

LITIGATION

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2023 Litigation & Appellate Summit

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Winning Strategies for Summary Judgment: Why, How, and When

Friday, May 5, 2023

Speaker:

Denyse Clancey

Dave Schultz

Justice Petrou

Honorable Sam Feng

MCLE: 1.5 Hours of MCLE of Implicit Bias

Conference Reference Materials

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California Lawyers Association
Litigation & Appellate Summit
May 5, 2023

Panelists:

Justice Ioana Petrou
Hon. Sam Feng
Denyse Clancy
Dave Schultz

Moderator:

Matthew O'Brien

**WINNING STRATEGIES
FOR SUMMARY
JUDGMENT: WHY,
HOW, AND WHEN**



PANELISTS

LOOKING BEHIND THE CURTAIN

- WHERE DO JUDGES START WHEN REVIEWING MSJ/MSA?
- HOW AND WHEN DO JUDGES READ THE SEPARATE STATEMENTS?
- HOW DO JUDGES VIEW BURDEN SHIFTING?
- WHAT DO JUDGES APPRECIATE MOST/LEAST IN BRIEFS?
- WHAT ORAL ARGUMENT CAN LEAD TO CHANGING A TENTATIVE RULING?



LEGAL DEVELOPMENTS

RAMIREZ – CAN YOU ADMIT OR EXCLUDE DECLARATIONS BY A PMK?

LAOSD ASBESTOS CASES, *RAMIREZ V. AVON PRODUCTS, INC.* (2023) 87 CAL.APP.5TH 939

- MSJ REVERSED BECAUSE AVON DID NOT MEET BURDEN.
- SUPPORTING DECLARATION BY ITS PMK DID NOT ESTABLISH REQUIRED PERSONAL KNOWLEDGE.
- TRIAL COURT ERRED IN OVERRULING OBJECTIONS TO THE DECLARATION
- “THE RAMIREZES CONTEND THERE ARE ONLY TWO TYPES OF WITNESSES, LAY OR EXPERT, AND GALLO WAS NOT DESIGNATED AS AN EXPERT. SHE WAS THEREFORE LIMITED TO TESTIMONY REFLECTING HER PERSONAL KNOWLEDGE AND COULD NOT TESTIFY TO HEARSAY. WE AGREE.” (ID. AT 184)



LEGAL DEVELOPMENTS

BERROTERAN – CAN YOU ADMIT OR EXCLUDE FORMER TESTIMONY?

Berroteran v. Superior Court (2022) 12 Cal.5th 867

- MIL Granted to Preclude 10 depositions of Ford Wits From Other Cases.
- “In sum...the official comment concerning [Evidence Code] section 1291(a)(2) articulates what is, in effect, a general rule against admission at trial, by way of that statute's hearsay exception, of prior testimony from a typical discovery deposition. ...Properly understood, the official comment to section 1291...simply recognizes that the circumstances surrounding a civil discovery deposition typically do not create an interest and motive for cross-examination by the party opponent similar to that existing at trial. **The party urging admission of deposition testimony bears the burden of rebutting the general rule by submitting appropriate information justifying the admission of designated deposition testimony.**” (Id. at 617-618.)

SUMMARY JUDGMENT DOS AND DON'TS

Citations

Experts –
Declarations
& Depositions

MSJ/MSA
disguised as
MILs

Pictures

Timing

1 **II. Facts.**

2 **A. American Optical marketed its 2090N respirator to protect against**
3 **“hazardous dusts,” including “pneumoconiosis dusts.”**

4 American Optical began selling its R2090N respirator in 1975. [UMF 32].¹ American Optical
5 advertised its R2090N respirator as “NIOSH-certified” and providing “dependable protection in
6 atmospheres containing hazardous dusts and mists, including lead, and other pneumoconiosis-
7 producing dust.” [UMF 33]



27 ¹ Plaintiffs' Separate Statement of Facts begins sequentially after American Optical's Separate
28 Statement of Facts.

