

THE UPDATE

SAN DIEGO DEFENSE LAWYERS ASSOCIATION

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JUDICIAL PROFILE

The San Diego Defense Lawyers will honor Judge Bollman for his abilities, leadership and commitment to justice and the rule of law at the 2002 installation dinner.



The Honorable J. Michael Bollman San Diego Superior Court, Department 4

Judge J. Michael Bollman has been a prominent member of the legal community since starting his practice in San Diego in July of 1968. His private practice focused primarily on civil law. After serving as a Judge of the Municipal Court from 1985 to 1992, he was appointed to the Superior Court by Governor Pete Wilson in January of 1992. For the last two years Judge Bollman has been performing an important function as a full time settlement conference Judge for the Superior Court.

Judge Bollman's calendar is quite busy with approximately six cases scheduled per day. He has a high rate of success

as approximately two-thirds of the cases before him settle at the conference itself. He prides himself on getting to know the case and understanding the emotional component, or the "psychology of settlements," which plays such an important role for the litigants. His attention to the individual nature of each case, instilling trust and confidence, and focusing on the human side plays a large part in his effectiveness as a settlement conference judge.

Judge Bollman's hard work is also evident by his regular practice of working through lunches and being available in the evenings to work out settlements and enter them on the record. The fact he makes time to enter settlements on the record outside his regular hours has resulted in successfully up-holding settlements entered into between the parties.

Judge Bollman's biggest pet peeves are attorneys who take matters personally and those who are not prepared for the settlement conference. For those attorneys who have thoroughly evaluated the case, developed a settlement strategy taking into account the costs of litigation, and are able to acknowledge when there is a lack of client

control, Judge Bollman will be able to best assist in the settlement process.

His theory is the more time you invest in settlement, the more likely you are to settle the matter. It is clear Judge Bollman invests a great deal of time and effort in the cases which come before him. While he will try to avoid valuing the case for the parties, he is more than willing to tell a party when their position is unreasonable. He agrees with Judge McCue's statement "the value of a case is that amount at which it settles."

Although Judge Bollman has enjoyed his time as a trial judge, his role as the settlement conference judge has been the most fulfilling. Judge Bollman sees his efforts making an impact in the court system. Based on his job satisfaction (and obvious success in the position) Judge Bollman has no immediate plans to leave his post in Department 4 as settlement conference judge. Interesting, he will admit his most rewarding settlement took place while he was an independent calendar judge. Unlike the cases he currently works on, this settlement took approximately one year (and ten settlement conferences) before the settlement of \$42.5 million dollars was reached.

The Bottom Line

The Bottom Line is a column that lists favorable defense results at trial and/or arbitration. If your firm has had such results since September 1, 2001, and wishes to be listed in the next edition of The Update, please provide that information to:

Clark R. Hudson
Neil, Dymott, Perkins,
Brown & Frank
1010 Second Avenue, Suite 2500,
San Diego, CA 9210.
Phone: 619- 238-1712
Fax: 619- 238-1562
E-mail: chudson@neil-dymott.com.

Joseph Givens vs. Ralph R. Ocampo, M.D., and Does 1 through 5 inclusive

- Case No. GIC 755985
- Judge: Hon. John S. Meyer
- Plaintiff Counsel:
Steven M. Boudreau of
Boudreau, Albert & Wohlfeil
- Defense Counsel: Clark R. Hudson of Neil, Dymott, Perkins, Brown & Frank
- Type of Incident: Medical malpractice - right inguinal hernia repair with resulting nerve entrapment
- Settlement Demand: 75,000
- Settlement Offer: None
- Verdict: Defense
- Trial length: 4 days
- Jury out: 40 minutes

