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The Privilege Log: Protecting Privileges in Mass Tort Litigation

by Rana M. Siam

(Part Two, continued from Spring 2002, Volume 7, Issue 1 THE UPDATE)

The author has set forth a sample privilege log on page 8. For each privileged document, the log contains all of the information that would be required in most jurisdictions in order to protect the document from discovery by opposing counsel. It follows, of course, that each privilege log must be tailored to the specific requirements of each jurisdiction.

Defending the Privilege Log Burden of Proof

The burden of establishing that a privilege applies to a given set of documents or communications is on the party claiming the privilege. *In re Grand Jury Investigations, supra*, 974 F.2d at 1070. In order to meet the privilege, a party must demonstrate that its documents meet the essential elements of the claimed privilege. *Id.* Essentially, the party asserting the privilege claim must make a *prima facie* showing that the privilege protects the information the party intends to withhold. *Id.* at 1071. Conversely, the burden of establishing an exception to a claimed privilege shifts to the party claiming the exception.

Either party may request a hearing for a ruling on objections or claims of privilege. However, only the discovering party can bring a motion to compel answers to specific discovery requests. If neither party secures a hearing, the document at issue need not be produced. Thus, the discovering party has the burden of securing a hearing and prevailing in a ruling on objections and privilege claims, or else risk waiver of its requested discovery. See Fed.R.Civ.P. 37(a)(2). Notably, prior to setting a hearing on a discovery dispute, the Federal Rules of Civil Procedure as well as many federal local rules require the parties to confer and attempt to resolve the dispute prior to obtaining court intervention. *Id.*

Evidence Required to Support Privilege Claims

Privilege claims must be resolved on formal motions supported by competent evidence proving the underlying facts. *Bowne v. AmBase, supra*, 150 F.R.D. at 472. To make a *prima facie* showing of the applicability of a privilege, a party must plead the particular privilege, produce evidence to

support the privilege through affidavits or testimony, and produce the documents if the trial court determines that an *in camera* review is necessary. In requiring a party to prove the factual basis for its privilege claims, courts generally look to a showing based on affidavits or equivalent statements that address each document at issue. *Id.* at 473; *Mervin v. Federal Trade Commission*, 591 F.2d 821, 826 (D.C.Cir. 1978) (submission of affidavit to support privilege claims was sufficient to sustain privilege without the necessity of an *in camera* inspection).

In large document intensive discovery disputes, the court may utilize "an adequately detailed privilege log in conjunction with evidentiary submissions to fill in any factual gaps." *Bowne*, 150 F.R.D. at 474. Thus, a privilege log unsupported by any evidence is insufficient to sustain a claim of privilege. In order to preserve the appellate record, all evidence submitted to the court for consideration should be offered into evidence and a ruling either admitting or denying the offer should be obtained and all objections and rulings should be included in the reporter's record.

In conjunction with privilege log submission, affidavits should be submitted by in-house and outside counsel as evidence that certain documents are privileged; they should trace the elements of the claimed privilege. *In re Grand Jury Investigations, supra*, 974 F.2d at 1069-70 (finding that counsel's affidavits reciting certain elements of the claimed privilege were sufficient to sustain the withholding party's privilege assertion); *Rabushka v. Crane Co.*, 122 F.3d 559, 565 (8th Cir. 1997) (withholding party met its burden to prove privilege by tendering a detailed privilege log stating the basis for each claim of privilege, along with an explanatory affidavit written by its general counsel); *Construction Products*, 73 F.3d at 474 (denying withholding party's privilege claim in the glaring absence of any supporting affidavits or other supporting documentation); *Bowne*, 150 F.R.D. at 473 (indicating that withholding party should have prepared affidavits by the appropriate attorneys setting forth the general nature of the documents withheld, the provenance of the documents, and their confidential status, if applicable). Similarly, deposition testimony may also be used as evidence to support privilege claims and to clarify relationships and facts that may not be clear on the face of the document or the privilege log. *Bowne*, 150 F.R.D. at 474; see *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550 (10th Cir. 1995).

Continued on page 3

Ins and Outs

- ◆ The board of the San Diego County Bar Association elected Christopher Todd as the organization's president for the 2003 term. Todd, a civil litigation attorney and partner with WINGERT GREBING BRUBAKER & RYAN, will replace current President Monty McIntyre as head of the 16-member board. Todd served as the president of San Diego Defense Lawyers from 1998-99. Todd will be installed as president along with newly elected board members on Dec. 6 at the SDCBA's "Stepping Up to the Bar" event.
- ◆ Bob Harrison, of NEIL, DYMOTT, PERKINS, BROWN & FRANK has been inducted as a Fellow of the International Academy of Trial Lawyers, which is limited to 500 members from the United States. In addition the Academy includes Fellows from over 30 countries throughout the world. His is the only general member (those Fellows actively engaged in the practice of law) from San Diego. Also, in January he became President-elect of the Association of Southern California Defense Counsel.

