THE UPDATE

SAN DIEGO
DEFENSE LAWYERS

SPRING 2011

In this Issue

Bottom line

Title Of Case: Kelsey Gibson vs. Bill Bell, M.D. and Seymour Kern, M.D. and Does 1 to 10.

Case No.: 37-2009-00055567-CU-MM-NC

Judge: The Honorable Earl H. Maas, III

Type Of Action: Medical Malpractice. Virtual loss of vision in the left eye.

Type Of Trial: Jury

Trial Length: 5 Days

Verdict: Defense 12-0

Attorney(S) For Plaintiff(S):
John Michael Taylor, Esq.
Edgar R. Nield, Esq.

Attorney(S) For Defendant(S):
Michael I. Neil, Esq.
Matthew R. Souther, Esq.
Neil, Dymott, Frank, Mcfall & Trexler APLC

Damages And/Or Injuries:

Settlement Demand: C.C.P. §998 offer in the amount of $99,950.00

Settlement Offer: None.

Plaintiff Attorney Asked The Jury For: $230,000

Bottom line

Case Title: Diane Davis v. Lori Baker, M.D.; RMG, Inc. and Imaging Health Care, Inc.

Case Number: 37-200900092589

Judge: Honorable John Meyer

Plaintiff's Counsel: Elizabeth Texteria of the Law Office of Robert Vaage

Defense Counsel: Clark Hudson of Neil Dymott Frank McFall & Trexler

Type of Incident/Claims: The plaintiff alleged Medical Malpractice arising during a CT Urogram with Contrast. The plaintiff allege the defendants failed to properly prescreen her for risks associated with contrast dye, and failed to properly pre-medicate her for the study. The plaintiff did experience an allergic reaction to the contrast dye. After the reaction, the plaintiff alleges the defendants administered medication against her will, and then delayed in calling for emergency aid.

Settlement Demand: $35,000

Settlement Offer: $20,000

Trial Type: Jury Trial

Trial Length: 5 days

Verdict: 12-0 defense.

Case Title: Maxwell vs.Compaction Plus

Case Number:

Judge: Honorable Loren Miller

Plaintiff's Counsel:

Defendant's Counsel: Elizabeth Skane and Kent Thaeler of Skane Wilcox LLP

Type of Incident/Causes of Action: One of the Plaintiffs was an employee of a subcontractor.

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PRESIDENT'S MESSAGE

I feel privileged and honored to be the 2011 president of San Diego Defense Lawyers and we are fortunate to have an energetic and committed board of directors this year. In my four years on the board I can honestly say that this year board has really hit the ground running. I wanted to take a moment to touch on some of the exciting events and programs planned for the year.

Education- The primary purpose of this organization has always been to provide an opportunity for our members to learn and to obtain MCLE credit. By attending SDDL monthly brown bags and evening quarterly seminars, members can accrue up to 20 hours of MCLE credits each year. As always we have been very fortunate in having top attorneys and judges volunteer their time as speakers. This year we are doing something a little different by co-hosting a couple of "brown bag" events with Consumer Attorneys of San Diego. The SDDL motto is Civility, Integrity and Balance. What better way to exemplify that motto than to work with our litigation opponents to foster professionalism and civility. Please visit our website www.sddl.org for a schedule of upcoming programs and speakers. So far in 2011, each of our brown bags have been standing room only.

Charity- As a non profit organization, the legacy of SDDL has been to give back to the community. This past year we doubled our charitable contributions; and we expect nothing less this year. Our primary charity over the years has been Juvenile Diabetes Research Foundation. Our annual golf tournament has benefited this fine organization. This year our tournament will be held at Lomas Santa Fe Country Club on July 19, 2011. Please be a part of the tournament to help support a great charity. Additionally this past year, through fund raising at our installation dinner, we were able to make a substantial donation to the South Bay Community Free Clinic. This group provides much needed medical care to those in our community who cannot afford medical care.

Mock Trial- This annual competition held in October has grown by leaps and bounds over the past decade. It has grown from essentially a battle of San Diego law schools into a national competition. Last year we had to turn away competitors. The success of the competition is due in large part to the numerous attorney volunteers who participate by judging the evening sessions and providing the competitors with valuable feedback. This year's competition promises not to disappoint with several East coast schools along with all the top schools in California already committed to attend.

Social- As Ken Greenfield repeatedly told the board four years ago, if you cannot have fun doing this; you should not do it. In an effort to not disappoint Mr. Greenfield, we have a Night at the Padres event scheduled for April 21, 2011. The tickets include a pre-game tailgate with food and beverages included. We will continue to hold our quarterly Happy Hour "socials" at popular gaslamp venues. They have been well-attended in the past, and we hope to continue this new tradition.

The Update- Our quarterly publication has become more relevant and substantial. Many of our members have realized that the Update is a great platform to submit articles as the publication is received not only by the defense community but by San Diego Superior Court Judges and mediators. We have been fortunate enough to have members provide timely and incisive analysis of new developments in the law, and encourage the submission of new ideas for future Updates.

Finally, we continue to request that our membership suggest ways to improve our organization. The e-mail communications are a useful asset to share information of mutual interest. We will be updating our website during the coming year to make it more interactive. I am fortunate to inherit a flourishing group that has been a mainstay in the community for twenty seven years. I look forward to meeting and working with each and every one of you this year.

Membership Information:

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 31, 2011. 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.

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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★ Member News ★

Ryan Mercaldo & Worthington proudly Congratulates Jeffrey Carvalho and Timothy White

In January 2011, the firm proudly announced the partnership of Jeffrey Carvalho and Timothy White. Both Messrs. Carvalho and White have been long-time associates with the Firm and their overall contributions to the Firm's growth and success have led them to this next important chapter in their careers. We congratulate both Messrs. Carvalho and White for their accomplishments and we thank their families, along with our lawyers and staff, for all of their support and encouragement.


Jeffrey Carvalho


Timothy White

BROWN BAG PROGRAMS

Civility and Courtroom Decorum

By Ben Howard, Esq.
Neil, Dymott, Frank, McFall & Trexler

On March 8, 2011 SDDL hosted its third Brown Bag seminar of the year, "Civility and Courtroom Decorum," featuring the Honorable Steven Denton and the Honorable Joan Lewis. The discussion with a standing-room only crowd covered three topics relevant to the subject: our profession, pre-trial, and trial.

First, all lawyers are part of the legal profession, and as officers of the Court, we are held to a higher standard. Judge Denton pointed out that the narrow perspective on any individual case does not always match our career perspectives, and our daily dealings should support the career-reputation we are cultivating. This career perspective might result in a place on the bench! Some of the civility tips Judge Lewis learned as an attorney she continues to practice in her Courtroom. Both Judges referred the attorneys to the San Diego County Bar Association's "Attorney Code of Conduct" for guidance, which can also be found at http://www.sdcba.org/index.cfm?pg=AttyCodeConduct.

Second, both Judges pointed out most of their cases' civility problems occur pre-trial, as the attorneys are usually on their best behavior for the juries. Judge Denton finds it helpful to remind attorneys when they are on the record, they should be addressing the Court, not each other, and this usually results in a more civil exchange. When discovery disputes arise, Judge Lewis believes a true "meet and confer" occurs face-to-face, as this usually results in an agreement (and will happen anyway outside her Department if a hearing is requested).

Last, during trial, civility should not stop outside the presence of the jury. Even in a bench trial, attorneys should remain professional with the courtroom staff and any hostile witnesses as well. Judge Lewis reminded counsel that in the Courthouse, and especially when invited into a Judge's chambers, language should comport with the setting and profession.

Save the Date

Save the Date for the 11th Annual SDDL Golf Tournament on July 19, 2011

Now is the time to recruit your friends, clients and anyone else who would enjoy the chance at playing on one of San Diego counties finest private courses. The 11th Annual San Diego Defense Lawyer tournament for the benefit of Juvenile Diabetes Research Fund will be held at Lomas Santa Fe Country club on July 19th at noon. As always our sponsors will be proving libations and other goodies on the course.

Lomas Santa Fe is a challenging course with ocean views and tree lined fairways. There are dramatic elevation changes and fast greens that make the course enjoyable for golfers of all skill levels.

There will be a delicious lunch served during the tournament. We will have our dinner following golf at the beautiful clubhouse. Our raffle and auction items will not disappoint.

But most importantly your contributions benefit Juvenile Diabetes Research Foundation. A flyer will be sent to you soon.

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Defendant Herigstad Equipment Rental rented a number of large pieces of equipment for a construction project in Murietta, The general contractor won a summary judgement motion based on the Privette line of cases, and was using the equipment to build a shopping mall. Two of Herigstad's employees were on site fixing a large piece of equipment. In the process of repair, they went to lift the equipment using a large boom on the end of a truck. The equipment was parked under some overhead electrical wires. The employees boomed into the electrical wires and were electrocuted. The third individual saw the employees on fire, and ran to their assistance, also suffering electrocution injuries in the interim. The causes of action alleged in the complaint were limited to Wrongful Death, and Negligence.

Settlement Demand: Policy Limits of $1 million dolalrs

Settlement Offer: $400,000 in CCP section 998 offer

Trial Type: Jury/Judge would have been a jury trial

Trial Length: 1 day

Verdict: Case dismissed. The Plaintiff blew the 5 year statute of limitations by just a few days. As a result, on the first day of trial we brought a motion to dismiss based on the running of the five year statute of limitations. The Plaintiff argued that the statute had been tolled while the case was on appeal due to the granting of summary judgments motions as to the general contractor and the So. Cal electric. We argued that the action had not been formally stayed and as a result there was no tolling. The court agreed and dismissed the case.

Bottom line

Case Title: Nunez v. Freeman, et al.

Case Number: ECU05425 (Imperial County Superior Court)

Judge: Honorable Joseph Zimmerman

Plaintiff's Counsel: Daniel Tamez, Esq., Gnau & Tamez

Defendant's Counsel: John T. Farmer, Esq., Farmer Case Hack & Fedor

Type of Incident/Causes of Action: Offroad accident, quad versus sandrail

Settlement Demand: $100,000 policy limits

Settlement Offer: None

Trial Type: Motion for Summary Judgment

Verdict: This vehicular accident case arose from an accident which occurred on Competition Hill at Buttercup Campground in Winterhaven, CA, in Imperial County. Plaintiff's ATV collided with the defendant's sandrail, resulting in a 2-3 month hospitalization for injuries consisting of multiplerib fractures on the left, ribs 9 through 12; thoracolumbar spine fractures, T11 and T12; left ankle fracture with

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Appellate Update

Home Builders Beware:

Contractual Alternative Nonadversarial Procedures Found to be Unconscionable will Result in a Waiver of the Right to Repair

Anders v. Superior Court of Stanislaus County (Meritage Homes) (February 7, 2011)

By Jason Gless and Keith Smith
Wood Smith Henning & Berman LLP

The California Fifth Appellate District Court of Appeal recently handed down a decision *Anders v. Superior Court of Stanislaus County* (Stanislaus Co. Sup. Ct. No. 643452). The decision appears to significantly impact a home builder's right to repair construction defects. Plaintiffs were the owners of 54 single family residences constructed in Stanislaus County who sued their home builder for construction defects. Of the 54 homeowners, 52 were either original purchasers or subsequent purchasers for which the original purchase, sale contracts, and warranty documents set forth alternative nonadversarial pre-litigation procedures in lieu of the statutory procedures set forth in SB 800 (*Civil Code §§ 910-938.*) Without first complying with either the agreed-to contractual alternative nonadversarial procedures or the statutory SB 800 procedures, Plaintiffs commenced litigation, alleging multiple violations of the standards for residential construction set forth at *Civil Code § 896*. The home-builder Defendant moved to stay the action and compel compliance with the contractual alternative nonadversarial procedures, arguing that, prior to the commencement of any litigation, all Plaintiffs were first required to attempt to resolve their respective disputes through the agreed to contractual pre-litigation dispute protocol set forth in the sales documents.

