Contra Costa County Bar Association

2022 MCLE SPECTACULAR

Building Our Future

CCCBA's Appellate Section proudly presents…

#1 LITIGATION & ARBITRATION ROUNDUP: Analyzing Recent Appellate Decisions Affecting Litigators

Justice Teri L. Jackson, California Court of Appeal, First Dist., Div. 5
Rosanna W. Gan, Hanson Bridgett LLP
Gary A. Watt, Hanson Bridgett LLP

AGENDA

United States Supreme Court Cases

Viking River Cruises v. Moriana, 142 S.Ct. 1906 (June 15, 2022) (FAA arbitration)
Morgan v. Sundance, Inc., 142 S.Ct. 1708 (May 23, 2022) (FAA arbitration)

California Supreme Court Cases

Geiser v. Kuhns, 13 Cal.5th 1238 (August 29, 2022) (anti-SLAPP)
Serova v. Sony Music Entertainment, 13 Cal.5th 859 (August 18, 2022) (anti-SLAPP)
People v. Valencia, 11 Cal.5th 818 (July 1, 2021) (expert witnesses)

California Court of Appeal Cases

Espinoza v. Superior Court of Los Angeles County, 2022 WL 4480057 (September 27, 2022) (CAA arbitration)

Malloy v. Superior Court, 83 Cal.App.5th 543 (September 19, 2022) (venue)

Miller v. Roseville Lodge No. 1293, 2022 WL 4493906 (September 2, 2022) (*Privette* doctrine)

Musgrove v. Silver, 82 Cal.App.5th 694 (August 25, 2022) (scope of employment)

Sanchez v. Bezos, 80 Cal.App.5th 750 (June 30, 2022) (anti-SLAPP & hearsay)

Kline v. Zimmer, Inc., 79 Cal.App.5th 123 (May 26, 2022) (expert witnesses)

Quach v. California Commerce Club, Inc., 78 Cal.App.5th 470 (May 10, 2022) (petition for review granted) (arbitration: forfeiture by delay)

Aronow v. Superior Court, 76 Cal.App.5th 865 (March 28, 2022) (arbitration: indigent)

Jane IL Doe v. Brightstar Residential Inc., 76 Cal.App.5th 171 (March 10, 2022) (evidence)

People v. Jenkins, 70 Cal.App.5th 175 (October 12, 2021) (evidence)

Zuniga v. Alexandria Care Center, LLC, 67 Cal.App.5th 871 (August 12, 2021) (experts)

Michaels v. Greenberg Traurig, LLP, 62 Cal.App.5th 512 (March 26, 2021) (experts)

Contra Costa County Bar Association

2022 MCLE SPECTACULAR

Building Our Future

PROGRAM MATERIALS

Arbitration & Litigation Update
CCCBA MCLE Spectacular 2022

Justice Teri L. Jackson, California Court of Appeal, First Dist., Div. 5
Rosanna W. Gan, Hanson Bridgett LLP rgan@hansonbridgett.com
Gary A. Watt, Hanson Bridgett LLP gwatt@hansonbridgett.com

Case Name	Court	Description
1. *Espinoza v. Superior Court of Los Angeles County*, 2022 WL 4480057 (September 27, 2022). Strict statutory construction of deadline to pay arbitration fees	California Court of Appeal, Second District	Plaintiff employee sued her former employer for discrimination and retaliation. The trial court granted employer's petition to compel arbitration and stayed the Superior Court litigation. Thereafter, the employer did not pay its arbitration fees by the statutory deadline, so plaintiff moved to lift the stay to permit her to proceed in the trial court instead of arbitration. The trial court denied her motion. Plaintiff filed a petition for writ of mandate in the Court of Appeal. Granting the writ, the Court of Appeal stated: "We agree with plaintiff that, based on the plain language as well as the legislative history of [Code of Civil Procedure] section 1281.97, the Legislature intended courts to apply the statute's payment deadline strictly. Thus, under section 1281.97, subdivision (a)(1), defendant was in material breach of the arbitration agreement even though, as the trial court found, the delay in payment was inadvertent, brief, and did not prejudice plaintiff."
2. *Malloy v. Superior Court*, 83 Cal.App.5th 543 (September 19, 2022). Working from home, then venue in county of residence too	California Court of Appeal, Second District	Plaintiff filed an action for pregnancy discrimination, interference and retaliation under the Fair Employment and Housing Act in Los Angeles County. Defendant moved to change venue to Orange County, location of its offices. The trial court granted defendant's change of venue motion. The question before the Court of Appeal was whether plaintiff could bring her lawsuit in Los Angeles County, where she had been working remotely before being fired, or, did

