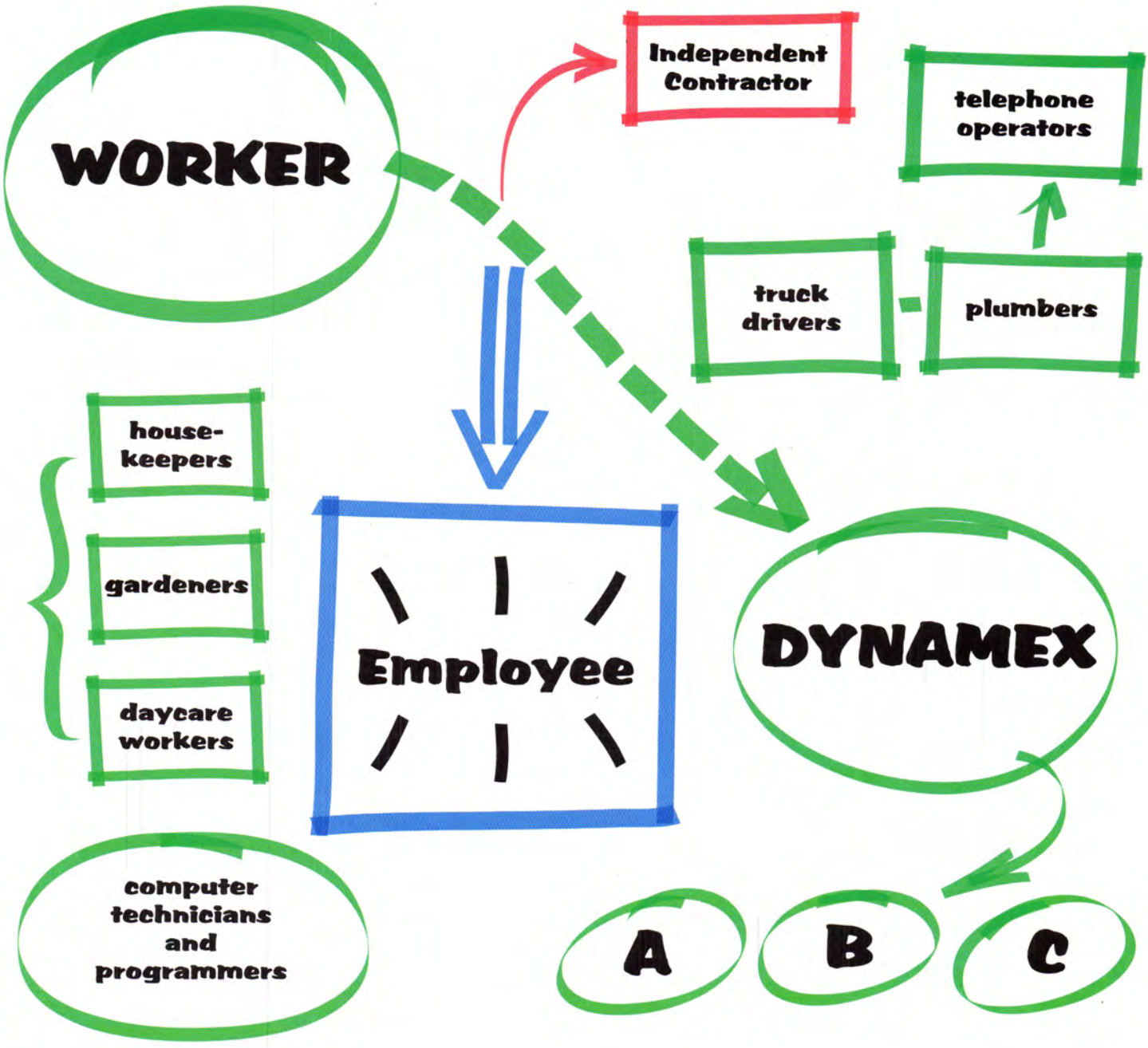
association of southern california defense counsel

verdict

Volume 2 • 2018



ALSO INSIDE:

