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RIVERSIDE LAWYER

IN THIS ISSUE

The Official Publication of the Riverside County Bar Association

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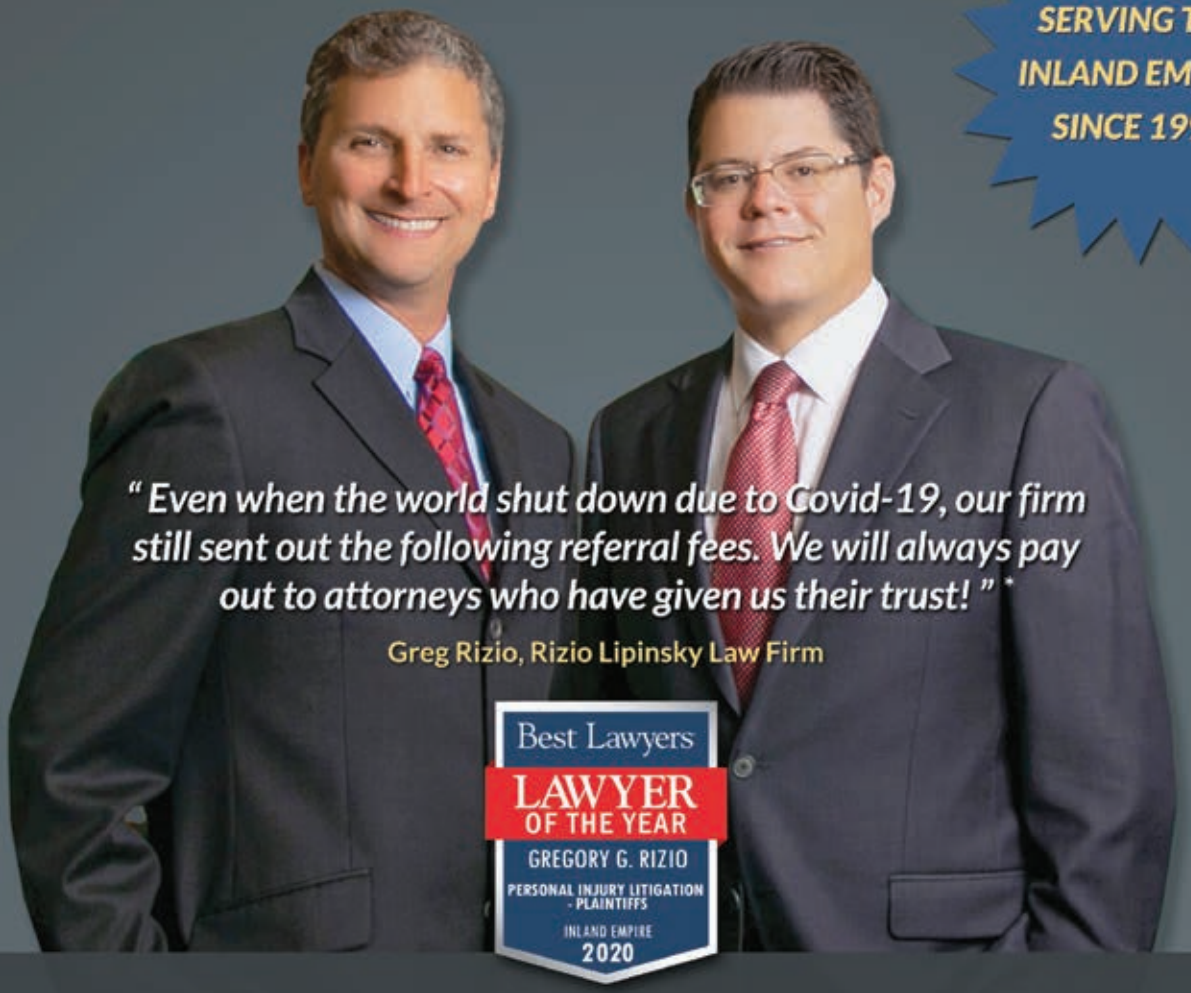

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RIVERSIDE LAWYER
MAGAZINE

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12 **Civil Litigation Section Meeting**
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14 **Installation of Officers Dinner**
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Mission Inn, Riverside

18 **New Attorney Academy Orientation Session #1**
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19 **New Attorney Academy Orientation Session #2**
5:30 p.m. - Rizio Lipinsky
4193 Flat Rock Drive, Suite 300
Riverside

19 **Family Law Section Meeting**
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20 **Estate Planning, Probate & Elder Law Section Meeting**
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21 **Appellate Law Section Meeting**
Noon, Zoom
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Events Subject To Change
For the latest calendar information please visit the RCBA's website at **riversidecountybar.com**

The Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are $30.00 and single copies are $3.50.

MISSION STATEMENT

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Statement

The mission of the Riverside County Bar Association is: To serve our members, our communities, and our legal system.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Riverside Legal Aid, Fee Arbitration, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Mock Trial, State Bar Conference of Delegates, Bridging the Gap, the RCBA - Riverside Superior Court New Attorney Academy and the Riverside Bar Foundation.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of *Riverside Lawyer* published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication, and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, Reading Day and other special activities, Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

PRESIDENT'S Message

by Kelly Moran

When I was a new attorney taking one of the first depositions of my career, my opposing counsel taught me a lesson that I will never forget. After the deposition, he called me and asked if I had a minute to talk. During the call, he said "you work with great people, and I am sure they will go over your deposition transcript with you, but as the guy who was in the room, I would love to give you my thoughts if you are interested." Over the next 30 or so minutes, he took time out of his day to explain to me both what I did well and how I could improve in the future.

More than a decade later, I may have forgotten the facts of the case and the questions that I asked the witness, but I will never forget the actions of that attorney. In that one call, I learned what the Riverside legal community is all about – inclusion, mentorship, and a passion for helping others. As I write this, my first president's message, it is my greatest hope that at the end of this next year, I will have lived up to those values for you all.

I am humbled beyond words to serve as the 2023-2024 President of the Riverside County Bar Association. As someone who grew up in Riverside, I cherish the fact that I have been able to build a career in the town that I have always called home. The last eight years that I have spent on the RCBA Board have been both inspiring and educational, full of opportunities and challenges that our membership, boards, and staff have conquered with strength and grace. I am honored to follow in the footsteps of those that have led this organization before me and will strive to uphold the legacy that they have built.

With that in mind, I would like to take a moment to thank Lori Myers, our outgoing president, for her service to the RCBA. Lori tackled her presidency, and her entire tenure on the board, with one overarching goal: to recognize the amazing accomplishments of our membership. She worked to grow our social media presence, encouraged strengthening our virtual outreach through the continued use of technology in meetings, and remains committed to the process of capturing the history of our organization through recorded interviews with some of our most treasured legal minds. On top of all of that, without a doubt Lori's greatest legacy will be the institution of the Attorney of the Year awards, a program created to give our community the opportunity to recognize, on an annual basis, local attorneys who demonstrate extraordinary legal ability and commitment to their field of law. With her focus on the community, the membership, and the success of others, Lori truly exemplifies the best of the RCBA. It has been an honor to serve under her leadership and a privilege to learn from her example.

My goal for this next year is to continue the good work of Lori and her predecessors, while embracing the ever-changing world around us. With that in mind, I humbly ask for your help. The RCBA is here for the benefit of our membership and our board is focused on meeting the needs that exist in our legal community, but we must hear from you to be successful in that endeavor. Members, is there an opportunity for engagement that you are hopeful we will add? Law students and new admittees, is there an innovative way to connect with young attorneys that we have not yet adopted? Those who may practice outside of the Riverside-area, is there something else we can do to help you feel connected to your fellow members despite relying more heavily on our virtual meeting options? Whatever your needs may be, please reach out, share your thoughts, and get involved. With a mission of serving our members, our community, and our legal system, this board is eager to learn from you what we can do to best accomplish that goal.

As I wrap up my first message to you all, I would like to leave you with one final thought: remember that your actions matter. What may have been nothing more than a 30-minute phone call in the eyes of my opposing counsel was a pivotal moment in both my life and my career. While he will likely never know the impact he had on me, his simple act of kindness and selflessness spoke volumes about what kind of lawyer I should strive to become and what this legal community values. I challenge you all to honor those who inspired you by being that source of encouragement for someone else. Over the course of the next year, I hope to use these messages to introduce you to some of the chances that the RCBA offers for you to do just that, and maybe to create some new such opportunities with your help. The RCBA, and our legal community, is made stronger because of each of you and I look forward to spending the next year growing together.

Kelly Moran is a chief deputy with the Riverside County Office of County Counsel.

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BARRISTERS President's Message

by David P. Rivera

What in All Heck Is a Barrister?

I. Definition

What is a barrister? As with so much in law, the answer is, "it depends." Here, context is key.