		she have to file suit in Orange County because the allegedly unlawful practices—terminating her employment while she was on protected pregnancy leave—would have occurred at her employer's office had she not been on leave. The Court of Appeal granted plaintiff's petition for writ of mandate, ordering the trial court to enter a new order denying the change of venue motion. The appellate court concluded that but for the unlawful termination during pregnancy leave, plaintiff "would have continued to work in Los Angeles County [i.e., remotely] but for the unlawful employment practices."
3. *Miller v. Roseville Lodge No. 1293*, 2022 WL 4493906 (September 2, 2022). No hirer liability to independent contractor's employee merely because scaffold were on the premises and plaintiff chose to use it	California Court of Appeal, Third District	This case involves application of the *Privette* doctrine (*Privette v. Superior Court* (1993) 5 Cal.4th 689), which deals with whether the hirer of an independent contractor can be liable for on-the-job injuries sustained by the independent contractor's employees. Defendant hired Charlie Gelatini to move an automated teller machine (ATM) on its premises. Plaintiff worked for Gelatini and was the person who performed the work. Plaintiff was injured when he fell off a scaffold and sought to hold defendant and one of defendant's employees liable for his injuries. The scaffold was already in the room where the work was to be done. It had four wheels that had to be locked to prevent it from moving while in use. Plaintiff had never used a scaffold before. He did not know that it had wheels or that the wheels had to be locked in order to prevent it from moving. The trial court granted summary judgment in favor of defendant, finding that neither the retained control exception nor the concealed hazardous condition exceptions to the *Privette* doctrine apply. The Court of Appeal affirmed. In so holding, the appellate court stated that at the summary judgment stage, the defendant is entitled to a burden-shifting presumption once it establishes that it hired an independent contractor and the contractor's employee was injured in the course of the work. At that point, the plaintiff must demonstrate triable issues of fact as to any exception to the *Privette* rule of no liability. The Court of Appeal concluded that plaintiff's argument that the hirer should be liable for providing the mobile scaffold which fell because the wheels were not locked was insufficient because the hirer did not actually direct plaintiff to use that mobile scaffold, did not direct that the work be performed in any particular way, and did not interfere with how plaintiff

		performed the work. The contractor and his employee (plaintiff) were "free to do the work as they saw fit."
4. *Geiser v. Kuhns*, 13 Cal.5th 1238 (August 29, 2022) Anti-SLAPP statute's razor-thin slicing on Prong 1 continues	California Supreme Court	Sidewalk picketers, including evicted homeowners and an advocacy group (collectively "protestors"), protested a real estate company's eviction, both at the company and its CEO's home. The CEO filed petitions for civil harassment restraining orders. The protesters filed an anti-SLAPP motion alleging that "the demonstration implicated a public issue because the business practices by which Wedgewood evicted the [homeowners] exemplified 'one of the many stories of hundreds of thousands who lost their homes since 2008 in the Great Recession.'" The CEO dismissed the petitions before the anti-SLAPP motion was resolved. The trial court awarded attorney fees. The Court of Appeal ruled that the true motivation for the protests "was purely personal to the [homeowners] and did not address any societal issues of residential displacement, gentrification, or the root causes of the great recession." In other words, CEO had not based liability on protected activity. A dissenting justice disagreed, finding this was a paradigmatic SLAPP case (well-funded developer limiting free expression by imposing litigation costs on citizens who protest). The Supreme Court sided with the Court of Appeal's dissenting justice and reversed. The Supreme Court rejected a narrow interpretation of the protest, and held that the protestors' expressive activity was about both private and public matters. "It is common knowledge that foreclosures, evictions, and inadequate housing are major issues in communities throughout California, and the participation of more than two dozen members of an advocacy group dedicated to fighting foreclosures and residential displacement must be considered against that backdrop." "Section 425.16, subdivision (e) sets forth four types of activity that trigger the statute's protections. The fourth — the catchall — covers 'any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.' (§ 425.16(e)(4).) In *FilmOn* [*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133], we articulated a two-step inquiry to determine whether the conduct from which the lawsuit arises falls within the catchall. 'First, we ask what 'public issue or . . . issue of public interest' ' is implicated by the challenged activity. (*FilmOn, supra*, 7 Cal.5th at p. 149.) Second, we look to the