President's Message

By: Ray J. Artiano

Twenty years ago, the insurance company's and legal community's view of insurance defense firms was markedly different. I do not believe it to be an overstatement to say that two decades ago it was generally recognized that the finest litigators in town were members of firms known as insurance defense law firms. The fact was that insurance defense firms clearly offered the best opportunity to develop civil trial skills. There were far fewer lawyers in town, many more cases filed and assigned to law firms, and the opportunity to hone trial skills was with insurance defense firms. Almost all high profile cases were tried by these firms. You didn't see "national firms" being brought in to try cases. Insurance bad faith cases were usually handled by local insurance defense firms as well. Times have changed. Fewer cases are being filed. Fewer cases are going to trial. National firms and firms which do not typically get assigned work from insurance companies are being brought in to handle large exposure cases. Cumis issues have also resulted in increased use of outside counsel. Recently, I was informed a respected local lawyer in an insurance defense firm was told by a company president that he did not want his company's case handled by "an HMO lawyer." When an insurance company is sued, it is typically not an insurance defense firm which handles

the defense - it is usually a larger firm which ordinarily has a national reputation and higher rates.

Why did this happen? One of the reasons is that some key corporate decision makers within the insurance industry have also shared the view that the lawyers whom they regularly retain to represent their insureds, are not equal to the task of representing their own company. One of the root causes of the problem rests with insurance defense counsel. For a number of years insurance defense lawyers, concerned about dwindling business, have encouraged unhealthy relationships. In the face of escalating costs, some firms accepted rate reductions, resulting in the establishment of lower "benchmarks" for the community. There have been agreements to waive legitimate costs incurred in defending insureds. Firms have agreed to submit their bills to auditors and have been told portions of bills would not be paid based on questionable or arbitrary review standards.

The importance of the relationship between the insurance company and defense counsel should be apparent to all members of the SDDL. It should be the mutual goal of the insurance industry and the civil defense bar to strengthen that relationship to the extent possible. This does not mean

A Matter of Self Image

Stutz, Gallagher, Artiano, Shinoff & Holtz

acceptance of conditions of engagement which could be interpreted as ratification of a poorer self-image. Lawyers performing services for insurance companies in San Diego are still among the finest civil trial lawyers in the city. Trial experience among lawyers in insurance defense firms is unparalleled. Insurance defense lawyers must insist on fair and reasonable compensation. Defense lawyers always recognize their important duty to their client, and are able to work within the confines of the tripartite relationship to ensure quality representation. Defense counsel can and should adhere to the guidelines of the insurance company by whom they are retained. Defense counsel can and should provide quality and cost-effective legal services. This does not mean that work should be performed at unreasonable rates, nor should corners be cut on proper legal representation.

Defense lawyers who are employed regularly by the insurance industry must first recognize their own importance and value. If the defense bar does not, it is unlikely that the insurance industry will. Only when both recognize the true value of the services being performed by lawyers regularly retained by insurance companies will the public perception change.

Continued from page 1

The Bottom Line

Nancy Norman v. Life Care Centers of America, Inc., et al.

- Case No. GIC 741100
- Judge: Hon. Geary D. Cortes
- Plaintiff Counsel: Norman Finkelstein, Esq. of Finkelstein & Finkelstein
- Defense Counsel: Linda Hunt Mullany, Esq. of Lucas, Mullany, Boyer & Haverkamp
- Type of Incident: Elder Abuse, Professional Negligence and Wrongful Death
- Settlement Demand: \$499,999.99
- Settlement Offer: \$75,001
- Verdict: 9-3 for Defense
- Trial length: 3 Weeks
- Jury out: Half a Day

Luis David Villegas Barrera, Cesar Alesander Villegas Barrera and Azucena Barrera Sanchez v. Mary Meyers, M.D. and Vista Community Clinic

- Case No. GIN001290
- Judge: Hon. Lisa Guy-Schall
- Plaintiff Counsel: William C. Halsey, Esq. and Donald Zeman, Esq. of Law Office of William C. Halsey
- Defense Counsel: Michael J. Grace, Esq. and D. Scott Barber, Esq. of Grace Brandon Hollis LLP
- Type of Incident: Alleged medical malpractice. Failure to treat a urinary tract infection in a pregnant woman resulting in the death of the mother.
- Settlement Demand: None
- Settlement Offer: Waiver of Costs
- Verdict: Defense verdict
- Trial length: 5 days
- Jury out: 40 minutes

The amount of time and effort involved in reaching this settlement, and the avoidance of a six month trial, made this his most rewarding settlement.

