

The **Update**

Winter 2004 - Volume 8, Issue 4

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In Recognition . . .



Honorable Marilyn L. Huff

SDDL chooses its “Honoree of the Year” and “Lawyer of the Year” based on a person’s exceptional commitment to the improvement and promotion of education, cordial relations, and the public perception of the legal profession based on their service to the community and the maintaining of standards of professional and ethical conduct.

SDDL’s 2004 Honoree of the Year: The Honorable Marilyn L. Huff, Chief Judge, U.S. District Court, Southern District of California

A former third-grade teacher, Chief Judge Huff graduated from the University of Michigan law school and was admitted to the Bar in 1976. She began her legal career with Gray Cary as a business litigator. Judge Huff recalls litigating her first case by being asked to “try a case next week” that had little to no discovery completed. She was a one-year associate and her opposing counsel was David Thompson, now a Senior Judge on the Ninth Circuit. Quickly gaining litigation and legal experience, Huff argued before California Supreme Court in 1989 when a fellow attorney was unable to attend. Judge Huff argued a case that became one of California’s seminal cases on the bystander negligence, *Thing v. La Chusa* (1989) 48 Cal.3d 644.

Shortly thereafter, one of the senior partners approached and asked if Huff had ever considered being a judge. The

rest is history: She was appointed by George Bush (Sr.) in 1991 and became Chief Judge in 1998. Huff’s term of seven years as Chief Judge will end January 24, 2005. As Chief Judge, her time is divided between criminal cases, civil cases, and administrative/managerial activities. In addition, she is the Chairperson for the Conference of Chief Judges for the Ninth Circuit and served as a member of the Ninth Circuit Judicial Council. She is past President of the American Inns of Court, Louis M. Welsh Chapter; served as Chairperson of the Judicial Conference Statistics Subcommittee, and has been a member of the U.S. Judicial Conference’s Judicial Resources Committee. Her past awards include San Diego County Bar Association’s awards for Legal Professional of the Year and for Service to the Legal Profession.

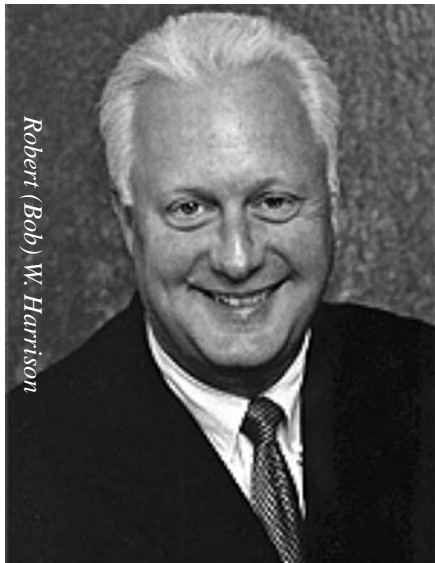
In reflection, Judge Huff is most proud of getting a bill passed in Congress and signed by President Bush to increase the number of federal judges for the Southern District. Judge Huff also spearheaded the construction and completion of the new jury-assembly space. Today, the jury lounge is a fabulous ground-floor and windowed room. As some might know, jurors in the past were directed to the basement of the courthouse. Not stopping there, Judge Huff has overseen the construction of the new federal courthouse in El Centro, which will be dedicated this January, 2005. Closer to home, Judge Huff was responsible for changing San Diego’s courthouse’s north-facing windowless, dark brick wall. Working with the GSA and Center City Development Corporation, the wall has been transformed into an educational tribute to the United States Constitution with the theme “We the People . . .” Within the newly installed window display, winners of a high school contest from around the county are showcasing their artwork on the themes of freedom, liberty, justice, and equality. Significantly, Judge Huff has overseen the development of the new federal courthouse project that began in 1992. The courthouse will span from Broadway to the

MCC and includes the removal of the Hotel San Diego. Plans for the 23-room courthouse are almost completed. Judge Huff anticipates construction funding will be included in the next Presidential budget. With a 140 percent increase in federal filings since 1993, the new courthouse will be a welcome addition to the Edward J. Schwartz U.S. Courthouse.

As demonstrated by her own actions in and out of the courtroom, Judge Huff believes that an attorney’s reputation is the most important attribute of a lawyer. Although San Diego’s legal profession is growing, it still maintains its small town feel. Most attorneys know each other; working side-by-side one day and as opposing advocates the next. An attorney’s conduct and performance in each case can have an impact on that lawyer’s reputation. Judge Huff expects attorneys to fight hard and be zealous for their clients, but they should never overstep the professional limits just to win one victory. Judge Huff believes that the best attorneys are creative and quickly adapt to the ever-changing facts and theories of a case. Judge Huff would also like to see seasoned attorneys mentor their younger associates by passing along advice and creative ideas, legal theories and tried-and-true strategies. At the same time, less experienced attorneys should seek out and observe the “masters of litigation.” She suggests observing both attorney and judge, noting how they interact with evidence, witnesses, and the jury to aid in developing one’s own style.

In closing, Judge Huff believes in the “never give up” philosophy. Early in her legal career, a secretary voted her “least likely to succeed in the practice of law.” Looking back through her 28 years of achievements, Judge Huff’s philosophy, professionalism and ethics, legal expertise, and unlimited contribution to our community clearly shows why we have proudly selected her as San Diego Defense Lawyer’s 2004 Honoree of the Year.

In Recognition . . .



Robert (Bob) W. Harrison

SDDL chooses its “Honoree of the Year” and “Lawyer of the Year” based on a person’s exceptional commitment to the improvement and promotion of education, cordial relations, and the public perception of the legal profession through service to the community and the maintaining of standards of professional and ethical conduct.

SDDL’s 2004 Lawyer of the Year: Robert W. Harrison of Neil, Dymott, Brown, Frank & Harrison

Robert W. Harrison is a graduate of the United States Naval Academy, Annapolis, Maryland, in 1972, the University of San Diego School of Law in 1981, and was admitted to the Bar in 1982. He is immediate Past President of the Association of Southern California Defense Counsel, Past President of California Defense Counsel, and Past President of the San Diego Barristers Club. He is a Fellow of the International Academy of Trial Lawyers. He has served as an instructor in the San Diego “Inn of Court” and is a member of the American Inns of Court, Louis Welsh Chapter. He is a Captain in the United States Naval Reserve (Retired, 1996).

Living in Pacific Beach, Bob enjoys spending time with his family: Debbie, his wife, and four children: Tyler (26), Colin (22), Jennifer (20) and Michael (12). He also enjoys playing golf, going to the beach, traveling, reading and celebrating his Irish heritage.

Bob began his career in law at the end of his first year in law school working in a probate related practice. He then interned in the Bronx DA’s office after his second year of law school and clerked for a bankruptcy firm during his third year. He was offered a clerking job at his current firm by Mike Neil, who happened to ride his bike past Bob’s home in South Mission Beach. Hearing Irish music (it was near St. Patrick’s Day), Mike stopped and introduced himself. Although Bob was a Naval Officer, and Mike was a Marine, Mike nevertheless suggested Bob consider working at what was then the law firm of Rhoades & Hollywood. Feeling an affinity for tort related issues, which was reinforced while working as a law clerk during law school, he was anxious to have the opportunity to be in the court room representing a client in a jury trial. After passing the Bar exam, Bob took Mike up on his offer and has been with the firm ever since. As of November 1, 2004 the new firm name is Neil, Dymott, Brown, Frank & Harrison!

One of Bob’s proudest professional moments was his first jury trial. It was a product liability case which he had the opportunity to try because a good friend, “and one of the finest examples for all trial attorneys,” Dan Broderick, “did me the favor of awarding the plaintiff \$100,000 in arbitration.” Another significant moment included the successful defense of three physicians in a medical malpractice case involving a severely brain damaged child. “I believed strongly each of the doctors was not to blame and had provided the patient with excellent care.” The jury returned defense verdicts for all three doctors. The case was chosen as one of the top 15 defense wins by the National Law Journal in 1998.

Bob has served as President of the Association of Southern California Defense Counsel and as President of California Defense Counsel. Those organizations work to represent the best interests of the defense bar in the legislature. His work with the Judicial Council included successful efforts to implement changes to fast track, an

amendment to the Code of Professional Conduct relating to potential conflicts for insurance defense counsel and working to successfully oppose tort reform initiatives which were in neither the public or defense bar interest.

Bob would like to be remembered as someone who always did his best to represent his clients in an ethical and professional way, who kept his commitments and who made a positive contribution to the perception of lawyers by the public. Remembering what it was like to be a “rookie,” Bob takes time to mentor new lawyers in every facet of the profession and leads by displaying professionalism and civility at all times. He reminds everyone to maintain their sense of humor because “life is too short to carry bitterness, anger and resentment. You aren’t as good or as bad as you think!” Last, he advises to keep things in perspective and don’t become a slave to the law. Value your family foremost and cultivate good friendships both in and out of the legal profession. And always preserve your professional integrity and get involved in both professional and other (civic, fraternal etc.) organizations.

Bob believes that, “SDDL through its leadership over the years has filled a void which had existed for quite some time in San Diego with respect to the local defense bar.” SDDL has provided all civil defense practitioners with an ongoing program of continuing legal education of superior quality. The organization’s commitment to its members has spurred its growth, making it larger than many statewide defense associations in the country. Ultimately if you hope to find the top defense lawyers in San Diego, one need look no further than the membership of SDDL. “I am proud to have been a member for nearly 20 years.”

Bob is “honored to have been selected and only hope that in some small way I measure up to the many outstanding prior recipients.” However, it is SDDL that is honored to select Robert W. Harrison as San Diego Defense Lawyer’s 2004 Lawyer of the Year. Congratulations.

The Bottom Line

CASE TITLE: Gloria Padilla Zalkin, Anthony Padilla, Charles Padilla vs. Paul Phillips, M.D. and Walter Dembitsky, M.D., Estate of Rebecca Padilla by Irwin M. Zalkin, Administrator (dismissed); Joseph Chammas, M.D. (dismissed); Sharp Memorial Hospital (settled)

CASE NUMBER: GIC 807863

JUDGE: Honorable Richard E.L. Strauss

COUNSEL FOR PLAINTIFF(S): William Litvak, Esq., Dapeer, Rosenbilt & Litvak and Irwin Zalkin, Esq., Zalkin & Zimmer

COUNSEL FOR DEFENDANT(S): Defendant Paul Phillips, M.D.: John DiCaro, Esq., David Balfour, Esq., DiCaro Coppo & Popcke

TYPE OF INCIDENT/CAUSES OF ACTION:

Medical Malpractice. Plaintiffs alleged defendant Dr. Phillips caused a perforation of a coronary artery during an angioplasty / stenting procedure. Plaintiffs further alleged Dr. Phillips breached standard of care by failing to recognize the perforation and taking steps to prevent decedent from bleeding to death. Plaintiffs also asserted Dr. Phillips should have sent the patient for cardiac bypass surgery after causing another complication, know as left main dissection; Plaintiffs alleged Dr. Dembitsky, a cardiac surgeon contacted by Dr. Phillips regarding the left main dissection, should have recommended and performed cardiac bypass surgery. Dr. Phillips claimed he met standard of care. Causing a perforation is not, by itself, a deviation from standard of care. Even in retrospect, it is not clear if there was a perforation, and decedent did not exhibit any of the characteristic signs of bleeding until minutes before her death. Dr. Phillips also claimed he had repaired the left main dissection with stents and had re-established good flow, making surgery unnecessary. Dr. Dembitsky agreed.

SETTLEMENT DEMAND: CCP 998 - \$120,000 - Defendant Phillips

SETTLEMENT OFFER: CCP 998 - Waiver of costs - Phillips

TRIAL TYPE: Jury

LENGTH OF DELIBERATIONS: 3 hours

TRIAL LENGTH: 11 ½ days

VERDICT: Defense Verdict as to both defendants.

President's Message



Billie Jaroszek

Dear Members:

It seems like only yesterday that I was installed as President of SDDL, and yet here it is the end of the year. It has been a fast-moving, challenging and exciting year for me. I have been privileged to work with some of the finest attorneys in San Diego, all of whom worked very hard on behalf of the SDDL membership.

During this year, we were able to obtain our goal of increasing our membership as well as supplying the membership with a full 20 units of MCLE credit through various seminars that were sponsored by this organization. Even if you only caught a few of these, I trust you were impressed by our commitment to present quality seminars to you.

Also this year, I was privileged to be able to attend the annual DRI meeting that was held in New Orleans, Louisiana. One of the highlights at that meeting for me was attending the half-day meeting of state and local defense organizations. The purpose was to discuss how each state and/or local defense organization went about promoting their membership, assisting the membership in satisfying their MCLE requirements, if any, whether they undertook charity work and whether other benefits were offered to the membership.

You will be pleased to learn, and should be proud of the fact, that your board of directors is heads above any other state or local organization in all of those categories. As a matter of fact, I talked to an attorney from Buffalo, New York, who has been trying to demonstrate to her small group the benefits of a defense organization such as SDDL. Apparently, as of October, to no avail.