		'functional relationship' between the challenged activity and the public issue it implicates, and ask whether the activity contributed to public discussion of that issue. (*Id*. at pp. 149–152.)" "We now make explicit the standard that is implicit in the analysis above: *FilmOn's* first step is satisfied so long as the challenged speech or conduct, considered in light of its context, may reasonably be understood to implicate a public issue, even if it also implicates a private dispute." Similarly, the second *FilmOn* step was met given the context in which the demonstration arose, the fact that advocacy group members with no connection to the affected individuals were also present, the fact that it was covered by the press, and that the real estate company issued a press release accusing the advocacy group of "portray[ing] the [homeowners] as victims, while exploiting a very emotional issue . . . to further its own agenda." The Court found that "[t]his language suggests that Wedgewood recognized not only that the protest implicated public issues, but also that the protest bore some connection to the 'further[ance]' of ACCE's 'agenda.'"
5. *Musgrove v. Silver*, 82 Cal.App.5th 694 (August 25, 2022). Late night partying, including cocaine and alcohol, outside scope of employment	California Court of Appeal, Second District	A Hollywood producer brought an executive assistant he employed through his company to a luxurious resort in Bora Bora. The trip, which included the producer's entourage of family and friends, was part vacation, although the assistant met with the concierge to plan the entourage's daily recreational activities. Tragically, the executive assistant drowned when she went for a midnight swim in the lagoon outside her overwater bungalow. The drowning was accidental, and related to her ingestion of alcohol and cocaine supplied by the chef, who was also an employee of the producer on a working vacation. The executive assistant's parents sued the producer for wrongful death, on the theory that: (1) he was directly liable, because he paid all resort-related expenses of the trip, including for alcohol; and (2) he was vicariously liable, because he also employed the chef, who had met up with the executive assistant for a late-night rendezvous when she drank half a bottle of wine and snorted a "significant" amount of cocaine just before going for a swim.

		The trial court granted summary judgment, ruling the producer was not liable under either theory as a matter of law. The Court of Appeal affirmed, holding the chef's late-night activities with the assistant were not within the scope of his employment for the producer. Applying the "no liability" rule made sense because the producer "had no control over [a chef's] injury-producing activities [supplying the executive assistant with cocaine and alcohol while partying] and where those activities are wholly unrelated" to his duties to the producer as chef.
6. *Serova v. Sony Music Entertainment*, 13 Cal.5th 859 (August 18, 2022). Anti-SLAPP commercial speech or not commercial speech?	California Supreme Court	Plaintiff Serova sued Sony under consumer protection statutes, claiming that some tracks on Michael, an album of music billed as Michael Jackson's first posthumous release, were not sung by Jackson but by an imitator, contrary to statements on the album label. The record company filed an anti-SLAPP motion, contending that the statements on the label were not commercial speech but protected First Amendment speech (artistic speech), so that plaintiff could not demonstrate a probability of prevailing. The trial court agreed, as did the Court of Appeal: Even if the statements about Jackson's contributions were false, said the Court of Appeal, the First Amendment required classifying them as noncommercial, and thus vigorously protected, speech. The Supreme Court disagreed and reversed: "The album-back statement and video were commercial advertising meant to sell a product, and generally there 'can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public.' [Citation omitted.] We recognize artistic works such as albums, in some instances, enjoy robust First Amendment protections, but that does not turn all marketing of such works into noncommercial speech, and it does not do so in this case. Additionally, a seller's purported lack of knowledge of falsity does not tell us whether that seller's speech is commercial or noncommercial, and commercial speech does not shed its commercial nature simply because a seller makes a statement without knowledge or that is hard to verify." Notably, the Supreme Court decided this case even though the parties reached an agreement to settle (after full briefing and oral argument), in light of the importance of the issues presented.

