

False Sense of Security: Issues Confronting Attorney E-mail Communications with Clients

by Robert J. Walters

Grace Brandon Hollis LLP

A few years ago, I received an e-mail from the general counsel of a fairly sophisticated corporate client that contained an e-mail notice very similar to the notices that typically are contained in fax cover sheets indicating that the attachments were confidential and privileged, as well as instructions if the fax had been received by anyone other than the intended recipient. This immediately prompted me to inquire whether there were any legal or ethical obligations to e-mail communications with clients.

It came as somewhat of a surprise to me that the California State Bar had not issued any opinion regarding the ethical obligations of attorneys in utilizing e-mail as a means of communication or transmitting (attaching) documents that otherwise would be considered confidential in any other context (e.g., snail mail, FedEx® or fax). This issue had been addressed by the American Bar Association in 1999, at which time, the ABA concluded that e-mail communications, like other forms of communication, including by electronic means, carried a reasonable expectation of privacy and a lawyer would not violate any ethical obligations by e-mail communications with a client.¹ Specifically, the opinion stated that a "lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet . . . because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint." The ABA also did not consider technologically available forms of securing the communication, such as encryption, to be required. The ABA cautioned, however, that there may be some circumstances that dictated enhanced security or encryption, and clients should be consulted. Notwithstanding, the ABA's position is that the attorney-client privilege is not waived and an attorney acts within permissible ethical boundaries by unencrypted e-mail communication with a client.

Through the end of 2002, the bar associations of only 21 states (including the District of Columbia) had issued any opinion regarding the scope of any ethical obligations with respect to e-mail communication between attorney and client. With the exception of one jurisdiction, the general consensus is similar to the ABA's position.

Although the California State Bar has not taken a position on the ethical issue, it is clear that the fact that a communication between attorney and client does not lose confidentiality solely because it is transmitted by fax, cellular phone or other electronic means. California Evidence Code §952; 18 USCA §2517(4). Thus, in California, under either state or federal law, the *mere* fact that attorney and client communicate via e-mail does not present waiver of privilege issues. However, given the duty to preserve client confidences inviolate,² one may infer that counsel communicates with a client via e-mail at his or her own risk.

There are many ways in which confidential and privileged e-mail may be compromised, including: compromise of lawyer e-mail account password; misdirected confidential communications by sending to wrong e-mail address; misdirected confidential communications by mistakenly sending e-mail to persons in addition to intended recipient; misdirected confidential communications by posting e-mail to a listserv, bulletin board, or other similar mass messaging system; attachment of another client's confidential documents or communications to properly directed e-mail communications; interception of e-mail communications between the time sent by the lawyer to the client; disclosure by a former employee of the lawyer's firm; and compromised confidentiality after the communication is received by the client.

These examples suggest that the greatest danger to electronic communications between lawyers and clients has nothing to do with malicious breaches of security. Instead, the greatest threat is the simple negligence of the lawyer or client in quickly preparing or responding to e-mail communications and not checking or confirming

that the client is indeed the person to whom the communication is being directed. Although this type of inadvertent disclosure of attorney-client communications is not unique to e-mail, the ability of e-mail to be irretrievably transported to the wrong person, or thousands of people, with the click of a button, makes this type of inadvertent disclosure more dangerous than with other types of communication.

Two areas of immediate concern should be evident. First, how are otherwise protected privileged communications impacted by inadvertent disclosures? This question arises not from the relative security of e-mail communication. Rather, it is an issue needing greater attention given the increasing use of electronic discovery.

Consider the following hypothetical: Client has exchanged e-mail communications with Attorney A regarding transactional matters and has requested an opinion regarding possible intellectual property issues. Coincidentally, Client has raised the possibility of litigation and provided Attorney A with information that is potentially damaging to Client's defense or admits some level of wrongdoing. Litigation does in fact commence and Attorney B represents Client in the litigation. Plaintiff's attorney subsequently makes a

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THE BOTTOM LINE

Case Title: Troy Bucko v. State Farm
General Insurance Company
Court Case No.: GIC 776005
Judge: Hon. Vincent P. DiFiglia
Nature of Case: Insurance - breach of
contract/bad-faith
Plaintiff's counsel: Andrew Dunk, Esq.
and Rebecca Lack Mowbray, Esq.
Dunk & Associates
Defense counsel: Randall Nunn, Esq.,
Hughes & Nunn
Type of Incident: Insurance claim for theft
of personal property
Settlement Demand:
Settlement Offer:
Verdict: Defense (12-0)
Trial Length: 5 days
Jury Out: 1 ½ hours

Case Title: Russell Aidukas and Krista
Aidukas v. Richard Lee Fassett, M.D.;
Paul R. Reeb, Jr., M.D. and Does 1
through 50 inclusive
Court Case No.: GIC 758731
Judge: Hon. Robert E. May
Nature of Case: Medical Malpractice
Plaintiff's Counsel: Dana M. Cole,
Esq., Cole & Loeterman
Defense Counsel: Michael I. Neil, Esq.
and Jason E. Gallegos, Esq., Neil,
Dymott, Perkins, Brown & Frank
Type of Incident: Myocardial Infarction
Settlement Demand: None
Settlement Offer: C.C.P. 998 offer for a
dismissal with a waiver of costs
Verdict: Defense
Trial Length: 6 days
Jury Out: 1 day

