The Update

Summer 2008

San Diego Defense Lawyers

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THE BOTTOM LINE

Case Title: Manoogian v. SDUSD

Case Number: GIC858498

Judge: Honorable Jay Bloom

Plaintiff's Counsel: Bradley Moores of Grady & Associates

Defendant's Counsel: Sam G. Sherman of Higgs Fletcher & Mack

Type of Incident/Causes of Action: Complaint for employment retaliation/cross-complaint for breach of contract

Settlement Demand: $1.2 million on Complaint

Settlement Offer: None

Trial Type: Jury

Trial Length: 14 days

Verdict: Defense on both causes of action

Case Title: Lua v. Salzetti

Case Number: GIC 833829

Judge: Honorable John Meyer

Plaintiff's Counsel: Donald Loftus, The Loftus Law Firm

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

Type of Incident/Causes of Action: Medical Malpractice - Medical Battery and Lack of Informed Consent resulting in Permanent Birth Injuries (This action was a retrial that originally resulted in a defense verdict in 2006, however, the Court of Appeals remanded for a retrial on Lack of Informed Consent.)

Settlement Demand: Policy Limits of 2 Million Dollars

Settlement offer: $100,000

Trial Type: Jury

Trial Length: 9 Days

Verdict: Judgment on the pleading the first day of trial on the Battery Claims. 12-0 defense verdict on Plaintiff's Lack of Informed Consent claims.

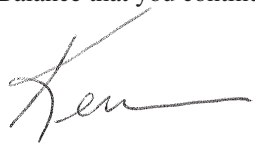
PRESIDENT'S MESSAGE

SDDL needs your help! As the Organization approaches its 25th Anniversary, we are creating the concept of Committee Membership; SDDL Members who will assist us with all that we do to make SDDL one of the best and brightest defense organizations of its kind.

The following Committees of SDDL currently exist and need volunteers: The MCLE Program; The Annual Golf Benefit; The Update; The Mock Trial Program; Membership; and, The Annual Installation and Awards Dinner.

Later on in this issue of The Update, you will find the contact information for each Board Member who chairs the committee. Call us to inquire further. E-mail us. Write to us. Or, contact me, personally. JOIN A COMMITTEE! Please help to make our Organization even better than it already is.

Thank you for your support, as well as the Civility, Integrity, and Balance that you continue to demonstrate to the San Diego legal community!



Thank You To Our Friend, Michelle Van Dyke!

On June 11, we reluctantly accepted the resignation of one of our long term Board members, Michelle Van Dyke. Michelle first began serving on your Board of Directors in the year 2003. The following year she became its Vice-President, and worked feverishly on the very successful SDDL Mock Trial Program in 2004. At the urging of one of the current Board members, Michelle ran again for office in the year 2006. She won the election and was close to completing her second year with us.

Michelle has been closely involved with our membership Committee nearly all the years she has served SDDL. With Michelle's help, the membership roll today is closely approaching 400! Without her help and spirit, this would not have happened.

On behalf of the Board, as well as the entire Membership, we thank this wonderful lady for her years of service, and we wish her the absolute best in her practice and in her life.

Thank you, Michelle. We will miss you at our board meetings. You added spirit, intelligence, and creativity to all that we have accomplished!

New Board Member announcement

On June 18, by unanimous vote of the Board of Directors, James J. Wallace, II was elected to fill the recent vacancy left by the resignation of Michelle Van Dyke. Jim is an AV rated lawyer (Martindale-Hubbell) who has been practicing law since 1980. Jim graduated from Seton Hall University, cum laude, in 1982. He then attended California Western School of Law. In 2000, Jim received his MBA from San Diego State University. Jim is with Lewis, Brisbois, Bisgaard & Smith here in San Diego, and practices in the areas of healthcare law, professional liability, products liability, and general civil litigation. We are very happy to have Jim on our Board for the remainder of Michelle's term of office.

"Seems it never rains in Southern California
Seems I've often heard that kind of talk before
It never rains in California
But girl don't they warn ya
*It pours, man it pours" **

On May 23 over 100 happy golfers were gathered at the Twin Oaks Golf Course in San Marcos for the 2008 San Diego Defense Lawyers Juvenile Diabetes Research Foundation Golf Tournament. At noon, with the weather threatening, the players grabbed their lunches off the golf carts and retreated to the warmth of the clubhouse to enjoy their tasty sandwiches provided by Rimkus Consulting Group. In the background, worried golf committee members huddled with the staff of Twin Oaks when the decision was made – the game was called due to inclement weather.

A rainstorm in San Diego in May? Preposterous, unbelievable, unheard of. At the moment Ken Greenfield, SDDL president, announced the cancellation it may have seemed an overly cautious decision, but as it turned out – it poured, man it poured. Bedraggled Hole Sponsors gathered up their tables, chairs and prizes and returned to the clubhouse.

Now some observers (namely the nervous Twin Oaks personnel) were expecting grumbling and unhappiness amongst the players, but our terrific members and friends of SDDL were incredibly gracious. Jim Boley of Neil, Dymott, Frank, McFall & Trexler, SDDL board member and co-chairman of the tournament, reminded us all that a little rain may be an unexpected inconvenience, but for children suffering from juvenile diabetes theirs is a lifelong hardship.

The day was not lost, however. One of our wonderful sponsors, Thorsnes Litigation Services, had donated a pair of tickets to the US Open Golf Tournament, a time sensitive item. Our dynamic auctioneer, Dino Buzunis, also of the Neil Dymott firm, had returned for a repeat performance, and he proceeded to engage two lively competitors in bidding for the tickets. After much excitement the winning bid went to Bridget Mastrobattista of Peterson Reporting for a record-breaking bid of $1150. Applause! Bridget herself has a young family member suffering from juvenile diabetes.

Of course, the tournament must go on, so a new date has been set for Friday July 18, same time, same place. With one incredible auction item under our belts, we look forward to a great day of golf followed by the auction, raffle and barbecue.

A Final Note: By the time you read this article, the golf tournament may have taken place. We'll give you a wrap up on our golf tournament in the Fall issue of The Update. In the meantime, you need not be a golfer to donate to the Juvenile Diabetes Research Foundation. Please join your fellow SDDL members, friends and our generous sponsors in their support of this worthy organization.

*from "It Never Rains in Southern California" by Albert Hammond, 1972.

THE BOTTOM LINE

Case Title: Kennedy et al. v. Cummings et al.

Case Number: GIE 032642

Judge: Honorable Laura Halgren

Plaintiff's Counsel: Otto Haselhoff, L/O of Otto Haselhoff and Paul Bates, Bates & Levy

Defendant's Counsel: John T. Farmer and Merris A Washington, Farmer Case & Fedor

Type of Incident/Causes of Action: Wrongful death, motorcycle vs. water truck

Settlement Demand: $1M reduced to $500,000

Settlement Offer: $250,000 CCP 998, with indication of $300,000

Trial Type: Jury

Trial Length: 5 1/2 days, bifurcated on liability

Verdict: Defense verdict, 10-2

Case Title: Andrew C. v. SDUSD

Case Number: GIC854968

Judge: Honorable William Nevitt

Plaintiff's Counsel: Patty Lewis of Lewis Law Firm

Defendant's Counsel: Sam Sherman of Higgs Fletcher & Mack

Type of Incident/Causes of Action: Civil Code section 52.1, Negligence

Settlement Demand: >$100,000

Settlement Offer: None

Trial Type: Jury

Trial Length: 8 days

Verdict: Defense

Case Title: Fredericks v. Jacobson, et al.

