

THE UPDATE



**SAN DIEGO
DEFENSE LAWYERS**

WINTER 2010

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The Bottom Line

Case Title: Hoang v. Pardee Homes

Case Number: ADR Services 07-1418-ER

Judge: Hon. Enrique Romero (retired) ADR Services Los Angeles

Plaintiff's Counsel: Edward C. Ip & David Sire, Jr.

Defendant's Counsel: Robert C. Carlson & Fort A. Zackary, Jr.

Type of Incident/Causes of Action: Negligence and Breach of Contract (Construction Defect). The initial allegation of inadequate restoration of damage following gray water overflow from clogged clothes washer drain line morphed into general construction defect claim regarding mold and allegations that every aspect of construction was illegal and improper.

Settlement Demand: \$1,793,000.00

Settlement Offer: \$20,000.00

Trial Type: Arbitration, single arbitrator

Trial Length: 10 arbitration days plus over one year of motion hearings.

Verdict: Defense. Claimant takes nothing. The Arbitrator found Claimant's primary expert, David R. Sannes' testimony to be "unbelievable, exaggerated, fantastical, unreal, invented, fictional and untrustworthy." His testimony amounted to "a 'dog and pony' show with no substance."

The Bottom Line

Case Title: Kelly Reisenauer v. Farzad Yaghouti, et al.

Case Number: 37-2008-00083745-CU-MM-CTL

Judge: Hon. John S. Meyer

Plaintiff's Counsel: Lowell Robert Fuselier, Esq. and David T. Hayek, Esq.

Defendant's Counsel: Daniel S. Belsky, Esq. and Gabriel M. Benrubi, Esq.

Type of Incident/Causes of Action: Medical Malpractice/LASIK Surgery

Settlement Demand: \$150,642.00

Settlement Offer: None

Trial Type: Jury

Trial Length: 6 days

Verdict: Defense

PRESIDENT'S MESSAGE



Welcome to 2010! A new year, a new San Diego Defense Lawyers President and three new Board members. In this issue you'll be able to read about our three newest Board members and also learn something about our other Board members. And, if the article on the tidbits of information about our Board members just doesn't give you enough "info", then please join us at the SDDL Happy Hour. Each quarter this year we are going to try to have a "Happy Hour" where SDDL members not only have a chance to get to know the Board members better, but also hobnob with their fellow members!

Speaking of "hobnobbing", we've already had several opportunities to do so this year. Our SDDL 2010 Installation Dinner was a great success and well attended. We had it on Saturday, January 30 at The Manchester Grand Hyatt.

Over 160 people attended. The facilities were wonderful. We thanked Darin Boles for his service as our 2009 President and honored Sheila Trexler, of Neil, Dymott, Frank, McFall & Trexler as our 2009 Defense Lawyer of the Year.

We also kicked off our Brown Bag luncheon series in January. Chuck Dick, a partner at Baker McKenzie, spoke to us on "Ethics in the Practice of Law". Look for the summary of that Brown Bag in this issue of The Update. If you missed that Brown Bag, not only did you miss the adventure of just getting to the Brown Bag that day due to the weather, but you also missed an inspiring and interesting talk by Chuck about the challenges that we face in the modern practice of law.

We followed up the Brown Bag with an Evening Seminar later in January, where once again, the topic was Ethics. As always, we try to cram in some of those "hard to get" CLE topics in for our members before the report period to Bar ends each year in February. David Carr regaled us with hypotheticals that tested our knowledge of ethics and educated us on the in's and out's of the various ethical guidelines. You can read about that seminar in this issue also.

Check out our website for the complete list of the Brown Bag topics and speakers for the remainder of the year. Please join us for those Brown Bag luncheons (lunch provided!) at our usual location, hosted by Peterson Court Reporting, at the 11th Floor Conference Room at 530 B Street. Additionally, we will be updating the Website on upcoming Quarterly Evening Seminars.

In addition to our educational events, we are working on scheduling the Annual Golf Tournament. Feedback was so positive about the venue of our event last year (The Crossings at Carlsbad Golf Club) that we are looking at a return engagement! So, adjust that grip, work on that backswing, and start setting up your winning foursome.

Finally, I'd be remiss if I didn't look months down the road and remind you of the SDDL Mock Trial which we host each October. We generally have 20 teams from 15 law schools across the country trek here for a Mock Trial competition. Last year, the winning team was from University of California, Berkeley, Boalt Hall. If you have not been a judge for this competition, consider being one this year. The skills and abilities of these law students are amazing, and for me, renews my enthusiasm for the practice of law.

That's it for now. We've got a very exciting event filled year ahead of us and look forward to seeing you at each and every event! In the meantime, as you go through the motions of the daily grind of the practice of law, keep in mind our motto: Civility, Integrity and Balance. Cheers.

UPCOMING BROWN BAG SEMINARS

Peterson Reporting
530 "B" Street, Suite 350, San Diego, CA 92101
From Noon till 1 P.M. (Lunch included)

April 13: Mediation: What Do Mean Your Carrier Representative Isn't Here and You Have No Authority? by Doug Glass

May 11: How to Avoid Committing Malpractice on a Daily Basis by Susan Oliver

June 8: Calderon and SB 800 by Tom Balestreri

July 13: Substance Abuse: Dealing With The Stresses of The Practice of Law in Other Ways by Greg Dorst

Evening Seminars dates to be announced

April: How to Avoid Sexual Harassment by Melissa Omansky

BROWN BAG PROGRAMS

Brown Bag Lunch Series **Ethics in the Practice of Law**

By *Brian Rawers*

Lewis Brisbois Bisgaard & Smith LLP

It was a cold, dark, rainy day. The rain was falling in sheets and the wind was blowing over trees. People were hunking down for another miserable day.....wait, this isn't the start of a Dickensian novel! It describes the weather in San Diego on January 19, 2010, the day of SDDL's first Brown Bag lunch of 2010! Thirty-six brave souls ventured forth to hear Chuck Dick speak on "Ethics in the Practice of Law". Those who showed up were treated to an hour talk by Chuck. The talk was intended to force us to think about what we, as lawyers, have become as a profession, and what we, individually, should think about, and hold onto, as we practice law in the modern, ever changing, world which focuses on "efficiency", "bottom lines", "profit margins" and other such concepts that are, historically, more at home in the business world.

As many of us know, Chuck is a long time member of the San Diego legal community. He practiced with several firms in town before opening the San Diego office of Baker McKenzie in 1988. He was the managing partner of that office for years and currently is the Chair of the firm's North American Litigation Practice Group. Chuck is a Founder of ABTL, and a member not only of ABOTA but also The American College of Trial Lawyers, which is composed of the top 1% of litigators nationwide. He is a recipient of the Daniel T. Broderick Award, which is considered to be one of the highest awards for civility and professionalism that can be bestowed upon a San Diego lawyer. He also served for four years as a Commissioner on the City of San Diego Ethics Commission.

Chuck started his presentation by recapitulating "where" we are as a profession today. He posed several questions for us to ponder. For instance, Chuck asked "Who are our most valuable members of a firm - advocates or rainmakers?" "Is winning the only thing, or can a client be satisfied without a jury saying 'You prevail'?" and "Is being 'cost effective' more important than handling a case correctly?"

Chuck noted that English Common Law, which our system is based on, was so advanced even compared to physicians who were still "bleeding" people as part of a cure for various ailments.

Chuck pointed out that as lawyers, we are

"professionals", and that lawyers have always been thought of, throughout history, as being "professionals". He noted, however, that many groups are now called "professionals", from accountants to realtors to fitness gurus. Chuck's question was this: What makes us different from those other "professionals"? Why should we be "more proud of our membership in the Bar" than perhaps, we have been lately? Chuck noted that lawyers are "different" because we have certain obligations that other professions don't have, such as "fiduciary duties" and "duties of loyalty". We are special, in part, because we stand in the shoes of a client and speak out on their behalf. Chuck focused on the Duty of Loyalty. Chuck noted that we spend a great deal of time in the practice of law on "the business model", for example, evaluating the "quality" of our inventory and how "aged" it is. We also focus on "moving inventory" such as settling cases, engaging in "beauty pageants" or creating glossy pamphlets in order to secure new clients, or trying to determine when or how soon a new hire will be a "profit center" for the firm. Chuck suggested that we spend more time focusing on our duty of loyalty to our clients and making that paramount.

Chuck also noted that "loyalty" raises its head in other situations. Many clients have let "client loyalty" fall to the wayside and adopted the mantra of "what have you done for me lately". And, with the number of lawyers moving from firm to firm at greater frequencies than have been seen in the past, lawyers have lost the "loyalty to the firm" mentality. In the long run, this also has a negative impact on the profession.

Chuck is an enthusiastic self described Anglophile which manifested itself in his reading of several short stories from one of his favorite works, "Forensic Fables." The Fables are a compilation of humorous stories dealing with the English Bench and Bar. The morals of these stories inspired all of us to reflect on this historic profession and how we, as individuals, can live up the ideals of our profession, expressed through these "fables".