I also learned from state representatives that some of the states with a smaller number of attorneys state wide, have very low membership in the defense organizations. Part of the problem is the fact that they are a much smaller number of attorneys admitted in that state, and the other part is the fact that the defense organization has nothing to offer them for the membership fee. A majority of the representatives of the state and/or local organizations have a membership fee, but do not offer the members anything in exchange for that fee.

As all of you know, in SDDL, for your \$120-a-year membership, you are entitled to 20 MCLE credits should you choose to attend all of the seminars that are presented by this organization. In addition, as each of you know, we sponsor an annual golf tournament, which benefits the San Diego Juvenile Diabetes Research Foundation. We also host with at least one other organization, a social evening. The board of directors for SDDL over the past 20 years, has formed an organization to promote the goals of its membership and assist in its education. Each of you should be proud to belong to this organization. I know I am.

I wish each and every one of you a Happy New Year and look forward to new beginnings in January.

Billie Jaroszek

"Top 10 Defense Practice Changes -- Legislation and Case Update"

By: Ken Greenfield, Esq., Law Offices of Kenneth N. Greenfield

On September 23, 2004, in a very well attended two-hour seminar co-sponsored by San Diego Defense Lawyers and the Association of Southern California Defense Council, the membership was treated to a very interesting behind-the-scenes look at how thoughts, ideas and desired rules are transformed into statutory law in the State of California. Lobbyist, Mike Belote, discussed how he has assisted the California defense bar by developing legislation touching on such things as Joint Defense Agreements, indemnity obligations, the tripartite relationship between insurer, insured, and the insurance defense attorney, and Code of Civil Procedure Section 998 offers to compromise, among other things.

Mr. Belote also discussed his close professional working relationship with

Chief Justice George, as well as the Chief Justice's desire that all Superior Court judges abide by such things as newly enacted Rule 375 (concerning the liberal rules granting continuance motions), and Rule 212 (Case Management Conferences). The Chief Justice believes very strongly in the jury system and amicable relations between bench and bar. He wants to make certain that all Superior Court judges respect the personal and professional needs of trial counsel. Any judge who is sternly obstinate toward trial attorneys, and in the handling of civil cases in general, will find themselves in disfavor with this Supreme Court Chief. In fact, the Chief Justice would like to be advised of how well the system is operating, and Mr. Belote suggested that any attorney who has encountered a judge unwilling to

enforce the new rules, especially with respect to the grant of continuances, should contact him at 916-441-5050, or MBelote@Caladvocates.com.

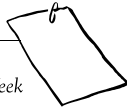
Also on the panel were Paul Fine Esq., current President of Southern California Defense Council and Robert Harrison, Esq., immediate past president of ASCDC and current president of California Defense Council. Mr. Fine and Mr. Harrison both highlighted the importance of all SDDL members becoming members of ASCDC. Both organizations complement one another and provide support to the California Defense Council in its role of seeking the passage of legislation important to the defense lawyer's representation of litigants.

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The Bottom Line

CASE TITLE: James McDonald, Kathryn McDonald v. Caryle Christianson, Geoffrey Bowmaster

CASE NUMBER: GIC800391

JUDGE: Honorable Linda B. Quinn

COUNSEL FOR PLAINTIFF(S): In Pro Per

COUNSEL FOR DEFENDANT(S): Daniel M. White, Esq. and Steven G. Amundson, Esq. of White & Oliver

TYPE OF INCIDENT/CAUSES OF ACTION:

Legal malpractice, including negligence, breach of fiduciary duty, fraud and Business & Professions Code 17200. The claims arose out of representation of the McDonalds as plaintiffs by lawyer Caryle Christianson in three earlier lawsuits. The first was itself a legal malpractice action in the state of Nevada, against Kathryn McDonald's divorce counsel, for failure to bring a subsequent separate battery action against her ex-husband after the divorce case. That malpractice case lasted 10 unsuccessful years, including two trips to the Nevada Supreme Court. That part of this case was eliminated through a motion in limine based on the absence of requisite expert witness opinions. The second alleged malpractice by Christianson was in the representation of both McDonalds seeking damages against their condominium HOA, arising out of an alleged "attempted" entry by the HOA into their condo unit to investigate water intrusion in a unit below. That case had resolved adversely at the trial court by a motion for summary judgment, which was affirmed on appeal. The third alleged legal malpractice was failure to pursue a claim on behalf of the McDonalds for water intrusion into their own unit, in what was called the "flood case." That case was filed but was dismissed for failure to prosecute. Negligence in the "flood case" was stipulated at trial here; causation and damages were contested.

SETTLEMENT DEMAND/OFFER: \$100,000 plus; offer: approximately \$20,000 to include the costs awarded against the McDonalds after the motion for summary judgment in the "attempted entry" case.

TRIAL TYPE: JURY

LENGTH OF DELIBERATIONS: 4 hours

TRIAL LENGTH: 5 days

VERDICT: Nonsuit as to defendant Geoffrey Bowmaster, who was awarded costs of \$7,354.00. No damage to either plaintiff in attempted entry case. Each plaintiff was awarded \$600.00 damages against Caryle Christianson in the "flood case," in which negligence was stipulated.



The Sword Of Nishihama

Matthew J. Hunter, Esq., Fredrickson, Mazzeika & Grant, LLP

Nishihama v. Superior Court (2001) 93 Cal.App.4th 298 and *Hanif v. Superior Court* (1988) 200 Cal.App.3d 635, stand for the

proposition that in a personal injury claim, when the evidence shows that a discounted amount has been paid or incurred for healthcare services, regardless of whether the amount was paid directly by the plaintiff or by a public or private health insurance carrier, that sum certain is the maximum amount the plaintiff may recover as special damages. The end result is that if the proper groundwork is laid by the defense, past medical expenses awardable as special damages in personal injury cases may be limited to the sharply discounted amounts (oftentimes as much as 75%) actually paid by the plaintiff's medical insurance.

Expansion of the Doctrine. Although the effect of this *Nishihama* credit is well known, what remains unknown is the extent the defense may extend the *Nishihama* decision and use its rationale to further limit plaintiff's ultimate recovery. In an effort to allow the jury to view general damages from the "actually paid" medical expenses viewpoint, the goal for the aggressive defense counsel is to try to get the lower number of "actually paid" medical bills into evidence (a practice readily allowed by statute in medical malpractice cases [see, Code of Civil Procedure § 3333.1]). It is most likely wishful thinking to believe that even a novice plaintiff's counsel would not object to such proffered evidence under the collateral source rule. However, if such evidence of "actually paid" medical expenses was allowed by the trial judge, it not only would result in a lower award for special damages, but also a potentially lower general damages award because of the so-called "multiplier rule" (the unwritten "rule of thumb" under which the amount of general damages is set by simply multiplying the amount of medical specials by a low of three to a high of seven times).

History of the Doctrine. In *Hanif*, plaintiff's medical expenses had been fully paid by MediCal, albeit with significant discounts from the total amount billed.

Although the total amount of medical bills was put into evidence by plaintiff and awarded by the jury, the trial court imposed a post-judgment credit, the effect of which was that plaintiff only recovered past medical expenses in the amount that actually had been paid by MediCal. *Hanif, supra*, 200 Cal.App.3d at 644.

In *Nishihama*, plaintiff argued against extending the *Hanif* holding to the area of private insurance, arguing that for public policy reasons the credit should be limited solely to government insurance cases. The court disagreed, however, and extended *Hanif* to cover the situation where a plaintiff's medical expenses had been discounted and paid by private insurance carriers. The end result in *Nishihama* was a post-verdict credit, reducing plaintiff's special damages awarded for past medical expenses to the substantially discounted amount that actually had been paid by plaintiff's medical insurer. *Nishihama, supra*, 93 Cal.App.4th at 308.

Yet, as with most legal issues in our day, *Nishihama* is not likely the final word on the subject. In *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, the California Supreme Court upheld the *Hanif* credit in the government insurance context, but urged the legislature to take corrective action to adjust what the court viewed as a windfall for third party tortfeasors. *Olszewski* involved the "balance billing" situation under which a health care provider accepts payment from a health care insurer but asserts a lien against any third party recovery by the patient/plaintiff to recoup the amount actually billed for services. In the Fourth District, the court in *McMeans v. Scripps Health* (2002) 123 Cal.Rptr.2d 143, (review granted) rejected "balance billing" in the context of payments made by private insurance, but as noted, the California Supreme Court has granted review. On the other hand, the Fifth District, in *Swanson v. St. John's Regional Medical Center* (2002) 97 Cal.App.4th 245 (review denied), previously upheld the practice of "balance billing." Also, this "balance billing" practice is not allowed in the case of plaintiffs covered by HMOs, as the maximum lien the health care provider or insurer can assert is the amount paid for services. (see, Cal. Civ. Code §3040; *Swanson v. St. John's*

Continued on page 7

The Sword of Nishihama

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Regional Medical Center (2002) 97 Cal. App. 4th 245, 251). When, how, or if the court will rule in the *McMeans* case is anyone's guess, but one would think that ruling is long overdue.

Discovery Issues Presented. Due to protracted discovery issues that typically arise in personal injury cases, it should be the goal of the defense attorney to identify and act on these billing issues from the very beginning of a case, rather than waiting until the time of trial preparation to focus on the bottom line number.

In order to timely and effectively marshal evidence of the "actually paid" amount, of medical expenses, one must identify all medical providers and all insurance coverage for a particular plaintiff as early as possible. That means sending out interrogatories almost contemporaneously with the answer and relentlessly following up on the piecemeal information that typically is provided. Once the plaintiff's answers trickle in, merely relying on medical billing numbers provided in discovery responses is problematic. Instead, once medical providers have been identified, one should immediately subpoena the billing files of the identified health care providers and medical insurance carriers. More likely than not, the records directly obtained from these providers will include new/different billing and payment information from that which was provided in discovery responses. During this process, it also is critical to identify the custodians of record (COR) for the given medical provider and insurance carriers needed to properly authenticate and interpret the billing records obtained. In a troublesome case, it may also take the threat or actual taking of a deposition of a COR in order to overcome HPPAA roadblocks and the like and to nail down this billing issue. Should the claim go beyond the mediation stage, already having these custodians identified will save valuable time at the trial preparation stage.

Use of the Doctrine During Mediation/Pre-Trial. While the plaintiff's bar undoubtedly is aware of the effect of the *Nishihama* credit, many times plaintiffs's counsel does not take it upon themselves to determine the amount of medical specials actually paid. Because of the leveling effect of the *Nishihama* credit, at a mediation session or a MSC it would be beneficial to have hard proof available of

the "actually paid" amount of medical expenses (as opposed to the inflated "billed" amount typically used by plaintiff). Consequently, it is good practice in most cases to provide plaintiff's counsel with copies of supporting documents well in advance of any settlement hearing. Otherwise, waiting until the mediation session or the MSC to address the effect of the *Nishihama* credit on the value of the case is likely to arouse plaintiff's suspicions and be less conducive to any meaningful settlement discussions.

Defense counsel hopefully also will know well in advance of the trial date how the assigned trial judge views this particular issue. The simplest way is to make inquiries with other defense counsel regarding the particular philosophy the trial judge has for this topic. Also, defense counsel should let the trial judge know at the trial readiness conference, or at a status conference, that the issue exists, and inquire as to how the court proposes to deal with it.

Use of the Doctrine at Trial. At the trial stage, the question posed is how evidence of the lower amount of bills actually paid can get beyond a collateral source objection. The collateral source doctrine provides that when injured party receives compensation for injuries from a source independent of the alleged tortfeasor, the amount of such compensation is not offset against the damage obligation of the tortfeasor, and is therefore irrelevant. *People v. Hamilton* (2003) 114 Cal.App.4th 932, 944. This doctrine is not so broad, however, that evidence of insurance cannot be introduced for some other purpose. For example, in *Arambula v. Wells* (1999) 72 Cal.App.4th 1006, while not directly dealing with the issue being addressed here, the court ruled that the existence of a collateral source is not entirely barred during the course of trial if there is a "persuasive showing" that such evidence is of "substantial probative value" for purposes other than reducing damages. *Id.*, at 1015. In the context of *Nishihama*, insurance evidence is not being offered to reduce damages; it is being offered to show what the actual damages are. In other words, the evidence is not excludable based on collateral source arguments.

Defense counsel definitely should plan on addressing these special damages issues at the in limine stage. One approach is to deal with the issue in two separate in limine motions. The first motion should seek to limit plaintiff's evidence of past

medical expenses solely to those amounts "actually paid" by the insurance company or otherwise, and to bar evidence of the higher billed amounts. The argument in that case would be evidence of the non-recoverable amount of gross billings is irrelevant, prejudicial, and likely to confuse the jury. Secondly, should plaintiff's counsel be unwilling to stipulate to the actual amounts *paid*, then another pre-trial motion should seek leave of court to offer affirmative evidence at trial, via testimony from the custodian of records of various healthcare providers, regarding the amount of medical expenses "actually paid." These motions may seem redundant, but instead address the two distinct legal issues presented of collateral source and the amount of damages allowable by *Nishihama*.

These efforts could very well result in a stipulation from plaintiff regarding the amount of actual expenditures. Such a stipulation should be welcomed because it will save the time and expense of having to put on the evidence necessary to prove the amount of "actually paid" damages. Further, defense counsel will have accomplished the goal of getting the lesser amount before the jury, with the consequential effect of limiting past medical expenses as well as the amount of general damages.

