# The Update

Spring 2007

San Diego Defense Lawyers

## In This Issue


| | |
|---|---|
| President's Message | 2 |
| Bottom Line | 2 |
| Court Clarifies Failure to Timely Respond to Discovery Requests | 3 |
| Removing Legal Malpractice Cases: The South Side of Broadway | 3 |
| Member Spotlight | 5 |
| SDDL Officers | 6 |
| Insurance Law | 6 |
| 2007 SDDL Installation Dinner | 8 |
| Brown Bag Summaries | 10 |
| ABOTA Trial by Masters Announcement | 12 |
| SDDL 2007 Golf Benefit Information | 13 |
| Members in the News | 14 |
| 2007 Educational Program Calendar | 15 |
| DRI Seminar | 15 |
| Tricky Typos | 16 |
| Case Summary | 18 |

## The Bottom Line

Case Title: Betancourt v. Sweetwater Union High School District, Carlos Sainz Case Case No.: GIC857226

Judge: Honorable Yuri Hofmann

Plaintiff's Counsel: Carl Fabian of Law Office of Carl Fabian

Defendant's Counsel: Jennifer S. Creighton of Winet Patrick & Weaver

Type of Incident/Causes of Action: Negligence and Negligent Supervision for injury to student at school

Settlement Demand: $17,500

Settlement Offer: $1,000

Trial Type: Jury

Trial Length: 4 days

Verdict: Defense verdict on liability

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Case Title: Claimant Gene Depierro, individually, as 50% Shareholder of Pro-Tech Process, Inc. v. Respondents Paul Lachut, an individual, Pro-Tech Process, Inc.

Case No.: GIC 814510

JAMS Arb. Ref. No. 1240017329; Arbitrator: Honorable J. Richard Haden, Ret.

Claimant's Counsel: Timothy S. Noon, Esq. of Noon & Associates, APC

Respondents' Counsel: Ron A. Stormoen, Esq. and Lori L. Krupa, Esq. of Law Offices of Ron A. Stormoen

Type of Incident/Causes of Action:

1. Conversion
2. Breach Of Fiduciary Duty
3. Constructive Trust
4. Permanent Injunction

Demand: At arbitration, Lachut sought to recover $479,583.58 in alleged unauthorized distributions to Claimants, as well as one-half the value of the company, or $590,000.00/2 equals $295,000.00, for a total of $774,583.58.

Settlement Offer: Claimant's offer to departing shareholder Lachut for the value of his 50% shares of $100,000 was rejected.

Arbitration: JAMS binding arbitration ordered by Court of Appeal after appeal of Claimant's Petition to Compel Arbitration

Arbitration Length: 6 days

Result: Judge Haden determined that Respondent Lachut breached his fiduciary duties and competed against the company, offsetting his $37,862.00 to Defendant Lachut as well the value of his claims of $774,583.58 to $37,862.00 and upheld enforceability of a non-compete clause for five years from the date of the award.

# PRESIDENT'S MESSAGE

*When I realized that I was responsible for writing a President's Message for The Update, the first question that came to mind was "What the heck did I have to say that would be interesting to the readers?" As I was racking my brain I thought what a wonderful job Judge Sammartino and Dennis Aiken did during their brief comments during the SDDL Installation Dinner. Some of Dennis Aiken's remarks hit particularly close to home.*

Of course we live and work in America's finest city; however, as we fly into Lindbergh Field, or look out into our harbor, we should also realize that we work in a city that is home to the world's finest Service Men and Women. Whether you are for the wars in Afghanistan and Iraq, or against the wars, we all should be standing behind our Armed Services.

One thing that may not be readily apparent is that San Diego Naval Regional Medical Center (Balboa Hospital) has anywhere from 20 to 40 men and women recovering from disabling injuries (the vast majority of which are combat related). Almost all of them are away from their families and loved ones. All of them are working towards getting physically better so that they can return to their units, their homes, to a more normal life.

Any, or all, of you can go to the Naval Hospital to meet these men and women. This past winter I was able to go meet some of these individuals with other members of my firm. They were glad to see us as we provided a welcomed break from their normal routine.

My co-workers and I are planning a tailgate outing with these men and women on June 21, 2007 at the Petco Park parking lot. For the Padres fans, this is one of the last few Padres weekday afternoon games of the season. We don't know how many service men and women will be attending, as they are constantly coming and going from Balboa Hospital. Frankly, many of the individuals we will meet on June 21st have not yet encountered the incident that will put them in that hospital. Whether it will be 20 individuals, or 40 individuals, we will be ready to take them out to a ball game.

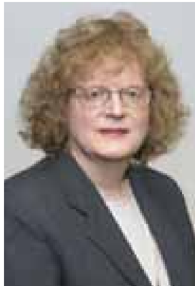
I will set up a tailgate in the parking lot between the trolley station and the ballpark a couple of hours prior to the game. I will be cooking burgers and dogs for anyone that would like to attend. If you would like to meet these men and women, send me an e-mail and I will make sure you are kept abreast of the time, location, etc. I can be reached at chudson@neildymott.com. If any of you would like to set up some other event for these remarkable individuals, you can do so by contacting the Armed Forces YMCA at (619) 532-8156.

*I hope to see some of you at the tailgate prior to the ballgame.*

**Clark Hudson**

## Court Clarifies Failure to Timely Respond to Discovery Requests

*By: Kristin A. Winter, Esq. of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*



The California Court of Appeals, Second District, just released a published opinion clarifying the law with respect to the obligations of counsel when another party fails to serve responses to written discovery in a timely manner. The opinion is significant in that it makes clear that the responding party's service of responses after the deadline does not transform any resulting motion to compel into a motion to compel further responses. The court held that when responses to written discovery is late, no meet and confer is required and that the 45 day time limit to file the motion is not applicable. The court also reiterated that all objections, including those for privilege have been waived.

Sinaiko HealthCare Consulting, Inc. v. Pacific HealthCare Consultants, --- Cal.Rptr.3d ----, 2007 WL 686623 (Cal.App. 2 Dist.).

In Sinaiko, the issue came before the court on an appeal of an award of significant monetary sanctions for failure to timely respond to written discovery propounded by the plaintiff. Plaintiff served form interrogatories and requests for inspection and production of documents. Defendants did not serve responses by the deadline. Plaintiffs demanded responses without objections, but this was also ignored. Upon being served with a motion to compel, which had not yet been filed, Defendants faxed responses to the interrogatories each with the same boilerplate language citing a pending demurrer and that plaintiff was unable to answer because of uncertainty. The trial court granted the motion to compel. Following that order, Defendants produced some documents but still claimed privilege for other documents. Plaintiff's then moved for terminating sanctions, which were denied, but the trial court ordered Defendants and their counsel to pay significant monetary sanctions.

The court enumerated the three situations where a trial court can intervene in a discovery dispute. The first is when the responding party moves for a protective order. The second is when the propounding party moves for further responses under CCP s 2030.300 and 2031.310. The third is when the responding party "fails to serve a timely response." in accordance with CCP sections 2030.290 and 2031.300. When the third situation is implicated, the court explained that "[u]nlike a motion to compel further responses, a motion to compel responses is not subject to a 45-day time limit, and the propounding party does not have to demonstrate either good cause or that it satisfied a "meet-and-confer" requirement."

Appellants argued that the fact that they served responses before the motion to compel was filed rendered the motion to compel moot and deprived the trial court of the power to award sanctions. The appeals court rejected this argument for three reasons. First, the court referred to the plain language of CCP 2030.290 which states it is the section that applies if timely responses are not made. Second, the court held that the responses that were made, were not in accordance with the requirements set forth as they stated an inability to answer without stating that a good faith attempt to find the information had been made. The court also noted that the responses were not verified.

Third, and perhaps most significant, the appellate court addressed the argument that serving late responses made a motion to compel brought under CCP 2030.290 moot. The court noted that there was no prior case law on this and set about interpreting the statute. The court found that CCP 2030.290 governed once the deadline to respond was missed, even if responses were later served. The appellate court went on to say that, the trial court has the power to hear the motion and then has wide latitude to award sanctions, order further responses, determine that the untimely response was complete and deny the motion, etc.

