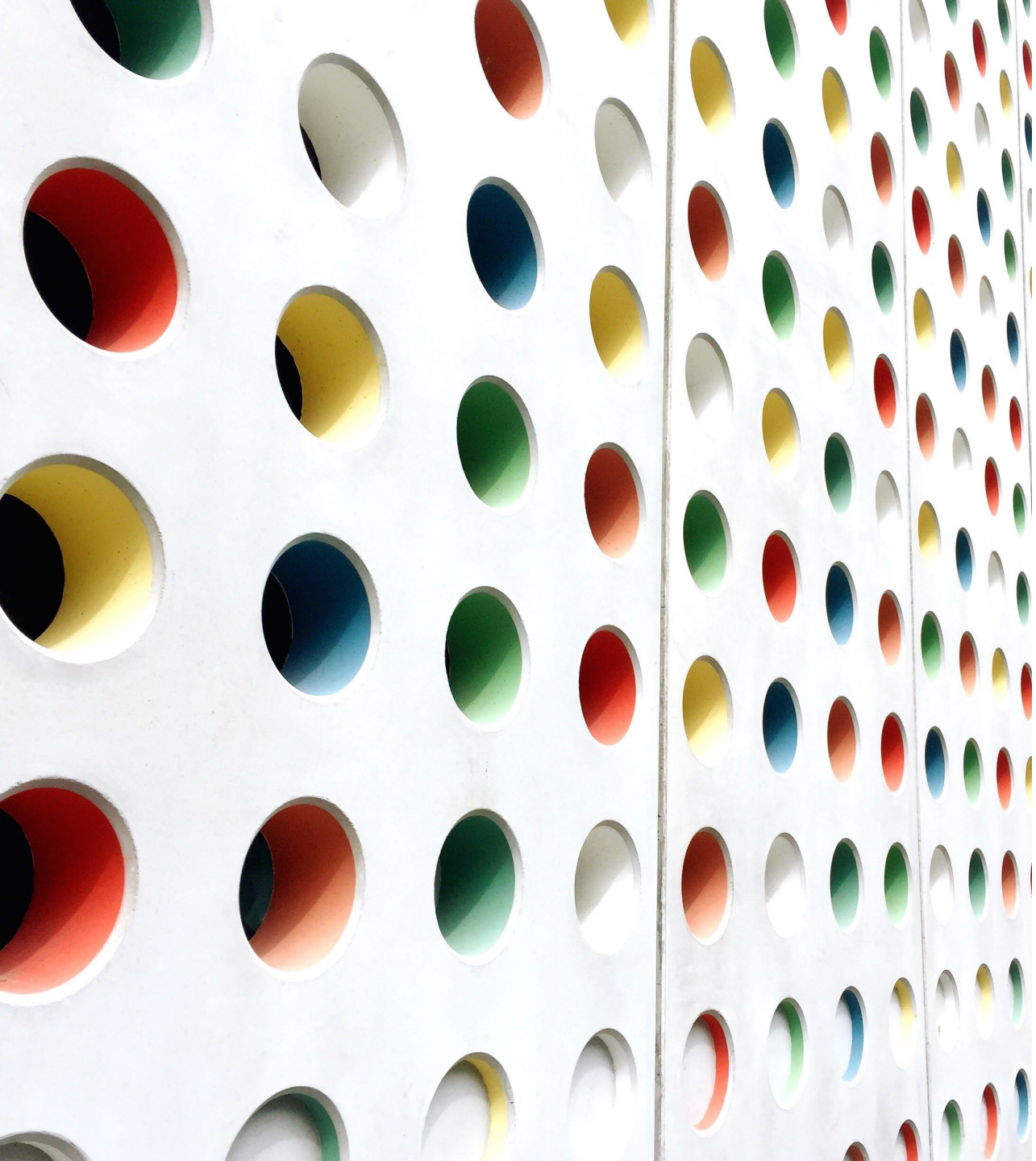


2024 Caselaw Update

APRIL 30, 2024

- JUDGE MICHAEL KELLEY
- JUDGE CRYSTAL SEILER
- COMMISSIONER KENNETH MCDANIEL

FAMILY LAW UPDATE

Comm. Kenneth R. McDaniel

N.M. V. W.K.

N.M v. W.K. (2024) 100 Cal.App.5th 978

Issued on March 19, 2024

First Appellate District, Division Three

Case Facts

- 23.02.07: PP seeks a DVRO and obtains a TRO against RP
- 23.03.15: Initial Hearing on DVRO; Court grants PP's Request for Continuance
- 23.03.29: RP files a Responsive Dec to PP's DVRO
- 23.03.30: PP files a Supplemental Dec alleging new facts in support of DVRO
- 23.04.04: Hearing on DVRO; Court denies RP's request for continuance; Court grants PP's DVRO and issues ROAH restraining RP.

- * PP = Protected Party / RP = Restrained Party

Is a Restrained Party entitled to a continuance "as a matter of course" under Fam.Code § 245, subd. (a).)?

"When a petitioner seeks a domestic violence restraining order, is a **respondent who has already responded to the petition entitled to a continuance** of the hearing on the request **"as a matter of course"? (Fam. Code, § 245, subd. (a).)** We conclude that the trial court **did not have a mandatory duty to grant a continuance under these circumstances**, and we further conclude that it did not abuse its discretion in proceeding with the hearing."

BR.C. V BE.C.

Issued on April 5, 2024

Third Appellate District

No. C097015.

Case Facts

- W filed a Request for DVRO alleging H committed acts of abuse against W and the parties' two three-year-old twins.
- W sought to introduce two surreptitiously-recorded conversations of H
  - (1) H yelled obscenities at W in the presence of the minor children.
  - (2) H refused to allow W out of H's vehicle while H continually cursed and berated W.
- H filed a Motion in Limine to exclude W's recordings based on his lack of knowledge or consent. W cited Evid.Code § 633.6. Court denied H's MIL.
- At the hearing, H did not object to the admission of W's recordings.
- Court granted W's DVRO and issued a ROAH restraining H.

May a party record acts of alleged abuse before filing a DVRO under Evid.Code § 633.6(b)?

- Evid.Code §633.6(b): "Notwithstanding the provisions of this chapter, and in accordance with federal law, a victim of domestic violence **who is seeking** a domestic violence restraining order from a court, and who **reasonably believes that a confidential communication made to him or her by the perpetrator may contain evidence germane to that restraining order, may record that communication** for the exclusive purpose and use of providing that evidence to the court."
- Does "who is seeking" require that the person have already filed a request for a DVRO before recording such communication?
- "We do not read this language to impose a requirement that a DVRO application be filed before recording evidence of domestic violence."