At the hearing on Defendant's motion, the trial court determined the alternative prelitigation requirements set forth in the sales documents were unconscionable and, therefore, unenforceable. Notwithstanding this determination, the trial court found that the home-builder made only a qualified election to use the alternative contractual pre-litigation requirements and ruled that the case thus defaulted into the prelitigation requirements of SB 800. The trial court ordered the case stayed and ordered the parties to comply with the statutory prelitigation requirements of SB 800. Plaintiffs sought a writ of mandate seeking review of the trial court's order. On appeal, Plaintiffs contended that a home-builder's election to utilize alternative nonadversarial pre-litigation procedures in the purchase documents was a binding election and precluded the home-builder from seeking to use the SB 800 procedures as a fall-back or default protocol in the event a court found the alternative procedures unenforceable.

Holding:

On appeal, the Fifth District focused on a strict interpretation of *Civil Code 914* and found that contractual alternative prelitigation procedures cannot be qualified such that, in the event they are found unenforceable, the parties default into the statutory procedures. Section 914(a) states in pertinent part:

> This chapter establishes a nonadversarial procedure. . .A builder may attempt to commence nonadversarial contractual provisions other than the nonadversarial procedures and remedies set forth in this chapter, *but may not, in addition to its own nonadversarial contractual provisions, require adherence to the nonadversarial procedures and remedies set forth in this chapter, regardless of whether the builder's own alternative nonadversarial contractual provisions are successful in resolving the dispute or ultimately deemed enforceable.*
>
> (Italics added)

In so doing, the Court of Appeal held that a home-builder may elect to choose its own alternative nonadversarial pre-litigation procedures, but if such are deemed unenforceable, the homeowner is released from the requirements of SB 800 and may proceed directly with litigation. Specifically, the court wrote:

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A builder who elects to use alternative prelitigation procedures in lieu of those set out in the statute has the right to attempt repairs, so long as it does so pursuant to procedures that are fair and enforceable. *If, however, the builder imposes procedures that are found to be unenforceable*, it forfeits its absolute right to attempt repairs. It may still offer to repair any defects, but the homeowner is not bound to accept the offer or to permit the builder to attempt the repairs prior to litigation. The builder thus has an incentive to ensure its alternative procedures are proper and enforceable, and the homeowners' protection against unnecessary delay is preserved. (Italics added)

Issues Left Unresolved

The Court of Appeal did not decide what constitutes an unconscionable or unenforceable set of alternative nonadversarial pre-litigation procedures, nor did it discuss the potential scenario in which there are alternative pre-litigation procedures which are arguably unconscionable, but the home-builder does not seek to enforce them. Two questions remain unanswered. First, in a case where the alternative nonadversarial pre-litigation procedures are arguably unconscionable, can the home-builder forgo seeking compliance with the alternative prelitigation protocol by only seeking to enforce the statutory pre-litigation procedures set forth in SB 800? Also, can plaintiffs circumvent the pre-litigation dispute resolution process by alleging in the complaint that the contractual nonadversarial procedure is unconscionable? It seems certain, however, that as the SB 800 process matures, home-builders will see a variety of challenges to their absolute right to repair. With more and more plaintiffs seeking damages over repairs and continuing to seek damages even where repairs have been performed, it is critical for a home-builder not only to ensure strict compliance with SB 800 once a claim is made, but such compliance must also begin at the initial stages of developing the project.

Visual Evidence **Archive:** Demonstratives That Made a Difference

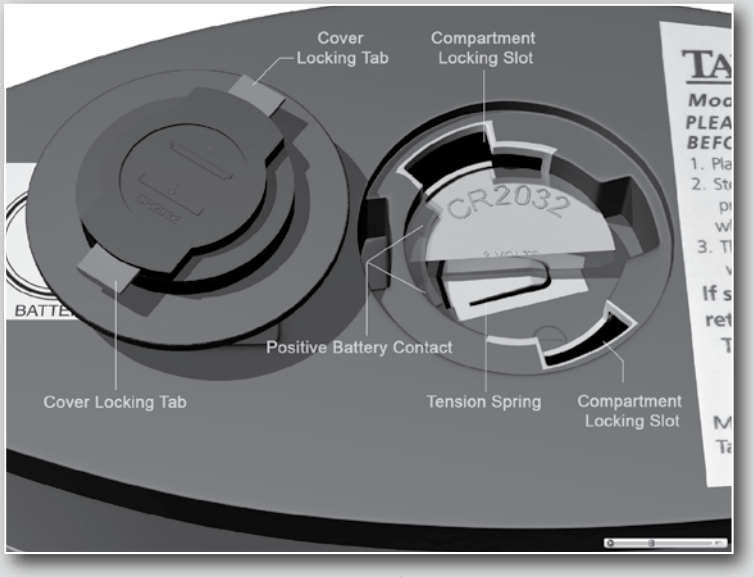
Practice Area: Personal Injury

Background: Plaintiff toddler accidentally swallowed a "button" battery that lodged in her throat. Over the course of several months, the battery leaked and caused serious health problems. At issue was the source of the battery, purportedly from a bathroom scale manufactured by defendant.

The source of the battery was questionable for several reasons: the battery had reportedly been replaced at one point by the parents, the parents threw away the scale after the child was initially treated, and the measured size of the recovered battery, which was discarded by the treating hospital, was different than that used in the scale.

A Demonstrative That Made a Difference: For mediation, a technical 3D-computer animation was created that illustrated how a button battery is inserted and locked into the scale's battery compartment. An additional sequence demonstrated how if the compartment somehow became unlocked, the battery would not fall to the ground and become visible unless the heavy scale was moved.

Outcome: Defendant settled for a confidential amount.



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open reduction and internal fixation; a pneumothorax and a hemothorax with a resulting left tube thoracostomy. Plaintiff's claimed medical expenses were approximately $500,000. The loss of earnings claim was uncertain, but plaintiff had not worked since the accident. The principal defense rested on the theory of primary assumption of the risk applicable in an off-road accident setting under the case of *Distefano v. Forester* (2001) 85 Cal.App.4th 1249. Following contested oral argument, the trial court found the defense applicable and granted summary judgment for the defendant sandrail operator, and plaintiff elected not to appeal.

Bottom line

Case Title: Tracy M. Porter v. Rulon Davis

Case Name/Number: SDSC Case No. 37-2008-00097417-CU-PO-CTL

Judge: The Honorable Lisa A. Foster

Plaintiff: Tracy M. Porter

Defendant: Rulon Davis

Length: Jury Trial, 4 Days

Type: Personal Injury

Causes of Action: Motor Vehicle Negligence; General Negligence

Plaintiff's counsel: Douglas A. Oden and Eugene S. Thompson of Oden, Greene & Thompson

Defendant's counsel: John H. Everett of the Law Offices of John H. Everett

Type of Incident/Cause of Action: Motor vehicle rear end collision; Plaintiff claimed a cervical spine injury, for which she underwent surgery, was proximately caused by the accident.

Plaintiff's Demand: $500,000

Defendant's Offer: None

Verdict: Defense

Trial Type: Jury

Deliberations: Approximately 1.5 hours

Post-Judgment: None

Bottom line

Case Title: Christopher Insley v. Miller's Field Plates and Pints & Taylor Radmore

Case Number: 37-2009-00085164-CU-PO-CTL

Judge: Honorable Joel Pressman

Plaintiff's Counsel: Dwight Ritter and Karen Albence of Ritter & Associates

Defendant's Counsel: James M. Roth and Blake J. Woodhall of The Roth Law Firm,

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SENATE BILL 800 IN CALIFORNIA: IS CALIFORNIA'S "FIX IT" LAW IN NEED OF REPAIRS?

By Paul L. Nolan, Esq.
Wood, Smith, Henning & Berman, LLP

Builders seeking to comply with the act have encountered a rocky road. Making the best use of the flawed system requires an understanding of the vision underlying the legislation, a keen grasp of the law's detailed requirements, and a proactive approach to implementation. However, even the most zealous attention to detail will not overcome all the flaws in the system. Putting the law into practice has highlighted areas ripe for change.

The Vision

In the 1990's, construction defect litigation dramatically expanded from a cottage industry to an overblown giant. At the hands of profiteers, the spiraling increase in claims caused insurance premiums to skyrocket and drove a wedge between homeowners and builders. Subjective determination of defects and the ease by which plaintiffs' attorneys could aggregate claims intensified the problems. Seeking relief from the flood of uncontrolled litigation, the building industry banded together to pursue relief through a bill which would allow builders the right to repair defects and curb the construction dispute litigation problem.

Through the efforts of the building and insurance industry, the legislature ultimately recognized the need for improved standards and procedures for early resolution of construction defect claims. In enacting it, the legislature declared "The prompt and fair resolution of construction defect claims is in the interest of consumers, homeowners, and the builders of homes, and is vital to the state's continuing growth and vitality. However, under current procedures and standards, homeowners and builders alike are not afforded the opportunity for quick and fair resolution of claims. Both need clear standards and mechanisms for prompt resolution of claims."

California's governor signed SB 800, or the "Fix-It" Law, in September 2002, which applies to all new homes sold after January 1, 2003. Heralded as groundbreaking, the law sought to reduce litigation and give homeowners and builders an opportunity to quickly and fairly resolve construction defect disputes.

Cornerstones of SB 800

Highlights of the key elements of the "Fix It" Law include the following:

Functionality Standards: The law defines construction defects according to 45 functionality standards that apply to a new home. The standards are divided into the following seven categories: water intrusion, structural issues, soils-related issues, fire protection issues, plumbing and sewer, electrical, and "other areas". Each standard is set forth in what is intended to be simple, clear language, such as the following example relating to concrete: "Foundation systems and slabs shall not allow water or vapor to enter into the structure so as to cause damage to another building component."

The "Enhanced Protection Agreement" and "Fit and Finish" Warranty: A builder may opt out of the functionality standards if it provides a warranty in its contract with the homeowner that provides protection equal or greater to the functionality standards. While an "enhanced protection agreement" is voluntary, a builder must provide a one year "fit & finish" warranty covering components such as cabinets, mirrors, countertops, flooring, paint finishes, and trim.

Homeowner Maintenance Obligations: The "Fix It" Bill is not a one-way street.

Homeowners are required to follow all reasonable maintenance guidelines provided by the builder and product manufacturers as well as commonly accepted maintenance practices.

The Right to Repair: Prior to filing a suit for violation of the functionality standards, a homeowner must follow a pre-litigation procedure commencing with notification to the builder of the claim. The notice is to describe the claim in sufficient detail to determine the nature and location of the claimed violation to the extent it is known.

This notice triggers a series of pre-litigation procedures and timelines with which the parties must strictly comply unless they mutually agree otherwise. These procedures include provision of documents by the builder upon request, inspections, and extension of an offer to repair and to mediate. Assuming compliance with the procedures, the law affords the builder with the opportunity to perform repairs.

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Applicability to Subcontractors and Others: The pre-litigation procedures apply to the subcontractors, suppliers, manufacturers, and design professionals to the extent they caused a violation of a functionality standard due to negligence or breach of contract. If a builder intends to hold a trade subcontractor responsible for a violation, then the builder must provide the trade with notice of the claim in sufficient time to allow the trade to participate in inspections and the repair process.

Additional provisions of the act relate to the statute of limitations, rules of litigation, and immunity for third party inspectors.

The Reality

While well-intentioned, the bill is filled pitfalls for the unwary and tempered by questionable benefits.

Strict Notice Requirements: A builder must provide notice of the existence of the pre-litigation procedures and a copy of the "Fix It" Law with the original sales documentation; both must be initialed and acknowledged by the purchaser and the builder's sales representative. This requirement still catches some builders by surprise.