Chuck concluded his talk by reminding us of the great privilege that is bestowed on us to speak on someone's behalf and to be thankful for this great privilege. He acknowledged that there will be natural points of conflict that arise in the "practice of law", especially given the "business plan" aspects of the modern practice and the current tough economic times. When we are faced with such con-

flicts, or difficult times, Chuck implored us to remember our duty of loyalty, and fidelity, to our clients. SDDL thanks Chuck for his inspiring words and enjoyable presentation.

Brown Bag Evening Seminar **"Conflicts 101"**

by *Brian Rawers*

Lewis Brisbois Bisgaard & Smith LLP

On Tuesday, January 26, 2010, San Diego Defense Lawyers held its first evening seminar of 2010. The speaker for the evening was David Cameron Carr and his topic was "Conflicts 101: Joint and Successive Representation Conflicts".

Mr. Carr is in private practice in San Diego. He specializes in legal ethics and the law of lawyering, including discipline defense, bar admissions, attorney fee disputes, legal malpractice, attorney professional responsibility and ethics advice. He graduated from Loyola Law School in 1986. He spent many years, with the State Bar of California in many capacities. He is the current president of the Association of Discipline Defense Counsel. He is also a graduate of Borrego Springs High School!

Mr. Carr's presentation was broken down into two different areas of conflicts. The first was "Joint Representation Conflicts" and the second was "Successive Representation Conflicts". In regard to Joint Representation Conflicts, he used a hypothetical case regarding a lawyer representing four doctors (whose names evoked memories of the Marx brothers!) and their medical group in a situation where one attorney represented not only each of the doctors individually, but also the group. A series of scenarios and questions ("What, if anything, did Attorney Driftwood do wrong?") were posed which reminded all of us of our halcyon days of law school!

There was plenty of group interaction as we discussed how California Rule of Professional Conduct 3-310 (the "basic" conflicts rule), California Evidence Code Section 962 (establishing the concept of obtaining "client consent" as opposed to obtaining "client waiver" of the conflict), California Business & Professions Code section 6068 (e) and *Tsakos Shipping and Trading S.A. v. Juniper Garden Town Homes Ltd.* (1993) 12 Cal. App. 4th 74 applied in analyzing the pitfalls encountered by Attorney Driftwood. We learned that the elements of Effective Joint Representation Conflict Waivers include: (1) Disclosure of Relevant Circumstances in Writing, (2) Advising of Reasonable Foreseeable Consequences of Joint Representation, (3) Letting Clients Know of Limitations of Confidentiality and (4) Dealing with Future Adversity.

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Mr. Carr indicated Successive Representation Conflicts was a "Duty of Loyalty" issue and control of "confidential information". Basically there should be "no unfair advantage" accruing to an attorney due to representing a client in matter #1 and then suing that "former" client in matter #2.

In analyzing Successive Representation Conflicts, we were presented with two hypothetical situations for our consideration. The first hypothetical dealt with a lawyer who left a law firm and then ended up litigating matters against a party that had been a

client of his at the law firm that he left. To answer the issues posed by this hypothetical, we looked at California Rule of Professional Conduct 3-301 (E), *Jessen v. Hartford Casualty Insurance Company* (2003) 111 Cal. App. 4th 698 (which discusses and analyzes the "substantial relationship" test) and California Rule of Professional Conduct 3-310 (B).

The second and last hypothetical dealt with an associate who left a law firm and went to a plaintiff's counsel's firm that had an ongoing lawsuit against a client who was represented by the associate's former firm. Despite the fact that the

associate had not worked on that case at his previous firm nor intended to work on the case with his current employer, "conflicts" still raised its head! To understand the conflict and how to address it, we looked at *Meza v. H. Muehlstein & Co.* (2009) 176 Cal. App. 4th 969 and ABA Model Rule 1.10, Imputation of Conflicts of Interest.

Mr. Carr's presentation was very informative and very entertaining. We all left the evening seminar feeling much more informed about the current state of "Client Conflicts".

Appellate Updates The "Costs" Case



By Jeffrey A. Miller
Lewis Brisbois Bisgaard & Smith LLP

Recently, the California Supreme Court decided a long-time irksome issue as to the meaning of "the party with a net monetary recovery" for purposes of the recovery of costs and attorney fees under Code of Civil Procedure section 1032, subdivision (b). In *Goodman v. Lozano* (2010) 47 Cal.4th 1237, the Supreme Court held that if an award in favor of a non-settling defendant is offset in full by the amount the plaintiff has received from the settling defendants under Code of Civil Procedure section 877, subdivision (a), the result is a "zero judgment." Therefore, the plaintiff is *not* "the party with a net monetary recovery" so cannot be classified as the "prevailing party" entitled to recover costs and attorney fees under section 1032. (*Id.*)

The plaintiffs in *Goodman* sued numerous defendants for construction defects discovered in their new house. They settled with all of the defendants except for one set of defendants, the Lozanos, for a grand total of \$230,000. The trial court found the settlements were in good faith. At a bench trial, the judge awarded plaintiffs damages in the amount of \$146,000, \$64,000 of which went to plaintiffs' contract claim. The trial court then applied the section 877 offset to the award, which resulted in a "zero judgment." The trial judge thereafter found the Defendant Lozanos were the prevailing parties because they paid nothing under the judgment. The court awarded the Lozanos attorney fees and costs. On appeal, the Court of Appeal affirmed expressly disagreeing with several appellate court decisions, including the majority in *Wakefield v. Bohlin* (2006) 145 Cal. App.4th 963.

The Supreme Court affirmed the ruling of the Court of Appeal while also disapproving of the majority opinion in *Wakefield*, which found that "any success" in pressing the claims against the losing party may result in a net award under section 1032, subdivision (b). According to Court, the plain meaning of "the party with a net monetary recovery" means just what it says -- a net monetary recovery -- not some amorphous concept of "success," which is contrary to the language found in section 1032, subdivision (a)(4). (*Id.*) The court also distinguished several other appellate cases that applied analysis similar to that used in *Wakefield* in other contexts, including the *Great Western*, *Zamora*, *Pirkig*, *Syverson* and *Ferraro* cases. The Court further observed that its interpretation was consistent with the legislative history of section 1032. (*Id.*) Applying its interpretation of the statute to the facts of the case, the Court concluded that the trial court did not abuse its discretion in awarding costs and attorney fees to the

Lazanos because the Lazanos fully achieved their objective, which was to obtain a judgment awarding damages in an amount less than the sum of the prior settlements. (*Id.*)

This decision was long overdue and finally clarifies once and for all what it means to be "the party with a net monetary recovery" under section 1032, subdivision (a)(4).

The New Common Interest Development Case

Here is an interesting new case that may come in handy down the road for the homeowner association litigators out there. In *Clear Lake Riviera Community Association v. Cramer* (2010) 182 Cal.App.4th 459, Division One of the First Appellate District Court of Appeal (SF) held last Friday that direct evidence is not necessarily needed to show a height restriction was validly adopted by an architectural committee of a homeowner's association; circumstantial evidence is sufficient.

In *Clear Lake*, the Clear Lake Riviera Community Association (Association), a common interest development, had a guideline in place since 1995 limiting the height of homes within the development to 17 feet above street level. The Association's CC&Rs authorized an architectural committee to enforce the CC&Rs and the height restriction in the development. Defendants, who had purchased a lot in the development, built their home with knowledge of the restrictions but at a height nine feet above the restriction. (*Id.*) The Association sued to abate the violation. The trial court found that defendants knowingly violated the height restriction and ordered defendants to bring the home within compliance. (*Id.*)

On appeal, defendants claimed the height restriction was unenforceable because the Association failed to prove the restriction had been properly adopted by the Association or the architectural committee. Therefore, according to defendants, no substantial evidence supported the judge's finding that the height guideline was valid and enforceable.

The Court of Appeal in *Clear Lake* initially agreed with defendants' claim that no direct evidence at trial proved that the guideline was properly adopted by the Association through its architectural committee. No documents could be located reflecting the votes of the members of the committee relative to the height restriction nor could a document be produced showing the committee had formally adopted the guideline. However,

the Court of Appeal nevertheless affirmed the trial court's findings emphasizing that circumstantial evidence supported the judge's finding that the height restriction was valid and enforceable, which necessarily included a finding the guideline was properly enacted under the Association's rules. Circumstantial evidence presented at trial showed that the guideline had been in existence since 1995, was available in print form and distributed to all who planned to build in the development, was followed by the committee when evaluating applications, and believed by committee members to be enforceable. According to the court, nothing in the case law prevents proof of a height restriction by way of circumstantial evidence where direct evidence does not exist. Since substantial circumstantial evidence supported the trial court's findings, the judgment was affirmed. (*Id.*)

This case may come in handy when questions arise as to whether an association properly adopted CC&Rs/guidelines that have been in place at the development for many years.