Holding

"Thus, the **primary inquiry** required by the statute is not whether the individual has formally requested relief from the court at the time of the recording, but rather **the intention of the individual at the time of the recording**. Specifically, the statute requires the victim to make the recording for the "**exclusive purpose and use of providing [relevant]" evidence in support of a restraining order, and with the reasonable belief that the recording is relevant**. (§ 633.6, subd. (b).) We read the statute to allow a victim to record confidential communications, so long as he or she intends to request a DVRO and reasonably believes that the communication may contain evidence germane to that request, regardless of whether a petition has yet been filed with a court."

"Thus, the statute was drafted (1) to aid domestic violence victims, by permitting them to submit relevant evidence in support of a restraining order without fear of legal retribution, and (2) to aid courts in making credibility determinations in difficult he-said, she-said scenarios, where direct evidence is often scarce."

Legislative Intent of Evid.Code § 633.6

M.A. V B.F.

M.A. v. B.F. (2024) 99 Cal.App.5th 559

Issued on February 5, 2024

Fourt Appellate District, Division Three

Case Facts

- 2015.Spring: M.A. introduced to B.F. at gym. No contact until…
- 2015.10: M.A. & B.F. see each other at gym. Kiss. Begin to text after gym.
- 2015.10.end: M.A. meets B.F. at gym and then go to H's house. Oral sex; no time together after.
- 2015.11.mid: Meet up at M.A.'s house. Oral sex; no time together after.
- 2016.02: Meet up at and kiss in hot tub.
- 2016.03: Meet up at gym, worked out together, and kissed "a lot."
- 2016.08: M.A. went to B.F's boxing match. M.A.'s mother came and took a photo with B.F. No kissing. M.A. did not go out with BF or help B.F. celebrate.

Case Facts

- 2016.08 - 2017.07: M.A. did not see B.F. MA. tried to make plans but B.F would decline.
- 2017.07.19: B.F. texted M.A. to meet up. Have sexual intercourse. No time together later that day.
- 2017.07.24: B.F. texted M.A. to meet up. They kiss in his car. B.F. asks M.A. is she likes her hair pulled. Without M.A. responding, B.F. "snapped" M.A. back. M.A. hears bones crack.
- 2017.07.25: M.A. diagnosed with "a concussion, "physical whiplash, similar to a car accident, . . . cervicalgia, [and] a muscle sprain."

Case Facts

- 2017.07.31: M.A. reported incident to campus security. No "trespass order" issued.
- 2017.07.31: M.A. files a police report.
- 2017:07.31 M.A. communicates with a prosecutor. "Friends for approximately two years" "special friend" "just wanted to be his friend" "never took me out on dates"
- 2018:03-07: M.A. saw staff psychologist at university. "special friend with special benefits"

Case Facts

- 2020.05: M.A. files complaint against B.F. (1) for DV under Civil Code §1708.6 & (2) sexual batter under Civil Code §1708.6.
- 2022.03: Trial: "M.A. acknowledged B.F. was never her boyfriend and she never referred to him as such. B.F. never asked her to be his girlfriend. She testified, 'the thing is, we weren't dating, we were friends with benefits.'" M.A.'s psychologist testified to same.
- 2022.05 "[T]he court concluded, '[p]laintiff did not prove the elements necessary for the plaintiff to show that the relationship fits the category of a dating relationship and therefore [is] actionable as a domestic violence cause of action.' The court entered judgment in B.F.'s favor".

“Dating Relationship” Under DVPA

- To establish tort of domestic violence, M.A. must prove B.F. and M.A. had the requisite relationship under Penal Code § 13700.
- To determine “dating relationship,” must consider DVPA. Under the DVPA, a "`dating relationship'" consists of "frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations." (Fam.Code § 6210.)
- COA referenced and analyzed:
  - (People v. Rucker (2005) 126 Cal.App.4th 1107, 1117 (Rucker).)
  - (Phillips v. Campbell (2016) 2 Cal.App.5th 844, 849 (Phillips).)

Substantial Evidence Supports No Dating Relationship between M.A & B.F.

COA concluded "substantial evidence supports the trial court's finding that the interactions between M.A. and B.F. **were not "frequent, intimate associations"** (Fam. Code, § 6210) within the plain meaning of those terms. Over the course of **19 months**, M.A. and B.F. saw each other in person **a total of eight times**."

"[A] reasonable trier of fact could find that three physical encounters over a six to seven-week period did not amount to frequent and intimate associations for purposes of Family Code section 6210. **We cannot conclude as a matter of law that three such interactions in such a time period amount to frequent and intimate associations within the meaning of the statute**."

"The trial court noted the **social media communications** in evidence were **"initiated mostly" by M.A. and reflected no amorous responses from B.F.**; indeed, some of his responses consisted of a single word."

Does a “friends with benefits” relationship constitute a dating relationship under FC § 6210?

- “Whether such a dating relationship exists is inherently a **fact-intensive inquiry**, not susceptible to resolution based on shorthand labels or descriptors. **We therefore do not hold a "friends with benefits" relationship is necessarily a dating relationship or that it can never be one**. We simply conclude, on the specific record before us, substantial evidence supports the trial court's finding that the relationship between plaintiff M.A. and defendant B.F. was not a dating relationship within the meaning of the relevant statutes.”

IRMO TARA D. V. ROBERT D.

In Re Marriage of Tara & Robert D. (2024) 99 Cal.App.5th 871

Issued on February 16, 2024

Fourth Appellate District, Division One

Case Facts

- 2019.11: H files a RFO for Custody of children
- 2021.10.14: Trial Readiness Conference. Hearing confirmed to start 2021.11.17.
- 2021.11.10: H's Atty files Motion to be Relieved. Court grants Mtn Shortening Time for a hearing to 2021.11.16. "Trial of 11/17/21 will not be continued."
- 2021.11.16: H files Responsive Dec agreeing that Atty-Client relationship has broken down & requests continuance of trial. H's Atty asserts ethical conflict in continued representation due to H's positions. Court grants Mtn to Withdraw. Court denies H's request to continue trial, and postpones trial one day "to get his ducks in a row."

Case Facts

- 2021.11.18: Trial Began with H representing himself.
- 2022.03: Each party filed written closing argument.
- 2022.05.16: Court issued proposed written statement of decision granting W sole legal custody and both parties joint physical custody of children.
- 2022.07.20: H hires new counsel.
- 2022.09.07: Court issues statement of decision and entered final custody orders.