This ruling appears to give a boost to counsel attempting to enforce discovery responses. It also highlights the importance of making sure that our client's discovery obligations are timely met.

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## Removing Legal Malpractice Cases: The South Side of Broadway

*by: Robert S. Gerber, Esq.*
*of Sheppard Mullin Richter & Hampton, LLP*

Defense lawyers are familiar with the fact that federal court offers advantages to their clients over state court in a variety of ways, such as unanimous jury requirements, more friendly summary judgment procedures, and more aggressive settlement proceedings. Defense lawyers are also familiar with the fact that most legal malpractice cases are tried in state court. After all, such cases typically involve a standard of care that is established in large part by reference to the California Rules of Professional Conduct, and thus they "arise under" state law. Accordingly, absent diversity jurisdiction or related federal law claims that independently trigger federal jurisdiction, the vast majority of legal malpractice cases get tried in state court.

There are, however, some limited circumstances where federal court jurisdiction may be invoked on removal, and the advantages of federal court can be exploited. These are cases in which the claim against the lawyer truly "arises under" federal law. While the case law is not well-established in this area, various legal arguments can be cobbled together from existing authority which should allow some legal malpractice cases to be removed from the north side to the south side of Broadway.

The U.S. Supreme Court has stated that an action "arises under" federal law so as to confer federal question jurisdiction when the plaintiff's right to relief necessarily depends on resolution of a question of federal law. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983). Even a seemingly clear state law claim may be treated as "arising under" federal law "where the vindication of a right under state law necessarily turn(s) on some construction of federal law." Id. at 9. Furthermore, "any claim purportedly based on … pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987).

For example, consider a professional liability claim against a lawyer for allegedly violating United States Patent and Trademark Office ("USPTO") rules in the prosecution of a patent application, allegedly causing the patent to be deemed invalid. The patent clause of the U.S.

*Continued on page 4*

## THE BOTTOM LINE

Case Title: O'Connor v. Beachfront II, LP.

Case Number: GIC844948

Judge: Honorable Jay Bloom

Plaintiff's Counsel: John Gomez of The Gomez Law Firm and Ross Jurewitz of Wick & Jurewitz

Defendant's Counsel: Michelle Van Dyke of Shewry & Van Dyke

Type of Incident/Causes of Action: Personal injury/Negligence

Settlement Demand: $5 million

Settlement Offer: $125,000 Trial

Type: Jury

Trial Length: 6 days

Verdict: Defense

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Case Title: Yvette Markoff v. The Upper Deck Company, LLC

Case Number: GIN044456

Judge: Honorable David Brown

Plaintiff's Counsel: Judi Sanzo of Sanzo Law

Defendant's Counsel: Craig Nicholas and Matthew Butler, Nicholas & Butler LLP

Type of Incident/Causes of Action: Labor Code Section 970 and Business & Professions Code Section 17200 (original claims of wrongful termination and indemnity for expenses were dismised prior to trial).

Settlement Demand: $70,000

Settlement Offer: $0

Trial Type: Jury

Trial Length: 3 weeks

Verdict: Defense (unanimous)

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Case Title: Alejo v. Tri-City Healthcare and "Defendant Obstetrician"

Case Number: GIN 045752

Judge: Honorable Michael M. Anello

Plaintiff's Counsel: Steven G. Root and Suzanne H. Mindlin

Defendant Obstetrician's Counsel: Michael J. Grace of Grace Hollis Lowe Hanson & Schaeffer, LLP

Type of Incident/Causes of Action: Medical malpractice

Settlement Demand: $249,999 (998 offer)

Settlement Offer: Dismissal in exchange for waiver of costs (998 offer)

Trial Type: Jury

Trial Length: 6 days

Verdict: Defense (12-0)

## *Removing Legal Malpractice Cases*

*Continued from page 3*

Constitution, and exclusive federal legislation governing patent law, make patent law a federal question. The USPTO is the federal body charged with determining whether to issue a patent, and accordingly, has the authority to authorize lawyers and even non-lawyers (patent agents) to appear before it on behalf of those seeking patents. Congress in its wisdom has clearly decreed at 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1338(a) ("Section 1338(a)") that the federal courts have original and exclusive jurisdiction of any civil action "arising under any Act of Congress relating to patents…." The federal statutes establishing and authorizing the exclusive powers and regulatory authority of the USPTO over patent issuance, and the federal regulations promulgated by the USPTO governing such matters, are "Act[s] of Congress relating to patents." See 35 U.S.C. 2(b)(2)(D).

The duty to offer competent services in the filing of a patent application is imposed by USPTO regulation. See 37 C.F.R. § 10.77. Moreover, state law cannot impose any duty with regard to practice before the USPTO which conflicts with this federal law in light of the Supremacy Clause of the U.S. Constitution. Sperry v. Florida, 373 U.S. 379, 384 (1963).

Whether the lawyer in our hypothetical caused the patent to be deemed invalid may also depend upon whether the information he or she conveyed was "material to patentability." Information is material to patentability when "[i]t establishes, by itself or in combination with other information, a prima facie case of unpatentability of a claim[.]" 37 C.F.R. § 1.56(b); see also Halliburton v. Schlumberger Tech Corp., 925 F.2d 1435, 1439 (Fed. Cir. 1991). Thus, this issue must also be assessed under a federal law standard.

Because we know that "Congress can and does preempt some state causes of action by providing for exclusive federal jurisdiction over certain types of disputes" (see, e.g., 28 U.S.C. § 1338(a); Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 752 (1983)), these authorities seem to form an excellent basis allowing defense counsel to remove our hypothetical legal malpractice claim against the patent lawyer to federal court.

Patent law is not the only area in which federal question jurisdiction may arise. In Dahl v. Rosenfeld, 316 F.3d 1074, 1076-1079 (9th Cir. 2003), the Ninth Circuit held that a district court improperly remanded a case back to state court where the plaintiff claimed the defendant attorneys "committed legal malpractice by not adequately enforcing a provision of a collective bargaining agreement" which was subject to the federal Labor Management Relations Act ("LMRA"). The Dahl court stated that claims which required interpretation of an existing provision of a collective bargaining agreement were completely preempted by the LRMA, and accordingly federal law provided for an exclusive federal forum for such claims.

This limited strategy will not open the flood gates to legal malpractice claims before the federal courts. For example, a legal malpractice claim based upon the loss by a litigator of a federal law claim in either state or federal court would not present federal question jurisdiction. In such a case, the State of California's laws and regulations and a state "standard of care" imposed the lawyer's duties to the client. The mere fact that the underlying subject matter of a legal malpractice claim somehow involves "federal law" does not make a state law legal malpractice claim removable.

In sum, in cases where a federal law "duty" of the defendant lawyer is at the heart of the dispute, or where interpretation of a federal law that provides for exclusive federal jurisdiction may be at issue, defense counsel should consider removing state court legal malpractice claims to federal court.

Mr. Gerber is a trial lawyer and partner of Sheppard Mullin in its Del Mar Heights office, where he regularly defends lawyers in professional liability cases.