Case Number: GIN051850

Judge: Hon. Robert P. Dahlquist

Plaintiff's Counsel: C. Colin Cossio

Defendant's Counsel: John E. Petze (Defendant Driver), and Thomas R. Kelleher of Walsh & Furcolo LLP (Defendants Restaurant/Bar/ Employee)

Type of Incident/Causes of Action: Personal Injury/Negligence and Motor Vehicle

Settlement Demand: $155,000.00

Settlement Offer: $5,000.00

Trial Type: Jury

Trial Length: 7 days

Verdict: Defense

Civil Discovery Techniques

SDDL Evening Seminar Series, March 26, 2008

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

On March 26, 2008, veteran trial lawyers Craig McClellan and Kenneth Medel presented the SDDL Evening Seminar on "Civil Discovery Techniques." The presentation provided practical information regarding the effective use of depositions in the realm of civil discovery. The panel emphasized that the art of practicing law necessitates successful and focused discovery. The following represents a summary of the points of discussion raised by the panel:

The goals of depositions can be summarized in four (4) specific goals, the first of which is the purpose of a deposition. The purpose of a deposition is to find out precisely what someone has to say and how what they say will affect your case. The secondary goal of a deposition is the development of themes to help you with your case. Have your own theme and don't just regurgitate plaintiff's case and then defend against it. Be as effective a prosecutor of your case as the plaintiffs are of theirs. The third goal is to undermine your enemies' case. The fourth goal is to assess the affect a particular witness has on your overall case.

Mr. Medel, on behalf of the defense, emphasized remaining professional at all times. He suggested treating the witness like you would a family member because if the witness is not fearing you then you will likely get more information based upon trust and better cross at trial because you have established credibility early on in the discovery process with that particular witness.

Mr. McClellan was critical of defense attorneys who ask everything under the sun

whether relevant or irrelevant on the basis that it is bad to ask everything. Mr. McClellan suggested that when deposing a high level executive of a company, you should videotape to preserve for future cases as you will likely only get once chance to depose that person. Mr. McClellan also offered two instances wherein you should not befriend the witness but should hammer the witness. Those are hot headed witnesses where your strategy should be to anger and set the witness off, and where you need to establish credibility so you can catch the witness off-guard. With regard to plaintiff depositions and opposing expert depositions, Mr. McClellan cautioned defense counsel to be extremely thorough because these are the witnesses most likely to hurt your case at trial.

The panel agreed that problems in depositions arise when the attorney does not listen to answers and does not visualize the deposition transcript wherein a verbose answer does not help your case.

Edifications

By: Lori J. Guthrie, Grace Hollis & Hanson

Whew!! It's Still Safe To Call Someone Names Anonymously On The Internet

Since this case came out in February, I have been intrigued by it for some reason. In February 2008, the California Court of Appeal for the 6th District (Santa Clara), in an opinion written by Justice Elia, reversed a trial court's order quashing a subpoena served on Yahoo! to disclose identity of one of its users- Senor_Pinche_Wey (whatever that means, but I don't think I really want to know.) See, *Krinsky v. Doe* 6 (2008) 159 Cal. App. 4th 1154.

Apparently, Mr. Pinche_Wey (if you read the opinion, you will conclude this person is a male), did not care for the president and other executives at a company called SFBC International (a developmental drug company) operating out of Florida. Mr. Pinche_Wey, on a Yahoo! Message board posted messages referring to these individuals using such colorful terms as "mega scumbag", "cockroach," and referred to a female executive as one with "fat thighs", a "fake medical degree" who has "poor feminine hygiene." I will spare you the more disgusting comments, but I'm sure you get the picture.

Plaintiff, Ms. Krinksy, the female executive alluded to above, filed a lawsuit against a series of Doe Defendants in Florida alleging libel/defamation and interference with business relationships. Plaintiff then served a subpoena on Yahoo! to discover the identity of Senor_Pinche_Wey. Doe 6 filed a motion to quash, but the trial court denied the motion.

The Court of Appeal determined that Doe 6's identity should be protected and so reversed the trial court's order. As part of its analysis, the Court acknowledged that "speech on the Internet is … accorded First Amendment protection." The Court further determined that Plaintiff must make a prima facie showing of the elements of libel/defamation (under Florida law of course) to overcome the motion to quash. The rationale, of course, is that libelous statements are not accorded 1st Amendment protection. In essence, the Court determined that when there is an issue of pure opinion versus mixed opinion, you cannot just consider the words; you have to consider them in the context in which they are used. The Court ultimately held that the messages posted by Doe 6, when viewed in context could not be "interpreted as asserting or implying objective facts" that "juvenile name-calling cannot reasonably be read as stating actual facts" and that the post was "obviously intended as a means to ridicule plaintiff." One final comment from the court was that the statements fall into the category of "crude, satirical hyperbole," which, although immature, constitutes Free Speech.

Did you know...?

By: Mark Angert, Esq., Grace Hollis & Hanson LLP mangert@gracehollis.com

Hello everyone! Once again, I want to thank everyone for their comments and suggestions in response to my previous articles. I am glad to know that people found them informative and most of all entertaining. Now I know, I missed the last publication, (practicing law, instead of just writing about it, got in the way), but I am back and once again ready to inform and entertain.

Did you know that a treating physician can provide opinion testimony without becoming a retained expert? The distinction between a retained expert and a treating physician is made based on how the facts surrounding the litigation were obtained. Unlike a retained expert, a treating physician is not consulted for litigation purposes, at least initially. Therefore, a treating physician is a percipient expert who has acquired information regarding the plaintiff or defendant independently during the individual's treatment by that physician.

However, the above does not prevent the physician from giving both fact and opinion testimony, including opinions on causation and the standard of care. "A treating physician is a percipient expert, but that does not mean that his testimony is limited only to personal observations. Rather, like any other expert, he may provide both fact and opinion testimony…what distinguishes the treating physician from a retained expert is not the content of the testimony, but the context in which he became familiar with the plaintiff's injuries that were ultimately the subject of litigation…" *Schreiber v. Estate of Kiser*, (1999) 22 Cal.4th 31, 35-36.

Knowing how much experts tend to charge per hour, this may be a less expensive way to get the necessary testimony without the heart-stopping expert's bill afterwards. Just make sure to explain to your client that California Supreme Court did not consider the physician your client trusted his life to, as an expert.

Speaking of testimony, how many of us arrived to depose a PMK designated by an entity only to realize that to our opponents PMK meant Person with Minimalistic Knowledge of anything? Well, did you know that according to California Code of Civil Procedure §2025.230 "If the deponent named is not a natural person, the deposition notice shall describe with reasonable particularity the matters on which examination is requested. In that event, the deponent shall designate

Save The Date!

Legal Roots: Celebrating 50 years of legal fundamentals, in a FUN-damental way, will be the theme of the NON-political evening event of the year, on October 10, 2008 at the Air and Space Museum in Balboa Park. SAVE THE DATE!

The dinner and program is meant to celebrate those who have worked in the legal community (lawyers, judges, paralegals, secretaries) for 50 years or more, and to mark the 50th anniversaries of the main law library, the American Board of Trial Advocates and Law Day.

The program emcee will be Fox News anchor Heather Myers. Featured will be the Bar News Alive team of Jim Pokorny, John Little and Ken Turek, with a film produced by John Morris. The special guest speaker will be announced soon!

The event will benefit the courthouse museum in Old Town (the first courthouse in San Diego) and the Law Library Justice Foundation. There will be a silent auction, and the museum (with a new Star Trek special exhibit) will be open exclusively to guests of the event. For more details, including sponsorship opportunities, see www.legalroots.com, or call the event chair, George Brewster, at 619-531-4893.

and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent." (Emphasis added.)

This means that if an entity designates a Person Most Knowledgeable in response to your "reasonably particular list of topics" set out in the deposition notice, the PMK must be prepared to speak not only on the topics he knows, but those "reasonably available to the PMK." In addition, when a request for documents is made, the witness or someone in authority "is expected to make an inquiry of everyone who might be holding responsive documents…" in order to respond. *Maldonado v. Sup. Ct.*, (2002) 94 CA4th 1390, 1396.

Feel free to use the above information to explain to the PMK that a deposition is not just a paid day away from the office. They have been named as a Person Most Knowledgeable, and now its time to live up to the title, so spread the knowledge!

