

The Update

Winter 2008

SAN DIEGO DEFENSE LAWYERS

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THE BOTTOM LINE

Case Title: Smyser v. Taz Express, et al.
 Case Number: Riverside Superior Court Case No. RIC425269
 Judge: Honorable Gary B. Tranbarger
 Plaintiff's Counsel: Gary Gebler, Esq. of Berglund, Johnson & Sommer
 Defendant's Counsel: Norman A. Ryan, Esq. of Ryan Mercaldo & Worthington LLP
 Type of Incident/Causes of Action: Automobile v. truck/negligence
 Settlement Demand: Remaining policy limits of \$920,000
 Settlement Offer: \$300,000 which Defendant increased to \$375,000 during trial
 Trial Type: Jury trial
 Trial Length: 9 days: deliberations of one day (Poll: 9-3)
 Verdict: \$713,926 (Plaintiff argued for an award of \$3.4 million)

Case Title: Feher v. Genesee Medical Group
 Case Number: GIC 868893
 Judge: Honorable Richard Strauss
 Plaintiff's Counsel: Andrew Dunk, Esq. of Dunk & Associates
 Defense Counsel: Clark Hudson, Esq. of Neil, Dymott, Frank, McFall & Trexler APLC
 Type of Case: Wrongful death and alleged Medical Malpractice in failing to diagnosis a perforated duodenal ulcer.
 Settlement Demand: CCP 998 - \$249,999.99
 Settlement Offer: None, no consent.
 Trial Type: Jury
 Trial Length: Six days (One and a half days of deliberations.)
 Verdict: Defense

PRESIDENT'S MESSAGE



The Board of Directors for the San Diego Defense Lawyers did a phenomenal job in 2007. Some of their accomplishments are in need of recognition.

The 2007 Golf Tournament was our most successful to date in terms of money raised for juvenile diabetes research. Jim Boley, Darin Boles and Danielle Nelson were responsible for hosting the event. Their efforts allowed our organization to donate \$10,500 to the Juvenile Diabetes Research Foundation.

Brian Rawers and Michelle Van Dyke were responsible for membership development. Through their efforts, the organization not only was able to bring old members back into our ranks, but also, successfully encouraged other defense firms to join the San Diego Defense Lawyers as new members. Our membership numbers are increasing. Hopefully that is a trend that will continue.

The editor of The Update, Lori Guthrie, did an outstanding job. She not only ensured The Update contained quality information, but also single handedly was responsible for its timely completion and distribution.

Lastly, Randy Nunn was responsible for the Mock Trial. This year we had a great turnout in terms of schools attending. We literally had schools from all across the country attending. We expect that next year's event will be even bigger given Randy's fine efforts.

Ken Greenfield will be the President in 2008. The President elect is Darin Boles. New Board Members are Ken Medel (The Medel Law Firm) and Tracey VanSteenhouse (Koeller, Nebeker, Carlson & Haluck). Randy Nunn was re-elected to a new term. Given the quality of the individuals on the San Diego Defense Lawyers Board, I would anticipate that Ken and Darin will have an enjoyable 2008.

Clark Hudson



PUBLISHED

Millard v. Biosources, Inc. (2007) 156 Cal. App. 4th 1338

Following the precedent set out in Privette v. Superior Court (1993) 5 Cal.4th 689 and Hooker v. Department of Transportation (2002) 27 Cal.4th 198, the Fourth District Court of Appeal, Division 1, has affirmed San Diego Superior Court Hon. Kevin Enright's grant of summary judgment in favor of defendant general contractor Biosources, Inc. finding no triable issue of fact that general contractor "affirmatively contributed" to cause injury to the employee of its HVAC subcontractor.

In Millard, during a tenant improvement, the subcontractor's employee fell from a narrow catwalk in an attic space where he claimed the lights had gone out. The lights had been inadvertently switched off earlier in the day by general contractor's electrician who was working at a mis-labeled circuit breaker. However, the lights were quickly turned back on and by the time of the accident, all general contractor personnel had left the job site. Also, immediately after the accident the lights were found to be on and plaintiff told co-workers the lights had "flickered."

Plaintiff argued that general contractor violated various OSHA provisions, such as failing to hold safety meetings and failing to "tag out" the electrical box, resulting in negligence per se according to the ruling in Elsner v. Uveges (2005) 34 Cal.4th 915. However, both courts found that Elsner did not apply and that OSHA statutes, while setting out standards of care, do not create the duty of care. In the absence of evidence that the general contractor had affirmatively contributed to cause the accident, there was no violation of the duty of care and these standards of care had no application.

* Editor's Note: Congratulations to SDDL member Dinah McKean of Walsh & Furcolo for her successful defense of her client, Biosources.

Honorable Wayne L. Peterson 2007 San Diego Defense Lawyers Honoree



The Honorable Wayne L. Peterson's extraordinary accomplishments and positive impact on the San Diego legal community will be appreciated for generations to come. Judge Peterson served as Presiding Judge of the San Diego Superior Court, and Chair of the Superior Court's Executive Committee from

1998 through 2001, an unprecedented term. As Presiding Judge, he oversaw the third largest trial court in the United States, managing one hundred fifty-four judicial officers, sixteen hundred employees, and a two hundred fifty million dollar budget. During his tenure, the Chief Justice also appointed him Chair of the Trial Court Presiding Judges Advisory Committee to the State Judicial Council as well as Chair of the Task Force of Judicial Ethics and named him to a seat on the Judicial Council.

Through twenty years of service on the bench, Judge Peterson's impact has been felt far beyond the courtroom. In addition to presiding over cases, Judge Peterson was instrumental in initiating and overseeing construction of San Diego's Hall of Justice in 1996; a task that began years earlier when he was assigned the responsibility to obtain space for more courtrooms.

Shortly after becoming the Superior Court's Presiding Judge in 1998, Peterson oversaw the daunting task of merging San Diego County's Municipal and Superior Courts into one system. He managed to unite each of the five jurisdictions in San Diego County, many with distinct rules and forms, and organize them into one, seamless entity.

During his tenure as Presiding Judge from 1998-2001, Judge Peterson developed a civil mediation program that became a model for developing legal systems in wide world countries. Judge Peterson traveled abroad, consulting with non-profit organizations, and helped implement a mediation system in several countries including: Malaysia and India.

Judge Peterson reluctantly left his beloved position on the bench to work in private dispute resolution in 2004. He humbly reflects upon his career in the courtroom as "blessed." He views the courtroom as "a theater of human events," where he enjoyed watching attorneys apply skills to make their cases. Judge Peterson takes pride in the many appreciative comments he received from both prevailing and unsuccessful litigants who felt they received a fair courtroom experience in his department.

Judge Peterson is now driven to help litigants resolve disputes in civil mediation. He recently mediated a matter for twenty hours straight, with no meal breaks, in successfully resolving the matter. He is the only San Diego mediator who has been named among the Los

Angeles Daily Journal's "Top 40" Neutrals in the State of California for the last two years, and was the only one named from San Diego in 2006.

Judge Peterson is happy with the evolution of his career and his current position at ADR Services, Inc., noting, "One of the great values of the legal profession is that it provides one a variation on a theme in terms of your career. Everybody needs to be re-potted and re-energized periodically throughout their lives no matter how happy they are doing what they are doing presently."

"Everybody needs to be re-potted and re-energized periodically throughout their lives no matter how happy they are doing what they are doing presently."

THE BOTTOM LINE

Case Title: *Follis v. Michael Russ, CPA*

Case Number: GN052870

Judge: Honorable Michael M. Anello

Plaintiff's Counsel: Michael Wischkaemper, Esq. of Law Office of Michael Wischkaemper

Defense Counsel: Robert W. Harrison, Esq. and Patrick Kearns, Esq. of Koeller Nebeker Carlson & Haluck LLP

Type of Incident/Causes of Action: Professional negligence (involving alleged erroneous tax advice involving an IRS section 1031 real estate exchange)

Settlement Demand: None (but asked jury for \$337,000)

Settlement Offer: None

Trial Type: Jury

Trial Length: 4 days

Verdict: Defense (9-3)

Misc: Plaintiffs' sons were the purchasers of the subject property. One of the sons was an experienced commercial real estate sales agent who had handled a significant number of 1031 exchanges. It was assessed that it was the son rather than the defendant on who the plaintiffs realized for advice regarding the transaction.

Case Title: *Evelyn Hogan v. Professional Performance Development Group*

Case Number: 04-CV-0424 IEG (BLM)

Judge: Honorable Irma E. Gonzelez

Plaintiff's Counsel: Suzy Moore, Esq. of Law Offices of Suzy Moore

Defendant's Counsel: Hugh McCabe, Esq. and David Hall, Esq. of Neil, Dymott, Frank, McFall & Trexler, APLC

Type of Incident/Causes of Action: Wrongful Termination and Sexual Harassment

Settlement Demand: \$350,000

Settlement Offer: \$50,000

Trial Type: Jury Trial

Trial Length: 6 days

Verdict: Defense verdict (8-0)

San Diego Defense Lawyers Attorney of the Year: Mary B. Pendleton, Esq.



Mary Pendleton is an active representative of the San Diego legal defense community and its interests. Beginning in 1984 working for Bernard Newell and Tom Balestreri, her practice revolved around casualty defense, municipal liability, and premises liability. Some of her early clients included the City of El Cajon and the Del Mar Thoroughbred Club. In 1991, she became a founding member of Balestreri, Pendleton & Potocki. Today, as managing principal of Balestreri, Pendleton & Potocki, her practice is dedicated to the defense and counseling of building and property owners, and businesses engaged in the construction industry in California.

Throughout her career Ms. Pendleton has actively supported the interests of defense lawyers and served as a mentor to others. She was one of the founders of the Young Alumni Association for San Diego State University shortly after graduation from law school. She served on the Board of Directors for the San Diego Defense Lawyers from 1996 to 1998, and continues to encourage active participation and leadership on the SDDL Board. To date, four other members of Balestreri, Pendleton & Potocki have also served on the SDDL Board.

Ms. Pendleton is a frequent speaker on legal trends and ethics to groups focused on construction law issues. Her advocacy for defense lawyers caught the attention

of the Association of Southern California Defense Counsel, who appointed her to its 2002 Board of Directors. She is one of only two lawyers from San Diego on the ASCDC Board and she will continue to serve through the end of 2009. The ASCDC advances the interests of civil defense lawyers and was instrumental in changing Rule 3-310 to prevent formal tripartite relationships developing as between defense lawyers, their clients, and their clients' insurers.

In 2004, Ms. Pendleton was appointed as a liaison member to the Board of the California Defense Counsel, which serves as a voice for defense counsel to the California State Legislature. The CDC allows Ms. Pendleton to keep her finger on the pulse of the Legislature in Sacramento and report back to her San Diego colleagues on matters of interest. Through the CDC, Ms. Pendleton was directly involved with focused changes leading to the elimination of Type I indemnity agreements in residential construction contracts.

There are very few attorneys in the California State Legislature, whose members have an average age of less than fifty, most with no experience running a private practice or business. As a lawyer and business owner, Ms. Pendleton provides a valuable perspective to the Legislature, and dedicated her St. Patrick's Day in 2005 to addressing a Joint Session of the Assembly and Senate Judiciary Committee on the dangers of legislatively mandated joint defense agreements.

Ms. Pendleton's ongoing work in the legal community and advocacy for the interests of San Diego defense lawyers garnered her recognition as the Top Attorney in Construction and Real Estate Law in 2005, a Super Lawyer Top Attorney in 2007, and one of the Top 25 Women Attorneys in San Diego for 2008. She has also begun a year of service as the Defense Research Institute's (DRI) California State Representative. Her recognition by the San Diego Defense Lawyers inspires her to continue her advocacy for defense lawyers with the utmost civility and professionalism.

