

# The Update

Summer 2007

San Diego Defense Lawyers

## In This Issue

President's Message	2
Bottom Line	2
March Evening MCLE Summary	3
Edifications	4
Member Spotlight	5
Insurance Law	6
Then and Now . . . . . (a contest!)	7
Brown Bag Summaries	8 - 9
Civility Guidelines	10 - 11
Too Punitive	12 - 13
Amendments to SDDL By-Laws	14
Unfair Competition Law (recent developments)	15
Case Summaries	16 - 17
Members in the News	18
Impact of Dampness and Mold	19
Answer the Question?	20

## The Bottom Line

### New Published Case

Austin B. / Jessica B. v. Escondido Union School District, et al. (2007) \_\_Cal.App.4th \_\_.  
Appellate Defense: Jack M. Sleeth, Jr. and Paul V. Carelli IV of Stutz Artiano Shinoff & Holtz.

#### 1. Introduction

The California Appellate court recently published a case that will be important to school teachers. This opinion provides — for the first time — the correct basis for a student suing a school teacher for battery. Before this case, there was no law on the issue of school teacher battery. One definition of “battery” is an “offensive touching.” Whenever a teacher touches a student and the student cries, there is arguably a battery by that teacher. This new case eliminates that argument, and provides the correct rule, that the teacher must be proven to “intend to harm” the student, or to have used “unreasonable force in the circumstances” before it is a battery.

#### 2. Jury Favorable to School District

The parents of two profoundly disabled autistic preschool students filed this lawsuit alleging that the student’s teacher physically abused them. The students’ claims were based solely on reports by third-party witnesses who saw the teacher handling the children and the children crying. Dan Shinoff and Jack Sleeth tried this case for the Escondido Union School District, and won the case before a jury in the Vista Superior Court. The jury determined that the teacher did not harm or batter either child. The jury specifically found that the teacher did not intend to harm the students, and that no school employee, including the teacher, breached any duty of care to either student. The jury decision completely vindicated all of the actions of the school teacher, and the Escondido Union Elementary School District.

#### 3. The Appeal

The parents appealed the case. Paul Carelli and Jack Sleeth of Stutz Artiano Shinoff & Holtz defended on the appeal. The Appellate Court agreed with the trial court, and affirmed the jury decision, but also provided legal authority for the correct jury instruction to be given in a battery case against a school teacher.

##### a. New Jury Instruction to Teachers

The published appellate opinion confirms the rule that school teachers have in loco parentis authority to touch students. But the opinion establishes the new rule that a teacher only violates that right by using excessive force or intending to harm the student. This new legal authority will make it easier to defend a battery case against a school teacher.

##### b. Confirmation of Sanctions for Frivolous Claims

The Appellate Court also agreed that part of the case was “frivolous” and approved the award of costs and attorney fees to the school district, based upon the trial court finding that several of the claims were frivolous. This published decision will be important to school districts by confirming that parents suing school district run a risk of paying the school district’s attorney fees if the law suit is baseless.

## PRESIDENT’S MESSAGE



All of us know someone with diabetes. Until Tom Dymott was killed by diabetes, I had no appreciation for how diabetes could literally ravage a human body. While advances have been made, diabetes remains the sixth leading cause of death in the United States.

As an organization we have supported the Juvenile Diabetes Research Foundation through our annual golf tournament for the past five years. So far we have raised more than \$ 27,000 - with more to come from our 2007 annual golf benefit. By the time this edition of The Update comes out, our tournament will have already been played. Hopefully you were able to join us. If not, we would love to have your support next year.

For those that did get to play, in addition to our sponsors, we have three individuals that deserve our thanks in putting the event together. This year’s event was organized by Jim Boley, Darin Boles and Danielle Nelson. These individuals spent countless hours working to ensure success of the golf tournament, donations for the charity, and the dinner/awards ceremony following the golf. If you see any of these individual tell them “thanks”. Let’s keep our fingers crossed that this year’s benefit sets a new mark in donations for the Juvenile Diabetes Research Foundation.

**Clark Hudson**

## Save the Date

**August 18, 2007**

*General Membership Meeting will be held at the Brown Bag event*

*Purpose: Vote to change By-Laws*

## Save the Date

**October 26-27, 2007**

*San Diego Defense Lawyers and Association of Southern California Defense Council Host a joint seminar at the Temecula Creek Inn*

*“Defending High Exposure Damage Cases” – a panel will present*

*Friday, October 26th*

*– Cocktail reception*

*Saturday, October 27th*

*– 3.0 hours of MCLE  
and an afternoon of golf*

*Limited rooms available*





## March Evening MCLE Program *E-Discovery is Coming to a Jurisdiction Near You*

By: *Kristopher M. Cronin, Esq., Grace Hollis Lowe Hanson & Schaeffer, LLP*

On March 28, 2007 the San Diego Defense Lawyers held an evening MCLE seminar on e-discovery. The presenters William N. Kammer, Esq. of Solomon Ward Seidenwurm & Smith and Neil Packard of the company e-Diligent provided valuable insights regarding the state of e-discovery.

Currently, attorneys who have cases in federal court have had to deal with the subject of e-discovery and the large amount of hurdles that comes with complying with the recently revised rules regarding electronic discovery. (See Federal Rules of Civil Procedure 26 and 34). However, according to the presenters, they expect many states, including California, will adopt their own rules on e-discovery once they see how the Federal courts apply the Federal rules.

The presentation covered an overview of the new buzzwords within the e-discovery field. Some of the more interesting buzzwords discussed were "claw backs", "quick peeks", and "safe harbors." "Claw back" e-discovery occurs when you provide the other side all of the electronic documents without searching or determining whether any privilege exists. The concept here is that the producing party can take back any privileged documents that were originally produced.

"Quick peeks" refers to the method of providing a description of all documents to opposing counsel and turning over only those documents opposing counsel is interested in after reviewing the descriptions. Finally, "safe harbor" refers to a client's normal deletion program. If a document is deleted according to a routine business practice then the client will not be responsible for producing these documents unless they know or are aware of pending litigation. According to Neil Packard many businesses have a document deletion program. Many businesses make a back-up every day that writes over the previous weeks back-up for that day. Also, at the end of the week many businesses do a complete back-up of their system that writes over the previous weeks back-up.

Violations of e-discovery rules can be very costly either in the form of sanctions against the non-complying party or even terminating sanctions. Some examples provided by Neil Packard's e-diligent company include: monetary sanctions granted for failure to comply with electronic evidence preservation order in *Creative Science Systems, Inc. v. Forex Capital Markets* 2006 U.S. District, Lexis 20116 (2006 WL 870973) (this disposition is not designated for publication and may not be cited) (specifically \$12,175 for failure to preserve a notebook computer, plus being required to bear the cost of analyzing computer servers that were copied but not yet analyzed), court ordered monetary sanctions against defendant for destroying digital evidence and prolonging the discovery process in *Pennar Software Corp. v. Fortune 500 Systems Ltd.* (2001) 51 Fed. R. Serv. 3d 279 and terminating sanctions

upheld for 'brazen' electronic data destruction *Electronic Funds Solutions v. Murphy* (2005) 36 Cal.Rptr.3d 663. With these consequences it is important for all attorneys to stay up to date on the latest e-discovery requirements.

Once attorneys have become fluent in the e-discovery rules that pertain to their particular jurisdiction it is important they notify and instruct their clients as to the retention requirements the client may be called upon to comply with if litigation occurs. Their clients need to have a plan for electronic data destruction, they have to stick to the plan they have created, and they must be prepared to comply with electronic data requests when involved in litigation or have reason to know litigation is pending.

The discussion also focused on the prevalence of "Meta-Data" in our every day life.

"Meta-Data" is the all the accompanying data that is embedded in every document we create and every e-mail we send. Many firms have come to realize the importance of scrubbing the documents that are forwarded out of their office and more than likely employ software and the use of PDF software to insure information they do not intend to disseminate is not. Neil Packard was able to provide specific examples of the amount of information that is contained in the header of all e-mails we send and how an expert computer forensic technician can locate this information. The amount of information that is in the background of each e-mail can sometimes contain more characters than the e-mail itself and for the untrained can result in the unplanned release of information that can lead to problems.

Finally, William N. Kammer, Esq. pointed out the additional problem of ever increasing memory capacity facing the clients we represent. With the continued reduction in size of memory devices, clients have to be aware of the potential problem of an entire client list or an entire job file leaving the office via an individual's personal cell phone/hand-held device without the permission of the client.

The presentation was a great success and very informative. The number one lesson learned from the presentation is for all attorneys to caution their clients on the ramifications of e-discovery. With the prospect of states adopting similar rules, and the fact Federal courts already have these rules in place, the age of e-discovery has arrived.

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## The Bottom Line

Case Title: Giti Sakhapour v. Jon W. Cassell, D.D.S.  
 Case Number: GIC 858703  
 Judge: Honorable Jeffrey B. Barton  
 Plaintiff's Counsel: Michael Palmer  
 Defendant's Counsel: Robert W. Harrison and Patrick J. Kearns of Koeller, Nebeker, Carlson & Haluck, LLP  
 Type of Incident/Causes of Action: Dental Malpractice - Crowns  
 Settlement Demand: None  
 Settlement Offer: None  
 Trial Type: Jury  
 Trial Length: 4 days  
 Verdict: Defense

Case Title: Bartolone v. Magone  
 Case Number: GIC 865039  
 Judge: Honorable Jay M. Bloom  
 Plaintiff's Counsel: L.B. Chip Edleson of Edleson & Rezzo  
 Defense Counsel: Clark Hudson and Jon Ehtessabian of Neil Dymott Frank McFall & Trexler  
 Type of Case: Medical Malpractice. Ureter injury requiring reimplantation following diagnostic laparoscopic surgery.  
 Settlement Demand: \$250,000  
 Settlement Offer: \$29,000 - 998 offer  
 Trial Type: Jury  
 Trial Length: 8 days  
 Verdict: Defense

Case Title: Svetlana Toun v. Louai Al-Faraje, D.D.S.  
 Case Number: GIC 859769  
 Judge: Honorable Jeffrey B. Barton  
 Plaintiff's Counsel: Judi M. Sanzo  
 Defendant's Counsel: Robert W. Harrison and Patrick J. Kearns of Koeller, Nebeker, Carlson & Haluck, LLP  
 Type of Incident/Causes of Action: Dental malpractice, breach of fiduciary duty, assault and battery and breach of contract  
 Settlement Demand: \$80,000  
 Settlement Offer: \$10,000 refund  
 Trial Type: Jury  
 Trial Length: 7 days  
 Verdict: Defense

## Edifications

### "Lawyers in Love" and Other Songs About Lawyers

by Lori J. Guthrie, Esq., Editor

As lawyers, we are always the butt of many jokes, usually being compared to scum sucking bottom feeders and the like. One of the titles to a song on a CD I recently purchased (okay, it was last year) was "Our Lawyers Made Us Change The Name Of This Song So We Wouldn't Get Sued." (In case you are wondering, the band is Fall Out Boy). According to various postings on various websites, the song was originally going to be "My Name is David Ruffin And These Are The Temptations" which refers to how Mr. Ruffin had attempted to change the name of the band to "David Ruffin and The Temptations." According to [www.songfacts.com](http://www.songfacts.com) the song is about the "trappings of fame" and it was feared that a lawsuit may be filed by the Ruffin estate if the song had kept its original title.