7. *Sanchez v. Bezos*, 80 Cal.App.5th 750 (June 30, 2022). Anti-SLAPP motions and hearsay: admissibility – now, or at trial?	California Court of Appeal, Second District	Plaintiff Sanchez brought a defamation action against defendant Bezos (yes, that Bezos) for allegedly telling news reporters that he, Sanchez, had provided explicit photos of Bezos to the National Enquirer. Bezos filed an anti-SLAPP motion. On Prong 2 (reasonable probability of success), Sanchez offered his own declaration claiming that numerous reporters had informed him of Bezos' defamatory statements. The trial court excluded the claims as inadmissible hearsay and granted the anti-SLAPP motion, dismissing Sanchez's case. On appeal, Sanchez argued that hearsay may be considered for anti-SLAPP purposes if there is reasonable possibility the hearsay will be cured at trial, arguing that the Supreme Court said so in *Sweetwater Union High School Dist. v. Gilbane Building Co.*, 6 Cal.5th 931. He further asserted any hearsay problem could be cured when the reporters testify under oath at trial. The Court of Appeal reasoned that the *Sweetwater* court limited its hearsay exception to statements made under oath or penalty of perjury, such as grand jury transcripts and plea forms. Thus, the statements of the news reporters could not be admitted because they were not made under oath or penalty of perjury. But *Sweetwater* also said that "Although affidavits and declarations constitute hearsay when offered for the truth of their content, [the anti-SLAPP statute] permits their consideration." 6 Cal. 5th at 942. "[D]eclarations may be considered, not because they satisfy some *other* hearsay exception," but because the anti-SLAPP statute says they can. (Emphasis added.) The entire Prong 2 process is to determine if evidence might *exist* which if credited demonstrates a claim with minimal merit, not to demonstrate actual trial admissibility. *Id.* at 944-45. "[E]vidence may be considered at the anti-SLAPP stage if it is reasonably possible the evidence set out in supporting affidavits, declarations, or their equivalent will be admissible at trial." *Id.* at 947. Only when the evidence described in an affidavit, declaration, or equivalent "could never be admitted" at trial, should a court make such rulings at the anti-SLAPP motion stage. *Id.* at 948. "To strike a complaint for failure to meet evidentiary obstacles that may be overcome at trial would not serve the SLAPP Act's protective purposes." *Id.* at 949. Did the *Sanchez* court read *Sweetwater* too narrowly?

8. *Viking River Cruises v. Moriana*, 142 S.Ct. 1906 (June 15, 2022). PAGA takes a hit in FAA arbitration	United States Supreme Court	In this case, a former employee of Viking River Cruises (petitioner) sued the company under the Private Attorneys General Act. Former employee alleged Viking violated the California Labor Code. In addition to her individual complaint, former employee made claims on behalf of other employees, invoking PAGA. Viking moved to compel arbitration in light of the arbitration agreement former employee signed. The arbitration agreement applied to any dispute arising out of her employment. Furthermore, the arbitration agreement contained a severability clause. The severability clause specified that if the waiver was found invalid, any class, collective, representative, or PAGA action would be litigated in court. Moreover, the severability clause stated that if any portion of the waiver remained valid, it would be enforced in arbitration. Accordingly, Viking moved to compel arbitration of former employee's individual claim (the violation she suffered independently) and moved to dismiss her PAGA claims. The Supreme Court of the United States held that the FAA preempted the California precedential case, *Iskanian*, "insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." In other words, because the PAGA claims can be divided, petitioner was entitled to compel arbitration of respondent's individual PAGA claim. And because a plaintiff can only maintain a non-individual PAGA claim if they have an individual PAGA claim, respondent lacked standing. Therefore, the Court held that respondent's PAGA claims should be dismissed.
9. *Kline v. Zimmer, Inc.*, 79 Cal.App.5th 123 (May 26, 2022). Reasonable medical probability requirement for expert witness testimony only applies to party bearing the burden of proof on the issue	California Court of Appeal, Second District	A patient who was implanted with an artificial joint during hip replacement surgery, filed a personal injury action against a medical device manufacturer. The patient alleged the device was defective. After two trials, the lower court entered judgment on a jury verdict awarding economic and noneconomic damages to the patient. Furthermore, the lower court denied the manufacturer's motion for a new trial. On appeal, the manufacturer claimed the trial court made two categories of evidentiary errors when it excluded the manufacturer's proffered medical opinions because they were not stated to a reasonable medical probability; and as a result, it prevented the manufacturer from presenting any expert testimony.