Evening MCLE Program - June 27

The Trial is Over, the Verdict is in - Now What?

“Judgments, Cost Memorandum and Motions to Tax Costs, Motions for Judgment Notwithstanding the Verdict, Motions for Offset, Motions for New Trial, Judgment Collection”



Brian Rawers, Esq.
Lewis Brisbois Bisgaard & Smith

On September 27, 2007 an SDDL evening seminar was held at the Daniel Broderick Room at the San Diego County Bar Building. Continuing with SDDL’s 2007 theme of “The Year of the Trial” this seminar focused on post-verdict matters the trial lawyer must concern him or herself with. Panel members were Lisa Cooney (Lewis Brisbois Bisgaard & Smith), Randy Nunn (Hughes & Nunn), Brian A. Rawers (Lewis Brisbois Bisgaard & Smith), and Bryan D. Sampson (Sampson & Associates).



Lisa Cooney started off the evening speaking about Judgments, Motions for Judgment Notwithstanding the Verdict, and Motions for New Trial. Ms. Cooney pointed out that an important aspect of post-trial motions, whether

it be motions for New Trial or Motions For Judgment Notwithstanding The Verdict is the element of timing. Pursuant to Code of Civil Procedure section 659 a party must move for a new trial either before the entry of judgment or within 15 days of the date of the mailing of the Notice of Entry of Judgment by the clerk of the court. A Motion for a Judgment Notwithstanding the Verdict is also governed by the same time frame. As such, if plaintiff’s counsel gets a judgment drafted, entered, and served in a expeditious manner, defense counsel may not have much time within which to analyze the trial and file a Motion For New Trial or Judgment Notwithstanding the Verdict. Ms. Cooney also stated that it may be a good strategic move for trial counsel to engage an appellate specialist to either draft the Motion for New Trial or Judgment Notwithstanding the Verdict, or at least provide defense counsel with advice on how to draft said motions relating to what points should be emphasized. Appellate counsel can use their expertise in structuring the motions so that if the trial court denies the motions, the motions

are more favorably positioned for review by the appellate court.



Randy Nunn related a recent experience he had in a case that went to trial and resulted in a hung jury. Mr. Nunn had been engaged in a lengthy jury trial that had resulted in a hung jury. After licking his wounds for several days, he became aware of a rather obscure code section. Mr. Nunn discovered Code of Civil Procedure 630(f) which allows parties, after a hung jury, to petition the court for a directed verdict on any or all issues that were presented to the jury. In his case, Mr. Nunn was

able to obtain the directed verdict on several important issues that had been presented to the jury which ended up being significant in resolving the entire case. Mr. Nunn pointed out that although C.C.P. §630(f) allows a party to request a directed verdict after a hung jury, one must keep in mind that there are strict time restraints. The request must be made within 10 days of the jury reaching their hung decision. The court cannot hear the matter after 10 days. In Mr. Nunn’s case there was a real issue as to whether or not the court could actually hear the motion within the ten day period as the judge took ill. Mr. Nunn was able to get his directed verdict motion heard on time, but felt very fortunate that he was able to do so.

Continued on next page

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THE BOTTOM LINE

Case Title: Vons Companies, Inc. v. Lyle Parks, Jr., Inc.

Case Number: Los Angeles Superior Court
Case No. BC352507

Judge: Honorable William F. Fahey

Counsel for Vons: James Lassart, Esq. and Suzanne Rischman, Esq. of Ropers Majeski Kohn & Bentley (San Francisco)

Counsel for Lyle Parks: Bruce Lorber, Esq. and Steven Polito, Esq. of Lorber Greenfield & Polito LLP

Type of Incident/Causes of Action: Construction defects

Settlement Demand: \$700,000 to \$1.1 million
(Vons sought \$2 million in its opening statement)

Settlement Offer: \$200,000

Trial Type: Jury

Trial Length: 2 weeks

Verdict: \$35,556.00

Misc: The action was filed by Mock Enterprises against Vons. After completion of construction by Lyle Parks, Mock entered into a transaction to buy the buildings from Vons. The complaint alleged fraud. Vons then cross-complained against Lyle Parks for construction defects. Mock and Vons settled the fraud claim shortly before the trial on the construction defects.

Case Title: Paul M. Hamzey v. Joel Berger, D.D.S., M.D.; Scripps Health; Scripps Green Hospital and DOES 1 to 20

Case Number: GIC870587

Judge: Honorable Jay Bloom

Plaintiff's Counsel: James J. Filicia, Esq. of Law Office of James J. Filicia

Defendant's Counsel: Clark Hudson, Esq. of Neil, Dymott, Frank, McFall & Trexler APLC

Type of Incident/Causes of Action: Medical Malpractice - Oral Surgery - Maxillary and Mandibular advancement for treatment of obstructive sleep apnea

Settlement Demand: \$149,999

Settlement Offer: None

Trial Type: Jury

Trial Length: 7 Days

Verdict: Defense

Brian Rawers spoke about Memorandum of Costs and Motion to Tax Costs. Mr. Rawers spoke about a case where the defense lost, but only had an award for the plaintiff for special damages in the amount of \$50,000.00. There were no general damages for pain and suffering. Another defendant had settled prior to trial in an amount that exceeded the verdict. As such, the entire verdict was off set by the settlement amount, resulting in a net award of \$0.00 to the plaintiff. California Court of Civil Procedure section 1032 governs when a party may be able to recover costs from an opposing party. The allowance of costs depends on how a "prevailing party" is determined. C.C.P. §1032 defines four categories of prevailing parties: (1) a party with a net monetary recovery; or (2) a defendant in who's favor a dismissal was entered; or (3) a defendant, when neither plaintiff nor defendant recovered any relief; or (4) a defendant against whom plaintiff has not recovered any relief. In the case Mr. Rawers discussed, neither party fell within the four numerated categories of "prevailing party." As such, pursuant to C.C.P. § 1032(a)(4), the court has the power to determine who is the prevailing party. Even in the case where a defendant loses a trial, but where a plaintiff does not fall within any of the numerated "prevailing party" provisions of section 1032, pursuant to 1032(a)(4), a defendant can make an argument that, in fact, it was the prevailing party. In Mr. Rawers' case, that argument was made, but, unfortunately, the defense did not prevail.

Mr. Rawers also pointed out that other ways to either reduce a prevailing plaintiff's cost, or to recover defense cost is through the use of C.C.P. §998 offer. C.C.P. §998(e) provides "if an offer made by defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the cost under this section from the time of the offer, shall be deducted from any damages awarded in favor of plaintiff. If the cost awarded under this section exceed the amount of damages awarded to the plaintiff, then that amount shall be awarded to the defendant and judgment or award shall be entered accordingly." Furthermore, C.C.P. §998(c)(1) provides: "In addition ... the court or arbitrator, in his discretion, may require the plaintiff to pay a reasonable sum to recover costs of the services of expert witnesses ... actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

In those cases where a party believes they are entitled to costs, again, timing is of the essence of in filing a Memorandum of Costs. Pursuant to California Rule of Court 870 a prevailing party who claims costs shall serve a file a memorandum of costs within 15 days of the date of mailing the Notice of Entry of Judgment or Dismissal by the clerk. If you are going to contest the costs, then a Motion to Strike or Tax the Costs needs to be served and filed 15 days after the service of the Memorandum of Costs. As with post trial motions and directed verdict motions after a hung jury, Mr. Rawers pointed out that there continued to be the theme of the importance of "time" in filing post-trial and post entry of judgment matters. Many lawyers relax after the verdict comes in, however, Mr. Rawers pointed out that many times there is still a great deal of work to do on a case after the judgment has been entered, and the time frame to do that work is very short.



The final speaker of the evening was **Bryan Sampson** who spoke on judgment collection. Mr. Sampson was very entertaining, interesting, and scary! Mr. Sampson's law firm is in the business of collecting judgments. As part of their work in assisting other attorneys to collect judgments, they have developed an expertise in routing out hidden assets. Mr. Sampson provided numerous examples of extraordinary efforts that his firm has gone through to discover and latch onto defendant's assets. The most riveting part of Mr. Sampson's talk related to the defense attorney's role in assisting clients to avoid paying judgments. The end result of Mr. Sampson's talk is that defense attorneys should play no role whatsoever in trying to hide client's assets or advise clients as to how to hide assets. Mr. Sampson provided numerous examples of how attorneys got in trouble with the State Bar by assisting clients in wrongfully hiding assets. Mr. Sampson's advice was that if you have a client that has a verdict against them that client should seek the advice of a bankruptcy attorney or attorney who specializes in asset protection. Woe be to the defense counsel who treads in these very dangerous waters!

There was a great deal of material that was covered in the evening. It was done in an informative and interesting way and certainly ended with everyone resolving to refer any clients, who have judgment against them, to bankruptcy attorneys or attorneys who specialize in asset protection!

Edifications

What's With All The Violins On TV?



by Lori J. Guthrie, Grace Hollis Lowe Hanson & Schaeffer

To quote Gilda Radner's character on Saturday Night Live, Emily Littella, she couldn't understand the "fuss" about "violins on television." When corrected by Chevy Chase that it was "Violence on television," her response was something to effect of "Oh, that's different . . . Nevermind." While I, myself, am not a big fan of violins on television (respecting that other people might enjoy same), I am concerned about violence on television. . . . Not on television, per se, but in commercials. Don't get me wrong, my favorite TV show is "24" (which I heard Fox would not air new episodes until the writer's strike ends and possibly not even until next year. . . .ughh), so I am clearly not adverse to violence on TV.

My main concern is sports programming on the major networks-- Specifically commercials during said sports programming. As a family, we mostly watch baseball and football games. Unlike other programs, these games are not "rated." But it seems that given the time frames in which these games are broadcast that they should be sensitive to the ratings of the TV shows for which they advertise. For example, I recall last year during the Super Bowl (which usually starts around 3:15 p.m. in California, 6:15 p.m. on the East Coast) that there were several commercials for the upcoming season of 24. While I myself was interested and wanted to see them, I was watching the game with my children (age 5 and 3 at the time) and was completely horrified by the guns and explosions that took place during these previews.

I took to the internet to find out whether there were any laws against this. (Of course there are not). But I did find an interesting study conducted by Dr. Robert Tamburro which was published in the December 2004 edition of Pediatrics. I reviewed the abstract of this study on the internet (at www.ncbi.nlm.nih.gov) which analyzed 1,185 commercials that were aired between 9/1/01 and 9/1/02 during the top rated sporting events (including the Winder Olympics, NFL games, NBA finals, World Series, etc.) and which aired before 9:00 p.m. Of the 1,185 commercials, 14% depicted "unsafe" behavior and 6% depicted "violence." "Unsafe" behavior was defined as "any action that could have harmful

consequences or that contravened the injury prevention recommendations of national organizations." "Violence" was defined as "any intentional physical contact by an aggressor that had the potential to inflict injury or harm or the legitimate threat of such action." Interestingly, only 18% of all the commercials advertised movies or TV shows, but these accounted for 86% of all violent commercials. Of the 86%, 48% were commercials for movies and 38% were for TV shows. Of course, the conclusion of the report was that parents "should both limit and directly supervise children's viewing of these events", including remaining present during commercials. However, the report also commented that "the sports, movie and television industries should be encouraged to adopt models of advertising that limit or eliminate such conduct" so that the "viewing of televised sporting events is a safe and positive experience for children."