President's Message

By John R. Clifford
Drath, Clifford, Murphy, Wennerholm & Hagen

By all accounts, 2002 remains a strong and robust year for the civil defense lawyer in San Diego. In conjunction with our busy practices, SDDL has been busy providing its educational programs and in planning social events for the future.

Already this year there have been 3 brown bag seminars that have been well-attended covering diverse issues from Appellate Law presented by Robert H. Lynn; Special Verdicts and Other Trial Related Subjects, presented by Robert Titus; and a program entitled Jury Consultants provided by Tiffany Denhardt of Jilien J. Rubin & Associates. SDDL also participated in a joint program with RIMS held on March 28th, which we hope to make an annual event. On June 5th, an entertaining and instructive Trial Evidence seminar was presented at the Grant Hotel. The trial was presided over by the Honorable Herbert Hoffman (ret.), and skilled advocacy was presented by Robert W. Frank and Charles R. Grebing. There will be two additional evening seminars presented this year, along with our continuing monthly brown bag lunches. I strongly encourage you to attend and obtain your Continuing Legal Education credits at no cost, and at the same time, mingle with your colleagues. Additionally, for those that are unable to attend the evening seminars, these are being videotaped and can be purchased for a nominal amount by contacting our Executive Director, Sandee Rugg.

We are always looking for new and interesting topics from our members as well as individuals willing to participate. Please contact me or any member of the Board of Directors to provide input or assistance.

I am also pleased to announce on the social front that we have secured The Auld Course for the SDDL Golf Tournament which be held on September 27, 2002. Please save the date. If you have any ideas for sponsors or can assist, please contact either Billie Jaroszek or Clark Hudson.

On a separate front, SDDL is attempting to coordinate activities with other defense organizations primarily DRI and the Southern California Association of Defense Counsel. We believe it is important to stay abreast of current developments and assist our brethren organizations and be proactive in issues involving our profession. This year one of our board members will attend the Northwest/Pacific Regional Defense Leader's Conference that is being hosted by the Association of Southern California Defense Counsel in conjunction with DRI scheduled for the end of July. I will have the pleasure of attending the annual DRI meeting in the fall.

As we all know, there have been many changes in the traditional civil defense practice over the past 10 years, many of which transpired without our participation. We need to be alert to these issues and participate in the process. One of the current issues that are being debated in defense organizations involves the "DRI Recommended Case Handling Guidelines for Insurers and Law Firms." This has been a hot topic item as there is an ongoing debate as to whether or not defense organizations should be involved in an effort which some see as acquiescing to defense guidelines which arguably can interfere with an attorneys ethical obligations. Consequently, the revised DRI guidelines include additional language to strengthen the fact that guidelines may not interfere with the ethical obligations of defense counsel. You can view/copy this document from the DRI website at: <http://www.dri.org/dri/about/casehandlinghidden.cfm>

In Sacramento, there are two issues, which are currently on the front burner for defense counsel, which are being monitored by the California Defense Counsel (CDC). One issue is to revise C.C.P. §437(c) to permit motions for summary adjudication even if that motion does not dispose of the entire cause of action or affirmative defense. The current bill which passed through the Assembly and is before the Senate will require a stipulation between plaintiff and defense counsel that the motion would contribute to judicial economy.

Another current topic involves the tripartite relationship and potential conflict of interest issues that were raised in State Farm v. Federal Insurance (1999) 72 Cal. App 4th 1422. The latest news is that the State Board of Governors has approved a comment to Rule 3-310 of the Rules of Professional Conduct and that proposal will move to the California Supreme Court for approval.

I welcome any comments you have concerning these topics and I strongly encourage all of our members to become active in the issues that affect our daily practice.



The Privilege Log

Continued from page 1

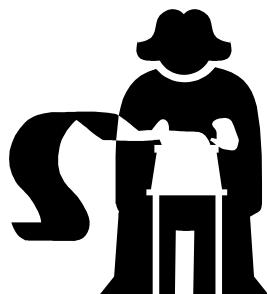
Often, the documents may constitute the only, and certainly the best, evidence substantiating a claim of privilege. Therefore, in addition to the privilege log, affidavits, deposition testimony, live testimony, and the documents (submitted under seal) are proper forms of evidence to support privilege claims. They should be offered at the hearing to fill in any factual gaps, including outlining the essential elements of the privilege asserted.