A Burdensome Timeline: While the pre-litigation procedures were intended to be fair, the timeline is overly stringent. The deadlines make it nearly impossible for a builder to identify and actively involve all the implicated parties as a practical matter. If the builder fails to comply with the procedures, the homeowner is freed from the pre-litigation procedures and may file suit.

Troublesome Tenders: SB 800 provides pre-litigation procedures, which by definition mean the matter is not in litigation. As a result, the trades, the trades' insurers, and even the builder's own primary carrier may balk at participation.

Trigger Happy Homeowners: Even with the most diligent compliance at the sales stage with the notice requirements, builders may find themselves facing homeowners who jump straight to litigation without complying with the pre-litigation procedures. However, a builder is not without recourse. Under *Civil Code* §920, the builder may bring a motion to stay any proceeding should the homeowner fail to comply with the pre-litigation procedures.

Vague Standards: As there has been little interpretation of the functionality standards, the interpretation of the meaning of the standards and the issue of whether extrapolation applies is still hotly debated. For example, what do "significant cracks" and "excessive condensation" mean?

No Release for Repairs: While a builder may secure a release for cash payments to a homeowner, it is important to note that a builder may not obtain a release for any repair work mandated by SB 800. If a dispute still exists over the defect or results from the repair, an owner can still file an action. Therefore, a builder cannot extinguish the possibility of litigation even by following the SB 800 procedures.

The Road Forward

While the most significant challenges may require legislative reform, simple steps can help address many of the issues.

Education: The first and most important step for builders, trades, and insurers to take to avoid pitfalls is to thoroughly educate themselves on the requirements of the Act.

Forewarned is Forearmed: With education comes awareness of the stringent requirements. Pending any future relaxation of the requirements by a change in legislation, the best offense is to follow the requirements and time lines as zealously as possible.

Nip Homeowner Non-Compliance in the Bud: If a homeowner or group of homeowners to which the "Fix-It" Act jumps straight to litigation, take action to seek a stay and force compliance with the pre-litigation procedures.

Support Legislative Reform: Finally, changes to the strict time line, the largely one sided enforcement penalties and the bar on a release for repairs are matters requiring legislative reform. Groups such as the California Building Industry Association are seeking to bring about change.

By following these simple steps, many builders have, thus, been able to successfully resolve claims through repairs and avoid litigation. As to those issues requiring changes to the law, don't sit back; support reform efforts.

SDDL hosts author and constitutional law scholar Ken Gormley at book discussion

Ken Gormley

On Friday, March 4, 2011, the SDDL, in conjunction with the Thomas Jefferson School of Law, hosted a discussion by author and constitutional law scholar Ken Gormley, whose 2010 book, "Death of American Virtue: Clinton vs. Starr," was named one of the ten best books of the year by both the New York Times and the Washington Post. At the Bayfront Hilton, Mr. Gormley spoke about his research into the question of how Bill Clinton became only the second American President to be impeached. In the national press, Mr. Gormley's book was roundly praised for its evenhanded approach and lack of political bias. After describing in detail how the book is based only on first source information, and his goal of writing the definitive, scholarly account of the scandal by interviewing hundreds of key players including President Clinton, his attorneys, Ken Starr, Monica Lewinsky, Mr. Gormley offered his view that while neither Clinton nor Starr was single-handedly responsible for what occurred, the changing American political culture was already on a path towards the divisiveness seen in today's twenty-four hour news cycle. Focusing on the decision to expand the Whitewater investigation into President Clinton's affair with Monica Lewinsky, Gormley offered that Ken Starr was "the last person on planet Earth" who should have taken such a direction given the strictures of the independent counsel law and the public sentiment that Starr was already on a witch hunt. In the end, Mr. Gormley, Dean of Duquesne University School of Law in Pittsburgh, suggested that the American people knew before any of the major players in the Whitewater saga that President Clinton had an affair - and lied about it - but that virtually everyone outside of politics wanted government to return to governing. Mr. Gormley explained that, unfortunately, the political leaders took far too long to realize the country was ready to move on.

The Friday evening crowd enjoyed a hosted bar sponsored by Thorsnes Litigation Services, the Xpera Group, and Butz Dunn & DeSantis. Mr. Gormley signed books for the crowd following his hour-long discussion. A crowd of approximately 100 SDDL members, law students, deans of various law schools in town for an ABA conference, and the general public attended the Friday evening event.

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APLC (Counsel for Miller's Field). Radmore was in pro per and did not participate.

Type of Incident/Causes of Action: Bar Fight/Premises Liability with allegations of lack of security; underage serving and over-serving. The case involved an underage patron (Radmore) who threw and struck Plaintiff in the right eye with a pint glass causing physical injuries while at Miller's Field in Pacific Beach. Radmore, Plaintiff and Plaintiff's friend were involved in a verbal altercation immediately before the glass was thrown. Plaintiff and his friend, who both stood at 6'4 and 215 pounds, claimed they were scared and intimidated by Radmore, who was 5'8" and 165 pounds. Miller's contended the incident was provoked by Plaintiff and his friend and was spontaneous, unforeseeable and not preventable.

Plaintiff sustained a lacerated cornea and alleged lifetime future treatment, including multiple surgeries, as well as a 25% loss in future employability. Miller's conceded it was a permanent injury, however discredited the extent of Plaintiff's claims through more persuasive experts, video surveillance, social networking sites (Facebook) and direct impeachment.

Settlement Demand: Plaintiff 998 for $998,499 but asked for $1.8 million at trial

Settlement Offer: $425,000

Trial Type: Judge

Trial Length: 6 days

Verdict: Plaintiff awarded $42,294.07 for past medical expenses, $137,753.36 for future medical expenses, and $250,000 for general damages.

Apportionment: Radmore 75% at fault; Plaintiff's friend 25% at fault; Miller's Field 0% at fault (defense verdict for Miller's Field)

Judgment: Plaintiff to take nothing from Miller's Field and awarded $325,253.36 against Radmore (who counsel believes is effectively judgment proof)

Bottom line

Case Title: Kirklen v. Auto on the Mall, et al.,

Case Name/Number: RCSC Case No. INC089351

Judge: Harold W. Hopp

Plaintiff : Dennis Kirklen and survivors

Defendant: Auto on the Mall

Causes of Action: Products Liability, Wrongful Death, Breach of Warranty, Negligence

Plaintiff's Counsel: C. Tab Turner, Esq., of Turner & Associates, North Little Rock,

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Insurance Law Update

By James M. Roth, Esq.
The Roth Law Firm

A handful of important insurance-related cases have recently been published. This column addresses (1) whether the court retains its declaratory relief powers to first resolve the interpretation of an appraisal provision before then compelling the parties to appraisal; (2) whether the "intentional loss" exclusion prohibits recovery to an innocent insured when the loss was caused by the intentional acts of a co-insured; (3) whether a Commercial General Liability insurer has a duty to defend its insured in lawsuits alleging construction defects when the insuring clause for coverage contained within a Montrose endorsement is internally ambiguous; and (4) whether an action against an insured cash distribution machine servicer for cash stolen by the insured's employee from a client bank is "property damage" under a Commercial General Liability policy.

1. The Court Retains its Declaratory Relief Powers to First Resolve the Interpretation of an Appraisal Provision Before Then Compelling the Parties to Appraisal Because California Courts Have Consistently Held That an Appraisal Panel Exceeds its Authority When it Does Anything Beyond Deciding the Worth of the Property in Question. In *Kirkwood v. California State Auto. Ass'n Inter-Insurance Bureau* (2011) Cal.Rptr.3d, 2011 WL 680345, the Court of Appeal, First District, Division 4, held on February 28, 2011, that a court retains its declaratory relief powers to first resolve the interpretation of an appraisal provision before then compelling the parties to undertake an appraisal because California courts have consistently held that an appraisal panel exceeds its authority when it does anything beyond deciding the worth of the property in question.

Factually, Douglas Kirkwood was insured by California State Automobile Association ("CSAA") under a homeowner's policy. It was an "open" policy in which the value of the covered items was not agreed upon, but was left to be determined following a loss. The policy provided that CSAA would pay actual cash value or the replacement cost of lost or damaged personal property. On August 21, 2007, Mr. Kirkwood's home and personal property were destroyed as the result of a fire. He submitted his personal property claim to CSAA, setting forth a physical depreciation amount based on the actual condition of each item at the time of the loss. CSAA provided Kirkwood with a contents inventory summary, which showed that a blanket depreciation schedule was applied to certain categories of property based upon the age of the item without regard to its condition. Mr. Kirkwood challenged the settlement offer, in particular what he asserted was "excessive depreciation" that was nearly triple what he had calculated, and accused CSAA of violating Section Insurance Code Section 2051(b). In 2004, with the passage of Assembly Bill No. 2962 introduced as part of the Homeowners Bill of Rights following the 2003 wildfires in Southern California, section 2051 was amended to state exactly how the measure of actual cash value should be determined. Section 2051, subdivision (b) now reads, in part: "(b) Under an open policy that requires payment of the actual cash value, the measure of the actual cash value recovery, in whole or partial settlement of the claim, shall be determined as follows: [¶] ... [¶] (2) In case of a partial loss to the structure, or loss to its contents, the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less."

CSAA responded to Mr. Kirkwood's arguement, arguing that it was aware of section 2051, had asked the Department of Insurance for guidelines on how to determine actual cash value using the language of fair and reasonable deduction for physical depreciation, but indicated the department had no guidelines. CSAA stated it did "not believe the code changes the language of the contract between an insured and their carrier."

Thereafter, Mr. Kirkwood sued CSAA for declaratory relief, breach of contract, bad faith, and violation of the unfair competition law. The complaint included Mr. Kirkwood's individual claims as well as class action allegations, all relating to the assertion that CSAA's use of standardized depreciation schedules to determine depreciation of personal property items ran afoul of California law as well as the parties' insurance contract. CSAA demanded that Mr. Kirkwood dismiss the lawsuit and proceed with an appraisal. Mr. Kirkwood rejected the demand for appraisal, responding that the appraisal provision had no effect on his action because the lawsuit presented questions of law and coverage, and appraisers have no authority to resolve such issues. Faced with this rejection, CSAA demurred and moved to strike. The court granted and denied in part the motions. CSAA also moved to compel an appraisal pursuant to the appraisal clause in the policy which essentially tracked the standard form provision detailed in section 2071. The trial court denied the motion to compel appraisal, without prejudice, so that CSAA could raise this issue again after the court resolved the

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issue of interpretation of section 2051(b). Subsequently, Mr. Kirkwood filed a first amended complaint; CSAA again demurred and moved to strike the class allegations. The court sustained (1) CSAA's demurrer to the breach of contract/specific performance claim on behalf of the class, without leave to amend; and (2) the UCL cause of action on behalf of the class, with leave to amend. It denied the motion to strike class allegations to the extent the demurrer rulings did not moot those concerns. Kirkwood submitted a second amended complaint realleging declaratory relief and UCL causes of action on behalf of the class, as well as individual breach of contract and breach of the implied covenant of good faith and fair dealing claims. Shortly thereafter this appeal followed.

CSAA argued that an appraisal was necessary to determine whether the insured had standing to pursue injunctive relief against the insurer, and if there was an actual controversy. In other words, CSAA posted that whether an insured proceeds with an action depends on whether the appraisal demonstrates that the insurer's offer was lower or higher than the actual cash value. This argument, noted the Court, "goes both ways." The result favored by CSAA bears the real, deleterious consequence of forcing insureds to pay for an appraisal prior to a definitive judicial declaration establishing the correct legal basis for determining actual cash value. A judicial declaration that CSAA's interpretation of section 2051(b) and its policy does not violate the statute would be the end of the line: no appraisal would be necessary, and insureds such as Mr. Kirkwood would not be forced to pay for an appraisal. On the other hand, "a contrary judicial declaration would inform the appraisal *[sic]* in this case and would have the meritorious effect of staving off future appraisals and litigation based on the same unlawful behavior." In the Court's view judicial economy favored resort to declaratory relief in this instance by heading off duplicative future actions challenging CSAA's statutory interpretation as reflected in its loss adjustment policy.