You may wonder why I even care. I care because I have two children, one almost 7 and one who just turned 4. I work full-time, am on the board of directors of the SDDL, am the editor of The Update and volunteer at my son's school, and blah, blah, blah. I'm busy just like everyone else. The end result is that I don't have a lot of time when I am home to watch what my kids watch TV. As a result, I rely on the TV ratings to guide me in deciding which shows I can let my kids watch while I am cooking dinner or doing whatever around the house. The problem is that during sports games, they show previews for movies or TV shows of the network. With the upcoming NFL Playoffs (NFC games) and the Super Bowl which will be broadcast on Fox, I am concerned about previews for shows like Prison Break and Bones which are both rated TV-14. According to the Fox TV website (www.fox.com), which links you to www.v-chip.org, and www.fcc.gov, a TV-14 rating means that the show may be unsuit-


able to children under 14. In the case of the upcoming episode of Prison Break, there was an additional rating of "V", which means there is violence in the show. In the case of the upcoming episode of Bones, there were additional ratings of "D", which means there is suggestive dialogue and "S", which means there are sexual situations. I am concerned that commercials for these sexually suggestive and violent shows will be aired while I am watching these football games. While I do what I can and now my 6 year old now pretty much knows when to shut his eyes, this may not always be the case if I have stepped out of the room.

You may be thinking, I don't HAVE to watch TV and I know that is true, but I bet the studios and ad execs would be upset to know that parents of young kids aren't watching their shows, and consequently the ads contained therein. Oh wait... would that work??? And would they want to know why??? And would they agree to only show commercials that mirror the TV rating of the show being aired. For example, any show that has a TV-14 rating should not be shown during a baseball or football or any other sport show before 8:00 p.m. The rating means it may be unsuitable for a kid under 14. How about a kid under 7? My kids go to bed at 8. I think that is a realistic time to begin showing violent commercials if they really need to. Do you think they would stop showing commercials for the DVD release of Resident Evil (MPAA Rated "R" for strong horror violence and some nudity) during college bowl games at 7:30 p.m.??? How hard is that??? I think this will be my cause for the year. I'll let you know how I do. But I'll still probably watch the Super Bowl—especially if the Chargers are playing. Go Bolts!!

Let me know what you think. E-mail me at lguthrie@gracehollis.com.



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THE BOTTOM LINE

Case Title: Carrie Castillo v. Peter Hellwig, DDS

Case Number: GIE 033519

Judge: Honorable Lillian Lim

Plaintiff's Counsel: Dane Levy, Esq. of Law Office of Dane Levy

Defendant's Counsel: Joseph Kutyla, Esq. of Law Offices of Joseph T. Kutyla

Type of Incident/Causes of Action: Dental Malpractice

Settlement Demand: \$250,000

Settlement Offer: \$45,000

Trial Type: Jury

Trial Length: 3 weeks

Verdict: Defense

Case Title: Julia Barrientos v. Barry Katzman, M.D., et al.

Case Number: GIC876334

Judge: Honorable Charles R. Hayes

Plaintiff's Counsel: Richard A. Williams, Esq. of Law Offices of Richard A. Williams; David T. Achord, Esq. of San Diego Injury Law Center

Defendant's Counsel: James D. Boley, Esq. of Neil, Dymott, Frank, McFall & Trexler APLC

Type of Incident/Causes of Action: Medical Malpractice (alleged failure to diagnose endophthalmitis post-operative day one following cataract surgery)

Settlement Demand: C.C.P. 998 \$250,000

Settlement Offer: None

Trial Type: Jury

Trial Length: 8 Days

Verdict: Defense (9/3 Causation)

INSURANCE LAW



James R. Roth, Esq.
The Roth Law Firm

The California Court of Appeal has been busy indeed. Decisions have been handed down which discuss competing "other insurance clauses;" legal malpractice claims against assigned insurance defense counsel; when coverage under the "use of a covered auto" provision does not exist; when the proration provision in an automobile policy takes precedence over the excess provision for uninsured motorist coverage; when cleanup costs pursuant to settlement are not "damages" subject to indemnification; and when an intentional act of self-defense could be an "accident," which triggers a duty to defend and possibly indemnify.

WHERE TWO INSURANCE POLICIES WHICH INSURED DIFFERENT INSUREDS AND APPLIED TO THE SAME RISK, THE RELATIVE APPLICATION OF THE POLICY IS GENERALLY DETERMINED BY THE EXPLICIT PROVISIONS OF THE RESPECTIVE "OTHER INSURANCE" CLAUSES. In Burns v. California Fair Plan (2007) 152 Cal.App.4th 646, 61 Cal.Rptr.3d 809, the Second District Court of Appeal Appellate District held that a life tenant and trust which held remainder interest in residence destroyed by fire could each only recover on a pro rata basis under their separate fire insurance policies, which each contained "other insurance" provisions. Ann Burns held a life estate on a residence and the Kent Burns Trust held the remainder interest. Both separately purchased fire insurance policies on the home from different insurance companies. A fire destroyed the home. Burns and the Trust brought an action each seeking to obtain the full value of the residence under their respective insurance policies, a total amount in excess of the damage to the residence. The court found that the pro rata payments under the separate fire insurance policies of \$279,410 to Ms. Burns destroyed by fire and \$198,792.99 to the Trust which held the remainder interest fully compensated them for the loss of the residence, which had estimate cash value of \$474,000. Ms. Burn's "other insurance" provision only required her insurer to pay covered losses in excess of the amount due from other insurance, the Trust's "other insurance" provision limited liability to the 41% proportion of the insurance policy limit to the total cover-

age between the two policies. The combined payment, noted the court, was more than the actual cash value of the property and more than the reconstruction estimate.

A PLAINTIFF ALLEGING LEGAL MALPRACTICE AGAINST ITS ASSIGNED INSURANCE DEFENSE COUNSEL IN THE DEFENSE OF A LAWSUIT MUST PROVE THAT, BUT FOR THE NEGLIGENCE OF THE ATTORNEY, A BETTER RESULT COULD HAVE BEEN OBTAINED IN THE UNDERLYING ACTION. In Lazy Acres Market, Inc. v. Tseng (2007) 152 Cal.App.4th 1431, 62 Cal.Rptr.3d 378, the Second District Court of Appeal held that the insured market owner failed to state a valid cause of action against its attorney for legal malpractice and breach of fiduciary duty, after the attorney was assigned by the insurer to represent the insured and others with regard to the underlying litigation but failed to disclose or advise the insured of any potential and actual conflicts of interest and obtain written waivers. Lazy Acres Market, Inc., hired Premier Protective Services ("Premier") to apprehend shoplifters in its market. The contract required Premier to defend and indemnify Lazy Acres Market Inc., its shareholders and employees (hereinafter collectively "Lazy Acres") for any claims arising out of Premier's loss prevention activities. Premier obtained a policy of insurance from Western Heritage Insurance Company ("Western Heritage"), naming Lazy Acres as an additional insured. Premier employee, Johnny Lopez, arrested Scott Courts for shoplifting an item from Lazy Acres Market. Courts sued Premier, Lazy Acres and others, alleging intentional and negligent torts. The complaint demanded punitive as well as compensatory damages. Western Heritage agreed to defend Lazy Acres. It did not reserve any rights to deny coverage. Instead, Western Heritage accepted full responsibility to defend and indemnify Lazy Acres pursuant to the insurance policy. Western Heritage selected Jennifer Tseng to represent Lazy Acres and Premier. On August 7, 2003, Tseng wrote Lazy Acres stating she had been retained to defend it, but Tseng disclosed no actual or potential conflict of interest. Earlier that day, Cappello & Noël, Lazy Acres's personal counsel, had obtained an extension of time to respond to Courts's complaint. On August 13, 2003, Terrence Bonham wrote to Tseng advising her that he had been retained by Lazy Acres's own insurance carrier to represent Lazy Acres's interest in the suit. Bonham stated that because Western Heritage had accepted defense and indemnity, he would monitor the case. Tseng represented Lazy Acres, Premier and Lopez in the lawsuit until July of 2004.

During this time, Tseng spoke to, advised, and corresponded with all defendants. Bonham monitored the case on behalf of Lazy Acres's carrier, and Cappello & Noël played no role in the litigation. Tseng failed to assert defenses that would benefit Lazy Acres; she failed to advise Lazy Acres of her conflict of interest in representing Lazy Acres and Premier; and she failed to advise Lazy Acres that Lazy Acres could be entitled to have Western Heritage assign independent, conflict-free counsel at Western Heritage's expense. In July of 2004, Lazy Acres contacted Cappello & Noël regarding the status of the Courts case. Cappello & Noël advised Lazy Acres that Tseng had an actual, or at least potential, conflict of interest in representing both Premier and Lazy Acres. Cappello & Noël told Tseng they were replacing her as Lazy Acres's counsel. By the time Cappello & Noël began representing Lazy Acres in July of 2004, crucial trial deadlines were looming. Lazy Acres requested documents retained by Tseng. Tseng responded only after repeated phone calls and letters. She refused to allow her former clients to remove the legal file from her office. Instead, she required Lazy Acres to come to her office to copy the file. This prejudiced Lazy Acres in its ability to prepare for trial. Lazy Acres requested Tseng to recuse herself from representing Premier because of a continuing conflict of interest. Tseng refused, and Lazy Acres moved to disqualify her. Tseng submitted opposition and the trial court denied the motion. Nevertheless, Tseng called Cappello & Noël the next day and acknowledged a conflict of interest existed, and expressed the view that the trial court was wrong in denying the motion. Tseng resigned from the case, and Western Heritage appointed new counsel for Premier and Lopez. Lazy Acres was forced to pay for its own defense beginning in July of 2004. Western Heritage did not respond to Lazy Acres's requests for payment of its fees and costs. However, Western Heritage paid \$100,000 to Courts to settle the case before trial. For purposes of its analysis, the appellate court assumed that attorney Tseng breached her duties to Lazy Acres. However, the court concluded that from the record before it, the insured failed to state a valid cause of action against its insurance defense attorney for legal malpractice and breach of fiduciary duty because there were no facts plead to show that the insured would have achieved a better result but for Tseng's breaches, nor any evidence to show that anything Tseng did influenced the insurer not to pay the insured's legal fees.

NO COVERAGE UNDER THE "USE OF A COVERED AUTO" PROVISION FOR THE CLAIMS BY A SHUTTLE SERVICE PASSENGER FROM THE SEXUAL ASSAULT BY THE SHUTTLE DRIVER WHEN THE USE OF THE VEHICLE WAS NOT THE PREDOMINATING CAUSE OR A SUBSTANTIAL FACTOR IN THE PASSENGER'S INJURIES. In R. A. Stuchbery Others Syndicate 1096 v. Redland Insurance Company (2007) 154 Cal.App.4th 796, 66 Cal.Rptr.3d 80, the First District Court of Appeal held that the alleged injuries of a shuttle service passenger from the sexual assault by the shuttle driver did not result from "use of a covered auto" within the coverage of the shuttle service's business automobile insurance, since the use of the vehicle was not the predominating cause or a substantial factor in the passenger's injuries; rather, the shuttle was used merely to drive the passenger to the driver's apartment where the alleged assault took place. In its analysis, the appellate court explained that under the "predominating cause/substantial factor test" for determining whether an injury resulted from the use of a vehicle, and thus is covered by auto insurance, a mere "but for" connection between the use of the vehicle and the alleged injuries is insufficient to bring the claim within the scope of coverage. The court concluded that the shuttle was merely used to transport the victim to the locale of the assault. Her injury resulted from the driver's conduct and not from the "use" of the shuttle.