In Camera Inspection

The documents themselves may be the only adequate evidence of privilege. If so, then the withholding party must request an *in camera* inspection to resolve the status of the disputed documents. Once (or if) the trial court grants the party's request for an *in camera* inspection, it must produce the documents to the trial court in a sealed wrapper properly indicating the privileges asserted for each document.

Rule 26(b)(5) was intended to help reduce the need for an *in camera* examination of documents. See Fed.R.Civ.P. 26, 1993 Notes of Advisory Committee 34. *In camera* procedures should be used only rarely in discovery disputes. *Krenning v. Hunter Health Clinic*, *supra*, 166 F.R.D. at 35; *Mervin v. FTC*, *supra*, 591 F.2d at 826 (submission of affidavit to support privilege claims was sufficient to sustain privilege without the necessity of an *in camera* inspection).

In camera review is not intended to be routinely undertaken in lieu of an evidentiary hearing or as a substitute for submitting an adequate record to support privilege claims. *Bowne v. AmBase*, *supra*, 150 F.R.D. at 475. See also, *Krenning*, *supra* (denying withholding party's request to review the documents *in camera* absent producing sufficiently detailed privilege log). Instead, it is intended to resolve genuine disputes concerning the accuracy of descriptions for certain withheld documents. Prior to requesting an *in camera* review, the withholding party should ensure that opposing counsel has complied with the requirements of Rule 37(a)(2) that it has in good faith conferred or attempted to confer with the withholding party in an attempt to resolve the dispute without court intervention. In some circumstances, however, *in camera* review may be the best or the only way to demonstrate the privileged nature of the documents.



If the court rules that the documents are not privileged and orders their production, either appellate jurisdiction under the "collateral order" doctrine or *mandamus* may be the proper means to challenge the district court's ruling ordering production of privileged documents. *In re Chrysler Motors Corp.*, *supra*, 860 F.2d at 846; *In re Ford Motor Co.*, 110 F.3d 954, 958 (3d Cir. 1997); *but see, Boughton v. Cotter Corp.*, 10 F.3d 746, 750 (10th Cir. 1993) (dismissed appeal for lack of jurisdiction, finding that petitioners were entitled neither to an interlocutory appeal under the "collateral order" exception, nor to a *mandamus* review of the district court's order, which was issued after *in camera* review and compelled production of privileged documents). [A complete discussion of appellate and *mandamus* review is beyond the scope of this paper.]

Conclusion

In mass document productions, time is of the essence and an orderly plan of action must be in place to anticipate and comply with court ordered-discovery schedules, and to preserve information protected by privilege. Creating a privilege log in a mass document production may appear to be a daunting task. However, with careful preparation and a grasp of the legal and factual issues, you can assert privileges, prepare a detailed privilege log, and defend those privileges valiantly.

AUTHOR

Rana M. Siam is an associate at the law firm of Clark, Thomas & Winters in Austin, Texas. Her principal areas of practice include pharmaceutical products liability and energy law. She is a member of DRI.

Ins and Outs

- ◆ Shewry, Stoddard & Van Dyke is now SHEWRY & VAN DYKE, LLP. Steve Shewry and Michelle Van Dyke are the principles.
- ◆ Kelly Bull, previously of Greenfield & Bull, LLP, has recently joined the San Diego office of MURCHISON & CUMMING. She will continue to practice general civil litigation defense as well as insurance bad faith and insurance coverage matters.
- ◆ The LAW OFFICE OF ELIZABETHA. SKANE has recently added Jennifer French, 2001 graduate of Thomas Jefferson school of law, cum laude as an associate with the firm.

Thank You

San Diego Defense Lawyers
would like to thank

— Brenda Peterson —

of Peterson & Associates

for sponsoring our

Brown Bag Luncheon programs
held in her offices at:

530 "B" Street • Suite 350
San Diego • CA • 92101 • 619.260.1069

Ins and Outs

◆ **KOELLER, NEBEKER, CARLSON & HALUCK** has added three new attorneys. Austin C. Sung specializes in the area of professional negligence, insurance coverage and construction defects. Mr. Sung has handled various aspects of discovery and pre-trial preparation and has successfully resolved cases for clients through summary judgment motions. Robert W. Bradley specializes in the areas of complex multi-party litigation, general liability, insurance coverage, bad faith litigation, and construction law. He has also handled a variety of civil cases including personal injury, wrongful death, sexual harassment, premises liability, municipal law, and public agency law. Fort Zackary practices in the areas of construction defect law, developer defense and insurance defense. His prior litigation experience includes service as a Special Assistant U.S. Attorney in the Border Crimes Section of the San Diego U.S. Attorney's Office prosecuting felony drug and immigration offenses in Federal District Court.