millennials, mediations, CACI modifications, and judicial admissions

the association of southern california defense counsel

verdict

2520 venture oaks way • suite 150 • sacramento, ca 95833

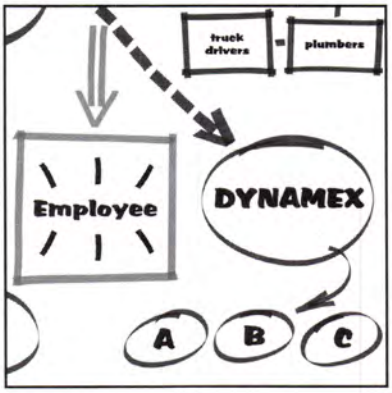
columns

features

departments

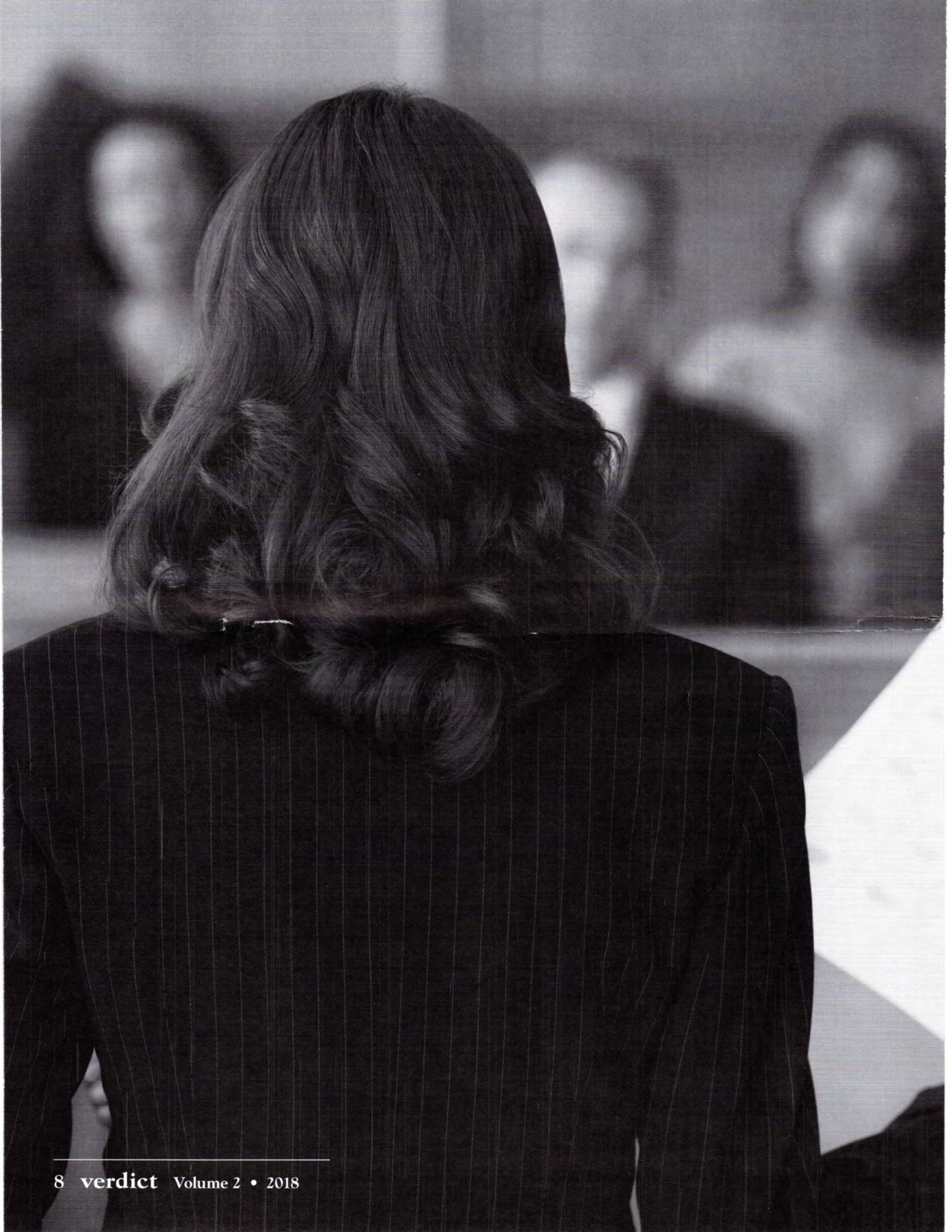
Admissions, 9

Millennials, 15



Dynamex, 19

Mediation, 26



A Defense Lawyer's Complaint:

Some Judges Don't Get It About Judicial Admissions

Timothy M. Kowal
Brendon M. Loper

A man is handing out leaflets in the train station, an old Soviet joke has it, when he is stopped by an officer. Examining the leaflets, the officer discovers they are just blank pieces of paper. "What is the meaning of this?" the officer asks. "What is there to write?" the man replies. "It's so obvious!"