THE PRORATION PROVISION IN AN AUTOMOBILE POLICY TAKES PRECEDENCE OVER THE EXCESS PROVISION FOR UNINSURED MOTORIST COVERAGE. In Allstate Ins. Co. v. Mercury Ins. Co. (2007) 154 Cal.App.4th 1253, 65 Cal.Rptr.3d 451, the Second District Court of Appeal held that the proration provision in an automobile policy takes precedence over the excess provision for uninsured motorist coverage. This case concerned a dispute between two insurance companies regarding which of two competing clauses in their respective uninsured motorist insurance policies apply to compensate a passenger injured in an automobile collision with an uninsured motorist. The Mercury insurance policy contained the following pro-rata provision: "[I]f the insured has insurance available to the insured under more than one uninsured motorist coverage provision, any damages shall not be deemed to exceed the higher of the applicable limits of the respective coverages, and such damages shall be prorated between the applicable coverages as the limit of each coverage bears

to the total of such limits." The Allstate insurance policy contained this following excess coverage provision: "If the insured person was in ... a vehicle you do not own which is insured for this coverage under another policy, this coverage will be excess. This means that when the insured person is legally entitled to recover damages in excess of the other policy limit, we will only pay the amount by which the limit of liability of this policy exceeds the limit of liability of that policy." Mercury and Allstate disagreed regarding the respective amounts that each was required to pay to settle the passenger's claims. Mercury claimed that Allstate must contribute a pro-rata share; Allstate claimed that its insurance was excess coverage to Mercury's UM \$30,000 damages limitation. The appellate court noted that California Insurance Code § 11580.2(d) provides that an insurance policy may require that uninsured motorist coverage be prorated when an insured has coverage under more than one UM policy. That section, explained the court, was designed to "avoid endless squabbles" engendered by claims made under multiple policies." The court held that the statute is clear and the policy with the proration provision takes preference over the policy with the excess coverage provision.

INSURED'S CLEANUP COSTS PURSUANT TO SETTLEMENT WERE NOT "DAMAGES" SUBJECT TO INDEMNIFICATION. In Aerojet-General Corp. v. Commercial Union Ins. Co. (2004) 155 Cal.App.4th 132, 65 Cal.Rptr.3d 803, the Third District Court of Appeal held that the insured's cleanup costs pursuant to settlement were not "damages" subject to indemnification. This case concerned whether the sums agreed to be paid as a settlement of litigation were subject to indemnification as "damages" under excess liability insurance policies. The insured sued for breach of contract and declaratory relief against its excess liability insurance carriers due to their refusal to indemnify their joint insured for the costs it incurred to remediate polluted real property pursuant to a settlement agreement from another legal action. In affirming the trial court's grant of summary judgment to the excess carriers, the appellate court explained that the costs incurred to remediate polluted real property pursuant to settlement agreement in court suit were not "damages" subject to indemnification under insured's excess liability insurance policies; in light of judicial interpretation

Continued on page 11

THE BOTTOM LINE

Case Title: Carol Austin v. Khan Ha, M.D.

Case Number: GIC858968

Judge: Honorable Frederic Link

Plaintiff's Counsel: Sean Simpson, Esq. and Charles Moore, Esq. of Simpson & Moore and Matthew Tyson, Esq. of Tyson & Tyson

Defendant's Counsel: Kenneth Medel, Esq. of The Medel Law Firm

Type of Incident/Causes of Action: Medical Malpractice

Settlement Demand: Back and forth between \$200,000 to \$1million

Settlement Offer: \$50,000

Trial Type: Jury

Trial Length: Three weeks

Verdict: Defense verdict 12-0, twenty minutes.

71-year Ms. Austin suffered mild stroke symptoms and was evaluated at Sharp Coronado ER by Dr. Ha, an ER doctor. After work-up, Dr. Ha spoke with her family doctor on the phone and Ms. Austin was admitted for observation to the Telemetry Unit. Four hours later, still in the hospital, she deteriorated and now has little use of right arm with right leg impairment greatly affecting her ability to walk. Plaintiff argued that a neurologist should have been summoned to the ER to evaluate the patient and tPA would have been given, a "wonder drug" to reverse stroke symptoms. Defense argued that tPA was not appropriate and dangerous.

Case Title: Richard and Arlene Rutherford v. Centex Homes

Case Number: GIN050560

Judge: Retired Judge Kevin W. Midlam (JAMS)

Plaintiff's Counsel: Francis T. Donohue, Esq. of Voss, Cook & Theil

Defendant's Counsel: John Schlichting, Esq. of Sooy & Associates

Type of Incident/Causes of Action: Single Family Home Construction Defect/Breach of Warranty

Settlement Demand: \$483,000

Settlement Offer: \$125,000 offered the morning of the first day of trial

Trial Type: Binding Judicial Reference

Trial Length: 6 days

Verdict: \$103,300

Employment Law



By Lori J. Guthrie, Esq.
Grace Hollis Lowe Han-
son & Schaeffer

In the last issue of The Update, two cases were discussed: Arias v. Superior Court (Angelo Dairy), 153 Cal. App. 4th 777 (July 24, 2007) and Estrada v. FedEx Ground Pack-
age System, 154 Cal. App. 4th 1 (August 13, 2007).

On October 10, 2007, the Supreme Court took Arias up on review. The Supreme Court case number is S155965. Petitioner's opening brief was filed on December 10, 2007 and respondent's answer brief is due on February 8, 2008. The questions presented for review are: (1) Must an employee who is suing an employer for labor law violations on behalf of himself and others under the Unfair Competition Law (Bus. & Prof. Code § 17200, et seq.) bring his representative claims as a class action? (2) Must an employee who is pursuing such claims under the Private Attorneys General Act ("PAGA") (Labor Code §2699) bring them as a class action? The Third District Court of Appeal had ruled that (1) Claims brought under the Unfair Competition Laws must comply with the class action requirements set forth in Civil Procedure section 382, although it does not expressly state such a requirement and (2) Representative claims under ("PAGA") need not comply with the class action requirements set for in Code of Civil Procedure section 382.

On November 28, 2007, the Supreme Court denied review of Estrada. Furthermore, the Supreme Court denied FedEx's request to depublish the case.

In other news....

Gentry v. Superior Court (Circuit City Stores), (2007) 42 Cal. 4th 443. In August 2007, the California Supreme Court determined that arbitration agreements that purport to waive class-wide arbitration may be unenforceable if a trial court determines that class arbitration is "a significantly more effective way of vindicating the rights of affected employees than individual arbitration." The Court's opinion sets forth various factors for the trial court to consider when making this determination. Also at issue in this case was whether the entire arbitration agreement was unconscionable. The Supreme Court concluded there was an element of procedural unconscionability and remanded the case for

a determination of whether the agreement was substantively unconscionable.

In Gentry, plaintiff employee was a salaried customer service manager who claimed to be "illegally misclassified" as an exempt employee. When he began work at Circuit City, he was provided with an "Associate Issue Resolution Package" which included Circuit City's dispute resolution procedures, i.e., their arbitration provisions ("Resolution Package"). The arbitration agreement contained a class arbitration waiver. In addition, the arbitration provision also included language limiting damages, recovery of attorneys' fees and other language that was "less favorable to employees than were provided in the applicable statutes." The Resolution Package gave the employee 30 days to opt out, which Plaintiff did not do.

The Supreme Court essentially granted review in this case to clarify their ruling in Discover Bank v. Superior Court (2005) 36 Cal. 4th 148. In that case, the court held that "at least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable." Discover Bank at 153. The court opined that in Discover Bank, they had no opportunity to consider whether a class arbitration waiver would impede plaintiff's statutory rights, as no California statutory rights were at issue in that case. In Gentry, statutory rights to overtime compensation were at issue. The Court of Appeal in Gentry had found the class arbitration waiver was not unconscionable because of the 30 day opt out provision. As such, it concluded, there was no adhesion to the contract and as a result, there was no procedural unconscionability.

Although the Court was unwilling to state that all class arbitration waivers in overtime cases are unenforceable, the Court set forth four factors the trial court must consider in determining whether a class arbitration waiver is enforceable: (1) "the modest size of the potential individual recovery"; (2) "the potential for retaliation against members of the class"; (3) the fact that absent class members "may be ill informed about their rights"; and (4) "other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration." If a trial court then finds that class arbitration is "likely to be a significantly more effective practical means of vindicating" the employees rights and also finds that disallowing the class action will "likely lead to a less comprehensive enforcement of overtime laws" then the class arbitration waiver should be invalidated. The court further noted that the class arbitration must still meet the class action requirements.

Gattuso v. Harte-Hanks Shoppers (2007) 42 Cal. 4th 554. In November 2007 the Supreme Court held that an employer can satisfy its statutory reimbursement obligations under Labor Code §2802 by paying outside sales persons an increased base salary (or increased commissions) as compared to inside sales persons. However, there must be some method to apportion the increased compensation so that it can be determined what is paid for labor and what is paid for reimbursement of business expenses.

In Gattuso, Plaintiffs filed a class action lawsuit against their employer alleging the employer failed to reimburse them for their business related expenses in violation of Labor Code §2802. Plaintiffs were “outside sales representatives.” Outside sales reps must drive their own cars to potential customers. Other sales persons who worked in employer’s offices contacted potential client with employer-owned telephones. Labor Code 2802 provides that “an employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties. . .”

Apparently the parties agreed that the employer must fully reimburse its outside sales force for the automobile expenses they “actually and necessarily incur in performing their employment tasks.” However, they disagreed as to whether the employer can do this by increasing the base salary or whether the employer must separately identify a reimbursement payment. Both parties even agreed that 2802 permits the employer to use the IRS mileage rate to calculate auto expense reimbursement. However, using this method allows for the employee to challenge the reimbursement if he or she can show that the reimbursement is less than his or her actual expenses. The court also acknowledged that while the parties could negotiate a mileage rate for reimbursement, Labor Code §2804 makes any agreement with an employee null and void if it waives the employee’s right to full reimbursement.

Essentially what is at issue here is whether the employer can use a “lump sum” method for reimbursement. The Supreme Court held that the employer can use this method. HOWEVER, the amount paid must be “sufficient to provide full reimbursement for actual expenses necessarily incurred.” Again, as with anything other than the actual cost method, the employee must be permitted to challenge the amount of the payment. To do this, the employee must be able to compare the lump sum paid with the actual cost. Furthermore,

the amount cannot be less than the amount necessary to provide full reimbursement.

Finding that “lump sum” is an appropriate method by which to reimburse employees for business expenses, the Court next considered whether the “lump sum” must be segregated from other compensation, or whether the “lump sum” may be in the form of an increase in base salary. The Court concluded that the reimbursement may be in the form of an increased base salary. HOWEVER, the employer (1) must establish “some means to identify the portion of overall compensation that is intended as expense reimbursement”; and (2) “the amounts so identified are sufficient to fully reimburse the employees for all expenses actually and necessarily incurred.” In footnote 6, the Court admonished employers who use this method to “separately identify the amounts that represent payment for labor performed and the amounts that represent reimbursement for business expense” on their pay statements. The Court seemed to say that although Labor Code §2802 does not specifically require this, there must be some way for employees and “officials charged with enforcing the labor laws” be able to distinguish between the two.

Another issue on appeal was whether the trial court abused its discretion in denying class certification finding the claims lacked commonality. The trial court and the Court of Appeal had framed the class issues as: (1) whether each outside sales person had an agreement about the manner in which they were reimbursed for business expenses; or (2) whether the compensation paid to each employee was reasonable to pay them for their business expenses. Both the trial court and the Court of Appeal found that answers to these questions would involve individualized inquiry.

The Supreme Court concluded the appropriate class would be those employees who were not “separately” reimbursed for their business expenses. The Supreme Court then opined that the validity of Plaintiffs’ claims turned on the answers to three questions: (1) whether the employer adopted a policy or practice of reimbursing outside sales persons by paying them higher base salaries and commission than inside sales persons; (2) If so, did the employer establish a method to apportion the compensation from the reimbursement; and (3) If so, was the amount paid for reimbursement sufficient to fully reimburse the employees for their business expenses. The case was remanded for a consideration of whether these inquiries were amenable to class treatment.