The Bottom Line

James Marshall, et al. vs. The Baldwin Company, et al.

COURT/CASE NO.: San Diego Superior Court, Case No. 725825

JUDGE: Honorable Kevin A. Enright

DAYS IN TRIAL: 44

DELIBERATIONS: 7 days

NATURE OF CASE: Construction defect case involving 54 single family homes within the Tierra subdivision of the Paloma master development in San Marcos. The Tierra subdivision represents 22% of the homes in the entire action. The trial of the remaining subdivisions will follow. The Plaintiffs claimed repair and relocation costs of \$3,767,386.14, plus investigation costs of \$234,315.00 (total claim of \$4,001,701.10). The Plaintiffs claimed that all roofs needed to be removed and replaced, all windows had to be removed, repaired and reinstalled and that all of the stucco needed to be patched, sandblasted and re-coated with an elastomeric coating in addition to other lesser alleged defects.

Baldwin, the Developer/General Contractor, contended that the reasonable cost of repair was only approximately \$188,000.00 and that relocation was not necessary during repairs.

Baldwin cross-complained for express indemnity against the following subcontractors: Archer Roofing, Premier Products, Premier Window products, Sunair Aluminum, Spring Valley Sheetmetal, T&M Framing, Coffman Enterprises, Coast Plastering.

In addition to seeking full indemnity for all damages awarded to the Plaintiffs, Baldwin sought a proportionate share of its \$2.75 to \$3.1 million in defense costs incurred in defending the entire action. Sunair Aluminum also cross-complained against Bathco for equitable indemnity.

COUNSEL: Plaintiffs: Steven Strauss, Esq. & Victor Felix, Esq. of Procopio, Hargreaves & Savitch

Baldwin: Mark Dillon, Esq., Jill Skinner, Esq., Steven Tee, Esq. & Anne Bickel, Esq. of Gatzke, Dillon & Ballance

Archer Roofing: Robert Titus, Esq. of Stutz, Gallagher, Artiano, Shinoff & Holtz; Patricia Ryan, Esq. of Horton & Ryan

Premier Products: Barry Schultz, Esq. of Sullivan, Wertz, McDade & Wallace

Premier Window Products: David Bregman, Esq. of Klinedinst, Flichman & McKillop

Sunair Aluminum: Michael San Filippo, Esq. of Law Offices of Jeffrey Hamilton; Quyen Khuon, Esq. of Waters, McClusky & Boehle

Bathco: James Stout, Esq. of Bremer & Whyte

Spring Valley Sheetmetal: Peter Hughes, Esq. of the Hughes Law Firm

Coffman Enterprises: David Hausfeld, Esq. of Brownwood, Chazen & Cannon; Timothy Lucas, Esq. of Parker Stanbury

Coast Plastering: Nannette Souhrada, Esq. of Campbell, Souhrada & Volk; Timothy Lucas, Esq. of Parker Stanbury

T&M Framing: Timothy Lucas, Esq. of Parker Stanbury

VERDICT (Plaintiffs vs. Baldwin): \$866,902.05

(The jury declined to award any Stearman damages.)

VERDICT (Baldwin vs. Subcontractors): Baldwin vs. T&M Framing: Defense verdict; Baldwin vs. Coffman Enterprises: Defense verdict; Baldwin vs. Coast Plastering: Defense verdict; Baldwin vs. Spring Valley Sheetmetal: Defense verdict; Baldwin vs. Archer Roofing: \$187,066.60; Baldwin vs. Premier Products: \$118,578.60; Baldwin vs. Premier Window Products: \$113,845.10; Baldwin vs. Sunair Aluminum: \$72,301.40.

VERDICT (Sunair vs. Bathco): Defense verdict.

COMMENTS: The gross award to Plaintiffs is subject to offsets for pre-trial settlements by other parties. That will, in turn, reduce the net awards against the subcontractors.

On Baldwin's cross-complaint for indemnity, Baldwin was found to be 50% at fault for the gross award for roof defects (\$187,066.60), as well as 50% at fault for the gross award for window defects (\$304,725.10). It was found to be 100% at fault for all other damages awarded to the Plaintiffs.

By stipulation of the parties, there will be a bench trial of the reserved issue of Baldwin's defense costs to be awarded against those subcontractors who did not obtain defense verdicts on Baldwin's cross-complaint. It is estimated that Baldwin may claim approximately \$700,000 in defense costs for the Tierra subdivision.

Those subcontractors receiving defense verdicts on Baldwin's cross-complaint have pending claims for attorneys fees and costs against Baldwin.

Continued on page 5



The Bottom Line

Continued from page 4

Merrilynn Clark and William Clark vs. Theodore G. Obenchain, M.D., and Theodore G. Obenchain, M.D., Inc.