If, however, for some reason the jury awards more in past medical specials than was actually paid by the insurance company, under the *Nishihama* doctrine, the trial judge must reduce this amount, post verdict, to reflect the actual amount paid. Therefore, if this aberrant result occurs, defense counsel should file a post-trial motion for remittitur so the judgment amount complies with *Nishihama* credit.

So what's bottom line? The bottom line is that the defense attorney can consistently get better results, whether through settlement or trial, if they identify the exact amount of recovery plaintiff is entitled to and then tactically use this information.

Until the California Supreme Court gives the final say, this matter is not settled. If the Supreme Court upholds "balance billing," then the entire *Nishihama* doctrine is likely to disappear because plaintiff's counsel will argue that their clients may actually become liable for the entire amount billed, rendering moot the issue of the credit. Stay tuned for the final word from the Supreme Court.

The Bottom Line

CASE TITLE: David Long v. Dick's Last Resort of San Diego, Inc.

CASE NUMBER: GIC819212

COUNSEL FOR PLAINTIFF(S): Richard P. Verlasky, Esq. of Law Office of Richard P. Verlasky and Erik Jenkins, Esq. of Glaser Jenkins LLP

COUNSEL FOR DEFENDANT(S): Thomas A. Balestreri, Jr., Esq. and Renee M. Botham, Esq. of Balestreri Pendleton & Potocki

TYPE OF INCIDENT/CAUSES OF ACTION: Plaintiff alleged causes of action for negligence, negligent hiring, battery, and false imprisonment for the acts of defendant's employees. Plaintiff sought punitive damages and alleged that defendant was negligent for failing to perform criminal background checks when hiring its door staff. Plaintiff was a patron at Dick's Last Resort when he was asked to leave the premises for inappropriate behavior. While being walked off the premises by a manager, an altercation ensued and plaintiff was restrained by a member of the door staff. While the plaintiff, who was still restrained, was walking through the patio with the door staff member, he fell to the ground. Plaintiff claimed to have sustained a rotator cuff tear as a result of the fall.

SETTLEMENT DEMAND/OFFER: Demand: \$90,000/Offer: Defendant served plaintiff with a CCP 998 offer in the amount of \$50,000

TRIAL TYPE: Jury Trial

TRIAL LENGTH: 8 days

VERDICT: Defense Verdict. The jury found the defendant was not negligent and that its door staff had the right to restrain the plaintiff.

DISCOVERY LAW



Edith J. Kaufman,
The Roth Law Firm

DRAFTING BALANCED DISCOVERY

When a request for discovery is disputed, the courts often use balancing

methods to decide whether the discovery's potential relevance outweighs the producer's objections to such discovery. The cases outlined below provide a sample of some areas where the courts have really had to balance the need for discovery against the risks of improper disclosure.

NO KISS AND TELL IN SEXUAL PRIVACY CASE

In the very shocking case of *John B. v. Sup.Ct.* (2004) 2004 WL 1875023, wife Bridget sued husband John for infecting her with HIV during their honeymoon. Bridget first exhibited signs of the illness, and tested positive, and her husband began to tell others Bridget brought HIV into the marriage. After John began getting sick, Bridget learned there was only a .03 percent chance she had brought the HIV into the marriage. John thereafter admitted to Bridget for the first time that he had sex with men before their marriage.

Bridget sued for intentional infliction of emotional distress, claiming John knew all along he had HIV, for negligent infliction of emotional distress, for fraud and negligence. Bridget sought discovery into John's past, including when he first became aware he was HIV positive, the names and addresses of all men he had sex with before the marriage, the date of his first sexual encounter with a man, the name, address and phone number of everyone he had unprotected sex with in the past ten years, and more. Bridget also sought medical records, including HIV test results.

The court summarized the discovery as belonging in two categories: (1) identities of John's previous sex partners; and (2) discovery to find direct and circumstantial evidence that John knew he had HIV. The

court acknowledged that interrogatories that seek to reveal the identity of a person's sexual partner impinge on the privacy rights granted by the California constitution, and may not be required to be answered unless a compelling state interest exists. The Court noted that disclosure of this information is not warranted, even if it is likely to be relevant, and thus denied Bridget access to the names, addresses and phone numbers of John's previous lovers as "extremely broad and unlimited."

By contrast, the allegation John knew or should have known that he had HIV was held fundamental to all the stated causes of action. Still, the Court would not allow questions regarding John's "lifestyle", noting: "The word 'lifestyle' is vague and ambiguous. To the extent that it suggests a sexual orientation, it is offensive and impermissibly intrusive into John's zone of sexual privacy." However, John was ordered to produce all his medical records and HIV results (as his condition was at issue), as well as to answer basic fact questions about when he learned he had HIV, the date he first had sex with a man, last had sex with a man, etc. The Court allowed these interrogatories on the grounds they could prove circumstantially that John injured Bridget by a want of ordinary care and skill.

This case presents an interesting scenario in balancing between quality discovery and protected discovery. The Court carefully drew lines to separate discovery that clearly implicated not just John's privacy, but the privacy of others, despite the fact such information could clearly be deemed as possibly leading to admissible evidence.

NO FREE SHOW FOR DIRECT COMPETITORS

In an astonishingly long two page decision, the Northern District of California court upheld the confidentiality of pending patents in *ICU Medical, Inc. v. B.Braun Medical, Inc.* (2002) 2002 WL 32693709 (N.D.Cal.) This case brings an interesting angle to the traditional relevancy v. privacy balancing act the courts apply when ruling on discovery motions,

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and may have application in similar business suits where the parties are competitors.

Defendant B. Braun Medical filed a Motion to Compel production of certain patent applications from Plaintiff ICU Medical which related to the patents-in-suit, including their prosecution histories. While noting that under Federal Rule of Civil Procedure 26(b)(1), discovery is broadly defined and thus information in a pending patent application may have relevance to a patent infringement action. And, while Title 35 U.S.C. § 122 expressly provides that pending patent applications are to be kept confidential, the Court noted this statutory prohibition is not binding on the courts. In an effort to provide some balance, the Court weighed the interest in discovery against the other party's interest in secrecy, taking into account the fact parties are competitors is a matter that weighs strongly against disclosure. Thus, the Court ruled against disclosure of the pending patent information, because the parties are in direct competition with one another.

PLEASE DON'T TAKE MY E-MAIL AWAY

On August 15, 2004, the federal judiciary disseminated a proposed set of rules to govern "e-discovery". In this technologically advanced day and age, exchange of electronic data and information has become more and more important to litigation. If adopted, the rules would amend the Federal Rules of Civil Procedure and take effect by December 1, 2006. These rules would require discussions between parties at their initial conference about any electronically stored information that may be relevant to the case. Of course, the need for this type of production has to be balanced against the risk of inadvertent disclosure by the producing attorney. To counteract the possibility of inadvertent disclosure of attorney work product or attorney client privilege, the proposal would have a requirement that such accidentally disclosed information be returned and not considered. Perhaps most importantly, these

rules would address the issue of email deletions and provide sanctions for deleting important evidence contained within emails, unless such emails were destroyed as part of a routine computer operation (such as automatic overwrites), but would require the party to take reasonable steps to preserve such evidence once it is known to be relevant.

These proposed rules should help remind all of us to consider how discovery can be drafted to uncovering any electronic evidence and ensuring its preservation. This should further make attorneys and their clients ensure that any possible relevant information is saved and that relevant e-mails are not deleted, as their absence could result in a sanction of "adverse inference" against your client.

ELDER ABUSE LAW



Shari I. Weintraub,
Esq., Fredrickson,
Mazeika & Grant LLP

The End of Confidential Settlements in Elder Abuse Cases?

Under the provisions of the newly enacted Code of Civil Procedure section 2031.1, settlement of statutory elder abuse claims can no longer be made confidential. This prohibition has existed since January 1, 2004, when the California Legislature proclaimed that as a matter of public policy, settlements of cases brought pursuant to the Elder Abuse and Dependent Adult Civil Protection Action (Welf. & Inst. Code § 15600 *et seq.*, hereafter "EADACPA") are prohibited from being made confidential.

Although under EADCPA, the actual amount of the settlement of a claim remains a protected fact, as do facts that do not otherwise amount to "abuse," those protections afford little comfort to an innocent defendant who settles just to cut off the cost of continued protracted litigation. To minimize the potential risks of harm to reputation caused by an innocent defendant's settlement of a baseless EADACPA abuse claim, steps need to be taken to absolve the settling person or facility from the stigma of the

EADACPA claim. One approach to take is as a condition precedent of any settlement, the parties could agree to first dismiss the EADACPA abuse claim, on a "with prejudice" basis, and subsequently agree to settle the non-EADACPA claims for an agreed sum, subject to a confidentiality agreement. This approach would appear to meet the requirements of Section 2031.1, and also protect the otherwise innocent violator from the bad publicity of an otherwise undeserved EADACPA abuse claim.

Section 2031.1 provides that, "... confidential settlement agreements are disfavored in any civil action the *factual foundation for which establishes* a cause of action for a violation of the...[EADACPA]." Section 2031.1 further requires that where an elder abuse claim is *made* (e.g., the mere filing of a complaint), a confidential settlement agreement may not be recognized or enforced by the court absent a showing that (1) the information is privileged under existing law; (2) the information is not evidence of "abuse" as defined under the Welfare & Institutions Code sections 15610.30, 15610.57 and 15610.63; or (3) there is a demonstration by the party seeking to uphold the confidentiality agreement that a substantial probability of prejudice will result from disclosure and the party's interest cannot be adequately protected through redaction. A defendant's name in any information made available to the public may not be sealed or redacted. Specifically excepted from this rule is the non-disclosure of the amount of money paid in a settlement.

If a client's otherwise sterling reputation has a chance of being preserved within ethical bounds, that goal should be the defense counsel's objective. However, once an EADACPA abuse claim has been filed, even though "recklessness" is the minimum level of misconduct needed to impose liability, an innocent violator cannot settle the claim confidentially without violating Section 2031.1, and the fact that the case was settled becomes a matter of public record. As a result, a disgruntled elder with a questionable claim can impugn the reputation of a facility or an individual merely by filing suit. This

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The Bottom Line

CASE TITLE: Sheldon Deutsch v. Bill Joswig, M.D. and Center for Health Care Medical Associates

CASE NO.: GIC 814562

JUDGE: Honorable Luis R. Vargas

PLAINTIFF'S COUNSEL: Kenneth Sigleman, Esq. and Penelope Phillips, Esq. of Kenneth Sigleman & Associates

DEFENSE COUNSEL: Clark Hudson, Esq. of Neil Dymott Brown Frank & Harrison

TYPE OF ACTION: Alleged Medical Malpractice - Failure to diagnosis congestive heart failure

TIME OF DELIBERATIONS: 2 hours

TYPE OF TRIAL: Jury Trial - 8 days

VERDICT: Defense 10-2

CASE TITLE: Centex Golden v. Neo

CASE NO.: GIC 733027

JUDGE: Honorable Luis R. Vargas

PLAINTIFF'S COUNSEL: Nancy J. Skovholt & Deb C. Pedersdotter, Law Office of Deb C. Pedersdotter

DEFENSE COUNSEL: John P. Cogger, Esq. & William P. Harris, III, Esq., Law Office of Vivian L. Schwartz

TYPE OF ACTION: Breach of Contract, Contractual Indemnity

SETTLEMENT DEMAND/OFFER: P demand of \$155,000, D CCP 998 offer of \$5,000

TYPE OF TRIAL: Jury Trial - 5 days

VERDICT: Defense

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scenario significantly increases the risks of a facility allowing a meritless claim to proceed to litigation, and unfairly prejudices the innocent operator of an elder care facility. The end result is that an unscrupulous elder abuse claimant now can force an elder care facility or professional to make a choice between (1) risking a sterling reputation or (2) settling an otherwise baseless claims before the matter proceeds to litigation, at which point a confidential settlement is not possible.

Proponents of Section 2031.1 in the legislature had argued that confidentiality agreements were being used to wrongfully protect the guilty facility's reputation, and to prevent public access to information that shows which facilities abuse elders. Numerous shameful and egregious examples of abuse were cited to support this position. However, a complaint under the EADACPA does not even require verification. Thus, there is little incentive to an "elder abuse" claimant to refrain from filing a lawsuit under the EADACPA, even if the claim is questionable. There also are many reasons, other than fault, for a facility to settle an elder abuse claim, including the high costs of litigation, the risk that available insurance will not cover all the defense costs, and the risk of harm to the facility's reputation. It would appear, therefore, that the only way to protect the reputation of an "innocent" client is to either take the case to trial and win, or to settle on a confidential basis along the lines set forth above.

INSURANCE LAW



*James M. Roth,
The Roth Law Firm*

Common sense seems to have reared its ugly head. Recent decisions by the Appellate Courts have generally favored insurance carriers. It's reassuring to know that good facts can make good law.