The pleading practice of filing fully detailed leaflets in court has sometimes lurched toward the practice of the man in the train station. The federal "short and plain statement," and California's "ultimate fact" pleading, not only provide the barest of notice of what sort of mischief defendant is believed to have gotten up to, but also allow inconsistent allegations bordering on alternative realities, and amendments of charging allegations right up to, during, and – in a case of remand after appeal – even after judgment. Defendants less notorious than Stalin are likely to ask that grievances against them be made rather more obvious than liberal pleading norms allow them to be.

And when those grievances are stated plainly, they should, by all rights, be binding on the plaintiff as judicial admissions. Though they do not always recognize it, lawyers and judges rely on judicial admissions routinely. Every demurrer is based on judicial admissions after a fashion – i.e., that the well-pleaded factual allegations in the complaint be accepted as true as against the plaintiff, binding the plaintiff to their legal effect. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) Under this standard, only the plaintiff, and not the defendant, is saddled with the effect of the fact in the complaint, which is why defendants rest easy invoking the statute of limitations without fear of being accused of having admitted liability. (E.g., *Uram v. Abex Corp.* (1990) 217 Cal.App.3d 1425, 1433.) And of course defendants are not made "to play a risky game of roulette"

continued on page 10

by acceding to facts in a complaint "for summary judgment purposes" to expose plaintiff's legal theories as untenable. (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746-748.)

Or take for example the judicial admissions in pleadings against defendants who settle out prior to trial. The remaining defendant at trial has good reason to point to those allegations in support of alternative causes of the injuries or contributing fault by the absent defendants. Those allegations, after all, earned plaintiff leverage against the settling defendants. Yet some judges seem reluctant to hold the plaintiff to the truth of their own allegations.

The source of this reluctance, in many cases, is the tension between judicial admissions, which are conclusive and binding, and pleading rules, which are pliable and, in some cases, optional. Where a judicial admission is based in the pleadings, its enforceability depends, by definition, on the durability of those pleadings. Under rules that allow plaintiffs to rewrite their complaints as if working from a blank leaflet, admissions rooted in the pleadings will be elusive. Employee defendants, for instance, may find themselves accused in a personal-injury complaint of acting in the "course and scope" of their employment (making their employer vicariously liable), then, when the same defendants invoke their employer's arbitration rights, newly accused of acting *outside* the course and scope, and then, finally – to suit plaintiff's substantive theory – back again to having acted within the course and scope. (See *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199.)

On closer inspection, however, many such cases fall outside the judicial-admissions canon – the *24 Hour Fitness* case, for example, did not directly discuss judicial admissions. No known cases criticize judicial admissions. But liberal pleading standards, taken to extremes, undermine the doctrine: allowing pleaders to keep their hand always at the plow makes for inhospitable soil for judicial admissions to take root.

OVERVIEW OF JUDICIAL ADMISSIONS

An "admission of fact in a pleading is a 'judicial admission.'" (*Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 187 (citing *Valerio v. Andrew Youngquist Construction (2002) 103 Cal.App.4th 1264, 1271.*) The rule applies equally to unverified pleadings (see Code Civ. Proc., §§ 420, 422.10; *Womack v. Lovell* (2015) 237 Cal.App.4th 772, 786), and attorneys' authority to file pleadings on behalf of their clients is a rebuttable presumption. (Evid. Code, §§ 1222 et seq.; *Dolinar v. Pedone* (1944) 63 Cal.App.2d 169, 176-177.) Once a party has pleaded facts "in support of a claim or defense, the opposing party may rely on the factual statements as judicial admissions." (*Myers, supra*, 178 Cal.App.4th at p. 746.)

The judicial admission is commonly a creature of pleading (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324-1326), though it also appears in the forms of stipulations (*Morningred v. Golden State*

continued on page 11

Co. (1961) 196 Cal.App.2d 130, 137) and requests for admission that have been admitted or deemed admitted. (*Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1578, disapproved on other grounds in *Wilcox v. Birtwistle* (1999) 21 Cal.4th 973, 983, fn. 12.)