Did you know that according to the Chico, California city laws, detonating a nuclear device within the city limits results in a $500 fine?

Two comments: 1. I think the law makers were very ambitious, because they are assuming that there are survivors to enforce and collect the fine and 2. Aren't you glad you live in San Diego?

Remember, what may be obvious to some, may have completely escaped other's attention, and hopefully this editorial can be used to share your individual "tricks of the trade" to help your fellow members. I encourage you to email me with any suggestions or tips for the next editorial at mangert@gracehollis.com. Until next time, I look forward to seeing your suggestions and comments, and who knows we just may learn something.

VOLUNTEER!

LET'S MAKE SDDL EVEN BETTER!

We currently have several openings for committee members in the following sections of san diego defense lawyers. Please contact the committee chair with questions and to sign up!

Membership Committee - - Brian Rawers Esq, Chair (rawers@lbbslaw.com)

Mock Trial Committee - - Eric Miersma Esq, Chair (emiersma@bpplawcorp.com)

The Update Editorial Committee - - Lori Guthrie Esq, Chair (lguthrie@gracehollis.com)

Golf Tournament Committee - - Jim Boley Esq, Chair (jboley@neildymott.com)

Installation Dinner Committee - - Danielle Nelson Esq, Chair (dnelson@fmglegal.com)

Education Committee - - Ken Greenfield Esq, Chair (kgreenfield@gjblaw.com)

THE BOTTOM LINE

Case Title: Rebecca Howell v. Hamilton Meats & Provisions, Inc.; Dion International Trucks, LLC and Juan Saenz

Proceeding: Defendants' post-trial "Hanif" motion to reduce medical expenses in personal injury action (see original trial result in Spring 2008 Edition)

Case Number: GIN 053925

Judge: Honorable Adrienne Orfield, San Diego Superior Court, Vista Branch

Plaintiff's Counsel: Jude Basile of Basile Law Firm, San Luis Obispo, California/John Rice of Lafave & Rice

Defendant's Counsel: Robert Tyson/Mark Petersen of Tyson & Mendes, LLP

Type of Incident/Causes of Action: In this personal injury action, plaintiff underwent two neck vertebrae fusion surgeries, one of which included a bone graft extraction from her left hip. A third surgery was performed to relieve complications on the bone harvest site.

Defendants stipulated to liability, causation, and damages. Plaintiff's total medical bills were submitted to the jury in the amount of $189,978.63. The jury returned a total verdict for $690,000. This award included economic damages of $340,000 and noneconomic of $350,000. The jury awarded the entire stipulated "past medical expenses."

Defendants filed a post-trial motion to reduce the "past medical expenses" portion of the special verdict by the amount of $130,286.90. The motion was based on Hanif v. Housing Authority of Yolo County (1988) 200 Cal. App.3d 635 and Nishihama v. City and County of San Francisco (2001) 93 Cal.App.4th 298, and related authority.

Plaintiff's medical insurer (Pacificare) had waived, or "written off" the amount of $130,286.90 from medical bills incurred at two of plaintiff's primary healthcare providers, Scripps Memorial Hospital-Encinitas and CORE Orthopedic. In their motion, Defendants submitted the medical bills, reflecting the write-off amounts, plus declarations of accounting personnel for the healthcare providers stating plaintiff was not liable for the written off amounts.

After extensive briefing and a hearing on May 19, 2008 which lasted several hours, Judge Orfield granted Defendants' motion on June 10, 2008. Judge Orfield reduced the past medical bills by the amount of $130,286.90 to reflect the amount the medical providers accepted as payment in full. The court ruled the reduction did not violate the collateral source rule, because "evidence of how or why an amount less than the full bill was accepted as payment in full is unnecessary to make this determination." Moreover, since the jury received the gross amount of the medical bills at trial, it

BROWN BAG PROGRAMS

Brown Bag Series Summary – May 13, 2008

Jury Voir Dire

By Beth Obra of Law Offices of Kenneth N. Greenfield

Q: Do you like my tie? A couple prospective jurors answer "Yes" in unison while the majority silently expresses their disapproval of the tie, their body language revealing the opinion that they would not otherwise verbally express. What is the purpose of this inquiry during voir dire? Mr. Rawers believes that this exercise helps to "break the ice" with the jury in order to condition them to provide honest responses to questions posed by the attorneys.

On May 13, 2008, John F. McGuire, Esq. of Thorsnes Bartolotta & McGuire and Brian A. Rawers, Esq., a partner at the San Diego office of Lewis Brisbois Bisgaard & Smith, LLP spoke at the San Diego Defense Lawyer Brown Bag MCLE regarding "Jury Voir Dire."

Mr. McGuire earned his law degree from Marquette University in 1975 graduating Cum Laude. During his 30 years of the practice of law, Mr. McGuire has received four "Outstanding Trial Lawyer" awards for his trial work and was selected as one of the Top 100 California Trial Lawyers by The American Trial Lawyers Association. He is also a member of the American Board of Trial Advocates and has served as a lecturer and panelist in trial technique seminars given across the country.

Mr. Rawers earned his law degree from Washington University in 1981 and has distinguished himself as a formidable advocate in the areas of professional liability, medical malpractice, legal malpractice, dental malpractice defense and general liability. Mr. Rawers is also a trial and evidence instructor for the San Diego Inns of Court and is a member of the American Board of Trial Advocates.

In their discussions of voir dire, Messrs. McGuire and Rawers provided valuable insight into what many believe to be the most challenging phase of trial. Voir dire means "to speak the truth" and refers to the process by which prospective jurors are questioned about their backgrounds and potential biases before being chosen to sit on a jury.

Although preparation is key, Messrs. McGuire and Rawers emphasized that one of the first steps in this process is to question the judge on how he or she handles voir dire. They stated that it is especially important to find out the number of persons subject to voir dire at a single time and the amount of time each attorney is given to conduct voir dire. They also recommended that sensitive topics be left to the judge for questioning in order to lessen the impact of the subject with the jurors during follow-up questioning by the attorneys. Alternatively, Messrs. McGuire and Rawers indicated that voir dire issues can be handled via motions in limine or through juror questionnaires.

Messrs. McGuire and Rawers described the need for organization in voir dire. They suggested memorizing names in order to build rapport with the jurors, as the attorney whom the jurors like or trust has the greatest likelihood of convincing the jury of his or her position. Mr. Rawers also demonstrated the effective use of "sticky-notes" on a jury box grid in order to keep track of juror numbers, their responses, and peremptory challenges.

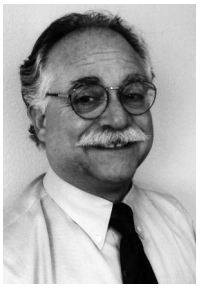
In dealing with standards of conduct during voir dire, Messrs. McGuire and Rawers emphasized common courtesy in the courtroom. They have found that this tends to make the jurors more comfortable, thus increasing their receptiveness, and also sets the tone of trial. In addition, maintaining a professional demeanor tends to affect the number of objections asserted during voir dire – where they cautioned that the "Golden Rule" approach often applies.

In sum, Messrs. McGuire and Rawers indicated that voir dire is essentially a system where you root-out the individuals that "may not be the right fit for trial" – just like that tie you wish you hadn't worn.

Save the Date

The SDDL Installation Dinner for 2009 will take place on Saturday January 24, 2009 at the Hard Rock Hotel in downtown San Diego near Petco Park.

Brown Bag Series Summary- June 10, 2008



Opening Statements

By Ken Greenfield, Law Offices of Kenneth N. Greenfield

Two preeminent and experienced ABOTA trial attorneys graced us with their presence at SDDL's June 10 Brownbag Seminar on "Opening Statements." Married in private life, attorneys Debra Hurst and Doug Walters gave one of the finest trial practice seminars of the year.