### Philip Hack

Current Firm: Farmer Case & Fedor

Other firms: 1983-1987: Assistant Attorney General for the State of Ohio; 1987- Dyer & Walton, becoming a partner in 1991 when firm renamed Walton, Ottesen, Meads, Koler & Hack; 1995- founded Hack, Shaw & Hackley

Education: B.S. Communications – Ohio University (1979); J.D.- University of Toledo (1983)

Practice Areas: Professional malpractice, civil rights, maritime, person injury

Professional Affiliations: Member of the San Diego Defense Lawyers Association, the American Bar Association, and the San Diego Bar Association; California Sate Bar; Frequent lecturer on medical-legal and Emergency Medical Services issues throughout Southern California

Favorite websites: cnn.com; msnbc.com

Favorite authors: Tom Clancy, Clive Cussler, Nelson DeMille, Wilbur Smith

Favorite T.V. shows: Seinfeld re-runs; Good Eats, Iron Chef America, Studio 60 (now cancelled), Charger games

Favorite activities: Sailing, scuba diving, cycling, pilates

Personal; Married to Susan M. Hack, a fellow attorney and partner at Higgs, Fletcher & Mack; has 3 children

### Carolyn Balfour

Current Firm: Belsky & Associates

Education: B.A. Art History (with emphasis on Greek & Roman antiquity)– Yale University (1998); J.D.- University of San Diego School of Law (2003)

Practice Areas: Medical malpractice; Elder abuse; Civil litigation

Professional Affiliations: Member of the San Diego Defense Lawyers, the San Diego County Bar Association and the American Bar Association; California State Bar

Favorite websites: Anything travel related

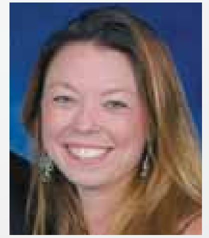
Favorite Book: Girl with the Pearl Earring by Tracy Chevalier

Favorite T.V. shows: CSI: Crime Scene Investigation (Las Vegas); Law & Order: Special Victims Unit

Favorite activities: Traveling and cooking. Has traveled to 33 countries. Last year, spent 3 weeks in Cambodia, Thailand and Vietnam. This year will be traveling to Greece and Turkey on her honeymoon. Next year, planning a trip to Tanzania to travel around the Serengeti

Personal: Currently planning “fairy tale” wedding to take place in Cortona, Italy in May to Patrick W. McCormick, an F-18 pilot with the U.S. Navy; Two brothers, both married- Older brother is an attorney with DiCaro, Coppo & Popcke;. Younger brother is attending U.S.D. School of Business

### Jennifer Creighton



Current Firm: Winet, Patrick & Weaver (Shareholder)

Education: B.A. History (with minors in English & Spanish) – Eastern Connecticut State University (1995) (summa cum laude); J.D.- California Western School of Law (1999); LL.M. Business and Corporate Law- University of San Diego School of Law (2001)

Practice Areas: Defense of public entities (school districts and community colleges); personal injury, and business and employment litigation

Professional Affiliations: Member of the San Diego Defense Lawyers Association, the American Bar Association, the San Diego Bar Association and the North County Bar Association; California State Bar; Working toward achieving ABOTA membership

Favorite authors: No time to read with little ones in the house

Favorite T.V. shows: House

Favorite activities: Playing with Legos and building sand castles with the kids

Personal: Married for 9 years; has twin 3-years olds- one boy and one girl. Also has a real estate broker’s license and enjoys real estate investment; Likes fine wine (red, of course) and travel (last trip was to Republic of Kiribati, which was great)

# Member Spotlight

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**Membership Information:**

Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Dues are $90/yr for attorneys in practice less than one year and $120/yr for attorneys in practice more than one year. The dues year runs from January through December. Applications can be downloaded at: www.sddl.org

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

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

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

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# INSURANCE LAW

*James R. Roth, Esq.*
*The Roth Law Firm*

During 2006 the Courts in California issued many important and varied decisions affection policyholders and the insurance industry. This month's edition shall discuss cases which were published in early 2006. Future editions shall bring you up to speed with recent developments.

INSURED'S BANKRUPTCY CONFIRMATION PROCEEDINGS WERE NOT AN ACTUAL TRIAL TRIGGERING THE (EXCESS) CARRIERS' INDEMNITY OBLIGATIONS. In Fuller-Austin Insulation Company v. Highlands Ins. Co. (2006) 135 Cal.App.4th 958, 38 Cal.Rptr.3d 716, the California Court of Appeal, Second Appellate District, reversed in part and remanded the judgment of the Los Angeles County Superior Court in favor of the insured and against its excess carriers. Fuller-Austin Insulation Company (Fuller-Austin) was involved in the installation and removal of building materials containing asbestos. It filed an action against its excess insurers to establish coverage for past, present, and future asbestos bodily injury claims. Thereafter, it filed a bankruptcy petition, and the bankruptcy court confirmed the plan and established a trust for resolving asbestos claims against the company. In this appellate action, the Court concluded that the insured's bankruptcy confirmation proceedings were not an actual trial triggering the excess carriers' indemnity obligations. While the Court found that the bankruptcy plan amounted to a settlement, it ruled that the excess carriers could challenge the settlement on grounds of unreasonableness, fraud or collusion, where they had been precluded from participating in the bankruptcy plan's confirmation hearing.

IN A MOTION FOR SUMMARY JUDGMENT BROUGHT BY AN INSURED AGAINST HIS CARRIER, A TRIABLE ISSUES OF FACT MAY EXIST AS TO WHETHER THE CARRIER INITIALLY THOROUGHLY INVESTIGATED AND OBJECTIVELY EVALUATED THE INSURED'S CLAIM, WHICH IT ULTIMATELY PAID IN FULL. [REVIEW GRANTED BY CALIFORNIA SUPREME COURT.] In Wilson v. 21st Century Ins. Co. (2006) 38 Cal.Rptr.3d 514, the California Court of Appeal, Second Appellate District, reversed the Los Angeles County Superior Court's order granting summary judgment in favor of a carrier in a breach of contract and bad faith action involving the adjustment of an underinsured motorist claim. The Court of Appeal concluded that triable issues of fact existed as to whether the carrier initially thoroughly investigated and objectively evaluated the insured's claim, which it ultimately paid in full. As a side issue, the Court also found that discovery the insured wanted to conduct into the carrier's use of a computer software program known as "Colossus," used to evaluate bodily injury claims, might be relevant. On April 26, 2006, the Petition for Review was granted by the California Supreme Court.

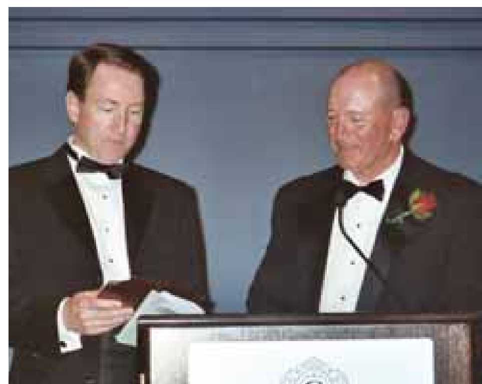
INSURER COULD NOT BE HELD LIABLE IN TORT TO INSURED CONDOMINIUM OWNER FOR NEGLIGENT CLAIM INVESTIGATION UNDER FIRST PARTY ALL-RISK HOMEOWNER'S POLICY, WHERE INSURED'S LOSS WAS DUE TO DISCOVERY OF MOLD IN UNIT, WHICH WAS NON-COVERED LOSS, AND JURY FOUND THAT WATER LEAKAGE FROM NEIGHBOR'S UNIT, WHICH WAS COVERED PERIL, WAS NOT PREDOMINATE CAUSE OF LOSS. In Benavides v. State Farm General Ins. Co., et. al. (2006) 136 Cal.App.4th 1241, 39 Cal.Rptr.3d 650, the California Court of Appeal, Second Appellate District, reversed a judgment of the Los Angeles County Superior Court in favor of an insured against her carrier arising out of a mold-related claim. Following State Farm's denial of Ms. Benavides's condominium owner's claim under an all-risk homeowner's policy, which claim was based on the discovery of mold in the unit, Ms. Benavides brought an action against State Farm, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent claim investigation. The Superior Court, Los Angeles County, entered judgment on a jury verdict finding no coverage under the policy, but awarding damages to Ms. Benavides on the negligent investigation claim. Both parties appealed. The Court concluded that since the mold-claim was uncovered, Ms. Benavides could not recover for negligent claim handling. The Court recognized that pursuant to it earlier ruling in Waller v. Truck Ins. Exchange (1995) 11 Cal.4th 1, 35-36, absent a covered loss, an insured could not maintain a claim for tortious breach of the implied covenant of good faith and fair dealing. The Court held that since State Farm's investigation, adequate or not, resulted in a correct conclusion that Ms. Benavides's losses were not covered, no tort liability could arise for breach of the implied covenant. Under the same logic, the Court concluded that, absent coverage, there was no tort liability for improperly investigating Ms. Benavides's claim whether State Farm's conduct was characterized as an implied covenant breach or negligence.