As any good community leader, Judge Bollman has not only been successful in his career, but also in balancing the all important family and

personal aspects of his life. When outside the courtroom he can be found spending time with his wife and two children, riding his bike and watching sports.

Judge Bollman's reputation as being effective and fair have come from years of hard work and devotion to the practice of

law. His staff has nothing but praise for his good demeanor. Judge Bollman's abilities, leadership and commitment to justice and the rule of law will be honored by the San Diego Defense Lawyers at the 2002 installation dinner.

WRITING 101: FOR TRIAL LAWYERS

Litigators spend a lot of time and energy learning how to persuade a jury, but very little time learning to write persuasively for the court. Sometimes we forget that judges are people too. When writing a motion or a brief, keep in mind that it won't matter if you are legally correct if the judge reading it doesn't get your point.

Just like persuading a jury with oral advocacy, persuading the court with written advocacy has a few basic elements.

Don't use a boilerplate form

If you want to win your argument, don't ever use a boilerplate form. A generic Motion for Summary Judgment that restates the general law in your state and includes a few paragraphs about your particular case is not very persuasive. You are not fooling anyone. A boilerplate motion reads like a boilerplate motion. It is worth the extra time to write a motion that specifically addresses the unique issues in your case. There is no such thing as a "typical slip and fall." There are nuances that support your argument and you need to make sure that the judge reading the motion can readily see those nuances.

State your case

Lawyers tend to organize

their writing in a set pattern: Facts-Argument-Conclusion. While this technique is helpful in organizing your thoughts and planning to write your motion, don't be bound to it. The concepts of primacy and recency apply to writing as well as speaking. What is the most persuasive aspect of your case? If the facts are good for you, start with them. If the law is on your side, start with that. Ask yourself: what is the most important detail in this case? Start with that and end with that.

Say what you mean

If you want to convey the fact that the dog in a dog bite case is not a vicious animal, don't say "the canine manifested non-aggressive behavior." Say, "the dog was not vicious."

We have a tendency when writing to use legalese and big words. This does not persuade a jury and it won't persuade a judge. Take advantage of the fact that you have time to think about what you are saying. You have time to organize it and choose the best language. When a short simple word will do-use it.

Don't forgo communicating the meaning of something just to make it sound good. Legal arguments contain many subtleties and a good writer

communicates these subtleties in a clear and convincing way. Decide what you want to say and say it.

Don't assume too much

You are writing a motion on a case you have lived with for a year. You know the facts inside out. You have read every case on point and every case that distinguishes the cases on point. You have evaluated witness testimony and scrutinized deposition transcripts. The judge hasn't. Your motion is one in many that the judge has to rule on. You have to come to the realization that this motion just isn't as important to the court as it is to you!

Don't assume the judge will read the cases you cite. Include the important facts and rulings in the text of your motion. Explain how and why this relates to your case.

Give the judge a little background. Emphasis on "little." When stating the facts relevant to the motion, put the facts in the context of the case. If the fact that the plaintiff filed suit on such and such a date and an answer was filed on such and such a date is not important to your argument, then leave it out. No one cares.