Case Title: Barnes v. Nunes
Court Case No.: GIC779496
Judge: Hon. E. Mac Amos, Jr.
Nature of Case: negligence
Plaintiff's Counsel: Gary Davis, Esq. and
Douglas Munro, Esq., Ault, David &
Schonfeld, LLP
Defense Counsel: Scott D. Schabacker,
Esq., Law Office of Scott D.
Schabacker
Type of Incident: motorcycle vs. truck
collision
Settlement Demand: \$1,400,000
Settlement Offer: \$250,000
Verdict: Defense
Trial Length: 6 days
Jury Out: 35 minutes

PRESIDENT'S MESSAGE

By Peter S. Doody
Higgs, Fletcher & Mack LLP

I am honored and privileged to serve as the President of San Diego Defense Lawyers for the year 2003. We have an outstanding and talented board which is committed to serving you, our SDDL members, for the upcoming year. In addition to providing relevant and high quality continuing education programs our featured agenda item this year is membership.

The Defense Research Institute (DRI), which keeps statistics on state and local defense organizations, informs us that San Diego Defense Lawyers at 320 members strong is one of the largest local defense groups in the nation. We should be proud of our ranking and stature, however, in surveying the San Diego civil defense lawyer landscape, I know we can increase our membership ranks with a little push from our active members. We are an all-inclusive defense organization and we will make it a point to reach out to our brethren San Diego defense lawyers small or large firm, in-house or private practice, or governmental attorney. We would especially like to bring in more public sector civil defense attorneys such as San Diego City Attorneys office, County Counsel and Caltrans.

Once local defense lawyers find out about our group, membership is an easy sell. We offer monthly brown bag seminars, quarterly evening seminars which begin with

appetizers and cocktails, a web site, an inter-membership e-mail system so our members can "trade-notes" with one another, this newsletter, a law student mock trial competition, a Fall golf tournament and the annual installation dinner. At an annual membership fee of \$120 for private practitioners and \$90 for governmental attorneys SDDL remains the greatest deal in town! So... next time you are at a break at a deposition, or in court waiting to be called on a Friday morning case management conference or at a mediation extend your hand to a fellow San Diego defense attorney and encourage him or her to join the greatest legal group in America's finest city, San Diego Defense Lawyers.

In other news from the board, our sister organization, the Association of Southern California Defense Counsel (ASCDC) is now offering members of SDDL to become first time members of ASCDC for only \$50, a substantial savings from the usual first time ASCDC membership fee of \$95. Also, for those of you who were not already aware, fellow SDDL member, Robert "Hondo" Harrison is the new President of ASCDC and his portrait graces the cover of the latest issue of "Verdict" magazine.

As we move forward through this year please feel free to contact me or other board members to share any ideas regarding seminar topics or other ways we can serve our membership. Keep up the good fight.



Standing (left to right): John Farmer, Bob Gallagher, Dino Buzunis, Peter Doody, Sean Cahill, Clark Hudson. **Seated (left to right):** Michelle Van Dyke, Billie Jaroszek, Coleen Lowe. **Not Pictured:** Chris Welsh and Ken Greenfield

False Sense of Security

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document production demand, which has included electronically created or stored documents. The physical or “hard” copies of the correspondence between client and Attorney A have been separated and identified on a privilege log. Unknown to Attorney B, the e-mail communications between Attorney A and Client are contained on the hard drive of Client’s computer, a clone of which was produced, and were found by Plaintiff’s counsel. What result? (To coin a phrase from law school)

Fortunately, the answer may be gleaned from *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, where the Second District Court of Appeal stated that “[b]ased on the language of Evidence Code section 912, we hold that ‘waiver’ does not include accidental, inadvertent disclosure of privileged information by the attorney.”³ Relying on ABA Formal Opinion No. 92-368, the *State Compensation* court further articulated the obligation of the attorney who receives privileged documents due to the inadvertence of another as follows:

When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. We do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact.⁴

Although Attorney B may obtain return of the inadvertently produced privileged matter, the unfortunate reality may be that “the cat is out of the bag.” Of course, if the client forwards a confidential communication to another third person, the privilege likely will be considered waived. Accordingly, clients should be cautioned regarding the risks of waiver from his or her inadvertent disclosure.

A second issue involves electronic communication with client through an employer provided e-mail system, *i.e.*, a site that is not controlled by the client, and instead, for example, by his or her employer. Accordingly, questions regarding persons having access to the client’s e-mail system always should be considered. Some jurisdictions require employers to obtain their employees’ consent to be able to monitor their e-mail at work, but others do not. At least one court has held that once an employee uses a company e-mail system to send personal messages to someone else, any reasonable expectation of privacy that the employee might once have had is lost.⁵ In the recent case of *TBG Insurance Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, the Second District Court of Appeal held that a former employee, who agreed in writing that former employer could monitor home computer which it had provided for former employee’s home use, did not have a reasonable expectation of privacy in the computer and thus could be compelled to produce the computer for discovery in wrongful termination action.

In California, legislation concerning employee e-mail privacy nearly became law in 1999. Senate Bill 1016 was passed by both houses of the California legislature, but vetoed by Governor Davis. The bill would have prohibited employers from viewing an employee’s personal e-mail, or other computer records generated by the employee, unless the employer had prepared and distributed a workplace privacy and electronic monitoring policy informing employees of the employer’s monitoring practices. In 2000, the California Senate introduced the Electronic Monitoring in the Workplace Act (SB 1822), considered to be identical to the 1999 bill, also did not become law in California.