2. The "Intentional Loss" Exclusion Was Invalid Insofar as it Applied to Innocent Insureds' Recovery for Losses Caused by Other Insureds' Intentional Acts. In *Century-National Ins. Co. v. Garcia* (2011) Cal.Rptr.3d, 11 Cal. Daily Op. Serv. 2194, 2011 WL 537627, the Supreme Court of California held, on February 17, 2011, that a fire insurance policy's "intentional loss" exclusion was invalid insofar as it excluded recovery by innocent insureds for fire losses caused by other insureds who acted intentionally and criminally, since such insurance resulted in coverage not substantially equivalent to the minimum statutory level of protection, which excluded only losses caused by the wilful act of "the insured."

Factually, Jesus Garcia, Sr., and his wife Theodora Garcia (the Garcias) suffered substantial damage to their home when their adult son set fire to his bedroom. At the time of the fire, the home was covered under a homeowner's policy issued by Century-National Insurance Company (Century-National). Under that policy, Jesus Garcia, Sr. was the named insured, and his wife Theodora Garcia and their son also qualified as insureds. The Garcias filed a claim for the damage, which Century-National investigated and denied. Century-National filed a civil complaint seeking a declaration that it had no duty to pay for the Garcias' loss because the policy contained clauses excluding coverage for the intentional act or criminal conduct of "any insured" (collectively, the intentional acts exclusion).

The Garcias filed a cross-complaint alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and reformation. The trial court agreed with Century-National, determining that (1) the Century-National policy defined the term "any insured," as contained in the intentional acts exclusion, to include relatives of the insured who lived at the insured property, i.e., the Garcias' adult son, (2) courts generally interpret policy exclusions for intentional or criminal acts to exclude coverage for innocent co-insureds, and (3) Insurance Code section 533 expressly sets forth California's public policy of denying coverage for willful wrongs. The court sustained the demurrer without leave to amend and entered a judgment dismissing the cross-complaint. The Court of Appeal affirmed.

In reversing the trial and appellate courts, a unanimous Supreme Court explained that, in California, fire insurance policies are regulated by the Insurance Code. Section 2070 provides: "All fire polices ... shall be on the standard form, and, except as provided by this article shall not contain additions thereto. No part of the standard form shall be omitted therefrom except that any policy providing coverage against the peril of fire only, or in combination with coverage against other perils, need not comply with the provisions of the standard form of fire insurance policy ...; *provided, that coverage with respect to the peril of fire, when viewed in its entirety, is substantially equivalent to or more favorable to the insured than that contained in such standard form fire insurance policy.*" (Italics original to published opinion.) First, the Court noted "[t]hat this intentional acts exclusion uses the term 'any insured' is significant. As we recently explained, '[a]bsent contrary evidence, in a policy with multiple insureds, exclusions from coverage described with reference to the acts of 'an' or 'any,' as opposed to 'the,' insured are deemed under California law to apply collectively, so that if one insured has committed acts for which coverage is excluded, the exclusion applies to all insureds with respect to the same occurrence." "Consequently, under the policy as written, the Garcias may not recover against Century-National because, even if they were innocent of wrongdoing, their fire losses were caused by another insured, who acted intentionally and criminally." Importantly, "[a]lthough the Century-National policy purports to exclude coverage of the Garcias' losses, section 2070 requires a comparison of the policy with the standard form fire policy set forth in section 2071. The question is whether the Century-National policy provides coverage that is at least as favorable to the insureds as the coverage provided in the standard form. If application of the intentional acts exclusion in the former results in coverage that is not at least substantially equivalent to the level of protection available in the latter, the exclusion is to that extent invalid." In rendering a comparison, the Court found that "[n]otably, the statutory standard form contains no express exclusion for losses caused by intentional acts or criminal conduct."

In finding that the innocent Garcia parents should not be penalized for the intentional acts of their son, the Court recast the issue: "The question is whether the Century-National policy provides coverage that is at least as favorable to the insureds as the coverage provided in the standard form. Under the Century-National policy, the intentional acts exclusion bars coverage for property losses sustained by insureds who are innocent of wrongdoing. But under the standard form, which must be read as including section 533's exclusion for losses caused by 'the wilful act of *the* insured' (italics original), innocent insureds would not be barred from coverage. Thus, under section 2070, it cannot be said that the coverage provided by the Century-National policy, 'with respect to the peril of fire, when viewed in its entirety, is substantially equivalent to or more favorable to the insured than that contained in such standard form fire insurance policy.'"

3. Commercial General Liability Insurer Had Duty to Defend Insured Grading Contractor in Lawsuits Against it Alleging Construction Defects When Insuring Clause for Coverage Was Internally Ambiguous. In *American Safety Indem. Co. v. National Union Fire Ins. Co. of Pittsburgh* (2011) F.Supp.2d, 2011 WL 9514, writing for the United States District Court, Southern District of California, Judge Dana Sabraw held, on Januray 3, 2011,

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that a Commercial General Liability insurance policy was ambiguous as to whether the issuing insurer had a duty to defend its insured grading contractor in lawsuits against it alleging construction defects. Thus, under California law, the insurer had a duty to defend its insured when a Montrose endorsement concurrently provided that the carrier had the right but not the duty to defend any suit seeking damages for bodily injury or property damage. Further in the event of continuing or progressive bodily injury or property damage over any length of time, the insurer had no duty to defend unless such injury or damage first commenced during policy period.

Factually, American Safety Indemnity Company ("ASIC") issued two commercial general liability insurance policies to grading contractor Signs & Pinnick, which were effective November 1, 2001 through November 1, 2003. National Union Fire Insurance Company of Pittsburgh, PA ("NUFIC") issued a commercial general liability insurance policy to Signs & Pinnick, which was effective November 1, 2003 through November 1, 2004. In 1999 and 2000, Signs & Pinnick performed grading work on seven single family home building sites at the 4S Ranch residential development. On February 15, 2005, a lawsuit was filed in San Diego Superior Court against several defendants, including Signs & Pinnick, alleging construction defects at the 4S Ranch development. In 2001 and 2002, Signs & Pinnick performed grading work at an apartment project called Casoleil in San Diego. On March 13, 2006, a lawsuit was filed in San Diego Superior Court against the general contractor of the Casoleil project alleging various construction defects, and the general contractor filed a cross-complaint against various subcontractors, including Signs & Pinnick. ASIC defended Signs & Pinnick in both the 4S Ranch litigation and the Casoleil litigation, and incurred fees and costs in doing so. NUFIC refused to defend Signs & Pinnick in either litigation pursuant to a full reservation of rights. ASIC thereafter filed suit against NUFIC alleging claims for declaratory relief and equitable contribution.

The insuring clause of the NUFIC policy provided: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages." However, a Montrose endorsement to the NUFIC policy for continuing or progressive injury or damage superceded the above insurance clause as follows:

We will pay on behalf of the Insured those sums in excess of the Retained Limit that the Insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right but not the duty to defend any "suit" seeking those damages. We may at our discretion and expense, participate with you in the investigation of any "occurrence" and the defense or settlement of any claim or "suit" that may exist. But:

(1) The amount we will pay for damage is limited as described in SECTION III-LIMITS OF INSURANCE; and

(2) Our right to defend, if we so exercise it, ends when we have exhausted the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

(3) In the event of continuing or progressive "bodily injury" or "property damage" over any length of time, we will have no duty to defend or investigate any "occurrence", claim or "suit" unless such "bodily injury" or "property damage" first commenced during the policy period.

In finding that NUFIC had a duty to defend Signs & Pinnick in the underlying state court actions, Judge Sabraw found that the introductory paragraph to the Montrose endorsement was ambiguous because it seemingly removed the duty to defend while subparagraph (3) of that same endorsement assumed the existence of a duty to defend. Given that ambiguity, Judge Sabraw concluded that because "doubts as to meaning must be resolved against the insurer, the Court finds [NUFIC] did have a duty to defend Signs & Pinnick under the policy.

4. An Action Against an Insured Cash Distribution Machine Servicer for Cash Stolen by the Insured's Employee from a Client Bank Was Not "Property Damage" under a Commercial General Liability Policy. In *Advanced Network, Inc. v. Peerless Ins. Co.* (2910) 190 Cal.App.4th 1054, 119 Cal.Rptr.3d 17, the Court of Appeal, Fourth District, Division 1, writing for a unanimous panel, P.J. McConnell held on December 10, 2010, that a credit union's action against an insured cash distribution machine servicer to recover cash which the servicer's employee stole from that credit union was not for the "loss of use" of the cash. Rather, it was for the permanent "loss" of the cash and its replacement value, and thus was not covered under a Commercial General Liability policy's "loss of use" provision of coverage for property damage.

Factually, in May 1997, ANI contracted with Mission Federal Credit Union (Mission Federal) to service cash distribution machines (CDMs) in its branch stores. ANI employee Jacob Johnson serviced Mission Federal's CDMs. In October 2004, it was discovered that Johnson had stolen approximately $2 million in cash from Mission Federal, which he concealed by submitting false records.

Mission Federal made a demand on its fidelity bond holder, Cumis Insurance Society, Inc. ("Cumis"), which paid the claim. In August 2005, Cumis sued ANI in the federal district court for equitable subrogation, breach of contract and negligence, and for *respondeat superior* liability for Johnson's torts. ANI had a CGL policy with Peerless, which covered third party "property damage" caused by an "occurrence" during the policy period. The policy defined "property damage" as (1) "Physical injury to tangible property, including all resulting loss of use of that property," and (2) "Loss of use of tangible property that is not physically injured." In rejecting the defense tender, Peerless took the position there was no "property damage" within the meaning of the CGL policy because money is not considered to be tangible property, and the theft of money was not a covered "occurrence" because it was not accidental. ANI then sued Peerless for breach of contract and breach of the implied duty of good faith and fair dealing.

The Court explained "the terms 'loss of use' and 'loss' are not interchangeable for insurance purposes. If we were to hold otherwise, we would have to ignore the words 'of use' in the term 'loss of use.'" As such, "[c]overage for 'loss of use' does not apply to an underlying action in which the claimant seeks only the replacement value of converted property. While the 'loss of use' provision in Peerless's CGL policy is not modified by the term 'temporary,' the impermanent nature of 'loss of use' damages is implicit. . . . Interpreting the term 'loss of use' to include a permanent loss would lead to absurd results."

Presiding Justice McConnell noted it was "undisputed that the cash ANI's employee stole from Mission Federal was irretrievable, and the Cumis action was for the replacement value of the cash. The Cumis action did not seek any 'loss of use' damages. Because neither the underlying complaint nor any extrinsic facts showed the potential for coverage under Peerless's CGL policy, it had no duty of defense or indemnity toward ANI."

Collateral source rule does not permit an injured plaintiff to recover medical expense damages in the amount billed by her medical provider if her health insurer paid less

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In response to requests filed by Horvitz & Levy and by the Association of Southern California Defense Counsel, the Court of Appeal recently ordered published its opinion on a much-litigated issue that is presently pending before the California Supreme Court. The Supreme Court will decide whether, under the collateral source rule, a plaintiff in a personal injury action may recover as economic damages the full amount her health care providers billed for their services even though the providers agreed to accept as payment in full much smaller amounts paid by the plaintiff's health insurer. (*Howell v. Hamilton Meats & Provisions, Inc.*, review granted March 10, 2010 (S179115).)