With no notes in their possession, Doug and Deb spoke in ad libbed fashion for nearly an hour expressing their thoughts and experiences with the all important "opening statement." Bearing in mind the significance of the opening statement, they agreed that one should never waive opening. And, when giving your opening statement, talk to the jury like they are the human beings you know them to be. Be human yourself. If you make a mistake by lapsing into the facts of another

one your cases, back up and tell the jurors what you just did. They will have respect for you and identify with you as a human being. You are not perfect. There is nothing wrong with letting them know this. Sometimes as a young lawyer when you mistakenly knock the pitcher of water over onto counsel table, and the bailiff runs over to you with paper towels in hand, you are not necessarily looking like the fool you think you are. You are simply looking human. You may have even scored points with the jury!

Stand behind the podium only if it suits your style. Even so, step away at times from both your notes and the podium in order to be more open and personal with the jury. In fact, if at all possible, don't use any notes at all. After all, when it comes down to it, there should only be three parts to any opening statement - - the introduction, the "what the evidence will show" section, and the conclusion. At most, a short outline is all you should have at your fingertips.

24th Annual Red Boudreau Dinner- 2008

Every year, the Association of Business Trial Lawyers, the American Board of Trial Advocates, the Consumer Attorneys of San Diego, and the San Diego Defense Lawyers honor a trial attorney in the community with the Daniel T. Broderick III Award. The award acknowledges recipients Civility, Integrity and Professionalism in their practice of law. On May 17, 2008 at the U.S. Grant, the honoree was distinguished trial attorney and SDDL member **Michael I. Neil, Esq.** Everyone knows Mike Neil: retired marine, sometimes news commentator, accomplished trial attorney, and shareholder of Neil, Dymott, Frank, McFall & Trexler (not coincidentally, I am sure- six attorneys from his law firm were recognized as Super Lawyers for 2008). Mr. Neil himself was also recognized as a 2008 Super Lawyer for San Diego (One of the Top 10!). He was also recognized as one of the Top 50 Super Lawyers in San Diego for 2007.

As in past years, his year's Red Boudreau Dinner benefited the Children of St. Vincent de Paul Villages. Several members of the SDDL attended. We are proud to have Mr. Neil as a part of our organization

Save the Date

The SDDL Mock Trial Competition will take place on October 16, 17 and 18, 2008. Clear your calendars now, and volunteer to judge this fun and exciting competition bringing law school students from all over the United States to San Diego.

had an "accurate understanding of the severity of Plaintiff's injuries." By reducing the medical bills post-trial, the Court noted it followed the "well-established principle that a plaintiff is entitled to recover an amount that would make her whole, but not overcompensate her." [Note- The motion was opposed by attorney John Rice, whom plaintiff hired specifically for this purpose.

Special thanks to fellow SDDL member Peter Doody for his generous donation of time, experience, and intelligence in assisting with the filing of this successful motion.

THE BOTTOM LINE

Case Title: Jose Canela v. American Medical Response of Southern California

Case No.: VC046190 (Los Angeles)

Judge: Honorable Patrick E. Meyer

Plaintiff's Counsel: Louis Krass, The Krass Law Firm, APC

Defendant's Counsel: Phillip L. Hack, Farmer Case & Fedor

Demand: $2,000,000 at trial. $300,000 (per CCP §998) prior to trial.

Offer: $150,000 raised to $225,000 prior to trial (per CCP §998).

Trial Type: Jury

Trial Length: 3 weeks

Verdict: For plaintiff. Gross: $ 237,500 reduced to $190,000 for plaintiff's 20% comparative negligence. The case settled, post trial for $140,000 after reduction of recoverable costs.

Facts: This case arose from an auto versus ambulance T-bone accident in the Vernon community of Los Angeles. An AMR ambulance crew was leaving the scene of a "cleared" call that already had sufficient police, fire and paramedic assets on scene. In leaving the scene, the ambulance driver waited for an oncoming truck to pass by and then made an illegal U-turn, The ambulance driver slowly pulled out and across the traffic lanes in front of plaintiff Canela, whom he apparently did not see approaching due to the truck that had just passed him in the opposite direction. Police and fire personnel on scene reported seeing the emergency lights activated but not hearing any sirens. Canela was traveling at approximately 35-40 mph and was unable to stop in time to avoid the collision. He hit the driver's door of the ambulance at a moderate impact.

Jose Canela reported pain in his ribs, chest, head, eye and right knee, as well as a 2 cm laceration on his tongue. He also claimed a brief loss of consciousness after the impact. A CT scan of his head was normal and Canela was treated for miscellaneous "bumps and

Bottom Line con't on page 14

New Laws, New Claims, New Policies?

Workplace Bullying

By Brian L. McDermott and Christopher C. Murray

"Workplace bullying"—it's become the object of academic study, the focus of a small advocacy movement, and even occasionally a topic of afternoon television talk shows, but so far, it's not become a specific legal claim. That could change. "Workplace bullying" legislation has been introduced in 13 states in the past five years, and the Indiana Supreme Court is presently reviewing a case described as the first workplace bullying action in the country. Other cases making similar allegations could follow.

For those wondering, "What is 'workplace bullying' exactly?," we offer this primer. We start with the facts alleged in two employment cases to help illustrate the problem.

Case #1

Michelle Snyder went to work for Medical Service Corporation in 1996 as a case manager. A few months later, Celestine Hall was hired as her supervisor. Hall was an imposing figure, standing over six feet tall and weighing 300 pounds, and she employed a forceful management style. Her subordinates described her as "authoritarian, belligerent, and in everyone's face" and claimed that she routinely embarrassed them in front of their peers. Hall allegedly towered over her employees "in a threatening manner" as they sat at their desks, addressed her department in a voice that tended to become "louder and louder," and generally acted with a high level of agitation that was upsetting to her employees. The department under her leadership became charged with tension and stress. Before long, four of the employees Hall supervised quit, citing her as the reason for their resignations.

Snyder stuck it out, although it apparently wasn't easy. In one incident, after Snyder asked Hall for a raise to compensate her for taking on additional workplace responsibilities, Hall threatened her with discipline. A few months later, Hall informed Snyder that she would be getting a raise, but warned her that if she told anyone else at the company, Hall "would literally hunt [her] down and 'kill her.'"

Another time, in February 1997, Hall convened a staff meeting at which she proposed a "push-day" during which all employees would come in and work on Saturday without extra compensation. Snyder objected, explaining that she had plans to spend that day with her children. Hall responded by mocking Snyder in front of the group, causing Snyder to leave the meeting. Hall later caught up with Snyder to confront her, poking her in the chest and accusing her of being insubordinate. The encounter left Snyder upset, crying, hysterical, and shaken.

That same day, Snyder was given medication to treat her for distress and was advised by her doctor to take two weeks off from work. The doctor later extended that prescription to four weeks off. At that point, Snyder met with the medical director of MSC, who was also Hall's supervisor, and complained of the work environment Hall was creating. Snyder explained that she wanted to continue working for the company, but requested that she work under the supervision of someone besides Hall. The medical director refused.

After Snyder's doctor would not release her to return to work under Hall's supervision, Snyder finally quit.

Case #2

Norma Rivas worked for Alamo Rental Car, where she was supervised by Nubia Duron. Duron was prone to frequent and graphic sexual discussion at work, describing in some detail various sexual acts that she performed with her husband, co-workers, and truck drivers who delivered new vehicles to the job site. Eventually, Rivas, who wished to avoid Duron's sexual talk, began refusing to ride in the work van that was driven by Duron, and Duron thereafter followed Rivas around the jobsite calling her "puta" (whore). In addition, Duron allegedly tried to hit Rivas with the van, blocked in the cars of other employees to make their jobs more difficult, and once, when the van was being driven by another employee, remained in the back, "without moving and merely staring at [the other employee] to make her uncomfortable."