INSURANCE LAW cont.

Continued from page 9

“damages” unambiguously meant money ordered by court to be paid, and settlement was agreement negotiated by insured and complaining water entities, which did not involve court order or judgment.

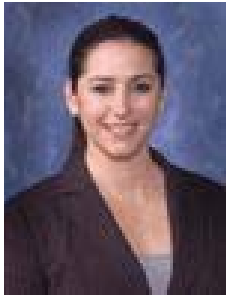
AN INTENTIONAL ACT OF SELF-DEFENSE COULD BE AN “ACCIDENT,” WHICH TRIGGERS A DUTY TO DEFEND AND POSSIBLY INDEMNIFY. In Jafari v. EMC Insurance Companies (2007) 155 Cal. App.4th 885, 66 Cal.Rptr.3d 359, the Second District held that in assault and battery cases, it is the unexpected conduct of a third-party that prompts the insured to act in self-defense that gives rise to coverage since the conduct of the third-party is an unexpected and unforeseen event. On August 30, 2003 Farhad Nazemzadeh came to pick up his car from Glendora Tire & Brake Center the business of the insured, Davar Jafari. Mark Mitchell, the manager of Jafari’s business, told Nazemzadeh his car was not ready for pickup. Apparently, Nazemzadeh became verbally abusive by yelling at Mitchell, who told Nazemzadeh to leave and to “get out of his face.” Nazemzadeh apparently did not leave but continued his verbal assault, telling Mitchell he would kill him. Mitchell punched Nazemzadeh at least twice in the face. Nazemzadeh sustained a cut over his right eye which required three stitches. Unsurprisingly, Nazemzadeh filed suit against both Jafari and Mitchell, alleging causes of action for assault, battery, negligence, intentional and negligent infliction of emotional distress, premises liability and negligent hiring. Jafari tendered defense and indemnification of the action to EMC, which rejected Jafari’s tender, explaining that Nazemzadeh’s suit was the result of Mitchell’s intentional acts, which are not “accidents,” and hence do not fall within the coverage provision of the policy. In concluding that Mitchell’s intentional act of hitting a customer in self-defense in an altercation with that customer on the business premises could be considered “accident” within meaning of policy under governing case law, thereby triggering liability insurer’s duty to defend, the appellate court explained that in assessing a liability insurer’s duty to defend an assault and battery case against the insured, the insurer must take a broad view of any incident raising the question of self-defense when determining whether there has been an unexpected and unintended force, or “happening,” in the causal chain of events creating the covered “accident.”

BROWN BAG PROGRAMS

Brown Bag Series Summary - August 21

Effective use of Direct and Cross-Examination of Witnesses at Trial – Pointers and Pitfalls to Avoid from a Judge and Trial Counsel’s Perspective”

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



On August 21, 2007, Judge Patricia Yim Cowett, Independent Calendar Judge for Department 67 of the San Diego Superior Court, along with veteran trial lawyers Andrew Albert, a former plaintiffs attorney and current mediator/arbitrator at Judicate West, and Thomas A. Balestreri, Jr. of Balestreri, Pendleton & Potocki presented the SDDL Brown Bag Seminar “Effective Use of Direct and Cross-Examination of Witnesses at Trial – Pointers and Pitfalls to

Avoid from a Judge and Trial Counsel’s Perspective.” Such presentation provided practical information regarding evaluating one’s case and preparing for trial via depositions and direct and cross-examination of witnesses at trial. The panel emphasized trial preparation from the moment you get a case as it takes so long to prepare for trial and trial is the time to convince the trier of fact of your case. The following represents a summary of the points of discussion raised by the panel:

A. Developing a Theme: While the entire panel agreed that developing a theme for your case is important, they differed on their approach to developing one.

Andrew Albert, representing the plaintiffs’ perspective, addressed the importance of developing a theme for a case early on and emphasized the difference in trying a case from the plaintiffs’ side because the burden of proof is on the plaintiffs. As such, the plaintiffs go first in trial and must immediately grab the attention of the Judge and Jury to persuade them and keep their attention throughout the presentation of their case. This is done by developing a common theme that juries relate to, such as family, home, work, community activities or simply targeting the defendant. The more compelling the theme, the better hook the plaintiffs have against competing themes from the defense.

Thomas A. Balestreri, Jr., representing the defense perspective, discussed how a theme for the defense case usually does not come as quickly as that of the plaintiffs as the defense receives the case later and typically doesn’t have enough information to develop a theme until after further information is received about the case. However, Mr. Balestreri cautioned that the defense should always have their theme well before commencement of depositions. Mr. Balestreri offered tips such as reviewing relevant jury instructions for the causes of action in your case to figure out what you need to prove and the defenses to those causes of action. This process not only enlightens you as to unique facts of the case but helps you develop a theme on the defense side.

B. Fitting Witnesses With a Theme & Sequencing of Witnesses: Again, while the entire panel agreed that you need to fit your witnesses with a theme and that sequencing of witnesses is extremely important, they differed on their approach to how to do same.

Andrew Albert, representing the plaintiffs’ perspective, cautioned all plaintiffs’ counsel to call as few witnesses as possible, as the more witnesses the jury hears, the more bored and sick of the process they

get. Mr. Albert emphasized “recency” and “primacy” in calling witnesses. Mr. Albert suggested starting and ending the day and trial with a good witness and calling a bad witness after lunch. Mr. Albert also suggested putting the plaintiff on as the last witness as the likelihood the plaintiff will get impeached by other testimony is greatly reduced if they are called last.

Thomas A. Balestreri, Jr., representing the defense perspective, agreed that the fewer witnesses called the better and again suggested reviewing the relevant jury instructions. Mr. Balestreri offered the following questions to ask yourself before calling a witness to help fit a witness to your theme: Why am I calling this witness? What facts do I need from this witness? Do I really need this testimony and what benefit will I get from this testimony? If no benefit to case and theme, then don’t call that witness.

C. Preparing Lay & Expert Witnesses: The entire panel also agreed on the importance of preparing your lay witnesses for direct and cross examination. Tips to prepare lay witnesses are conducting a rehearsal of questions you will be asking in direct and prepare lay witnesses for cross by playing devil’s advocacy with them and anticipating the questions which will be asked on cross examination by the other side. Adequate preparation of a lay witness for both direct and cross-examination will make them more comfortable in the courtroom and during questioning. Judge Cowett also suggested having your witness sit in on another trial to get familiar with the courtroom and the proceedings.

In preparing expert witnesses for direct and cross examination in deposition and at trial, it is also important to prepare them about for cross examination about any weaknesses in their case. At trial, you do not want to let the jury hear the weaknesses in your case for the first time on cross examination. All damaging evidence or weaknesses should be addressed in direct. However, when you have a truly good expert, it enables you to really hammer your themes with their testimony and teach the jury about the facts or unique issues in your case.

Whether a lay witness or expert witness, it is imperative that both counsel and the witness read that particular witnesses’ deposition transcript so that weaknesses are pointed out and the witness is prepared for cross examination on their deposition testimony.

D. Direct & Cross Examination of Witnesses: Mr. Albert and Mr. Balestreri agreed that when conducting direct examination of a witness the focus should be on the witness, and when conducting cross examination of a witness the focus should be on the attorney. Whether preparing a bullet point outline of questioning or writing out every single question that will be asked of a witness, the panel agreed that the questioning should look and sound spontaneous.

With regard to direct examination, Judge Cowett advised that the Judge enjoys a direct examination that is smooth and that moves forward giving the Court an understanding of what that witness is say-

ing. Mr. Albert and Mr. Balestreri both agreed that you shouldn't ask a question unless it gives you information you need to prove your case during closing argument.

With regard to demonstrative evidence, the panel discussed our "show and tell" society wherein demonstrative evidence is essential to a case. The panel agreed that a well prepared exhibit could itself provide an outline for questioning on direct examination. The panel, however, cautioned against becoming too tied to your exhibit lists, because if too many exhibits are used, the jury will be bored. The panel urged a use of mixed media to keep the jury's attention with exhibits. Judge Cowett also cautioned against not testing out equipment prior to using it in trial and urged all counsel to know how to operate the equipment and to pick the method of presentation of demonstrative evidence wisely. Finally, the panel agreed that you shouldn't put every possible photograph in front of the jury, just the best representative photographs.

With regard to cross examination, the panel agreed that before you ask a question, make sure you know the answer or reasonably know what their answer will be and prepare supplemental questions for cross should they answer contrary to your expectations. The panel agreed that you should pin the witness down to key points and should not repeat the plaintiffs' case on cross examination because it only reinforces the points made in same. On cross examination be prepared to make between 3-6 points, but most importantly your cross examination should make the jury believe that this witness is not worthy of believing. The panel also agreed that sometimes it's best not to ask any

Brown Bag Series Summary - September 18 **Utilizing The Latest Litigation Support Technologies**

Lori Guthrie, Esq. of Grace Hollis Lowe Hanson & Schaeffer



On Tuesday September 18, 2007 Brenda Peterson of Peterson Reporting shared her insight on electronic presentation AND her birthday with the SDDL. The SDDL presented Ms. Peterson with a cake and gift and everyone present sang Happy Birthday.

The topic of the seminar was "Utilizing the Latest Litigation Technologies." During the presentation, Ms. Peterson, along with Missy Szymanski, explained the benefits of using a document management and trial presentation program called "Visionary." "Visionary" is different from other trial presentation software in that the software is FREE. Ms. Szymanski provided a live demonstration of the program in action. Using "Visionary", the attorney can access clips of videotaped depositions and show both the written deposition transcript with the videotaped testimony at the same time so the jury can read along as well as observe the witness. Using this during trial, especially to impeach a witness can have devastating effects. In fact, SDDL member Dick Semerdjian of Schwarz Semerdjian Haile Ballard & Cauley used "Visionary" during a trial in February 2007. In addition to using the software, he also used one of Peterson's trial presenters to assist in the trial. Mr. Semerdjian told Peterson that the "Visionary" technology assisted in all aspects of the trial including opening statements, direct and cross-examination, along with closing arguments. Mr. Semerdjian obtained a favorable result for his client and he believes that both the trial presenter and "Visionary" had a positive aspect in the trial result.

questions on cross at all. Also, remember to listen to what the witness said because sometimes you will be surprised at the openings they will give you. Finally, the panel emphasized that you shouldn't give up on questioning regarding an important fact. If an objection is sustained, rephrase the question until it survives objection but never give up on that question if it pertains to an important fact. With regard to an important point, Mr. Balestreri uses the Rule of 3, which means that on an important point that you really want the jury to hear, you should ask the question differently 3 times so that every jury member will likely hear the response at least once.

E. Techniques for Difficult Witnesses: With regard to difficult witnesses, the panel agreed that you have to "bull-whip" them into shape by asking yes or no questions and when answer go beyond a yes or no, then immediately moving to strike their answer as non-responsive. Judge Cowett indicated that the Court will often instruct the witness to listen to the question and answer only what is asked, but if the Court has not done so on their own volition you should request the Court's assistance to get the witness to answer your questions. Another option would be to ask the reporter to read the answer back so the witness can hear their own rambling and the jury can see how the witness' response is evasive.

F. Conclusion: Overall, the esteemed panel encouraged all counsel to prepare, prepare, prepare. Be conscious of your theme, tailor witnesses to that theme, sequence witnesses to start and end the day and trial on a good note, and don't call witnesses or ask questions that don't add something to your case.

Using the "Visionary" software you can image and manage documents and depositions even if you do not use the program at trial. In addition, if you have a deposition videotaped (it does not necessarily have to be videotaped by Peterson), that can be synched with the "Visionary" program. However, there are costs associated with synching the video deposition with the program (there will also be costs incurred with hiring a trial presenter to assist during trial). On the other hand, if an attorney is computer savvy or has a computer savvy paralegal, they can be trained to use and operate the program themselves to minimize costs.