Anyway, I got to wondering how many songs were out there with "lawyer" in the title. I did a Google search and only a few kept coming up over and over (because, of course, I don't have that much free time on my hands to review 1.1 million potential hits). They are:

California Sex Lawyers, by Fountains of Wayne (2005)- allegedly titled after a "California Lawyer" magazine the band saw on the table in the lobby of their attorney's office

Lovers Need Lawyers, by The Good Life (2004)- about divorce

Lawyers In Love, by Jackson Browne (1978)- about political apathy

Lawyers, Guns and Money, by Warren Zevon (1978) (covered by Hank Williams, Jr. in 1985 and by The Wallflowers in October 2004)- about being on the run

The Philadelphia Lawyer, by Woody Guthrie (no relation) (1937)- about a lawyer's affair with a married woman

None of these songs really had anything nice to say about practicing law, but it does provide some insight into the perception of attorneys from outside the profession.

I also found another website that had Christmas Music CD with song titles such as "Another Billable Christmas" and "Living Life in Six Minutes" by Lawrence Savell. The album is titled "Merry Lexmas from the Lawtunes." Check out this and additional albums by the Lawtunes at [www.lawtunes.com](http://www.lawtunes.com).

There are many, many songs that refer to lawyers or legal proceedings in their lyrics, but too many to write about here. If you have a favorite song about lawyers, email me at [lguthrie@gracehollis.com](mailto:lguthrie@gracehollis.com) and let me know which song and why. We will publish selected responses in next edition of The Update.



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**Kevin J. Healy**

Current Firm: Butz  
Dunn DeSantis &  
Bingham (Share-  
holder)

Education: B.A.  
Sociology – Brandeis  
University (1985);  
J.D.- California Western School of Law  
(cum laude) (1992)

Practice Areas: Professional liability (ar-  
chitects, engineers, attorneys), commer-  
cial disputes, employment and wrongful  
termination, and environment litigation.

Professional Affiliations: Member of the  
San Diego Defense Lawyers Association,  
the San Diego Bar Association; California  
State Bar; Association of Business Trial  
Lawyers; Legal Malpractice Committee  
of the San Diego County Bar Association;  
American Institute of Architects

Favorite websites: [espn.com](http://espn.com)

Favorite authors: Leigh Montville, Mitch  
Albom

Favorite T.V. shows: The Office,  
SportsCenter

Favorite movies: Fletch, Field of Dreams

Favorite activities: Soccer, baseball

Personal: Born and raised in Boston, MA,  
the oldest of six children; Married to  
Susan for 18 years; lives in Carlsbad with  
his wife, his 13 year old son, Ryan and  
11 year old daughter, Devon; named to  
the College All-American Soccer Team  
in both 1981 and 1982 and inducted into  
the Brandeis University Athletic Hall of  
Fame in 1995; Assistant Men's Soccer  
Coach at Brandeis University for four  
years before moving to California; coach-  
es baseball and is currently on the Board  
of Directors of Carlsbad Youth Baseball

**Christopher Allison**

Current Firm: Man-  
ning & Marder, Kass,  
Ellrod, Ramirez LLP

Education: B.A. Politi-  
cal Science (minor in  
philosophy)–Univer-  
sity of California, San  
Diego (Revelle) (1994); J.D.–California  
Western School of Law (1998)

Practice Areas: Civil Litigation –personal  
injury, construction and landlord-tenant

Professional Affiliations: Member of San  
Diego Defense Lawyers, San Diego  
County Bar Association and American  
Bar Association; California State Bar;  
United States District Courts of Central  
and Southern California

Favorite websites: [mlb.com](http://mlb.com)

Favorite authors: For fun, Rick Reilly,  
Jack Nicklaus and Dave Pelz. For “deep-  
er” moments, Thomas Hobbes, Immanuel  
Kant and Friedrich Nietzsche

Favorite T.V. shows: Baseball Tonight,  
SportsCenter, House and Scrubs

Favorite activities: Golf, soccer and Pa-  
dres games (two time NL West champs)

Personal: Married for two years to intel-  
ligent, charming and beautiful middle  
school teacher, Olivia. Met while both  
working in the Education Department at  
SeaWorld. For past two years, played  
on second and third place teams in the  
San Diego County Bar Association golf  
tournament (this year is the year!)

**Krista Ostoich**

Current Firm: Bal-  
estreri, Pendleton &  
Potocki

Education: B.A.  
Spanish/Geography -  
University of Oregon  
(2000); J.D. - Califor-  
nia Western School of Law (2005)

Practice Areas: Construction Defect; Civil  
Litigation

Professional Affiliations: Member of the  
San Diego County Bar Association; SD-  
CBA Young/New Lawyers Division; San  
Diego Defense Lawyers and California  
State Bar.

Favorite authors: Lately, I enjoy everything  
by Adriana Trigiani!

Favorite T.V. shows: My Name is Earl;  
Grey's Anatomy

Favorite websites: I am a news junkie, so  
CNN.com is one of my favorites

Favorite activities: Snowboarding; hiking;  
and travel

Favorite Travel Destination: Anywhere in  
the Sierra Nevadas; Hawaii



# Member Spotlight



## The Bottom Line

Case Title: Stevens v. Sessions

Case Number: GIC 866626

Judge: Honorable Ronald Prager

Plaintiff's Counsel: George John Ronis, Esq. and R. Scott Sims, Esq.

Defendant's Counsel: Clark Hudson of Neil Dymott Frank Harrison & McFall

Type of Incident/Causes of Action: Medical Malpractice. The plaintiff alleged she could not shut her eyes completely following a four lid blephoroplasty.

Settlement Demand: \$120,000

Settlement Offer: \$30,000

Trial type: Jury

Trial Length: 6 days

Verdict: Defense

Case Title: FIDM Properties Inc. vs Red Point Builders Inc.

Case Number: 05CC07075

Judge: Honorable Andrew Banks

Plaintiff's Counsel: Plaintiff was represented by Segwick, Detert, Moran & Arnold, LLP. ("Segwick"). The handling attorney was David Eligator.

Defendant's Counsel: Mark Zimet and Jose Gonzales of Jampol, Zimet, Skane and Wilcox.

Type of Incident/Causes of Action: Construction Defect Breach of Contract and Negligence. This was a construction defect claim arising out of the conversion of a tilt-up concrete warehouse into the Orange County campus of The Fashion Institute of Design & Merchandising ("FIDM") located at 17590 Gillette Avenue, Irvine, California (the "Project"). Plaintiff FIDM alleged numerous construction defects with the Project.

Marc Zimet represented cross defendant Frith Smith Construction who was responsible for the concrete flooring installation via a subcontract with Red Point Builders.

Settlement Demand: \$1.8 million was last global demand

Settlement Offer: \$1.2 million was the last global offer, including \$55K from Smith-Frith.

Trial Type: Jury/Judge : Jury

Trial Length: 3 months

Verdict: Defense

## INSURANCE LAW



James R. Roth, Esq.  
The Roth Law Firm

It appears that the Second District Court of Appeal (i.e., Los Angeles) has been busy limiting coverage to directors' and officers' liability arising from errors committed in their official capacity; tightening the definition of an "occurrence" over multiply policy years; finding that an insurer's tort liability for failure to accept a reasonable settlement offer can only arise with respect to third party (liability), not first party coverage; and holding an insurer accountable for good faith mistakes when coverage is at issue.

**D & O POLICY LIMITED COVERAGE TO DIRECTORS' AND OFFICERS' LIABILITY ARISING FROM ERRORS COMMITTED IN THEIR OFFICIAL CAPACITY.** In August Entertainment, Inc. v. Philadelphia Indemnity Insurance Company (2007) 146 Cal.App.4th 565, 52 Cal.Rptr.3d 908, the Second District Court of Appeal affirmed an order of the Los Angeles County Superior Court sustaining an insurer's demurrer without leave to amend. The court held the insured corporation's Directors & Officers liability policy did not cover the corporation's or its officer's contractual liability because the claim was not due to a "wrongful act" within the meaning of the policy. Philadelphia Indemnity Insurance Company ("Philadelphia") had issued a D&O liability policy to InternetStudios.com, Inc. ("InternetStudios"). The policy agreed to pay on behalf of directors or officers defense and indemnity costs on claims made during the policy period for any "wrongful act," which was defined as any "actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed by an Insured . . . in [his or her] capacity as a director or officer of [InternetStudios]; or . . . claimed against an Insured solely in [his or her] capacity as such." Robert Maclean was an officer of InternetStudios, which produced, distributed and marketed films. Gregory Cascante was the president of August Entertainment, Inc. ("August"), an agent for entities that control the rights to several motion pictures. In March 2000, Maclean and Cascante entered into an agreement whereby InternetStudios would pay August a minimum

of \$2 million for the distribution rights to certain films. Thereafter, InternetStudios advised August it would not perform under the agreement. August sued InternetStudios and Maclean for breach of contract and anticipatory repudiation. InternetStudios tendered August's lawsuit to Philadelphia which denied coverage based on the exclusion for liabilities arising from express contracts or agreements. It also declined to cover Maclean because his potential liability was individual and not as an officer or director of InternetStudios. The Court of Appeal first held no coverage existed for a breach of contract because the policy expressly excluded actual or alleged liability of the company for breach of contract, and the policy limited reimbursement coverage for directors and officers to liability arising from errors committed in their official capacity. The Court of Appeal then rejected August's argument coverage existed because Maclean had committed a "wrongful act" within the meaning of the policy by signing the contract without stating he was an agent of InternetStudios. The court held the mere existence of a mistake or negligent act by an officer or director does not create coverage under the policy for breach of contract as a "wrongful act." The court further noted the term "wrongful act," as defined in policy did not include a breach of contract of any kind.