Rivas complained about Duron's conduct to higher-level managers. As a result of the complaints, Rivas, Duron, and other members of their work group were all required to attend together a sexual harassment training course. Duron used the class as an opportunity to express her displeasure with Revas, ridiculing her in front of the group. According to the instructor of the course, Duron acted like a "bully" during the class, "mak[ing] jokes at the expense of others" and using her "authority and influence within the group to freeze-out others."

Rivas ended up receiving written warning notices for her refusal to ride in the work van with Duron, was placed on probation, and, after going out on a medical leave of absence, never returned to work.

What Is "workplace bullying"?

Heinz Leymann, a researcher working in Sweden, first focused on the phenomenon of workplace bullying in the 1980s, after his interest in the subject evolved from his study of schoolyard bullying. He referred to the phenomenon as "mobbing," which he described as a form of "psychological terror" involving hostile communication systematically directed by one or more individuals towards another.

The concept of workplace bullying started to catch on in the 1990s, when a number of European countries began investigating and regulating categories of psychological and emotional workplace abuse that were variously described as "bullying," "mobbing," or "moral harassment." The first of these was Sweden, which in 1993 adopted an ordinance aimed at preventing and remedying "victimization at work." "Victimization" was broadly defined in the ordinance as "recurrent reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community." Other countries, including the Netherlands, France, Belgium, Denmark, and Finland, followed suit in adopting new regulation to deal with the problem, while countries such as the United Kingdom, Ireland, and Germany studied the issue and concluded that their existing legislation provided sufficient means to combat it.

In the United States, academic researchers studying organizational psychology and management also turned their attention to workplace bullying. According to Pamela Lutgen-Sandvik, a professor at the University of New Mexico, researchers identified bullying as "a type of interpersonal aggression at work that goes beyond simple incivility." It consists of a pattern of persistent, hostile behavior that its targets perceive as an "effort to harm, control, or drive them from the workplace" and "includes public humiliation, constant criticism, ridicule, gossip, insults, and social ostracism."

Some state governments are beginning to take note of the phenomenon. For instance, the Washington State Department of Labor and Industries issued a report in 2006 addressing workplace bullying, which it described as "repeated, unreasonable actions" directed towards an employee that are "intended to intimidate and creates a risk to the health and safety of the employee." The report further explained:

Workplace bullying often involves an abuse or misuse of power. Bullying includes behavior that intimidates, degrades, offends, or humiliates a worker, often in front of others. Bullying behavior creates feelings of defenselessness in the target and undermines an individual's right to dignity at work.

The Swedish Ordinance gives the following examples of specific types of behavior that can constitute bullying:

- Slandering or maligning an employee or his or her family.
- Deliberately withholding work-related information or supplying incorrect information of this kind.
- Deliberately sabotaging or impeding the performance of work.
- Obviously insulting ostracism, boycott or disregard of the employee.
- Persecution in various forms, threats and the inspiration of fear, degradation, e.g., sexual harassment.
- Deliberate insults, hypercritical or negative response or attitudes (ridicule, unfriendliness, etc.).
- Supervision of the employee without his or her knowledge and with harmful intent.
- Offensive "administrative penal sanctions" that are suddenly directed against an individual employee without any objective cause, explanation, or effort at jointly solving any underlying problems. The sanctions may, for example, take the form of groundless withdrawal of an office or duties, unexplained transfers or overtime

requirements, manifest obstruction in the processing of applications for training, leave of absence and suchlike.

Similarly, Washington Department of Labor and Industries' report lists:

- Unwarranted or invalid criticism
- Blame without factual justification
- Being treated differently than the rest of your work group
- Being sworn at
- Exclusion or social isolation
- Being shouted at or being humiliated
- Being the target of practical jokes
- Excessive monitoring

Researchers have found that bullying can cause significant harm to the physical and mental health of the bullied "target." The effects of workplace bullying can range from severe anxiety, disrupted sleep, and loss of concentration to post-traumatic stress disorder, clinical depression, and panic attacks. In some instances, even cardiovascular stress-related disease can result. Bullied targets also suffer economic consequences through increased absenteeism and, for many, ultimately job loss.

Researchers have also found that workplace bullying is fairly common. For example, in a recent Zogby International survey of over 7000 employees, thirty-seven percent reported experiencing workplace bullying at some point in their work lives in the form of sabotage by others that prevented work from getting done, verbal abuse, threatening conduct, intimidation, or humiliation. The survey found that bullying is four times more prevalent than illegal harassment.

Legislating Workplace Bullying

A movement is now underway in the U.S. to ban workplace bullying through legislation. Leading these efforts is the Workplace Bullying Institute (WBI), run by two psychologists, Gary and Ruth Namie, who have contributed significantly to popularizing the concept of workplace bullying in the U.S. through books, websites (such as www.bullybusters.org and www.workdoctor.com), and numerous media appearances. WBI is dedicated to raising public awareness of workplace bullying, sponsoring research relating to it, and lobbying state governments to enact anti-bullying legislation.

The currently proposed anti-bullying legislation takes its cues from anti-discrimination law. Title VII already creates a right for employees to be free from a "hostile work environment" in which severe or pervasive harassment based on the employee's sex, race, or other protected characteristic effectively changes the terms and conditions of the employee's employment.

Looking to Title VII, law professor David Yamada proposed that employees should be protected under the law from "hostile work environments" in general and not just with respect to discriminatory harassment. To this end, he drafted model legislation called "The Healthy Workplace Bill," which would make it an unlawful employment practice

"to subject an employee to an abusive work environment." Such an environment exists, according to this proposed law, "when the defendant, acting with malice, subjects the complainant to abusive conduct so severe that it causes tangible harm to the complainant." "Abusive conduct" would be defined as:

conduct that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. In considering whether abusive conduct is present, a trier of fact should weigh the severity, nature, and frequency of the defendant's conduct. Abusive conduct may include, but is not limited to: repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person's work performance. A single act normally will not constitute abusive conduct, but an especially severe and egregious act may meet this standard.

Under the Healthy Workplace Bill, a prevailing plaintiff would be entitled to reinstatement, back pay, front pay, medical expenses, compensation for emotional distress, punitive damages, and attorneys' fees. A court would, in addition, be authorized under the law to order "removal of the offending party from the complainant's work environment."

According to the WBI—which has been lobbying for passage of the Healthy Workplace Bill—13 states have introduced anti-bullying legislation since 2003. These are as follows:

1. California became the first state to consider the bill (AB 1582) in 2003.
2. Oklahoma saw the bill introduced in 2004 (HB 2467) and again in 2007 (HB 1467).
3. In Hawaii, bills have been introduced in four years: 2004 (SB 2353), 2005 (SB 481 and HB 232); 2006 (SB 3269 and HB 2840), and 2007 (SB 253, HB 868, and HB 1806). In addition, a senate resolution in 2006 (106) urged employers to adopt anti-bullying policies voluntarily.
4. Oregon has considered the bill twice, in 2005 (HB 2410 and HB 2639) and 2007 (SB 1035).
5. Massachusetts introduced the bill in 2005 (H 3809).
6. Missouri considered it in 2006 (HB 1187).
7. Kansas considered it in 2006 (HB 2990).
8. New Jersey introduced the bill in 2006 (A3590).
9. Montana introduced it in 2007 (HB 213).
10. Connecticut introduced it in 2007 (SB 371). ing trial, Doescher's counsel consistently called Dr. Raess a bully. He even was permitted to introduce expert testimony from WBI- founder Gary Namie, opining that Dr. Raess was indeed a "workplace bully." And in his closing argument, Doescher's counsel referred to bullying eleven times, again cited Namie's expert opinion, and asked the jury for a verdict "in favor of Joe Doescher," explaining that it would be "a verdict against a workplace

bruises" type injuries apparently caused by his body and head impacting the steering wheel and windshield, respectively.

Within 18 months of the accident Canela began treatment at Kaiser for depression and anxiety. His subjective complaints included suicidal ideation, PTSD, head pain with frequent headaches, difficulty sleeping, problems with his concentration and memory, decreased appetite and energy, and emotional swings such that he is unable to enjoy life. Canela also professed a fear of driving and had to quit working due to the antipsychotic medications he was prescribed.