In the United Kingdom and certain other common law jurisdictions, the practice of law is formally divided into two distinct roles. Barristers specialize in courtroom advocacy. They are distinguished from solicitors who counsel clients outside of the courtroom in all manner of legal areas, including with respect to transactional work.[1] While barristers are akin to trial attorneys in the United States, "most of what corresponds to [U.S.] law practice is carried out by 'solicitors.'"[2] Sometimes, barristers are permitted to practice as solicitors and vice versa, though that is not the norm.[3]

In contrast, the U.S. legal system does not distinguish between lawyers as barristers and solicitors. Licensed attorneys can represent clients inside or outside of the courtroom. That said, some bar associations and other groups use the "barrister" moniker to describe an attorney who is relatively new to the profession.

We barristers are the new (and cool!) kids on the block.

II. A Recognized "Activity" of RCBA

The Riverside County Barristers Association ("Barristers") has been active for more than 60 years as part of the Riverside County Bar Association ("RCBA").[4] Specifically, we are a recognized "activity" of RCBA that is best understood as one of its sections. Whereas RCBA's other sections focus on particular areas of practice (e.g., Family Law and Civil Litigation Sections), Barristers caters to RCBA's new and young attorneys regardless of practice area.

All attorney members of RCBA who meet specific criteria are automatically added to the Barristers membership rolls. Are you younger than 37 years of age? Have you been practicing law for fewer than seven years? If you answered "yes" to either of these questions, then you are a Barrister.

Only Barristers members may vote on official Barristers matters, but our events are, by and large, open to non-Barristers. Are you a law student? Are you an undergraduate student? Are you a legal assistant, paralegal, or law clerk? Are you a seasoned attorney who enjoys hanging out in an informal setting? Are you training a service dog (ahem, Michael Geller)? If you answered "yes" to any of these questions—especially the last one—then you are welcome at our events!

III. Purpose, Activities, and Benefits

Barristers' core purpose is to help new and young attorneys grow. We provide opportunities for our members to engage one another and our colleagues in the broader legal community. We furnish CLEs that promote professionalism from both competency and ethics angles. We join in service to the community. And we have fun!

Near-monthly happy hours are a Barristers hallmark, as is annual gift-wrapping for RCBA's Elves Program. Other activities are trending toward Barristers staples. We enjoy trips to Disneyland and Mt. Rubidoux hikes. We partner, through RCBA, with Phi Alpha Delta's pre-law chapter at the University of California, Riverside, to advise undergraduate students on pathways to law school and the legal profession. Our budding Annual Judicial Reception celebrates the commitment of our local bench to the administration of justice and the development of new and young attorneys.

Leadership opportunities are also available. Barristers is governed by its own board of directors, elected from and by its members. Nominees for board seats must be active in Barristers, defined as having attended three Barristers events in the most current annual term beginning each September 1st. Elections are held in June.

Involvement in Barristers affords opportunities to grow your professional and social networks, develop your professional reputation and visibility, continue your legal education, contribute to the community, and hone your leadership skills.

IV. Membership Profile

Barristers has approximately 200 members drawn from a number of practice areas, including: employment law, property law, intellectual property, criminal law, family law, estate planning, probate, business law, bankruptcy, immigration, education law, municipal law, and legal aid.

We are diverse not only in legal discipline, but also in race, ethnicity, gender, religion, and age. With respect to the latter, we range in age from 26 to 76 years.

As National Hispanic Heritage Month approaches, I find the Hispanic composition of our membership to be notable.[5] Based on a summary review

1 Cornell L. Sch., Legal Dictionary, https://www.law.cornell.edu/wex/barrister (last visited Aug 18, 2023).
2 *In re Pro-Fit Holdings Ltd.*, 391 B.R. 850, 867 n.16 (Bankr. C.D. Cal. 2008).
3 Cornell, *supra* note 1.
4 Barristers was formed in 1962, largely through the efforts of it first President, Horace Coil.
5 National Hispanic Heritage Month is a month of Hispanic recognition beginning on September 15th of each year. This year, it is themed on the prosperity, power, and progress of the Hispanic community.

of our members' surnames, approximately 22% percent are Hispanic in origin. I find that statistic striking, even without diving into a detailed analysis of Hispanic rates of representation in the general and attorney populations of California and Riverside County.

All this is to say Barristers is not a monolith. We boast varied backgrounds, varied experiences. You are welcome here.

V. Key Goals for the New Term

I want to keep three key goals in mind as the new board plans the 2023–2024 term.

A. *Increase member participation.* We are only as strong as our members are active. Our board is taking steps to communicate with our members more effectively. We are here for you and welcome your involvement!

B. *Be mindful of Barristers' 60-year legacy.* Our past leaders and members have contributed so much to our group. RCBA has been steadfast in its support. We can take steps to reinforce those ties. We can adapt time-lost activities that remain relevant to our core purpose.

C. *Have fun!* Our group is successful in part because we interact in enjoyable ways. Working with the board is fun. Engaging our membership and the community is fun. If we make it fun, they will come. Let's double down.

VI. Upcoming Events

The 2023–2024 term begins on September 1st. As I write this article, that date remains two weeks away. The incoming board and I have some ideas to expand our activities in ways that reflect our personalities (and we believe, those of our members) while remaining true to our core purpose. We also believe we can introduce a few more opportunities for our members to become involved. Planning will begin in earnest once we take office.

We will communicate scheduled activities on our Instagram account and via email. Our first happy hour in the new term will be held on September 22nd, 5:30 p.m. at Retro Taco.

Follow us!

For upcoming events and updates:

Website: RiversideBarristers.org
Facebook: /RCBABarristers
Instagram: @RCBABarristers

Contact me directly by email at drivera@alumni.nd.edu, or by text or phone call at (909) 844-7397. If you are just discovering Barristers and would like to attend one of our events, I am more than happy to meet you at the door and introduce you to our wonderful group. Truly. I look forward to hearing from you!

David P. Rivera is a solo practitioner of business law in Highland, treasurer of the Hispanic Bar Association of the Inland Empire, treasurer of the Asian Pacific American Lawyers of the Inland Empire, and a member of the RCBA Bar Publications Committee.

Practicing Responsibly and Ethically
Attorney-Client Privilege for Employees

by David Cantrell and Cole Heggi

While the attorney-client privilege is generally considered to be sacrosanct, California law has carved out a narrow exception that can lead to an employer using an employee's attorney-client communications against her in trial. This scenario has arisen where an employee used her employer's computer system to communicate with her counsel, and then later filed suit against the employer.

California recognizes the attorney-client privilege such that a client "has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer[.]"[1] A communication is considered confidential if it is "transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons . . ."[2]

In Holmes v. Petrovich Development Co., LLC (2011) 191 Cal.App.4th 1047, 1068, the court held that if each of the following is true, an employee's email communications with her attorney are not privileged: (1) the electronic means used to make the communication belongs to the employer; (2) the employer has advised the employee that communications using electronic means are not private, may be monitored, and may be used only for business purposes; and (3) the employee is aware of and agrees to these conditions.

In *Holmes*, the plaintiff, Holmes, sued her employer for workplace discrimination and sexual harassment after interactions with her employer about how to handle her pregnancy went sour and she quit. The employer successfully defeated all claims, some of which were summarily adjudicated and the remainder through defense verdict at trial. Holmes appealed, claiming that the summary adjudication and verdict improperly relied on attorney-client privileged emails she had sent to her attorney using the employer's computer, which the trial court had declined to withhold from evidence. The emails at issue undermined Holmes' case, as they showed that she did not suffer severe emotional distress, was merely frustrated and annoyed by the employer's conduct, and may have only filed the lawsuit because her attorney urged her to file.

The appellate court ruled that these emails were properly admitted into evidence because they were not attorney-client privileged. The court relied heavily on the fact that Holmes had acknowledged receipt of and agreed to be bound by the company's employee handbook, which explained that (1) company computers were to be used only for company business and that employees were prohibited from using them to send or receive personal e-mail, (2) the company would monitor its computers for compliance with this company policy and thus might "inspect all files and messages ... at any time," and (3) employees using company computers to create or maintain personal information or messages "have no right of privacy with respect to that information or message."[3]

Thus, "so far as [Holmes was] aware," the company computer "was not a means by which to communicate in confidence any information to her attorney," meaning that the emails Holmes sent to her lawyer using that computer were not "confidential" within the meaning of Evidence Code section 952. Thus, the communications were not privileged.[4]

If you represent an employee with claims against a current employer, you may want to advise your client not to email you from their work computer. If you advise employers, you may consider whether it makes sense for your client to implement a policy like the employer in Holmes did. If such a policy is already in place, you may be able to use a disgruntled employee's emails to your client's advantage if a claim arises.

Of course, before using their clients' employees' unprivileged emails, practitioners should nevertheless consider whether such use might violate any other rights of the employee (i.e., privacy) or might constitute a statutory violation or tort.

David Cantrell is a partner with the firm Lester, Cantrell & Kraus, LLP. His practice focuses on legal malpractice and professional responsibility issues. David is certified by the California State Bar's Board of Legal Specialization as a specialist in legal malpractice law.

Cole Heggi is senior counsel at Lester, Cantrell & Kraus, LLP, where he also represents and advises clients on legal malpractice and professional responsibility issues.

1 Cal. Evid. Code § 954.
2 Cal. Evid. Code § 952.
3 *Holmes, supra,* 191 Cal.App.4th 1047, at p. 1051.
4 *Id.*, at pp. 1071-1072.