LIABILITY INSURER DID NOT BREACH ITS DUTIES UNDER DIRECTOR AND OFFICER PROVISION TO DEFEND OR INDEMNIFY INSURED CONDOMINIUM ASSOCIATION IN UNDERLYING ACTION AGAINST ASSOCIATION BY CONSTRUCTION COMPANY, WHICH AROSE AFTER ASSOCIATION REFUSED TO PAY ALL MONEY OWED TO CONSTRUCTION COMPANY FOR REPAIRS MADE TO CONDOMINIUMS FOLLOWING EARTHQUAKE. In Oak Park Calabasas Condominium Assn. v. State Farm Fire & Cas. Co. (2006) 137 Cal. App.4th 557, 40 Cal.Rptr.3d 263, the Court of Appeal, Second District, affirmed the Los Angeles County Superior Court's entry of judgment in favor of State Farm finding that an insured's voluntary refusal to pay a contractor does not constitute a "wrongful act" covered under a D&O liability policy. In January of 1994 the Northridge earthquake occurred. Oak Park structures suffered considerable damage. As a result, Oak Park made agreements with a construction company by the name of ECC to repair the damaged structures. Following several contractual modifications, Oak Park refused to pay the remaining amounts due under the contract. ECC recorded a mechanic's lien on the Oak Park complex on June 1, 1995. In July 1995 ECC filed an action against Oak Park and the owners of the condominiums containing causes of action for breach of written contract, foreclosure of mechanic's lien, reasonable value of services rendered, failure to release retention proceeds in violation of Civil Code section 3260 and fraud. The insurance policy at issue defined "wrongful acts" as "negligent acts, errors, omissions or breach of duty directly related to the operation of the Condominium/Association." The insured Association argued that the term "negligent" only applied to "negligent acts," while State Farm contended that the term "negligent" applied to each and every act set forth in the "wrongful act" definition, including errors, omissions, or breach of duty. The Court sided with State Farm and concluded that the underlying contract dispute did not amount to a wrongful act covered under the D&O policy.

ALTHOUGH AMBIGUOUS, EMPLOYMENT-RELATED PRACTICES LIABILITY (EPL) EXCLUSION IN INSURED JANITORIAL SERVICES COMPANY'S CGL POLICY, WHICH EXCLUDED PERSONAL INJURY COVERAGE WHETHER INSURED WAS LIABLE AS EMPLOYER "OR IN ANY OTHER CAPACITY," APPLIED ONLY WHERE THERE WAS EMPLOYMENT RELATIONSHIP BETWEEN INSURED AND THIRD PARTY CLAIMANT, AND DID NOT APPLY TO EXCLUDE COVERAGE FOR LAWSUIT AGAINST INSURED FOR FALSE IMPRISONMENT AND LABOR VIOLATIONS BROUGHT BY EMPLOYEES OF INSURED'S SUBCONTRACTOR. In North American Building Maintenance, Inc. v. Fireman's Fund Ins. Co. (2006) 137 Cal. App.4th 627, 40 Cal.Rptr.3d 468, the California Court of Appeal, Fifth Appellate District, reversed the Fresno County Superior Court's decision and held that an employment-related practices exclusion did not preclude a duty to defend claims asserted against the insured by non-employees. The insured, North American Building Maintenance, Inc. ("NABM") provided commercial janitorial services to other companies throughout California. One such company was Target Stores, with which NABM had a "Floor Maintenance Service Agreement." NABM, in turn, subcontracted with California Building Management Services ("CBMS") to perform the actual work at individual Target stores. It was employees of CBMS who brought the underlying lawsuit against NABM and, as well, Target and others. Fireman's Fund denied NABM's tender of the CBMS suit based on an employment-related practices exclusion. The Court determined that the denial was improper because the exclusion applied only to claims brought by the NABM's employees, and the underlying suit was brought by the employees of CBMS. The Court interpreted the exclusion as being limited to situations of employment, former employment, or prospective employment, and determined that NABM could be found liable to plaintiffs regardless of whether or not it employed them.

SURPLUS LINES INSURANCE BROKER, WHICH ALLEGEDLY HAD FAILED TO PROCURE ERRORS AND OMISSIONS POLICY WHICH WOULD COMPENSATE MARKETING COMPANY FOR INADEQUATE SOFTWARE DEVELOPED IN INDIA, OWED DUTY OF CARE TO MARKETING COMPANY, AND SO WAS POTENTIALLY LIABLE TO COMPANY IN NEGLIGENCE FOR ITS ALLEGED LAPSE, DESPITE ABSENCE OF PRIVITY OF CONTRACT BETWEEN BROKER AND COMPANY. In Business to Business Markets, Inc. v. Zurich Specialties, et al. (2006) 135 Cal. App.4th 165, 37 Cal.Rptr.3d 295, the California Court of Appeal, Second Appellate District, reversed and remanded the judgment of the Los Angeles County Superior Court, finding that a broker may have professional liability for failing to obtain necessary insurance coverage where a party qualifies as an intended beneficiary of the broker's obligation. In July 2000, Business to Business Markets, Inc., also known as "B2B," hired Tricon Infotech, an Indian software company, to write a custom-made computer program for B2B's business. One term of their contract obligated Tricon to carry an errors and omissions insurance policy to compensate B2B if Tricon failed to deliver the promised software. B2B thereafter contacted Hoyla, a retail insurance broker. B2B informed Hoyla of Tricon's insurance needs, and told Hoyla that Tricon was based in India. Hoyla contacted Professional Liability Insurance Services, Inc. ("PLIS"), a surplus lines insurance broker, to place the insurance policy and gave PLIS the information it had received from B2B. PLIS contacted Zurich Specialties London Limited, which issued a policy to Tricon. Although Tricon was an Indian company doing business in India, the policy excluded coverage for any claims arising from or related to work performed in India. Tricon failed to deliver usable software to B2B, so B2B sued Tricon for breach of contract. Based on the insurance policy's exclusion for work done in India, Zurich Specialties refused to pay for Tricon's defense or to indemnify Tricon against B2B's claim. Tricon did not appear in the trial court to contest B2B's complaint. After a prove-up hearing on damages, the trial court entered a default judgment against Tricon of $922,480. But without any insurance coverage, the judgment against Tricon was uncollectible. B2B thus sued PLIS for negligence in procuring a policy that did not cover work done in India. Pointing to the absence of any direct dealings or contact with B2B, PLIS demurred on the ground that it owed no duty of care to B2B. The trial court agreed and sustained PLIS's demurrer without leave to amend. Relying upon factors outlined by the California Supreme Court in its 1958 opinion in Biakanja v. Irving, 49 Cal.2d 647, the Court of Appeal found that B2B satisfied the conditions to become an intended beneficiary of PLIS's professional obligations. The Court pointed out that PLIS knew that the Zurich policy was expected to benefit B2B by providing protection for Tricon's failure to perform, even though the policy only named Tricon. Too, B2B suffered foreseeable harm from the PLIS mistake in obtaining the Zurich policy with the India exclusion, as Tricon bought the policy specifically to protect against the unlikely but foreseeable event of its failure to deliver the software. Additionally, B2B's loss occurred with a reasonably close degree of certainty, given B2B's proof of $922,480 in economic harm from Tricon's breakdown in delivering the software. Finally, the Court found that "moral blame" attached to the PLIS neglect to meet the standard of care, because PLIS assumed the responsibility of obtaining the correct coverage and therefore had the obligation competently to discharge that duty.

# Installation Dinner Photos



# 2007 SDDL Installation Dinner

More than 200 members and guests attended this year's 22nd Annual San Diego Defense Lawyers Installation Dinner. Themed "Casino Night" and held at the newly renovated U. S. Grant Hotel, the evening began with a reception and a chance to "try your luck" at the gaming tables. After dinner outgoing President Martha Dorsey of Koeller Nebeker Carlson & Haluck began the installation ceremonies by recognizing and thanking the outgoing board members Jay Bulger (Vice-President) of Koeller Nebeker Carlson & Haluck, Tony Case (Treasurer) of Farmer Case & Fedor, Alan Greenberg (Secretary) of Wilson Elser Moskowitz Edelman & Dicker, Kelly Boruszewski of Lorber Greenfield & Polito, Jack Sleeth of Stutz Artiano Shinoff & Holtz, and Shari Weintraub of Gordon & Rees for their service to the association.