The Court of Appeal's newly published opinion concludes that, notwithstanding the collateral source rule, it is appropriate to reduce a plaintiff's medical expense damages "from the amount billed by her medical provider to the amount paid by her private medical insurer."

The court said its holding follows "current California case law" in *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, and *People v. Bergin* (2008) 167 Cal.App.4th 1166. That is significant because many plaintiffs' attorneys have been arguing, and some courts have been ruling, that the *Hanif* line of cases is obsolete and need not be followed.

With publication of the *Cabrera* opinion—and because the Supreme Court has granted review of all contrary Court of Appeal decisions, which renders them not citable—all California trial courts must follow the law stated in *Cabrera* and limit medical expense damages to the amount actually paid by the plaintiff and/or her health insurance for her treatment. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Decisions of every division of the District Courts of Appeal are binding . . . upon all the superior courts of this state"].) At least for now. The Supreme Court will likely grant review in *Cabrera* in two or three months. But until it does so, *Cabrera* is citable to any court and is binding on all superior courts. (Cal. Rules of Court, rule 8.1115(d) ["A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published"].)

Horvitz & Levy LLP requested publication of the *Cabrera* opinion on behalf of the American Insurance Association, the Association of California Insurance Companies, the Personal Insurance Federation of California, the California State Automobile Association Inter-Insurance Bureau, Chartis, Inc., Farmers Insurance Exchange, Infinity Insurance Company, the Interinsurance Exchange of the Automobile Club, Mercury Insurance Group, State Farm General Insurance Company, and State Farm Mutual Automobile Insurance Company.

2011 Annual San Diego Defense Lawyers Installation Dinner & Casino Night

By Victoria G. Stairs
Lotz Doggett & Rawers, LLP

Thank you to all of our members who attended the 2011 Annual Installation Dinner and Casino Night on January 29th. The San Diego Defense Lawyers were able to raise over $10,000 for the South Bay Community Free Clinic because of the generosity of our members and sponsors. If you were unable to attend the event, you missed a memorable evening of great speeches, a humorous video and casino fun. With over two hundred people in attendance, the San Diego Defense Lawyers connected with colleagues and friends over food and wine while welcoming the newly appointed Board of Directors, thanking the 2010 Board and honoring our very own Hon. Kenneth J. Medel. After heavy appetizers and a hearty four course meal (complete with a mango sherbet palate cleanser), attendees migrated to the casino room where everyone got to try their hand at blackjack, poker, roulette and craps. Throughout the night, guests had a chance to win one of many spectacular prizes donated by our generous sponsors. Sezen Oygar of Neil Dymott was one of the lucky winners who walked away with a 12 bottle case of wine in the 89-93 point range! The evening was a successful event for the San Diego Defense Lawyers.

Brian Rawers, outgoing president and his wife, Kim Rawers

Board Member, Ben Howard and his wife, Jeanne Howard

Board member, Alan Greenberg and Amy Lee

Kevin DeSantis and his wife, Gina DeSantis

Peter Doody and his wife, Julie Doody

Hon. Janis Sammartino and Hon. Herbert Hoffman (ret.)

Debbie Medel, John Walsh and Allison Walsh

A full house including Hon. Kenneth Medel (SDDL Lawyer of the Year recipient) and his wife Debbie Medel; Hon. Janis Sammartino, Hon. Herbert Hoffman (ret.) who swore in the Board of Directors; Dan Link, San Diego Bar President and Jim Wallace, SDDL incoming President

Stolen Identities and the Stolen Innocence of Children

By Deborah A. Cumba

You have heard the horror stories of identity theft: someone charging lavish trips to a credit card in your name, posing as you to get a job, or even committing a crime using your identity. But did you know that a growing number of identity theft victims are kids and even babies? Identity theft can affect a child's credit, employment history and criminal record. If a thief is arrested for another crime while using a child's identity, that crime may affect on the child's record, unless remedied.

The unlawful use of personal identifying information, including Social Security numbers (SSNs), may result in criminal penalties. Specifically, it is a felony in California to use the personal identifying information of another person without the authorization of that person for any unlawful purpose to obtain credit, goods, services or medical information. Penal Code section 530.5 et seq.

In the civil context, victims of identity theft have other remedies against debt collectors and other claimants. For example, upon receipt of a debtor's statement that the debtor is the victim of identity theft, a debt collector has a duty to cease its collection activities and conduct a review. Civil Code section 1788.18. In addition, a victim of identity theft can bring a civil action against a claimant (such as a credit card company) in connection with the claimant's claim against that person. Civil Code section 1798.93.

In 2009, there were 19,204 reported cases of identity theft involving victims age 19 and under nationwide according to the Consumer Sentinel Network (CSN), a secure online database of millions of consumer complaints maintained by the Federal Trade Commission. Identity theft made up the largest percentage of all consumer complaints on the CSN in 2009 at 21%. According to the Federal Trade Commission, San Diego is second only to Los Angeles for the number of identity theft victims in the State of California.

Thieves look for dormant SSNs, which usually belong to children and the deceased. Children are easy targets for identity theft because they do not have or use their own credit and likely would not notice any discrepancies until they are at least 18 years old. Even though a child's SSN may be dormant for a long period of time, children need SSNs to be claimed as a dependent on an income tax return, to open a bank account in the child's name, to obtain a savings bond in the child's name, and for the child to obtain medical treatment or receive government services.

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Arkansas; Timothy J. Ryan, Esq., of Timothy J. Ryan & Associates, Huntington Beach, California.

Defense Counsel: Norman Ryan, Esq., Tim White, Esq., and Giles Townsend, Esq., of Ryan, Mercaldo & Worthington, San Diego

Type of Incident/Cause of Action: Wrongful Death/ vehicle rollover

Plaintiffs' Demand: $2 million special damages claimed

Defendants' Offer: None

Outcome: Dismissal after service of Summary Judgment Motion

Bottom line

Case Title: Vernalee Aquino v. Stockton Hospitality LP

Case Number: 39-2009-00214830

Judge: Hon. Barbara A. Kronlund , San Joaquin County Superior Court

Plaintiff's Counsel: Robert A. Carichoff (Law Offices of Robert A. Carichoff)

Defendant's Counsel: Alan K. Brubaker (Wingert Grebing Brubaker & Juskie LLP)

Type of Incident/Causes of Action: Employment Law/ Age Discrimination/Retaliation

Settlement Demand: $168,500, later indications at $100,000

Settlement Offer: $$20,000 later increased to $40,000

Trial Type: Jury

Trial Length: Four days

Verdict: The jury rendered a verdict for the defense after 45 minutes.

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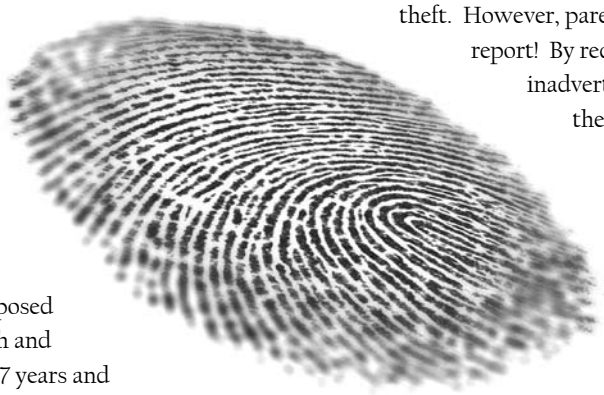
If a Child's SSN is Not in the Credit System, How Can It be Stolen?

A look at how SSNs are created is instructive. The first three numbers represent the geographical region where a number is issued; the middle numbers are group numbers generated during a certain window of time; and the final four numbers are random serial or pin numbers. Based on the information that is already in the public domain regarding the first five numbers, thieves are able to use a computer program to come up with the final four random numbers until they get a match.

In fact, researchers at Carnegie Mellon University in Pittsburgh have demonstrated an algorithm which uses publicly available personal information to reverse engineer a SSN. Shockingly, all that is needed is a person's name and date and place of birth, information that is often provided by children on social networking sites like Facebook and MySpace.

In 2010 alone, the Identity Theft Resource Center, a non-profit organization based in San Diego, California, has received reports of the theft of medical billing records, hospital records (including a children's hospital), and BlueCross/Anthem/WellPoint insurance application records. There was also a report of property loan application documents, including SSNs, mistakenly being tossed in an outdoor waste bin. In addition, thieves are stealing confidential documents the good old fashioned way: from the mail.



Is there a Solution to this Growing Problem?

The Identity Theft Resource Center has proposed the Minors 17-10 Database, a tool for credit issuers to determine whether a SSN belongs to a child. The proposed credit record file would contain the name, birth month and year, and SSN of every minor from birth to the age of 17 years and 10 months (ending at the age most minors need to submit student loans and other credit forms). This credit record file would be maintained by the Social Security Administration and provided to the approved credit reporting agencies on a monthly basis. When a credit issuer calls to check the creditworthiness of an SSN that is on the database, they will be told that the SSN belongs to a minor. The proposed database would effectively deny thieves from obtaining credit by using a minor's SSN.

The Minors 17-10 Database proposal is supported by various senior managers from the credit reporting agencies, the Social Security Administration, the IRS and some Departments of Motor Vehicles, according to Jay Foley of the Identity Theft Resource Center. Mr. Foley stated the concept of the 17-10 Database is "an obvious solution to a massive problem. It is a tool that will eliminate a major portion of the financial loss as well as governmental inconvenience of identify theft." To avoid going through the lengthy legislative process, the Identify Theft Resource Center is currently seeking the direct support of various agencies for the Minors 17-10 Database.

Parents Must Play an Active Role

Parents need to protect their children's SSNs. Social security cards should be kept in a secure place, not in a parent's wallet. When providing a child's SSN is necessary, such as at the doctor's office, parents should ask about the information security procedures in place and make sure the child's SSN will be kept confidential.

Often, individuals are not aware they are victims of identity theft until they are denied credit or employment, or when a debt collector seeks payment for a debt the victim did not incur. Thus, parents need to be on the lookout for signs of identity theft, including any suspicious activity. Some red flags that a child's identity may have been stolen include:

. Calls from collection agencies

. Receipt of pre-approved credit offers in the mail

. A job verification call when the child has never worked

. Denial of government assistance because the child is already receiving assistance

. Warrants for traffic violations for a child without a driver's license

Putting a Band-Aid on the Problem

If a child's identity has been stolen, a parent should file a report with the police department, the Federal Trade Commission, and the major credit bureaus: Experian, TransUnion and Equifax. Next, the parent needs to contact all creditors and contest any bills that result from the identity theft. However, parents should not check the child's credit report! By requesting a credit report, a parent could inadvertently establish a credit report and open the door for thieves. Finally, by simply calling the Social Security Administration, a parent may discover whether any income has been associated with the child's SSN.

Furthermore, to investigate and prosecute identity theft, California operates five regional Hi-Tech Crimes Task Forces. In San Diego, the Computer and Technology Crime High-Tech Response Teach (CATCH) is a local, state and federal task force dedicated to investigating and prosecuting criminals who commit crimes using computer or targeted high-technology. In addition, the California Attorney General administers the statewide Identity Theft Registry to assist identity theft victims who are wrongfully identified as criminals. Victims who have been charged with a crime committed by another person using the victim's stolen identity or victims mistakenly associated with a record of criminal conviction can register their names in the Identity Theft Data Base. Once confirmed, this information is entered into a statewide database and used to show others that the victim was not actually responsible for the crime.

However, there is only so much the government can do to contain identity theft. Parents need to be proactive and take steps to avoid putting themselves and their children at risk of identity theft.

For more information, please visit the following websites:
www.ag.ca.gov/idtheft
www.ftc.gov/bcp/edu/microsites/idtheft/index.html
www.idtheftcenter.org
www.ssa.gov/history/*ssn/geocard.html*

Special Jury Instructions: When CACI Won't Cut It.