Does Anyone Know Now What California's Statute Of Limitations Is For Filing A Sexual Harassment Claim?

by Geoffrey Hopper

There has been substantial confusion about the statute of limitations under California law as it relates to private employers and employees in a variety of areas. Sexual harassment and/or sexual abuse civil claims under civil law are the focus of this article as it relates to private employers and private employees and is subject to numerous caveats.

The current statute of limitations for a lawsuit to be filed in California Superior Court against a private employer by an employee is three years. Some of the many factors involved in determining the applicable statute of limitations include whether or not the party is going to sue in California state court or federal court, and/or whether or not the employee is going to file and request an administrative agency to pursue the claim versus filing a lawsuit. Another factor involved includes whether or not the person who was sexually harassed and/or abused at the time involved was a minor. Additional factors include whether or not the inappropriate act itself would have the statute of limitations tolled. In situations involving minors, in California, one of the other exceptions for tolling includes the COVID pandemic. Because of all of these factors and their inter-relationship with one another, please understand that I am not asserting every caveat that you can possibly imagine and recommend that you consult with qualified legal counsel as to any specific situation.

The general rule in California is that, for a civil claim for sexual harassment to be filed in a California superior court, the statute of limitations is a three-year statute of limitations for an adult claimant assuming the inappropriate conduct occurred during the time period the person was an adult (i.e. over the age of 18). There are a variety of various factors that may apply in determining the applicable statute of limitations: If the inappropriate conduct occurred when the person was not an adult then, if such amounts to sexual assault, the action shall be filed within 22 years from the age the plaintiff attains the age of majority, or within five years when the plaintiff discovers or reasonably should have discovered a psychological illness or injury occurring after the date of majority, whichever period expires later, for any actions regarding child and sexual assault and/or for any person who owed a duty of care to the plaintiff.

A) Situations where a ten-year statute of limitations may apply regarding sexual abuse and/or sexual harassment and state court claims:
Pursuant to California Civil Procedure (CCP) section 340.16, adult victims of sexual abuse and/or sexual harassment, etc., can make claims within ten years of the event, or within three years since the discovery of any injury or illness resulting from the event. In these situations where the event occurred on or after the plaintiff's 18th birthday, the time for beginning the claim shall be the later of the following:
    a. Within ten years from the date of the last act, attempted at, or assault with the intent to commit the act of sexual assault of the defendant against the plaintiff;
    b. Within three years of the date that plaintiff reasonably or should have reasonably discovered an illness or injury resulting in the act or attempted act by defendant against plaintiff (this applies to incidents taking place after January 1, 2019); however, if the incident occurred prior to that date, the three-year statute of limitations would apply from the date of the incident with certain additional qualifiers;

B) Tolling of applicable statute of limitations because of COVID-19 pandemic
During the COVID-19 pandemic, California rule of court, emergency rule number 9 came into effect, which further provided a tolling of the applicable statute of limitations regarding the filing of certain civil claims in state court, both April 6, 2020, and October 1, 2020, providing an additional 178 days of the applicable statute of limitations. The applicable statute of limitations was extended due to the fact of the shutdown of the court system and administrative agencies during this time were not available for plaintiffs, the legislature decided to provide a tolling of the applicable statute of limitations during that shutdown. Again, there are a variety of factors that can affect these calculations.

C) Reviving time frames to file claims for sexual harassment and related claims, even though the statute of limitations has lapsed:
On January 1, 2023, the legislature approved Assembly Bill 2777, now codified as CCP 340.16 so as to allow, up until December 31, 2023, plaintiffs under particular circumstances to go back and revive possible claims for sexual abuse and/or harassment commonly known as the Sexual Abuse and Cover-Up Accountability Act. In order to do such, the plaintiffs must meet all of the following three requirements:

a. Establish that the plaintiff was sexually assaulted and/or harassed;
b. Establish that the defendant such as a company, LLC, corporation, association, or sole-proprietor, would normally be liable under California law for damages arising from said inappropriate conduct under theories of vicarious liability, tort law, and/or negligence;
c. Establish that the employer, the defendant, and/or their officers and directors were involved in some type of "cover-up" and an effort was made to prevent this matter from becoming public, such as the use of a confidentiality and/or non-disclosure agreement.

SUMMARY

The bottom line is that the general time period a plaintiff has to file a claim in state court for a civil action involving sexual harassment against a private versus public defendant would now be three years. However, there are many arguments that expand that time frame, depending upon the specific circumstances involved and legal counsel should be consulted as to the specific facts and circumstances involved. Further, as to public entities and claims with the EEOC, there are separate rules and regulations that apply or may apply.

The legislature has done much to extend opportunities for claimants to pursue their civil remedies in California state court for sexual harassment claims. As a reminder, California still mandates all employers within the state who have more than five employees are required to have mandated, interactive, sexual harassment and prevention training for all of their supervisors of not less than two hours once every two years, and non-supervisors to have such training not less than one hour once every two years.

It is evident that sexual harassment claims are being treated with more gravity now than even a decade ago, with the statute of limitations on such being extended and even becoming retroactive. The moral of the story is that there is never a safe time to do the wrong thing.

Geoffrey Hopper is a past president of the Riverside County Bar Association having practiced labor and employment law for an excess of 35 years, having received an AV rating from Martindale Hubbell, having conducted a multitude of seminars on discrimination, wrongful termination, and retaliation topics, representing both employers and employees, and having written a book on the topic entitled, Employment Law for Bosses and Supervisors. *His firm will once again be conducting its annual Updates in Employment Law program at the University of Redlands on November 7, 2023. Reservations can be obtained by contacting his office. His website is www.hopperlaw.com and he can be contacted at (909) 798-9800.*

A Unanimous Supreme Court "Clarifies" The Undue Hardship Standard In Religious Accommodation Claims

by Michelle Wolfe

In a unanimous decision on June 29, 2023, in *Groff v. DeJoy,* 143 S. Ct. 2279 (2023), the U.S. Supreme Court "clarified" and changed the religious accommodation standard under Title VII of the Civil Rights Act of 1964, on which employers have relied for more than 46 years. The Supreme Court effectively dismantled the "de minimus" framework and the precedent set in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977) (*"Hardison"*), clarifying Title VII's undue hardship standard to mean "substantial increased costs in relation to the conduct of its particular business."

Background

Under Title VII, employers are required to reasonably accommodate employees whose sincerely held religious beliefs or observances conflict with work requirements unless doing so would create an undue hardship for the employer. Absent a statutory definition of "undue hardship," courts relied on the Supreme Court's decision in *Hardison*. In *Hardison,* the Court had interpreted the term "undue hardship" to mean that employers need not accommodate employees' religious beliefs if doing so would require an employer "to bear more than a de minimis cost."

In *Groff v. DeJoy,* Groff, an Evangelical Christian, was a mail carrier for the United States Postal Service (USPS), whose religious beliefs prohibited him from working on Sundays in observance of the Sabbath. Groff began working for the USPS in 2012. After the Postal Service made a deal with Amazon to deliver some of the company's packages on Sundays, Groff initially received an exemption, but was later told he would have to work Sundays. Groff then transferred to another office that had not implemented Sunday deliveries.

In 2017, Groff's new post office began requiring Sunday deliveries. Groff offered to work extra shifts to avoid working on Sunday, and the postmaster tried to find volunteers to replace Groff on Sunday, but often could not find any volunteers. Facing escalating discipline for failing to work on scheduled Sundays and fearing his own termination, Groff eventually resigned and sued the USPS for failing to accommodate him under Title VII of the Civil Rights Act. Groff alleged that the USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of USPS's business." The District Court granted summary judgment in favor of the USPS, and the Court of Appeals for the Third Circuit affirmed. The Court referred to the precedent in *Hardison*, which stated in the oft-quoted sentence that an employer should not be burdened with more than a "de minimis cost" to provide religious-based accommodations. Relying on this standard, the Third Circuit decided that excusing Groff from Sunday work imposed an undue burden on the USPS by disrupting the workplace dynamics and diminishing employee morale. Groff appealed to the Supreme Court.

The Undue Hardship Standard Clarified

In the unanimous opinion authored by Justice Samuel Alito, the Court set aside the "de minimis" standard set more than 45 years ago and laid out a "clarified standard" for lower courts to apply to determine when, under Title VII of the Civil Rights Act, an employee's proposed religious accommodation imposes an undue hardship on the employer's business.

The Court held that the "more than de minimis cost" standard established in the wake of *Hardison* mistook what it meant to impose an "undue hardship." Reading Title VII's text and the term "undue hardship," the Court noted that the ordinary meaning of the terms "undue" and "hardship" implies a degree of severity beyond a mere burden and instead suggests an "excessive" or "unjustifiable" level.

SCOTUS reversed the judgment against Groff and instructed the lower Court to apply a revised standard that maintains the structure created by *Hardison*, but excises the misplaced focus on de minimis costs.

As Justice Samuel Alito wrote for the majority, courts "should resolve whether a hardship would be substantial in the context of an employer's business in the commonsense manner that it would use in applying any such test."