		The Court of Appeal held that the reasonable medical probability requirement applies only to the party bearing the burden of proof on the issue. Because the *patient* bore the burden of proof, the reasonable medical probability requirement did not apply to the manufacturer. Thus, the court held the trial court's error in excluding the manufacturer's medical expert's statements and the resulting exclusion of the manufacturer's expert testimony deprived the manufacturer of a fair trial.
10. *Morgan v. Sundance, Inc.*, 142 S.Ct. 1708 (May 23, 2022). Prejudice to a party irrelevant when ruling on compelling FAA arbitration	United States Supreme Court	*Morgan v. Sundance* answers the question of whether the FAA allows federal courts to create arbitration-specific procedural rules. There, petitioner sued respondent for violating the Fair Labor Standards Act. At first, Sundance defended itself in the litigation brought by an employee. Then eight months after the suit was filed, Sundance moved to compel arbitration under Sections 3 and 4 of the FAA. In response, employee claimed that Sundance waived its right to arbitration by waiting so long and litigating in court. The district court applied Eighth Circuit precedent, which like some other circuits, asks whether the party moving for arbitration acted inconsistently with that right and "prejudiced the other party by its actions." The district court found sufficient prejudice, and denied the motion, but the Court of Appeals reversed, sending the case to arbitration. The Supreme Court held that the FAA's "policy favoring arbitration" does not allow federal courts to conjure special rules for arbitration. The prejudice requirement (followed in some cases including California) was an example of such a made up rule. Therefore, the Supreme Court invalidated the prejudice requirement. In closing, the Court stated "Our sole holding today is that [the Courts of Appeals] may not make up a new procedural rule based on the FAA's 'policy favoring arbitration.'"
11. *Quach v. California Commerce Club, Inc.*, 78 Cal.App.5th 470 (May 10, 2022) (petition for review granted)	California Court of Appeal, Second District	An employer sought to compel arbitration with a former employee. The employee contended that the employer waived its right to compel arbitration because it waited 13 months after filing the lawsuit to move to compel arbitration and had engaged in extensive discovery. Employee claimed employer prejudiced him by forcing him to expend time and money litigating. The trial court agreed, ruling that respondent waived the right to compel arbitration.

Actual prejudice required in order to avoid arbitration on grounds petitioner delayed		The Court of Appeal reversed. After observing that under California case law, arbitration waivers are not to be lightly inferred, the Court of Appeal turned to the issue of actual prejudice. The Court of Appeal held that the employer's actions were not prejudicial because employee did not show he spent any time or money on the litigation that he would not have spent in arbitration. The Court of Appeal further held that when a party resisting arbitration makes no showing other than a lengthy delay during which the parties engaged in discovery and does not show that discovery would have been unavailable in arbitration, then prejudice has not been demonstrated. FAA case? See *Morgan v. Sundance, Inc.*, discussed above, with U.S. Supreme Court holding prejudice is irrelevant in determining whether to compel arbitration. From the California Supreme Court's "Pending Issues Summary" re *Quach*: Does California's test for determining whether a party has waived its right to compel arbitration by engaging in litigation remain valid after the United States Supreme Court decision in *Morgan v. Sundance, Inc.*?
12. *Aronow v. Superior Court*, 76 Cal.App.5th 865 (March 28, 2022). The indigent cannot be forced to bear the costs of arbitration	California Court of Appeal, First District	This California Arbitration Act case involved a dispute over the trial court's jurisdiction to lift a stay of trial pending arbitration, where a plaintiff demonstrates a financial inability to pay anticipated arbitration costs. Another issue was whether a trial court can require a defendant to pay the plaintiff's share of arbitration costs and if not, to waive the right to arbitration. The backdrop is Code of Civil Procedure section 1281.4, which authorizes courts to stay litigation until arbitration has occurred "or until such earlier time as the court specifies." Section 1281.4 is silent on indigent parties as grounds for lifting the stay. Aronow, a client, sued his former law firm. The former law firm petitioned to compel arbitration, the court granted the petition, and stayed the litigation. Before arbitration commenced, Aronow claimed he was financially unable to pay his share of the arbitration costs. He filed a motion in court for those costs to be waived or, alternatively,