Anti-SLAPP and Attorney Loyalty – This should get interesting...

Anti-SLAPP aficionados and attorney malpractice practitioners may find this case of interest. Division Five of the Second Appellate District Court of Appeal (LA) in *Oasis West Realty, LLC v. Goldman* (March 3, 2010; B217141) __ Cal.App.4th __ reversed a trial court's order denying defendants' anti-SLAPP motion finding an attorney's duty of loyalty to a former client did not prevent the attorney from taking a personal position on a public issue involving the former client so long as current representation of the client and confidentiality were not compromised.

Plaintiff Oasis hired an attorney from Reed Smith to provide advice and strategic planning for the Hilton redevelopment project in Beverly Hills. This included hiring the attorney to interface with City officials. The attorney had preexisting relationships with City officials and experience in obtaining support for such projects. The attorney represented Oasis relative to the project for a little over a year. However, approximately three years after his representation ended, the attorney addressed the City counsel and made remarks construed by plaintiff as being adverse to the project. He also solicited signatures on a referendum petition against the project from his neighbors. Plaintiff sued the attorney and his firm for breach of fiduciary duty, professional negligence and breach of contract claiming the attorney's actions constituted a breach of an attorney's duties of loyalty and confidentiality. The trial court later denied the attorney's anti-SLAPP motion.

The Court of Appeal in *Oasis West* reversed the trial court's order denying the anti-SLAPP motion finding the causes of action allegedly arose from acts in furtherance of protected activity, and that Oasis could not show a probability of prevailing at trial.

The appellate court observed that although a substantial line of cases holds that section 425.16 does not apply to litigation that asserts an attorney's breach of the duty of loyalty, those cases typically arise from the lawyer's act in accepting a second representation of an adverse party, rather than litigation activities the attorney undertook on behalf of the second client. Here, the attorney did not undertake a second representation adverse to the former client. Therefore, no violation of Rule 3-310(E) occurred.

The *Oasis West* court went further by observing that the duty of loyalty does not usually extend to a lawyer's conduct in a private capacity. Although prior cases provide sweeping pronouncements about the broad scope of the duty of loyalty, this does not necessarily extend to an attorney's personal interests and pursuits. According to the court, "Loyalty to a client requires subordination of a lawyer's personal interests when acting in a professional capacity. But loyalty to a client does not require extinguishment of a lawyer's deepest convictions; and there are occasions where exercise of these convictions -- even an exercise debatable in professional terms -- is protected by the Constitution." [Citation]. Accordingly, the former attorney's actions, which included signing a petition against the Hilton project and asking his neighbors to also sign the petition, did not breach a duty of loyalty to his former client. Therefore, plaintiff could not show a legally sufficient claim under prong II. A most interesting decision indeed.

More Attorney Work-Product

On March 4, 2010, the Fifth Appellate District Court of Appeal (Fresno) in *Coito v. Superior Court* (March 4, 2010; F057690) __ Cal. App.4th __ held that a statement of a witness, whether taken in writing or recorded verbatim by an attorney or an attorney's representative, is not protected by the work-product privilege and therefore is available through discovery.

Plaintiff's teenage son died in a drowning incident. At the time of the drowning, six other juveniles were present on the site and witnessed the incident. After plaintiff sued numerous defendants, including the State of California, agents from the California Department of Justice interviewed and took statements from four of the juveniles. Plaintiff's attorney later got wind of the interviews and requested the recorded statements. The state objected to the request and plaintiff followed with a motion to compel. The superior court denied plaintiff's request finding the recorded witness statements were entitled to absolute work-product protection. A list of potential witnesses from whom written or recorded statements had been obtained also constituted qualified attorney work product. Plaintiff challenged the ruling with a petition for writ of mandate.

The Court of Appeal granted the writ petition. The court reviewed the key cases involving work product and witness statements. The court disagreed with the trial court's reliance on *Nacht & Lewis Architects, inc v. Superior Court* (1996) 47 Cal.App.4th 214, finding *Nacht & Lewis'* discussion on the issue was cursory at best and did not acknowledge the long line of contrary precedent beginning with the Supreme Court's decision in *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355. According to the court, witness statements are "classic evidentiary material." "[I]f the statements are not subject to discovery, the party denied access to them will have had no opportunity to prepare for their use." The court also rejected the state's argument that the statements were subject to qualified work-product protection.

Justice Kane's concurring and dissenting opinion, is more lengthy than the majority opinion and is worth the read. He argues that although the witness statements are not absolutely privileged, they are protected as qualified work-product.

It would not be surprising if the Supreme Court accepts a petition for review if one is filed, because of the conflict in the appellate decisions and the importance of the issue to litigators.

CAN INSURERS SETTLE THIRD-PARTY CLAIMS AGAINST THEIR INSURED OVER THE INSURED'S OBJECTIONS?



By Alan E. Greenberg
Wood Smith Henning & Berman LLP

In most cases, the answer is a qualified "yes". Such settlements present significant risks, however, to both insurers and retained panel defense counsel.

Most comprehensive general liability ("CGL") policies are not "consent policies" and provide that the insurer will have the "right and duty" to defend the insured against any "suit" seeking damages,

including claims and suits that are "groundless, false or fraudulent". Most policies further contain language such as the following: "We may at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result." These policies do not require that the insured give its consent to any settlement.

Unless the insured has purchased a policy with a consent clause, an insurer that is providing a defense has the absolute right to decide whether to settle claims against the insured within its policy limits even if the settlement terms are prejudicial to the insured, leads to the loss of the insured's potential claim for malicious prosecution, injures their reputation, or impacts their future insurability. *See, e.g., Hurvitz v. St. Paul Fire & Marine Ins. Co.* (2003) 109 Cal.App. 4th 918; *New Hampshire Ins. Co. v. Ridout Roofing Co.* (1998) 68 Cal. App. 4th 495; *Western Polymer Technology, Inc. v. Reliance Ins. Co.* (1995) 32 Cal. App. 4th 14.

The typical "bad faith" case involves an insurer's bad faith refusal to settle. In *Western Polymer Technology v. Reliance Ins. Co.*, *supra*, the insured alleged that the insurer acted in bad faith because it unreasonably accepted a settlement offer within its policy limits. The insured asserted damage to its business reputation by the settlement. The Court held that while there are limits to the latitude afforded an insurer in effectuating a settlement under a clause that permits the insurer to settle a claim as it "deems expedient", bad faith liability could not be founded on an injury to the insured's business reputation. The Court emphasized that the purpose of a liability insurance policy is to provide the insured with a defense and indemnification for third-party claims within the scope of the coverage purchased, and not to insure the entire range of the insured's well-being. (*Western Polymer Technology v. Reliance Ins. Co.*, *supra*, 32 Cal. App. 4th at 26.)

New Hampshire Ins. Co. v. Ridout Roofing Co., *supra*, cited *Western Polymer* for the principle that an insurer's settlement may, under some circumstances, constitute a breach of the covenant of good faith and fair dealing, but again found the theory of "bad faith" inapplicable under the particular facts of the case. An insurer sued its insured under a CGL policy for reimbursement of over \$50,000 in deductibles arising from 11 separate construction defect claims made against the policy and settled by the insurer on behalf of the insured. The policy included an endorsement providing for a deductible of \$5,000 "per occurrence." The trial court granted the insurer's motion for summary judgment, and the Court of Appeal affirmed. The Court's rationale was that the parties gave the insurer the express right to settle claims and, if those settlements included the insured's deductible, to seek reimbursement thereafter from the insured. The exercise of such an express grant could not be limited by the implied covenant of good faith and fair dealing. (*New Hampshire Ins. Co. v. Ridout Roofing Co.*, *supra*, 68

Cal. App. 4th at 501.)

Liability under a bad faith settlement theory was also rejected in *Hurvitz v. St. Paul Fire And Marine Insurance Company*, *supra*. In that case, the insurer settled claims by a business partner against an insured over the insured's objections. The policy gave the insurer the right and duty to defend any claim or suit for covered injury or damage and the right to settle any claim or suit within the available limits of coverage. The insured filed an action against the insurer, alleging bad faith breach of the insurance contract principally because of the loss of his right to pursue a claim against the business partner for malicious prosecution.

The trial court granted the insurer's motion for summary judgment and the Court of Appeal affirmed. The Court held that where an insurance policy grants to the insurer the right and duty to defend any claim or suit for covered injury or damage, and the right to settle any claim or suit within the available limits of coverage, the insurer need not obtain the insured's consent prior to settling with a third party even though it leads to the loss of the insured's potential claim for malicious prosecution, injures their reputation, or impacts their future insurability. The Court's rationale was that a party purchasing a liability insurance policy without a consent clause agrees to accept the insurer's view concerning the point at which the benefits of settlement exceed the risk (or cost) of continuing litigation. (*Hurvitz v. St. Paul Fire & Marine Ins. Co.*, *supra*, 109 Cal. App. 4th at 930.) Moreover, a rule requiring an insurer to refuse a reasonable settlement merely because the insured hoped to someday prevail in a malicious prosecution action would conflict with the insurer's duty to handle claims efficiently and pay reasonable settlement offers in order to protect the insured from an excessive judgment. (*Id.* at 934.)