"We think it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business," *Groff,* 143 S. Ct. at 2295.

When applying this rule, the Court opined that all relevant factors should be considered, including the particular accommodations at issue, the practical impact, and the employer's nature, size, and operating costs.

Employers should no longer focus on whether an accommodation would impose more than a "de minimis cost." Instead, employers must determine whether the requested accommodation would result in increased costs with regard to the conduct of their business.

Unanimously, the Justices also emphasized that "a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice, cannot be considered undue." *Groff,* 143 S. Ct. at 2296. Bias or hostility to a religious accommodation practice cannot supply a defense.

Conclusion

As a result of *Groff,* employers should consider all aspects of how different religious accommodations may impact the nature and costs of their particular businesses. Considerations like administrative costs and modest financial expenditures will be insufficient for denying such requests. The Court's opinion indicates that employers must consider voluntary shift swaps and incentives such as overtime to accommodate Sabbath-observing employees. In conclusion, the Court unanimously commands employers to find a workable solution to conflicts between business objectives and faith commitments.

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Adolph v. Uber Technologies: Arbitration Agreements Are Not the Silver Bullets PAGA-Weary Employers Were Hoping

by Craig Sterling

In the recent decision *Adolph v. Uber Technologies,* Inc., 2023 WL 4553702, ____ Cal. 5th ___ (2023), the California Supreme Court conclusively (and affirmatively) resolved whether a litigant alleging individual Labor Code violations and non-individual claims under the Private Attorney General Act ("PAGA") maintains standing to serve as a PAGA action representative if the litigant's individual claims are ordered to be addressed in arbitration pursuant to a prelitigation arbitration agreement.

The *Adolph* ruling provides PAGA litigants certainty on the issue of standing in actions where arbitration is an issue, after the United State Supreme Court's ruling in *Viking River Cruises, Inc. v. Moriana,* (2022) 142 S.Ct 1906, 1916. In *Viking River*, the U.S. Supreme Court held the individual Labor Code claims of a California plaintiff, who was a party to a valid arbitration agreement covered by the Federal Arbitration Act (the "FAA"), could be severed from the litigant's PAGA claims. *Viking River,* 142 S.Ct at 1916. The Court made that ruling because the FAA preempted conflicting state law and governed the enforcement of the arbitration agreement as to the individual claims. *Viking River*, 142 S.Ct at 1916. Thus, such claims can be removed from court proceedings to arbitration. *Id.*

Although *Viking River* was limited to the individual Labor Code claims in arbitration situations governed by the FAA,[1] there was speculation (and, for others, the hope) after the *Viking River* ruling that it might extend beyond the holding, perhaps to circumstances where an arbitration order could divest the plaintiff of standing to act as a suitable PAGA class representative. The *Viking River* opinion went so far as to suppose that the plaintiff in that action should be compelled to dismiss her remaining claims because she lack[ed] statutory standing.",[2] although the concurring opinion of Justice Sotomayor correctly noted that the California Supreme Court would "have the last word" on the proper interpretation of California law. *Id.*

Nearly a decade ago, in *Iskanian v. CLS Transportation Los Angeles LLC*, 59 Cal. 4th 348, 382-382, (2014), the California Supreme Court held that an absolute waiver of the right to bring a PAGA action made prior to litigation was unenforceable. The U.S. Supreme Court's 2022 *Viking River* ruling did not affect that portion of the *Iskanian holding*,[3] but with the passage of time and the *Viking River* opinion, counsel for some California employers were somewhat optimistic that a change to California's PAGA standing rules—which might lead to a sharp drop in PAGA lawsuits--was near.

Such hopes were unrealized, however, and California's PAGA standing rules are unchanged and confirmed by the *Adolph* ruling. Specifically, if a PAGA plaintiff was employed by the alleged violator and purportedly suffered one or more of the claimed violations, that plaintiff has PAGA statutory standing. Therefore, a subsequent order compelling arbitration of any individual claims does not eliminate a plaintiff's ability to represent other similarly situated employees in a PAGA action. 2023 WL 4553702 *1.

The *Adolph* court relied on the PAGA statutes and its previous rulings in Iskanian, *Kim v. Reins International California, Inc.*, 9 Cal. 5th 73, 83 (2020) and *ZB, N.A. v Superior Court,* 8 Cal. 5th 175, 185 (2019) to reaffirm its position on PAGA standing. Because the Court's ruling in *Adolph* confirms California law and gently sweeps aside the U. S. Supreme Court's PAGA standing musings, it seems unlikely that Uber can successfully petition the United State Supreme Court to review the ruling.

Strengthened by the *Adolph* ruling, plaintiffs can continue to serve as representatives in a PAGA suit on behalf of the purportedly aggrieved class even after their individual claims are ordered to proceed in an arbitral action. Conversely, after a brief period of encouragement due to the *Viking River* ruling, California employers must find a different way to limit exposure in PAGA suits.

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1 See, 142 S.Ct at p. 1925

2 *Viking River,* 142 S.Ct. at p. 1925.

3 see 142. S.Ct. at pp. 1922-1923

The Rise of Artificial Intelligence and its Impact on the Labor Market

by Mary Shafidazeh

Artificial Intelligence (AI) is not merely a passing trend, but a catalyst for change that is redefining the labor market. Although dating back to the 1950s, AI's recent prevalence is increasingly apparent. From virtual assistants, like Alexa and Siri, to self-driving cars, chatbots such as OpenAI's ChatGPT, Bing Chat, and Google Bard, along with image generators like DALL·E2, AI's influence is spreading across various applications, including within the legal industry and for medical diagnosis. We are in the midst of an exciting chapter in history, witnessing AI rapidly evolve and transform the world.

AI's Unprecedented Growth and Impact

ChatGPT, an AI tool that is part of the GPT (Generative Pre-trained Transformer) architecture, is a powerful language model that can understand and generate human-like text in response to prompts received. Its remarkable capabilities have led it to an extraordinary surge in popularity, establishing itself as the fastest-growing app of all times. Whereas Instagram and TikTok took 2.5 years and nine months, respectively, to reach 100 million monthly active users, ChatGPT achieved an astounding 123 million in just three months post-launch.[1] This milestone, however, is merely the tip of the iceberg when considering the revolutionary impact AI is having on society and the labor market.

Categorizing AI: Capabilities and Functionalities

With its explosive growth and powerful abilities, AI's potential excites some and worries others. By analyzing vast amounts of data and using knowledge, rules, and information to detect patterns, create sophisticated algorithms, and build intelligent machines, AI can make automated decisions and perform human-like tasks.[2]

AI can be classified based on its capabilities and functionalities. In terms of capabilities, AI is comprised of three main types: Narrow, General, and Super. Narrow AI, also known as Weak AI, specializes in performing specific tasks with proficiency, like Siri or Google Translate. General AI, or Strong AI, however, aims to perform a wide range of tasks at a human level, encompassing the ability to understand and learn anything a human can. Super AI, though, remains hypothetical and has the potential to surpass human intelligence and outperform humans in nearly every task. Moreover, Super AI could develop its own emotions, needs, desires, and beliefs, enabling it to engage in independent thinking, problem-solving, and decision-making.[3]

In respect to functionalities, AI can further be divided into Reactive Machines, Limited Theory, Theory of Mind, and Self-awareness. Reactive Machines, like IBM's "Deep Blue" defeating chess Grandmaster Garry Kasparov, represent the oldest and simplest form of AI, lacking stored memories, past experiences, or learning capabilities. They solely respond automatically to a limited input. Conversely, Limited Theory AI, customary in self-driving cars, chatbots, image recognition, and virtual assistants, retains some memory of past data to make decisions, but cannot learn or expand on it. Theory of Mind AI, such as Sophia from Hanson Robotics, can comprehend and interpret human emotions, beliefs, thought processes, and intentions, allowing it to form mental models of others and anticipate their actions. Lastly, Self-awareness AI represents the highest level of AI, possessing a sense of self and consciousness, enabling it to understand others and its own emotions and beliefs, ultimately developing a sense of identity.[4]

AI's Impact on the Labor Market

With its diverse forms, AI serves various purposes and applications, making it a transformative force in the labor market. Similar to the impact personal computers, the internet, and software once had on the job market — enhancing efficiency, but also replacing certain workers and demanding new tech-savvy skills — AI is following suit. While AI may substitute some tasks previously performed by humans, it can also complement and augment human work, thereby presenting a blend of challenges and opportunities in the evolving job market.

AI's impact on the labor market is two-fold. On one hand, AI-powered automation streamlines processes, increases efficiency, improves accuracy, enhances productivity, and reduces costs. On the other, automation raises concerns about potential job displacement, wage stagnation, and income inequality in sectors reliant on repetitive and routine tasks. Nevertheless, this shift doesn't necessarily equate to widespread unemployment; rather, it shifts the demand for certain skills and creates new job opportunities, particularly in specialized, technical, higher skilled, and innovative roles. Positions requiring human skills, such as complex problem-solving, creativity, and empathy, also continue to hold immense value. Accordingly, to remain competitive, workers need to adapt, enhance their existing skills, and acquire new proficiencies that complement AI's capabilities.[5]

AI's Impact on the Job Market Dynamics

The rapid pace of automation in the U.S. workforce is surpassing expectations. A study on GPTs reveals that 80% of the U.S.