Distinctive about its nature, then, is the judicial admission "is entirely different from an evidentiary admission. The judicial admission is not merely evidence of a fact; it is a conclusive concession of the truth of a matter which has the effect of removing it from the issues...." (*Troche v. Daley* (1990) 217 Cal.App.3d 403, 409, quoting *Walker v. Dorn* (1966) 240 Cal.App.2d 118, 120; *Heater v. Southwood Psychiatric Ctr.* (1996) 42 Cal.App.4th 1068, 1079, fn. 10.)

A judicial admission, no mere flesh wound, cuts to the bone: a trial court "may not ignore a judicial admission in a pleading, but must conclusively deem it true as against the pleader." (*Bucur*, 244 Cal.App.4th at p. 187 (citing *Thurman v. Bayshore Transit Management, Inc. (2012) 203 Cal.App.4th 1112, 1155*).)

OVERVIEW OF PLEADING AMENDMENTS

For such reasons have courts historically insisted on good reason for amending pleadings. Honesty in pleading, at least, has been required since at least Justinian, whose code required parties to swear on the justice of their cause, and even expected lawyers to resign their case if they found it dishonest.

The California Supreme Court continues to take a dim view of situational pleading, holding that "'[a]s a general rule a party will not be allowed to file an amendment contradicting an admission made in his original pleadings" unless "upon very satisfactory evidence that the party has been deceived or misled, or that his pleading was put in under a clear mistake as to the facts.'" (*Brown v. Aguilar* (1927) 202 Cal. 143, 149; *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 836-837 [amended complaint properly dismissed where plaintiff gives no explanation for omitting prior allegations]. As a safeguard, superseded pleadings may be considered for the purpose of impeachment. (*Meyer v. State Board of Equalization* (1954) 42 Cal.2d 376, 385; *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1412 [error to refuse to admit unverified, dismissed cross-complaint to impeach]; *Cahill Brothers, Inc. v. Clementina Co.* (1962) 208 Cal.App.2d 367, 383.) And pleadings from a *prior* action may be asserted either as direct or impeachment evidence. (*Coward v. Clinton* (1889) 79 Cal. 23, 29 [commenting, but not deciding, that prior pleadings also should be considered admissions]; *Kamm v. Bank of California* (1887) 74 Cal. 191, 197-198. Accord *Magnolia Square Homeowners Association v. Safeco Ins. Co.* (1990) 221 Cal. App.3d 1049, 1061 [allegations in prior action are evidentiary in nature]; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 707; *Nungaray v. Pleasant Valley Lima Bean Growers and Warehouse Assn.* (1956) 142 Cal.App.2d 653, 667; *Dolinar v. Pedone* (1944) 63 Cal.App.2d 169, 176-177.)

BETWEEN A ROCK AND A SOFT PLACE: RELAXING THE RULES OF PLEADINGS UNDERMINES JUDICIAL ADMISSIONS

Though binding and irrevocable, a judicial admission is rooted in the pleadings, and rests on a shaky foundation when courts treat pleadings as pliable. One court has reasoned that a judicial admission "is not set in stone" because the trial judge "has discretion to relieve a party from the effects of a judicial admission by permitting amendment of a pleading." (*Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 446, 452, fn. 2. See also *Dang v. Smith* (2010) 190 Cal.App.4th 646, 659, fn. 8.) Parties seeking to avoid a judicial admission, then, might simply – as though seeing themselves caught between a rock and a soft place – seek to amend their pleadings. "Occasionally he stumbled over the truth," Churchill once remarked of former Prime Minister Stanley Baldwin, "but he always picked himself up and hurried on as if nothing had happened."

The correct analysis is reflected in *Valerio v. Andrew Youngquist Constr.* (2002) 103 Cal. App.4th 1264, 1272, reversing a quantum meruit judgment on the grounds plaintiff judicially admitted the existence of a written contract when answering the cross-complaint. The court noted that, though this judicial admission could have been excused had Valerio moved to amend his pleading, and that such motion "would have been granted" (*id.* at p. 1273), the pleadings otherwise stand: "While the result here is rigorous, the rule is clear and [defendant] is entitled to rely upon it. To hold otherwise would undermine well-settled rules of pleading relied upon to properly structure litigation." (*Id.* at pp. 1273-1274.)