Ms. Peterson also discussed online services they offer, such as organizing master calendars and firm-specific calendaring, as well as cost analysis. Deposition transcripts can also be reviewed and downloaded from their website. One benefit to this online access of documents or deposition transcripts is the ease in providing these to experts who may need instant access. They can be provided with the access information and look up the documents or transcripts themselves.



The SDDL would like to thank Brenda Peterson and Peterson Reporting for their continued support.

Jim Boley took great pleasure in recognizing Brenda Peterson's birthday by giving her a gift from the SDDL membership. Brenda has been a loyal supporter of SDDL, hosting the Brown Bag lunches for the past several years. It was our pleasure to celebrate with her that day.

Brown Bag Series Summary – October 18

Jury Instructions and the Use of Special Verdict Forms

By: Eric J. Miersma, Esq. of Balestreri Pendleton & Potocki



The October 18, 2007 Brown Bag MCLE Seminar on jury instructions and special verdict forms was a resounding success. The San Diego Defense Lawyers were privileged to hear Judge Judith F. Hayes, Christopher W. Todd, Esq., and Matthew J. Liedle, Esq. speak from years of experience. We are grateful to each of them for sharing their time and knowledge.

For those of you who have been following the Brown Bag series all year, you know that the series has tracked a case from beginning to end. Although we are now nearing the end of the series, the panelists reminded us that jury instructions are actually one of the first things a lawyer should review. They provide a clear and concise statement of the law and help you know how to prepare a case. Jury instructions are an excellent source for ascertaining the elements you need to prove or defend against. Early review of the applicable jury instructions will help you maintain a “laser-like focus” on the important elements throughout the trial.

Everyone knows that it is counsel’s duty to prepare the jury instructions. Judge Hayes emphasized the importance of submitting your jury instructions early and getting them right. Make sure you fill in the blanks! Check and know the Rules of Court, the local rules, and the department rules for jury instructions. This will impress the Court and show that you are experienced and know what you are doing.

When preparing your instructions, begin with CACI. They were specifically designed to accurately state the law in a way that is understandable to the average juror. While instructions are allowed on inconsistent case theories, they must be supported by substantial evidence. When drafting special instructions, keep them simple. Judges are trained to watch for special instructions that contain quotes from cases, so your best bet is to use language taken verbatim from statutes. The basic ob-

jections to instructions are: argumentative, confusing, or misstatement of the law. Remember that the judge is the one who will review them and modify them if the parties cannot agree. Judges do not have a lot of time so it is in your best interest to resolve objections with opposing counsel rather than let the judge redraft your instructions. If the Court does exclude your instruction, make sure you document the ruling on the record to preserve your right to appeal. Errors are waived if there is no objection, except for incorrect statements of law.

The Court’s role is akin to that of newscaster with the lawyers as copy editors. The lawyers should provide the judge with clear, concise, and accurate instructions which the judge can read to the jury. If the judge reads an instruction incorrectly, it is okay as long as the written copy given to the jury is correct. Remember that the Court is not necessarily obligated to provide specific instructions, and if counsel forgets to include them, the jury will not hear them. Finally, be prepared to adapt. Arrange quick access to a printer to accommodate last minute changes to instructions. Consider loading all of your instructions into a PowerPoint presentation and modify it as the case progresses. When it is time for closing, you will have select approved instructions readily available.

Special verdict forms should be short and simple, or you are inviting error. It is better to ask yes or no questions, or request a percentage or dollar amount. Work directly from CACI to formulate the questions. Remember that you can ask advisory questions to the jury for an equitable decision by the judge. Make sure the numbering is accurate and the questions maintain a logical flow. Try to put the bad stuff in first or in the middle, and save the easy questions for later. Work with opposing counsel to agree on a special verdict form in advance, otherwise you may end up with the judge drafting it for you. Use the verdict form in your closing argument, both to argue your case and to make sure the jury understands what to do. Finally, if nothing else, remember the following: “A jury consists of twelve persons chosen to decide who has the better lawyer.” Robert Frost, 1874-1963.

Thank You

San Diego Defense Lawyers would like to thank
Brenda Peterson of Peterson Reporting
for sponsoring
our Brown Bag Luncheon programs
held in her offices at:

530 “B” Street · Suite 350 ·
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Brown Bag Series Summary – November 20

What Works (or doesn't) in Closing Argument - from a Judge's Perspective

By: Dan H. Deuprey of Deuprey & Associates



Once again, Judge Wayne Peterson (Ret.) gave generously of his time and efforts to educate SDDL members, this time in the November Brown Bag Seminar entitled, "What Works (or Doesn't) in Closing Argument from a Judge's Perspective." Judge Peterson's long and distinguished service on the Bench needs no introduction for purposes of this summary, but it bears special mention that he was recently recognized as one of the "Top 30" neutrals in California by the L.A. Daily Journal.

The attendance for the Seminar was high in anticipation of hearing some of the most important aspects of preparing and delivering closing arguments from the perspective of the trial judge, and Judge Peterson did not disappoint. Some of the highlights of the presentation are the following:

1. Before trial begins, prepare the basic points you anticipate will be made in closing argument. This requires advance preparation of the expected jury instructions and an analysis of what facts will have to be developed in trial, witness by witness, in order to build the blocks for the final argument.

2. During trial, keep the testimony tailored to the points which you will need for closing argument. Careful cross-examination of the witnesses should be done to focus the testimony primarily upon the facts needed for closing argument, using skillful questioning to nail the witnesses down and to avoid giving witnesses opportunities to waver from, dilute or retreat from the key testimony they have given. Avoid repetition in the questioning of the witnesses. Be concise and succinct throughout, and avoid belaboring the objections.

3. During the course of giving closing argument, take the opportunity to use the text of jury instructions to educate the jurors. It was Judge Peterson's experience that most attorneys should spend more time with the jury instructions during closing argument. An example of one of the issues for which jury instructions can be particularly helpful is in dealing with the frequent problem for the defense arising from the need to argue damages without coming across as conceding liability. The lead-in to the presentation by the defense attorney on this issue can be tied to the jury instructions, by first establishing that the plaintiff has the burden of proving each element, including damages. The jury could be told that the judge will therefore be required to instruct them on each of the elements, including the damages, and that therefore this issue must be addressed by the defense regardless of the strength of the evidence that there should be no liability at all. The defense attorney can then segue into the damages arguments, i.e., possibly next arguing that if the jury happens to be inclined to award any damages, notwithstanding the weaknesses of the plaintiff's case on negligence and causation, any such damages must be reasonable and so forth. Judge Peterson stressed that from his perspective defense counsel should try to avoid personal comments to the jury leading into a discussion whether the jury might possibly award damages by using the tag line, "...but I don't think you will." This sort of whiney and presumptuous comment tends to undermine the credibility of the attorney, to Judge Peterson's observation.

4. At all times maintain your credibility as counsel. With the give and take of the evidence, counsel is frequently vulnerable to arguments by the opposing side that misrepresentations of the evidence have been made. This issue can be defused in advance, in Judge Peterson's opinion, by early on telling the jury that you are doing your best to accurately recall the factual testimony given during the trial, but that recollection is not perfect and the jurors must ultimately rely upon their own notes and recollections in finding the facts.

5. Remind the jurors that the party with the burden of proof has the last word, but that they should bear in mind what the response of the defense would be to any of the points made by the plaintiff's counsel in the rebuttal portion of the closing argument.

6. Keep in mind the most frequent comments of jurors about conduct of counsel in the courtroom. Avoid negative reactions by jurors by being prepared, by being professional at all times (avoiding sarcasm), by being efficient with the use of time, by avoiding annoying personal habits (and being neatly dressed and groomed), and by treating the jury in a way that does not insult their intelligence.

The foregoing points were only a portion of the outstanding and thorough presentation made by Judge Peterson, who was himself the epitome of the prepared, articulate and thoughtful jurist. SDDL is very grateful for his willingness to participate in the educational programs of this nature.

Save The Date!

7th Annual
San Diego Defense Lawyers
Golf Benefit

Friday, May 23, 2008 –
Twin Oaks Golf Course

\$125 per player
(includes lunch and post-event BBQ)

Proceeds to benefit
Juvenile Diabetes Research
Foundation

BURNOUT: A NECESSARY PART OF LAWYERS' LIVES?

by Randall Christison, Esq.



Talking to a lawyer-friend recently, one in practice for many years, I asked how he was. "Working harder; enjoying it less." Far from flippant, he was deadly serious. Everything in his voice and body language suggested he was at the end of his rope. I asked what he does after he leaves his office each day: "home to my networked computer." In essence he's in the office many hours and telecommutes the rest. I asked about his résumé, down at the bottom, where we put hobbies and personal information, what did he have there? With a mirthless laugh he responded, "You mean those things I haven't done in decades? That was a different lifetime." Maybe more accurately, that "was when I had a life, before the law sucked it out of me."

The conversation of any group of lawyers often turns to the stresses and frustrations of our colleagues—and often of ourselves—following years of practice. We lawyers easily identify the source; we work in an adversarial, pressured, high-speed environment. Long hours are often marks of success, even badges of honor. An unstressed lawyer? I've not met one. Burned out lawyers? I've met several—including one in the mirror.

A Profession in Trouble

Since the problem began garnering attention in the 1980s, survey upon survey shows a profession in trouble. The signs

are hard to miss:

- Large percentages, even majorities, if they had to do it over again, would not become lawyers.
- Many lawyers drop out of the profession altogether.
- Remarkable numbers, well more than 30%, qualify for mental health intervention, and not just for depression and substance abuse.
- Lawyers suffer nearly quadruple the clinical depression rates of the average occupation, easily the highest of any occupation studied.

As asked by one author, "Lawyers have never wielded more political and economic power than they do today. [They] are the wealthiest in the world. In influence, affluence, and prestige, practicing lawyers surpass most other occupational groups. Why are so many lawyers so sad?" Why indeed? Part of the answer lies in a lawyer's distinct personality.

Lawyers Are Different

Studies suggest entering law students are not markedly different from other graduate students, at least as far as psychopathology. But other studies show these students are different from the general population in several ways, a difference law school intensifies. By the end of law school, law students are markedly different from their graduate school peers, and the difference is not healthy. The well-known Myers-Briggs tests show lawyers and law students are appreciably different from the rest of the population. They are detached thinkers, not empathetic feelers, abstract intuitive thinkers rather than concrete ("sensing") ones. Surprisingly, they are more introverted than extroverted. Some suggest this reflects self-selection and law-school winnowing; much of law training rewards those whose hours of studying resembles less a courtroom performer than a monk. Susan Daicoff summarizes the "attributes associated with effectiveness as a lawyer,"

1. Need achievement,
2. Be extroverted and sociable,
3. Be competitive, argumentative, aggressive, dominant, cold,

4. Show low interest in people, emotional concerns and interpersonal matters,
5. Have disproportionate preference for Myers-Briggs thinking v. feeling,
6. Focus on economic bottom-line and material concerns, and
7. Have a markedly higher incidence of psychological distress and substance abuse.

Not only do lawyers have a distinct personality, but also they work in a distinct environment. In the lawyers' world, we measure success (too often) by revenue and by billable hours. We gain success by putting in long hours, in a constantly pressured, highly adversarial environment, often carrying the burden of emotionally charged clients and situations. Dennis Kozich and Peter Lattman lists the common sources:

- Long, dehumanizing hours,
- Burdens of responsibility for someone else's money, family, freedom, even life,
- The omnipresence of trained adversaries eager to pounce on any opening,
- Judges, juries, others constantly passing judgment on your performance,
- Ever-present deadlines,
- Ever-present interruptions—telephones, emails, Blackberries,
- Instant communication causing ever-faster documents and decisions,
- Competition for clients,
- Clients' stress and anger transferred to their lawyers,
- Job security concerns,
- A gap between the ideals of those entering the profession and the reality, and
- Too often, a gap between lawyers' intelligence and the mind-numbing nature of the work.