On the other hand, the Electronic Communications Privacy Act of 1986 (“ECPA”)⁶ is considered to preclude employer monitoring of employee e-mail. However, the ECPA has three exceptions that serve to limit its applicability to employer monitoring: (1) the provider exception – in which the employer provides the employee with e-mail through a company owned system, (2) the ordinary course of business exception – in which business related e-mail may be monitored; and (3) the consent exception.⁷

The consent exception generally applies when one party to the communication has given prior consent, actual or implied, to the interception or access of the communication. Gaining employee consent can occur in at least two different ways: an employer can publish an e-mail monitoring

policy to all employees, or an employer can rely on the fact that its employees have been informed of an affirmative monitoring policy with regard to their e-mail that comes into effect when they subsequently choose to use the e-mail system. By using the system, such employees would be considered to have consented to the e-mail monitoring. Another obvious consent occurs when the employee voluntarily agrees to the monitoring as a part of the employment agreement.

Unless the client also happens to be the employer of the employee, the employers’ right to monitor employee e-mail communications provides an argument in an unsettled legal landscape for disclosure to a third party, not the client. Obviously, lawyers also should avoid communicating with an individual client by e-mail at the client’s place of business unless the client is the proprietor. Arguably, there is not an objectively reasonable expectation of privacy for an e-mail communication to an address that clearly does not belong to or is controlled by the client alone.

If clients desire or demand the immediate and convenient manner of communication that e-mail offers, with its acknowledged security limitations, a law firm policy to advise of clients of attendant risks to e-mail communication or transferring of documents in digital form, and obtaining client consent to its utilization, would appear well-advised. Certainly, if the representation dictates a higher level of security, the least conservative approach would dictate client consultation regarding an appropriate level of security. In between the extremes, various procedures have been suggested.

For example, the May 2001 issue of the California Bar Journal (a publication of the California State Bar Association) listed the following pointers from attorneys and consultants in an article entitled, “Managing Your E-mail:”

Consult your client before using e-mail. Discuss its risks and benefits. Establish the particular modes of communication to be used in each attorney-client relationship.

Advise clients not to forward confidential e-mails. Ask whether your client’s e-mail account is a corporate account accessible to his or her employer.

Consider seeking a client’s permission in a retainer agreement before using e-mail. Obtaining permission is “always a wise idea” — particularly with less sophisticated clients.

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Bottom Line

Case Title: Wells v. Horn
 Court Case No.: IC 787618
 Judge: Hon. Ronald Styn
 Nature of Case: Personal Injury - Auto
 Plaintiff's Counsel: J.R. Ros, Esq.
 Defense Counsel: Gina C. Haggerty,
 Esq., Farmer & Case
 Type of Incident: Auto Accident
 Settlement Demand: \$12,000.00
 Settlement Offer: \$8,242.54
 Verdict: Defense
 Trial Length: 3 days
 Jury Out: 3 hours

Case Title: Siphon Rasana v. San Diego
 Transit
 Court Case No.: IC756525
 Judge: Hon. Charles R. Hayes
 Nature of Case: Personal Injury
 Plaintiff's Counsel: Kenneth L.
 Simpkins, Esq. and Suzanne Mindlin,
 Esq.
 Defense Counsel: Constantine D.
 Buzunis, Esq., Neil, Dymott, Perkins,
 Brown & Frank
 Type of Incident: Auto v. Bus rearend
 accident (admitted liability)
 Settlement Demand: Initially
 \$750,000.00 with \$250,000.00 CCP998
 Offer prior to trial
 Settlement Offer: \$10,000.00 CCP 998
 Offer
 Verdict: Defense
 Trial Length: 10 days
 Jury Out: 2 hours 10 minutes

Case Title: Sinasohn v. Brian Krogstad, et.
 al.
 Court Case No.: GIC 752522
 Judge: Hon. Vincent J. DiFiglia
 Nature of Case: Interference with
 contracts/business torts
 Plaintiff's Counsel: James Miller, Esq.
 and Melissa Cross, Esq., Miller &
 Ledebur
 Defense Counsel: Jennifer N. Lutz, Esq.,
 Klinedinst Attorneys at Law
 Type of Incident: Alleged Interference
 with contract
 Settlement Demand: \$21,000
 Settlement Offer: \$8,333
 Verdict: Defense
 Trial Length: 2 days
 Jury Out: 1 hour

San Diego Defense Lawyer's Brown Bag Update — Year End 2002

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

The 2002 Brown Bag season ended with attorneys Lesa Wilson and Jack Sleeth, Jr., of Stutz, Gallagher, Artiano, Shinoff & Holtz, presenting "Employment Law: The year in review and a look into 2003." This one-hour MCLE seminar focused on legislative enactments, "customer service," and prevention. Ms. Wilson and Mr. Sleeth discussed the laws of the past, present, and future.

A Brief Review of 2002: Assembly Bills 1068 and 2868 became Civil Code §§ 1785.16.2 et seq. and § 47. There, employers may be required to give employees notice and a copy of any background check or investigation report. Look for case law to define this complicated issue. Bill 1015 turned into Labor Code § 96(k) and 98.6. These statutes make it illegal—criminally and civilly—to discipline an employee for conduct off duty that is otherwise legal. The employment part of Bill 25 (Labor Code § 233) related to employment law is that domestic partners may collect unemployment insurance if they leave the job to follow their relocating partner. And that domestic partner may take sick leave to care for a sick partner. Last, Bill 800 (Government Code § 12951) now makes it an unlawful employment practice for an employer to limit the use of any language in any workplace (with some exceptions).