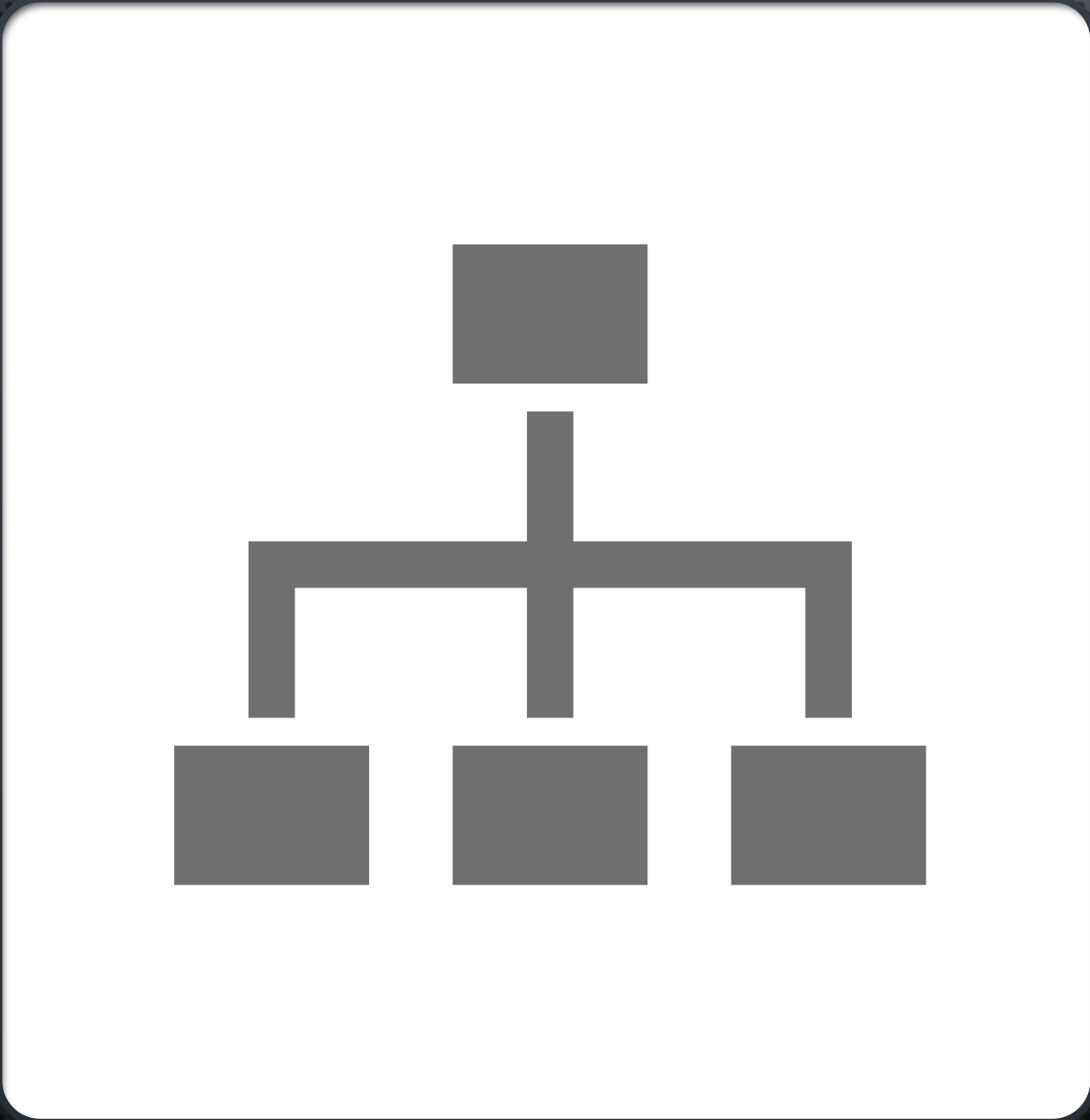


13 Mr. Tyler identified a photo of himself wearing a black respirator mask made of rubber while
14 working at Foundry Service. [UMF 71]. He wore this respirator mask from 1975 to 1992. [UMF 70,
15 72]. Darrell Alvin Bevis, an expert in industrial hygiene with 54 years of experience in respiratory
16 specialty, testified that Mr. Tyler used an American Optical 2090N respirator. [UMF 73]. Specifically,
17 Mr. Bevis looked at the photograph of Mr. Tyler in the black respirator and identified it as an
18 American Optical R2090N respirator. [UMF 74]. Mr. Bevis is an expert in industrial hygiene; he is a
19 full member of the American Industrial Hygiene Association and serves on the AIHA respirator
20 committee. [UMF 75]. He teaches respirator training to private employers and the United States armed
21 forces. [UMF 76]. He performs independent testing on respirators. [UMF 77]. With respect to the
22 rubber straps in the photo of Mr. Tyler in an AO 2090N respirator, Mr. Bevis explained that the rubber
23 straps on the mask were prone to deteriorate very quickly, and the worker would tie them to maintain
24 protection. [UMF 78].

25 Mr. Tyler wore the respirator mask with a white “comfort sock” (facelet) that was supplied
26 with the respirator in the respirator box. [UMF 79]. The comfort sock was between the rubber mask
27 and his face. [UMF 80]. He replaced the filters in the mask once a week. [UMF 81]. About once a
28 year, Mr. Tyler would replace the mask with an “identical” mask. [UMF 82]. Mr. Tyler expected that
the respirator mask would protect him. [UMF 83].



Photo from Best Body Shop's Facebook page



STRATEGIES AND STRUCTURE FOR MSJ/MSA

- BY PLAINTIFFS
- BY DEFENDANTS

STRATEGIES FOR OPPOSITIONS

(AND OBJECTIONS TO MOVING EVIDENCE)

STRATEGIES FOR REPLIES

(AND OBJECTIONS TO OPPOSING EVIDENCE)

QUESTIONS FOR THE PANEL?