Incoming President Clark Hudson of Neil Dymott thanked Martha for her service as President and presented her with plaques from both SDDL and DRI recognizing her service to the association. Clark then introduced the returning and incoming board members: Ken Greenfield (Vice-President) of Law Offices of Kenneth N. Greenfield, Darin Boles (Secretary) of Aiken & Boles, Coleen Lowe (Treasurer) of Grace Hollis Lowe Hanson & Schaeffer, Jim Boley of Neil Dymott, Lori Guthrie of Grace Hollis Lowe Hanson & Schaeffer, Eric Miersma of Balestreri Pendleton & Potocki, Randy Nunn of Hughes & Nunn, Danielle Nelson of Fredrickson Mazeika & Grant, Brian Rawers of Lewis Brisbois Bisgaard & Smith and Michelle Van Dyke of Shewry & Van Dyke.

A new award entitled Outstanding New Lawyer of the Year was given to Nicholas Pagnotta of Farmer Case & Fedor, Jonathan Rose of Grace Hollis Lowe Hanson & Schaeffer, Tracey Moss of Neil Dymott, Christine Branch and Sara Skocilich both of The Law Offices of Kenneth N. Greenfield. The managing partners of the SDDL member firms had been encouraged to nominate a young attorney (in practice for 5 years or less), who exemplifies the professionalism of their more practiced colleagues. The association wanted a way of saying that we appreciate these attorneys' hard work and dedication to not only the practice of law, but also to the collegiality within the Bar, the ability to understand and appreciate our client's needs, and recognize the lawyers who will move our profession forward with honor and professionalism in the future.

The highlight of the evening came with the presentation to this year's Honoree and SDDL Lawyer of the Year. The 2006 Honoree is Presiding Judge Janis Sammartino. The 2006 SDDL Lawyer of the Year is Dennis Aiken. Each made remarks that were both interesting and appreciative of the honor they had received.

After the installation guests were invited back to the tables for a few hours more of fun and games. From what we heard, a good time was had by all!

23rd Annual

**Red Boudreau**
Trial Lawyers Dinner

**Honoring**
**Cynthia Chihak**

**June 16, 2007**

***Save the Date***

### January's Brown Bag Program

## Alternative Dispute Resolution

By: Todd Ratay, Esq. of Neil Dymott

*On January 23, 2007, the Honorable Vincent P. DiFiglia, Retired, presented a one hour lunch seminar on Alternative Dispute Resolution (ADR).*

Judge DiFiglia provided insight into ADR as a process, and encouraged those who employ the process to consider some of its less intuitive benefits. In addition to the obvious goal of settling the dispute through a mediator, ADR is a great opportunity to evaluate your case through the eyes of someone with years of experience observing how jurors will likely act.

It is important to consider what you want the mediator to accomplish before selecting a mediator and engaging in the process. Just as each counselor or judge has his own personality, each mediator approaches the process differently. For example, as anyone who has engaged in ADR previously can attest, not all mediators approach the sessions similarly. Some believe keeping the parties separated facilitates swift resolution to the matter. Although there is no steadfast rule, Judge DiFiglia prefers to begin mediation with a joint session in an effort to bring the parties together.

### Before your next mediation, consider the following:

***1. Be ready, willing and able to discuss settlement.***

The parties are spending a lot of money on the mediator; make it worth your while.

***2. Do not over sell your case.***

Plaintiff attorneys have a tendency to over-value their case which can result in them losing face with the mediator and their client. Consider a reasonable starting place to begin the negotiations.

***3. Encourage all parties to share their mediation briefs.***

In Judge DiFiglia's experience, 9 out of 10 times that he receives briefs, they are confidential. However, 10 out of 10 times the mediator would not be compromising a party's position if he shared the information.

***4. Confide in the mediator.***

Share challenges such as client control issues or inexperienced adjustors on a confidential basis with the mediator so he or she can appreciate which tactics to employ to effectuate settlement.

***5. Obtain an honest evaluation of your case through the process.***

Do not press too hard too early for the mediator to put a dollar value on your case, but do not be afraid at the end of the day to ask the mediator for an honest evaluation. However, bear in mind facts will often come out during the mediation process which will affect its value.

***6. Remember, this is a conciliatory proceeding!***

### February's Brown Bag Program

## "First Appearance Pleadings – How they effect the course of trial"

By: Margaret Buquid, Esq. of Grace Hollis Lowe Hanson & Schaeffer, LLP

February's lunch seminar addressed the importance of first appearance pleadings and their effect on the course of trial. Ken Greenfield, Esq. addressed the practical application of first appearance pleadings from the defense perspective while the Honorable Steven R. Denton provided insight into a judge's evaluation of such pleadings. Prior to filing any responsive pleadings Judge Denton urged defense counsel to first meet and confer with plaintiff's counsel in an attempt to informally address any deficiencies in the complaint.

### I. CCP §170.6 Challenges

Both Judge Denton, referring to his prior practice representing plaintiffs, and Mr. Greenfield stated that such challenges are extremely rare and should be exercised cautiously.

### II. Motion to Compel Arbitrations

Judge Denton stated that if an arbitration clause is contained in a contract then there is a presumption in favor of arbitration unless the contract is void, the most common reason being unconscionability. Mr. Greenfield articulated the benefits of arbitration being that it is potentially less costly than trial and that (usually) defendants are in favor of using an arbitrator – as they negotiated the arbitration clause contained in the contract.

### III. Demurrers

Mr. Greenfield explained that these pleadings are most effectively used to limit evidence, eliminate causes of action and eliminate demands for punitive damages that have no legal basis. Practically speaking, he suggested that it is not necessary to go heavily into the facts in your demurrer as the complaint should contain a thorough recitation of the facts. Rather, it is important to separately and distinctly analyze each cause of action as this will assist the court in ruling on each cause of action. Tactically, Mr. Greenfield stated that it is sometimes better to address a cause of action in a motion for summary judgment because the information contained in the complaint is read as being true for purposes of a demurrer.

### IV. Motions to Strike

A motion to strike can also be used to attack a plaintiff's request for improper relief, namely punitive damages and thus the prayer for relief should be carefully scrutinized. Additionally, it is important when reviewing an amended pleading to make sure it is in line with the court's prior ruling.

### V. Motions for Change in Venue

When weighing whether or not to file a §170.6 challenge you may want to consider whether a motion for a change in venue could be an acceptable alternative.

### VI. Removal to Federal District Court

While many attorneys believe it is easier to get a motion for summary judgment granted in Federal Court Judge Denton pointed out that even once a case is removed they are frequently bounced back to state court.

### VII. The Answer and Affirmative Defenses

Mr. Greenfield advocated filing a comprehensive answer which includes all defenses that may apply, especially those involving statues of limitation and comparative fault, to avoid waiver of the affirmative defenses. He explained that after you have the benefit of conducting discovery you can dismiss or waive any defenses which you have no evidence to support.

### March's Brown Bag Program

# "Motions for Summary Judgment: A Trial Judge's Perspective"

*By: Danielle G. Nelson, Esq., Fredrickson, Mazeika & Grant*

On March 20, 2007, Judge John Meyer, Independent Calendar Judge for Department 61 of the San Diego Superior Court presented the SDDL Brown Bag Seminar "Motions for Summary Judgment: A Trial Judge's Perspective." Judge Meyer's presentation provided practical information regarding new calendaring programs being instituted in the San Diego Superior Court, realities of law and motion calendaring, time constraints and attention given by the Court to motions for summary judgment or adjudication, and invaluable insight towards improving practitioners law and motion practice.

## New V3 Calendaring Program

Judge Meyer advised all counsel that a new computer system called V3 which is currently utilized in North County, Traffic and Small Claims Courts is currently being installed and implemented in the San Diego Superior Courts. The V3 system will change the Independent Calendar System from Fast Track to V3 and will internally affect how the Independent Calendar Departments set their calendar and produce their tentative rulings. With the V3 system, all calendaring and tentative rulings will be created internally by a computer, with law and motion matters set for hearing, only to be overridden specifically by the Judge. On a practical note, Judge Meyer advised that the V3 system may slow down Fast Track but should not affect practitioners.