**WHEN ALL INJURIES EMANATE FROM A COMMON SOURCE, THERE IS ONLY A SINGLE "OCCURRENCE" FOR PURPOSES OF LIABILITY INSURANCE POLICY COVERAGE IRRESPECTIVE OF MULTIPLE INJURIES OR INJURIES OF DIFFERENT MAGNITUDES OR THAT THE INJURIES EXTEND OVER A PERIOD OF TIME.** In Safeco Insurance Company Of America v. Fireman's Fund Insurance Company (2007) 148 Cal.App.4th 620, 55 Cal.Rptr.3d 844, the Second District Court of Appeal affirmed a trial court's grant of motion for summary judgment to a primary insurer, ruling there was a single occurrence where one landslide caused property damage extending over successive policy periods. Fireman's Fund Insurance Company ("FFIC") issued to Harold Lancer a homeowners policy that provided liability coverage with a limit of \$500,000 per occurrence. Lancer also

Continued on page 22

# Then and Now . . . . . . Match 'Em and Win!!!

(Awwwwwwww.....aren't they just adorable!)

Match the current San Diego Defense Lawyers Board of Directors member with their baby photo and win!

Email Sandee Rugg at [srugg@waltonbiz.com](mailto:srugg@waltonbiz.com) with the name of board member and corresponding number under the baby picture. The first 5 members who guess correctly will be mailed a Starbucks gift card!



Randy Nunn



Michelle Van Dyke



Lori Guthrie



Ken Greenfield



Jim Boley



Eric Miersma



Darin Boles



Danielle Nelson



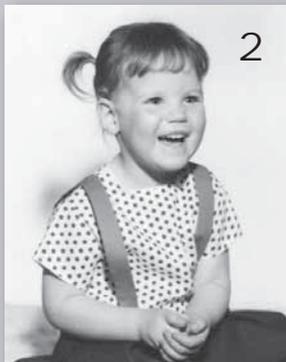
Brian Rawers



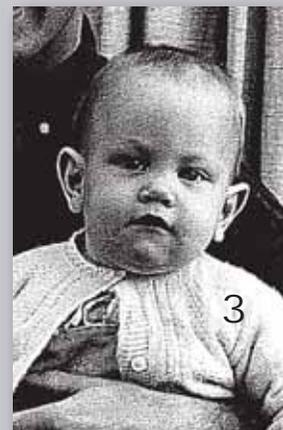
Coleen Lowe



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2



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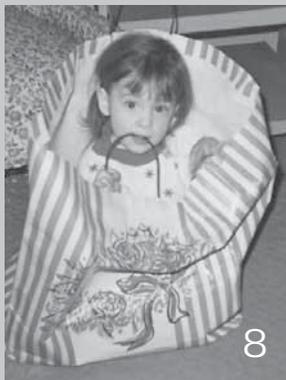
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8



7



10



9

## The Bottom Line

Case Title: Ponani Sukumar v. Med-Fit Systems, Inc. and Nautilus Group, Inc.

Case Number: GIC 852863

Judge: Honorable John S. Meyer

Plaintiff's Counsel: Jose Patino and Ellen Nudelman of Morrison, Foerster

Defendant's Counsel: Robert W. Harrison and Patrick J. Kearns of Koeller, Nebeker, Carlson & Haluck, LLP

Type of Incident/Causes of Action: Alleged breach of contract and interference with contract case in connection with the purchase of Nautilus exercise machines by plaintiff from Med-Fit Systems.

Settlement Demand: None, however plaintiff's counsel asked the jury for \$1.6 million at the time of trial

Settlement Offer: None

Trial Type: Jury

Trial Length: 6 days

Verdict: Defense

Case Title: Lyons v. Wawanesa General Insurance

Case Number: San Bernardino Superior Court (Victorville) VCVVS037846

Judge: Honorable Kurt J. Lewin

Plaintiff's Counsel: Brian C. Ostler

Defendant's Counsel: Kenneth Greenfield and Christine Branch, Law Offices of Kenneth N. Greenfield

Type of Incident/Causes of Action: Breach of Contract; Insurance Bad Faith, including attorneys fees, costs, and emotional distress damages

Disposition: Motion for Summary Adjudication Granted in favor of Wawanesa as to the Bad Faith cause of action, eliminating plaintiff's right to recover attorneys fees and costs and damages for emotional distress.

Subsequent actions: After the court granted its Motion for Summary Adjudication, Wawanesa made a C.C.P. §998 offer to compromise to plaintiffs. Taking the position that the offer was unreasonably low, plaintiffs sought leave to amend the complaint using the §998 offer as evidence of bad faith. The court denied leave. Plaintiffs then filed another action, Lyons v. Wawanesa, Case No.: VCVVS043422, which was also initially assigned to Judge Lewin. Plaintiffs filed a C.C.P. §170.6 challenge, and the case was transferred to Hon. Kyle Brodie in Department V-10. Wawanesa demurred to the complaint, which the court sustained without leave to amend. Essentially the court ruled that Plaintiffs were attempting to split a cause of action and that it did not see how mere §998 offers were actionable. The original case with the remaining breach of contract cause of action is still pending.

## Brown Bag Series Summary – May 22, 2007 – VoiR Dire: Jury Selection Views From Both Sides of the Podium Presented by Daniel M. White, Esq. and R. Christian Hulburt, Esq.



By: Jim Boley, Esq.  
of Neil Dymott

On May 22, 2007, veteran trial lawyers R. Christian Hulburt, Esq. and Daniel M. White, Esq. presented a powerful program on voir dire, jury selection from the plaintiff and defense perspective. Both trial lawyers agreed that voir dire is one of the most important aspects of the trial, yet one of the least comfortable times in the courtroom.

Attorney Hulburt noted that the “mystery of voir dire” is just plain scary. You have limited time with 36 people, so how can you know anything about them? As a plaintiff's lawyer, Mr. Hulburt wants to start developing a relationship with the jurors and is seeking to build a level of trust and confidence. The only way to build a relationship is to impress upon the jurors that the trial lawyer is willing to be truthful with them, so that they might reveal something truthful back. He emphasized that lawyers need to connect to people as people, and not as lawyers. As a plaintiff's attorney, one needs to learn how to be human and unlearn being a lawyer in the voir dire process.

Mr. White gave a number of practical pointers for communicating with a jury. Tips to get rid of body consciousness included keeping ones hands centered, and using them to make points, but always bringing them back to center. He recommended holding a pen to deal with shaky hands, although he cautioned not to be afraid of the proverbial butterflies, as they keep you on your game.

Mr. White often advises jurors that there are two judges in the courtroom: One wearing a black robe, and then the jury itself. He impresses upon the prospective jurors that he must have a commitment from them wherein they will think of themselves as a judge, and they will not make any decision until everything is before them.

Both lawyers agreed that the trial lawyer must build up a level of trust, convincing the prospective jurors that he or she is a decent person worthy of trust. Mr. Hulburt suggests that what trial lawyers are really afraid of in voir dire is their “own truth.” How do you really feel about what you are going to do in this case? It is easier for a plaintiff's attorney, because the plaintiff's attorney selected the case and obviously believes in the merit of the case.

Mr. Hulburt starts with the worst part of the case and gets that issue out in the open for the jury. He sends a message that he is okay with the bad facts and has the jurors thinking that those damaging facts must be okay because the lawyer is not running from them. On the other hand, Mr. White does not immediately get into the harshest part of the case. He utilizes an introduction, although recognizing that it is important to get the jurors talking very quickly. He advises jurors that he will never tell them anything that he doesn't believe, but in turn, they have to be up front with him in return.

Both trial lawyers agreed that judges will give a lot of leeway to counsel in discussing facts of a case if they are, in fact, engaging in a dialog with the panel. Think of yourself as a facilitator of a talk, much like Oprah Winfrey. Both lawyers agreed that you want to pick a jury that will work out well together and you should identify the constraints that might not fit into the group. You are not looking for “star jurors” because they will invariably be eliminated from the panel. They can, however, be used as a vehicle to get the favorable dialogue going.

Mr. Hulburt embraces a concept of the “magic mirror” brought forth by premier lawyer, Gerry Spence, which is “whatever you put out is what you can expect to receive.” You have to give of yourself to the jury, in order for them to give something back. He believes that picking a jury is more about being honest than about a particular skill. Since we are all steeped in advocacy, however, it is hard to let down the side of an advocate and just become a regular person during jury selection.

As far as final pointers, both gentlemen reject stereotypes and react to only what they see in the courtroom. Each lawyer memorizes every juror's name, while the judge is asking the preliminary questions. This is a powerful relationship-building tool and allows you to stray from your notes.





## **Brown Bag Series Summary – April 17, 2007 Civility In and Out of the Courtroom Presented by Honorable Herbert B. Hoffman (Ret.) and Honorable Robert E. May (Ret.)**



*By: Arlene D. Luu, Esq., Grace Hollis Lowe Hanson & Schaeffer, LLP*

The Brown Bag series this month featured Honorable Herbert Hoffman and Honorable Robert May. Both judges provided valuable

insight and practical strategies on how to be civil in various situations, in and out of the courtroom.

Judge Hoffman started off the presentation by announcing that nowadays there is an abundance of civility problems in the profession and this trend appears to be getting worse rather than better. The causes of which could be: increased pressure in the profession, an attitude of winning at all cost from law firms and attorneys, and the pressures to get more clients.

Judge May pointed out that civility is different from any ethical issues that may arise in the profession. An attorney can be ethical but still lack civility. The lack of civility generally comes in the form “game playing” tactics with opposing counsel. Often it arises in the deposition situation. Examples include: constant interruptions, inappropriate objections, speaking out of turn, giving clues to your client, interrupting the flow, buying time, taking breaks for private conversations with the client, other harassment and intimidation techniques.

Judge Hoffman stated that one of the things that bothered him as a judge was seeing attorneys make faces or hand gestures when the judge or opposing party is speaking. Where the hearing involves a ruling on attorney’s fees, he as well as most judges will consider the conduct of the attorney when making their decision.

Judge Hoffman also conducted an informal survey among members of the bench prior to the presentation to find out what they have seen or experienced. He was shocked to learn that most judges believe that criminal lawyers are more respectful toward judges than civil lawyers. He added that if you mistreat a judge, the jury will perceive that because they see the judge as the “shining star”.

Judge May added that inflammatory remarks on motions and other documents filed with the court can also make a negative impression on the judge. The judge may think that the writer is attempting to mask something.

The judges invited the audience to give examples of uncivil behaviors that they have witnessed. Examples provided included a situation in which an attorney received a rapid fire line of questioning from a panel of judges after he interrupted a judge with the remark, “I’m not finished!” Another attorney commented that he was seeing a trend in which more seasoned attorneys were attempting to intimidate new attorneys. Judge May said this was not a new phenomenon but advised that the best way to combat the problem was to be well prepared for your hearings and other proceedings. He also recommended that all attorneys treat their opposing party not as an adversary but as a fellow professional.

### **Other practical advice:**

1. You can aggressively represent your client while still maintaining your civility. Emulate those attorneys that are able to aggressively represent their clients while still being able to get along with all their colleagues.