Opening up in 2003: Senate Bill (Code of Civil Procedure §§ 340 and 437c) extended the time for an employee to bring an action from one year to two years and requires a 75-day notice for filing a summary-judgment motion. With fast track, and an employer not able to bring a motion for summary judgment until discovery is completed (CCP § 437c(h)), expect to see more cases go to trial. Assembly Bill 2895 (Labor Code § 232) prohibits an employer from disciplining (retaliating against) an employee for disclosing the amount of wages or discussing working conditions. Bill 1599 added "age" to the FEHA as a protected classification, making it unlawful to discriminate or harass on the basis of age, or to lay off an employee because of high wages in order to hire cheaper (and younger) employees. Senate Bill 1730 (Civil Code § 1798.85) states that a Social Security number may not be used as an identification number. Assembly Bill 1401 (incorporated in the Health & Safety and Insurance Code) made several changes to COBRA. Last, Senate Bill 1471 (Labor Code § 234) prohibits a negative employee evaluation because an employee takes sick leave provided by law.

Working directly with employers of all sorts, Ms. Wilson and Mr. Sleeth closed their presentation discussing what has become a hot issue in 2003: Fitness of Duty Evaluations. May an employer *require* an employee to have a fitness-for-duty medical examination with a doctor of the employer's choice? The answer, generally yes. But it is dependent on the point in the relationship. Before hire, the ADA forbids medical examinations and inquiries that may focus on disabilities, but may permit it where an inquiry is made to all employees and limited in determining whether the employee can perform job-related functions. (42 U.S.C. § 12112(c)(2).)

After an offer of employment, but before commencement, the ADA permits an examination if all applicants are examined and the results are collected and maintained on separate, confidential files—not in the employee's personnel file. Further, the examination must be job related in that there is a business necessity for it.

After employment has commenced, the ADA specifically permits an employer to require a fitness-for-duty medical examination in order to determine whether an employee who has suffered an injury or illness is physically capable of returning to work. (39 C.F.R. § 1630.14(c).) An employee who refuses to undergo examination may be terminated. (*See, Watson v. City of Miami Beach* (9th Cir. 1999) 177 F.3d 932.

The seminar concluded with discussion a of FEHA, FMLA, and Workers' Compensation. Much has changed in the past year, and much more is to come in 2003 and 2004. If the above information wets your appetite, give Ms. Wilson or Mr. Sleeth a call. They would be happy to forward their seminar materials to you.

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Remember that e-mail provides a written record and may be subject to discovery requests.

Remember that previous e-mail communications easily can be forwarded to others (watch out for e-mails that contain prior communications – e.g., e-mails that contain a trail of communications with the client or expert that are inadvertently forwarded to opposing counsel).

Consider encrypting confidential client-related e-mail.

Consider including a disclaimer on all e-mail, noting its confidentiality.

Use software that helps manage your e-mail. For example, “filters” automatically can file certain e-mails, redirect spam or send automatic replies.

Develop firm-wide policies for using the Internet and e-mail. Address such issues as e-mail retention, inappropriate material, personal e-mail, the alteration of third-party e-mail and accessing co-workers’ e-mail accounts.

Write clearly, concisely and carefully. Without body language and verbal cues, the tone of a written message easily can be misconstrued.

The California Practice Guide for Professional Responsibility also makes the following observations: “It is good practice to discuss the means by which you will communicate confidential information with your clients. Establish procedures to ensure the confidential handling of information—both within your firm and in the client’s organization. Before communicating by e-mail, ascertain who has access to the client’s e-mail messages; and, specifically who is permitted to read or retrieve them. Consider sending the client a ‘test’ e-mail that does not contain confidential information and confirm its receipt. Add a confidentiality notice to your e-mail that the message is confidential and only intended to be read by the recipient.”⁸

Even though the ABA and many state bar associations consider unencrypted e-mail a reasonable and acceptable means of attorney-client communication, and even if courts treat e-mail messages just like other documents that may be protected by the attorney-client privilege, attorneys still need to be aware of their ethical and professional responsibilities in relation to e-mail. An awareness of those responsibilities allows attorneys to make decisions that afford maximum protection of confidential information and communications. One may also predict that over time, the ethical obligations may become standard of care issues.

SAN DIEGO DEFENSE LAWYERS BROWN BAG SERIES

Recent Developments in Summary Judgment Law in California

Presented by Robert J. Walters
Grace Brandon Hollis LLP
February 20, 2003

The presentation by Mr. Robert J. Walters of Grace Brandon Hollis, LLP, provided invaluable information regarding the recent changes to law regarding the filing of Motions for Summary Judgment, together with insights as to the requirements of such motions.

Included in the handouts, Mr. Walters brings us up-to-date with his presentation, “Changes in Latitude, Changes in Attitude.”

Mr. Walters reminds us that an initial step in preparing an MSJ, is looking to *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826. *Aguilar* clarifies the burden of proof and allows the moving party to determine whether the evidence meets the standard set forth in the case. If it does, and the opposing party is unable to produce evidence that a triable issue(s) exists, the filing of a Motion for Summary Judgment is appropriate.