COURT/CASE NO.: GIN 006238

JUDGE: Hon. Michael M. Anello

NATURE OF CASE: Medical Malpractice/Neurosurgery

PLAINTIFF COUNSEL: David D. Miller, Esq., MILLER & JAMES

DEFENSE COUNSEL: Daniel S. Belsky, Esq., Belsky & Associates

TYPE OF INCIDENT: Meningioma surgery leading to brain damage and paralysis (triplegia)

SETTLEMENT DEMAND:

SETTLEMENT OFFER: Defendants served plaintiffs with CCP §998 offers for zero dollars and a waiver of costs

VERDICT: Defense

TRIAL LENGTH: 7 Days

JURY OUT: 1 Hour

Ron Klein vs. Kevin Metros, M.D.

COURT/CASE NO.:

JUDGE: Hon. Michael Orfield

NATURE OF CASE: Medical Malpractice

PLAINTIFF COUNSEL: John Mittelman, Esq.,

DEFENSE COUNSEL: James D. Boley, Esq., NEIL, DYMOTT, PERKINS, BROWN & FRANK

TYPE OF INCIDENT: Improperly performed right elbow arthroplasty resulting in posterolateral rotatory instability

SETTLEMENT DEMAND: \$175,000

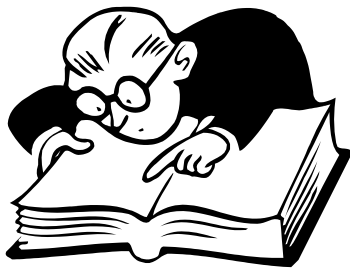
SETTLEMENT OFFER: Waiver of costs

VERDICT: Defense

TRIAL LENGTH: 5 days

JURY OUT: 10 Minutes

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“What is Retraxit, and Why Should I Care?”

by David P. Burke

Neil, Dymott, Perkins, Brown & Frank

Retraxit is a relatively obscure, but also somewhat useful defense tool. At common law, retraxit was “a voluntary renunciation by plaintiff in open court of his suit and cause thereof, and by it plaintiff forever loses his action.” (Black’s Law Dict. (5th ed. 1979) p. 1183). To put it more practically, retraxit has the same legal effect as a dismissal with prejudice.

A retraxit is a judgment on the merits preventing subsequent action on the dismissed claim. Invoking many of the same principles as res judicata, retraxit only bars future action on causes of action that have been dismissed with prejudice between the same parties or those in privity with them. *Rice v. Crow* (2000) 81 Cal.App.4th 725, 733-34.

Retraxit does not operate to eliminate every claim that may arise out of a particular event or series of events. In *Morris v. Blank* (2001) 94 Cal.App.4th 823, Morris filed a lawsuit against Blank in superior court. The case arose out of an auto accident with disputed liability. Subsequently, Blank filed her own claim against Morris in municipal court. Months later, Blank settled her municipal court action with Morris’ insurer. She filed a dismissal with prejudice in return for \$1,200.

Blank then filed a Motion for Summary Judgment in Morris’ superior court action, claiming the action was now barred by retraxit. The trial court agreed, apparently because both actions involved the same subject matter. However, the appellate court ruled that retraxit did not apply to this situation. The two lawsuits involved different torts and different causes of action. Since Morris’ claim was not independently barred by either res judicata or collateral estoppel, summary judgment was reversed. *Id.* at 828-832.

Nevertheless, retraxit can be an effective shield for defendants. For example, in a medical malpractice action involving the failure to timely diagnose a now terminal disease, the defendant will almost always seek to include the current action and any prospective wrongful death action in a universal settlement agreement. Assuming the settlement agreement is signed by all of the necessary principles and includes all possible causes of action arising out of the offending occurrence, the dismissal with prejudice would operate as a retraxit. The doctor would then have an efficient means of short-circuiting any plaintiffs who got inspired for more litigation after the patient died.

In addition, retraxit could come into play in a case involving two co-defendants who cross-complained against each other. In this hypothetical, the co-defendants decide to present a united front and agree to dismiss, with prejudice, their cross-complaints against each other. Subsequently, one co-defendant settles with the plaintiff. The stubborn remaining co-defendant goes to trial and loses big. When the losing co-defendant tries to assert a claim for indemnity against the settling co-defendant, retraxit would bar the indemnity claim.

As the examples above demonstrate, retraxit will not present itself too often in defense strategy, but it should be kept in mind as an efficient means of disposing of cases that have essentially already been decided and would otherwise linger unnecessarily.