2. Seek sanctions for legitimate reasons and not just to get back at opposing counsel.

3. Always address the court with respect even if you disagree with the judge. One way to accomplish this is by using the phrase “with all due respect your honor”.

4. Always be respectful to the court staff. You can probably get a lot out of them if you do, and be advised that court staff do speak with their judges regarding the bad behaviors.

5. All attorneys should be self-policing.

6. Always treat others as you would want to be treated, like we all learned in kindergarten.

7. Civility is equated with judicial temperament, for those seeking judicial appointments.

8. If you are having problems with an attorney, invite him or her to have coffee and discuss your concerns there instead of waiting for a blow-up in court or at some other venue.

### **Consequences of bad behavior:**

1. You can lose the cooperation of other counsel even if they did not personally observe the incident because stories of bad behavior will spread quickly.

2. It will become more difficult for you to resolve cases.

3. As an economic matter, it will affect future referrals.

4. You will lose credibility in other ways, for example your competence will be questioned.

5. It will increase your personal stress level.

6. It will affect your client.

7. It will increase the time it takes for you to get work done, for example, in conducting depositions.

### **Editor’s Note:**

In May 2007 the California State Bar Committee on Member Oversight released proposed “California Attorney Guidelines of Civility and Professionalism” for public comment. Although the public comment period ended June 12, 2007 the guidelines suggest ways in which we might become more civil and courteous attorneys. The proposed guidelines can be found at the SDDL website located at [www.sddl.org](http://www.sddl.org), and on pages 10 & 11 of this newsletter.

# **BROWN BAG PROGRAMS**



**Attachment 2****California Attorney Guidelines of Civility and Professionalism  
Proposed Short Version (April 18, 2007)**

**SECTION 1.** The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice.

**SECTION 2.** An attorney should be mindful that, as individual circumstances permit, the goals of the profession include improving the administration of justice and contributing time to persons and organizations that cannot afford legal assistance.

An attorney should encourage new members of the bar to adopt these guidelines of civility and professionalism and mentor them in applying the guidelines.

**SECTION 3.** An attorney should treat clients with courtesy and respect, and represent them in a civil and professional manner. An attorney should advise current and potential clients that it is not acceptable for an attorney to engage in abusive behavior or other conduct unbecoming a member of the bar and an officer of the court.

As an officer of the court, an attorney should not allow clients to prevail upon the attorney to engage in uncivil behavior.

An attorney should not compromise the guidelines of civility and professionalism to achieve an advantage.

**SECTION 4.** An attorney's communications about the legal system should at all times reflect civility, professional integrity, personal dignity, and respect for the legal system. An attorney should not engage in conduct that is unbecoming a member of the Bar and an officer of the court.

Nothing above shall be construed as discouraging the reporting of conduct that fails to comply with the Rules of Professional Conduct.

**SECTION 5.** An attorney should be punctual in appearing at trials, hearings, meetings, depositions and other scheduled appearances.

**SECTION 6.** An attorney should advise clients that civility and courtesy in scheduling meetings, hearings and discovery are expected as professional conduct.

In considering requests for an extension of time, an attorney should consider the client's interests and need to promptly resolve matters, the schedules and willingness of others to grant reciprocal extensions, the time needed for a task, and other relevant factors.

Consistent with existing law and court orders, an attorney should agree to reasonable requests for extensions of time that are not adverse to a client's interests.

**SECTION 7.** The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

**SECTION 8.** Written materials directed to counsel, third parties or a court should be factual and concise and focused on the issue to be decided.

**SECTION 9.** Attorneys are encouraged to meet and confer early in order to explore voluntary disclosure, which includes identification of issues, identification of persons with knowledge of such issues, and exchange of documents.

Attorneys are encouraged to propound and respond to formal discovery in a manner designed to fully implement the purposes of the California Discovery Act.

An attorney should not use discovery to harass an opposing counsel or delay the resolution of a dispute.

**SECTION 10.** An attorney should consider whether, before filing or pursuing a motion, to contact opposing counsel to attempt to informally resolve or limit the dispute.

**SECTION 11.** It is important to promote high regard for the profession and the legal system among those who are neither attorneys nor litigants. An attorney's conduct in dealings with nonparty witnesses should exhibit the highest standards of civility.

**SECTION 12.** An attorney should not communicate *ex parte* with a court on the substance of a case pending before the court, except where permitted by law and where the lawyer's client will be seriously prejudiced if the application or communication is made with regular notice.

**SECTION 13.** An attorney should raise and explore with the client and, if the client consents, with opposing counsel, the possibility of settlement and alternative dispute resolution in every case as soon possible and, when appropriate, during the course of litigation.

**SECTION 14.** To promote a positive image of the profession, an attorney should always act respectfully and with dignity in court and assist the court in proper handling of a case.

**SECTION 15.** An attorney should not take the default of an opposing party known to be represented by counsel without giving the party advance warning.

**SECTION 16.** An attorney should avoid even the appearance of bias by notifying opposing counsel or an unrepresented opposing party of any close, personal relationship between the attorney and a judicial officer, arbitrator, mediator or court-appointed expert and allowing a reasonable opportunity to object.

**SECTION 17.** An attorney should respect the privacy rights of parties and non-parties.

**SECTION 18.** In addition to other applicable Sections of these Guidelines, attorneys engaged in a transactional practice have unique responsibilities because much of the practice is conducted without judicial supervision. Attorneys engaged in a transactional practice should be mindful that their primary goals are to negotiate in a manner that accurately represents their client and the purpose for which they were retained, and to successfully and timely conclude a transaction in a manner that accurately represents the parties' intentions and has the least likely potential for causing litigation.

**SECTION 19.** In addition to other applicable Sections of these Guidelines, family law practitioners have special duties. In dissolution of marriage and child custody proceedings, an attorney should take a problem-solving approach and keep the best interest of the child in mind. The attorney should seek to reduce emotional tension and trauma and encourage the parties and attorneys to interact in a cooperative atmosphere.

**SECTION 20.** In addition to other applicable Sections of these Guidelines, criminal law practitioners have special duties. Prosecutors are charged with seeking justice, while defenders must zealously represent their clients even in the face of seemingly overwhelming evidence of guilt. In practicing criminal law, a criminal law attorney should appreciate these duties.

**SECTION 21.** Judges are encouraged to become familiar with these Guidelines and to support and promote them where appropriate in court proceedings.

**ATTORNEY'S PLEDGE.** I commit to these Guidelines of Civility and Professionalism and will be guided by a sense of integrity, cooperation and fair play.

I will abstain from rude, disruptive, disrespectful, and abusive behavior, and will act with dignity, decency, courtesy, and candor with opposing counsel, the courts and the public.

As part of my responsibility for the fair administration of justice, I will inform my clients of this commitment and, in an effort to help promote the responsible practice of law, I will encourage other attorneys to observe these Guidelines.

**The Bottom Line**

Case Title: James F. Young v. Donald Ritt, M.D.  
 Case Number: GIC 865887  
 Judge: Honorable Frederick Link  
 Plaintiff's Counsel: Louis J. Bertsche  
 Defendant's Counsel: Robert W. Harrison and Tracey Moss of Koeller, Nebeker, Carlson & Haluck, LLP  
 Type of Incident/Causes of Action: Medical malpractice action involving allegedly erroneous report of metastasized tumor to plaintiff allegedly resulting in physical and emotional injury to plaintiff.  
 Settlement Demand: \$20,500  
 Settlement Offer: None  
 Trial Type: Jury  
 Trial Length: 5 days  
 Verdict: Defense

## "Too Punitive?" by Rex Heeseman, Daily Journal, Wednesday, April 7, 2007.

The blockbuster decision of *State Farm Mut. Auto, Ins. Co. v. Campbell*, 538 U.S. 408 (2003), contained several significant comments, including "an award of [punitive damages] more than four times the amount of compensatory damages might be close to the line of constitutional impropriety."

Appellate courts thereafter addressed this multiplier issue, often selecting a ratio exceeding that line. See, e.g., *Johnson v. Fort Motor Co.*, 135 Cal.App.4th 137 (2006) (a lemon-law case, as no "extraordinary degree of reprehensibility," assessment of \$175,000 in punitive damages; that is, a sum "just less than 10 times the compensatory award"), and *Gober v. Ralphs Grocery Co.*, 137 Cal.App.4th 204 (2006) (a sexual harassment case, setting a 6-1 ratio with the observation that "ratios exceeding 9:1 are presumably unconstitutional absent extraordinary facts").

In response to this judicial trend, plaintiffs' attorneys naturally try to beef up the compensatory damages in order to increase the impact of the multiplier, and defense attorneys resist that effort. But can increased compensatory damages negatively affect the amount of punitive damages? At least sometimes, the answer appears to be in the affirmative.

For instance, consider the 4th District Court of Appeal's recent decision in *Jet Source Charter Inc. v.*

*Doherty*, 2007 DJDAR 2759. That court concluded, [W]here, as here, substantial compensatory damages have been awarded, and the conduct in question only involves economic damage to a single plaintiff who is not particularly vulnerable, an award [of punitive damages] which exceeds the compensatory damages awarded is not consistent with due process."

In other words, a 1-1 ratio was appropriate. Interestingly, that court added that, because "varying amounts of punitive damages were awarded separately against all the defendants, evidently reflecting the jury's determination as to varying degrees of culpability," the trial judge must "reduce on a pro rata basis the punitive damage award so that the total does not exceed the \$6.5 million compensatory award."

The plaintiff, private aircraft charter company Jet Source, hired two individuals and their respective business entities. Those defendants were to find and purchase, with the plaintiff's funds, aircraft for the plaintiff's use. But this arrangement soured.

In the resulting lawsuit, Jet Source claimed the defendants acted as an agent. The defendants analogized their status to middleman.

The jury soundly rejected the defendants' contentions. Notably, the appellate court found "sufficient evidence"



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for the jury's conclusion that, in negotiating aircraft purchases, "the defendant aircraft dealers owed the plaintiff the duties of a fiduciary, ... [but] in providing the plaintiff with misleading information about the negotiated price of the aircraft, the defendants breached" that duty. Primarily because of this deception, the defendants were also liable for intentional and negligent misrepresentation, breach of contract and conversion.

Besides other significant damages (totaling \$5 million), the jury awarded a total of \$11.4 million in punitive damages, in varying amounts, against the four defendants. The trial judge assessed \$1.5 million in pre-judgment interest but allowed the jury's awards to stand.