## Practical Pointers

Judge Meyer advised that the Independent Calendar Judges really rely on their research attorneys, with the research attorney being the first person to review motions for summary judgment, adjudication or other law and motion matters. Due to heavy law and motion calendars and time constraints, the Court and/or research attorney does not have time to read every single page of a Motion for Summary Judgment or Adjudication. Therefore, the first document the research attorney looks at is the Points & Authorities in the Opposition to the Motion for Summary Judgment to get a snap shot of what the motion is about. For this reason, Judge Meyer stressed the importance of immediately getting to the point in a clear and concise format as the more information, details, and paper that are produced, the more likely you create a triable issue of fact and that the Motion will be denied. Further, the moving party has the burden to prove as a matter of law that there are no triable issues of fact as there is an inference that there is a triable issue of fact. Therefore the easier one makes it for the Judge and research attorney the more likely it is that the Court will rule in ones favor.

Judge Meyer cautioned against making the error of assuming that one can provide important details in oral argument as the Court has a tight schedule, limited time, often makes their ruling prior to oral argument and you are competing with other counsel for the Court's attention during oral argument. For this reason, make the best use of your time in oral argument by focusing your argument on items raised by the Judge or in the tentative ruling, as the Court hates when parties read from their moving papers. Be prepared to discuss discreet issues as opposed to reiterating your moving papers.

Be advised that the Courts are reluctant to grant Motions for Summary Judgment or Adjudication as it is not difficult to create a triable issue of fact and Judges are most often reversed by the Appellate Court on Motions for Summary Judgment or Adjudication that were granted. When raising objections to evidence, be sure to reference a specific item or fact as opposed to the entire document, as the Court is more inclined to overrule any objections not specifically identified. Further, provide the specific Evidence Code in connection with your objection. Treat objections to evidence as if you were in trial. The more you object to relevance, the more you draw attention to the item and that it might be relevant. Be wary to comply with the Court and Code requirements and do not exceed page requirements unless you have received authority from the Court to do so as violations of CCP § 437c could provide a basis for denial of a motion in its entirety. Don't be fooled into thinking the word doesn't get out for those who blatantly violate page requirements, etc. as the Court and Clerks are gossips. Therefore, don't ruin your reputation over something like page limits, changing font size, etc.

If you have a potential for Summary Adjudication of specific issues, make sure to plead alternatively for Summary Adjudication as well as for Summary Judgment as the Court cannot grant Summary Adjudication if the motion is specific to Summary Judgment. Be mindful that court can take judicial notice of the fact that a pleading or declaration was filed but cannot take notice of the facts contained in any pleading or declaration. With regard to Joinders, you cannot file a one page Joinder to someone else's Motion for Summary Judgment. However, Joinders to Motions for Summary Judgment may be permitted if a separate statement of fact is submitted with the Joinder.

Finally, Judge Meyer cautioned against "laying in the weeds" when preparing your motions as new information raised in a reply that could and should have been raised in moving papers will not be considered and the motion will likely be denied. This is different from responding to new information raised in an opposition.

## Conclusion

Overall, Judge Meyer encouraged all counsel to know the Code, your reader and keep in mind who you are trying to convince with your motions. Be conscious of your audience and the amount of time dedicated to your motion and present your argument in a clear, concise and persuading manner right from the start. Be mindful of the work created by Motions for Summary Judgment for counsel and everyone else and don't submit a frivolous motion as it will likely be denied.

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SAN DIEGO CHAPTER

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# TRIAL BY MASTERS
## A TRIAL SKILLS SEMINAR

JURY SELECTION THROUGH CLOSING ARGUMENT
LIVE JURORS
DELIBERATIONS VIDEOTAPED

SATURDAY, MAY 19, 2007
8:15 AM – 4:30 PM

6.5 MCLE HOURS
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# SAN DIEGO DEFENSE LAWYERS

## 2007 JUVENILE DIABETES RESEARCH FOUNDATION GOLF BENEFIT

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A Portion of the Proceeds Will Benefit the Juvenile Diabetes Research Foundation

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- Putting Contest
- Hole-In-One Contest
- Longest Drive Contest
- Raffle Prizes and Awards
- Post-Event Dinner

Come one, come all to the 6th annual SDDL Golf Benefit. This is a great chance to relax and have fun with business associates, clients, friends and co-workers. If you don't golf, join us for the Post-Event dinner ($30.00) and awards.

*Friday, June 22, 2007 at 12:30 pm (check-in at 10:30 am)*
*Salt Creek Golf Course*
*Call Jim Boley at 619.238-1712*
*or jboley@neildymott.com for more information.*

*Sponsorship opportunities are also available.*
*Print out sponsor form at www.sddl.org*

Number of Golfers: ________ x $125 or $500 per foursome

*Name(s):* ____________________ ____________________

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# EXTRA!!! Member News EXTRA!!!

***John Clifford*** of Drath Clifford Murphy & Hagen has been elected to the Board of Directors of the Defense Research Institute (DRI) a national organization of more than 22,000 lawyers involved in the defense of civil litigation. DRI is committed to: Enhancing the skills, effectiveness, and professionalism of defense lawyers;

Anticipating and addressing issues germane to defense lawyers and the civil justice system; Promoting appreciation of the role of the defense lawyer; and improving the civil justice system and preserving the civil jury. Congratulation John!

Grace Hollis Lowe Hanson & Schaeffer, LLP is pleased to announce that ***Lori J. Guthrie*** has been named as a partner of the firm. Lori started as an associate at GraceHollis in 1999. She received her J.D. from California Western School of Law in 1998 where she graduated cum laude. Her main practice areas are construction defect defense, product liability and business disputes.

***Robert W. Harrison*** has joined the firm of Koeller, Nebeker, Carlson & Haluck, LLP as a lateral partner after 25 years as an associate and shareholder at Neil Dymott. He was accompanied in the move by associates, ***Tracey Moss*** and ***Patrick J. Kearns***. They will continue to practice in the areas of professional liability, business litigation and administrative law.

*Harrison*

*Moss*

*Kearns*

Farmer Case & Fedor is pleased to announce the recent addition of ***Phillip L. Hack***, former principal of the firm of Hack, Shaw & Hackely, as a partner. Mr. Hack's practice focuses on the defense of ambulance, transportation and hospital matters. The firm is also pleased to announce the addition of ***Jamie R. Moriyama*** as an associate.

Grace Hollis Lowe Hanson & Schaeffer, LLP is pleased to announce that several new associates have joined the firm: ***Mark Angert, Arlene Luu, Kimberly Snyder, D. Aaron Wells, Amy M. Oakden and Michael J. Hurvitz, Kristopher M. Cronin, Matthew C. Anderson***. Their main areas of practice are construction defect defense, product liability, medical malpractice, business law and employment law.

*Angert*

*Luu*

*Snyder*

*Wells*

*Oakden*

*Hurvitz*

# San Diego Defense Lawyers 2007 Educational Program Calendar

*San Diego Defense Lawyers is comprised exclusively of civil defense trial lawyers. We are committed to the education of our members. Thus, the annual dues now include the opportunity to earn 20 MCLE credits per year. This year's educational calendar series is theme-based on the litigation process. Offered are 12, one unit lunch time "Brown Bag" seminars, and 4, two unit evening seminars. All will be taught by noted trial and appellate court judges, lawyers, and scholars from our community and beyond. Many required MCLE subjects will be dealt with, including ethics, bias, and substance abuse.*

## PRE-TRIAL

**January 23***
Meddiation and Settlement Conferences

**February 20***
Pre-trial pleadings, demurrers, motions to strike, answers and affirmative defenses

**March 20***
Motions for Summary Judgment

**March 28****
Focus on Electronic Discovery (aka e-Discovery)

## TRIAL

**April 17***
Civility Both In and Out of the Courtroom

**May 22***
Jury Voir Dire

**June 19***
Opening Statements

**June (TBA)****
Trial preparation and Organization (witness and client testimony, preparation, motions in Limine, preparation of trail notebooks, the trial brief)