Ins and Outs

- ◆ KLINEDINST, FLIEHMAN & MCKILLOP, P.C. has opened offices in Orange County and Los Angeles and added Jennifer D. Merta is their newest associate. Merta’s primary responsibilities have included conducting legal research projects and preparing case briefs.
- ◆ Teresa M. Beck, a partner at LINCOLN, GUSTAFSON & CERCOS was recently elected Board Chair of Travelers Aid Society of San Diego, a non-profit corporation which provides aid to travelers in need, including business travelers, battered women, and the homeless. Ms. Beck was also recently elected Board Chair of Icarus Puppet Company, a non-profit arts organization which brings cultural arts to the San Diego community.
- ◆ LINCOLN, GUSTAFSON & CERCOS was recently named one of San Diego top fund raisers for the MS Society. With the help of its lawyers, staff, clients, and fellow law firms and lawyers, the firm raised more than \$25,000 for the MS Society.

Ins and Outs

- ♦ Joining FARMER & CASE are: Gina C. Haggerty, Southwestern University School of Law, J.D., 2001, Recipient, CALI "Excellence for the Future", Interviewing Counseling and Negotiation, Spring, 2001; Susan Filipovic, Tulane University School of Law (J.D., cum laude, 1998), formerly with Neil, Dymott and Lisa Parella, Touro College Jacob D. Fuchsberg Law Center (J.D., magna cum laude, 1989) has joined the firm's Las Vegas office, LAW OFFICES OF ANTHONY T. CASE, as an associate.
- ♦ CAMPBELL, SOUHRADA & VOLK announces that Mr. Shawn Robinson, Mr. Scott Stonehocker, and Ms. Eileen Luttrell have joined the firm as associate attorneys. Mr. Robinson will staff the San Diego Office and Mr. Stonehocker and Ms. Luttrell will staff the Las Vegas Office.
- ♦ Carolyn P. Gallinghouse joined MAXIE RHEINHEIMJER STEPHENS & VREVICH at the beginning of the year.

SDDL Brown Bag Series Recap

"Special Verdicts and Other Trial Related Subjects"

by Ian Williamson
Stutz, Gallagher, Artiano, Shinoff & Holtz

On May 23, Robert Titus of Stutz, Gallagher, Artiano, Shinoff & Holtz led a brown-bag seminar on the evolution of the Special Verdict form in complex cases. Fresh from the trial of *Marshall et al v. Baldwin*, Mr. Titus discussed the use of the matrix-style jury verdict for assigning damages to multiple plaintiffs on numerous issues. He also discussed the use of a matrix jury form for assigning liability on an indemnity cross-complaint. Jurors use (or maybe misuse) of the forms to allocate damages contrary to instructions was addressed. There were several questions regarding the use of the verdict form's contents for post-trial motions.

Mr. Titus provided hints and suggestions for the preparation of verdict forms. He also discussed wording of certain questions on three different verdict forms that were key to the defense presentation of the case. In summary, counsel are well-advised to thoroughly consider post-trial use of the verdict form before it is drafted. Matrices are useful tools in complex matters.

Approximately 20 members attended this informative seminar. Thanks to Robert Titus and Brenda Peterson of Peterson & Associates Court Reporting for providing their generous hospitality.

"Jury Consultants"

by Kelly Boruszewski
Stutz, Gallagher, Artiano, Shinoff & Holtz

You smile. She smiles. You ask questions, and argue at the close. She sits, watching, nodding with slight approval. No, its not your mother, its Juror #5, and over the past several days you established a rapport with her and other members of the jury. The case is yours, so you thought. Why did the jury come to a plaintiff's verdict: Was it your tie? Was the hem too short, too long? Did the jurors even read your instructions that some poor associate spent days preparing? Before another client asks you, "What happened?", maybe a call to Ms. Tiffany Denhardt is in order.



The above questions and more were answered well past the normal lunch hour by our guest speaker Ms. Denhardt who was questioned and probed by numerous defense lawyers (so out of character for us all) into disclosing some "tricks-of-the-trade." Held at Peterson & Associates (thank you Brenda), Ms. Denhardt discussed the various roles jury consultants can play, from pre-deposition to closing argument.

For example, arranging focus groups and profiling your case may be key in how you present your case and pick a jury. Focus groups can range from a three-hour, one-attorney session to a full day 24-person panel, giving two attorneys (one playing the role of plaintiff's counsel) an opportunity to battle it out and supply abbreviated jury instructions. If neither work for you, Ms. Denhardt can "custom" design one for your client's purpose and price range. Typically, panels will "deliberate" and spend time critiquing the facts, the law, and you. But maybe you only want to know how your client may come across at trial. Show an edited version of a deposition video, and wait for the comments to follow. From the stories told during this program, whichever way is chosen, expect the unexpected. Panels will enlighten you on what your case lacks, where it is strong, and what they wanted to hear or be told. They will even critique your diagrams that you think are so straight forward, but allude every member of the panel.