1 Jürgen Rudolph, Shannon Tan & Samson Tan, *War of the Chatbots: Bard, Bing Chat, ChatGPT, Ernie and Beyond. The New AI Gold Rush and its Impact on Higher Education*, 6 J. APPLIED LEARNING & TEACHING 364-389 (2023). Available at: https://journals.sfu.ca/jalt/index.php/jalt/article/view/771

2 Harry Surden, *Artificial Intelligence and Law: An Overview*, 35 Ga. St. U. L. Rev. (2019). Available at: https://readingroom.law.gsu.edu/gsulr/vol35/iss4/8

3 Avijeet Biswal, *7 Types of Artificial Intelligence That You Should Know in 2023*, Simplilearn (May 26, 2023), https://www.simplilearn.com/tutorials/artificial-intelligence-tutorial/types-of-artificial-intelligence.

4 *Id.*

5 Ali Zarifhonarvar, *Economics of ChatGPT: A Labor Market View on the Occupational Impact of Artificial Intelligence*, Indiana University Bloomington (Feb. 9, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4350925.

workforce could see at least 10% of their work tasks affected by AI.[6] As a result, it is projected that by 2025, approximately 85 million jobs will be displaced globally due to AI, but there is a silver lining as well, with an estimated 97 million new roles emerging. These new jobs require skills such as analytical thinking, creativity, and adaptability. Additionally, the top emerging professions are in data and artificial intelligence, content creation, and cloud computing; with the most competitive businesses being those that reskill and upskill their employees.[7] Notably, the industry most exposed to AI is legal services, with one report estimating that 44% of legal work could be automated. The only job higher is office and administrative support roles, where 46% could be automated.[8]

AI's Impact on Legal Services and Writing Careers

While the introduction of AI in the legal industry might be met with skepticism by some, the reality is AI can be beneficial. AI tools can be likened to highly skilled paralegals, offering valuable assistance in reading, analyzing, summarizing, and drafting legal documents. Although these tools may require some improvements in factual accuracy, they can be instrumental in tasks such as reviewing documents for relevant information, legal research, contract analysis and drafting, proofreading, editing, document organization, as well as facilitating intake and client communications. Ultimately, AI can save attorneys and their staff significant time, reduce stress and frustration, cut costs, and mitigate risks. As AI handles more repetitive tasks, attorneys can focus on building stronger client relationships, providing strategic guidance, and honing their expertise in the legal field.

The utilization of ChatGPT and similar technologies has also significantly impacted writing careers. With AI's ability to generate human-like text, it serves as both an assistant and potential risk. AI proves useful for research, idea generation, writing suggestions, content automation, and drafting various materials, from writings and contracts to articles and stories. Moreover, it aids in grammar correction and tone improvement, speeding up the writing and editing process. AI's advancement, however, also raises concerns about its potential to replace certain writing tasks. Consequently, writers, including marketers and attorneys, must adapt their skills to complement AI's capabilities. Emphasizing creativity, deeper analysis, storytelling, and ensuring accuracy in areas where AI struggles to replicate human expertise, becomes crucial. Ultimately, AI's impact on writers presents a blend of benefits and drawbacks, urging them to embrace and leverage this technology to enhance their work while preserving the irreplaceable aspects of human creativity and expertise.

AI in Recruitment and Human Resources

AI's impact extends beyond automation and the aforementioned. It also reaches into the realms of recruitment and human resources. AI can streamline candidate screening, identify top talents, conduct interviews, and assess cultural fit, thereby expediting the hiring process. This advancement, however, raises concerns about potential bias and discrimination in AI algorithms. For instance, AI tools may unintentionally lead to age or employment gap discrimination while analyzing resumes, and potentially disadvantaging women with employment gaps due to maternity leave.[9] Addressing and mitigating these challenges is crucial to ensuring fairness and inclusivity in the workplace.

Regulatory and Ethical Considerations

Regulators are increasingly concerned with the risks and benefits of AI technology, particularly in the context of employment. This has led to a rise in federal, state, and foreign regulations. The Equal Employment Opportunity Commission (EEOC) has taken a proactive approach by issuing a draft strategic enforcement plan prioritizing AI-related employment discrimination. The plan strives to combat discrimination, promote inclusive workplaces, and respond to calls for racial and economic justice. The EEOC will focus on recruitment and hiring practices that may discriminate against protected groups, including the use of automated systems such as AI and machine learning that may exclude or adversely impact certain individuals. Furthermore, they will address employment decisions influenced by technology, including algorithmic decision-making and automated tools used in hiring and performance management. Through this plan, the EEOC seeks to advance equality and justice in the nation's workplaces.[10]

Privacy and Data Security Concerns

Other ethical and legal concerns arising from AI's integration into the labor market pertain to privacy and data security, as AI handles vast amounts of sensitive information. In response to these concerns, numerous legislative measures have been introduced on a global scale. For instance, in the United States, the California Consumer Privacy Act (CCPA) grants Californians the right to know what personal information companies have collected about them and allow them to request its deletion. Additionally, the U.S. government has proposed other acts, such as the Safe Data Act and the Consumer Online Privacy Rights Act (COPRA), to establish federal privacy regulations. In Europe, the General Data Protection Regulation (GDPR) sets a global standard for privacy regulations, safeguarding the data of EU citizens and applying to all companies doing business there. These measures aim to promote transparency, data protection, and individual control over personal information amidst AI's ever-growing presence.[11] Additionally, the decision-making capabilities of AI must be scrutinized to ensure fairness, explainability, reliability, and impartiality.

Intellectual Property and AI-Generated Content

Furthermore, as companies adopt AI for creative tasks, such as writing, generating images, creating audio and video, and other forms of creative content, ensuring compliance with intellectual property (IP) laws becomes essential to address concerns related to copyright infringement and ownership. AI tools are often trained using extensive copyrighted data without proper licensing — allowing them to identify patterns, create rules, and make predictions when responding to prompts. Therefore, questions develop as to whether AI tools are infringing on the copyright owner's rights. Some AI companies assert fair and transformative use, citing precedents like *Authors Guild v. Google, Inc.*,[12] where Google faced a law-

6 Tyna Eloundou, Sam Manning, Pamela Mishkin, & Daniel Rock, *GPTs are GPTs: An Early Look at the Labor Market Impact Potential of Large Language Models*, Cornell University, https://arxiv.org/abs/2303.10130 (March 17, 2023).

7 World Economic Forum, *The Future of Jobs Report 2020* (2020), https://www3.weforum.org/docs/WEF_Future_of_Jobs_2020.pdf.

8 Goldman Sachs Economic Research, *The Potentially Large Effects of Artificial Intelligence on Economic Growth* (Briggs/Kodnani) (2023), https://www.ansa.it/documents/1680080409454_ert.pdf.

9 Mritunjay Kumar, *The Legal Implication of Artificial Intelligence in the Workforce,* Amikus Qriae, https://theamikusqriae.com/the-legal-implication-of-artificial-intelligence-in-the-workforce/ (last visited Aug. 3, 2023).

10 *Draft Strategic Enforcement Plan*, 88 Fed. Reg. 283 (Jan. 10, 2023)

11 *Id.*

12 *Authors Guild v. Google, Inc.*, 804 F.3d 202, 116 U.S.P.Q.2d (BNA) 1423 (2d Cir. 2015)

suit for scanning books and displaying snippets in search results, but prevailed due to the recognition of transformation use.

The issue of copyright ownership over AI-generated works is also a challenge. Accordingly, on March 16, 2023, the U.S. Copyright Office clarified that copyright protection can only extend to material produced through human creativity, thus excluding non-humans as authors.[13] While AI-generated material itself might not receive copyright protection, works containing a mix of AI-generated and human-authored elements may qualify if there is "'human selection and arrangement of the revelations.'"[14] Therefore, when using AI to prompt an output, the material cannot receive copyright protection. Conversely, if the work contains AI-generated material and sufficient human authorship, such as through creative selection and arrangement of the AI-generated content, or substantial modification of AI-generated material to meet the standards for copyright protection, "'the resulting work as a whole constitutes an original work of authorship.'"[15] Copyright protection, however, will only extend to the human-authored elements. Additionally, authors can receive copyright protection for their creative contributions, even if they use AI as part of the creative process, such as using technological tools in image editing or music production.[16] Moreover, concerns arise about AI's role in patent inventorship and whether AI-generated content infringes on one's right of publicity or personality, particularly when imitating the voice of public figures or celebrities.[17] As AI continues to integrate into the labor market, these new complexities demand thoughtful consideration and legal clarity.

13 U.S. Copyright Office. (2023). *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence* (16190 Fed. Reg., Vol. 88, No. 51).
14 *Id.*
15 *Id.*
16 *Id.*

Embracing AI's Potential

In conclusion, AI's rapid evolution and powerful capabilities are reshaping the labor market and leaving a profound impact across various industries. While automation streamlines processes, increases efficiency, and enhances productivity, it also presents challenges related to job displacement and potential bias. Amongst these challenges, however, lies numerous opportunities for growth and innovation. By embracing AI's potential and complementing it with specialized human skills such as creativity and empathy, the labor market can adapt and flourish. Responsible regulation and thoughtful consideration of ethical implications are crucial in this transformation. With collaborative efforts and a balanced approach, AI's transformative power can be leveraged into a new era of possibilities and a thriving future for industries and the workforce.