The right of insurers to settle over their insured's objection was also addressed in *Fiege v. Cooke* (2004) 125 Cal. App. 4th 1350. The plaintiff, Fiege, was injured in an automobile collision and sued three persons for his injuries. Fiege accepted settlement offers from the defendants' insurer, but later tried to avoid the settlement. The defendants sought and were granted a motion to enforce the settlement under section 664.6. Fiege contended on appeal that the defendants themselves had to be present and consent to make the settlement enforceable under section 664.6, and that an agreement by their insurers was not sufficient. The appellate court disagreed. Because the defendants' insurance policies expressly gave the insurers the right to settle without the defendants' consent, and because the settlement within policy limits did not prejudice the defendants' substantial rights, the court held that section 664.6 had been satisfied. (*Fiege v. Cooke*, *supra*, 125 Cal. App. 4th at 1354-1355.)

In *New Plumbing Contractors, Inc. v. Edwards, Sooy & Byron* (2002) 99 Cal. App. 4th 799, the insured sued not its insurer, but the insurer's retained defense counsel, alleging professional negligence and breach of fiduciary duty for settling an earlier action without notifying the insured and "ignoring valid defenses that would have absolved [the insured] of any liability." (*Id.* at 801.) The damages were said to be "higher premiums, lower coverage and higher deductibles," as well as the need to deal with "financially weaker carriers. . ." (*Ibid.*) The trial court ruled that "the insurer had the right to settle the case regardless of whether it was defensible, and without consulting its insured." (*Id.* at 801-802.) The appellate court agreed:

Under a policy provision giving an insurance company discretion to settle as it sees fit, the insurer is 'entitled to control settlement negotiations without interference from the insured,' and generally, it has no liability to the insured for settling within the policy limits. [Citation.] Thus, there is no cause of action where the insured claims the settlement injured its business reputation [citation], nor any where the insured claims the settlement unfairly used up its deductibles. [Citation.]...Since [the insurer] could settle without consulting [the insured] and over its objection, counsel's recommendation of settlement was not a cause of any harm the [insured] may have suffered.

(*Id.* at 802.)

A case that reached a dissimilar conclusion was *Novak v. Low, Ball & Lynch* (1999) 77 Cal. App. 4th 278. In *Novak*, the insurer agreed to defend two of the multiple causes of action in a third party complaint under a reser-

vation of rights. Independent counsel was appointed to provide the insured a defense. In the meantime, unbeknownst to the insured or his independent counsel, counsel for the insurer (hired by the insurer to monitor the litigation and review the billings of independent counsel) entered into settlement negotiations with the third party, eventually agreeing to settle the two potentially covered causes of action, allowing the insurer to completely withdraw. As in *New Plumbing Contractors*, the insured brought an action against the attorneys for the insurer, contending that they should have advised the insured and his counsel of settlement negotiations. The claim was dismissed by the trial court, but the Court of Appeal believed there was merit to the allegations because the insured and his counsel might have been able "to impact settlement through the exchange of information or otherwise...protect [the insured's] interest in light of the proposed dismissal of the first two causes of action." (*Id.* at 285.)

In the *Hurvitz* case, the Court noted that in *Novak* the harm to the insured arose primarily from the failure to negotiate a global settlement that included dismissal of *all* causes of action against the insured and distinguished the case on that ground. The Court went on to say that to the extent *Novak* is supportive of the view that, prior to acceptance of a reasonable settlement within policy limits, an insurer or its counsel must consider the impact of a settlement on an insured's potential claim for malicious prosecution or on the third party's ability to finance continuing litigation, it disagreed with *Novak* and refused to follow it.

The *Hurvitz* Court also noted that in other circumstances courts have held that settlements which eliminate the insureds' rights to obtain recovery for their affirmative claims of injury can result in liability for bad faith. In two cases—*Barney v. Aetna Casualty & Surety Co.* (1986) 185 Cal. App. 3d 966 and *Rothrock v. Ohio Farmers Ins. Co.* (1965) 233 Cal. App. 2d 616—both involving automobile accidents, the insurance companies' settlements with third parties caused the insureds' compulsory cross-claims for personal injuries arising out of the same accidents to be barred. In those cases, the insurers undertook the settlements knowing that the insureds intended to file cross-claims, but before the cross-claims were filed.

Thus, so long as any settlement *completely* disposes of *all* of the causes of action against the insureds and does not substantially impair affirmative claims (other than potential malicious prosecution claims) that the insureds might have against third parties, insurers are free to settle actions as they see fit. Defense counsel do not face any liability for negligence or breach of fiduciary duty in connection with such settlements.

If insureds want to avoid the possibility of their insurers settling over their objections they have the option of either not tendering the claim to their insurer in the first place or paying an additional premium for a policy with a consent provision. From the defense counsel perspective, however, the "tripartite relationship" between the insurer, the insured and the appointed insurance defense counsel makes any negotiation of a settlement over their clients' objections problematical. If the insurance carrier has made a tactical decision in a given case that it wants to settle the case, even though the insured wants to proceed with litigation, the better practice is for the insurance company to have its separate counsel handle all settlement negotiations with the Plaintiff's counsel directly.

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JOIN or Renew Your SDDL Membership

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For those of you who have not renewed your SDDL Membership for 2010, it is not too late! Send in your renewal application and \$145 for your membership dues by May 1, 2010 so you won't miss out on a year full of MCLE credit and social/networking events. All non-renewing members will lose access to the SDDL mailing list by May 15 and will no longer receive the Update.

SDDL's annual Installation Dinner was a Success

By Ben Howard
Neil Dymott APLC

The San Diego Defense Lawyers had its annual Installation Dinner Saturday, January 30, 2010 at the Manchester Grand Hyatt. SDDL honored its 2009 Defense Lawyer of the Year, Sheila Trexler, a shareholder with Neil Dymott APLC. In her remarks, Ms. Trexler thanked the Plaintiff's bar, her fellow shareholders, and men and women serving in the U.S. armed forces.

Outgoing SDDL President Darin Boles was honored for his service, and made note of the SDDL's numerous accomplishments and community contributions in 2009. Mr. Boles highlighted SDDL's 8th annual charity golf tournament, benefitting the Juvenile Diabetes Research Foundation, and the 19th Annual Mock Trial Competition, which attracted law students from across the country. Outgoing Board of Director members Randy Nunn and Tracey VanSteenhouse were also thanked for their service.

Brian Rawers was sworn in by Judge (Ret.) Herbert Hoffman as the 2010 SDDL president, as well as new board members Alan Greenberg, Ben Howard, Matt Souther, and Tracey VanSteenhouse (elected for a second term).

Mr. Rawers emphasized comraderie and its importance in a profession such as ours. Ms. Trexler echoed these sentiments.



Mingling and appetizers and drinks - what a wonderful start to the evening



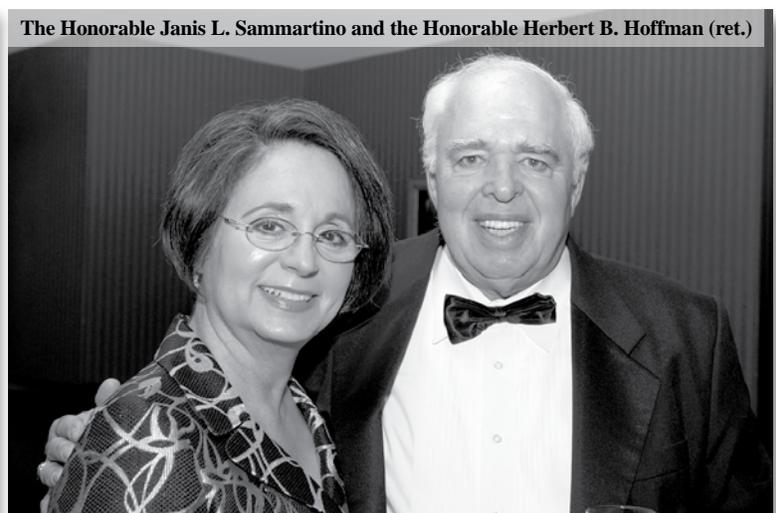
Incoming SDDL 2010 President, Brian and his wife, Kimberly Rawers; Victoria Stairs and Diana Bedri



Clark and Debbie Hudson and Ben and Jeanne Howard



SDDL 2009 outgoing President, Darin Boles and his wife, Sharon Lawrence

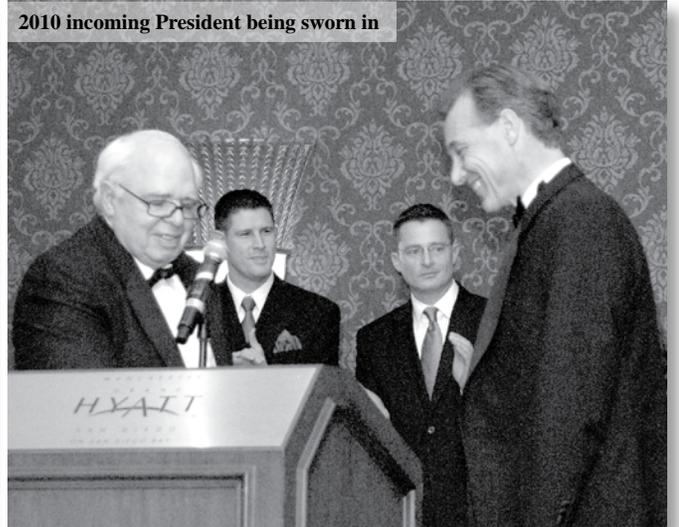


The Honorable Janis L. Sammartino and the Honorable Herbert B. Hoffman (ret.)