By Lisa Perrochet
Horvitz & Levy
This article is reprinted from the Feb. 2011 edition of Valley Lawyer magazine

Trial is imminent, and it's time to prepare a set of proposed jury instructions. Just whip out the list of CACI instructions, check all the ones that conceivably apply, and the job is done, right? Well, not exactly, especially not if the plan is to keep one eye on any potential appellate proceedings down the road.

A recent appellate decision highlights the potential problems. In *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, the Court of Appeal reversed a verdict of over $15 million in a personal injury action, all because of instructional error. The plaintiff in *Bowman* sued the driver of the dump truck that caused his injury, as well as the city for whom the driver was working at the time of the accident, alleging negligence and vicarious liability. Plaintiff prevailed and, on appeal, the court affirmed the judgment against the driver. But the court held the judgment *against the city* could not stand because the standard CACI form jury instruction on employment status was both erroneous and prejudicial. The court explained that "CACI No. 3704, given in the present case, did not correctly instruct the jury that it must weigh [multiple] factors to determine whether [plaintiff] was an employee or an independent contractor. Instead, it told the jury that if it decided that the City had the right to control how [plaintiff] performed his work, then it must conclude that [plaintiff] was a City employee. In other words, it told the jury that the right of control, *by itself*, gave rise to an employer-employee relationship." This instruction simply didn't capture existing precedent on the issue, which requires a more nuanced analysis.

This is not to say that the CACI committee—an advisory subcommittee formed by the California Judicial Council—isn't doing its job. As we all know, many questions of law are highly debatable. And the committee does a commendable job of deliberating over the phrasing of the instructions, monitoring new cases as they come down to determine whether the instructions should be revised, and inviting public comment on draft instructions and revisions. (An interesting summary of the formation of the committee can be found at http://www.courtinfo.ca.gov/jury/civiljuryinstructions/about.htm.) The committee is made up of appellate justices, trial judges, law professors, and lawyers from a broad spectrum of civil practice (see Cal. Rules of Court, rule 10.58), and they work very hard to make trial lawyers' and jurors' jobs easier. That said, there may be room for correcting, supplementing, or otherwise improving the standard form instructions depending on the circumstances of each case.

So what's a busy trial lawyer to do? Here are some tips for digging a little deeper when preparing proposed jury instructions.

First, it's never too early to be thinking about the jury instructions. Even when drafting or answering a complaint, it's useful to consider what standard of care, what affirmative defenses, and what measure of damages the jury may be asked to apply. And when one thinks about the allegations to be pleaded (and, eventually, the evidence to be offered) in that light, the task of planning out the litigation strategy becomes much more concrete. The Judicial Council makes the complete, searchable text of the CACI instructions available online for free to aid in this process. (See http://www.courtinfo.ca.gov/jury/civiljuryinstructions/juryinst.htm.)

Starting out by reviewing the CACI instructions is not a bad idea to get the lay of the land, but during the investigation phase of the case, it may become clear that some facts or legal theories just don't fit well into the standard rubric. When that preliminary review identifies a square peg that doesn't fit neatly into the round hole of a CACI instruction, it may signal the need for further factual investigation and refinement of litigation strategy. In other words, the CACI instructions can be a checklist, of sorts, to make sure the legal requirements for a case going to trial are all taken into consideration. But that nagging feeling that there's a mismatch between the case and the instructions may instead signal the need for some additional research and some real creativity to come up with ideas for persuading the trial judge why the form instructions aren't quite the end of the story—they may be downright wrong, as the *Bowman* case discussed above demonstrates.

Second, look not only for grounds to *object* to inaccurate CACI instructions, but also for ways to *supplement* CACI with special instructions.

Even as to CACI instructions that are more or less accurate, they're not set in stone. Sure, they're officially approved by the Judicial Council—usually a safe bet for the trial judge who hopes to avoid reversal on appeal. But in some cases they could be clearer or more complete. Rule 2.1050 of the California Rules of Court designates the CACI instructions as the "official instructions for use in the state of California" and use of the new instructions is "strongly encouraged." But the rule further explains that a departure from CACI is appropriate if a judge "finds that a different instruction would more accurately state the law and be understood by jurors."

To the extent the CACI instructions can be framed more favorably, in a way that is supported by legal authority, go ahead and propose something from a wish list based on how the client's case can best be presented to the jury. After all, "[a] party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp* (1994) 8 Cal.4th 548.) Just be sure to offer a fallback alternative instruction (perhaps from CACI itself), making clear that this is secondary to the special instruction. That way, if the trial court refuses the special instruction, the court won't later find any waiver of the right to have at least some guidance, imperfect as it may be, in the instructions given to the jury.

Note that simplicity is a worthy goal—rule 2.1055(e) admonishes that special instructions "should be accurate, brief, understandable, impartial, and free from argument." Understandably, judges often look crosswise at instructions that seem very detailed and complex. But many cases raise complex issues, and counsel sometimes need to remind the judge that a long, complicated instruction cannot be refused merely because it may take a little effort on the part of the jury to master. (See, e.g., *Nix v. Heald* 90 Cal.App.2d 723, 731 ["Appellants' final assignment is concerning the instructions given. It is first contended that they were too long and confusing. This contention is utterly without merit. Time consumed in instructing a jury is immaterial if the court's charge is clear, the issues are fairly discussed and the law is correctly applied. . . . .While the instructions were somewhat involved they were as simple as the complicated issues would allow"]; *People v. Reliford* (2003) 29 Cal.4th 1007, 1016 [rejecting notion that an instruction was too complicated for jury]; *City of San Diego v. Barratt American Inc.* (2005) 128 Cal.App.4th 917 ["although the above-quoted instructions involve complex concepts, they are not misleading or inaccurate statements of law"]; *O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 584 ["As between the competing instructions, the one chosen by the judge, while more complex, was clearly superior in the context of this case"]; *Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1475 [rejecting generalized attack on instructions as confusing: "Although complicated, the instructions, including those which appellants have singled out above, have not been shown to be erroneous or misleading in any respect"].)

Useful language to use in proposing alternative special instructions may be found in the BAJI instructions, which some judges frankly admit they prefer. (Publisher Thomson Reuters still updates BAJI even though they are no longer California's official instructions, and a comparison table between BAJI and

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CACI is available for free online at http://www.courtinfo.ca.gov/jury/civiljuryinstructions/correlation_tbl.pdf.) Other publishers offer pattern instructions as well, and these can be particularly useful in specialized areas of practice, such as product liability. Also consider examining other states' pattern instructions. (See, e.g., http://www.llrx.com/columns/reference38.htm.)

An advantage of using these resources is that a court may be less skeptical about instructions that don't appear to have been made up from scratch, and that appear to have been previously approved by someone with a more objective eye than that of counsel standing before the court.

On the other hand, it may not be best to pull an instruction straight from an appellate decision without analyzing whether the principle is suitably framed for a jury instruction. "`The admonition has been frequently stated that it is dangerous to frame an instruction from the opinions of the court.' [Citation.] `Judicial opinions are not written as jury instructions and are notoriously unreliable as such." [Citation.] `One of the reasons for care in adopting a court opinion verbatim as a jury instruction is that its abstract or argumentative nature may have a confusing effect upon the jury.' [Citations.]" (*Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 876, fn. 5; accord *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5.) Appellate courts use terms of art, or sometimes old fashioned legalese, that just isn't appropriate for helping a jury figure out how to apply the law to the facts before them—which is, after all, the point of jury instructions.

Third, consider browsing online resources that might prompt new thinking about grounds for objecting to an instruction as erroneous, or grounds for providing a complementary instruction to complete a concept that is only partially covered by CACI. For example, the Judicial Council issues periodic reports that reflect public comment on the evolving CACI instructions (see, e.g., http://www.courtinfo.ca.gov/jc/documents/reports/20100625item1.pdf.), and interesting information may be gleaned from the Judicial Council's archived redline versions of prior changes (see links under "Civil Jury Instructions (CACI)" in the chart posted at http://www.courtinfo.ca.gov/invitationstocomment/pastprop.htm#caci.)

Similarly, check cases pending in the California Supreme Court, and perhaps other pending appeals or pending legislation that's reported to be in the works, to see whether a legal development might be brewing on an issue relevant to the case at hand. If so, try to anticipate any potentially favorable developments by outlining them in a proposed special instructions. That way, if the instruction is refused and an adverse judgment is entered, it may be possible to get a new trial based on instructional error in the court's refusal to give losing counsel's prescient proposal.

Fourth, consider writing directly to the CACI committee with suggestions for improvements. If a case is still in its early stages, with any trial date a long way off, there may be time to get a CACI revision in time for trial. As online reports of the committee's work (referenced above) indicate, they can be quite responsive to proposals.

Fifth, take care in the *form* of any special instructions to be proposed. Code of Civil Procedure section 609 specifically authorizes counsel to present special instructions; the judge has a duty to rule on such proposals, making clear whose instructions were given or refused, and ruling "in such a manner that it may distinctly appear what instructions were given in whole or in part." But a judge may correctly refuse a requested special instruction if it does not conform to the *format requirements* of Rule 2.1055, which prescribes how instructions should appear on a page, and how they should be bound. (Rule 2.1058 requires that instructions use "gender-neutral" language.) Note that rule 2.1055 bars "local rules" under which a particular court or judge may attempt to dictate a format different from that outlined in the rule.

Sixth, get it all on the record. Counsel's brilliance in proposing creative and legally correct special instructions, and the judge's intransigence in refusing them, won't help the client get a new trial after an adverse verdict if the proposal occurred orally in an unreported conference in chambers, or if the scribbled addendum written on the instruction packet and shown to the judge doesn't make it into the court file. (See, e.g., *In re Marriage of* Schultz (1980) 105 Cal.App.3d 846, 857 [stipulations and rulings in chambers must be placed on the record: "Trial judges must be alert to insist upon it; counsel for the parties should be equally alert to their respective duties to their clients" to ensure an adequate appellate record].)

For the same reason, it is best to press the judge to allow the court reporter transcribe the judge's reading of the instructions to the jury. And make sure to lodge with the clerk a clear copy of proposed instructions, as well as objections made to the other side's proposals. That way, an appellate court will later be able to see how careful and creative counsel took every step to preserve the client's right to jury that has an accurate and complete description of the law to apply to the facts presented at trial.

Finally, keep in mind that a party is *not* compelled to *jointly* request instructions offered on the other side's theories.

Trial judges may urge counsel to do this, but it's possible to demonstrate professionalism and to show respect for the judge by agreeing readily on most of the instructions while standing on the right to say (politely) that the other side is responsible for the content of the instructions as to issues on which that side bears the burden. It may not be possible to identify a specific problem with any particular instruction the other side is proposing, but caution in agreeing to all instructions is warranted because a party who proposes an instruction will be deemed to have *waived* any error in the instruction that later comes to light. In contrast, even if trial counsel does not articulate an error in an instruction, counsel is nonetheless deemed to have objected to instructions proposed by the other side (and thus preserved claims of error for appeal), *absent an overt acquiescence in the instruction.* (See Code Civ. Proc., § 647.)

Thus, for example, a defendant need not join in requesting basic negligence instructions, and a plaintiff need not join in requesting a standard instruction on an affirmative defense, because each side's duty is only to make sure the instructions correctly cover the points pertinent to his or her own theory of the case. (See *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 949 [""To hold that it is the duty of a party to correct the errors of his adversary's instructions . . . would be in contravention of [Code of Civil Procedure] section 647""]; *Hensley v. Harris* (1957) 151 Cal.App.2d 821, 825-826 ["[e]ach party has a duty to propose instructions in the law applicable to his own theory of the case. He has no duty to propose instructions which relate only to the opposing theories of his adversary, and having no duty respecting them he has no responsibility for the latter's mistakes" or to "offer corrections of the instructions of his adversary pertinent only to the latter's theory of the case"]; *Valentine v. Kaiser Foundation Hosps.* (1961) 194 Cal.App.2d 282, 290 ["It has repeatedly been held that a defendant has no duty to propose instructions upon the plaintiff's theory of the case"].)