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17 Nathan Smith, *Embracing the AI Revolution: Navigating Intellectual Property Challenges and Opportunities*, Dechert LLP (July. 7, 2023), https://www.jdsupra.com/legalnews/embracing-the-ai-revolution-navigating-8329884/.

The Invisible Employee: California Senate Bill 639 (2021) and the Push for a More Inclusive Workforce

by Isabella Ouliguian

The fight for a livable minimum wage in California lives on, but one group has consistently been left out of the conversation: workers with disabilities. You have most likely had interactions with employees with disabilities, whether it be at a grocery store or a second-hand apparel store. Those moments were fleeting, the impressions leaving your mind just as quickly as they entered. Would those interactions stick longer in your mind if you knew that the individual you are interacting with may be earning as little as 15 cents an hour for their work?

Many Californians are unaware that companies in California can legally pay people with disabilities wages well below the state or local minimum wages. However, starting January 1, 2025, businesses in California will no longer be able to pay workers with disabilities less than the legal minimum wage required by Section 1182.12 of the Labor Code or the applicable local minimum wage ordinance, whichever is higher, thanks to Senate Bill 639 (hereinafter "SB 639"). This bill is set to repeal two sections of the California Labor Code, which authorize special licenses to be issued to employees who have mental or physical disabilities that allow businesses, on a yearly basis, to pay said employees a fixed special wage that is less than the legal minimum wage. Come 2025, workers with disabilities will finally have the same protections as the general workforce, but at what cost?

Special licenses sprouted from President Roosevelt's Fair Labor Standards Act of 1938 (FLSA), which established a federal minimum wage, but also included an exemption: Section 14(c), which authorized employers to pay workers with disabilities less than the federal minimum wage because there was a fear of employment disparities if employers had to pay comparable wages to people with and without disabilities. California soon followed suit, adding language to its Labor Code to reflect the FLSA's exemption.

SB 639 stems from a nationwide shift toward integrating people with disabilities into the mainstream workforce. A 2020 U.S. Commission on Civil Rights report examined the viability of Section 14(c) of the FLSA. In review, the Commission recommended that Congress should repeal Section 14(c) because it found that it limited people with disabilities from realizing their full potential while allowing employers and associated businesses to profit from their labor. The report, citing the U.S. Department of Justice's (DOJ) complaint in *Lane v. Brown,* connected the principles of the Supreme Court's 1999 *Olmstead* ruling to Section 14(c). *Olmstead* reiterated that public entities "shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." The "most integrated setting appropriate to the needs of qualified individuals" is defined as a "setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." *Olmstead* spoke to institutionalization rather than employment, but its underlying principles can be translated into other fields. In *Lane*, the DOJ argued that *Olmstead's* "most integrated setting mandate" established under the Americans with Disabilities Act, "applied to workday activities, and therefore, 'required the state to provide plaintiffs with support to access mainstream employment and avoid unnecessary segregation.'" The Commission recommended in its report that the DOJ should increase enforcement of the *Olmstead* integration mandate to determine if state systems are inappropriately relying on providers using Section 14(c) licenses to provide non-integrated employment in violation of *Olmstead*.

In 2021, the California Legislature reiterated the Commission's recommendations in SB 639, articulating that the State's reliance on Section 14(c) and the state-equivalent Sections 1191 and 1191.5 impedes upon its "modern principles of, and protections for, equality." Further, in line with the Commission's report, SB 639 alleges that such exemptions are "subject to substantial misuse with subjective measures of how much individuals should be paid."

Come 2025, Section 1191 of the Labor Code will be revised to say that "an employee with a disability shall not be paid less than the legal minimum wage required by Section 1182.12 or the applicable local minimum wage ordinance, whichever is higher." In support of SB 639, the California Legislature cited data on disability employment within the state. In 2019, with continued use of Section14(c) and Sections 1191 and 1191.5 exemptions, California still only ranked 22nd in the nation in regard to the employment of people with disabilities, with 36.9 percent of people with disabilities working compared to 75.6 percent of people without disabilities working. Within the group of Californians with disabilities who do work, over 5,000 work in segregated settings

and are, at times, paid as low as 15 cents an hour for their work. With a lower rate of pay comes a higher rate of poverty for Californians with disabilities: 18.4 percent compared to 11 percent for Californians without disabilities.

The passage of SB 639, however well-intended, has still been met with opposition by those who are concerned that the broader labor market will be too competitive for Californians with disabilities to obtain, defeating the purpose of the bill. VistAbility, a nonprofit employment services provider that runs a "sheltered" disability program in California, employs workers with disabilities to perform jobs under contract for local businesses and other nonprofits for $3 to $14 an hour, depending on their speed. The nonprofit's executive director, John Bolle, told CalMatters that some of the faster workers may be able to keep working once his workshop is required to pay minimum wage, but he doubts that the local businesses and nonprofits will pay more expensive contracts to accommodate higher wages and he predicts that Californians with more significant disabilities will likely lose their jobs.

The National Council on Severe Autism sent a letter to Governor Newsom, urging him to veto SB 639. The Council argued that the bill would "eliminate the crucial option of non-competitive employment in California . . . defeating the very purpose of the enlightened legislation that allowed them the dignity and purpose of jobs relieved of the pressure of an unachievable performance metric."

Proponents of the bill have shown their support as well. Disability Rights Education and Defense Fund (DREDF) sent their own letter to Governor Newsom in 2021, urging him to sign off on SB 639. Citing the 2020 U.S. Commission on Civil Rights report, DREDF argued that the bill "closes an outdated loophole . . . ensur[ing] that Californians with disabilities are paid in the same manner as those without." Disability Rights California (DRC) presented its support in a letter to Senate Committee on Human Services Chair, Melissa Hurtado. In its letter, DRC suggested that the reasoning of Section 14(c) is premised on an antiquated theory that wages should be downwardly adjusted for workers who have disabilities that would make them unable to work in typical work setting. It equated sheltered workshops under Section14(c) with a failure to provide qualified employees with disabilities reasonable accommodations, thus connecting segregated workshops with a form of employment discrimination under the Americans with Disabilities Act.

Ultimately, SB 639 is set to go into effect on January 1, 2025, and sheltered workshops in California that employ workers with disabilities will need to increase contract prices with businesses to cover increased wages. It is uncertain how much of an effect it will have on the employment rates of Californians with disabilities. Workers who can reasonably compete in the mainstream job market may already be participants of the general workforce. However, what of those who have disabilities that may limit their ability to compete? If businesses are not willing to front the costs of increased contract prices to pay these workers minimum wage, what will be the effect on the employment rate of individuals with more severe disabilities? Sheltered workshops are, however, just that: sheltered. The national push for a more inclusive and integrated society has translated over into the employment sector, with several states already outlawing §14(c) exemptions within their workforces. This bill may be the beginning of the desegregation of the workforce or may serve to further isolate one community.

The effects of SB 639 will not be known for some time, but it is important to pay attention to the data to see how it will affect employment opportunities for people with disabilities of all levels. Given the trend towards livable wages for all, this bill aims to include a group into the conversation that has historically been left out. The underlying message of SB 639 is commendable, but will it do more harm than good? For a community that has been consistently set aside and overlooked, we can only hope that it creates a more inclusive, equitable workforce in California for everyone.

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Keep Up or Face the Music: Important Employment Law Updates for Small Businesses

by Ankit H. Bhakta

Few areas of law move as quickly as the shifting sands of employment law. Too often, I encounter small business owners either operating without an employee handbook, or without updating it for years (despite having retained legal counsel in years prior). The result is non-existent or stale employment policies and employers who are unaware of new legal requirements. In such circumstances, we must be reminded that ignorance of the law is not a defense, and small business owners are advised to keep up or face the music. Although by no means exhaustive, here are some important legal developments over the past year.

CFRA LEAVE

As brief background, in January 2021, the California legislature significantly expanded the scope of the California Family Rights Act ("CFRA") to apply to all private employers with 5 or more employees (in addition to the California state and local governments as employers). Beginning January 1, 2023, AB 1041 further expanded the CFRA so that employees could use some or all of their 12 weeks of CFRA leave to care for an additional "designated person" with a serious health condition. A "designated person" means any individual related by blood or whose association with the employee is the equivalent of a family relationship.

AB 1949, also effective January 1, 2023, further expanded the CFRA to make it unlawful employment practice for an employer to refuse to grant a request by any employee to take up to five days of bereavement leave upon the death of a family member. Although the days of bereavement leave need not be consecutive, it shall be completed within three months of the date of death of the family member. In the absence of an existing bereavement policy, the leave may be unpaid, except that an employee should be allowed to use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee.