Don't assume that the judge will know how an incident arose or that the judge will

Continued on page 4

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Ins And Outs

- Ruben Tarango has joined Bacalski, Byrne and Koska. Tarango will continue his construction defect defense practice on behalf of developers, design professionals and subcontractors. He has also joined the firm's growing business and environmental litigation teams.
- Klinedinst, Fliehman & McKillop, P.C., is pleased to announce the addition of David B. Monks and Grant Waterkotte to the firm. Monks focuses on labor and employment law while Waterkotte works primarily on professional liability matters with a special focus on legal malpractice.
- On May 1, 2001 Elizabeth Skane formed the Law Office of Elizabeth Skane. Victor Block is an associate and Nancy Manning is "Of Counsel".
- Patricia P. Hollenbeck, a veteran litigator whose national and regional clients include Mail Boxes Etc., Inc., Whirlpool corporation and The Sherwin-Williams Company, has joined the San Diego office of the law firm of Buchanan Ingersoll as a shareholder. Additionally, she has been appointed to the California State Bar Business Law Section's Franchise Law Committee. As a member of the committee, Hollenbeck deals with legislative, judicial and regulatory issues relating to systems for distribution of goods and services, particularly through franchised businesses and business opportunities. She also takes care of the interests of the legal and business community involved in franchising. Her term will continue until 2004.
- New Address:
Law Offices of Robert L. Friedenber
12520 High Bluff Drive, Suite 375 San Diego, CA 92130
858-794-7800
858-794-7801 (fax)

understand what you mean when you use certain terms of art. Don't use terms such as "coefficient of friction" without explaining the meaning of that term in the context of your argument. Some words have different meanings in different settings. For example, "prophylactic" means one thing in a products liability case but quite another in sexual assault case. Make sure that these words convey the meaning to the reader that you intend to convey.

Avoid references and analogies to pop culture and colloquialisms. Judges come from very diverse backgrounds and may interpret a reference in a way you did not intend. To a parent with small children, a reference to "Barney" may be understood as the friendly purple dinosaur, but to me, it

means Fred Flintstone's loveable sidekick. You may understand a reference to "phat" or "phish", but the judge may just think you are a bad speller! If the judge doesn't "get it" and you've wasted a good point.

Be on the offense, not the defense

You are writing the motion because you want something from the court. Tell the judge what you want and why you should get it. Dwelling on your opponent's weaknesses only gives legitimacy to your opponent's argument.

Avoid arguments *ad hominem*

Attacking the plaintiff or his lawyer personally gets you nowhere. Any logic book will tell you that this type of argument is not a valid argument. It's tempting to point

out that your opponent is an idiot but it does nothing to strengthen your case. Write a first draft to relieve your frustration with your opponent's incompetence, and then edit. You can then focus on the real issues.

Maureen L. Rowland, Esq. is an Associate with the Law Office of Michael H. Burgoyne, P.A. in Towson, Maryland. Her practice consists of general civil litigation with a focus on the defense of tort cases. (This article is reprinted from FOR THE DEFENSE, October 2001, Vol. 43, No. 10 © 2001 with the permission of The Defense Research Institute, Inc.)

USD takes First Place for Second Year Running

The San Diego Defense Lawyers hosted its annual mock trial competition with the participation of 10 California law school teams. Represented were: McGeorge, University of San Diego, Thomas Jefferson, Western University and Pepperdine. The civil trial involved the sinking of an oil tanker due to the alleged negligent salvage efforts by the defendant tug boat company.

The competition took place at the downtown court house on the evenings of November 1 and 2 with the finals being held at University of San Diego's mock trial courtroom on Saturday, November 3. Each case was tried before a three member jury composed of San Diego Defense Lawyers. The identity of each school was anonymous to the judges. The law school teams

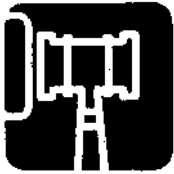
were well prepared and as our judges can attest, the advocacy was first rate and fierce.

The finals came down to McGeorge and University of San Diego, with USD carrying the day after a close match. USD was able to keep the trophy as they were last years winners as well.

There are numerous mock trial competitions throughout the school year, and we were informed by the participants that the San Diego Defense Lawyer's trophy is one of the most coveted. The board would like to express its gratitude for all members who participated as judges this year.