2010 Board of Directors being sworn in by the Hon. Herbert B. Hoffman (ret.)



2010 incoming President being sworn in



SDDL 2009 Lawyer of the Year, Sheila Trexler and her husband, Don

Sheila Trexler gave a wonderful speech



Everyone enjoyed Ms. Trexler's speech



Dinner is served



As promised, a margarita



It was a full house!



Insurance Law Updates

By James M. Roth
The Roth Law Firm



As we journey into this new year, the courts initially are strictly construing and interpreting insurance policies in favor of the issuing carriers.

Unambiguous Provisions in Subcontractors' Liability Policies Prohibiting Additional Insureds from

Satisfying the Self-Insured Retention (SIR) and Thus Precluding Additional Insureds from Triggering the Insurer's Duty to Indemnify Were Not Contrary to Public Policy Where the Additional Insureds Were Developers That Provided Detailed Instructions to the Subcontractors on the Scope of Required Coverage, and the Developers Failed to Require the Subcontractors to Obtain Insurance Allowing Additional Insureds to Satisfy the SIR.

In *Forecast Homes, Inc. v. Steadfast Ins. Co.*, (Jan. 12, 2010) _ Cal.Rptr.3d _, 2010 WL 95091, the Court of Appeal, Fourth District, Division 3, held that the unambiguous provisions in subcontractors' liability policies prohibiting additional insureds from satisfying the self-insured retention (SIR) and thus precluding additional insureds from triggering the insurer's duty to indemnify were not contrary to public policy where the additional insureds were developers that provided detailed instructions to the subcontractors on the scope of required coverage, and the developers failed to require the subcontractors to obtain insurance allowing additional insureds to satisfy the SIR.

Factually, housing developers, Forecast Homes, Inc., and K. Hovnanian Forecast Homes, Inc. (collectively referred to as "Forecast"), appealed from the judgment entered in its declaratory relief action in favor of Steadfast Insurance Company ("Steadfast"). Forecast contractually required all its subcontractors to defend and hold it harmless against any liability arising out of the subcontractors' work. Subcontractors were required to add Forecast to their general liability insurance policies as an additional insured. Several subcontractors obtained their required insurance coverage from Steadfast, who later refused to indemnify Forecast when a lawsuit was filed by several homeowners against Forecast for construction defects. Steadfast maintained that pursuant to the policy language, only the subcontractor as a named insured, and not Forecast, as an additional insured, was authorized to incur the policy's self-insured retention (SIR), which was a precondition for coverage. The operative policy language at issue

provided in pertinent part that: "The self-insured retention amounts stated in the Schedule of this endorsement apply as follows: ... If the [p]er [o]ccurrence self-insured retention amount is shown in the Schedule of this endorsement, **it is a condition precedent to our liability that you make actual payment of all damages and defense costs for each occurrence or offense, until you have paid self-insured retention amounts and defense costs equal to the [p]er [o]ccurrence amount shown in the Schedule, subject to the provisions ... below, if applicable. Payments by others, including but not limited to additional insureds or insurers, do not serve to satisfy the self-insured retention. Satisfaction of the self-insured retention as a condition precedent to our liability applies regardless of insolvency or bankruptcy by you.** The [p]er [o]ccurrence amount is the most you will pay for self-insured retention amounts and defense costs arising out of any one occurrence or offense, regardless of the number of persons or organizations making claims or bringing suits because of the occurrence or offense." [Emphasis original.]

The trial court ruled that only the named insured subcontractors, not Forecast, had the right to satisfy the SIR per occurrence amounts and Steadfast's defense obligation had not been triggered because Forecast failed to require its subcontractors to obtain insurance allowing Forecast to satisfy the SIR. To hold otherwise, said the Court, would rewrite the provisions of the insurance policy and would compel the insurer to give more than it promised.

An Accident Does Not Occur When the Insured Performs a Deliberate Act Unless Some Additional, Unexpected, Independent, and Unforeseen Happening Occurs That Produces the Damage.

In *Fire Ins. Exchange v. Superior Court* (Jan. 26, 2010) _ Cal.Rptr.3d _, 181 Cal.App.4th 388, the Court of Appeal, Fourth District, Division 2, held that insured homeowners' act of a building house in a location where it encroached on a neighbors' property was not an "accident" under the homeowner insurance policy which triggered the insurer's duty to defend in the underlying quiet title action, regardless of whether homeowners believed they owned five and one-half foot strip of land and had the legal right to build on it, as the act of construction was intentional and not an accident, and there was no unexpected and unintended event between the intentional construction of the building and the encroachment.

Factually, Kenneth and Dorothy Bourguignon owned property adjoining the Leach property. In 1984, Louise Leach granted them an access easement over a five and one-half foot wide portion of her property that bordered theirs. After their property suffered earthquake damage, the Bourguignons wanted to renovate and rebuild their residence and obtained Leach's signature on a "Lot Line Adjustment" application submitted to the City for the five and one-half foot easement. The City approved the application and the Bourguignons completed construction. In 2002, the Parsons negotiated to purchase the Leach property and found that the Lot Line Adjustment was a cloud on title. They obtained an assignment of any rights possessed by Leach and her two sons to contest its validity. The Parsons then purchased the Leach property. The Parsons disputed the validity of the Lot Line Adjustment, asserting that Leach had conveyed a one-third interest in the property to her two sons in 1988 and the latter had not signed the Lot Line Adjustment application. The Bourguignons sued the Parsons for quiet title and adverse possession of this five and one-half foot strip. The Parsons cross-complained for quiet title, declaratory relief and fraud. The Bourguignons tendered their defense to Fire Insurance Exchange, which had issued a homeowner policy to them. Fire Insurance refused to defend the suit on the ground that it owed no duty to defend because it had no potential liability under the policy. The Bourguignons sued Fire Insurance for breach of the insurance contract and bad faith.

The Court articulated the parties' views: Fire Insurance contended that the Bourguignons' action in building a structure at a specified location was not an accident but an intentional act so that there was no coverage. The Bourguignons countered that they were mistaken that they owned the property where they built the house so that the encroachment on the Parsons' property was an accident. The Court then noted that the term "accident" referred to the nature of the act giving rise to liability; not to the insured's intent to cause harm. Consequently, where the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an "accident" merely because the insured did not intend to cause injury. Importantly, the Court observed that the insured's subjective intent is irrelevant.

The Court concluded that the Bourguignons intended to build the house where they built

it. Accepting their contention that they believed they owned the five and one-half foot strip of land and had the legal right to build on it, the act of construction was intentional and not an accident even though they acted under a mistaken belief that they had the right to do so. While the Bourguignons insisted that their engineer failed to obtain and include an executed grant deed in the Lot Line Adjustment application resulting in their failure to obtain the legal right to build where they did, the reasons for their failure to obtain title was irrelevant to the determination whether the act in locating the building where they did could be characterized as an accident. Consequently, there was no unexpected and unintended event between the intentional construction of the building and the encroachment.

“Fax Blasting” Was Not an “Accident” Within Meaning of Liability Policy’s Accidental Property Damage Provision.

In *State Farm General Insurance Company v. JT’s Frames, Inc.* (Jan. 27, 2010) _ Cal.Rptr.3d _, 181 Cal.App.4th 429, the Court of Appeal, Second District, Division 4, held that an insured’s act of “fax blasting,” or sending unsolicited advertising faxes, was not an “accident” and thus not an “occurrence,” within the meaning of a liability policy providing coverage for “property damage caused by an occurrence,” and defining “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result in bodily injury or property damage,” absent evidence that insured believed that its tens of thousands of faxed transmissions were solicited.