A jury consultant can also develop a "juror profile" sheet characterizing the aspects of a "good" juror and a "bad" juror. This can aid in selecting, or more importantly, deselecting a potential juror. Do you really want the "long-haired hippie" on the jury? How about an attorney? Ms. Denhardt's answer: Maybe. The hippie may know everything about pollen and mold. Or maybe your case is so "law-driven" that an attorney on the panel may help keep the other jurors focused on the law during deliberation.

During voir dire, have the consultant look for "leaders" According to Ms. Denhardt, it is generally the tallest male with the most social clout (i.e., prestigious job, educated, friendly, and articulate.) Unless the trial is going to last longer than a few days, the jury dynamics change. The cost for consulting services can range from \$1,500 to \$10,000. Depending on the trial's outcome, this service may prove to be the least expensive part of the legal process. Still too much? Call your parents and present your case. According to Ms. Denhardt, 95% of the jury poll is over the age of 65.

You may want a jury consultant just to find the "golden egg" in the potential jury panel: the elusive "tort reformer." How do you spot a tort reformer? If you went to the meeting, you know. If you did not, maybe you should give Ms. Denhardt a call at 619/233-6001 before your next trial. In the end, it may be worth your client's time and money.

OBJECTION!!!

By Robert J. Walters
Grace Brandon Hollis LLP

On June 5, 2002, SDDL members were treated to an informative and entertaining evening of lawyering extraordinaire. The event: "TRIAL EVIDENCE (All You Ever Wanted to Know But Were Afraid to Ask!) held at the U.S. Grant Hotel. This program is part of SDDL's ongoing goal to provide practical instruction to its members of various subjects designed to improve legal skills. Attendees received 2 hour MCLE credit and a helpful handout of a table of typical objections with statutory basis and recommended use. This program included a trial demonstration on "How to Object, When to Object and Why." The presenters were the Honorable Herbert B. Hoffman of Private Dispute Resolution; Charles R. Grebing of Wingert, Grebing, Brubaker & Ryan; and Bob Frank of Neil, Dymott, Perkins, Brown & Frank.

Attendees saw a mock direct and cross-examination of a witness named Jack Daniels, played by SDDL President, John Clifford, a truck driver from Oklahoma who allegedly ran over an intoxicated pedestrian either standing at or crossing an intersection in scenic Pacific Beach around dusk on a December day. Bob Frank, represented Mr. Daniels (with true to life southern accent and red-neck twang), and conducted the direct. Retired Judge Hoffman presided over the script - er, examination, and very judiciously fielded objections by able defense counsel, Charles Grebing.

The authenticity would have been complete but for the number of objections (easily 10 or more a segment) and the rulings, which were designed purely to illustrate the types of objections that might be made, providing further opportunity for attendees to participate in Q&A regarding appropriateness of particular objections and/or ruling. After the fifth objection - fifth in a series that had been overruled - Mr. Grebing demonstrated an important trial technique following ruling by the Court: an appropriate response, such as, "Thank you, Your Honor," with a sincere smile. This alone was worth the cost of admission. Mr. Grebing also conducted the cross examination, to which Mr. Frank fared no better with his objections.

Bottom line: Whether an attendee agreed with the appropriateness of each objection or the ruling, it was an invaluable way to illustrate the importance of being prepared for making an objection to an inappropriate line of questioning and deciding whether the objection itself would be appropriate or ill-advised.

**SDDL Golf Tournament -
September 27, 2002**

The San Diego Defense Lawyers will be sponsoring a charity golf tournament on September 27, 2002. The Juvenile Diabetes Research Foundation is the charity the tournament will sponsor. The tournament will be hosted at The Auld Course. We will have a four person Scramble Format, with awards, prizes and dinner to follow the golf. Registration forms will be sent out in the very near future. Space for the tournament will be limited to the first 144 golfers to sign up.



The Juvenile Diabetes Research Foundation (JDRF) was begun in 1970 by parents of children with the disease. They understood that managing juvenile diabetes was not the answer. The only acceptable answer - cure it. And they also understood, that only intensive research would yield a cure.

JDRF is the world's leading nonprofit fund raising organization for diabetes research. In FY 2001, JDRF allocated 87 cents of every dollar directly to research and education about research.

We are looking forward to an outstanding tournament supporting a worthy cause. Save the date on your calendars today!!!

The Bottom Line

Continued from page 5

Stephen Ward vs. Gary Boone, M.D.

COURT/CASE NO.: GIC 758349

JUDGE: Honorable E. Mac Amos, Jr.