L-R: Lisa Hillan, Esq. (Asst. Coach), Ben Benumof, Matt Beran, Katherine Pasieta, Ash Hormozan, and Prof. Richard "Corky" Wharton (Head Coach)



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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 Clark R. Hudson at Neil, Dymott, Perkins, Brown & Frank, 1010 Second Avenue, Suite 2500, San Diego, CA 9210. Phone: 619-238-1712, Fax: 619-238-1562, E-mail: chudson@neil-dymott.com.

FIVE HINTS FOR APPELLATE SUCCESS

By Robert H. Lynn

The courts of appeal can be an apprehensive adventure for those unfamiliar with appellate procedures. Here are five hints that can contribute to your success.

First, in a summary judgment case, make sure you get rulings on your objections in the trial court. The trial court's consideration of "all the admissible evidence" under Biljac Associates v. First Interstate Bank of Oregon [(1990) 218 Cal. App.3d 1410] will result in the objections being waived on appeal. The court of appeal will then consider all the evidence as it essentially re-decides the summary judgment motion.

Second, be aware that the courts of appeal only consider the record from the trial court. If something is not in the record, it doesn't exist. Make sure trial court rulings are on the record or summarize them later on the record so the trial court has an opportunity to endorse or correct them. Procedural errors, such as the failure to make a required finding of fact, will be implied by the Court of Appeal unless you can show there are no facts in the record that would support an implied finding.

Third, keep your eye on the bottom line. To win an appeal, you have to show: (1) that the trial court made an error of law and (2) that the error was "prejudicial," i.e., the case would have turned out differently if the error had not been made. The court of appeal reviews alleged errors by applying certain rules, known as the "standards of review." Each issue in your case may have a different standard. If you don't have a working knowledge of the different standards, spend an hour with an appellate lawyer discussing your case issues. It will be money well spent because it should ensure that your brief is on target.

Fourth, be frank with your client about your chances of success. Overall civil reversal rates in the courts of appeal are 12-15%. In the Supreme Court, only one case in about 33 is even accepted for review. Even if accepted, the reversal rate is still only about 12-15%. Clients often want to blame everyone but themselves for losing a case. They think an appeal is a trial de novo. Disabuse them of this notion or you'll never satisfactorily explain why you lost again.

Some cases are more successfully appealed than others. Reversal rates are higher for a case ended by a demurrer or a summary judgment motion rather than a full trial. Any case with a de novo standard of

review is more likely to be reversed because the Court of Appeal theoretically gives no deference to the trial court. The de novo standard applies to a wide variety of issues, but the most common are probably statutory interpretation and summary judgments.

Fifth, if you know from the beginning that a case is a likely candidate for appeal, get an appellate lawyer onboard early. Trial courts are fact-intensive and trial lawyers are fact-oriented. Appellate courts are law-intensive and appellate lawyers are law-oriented. An appellate lawyer can help frame the issues in the trial court to your advantage in the courts of appeal. An appellate lawyer sitting second chair at the trial can make sure the record is protected during the maelstrom of trial. For a general look at how the courts of appeal view appellate lawyers, see In re Marriage of Shaban (2001) 88 Cal. App.4th 398, 408-411.

Robert H. Lynn is a partner at Lynn, Stock & Stephens, LLP. In addition to his appellate practice, Mr. Lynn teaches legal writing at Thomas Jefferson School of Law, consults on appellate matters and lectures frequently on appellate procedure for trial lawyers.