Mr. Walters further asserts that those wishing to file MSJ’s should also look to *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, a local case in which the Fourth District Court of Appeal held that a court could consider evidence that was not referenced in the separate statement; however, the court is not obligated to consider such evidence.

As far as the new procedural requirements are concerned, Senate Bill 688 altered many of the requirements as set forth in CCP §437c. Mr. Walters cautioned to pay close attention to the amendments, especially to CCP §437c(a) which extends the notice period for MSJ/MSA from 28 to 75 days. As most are probably aware, different departments, at least in San Diego County, are handling the notice period differently. Some may consider Orders Shortening Time in order to allow for the filing of a motion, while others may consider trial continuances to allow for compliance with the new notice period. Look for a ruling to come down soon on this issue in a case entitled *Ed McMahon v. Superior Court*.

For appellate related reasons, Mr. Walters stressed that parties should pay close attention to CCP §437c(m)(2), which establishes the appellate court’s powers or obligations. He suggests that the Appellate issues should be kept in mind when arguing an MSJ/MSA, as the moving party should seek to preserve and build a good record at the lower level, thereby forcing the court to make a good ruling.



(Footnotes)

¹ See, ABA Form. Op. No. 99-413.

² The California Supreme Court stated that “[p]rotecting the confidentiality of communications between attorney and client is fundamental to our legal system [and t]o this end, a basic obligation of every attorney is “[t]o maintain inviolate the confidence, and every peril to himself or herself to preserve the secrets, of his or her client.” *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145.

³ California Evidence Code section (“EC §”) 912(a) provides that “the right of any person to claim a privilege provided by [Evidence Code] Section 954 [lawyer-client privilege] . . . is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has

consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.”

⁴ *Id.* at 656-657.

⁵ See, e.g., *Smyth v. Pillsbury Co.*, 914 F.Supp. 97, 101 (E.D. Pa. 1996).

⁶ 18 U.S.C. §§2510-2521 (1986).

⁷ See, 18 U.S.C. §§2511(2)(a)(i), (d) and 2510(5)(a), respectively.

⁸ Yapneck, et al., RUTTER CAL. PRAC. GUIDE PROF. RESP., Duty to Maintain Client Confidence and Secrets under State Bar Act, Ch. 7-B, §7:157 (2000).

Bottom Line

Case Title: Stephenson v. San Diego Transit Corporation
 Court Case No.: GIC 778085
 Judge: Hon. William R. Nevitt, Jr.
 Nature of Case: Personal Injury
 Plaintiff's Counsel: James D. Hoey, III, Esq., Hoey & Morgan
 Defense Counsel: Norman A. Ryan, Esq., Wingert, Grebing, Brubaker & Ryan
 Type of Incident: Neck and back injuries as well as an exacerbation of pre-existing psychiatric problems
 Settlement Offer: Defendant submitted a statutory offer to compromise of \$25,000.00 which was rejected
 Settlement Demand: Plaintiff countered with an offer of \$150,000.00.
 Verdict: Defense
 Trial Length: 5 days
 Jury Out: 1/2 day

Case Title: Gomez v. North County OBGYN Medical Group, Inc.
 Court/Case No.: GIC 711968
 Judge: Hon. Charles R. Hayes
 Nature of Case: Medical Malpractice
 Plaintiffs Counsel: David Miller, Esq. and Nick King, Esq.
 Defense Counsel: Clark Hudson, Esq., Neil, Dymott, Perkins Brown & Frank
 Type of incident: Alleged wrongful life of Downs Syndrome child, inappropriate sterilization of mother following delivery.
 Demand: None Certain
 Offer: Waiver of Costs
 Verdict: Defense
 Trial Length: 8 days
 Jury Out: 1 and ½ days



Bussard v. Minimed, Inc., 2003 Daily Journal D.A.R. 913 (1/27/03)

In a case recently dealing with alleged application of the “going-and-coming rule”, the California Court of Appeal held that an employer may be held liable for an accident caused by an employee driving home after the employee left work because of illness due to pesticide fumes in the workplace.

In Bussard, the plaintiff sued the defendant employee and the defendant employer (Minimed, Inc.) for negligence in connection with an auto accident involving the defendant employee. The accident occurred after the defendant employee had left work early because she felt sick due to the pesticide fumes that had been sprayed the previous night at her workplace. After indicating that she felt sick, the employee’s supervisors asked if she wanted to see a doctor and she declined. They asked if she was okay to drive herself home, and she answered affirmatively. She drove herself home, and en route caused an auto accident, from which the plaintiff suffered injuries.

The plaintiff’s cause of action against the employer was based on a theory of *respondeat superior*. Employer moved for summary judgment on the ground that the “going-and-coming” exception applied to bar a *respondeat superior* theory of liability. The trial court granted the motion, and the plaintiff appealed. The Court of Appeal reversed on the grounds that the “going-and-coming” rule did not apply because the accident occurred because of a condition at work, namely the presence of the pesticide fumes.

An employer may be held to be vicariously liable for the acts of its employees if the acts are committed within the normal course and scope of employment. The employer is held to bear the costs of the risks inherent in or created by the enterprise.

Typically, an employee is held to be outside the scope of her employment when commuting to and from work. This going and coming rule has exceptions. One such exception applies when an employee endangers others with a risk arising from or related to work. This endangerment is governed by a foreseeability test; the risk is foreseeable if the employee’s conduct is neither startling nor unusual. Foreseeability of a risk arising from or connected to work requires no more than a causal connection between a work-related event and the employee’s subsequent act causing injury.