NATURE OF CASE: Medical Malpractice

PLAINTIFF COUNSEL: Mark T. Brisbois, Esq., LAW

OFFICES OF MARK T. BRISEBOIS

DEFENSE COUNSEL: Michael I. Neil, Esq., NEIL,

DYMOTT, PERKINS, BROWN & FRANK

TYPE OF INCIDENT: Failure to diagnose a right ring finger tendon rupture at the distal joint with a subsequent left wrist fracture

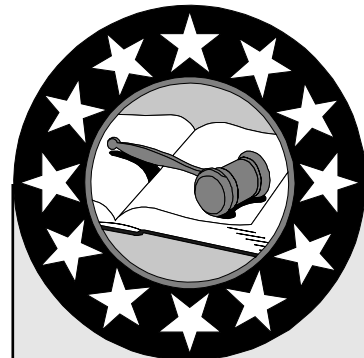
SETTLEMENT DEMAND: Plaintiff attorney asked jury for \$785,000 and then offered to settle for \$125,000 during trial

SETTLEMENT OFFER: 1998 Offer in the amount of \$29,999.99

VERDICT: Defense

TRIAL LENGTH: 5 Days

JURY OUT: 2 Hours

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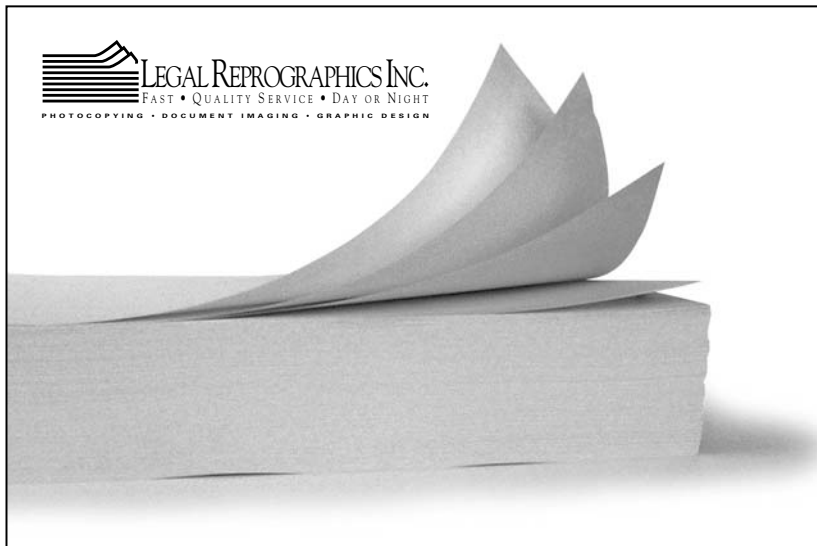
Membership Information

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.

THE UPDATE is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense attorneys, judges and persons allied with the profession as suppliers of goods or services.

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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 92101. Phone: 619- 238-1712, Fax: 619- 238-1562, E-mail: chudson@neil-dymott.com.



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DOCUMENT NUMBER (Bates Range)	DATE	AUTHOR ("From")	RECIPIENT ("To")	COPYEES ("cc")	DOCUMENT TYPE AND DESCRIPTION	PRIVILEGE
DRI-2001	05/04/90	Mullen, L. (A)	Clayton, A.	Hewson, P. (A) Evans, D. (A)	Facsimile and attachment: Memorandum relating confidential communications from in-house counsel to client providing legal advice re draft product labeling.	ATTY/CLIENT
DRI-2002	12/02/94	Clayton, A.	Singley, M.(A)	Anderson, E. (A)	E-Mail: Confidential communication to outside counsel from client providing information requested by counsel to be used in facilitating the rendition of legal advice re draft advertising materials.	ATTY/CLIENT
DRI-2003	04/28/96	Francis, S.	Mullen, L.(A)	Clayton, A.	Memorandum: Confidential communications from representative of client to in-house counsel prepared at the request of counsel re statistical analysis providing information to assist counsel in rendering legal advice.	ATTY/CLIENT
DRI-2004	02/02/97	Williams, R.(A)	Clayton, A.	Clark, E. Thomas, S. Winters, S.	Letter: Work product prepared by outside counsel to client summarizing attorney's mental impressions, conclusions, and opinions re retention of experts in pending litigation.	ATTY/CLIENT WORK PROD
DRI-2005	05/02/97	AC	LM		Handwritten Note: Redaction: Confidential communication from client to in-house counsel requesting legal advice re FDA regulatory requirements. [Need affidavits to identify recipients and support privilege claim]	ATTY/CLIENT

"(A)" designates Counsel