The de novo appellate review found those punitive-damages awards to be "excessive." Specifically, although "defendants' fraudulent scheme, repeated over a number of transactions, 'merits no praise,' nonetheless, the harm the defendants caused was solely economic and did not involve, in any sense, a vulnerable victim. ... Moreover, the total of \$6.5 million in compensatory damages and prejudgment interest was, to say the least, substantial. (Compare *Bardis v. Oates*, 119 Cal.App. 4th 1 (2004) [relatively small compensatory award justifies 9-1 ratio of punitive to compensatory damages])."

Another example of this phenomenon is *Buell-Wilson v. Ford Motor Co.*, 141 Cal.App.4th 325 (2006). There, a rollover accident caused very serious injuries to Mrs. Wilson and related claims by her husband. The Wilsons sued, asserting severely inadequate design and related torts with respect to the sport utility vehicle in question. The jury assessed \$109 million in personal damages to Mrs. Wilson and \$13 million to Mr. Wilson and \$246 million in punitive damages for both. The trial judge reduced the former to \$70 million and \$5 million, respectively, and the latter to \$75 million.

The appellate court rejected Ford's lengthy arguments regarding the trial judge's evidentiary rulings. But the court reduced to \$18 million Mrs. Wilson's non-economic damages, finding that award "excessive" and the "product of passion or prejudice." And, that court observed, the reduced sum was "within the ratio/range requested by the Wilsons' counsel [during his closing argument]."

Similarly, that court rejected the trial judge's rulings related to the punitive damages. Accordingly, those damages were further "reduced to \$55 million, a ratio of approximately two to one to the total compensatory damage award, after our reduction."

How did the Buell-Wilson court justify that reduction? Mainly by turning to precedent: "[B]ecause the noneconomic damages award is substantial, a low single digit ratio is appropriate. We are mindful of the Supreme Court's statement in *State Farm*, supra, 538 U.S. at page 425 that '[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.' In this case we conclude that a one-to-one ratio is warranted because the degree of Ford's reprehensibility is also high."

As quoted above, the Doherty court referred to *Bardis* to demonstrate that lower compensatory damages sometimes can produce higher punitive damages (that is, by applying a higher multiplier to yield more punitives). But the "reverse" was acceptable in that court's reduction to a 1-1 ratio. As also quoted above, the Buell-Wilson court cited *State Farm v. Campbell* for a similar approach in setting a 2-1 ratio.

In reviewing and then reducing the award of punitive damages, both courts in Doherty and Buell-Wilson referred to those awards as "excessive." It seems the preferred phrase is "grossly excessive." See, e.g., *Philip Morris v. Williams*, 2007 DJDAR 2233 (U.S. Supreme Court has adopted "procedures for awarding punitive damages and standards for precluding 'grossly excessive' awards").

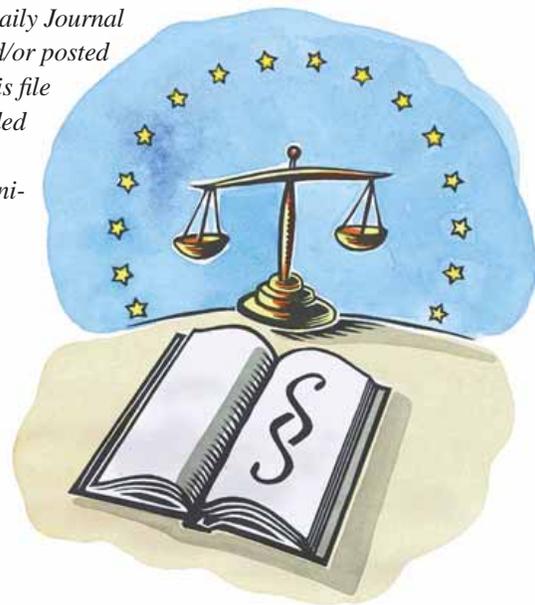
Doherty and Buell-Wilson seem to be additional examples of the manner in which the law on punitive damages is undergoing meaningful change. In these regards, questions abound. For instance, will Campbell's principal legacy be an overall reduction in punitive-damages awards judicially approved?

What will be the impact of a court's approach (for example, in using a high or low multiplier)? In any event, plaintiffs' attorneys will not control the amount of compensatory damages to influence an award of punitive damages. If nothing else, compensatories are easier to prove (for example, no "clear and convincing" evidentiary requirement as in Civil Code Section 3294).

In litigating the case, especially in preparing for trial, attorneys need to understand the dynamics of extra-contractual damages. In this fast-moving area of the law, attorneys have changed, and will continue to change, their strategies and tactics. The challenge is to keep current with and to adjust to the continuing developments.

A former commercial litigator, Rex Heeseman is a Los Angeles County Superior Court judge. He has written numerous papers and co-edits a Rutter Group practice guide. He is also an adjunct professor at Loyola Law School, teaching classes on California business torts and insurance law.

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# Proposed Amendments to San Diego Defense Lawyers Association By-Laws

## Article V. - OFFICERS

### **Section 1. NUMBER:**

The officers of SDDL are President, President-elect/Vice President, Treasurer and Secretary.

### **Section 2. ELECTION AND APPOINTMENT.**

#### **Proposed:**

(a) The Vice President will assume the position of President-elect at the first regularly scheduled Board Meeting of November. The President-elect shall assume the office of President at the installation of officers held pursuant to Article IX, Elections, Section 1.

#### **Replaced:**

A President-elect shall be appointed by the Board of Directors by the first regularly scheduled Board meeting in November.)

#### **Proposed:**

(b) At the same board meeting in November, a new Vice President, Secretary and Treasurer shall be appointed by the Board of Directors.

#### **Replaced:**

A Vice President, Secretary and Treasurer shall be appointed by the Board of Directors by the first Wednesday of December.)

(c) All officers shall hold office until the next appointment of officers. (NO CHANGE)

### **Section 3. VACANCIES:**

All vacancies in office occurring during an unexpired term of any officer shall be filled by the Board of Directors upon simple majority vote of the full Board. (NO CHANGE)

## Article VI. - DUTIES OF OFFICERS

### **Section 1. PRESIDENT.**

The President shall preside at all meetings of SDDL, shall be Chairman of the Board of Directors and shall be Chairman of the Executive Committee. The President shall appoint all committees, other than the Executive Committee, subject to the approval of the Executive Committee, and shall discharge any other duties the Board of Directors may require. (NO CHANGE)

#### **Proposed:**

### **Section 2. PRESIDENT-ELECT/VICE-PRESIDENT.**

The President-Elect/Vice-President shall perform the duties of the President during the President's absence or inability to act, shall assist the President in the performance of the President's duties, shall prepare plans and recruit committee members for his or her term of office and shall perform and discharge any other duties the Board of Directors may require.

(Added: Vice-President)

## Article VII. - BOARD OF DIRECTORS

#### **Proposed:**

**Section 1.** The Board of Directors of SDDL shall consist of its officers and seven members. The Directors shall be elected to a two-year term. The newly elected Directors shall be installed by January 31 of each year. Any Director who is elected President-Elect in the second year of his or her term shall serve a total term of four years as a Director. Nothing contained in these By-Laws shall preclude the Secretary or Treasurer from serving as President-Elect.

(Amended: President was changed to President-Elect; term of four years was previously a term of 3 years; Vice-President was deleted from the next to the last sentence right before "Secretary or Treasurer"...



## Recent Developments in California's Unfair Competition Law And Their Relevance In Defending Class Actions

By: Daniel H. Lee<sup>1</sup>, Esq. of Wilson Elser (L.A. office)

### I. Introduction

Section 17200 et seq. of the California Business & Professions Code, more commonly known as the Unfair Competition Law ("UCL") allows

plaintiffs to sue businesses for unlawful, unfair or fraudulent business practices, including unfair and fraudulent advertising. The sweeping language of the UCL includes anything that can be called a business practice and any conduct that is forbidden by any law – federal, state, or local. For instance, employers have been sued for engaging in "unlawful" business practice by failing to post an updated wage order at their workplace. Banks have been sued for engaging in "unfair" business practice for their policy of charging \$20 for bounced checks. Individuals could even sue businesses on behalf of other similarly situated individuals without demonstrating they suffered actual harm and without complying with the legal requirements for maintaining a class action.<sup>2</sup>

On November 2, 2004, California voters limited the reach of the UCL by enacting Proposition 64. Now, private litigants seeking redress under the UCL must demonstrate that they suffered actual harm, and must also comply with established class action procedures.<sup>3</sup> Recently, the California Supreme Court has agreed to review an appellate case that further limited the broad reach of the UCL. The court will review *In re Tobacco II Cases* (2006) 142 Cal.App.4th 891, 895, to resolve the following issues: (1) does Proposition 64 require every member of the proposed class of UCL claimants to demonstrate injury in fact, or is it sufficient for just the class representative to comply with that requirement? (2) in a UCL action based on a manufacturer's alleged misrepresentations, must every member of the class have actually relied on the manufacturer's representations?<sup>4</sup>

### II. Analysis of *In re Tobacco II Cases*

The appellate decision at issue arises from an action filed by a proposed class of smokers from California who claim that they were exposed to a cigarette manufacturer's unfair and fraudulent marketing practices in California.<sup>5</sup> The trial court initially granted class certification as to plaintiffs' UCL claim.<sup>6</sup>

However, after passage of Proposition 64, the defendants successfully moved to decertify the class. The trial court held that to establish standing under the UCL, all class members were now required to show injury in fact and individual reliance on the alleged false and misleading statements denying the health hazards and addictiveness of cigarette smoking.<sup>7</sup> Plaintiffs appealed the trial court's decision to decertify the class of UCL plaintiffs.

The Court of Appeal for the Fourth District upheld the trial court's decision. The court found that while class action is a procedural device for collectively litigating substantive claims, "[t]he definition of a class cannot be so broad as to include individuals who are without standing to maintain the action on their own behalf. Each class member must have standing to bring the suit in his [or her] own right."<sup>8</sup> The court, also found that "[i]f a specific form of relief is foreclosed to claimants as individuals, it remains unavailable to them even if they congregate into a class."<sup>9</sup> Under Proposition 64, the court explained, a private plaintiff must demonstrate that he or she suffered actual harm,

and that he or she lost money or property as a result of an unfair business practice. Hence, the court held that "the named plaintiff as well as [each] class member[] must have suffered an injury in fact and lost money or property."<sup>10</sup>

### III. Impact

Under *In re Tobacco II Cases* it is virtually impossible for a court to certify class actions brought under the UCL for false or misleading advertising. If, as in *In re Tobacco II Cases*, each class member must show that he or she suffered actual harm, and that he or she actually relied on the alleged false or misleading statements, the predominance requirement will be extremely difficult, if not impossible to satisfy in such class actions. That is because to certify a class, class representatives must show that common questions of fact and law predominate over individual questions.<sup>11</sup> If factual questions unique to each class member dominate the case, the mammoth task of determining liability on a case-by-case basis will negate any efficiency that may be created by a joint action. In such cases, UCL defendants will argue that class certification should not be granted because a class action is not be a superior method of resolving the dispute.