Here the court ruled that an employee might not be fit to drive after breathing lingering pesticide fumes for several hours; such condition is not such a startling or unusual event that a car accident occurring on the employee’s commute home would be unforeseeable. Evidence of a causal connection between the work-related event and the subsequent injury existed, therefore, the trial court’s ruling on the defendant’s motion for summary judgment was reversed.

Jimenez v. Superior (T.M. Cobb), (2002) 29 Cal. 4th 473, 127 Cal. Rptr. 2d 614, 58 P. 3d 450

In a case impacting construction defect defense practitioners which represent manufacturers and suppliers of products incorporated into works of construction, the California Supreme Court has held that, in California, a manufacturer, distributor or retailer of a defective product is strictly liable in tort for any resulting harm to a person or to property other than the product itself.

Plaintiffs Filipina and Nestor Jimenez, owners of a Gallaria Home built by Developer McMillan Scripps II in 1988, in the Scripps Ranch area of San Diego, brought an action against window manufacturers Viking Industries, T.M. Cobb, and Medalion Industries and Minnoch Supply Co.,

who had supplied and installed the windows. Plaintiffs asserted that the defendants had “designed, developed, manufactured, produced, supplied and placed into the stream of commerce” defective windows installed in the Gallaria and Renaissance homes and that the defects caused property damage.

Cobb moved for summary adjudication on the strict liability cause of action arguing that the manufacturer of a product installed in a mass-produced home, unless is has ownership or control of the development, cannot be held strictly liable to a homeowner for a defective or dangerous condition in the home. Cobb prevailed on the motion and the court ordered that the ruling also applied to Viking. The Court of Appeal issued a writ after petition, directing the Trial Court to vacate its order, holding that the doctrine of strict products liability applied to manufacturers of defective component parts installed in mass-produced homes, and that this strict liability extended to damage to other parts of the house in which the defective component was installed. The California Supreme Court granted review.

Strict Products Liability of Component Manufacturers

Defendants relied on *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131 (*La Jolla Village*), contending that merely supplying component parts of mass-produced homes, not the completed homes themselves, should not subject them to strict products liability. Furthermore, they argued that subjecting them to liability would be improper because they had no physical control over the windows at the time of the alleged harm. The Court ruled that for purposes of strict liability, there are “no meaningful distinctions” between, on the one hand, component manufacturers and suppliers and, on the other hand, manufacturers and distributors or complete products; for both groups, the “overriding policy considerations are the same.” *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224.

Defendants further maintained, relying on language in subdivision (1)(b) of section 402A of the Restatement 2d of Torts, that their windows are shipped in parts, assembled by others and installed by others. A substantial change in the product relieves the manufacturer of liability. The Court determined that the mere assembly of a product that is sold in parts is not a “substantial change” in the product within the meaning of the Restatement.

Defendants argument that subjecting them to liability would nullify the California Legislature’s intent when it enacted CCP §337.15, was not considered as it was not raised in the Trial Court, Court of Appeal or in their petitions for review to the Supreme Court.

Defendants further argued that subjecting manufacturers to strict liability would “open the litigation floodgates.” The Court stated it was not convinced by this argument indicating that the burden of increased litigation is outweighed by the policy reasons favoring strict products liability in addition to the incentives for improved product safety.

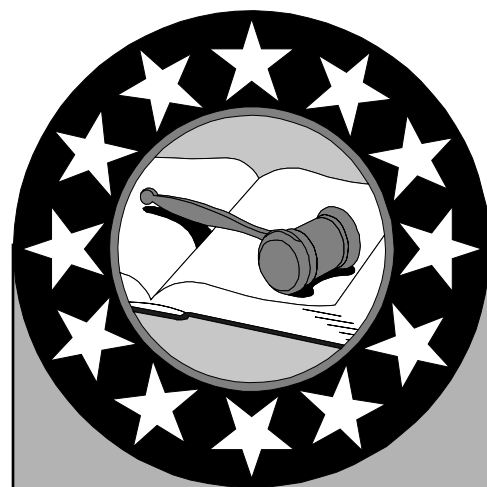
La Jolla Village and *Casey v. Overhead Door Corp.*, (1999) 74 Cal.App.4th 112, were disapproved to the extent they are inconsistent with the holding in *Jimenez*.

Economic Loss Rule

In *Seely v. White Motor Co.* (1965) 63 Cal.2d 9, it was held that recovery under the doctrine of strict products liability does not include economic loss, which includes “damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damages to other property...” *Sacramento Regional Transit Dist. v. Grumman Flexible* (1984) 158 Cal.App.3d 289.

The Economic Loss Rule allows a plaintiff to recover in strict products liability in tort when a product defect causes damage to “other property,” that is, property other than the product itself. To apply the rule, the product at issue must first be determined. Defendants asserted that the “product” is the entire house in which their windows were installed, and that the damage caused to other parts of the house by the allegedly defective windows is damage to the product itself within the economic loss rule, thus precluding application of strict liability. Citing *Aas v. Superior Court* (2000) 24 Cal.4th 627, the Court stated that the duty of a manufacturer to prevent property damage does not necessarily end when the product is incorporated into a larger product. The Court held that under California decisional law, the economic loss rule does not bar a homeowner’s recovery in tort for damage that a defective window causes to other parts of the home in which is has been installed.

There were concurring and dissenting opinions which should be consulted.