WORKERS' COMPENSATION CARRIER HAD STANDING TO SUE A THIRD PARTY TORTFEASOR: In Fremont Compensation Ins. Co. v. Sierra Pine, Ltd., (2004) 121 Cal.App.4th 389, the California Court of Appeal, Third Appellate District, held that under Labor Code §3852, a workers' compensation insurer had standing to sue a third party tortfeasor despite the fact that the insurer had paid a death benefit to the worker's former wife (they were divorced at the time of the worker's death). The Workers Compensation Appeals Board ("WCAB") ordered an insurer to pay death benefits to the former wife of an employee killed on the job. The insurer sued the third party tortfeasor to recoup the money under Labor Code §3852. The trial court ruled that the insurer did not have a right to sue to recoup compensation benefits from the third party tortfeasor because §3852 subrogated the insurer to the rights of the former wife, and she had no standing to sue for wrongful death. The trial court sustained a demurrer without leave to amend and the insurer appealed. Because the insurer could have sued to recoup benefits paid to the worker while alive and because recoupment actions survive a worker's death (see Labor Code §3851), the fact compensation was paid as a death benefit, rather than vocational rehabilitation or medical benefits, makes no difference. To allow tortfeasors to escape liability due to the happenstance that the WCAB ordered benefits to be paid to someone who had no standing to file a wrongful death action would conflict with the letter and spirit of §3852.

LEAD CONTAMINATION IN A MUNICIPAL WATER SYSTEM IS "PROPERTY DAMAGE" WHEN THE DEFECTIVE COMPONENT PHYSICALLY INJURES SOME OTHER TANGIBLE PART OF THE LARGER SYSTEM OR THE SYSTEM AS A WHOLE:

In Watts Industries, Inc. v. Zurich American Ins. Co., (2004) 121 Cal.App.4th 1029, the California Court of Appeal, Second Appellate District, affirmed the trial court's grant of an insured's motion for summary judgment holding that its insurer owed a duty to defend a suit by municipalities seeking

Continued on page 11

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damages and injunctive relief for alleged lead contamination in their water systems. The court rejected the insurer's contentions that no "property damage" was alleged, that the relief sought was purely prophylactic, and that coverage was excluded by the impaired property exclusion. The insured owned a waterworks parts manufacturer which sold parts to municipalities for use in their water systems. The municipalities sued the insured alleging the parts wore out too quickly and caused lead to leach into the water supply. The municipalities also claimed defective parts at thousands of sites needed to be replaced. The court rejected the insurer's contention that no "property damage" was alleged because the municipalities did not claim physical injury to other parts of the water systems. The court noted incorporation of a defective component or product into a larger structure or system does not constitute "physical injury to tangible property," unless the defective component physically injures some other tangible part of the larger system or the system as a whole. It further noted that where products or work containing hazardous materials are incorporated into other products or structures, other property is immediately physically injured at the moment incorporation occurs. Here, the municipalities alleged the defective parts were built into municipal water systems, leaching lead into water supplies and threatening public health and safety. Moreover, the parts were not easily removable, as they had to be dug up and replaced. The court concluded these allegations raised a sufficient prima facie showing of physical injury to tangible property.

DOG BITE OCCURRING WHEN DOG ESCAPED FROM AUTOMOBILE WAS NOT "CAUSED BY AN ACCIDENT RESULTING FROM THE OWNERSHIP, MAINTENANCE OR USE OF" THE INSURED VEHICLE: In *State Farm Mut. Ins. Co. v. Grisham*, (2004) 122

Cal.App.4th 563, the California Court of Appeal, Third Appellate District, affirmed the trial court's decision that State Farm had no duty to defend or indemnify its

insured under an auto liability policy against a dog bite claim because plaintiff's injury was not "caused by an accident resulting from the ownership, maintenance or use of" the insured vehicle. The insured's dog bit plaintiff's leg after escaping from the insured's parked pickup truck. The court recognized that California interprets the word "use" in auto liability policies to require "some minimal causal connection" between the use of the vehicle and the accident. It applied the "predominating cause/substantial factor" test under which the use of the vehicle must contribute in some way to the injury beyond merely serving as the location of the injury. Something involving the vehicle's operation, movement, maintenance, or its loading or unloading must be a contributing cause of the injury. Applying these principles, the court determined that plaintiff's injury did not result from the use of the insured vehicle. The vehicle did not contribute to the injury beyond merely transporting the dog to a place near the injury site. Plaintiff's injury did not result from, or in the course of, the vehicle being operated, moved, maintained, loaded or unloaded. Plaintiff was bit 20 to 25 yards from the vehicle, well beyond any unloading zone or activity. The vehicle had also been parked for some time prior to the insured's dog escaping and biting plaintiff.

CIVIL PROCEDURE



David M. Balfour,
DiCaro Coppo &
Popcke

ANTI-SLAPP: NEW PROTECTION FOR HOSPITAL PEER REVIEW

Physicians sitting on hospital peer review committees often wonder why it seems they are frequently involved in litigation with disruptive physicians, even though they themselves had voluntarily chosen to assist the hospital in conducting its mandated peer review responsibilities. These peer review committee members are frequently sued personally for their involvement in committee recommendations to censure, discipline or suspend the medical staff privileges of disruptive

members of the medical staff. Moreover, the disruptive physicians often do not seek to have allegedly mistaken committee decisions overturned through administrative channels, but instead file lawsuits directly in the civil courts. Although *Westlake*¹ and peer review immunities do exist, litigation is quite an expense and a headache to these physicians voluntarily serving on peer review committees. With its mandatory provision for attorneys' fees, stay on discovery and quick dismissal of frivolous lawsuits, the Anti-SLAPP statute provides stronger protections for physicians serving on peer review committees. The application of the Anti-SLAPP statute to peer review proceedings is currently being reviewed on appeal in cases of first impression.

THE STRUCTURE OF ANTI-SLAPP LEGISLATION AND WHERE PEER REVIEW FITS IN

The Anti-SLAPP statute seems a natural fit to provide these protections for the peer review proceedings. SLAPP is an acronym for Strategic Lawsuit Against Public Participation; Anti-SLAPP being a statute enacted to protect against SLAPP lawsuits. Initially, the Anti-SLAPP statutes were enacted to protect environmental protestors who were abusively burdened, and whose free speech rights were chilled, by the onslaught of litigation launched by large corporations and developers who wished them silent. The purpose of a SLAPP suit is not to assert a legitimate right, but to chill the defendant for exercising its free speech or petition rights. In revising the Anti-SLAPP statute in 1997, the California Legislature found and declared it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process, and furthermore, the Legislature declared to this end this section *shall* be construed broadly.

Since this 1997 Legislative edict, the Courts have responded by applying the Anti-SLAPP statute to a wide array of cases, from malicious prosecution lawsuits to lawsuits arising from disputes among homeowners' associations. The statutorily-mandated hospital peer review

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process appears to be a next, reasonable progression in the expansion of Anti-SLAPP protections.

Section 425.16 allows defendants to make an accelerated motion to strike a cause of action if the defendant's acts, in this case the act of administering a peer review procedure or discipline, was an "act in furtherance of the right of petition or free speech under the United States or California Constitution in connection with a public issue" including: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or **any other official proceeding authorized by law**; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. *See* California Code of Civil Procedure section 425.16 (e) (1-4).

In cases involving peer review, a trial court is asked to decide whether peer review proceedings or statements made during the course of or at the conclusion of such proceedings (e.g. in the imposition of the disciplinary steps by the Hospital Executive Committee acting on the recommendation of the Medical Staff Peer Review Committee), are part of official proceedings authorized by law ((e)(1) candidates), or were made in connection with such an official proceeding ((e)(2) candidates).² Despite the protests of disruptive physicians, courts are likely to find peer review proceedings are official proceedings authorized by law because a hospital is mandated by California statutory, regulatory and case law to enact and maintain an effective system of medical review through the creation and implementation of the peer review process. *See, e.g.* California Health & Safety Code section 1250 et seq; Califor-

nia Code of Regulations Title 22 §§ 70701, subds, (a)(1)(D) & (a)(1)(F); Cal. Code of Regs., Title 22, § 70703; Arnett v. Dal Cielo (1996) 14 Cal. 4th 4, 10; Fox v. Kramer (2000) 22 Cal. 4th 531, 538. In sum, hospitals and their medical staffs are more than *authorized* by law to conduct peer review proceedings, they are *mandated* to conduct such proceedings.

PROTECTING THE PEER REVIEW PROCESS IS OF PARAMOUNT IMPORTANCE

Peer Review proceedings clearly differ from many legislative, executive and judicial proceedings in that they are closed proceedings. Peer review proceedings are immune from discovery in civil lawsuits, such as medical malpractice actions, pursuant to California Evidence Code section 1157. The justification for the secretive nature of the proceedings and the various immunities is the belief the peer review committee members will be able to more honestly assess and act for the benefit of patient safety if their thought-processes are sheltered from public and judicial second-guessing. The peer review process itself was created decades ago when the hospitals and Legislature agreed a confidential self-policing quality review process would be most effective in allowing hospitals to ensure the quality of care provided to patients by members of the hospital's medical staff. Despite some concerns about the secretive nature of peer review proceedings, due to the candor achieved it is widely accepted that the peer review process mandated and regulated by California law is an official proceeding worthy of protection. *See Machett v. Superior Court* (1974) 40 Cal. App. 3d 623, 628.

The statutory framework of the peer review process establishes safeguards so that physicians who are facing discipline can challenge the charges brought against them. The statutes enable a hospital to *only* discipline physicians with the prior recommendation and approval by the medical staff (or, in the case of a summary suspension by the Chief of the Medical Staff necessary to immediately protect the safety of patients, with the subsequent approval by the medical staff). Quasi-judicial review processes are also

mandated to allow physicians who believe they have wrongfully been disciplined to seek redress.

Disruptive physicians often argue their damage is really due to statements made *outside* of the disciplinary process to members of the medical community, and thus are unprotected statements. In short, these plaintiffs claim the damage to their reputation was a result of leaks in the peer review process and are actionable. Where plaintiff's cause of action includes both protected and unprotected activities, the cause of action is deemed covered by the Anti-SLAPP statute for the purpose of an Anti-SLAPP motion unless the protected conduct is "merely incidental" to the unprotected conduct. *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal. App. 4th 90, 103; *Scott v. Metabolife International, Inc.* (2004) 115 Cal. App. 4th 404, 419. The egregiousness of the leak can surely factor into prong two of the Anti-SLAPP analysis, discussed below.

THE FIRST TRIAL COURTS HAVE RULED PEER REVIEW PROCEEDINGS ARE OFFICIAL

In three recent trial court opinions— all pending on appeal — the trial courts were uniformly satisfied the peer review proceedings the hospital engaged in to discipline the physicians qualified for protection under the Anti-SLAPP statute as official proceedings authorized by law. The peer review process was likened to speaking out or petitioning against a disruptive physician and was repeatedly ruled by the trial courts to be a necessary process to ensure the quality of health care provided to patients by members of the hospital's medical staff. These trial courts believed the Anti-SLAPP statute is intended to protect the speech and conduct in the peer review proceedings and in connection with such proceedings.

PROVING PEER REVIEW QUALIFIES AS OFFICIAL PROCEEDING IS HALF THE BATTLE

The Anti-SLAPP statute, Code of Civil Procedure Section 425.16 is often described as having two prongs. Prong one involves the analysis described above as to whether the defendant's act was in furtherance of the person's right of

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petition or free speech under the U.S. or California Constitution in connection with a public issue. Prong two of the Anti-SLAPP statute comes in to play once the defendant has proven the speech or conduct in question was, in fact, protected free speech or petition rights. Prong two then places the burden on the plaintiff to establish that there is a probability that the plaintiff will prevail on the claim. See section 425.16 §§ (b)(1). A physician may be able to overcome this obstacle, either due to the facts of the particular claim or because of the lower evidentiary threshold when the Motion is heard. But, there will be instances when a physician will not be able to succeed on prong two. The Hospital and physician-members of the defendant peer review committees can rely on the protections commonly used before the enactment of the Anti-SLAPP statute in defense of prong two. For example, if a physician has initiated a lawsuit before the conclusion of the peer review process, defendants can assert the disruptive physician failed to exhaust his administrative remedies under Westlake and therefore has no likelihood of success on the merits because his/her claims were prematurely filed.

MOTIONS TO STRIKE LIKELY TO HAVE AN EARLY IMPACT IN PEER REVIEW LAWSUITS

Because the Anti-SLAPP Motions to Strike are required to be filed within 60 days of the service of the complaint and because the headache-and-expense causing discovery is stayed pending hearing on the Motion, these Anti-SLAPP Motions can, and should when appropriate, be used early by counsel representing hospitals and peer review physicians to thwart actions lacking merit. Similarly, counsel representing physicians who intend to sue a hospital and/or its peer review physicians, would be wise to advise that client of the potential for an Anti-SLAPP Motion, and the potential consequences of a successful Motion, including the award of the defense attorney fees.

CONCLUSION

Since California statutory, regulatory and case law requires that hospitals implement a peer review system and hold peer review proceedings to ensure the delivery of quality health care, it follows necessarily that such peer review proceedings are "official proceedings authorized by law." Hospitals faced with the mandatory requirement of holding peer review proceedings should, at the least,

enjoy Anti-SLAPP protection for those proceedings. And, the physicians who voluntarily serve on these committees may then be afforded the additional protection in their arsenal of potentially recovering attorneys' fees and having the case dismissed early in the litigation.