DISCRIMINATION

AB 2188, which becomes effective January 1, 2024, makes it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, for the person's use of cannabis off the job and away from the workplace, with some exceptions. The law, for example, does not apply to an employee in the building and construction trades, nor to positions requiring a federal background investigation or clearance. In addition, the law does not permit an employee to possess, to be impaired by, or to use, cannabis on the job, or affects the rights or obligations of an employer to maintain a drug and alcohol free workplace.

SB 523 further expands the protected categories subject to the Fair Employment and Housing Act ("FEHA") and adds "reproductive health decisionmaking" as a new category. Specifically, the law prohibits employers from discriminating against employees or applicants based on their reproductive health decisionmaking, which includes, but is not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health.

ARBITRATION

The enforceability of employment arbitration agreements has become increasingly politicized and has resembled a game of tug-of-war in recent years. Although California attempted to prohibit employers from requiring employees and job applicants to agree to arbitration as a condition of employment (AB 51), the Ninth Circuit Court of Appeals, in *Chamber of Commerce of the United States of America v. Bonta,* blocked the new law and held that the Federal Arbitration Act ("FAA") preempted AB 51.

In addition, employers secured a temporary win in the U.S. Supreme Court decision *Viking River Cruises v. Moriana,* which held that, under the FAA, PAGA plaintiffs can be required to arbitrate their individual claims based on Labor Code violations they alleged to have personally suffered. In *Viking River,* the Court announced that, once an individual PAGA claim is compelled to arbitration, PAGA provides no mechanism to adjudicate the non-individual, representative PAGA claims and that plaintiffs whose individual claims are arbitrable therefore lack standing to assert claims on behalf of other alleged aggrieved employees.

Unfortunately for employers, the California Supreme Court, in *Adolph v. Uber Technologies, Inc*., stated that it remains the final arbiter of what state law is and that it was not bound by the U.S. Supreme Court's interpretation of PAGA standing in *Viking River.* It further held that "an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other [alleged] employees under PAGA." At least for now, following the *Adolph* ruling, it appears that if the arbitrator determines the plaintiff is not aggrieved, the plaintiff might be precluded from prosecuting his non-individual claims due to lack of standing. However, if the arbitrator finds a PAGA plaintiff is an "aggrieved employee," the plaintiff would be allowed to proceed on a representative basis. Although not explicitly stated, this reasoning reflects that courts, upon appropriate motion work, will likely stay any non-individual, representative claims pending the outcome of arbitration of individual PAGA claims.

Finally, on a national level, H.R. 4445 prohibits the enforcement of any pre-dispute arbitration agreement or joint-action waiver relating to sexual assault or sexual harassment disputes if the alleged victim wishes to proceed in court.

WAGE AND HOUR

In *Naranjo v. Spectrum Security Services, Inc.,* the California Supreme Court clarified that premium pay for meal and rest break violations constitutes wages for purposes of waiting time penalties. The Court also held that an employer's obligation under Labor Code section 226 to report wages earned includes an obligation to report premium pay for missed breaks. The effect of both holdings assures that the consequences for wage-and-hour violations, whether due to misclassification, failure to pay proper minimum or overtime wages, and/or the failure to provide meal or rest breaks, will be catastrophic.

Naturally, businesses are advised to consult an attorney regarding any changes to their employment policies and practices. Employers with good intentions often land in hot water when such changes are not properly implemented.

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My Pension Plan: Whose Responsibility Is It?

by Craig Dart

Professional service firms, including those in the legal profession, can establish pension plans for the benefit of their employees, but who is responsible for administering these plans?

Types of Pension Plans

Benefit plans can be classified as defined benefit plans or defined contribution plans. Defined benefit plans require the employer to fund contributions over a period of time. Defined contribution plans allow employees to defer a portion of their wages on a pre-tax or post-tax basis. Post tax contributions are commonly known as Roth contributions.

Defined contribution plans also allow employers to make matching contributions or profit-sharing contributions. Matching contributions require the employer to make a contribution for each employee who elects to make a contribution based on a specific formula for each pay period or can be made on an annual basis. Profit sharing contributions are typically made annually (sometimes on a discretionary basis) and are also allocated based upon a specific formula. Regardless of which plan is selected, each one has a common set of service providers who are responsible for the plan's administration on behalf of the participants.

These plans can be self-directed; meaning that participants can determine which investments they want their account to be invested in from those offered by the plan.

Types of Service Providers and their Function in Plan Administration

The Company who establishes the plan is known as the "Plan Sponsor" and can be commonly referred to as the "Plan Administrator" or "Fiduciary." It is their responsibility to administer the plan for the benefit of the plan participants, the beneficiaries, and to oversee the operations of the plan.

There are several functions that must be performed to operate a pension. Some of these functions can be outsourced to service providers with specific knowledge and experience. Below we outline some of the most common functions and who performs them.

- **Trustee.** The trustee is responsible for managing the plan's assets. The plan can be self-trusted, meaning that the plan sponsor serves this role, or the plan could hire an independent trustee or institutional trustee to serve in this capacity.
- **Custodian.** The custodian oversees the holding of assets on behalf of plan participants and provides different investment options for the plan and its participants. The custodian will also sometimes provide periodic investment statements to participants, which shows participants what their account is invested in along with any changes related to contributions, distributions, expenses, and gain/losses on those investments.
- **ERISA Attorney.** The ERISA attorney can prepare plan documents and amendments, answer questions regarding complex plan provisions, and help sponsors with correcting operational plan failures.
- **Investment Advisor.** The investment advisor can provide investment advice to the plan sponsor and/or participants. It is possible to have an advisor who provides advice to the sponsor and a separate advisor who provides advice to the participants.
- **Recordkeeper.** Commonly known as the "third-party administrator or TPA," the recordkeeper usually obtains investment information from the trustee and/or custodian and payroll related information from the sponsor and/or payroll service provider and does the following: (1) Prepares the financial statements at the plan level for the trustee, (2) Prepares participant statements and sends them to participants, (3) Prepares the plan's annual tax return (Form 5500 and related schedules) and assists the plan sponsor with its filing, (4) Tests the plan's activities for the year to ensure compliance with provisions of the Internal Revenue Code, (5) Assists with preparation of plan amendments, (6) Assists with correcting operational plan failures, and (7) Can help plan sponsors with understanding key plan provisions.
- **Payroll Service Provider.** Companies can perform payroll "in-house" or use a third-party payroll service provider. This information from payroll is critical to the operation of the plan. Therefore, plan sponsors and their service providers must have controls in place to ensure the accuracy of the information used by the plan. This includes the accuracy of participant dates of hire, birth, termination, social security numbers, wages and hours worked. The information is used to prepare participants statements, perform annual compliance testing, and prepare the plans financial statements.

- **Insurance Provider and Fidelity Bond.** A plan must have a fidelity bond which is a type of insurance that protects the plan against losses due to fraud or dishonesty.
- **Auditor.** Plans that are considered to be large plans (usually defined as those plans with greater than 100 participants) are required to be audited every year by an independent qualified public accountant (IQPA) and attach their report to the plans financial statements that are filed with the Form 5500. Not every CPA is an IQPA. The CPA must be certified to perform an audit and have suitable knowledge and experience in the area of employee benefits.

Who is Responsible?

Although plan sponsors can outsource many of the functions previously described, the employer is responsible for keeping the plan in compliance as noted on the website of the Internal Revenue Service, "A Plan Sponsor's Responsibilities." It is the employer's responsibility to regularly review service provider agreements and ensure that tax returns are timely filed. Working with a plan's providers to establish policies, procedures, and controls can help to ensure the accuracy for financial reporting at the plan and participant level. Over reliance on service providers to perform plan administration can result in serious failures that require corrective action.

Craig Dart, MBA, CPA, practices accounting in Riverside. He has been auditing, consulting and has performed recordkeeping for employee benefit plans for over 25 years. He is a graduate of UC Irvine and Loyola Marymount University.

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Opposing Counsel: Ankit Bhakta

by Betty Fracisco

Ankit Bhakta

This month we're focusing on a newer member of the Riverside Bar, Ankit Bhakta, who has been practicing law for seven years. His experiences and decision-making will strike a chord for all those who passed the State Bar after 2015. Additionally, he has an interesting family history of immigration and cross-country relocations.

When Ankit's grandfather was sixteen in India, his father became terminally ill, and his mother was already suffering from a debilitating disability. With few options in hand, they pulled him from school and sent him to Zambia, Africa to work. He initially worked as a clerk in a women's garment store, spending only as much as he needed, and sending any savings back home to support his mother and his two younger brothers (aged 12 and 8). In time, and with the help of friends and extended family, he became a part-owner of his own garment store. Eventually, the garment store was sold, and the partners instead went into plastics manufacturing, which was quite successful and became the impetus for the partners to emigrate together to the same community in Cerritos, walking distance from one another. Ankit's father was the eldest of four sons, each of whom was born in Zambia, but sent to boarding school in India. Although each of the four sons specialized in their own trade (a doctor, dentist, engineer, and pharmacist), all followed their dad's entrepreneurial path and owned and operated their own business. In fact, Ankit's maternal grandfather was similarly entrepreneurial, and after initially working as a car mechanic, went on to own and operate his own motel in Texas.