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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:

John T. Farmer - Farmer & Case
402 West Broadway, Suite 1100
San Diego, CA 92101
Phone: 619.338.0300
Fax: 619.338.0180
E-mail: jfarmer@farmercase.com

Bottom Line

Case Title: Manuel Bustamante, M.D. and Carolina Bustamante v. Lance Altenau, M.D.

Case No.: GIC 780976

Judge: Hon. Vincent P. DiFiglia

Plaintiff Counsel: Lawrence Rudd, M.D., J.D.; Cohen & Rudd

Defense Counsel: Clark Hudson, Esq., Neil, Dymott, Perkins, Brown & Frank

Type of Incident: Alleged Medical Malpractice. C-6 Quadriplegia following C-6/C-7 spinal fusion

Settlement Demand: 998 offer by Dr. Bustamante - \$1,750,000.00. 998 offer by Mrs. Bustamante - \$249,999.00.

Request to Jury, \$625,865 past economic loss, \$817,000 future medical expenses (Present Value). Unspecified demand for past and future pain and suffering, and loss of consortium.

Settlement Offer: None

Trial Type: Jury

Trial Length: Eight days

Verdict: Defense 11-1

Jury out: One day

Case Title: Philip Baum v. J. Byron Wood, M.D.

Court Case No.: GIN 014084

Judge: Hon. Marguerite Wagner

Nature of Case: Medical Malpractice

Plaintiff's Counsel: Christine A. Carlino, Esq., Law Offices of Christine A. Carlino

Defense Counsel: Kendra A. Ball, Esq., Neil, Dymott, Perkins, Brown & Frank

Type of Incident: Alleged negligence in laparoscopic hernia repair and lack of informed consent

Settlement Demand: \$100,000

Settlement Offer: waiver of costs

Verdict: Defense

Trial Length: 5 days

Jury Out: 2 hours



Each year members of the Koeller Nebeker Carlson & Haluck firm, along with kids (this year's crew included the Carlson, Amundson and Hallman children), spouses and significant others participate in the Torrey Pines Pardee Run for Knowledge. This year's race was held on Sunday, February 23rd. There were medals all around and great fun was had by all!



An Opportunity to Support Our Troops!

San Diego Defense Lawyers members and their firm personnel now have an opportunity to support our troops in a very up-front and personal way.

Dino Buzunis has learned from Reserve Marine Colonel Dave Brown, who is currently serving in Kuwait, that our service men and women in Kuwait and Afghanistan could use a variety of sundries which are difficult to come by there. Following is a "Top 10" list of items you can contribute. All items will be boxed and shipped overseas to our men and women in the war zone.

- disposable razors
- moist towelettes
- small soaps
- pre-paid calling cards
- shaving cream
- toothbrushes
- shampoo/rinse
- magazines
- toothpaste
- candy bars

Or, if you prefer you may make a \$25 contribution (check payable to SDDL) which will buy a care package containing several items including a pre-paid calling card, disposable camera, toiletries and sunscreen.

Please mail checks or drop off items to be shipped to: Dino Buzunis, Neil, Dymott, Perkins, Brown & Frank, 1010 Second Avenue, 25th Floor, San Diego, CA 92101

Here is an opportunity to show support and make a difference to our troops!

Member News

William P. Volk was elected to the membership of the American Board of Trial Advocates (A.B.O.T.A.) by the National Board of Directors in San Francisco on January 18, 2003. ABOTA's website states that "Only the most qualified defense and plaintiff attorneys with courtroom experience are invited to join ABOTA. To qualify for membership courtroom experience must be verified. However, more than the number of trials is considered. High personal character and an honorable reputation are paramount to qualify for ABOTA." Congratulations Bill!

Andrew Blackburn has recently accepted a position with Aiken & Boles. Mr. Blackburn graduated California Western School of Law in 1995 and has focused largely on construction defect and product liability litigation. Mr. Blackburn's first trial was the Aas v. Superior Court case in which he represented a sheet metal company. Additionally, he wrote one of the Supreme Court briefs.

Stutz, Gallagher, Artiano, Shinoff & Holtz, is pleased to welcome education attorney Christina Dyer as a partner to the firm. In a legal career spanning three decades in the education field, Ms. Dyer has served as Assistant County Counsel, School Section of the Imperial County Counsel's Office; School Section Chief, San Diego County Counsel's Office; and General Counsel, San Diego Unified School District. Ms. Dyer's extensive experience as a school attorney will now serve the firm's public agency clients. In her role as general counsel, Ms. Dyer advises clients in such areas as certificated and classified personnel, ADA, FMLA, employment discrimination, charter schools, Proposition 39, facilities, construction, environmental issues, contracts, labor law, finance, legislation, student rights, special education, Section 504, Proposition 227, and more. During the 1996 teachers' strike, Ms. Dyer acted as media spokesperson for the San Diego Unified School District, representing the District on local and national media, and calling on her knowledge of certified and classified employment and collective bargaining. Most recently she assumed the position of Vice-Chair for the K-12 Schools Accrediting Commission for the Western Association of Schools and Colleges.

Royce, Grimm, Vranjes, McCormick & Graham announced that on January 31st Gene Royce left the firm to become a full time mediator. The firm is now **Grimm, Vranjes, McCormick & Graham LLP**.