Factually, State Farm issued several successive insurance policies to “[t]he Friedman Group.” The policies covered “advertising injury caused by an occurrence committed in the coverage territory during the policy period.” “[A]dvertising injury” was defined to include: “a. oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services; b. oral or written publication of material that violates a person’s right of privacy; c. misappropriation of advertising ideas or style of doing business; or d. infringement of copyright, title or slogan.” The policies also covered “property damage caused by an occurrence.” With respect to property damage, “occurrence” was defined to mean “an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result in bodily injury or property damage.” During the period the policies were in effect, a

company identifying itself as “[t]he Friedman Group” transmitted tens of thousands of unsolicited advertisements via facsimile machine or “fax” to a number of parties, including appellant JT’s Frames (“JT’s”), which then filed a class action lawsuit against “[t]he Friedman Group International,” alleging violation of the Telephone Consumer Protection Act. JT’s also alleged conversion and violation of the Illinois Consumer Fraud and Deceptive Practices Act. The Friedman Group tendered the defense to State Farm, which denied coverage.

The Court concluded that absent credible evidence that the insured believed that its tens of thousands of faxed transmissions were solicited, the insured’s act of “fax blasting,” or sending unsolicited advertising faxes, was not an “accident” and thus not an “occurrence” within the meaning of the liability policy providing coverage for “property damage caused by an occurrence,” and defining “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions which result in bodily injury or property damage.”

A Subrogation Complaint, Based on its Insured’s Contractual Indemnification Claim, Was Not Barred by its Insured’s Good Faith Settlement in the Underlying Litigation Pursuant to C.C.P. § 877.6.

In *Interstate Fire and Casualty Insurance Company v. Cleveland Wrecking Company* (Feb. 22, 2010) _ Cal.Rptr.3d _, 2010 WL 598602, the Court of Appeal, First District, Division 5, held that a subrogation complaint, based on its insured’s contractual indemnification claim, was not barred by its insured’s good faith settlement in the underlying litigation pursuant to C.C.P. § 877.6.

Factually, Webcor Construction, Inc. (“Webcor”) was the general contractor for a construction project. Cleveland Wrecking Company (“Cleveland”) was a subcontractor responsible for certain demolition work. Delta Steel Erectors (“Delta”) was a subcontractor engaged in the installation of steel stairways. Cleveland and Delta each entered into similar subcontracts with Webcor, by which they undertook to indemnify Webcor for liability arising out of their work and to procure general liability insurance with Webcor as an additional insured. Although both Cleveland and Delta had agreed to procure liability insurance with Webcor as an additional insured, only Delta complied with the obligation, obtaining coverage from Interstate in which Webcor was a named additional insured. Cleveland’s employees were moving debris to an area

where it could be loaded onto trucks. They had been warned that Delta’s employees were working in areas below them, and that Delta’s employees were being showered by debris dislodged by Cleveland’s operations. One of Delta’s employees, ironworker Thelbert Allen Frisby (“Frisby”), was working in a stairwell below an opening in the floor on which Cleveland’s employees were moving the debris. To move the debris, Cleveland’s Bobcat operator drove a loader bucket into the pile of debris, and then backed up with the load to move it. This repeated process moved the pile of debris closer to the opening and ultimately into a slab grabber, which became dislodged and fell into the opening where Frisby was working. The slab grabber struck Frisby and caused significant injury. Frisby filed a workers’ compensation claim against his employer Delta. In addition, he filed a lawsuit against Webcor and Cleveland in San Francisco Superior Court. Webcor tendered its defense and indemnification to Cleveland pursuant to the terms of the Agreement. Cleveland rejected the tender. Webcor also tendered its defense and indemnification to Interstate pursuant to the terms of the Interstate-Delta Policy. Interstate accepted it and filed a complaint for subrogation against Cleveland, alleging that Cleveland had breached its contract with Webcor by failing to defend and indemnify Webcor. Frisby and Webcor entered into a settlement by which Webcor would pay Frisby \$575,000 and Frisby would dismiss his claims against Webcor. The trial court approved their agreement as a good faith settlement under Code of Civil Procedure section 877.6. Interstate funded the \$575,000 settlement payment and additionally paid over \$152,000 for the attorney fees and costs incurred in defending Webcor against Frisby’s claims. Cleveland also entered into a settlement with Frisby, which the court approved as a good faith settlement as well.

A determination that a settlement was made in good faith, noted the Court, bars the non-settling defendants from asserting claims against the settling tortfeasor for equitable comparative contribution and partial or comparative indemnity. Because an insurer stands in the shoes of its insured in a subrogation action, the insurer cannot pursue those types of indemnity claims against the settling tortfeasor. However, a good faith settlement order does not bar a non-settling tortfeasor from asserting an indemnification claim against the settling defendants based on an express contract. Because an insurer stands in the shoes of its insured, the insurer can pursue a cause of action against the settling tortfeasor for breach of an express contractual indemnification clause.

DOG BITE CASES

AVOIDING EIGHT COMMON MISTAKES

By Ron Berman

Dogs are wonderful companions and Americans are very fond of them. There are approximately 68 million dogs in the United States and pets and pet products are very big business. Living with a dog has been shown to benefit children, adults and senior citizens both physically and emotionally. At the same time, according to the Center for Disease Control and Prevention there are more than 4.7 million people bitten by dogs resulting in an estimated 800,000 injuries that require medical attention every year.

The latest numbers available show that dog bites are an increasing problem for carriers.

According to Insurance Information claims related to dog bites cost the insurance industry \$317 million in 2005 and \$356.2 million in 2007, a significant increase.

Typical reactions by insurers are to hike premiums and in many cases exclude specific breeds like Rottweilers, German Shepherds and "pit bulls" from coverage altogether. All in all, 32 states have instituted a dog bite statute that makes the owner "strictly" liable for any injury or property damage their dog causes. Varying on the state, the defense has to prove that the victim provoked the dog in order to minimize or even escape liability. The only other defenses are that the victim was trespassing or that the defendant is not the owner/caretaker of the dog.

This article intends to offer insights into the discovery process as it relates specifically to dog bites and other pet related injuries by examining 8 common ways defense attorneys can miss vital evidence that can have a profound effect on the outcome of their case.

Mistake 1: NOT EVALUATING THE DOG

A video presentation of the defendant's dog is possibly the most powerful evidence a defense attorney can offer a jury. If the dog is aggressive or even vicious each member of the jury gets to fully experience that behavior and get a real sense of what the plaintiff was dealing with at the time of the incident. The same video also can help to attack the credibility of a defendant who has previously said that their dog is not aggressive and that the plaintiff provoked the dog.

Of course, it is important that the evaluation be set up correctly and that no opportunity to view and record the dog's unprovoked behavior in multiple settings and situations is missed. There are many questions that have to be answered and planned for when setting up the format for an evaluation. Was another dog involved? Did the incident happen on the defendant's property or somewhere the dog would relate to as neutral territory? Has the defendant made any statements that could be tested during the evaluation? Which testing protocol should be used? The goal is to set up as fool proof and professional an evaluation, as soon as possible after the incident so that every bit of information possible is obtained.

Immediacy is a prime factor as so often the dog is given away, disappears or dies for any of a myriad of reasons and the opportunity to evaluate the animal is gone and with it a possible turning point in the plaintiff's case. Fortunately, a solid presentation can be conducted even if the dog is no longer available but no other evidence sums it up quite as well or intensely.

The choice "not" to evaluate the defendant's dog especially if the dog is alive and available, can easily backfire. If you have retained an expert, not evaluating the dog can be used to show that he or she not only did not do a complete investigation but that their opinions

are based on second hand information. It can also be the case where the plaintiff's expert does an evaluation but the defense expert does not. This can be very problematic because if the plaintiff's expert actually saw and evaluated the dog, his testimony will likely carry more weight.

Mistake 2: SCENE INSPECTION

If a dog living at the defendant's home also spends time inside the house it is important to inspect inside the home as well. Chewed door or window frames, scratches on the door, the dog's bed or lack of one, where the dog slept, photos of dogs on the wall...all give you a sense of how the dog was treated, how it acted in the house. A plethora of toys in every room gives a lot of information about whether the defendants were indulgent with their dog. Inspecting leashes, collars, chains, dog houses, food bowls, kennels, yards, toys etc. also provide a wealth of information about the dog to someone who deeply understands the human/canine companion bond and how it influences behavior. Do they use a choke or prong collar? Is their leash extendable to 15 or 20 feet? Is the water in the bowl dirty?

Does the fence meet the standard for containing a dog of this size? Is there any evidence that the dog was ag-



gressive at the fence and or property boundaries?

Mistake 3: USING THE WRONG INTERVIEWER

Often times statements of witnesses are taken by people experienced in interviewing techniques but who have little experience in animal behavior. As a result the evidence they discover leaves openings that can be explored by the defense. What if a witness gives a statement that the dog was aggressive and it scared them. That sounds solid but what does it really say. Aggressive is a general term that can mean many things. In one case, the witness who labeled the dog aggressive meant that he had a lot of energy and played really hard or "aggressively." Also the fact that the dog scared them is really based only on their perception of the dog as a "non" expert which has little meaning unless the dog actually demonstrated behaviors which were clearly threatening. A dog that barks at people passing the property may scare them but barking is not considered an aggressive behavior on it's own. Even a statement from a witness that the dog barks aggressively can be challenged unless it is dissected and proved to reveal true aggressive behavior or just the witnesses personal observations and reactions.