		for the stay pending arbitration to be lifted so the dispute could proceed to trial instead. The trial court denied his motion. Aronow filed a writ petition. After surveying a split in the case law, the *Aronow* court joined other appellate courts which had concluded that a court cannot consign an indigent party to any private alternative procedure the litigant cannot afford, including arbitration. If arbitration costs will effectively deprive an in forma pauperis litigant of a forum for resolution, the dispute should instead proceed to litigation, where courts have inherent power to waive particular fees. And if the other party wishes to remain in arbitration, it can pay the indigent party's share of arbitration costs. (But see *MKJA, Inc. v. 123 Fit Franchising, LLC*, 191 Cal.App.4th 643, 647, 662 (2011) (holding that "a party's inability to afford to pay the costs of arbitration is not a ground on which a trial court may lift a stay of litigation that was imposed pursuant to section 1281.4." "[O]nce a petition is granted and the lawsuit is stayed, 'the action at law sits in the twilight zone of abatement with the trial court retaining merely vestigial jurisdiction … .' [Citation.]".
13. *Jane IL Doe v. Brightstar Residential Inc.*, 76 Cal.App.5th 171 (March 10, 2022). Police reports, party admissions, official records, and hearsay	California Court of Appeal, Second District	A handyman of a residence for the disabled was charged with sexual assault on a resident. Plaintiff Doe sued Brightstar, the residence, for negligence. Brightstar moved for summary judgment on the negligence claim asserting the attack was unforeseeable. In response, Doe introduced evidence from a police file that Brightstar knew its handyman had a history of harassing women. The trial court excluded the evidence claiming it was inadmissible double hearsay and granted Brightstar's motion for summary judgment based on lack of foreseeability. The Court of Appeal reversed. The first issue was one of Brightstar's owner's statement to officers investigating the incident that the perpetrator had "'a history of loitering around the facility and harassing female employees.' One of the officers recorded [the owner's] admission in a police report, which was in the file Doe included as an exhibit to her summary judgment opposition." "It is true that police reports are *often* inadmissible … But not always." Double hearsay is admissible if a justification for admitting the evidence rebuts the hearsay objection at

		each level. On the first level, the owner's admission about the perpetrator was "the admission of a party opponent." (See Evid. Code § 1220.) At level two, the police report was admissible as an official record. (See Evid. Code § 1280.) For its part, Brightstar "contested neither the authenticity of the police report nor the foundational requirements for the official records exception … ." The report and the admission within it were admissible, and the admission was *relevant* on the issue of foreseeability of the molestation. The Court of Appeal repeated the analysis to find admissible statements Brightstar's employees made to police about the perpetrator. At level one, the statements made by employees were offered not for their truth, but for the non-hearsay purpose that the defendant and its employees were on notice of the perpetrator's "disturbing and unsupervised presence." At level two, the police reports containing these statements counted as official records. Thus, whether Brightstar or its owners knew or should have known of any danger presented by the handyman was a disputed fact.
14. *People v. Jenkins*, 70 Cal.App.5th 175 (October 12, 2021). Used cars, valuation, and published compilations	California Court of Appeal, Fourth District	Defendant was convicted of first-degree burglary of a residence with a person present, second-degree burglary of a vehicle, attempted unlawful taking of a vehicle (value must exceed $950), and possession of burglary tools. The court sentenced defendant to 13 years. Defendant contended that his conviction for unlawful taking of a vehicle must be reversed because the court permitted, over objection, a police detective to testify to the car's estimated value obtained from Kelley Blue Book's website. A police detective obtained the trade-in value of the used car as between $1,800 to $2,240. At trial, outside the presence of the jury, the court conducted a hearing regarding how the detective determined the value of the car. Though he used Kelley Blue Book often, on cross the detective admitted "he did not know how the Kelley Blue Book obtained the information it used to provide a vehicle's estimated value nor did he know how frequently the Kelley Blue Book updated its information. And he was not aware of other pricing methods to determine whether the information provided by the Kelley Blue Book was accurate." Over the defendant's objection, the court ruled the Kelley Blue Book valuation admissible under Evidence Code section 1340 ("Evidence of a statement, other than an

		opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270"). The Court of Appeals reviewed this claim to determine whether the testimony was in fact, inadmissible hearsay. "Five elements must be satisfied when a party seeks to admit evidence under the published compilation exception: '(1) the proffered statement must be contained in a 'compilation'; (2) the compilation must be 'published'; (3) the compilation must be 'generally used ... in the course of a business'; (4) it must be 'generally ... relied upon as accurate' in the course of such business; and (5) the statement must be one of fact rather than opinion. [Citation.]'" After walking through the elements and case law interpreting them, the Court of Appeal concluded that Kelley Blue Book qualifies as a reliable published compilation. "A party seeking to admit evidence under section 1340 does not have to show how the compilation was made, only that once made, the compilation is "generally used and relied upon as accurate ... ." Therefore, the valuation testimony was admissible under the published compilation exception.
15. *Zuniga v. Alexandria Care Center, LLC*, 67 Cal.App.5th 871 (August 12, 2021). Spreadsheets, foundation, admissibility, and expert testimony.	California Court of Appeal, Second District	In *Zuniga,* a former employee brought an action against a former employer alleging individual and class claims for violations of PAGA and unfair and unlawful business practices. The employee settled the individual claims and a bench trial occurred on the representative claims. After the employee rested, the court granted the employer's motion for judgment as to the representative claims. The employee appealed and claimed the trial court erred when it excluded the testimony of her expert witnesses and the spreadsheets prepared by another witness which the expert had relied upon. The Court of Appeal held the trial court correctly excluded the spreadsheets because the employee who prepared them failed to provide foundational testimony necessary to authenticate them. It noted that the exclusion was not an abuse of discretion because the expert had no hands on or supervisory involvement in the conversion of the documents into spreadsheets. The spreadsheets would only be admissible if the employee "introduce[d] evidence sufficient to sustain a finding that … [the spreadsheets] accurately reflected the conversion into a computer-readable form [from hard copies]."

		The witness who did testify "had no hands-on or supervisory involvement in the conversion of the … documents into Excel spreadsheets, had no substantive conversations with the team that prepared the spreadsheets and did not review the finished product, let alone validate the results. He testified only as to the general quality control procedures used at iBridge to ensure the accuracy of the conversion process. He had no personal knowledge that those procedures were actually used on [employee's litigation] project and did not offer an opinion, expert or otherwise, that [the exhibits] accurately reflected in computer-readable format the Alexandria Care timekeeping and payroll records." Given all of this, it could not be said that the trial court abused its discretion in excluding this evidence. Interestingly, while the Court of Appeal concluded the spreadsheets were properly excluded as evidence, the trial court erred in concluding the employee's expert could not testify about his opinions based on that evidence. This is because Evidence Code section 801 only requires the basis for an expert's opinion be reliable, "whether or not admissible." Had the expert relied solely on the hard copies produced by the defendant (instead of the converted Excel spreadsheets), "There can be no doubt [the] expert opinion … would be admissible … ." The key is whether the evidence relied upon by an expert "'is of a type reasonably relied upon by professionals in the relevant field … .'" But "'when the expert's opinion is not based on his own perception or knowledge, but depends instead upon information furnished by others, it is of little value unless the source is reliable … expert opinion testimony may not be based upon information furnished by others that is speculative, conjectural or otherwise unreliable.'" "Accordingly, if the trial court rejected [the expert's] testimony simply because it was based on inadmissible evidence, without further consideration of the reliability of the data used, the court committed legal error." There was also "nothing speculative or conjectural about [the spreadsheets for Evidence Code section 801 purposes]." The information came from the defendant employer, and any issues about the expert's conversion from hard copy to electronic copy (by a third party) "go to the weight of [the expert's] testimony, not its admissibility, and was the proper subject of cross-examination … ."

16. *People v. Valencia*, 11 Cal.5th 818 (July 1, 2021). Another take on *People v. Sanchez* (expert testimony, case specific facts, and hearsay)	California Supreme Court	The issue in *Valencia* was hearsay. The Court resolved the question of whether a gang expert's recitation of hearsay describing the circumstances of predicate offenses constituted background information about which the expert could properly testify without satisfying hearsay objections, or whether it involved "case-specific" facts which require overcoming hearsay objections. In *Valencia*, the defendant was arrested and charged with attempted murder and various other charges with gang enhancements. The prosecution's expert, a former police officer who specialized in gangs, testified to support the enhancements. After two trials, a jury convicted the defendant and he appealed. The Court of Appeal held that some of the expert's testimony about the predicate offenses constituted inadmissible hearsay about which the testifying expert lacked any personal knowledge, and accordingly, reversed the gang charges. The Attorney General appealed. The Supreme Court of California rejected the Attorney General's argument that the facts about predicate offenses were only "background information." The Court reasoned that the facts about the predicate offenses were case specific, and thus barred under *People v. Sanchez*, 63 Cal.4th 665 (2016), unless any hearsay objections were overcome. (*Sanchez* contrasted general knowledge about facts accepted in the expert's field with "case-specific facts about which the expert has no independent knowledge.") As the Court put it in *Valencia*, "drawing the line of demarcation between background and case-specific information can present challenges, as reflected by the different conclusions drawn by the Courts of Appeal regarding predicate offenses." "Hallmarks of background facts are that they are generally accepted by experts in their field of expertise, and that they will usually be applicable to all similar cases. Permitting experts to relate background hearsay information is analytically based on the safeguard of reliability." "As *Sanchez* observed, general testimony about a gang's behavior, history, territory, and general operations is usually admissible … The same is true of the gang's name, symbols, and colors. All this background information can be admitted through an expert's testimony, even if hearsay, if there is evidence that it is considered reliable and accurate by experts on the gang."