DENYSE CLANCY, Partner



Denyse F. Clancy is a nationally recognized appellate and trial lawyer with prominent experience in asbestos and talc litigation and other toxic torts. She is a partner in the Oakland, CA law firm of Kazan, McClain, Satterley & Greenwood. Prior to joining Kazan Law as a partner in 2016, Ms. Clancy was a shareholder and lead appellate and trial counsel at Baron & Budd, P.C.

Ms. Clancy is one of only a handful of lawyers in the entire nation who has both (i) been lead trial lawyer in cases resulting in National Law Journal Top 100 verdicts in the nation, and (ii) protected the law as an appellate attorney in numerous state Supreme and Appellate Courts. She was selected by San Francisco Magazine as one of the top women attorneys in Northern California.

Ms. Clancy is a recipient of the Pound Civil Justice Institute Award for her work on *Air & Liquid Systems Corp. et al v. DeVries* (2019), a United States Supreme Court opinion holding that manufacturers of equipment incorporating asbestos component parts are liable for the foreseeable harm caused by these asbestos parts. Her recent victories as lead appellate attorney include *Hart v. Keenan* (2020), a California Supreme Court case holding that names and logos are non-hearsay identification evidence; *Bader v. Avon* (2020), a California Court of Appeal case holding that Plaintiffs do not have to prove that talc products contain asbestos at the jurisdictional phase of the case; and *Booker v. Imerys Talc America, Inc.* (2020), a California

Court of Appeal case holding that Plaintiffs were not required to provide testimony from an expert geologist in order to prove that there is asbestos in talc. She was also lead appellate attorney in *Izell v. Union Carbide* and *Mahoney v. Georgia-Pacific*, which affirmed large punitive and compensatory damages verdicts, respectively.

Ms. Clancy was co-first chair in *Schmitz v. Johnson & Johnson and Colgate* (2019), in which the jury awarded \$12 million to a lifelong school teacher whose mesothelioma was caused by her exposure to cosmetic talc. She was part of the trial team in *Lanzo v. Johnson & Johnson* (2018), in which the jury awarded \$117 million to a forty-four old man whose mesothelioma was caused by lifelong use of Johnson's Baby Powder. She was co-first chair in *Tyler v. American Optical* (2016), in which the jury awarded \$32.8 million to a machinist whose respirator was defective.

Ms. Clancy graduated *magna cum laude* from Yale University, and was valedictorian, *summa cum laude* of her law school, Southern Methodist University.



Schultz, David: David Schultz is a partner in the litigation and appellate departments of Polsinelli LLP, an AmLaw 100 firm with over 1000 attorneys in 22 cities. David is certified by the State Bar of California as a specialist in Appellate Law, and has over 30 years of experience handling high-exposure civil litigation cases. In addition to practicing in California, he serves as national counsel in toxic tort litigation and has been admitted *pro hac vice* to litigate cases at trial and on appeal in other states. He is also frequently retained to brief and argue post-trial matters, including one case where he successfully vacated a \$250 million verdict. His cases have resulted in published decisions on issues such as federal preemption, statute of limitations, and duties in premises liability and strict product liability cases. David is also active in the litigation community, as he teaches civil litigation as an adjunct professor at Pepperdine Law School, serves on amicus committees, volunteers as a settlement officer for the Los Angeles Superior Court, and provides pro bono legal services to indigent clients. He has also authored articles and spoken at national litigation conferences on many issues, including the ethical responsibilities of litigants and attorneys, legal developments in California and other jurisdictions, litigation strategy, and personal jurisdiction. He obtained his undergraduate degree from U.C.L.A in 1987 and J.D. from Loyola Law School in 1990.



Judge Feng was appointed to the San Francisco Superior Court in 2009. Prior to his appointment he was a civil litigator, where his areas of practice included insurance defense, bad faith litigation and representation of plaintiffs in catastrophic injuries. He also served as a private mediator and arbitrator. He received his Bachelor of Arts from the University of Southern California, where he graduated magna cum laude, Phi Beta Kappa, Phi Kappa Phi. He received his Juris Doctorate from University of California, College of Law, San Francisco. From 2019 to the present, he was the criminal supervising judge, assistant presiding judge and the presiding judge of the court. He has been a member of Judicial Council since 2013 and is vice chair of Executive and Planning.



Justice Ioana Petrou has served on the California Court of Appeal, First Appellate District, since 2018, and previously served on the Alameda County Superior Court, where she was Chief Supervising Judge of the Civil Division. Justice Petrou is a graduate of Berkeley Law, where she teaches trial practice. She is a member of the Judicial Council’s Advisory Committee on Civil Jury Instructions and the State-Federal Judicial Council Committee. Justice Petrou served on the Board of Directors of the California Judges Association and is the current chair of its Appellate Committee. She also serves on the board of the Association of Business Trial Lawyers. Prior to her appointment to the bench, Justice Petrou was an Assistant U.S. Attorney in New York and in San Francisco and worked at O'Melveny & Myers and Foley & Lardner. She was also pro bono general counsel for Breast Cancer Prevention Partners and served on its executive board.