David Balfour is a partner at the Law Firm of DiCaro, Coppo & Popcke. His practice primarily consists of representing health care practitioners and facilities in civil litigation.

(Footnotes)

¹A physician who wishes to sue for damages stemming from decisions or actions by a hospital involving his staff privileges must, prior to filing suit, fully exhaust his administrative remedies.

Westlake Community Hospital v. Superior Court (1976) 17 Cal. 3d 465.

²Reliance by hospitals and peer review committees should not necessarily have to be placed on § 425.16 §§(e)(1) or (e)(2) – the "official proceedings authorized by law" subsections. The actions of these peer review committees are, when in good faith, in the public interest and may therefore satisfy the other (e) subsections.

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SDDL Annual Golf Benefit

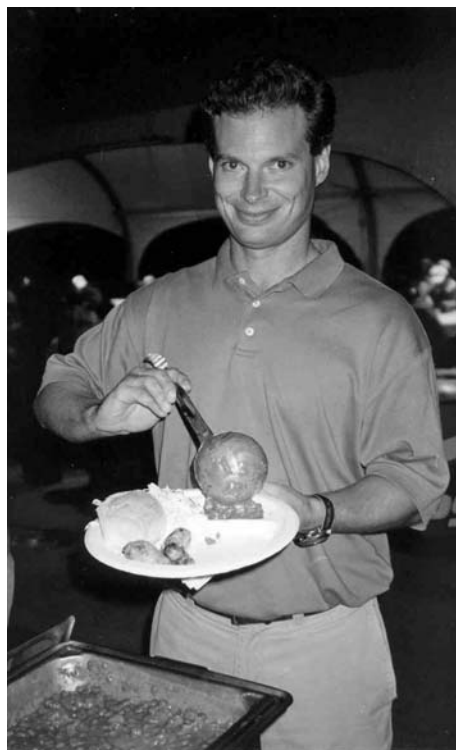
San Diego Defense Lawyers held their Annual Golf Benefit on October 1st. SDDL continued their partnership with the Auld Course for the third consecutive (and successful) year. Eighty players attended a beautiful day on the links-style course in a best-ball format. Many members took advantage of the opportunity to spend a day out of the office golfing with friends, colleagues and clients. The weather was perfect, and the competition fierce, with the event winning foursome being John Trask, Vic Botello, Gren Pendergast and Jack Galloway.

With many generous sponsors providing sponsorships, many holes had more than just golf for the players. There was a hole-in-one contest for a BMW Z-3 roadster sponsored by S. C. Wright Construction. Many other holes had sponsors providing food, beverages and giveaways for the players. SDDL wishes to thank all of the sponsors and will appreciate members patronizing these business as a thank-you for their support.

As in the past, this year's tournament was a benefit for the Juvenile Diabetes Research Foundation. The JDRF provides funding for research into finding a cure for juvenile diabetes, the fastest growing disease in children in the United States. SDDL started the benefit in memory of Tom Dymott who died of complications from diabetes. In addition to receiving a portion of the entry fees, a raffle and auction were held after the BBQ dinner with the proceeds going to JDRF. SDDL would like to thank the many generous attendees who bought raffle tickets as well as those who won the various auction items. The generosity of the participants and the sponsors is what makes this event a success every year!

Thanks also go out to the SDDL golf committee, Dino Buzunis, Sean Cahill and Scott Barber for organizing the event. As always, a special thank you also needs to be given to Sandee Rugg for all of her valuable assistance and tireless efforts in ensuring a successful event.

The committee is already gearing up for next year's tournament which promises to be bigger and better than ever. If you attended this year we hope you will be back next year and for those who missed out this year, plan on attending next year as it promises to be another great tournament.



EXTRA!!! Member News EXTRA!!!



Neil Dymott is pleased to announce that *Constantine "Dino" Buzunis*, a shareholder with the firm, has been honored with the Past President's award by the San Diego Chapter of AHEPA (American Hellenic Educational Progressive Association). Dino has served as San Diego Chapter President from 2001-2004. The

mission of AHEPA is to promote Hellenism, Education, Philanthropy, Civic Responsibility, and Family and Individual Excellence. Membership is open to everyone who believes in the mission of the organization. "I am extremely honored to receive the Past President's Award, which really belongs to our entire Chapter for their commitment to community service in San Diego County" says Buzunis. Additionally, Dino currently serves as Secretary of the San Diego Defense Lawyers Board of Directors and chaired the very successful SDDL golf benefit held this past October.



San Diego Metropolitan has named *Heather L. Rosing*, to its 2004 "40 Under Forty" list. The annual "40 Under Forty" list features San Diego movers and shakers who are making a difference in the San Diego business landscape and community. A respected speaker and writer, Rosing has spoken to dozens of groups, and

written many articles, on ethics, professional liability, and risk management. She also serves on the board of directors of the San Diego County Bar Association, the San Diego Volunteer Lawyers Program, and the San Dieguito River Valley Conservancy. Rosing is a Regional Director for the Northwestern University Alumni Association. She additionally serves as a member and volunteer with numerous other organizations that promote legal ethics, professional development, community involvement and service, and environmental causes.

Campbell, Souhrada & Volk has now become **Campbell, Volk & Lauter**. The firm continues to provide legal services in California, Nevada, and Arizona

Klinedinst PC announced the official opening of its Sacramento location. The office, the fourth location for Klinedinst PC, is already serving clients in Northern California.



Deuprey & Associates, LLP is pleased to announce that *Rachael A. Campbell* has joined the firm as an associate. Rachael completed her undergraduate degree in Liberal Studies at the University of Washington in 1997. In 2000, she received her Juris Doctorate from Santa Clara

University, where she served as an editor for the Santa Clara Computer and High Technology Journal, was a quarter-finalist in Honors Moot Court, and earned a Certificate of Excellence in Legal Research and Writing. While studying at Santa Clara University, Rachael co-authored an article entitled United States Supreme Court Supports State Immunity From Suit Under Federal Patent Law (Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 1999) 16 Santa Clara Computer & High Tech. L.J. 499-510 (2000). Rachael is admitted to practice in the State of California, and before the United States District Court for the Southern, Central and Eastern Districts of California. Rachael is a former associate with Procopio, Cory, Hargreaves & Savitch, LLP and Wright & L'Estrange, and will assist Deuprey & Associates, LLP with its representation of physicians in medical malpractice cases and with defense work in business and general liability matters.



Deuprey & Associates, LLP is pleased to announce that *Brett C. Peterson* has joined the firm as an associate. Mr. Peterson received his Bachelor of Science Degree in Quantitative Economics and Decision Science from the University of California at San Diego in 1995. He graduated from the University of San

Diego School of Law in 1998. Brett is a former associate with Daley & Heft, LLP, where he practiced general civil litigation with an emphasis in public entity defense, insurance defense, and ADA litigation. He is admitted to practice in the State of California, and before the United States District Court for the Southern, Central and Northern Districts of California. Brett will assist Deuprey & Associates, LLP with its representation of physicians in medical malpractice cases and with defense work in general liability matters.

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Member News

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Robert J. Gallagher (left) has joined White & Oliver as Of Counsel.



Melvin D. Rich (below) recently joined The Law Offices of Kenneth Greenfield as "Of Counsel." Mr. Rich is an Air Force Vietnam Veteran who graduated from Arizona State University in 1975, receiving a B.S. in Finance, and from the University of Arizona School of Law in 1978. Mr. Rich has been licensed to practice law in California since 1978. His practice focused on civil litigation for the first 16 years. During the last 9 years, he has focused primarily on estate planning.

Grace Brandon Hollis LLP is pleased to announce the opening of its Central Valley and Temecula offices. The Temecula office, located at One Ridge Gate near Old Town Temecula, will serve Riverside county. The Central Valley office, located at 5415 Avenida De Los Robles in Visalia, will serve Tulare and Kern counties.



Grace Brandon Hollis LLP is pleased to announce that J. **Kevin Mackin** and **Kimberly Ann Davies** have joined the firm as associate attorneys. Kevin attended Western State University College of Law where he participated in moot court and received American Jurisprudence awards in real property and corporations. He was admitted to the State Bar of California in 1975. Kevin has over thirty-five jury trials to completion and has practiced in a wide range of civil litigation, including personal injury, products

liability, professional malpractice, government tort liability, and insurance bad faith. Kevin will assist the firm with construction defect and medical professional liability matters. Kim obtained her law degree from the University of San Diego School of Law, where she received honors in Moot Court, was research assistant to Distinguished Professor Kenneth Culp Davis on the Administrative Law

Treatise, and studied constitutional law at Magdalen College in Oxford, England. She was admitted to the State Bar of California in 1989. Kim's experience ranges from negotiating international contracts as in-house counsel for Cubic Corporation to successfully litigating cases involving employment law, real estate transactions and civil rights matters as an attorney in private practice. Kim will assist the firm with construction defect, employment, and real estate matters.



Bacalski, Bailey, Koska & Ottoson, LLP, is pleased to announce that **Roger G. Perkins** and **Carolyn Taylor**, formerly shareholders of Neil, Dymott, Perkins, Brown & Frank, have joined the firm as partners. Mr. Perkins will continue his civil litigation practices with emphasis



on pharmaceutical, medical device biotechnology, mass torts, unfair business practices and transportation law. Ms. Taylor will continue her concentration on pharmaceutical and medical devices, products liability and complex litigation.

Reminder!

2005 Membership Dues

\$120.00 for those in practice for more than 1 year

\$ 90.00 for those in practice for less than 1 year

Membership applications can be downloaded from the website: www.sddl.org

Dues notices have been sent to all firms. If you did not receive yours please contact:

*Sandee Rugg, Executive Director
at srugg@waltonbiz.com
or 858-546-5254*

Meet Your Board of Directors



Dennis Aiken

Dennis Aiken graduated from San Diego State University with a degree in Biology. He received his Juris Doctor from Cal Western Law

School in 1975. He presently is the Managing Attorney for the law office of Aiken & Boles, house counsel for Farmers Insurance Exchange. The AV rated office handles insurance defense matters, including personal injury, property damage, products liability, UM/ UIM, construction defect and workers compensation cases. He is a Superior Court Arbitrator, Mediator and an instructor for NITA. He is a long time member of San Diego Defense Lawyers, and was recently elected Vice President of the Board of Directors.



Martha J. Dorsey

Martha Dorsey was born and raised in Orange County, California. She graduated from the University of California, Santa Barbara,

with a degree in cellular biology. Martha earned her law degree from Loyola Law School in Los Angeles in 1992, where she participated as a case note editor on the Loyola Entertainment Law Journal. Martha is a partner in the San Diego office of Koeller, Nebeker, Carlson & Haluck. Her practice focuses primarily on the defense of residential real estate developers in both Southern California and Nevada. Martha has been licensed to practice law in Nevada since 2002. Martha has been a member of the San Diego Defense Lawyers for approximately 10 years. She served as an officer on the Board of Directors during 2004 and will participate as the Treasurer for the San Diego Defense Lawyers in 2005. Martha is also a member of the San Diego County Bar Association and Clark County Nevada Bar.



D. Scott Barber

Scott Barber is a senior associate in the San Diego office of Gordon & Rees. He is a member of both the Health Care Group and the Real Estate

Group. His practice focuses on the defense of long term care facilities against elder abuse, wrongful death, medical and nursing malpractice, unfair business practice and fraud claims. He also represents commercial real estate clients in litigation matters, including lease disputes, premises liability and unlawful detainer actions.

Prior to joining Gordon & Rees, Scott was an associate with Grace Brandon Hollis LLP where he successfully

defended physicians from a variety of specialties including obstetrics, orthopedics, family practice, psychiatry and internal medicine in all aspects of complex medical malpractice cases.

Scott has been associated with San Diego Defense Lawyers for several years, and will start his second term on the Board of Directors as Secretary.

Scott earned his Bachelor of Science from the University of California, San Diego and his J.D. from California Western School of Law in 1996 where he received the American Jurisprudence Award for Real Property Law. He is a member of the San Diego County Bar Association and also serves as General Counsel for the San Diego Bicycle Club, Inc.

To Each His Own § 998

By: D. Scott Barber, Gordon & Rees

In Menees v. Andrews (2004) 122 Cal.App.4th 1540, the Fifth District of the Court of Appeal held that a physician's pre-trial offer to compromise was directed to both plaintiffs jointly and was thus conditional. Because the offer was conditional, the court overturned the trial court's ruling awarding the physician's expert witness fees.

Dr. Andrews delivered Lisa Menees' twin babies. During the delivery, Dr. Andrews dropped the first-born to the floor causing injury. Lisa and Robert Menees jointly sued Dr. Andrews and Bakersfield Memorial Hospital. Dr. Andrews made a CCP § 998 offer to compromise to both Lisa and Robert Menees. Dr. Andrews' offer to waive fees and costs in exchange for a dismissal with prejudice was made to the Menees jointly and the attached "notice of acceptance" was a joint acceptance. The offer was not accepted. The jury returned a defense verdict and Dr. Andrews filed a memorandum of costs in the total amount of over \$38,000.00, which included \$ 27,212.38 for reimbursement of expert fees. The trial court ordered the Meneeses to pay Dr. Andrews' costs and the Meneeses appealed.