		Nonetheless, “such information stands in contrast to information regarding the commission of a particular offense on a specific occasion. Experts with no personal knowledge of case-specific facts, or who do not rely on other admissible evidence establishing those facts, are simply ‘regurgitat[ing] information from another source.’” “Without independent admissible evidence of the particulars of the predicate offenses, the expert’s hearsay testimony cannot be used to supply them. In the absence of any additional foundation, the facts of an individual case are not the kind of general information on which experts can be said to agree.”
17. *Michaels v. Greenberg Traurig, LLP*, 62 Cal.App.5th 512 (March 26, 2021). Expert testimony, future lost profits, and speculation	California Court of Appeal, Second District	One issue in this case was whether the trial court abused its discretion by excluding portions of an expert witness’s declaration on damages (lost profits). Fitness celebrity Jillian Michaels brought a legal malpractice action against a law firm regarding the negotiation of a branding contract with a diet supplement company and another contract with an unrelated entity. The gist of the malpractice claim was that her attorney failed to recognize inconsistencies and tension between the clauses in unrelated contracts and how each could impinge on the other. Law firm moved for summary adjudication on six out of the nine causes of action. The trial court excluded Michaels’s expert witness's declaration on future damages as speculative and not supported by the record. Accordingly, the trial court granted law firm’s motion on all six causes of action. As to the damages arising out of the malpractice involving the contract with the diet supplement company, the Court of Appeal held that the trial court appeared to have weighed the evidence as to the scope and duration of Michaels’s marketing efforts, when in actuality, genuine issues of fact existed as to same. Because there were genuine issues of fact as to the amount of marketing and duration of same, the trial court was incorrect to conclude there were no facts supporting the lost profits estimate. The question then, was whether the expert testimony was, nonetheless, speculative under *Sargon Enterprises, Inc. v. University of Southern California*, 55 Cal.4th 747 (2012) (drawing distinction, for expert witness testimony gatekeeping purposes, between established and unestablished businesses when assessing future profits). In the case of established businesses, lost profits may be reasonably ascertained by

		looking at the business's past performance to extrapolate potential future earnings. For unestablished businesses, past performance may be objectionable as speculative. However, as *Sargon* put it, "'anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability.'" The Court of Appeal concluded that: 1) the expert's opinion fell within the established business dichotomy; 2) the trial court was not to weigh the expert's opinion or choose between competing experts in deciding a summary judgment motion, but rather "analyzes principles and methodologies, not the conclusions generated; and 3) with respect to the principles and methodologies at issue, the trial court abused its discretion in excluding the expert's "Before" period damages calculation and in excluding the first "After" [litigation disrupted Michaels's relationship with the company whose products she was endorsing] period damages calculation, because both found support in the record and had proper foundations. As to the separate deal Michaels had with another entity (the other contract at issue in the malpractice claim against her law firm), the trial court did *not* abuse its discretion in excluding the expert's opinion because the business referred to was *unestablished* at all relevant times. Thus, the trial court acted well within its discretion (and *Sargon*) in concluding the expert had not "'established a basis for … [lost profits as to an entity] which had never operated in this field or [even] fielded any similar product … .'" Given the completely unestablished business, the expert "had an uphill task of attempting to formulate a lost profit analysis … noted the lost profit calculation was based on other deals … offered no analysis on the identity or calculation analysis based on these other deals … We agree with the trial court, this opinion was wholly speculative."