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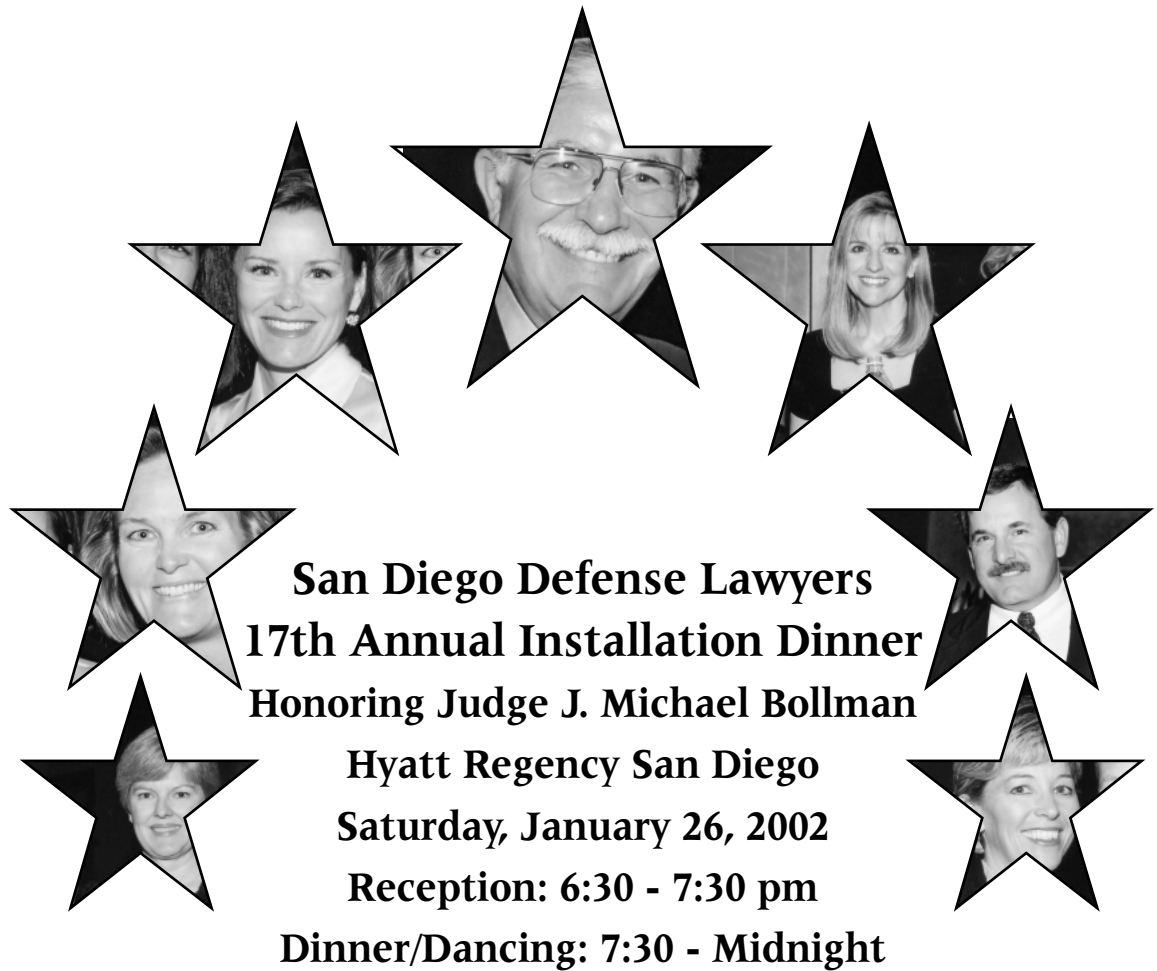
San Diego

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For Hosting Our Brown Bag Lunch Series

Membership Information

- Membership is open to any attorney who is primarily engaged in the defense of civil litigants.
- Membership dues are: \$90 for attorneys in practice less than one year and \$120 for attorneys in practice more than one year.
- Applications are available on the web at www.sddl.org.



**San Diego Defense Lawyers
17th Annual Installation Dinner
Honoring Judge J. Michael Bollman
Hyatt Regency San Diego
Saturday, January 26, 2002
Reception: 6:30 - 7:30 pm
Dinner/Dancing: 7:30 - Midnight**