The Court of Appeal held that Dr. Andrews was not entitled to recover expert witness fees because the § 998 offer to compromise was conditioned on the Menees' joint acceptance. Dr. Menees argued that the issue of apportionment had no application as his offer was for a waiver of costs: "One cannot apportion zero." The court rejected this argument stating that a § 998 offer is effective to shift the liability for costs only where the offer was properly allocated as to multiple offerees and was made in a manner allowing individual offerees to accept or reject it. Where an offer is not apportioned between the individual offerees, there is an inherent inference that the offer must be accepted jointly.

The court concluded that "the legislative purpose of section 998 is best served in multiplaintiff cases by requiring that section 998 offers be separately prepared and served on individual plaintiffs, allowing each individual the opportunity to accept individually." (Menees at 1546.)

SDDL 14th Annual Mock Trial Competition

San Diego Superior Court Judges Kevin Enright, Roger Krauel and Randa Trapp all supported the 14th Annual Mock Trial Competition by serving as judges at the competition held October 21-23, 2004. Several schools participated, including Hastings, Pepperdine, USD, Thomas Jefferson, Chapman, Mc George, Brooklyn, and Whittier. After two nights of preliminary rounds, teams from Pepperdine, Thomas Jefferson, and Hastings School of Law advanced to the final day of competition. The students participating in the competition were extremely well prepared, and many demonstrated excellent advocacy skills. Most participating law schools hold tryouts, enabling them to select the best advocates from a large pool of very competitive applicants. The Mock Trial arena has become a fertile ground for cultivating new associates. SDDL members who volunteered to serve as judges were able to see, outside of the usual job interview context, just how talented these law students really are. This year's competition presented evidentiary and courtroom skills issues in the context of a contract case, including time for completion and oral modifications. Competitors were required to represent the plaintiff one night, and the defendant the next night. A "happy hour" reception for all student competitors and the SDDL "judges" was held Friday night following the second round. The final four teams were announced at the reception and the final round was held Saturday, October 23 at USD. Ultimately, Pepperdine prevailed over Thomas Jefferson in the final round, taking home the trophy. SDDL would like to thank all of the judges for participating and would like to give a special thanks to Alan Greenberg, Ken Greenfield and Philip Cohen for their extra participation as judges for the final rounds on Saturday, October 23rd.



San Diego Defense Lawyers Sincerely Thanks

KnOX

S E R V I C E S

***For their contribution to the "After Competition Reception"
at the 14th Annual SDDL Mock Trial Competition***

Legislative Alert - Changes to Notice Motions and Discovery

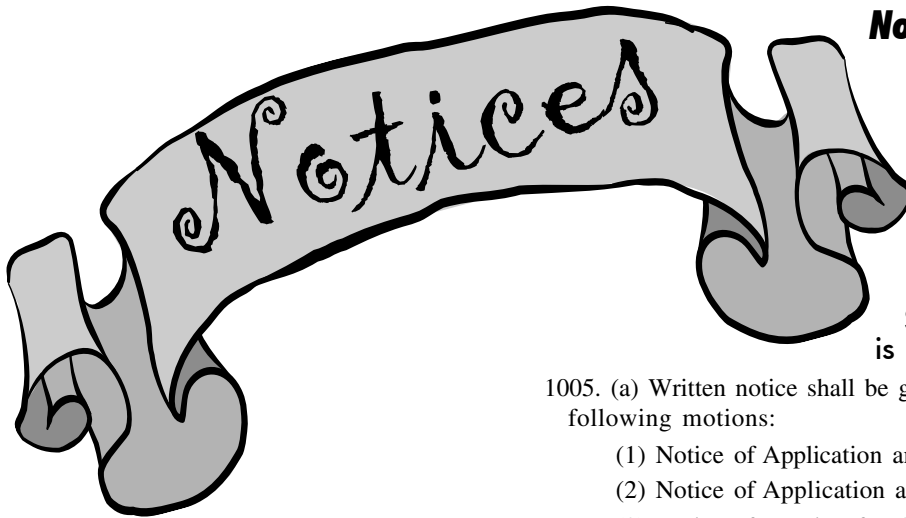
CHAPTER 171

A.B. No. 3078

AN ACT to amend Sections 116.410, 411.20, 1005, 2024, and 2034 of, and to add Section 2016.060 to, the Code of Civil Procedure, relating to procedure.

Section 1005 of the Code of Civil Procedure is amended to read:

1005. (a) Written notice shall be given, as prescribed in subdivisions (b) and (c), for the following motions:
- (1) Notice of Application and Hearing for Writ of Attachment under Section 484.040.
 - (2) Notice of Application and Hearing for Claim and Delivery under Section 512.030.
 - (3) Notice of Hearing for Claim of Exemption under Section 706.105.
 - (4) Motion to Quash Summons pursuant to subdivision (b) of Section 418.10.
 - (5) Motion for Determination of Good Faith Settlement pursuant to Section 877.6.
 - (6) Hearing for Discovery of Peace Officer Personnel Records pursuant to Section 1043 of the Evidence Code.
 - (7) Notice of Hearing of Third Party Claim pursuant to Section 720.320.
 - (8) Motion for an Order to Attend Deposition more than 150 miles from deponent's residence pursuant to paragraph (3) of subdivision (e) of Section 2025.
 - (9) Notice of Hearing of Application for Relief pursuant to Section 946.6 of the Government Code.
 - (10) Motion to Set Aside Default or Default Judgment and for Leave to Defend Actions pursuant to Section 473.5.
 - (11) Motion to Expunge Notice of Pendency of Action pursuant to Section 405.30.
 - (12) Motion to Set Aside Default and for Leave to Amend pursuant to Section 585.5.
 - (13) Any other proceeding under this code in which notice is required and no other time or method is prescribed by law or by court or judge.
- (b) Unless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least **16 court days** before the hearing. The moving and supporting papers served shall be a copy of the papers filed or to be filed with the court. However, if the notice is served by mail, the required 16 day period of notice before the hearing shall be increased by five calendar days if the place of mailing and the place of address are within the State of California, 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States, and if the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the required 16day period of notice before the hearing shall be increased by two calendar days. Section 1013, which extends the time within which a right may be exercised or an act may be done, does not apply to a notice of motion, papers opposing a motion, or reply papers governed by this section. All papers opposing a motion so noticed shall be filed with the court and a copy served on each party at least **nine court days**, and all reply papers at least **five court days** before the hearing. The court, or a judge thereof, may prescribe a shorter time.
- (c) Notwithstanding any other provision of this section, all papers opposing a motion and all reply papers shall be served by personal delivery, facsimile transmission, express mail, or other means consistent with Sections 1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed. This subdivision applies to the service of opposition and reply papers regarding motions for summary judgment or summary adjudication, in addition to the motions listed in subdivision (a). The court, or a judge thereof, may prescribe a shorter time.



Legislative Alert - "New" Civil Code Section

From Senate Bill 1102 comes Civil Code section 3294.5. This new code section was created because California's "extraordinary and dire budgetary needs have forced the enactment of this extraordinary measure to allocate temporarily for the state's Public Benefit Trust Fund substantial portion of any punitive damages paid from a judgment". (Civ. Code § 3294.5(a).) Under this statute, if an action is filed after August 16, 2004 and fully adjudicated before July 1, 2006, then "upon final judgment that including punitive damages, after payment of costs, if any, to the plaintiff, the" defendant shall do the following: Pay 75% of the award to the State; pay 25% share to the plaintiff; and notify plaintiff's attorney of the amount paid to the State. (§ 3294.5(c).) After the State deposits its 75% portion, "the plaintiff's attorney . . . shall be entitled to" 25% of the 75% the State received. Any claim for payment "shall be paid by the fund on July 1 of the next fiscal year." (§ 3294.5(d).) The law further prohibits informing the jury of this proportioning. (§ 3294.5(g).) This law is automatically repealed on July 1, 2006—"unless a later enacted statute extends or deletes that date." (§ 3294.5(i).)

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Notices

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Section 2016.060 is added to the Code of Civil Procedure, to read:

2016.060. When the last day to perform or complete any act provided for in this title falls on a Saturday, Sunday, or holiday as specified in Section 10, the time limit is extended until the next court day closer to the trial date.

Section 2024 of the Code of Civil Procedure is amended to read:

2024. (a) Except as otherwise provided in this section, any party shall be entitled as a matter of right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action. If either of these dates falls on a Saturday, Sunday, or holiday as specified in Section 10, the last day shall be the next court day closer to the trial date. As used in this section, discovery is considered completed on the day a response is due or on the day a deposition begins. Except as provided in subdivision (e), a continuance or postponement of the trial date does not operate to reopen discovery proceedings.

(b) The time limit on completing discovery in an action to be arbitrated under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 is subject to Judicial Council Rule. After an award in a case ordered to judicial arbitration, completion of discovery is limited by Section 1141.24.

(c) This section does not apply to (1) summary proceedings for obtaining possession of real property governed by Chapter 4 (commencing with Section 1159) of Title 3 of Part 3, in which discovery shall be completed on or before the fifth day before the date set for trial except as provided in subdivisions (e) and (f), or (2) eminent domain proceedings governed by Title 7 (commencing with Section 1230.010) of Part 3.

(d) Any party shall be entitled as a matter of right to complete discovery proceedings pertaining to a witness identified under Section 2034 on or before the 15th day, and to have motions concerning that discovery heard on or before the 10th day, before the date initially set for the trial of the action. If either of these days falls on a Saturday, a Sunday, or a holiday as specified in Section 10, the last day shall be the next court day closer to the trial date.

(e) On motion of any party, the court may grant leave to complete discovery proceedings, or to have a motion concerning discovery heard, closer to the initial trial date, or to reopen discovery after a new trial date has been set. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

In exercising its discretion to grant or deny this motion, the court shall take into consideration any matter relevant to the leave requested, including, but not limited to, the following:

- (1) The necessity and the reasons for the discovery.
- (2) The diligence or lack of diligence of the party seeking the discovery or the hearing of a discovery motion, and the reasons that the discovery was not completed or that the discovery motion was not heard earlier.
- (3) Any likelihood that permitting the discovery or hearing the discovery motion will prevent the case from going to trial on the date set, or otherwise interfere with the trial calendar, or result in prejudice to any other party.
- (4) The length of time that has elapsed between any date previously set, and the date presently set, for the trial of the action.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to extend or to reopen discovery, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(f) Parties to the action may, with the consent of any party affected by it, enter into an agreement to extend the time for the completion of discovery proceedings or for the hearing of motions concerning discovery, or to reopen discovery after a new date for trial of the action has been set. This agreement may be informal, but it shall be confirmed in a writing that specifies the extended date. In no event shall this agreement require a court to grant a continuance or postponement of the trial of the action.

(g) When the last day to perform or complete any act provided for in this article falls on a Saturday, Sunday, or holiday as specified in Section 10, the time limit is extended until the next court day closer to the trial date.



You are cordially invited
to attend the
**San Diego Defense Lawyers
Twentieth Annual
Installation Dinner**

Honoring

*San Diego Defense Lawyers
2004 Honoree*
Honorable Marilyn L. Huff,
Chief Judge
U. S. District Court,
Southern District of California



*San Diego Defense Lawyers
Lawyer of the Year 2004*
Robert W. Harrison
Neil Dymott Brown Frank & Harrison

Saturday, January 22, 2005
Hyatt Regency San Diego
1 Market Place
San Diego, CA 92101

\$150/couple	Cocktails 6:30 P.M.
\$75.00/individual	Dinner 7:30 P.M.
\$750.00/table of 10	Dancing 9:00 P.M.

Business Attire

Broadcast E-mail list information

San Diego Defense Lawyers now has two broadcast e-mail lists.

One list broadcasts only SDDL announcements of educational programs and association related notices.

The other list is a benefit that enables "members only" to query one another about people, places and things related to their practice.

You are currently set up to receive notices from both lists. If you prefer to receive only notices of association events please contact Sandee Rugg at srugg@waltonbiz.com.

HOT CASES!!!



By Robert J. Walters
GRACE BRANDON
HOLLIS LLP

The most significant appellate cases in the employment law context in California concerned retroactivity of remedies. Thus, a

new law imposing personal liability for sexual harassment on coworkers without express legislative directive could not be applied retroactively, however, a new law imposing liability on an employer for the sexual harassment by a non-employee – despite a legislative declaration of retroactivity – could not be applied retroactively. On the other hand, a holding that extrinsic evidence could not be used to determine the scope of a workers compensation release form, which might also apply to a civil action, could only be applied prospectively. The Supreme Court also provided some insight to requirements for class actions in the employment law context. In addition, the Supreme Court indicated appropriate calculations for purposes of Brandt fees when the plaintiff has a contingency arrangement with his or her attorney. In the medical malpractice context, elder abuse actions are not subject to the statute of limitations applicable to actions against medical professionals for negligence. In general, the request for a continuance of the hearing on the motion for summary judgment should be brought in good faith with a showing that evidence to oppose the

motion exists and must still be obtained by discovery, although there will need to be a showing of diligence in discovery otherwise. For a discussion of these and other “HOT” cases, read on, if you dare to be confused. Or not.