"In ruling on a motion or application for continuance, the court must consider all the facts and circumstances that are relevant to the determination." (Rule 3.1332(d).) The factors that are typically significant are listed in the rule and include:

- "(1) The **proximity of the trial date**;
- (2) Whether there was any **previous continuance**, extension of time**, or delay** of trial due to any party;
- (3) The **length of the continuance requested**;
- (4) The **availability of alternative means** to address the problem that gave rise to the motion or application for a continuance;
- (5) **The prejudice** that parties or witnesses will suffer as a result of the continuance;
- (6) If the case is entitled to a preferential trial setting, the reasons for that status and **whether the need for a continuance outweighs the need to avoid delay**;
- (7) The **court's calendar and the impact** of granting a continuance on other pending trials;
- (8) **Whether trial counsel is engaged in another trial**;
- (9) **Whether all parties have stipulated to a continuance**;
- (10) Whether **the interests of justice** are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance; and
- (11) **Any other fact or circumstance** relevant to the fair determination of the motion or application."

CRC 3.1332(d) & Continuance Requests

Everything in Moderation, Including Consistency

Losing counsel shortly before trial often constitutes good cause for a continuance.

After deciding to permit counsel to withdraw, the court explained that it would not grant a continuance primarily because it had previously told the parties the trial would not be continued.

"Consistency may be a virtue, but as Ralph Waldo Emerson reminds us, 'A foolish consistency is the hobgoblin of little minds.' The appropriate exercise of judicial discretion requires the judge to reexamine tentative conclusions in light of changed circumstances."

Trial Court Did Not Make Adequate Inquiry

"Thus, we do not hold that the trial court was obligated to grant a continuance, or that a continuance of some particular length was required. **The problem here is that the court failed to conduct the necessary inquiry**. […] Without making this fundamental inquiry, **the court lacked the information necessary to balance the competing interests at stake**. It thus failed to properly exercise its broad discretion."

IRMO WHITMAN

In re Marriage of Whtiman (2023) 98 Cal.App.5th 465

Issued on December 29, 2023

First Appellate District, Division Two

Case Facts

- 1992: H & W marry & live frugally first 2 years DM; H has significant SP.
- 1994: H "terminated from his position" and forms own hedge fund.
- 2011: Hedge fund had grown cumulatively 2118.7% - at peak, nearly $300MM in assets.
- 2012: US Attorney in Southern District of NY charged H with crimes.
- 2012.02: SEC filed an enforcement action against H and Whitman Capital.
- 2012.03: All outside investors withdrawn leaving $29MM in equity belonging to H.

Case Facts

- 2012.04: W files for legal separation from H (later amended to dissolution action).
- 2013.01: H convicted on four counts of insider trading, sentenced to 24 months in jail, assessed $250k criminal penalty, and ordered to forfeit $935,306.
- 2013.03: H settled SEC action and paid a $935,306 civil penalty.
- 2013.06: Hedge fund granted leave to intervene in dissolution.
- 2017.03- : 2018.01 30-day bench trial re characterization and vision of assets

Characterization of Parties' Interests in the Hedge Fund

At time of trial, the parties' interest in hedge fund was valued at $31.6MM

H alleged $19MM of that value was traceable to his SP investments in 1994

- $500k investment in July 1994
- $300k investment in October 1994
- $100k investment in November 1994

Doug commingled the funds. Doug was unable to meet his burden of proof as to $500k and $100k investments by adequately tracing them to a SP source.

His testimony about the SP source was unreliable and not persuasive.

Tracing of $900k Withdrawal to House

Because the Trial Court found H adequately traced $300k of investments in hedge fund to SP source, the Trial Court next analyzed whether a $900k withdrawal the following year exhausted any SP interest in hedge fund and whether H could trace SP withdrawal to investment in CP residence.

Trial Court found that the $900k withdrawal exhausted any SP interest in hedge fund

Trial Court found that H deposited $900k into an SP brokerage account and failed to meet his burden of proof to trace his SP interest to any community purposes due to the absence of any documentary evidence at the time of trial.

Legal Fees and Fines Arising From H's Insider Trading

Who should be responsible for the financial repercussions of Doug's criminal conduct?

Trial Court allocated the $950k civil penalty and $290k in attorney fees from SEC case to Community and confirmed $9.4MM attorney fees and $250k penalty in criminal case to H as his SP debt. COA confirmed except it found the $950k civil penalty should have been confirmed to H as his SP debt.

Legal Fees and Fines Arising From H's Insider Trading

Section 2625 states: "Notwithstanding Sections 2620 to 2624, inclusive, **all separate debts**, including those debts incurred by a spouse during marriage and before the date of separation **that were not incurred for the benefit of the community, shall be confirmed without offset to the spouse who incurred the debt**."

Section 2627 provides in relevant part, "Notwithstanding Sections 2550 to 2552, inclusive, and Sections 2620 to 2624, inclusive, . . . **liabilities subject to paragraph (2) of subdivision (b) of Section 1000 shall be assigned to the spouse whose act or omission provided the basis for the liability, without offset**."

Section 2623 requires the court to confirm **any post-separation debts not incurred for the necessaries of that spouse or children of the marriage "without offset to the spouse who incurred the debt."**

Legal Fees and Fines Arising From H's Insider Trading

The $950k SEC penalty and $250k criminal fine are post-separation debts governed by Fam.Code 2623. Obligation arose when the criminal judgment was entered and the SEC settlement took place.

"Applying section 2623, then, which addresses post-separation debts, the conclusion that these are Doug's separate debts is not even debatable. Under section 2623, debts incurred after legal separation that are not for the necessaries of the spouse or children are separate debts of the spouse who incurred them. (See § 2623.) The parties agree that the criminal fines or civil penalties do not constitute the "common necessaries of life."

Legal Fees and Fines Arising From H's Insider Trading

- The question is whether the amounts Doug expended on attorney fees to defend himself in the criminal and SEC cases were incurred for the benefit of the community.
- Debt may be incurred for multiple purposes, some of which are for the benefit of the community and some which are not.
- "We hold only that where, as here, one spouse, expends an extraordinary sum that is out of proportion to any community benefit for purposes that are predominantly for his or her separate benefit, nothing in Family Code section 2625 requires the court to order the other spouse to share equally in that burden."
- "[T]he statute permits the trial court to allocate the attorney fees between the community and the spouse who incurred them in reasonable proportion to the value of the community and separate benefits the fees were expended to achieve."

Attorney Fees Incurred by Hedge Fund

- H used approximately $1.3MM of his own SP to pay hedge fund's legal fees
- In dissolution action, W sought accounting from hedge fund and freezing of hedge fund's assets. W issued subpoenas to numerous financial institutions with whom the hedge funds had business relationships. W filed a request for appointment of receiver to take over fund and either wind down or freeze all business accounts.
- Trial court evenly divided hedge fund attorney fees between W and H, as it found that the hedge funds attorney fees were incurred in part by W's actions and the community benefited.
- Issue is whether the party seeking to have the entirety of the debt confirmed to the other party proves no community benefit from the obligation.