Not only that, to allow a plaintiff to assert new factual theories virtually at will would replace Justinian with civil procedure according to Groucho Marx: *Those are my allegations, and if you don't like them... well, I have others.*

A CASE STUDY: THE SECOND AND FOURTH DISTRICTS DIVERGE ON WHETHER A PLAINTIFF'S ALLEGATIONS OF DEFENDANTS' AGENCY RELATIONSHIP ARE JUDICIAL ADMISSIONS SUPPORTING A MOTION TO COMPEL ARBITRATION

In 2012, the Fourth District, Division One considered judicial admissions in the context of a motion to compel arbitration. In *Thomas v. Westlake* (2012) 204 Cal. App.4th 605, plaintiff sued an investment firm and various brokers, advisors, and other defendants, who petitioned to compel arbitration. Plaintiff protested that none of the defendants save one was a signatory to the arbitration agreement and thus were not entitled to arbitrate. When defendants pointed out that plaintiff alleged in his complaint that defendants "acted as an agent of each other," plaintiff insisted that was "only a theory of tort liability" and not, presumably, anything plaintiff had expected anyone to take seriously.

Thomas rejected plaintiff's cynical view of his own pleadings: "Having alleged all defendants acted as agents of one

continued on page 12

another, [plaintiff] is bound by the legal consequences of his allegations." (*Id.* at p. 614.) It "would be unfair to defendants to allow [plaintiff] to invoke agency principles when it is to his advantage to do so, but to disavow those same principles when it is not." (*Id.* at p. 615.)

Yet just one year later, however, the Second District, Division One ruled quite differently on a similar set of facts. In *Barsegian*, *supra*, 215 Cal.App.4th 446, plaintiff made similar allegations of defendants' agency relationships with one another. As in *Thomas*, certain defendants invoked the arbitration rights held by their codefendants – their "agents," in plaintiff's telling. The trial court denied the motion. Unlike in *Thomas*, however, this time the Court of Appeal affirmed.

Barsegian distinguished *Thomas* on the ground that *Thomas* "does not make clear whether the mutual agency of the defendants was conceded by all sides for all purposes," whereas the moving defendants in *Barsegian* explicitly did not concede the allegation that they were agents of each other. (*Id.*, at p. 453.) Perhaps the reason why *Thomas* did not "make clear" whether defendants agreed with the agency allegations is because it shouldn't matter: a judicial admission bars "the party whose pleadings are used against him or her," not the party the pleadings are asserted against. (*Id.*, at p. 451, citing *Myers*, *supra*, 178 Cal.App.4th at p. 746 (emphasis added).) Inverting this rule, the reader will recall, would "force defendants to play a risky game of roulette" when asserting a judicial admission against the pleader. (*Myers, supra*, 178 Cal.App.4th at p. 748.) But the gap between *Thomas* and *Barsegian* is indeed the space to watch: courts will likely enforce a judicial admission to bind a plaintiff to the legal effect of the pleadings (e.g., *Uram, supra*, 217 Cal.App.3d at p. 1433), but will not likely enforce a judicial admission merely to estop a plaintiff from correcting factual errors. (E.g., *Dang v. Smith* (2010) 190 Cal. App.4th 646, 659, fn. 8.)

A procedural motion such as a petition to compel arbitration makes for a harder case, which in *Barsegian* yielded questionable law. Distracted, perhaps, by the possibility of an inequitable result, *Barsegian* stated that

a judicial admission is a "*factual allegation by one party that is admitted by the opposing party.* The factual allegation is removed from the issues in the litigation because the parties *agree as to its truth.*" (*Id.*, at p. 452.) The court supplies the italics, but no citations. Instead, the court reasoned that a judicial admission is binding only "because the parties *agree* to its truth." (*Id.*) And thus a judicial admission in the *Barsegian* court means the fact "is effectively conceded *by both sides*."

As discussed above, however, the stipulation is but one of at least three species of judicial admission. Although *Barsegian* acknowledges that facts admitted in response to requests for admission are also judicial admissions, it fails to note that, like judicial admissions in pleadings, they are not stipulative in nature. But who knows? When *Barsegian* concludes, pedal down, throttle out, that "a judicial admission is therefore conclusive both as to the admitting party *and as to that party's opponent*" (*id.*, italics in original), attorneys who have recently propounded RFAs might feel that last bit an unwelcome finger pointed in their direction: *will the responses to my discovery prove "conclusive both as to the admitting party and to that party's opponent"?*

If courts follow *Barsegian* rather than *Thomas*, factual allegations in a complaint would be binding only to the extent the defendant counter-admits them. The holding of *Barsegian*, if adopted, would fundamentally narrow and indeed redefine the judicial-admissions doctrine.