EMPLOYMENT LAW HIGHLIGHTS

California Supreme Court Opinions

In *McClung v. Employment Development Dept.* (2004) __ Cal.4th __, 20 Cal.Rptr.3d 428, the California Supreme Court held that an amendment to California Fair Employment and Housing Act (“FEHA”) imposing personal liability for harassment did not apply retroactively. A state Employment Development Department (“EDD”) auditor, who alleged she was sexually harassed by a co-worker, Manuel Lopez, sued EDD and Mr. Lopez for hostile work environment and failure to remedy hostile work environment under the FEHA. The court found Lopez liable for harassment under an amendment to the FEHA that imposes personal liability on coworkers. The Superior Court granted summary judgment for the defendants. The Court of Appeal affirmed as to EDD, but reversed as to Mr. Lopez because the court found Mr. Lopez liable for harassment under an amendment to the FEHA that imposes personal liability on coworkers. The Supreme Court reversed and held that: (1) an amendment to FEHA making non-supervisory employees liable for sex harassment effectuated a change in the law, rather than merely clarifying it, and (2) amendment imposing liability on non-supervisory personnel did not apply retroactively.

The retroactive application of an amendment to impose liability that did not exist prior to a defendant’s conduct would attach new legal consequences to the conduct. Aside from basic considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly, the Supreme Court concluded that an amendment cannot apply retroactively unless it is the Legislature’s “manifest intention” to allow it to do so. Because the Legislature provided no such intention, expressly, or through other sources, to indicate that the statute should retroactively impose liability for a defendant’s actions, the FEHA’s amendment imposing liability could not be retroactively applied to Lopez.

In *Claxton v. Waters* (2004) 34 Cal.4th 367, 96 P.3d 496, 18 Cal.Rptr.3d 246, the California Supreme Court held that the preprinted language in workers’ compensation compromise and release forms did not bar civil remedies outside scope of workers’ compensation system. Carolyn Claxton was employed by Pacific Maritime Association (“PMA”) as an office assistant. Ms. Claxton filed a workers’ compensation claim against PMA for an injury sustained in a slip-and-fall. One month later, she filed another workers’ compensation claim against PMA for injury to her “psyche due to sexual harassment.” Ms. Claxton sued PMA and her supervisor, Ray Waters, for alleged sexual harassment. Claxton and PMA subsequently settled the workers’ compensation claims. Claxton executed a preprinted compromise and release form, which made no reference to the pending civil action. PMA and Waters then moved for summary judgment in the civil action, arguing that Claxton extinguished any recovery for emotional distress damages by executing the workers’ compensation compromise and release form. The trial court granted the motion. The Court of Appeal reversed the lower court’s decision. The Supreme Court affirmed holding that the standard language of a preprinted form used in settling workers’ compensation claims releases only those claims that are within the scope of the

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Hot Cases

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workers' compensation system and does not apply to claims asserted in separate civil actions. Although outside claims may be the subject of a different settlement and release, the preprinted form signed by Claxton did not have an attachment expressing the parties' intent to have the release also apply to her civil action. 34 Cal.4th at 376. In addition, the Court held that extrinsic evidence was not admissible to show form applied to other claims and that the extrinsic evidence holding only applied prospectively. *Id.* at 377, 379. Unlike most physical injuries, for which employees must forgo litigation if they accept a workers' compensation payment, claims alleging harassment, discrimination and other violations of public policy are not limited to the remedies available under the state workers' compensation system. Employers, therefore, must document any waiver of such civil claims separately.

In *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 96 P.3d 194, 17 Cal.Rptr.3d 906, the California Supreme Court reaffirmed trial judges' broad discretion to certify class actions. In this case, the representative plaintiffs, Robert Rocher and Connie Dahlin, filed a class action against Sav-on Drug Stores to recover unpaid overtime compensation. The trial court certified a class that included all current and former salaried operating managers and assistant managers in California at any time between April 3, 1996 and June 22, 2001, which included approximately 1,400 in number. The court also held that common issues predominated the case and that a class action was superior to alternate means for fair and efficient adjudication of the claims. The Court of Appeal disagreed and directed the trial court to enter a new order denying class certification. The California Supreme Court reversed. The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. Community of interest embraces three factors: predominant common questions of law or fact, class

representatives with claims or defenses typical of the class, and class representatives who can adequately represent the class. The Court noted that Sav-on did not contest the typicality and adequacy factors. As to the disputed issue of commonality, however, neither variation in the mix of actual work activities undertaken during the class period by individual operating an assistant managers nor differences in the computation of unpaid overtime compensation owed each class member bars class certification as a matter of law. In light of the substantial evidence that common issues of law and fact will predominate over individual issues, class certification was proper. The Supreme Court stated that "a trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made.'" 34 Cal.4th at 326. In determining whether there is substantial evidence to support a trial court's certification order, appellate courts should consider "whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." *Id.*

California Court of Appeal Opinions

In *Carter v. California Dept. of Veterans Affairs* (2004) 121 Cal.App.4th 840, 17 Cal.Rptr.3d 674, the Fourth District Court of Appeal held that employer is not liable for sexual harassment perpetrated by a client or customer under Fair Employment and Housing Act. The California Department of Veterans Affairs operated Veterans' Home, where Helga Carter worked as a nurse. Ms. Carter provided care to a patient, Mr. Brown, who made sexually suggestive remarks to Carter, and threatened to ruin her reputation because she refused to sleep with him. Although Carter complained to her supervisor, the patient persisted. Carter sued Veterans' Home, alleging claims stemming from Brown's sexual harassment. The jury found that Carter was subjected to hostile environment harassment and also concluded that Veterans' Home knew or should have known of the harassment, but failed to take immediate and appro-

priate steps to correct the situation. The Court of Appeal reversed, holding that the FEHA did not impose employer liability for non-employee harassment. The California Supreme Court granted review, then remanded the case for reexamination in light of changes to the Act that provided that an employer may be responsible for sexual harassment by non-employees. However, although the Legislature intended the amendment to apply retroactively, the Court of Appeal held that retroactive application of the amendment was constitutionally objectionable. Thus, liability could not be imposed on Veterans' Home for Brown's misconduct. 121 Cal.App.4th at 863.

In *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 16 Cal.Rptr.3d 717, the Sixth District Court of Appeal held that an employer may be liable for retaliatory discharge where a supervisor's retaliatory motive could be imputed as a cause of the employee's dismissal. William Reeves worked as a food clerk at Safeway Stores Inc. In late 1997, Reeves complained to store manager, Fred Demarest, regarding conduct which he believed constituted sexual harassment of female employees. Reeves later was investigated for possible workplace violence, the result of which was a recommendation for discharge. Reeves sued Safeway for retaliatory discharge, however, finding that Safeway established a legitimate, non-discriminatory reasons for terminating Reeves, the trial court granted Safeway's motion for summary judgment. The Court of Appeal reversed holding that an employer can rebut a presumption of retaliatory discharge by articulating a legitimate, nondiscriminatory reason for the termination. However, since Plaintiff had produced sufficient evidence of a retaliatory animus was a substantial contributing factor in bringing about his dismissal to raise a triable issue of facts, summary judgment should not have been granted. Safeway failed to show that all material contributors to the decision acted for legitimate, nondiscriminatory motives.

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Hot Cases

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MEDICAL MALPRACTICE HIGHLIGHTS

In *Benun v. Superior Court* (2004) 123 Cal.App.4th 113, 20 Cal.Rptr.3d 26, a Second District Court of Appeal has held that the statute limitations for professional negligence actions against health care providers is not applicable to elderly abuse actions. Sam Benun sued Country Villa East LP for committing elder abuse against his mother, Fortune Benun, by failing to provide adequate custodial care while she resided at Country's nursing home from 1998 to 2001. Sam claimed Fortune suffered from insanity caused by dementia and Alzheimer's disease during the period of her alleged custodial abuse within the meaning of CCP §352. Country Villa argued that the applicable statute of limitations for the elder abuse cause of action was set forth in CCP §340.5. The Court of Appeal held that CCP §340.5 applied to actions against health care providers based upon "alleged professional negligence." However, in light of the objectives laws applicable to elder abuse, the issue was whether this provision should be interpreted broadly to include actions for reckless or intentional physical abuse of patients that are in any manner related to the provision of professional health care services. Laws applicable to negligence do not govern egregious acts of elder abuse because the function of a health care provider is distinct from that of an elder custodian. Thus, the statute of limitations under CCP §340.5 did not apply.

In *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 19 Cal.Rptr.3d 810, a Second District Court of Appeal discussed the requirements necessary to obtain a continuance of a summary judgment motion to obtain further discovery and held that declaration by patient's counsel did not establish good cause for a continuance. This case was decided under prior law requiring motions for summary judgment to be noticed a minimum of 75 days prior to hearing. Counsel for defendants requested that the trial court enter an order

permitting the motion for summary judgment following motion cut-off, which was unopposed by plaintiff's counsel, and the trial court entered a schedule for moving and opposing papers. Plaintiff subsequently requested that the court continue the motion and trial on the grounds that additional discovery was needed. The trial court stated that there was nothing in plaintiff's moving papers to warrant a continuance and that her request for a continuance was unsupported by any declaration other than that of her counsel stating that discovery was needed in order to finalize the opinions of plaintiff's expert, which was expected to be based upon the deposition of treating doctor, although the deposition had not been scheduled until a date *after* the opposition was due. The court further noted that plaintiff's counsel had plaintiff's medical records as early as June 2002 and plaintiff's counsel failed to present any explanation in his declaration as to why the necessary discovery was not initiated sooner. Affirming the denial of the request for continuance the appellate court stated that a declaration in support of a request for continuance under CCP §437c (h) must show the following: "(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts." 123 Cal.App.4th at 254. Accordingly, the appellate court held that the trial court's denial of the request for a continuance under CCP §437c (h) was not an abuse of discretion because plaintiff failed to make a good faith showing as to what facts essential to oppose summary judgment may have existed and why such facts could not have been discovered sooner. The appellate court further held that in determining whether to grant to a party responding to a summary judgment motion a continuance for discovery under CCP §437c (h) the trial court may consider whether that party has been diligent in completing discovery.

In *Piedra v. Dugan*, (Cal.App. 4 Dist.), ___ Cal.4th ___, 2004 WL 2569355, a brain damaged infant, through his guardians *ad litem*, sued the treating

physician for medical malpractice, negligent failure to obtain informed consent, and battery. Rey Piedra was admitted to a Fountain Valley hospital with a seizure disorder when he was six months old. Rey's mother signed a general consent form authorizing the use of any procedures during the hospitalization. However, she orally told hospital officials not to give Rey any medication without her knowledge. The next day, J.M. Dugan, M.D, treated Rey. After Rey had a prolonged seizure, Dr. Dugan administered Ativan and several other medications. Rey had a cardiac arrest, which is a rare side effect of the drugs. He suffered permanent brain damage. Rey's parents sued Dugan for medical battery and other torts. A trial court granted a nonsuit on the battery claim, and a jury found in favor of Dugan on the other claims. The Court of Appeal affirmed holding, among other things, that: (1) substantial evidence supported finding that physician was not required to obtain parents' consent to administer Ativan; (2) instructing jury regarding infant's settlements with other defendants was not erroneous; (3) conditions of admission form signed by mother when infant was admitted to hospital provided general consent to treatment at hospital; and (4) physician was not liable in battery for administering treatment in excess of mother's conditional consent. A medical battery occurs when a doctor obtains consent to perform one type of treatment and performs a substantially different treatment. The mother signed a consent form that covered the treatment administered to Rey. The Court rejected the mother's argument that the form was "simply informational" and did not constitute consent to treatment because such interpretation ignores the realities of emergency medical care. Consent to for every dose of medication cannot be required under emergency circumstances. Although the mother may have orally told other officials not to medicate Rey without her consent, Dr. Dugan was never informed of this alleged condition. Because Dr. Dugan was not aware of the conditional consent, he could not be liable for battery, an intentional tort.

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Hot Cases

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In *Ewing v. Northridge Hospital Medical Center* (2004) 120 Cal.App.4th 1289, 16 Cal.Rptr.3d 591, a Second District Court of Appeal held that expert testimony was not required to establish psychotherapist's liability for failure to warn third person of harm posed by therapist's patient.