IRMO LIETZ

In re Marriage of Lietz (2024) 99 Cal.App.5th 664

Issued on February 8, 2024

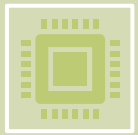
Fourth Appellate District, Division One

Facts

- W sought to introduce expert's testimony regarding value of residence
- W's expert wanted to testify that the lot size of the residence was larger than 9,000 feet based upon W's expert's review of a public document
- H's Atty objected to W's Expert's statement re: lot size as hearsay
- W's Atty argued "she's an expert, and she can testify as to what she reviewed."
- Court sustained hearsay objection absent the public record being independently admitted into evidence
- W did not independently admit the public record into evidence
- W appeals

Holding

"[T]he California Supreme Court explained—and limited—the situations in which an expert witness may relate hearsay evidence."



Although Sanchez was a criminal case, its intention was to "clarify the proper application of Evidence Code sections 801 and 802, relating to the scope of expert testimony." (In re Marriage of Lietz (Cal. App. 4th Dist., Div. 3, Feb. 8, 2024) 99 Cal.App.5th 664.

"When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth."

Holding

Expert may rely on inadmissible hearsay in forming opinion, but expert cannot be conduit to court for inadmissible hearsay.

Expert cannot relate case-specific facts asserted in hearsay statements unless "they are independently proven by competent evidence or are covered by a hearsay exception."

Expert can rely on inadmissible hearsay re general knowledge, but not inadmissible hearsay re specific facts

Sanchez is applicable to Family Law [IRMO Lietz (February 2024)]

***Confrontation clause issue from Sanchez inapplicable in civil cases

- "The square footage of the lot on which the home is situated was without doubt a **case-specific fact**. Thus, during redirect examination when Diana's counsel asked Burke if the lot size was larger than 9,000 square feet, counsel was eliciting case-specific facts. The trial court pointed out that Burke's testimony would relate to hearsay statements. Counsel did not disagree, but claimed the information was in public records. **Under Sanchez**, Burke could not be permitted to testify that the lot size was larger than 9,000 square feet unless counsel produced and was able to **admit into evidence the public record or other evidence that would have independently proven that fact**."

"[T]he Sanchez rule concerning state evidentiary rules for expert testimony applies in civil cases."

WOOD V SUPERIOR COURT

Wood v San Francisco County Superior Court (2024) 100 Cal.App.5th 717

Issued on March 14, 2024

First Appellate District, Division Two

Case Facts

- W filed a Petition for Name Change to change her name to "Candi Bimbo Doll".
- No opposition was filed and no hearing was held.
- Trial Court denied the Petition.
  - Trial Court found that the requested name change was offensive.
  - "Bimbo" has sometimes used to mean "prostitute" or "sexually attractive with limited intelligence."
  - Court recognized Tik-Tok trend of "Bimbofication" which means "self-love", but found the name may "result in an unwanted physical response against the owner of the name or others around him or her."

Denial of Name Change was Error

Code of Civil Procedure sections 1275 et seq. govern the process by which an individual can obtain a formal legal name change in California.

A change of name "may be denied *only* when there is a showing of 'substantial reason.' "

A person should be able to "adopt any name he or she chooses [citation] so long as the name is not adopted to defraud or intentionally confuse."

COA found that "In sum and in short, Bimbo is not a fighting word. It is not vulgar. And according to the trial court's description of TikTok and the professor's comments, it is not necessarily offensive."

Case Law Update: Criminal Law

Judge Crystal T. Seiler
San Luis Obispo County Superior Court

Topics

- Changes in the Law
- Evidence Code
- Homicide Resentencing
- Mental Health Diversion
- Dismissals and Judicial Discretion
- Motions to Suppress
- Gang Laws

Changes in the Law

Changes in the Law

Code	Change
Penal Code § 136.2	Court retains jurisdiction to modify CPO for life of order (up to 10 years)
Penal Code § 1172.1	Requires opportunity for victim to be heard in resentencing cases
Penal Code § 1192.7	Adds human trafficking of a minor for the purpose of a commercial sex act (PC 236.2(c)) to the list of serious felonies
Penal Code § 1001.36	Court can order firearm prohibition for mental health diversion period if it makes certain findings
Penal Code § 31360	All persons prohibited from possessing a firearm also cannot possess body armor

Changes in the Law, cont'd

Code	Change
Health & Safety Code § 11356.6	Grants of probation on specific fentanyl and synthetic opiate cases must require a program related to those offenses
Health & Safety Code § 11370.4	Adds fentanyl to the list of controlled substances eligible for weight enhancements
Vehicle Code §§ 4000, 5204, 40225	Prohibits enforcement of expired registration before the end of the month after registration expired unless stopped for any other violation
Vehicle Code § 10753	Misdemeanor to remove/alter/obfuscate VINs on catalytic converters or to knowingly possess 3+ catalytic converters with VINs removed/altered/obfuscated
Vehicle Code § 24020	Prohibits car dealers from selling vehicles with VIN-less catalytic converters