However, parties sued under the UCL should not celebrate just yet. If the California Supreme Court upholds the decision, but limits the holding to the facts of *In re Tobacco II Cases*, the injury and reliance requirement may be limited to situations where numerous misrepresentations were made over a long period of time. If so, UCL defendants may see more cases alleging a single false statement that was made to every class members, as in the *Anunziato* case.<sup>12</sup>

### Footnotes

<sup>1</sup> Daniel H. Lee is an associate in the Class Action Practice Group of Wilson Elser, LLP in Los Angeles, California. He can be reached at daniel.lee@wilsonelser.com.

<sup>2</sup> Section 382 of the Code of Civil Procedure authorizes class suits in California "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court ... The burden is on the party seeking certification to establish the existence of both an ascertainable class and a well-defined community of interest among the class members." (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104.) "The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

<sup>3</sup> Bus. & Prof. Code §§ 17203, 17204.

<sup>4</sup> The California Supreme Court also granted review of *Pfizer, Inc. v. Superior Court* (2006) 141 Cal.App.4th 290, a case similar to *In re Tobacco II Cases*, which was decided by the Court of Appeal for the Second District. The court, however, deferred briefing for *Pfizer, Inc.* pending resolution of *In re Tobacco II Cases*.

<sup>5</sup> *In re Tobacco II Cases* (2006) 142 Cal.App.4th 891, 895.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 896.

<sup>8</sup> *Id.* at 898, citing *Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 73.

<sup>9</sup> *Id.*, citing *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1018.

<sup>10</sup> *Id.*

<sup>11</sup> See e.g. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.

<sup>12</sup> *Anunziato v. eMachines, Inc.* (C.D. Cal. 2005) 402 F. Supp. 2d 1133, 1140-1141 (denying defendant's motion to dismiss plaintiffs' UCL claim where the defendant made a single false statement to each and every class member).

**Ambriz v. Kelegian****146 Cal.App. 4th 1519 (2007)**

By: *Lisa Kahle, Esq. of Goodwin Procter, LLP*

In *Ambriz v. Kelegian*, the Court of Appeal for the Fourth District considered the issue of a landlord's duty to protect tenants from third party criminal activity in the context of a legal malpractice suit brought by a plaintiff against the lawyers/law firm ("defendants") she hired to represent her in her suit against the owners

and managers of the apartment complex. The basic facts are that plaintiff was raped in the laundry room of the apartment complex in which she lived and then hired defendants to represent her in her suit against the owners and managers of the apartment complex. The owners/managers of the apartment complex prevailed on their summary judgment motion, prompting plaintiff to sue defendants because of their alleged subpar handling of her case. The defendants moved for summary judgment on the ground that plaintiff could not have, as a matter of law, established duty or causation against the owners/managers of the apartment complex. The trial court granted defendants' summary judgment motion. The appellate court held that the trial court improperly awarded summary judgment in favor of the defendants because Ambriz did have sufficient evidence regarding duty and causation to withstand a summary judgment motion.

**FACTUAL BACKGROUND**

Ambriz was assaulted and raped by an intruder at Casa Escondida, the apartment complex where Ambriz lived. Casa Escondida has 330 rental units, exceeding typical density limits for a property of its size on the condition that it rent to senior citizens and/or disabled individuals. Casa Escondida's tenant population consists of lower income, elderly individuals, many of whom are female. Ambriz was told that Casa Escondida was a "secured community" and had seen it marketed as a "controlled access community." A Casa Escondida security guard reported to Casa Escondida management that male intruders were gaining access to the building. Further, at the time of Ambriz's rape, three of the four entrances to the building did not close and lock properly because their mechanisms were broken.

The rapist was a transient who had been seen around the complex on many occasions over a period of more than eight months prior to the rape. The rapist slept on benches in the complex, asked residents (including Ambriz) for money, and became more aggressive and began to frighten tenants over time.

Prior to her rape (that same month), Ambriz complained to the management that the doors to the buildings would not lock and that the transient was scaring her. Management responded that it would "take care of it."

**LEGAL ANALYSIS**

The appellate court's task was to review the summary judgment motion that was entered in favor of defendants (Ambriz's lawyers representing her in her suit against the owners/managers of Casa

Escondida). This involved whether or not Ambriz could establish the elements of legal malpractice against defendants<sup>1</sup>, which in turn involved examining duty and causation from the underlying premises liability action against Casa Escondida.

Defendants argued that Ambriz could not have established in the premises liability action that the management of Casa Escondida owed her a duty to take additional security measures or that any breach of a presumed duty was the proximate cause of her injuries. The court of appeal disagreed, for the reasons set forth below.

The court first set forth the applicable legal principles, namely that negligence law in the landlord-tenant context imposes a duty of reasonable care on the owner of an apartment building to protect its tenants from foreseeable third party criminal assaults. Where the burden of preventing future harm is great, a high degree of foreseeability is required, but where the harm can be prevented by simple means, a lesser degree of foreseeability is required. In either case, a plaintiff must also show that the landlord's conduct is a substantial factor in bringing about harm.

**Duty**

The court then discussed the degree of foreseeability required in Ambriz's case given that Ambriz argued that Casa Escondida had a duty to properly maintain the locks on the doors and gates intended to limit access to the apartment complex. Because Ambriz only sought such minimal duties, the court concluded that she only needed to show "regular reasonable foreseeability" to establish Casa Escondida's duty to her to keep her safe from the criminal activity of third parties.

The court further concluded that Ambriz could easily meet this burden because: <sup>(1)</sup> there was evidence that a number of vagrants had been congregating just outside the complex and making their way into the complex on a number of occasions; <sup>(2)</sup> some vagrants were seen showering in the poolside showers; <sup>(3)</sup> Ambriz saw vagrants sleeping on benches at various locations on the property; <sup>(4)</sup> there was evidence that male intruders had gained unauthorized access into the complex; <sup>(5)</sup> the transient who attacked Ambriz had been inside her building on more than 19 occasions prior to the rape; <sup>(6)</sup> the transient who attacked Ambriz had become more aggressive in his panhandling in the weeks prior to the rape; <sup>(7)</sup> Ambriz and her neighbors complained to management that this transient "scared" them and that the doors were not locking; and <sup>(8)</sup> when the residents asked if something would be done about the "doors and the man," management assured them that it would be taken care of. Under these circumstances, the court noted, Casa Escondida management could foresee that a resident in the vulnerable resident population might be attacked by an unauthorized intruder. Moreover, Casa Escondida had previously installed locks on the doors to maintain the complex as a "controlled access" residential facility, and Casa Escondida was granted a density variance on the number of units in the complex on the condition that it meet certain safety standards for its low-to-moderate income elderly and/or disabled tenants.

# SUMMARY

## CAUSATION

To establish causation, a plaintiff must establish that the defendant's act or omission was a substantial factor in causing the injury. Either direct or circumstantial evidence may show that the assailant took advantage of the landlord's lapse in the course of committing his attack. Where circumstantial evidence is used, the plaintiff must show that the inferences favorable to him or her are more reasonable or probable than those against him or her.

Here, the court concluded that the inferences from the circumstantial evidence that are favorable to Ambriz are more reasonable than those against her. This is because of the evidence of the many entry doors that were not closing properly and were not locking, the security guard's report that three of the four building entrances would not lock and close properly, and the fact that management was aware of these complaints but did not repair the doors prior to the rape. In addition, there was evidence that male intruders were gaining access to the property and the detectives investigating Ambriz's rape did not find any evidence of forced entry into the building, yielding the inference that the rapist gained entry through a door that failed to close and lock properly.

Accordingly, because Ambriz raised a triable issue of material fact regarding Casa Escondida's duty to maintain properly locking doors as well as whether its failure to do so was a substantial factor in causing her injury, the Court of Appeal held that the trial court erred in determining that, as a matter of law, Ambriz would not have been able to establish the element of causation in the premises liability action and also erred in granting summary judgment in favor of defendants on that basis in the legal malpractice action.

<sup>1</sup> The elements of a legal malpractice cause of action are: <sup>(1)</sup> the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; <sup>(2)</sup> a breach of that duty; and <sup>(3)</sup> a proximate causal connection between the breach and the resulting injury; and <sup>(4)</sup> actual loss or damage resulting from the attorney's negligence.

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## **Sheila Stone v. Center Trust Retail Properties, Inc.** **146 Cal. App. 4th 1435 (2007)**

By: *Tatiana Oseroff, Esq. of Lewis Brisbois Bisgaard & Smith*



This is a premises liability action where a jury found a landlord liable for economic damages and noneconomic damages to a customer who was injured at a restaurant in the landlord's shopping mall. Appellant landlord sought review of a premises liability judgment from the Superior Court of Los Angeles County (California).

The facts of the case are that the tenant defaulted on its rent for the restaurant premises. The landlord filed an unlawful detainer complaint, took the tenant's default, and obtained a writ

of possession. After the entry of the judgment of possession in the unlawful detainer action, but before the tenant vacated the restaurant premises, the customer slipped on water on the restaurant's floor and was injured. Evidence of a water leak was presented. The trial court instructed the jury that a landlord had to act reasonably to correct defects about which it knew or should have known, but the trial court did not mention a duty to inspect. The court held that the landlord's duty of reasonable care under Civ. Code 1714, included the duty to inspect the premises. For landlords, reasonable care ordinarily involves making sure the property is safe at the beginning of the tenancy, and repairing any hazards the landlord learns about later.

The court found that the landlord's duty to inspect attached upon entry of the judgment of possession in the unlawful detainer action and included reasonable periodic inspections after that date. The trial court should have instructed the jury accordingly as to the landlord's duty to inspect.

California case law holds that because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition. Limiting a landlord's obligations releases it from needing to engage in potentially intrusive oversight of the property, thus permitting the tenant to enjoy its tenancy unmolested. A landlord's move to evict a defaulting tenant unsettles their relationship, however, requiring a rebalancing of their rights and duties. Therefore, the court states it is one thing for a landlord to leave a tenant alone who is complying with its lease. It is entirely different, however, for a landlord to ignore a defaulting tenant's possible neglect of property. Neglected property endangers the public, and a landlord's detachment frustrates the public policy of keeping property in good repair and safe. To strike the right balance between safety and disfavored self-help, a landlord's duty to inspect attaches upon entry of the judgment of possession in the unlawful detainer action and includes reasonable periodic inspections thereafter. Upon entry of judgment, a tenant's incentive to maintain a property dissipates because continued maintenance likely benefits only the landlord. Entry of judgment provides a workable bright line for the parties to know where responsibility lies, and aligns that responsibility with the parties' reordered incentives.