In years past, mail and telephones controlled our time. Now instant communication—email, fax, and Blackberry—make such memories seem quaint. Vacations once were a way to get away from these pressures. Now cell phones and laptops are essential parts of vacation packing. In essence, lawyers are called on to assume the burdens of responsibility for other's

fortunes, family, and freedom.

Indeed, to help and protect others is why many became lawyers. But unlike the other helping professions, lawyers have trained, skillful, even ruthless adversaries waiting to jump on any mistake. Getting a 90% grade in college was not bad; in law practice it's an invitation to embarrassment, if not to a malpractice claim. For many of us, judges, juries, even the news media, are passing judgment on our performance, a judgment that is visited upon our clients. And as lawyers progress from novice to veteran, their passage is monitored, scrutinized, and frequently harshly criticized by the firm's more senior lawyers. Under these circumstances, it's hard to imagine a lawyer not suffering from stress. And added to it are the inevitable economic expectations and pressures.

Burnout's Red Flags

Physical

- Headaches, backaches,
- Fast or skipping heartbeat,
- Indigestion, diarrhea, gastric complaints,
- Sleep problems—getting to sleep or staying asleep,
- Appetite changes (decrease or increase),
- Sexual dysfunction or lost interest.

Mental

- Short fuse, impatience,
- Feeling of being overwhelmed,
- Emotional roller coaster,
- Forgetfulness, Inability to concentrate,
- Increased procrastination,
- Floating anxiety,
- Feeling of dread.

These warning signs are not unique to lawyers by any means—ask a police officer or a paramedic—but they are more prevalent. My one-sentence incipient-burnout test is the alarm-clock question: when the alarm goes off, do you:

- a. wake up, looking forward to the day?
- b. wake up, regarding the day with indifference?

c. wake up, regarding the day with dread, burying your head in your pillow, hitting the snooze button repeatedly?

d. throw the clock out the window?

Can Leopards Change Their Spots?

If lawyers indeed have a different personality and if lawyers are subject to a particularly demanding environment, can lawyers do anything about it? Do we instead resign ourselves to a life “poor, nasty, brutish and short”? (Well, maybe not “poor.”) Can leopards change their spots? We suggest yes, but it requires effort and changes in the way we think.

Over the past few years we lawyers have talked of “life-work balance.” Some law firms devote considerable effort to the problem. Balance is a common topic in associate recruiting. But the signs of burnout continue to spread.

The Blackberry illustrates the problem. A few years ago we debated whether to provide associates Blackberries or simply let them buy their own. That debate is over. Firms have their Blackberry-equipped associates on a 24/7 leash. Vacations are replaced by resort-based telecommuting. Perhaps we should place a warning, “This device will handcuff you to the job.”

Billable hours, uncommon before the supreme court's 1975 case, *Goldfarb v. State Bar*, now are ubiquitous. A whole generation of lawyers thinks of a world without billable hours as akin to working with quill pens. 1,800-hour requirements are remnants of some quaint, bygone era. Requirements, and worse, expectations, inexorably increase.

Short-term Solutions

So it seems not much good news is out there. But lawyers can try some remedies, some short-term, some for the long haul.

Under the sort-term rubric are familiar ones:

- Modern time management skills;
- Stress management skills;
- Physical: exercise, nutrition, sleep;

- Taming the chemical monsters—caffeine, alcohol, drugs;

- Vacations that are vacations, days off that are days off.

One problem remains difficult to solve, changing an achievement-oriented profession's definition of success. And revenue and billable hours represent an unmistakable measure.

Long-term Solutions

Periodic Change. “Just like my houseplants, I need to be repotted every ten years or so.” Mental and intellectual stimulation may be the leading reason we become lawyers. But after several years in the same practice field, many find the thrill is gone. The now largely forgotten practice of sabbaticals was a useful solution. Changing into an entirely new field is likely economically unrealistic, though taking the financial hit may be a solution of last resort. But developing into related areas is within the reach of most. Sometimes clients, needing assistance in a new area, can provide that springboard.

Firm Style. How the firm conducts business includes how it treats its people. Does the firm increase or ease stress? Usually it's the former. Does the firm promote collaboration or competition; does it reward cutthroat, “I'm in it for myself” behavior, or team efforts? Does the firm reward rainmakers and no one else? Do the firm's members share attitudes, behavior, values, friendships? Does the firm promote the lawyers' family responsibilities or undermine them? Above all are there collegiality, mutual support, and respect?

Client Relations. Clients sometimes expect too much. Putting those expectations on the lawyers' shoulders only increases stress, magnified especially for those lawyers who entered the law to protect and serve others. Lawyers have much to do with raising and moderating those expectations, both for their clients' and their own sake.

Success and Money. Chasing high income is its own self-defeating effort. The Woodard Rule (no matter what the income, “I'd be happy if I only made 25%

more”) applies as much if not more to high income earners as to those earning five-figure incomes. As long as money is a (or the) criterion for success, lawyers will cause themselves untold unneeded stress. Rethinking this goal may prove the most difficult trait to remedy, yet the most important.

Positive Changes. Amiram Elwork, PhD, talks of changes in his chapter “All the Sages Agree.” Those who are happiest, those enjoy the benefits of stress and not its destructiveness are those who

- (1) have reasonable goals and expectations,
- (2) feel competent in their jobs,
- (3) have challenging work, but
- (4) have work balanced by leisure,
- (5) have a good marriage and family, and
- (6) contribute to the community.

They do not seek success at any cost, do not demand or aspire to be the top dogs, do not spend their lives at work, and do not substitute work for family. Instead, those who contribute to the community are often the ones who feel the best about being lawyers, for they are the ones who can use their hard-earned skills for the common good.

Sharpening the Saw. Continuing the theme of “all the sages agree,” is the universal view that those who continue to develop their skills, those who engage in lifelong learning and continuing professional development are those who best keep the stress monster at bay. One needs only to think of Stephen Covey’s parable of the lumberjacks who are too busy, working too hard, driving themselves to exhaustion cutting down a tree, all because they “don’t have time” to sharpen their now quite dull saw. And continuing professional development has the added benefit of exposing us to others we wouldn’t otherwise know, to ideas, even inspirations we would never otherwise encounter.

The Prescription

Lawyers work in a tough environment, and yet we make it tougher on ourselves.

We need to turn some of that toughness toward protecting ourselves from burnout. To do so requires effort, requires knowledge, requires self-awareness, and requires reworking of our law firms. But lawyers’ own personalities render self-protection much more difficult. We spend our time and effort on others’ problems, on achieving, on competitive success. And we are hardly introspective.

These very characteristics make it unlikely burnout-susceptible lawyers by themselves will successfully carry out a burnout-protection program.

First, all of us need to understand the risks and the warning signs, and identify what in our work and our personality leads us toward burnout. Law school didn’t teach us that.

Second, we need someone, usually a coach, to keep us on the right path and to alert us to our high-risk and self-destructive behavior.

Third, we need to exercise the same kind of self-discipline that enabled us to get as far as we have already, but this time self-discipline directed at helping ourselves.

Fourth, for those who have firm management responsibility, you need to attend to the firm’s culture. Because high-achievement lawyers—the ones who are the chief assets of any law firm, are the ones most susceptible—the firm must not be the cause of burning out its prize assets.

Just as we didn’t become burnout champions overnight, it will take time to get it turned around. But it’s worth it.

I suggested to my friend from the opening paragraph one reason his firm hired him was because of the complete person he was, a person who had those end-of-the-resume experiences. What made him a more complete lawyer, one more valuable to his clients, were those same things. Burned-out lawyers are not much good to anyone. He needs to dig out that old résumé and reconnect with himself, a good first step in burnout prevention.

Footnotes

i. Mary Ann Glendon, *A Nation under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society*, 1994, p.15.

ii. *Lawyer, Know Thyself: a Psychological Analysis of Personality Strengths and Weaknesses*, 2004, pp. 40-41.

iii. *Those with a high “thinking” score analyze situations, keeping a detached distance, seeking logical and rule-based conclusions. Those with high “feeling” scores prefer to get close to the situation, a “looking from the inside,” and seek conclusions based on achieving harmony and consensus.*

iv. “Stress: What Is It?” in Julie Tamminen, ed., *Living with the Law: Strategies to Avoid Burnout and Create Balance*, 1997, pp. 1-2.

v <http://blogs.wsj.com/law/2007/07/16/british-lawyers-are-unhappy-too/> by Peter Lattman, July 16, 2007.

vi. *From Newport Beach CPA Douglas C. Woodard, describing his extensive experience with high net worth clients.*

vii. *Stress Management for Lawyers: How to Increase Personal and Professional Satisfaction in the Law*, 2d ed., 1997, pp. 157-159.

viii. *The Seven Habits of Highly Effective People*, 1989.

Randall B. Christison, when he is not an appellate lawyer, consults with law firms through Wolf Management Consultants. He specializes in lawyer skills, including writing, listening skills, and other matters. He may be reached at 858.459.9900 or randychristison@sbcglobal.net

Did you know...?



By: *Mark Angert, Esq. of Grace Hollis Lowe Hanson & Schaeffer*
mangert@gracehollis.com

Hello everyone! First of all, I would like to thank all of you who sent me your comments and suggestions in response to my last article. I am glad to know that people found it informative and most of all entertaining. I will try my best to inform and entertain, and of course I am always looking for your suggestions in shining a light on things that may escape us in our everyday busy practices. What may be obvious to some, may have completely escaped other's attention, and hopefully this editorial can be used to share your individual "tricks of the trade" to help your fellow members. I encourage you to email me with any suggestions or tips for the next editorial at mangert@gracehollis.com.

1. Did you know that there is an action that can be taken after the final judgment in a Superior Court but before incurring the costs of preparing an Appeal? That is called a Motion for Reconsideration.

California Code of Civil Procedure §1008(a) states the following, "When an application for an order has been made to a judge, or to a court, and refused...granted...any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter..." Keep in mind, that motion for reconsideration is authorized only when the motion is based on new or different facts, circumstances or law. Le Francois v. Goel, (2005) 35Cal.4th 1094, 1096-1097; McPherson v. City of Manhattan Beach, (2000) 78 Cal.App.4th 1252, 1265. "New or different facts" does not mean that all facts not previously presented to a court now suffice. Garcia v. Hejmadi, (1997) 58 Cal.App.4th 674, 690. In any event, a showing must be made that there is a satisfactory explanation for failing to provide the evidence earlier. *Id.* Similarly, when the basis for the motion is "different law," a showing must be made that there is a satisfactory explanation for failing to provide this information previously. Baldwin v. Home Savings of America, (1997) 59 Cal.App.4th 1192, 1198-1200.

So, for those of us that don't give up easy and tend to believe that they are ALWAYS right, before incurring the costs and headaches of an appeal process, try the Motion for Reconsideration. Who knows that judge just may realize that you are never wrong and change his or her view. (p.s. I know how likely that is to happen.)

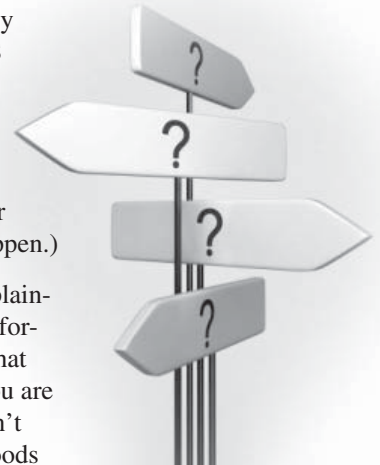
2. Did you know that when you have a plaintiff that resides outside of the state of California, you can petition the court to require that plaintiff to post a bond to ensure that if you are successful in defeating the claim, you won't have to chase them to their neck of the woods to obtain compensation for costs and fees incurred?