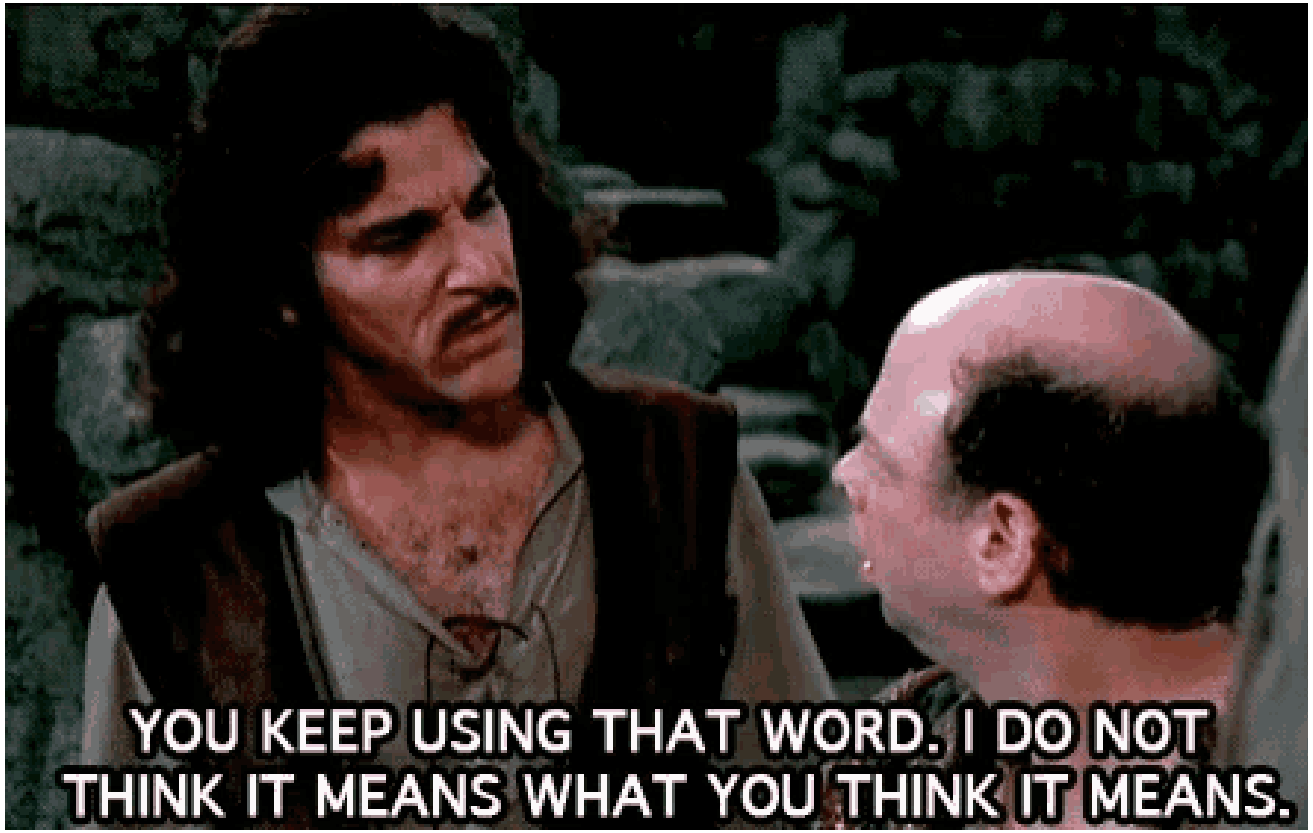
Evidence Code

“Fresh Complaint” Doctrine

People v. Flores (2024) __ Cal.App.5th __, filed 4/15/24 (CA 4/1 no. D083310)

- Claim on appeal: minor victim’s disclosure was not “fresh” enough
- History lesson:
  - 13th century: “hue and cry” rule
  - 1900s: Admit fact of fresh/recent complaint for limited purpose to show a complaint was made, not for the truth of the matter asserted
  - 1994: CA Supreme Court in *Brown* concluded “it is *not* inherently ‘natural’ for the victim to confide in someone or to disclose” assault immediately after it happens.
- Delay in disclosure generally goes to weight, not admissibility. Should not exclude solely because it isn’t “fresh” enough
- Still subject to Evidence Code section 352

~~“Fresh Complaint”~~ “Prior Disclosure” Doctrine



“With this understanding, we also find it appropriate to follow the lead of other jurisdictions by dispensing with the inapt and misleading ‘fresh complaint’ label. We instead encourage California courts and commentators to refer to this approach as the ‘prior disclosure’ doctrine.”

Prior Testimony & Witness Unavailability

People v. Ayala (2024) 319 Cal.Rptr.3d 856, filed 3/29/24 (CA 4/1)

- Intersection of hearsay, prior testimony, witness unavailability, and the Confrontation Clause
- Important witness testified at the preliminary hearing, DA could not locate at trial
- Trial court found due diligence, allowed the testimony, the defendant was convicted of murder
- Boundaries of EC 1291 when a witness is unavailable

Prior Testimony & Witness Unavailability

Factors to show reasonable diligence under EC 240(a)(5):

- Timeliness of search
- Importance of testimony
- Were leads to witness location reasonably explored *(not disputed)*

Timeliness of search	Importance of Testimony
Testified late 2017	Essential to prosecution case
DA lost contact pre-COVID	Only witness who knew Samuel
Set for trial April 2020, continued repeatedly until July 13, 2021	Percipient knowledge of events leading up to murder
Subpoena generated 7/6/21	Percipient knowledge of motive
2 weeks of diligent search	Differed from defendant's testimony
BUT nothing done to locate witness before then	Corroborated coconspirator

Kelly rule and new scientific techniques

People v. Rios (2024) 99 Cal.App.5th 1128, filed 2/23/24 (CA 4/3)

- Claim on appeal: Laser narcotics identification test (TruNarc—handheld laser device used in the field to test for presence of narcotics) was based on a new scientific technique and subject
- *Kelly* rule: expert testimony based on application of new scientific technique is not admissible in CA unless the proponent shows:
    1. The reliability of the technique is generally accepted in relevant scientific community;
    2. The expert testifying about the technique is properly qualified on the subject; and
    3. The person who performed the test in the particular case used correct scientific procedures.
- No case law on the technique and this is exactly the kind of evidence that conveys to a jury an "aura of certainty."
- Prosecution didn't meet burden with testimony from officer about the administration of the test.

Penal Code Section 1172.6

Resentencing for Homicide Convictions Based on Felony-murder/Natural and Probable Consequences Theories

PC 1172.6 Procedure

Petition:

- Previously convicted of murder/ attempted murder based on felony-murder or natural and probable consequences theory
- Could not now be convicted of murder/ attempted murder based on changes in the law, unless:
  - ✓ Actual killer
  - ✓ Aided and abetted with intent to kill
  - ✓ Major participant in underlying felony + acted with reckless indifference to human life

PC 1172.6 Procedure

Petition:

- Previously convicted of murder/ attempted murder based on felony-murder or natural and probable consequences theory
- Could not now be convicted of murder/ attempted murder based on changes in the law, unless:
  - ✓ Actual killer
  - ✓ Aided and abetted with intent to kill
  - ✓ Major participant in underlying felony + acted with reckless indifference to human life

Process:

1. Prima facie stage. Does the record of conviction show a petitioner is not entitled to relief?

2. Evidentiary hearing. Can use prior transcripts so long as they comply with the Evidence Code (no preliminary hearing hearsay) or present new evidence.

Prima Facie Hearing & Intent to Kill

People v. Curiel (2023) 15 Cal.5th 433, filed 11/27/23 (CASC)

- Issue on appeal: What is the effect of a jury's true finding on a gang-murder special circumstance (specifically, the intent to kill) at the prima facie stage?
- Undisputed that Curiel was not the actual killer
- The jury was instructed on many still-valid theories (express malice, implied malice, direct aider and abettor)… and on natural and probable consequences
- Issue #1: Jury verdict on the gang-murder special circumstance = issue preclusion.
    - *Hearsay: Effect of Sanchez on this?*

Issue #2: What does the jury finding mean?

Relevant to trial court consideration, but that finding alone does not conclusively establish the petitioner is not eligible for relief.

A quick reminder about hearsay and *Sanchez*

Experts can testify to:

- general knowledge hearsay
- opinions on facts established by witnesses with personal knowledge
- opinions based on hearsay (and in general terms that they relied on it)

They cannot testify to case-specific facts.