THE BOTTOM LINE

Case Title: Clifford Hoggatt v. Laidlaw Transit, Inc.

Case No.: GIC 874496

Judge: Honorable John S. Meyer

Plaintiff's Counsel: William C. Mathews and James T. Bentson

Defense Counsel: Phillip L. Hack, Farmer Case & Fedor

Demand: $160,000

Offer: $1,500 (per CCP §998)

Trial Type: Jury

Trial Length: 4 days

Verdict: Defense verdict, 12-0

Facts: The lawsuit arose out of an incident in which 46 year-old plaintiff Hoggatt claimed he injured his left arm, rotator-cuff and shoulder when the bus driver closed the doors on him as he was boarding a transit bus in San Diego. The bus driver denied closing the doors on Hoggatt and maintained that she only closed the doors on a shopping cart that Hoggatt was pulling because he boarded closely behind the woman that accompanied him.

bully." The jury responded favorably, awarding Doescher $325,000 on his assault claim, although it found for Dr. Raess on the intentional infliction of emotional distress charge.

The Indiana Court of Appeals later reversed, holding that it had been error for the trial court to deny Dr. Raess's request for a jury instruction stating that there is no legal claim for workplace bullying. The court also held that Namie's expert testimony labeling Dr. Raess as a "workplace bully" unfairly prejudiced him. Unfortunately, the Indiana Court of Appeals left open the issue of whether an expert in "workplace bullying" is a qualified expert. However, the Indiana Supreme Court accepted the case and heard oral arguments in October 2007. The appeal remains pending.

The Costs of Workplace Bullying to Employers Now

Even if anti-bullying legislation ultimately fails to pass and even if courts conclude that expert testimony labeling a defendant as a "workplace bully" is inadmissible, employers still face substantial litigation risks due to bullying bosses.

Turning back to the two cases discussed at the beginning of this article, notably neither of them involved a "claim" of workplace bulling. When Michelle Snyder sued her former employer, it was for intentional and negligent infliction of emotional distress, among other things. *See Snyder v. Medical Service Corporation of Eastern Washington,* 35 P.3d 1158 (Wash. 2001). And Norma Rivas sued her employer for sexual harassment and retaliation under Title VII. *See Rivas v. Steward Ventures, Inc.*, CV-05-3801, 2007 WL 496767 (D. Az. Feb. 13, 2007).

But the facts alleged in both of these cases suggest that what they were really about was bullying. In both cases, the employees contended that they had been repeatedly targeted with unreasonable, hostile conduct by their supervisors, including conduct that humiliated them in front of their peers.

The lesson of cases such as these is that employees who feel they have been harmed by a bullying boss can find ways to sue, even absent the existence of a specific claim for bullying. Employees in such circumstances may bring actions, among others, for:

- Assault
- Intentional Infliction of Emotional Distress
- Intentional Interference with a Business Relationship
- Breach of Contract
- Discrimination or Harassment under an antidiscrimination law
- Retaliation
- Worker's Compensation
- Occupational Safety And Health Act violations

In addition to litigation, workplace bullying can impose other significant costs on employers. Workplace bullying leads to decreased job satisfaction, reduced organizational commitment, and increased absenteeism and turnover. Researchers have found that bullying can increase negative emotional states among employees that are associated with reduced "helping behavior," lowered levels of creativity, a decreased willingness to initiate conversations with others, decreased receptiveness to persuasive communication, and a predisposition to perceive failure. Hardly a recipe for success.

Recommendations

Surveys also suggest that employers are currently ill-prepared to deal with "workplace bullying" situations. Studies have found that employee targets who report alleged bullying to the direct supervisor of the bully rarely receive helpful responses. Indeed, many survey respondents indicate

that their reporting the problem only made it worse.

Given its high costs, employers should recognize workplace bullying as a potentially serious problem and find a way to address it when it arises. Fortunately, most employers already have in place a framework for doing so: the policies and procedures prohibiting discriminatory harassment in the workplace. Employers should be able to acknowledge, prevent, and remedy workplace bullying effectively by modifying their existing policies.

To address workplace bullying, employers should:

- Implement policies. Expand current anti-harassment policies and/or codes of conduct to prohibit all abusive behavior, including workplace bullying.
- Provide training. When employers conduct training dealing with hostile work environment harassment, that training should emphasize that harassment, bullying, or degrading behavior of any type will not be tolerated, regardless of whether it is linked to an alleged target's protected class under an anti-discrimination statute.
- Create a complaint procedure. Provide a means for employees to report bullying behavior and for such complaints to be investigated and, if appropriate, corrected. Ensure that the procedure protects the purported target from possible retaliation.

Many jobs, even under the best of circumstances, can be stressful and competitive at times. It's not unreasonable to expect that supervisors will occasionally be forceful, aggressive, and abrupt. After all, supervisors can succumb to the pressures of a job just like everyone else, and civility may take a vacation at such times. At the same time, it's becoming increasingly clear that employers may need to set and enforce certain expectations for employee conduct. Abusive interactions—whether or not they're called workplace bullying—should not be tolerated for the good of the employee and for the good of the employer.

Brian L. McDermott is a shareholder in the Indianapolis office of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., where he represents and provides advice to public and private employers on a variety of labor and employment issues, including the FMLA, ADA, Title VII, ADEA, ERISA, FLSA, NLRA, covenant not to compete/trade secret matters, wage claims, and wrongful discharge. Christopher C. Murray, an associate also in the Ogletree Deakins's Indianapolis office, concentrates his practice on litigation, representing clients in individual, class, and collective actions.

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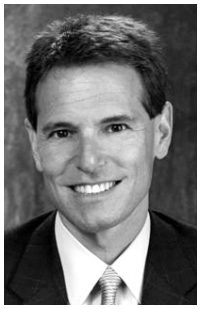
Save the Date

The SDDL Mock Trial Competition will take place on October 16, 17 and 18, 2008. Clear your calendars now, and volunteer to judge this fun and exciting competition bringing law school students from all over the United States to San Diego.

Save the Date

The SDDL Installation Dinner for 2009 will take place on Saturday January 24, 2009 at the Hard Rock Hotel in downtown San Diego near Petco Park.

INSURANCE LAW



James R. Roth, Esq.
The Roth Law Firm

Since our last edition, our intermediate and high courts have been preoccupied with many issues in which insurance was not at the centerpiece. In this edition, we discuss two recent decisions which apply both the clear language of the insurance policies and common sense – two concepts which have not always been mutually compatible.

METHYLENE CHLORIDE WHICH HAD BEEN DISCHARGED INTO PUBLIC SEWER SYSTEM BY INSURED WAS "POLLUTANT" WITHIN MEANING OF POLLUTION EXCLUSION OF COMPREHENSIVE GENERAL LIABILITY POLICY WHICH DEFINED POLLUTANTS AS INCLUDING, INTER ALIA, CHEMICALS. In American Casualty Co. of Reading, PA. v. Miller (2008) 159 Cal.App.4th 501, 71 Cal.Rptr.3d 571, the California Court of Appeal for the Second District held that a pollution exclusion clause of a furniture stripper's comprehensive general liability (CGL) policy barred coverage for injuries sustained by a sewer worker who was exposed to methylene chloride discharged into public sewer system by the insured. Michael Miller (Miller) owned a furniture stripping business called Stripper Herk located in Santa Monica, California. As part of the business, Stripper Herk generated wastewaters containing solvents, including methylene chloride, and generated hazardous wastes that accumulated in drums on the premises. The City of Santa Monica issued Stripper Herk an "Industrial Wastewater Permit-Manufacturing Facility." The permit allowed Stripper Herk to discharge wastewater from its premises into the City's sewer. The permit, however, prohibited the discharge of any solvents, including methylene chloride, into the sewer.