**July 17***
Use of Exhibits, Presentation and Introduction of Evidence, Use of Demonstrative Evidence, Use of Technology at Trial

**August 21***
The Use of Direct and Cross Examination of Witnesses at Trial

**September 18***
Evidence 101 for the Trial Lawyer

**September (TBA)****
Judgments, Cost Memoranda and Motions to Tax Costs, Motions for Judgment Notwithstanding the Verdict, Motions for Offset, Motions for New Trial, Judgment Collection

**October 16***
Jury Instructions and the Use of Special Verdict Forms

## POST TRIAL

**November 20***
Closing Arguments

**December 18**
Appeals, Writ Procedure and Re-trial

**December (TBA)****
Anatomy of a DUI

** Brown Bag programs held at Peterson Reporting 530 B Street, 11th Floor Training Room, San Diego, CA 92101*

*** Evening Programs held at San Diego County Bar Association-Broderick Room 1333 Seventh Avenue, San Diego, CA 92101*

# DRI Seminar

## *June 7 - 8, 2007*
## *San Diego Marriott Hotel*

DRI's Young Lawyers Committee proudly presents its annual trial advocacy seminar for defense trial lawyers and corporate counsel who have been practicing for 10 years or less. This program is designed to enhance the skills of defense lawyers and in-house counsel as they work together to defend the corporate client. This seminar boasts distinguished faculty from around the country, including in-house lawyers from some of the most recognized companies in America, experienced and successful trial lawyers, a prominent law professor and some of the best speakers from DRI's Young Lawyers Committee. In addition, there is a Corporate Counsel Breakout Session open only to in-house counsel, which will provide its attendees with unique presentations on developing their legal departments and managing litigation matters. Join us for the opportunity to hone your trial skills while participating in numerous networking & social events. Come for CLE & stay for the community service project on Saturday. Go to www.dri.org for details.

Young Lawyers Seminar—
*Advanced Litigation Skills for Taking Your Case through Final Verdict*
June 7–8, 2007
San Diego Marriott Hotel
San Diego, California

*Presented by DRI's Young Lawyers Committee*

**Who Should Attend**
- Defense attorneys who want to refine their trial skills
- Defense attorneys seeking to improve their pretrial and trial practices
- In-house counsel looking to enhance their legal departments
- Litigation managers who want to increase their efficiency in case resolution

DRI The Voice of the Defense Bar

DRI The Voice of the Defense Bar

DRI wishes to thank its sponsors for supporting the continental breakfasts, refreshment breaks, networking lunches and receptions, community service project and social events at this year's seminar.

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*Tricky Typos:*

# Missing and Reversed Letters Inject Errors and Torpedo Effective Advocacy

*By Benjamin G. Shatz, Esq.*

*Every writer should strive to produce error-free copy. This is especially true of legal writers, for whom credibility is essential for persuasion. A reader of sloppy legal prose may (consciously or not) equate poor writing with poor analysis. Similarly, a reader may equate careless proofreading with carelessness generally. Beyond that, because legal writing has such a broad potential audience (e.g., clients, judges, clerks, opposing counsel, appellate justices and their staff, the press, and posterity if posted on an on-line service or a weblog), an embarrassing typo may be seen by many readers. These errors not only detract from the effectiveness of the piece, but also tarnish the writer's reputation.*

One of the most invidious and insidious errors is the correctly spelled, but obviously wrong word. These errors are hard to catch because a word processor's spellchecker overlooks them as correctly spelled. A classic example is how a computer will not blink at the sentence "'Eye mite knead sum knew shoos four Jim,' Hairy tolled hour ant an," when the sentence should read "'I might need some new shoes for gym,' Harry told our Aunt Ann." See Ten Tips for Better Spelling, http://www.factmonster.com/ipka/A0903395.html. Legal writing is particularly prone to this sort of error. Here are several notable examples involving missing letters or switched letters:

Statue for Statute — A Westlaw search in the "allcases" database returns 1,485 occurrences of "statue of limitations" alone. Given the many legal phrases involving the word "statute," as well as the ordinary use of the word, this figure probably just scratches the surface. Even United States Supreme Court Justices have missed this one: In the originally released version of a dissenting opinion in 2004, "statues" was used for statutes. See How Appealing, http://howappealing.law.com, April 28, 2004.

Pubic for Public — This one's an all-time classic. While researching an easement dispute involving recorded documents, I recently discovered the following heading in a leading treatise: "Notice from the pubic records." 6 Miller & Starr, California Real Estate 3d § 15:70 at 223. A Westlaw search for "pubic policy" returns 51 cases — none of which involve regulation of nudity. And the less said about a "pubic nuisance," the better. See also How Appealing blog post of Oct. 12, 2006 http://howappealing.law.com/101206.html#018605 (noting "pubic" typos in appellate opinions and in ballots proposing an amendment to Michigan's constitution).

A few other typos of the missing letter variety include: "contact" for "contract"; "Easter District" for "Eastern District"; "fist" for "first"; "noting" for "nothing"; and "clam" for "claim" (Westlaw carries several amusing examples of "retaliation clams" and cases mentioning the "elements of the clam"). And there are instances of the two missing letter variety, such as "feral" for "federal" (though practice in some Article III courts may seem pretty wild).

Also look out for the wrong-letter typo, as in "properly" for "property" (or vice-versa) or "band" for "bank" (or vice-versa). See http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=265613&doc_no=S115699) (California Supreme Court's docket mistakenly transforms the Agua Caliente Band of Indians into a Native American financial institution). And keep an eye out for the extra-letter typo, as in "latches" for "laches." Finally, make sure to spell the word "supersede" with an "s" instead of the common misspelling — used in one recent national advertising campaign — "supercede."

Similar to the missing-letter typo is the reversed-letter typo, such as "set froth" instead of "set forth" (which, according to Westlaw's allcases database, appears in 121 cases); "discreet" for "discrete"; "singer" instead of "signer"; or "Crop. Code" for "Corp. Code" (unless agricultural business entities are governed by the Crop Code?). In this category, be alert for the following:

Trail for Trial — A Westlaw search reveals 1,272 instances of "trail court," all of which must have meant to say "trial court" — unless there's some specialized tribunal for disputes on the open range? This error also may crop up as "trail judge," "trail date," "trail proceedings" "pre-trail statement," "post-trail motions," and many other permutations.

Untied for United — No matter how disconnected or unraveled one may feel our nation has become, its proper name remains the United States — despite the 481 instances (again found on Westlaw) of references to the "Untied States."

A related switching and dropping of letters may see "plenty" replacing "penalty," as is in the apocryphal story about how a dictation error resulted in: "I declare under plenty of perjury that ...."

Levity aside, these typos are serious. Such errors evade notice at the proofreading stage because they involve the type of words often skipped over when reading. A widely circulated example explains why errors involving mixed up letters in the middle of a word are so difficult to notice:

The phaonmneal pweor of the hmuan mind: Aoccdrnig to rscheearch at Cmabrigde Uinervtisy, it deosn't mttaer in waht oredr the ltteers in a wrod are, the olny iprmoatnt tihng is taht the frist and lsat ltteer be in the rghit plcae.

On the topic of problems with word processor spellcheckers, be careful about relying on a computer to "fix" typos. While the typical word processing program helpfully automatically converts "tot he" and "doe snot" to "to the" and "does not," other problems may arise. In early 2006, a lawyer filed a brief in the California Court of Appeal in which the computer's automatic spellchecker converted all occurrences of the term "sua sponte" to "sea sponge." 'Sea Sponge' Sabotages Spell Check in Danser Filing, The Recorder (Feb. 28, 2006). This tale emphasizes not only a danger in computerized corrections, but the need to proofread the very final version of a document before it leaves your control.

*Continued on page 17*

### Tricky Typos

*Continued from page 16*

Catching and correcting typos may affect a lawyer's compensation as well. In 2004 a federal magistrate judge reduced a lawyer's fee award for filing briefs riddled with errors, including "tired" for "tried." Judge Slashes Lawyer's Rate for Typos, Careless Writing, The Legal Intelligencer (Feb. 25, 2004).