Prima Facie Hearing & Intent to Kill

PC 1172.6 – Other Cases of Note

Case	Holding
People v. Hill (2024) 100 Cal.App.5th 1055 filed 3/25/24 (DCA 2/2 – Los Angeles)	Petitioner ineligible for relief based on kidnapping felony-murder even though kidnapping wasn't a valid theory for it at the time of the offense (ex post facto doesn't apply)
People v. Lopez (2024) 99 Cal.App.5th 1242 filed 2/27/24 (DCA 5 – Tulare)	Elimination of natural and probable consequences doctrine did not abrogate doctrine of transferred intent
People v. Cunningham (B323640) filed 4/23/24 (DCA 2/6 – Ventura)	Petitioner ineligible for relief for provocative act murder
People v. Patterson (2024) 99 Cal.App.5th 1215 *People v. Fouse* (2024) 98 Cal.App.5th 1131	When relief is granted, the conviction must be redesignated to the felony on which the conviction was based
People v. Gomez (2024) 100 Cal.App.5th 778	CCP 170.6 challenge untimely when 1172.6 judge was the judge who took the guilty plea

Mental Health Diversion

Penal Code Section 1001.36 *et seq*

Mental Health Diversion Procedure

Step 1: Eligibility

1. Diagnosed with mental disorder as identified in DSM (but excluding antisocial personality disorder and pedophilia)
2. Mental disorder was a significant factor in the commission of the charged offense (shall find if diagnosis unless clear and convincing evidence it was not a motivating, causal, or contributing factor)

Mental Health Diversion Procedure

Step 1: Eligibility

1. Diagnosed with mental disorder as identified in DSM (but excluding antisocial personality disorder and pedophilia)
2. Mental disorder was a significant factor in the commission of the charged offense (presumed unless clear and convincing evidence it was not a motivating, causal, or contributing factor)

Step 2: Suitability

1. Mental health professional says symptoms will respond to treatment
2. Defendant consents to diversion and waives right to speedy trial*
3. Defendant agrees to comply with treatment*
4. Defendant will not pose unreasonable risk of danger to public safety as specified

* With exceptions for incompetence

Mental Health Diversion: Suitability

Sarmiento v. Superior Court (2024) 98 Cal.App.5th 882, filed 1/9/24 (CA 4/1)

Issues on writ of mandate: Was there sufficient evidence to support trial court's conclusion (1) the defendant's symptoms would not respond to treatment and (2) the defendant was a danger to public safety?

- Issue #1: No. Sarmiento was never treated for underlying mental disorders. Substance abuse treatment attempts ≠ mental health treatment.
- Issue #2: No. Statute requires unreasonable risk of danger to public safety because the individual is likely to commit a new violent super strike
    - PC 667(e)(2)(C)(iv)): sexually violent offense, specified child sex offenses, homicide or attempted homicide, solicitation to commit murder, assault with machinegun on peace officer or firefighter, possession of WMD, any strike offense punishable by life or death

Mental Health Diversion: Termination

People v. Hall (2024) 99 Cal.App.5th 1116, filed 2/22/24 (DCA 2/1)

Bases for terminating MHD (PC 1001.36(g)(1)-(4)):

1) Charged with additional misdemeanor allegedly committed during diversion and reflecting propensity for violence;
2) Charged with additional felony allegedly committed during diversion;
3) Engaged in criminal conduct rendering defendant unsuitable for diversion;
4) Mental health expert believes defendant is either (A) performing unsatisfactorily in assigned program or (B) gravely disabled

"Criminal conduct" demonstrated no longer willing to comply with treatment obligations and stopped consenting to diversion.

- Not deciding full scope, just that "criminal conduct" doesn't require super-strike risk assessment.

Dismissals & Judicial Discretion

Penal Code Section 1385

Dismissals & Judicial Discretion

Penal Code section 1385(c): The court shall dismiss an enhancement if it is in the furtherance of justice, unless prohibited by statute.

Specified mitigating circumstances:

- Application results in discriminatory racial impact
- Multiple enhancements in single case
- Enhancement results in sentence >20 years
- Current offense connected to mental illness
- Current offense connected to prior victimization or childhood trauma
- Current offense not a violent felony
- Defendant was a juvenile at time of current offense/priors triggering enhancement(s)
- Based on prior conviction >5 years old
- Firearm was inoperable or unloaded

Interpretations of PC 1385 (mostly (c))

Case	Holding
People v. Serrano (2024) 100 Cal.App.5th 1324 filed 3/28/24 (DCA 5 – Contra Costa)	PC 1385(c) does not apply to premeditated/deliberated finding for attempted murder (penalty provision, not enhancement)
People v. McDowell (2024) 99 Cal.App.5th 1147 filed 2/23/24 (DCA 4/3 – Orange)	PC 1385(c)(2) does not apply to PC 236.1(c) (penalty provision for human trafficking, not enhancement)
People v. Dain (2024) 99 Cal.App.5th 399 filed 1/31/24 (DCA 1/2 – Sonoma)	PC 1385(c) does not apply to strike priors (penalty provision, not enhancement)
People v. Superior Court (Woodward) (2024) 100 Cal.App.5th 679 filed 3/14/24 (DCA 6 – Santa Clara)	1385 dismissal by trial judge after two mistrials in 1992 murder case did not amount to an acquittal for double jeopardy purposes

Gun Enhancements & PC 1385

People v. McDavid (2024) __ Cal.5th __,
filed 4/29/24 (CASC no. S275940)

PC 12022.53(h): Court can strike/dismiss PC 12022.53 enhancements under that section per PC 1385

Tirado: Subd. (h) allows trial courts to substitute lesser included uncharged subsection within PC 12022.53.

- Example: PC 12022.53(d) [25-life] → PC 12022.53(b) [10 years]
- Example: PC 12022.53(d) [25-life] → PC 12022.53(c) [20 years]

McDavid: PC 12022.53(h) allows trial courts to strike a 12022.53 enhancement and impose a lesser included, uncharged enhancement outside PC 12022.53.

- Example: PC 12022.53(d) [25-life] → PC 12022.5(a) [3-4-10]
- Example: PC 12022.53(d) [25-life] → PC 12022(a) [1 year]

Motions to Suppress

Penal Code Section 1538.5

Search Warrants

People v. Helzer (2024) 15 Cal.5th 622, filed 1/22/24 (CASC)
Petition for certiorari filed with USSC 4/23/24

Issue on appeal (for our purposes): Does search exceeding scope of warrant justify suppression of the entire search under the exclusionary rule?

- Defendant bears burden to justify blanket suppression when there is a search warrant
- Limited issue: Not deciding whether the officers properly seized every item, but whether the unusual remedy of blanket suppression should be denied
- Holding: The remedy of total suppression may be appropriate in extreme circumstances of flagrant government misconduct, but the defendant has not demonstrated that here.