American Casualty Company of Redding, PA. (American Casualty), provided Miller, doing business as Stripper Herk, with a CGL policy. Under Coverage A, the policy provided coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' " caused by an occurrence during the policy period. The policy also obligated American Casualty "to defend the insured against any 'suit' seeking damages." The CGL policy contained a pollution exclusion clause which provided in pertinent part that Coverage A did not apply to: "(1) 'Bodily Injury' or 'property damage' arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants': [¶] (a) At or from any premises, site, or location which is or was at any time owned or occupied by, or rented or loaned to, any insured." The CGL policy defined "pollutants" as follows: "[A]ny solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

On the morning of March 26, 2003, a private contractor hired by the City of Santa Monica was working in the City's sewer lines, which were downstream of the premises of Stripper Herk. Valenzuela, an employee of the private contractor, was repairing a 36-inch sewer line in front of and approximately 20 feet below Stripper Herk. Valenzuela noticed wastewaters discharging from a drain outlet into the sewer. The wastewaters soaked Valenzuela's clothing and caused him to lose consciousness. Monitors that measure the presence of dangerous chemicals sounded. Valenzuela sustained serious bodily injuries.

Later that day, inspectors from the City of Santa Monica Environmental and Public Works Management, Industrial Waste Section, inspected Stripper Herk. The investigators discovered organic solvents, including methylene chloride, discharging into Stripper Herk's floor sump and into the City's sewer system. The investigators conducted a dye test, which confirmed that Stripper Herk's industrial waste sump was tied into the sewer leading into the section of sewer line where Valenzuela was working at the time of the incident. The investigation resulted in federal criminal proceedings against Miller. The federal proceedings concluded with Miller entering a plea agreement with the United States Attorney's Office for the Central District of California. There, Miller pled guilty to: (1) negligent discharge of pollutants into a publicly-owned treatment works in violation of a permit; and (2) storage of hazardous wastes without a permit. In the plea agreement, Miller and the United State Attorney stipulated to the following: "[Miller] and his employees allowed such wastewaters to flow into a sump located on the floor of [Stripper Herk's] premises. Located in the sump was a pipe connected to the [sewer]. The pipe was not properly sealed, which negligently allowed some of the wastewaters that accumulated in the sump to flow into the pipe and thereafter discharge into the [sewer]." Neither party presented any evidence as to how long methylene chloride wastewaters had escaped into the sewer.

On June 16, 2003, Zurich American Insurance Company (Zurich) sued Stripper Herk for reimbursement of workers' compensation benefits paid to Valenzuela following the incident. There, Zurich alleged that Stripper Herk caused or permitted toxic compounds to enter the sewer and injure Valenzuela. Zurich also alleged that Stripper Herk retained sufficient control over its premises to owe Valenzuela a duty of care to avoid exposing him to an unreasonable risk of harm. Zurich alleged that the release of wastewaters breached the duty of care. Miller notified American Casualty of the Zurich action, and that Zurich was seeking reimbursement of workers' compensation benefits it had paid and would pay to Valenzuela. American Casualty denied the claim based on the pollution exclusion clause, and refused to defend or indemnify Miller with respect to the claim.

In February 2004, Valenzuela filed suit against Miller and Stripper Herk. Valenzuela alleged eight causes of action, including: negligence, negligence per se, premises liability, strict liability, battery, assault and negligent and intentional infliction of emotional distress (the Valenzuela action). Valenzuela alleged, inter alia, that Miller and Stripper Herk breached a duty of care by discharging wastewaters containing methylene chloride. In May 2004, Miller tendered the Valenzuela

action and re-tendered the Zurich action to American Casualty. On May 28, 2004, American Casualty refused to defend or indemnify Miller with respect to the lawsuits. In January and February 2005, Miller again requested that American Casualty defend and indemnify him for damages resulting from Valenzuela's injuries. American Casualty again refused.

In June 2005, the parties settled the Valenzuela action against Miller and Stripper Herk. As part of the settlement agreement, Miller assigned his rights under the CGL insurance policy to Valenzuela. Valenzuela made a policy limit demand on American Casualty of $1 million. American Casualty declined the demand. On June 7, 2005, American Casualty filed a complaint for declaratory relief against Miller, doing business as Stripper Herk, and Valenzuela. American Casualty alleged that pursuant to the CGL insurance policy, it had no duty to defend or indemnify Miller in either the Valenzuela or Zurich action. Defendants answered and filed a cross-complaint.

On April 26, 2006, the trial court granted summary judgment in favor of American Casualty. The trial court found that under the pollution exclusion clause, quoted above, American Casualty was not required to defend or indemnify Miller, doing business as Stripper Herk, and thus had no liability to Valenzuela for his injuries from the methylene chloride. Defendants timely filed a notice of appeal. In affirming the lower court, the appellate court relied upon the case of MacKinnon v. Truck Ins. Exchange (2003) 31 Cal.4th 635, 3 Cal.Rptr.3d 228. In MacKinnon, the California Supreme Court addressed the meaning and scope of a pollution exclusion clause in a CGL policy. There, the Supreme Court found the pollution exclusion clause was intended to exclude coverage for injuries resulting from events commonly thought as environmental pollution. Applying the MacKinnon rationale, this court found that the injured worker's injuries arose from an event commonly thought of as environmental pollution and that an ordinary insured would reasonably expect that the release of methylene chloride into a public sewer is environmental pollution and affirmed the grant of summary judgment.

THE EXHAUSTION CLAUSE PRECLUDED AN EXCESS INSURER'S LIABILITY WHEN THE INSURED'S SETTLEMENT WITH ITS PRIMARY INSURER IS FOR LESS THAN THE POLICY LIMITS. In Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London (2008) 161 Cal.App.4th 184, 73 Cal.Rptr.3d 770, the California Court of Appeal for the Fourth District (in San Diego) held that the exhaustion clause in an excess director and officer liability policy, providing that the excess insurer "shall be liable only after the insurers under each of the Underlying Policies have paid or have been held liable to pay the full amount of the Underlying Limit of Liability," unambiguously precluded that excess insurer's liability for its insured's losses in excess of the primary policy's limit after the insured settled with its primary insurer for less than the primary policy limit. In so ruling the court noted that taking into account the nature of the excess insurance policy, an objectively reasonable expectation of the insured would be that the primary insurance policy would have to be exhausted before the excess insurance would attach.

In May 1999, certain Qualcomm employees filed a class action lawsuit related to their asserted right to unvested company stock options. Other Qualcomm employees and former employees followed with separate lawsuits. With one apparent exception in which it prevailed on summary judgment, Qualcomm settled these lawsuits, incurring approximately $3.6 million in unreimbursed defense expenses for the class action and unreimbursed expenses in connection with settlement of the other litigation in an estimated amount of over $9 million. Qualcomm tendered those litigation matters to its director and officer (D & O) liability insurers, including National Union Fire Insurance Company of Pittsburgh, P.A. (National) and Certain Underwriters at Lloyd's, London (Underwriters). National had issued Qualcomm a primary D & O insurance policy, with a liability limit of $20 million. The National policy insured Qualcomm and its directors and officers for a " 'Loss' " including " 'damages, judgments, settlements and Defense Costs,' arising from a 'Claim' " including a civil lawsuit. Underwriters had issued Qualcomm a first layer excess "following form" D & O reimbursement policy for the same time period (the excess policy), providing $20 million in coverage for losses in excess of the underlying $20 million primary policy limit. The excess policy contained a "Maintenance of Underlying Policies" clause. Incorporating its definitions, that clause provided: "This Policy provides excess coverage only. It is a condition precedent to the coverage afforded under this Policy that [Qualcomm] maintain [the National policy] with retentions/deductibles, and limits of liability (subject to reduction or exhaustion as a result of loss payments) . . . . This Policy does not provide coverage for any loss not covered by the [National policy] except and to the extent that such loss is not paid under the [National policy] solely by reason of the reduction or exhaustion of the Underlying Limit of Liability through payments of loss thereunder.