Ankit Bhakta was born in Yonkers, New York on December 17, 1991. His father was completing his residency in family medicine, and when Ankit was around ten months old, the family moved to Cerritos, California, where his grandparents and uncles all lived. His father obtained employment with Redlands Medical Group, and after living in Riverside a short while, his dad bought a house in Claremont and opened his own clinic near Pomona Valley Hospital. Ankit has vivid memories of Friday afternoons when his mother would pick him and his older sister up, go to the hospital or clinic to wait for their father, and then head to his grandparents' home in Cerritos, where they spent the weekend playing with his seven cousins. Stemming from the rich history of familial relations, "family" was never just Ankit's nuclear family, but included (and continues to include) all his extended family as well.

In Claremont, Ankit attended Western Christian from kindergarten through eighth grade. Although his family was Hindu, Ankit admits that there was a strong Christian influence that characterized his childhood. In fact, upon attending Claremont High School after Western Christian, Ankit experienced a definitive culture shock due to the drugs, sex, and alcohol exposure he was previously sheltered from growing up. He initially hung out only with the "Christian kids," but one by one the group splintered as they each found their own niche in high school. As for Ankit, he fell into the speech and debate crowd where he stayed for four years. This started with a speech and debate class freshman year, which evolved into joining the competitive team and eventually participating in state and national competitions through the National Forensic League. In his junior and senior year, Ankit also participated in mock trial, serving as a pretrial attorney. As for sports, Ankit grew up playing mostly tennis, baseball, and cricket—a sport his dad had played, followed, and taught him. He continued to play tennis in high school for all four years and continued playing cricket in local youth leagues. Ankit also spent time tutoring at Kumon facilities, was involved in representing the youth in Claremont as part of the Teen Committee, and volunteering at Bhakta Cultural Center in Norwalk—a nonprofit organization which helped Ankit preserve certain cultural traditions associated with his South Asian heritage.

Ankit graduated from Claremont High School in 2009 and started at UCLA, where he majored in political science, and minored in global studies and public policy. He continued playing cricket and his involvement with the Bhakta Cultural Center during college. He also gained work experience at a family-owned motel, interning with a congressman, and working in the marketing department of a mid-sized law firm. While at UCLA, Ankit also joined two South Asian dance teams, which competed against schools across the nation. Although both teams qualified for nationals, his Bollywood dance team placed third in the nation. Although Ankit was considering three career paths in college (academia, politics, and practicing law), Ankit eventually chose the law.

Despite scoring well on his LSAT, at USC Gould School of Law, Ankit struggled to place within the top 25% of his class—a goal he had set for himself before beginning law school. Although he eventually finished in the top third of his class, he felt this cost him his goal of joining a big law firm following graduation. After his first year of law school, Ankit interned with Judge Meredith Jury, a bankruptcy judge in Riverside. The following summer, he was a summer intern at Varner & Brandt in Riverside, where he was offered a full-time job following graduation. In his first month of joining Varner & Brandt, the firm had added two senior partners to the team, both of whom specialized in labor and employment law. One of the new partners, Richard D. Marca, became his long-time mentor.

Ankit left Varner & Brandt to chase the big law salary he had desired in law school, joining the labor and employment department of Rutan and Tucker in Orange County. After a year, he returned to work with his mentor Marca at Varner & Brandt, where he remained for another three and a half years, earning both jury and bench verdicts on behalf of the firm's clients. Following lengthy discussion with the firm's partners, including weathering hard times brought about by the sudden passing of the firm's managing litigation attorney, Brendan Brandt, Ankit decided to follow his family's entrepreneurial legacy and start his own law firm—Bhakta Law Firm. With the continued guidance and mentorship of senior attorneys he has worked with, in addition to the sole practitioners he has leaned on for advice along the way, Ankit secured office space in Ontario and hung up his own shingle on April 1, 2022. Ankit's primary practice areas include labor and employment defense and general business litigation.

Ankit loves practicing in the Inland Empire. He was a graduate of the RCBA New Attorney Academy and has served as a member-at-large on the RCBA's Barristers Board for almost five years. He also enjoys participating as a scoring attorney for the high school mock trial competitions. Ankit recently bought a house in Ontario Ranch, became engaged to Nidhi Mastey, a products manager with Pinterest, and is planning a traditional Hindu wedding in Thailand next year. As they say, "The best is yet to come."

Betty Fracisco is an attorney at Garrett & Jensen in Riverside and a member of the RCBA Bar Publications Committee

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Judicial Profile: Honorable Francisco Navarro

by Sophia Choi

Hon. Francisco Navarro

One of the best news I heard in February of this year was that Honorable Francisco Navarro was appointed to the Riverside County Superior Court bench, and it is with great pleasure and honor that I write this judicial profile. Judge Francisco Navarro's appointment gives Riverside County several firsts. He is of Nicaraguan and Mexican descent and is the first Central American appointed to the bench in Riverside County. He is first-generation and the only one in his household to attend college. If you heard about the enrobement ceremony of Judge Navarro x2, you would also be aware that it was the first time in Riverside County history that husband and wife were sworn in together as judges. Starting their careers at different offices, Judge Valerie Navarro in the Riverside County Public Defender's Office and Judge Francisco Navarro in the Riverside County District Attorney's Office, they came together to the bench to dedicate their legal knowledge, patience, and work ethic to equal justice.

Judge Navarro attended Fullerton College and received an associate degree in liberal arts in May of 2001. He then received his Bachelor of Arts degree in political science, with an emphasis in public law, from the University of California, San Diego (UCSD) in June of 2003. Judge Navarro worked two jobs while at UCSD, including being a branch manager at the Boys and Girls Club of Fullerton. He used credit card advances to pay for his college education. However, he could not have continued to finish his college education without the help of his best friend John, who is currently an investigator at the Riverside County Sheriff's Department. Judge Navarro was blessed with a best friend who continued to pay his portion of the rent after he moved out. In fact, John kept his condo in San Diego, so that Judge Navarro could finish his college education. It was also John who encouraged Judge Navarro to submit his college application to Fullerton College. Judge Navarro attended Western State University College of Law, where he received his juris doctorate degree in May of 2006. He served as the president of the Latino Student Bar Association in law school. During law school, Judge Navarro worked as a hotline operator for the Legal Aid Society of Orange County.

If Judge Navarro had not gone to law school, he would not have met "the one" that changed his life forever, Judge Valerie Navarro. Judge Navarro was a charmer, and when he saw Judge Valerie Navarro, he knew he needed to ask her out on a date. However, Judge Valerie Navarro was not ready for a new relationship at the time and kindly declined. Judge Navarro was not one to give up, and his persistence earned him his wife, his life partner. I believe that one of the biggest blessings in life is meeting good people, and Judge Navarro is definitely someone who has attracted good people in his life, like his wife Judge Valerie Navarro and his best friend John. These two individuals have shaped Judge Navarro's life into the path of success and with the sincerest desire to see him do well.

After graduating law school and passing the California State Bar examination, Judge Navarro started his legal career at the Riverside County District Attorney's Office, where he remained for approximately 16 years before his judicial appointment. As a senior deputy district attorney, he completed nearly 50 jury trials to verdict, litigating serious and complex cases, including special circumstance murders, gang crimes, violent attacks against police officers, and sensitive high-profile cases. During his time at the District Attorney's Office, Judge Navarro served as a trial team leader over the felony prosecution unit and had been assigned to various other units, including gang, CAPO, GAME, and public integrity. As a prosecutor, Judge Navarro acted with reasonableness and integrity, exhibited a strong work ethic, and showed a true dedication to the community, qualities ideal for a judicial officer.

Judge Navarro has a passion for mentorship, perhaps because having received support from others, he knows the value of giving to a person's life. He has volunteered for Toys for Tots, Second Harvest Food Bank, and Orangewood Children's Home & Lamoreaux Justice Dissolution Clinic. He was a mock trial coach for Norco High School and was a guest speaker at various schools, including Career Day at Patriot High School, Norco High School, Peralta Elementary, Mission Bell Elementary, Val Verde High School, Vista Del Lago High School, and several others. He has also served as mentor for the Women's Wonder Writer Program, a mentor in the District Attorney's Office, and a mentor for Mission Bell Elementary school students.

Judge Navarro is a family man, and his family is his number one priority. His wife, daughter, and son are the center of his life. The Honorable Navarros are the ideal example of a loving family. They are there for each other to truly support one another and really put each other before their own selves. They also know how to enjoy life and travel as a family often. Judge Navarro enjoys coaching his children's sports teams. He is an avid fan of the Dodgers, Lakers, and 49ers. When he can find time, you will find Judge Navarro playing recreational basketball, golf, or reading. As a friend and fan of the Honorable Navarros, if you have not yet had a chance to meet them, find them on the bench in Riverside County and you will see why they are people I trust, love, and support.

Sophia Choi is a Riverside County deputy district attorney, past president of the RCBA and of Leo A. Deegan Inn of Court, inaugural president of APALIE, and current president of the Korean Prosecutors Association.

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Kiarash ("Kia") Feyzjou – Kia Law Firm, Riverside

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