How can the diligent practitioner avoid these common typos? Because these typos evade computer spellcheckers, the best way to detect and correct them is old-fashioned proofing. And because these typos are easily missed by authors who have read and re-read their own writing so often that they become blind to such mistakes, the best proofreader is someone who has never read the document. Building proofing time into a filing schedule has the double benefit of encouraging the practitioner to have a final draft prepared early.

Lacking time to pass a brief to a fresh pair of eyes, some lawyers alter the spell check feature in their word processing programs to flag problem words like "statue," "pubic," "trail" and "untied," on the assumption that these words are unlikely to appear in the typical brief. A similar solution is to use the computer's search feature on the final version of a brief to check for key problem words like those above to ensure that they have not slipped into a brief. Whatever remedy appeals to you, the most important lesson is to be aware of these common typos and to prevent your brief from becoming the next example held to ridicule.

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CASE

## *Class Action Definition Cannot Rely On Ultimate Liability*

### Sony Electronics Inc. v. Hapner
### 145 Cal.App.4th 1086 (December 15, 2006)

*Authored by: Jacqueline Vinaccia, Esq. of Lewis Brisbois Bisgaard & Smith*

The Court of Appeal for the Fourth District recently discussed the proper way of forming a class definition for certification purposes in Sony Electronics Inc. v. Hapner. The court held that definitions requiring a merits-based determination to establish whether a particular person is a member of the class are improper because they do not permit an ascertainable class. That is, such definitions do not make members of the class readily identifiable to permit appropriate notice, nor do such definitions permit people who are given notice to determine whether they are part of the class.

In Sony Electronics Inc. v. Hapner, __ Cal.App.4th __ (December 15, 2006), Sony petitioned for a writ of mandate directing the trial court to vacate an order certifying a class. The underlying action was filed by Hapner in July 2004 after he experienced repeated problems with the laptop (Vaio GRX550) that he purchased. Hapner's complaint alleged that Sony had marketed and distributed GRX Series Notebook computers knowing that the computers had defective memory chip sockets, but failing to disclose such defects to consumers.

In October of 2005, Hapner filed a motion for class certification consisting of "all persons or entities in the United States who purchased Sony Vaio GRX Series Notebook computers," but excluding Sony, its affiliates, employees, officers and directors, persons or entities that distribute or sell Vaio GRX laptop computers and the court. Hapner also sought to certify a sub-class consisting of all class members who purchased the GRX Series Notebook computers in the State of California. Hapner supported these motions by submitting evidence that the GRX500 Series Notebooks manufactured in the spring of 2002 suffered from a failure rate of 10.1 percent from any cause (much higher than Sony's accepted failure rate of less than 1 percent), that sixty to seventy percent of the 500 series models were sent to Sony for repair suffering from "no boot" or memory problems. Hapner also introduced evidence that Sony characterized the memory slot problem as a design defect in addition to the problems he had with his own personal laptop.

Sony opposed certification arguing that Hapner had not shown common issues of fact and law predominating or that there was an ascertainable class. Sony's argument regarding ascertainability was the critical issue on appeal and will therefore be discussed to the exclusion of common issues of law and fact. Regarding ascertainability of the class, Sony specifically argued that the proposed class was not ascertainable because it included people who lacked viable claims.

The trial court, after briefing by both parties, certified the following class:

"Class: All persons or entities in the United States who are original purchasers of Sony Vaio GRX Notebook computers from Sony or from an authorized reseller, and in which the memory connector pins for either of the two memory slots were inadequately soldered[,] impeding the recognition of installed memory causing boot failures, and other problems. Excluded from this Class are the following: (1) [Sony] (including its affiliates, employees, officers and directors); (2) persons or entities which distribute or sell Sony Vaio GRX Notebook computers; (3) the Court; and (4) purchasers who had the solder points repaired by Sony at no cost under the express warranty and who no longer experience boot failures and other problems related to inadequate soldering of the memory connector pins.

"Sub-Class A (for purposes of [the] Third Cause of Action [for violations of the Consumer Legal Remedies Act]): All class members who are 'consumers' as defined by California Civil Code section 1761[, subdivision ](d).

"Sub-Class B (for purposes of [the] Fifth Cause of Action [for violations of the Song-Beverly Consumer Warranty Act]): All class members who purchased Sony Vaio GRX Notebook computers in the State of California, and who bought their computers primarily for personal, family, or household purposes as defined by California Civil Code section 1791[, subdivision ](a)."

The trial court recognized that the class definition was not perfect, but determined that a class action in this case was the superior mechanism for providing a remedy. Sony therefore petitioned the Court of Appeal for a writ of mandate arguing that the class certification violated due process.

The Court of Appeal noted that a proposed class plaintiff must show that there are objective criteria by which class members can be later identified and given notice of the proceedings. Sony therefore argued that the class definition given by the trial court did not meet this criteria because the class definition was based on the issue of ultimate liability (i.e., whether a particular person's Notebook has a soldering defect), not on objective criteria. The Court of Appeal accepted Sony's argument, citing the Intratex (Intratex Gas Co. v. Beeson (Tex. 2000) 22 S.W.3d 398) court's statement that a proposed class certification that rests on the paramount liability question cannot be objective because the court has no way of ascertaining whether a given person is a member of the class until determination of liability is made.

# SUMMARY

The Court of Appeal accordingly held that the class definition allowed by the trial court was improper because it required a merits-based determination to establish whether a particular GRX Series Notebook owner is a member of the class. Thus, the members of the class were not readily identifiable so as to permit appropriate notice to be given and the definition also did not allow people who received notice to determine whether they are part of the class.

Despite this conclusion, the appellate court refused to grant Sony's request that the superior court be ordered to deny the class certification motion outright because there was evidence suggesting that the alleged manufacturing defect affected primarily GRX Series 500 Notebook computers that were manufactured in the spring and summer of 2002 and had motherboards that were manufactured in Japan. The court thus issued a writ ordering the trial court to conduct further proceedings regarding whether or not a more appropriate class definition could be made.

*Ms. Vinaccia is a litigation and trial attorney. Her areas of practice include all aspects of construction litigation, insurance litigation, products liability, premises liability and general liability litigation. Ms. Vinaccia also specializes in attorney fee analysis and auditing.*

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## *Employer May Be Liable for An Employee's Assaults If The Employer Negligently Hired Him Or Placed Him in A Position to Commit Foreseeable Harm*

**Hawkins v. Wilton**

**(CV021432, Oct. 11, 2006) 144 Cal.App.4th 936**

*Authored by: Heidi Inman, Esq. of Lewis Brisbois Bisgaard & Smith*

David Rodriguez shot Michael Hawkins outside an apartment complex. In this matter, Hawkins sued the owners and managers of the apartment complex (Wilton) for negligently hiring Rodriguez as an apartment manager and security guard, and as allowing him to remain as a tenant. Hawkins alleged that Wilton knew of Rodriguez' dangerous propensities, including that he was convicted of manslaughter, carried firearms, used methamphetamine, and threatened tenants.

Rodriguez's complaint contained four causes of action. First, Wilton was liable under respondeat superior, as his employer. Second, Wilton was negligent in hiring and retaining Rodriguez. Third, Wilton was negligent in not protecting tenants from foreseeable criminality. Finally, Wilton was negligent in allowing a dangerous tenant to remain in possession.

Wilton brought a motion for summary judgement as the shooting occurred outside the premises of the apartment complex between two individuals that were voluntarily associating, and it had no duty to protect plaintiff as a matter of law. The trial court sustained the motion and found that Rodriguez was not an employee at the time of the shooting, his conduct was not reasonably foreseeable, and it would have been against public policy to prevent him access to the apartments where his children resided.

The appellate court decided that the motion for summary judgment should have been denied as it did not address the theory that Wilton was responsible for the employment of a known dangerous person, or that Wilton negligently allowed him to remain as a tenant. Thus, the Court held that an employer may be liable for an employee's assaults if the employer negligently hired him or placed him in a position to commit foreseeable harm. The Court further held that a landlord may be "liable for failing to address the presence of a dangerous tenant or other person on or about the property." Accordingly, the Court reversed the decision of the trial court and remanded.

*Ms. Inman handles mass tort and product liability matters.*

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