The court found no error in the damages award because the verdict form included no special jury findings about different types of economic damages and the total amount was reasonable. The court reversed and remanded for retrial of liability only.

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# EXTRA!!! Member News EXTRA!!!

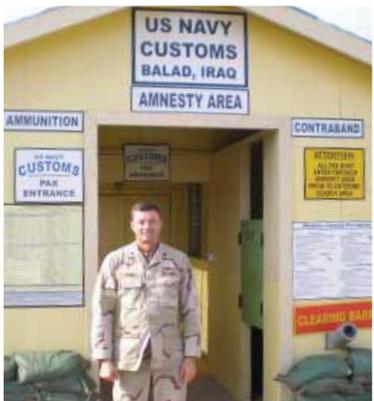


Balestreri, Pendleton & Potocki is busting with great news that our colleague **Matt Stohl** was the first San Diegan to cross the finish line of the 2007 Rock 'N' Roll Marathon held yesterday. He ran a personal best marathon, finishing 22nd in about 2.4 hours (the sports page takes it down to seconds, but lawyers usually don't)! Cheers to Matt, an elite runner and civil defense attorney, who gets the

“work” done like a champ in less time than it takes about 17,000 other folks! Hurray!



Stutz Artiano Shinoff & Holtz is pleased to announce that on May 15th the City Council of Murrieta appointed **Leslie Devaney** (left) as City Attorney and **Precilla Dugard** (right) as Assistant City Attorney sitting with the Planning Commission.



Upon his return from active duty in Kuwait and Iraq, **Michael J. Mason** has joined Koeller, Nebeker, Carlson, and Haluck LLP as an associate.

Jampol Zimet Skane and Wilcox announce that **James C. Mason** and **Shadi Melvin** have joined the firm. James is a graduate of Thomas Jefferson School of Law (1988) and has been practicing primarily insurance defense

law in Southern California for nearly twenty years. Jim expanded his practice in 2002 to emphasize the defense of ADA access law suits. Prior to joining JZSW he was responsible for the handling of each ADA case in Southern California for a major national insurance company as its Senior Staff Counsel. Jim has spoken before numerous civic groups including the Chambers of Commerce of most municipalities of San Diego County and has published articles on avoidance of ADA law suits via compliance with the ADA and its California counterparts. Shadi earned her Bachelor of Science degree from Emory University in Atlanta, Georgia and Juris Doctor from University of San Diego Law School. In college, Shadi majored in Biology and conducted research at the Centers for Disease Control and Prevention. Her research assisted in the identification of a new species of bacteria that was later published in the Journal of Clinical Microbiology. During law school Shadi interned for

the YWCA as a legal advocate representing victims of domestic violence. She also represented both Mayflower Transit, LLC and Bekins Van Lines headquarters in small claims court and negotiated property damage disputes arising out of local and nationwide moving. Most recently Shadi served as a legal reference librarian at the San Diego County Public Law Library, assisting the public with a variety of legal questions and concerns.



Grace Hollis Lowe Hanson & Schaeffer, LLP is pleased to announce that its recently hired associate, **Michael J. Hurvitz, Esq.**, passed the February California Bar exam. Mr. Hurvitz came to California from Pennsylvania where in 2006 he was recognized by Law and Politics Magazine as a “Rising Star.” This honor is given to the top 2.5% of Pennsylvania lawyers under the age of 40.



In other GraceHollis news, associate **Mark Angert, Esq.** was recently voted Employee of the Quarter for his outstanding service to both the firm and his clients, including his work in the Russian community. An article regarding Mr. Angert was featured in 2006 in the Russian publication, Echo of the Week Newspaper which details Mark's journey from the former Soviet Union to the United States.

The partners of GraceHollis are pleased to announce that they have closed escrow on their new office building in Temecula. Effective May 14, 2007 GraceHollis' Temecula office is now located at 43426 Business Park Drive, Temecula, CA 92590.

**Arthur Travieso, Esq.** has joined Wilson, Elser, Moskowitz, Edelman & Dicker LLP. Mr. Travieso received in J.D. degree from Western State University College of Law and was admitted to practice in 1992. His practice primarily involves the defense of environmental and toxic tort matters. Prior to joining Wilson Elser, Mr. Travieso was a partner in the Orange County office of Lewis Brisbois Bisgaard & Smith. Mr. Travieso will be splitting his time between Wilson Elser's San Diego office and Wilson Elser's new office in Newport Beach, California which will be headed up by Mr. Travieso.



Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, the largest insurance defense firm in the United States with over 850 lawyers in 23 offices, is pleased to announce that **Lane E. Webb** will be the Managing Partner of the San Diego office effective June 11, 2007. Lane joined the Wilson, Elser firm in June, 2005.

## Berkeley Lab, EPA Studies Suggest Large Public Health, Economic Impact of Dampness and Mold

By: Lane E. Webb, Esq. and Alan E. Greenberg, Esq. of Wilson Elser

Defense attorneys involved in the defense of mold claims should be aware of a pair of studies to be published in the journal *Indoor Air* which suggests that it is possible to quantify the considerable public health risks and economic consequences in the United States from building dampness and mold.

One paper by William J. Fisk, Quanhong Lei-Gomez and Mark J. Mendell, all from the U.S. Department of Energy's Lawrence Berkeley National Laboratory (Berkeley Lab), concludes that building dampness and mold raised the risk of a variety of respiratory and asthma-related health outcomes by 30 to 50 percent.

The second paper, by David Mudarri of the U.S. Environmental Protection Agency (EPA) and Fisk uses results of the first paper plus additional data on dampness prevalence to estimate that 21 percent of current asthma cases in the U.S. are attributable to dampness and mold exposure.

Mudarri and Fisk suggest that "a significant community response" is warranted given the size of the population affected and the large economic costs.

The Berkeley Lab paper provides quantitative estimates of the increased risks of having current asthma, being diagnosed with asthma, and having related health effects when people live in homes with visible dampness or mold problems. These estimates are based on a statistical analyses of a large number of previously published studies, none of which by themselves are a suitable basis for overall risk quantification.

The EPA paper's results are based on the analyses of studies of this health issue cited in a 2004 report released by the Institute of Medicine (IOM) of the National Academy of Sciences and more recently published studies. The IOM report, which is considered the current consensus of the U.S. Scientific community, did not offer any overall quantitative assessment.

Fisk is Acting Division Director of Berkeley Lab's Environmental Energy Technologies Division. When writing these papers he was head of the division's Indoor Environment Department. Mudarri was a senior economist and research program manager in the Indoor Environments Division at the U.S. EPA and has recently retired.

These studies are part of the Indoor Air Quality Scientific Findings Resource Bank project,



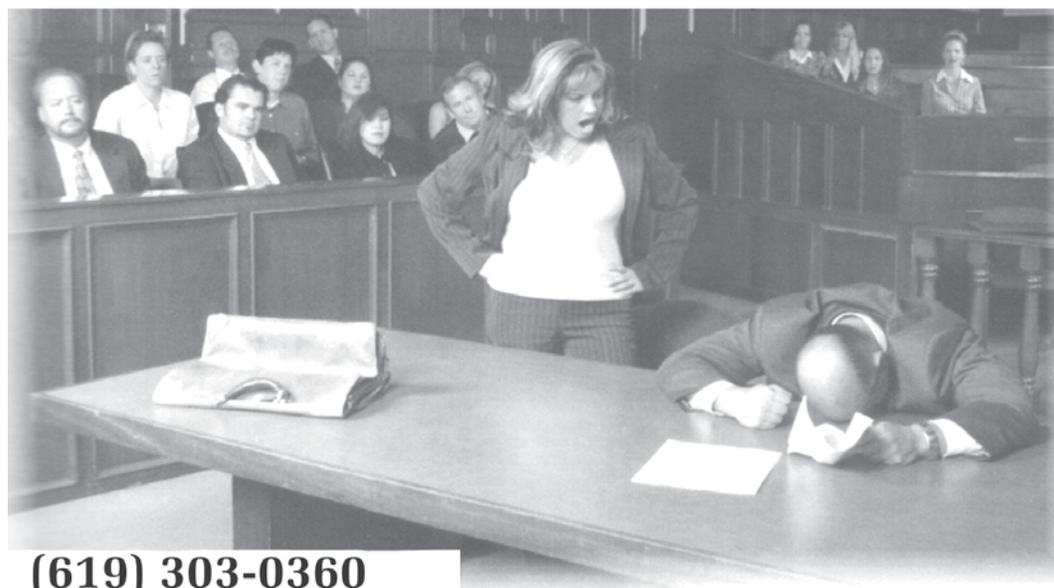
funded by the Indoor Environments Division, Office of Radiation and Indoor Air of the EPA. The project is a cooperative venture between EPA and Berkeley Lab to quantify the health and productivity impacts of indoor air exposures and make those data publicly accessible.

The papers are available from the web site of the *Indoor Air* journal (<http://www.blackwell-publishing.com/journal.asp?ref=0905-6947>).

Since these studies will be published by governmental agencies they are likely to be heavily cited by plaintiffs' counsel in the immediate future. We will need to wait and see how they hold up under what we anticipate to be intense scrutiny.

Mr. Webb is the partner in charge of the Environmental and Toxic Tort Practice Group in Wilson, Elser's San Diego office. He is National Coordinating Counsel for mold litigation for a number of insurance carriers. Mr. Greenberg, a former SDDL Board member, is also a member of that practice group.

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## Answer the Question?

### **Advising your client or expert not to answer an examiner's question during deposition**



By: Victoria Puruganan, Esq. of Neil Dymott

*There are very few reasons an attorney can ask their client or expert witness not to answer a question. Code of Civil Procedure section 2025.460 governing deposition objections sets forth three categories of objections: (a) privilege; (b) errors and irregularities; and (c) irrelevant and immaterial matters<sup>1</sup>.*

Instructing your client not to answer a deposition question is an instruction that should be made only after careful consideration. *Stewart v. Colonial Western Agency* states that even where questions are “designed to elicit irrelevant evidence, irrelevance alone is insufficient ground to justify preventing a witness from answering a question posed at a deposition<sup>2</sup>.”

The *Stewart* court found section 2025.460 recognized two reasons counsel can instruct a deponent not to respond: (a) when an inquiry pertains to privileged matters such as those protected by the attorney-client privilege, attorney work-product, invasion of your client's right to privacy, etc; or (b) when deposing counsel asks questions or conducts the deposition in a manner that unreasonably annoys embarrasses, or oppresses your client or expert.

When defending your expert's deposition, however, counsel's ability to advise their expert not to answer is even more limited. As an expert witness (and a non-party deponent) the privileges of work-product and the attorney-client privilege are inapplicable. In an expert witness deposition, privilege arises where an inquiry is directed at matters which would violate the expert's constitutional right to privacy<sup>3</sup>.