RE-ADMISSION: THE FOURTH DISTRICT'S 2012 OPINION SHOWS THE PATH TO ESTABLISHING JUDICIAL ADMISSIONS

The Fourth District's 2012 opinion in *Thurman*, *supra*, 203 Cal.App.4th 1112 offers a roadmap to establishing a judicial admission consistent with *Thomas*, and notwithstanding *Barsegian*. There, the operative verified complaint sought recovery for Labor Code meal- and rest-break violations. It alleged defendants had been providing meal periods from July 2003 onwards, yet the trial court nonetheless awarded the plaintiff recovery for missed meal periods after that date, finding the plaintiff not bound by the admission: the trial court felt it would "elevate pleading form over the facts" and "would give dignity to the 'gotcha' theory of litigation." (*Id.*, at p. 1154.)

Reversing, the Court of Appeal noted the steps the defendants took to highlight that admission, and the steps plaintiff failed to take to relieve himself from it. (*Id.*, at pp. 1156-1157.) The defendants worked overtime to enforce the admission, "clearly object[ing] before, during, and after trial, to the admission of evidence of missed meal periods after July 2003," and filing a motion in limine to prohibit introduction of such evidence. (*Id.*) And the plaintiff failed to

continued on page 13

Judicial Admissions – continued from page 12

amend the complaint despite indicating it would do so in its opposition to the motion in limine. (*Id.*, at p. 1156.)

The Court of Appeal also noted that the defendants "prejudicially relied on [the] judicial admissions," as the defendants prepared a settlement offer under Code of Civil Procedure section 998, calculating the amount of the statutory offer in reliance on the admission that they had no liability for missed meal periods after July 2003, and that permitting the plaintiff to walk back his judicial admission could allow him to recover damages in excess of the offer. (*Id.*, at p. 1157.) (Emphasis on prejudice, however, probably causes the judicial-admissions analysis to tread on judicial estoppel's turf. (See *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1383-1384.))

In terms of establishing a judicial admission, the job description in *Thurman* involves long hours with few rest breaks: the admission in the complaint was clear and unequivocal; it was relevant to a material fact in the case; it was invoked as to the merits rather than in a procedural motion; and the complaint, seasoned through litigation, discovery, and trial, including objections and a motion in limine, was not susceptible to amendment without prejudicing the defendant.

But the *Thurman* factors are not all indispensable elements, and the judicial-admissions canon merely requires a clear allegation in a pleading. Against healthy judicial concerns against elevating form over function, the judicial admission follows from the principle that a lawyer may not file a complaint absent grounds to believe the allegations are true. It is the pleader who engages in "sharp practice" in making factual allegations against the named defendants "unless, after a reasonable inquiry, the plaintiff actually believes that evidence has been or is likely to be found" to support the assertions; the actual-belief standard of pleading "requires more than a hunch, a speculative belief, or wishful thinking: it requires a well-founded belief. (*Kojabadian v. Genuine Home Loans, Inc.* (2009) 174 Cal.App.4th 408, 421-22 [citing Supreme Court precedent].) If a lawyer files a complaint with factual allegations without the requisite actual belief in their truth, the lawyer can be sanctioned (Code Civ. Proc., § 128.7, subd. (c)) and is subject to other disciplinary action. (*Pickering v. State Bar* (1944) 24 Cal.2d 141 (*per curiam*); see Bus. & Prof.Code, § 6068, subd. (d).) Not every allegation, in other words, is a stick good enough to beat a defendant with.

Yet despite these fundamental rules of honest and reasoned pleading, some trial courts – like the one reversed in *Thurman*– may feel that invoking the doctrine of judicial admissions would work a "gotcha" on plaintiff. Pity, as a proper application of the doctrine might inspire more discipline in pleading practice. For many litigants are not unlike Mark Twain when he observed he "could remember anything, whether it had happened or not." Give them enough liberties in pleading practice and they'll prove it.