OTHER "HOT" CASES

In *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 94 P.3d 513, 16 Cal.Rptr.3d 374, the California Supreme Court held that attorney fees payable as damages for insurer's bad faith limited to portion of efforts devoted to recovery of amount due under policy. Fareed and Rashida Cassim prevailed in a claim against Allstate Insurance Company for bad faith in the handling of their insurance claim. The jury awarded a combined \$3,594,600 in compensatory damages and \$5 million in punitive damages. Thereafter, the trial court awarded the Cassims \$1,193,533 in fees under *Brandt v. Superior Court* without explaining how it determined the figure. The amount due on the Cassims' policy was \$40,856 and they agreed to pay their attorney a 40% contingency fee. The Court noted that nothing in the contingent fee agreement differentiated between recovery on the contract and recovery on the tort, or between compensatory damages and punitive damages. On the other hand, According to Allstate, the *Brandt* fees, should have been 40% of the amount recovered of \$40,856.40, or \$16,342.56. The Supreme Court determined that Allstate's argument that *Brandt* fees should be limited to 40% of the recovery on the contract and such method of calculation was flawed and inconsistent with practical experience in fees. However, since the trial court failed to determine the total hours spent on the case and the percentage of those hours spent on contract recovery, its award was an abuse of discretion. The Supreme Court reiterated

that the *Brandt* case established an exception to the general rule that each party is responsible for her own attorney's fees. The *Brandt* rule that tort liability for damages caused by an insurer's bad faith may include the insured's cost to hire an attorney to recover under the policy and that the recovery was to be limited to fees attributable to the attorney's efforts to obtain the rejected payment due. The Court further observed that *Brandt* fees should never exceed the legal fees for the combined tort and contract recovery. Nonetheless, the Supreme Court offered guidance in the calculation. To determine the percentage of the legal fees attributable to the contract recovery, the trial court should determine the total number of hours an attorney spent on the case and then determine how many hours were spent working exclusively on the contract recovery. However, hours spent working on issues jointly related to both the tort and contract should be apportioned, with some hours assigned to the contract and some to the tort. The Court concluded that this latter figure, added to the hours spent on the contract alone, when divided by the total number of hours worked, should provide the appropriate percentage. 33 Cal.4th at 812.

In *Hartford Casualty Insurance Company v. Mt. Hawley Insurance Company* (2004) 123 Cal.App.4th 278, 20 Cal.Rptr.3d 128, a subcontractor's insurer brought equitable contribution action against general contractor's insurer, seeking payment of one-half of defense and settlement expenses incurred in defending suit against general contractor. A Second District Court of Appeal held that the indemnity provision in contract between general contractor and subcontractor precluded subcontractor's insurer from recovering. The Court concluded that an insurer of general contractor is not liable for contribution to subcontractor's insurer when general contractor is not liable.



L to R: Steve Polito, Dennis Aiken, Dino Buzunis, Scott Barber, Billie Jaroszek, Kelly Boruszewski, Martha Dorsey, Michelle Van Dyke, Sean Cahill and John Farmer. Not Pictured: Ken Greenfield

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SDDL Brown Bag Series, October: "Comfort In The Courtroom"

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

Insurance contracts contain liability insuring clauses similar to the following: The insurer "will pay damages which an *insured* becomes legally liable to pay because of *bodily injury* to others and damage to or destruction of property caused by accident resulting from the ownership, maintenance or use of *your* car, and defend any suit against *an insured* for such damages with attorneys hired and paid by us. The insurer **will not defend any suit if there is no coverage under the policy.**" As a

distinguished trial attorney, Mr. Mendel discussed at length, through the use of examples and personal war stories achieved through his own trial and error, how an attorney might go about creating his or her own comfort in the courtroom.

First, Mr. Mendel focused on determining what an attorney's own personal comfort might be. For example, one attorney might feel more comfortable with his or her suit jacket buttoned all the way up, while another attorney might feel more comfortable with only one or two buttons buttoned. Additionally, some people find comfort and confidence in having their hair and/or make-up done just right, or in wearing their best suit. By determining ones own comfort level in both mental and physical aspects, and incorporating those elements into an attorneys schedule and preparation on a day wherein a court appearance is required will automatically make that attorney feel more comfortable with themselves.

Second, Mr. Mendel focused on a three-prong approach to preparation for trial. The first prong simply consists of knowing your case. The second prong consists of having a plan, and the third prong consists of executing such plan with as much confidence as you can muster. Mr. Mendel discussed the subjective nature of trials and how each and every attorney approaches and conducts them differently. He advises eliminating all distractions, i.e., cell phones, keys, change, from your person. He also advises including a copy of the California Evidence Code at your table, as well as extra pens, highlighters, paper clips, etc. Mr. Mendel also focused on the importance of outlines, although stressed that attorneys should possess the ability to be flexible from their outlines as the trial and questioning evolves. Also, Mr. Mendel suggested that in determining one's comfort in the courtroom, an attorney should approach a trial with the knowledge that they are a person who has something attractive about them to offer. Focus on your strengths, go with the flow and never disregard a witnesses emotion during trial.

Third, Mr. Mendel discussed the Mechanics of Trial, namely, voir dire, opening statement, direct and cross examination of witnesses and closing argument. Voir Dire is the only aspect of trial an attorney cannot plan for. Mr. Mendel suggests correlating legal principles into questioning of jurors by asking them something personal. For example, if a juror is a member of a committee which conducts seminars and works as a group toward a common goal and finality, then an attorney can parlay that personal experience into the role of a juror at trial. With regards to opening statements, Mr. Mendel suggests practicing your opening statement on a friend or spouse, so that they can screen your opening and give you confidence to get through it at trial. Mr. Mendel also suggests getting to court early so that you can visualize where your trial exhibits are going to be when you reference them in your arguments or questioning. As for direct examination, Mr. Mendel suggests meeting and preparing your client in advance of trial, going through your outline of questioning with the client and showing them the exhibits that you will use during trial. Mr. Mendel also suggests preparing your client for questions that will likely be posed by opposing counsel during cross-examination. For cross-examination, Mr. Mendel suggests using outlines and adding or eliminating questions based upon the witness responses. He emphasized including page and line number of depositions in your outline for efficiency.

Overall, Mr. Mendel explained that comfort in the courtroom comes from all of the above preparatory elements, but more importantly from being comfortable with your yourself, being respectful and professional in the courtroom, and by establishing a rapport with opposing counsel to make life easier on you in trial.

SDDL Brown Bag Series, December: Automobile Insurance Coverage 101

By: Kelly T. Boruszewski,
Stutz Artiano Shinoff & Holtz

Insurance contracts contain liability insuring clauses similar to the following: The insurer "will pay damages which an *insured* becomes legally liable to pay because of *bodily injury* to others and damage to or destruction of property cause by accident resulting from the ownership, maintenance or use of *your* car, and defend any suit against *an insured* for such damages with attorneys hired and paid by us. The insurer **will not defend any suit if there is no coverage under the policy.**"

John Farmer, founding and managing partner at Farmer & Case, presented six major "Selected Issues In Automobile Insurance Coverage" regarding the above provision to introduce new lawyers to the world of automobile insurance coverage and present more senior attorneys his observations on the current judicial trend. The six topics of discussion at the December's Brown Bag Program were as follows:

1. The Insuring Agreement—Duty to Defend

An insurer must defend a lawsuit against the insured seeking the damages that would covered if a judgment was rendered on any theory or cause of action that could be based on the facts involved. (*Gray v Zurich Ins. Co.* (1966) 65 Cal.2d 263.) The program's underlying theme was that, in determining the fiduciary duty of the insurance carrier, the carrier must defend a suit which *potentially* seeks damages within the coverage of the policy. (*Id.*) But a carrier has no duty to defend where undisputed facts conclusively show that there exists no potential for coverage under the policy—including claims falling outside the scope of the insuring clause. (*Id.*) A more recent case, *Montrose Chemical Corporation v. Superior Court* (1993) 6 Cal.4th 287, held that an insurer's duty to defend is determined "upon those facts known by the insurer at the inception of a third-party lawsuit." A defense is excused only where "the third-party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage." (*Id.*)

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2. "Arising Out of the Use, Maintenance or Operation" of a Motor Vehicle

An inquiry as to whether the injury or damage arose out of an accident or was intentional is requiring a causal analysis. Mr. Farmer explained that, under established case authority, there must be a minimal physical connection between the use of the vehicle and the loss, damage, or harm for it be said that the loss, damage, or harm "arises out of" the use, maintenance, or operation of a vehicle. The leading case is *State Farm Mutual Automobile Insurance Company v. Partridge* (1973) 10 Cal.3d 94. Other cases include, *USAA v. Ledger* (1987) 189 Cal.App.3d 779 and *Interinsurance Exchange v. Flores* (1996) 45 Cal.App.4th 661.

The term "use" "when applied to a motor vehicle shall only mean operating, maintaining, loading or unloading a motor vehicle." (Ins. Code § 11580.06.) Historically, courts have given a rather expansive reading to the term "use." (See, *Utah Home Fire Ins. Co. v. Fireman's Fund Ins. Co.* (1970) 14 Cal.App.3d 50 [standing next to vehicle while conversing with owner was "use"]; *USAA v. Ledger, supra*, [insured's fatal stabbing of another motorist after inadvertent lane change nearly caused collision did not "arise out of the use" of the vehicle]; *State Farm Mut. Auto. Ins. Co. v. Grisham* (2004) 18 Cal.App.4th 563 [dog bite injury from dog that jumped out of stopped vehicle did not "arise out of use".]) Other notable cases discussed were *National Insurance Company v. Insurance Company of North America* (1977) 74 Cal.App.3d 565; *State Farm v. Davis* (9th Cir. 1991) 937 F.2d 1415.

3. "Caused by Accident"—Intentional Acts

Some policies do not contain an "intentional acts" exclusion. Instead, they contain the requirement that the injury or damage be "caused by accident". The Insurance Code expressly sanctions the intentional acts exclusion in automobile liability policies. (Ins. Code § 11580.1(c)(2).) And Section 533, which provides that an insurer is not liable for loss caused by the willful act of the insured, overlaps the exclusionary language and directly limits the scope of coverage provided by an insurance policy. (See, *Maxon v. Security Ins. Co.* (1963) 214 Cal.App.2d 603.) Cases of interest on this topic include *Gray v. Zurich Insurance Company, supra* [intent to do the wrongful

act is not the equivalent of intent to bring about the harm]; *Mullen v. Glens Falls Ins. Co.* (1977) 73 Cal.App.3d 163; *J.C. Penney Cas. Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009 [child molestation]; *St. Paul Fire & Marine Ins. Co. v. Super. Ct.* (1984) 164 Cal.App.3d 1199 [wrongful termination]; and *State Farm v. Davis, supra* [shooting from moving vehicle not "accidental"].

4. "Ownership" and Insurable Interest

The purchaser of a policy must have an **insurable interest** in the subject matter of the insurance. "[I]f the insured has not insurable interest, the contract is void." (Ins. Code § 280.) In other words, the question is whether the insured had sufficient jeopardy in relation to the vehicle. Discussion focused on several cases. (See, *Napavale, Inc. v. United Nat. Indem. Co.* (1951) 169 Cal.App.2d 119; *Osborne v. Security Ins. Co.* (1957) [mother has insurable interest when registered a car in her son's name and purchased policy designating herself as the named insured, might suffer loss if car had property damage, and might be liable because financially responsible by reason of signing son's driver's license application]; *International Serv. Ins. Co. v. Gonzalez* (1987) 194 Cal.App.3d 110 [former husband has no insurable interest when wife's new husband was involved in accident with vehicle that former husband purchased policy during marriage and, after divorce, renewed policy but failed to delete the vehicle].)

5. Conflict of Laws

The typical scenarios raising conflict of laws questions include vehicle insured in California, but (1) accident occurs in sister state while insured is on a trip; (2) insured moves to another state and new policy has not yet been issued; and (3) child takes vehicle out of state for school.

The test in California is the "governmental interest" test. First, it must be determined whether there is a genuine conflict of law. Second, a court must determine the interests of the litigants and the applicable statutes. In the absence of a clear choice of law by the parties, the contracts taken into account are: (1) the place of contracting; (2) the place of negotiating the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation

and/or place of business of the parties. The Brown Bag material presented several cases. (See, *State Farms v. Super. Ct.* (2003) 114 Cal.App.4th 434; *California Cas. Indem. Exch. v. Pettis* (1987) 193 Cal.App.3d 1597.)

6. Uninsured Motorist Coverage Offsets

Here, the insurer may permissively reduce the amount payable (insured's damages or policy limits, whichever is less) by all amounts payable as workers' compensation benefits. (See, Ins. Code § 11580.2(h)(1).) The policy, however, must contain specific provisions. (*Coltherd v. WCAB* (1990) 225 Cal.App.3d 455.)

The offset may be taken from insured's damages or policy limits, whichever is less. If the damages are greater than the policy limits; the reduction is taken from the policy limits. (*McGreehan v. Cal. State Auto Assn.* (1991) 235 Cal.App.3d 997.) Such offsets apply in underinsured motorist cases as well. (*Rudd v. Cal. Cas. Gen. Ins. Co.* (1990) 219 Cal.App.3d 948.)

By contrast, amounts received under medical payments coverage are offset from the insured's damages, not the policy limits. Thus, if the damages the insured could recover (without considering policy limits) are sufficiently in excess of those limits, the offset may not apply. See, Cal. Ins. Code § 11580.2(e).

As in the case of workers' compensation benefits, an insurer may permissively offset amounts recoverable from another insured under the liability portion of the policy, from the UM policy limits. See, Ins. Code § 11580.2(h)(2).

SDDL would like to thank John Farmer for contributing his time and effort in presenting December's Brown Bag topic. If you have a topic that you would like presented at future Brown Bag Programs or the Evening Seminars, please voice your desire to any SDDL board member, or e-mail SDDL's Executive Director, Sandee Rugg at S.Rugg@LBHLawFirm.com.



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