Martha Dorsey was recently made a partner at Koeller, Nebeker, Carlson & Haluck, LLP. Ms. Dorsey joined the firm in 1991, the same year she graduated Loyola Law School. Additionally, the firm has hired **Doug Barish** as an associate. Mr. Barish completed his undergraduate work at UCLA and received his J.D. from USC where he served as Senior Editor of The Southern California Review of the Law and Women's Studies. He also clerked in the Los Angeles office of the U.S. Attorney working in both the civil and criminal divisions. Mr. Barish's practice is general defense litigation.

Grace Brandon Hollis, LLP has recently taken over 6000 additional square feet of space in The Design Center on Fifth Avenue. Coincidentally, that building has just been acquired by the firm's partners. Additionally, **Cari Brundy** and **Daniela-Real Ferreri** were admitted to the bar in December and have joined the firm as associates. Ms. Brundy's background is in health care and she continues to pursue that interest in the defense of physicians. Ms. Ferreri is primarily working in the area of construction defense.

Shewry & Van Dyke LLP has added **Matthew B. Butler** as an associate.

Balestreri, Pendleton and Potocki is pleased to announce that senior associate **Andra Deroian** was elected Vice Chairperson of the Construction Law Section of San Diego County Bar Association. Ms. Deroian's background and experience were important factors in her election. Prior to attending law school, Ms. Deroian worked as a construction project manager and cost estimator in New York. She has significant exposure to toxic waste cases and other extremely complex engineering-legal matters. She received her Juris Doctorate from the University of San Diego School of Law in 1994 after completing foreign study programs in Sydney, Australia, London, England, and Nairobi, Kenya. She received her Bachelor of Science in Construction Management from Pratt Institute in New York.

Kleindinst Attorneys at Law has promoted **Jennifer Lutz** to shareholder. Ms. Lutz represents employers in all aspects of employment disputes. She has successfully litigated disputes involving issues of discrimination, wrongful termination, harassment, and defamation. Jennifer communicates legislative updates and educates her clients through speaking engagements, publishing articles and training on issues such as wage and hour law compliance, employee privacy, family and medical leave, reductions in force, and contract disputes.

Rebecca Cady of Grace Brandon Hollis, LLP has been appointed Editor in Chief of the Journal of Nursing Administration's Healthcare Law, Ethics, and Regulation, a nursing publication. The journal's main audience is nurse executives and she invites members of San Diego Defense Lawyers, with expertise in these areas to submit articles for publication. Please contact her at rcady@gbhlaw.com if you have a submission.

Thank You

San Diego Defense Lawyers
would like to thank

Brenda Peterson

of Peterson & Associates

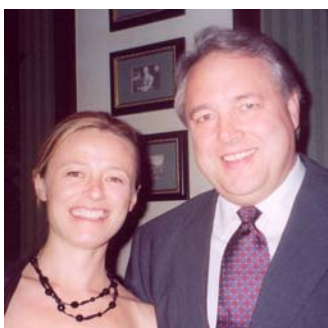
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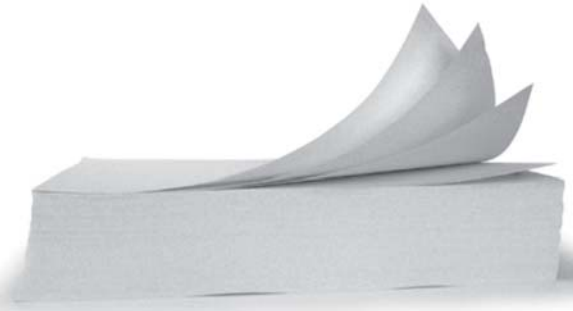
On February 1, 2003, San Diego Defense Lawyers held its Eighteenth Annual Installation Dinner at the Manchester Hyatt San Diego. Mike Neil of Neil, Dymott, Perkins, Brown & Frank presented Dan White of White, Noon & Oliver with the San Diego Defense Lawyers 2002 SDDL Lawyer of the Year award and Bob Gallagher presented his partner Sid Stutz of Stutz, Gallagher, Artiano, Shinoff & Holtz with the 2002 SDDL Honoree Award.

Past president, John Clifford, was recognized by current president Pete Doody for his tremendous efforts this past year and for bringing the association forward in membership development and education. Also receiving awards for service to the association were outgoing board members, Treasurer Anna T. Amundson of Koeller, Nebeker, Carlson & Haluck, LLP; Secretary Dennis Aiken of Aiken & Boles, along with board members Timothy D. Lucas of Parker Stanbury and Norman A. Ryan of Wingert, Grebing, Brubaker & Ryan.

Incoming officers President, Peter S. Doody of Higgs, Fletcher & Mack; Vice-President Robert E. Gallagher of Stutz, Gallagher, Artiano, Shinoff & Holtz; Secretary, Clark R. Hudson of Neil, Dymott, Perkins, Brown & Frank; Treasurer, Billie J. Jaroszek of Fredrickson, Mazeika & Grant as well as Directors Coleen H. Lowe of Grace Brandon Hollis, Chris J. Welsh of Cal Trans, Sean Cahill of Balestreri, Pendleton & Potocki, Dino Buzunis of Neil, Dymott, Perkins, Brown & Frank, John Farmer of Farmer & Case, Michelle Van Dyke of Shewry & Van Dyke and Ken Greenfield of The Law Offices of Kenneth L. Greenfield were introduced.

“Night Shift” provided the rock & roll for the post dinner dance and many members took that opportunity to “shake a leg” and mingle with fellow party goers.





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