CA Electronic Privacy Act (CalECPA)

People v. Campos (2024) 98 Cal.App.5th 1281, filed 1/22/24 (CA 5)

PC 1546 et seq (CalECPA)

Protections for electronic communication-related searches with requirements that include

- Search warrants
- Notice
- Sealing of unrelated material

Remedy of suppression for anyone, regardless of traditional standing

CA Electronic Privacy Act (CalECPA)

People v. Campos (2024) 98 Cal.App.5th 1281, filed 1/22/24 (CA 5)

PC 1546 et seq (CalECPA)

Protections for electronic communication-related searches with requirements that include

- Search warrants
- Notice
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Remedy of suppression for anyone, regardless of traditional standing

Interpretation related to Facebook warrants

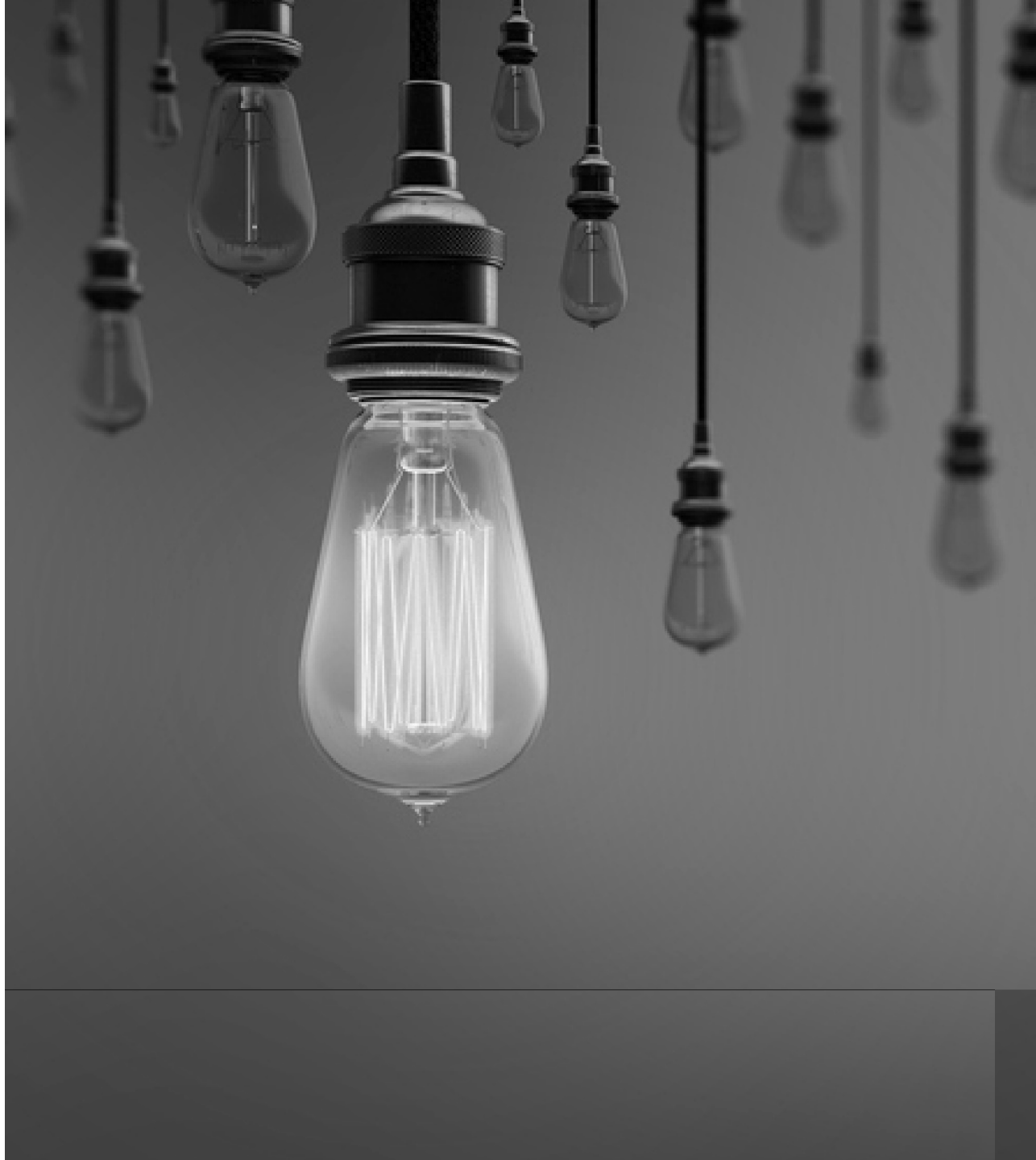
1. Insufficient notice—must be by government, including info related to records disclosed
2. Suppression not required for notice violations (though Court mentions "an argument can be made that suppression is never appropriate when the only error is one of notice")
3. *Jackson* inquiry: suppression not required because CalECPA's broader purpose was accomplished

Reasonable Expectation of Privacy

People v. Cartwright (2024)
99 Cal.App.5th 98, filed 1/25/24

No reasonable expectation of privacy when traversing public right of way in downtown San Diego in middle of business day.

Conclusion: Streetlight cameras do not require a warrant.



Gang Law Updates

Penal Code Section 186.22

Gang Case Law

People v. Clark (2024) 15 Cal.5th 743, filed 2/22/24 (CASC)

Much-needed guidance on the changes by AB 333 to PC 186.22. Requirement that gang members "collectively engage" in pattern of criminal gang activity:

- Does not require each predicate offense be committed in concert with other gang members
- But collective engagement requires organizational nexus between individual predicate offenses and gang as organized, collective enterprise. Examples:
  - Direct order to commit crimes
  - More general, well-understood expectation members engage in certain offenses
  - Offenses reflect primary activities, adhere to common goal/plan of gang

Gang Case Law

People v. Fletcher (2023) 92 CA5th 1374, CASC grant of review (S281282)

1. Does AB 333 amend the requirements for a prior strike conviction or is that determination made on the date of the prior conviction?
2. Does AB 333 unconstitutionally amend Prop 21 and Prop 36 if applied to prior strike and serious felony convictions?

Gang Case Law

People v. Fletcher (2023) 92 CA5th 1374, CASC grant of review (S281282)

1. Does AB 333 amend the requirements for a prior strike conviction or is that determination made on the date of the prior conviction?
2. Does AB 333 unconstitutionally amend Prop 21 and Prop 36 if applied to prior strike and serious felony convictions?