When resisting agreement on certain instructions proposed by the other side, counsel can explain that the evidence may not turn out to support giving the instruction, and counsel does not want the opponent to use any agreement on the instructions as some sort of acknowledgment to the contrary. In addition, counsel might be able to point to indications that the law is somewhat in flux, and counsel feels obligated to preserve arguments based on new authorities that later make the instruction erroneous. Or counsel can simply note that an article published in a legal magazine pointed out that it's not a good idea to waive appellate arguments by proposing instructions, even well established form instructions, that don't help the client's cause!

In conclusion, this is one of the many areas in which wise counsel is advised to "pick your battles." How hard to push for an aggressive special instruction, or how hard to resist the other side's proposed instructions, may turn on such intangibles as the perceived strength of the evidence on particular issues, the client's potential institutional interest in consistently advancing a legal theory, the dynamics of relations with opposing counsel, the trial judge's anticipated attitude toward creative legal thinking, and so forth. The practice pointers above are designed to get trial lawyers to look beyond their CACI form books when preparing to present a case to a jury.

We Are All Geeks Now: Confidentiality in the Information Age

By David Cameron Carr, Esq.
Law Office of David Cameron Carr PLC

Some of most interesting ethical issues facing lawyers now revolve around issues of information technology. In this article, I discuss the interesting current developments that primarily center around confidentiality. The lesson that lawyers should draw from these is that information technology is a boon but also a source of potential trouble. Lawyers are now ethically obligated to think seriously about the issues of how both their and their clients' use of technology impact their practices. This requires lawyers to learn the technological details of these modes of communication. Despite the convenience of this technology, lawyers must now also consider whether its use is always in the interest of their clients and themselves.

Lawyers don't typically think of themselves as being in the information business but they are. Almost every aspect of our practices comes down to receiving, processing and presenting information; written information, verbal information, and even non-verbal information – think about the skills that a good trial lawyer brings in presenting a matter to a jury that go far beyond the mere words that he or she uses.

Because we are in the information business, many of the ethical rules address how information is received, processed and presented. Many of the rules address issues such as:

How reliable information is, such as Rule Prof. Conduct 1-400, which governs lawyer advertising and solicitation, Rule Prof. Conduct 5-200 and Bus. & Prof Code section 6068(d), which set forth the attorney's duty of candor to a court, and even Bus. & Prof. Code section 6106, which makes acts of dishonesty a cause for suspension or disbarment;

What information must be transmitted, such as Rules Prof. Conduct 3-310, addressing information that must be transmitted by an attorney to permit representation in conflict situations, and Rule Prof. Conduct 3-510 which sets forth when settlement offers must be communicated to the client; and Rule Prof. Conduct; and

What information can not be transmitted and must be protected, such as Rule Prof. Conduct 3-100 and Bus. & Prof. Code section 6068(e), which, along the familiar lawyer-client privilege codified in Evidence Code section 952, addresses the lawyer's duty to maintain client information confidential.

Because we are in the information business, the impact of what can justly described as the Information Revolution can hardly be understated. By Information Revolution, I mean the adoption of digital technology over the last thirty years to receive, process and propagate information. This technology has made it faster, cheaper and easier to move information than ever before in history. It has also presented a series of challenges to the legal profession as the traditional ethical rules regarding information collide with the new technology, technology that is seems to be involving faster and faster.

Confidentiality is one of the areas where technology has had the biggest impact. In olden times, attorney client communications took place behind closed doors or through the low tech technology of ink and paper. Communication could be inconvenient or slow, but the risks of confidential information reaching the wrong person was relatively small. Now communication by email has become a significant, if not predominate, mode by which attorneys and clients reach out and touch each other. It is fast, cheap, convenient – and risky.

The recent Court of Appeal decision in *Holmes v. Petrovich* (2011) 191 Cal. App.4th 1047, addressed the application of privilege issues in client emails. Holmes involved an employee who became pregnant shortly after starting a new job, causing some unhappiness with the employer. Despite having been informed that she had no expectation of privacy when using company computers, she used it to email an employment attorney about her situation. Shortly after she did so, the employment attorney emailed her back at the company email address and advised her to delete all of their emails because her employer might access these confidential attorney client communications.

Holmes did so; unfortunately for her, neither she nor the employment attorney realized that deleting the emails from Holmes's computer would not delete the emails from the company's server. The emails were introduced at trial over her objections. Holmes tried to argue that she thought that, because her email account required a password, she had a reasonable expectation of privacy. To no avail; the Court of Appeal found that this was not error because:

> the e-mails sent via company computer under the circumstances of this case were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him. By using the company's computer to communicate with her lawyer, knowing the communications violated company computer policy and could be discovered by her employer due to company monitoring of e-mail usage, Holmes did not communicate "in confidence by means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." (Evid. code, § 952.) consequently, the communications were not privileged. *Holmes*, at 1052.

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Despite the Court of Appeal's conclusion, the reality is that employees routinely use work computers for personal email and other personal uses; consider the phenomenon of "Cyber Monday" the uptick on-line shopping that occurs after Thanksgiving weekend. Many employers have given up trying to enforce strict "work only" policies and instead permit limited personal use. Among the issues raised by the widespread use of company computers and the erroneous advice given by Holmes employment lawyer is the extent to which a duty to advise clients regarding secure communications is now part of the standard of care. If it is, lawyers may have to become far more versed in technology to meet that standard.

The learning curve faced by lawyers is highlighted by the recent State Bar of California formal ethics opinion 2010-179, issued by the Committee on Professional Responsibility and Conduct (COPRAC) (www.calbar.ca.gov). The opinion poses this question:

Does an attorney violate the duties of confidentiality and competence he or she owes to a client by using technology to transmit or store confidential client information when the technology may be susceptible to unauthorized access by third parties?

COPRAC's answer caused a lot of discomfort for some lawyers:

Whether an attorney violates his or her duties of confidentiality and competence when using technology to transmit or store confidential client information will depend on the particular technology being used and the circumstances surrounding such use. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client's devices and communications.

Lawyers now have to be not only lawyers, versed in a deep understanding of law and human nature. Lawyer now also need to develop enough understanding of technology, or more accurately, technologies as they become commonly used, to he able to evaluate whether the risk involved in using it.

Those of us who have delved in the intricacies of privacy settings on Facebook, pondered the merits of Secure Socket Layer protection, or were surprised when we suddenly found ourselves enmeshed in Google Buzz, can appreciate what this opinion means. It is no longer enough the just start using the latest information technology; we now have to understand it as well.

It is enough to make a lawyer go back to in-person meetings and paper. And that might be part of the solution in some cases. There are aspects of the new technology that don't facilitate communication but squelch it; anybody who has poured through long email strings where the participants talk past each other will understand what I mean. More and more, I find myself eschewing email and picking up the phone or traveling to the client's office to hash out problems in person. You may want to consider doing this as well.

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Cupcakes and Colloquy:
A Court Reporter's Suggestions for a Smooth Deposition

By Nic Harnish, Imagine Court Reporting

When asked to compile a list of tips from a court reporter to ensure a smooth deposition and a useful transcript, I had a lot to choose from. But, after many years of court reporting, here are the keys. These suggestions have been pulled together from my personal experiences as a working court reporter. Even if you don't butter up your deponents with freshly baked cupcakes (like I love to do for my attorneys!), working some of these suggestions into your routine could prove beneficial.

1: I love it when you say my name.

Instead of "Madam Reporter, would you please read that back..."

Take a few minutes and get to know your reporter. Walk in, introduce yourself, make sure you find out your reporters name and write it down if you need to. I will feel flattered when an attorney remembered my name. I often hear "Madam Reporter" or "Ms. Reporter," but nothing warms me up like being referred to by name.

2: Mark your exhibits, keep them together and close at hand.

Exhibits are an often overlooked and neglected area. To accommodate my attorneys, I pre-mark all my post-it notes so that the attorney can mark the exhibits as they go. This allows the deposition to flow smoothly, and keeps the pace from being disrupted by having the reporter pause to mark each exhibit.

Keep the exhibits stacked on the center table between yourself and the witness. The exhibits will be easily accessible when someone inevitably misses one and says: What was Exhibit 12? At the conclusion of the deposition, reporters count their exhibits and make sure they are all there. Keeping the exhibits in one place will make wrapping up the deposition much faster and easier, and lessens the potential for errors in the record.

3: Direct your witness to wait for you to finish asking a question before they answer.

This is the greatest impediment to a clean record. Even though every attorney begins with the admonition; "Please wait for me to finish my question before you begin your answer," witnesses will still cut attorneys off. The problem this creates for you on the record is that none of your questions will be complete. The deponent's answer just cuts the attorney off and leaves the question open-ended.

For Example:
Q. What street –
A. 1504 Monroe Avenue.
Q. No, I was referring to what street the accident –
A. Oh, I thought you meant what street do I live on.
Okay. The accident happened on First Avenue.
Q. Thank you.
What color was the –
A. The light was green for me, but the light for –
Q. You have to wait for me to finish my question. My question is in relation to what color the car was that hit you.
A. Oh, I thought you meant what color the light was. It was green.
Q. Are you now referring to the light or the car?

You can see how confusing it can be when the witness won't let the attorney finish their question. Politely reminding the witness (as often as you need to) that they should wait to allow you to finish your question before they answer to make a clean record works almost every time.

4: The more time you can give your reporter to deliver a rough transcript the closer to a finished product it will be.

As a reporter, I really like to send you a rough that is readable and close to what your finished product will look like. If you insist upon having a rough that night or the very next day, oftentimes you will end up with a transcript that is incomplete because the reporter will have simply gone through and removed the words that weren't translated from steno. With more time a reporter has the opportunity to go through the transcript to make it readable, which is likely to be a far more useable work product.

It is important for me to take care of my attorneys, and always make sure a rough transcript is readable and usable. More often than not my roughs are very close to what you will receive when you receive your final copy. If my attorney can give me a few extra days after the deposition to go through the transcript and proof it, I will always send a clean rough out. I think this is one of the things I receive the most positive feedback and praise for doing. It is a rule I try never, ever to break, because otherwise you are ordering and paying for something that will be of no help to you. So, if you can give your reporter 2 to 3 days, she should take care of your record and send you something useful.

For the attorneys who use my service, and are often willing to give me an extra day or two when they have it, I am willing to stay up half the night to deliver a clean rough when they really do need it next day.

5: Just Breathe.

Simply providing a clean transcript of the record is a difficult task. When an attorney is anxious and rushed, it's close to impossible. I've sat through hundreds of depositions, and one way or another the attorney always makes it through. The more you calm yourself, refer to your outline, and try not to rush anything, the smoother the deposition, the better the record. The witness doesn't know if you're pausing because you don't know your next question, or if you are simply thinking about their last answer and formulating your next question. So take your time and let the pauses happen. Everybody takes depositions differently, and I have never seen anyone comment or complain if there are pauses.

I asked a few of the more experienced attorneys I work with for some sage advice, and here is what they had to say:

Thomas Byron, Byron & Edwards, "While taking the deposition of adverse witnesses and even third party witness who you do not control, do not focus too much on reading from your outline (if you need one) and/or taking notes (the court reporter will do a better job than you can ever hope to do!). If you do that, you will most likely miss the deponent's body language and facial expressions, especially eye movements, which are clear indicia of what is going on in the witness' mind. You cannot always sense evasion in a witness; tone of voice, but you can usually see it in his/her expression. Pay attention to those expressions and follow up when they appear."