Yes, it's called a Motion for Undertaking and it is authorized by California Code of Civil Procedure §1030. C.C.P. §1030 authorizes the Court to require a non-California plaintiff to post a bond upon the showing that the moving defendant has a "reasonable possibility" of prevailing in an action. More specifically, §1030(a) provides, in pertinent part, that: When a plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, the defendant may at any time apply to the court by noticed motion for an order requiring the plaintiff to file an undertaking to secure an award of costs and attorneys fees which may be awarded in the action or special proceeding.

3. Did you know that according to the San Diego city laws, the owners of houses with Christmas lights on them past February second may be fined up to \$250?

Just something to keep in mind this holiday season. We all have one of those neighbors, but now instead of calling the home owners association or dropping hints to them to finally take down their lights, you can be a good neighbor and simply tell them that you are trying to save them from paying fees and possibly being electrocuted.

Until next time, I look forward to seeing your suggestions and comments, and who knows we just may learn something.





Jackie Stein & Michael Popcke



David Burke, Jackie M. Ni Mhairtin and Jonathan R. Ehtessabian



"A good time was had by all!"



Eric Miersma & Julia Cline



Darin Boles & Sharon Lawrence



Danielle Nelson and Elliott Heller



Coleen Lowe, Clark Hudson and Jim Boley



Debbie & Clark Hudson



Outgoing President Clark Hudson

*San Diego Defense Lawyers acknowledges
 2007 New Lawyers of the Year*

Mark Angert – Grace Hollis Lowe Hanson & Schaeffer
Daniel Fallon – Farmer Case & Fedor
Benjamin Howard – Neil Dymott Frank McFall & Trexler
Sasha Selfridge – Law Office of Kenneth N. Greenfield



Lori & Bill Guthrie



Debbie & Ken Medel with Judy Peterson



Ken Greenfield & Sylvia Palomo



Karen & "Stick" Holmes



Rob Mansbach & Martha Dorsey



Bruce & Mary Pendleton and Wayne & Judy Peterson



Randy & Molly Nunn



Harold Trimmer & Sasha Selfridge



Timothy Grant, Joyia Greenfield & Bruce Lorber



Tony & Beth Case



Lesa Wilson & Scott Loosen



Kim & Brian Rawers

17th Annual SDDL Mock Trial Competition

By: Randy Nunn, Esq. of Hughes & Nunn

On October 11, 12 and 13, 2007, 24 teams from 15 law schools throughout the United States participated in SDDL's 17th Annual Mock Trial Competition. After surviving two preliminary rounds and a semi-final round, teams from the University of San Diego School of Law and Thomas Jefferson School of Law squared off in the finals. The University of San Diego prevailed by the narrowest of margins.

This year's fact pattern combined stem cell treatment with breach of contract. In the fact pattern, the Plaintiffs, a husband and wife, signed an agreement with Defendant company to preserve their newborn son's stem cells from his umbilical cord. When Plaintiffs requested the stem cells for use in leukemia treatments for their son, they learned that half of the stem cells were no longer available. The Defendant had determined that Plaintiffs were in default on their enrollment agreement and sold half of the son's stem cells to Plaintiffs' estranged aunt who needed them for her own leukemia treatment. Plaintiffs' son died two months later. Though the focus of the Competition is on trial advocacy (and not necessarily on the merits of the case), it was evident that each participating team was emotionally involved in the case and had worked very hard on their trial presentations.

This year's Competition consisted of teams from Duke University School of Law, University of California, Berkeley School of Law- Boalt Hall, University of California, Hastings College of Law, Emory University School of Law, St. Johns School of Law, Fordham University School of Law, Thomas Jefferson School of Law, Brooklyn Law School, Whittier School of Law, University of the Pacific-McGeorge School of Law, Pepperdine School of Law, California Western School of Law, Nova Southeastern University School of Law, Southwestern School of Law and

the University of San Diego School of Law.

SDDL's Mock Trial Competition is recognized as an extremely valuable experience for the competitors. As many as eighty students compete for the few coveted positions on each school's Mock Trial teams. Some of the coaches related that the law schools currently place a higher percentage of Mock Trial teams members in summer legal jobs than members of Law Review or the Moot Court Board. The feedback students receive from experienced lawyers and judges makes the competition a valuable teaching tool.

Naturally, this event could not be held without the support of SDDL and the many members, non-members and judges who volunteered to judge the Competition. Many of the volunteers were surprised to find the experience to be personally enjoyable and rewarding and expressed a desire to participate again next year. Hopefully, next year's event will see even more members participate.

University of San Diego



From left to right: Bryan M. Zuetel, Joy Shedlosky, Viviane Pourazary, Jamahl C. Kersey with Coach Paul Reizen (rear)

Thomas Jefferson



From left to right: Ryan Karkenny, Nichole Denton, Andrew Poplin and Frederick Dunne

SDDL Evening MCLE Program – December 6



JUST ONE MORE DRINK... ANATOMY OF A DUI

By Darin Boles, Esq. of Aiken & Boles

Those words could be very costly. In December, Officer Blake Cheary, a ten year veteran with the San Diego Police Department, and attorney Jack Phillips, with more than 30 years of experience defending individuals in criminal matters, presented "Anatomy of a DUI," which provided attendees with two hours of substance abuse MCLE credit.

What should an attorney expect if they were to be arrested for DUI? First, try embarrassment, not only for you, but for one's firm, family and friends. With this potentially life changing event, one's car will be impounded at a cost of about \$400, regular insurance coverage could be replaced with high risk coverage and that prized umbrella policy would disappear.

Before reaching what those hefty penalties may be, what could one do differently when pulled over? Should they tell the officer they are an attorney? Absolutely not. As a condition of a driver's license, each driver consents to a blood alcohol test. With regard to the PAS (Preliminary Alcohol Screening Device), Mr. Phillips advised that it is optional. However, Officer Cheary cautioned that he does not offer a PAS until he has already observed other indications of DUI, such as a failed field sobriety test. Officer Cheary suggested that the PAS is a good option because if a person blows less than .08, the person will not be arrested.

In order to demonstrate the PAS, two attendees, Danielle and Mark, agreed to take a PAS an hour into the program, at which time they both blew a .04. Mark acknowledged four beers while Danielle had only one. After initially thinking the PAS had malfunctioned, Officer Cheary learned that thirsty Danielle guzzled down her beer moments before using the PAS device, thereby providing the false reading. An hour later, they were retested with Danielle registering nothing and Mark less than the prior reading.

With a DUI arrest, an attorney faces criminal and administrative penalties, including potential Bar discipline after a second offense. With just a first offense and assuming no accident involved, one faces a 6 month driver's license restriction, summary probation for 5 years, fines of \$2,200, public work service if the BAL is over .15, a prohibition against any law violations for 5 years, attendance at a first offender program/MADD Victims Impact classes and an Order not to drive with any measurable amount of alcohol for 5 years. The financial cost is typically in excess of \$10,000.

On the administrative end, the offender is given a temporary license good for only 10 days before a suspension is imposed, unless a hearing is requested. At the hearing, the DMV hearing officer weighs the evidence on a preponderance standard only and considers three issues: Was there reasonable cause for the stop, was there probable cause for arrest and was the BAL .08 or higher at the time of arrest? If yes to all three, a first offender will get a choice of 30 days of no driving and 90 days of restricted use followed by a probationary period, or a choice of 120 days of total loss of the license but return of the license after that time. If someone is caught driving while under a license restriction, they face a \$1,400 fine, but if they do it again, they could not only have their car impounded, but the car could be sold as well! If an injury occurs due to the DUI, an attorney would probably be sent to prison and suspended by the Bar.

EXTRA!!! Member News EXTRA!!!



Dan White and Susan Oliver are pleased to announce that **Steven G. Amundson** has agreed to become a named member of the firm, which will now be called White, Oliver & Amundson, effective January 1, 2008. Mr. Amundson has been with the firm since its inception in 1997. He received his J.D. from Stanford University in 1976. He is a member of the American Board of Trial Advocates and is admitted to practice in the many different courts, including the United States Supreme Court and has served as an arbitrator for the American Arbitration Association. In 2003 he was also on the board for the Association of Southern California Defense Counsel. His main areas of practice include business/employment litigation, professional liability, personal injury and construction litigation.



White, Oliver & Amundson is also please to announce that **Conor J. Hulbert** has joined the firm as an associate. Mr. Hulbert received his J.D. from the University of San Diego School of Law in 2007, and passed the July 2007 Bar Exam. He was born in Escondido and obtained his undergraduate degree from California State University, Chico in 2003.



In addition, White, Oliver & Amundson is please announce that **Micheal C. Webb** has joined the firm "Of Counsel." Mr. Webb most recently worked as counsel for the Diocese of San Diego. He received his J.D. from the University of California, Davis in 1980. Mr. Webb also obtained his undergraduate and masters degrees in Economics from U.C. Davis. In addition to California, Mr. Webb is also admitted to practice in Hawaii and Colorado, as well as the United States Supreme Court. His main areas of practice include business, personal injury, real property, construction and complex litigation.

In November 2007 Member **Mary Pendleton** of Balestreri, Pendleton & Potocki, L.C. was appointed as California's representative to the DRI. Ms. Pendleton was also honored as the SDDL Defense Lawyer of the Year for 2007. The award was presented at this year's SDDL Installation Dinner which was held on January 19, 2008 at the U.S. Grant.

Stephen Gentes is pleased to announce the formation of Gentes & Associates, in April 2007. The firm's contact information is 225 Broadway, Suite 1500, San Diego, California 92101, Tel: (619) 238-8028 / Fax: (619) 238-8261.

The law firm of **Munro Smigliani & Jordan, LLP** is proud to announce its continuing practice after a reorganization of Ault, Schonfeld, Jordan & Munro, LLP effective December 31, 2007. Joining us are partners Douglas J. Munro, Paul W. Smigliani and R. Michael Jordan and associates Jeffrey L. Ebright, Michael D. Marchesini, David M. Plouff and James Gorman. Richard P. Edwards will be Of Counsel. Our new location is 655 West Broadway, Suite 840, San Diego, CA; Telephone 619-237-5400; facsimile 619-238-5597.



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The one on the right is your 2008 SDDL President.
The one on the left is a current board member.
Can you name him?



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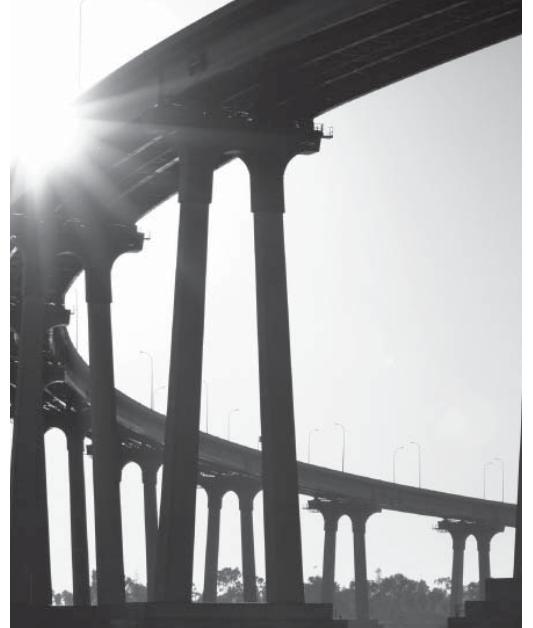
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