Chavez v. Superior Court (2024) 99 Cal.App.5th 165 (CA 2/2)

- Grand jury indictment → change in gang law → PC 995 motion
- Dismissal not required: Trial court can reserve ruling, resubmit to grand jury for DA to present evidence on new elements and for the reviewing court to then consider sufficiency of the evidence
- Based on “inherent power” of courts to carry out duties, ensure orderly administration of justice

Racial Justice Act & CCP 231.7

Significant changes in the law to the RJA and a number of cases interpreting CCP 231.7, including the recently published case out of our district:

People v. Uriostegui (2024) __ Cal.App.5th __,
filed 4/5/24 (CA 2/6 no. B325200 – Santa Barbara)

SLO County Bar Association MCLE training presented by Judge Matt Guerrero
"Elimination of Bias in Peremptory Challenges, from *Batson & Wheeler* to CCP 231.7"
Thursday, May 16, 2024
12-1 PM - *Virtual Event*
Sign up on the SLO County Bar Association Website

Free Resources

California laws, bill information: https://leginfo.legislature.ca.gov

California Courts of Appeal: https://courts.ca.gov/courtsofappeal.htm

- Search case information and set up notifications
- Most recent published cases
- Unpublished cases
- Oral arguments

Hearings in court

Thank you, and happy practicing!

Judge Crystal T. Seiler
San Luis Obispo County Superior Court

UPDATE ON CIVIL LAW

April 30, 2024

Judge Michael C. Kelley

What We Will Cover

ARBITRATION

JURY TRIAL WAIVERS

EXPERT WITNESSES

EMPLOYMENT LITIGATION

IMPLIED EASEMENTS

INSURANCE LITIGATION

SONG-BEVERLY ACT

RECENT STATUTORY CHANGES

ARBITRATION

***Harrod v. Country Oaks Partners* (2024) 5 Cal. 5th 939**

- Consent to arbitrate claims by a patient against a skilled nursing facility cannot be provided by relative holding power of attorney for health care decisions because agreeing to arbitration is not within scope of "health care decisions."

ARBITRATION/ WAIVER

***Hohenshelt v. Superior Court (Golden State Foods)* (2024) 99 Cal.App.5th 1319**

- Defendant who failed to pay arbitration fees timely, waived the right to compel arbitration under CCP Section 1281.98, even though the arbitration service had waived the deadline.
  - Section 1281.98 applies to consumer and employment arbitrations and provides that a failure to pay fees within 30 days is "material breach" of the arbitration agreement
  - Options for consumer or employee
    - Withdraw claims from arbitration
    - Continue the arbitration
    - Petition the Court to compel payment
    - Pay the fees for the defaulting party and seek recovery
  - Can also recover sanctions and the costs, including attorneys fees associated with the abandoned arbitration proceeding
- The court held that § 1281.98 is not preempted by the FAA

Jury Trial Waivers

Tricoast Builders, Inc. v. Fonnegra (2024) 15 Cal.5th 766

- Holding: Trial court is not always required to grant relief from an express jury waiver if doing so would not cause hardship.
- A party appealing from a trial court ruling that denied a request to be relieved of a jury trial waiver must show prejudice.

Expert Testimony

***Garner v. BNSF Railway Co.* (2024) 98 Cal.App.5th 86**

- In a wrongful death case alleging terminal non-Hodgkin's Lymphoma was caused by occupational exposure to diesel particulate matter, the trial court granted defense motions in limine precluding plaintiffs three experts on causation under *Sargon*.
- The Court of Appeal reversed.
  - Court should proceed "cautiously" when asked to exclude expert testimony on general causation as speculative
  - The court should not determine the persuasiveness of an expert's opinion, weigh the opinion's probative value, substitute its own opinion for the expert's opinion, or resolve scientific controversies; rather, the goal is simply to exclude "clearly invalid and unreliable" expert opinion.
  - The connection between existing data and expert's conclusions does not have to be established by existing scientific studies.
  - Whether an inference of ***causation*** is appropriate based on an ***association*** discussed in epidemiology literature is a matter of informed judgment, not scientific methodology.

Expert Testimony/*Sanchez* issues

***People v. Curiel, (2023)*15 Cal. 5th 433, 456–57**

- Potentially relevant to civil practitioners for its gloss on the rule expressed in *People v. Sanchez* (2016) 63 Cal.4th 665
  - The Supreme Court, in *Sanchez* acknowledged that " an expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so."
  - And, because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests. ...
  - Accordingly, there is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*Sanchez*, *supra*, 63 Cal.4th at pp. 685–686, 204 Cal.Rptr.3d 102, 374 P.3d 320.)

Employment litigation/Attorney's fees

Gramajo v. Joe's Pizza on Sunset, Inc. **(2024) 100 Cal. App.5th 1094**

- In employment action alleging failure to pay minimum and overtime wages, failure to provide meal and rest periods and other violations of employment-related laws, Plaintiff recovered only $7,659.93 in a jury trial, but sought $296,920 in attorney fees, which the trial court denied, relying on CCP § 1033 subd. (a), which grants discretion to deny fees to a prevailing plaintiff if a case is filed as an unlimited jurisdiction case and the amount recovered would have been available in a limited jurisdiction civil action.
- The court of appeal reversed, holding that the statute under which the Plaintiff sought fees (Labor Code § 1194 subd. (a)) provides for recovery of fees irrespective of the amount recovered.

Employment litigation/Administrative Claims

Kuigoua v. Dept. of Veteran Affairs, 2024 WL 1651349

Inclusion of fundamentally different claims in a legal complaint from those contained in administrative complaint concerning alleged employment discrimination meant plaintiff failed to exhaust administrative remedies.

Implied Easements

Romero v. Shih (2024) 15 Cal. 5th 680

An implied easement may be recognized that effectively precludes the owner of the servient tenement from most practical uses of the property.

Insurance

City of Wittier v. Everest National Insurance Company (2023) 97 Cal.App.5th 895 (Pet for Rev. filed)

Insurance for willful acts is barred by Ins. Code Section 533.

The city appealed a grant of summary judgment against it in a coverage action related to a suit brought by former officers alleging retaliation for refusing to participate in and/or reporting unlawful citation and arrest quotas.

The Court of Appeal held as a matter of first impression that coverage was not barred because the City could have possibly been held liable even if it held a reasonable (but mistaken) view that its policy was lawful.

Insurance/notice of cancellation

***Molinar v. 21st Century Ins. Co*. (2024) 99 Cal.App. 5th 1228**

- Named insureds who are statutorily entitled to pre-cancellation notice for failure to pay premiums, is not limited to the policyholders, but extends to an adult child who is also named as one of the insureds

Song-Beverly (Lemon Law)

Niedermeier v. FCA (2024) 15 Cal. 5th 792

- In a Song Beverly Act (lemon law) case, a plaintiff is not required to offset from her recovery any amounts obtained from an actual sale or trade-in credit attributable to the vehicle when the sale or trade-in results from a forced transaction due to the defendant's failure to comply with the Act.

Statutory Changes

- Jurisdictional Limits (limited civil increased to $35,000)
- Initial Disclosures (CCP Section 2016.090)
- Increased Sanctions for Certain Discovery Conduct (CCP Section 2023.050)

Coming Attractions

- Watch for an updated Standing Case Management Order for Department P-2 in Paso Robles.