When counsel insists on inquiring into irrelevant or protected areas, you may have grounds for suspending the deposition and requesting a protective order. Be forewarned, suspension of the deposition opens the door to sanctions for you and opposing counsel<sup>4</sup>. The attorney who suspends a deposition may be forced to pay “for the cost of reopening an improperly suspended deposition and for improperly seeking a protective order<sup>5</sup>.” On the other hand, if your motion for protective order is won, offending counsel can be forced to pay sanctions.

Take for example, a 2002 medical malpractice case tried here in San Diego where plaintiff's counsel interrogated the defense's economist expert regarding the “costs associated” with plaintiff's loss of consortium claim<sup>6</sup>. In this case plaintiff's counsel asked the following questions, which were met with timely objections:

Q: What's the going rate for sex?

Q: Do you understand that in this case, there's a claim for loss of sex by the [plaintiffs]?

Q: Are you aware of prostitution being the oldest profession in the world? Ever heard of that?

(Defense: Objection. Argumentative, vague, relevance.)

Q: Okay. But do you understand there's a value to sex?

(Defense: Expert will not be asked to discuss the economic value of sex. Therefore, the question is irrelevant and inappropriate. So please either move on or let's conclude the deposition.)

Q: Have you ever heard of the value of sex?

(Defense instructs expert not to answer)

Q: Have you ever been to Nevada?

(Defense: Counsel, this deposition is going to be over if you ask this question one more time. Expert instructed not to answer)

Q: Have you ever been to Las Vegas?

(Defense: Instruct her not to answer. This deposition is over. I don't mind if you want to finish questioning, but this is inappropriate. You're harassing the witness. It's offensive.)

Defense counsel and the expert left the deposition, however, plaintiff continued to ask the following questions on the record:

Q: Isn't it true that the value of sex is at least \$1,000 a night?

Q: Isn't it true the [plaintiffs] made love approximately three times a week, and you would expect them to do that for the next 40 years?

Q: Isn't it true that the [plaintiffs] making love for the next 40 years, 6,800 times at \$1,000 a night is worth \$6,800,000?

Q: And isn't it true that [husband] is entitled to receive 6.8 million for the loss of sexual relations with his wife?

Q: And isn't it true that [wife] is entitled to receive 6.8 million for the economic value of the loss of sexual relations?

During motions in limine plaintiff's counsel moved (1) the court find all questions asked “isn't it true” be answered true; and (2) exclude the expert witness for refusal to complete her deposition. The Court found defense counsel's objections timely, appropriate and provided counsel ample opportunity to correct his behavior. Plaintiff's motion in limine was denied.

The above example shows that the San Diego Courts can and will protect your deponent from offensive, harassing and inappropriate inquiries so long as the reasons behind instructing the witness not to answer and/or suspending a deposition are appropriate and objections are made timely.

## Footnotes

<sup>1</sup> Code of Civil Procedure section 2025.460.

<sup>2</sup> *Stewart v. Colonial Western Agency*, (2001) 87 Cal. App. 4th 1006, 1014.

<sup>3</sup> i.e. asking the expert how many times he has had sex, asking the expert his social security number, etc.

<sup>4</sup> Code Civil Procedure section 2031.060, subd. (d) states “[t]he court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.”

<sup>5</sup> *Stewart v. Colonial Western Agency*, (2001) 87 Cal. App. 4th 1006, 1014-1015.

<sup>6</sup> Civil Code section 1431.2 defines loss of consortium as a non-economic damage.

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

### **Lori J. Guthrie, Editor**

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## INSURANCE LAW

*Continued from page 6*

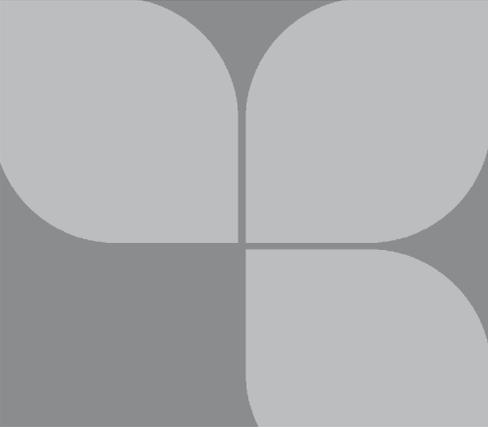
obtained an umbrella policy with a limit of \$5 million per occurrence from Safeco Insurance Company ("Safeco") that same year. Both policies were in effect for more than one year. Lancer and next-door neighbors owned homes on top of a hill. During the first policy period for both policies, a portion of the uphill properties failed, causing a landslide that inundated the backyard of a downhill neighbor with dirt and debris. The downhill neighbor sued Lancer alleging nuisance, trespass, and negligence. As the primary carrier, FFIC defended Lancer. Lancer and another uphill neighbor filed cross complaints against each other for indemnity and comparative fault. They eventually settled the cross-complaints, agreeing to pay \$1.1 million to repair the slope. FFIC paid a portion of the settlement and contended it had exhausted its policy limits of \$500,000. FFIC agreed to continue defending Lancer against the downslope homeowner (for an additional \$265,000) subject to a reservation of rights to seek reimbursement of defense costs from the excess carrier, Safeco. The court determined that the slope repairs would cost \$3,795,448. Safeco paid \$1.54 million of the judgment on Lancer's behalf and filed a declaratory relief action against FFIC, arguing FFIC was solely obligated to indemnify for the judgment because FFIC owed \$500,000 in coverage for property damage and an additional \$500,000 in coverage for personal injury during each of FFIC's four policy periods, for a total of \$4 million. FFIC argued it owed Lancer only \$500,000 in indemnity it had already paid and sought the \$265,000 in defense costs incurred after it had paid the \$500,000 limit. The trial court concluded there was a single occurrence resulting in \$500,000 in coverage for the slope failure. Safeco appealed and the Second District Court of Appeal affirmed. On appeal Safeco contended a single event, such as a landslide, could result in two occurrences based on the distinct definitions of an occurrence in the FFIC policy. The court disagreed. It held Safeco could not rely on a provision limiting an insurer's liability per occurrence to argue for higher policy limits. The court also explained the purpose of the two occurrence definitions was to determine the existence of coverage, and not the amount of coverage. In determining the amount of coverage, the court focused on case law where an "occurrence"

has generally been held to mean the underlying cause of the injury, regardless the number or nature of resulting injuries. Thus, where one proximate, uninterrupted, and continuing cause results in injuries, there is a single occurrence. Safeco's second argument was that damage resulting from the landslide continued into FFIC's three subsequent policy periods and therefore constituted a separate occurrence under each of those policies. The court rejected this argument stating that continuation of damage during successive policy periods, by itself, does not create a series of indefinitely ongoing occurrences.

**AN INSURER'S TORT LIABILITY FOR FAILURE TO ACCEPT A REASONABLE SETTLEMENT OFFER CAN ONLY ARISE WITH RESPECT TO THIRD PARTY (LIABILITY), NOT FIRST PARTY, COVERAGE.** In *Rappaport-Scott v. Interinsurance Exchange of the Automobile Club* (2007) 146 Cal.App.4th 831, 53 Cal.Rptr.3d 245, the Second District Court of Appeal affirmed an order of the Los Angeles County Superior Court holding that an insurer's tort liability for failure to accept a reasonable settlement offer can only arise with respect to third party (i.e., liability) coverage. Interinsurance Exchange of the Automobile Club ("Interinsurance") issued an automobile insurance policy to Laura Rappaport-Scott ("Rappaport-Scott") including coverage for bodily injury caused by uninsured and underinsured motorists. The coverage limit was \$100,000 per person. Rappaport-Scott, while driving her automobile in January 1997, was rear-ended by another vehicle that had been struck by a vehicle driven by an underinsured motorist. Rappaport-Scott sued the underinsured motorist for her injuries and settled the action for \$25,000, the policy limit available. Rappaport-Scott then submitted a claim to Interinsurance for benefits under her underinsured motorist coverage. She claimed the total value of her injuries and losses caused by the underinsured motorist was \$346,732.34. She made what she characterized as a settlement demand to Interinsurance for payment of \$75,000 and in response, Interinsurance offered her \$7,000 on the claim. Following an arbitration hearing, Rappaport-Scott was awarded \$33,000. Rappaport-Scott thereafter filed suit against Interinsurance breach of the implied covenant of good faith and fair dealing by failing to negotiate with her in good faith. Rappaport-Scott further alleged Interinsurance failed to present a reasonable counter-offer to her set-

tlement demand of \$75,000. In affirming the trial court granting Interinsurance's demurrer, the court found an insurer's tort liability for failure to accept a reasonable settlement offer can only arise with respect to third party (liability) coverage. An insurer's obligations under the implied covenant of good faith and fair dealing with respect to first party coverage only includes a duty not to unreasonably withhold benefits due under the policy.

**INSURER'S REASONABLE, THOUGH ERRONEOUS, INTERPRETATION OF POLICY EXCLUSION DID NOT EXCUSE ITS FAILURE TO INVESTIGATE OTHER POSSIBLE BASES FOR INSURED'S CLAIM.** In *Jordan v. Allstate Insurance Company* (2007) 148 Cal.App.4th 1062, 56 Cal.Rptr.3d 312, the Second District Court of Appeal reversed a trial court judgment dismissing an insured's complaint against her insurance company for breach of the implied covenant of good faith. Insured homeowner Mary Jordan ("Jordan") filed suit against her all-risk insurer, Allstate Insurance Company ("Allstate") for recovery for alleged "collapse" of a portion of her home under her policy that expressly provided "additional coverage" for any loss due to an "entire" collapse caused by "hidden decay," but with an exclusion for any loss caused by "wet or dry rot." In December 2000, Jordan discovered a window had fallen out of her living room wall and floorboards were giving way. Thereafter, Allstate denied Jordan's claim on the grounds coverage was precluded under the exclusion for losses caused by wet or dry rot. After summary judgment in favor of Allstate, which was reversed on appeal (at 116 Cal.App.4th 1206, 11 Cal.Rptr.3d 169), the Superior Court, Los Angeles County, granted Allstate summary adjudication upon the cause of action for breach of the covenant of good faith and fair dealing, resulting in instant appeal. The second appeal concluded that Allstate's reasonable, though erroneous, interpretation of the policy exclusion did not excuse its failure to investigate other possible bases for Jordan's claim, and a fact issue remained whether Allstate failed to investigate Jordan's alternate basis for coverage. The policy provided an exception to the collapse exclusion under a section entitled "additional coverage" which covered the "entire collapse" of a building structure and "entire collapse" of part of a covered building structure that was "a sudden and accidental direct physical loss caused by hidden decay."



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