An interviewer such as a private investigator may miss important information because he didn't even realize that a number of follow up questions were necessary to insure that the full value of the interview is realized. Also, it can be frustrating after figuring out that a second interview is necessary that the previously willing witness seen by the investigator is now "not" so willing to cooperate and that a valuable opportunity has been lost.

Mistake 4: MISSING IMPORTANT DISCOVERY DOCUMENTS

Basically the laundry list of important discovery documents needed in a dog bite case or pet related injury are well known. As far as the dog is concerned nearly always necessary are the veterinarian records, animal control records, police report, paramedic records if any, the names of any trainers and or groomers the dog has had, names of independent witnesses who are familiar with the dog including neighbors, friends, employee's people who have visited the home etc. Other related documents that may prove helpful are AKC registration certificates, breeding documents if the dog was imported as a puppy or as a trained dog and diplomas from any training schools the defendant claims the dog has had.

Mistake 5: DEPENDING ON DOCUMENTS ALONE

Receipt of a veterinarians records doesn't insure that you have all the information contained on them. These days a lot of veterinary clinics respond to subpoenas for records with digitized or computer printouts. As most veterinarians still write initial reports in hand, it is important to get the handwritten notes and the computerized print out if even to help decipher the doctors handwriting. In more than a few cases notes containing the words "reactive" or "tried to bite" were written in the top corner of some records but were not transferred to the computer version. Also, it is always good to talk to the veterinarian as well. They are a great source of information and there are always things they don't put on the charts.

Mistake 6: NOT PROPERLY EVALUATING WOUNDS AND PHOTOS

If a plaintiff claims that a Rottweiler bit her arm and held it in the dogs mouth for over two minutes while knocking her down and shaking his head, their wounds are "direct" physical evidence of the attack. An expert, court qualified in wound evaluation, can give a strong

opinions based on photos of the wounds as well as specific information supports the plaintiff's version. Victims of dog attacks are often not clear about every detail of the incident but their wounds tell a complete story in a way that is hard to challenge. If there is too much disparity between the plaintiff's version and their actual wounds it can lead to a serious credibility issue.

An example of this is a case in which the plaintiff, a tenant on the landlords property, filed suit against the landlord after being attacked by her male, unneutered, 125 pound Pit Bull/Rottweiler mix. The plaintiff had many wounds on his body and the photos were disturbing. The plaintiff, an actor, gave highly emotional testimony about how he thought the dog would kill him and how the dog bit down and held each arm for minutes at a time while he struggled trying to save himself. He described the dog grabbing and tearing at his flesh.

When the photos of the wounds were examined by an expert it was determined that the Plaintiff's wounds did not support his story. There were puncture wounds but none that suggested that the dog ever "clamped down" or tore flesh. In fact, one area where the plaintiff described such an attack had no puncture wounds at all, just scratches and bruising. There was also no sign of ecchymosis, the dark bruising that appears when minor blood vessels break around a wound caused by the pressure of the bite.

Originally, the plaintiff asked for more than a million dollars. Just before trial the defense offered \$300,000.00. The final result was that the jury did not buy the plaintiff's story, assigned him a large percentage of comparative fault and awarded him \$19,000.00.

Mistake 7: NOT CONSULTING AN EXPERT

It is vitally important to know as much about a case as possible, even before accepting it. Retaining an expert can be expensive, especially if your case goes all the way through deposition and trial. Most, if not all experts offer an initial free consultation. The attorney can give a very general set of facts and pick the expert's brain a bit. As no proprietary information is being exchanged there is no risk to either party.

If the expert is worth his or her salt, it is highly likely that most attorneys will benefit from this call. Either the expert will offer initial responses that support what the attorney himself thinks or expert will bring up potential weakness not previously given much notice that need to be addressed in a timely manner. Either way the attorney will have more information and perhaps new insights that they did not have before. If retaining an expert is necessary, then it is a matter of picking the right expert. If you are wondering if retaining an expert would be worth the expense, a 5-10 minute call should be very valuable in helping you to make the right decision. There are only a handful of competent, court qualified, highly experienced experts in this field and the closest one may still be in another state. If travel is necessary, make sure the expert does all review during the flight so the cost of travel also includes the cost of review for trial. Depending on the amount of document's involved this could save a good deal of expense.

Mistake 8: PICKING THE WRONG EXPERT

Picking the right expert can make your case and picking the wrong expert can destroy it. Experienced, court qualified canine behavior experts are few and far between. It is imperative that a thorough examination of the experts qualifications is made. For example, an expert

Cont'd from pg 13

with a Ph.D. in Animal Behavior sounds great but not if the animals that he or she studied weren't dogs and were in a laboratory instead of a human environment.

Veterinarians who have not had special training in the behavior of companion animals can also be problematic especially if their experience is only in the veterinary clinic and the incident happened somewhere else. People in the animal professions like trainers can be extremely knowledgeable but may not have the personality or experience to handle attack's on their professionalism and credibility in a courtroom.

The right expert should have many years of experience with a solid background specific to dogs, dog training and dog behavior. If they have testified in a similar case or one involving the same breed such as a "pit bull", it is important to make sure they have not testified in a conflicting manner in an other case. It is good to directly ask this question as it can be quite upsetting when the opposing side impeaches your expert with their own testimony. An expert who changes their testimony based on which side they are on will think twice before answering this question dishonestly but may easily offer the opinion an attorney wants to hear and let it go at that, if he or she is not asked directly.

An expert who has been around for a while should have solid impeachment materials on many of the other experts in case one of them should be chosen by the opposition.

Have they been qualified in every court they have agreed to appear in? If not, why? If they offer attorney references make sure that they have testified either at trial, mediation or arbitration for that attorney.

A great question to ask prospective experts is for the names of two attorneys. One who they testified for and one who has cross examined them. That should give a very good sense of whether they are right for you.

Your expert should also have a great deal of experience in both the investigation and litigation of animal related cases. Knowledge is power and you want to make sure you have all that you need to fully support your case. It is also important that your expert be court qualified in wound evaluation. This will be essential, especially if your experts' opinions regarding your clients wounds are challenged.

In many cases the only witness that will tell the whole truth is the dog. They are truly independent witnesses in the sense that they have no desire to control the outcome and no ability or desire to change their behavior because they are being evaluated.

In a well planned and executed evaluation an aggressive dog will almost always act aggressively and a friendly dog will almost always act friendly. Taking advantage of each and every information source is the most effective way of defending your case.

Ron Berman is a canine and feline behavior expert specializing in the litigation of dog bites and pet related injuries. His website is dogbite-expert.com.

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★ Member News ★

San Diego Defense Attorney Dick Semerdjian Elected Vice-chair of American Bar Association Tort Trial and Insurance Practice Section



Schwartz Semerdjian Haile Ballard & Cauley, LLP is proud to announce that at the American Bar Association (ABA) mid-term meeting in Orlando, Florida, partner Dick Semerdjian was elected vice-chair of the ABA Tort Trial and Insurance Practice Section (TIPS). Semerdjian, who specializes in civil litigation and trial practice, will begin his one-year term at the close of the ABA Annual Meeting in August 2010.

The ABA Tort Trial & Insurance Practice Section is a national source of expertise in tort, trial and insurance law and brings lawyers together to share information and speak out on issues of importance. The section has more than 32,000 members and 34 general committees that focus on substantive and procedural matters in areas across the broad spectrum of civil law and practice.

“It’s an honor to take this new position,” states Semerdjian. “I’ve enjoyed my service to the ABA, and specifically the TIPS section, for nearly two decades. I consider this an opportunity to take my leadership to the next level.”

On a local level, Semerdjian has been on the Board of Governors for the San Diego County Bar Association, and acted as Chairman for the San Diego International Sports Council and Foundation (now the San Diego Sports Commission/Hall of Champions where he remains as a trustee) and Chair of the UCSD Athletic Board.

“It’s a passion for Dick to give back to the legal profession and to be involved with attorneys from all over the country on issues important to our firm’s practice, explains Ross Schwartz, managing partner of the firm. “I’m speaking of substantive and procedural issues which really make a difference in the way our law firm lawyers seek excellent outcomes for our clients. We are proud of Dick’s accomplishments”

Semerdjian says he is excited to begin what will be a three-year commitment to TIPS, eventually taking over Chair of the organization in 2012. “I thoroughly enjoy helping to shape policy for our profession. And in my experience with TIPS, I have met excellent attorneys throughout the country and our clients know that our firm’s reputation extends far beyond San Diego County and that judges and attorneys throughout the country recognize our name and accomplishments.”

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Save the Date

**San Diego Defense Lawyers
2010 Juvenile Diabetes Research Golf Benefit**



On June 18, 2010, our annual golf tournament will be at The Crossings at Carlsbad.