Cynthia Chihak, Chihak & Associates, "Listen to the answer to your question, don't just move on. Make sure the witness does answer the question and not just talk. Stop when you are ahead. 'Who, what, when how and why.' If your questions are longer then the explanation, the question is wrong."

Chris Welsh, Caltrans Legal, "Write down the areas you need to cover in the deposition, including specific documents you need to ask about. Then, go off your "script" early, often and for as long as needed to follow-up on relevant information. Just remember to come back to the written list when you are ready to move on to the next area. When I get an answer which really

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helps me on a significant issue I say 'Thank you.' Later, when I'm reviewing the deposition transcript, I look at each 'thank you' so I don't miss any of the key answers."

Steve Estey, Estey & Bomberger, " I suggest that young attorneys (who are heavily dependent on their outlines) take a step back and listen to what the deponent is saying; rather than being so intent on following their outlines. Many times the attorney will move on to the next question on his/her outline without considering or factoring in what the deponent just said.

Finally, let me add that there is no greater compliment to a reporter than to be personally requested by an attorney. In most cases, the attorneys that use my service have gone out of their way to refer me. If you are happy with a reporter's service, the best thing you could do to say thank you is call and request them for future work.

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Hall, David P.
Hallett, David E.
Harris, Cherrie D.
Harris, Dana
Harrison, Robert W.
Haughey Jr., Charles S.
Healy, Kevin J.
Heft, Robert R.
Hilberg, Scott
Holmes, Karen A.
Holnagel, David B.
Horton, Sommer C.
Howard, Benjamin J.
Hudson, Clark R.
Huerta, Sharon A.
Hughes, William D.
Hulburt, Conor J.
Ingold, Scott
Inman, Heidi
Isaacs, Jackson W.
Iuliano, Vince J.
Jacobs, Michael W.
Jaworsky, Todd E.
Jeffries, Sara A.
Jones, Allison
Joseph, Dane F.
Kaler, Randall W.
Katz, Bruno W.
Kearns, Patrick J.
Kelleher, Thomas R.
Kenny, Eugene P.
Kish, Fernando
Knutson, Lucy M.
Kope, Jennifer
Landrith, Kevin S.
Lauter, Ronald James
Lea, Chris M.
Letofsky, Larry D.
Liker, Keith A.
Lillig, Rebecca M.
Lin, Arthur Ying-Chang
Lopez, Michelle
Lorber, Bruce W.
Lotz, Thomas
Mahlowitz, Robert M.
Mangin, Margaret
Manzi, Jeffrey F.
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McCabe, Hugh A.
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McClain, Robyn S.
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McDonald, Sarah A.
McFall, James A.
McFaul, James A.
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Mercaldo, Marco B.
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Miersma, Eric J.
Miller, Nelse
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Morales, Norma A.
Moriarty, Marilyn R.
Moriyama, Jamie
Mortyn, Russell
Mougin, Cassandra
Mullins, Angela
Murphy, Jason Michael
Nahama, Susan S.
Neil, Michael I.
Ni Mhairtin, Jackie M.
Nicholas, Dana
Noland, Leslee A.
Noon, Timothy S.
Norman, Robert S.
Noya, Scott
Nunn, Randall M.
O'Neill, Dennis S.
Oberrecht, Kim
Obra-White, Bethsaida
Oliver, Susan L.
Olsen, Thomas F.
Oygar, Sezen
Paskowitz, Michael A.
Passons, Omar
Patajo, Lee T.
Pate, William C.
Patel, Samir R.
Pendleton, Mary B.
Penton, Robyn
Peterson, Jared
Peterson, Mark T.
Phillips, Charles A.
Picciurro, Andre M.
Polito, Steven M.
Popcke, Michael R.
Potocki, Joseph
Price, Virginia
Purviance, E. Kenneth
Ramirez, A. Paloma
Randall, Jill E.
Rasmussen, Konrad
Ratay, M. Todd
Rawers, Brian A.
Rawers, Kimberlee S.
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Reinbold, Douglas C.
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Rodriguez, Robert C.
Rogaski, Michael
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Rosing, Heather L.
Roth, James M.
Rowland, Zachariah H.
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Ryan, Norman A.
Sahba, Anahita M.
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Serrano, Gilbert
Shedlosky, Joy
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Shu, Shirely
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Stephan, Gregory D.
Stohl, Matthew
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Todd, Christopher W.
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Verma, Joy
Verne, Andrew G.
Vranjes, Mark E.
Wade, Jeffrey P.
Wallace II, James J.
Wallington, Hilary
Walsh, John H.
Walshok, Janice Y.
Ward, Danielle
Washington, Merris A.
Weadock, Katherine T.
Weeber, Craig
Weinstein, Michael R.
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White, Timothy M.
Wilson, Jessica G.
Wilson, Lesa
Winet, Randall L.
Woodhall, Blake J.
Woolfall, Brian D.
Worthington, Brian P.
Yaeckel, A. Carl
Yoon, Monica J.
Zackary, Fort A.
Zickert, Robert W.

Meet SDDL's Board of Directors for 2011

James Wallace is the current President of the San Diego Defense Lawyers. He has more than 20 years of experience in the areas of health care law, professional liability defense, products liability and general civil litigation. Jim has successfully tried numerous cases and binding arbitrations throughout his career.

Jim has also been a workshop leader for the San Diego County Inn of Courts. He holds the highest "AV" rating by Martindale-Hubbell and he has been repeatedly selected as one of the Southern California "Super Lawyers."

Mr. Wallace has been a Judge Pro Tem and Arbitrator for the San Diego Superior Court and was a State Bar delegate, from 1995-2001. He is a member of the San Diego County Bar, Los Angeles County Bar, American Society of Law & Medicine, Southern California Defense Lawyers and the DRI.

He attended Seton Hall University receiving a B.A., cum laude, in 1982. Thereafter he received his J.D. from California Western School of Law in 1986.

Victoria Grace Stairs is SDDL's Vice President for 2011. She is an Associate at the firm of Lotz Doggett & Rawers where she practices in the field of professional liability. She attended college at St. Mary's in Moraga, California and received her law degree in San Diego. Originally from the San Francisco, Bay Area, Victoria is naturally a food lover. When she is not seeking out Southern California's best eating establishments, she enjoys spending time with her son, Aiden, her husband, Kelly, and their dog, Chompers Frankenstein.

Tracey VanSteenhouse is the Update's editor and SDDL secretary. She is an associate at Wilson Elser Moskowitz Edelman & Dicker. Tracy's practice includes medical, dental, chiropractic and legal malpractice as well as employment law. She also represents health care providers and lawyers in disciplinary and licensure matters. She volunteers at Rady Children's Hospital. Ms. VanSteenhouse enjoys spending time with her husband-Harper, cooking, running marathons, hiking and snow camping.

Prior to moving to San Diego and becoming a lawyer, **Ben Howard** served in the U.S. Army as an Infantry Platoon Leader, executive officer, and adjutant. He is a recipient of the Airborne and Air Assault Badges, the Expert Infantryman's Badge, and the Ranger Tab. Ben Howard worked as a law clerk at Neil Dymott before he joined as an associate in 2005. In 2010, he was elected to serve on SDDL's Board of Directors, and was elected as the organization's treasurer for 2011.

He is married to his wife of thirteen years, Jeanne, and they have three children, Hayden (six), Sadie (four), and Heidi (one). Mr. Howard volunteers at Sunset View Elementary, where he has planned and directed security at the school's annual Halloween Carnival fund raiser since 2009. Since 2007, he has coordinated and co-hosted an annual meet-and-greet, barbeque, and baseball game for Balboa Naval Hospital's wounded veterans in conjunction with the San Diego Padres and the YMCA. He volunteers with the Boy Scouts of America as an Assistant Scoutmaster in Point Loma, attending at least 75% of the weekly meetings, over 83% of the monthly campouts, and attending Summer Camp each year since 2007. He enjoys reading, history, and backpacking, completing the John Muir Trail (from Yosemite National Park to Mt. Whitney) in 2005 and Yosemite National Park's North Rim in 2010. He is looking forward to hiking Yosemite's Half Dome this summer.

Alan Greenberg previously served on the Board in 2005-2006 and was elected to his second two-year term on the Board in 2010. Alan graduated from Columbia University School of Law and has almost 35 years of trial and general litigation experience. His practice areas included environmental and toxic tort litigation, professional liability defense, "bad faith" defense", insurance litigation and insurance coverage and appellate practice. Alan has over a dozen reported appellate decisions, including seminal decisions in the areas of legal malpractice and mold litigation. Alan was the thirteenth attorney to join what is now known as Lewis Brisbois Bisgaard & Smith, LLP, in Los Angeles in September, 1979 and he opened the San Diego office of that firm as its Founding and Managing Partner in 1983. Alan practiced with the Lewis firm until 2005 and later spent three happy years at Wilson, Elser, Moskowitz, Edelman & Dicker, LLP. Alan retired from Wood, Smith, Henning & Berman,

LLP on March 4, 2011 and will be concentrating on his life-long passion to become a professional blues guitarist. Of course, he does not know how to play the guitar yet or read music, but as Lao Tzu once said, "A journey of a thousand miles begins with just a single step."

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.

David Cardone, a native Pittsburgher, is graduate of Penn State and Duquesne Law. David joined Butz Dunn & DeSantis in 2008 after working as one of six judicial law clerks to Justice Cynthia A. Baldwin of the Pennsylvania Supreme Court. His practice focuses on complex litigation and professional liability defense. When not slaving away on behalf of his clients, David's favorite avocations in San Diego include restoring and racing vintage sports cars, beating Jim Drimmer and James McFaul at racquetball, and practicing his decidedly mediocre golf skills.

Rita R. Kanno is a senior associate with the law firm Lewis Brisbois Bisgaard & Smith LLP. She began her practice with the firm in 2006 as a member of the healthcare and employment/labor practice groups. Ms. Kanno's practice focuses on labor law and medical malpractice. She has substantial experience representing employers in litigation. Her areas of concentration include wrongful termination, sexual harassment, employment discrimination and wage issues. In addition to litigation, Ms. Kanno enjoys spending time with her family and friends and her new baby girl, Mila Mckenzie Shatzko, who was born on March 8, 2011.

Alexandra Selfridge is an associate attorney at the Law Offices of Kenneth N. Greenfield. She practices general civil litigation and specializes in insurance "bad faith" defense. Alexandra graduated from the University of San Diego School of Law in 2006, and has had the opportunity to experience all aspects of civil practice, including trials, mediations, arbitrations, and appellate work. Alexandra recently married Harold Trimmer, who practices white collar criminal defense. In her free time, she enjoys cooking, wine tasting, reading, and spending time with her husband, friends, and her two dogs.

David B. Roper was born in New York City. David is a graduate of S.U.N.Y. New Paltz. After working briefly in the family real estate business, David moved to San Diego in 1979 where he attended California Western School of Law. He was admitted to the California Bar in 1982 and the Nevada Bar in 2000. He has been with the law firm of Lorber, Greenfield & Polito, LLP for 11 years, where he is the head of their Law & Motion Department. He particularly enjoys working with young associates helping them to develop their understanding of the substantive law underlying their defense practice, as well as their talent for written advocacy. David and his wife of 28 years, Lydia, live in Poway with their sons, Andrew and Jacob.

Tamara Glaser grew up in Pennsylvania and graduated from the University of Pittsburgh School of Law. Before moving to San Diego, she worked as an Assistant Public Defender in Mercer County, Pennsylvania and established her own law practice there. Tamara joined Neil, Dymott, Frank, McFall & Trexler, APLC in 2000 and became a shareholder in 2009. Her practice focuses on the representation of physicians, hospitals and other healthcare providers in medical negligence and licensure matters. She also has experience in medical device/pharmaceutical product defense. Tamara spends her free time hiking, cooking, traveling and doting on her nieces and nephews.

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