In the event [National] fails to pay loss in connection with any claim as a result of the insolvency, bankruptcy or liquidation of said insurer, then those insured hereunder shall be deemed self-insured for the amount of the Limit of Liability of said insurer which is not paid as a result of such insolvency, bankruptcy or liquidation." In a "Limit of Liability" section, the excess policy also contained a clause (referred to by the parties as the exhaustion clause) providing that "Underwriters shall be liable only after the insurers under each of the Underlying Policies [the National policy] have paid or have been held liable to pay the full amount of the Underlying Limit of Liability."

In April 2004, Qualcomm, National and Underwriters participated in a mediation concerning coverage for the litigation. Qualcomm thereafter settled with National under an agreement providing it would release National from all future obligations under the National policy in exchange for National's commitment to reimburse Qualcomm for additional settlement payments and defense expenses for the non-class action litigation, bringing National's total payment under its policy to $16 million. In October 2006, Qualcomm sued Underwriters for breach of contract and declaratory relief. It sought compensatory damages as well as a judicial declaration that Underwriters were obligated to indemnify Qualcomm under the excess policy for more than $9 million in unreimbursed expenses Qualcomm had incurred in connection with the defense and settlement of the non-class action litigation, "provided that Qualcomm, [National], or other third parties paid at least $20 million in defense and indemnity of Qualcomm for [the litigation matters]." Qualcomm also alleged it had "paid the required premiums in full and has satisfied all other conditions to coverage, or is otherwise excused from doing so."

The appellate court held that the excess language in question unambiguously stated that the excess carrier's obligation should only arise after the primary insurer had paid the limits of his coverage or after the insured had been held liable to pay the full amount of the underlying limits of liability. The court ruled that the phrase "had paid the full amount of limits of liability" could only reasonably be interpreted as meaning the actual payment of no less than $20 million, particularly when considered in the overall context of the policy in which it was included. Further, the court held that the clause that the insured "had been liable to pay the full amount of the underlying limit of liability" was not susceptible of contrary meanings and could only reasonably be understood as only requiring coverage where a court order or judgment had entered declaring the insured's liability to pay more than the underlying limits.

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If you need more information about the DRI Complex Medicine Seminar or have questions about registration, contact Patrick Kearns at Patrick.kearns@wilsonelser.com. See you in November!

EXTRA!!! Member News EXTRA!!!

Robert Harrison has joined the San Diego office of Wilson, Elser, Moskowitz, Edelman & Dicker LLP as a partner effective May 1, 2008 according to Lane Webb, Managing Partner of Wilson Elser's San Diego office. Mr. Harrison was previously a partner in the San Diego offices of Koeller, Nebecker, Carlson & Haluck LLP and Neil Dymott. In addition, Tracey VanSteenhouse and Patrick Kearns, who have worked with Mr. Harrison at his previous firms, have joined the office as Associates.

Mr. Harrison specializes in civil litigation with emphasis in professional liability, products liability, wrongful termination/employment law and business litigation. He has also successfully handled a number of plaintiff litigation matters in the areas of personal injury, products liability and wrongful termination. He has tried over 100 cases to jury verdict. He also has extensive experience in the area of administrative hearing before professional licensing boards of the state of California. He is a member of the California State Bar and is admitted to practice before the U.S. Court of Appeals, Ninth Circuit and the U.S. District Court for the Southern District of California. He is past President of the Association of Southern California Defense Counsel and past President of the California Defense Counsel and the San Diego Barristers Club. He is an advocate member of the American Board of Trial Advocates "ABOTA") and is a Fellow of the International Academy of Trial Lawyers, which is limited to 500 active members from throughout the United States. Mr. Harrison was also named the San Diego Defense Lawyer's 2004 Defense Lawyer of the Year. Mr. Harrison specializes in civil litigation with emphasis in medical malpractice, legal malpractice, products liability, wrongful termination/employment law and business litigation.

Mr. Harrison was one of the Top 50 lawyers in terms of point totals in the 2008 San Diego Super Lawyers nomination, research and blue ribbon review process." **Tracey M. VanSteenhouse** was born in Johannesburg, South Africa. She attended the University of California, Santa Barbara, where she earned her Bachelor of Arts degree in Law and Society.

Mrs. VanSteenhouse received her Juris Doctorate from California Western School of Law. Her experience includes defense of medical and professional malpractice, employment law and contract disputes. Mrs. VanSteenhouse was recognized in 2006 as Outstanding New Lawyer by the San Diego Defense Lawyers and is currently a member of the SDDL Board of Directors.

Patrick Kearns obtained his B.S. in Sociology from the University of Wisconsin-LaCrosse with minors in Political Science and Criminal Justice. While attending UW-LaCrosse, Mr. Kearns was the captain of UW-LaCrosse's NCAA wrestling team and two-time recipient of Academic All-American honors. After college, Mr. Kearns obtained his law degree from Thomas Jefferson School of law, graduating cum laude. During law school, Mr. Kearns was a literary editor and staff writer for the Thomas Jefferson Law Review as well as a competitor on the Thomas Jefferson Moot Court Society.

Mr. Kearns focuses his practice on civil litigation, specializing in the defense of medical and dental professionals. Mr. Kearns' experience also includes administrative law matters involving the California Medical and Dental licensing boards, business litigation, and employment law. Mr. Kearns was recognized by the San Diego Daily Transcript as Outstanding Young Attorney in 2007.

Farmer Case & Fedor is pleased to announce the addition of **Lee I Jurewitz** and **Keith S. Ciceron** as associates with the firm. Ms. Jurewitz brings with her several years of past defense experience with the Kolod Wager firm, while Mr. Ciceron has developed experience in the area of insurance coverage matters.

Balestreri, Pendelton & Potocki are pleased to announce two associates have joined the firm. **Thomas Doug Tabbert II** joined the firm on May 5th, 2008. Doug previously worked for Kinkle, Rodiger and Spriggs in Riverside, CA. He received his law degree from the University of San Diego.

Sean Patrick Reynolds joined the firm on June 16th, 2008. Sean associated with the firm after several assignments including time with the San Diego Unified School District. He graduated from Thomas Jefferson School of Law in June 2006.

Law & Politics Magazine Publishes Super Lawyers of San Diego 2008

25 San Diego Defense Lawyers are recognized

Karen A. Holmes, Balestreri, Pendleton & Potocki**
Mary B. Pendleton, Balestreri, Pendleton & Potocki**
Douglas M. Butz, Butz, Dunn, DeSantis & Bingham*
Peter S. Doody, Higgs, Fletcher & Mack
Heather L. Rosing, Klinedinst, PC
Robert C. Carlson, Koeller, Nebeker Carlson & Haluck
Robert W. Harrison, Wilson, Elser, Moskowitz, Edelman and Dicker *
Marilyn R. Moriarty, Lewis, Brisbois, Bisgaard & Smith **
James Wallace, Lewis, Brisbois, Bisgaard & Smith
Clark R. Hudson, Neil, Dymott, Frank, McFall & Trexler*
Hugh A. McCabe, Neil, Dymott, Frank, McFall & Trexler
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Timothy S. Noon, Noon & Associates
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Jim Holtz, Stutz, Artiano, Shinnoff & Holtz
Daniel M. White, White & Oliver*
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Randall L. Winet, Winet, Patrick & Weaver
Charles R. Grebing, Wingert, Grebing, Brubaker & Goodwin

***Top 50; ** Top 25 women; ***Top 10**

Thank You

San Diego Defense Lawyers would like to thank
Brenda Peterson of Peterson Reporting
for sponsoring our Brown Bag Luncheon programs
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Back row left to right: *Ken Medel, Brian Rawers, Darin Boles, Ken Greenfield, Randy Nunn, James Boley, Eric Miersma*

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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/year for attorneys in practice less than one year and $120/year for attorneys in practice more than one year. The dues year runs from January to December. Applications can be downloaded at: www.sddl.org

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

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

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

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