Dinner will be held at the award winning Club house.

We look forward to seeing you tee off!

THE CROSSINGS
AT CARLSBAD

Meet the 2010 SDDL Board of Directors



Brian Rawers

Brian Rawers our president, is a partner Lewis Brisbois Bisgaard & Smith. Brian is a member of ABOTA. Brian's wife, Kim Rawers is partner at Lotz, Doggett & Rawers and Brian was quoted as saying, "she is the prettiest, smartest woman lawyer in town." In his "spare time", he hangs out with his 5 kids- ages 23 to 6, he also swims a little over two miles three days a week at 5:10 A.M.! He also really enjoys the Beach Boys. (Both he and J.D. were born in Oak Park, IL.)



James J. Wallace

James J. Wallace, president-elect is a partner Lewis Brisbois Bisgaard & Smith. Jim is a Delegate of the State Bar of California and Superior Court Pro Tem Judge and Superior Court Arbitrator. Jim is a San Diego Super Lawyer.



Tracey VanSteenhouse

Tracey VanSteenhouse is the editor and secretary. She is an associate at Wilson Elser Moskowitz Edelman & Dicker. Tracey's practice includes medical, dental, chiropractic and legal malpractice and employment law. Tracey volunteers at Rady Children's Hospital. Ms. VanSteenhouse enjoys spending time with her husband, Harper, cooking, hiking and running marathons.



Pat Mendes

Pat Mendes is a founding member of Tyson & Mendes and is this year's MCLE "Czar." "I do not really know what that means, but I liked the ring of the title, so I took the job." Pat is a 1995 graduate from USD School of Law. In his spare time, he watches in amazement as his 4 year old daughter (youngest) "calls all the shots" in his family of five.



Ben Howard

Ben Howard moved to San Diego after graduating from the University of Iowa College of Law in 2005. He interned with Neil Dymott APLC in 2004, was hired in 2005, and has remained ever since. Prior to that, he was an Infantry officer in the U.S. Army, where he was Airborne, Air Assault, and Ranger qualified before resigning his commission as a Captain. Ben is married to Jeanne Howard and has three children, ages five and three, and the third born late February 2010. He volunteers weekly with a Boy Scout troop in Point Loma, and enjoys camping, backpacking, reading, and military history. He backpacked the John Muir Trail, from Yosemite Valley to Mount Whitney, in 2005 while waiting for his bar results.



SDDL Board 2010-

Front Row (L to R): Victoria Stairs (Treasurer), Brian Rawers (President), Tracey VanSteenhouse (Secretary), James Wallace (Vice President)

Back Row (L to R): Ben Howard, Alan Greenberg, Dennis O'Neill, J.D. Turner, Matt Souther, Scott Schabacker, Pat Mendes (CLE Coordinator)

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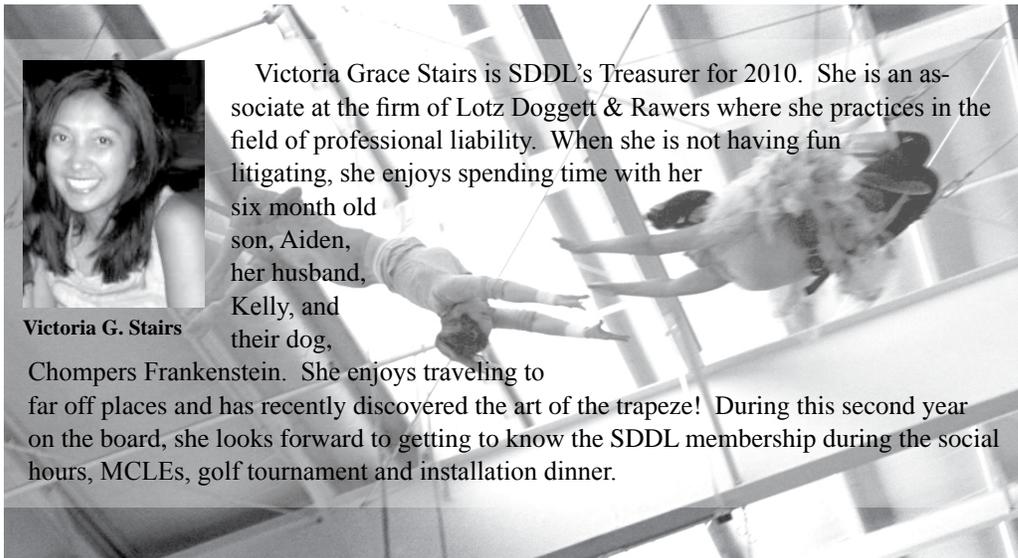
Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Dues are \$145/year. The dues year runs from January to December. Applications can be downloaded at: www.sddl.org

THE UPDATE is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense lawyers.

All views, opinions, statements and conclusions expressed in this magazine are those of the authors and do not necessarily reflect the opinion and/or policy of San Diego Defense Lawyers and its leadership.

We welcome the submission of articles by our members on topics of general interest to our membership. Please submit material to:

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Victoria G. Stairs

Victoria Grace Stairs is SDDL's Treasurer for 2010. She is an associate at the firm of Lotz Doggett & Rawers where she practices in the field of professional liability. When she is not having fun litigating, she enjoys spending time with her six month old son, Aiden, her husband, Kelly, and their dog,

Chompers Frankenstein. She enjoys traveling to far off places and has recently discovered the art of the trapeze! During this second year on the board, she looks forward to getting to know the SDDL membership during the social hours, MCLEs, golf tournament and installation dinner.



Alan Greenberg

Alan Greenberg moved to San Diego from Los Angeles in 1983 to open the San Diego office of what was then known as Lewis, D'Amato

Brisbois & Bisgaard. He has been with Wood, Smith, Henning & Berman since 2008 and was a former Board member in 2005-2006. He practices primarily in the areas of professional liability, employment law, and environmental/toxic tort litigation. He is a single father of a 19 year-old daughter, Alex, and is an avid fan of the Chargers, Lakers and the UCLA Bruins. He enjoys science fiction, indoor rock climbing and going to blues concerts.



J.D. Turner

J. D. Turner was born in Oak Park, Illinois and resides in San Diego County. She is admitted to practice law in Arizona, California, and Nevada. Prior

to joining Lorber, Greenfield & Polito, LLP she practiced in-house for Managed Health-care Organizations. She joined the Firm in 1996, became a partner in 2004, practicing in the area of civil litigation with an emphasis in construction litigation and personal injury. She has successfully resolved numerous cases on behalf of developers and general contractors emphasizing alternative dispute resolution.

When not "fighting the good fight", Ms. Turner enjoys on and off-road motorcycle riding, horseback riding, reading, theatre, quilting, and various philanthropic endeavors.



Dennis O'Neill

Dennis S. O'Neill specializes in defending subcontractors in construction defect lawsuits at Farmer Case Hack & Fedor. He enjoys living at the beach with my wife, golfing, and automobile racing.

Scott Schabacker has been practicing as an insurance defense attorney in San Diego for over 25 years and has substantial experience in personal injury defense, coverage, bad faith, construction defect and subrogation matters. He started at McCormick & Mitchell and spent nine years at Hughes & Nunn before founding his own insurance defense firm in 1998. Most of his current practice is devoted to claims and cases involving personal lines policies. He enjoys his second "job" managing his teenage daughter's competitive soccer team.



Matt Souther

Matt Souther is an associate with Neil, Dymott, Frank, McFall & Trexler APLC. He's been with the firm since January 2004. Matt's practice areas include medical malpractice, professional liability, personal injury and healthcare claims.

Matt obtained his undergraduate degree in English from the University of Nevada Las Vegas and then attended California Western School of Law for his legal education. In his spare time, Matt is an avid snow skier, road cyclist, and golfer.

★ Member News ★



Phillip L. Hack

Farmer Case & Fedor is pleased to announce both a change of firm name and the addition of three new associates. The firm will be known as Farmer Case Hack & Fedor, with the addition of **Phillip L. Hack** to the roll of named partners. Mr. Hack's practice focus is transportation and ambulance defense together with medical malpractice. Joining the firm as associates in the past several months are **Allison C. Schneider**, **Benjeman R. Beck** and **Janine R. Mehennet**. Ms. Schneider received her B.A. from the University of Minnesota and her J.D. from California Western School of Law. Mr. Beck, a recent admittee, clerked for the firm for two summers. He brings a claims adjusting background to his practice and is fluent in Spanish. His current practice focus is in the areas of Auto and Trucking Liability, Insurance Coverage, and Commercial Auto/Transit Liability. He holds an undergraduate degree from Portland State and and Thomas M. Cooley Law School. Ms. Mehennet brings experience from multiple litigation perspectives, including personal injury, employer liability, product liability, breach of contract, fraud, insurance defense, and insurance brokering disputes, together with appellate advocacy. She obtained her undergraduate degree from the University of California, Berkeley, and law degree from Loyola of Los Angeles.



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